

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. FAR-21158

Appeals Court No. 2011-P-1533

JENZABAR, INC.,
Plaintiff-Appellant,

v.

LONG BOW GROUP, INC.,
Defendant-Appellee.

ON APPEAL FROM A JUDGMENT
OF THE SUPERIOR COURT, COUNTY OF SUFFOLK

DEFENDANT-APPELLEE'S OPPOSITION TO FURTHER REVIEW

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QUESTIONS PRESENTED

1. Should the Court grant review to decide the fact-bound question whether the author of a web page that criticized a trademark holder infringed its trademark when it placed the trademark in the keyword meta tags and title tags of the page, telling the truth about the subject of the page, when Google's proprietary algorithm created a search listing for the page which also accurately characterized the contents of the web page, and when there is no evidence that, over a period of more than ten years, even a single Internet user was confused about the source of a search listing linked to the page?

2. Should the Court grant review of its first case about the application of federal trademark law to Internet search engine listings in a case where the court below assumed *arguendo* most of the trademark holder's legal theories and issued a narrow opinion addressed solely to the application of the "likelihood of confusion factors," and where the record on the subject is poorly developed because the plaintiff did not offer its theory on appeal until after discovery was closed and in response to a motion for summary judgment?

Introduction

Ninety years ago, Justice Holmes enunciated a fundamental precept: trademark law cannot prevent a mark from "being used to tell the truth. It is not taboo."

Prestonettes, Inc. v. Coty, 264 U.S. 359 (1924).
Jenzabar's claims in this case fly in the face of this fundamental rule - they represent a sustained effort by Jenzabar to prevent unpleasant truths about the company and about one of its founders from being seen by potential customers that do due diligence about potential suppliers before deciding to pay hundreds of thousands of dollars for Jenzabar enterprise software systems. There is no dispute that the search listing that Jenzabar claims to be infringing "tells the truth" about the contents of the web page to which the search result leads - it is a page about Jenzabar and its founders. There is also no dispute that the critic's "product" - documentary films - in no way competes with any of Jenzabar's products. As far as trademark law is concerned, these facts are enough to negate a claim for infringement.

The request for further review ("Rvw. Applic.") represents an effort to stretch Long Bow Group further on the rack of litigation, despite Jenzabar's utter failure to adduce any evidence that its customers are likely to be confused by, or, indeed, that Long Bow is responsible for, the contents of the search result that is at the heart of the Lanham Act claim pressed on appeal.

Facts and Proceedings to Date

In 1995, defendant Long Bow Group made a documentary

film that revealed an uncomfortable fact about Chai Ling, one of Jenzabar's founders - as a brash young student leader at Tiananmen Square, she expressed hope that the Chinese Government would use force because only bloodshed would open the eyes of the Chinese people to the true nature of their government. http://tsquare.tv/film/transcript_may27.php. In 1996, Long Bow created a web site about the film and its subject, including the full text of the interview, which Chai gave a week before the tanks rolled in at Tiananmen Square. Joint Appendix ("JA") 372, 684. In the late 1990's, Chai created Jenzabar to make enterprise software for colleges and universities. JA 616, 956. The undisputed record is that Jenzabar only makes and services software, and hence does not in any way compete with Long Bow, which makes only documentaries. JA 310, 322. See also JA 439 (Long Bow has "no business interest that overlaps with us.")

Although Jenzabar was just a small startup at the time, Long Bow added to the site a page about the company. Long Bow put each of Jenzabar's three early names (jenzabar.com, jenzabar.net, and Jenzabar) in the keyword meta tags of that web page, and put "Jenzabar" in its title tag. JA 373, 650, 652, 1420. According to Jenzabar's own expert report, the keyword and title tags for a web site function much like the cards in a card

catalog, identifying for search engines the subject and title of the web pages on which they are placed. JA 991 n.6. Although the page's content was supplemented from time to time, including reports from the Boston Globe about financial shenanigans at Jenzabar, the tags on the page remained unchanged. And although, at the time the page was created, keyword meta tags were a key finding device for the then-dominant search engines like Altavista, JA 651-652, Google subsequently rose to prominence by using its own proprietary algorithm that made no use of keyword meta tags. JA 1270, 1272, 1278. Indeed, the leading trademark treatise declares flatly that keyword meta tags play no role in Google search rankings, and many federal court decisions reflect that fact. *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp.2d 450, 467 (E.D.N.Y. 2011), citing J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 25:69 (4th ed. 2003); *Network Automation v. Advanced Systems Concepts*, 638 F.3d 1137, 1146 n.3 (9th Cir. 2011) (same). See also Lalonde & Gilson, *Gilson on Trademarks* § 7A.08 (2009 ed.) ("Since at least 2002 . . . search engines such as Google generally do not index web sites based on their meta keywords tags.")

By the time Chai had built the company into a substantial revenue-maker that could afford to sue Long

Bow, JA 322, 903-904, the statute of limitations for suing over the documentary and the original content of the web site had long expired. Instead, she brought a defamation claim over certain statements about Jenzabar's business dealings that had been added later. JA 1, 7. The only trademark claim pleaded in the complaint was that Long Bow was using keyword meta tags to cause the page about Jenzabar to appear high in the Google search rankings, thus harming Jenzabar's reputation among college officials doing due diligence, while promoting Long Bow's "divergent political agenda". JA 1-2, 7-8. There were no allegations that Long Bow was trying to steal Jenzabar's customers, nor about title tags, and nor about the content of the search listing.

Approximately one year after the defamation claims were dismissed, Jenzabar retained a new law firm which initiated extensive discovery over the trademark claim, forcing Long Bow to spend more than \$250,000 in fees. JA 2362. This is not at all unusual in trademark litigation, which is notorious for being very expensive, AIPLA, *Report of the Economic Survey* 22 (2005); Grinvald, *Shaming Trademark Bullies*, 2011 Wis. L. Rev. 625, 630 (2011). In their complaint, and during discovery, Jenzabar's attorney and plaintiff Chai so often interjected issues about the contents of the film and

their perceptions about the political leanings of Long Bow's principals, JA 5-6, 8, 540, 593-594, 608-610, 2454-2477, that they effectively communicated the message that the case is about the contents of defendant's expression, rather than about a trademark.

Long Bow moved for summary judgment on ten different independent grounds. The grounds were listed in Long Bow's main appellate brief at 8-9, and included the one ground addressed by the majority and dissenting opinions in the Appeals Court - that, on the undisputed evidence, the "likelihood of confusion" factors uniformly favored Long Bow. But Long Bow also showed that the First Amendment protects Long Bow's right to tell the truth about the contents of its web page about Jenzabar (*i.e.*, that the page **is** about Jenzabar), JA 213-217; that Jenzabar could not meet the requirements of the special test that courts use to determine whether the title of an expressive work infringes a trademark, JA 217-219, and that Long Bow's use of the mark was protected fair use. JA 232-234. Long Bow also argued that Jenzabar's claims rested on the theory of initial interest confusion, that many federal appellate courts (including the First Circuit) express doubt about the validity of initial interest confusion as a basis for finding trademark infringement, and that in any event, given the undisputed

facts in the record, no claim based on initial interest confusion was tenable on the record. JA 225-230.

Speaking of keyword meta tags specifically, Long Bow showed that the caselaw uniformly upheld the use of trademarks in meta tags for a page about the trademark holder, finding infringement only when the tags are used in a deceptive manner to attract Internet users to web pages that offer competing products. JA 229. Long Bow also sought summary judgment on causation grounds, pointing to Google's own reminder that keyword meta tags play no role in its search rankings. JA 230-232. Long Bow also argued that Jenzabar's complaint about the impact of Long Bow's use of the mark on Jenzabar's reputation did not allege trademark injury, JA 239, and sought summary judgment on limitations grounds, citing the single publication rule. JA 232.

Jenzabar then amended its complaint and changed its trademark theory dramatically. The amended complaint alleged that Long Bow had created its web page about Jenzabar, and had misused Jenzabar's mark in the title tag of its web page, as well as in the keyword meta tags, to try to raise the search ranking for that page and lead potential customers in the world of higher education to the web site about the film, hoping to gain more film sales. JA 253, 255-256, 262, 2178, 2185-2186. Jenzabar

also argued that the contents of the Google search result might confuse Internet users into believing that Jenzabar was the source of Long Bow's web page about Jenzabar. The summary judgment opposition was supported by a highly opinion-laden affidavit from Chai's husband Robert Maginn, JA 1008-1017, who also helped run the company and whose personal investment had turned the company into a major enterprise, and by a sworn expert report from a computer expert who discussed the role of various meta tags and title tags in search results. Even though the close of discovery prevented Long Bow from piercing the affidavits through cross-examination, Long Bow showed that even these new theories were negated by the undisputed evidence in the record.

For example, Long Bow pointed out that its films do not compete with Jenzabar's software, and the tags lead to a web page solely devoted to discussion of Jenzabar. Yet every one of the trademark infringement cases about misleading tags, and about artificially boosting search engine rankings to lead customers to rival web pages, had involved commercial competitors whose web sites sold goods that competed with the trademark holder. JA 2214-2215. Moreover, as Long Bow showed, in every one of the cases where use of meta tags and other Internet finding devices was applied to web sites or web pages about the

trademark holder, the courts had rejected claims of trademark infringement. JA 232, 2220, 2266-2267.

Second, Long Bow demonstrated that the undisputed evidence showed that Jenzabar's prospective customers do due diligence before spending large sums of money on Jenzabar's expensive product, JA 324, 488, 853-856; for such customers, finding negative information about Jenzabar represents a **successful search**, not confusion. Thus, Long Bow argued that Jenzabar's lawsuit was aimed at suppressing its customers' access to information they wanted to make sound business decisions. Long Bow showed that the expert's affidavit had carefully avoided averring that keyword meta tags alone would boost search ranking, and had said nothing about the search listing's content. JA 1759-1763. Long Bow also showed that, even though the allegedly infringing use had existed for more than ten years, Jenzabar had not offered a single example of actual confusion, JA 326-328, a fact that strongly disfavors a conclusion that confusion is likely.

Long Bow also showed that Jenzabar's theory of commercial competition was nonsense - when the tags were created, Jenzabar was a bit player, so the trademark use could not have been intended to take advantage of Jenzabar's claimed major status in the world of education to find new customers. And analysis of server logs that

had been provided in discovery, and that were discussed in Jenzabar's expert affidavit, showed that the several hundred Internet users from educational institutions who visited the web page about Jenzabar as a result of using "Jenzabar" as a search term, Rvw. Applic. 11, were only .004% of all visitors to the Long Bow site, and that not one of them had navigated to a page that showed how to buy Long Bow's film. JA 1417-1418, 2217.

The Superior Court granted summary judgment on several of the grounds offered by Long Bow, including the likelihood of confusion factors, lack of causation, fair use, and the inadequacy of initial interest confusion to support an infringement claim. JA 2325-2335.¹ Jenzabar appealed, and changed lawyers again. On appeal, the new lawyers focused on the content of the search listing, rather than the mere high Google search ranking. Long Bow defended its judgment both on the grounds on which summary judgment had been granted, and on the remaining grounds for summary judgment that the Superior Court had

¹Jenzabar's original complaint alleged dilution under the federal Lanham Act. JA 12. In response to the summary judgment motion, which showed inter alia that the Jenzabar mark does not meet the very high standard for "famousness" under the Lanham Act, JA 235-239, Jenzabar dropped its Lanham Act dilution claim, but retained a state-law dilution claim; the trial court granted summary judgment dismissing that claim. Although Jenzabar appealed that issue, it does not argue that its remaining dilution claim is a basis for further appellate review. Therefore, dilution is not further discussed here.

not reached.

The Appeals Court affirmed summary judgment. 82 Mass. App. Ct. 648. The majority found it unnecessary to reach the First Amendment, fair use and other arguments, and it assumed arguendo that initial interest confusion could sometimes be a valid basis for finding infringement. Thus, the court focused solely on the "likelihood of confusion factors" and found that they so overwhelmingly favored a finding of no likely confusion that summary judgment was justified, even assuming the validity of the legal theory. Judge Berry dissented from the Lanham Act holding because she found the question of whether initial interest confusion could be shown on the record to be a closer one. Although Judge Berry voted to reverse, she did not address Long Bow's First Amendment, fair use, expressive use, and other alternate grounds for affirmance. Nor did she explain how reversal could be proper without considering all the grounds on which the Superior Court had granted summary judgment, not to speak of the additional grounds for affirmance that had been argued below but not decided by Judge Cratsley.

Reasons for Denying Further Review

The request for further review should be denied because the panel opinion represents an unremarkable application of the "likelihood of confusion" factors to

decide that, on the undisputed record in this case, the evidence so uniformly pointed in one direction that there was no justification for subjecting defendant to a trial on Jenzabar's federal law trademark infringement theory.

This was, in fact, the narrowest possible ground on which the panel could rest its decision, and was the legal theory most favorable to Jenzabar. As a result, the majority did not have to address the many significant questions about the application of federal trademark law to the Internet that Long Bow had argued and that, indeed, had attracted the interest of amici curiae. To be sure, if this Court grants review, Long Bow will offer those additional arguments about the First Amendment, fair use, and the impropriety of the doctrine of initial interest confusion as alternate grounds for affirmance. But the possibility of addressing these interesting questions as alternate grounds for affirmance, which will be needed only if the Court rejects the narrow ground on which the Appeals Court ruled, is not a sound basis for granting review of the lower court's routine application of the likelihood of confusion factors.²

²Because this appeal turns on federal law issues, and given the number of federal law issues potentially involved, if the Court does grant further review, it should allow each party one new brief, each the length permitted by the federal appellate courts. Federal Rules of Appellate Procedure Rule 32(a)(7) (14000 words); Supreme Court Rule 33(g)(vi) (15000 words).

Jenzabar argues that summary judgment should not be granted when the parties disagree about how the Lanham Act "likelihood of confusion factors" apply, or if judges disagree about whether the summary judgment standard has been met, Rvw. Applic. 19-22, but that is not the law. To the contrary, federal courts often allow summary judgment where undisputed facts show that likelihood of confusion factors -- which are legal conclusions -- largely or overwhelmingly favor one side. In the First Circuit alone, such cases include *Astra Pharm. Prod. v. Beckman Instruments*, 718 F.2d 1201 (1st Cir. 1983); *Hasbro v. Clue Computing*, 232 F.3d 1 (1st Cir. 2000); *Pignons v. Polaroid Corp.*, 657 F.2d 482 (1st Cir. 1981); *Machinists v. Winship Green Nursing Ctr.*, 103 F.3d 196 (1st Cir. 1996); *Boston Athletic Ass'n v. Sullivan*, 867 F.2d 22 (1st Cir. 1989). See also *Tana v. Dantanna's*, 611 F.3d 767, 775 (11th Cir. 2010) ("Our circuit has routinely 'weighed' the likelihood-of-confusion factors on summary judgment"). Indeed, summary judgment can be favored to avoid the chilling effect of protracted litigation on free speech. *Peckham v. Boston Herald*, 48 Mass. App. Ct. 282, 288 (1999).

In support of its grandiose assertion that the holding below threatens the "usability of the Internet," Rvw. Applic. 13, Jenzabar discusses lengthy dictum in a

decision denying a preliminary injunction that had been sought against dissemination in front of a restaurant of a leaflet, by a group that had organized a competing restaurant, after first concluding that the leaflet's front page infringed the plaintiff's mark based on a theory of initial interest confusion. *Id.* 15-16, citing *SMJ Group v. 417 Lafayette Restaurant*, 439 F. Supp.2d 281 (S.D.N.Y. 2006). But *SMJ Group* is not at all at odds with the ruling below, because in *SMJ Group* the parties had **agreed** that there was a likelihood of initial interest confusion. *Id.* at 288. The issue addressed in that case, and the reason why Jenzabar discussed the case below (only in its brief opposing Long Bow's cross-appeal on fees), was that initial interest confusion could be a basis for finding infringement in the offline context. Because the decision below **accepted** the initial interest confusion doctrine at least *arguendo*, and because Jenzabar is seeking review of the lower court's application of the likelihood of confusion factors that *SMJ Group* expressly declined to address, it is small wonder that the panel found it unnecessary to discuss the case, and a great wonder that Jenzabar argues that the case is relevant to the Lanham Act factors.³

³Long Bow's reply brief below on fees addressed *SMJ Group* at some length, showing why the case did not even support Jenzabar on the issue of whether initial interest

Jenzabar contends, however, that the impact on consumers of the Google search result listing that Long Bow allegedly created is uncertain enough that it ought to be left to a jury to decide whether there is a likelihood of confusion. That is not, however, how trademark cases are litigated. A trademark holder cannot simply present its trademark, compare it to the defendant's use, and demand that a jury decide whether the defendant's use, or indeed a nominative use, is likely to cause confusion. The likelihood of confusion factors were created precisely because trademark litigation is so notoriously expensive, *AIPLA, Report of the Economic Survey* 22 (2005); the factors bring some order to the adjudication of such cases, and enable weak cases to be weeded out at the summary judgment stage. "Summary judgment is as appropriate in a trademark infringement case as in any other case and should be granted or denied on the same principles." *WSM, Inc. v. Tennessee Sales Co.*, 709 F.2d 1084, 1086 (6th Cir. 1983). Because Jenzabar failed to produce sufficient evidence to create genuine issues of material fact about the individual likelihood of confusion factors, there is no

confusion was a valid doctrine as applied to search listings. Long Bow Reply Br. 5-8. Apparently, Jenzabar found the rebuttal so devastating that its only response was a motion to strike (which the court below denied).

good reason to grant review of the Appeals Court's analysis of those factors.

Indeed, Jenzabar's evidence was inadequate to create genuine issues in yet another way. Although Jenzabar's application intones like a mantra the phrase "search listing devised by Long Bow," Applic. Rvw. 10, as the Appeals Court pointed out, it was not Long Bow but **Google** that selected the words that appear in the search listing, through its proprietary algorithm. Jenzabar cites no evidence for the contrary assumption on which its trademark theory turns; even Jenzabar's expert witness, who opined at some length about the combined impact of the key word meta tags and title tag on the main page about Jenzabar on the search ranking for that page, said nothing whatsoever about the contents of the search listing, how it came to have the contents that it did, and what impact that listing would likely have on search engine users. Nor does Jenzabar explain why Long Bow should be held liable for trademark infringement for actions that Google took, rather than for its own acts.

Indeed, in the late 1990's, when Long Bow created the web page and chose the title and meta tags that Jenzabar now claims are infringing, Google had barely been founded, and was by no means the dominant force in Internet search that it is today. Jenzabar presented no

evidence about how the web page and its tags would have affected the configuration of search result listings in the search engines that were dominant at that time.

Although the ruling below will have no appreciable impact on "the usability of the Internet" for trademark owners, given how narrowly it is written, Jenzabar's suit, and its request for further appellate review, does pose a significant danger to use of the Internet as a forum for free speech. The Internet is not just a means for merchants to peddle products; it is an unparalleled forum for the expression of ideas. *Reno v. ACLU*, 521 U.S. 844, 853, 870 (1997). Those who criticize companies need to use the company name - that is, a trademark - to identify the company that they chose to criticize, and, indeed, to call their critical pages to the attention of search engine users who may be interested in learning more about that company. By the same token, consumers who perform due diligence to find out about products and services before they buy them have a strong interest in protecting the right of speakers to use business names in this way. Trademark law needs to accommodate these interests, not just the interests of businesses. And because it is the search engine, and not the web site operator, that generally controls the appearance of a search listing, if Jenzabar has its way, Internet critics

will routinely face the risk of well-funded trademark holders, motivated by revenge and not by competitive concerns, suing for infringement based on merely ephemeral confusion resulting from the happenstance of how the search engine designs its listings.⁴

Given how expensive trademark litigation has come to be, it is too often the weapon of choice for business interests that want to use litigation as a tool of oppression to intimidate their critics or, indeed, to drive them to surrender their right to speak - the phenomenon of "trademark bullying." If, as Jenzabar argues, a trademark holder is entitled not only to avoid dismissal but to force every case to a jury, simply by alleging a likelihood of confusion and without making a tenable case on the likelihood of confusion factors, criticism will become too dangerous and much use of the Internet for critical expression will be chilled.

In any event, even assuming that there is a reason for the Court to "have a hand" in determining how federal trademark law applies to Internet search listings and HTML tags, as Jenzabar asks, *Rvw. Applic. 13*, the Court should await a better vehicle, in which a full record has

⁴ The First Circuit has repeatedly said that temporary confusion will not support an infringement claim. *Astra Pharmaceutical*, 718 F.2d at 1207; *Winship Green*, 103 F.3d at 201.

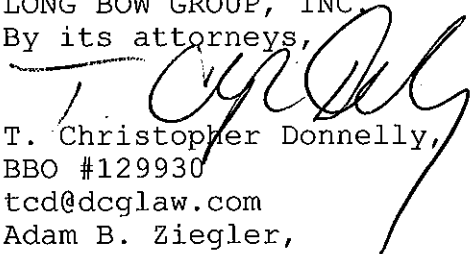
been built because the theory of infringement was originally alleged in the complaint and was subjected to plenary discovery, not a case in which the theory was invented to try to save a case from summary judgment after discovery was closed. Here, plaintiff's tactical choice to wait until so late in the litigation to introduce the theory on which it now seeks this Court's review precluded creation of a full record. That is an additional reason why the Court should not grant review.

CONCLUSION

No further review is warranted.

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2012 a true copy of the above document was served upon the attorney of record for each party ~~by mail~~/by hand.



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