Use of a Trademark in Metatags May No Longer Lead to a Nearly Automatic Finding of Trademark Infringement

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Ever since search engines became the primary entry point to the Internet, website operators have been trying to take advantage of search engine algorithms to attract more traffic and raise their placement in search results. Many of the earliest search engines would read the metatags[1] embedded in a website's metadata to aid the search engine in determining that website's responsiveness to a search query.

Thus early courts dealing with allegations of "infringement by metatag" were persuaded that use of the plaintiff's trademark as a metatag lead easily to a conclusion of trademark infringement. The most prominent and most often cited case holding this was *Brookfield Communications, Inc. v. West Coast* Entertainment *Corp.*, 174 F.3d 1036 (9th Cir. 1999), finding that such use could cause initial interest confusion, *i.e.*, actionable confusion in attracting searchers to a site even if the confusion was subsequently dispelled. Many courts followed this reasoning.

However, as website operators increasingly took advantage of search engine algorithms, the search engine operators reduced their emphasis on metatags to determine a website's relevance. The courts (and many attorneys) have been slow to appreciate these changes, but a recent decision out of the Eastern District of Louisiana took a closer look.

In *Southern Snow Manufacturing v. Sno Wizard Holdings, Inc.*, 2:10-cv-00791 (E.D. La. Feb. 16, 2011), the Court granted summary judgment to a third-party defendant over its use of a term similar to plaintiff's federally registered trademark, SNOWIZARD. The third-party defendant allegedly used "snow wizard" in its metatags. The defendant moved for summary judgment on the ground that plaintiff presented no evidence of the impact of defendant's alleged metatag on consumers. The court agreed, explaining:

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[1] For an overview of metatags and their use in search engine algorithms, see http://en.wikipedia.org/wiki/Meta_element#Meta_element_used_in_search_engine_optimization. Note that the most popular search engine, Google, claims not to rely upon metatags in its search algorithm.

> [I]n light of the technical, esoteric, and hidden nature of website metatags, the Court is persuaded that [plaintiff] cannot prevail on its metatag claim without evidence of what actually takes place as a result of the phrase "snow wizard" being hidden in [defendant's] website. Is every consumer diverted to [defendant's] website, or is [defendant] listed at the top of many search results, or somewhere in the middle of a result list, or twenty names down the list? Does the consumer have to type in just "snow wizard" or is the metatag triggered by other variations of the phrase too? Certainly the likelihood of consumer confusion will turn on questions such as these but the record contains no evidence of this nature.

The plaintiff relied on the line of case law following *Brookfield*, essentially arguing that it did not need to submit additional evidence to defeat defendant's summary judgment motion. The Court would have none of it: "[Plaintiff] cannot meet its burden on these infringement claims simply by establishing that [defendant] used "snow wizard" in its website."

While this district court decision will not be the last word on metatags-as-infringement, it is an important one. Trademark owners should know they may no longer get a free lunch against a defendant using their trademark in a metatag. Just as in most other contexts, trademark owners probably will need to show the impact of such use and present evidence that it is likely to cause confusion among consumers.

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