
In the
United States Court of Appeals
For the Seventh Circuit

No. 09-3379

BEVERLY STAYART,

Plaintiff/Appellant,

vs.

**YAHOO!, INC., OVERTURE SERVICES,
INC., d/b/a ALTA VISTA and VARIOUS,
INC., d/b/a FRIENDFINDER.COM,**

Defendants/Appellees.

Appeal from the United States District Court for the Eastern
District of Wisconsin, Milwaukee Division
Case No. 2:09-cv-00116-RTR
Hon. Rudolph T. Randa, Judge Presiding

REPLY BRIEF OF
APPELLANT

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ARGUMENT

I. The district court erred in concluding that Stayart lacked prudential standing at the pleading stage.

Beverly Stayart (“Stayart”) demonstrated in her Appellate Brief that the district court erred in concluding at the pleading stage that she lacked prudential standing to bring false endorsement claims under the Lanham Act.

Stayart adequately alleged in her complaint that she has a unique and distinctive personal name; that she regularly uses her name on the Internet and elsewhere; that she frequently engages in public advocacy for the humane treatment of animals; and that her name has commercial value, in part, because of these humanitarian efforts (R. 1; Jt. Apx., pp. 3-4).

A. The Lanham Act protects those engaged in noncommercial or political speech from false endorsement.

Stayart participates in worldwide animal protection programs. Media advocacy, practiced actively by Stayart, is “the strategic use of the mass media as a resource to advance a social or public policy initiative.” D. H. Jernigan, and P. Wright, *Media advocacy: lessons from community experience*, 17 J OF PUBLIC HEALTH POLICY 306 (1996). The scope of the Lanham Act encompasses those publicly involved in social initiatives. See, Stayart’s Brief, at 23-25 [citing cases].

B. Noncompetitors have standing under the Lanham Act.

The purpose of § 43(a) of the Lanham Act is not solely to protect business competitors. This section applies to any “person” who is or is likely to be damaged. The plain language of the intent section, 15 U.S.C. § 1127, makes actionable the deceptive and misleading use of marks and descriptions. Since that same section defines “person”

as both natural and juristic persons, this Court cannot conclude that only competitors are protected. See, L’Aiglon Apparel, Inc. v. Lana Lobell, Inc., 214 F. 2d 649, 651 (3d Cir. 1954).

Yahoo and Various (collectively “Appellees”) nevertheless contend that Stayart “lacks any commercial interests” in her “allegedly misappropriated identity” (Joint Brief, at 16). We are told that Stayart “has failed to allege that she is engaged in competition, even indirectly, with either Appellee (Joint Brief, at 19).¹

There is no requirement in the Seventh Circuit that the plaintiff be a competitor to state a viable false endorsement claim under § 43(a) of the Lanham Act. See, Stayart’s Brief, at 20-22 [citing cases].²

For prudential standing at the pleading stage, the plaintiff must allege that she is engaged in commercial activity, which Stayart has sufficiently done. “Commercial” in the context of the Lanham Act involves promotion or advertising for the purposes of influencing the purchasing decisions of the consuming public. See, Stayart’s Brief, at 23. Cases brought under a different provision of the Lanham Act (the Federal Trademark Dilution Act, 15 U.S.C. § 1125(c)) expressly exempt “noncommercial use of a mark,” 15 U.S.C. § 1125(c)(4)(B). In sharp contrast, there is no exception for “noncommercial speech” for false endorsement. See, 15 U.S.C. § 1125(a).

¹ Appellees cite Colligan v. Activities Club of N.Y., Ltd., 442 F. 2d 686 (2d Cir. 1971) for the proposition that § 43(a) standing is limited to members of a “purely commercial class” (Joint Brief, at 18). Appellees ignore that this Court rejected such approach in Dovenmuehle. See, Stayart’s Brief at 21.

² See also, Nollf, “Non-Competing Goods in Trade-Mark Law,” 37 COLUM. L. REV. 582, 604 (1937) (suggesting a distinction between confusion of source and “confusion in a wider sense,” where the public may be deceived into the assumption that defendant is connected with the plaintiff).

Appellees argue spuriously in asserting that this Court has “rejected a [similar] false endorsement Lanham Act claim” in L. S. Heath & Son, Inc. v. AT&T Information Systems, Inc., 9 F. 3d 561 (7th Cir. 1993) (Joint Brief, at 25-27).

The Heath case involved a chocolate maker who sued a technology firm because of the firm’s faulty computer network. During implementation, Heath agreed to help advertise AT&T’s system. 9 F. 3d at 565.

Heath sued, alleging breach of warranty, breach of a partnership agreement and, as an aside, a Lanham Act claim for false advertising -- not false endorsement. Id., at 575.

Heath urged that AT&T violated the Lanham Act by ads stating “Once Heath chose AT&T, all the ingredients came together.” Id.³

This Court held that Heath did not have standing to sue for false advertising because it had no “discernible competitive injury.” It was not in the computer business and was not a competitor of AT&T. But this Court did not explicitly limit standing under § 43(a) to competitors and concluded, on summary judgment, that Heath’s false advertising claim failed because no damages were shown. Id.

The Heath case simply does not deal with prudential standing at the pleading stage for false endorsement claims under § 43(a) of the Lanham Act, or with a motion to dismiss under Rule 12(b)(6).

Appellees further obfuscate when they blatantly state (Joint Brief, at 26):

It is obvious from the face of the Complaint that the only way anyone would ever encounter the web pages that offended Appellant would be not only to do an Internet search for “Bev Stayart,” but also to click through every web page that the search pulled up, all the way to the bottom of the list. Appellees submit that the

³ Since Heath gave its endorsement and approved the ad, any “false” endorsement claim failed. Id.

only person likely to do that is Appellant herself. * * * [i]t is unlikely that a significant number of people beyond Appellant herself, Appellees' counsel, and persons interested in this case, would ever be aware of these links. In fact, Appellant's complaint fails to allege that anyone other than Appellant ever saw or was misled by the search results in question. (JA at 32.)

An Internet searcher seeking information about "Bev Stayart" need not laboriously "click through" page after page of search results (contrary to Appellees' misrepresentation) to find the false and deceptive web pages. Appellees state that there were "only seven search engine results" in total on Yahoo for "Bev Stayart." (Joint Brief, at 35).

For example, the <http://jewellery-makin.doorway.orge.pl/bev-stayart.html> website was accessible on the first page of both Yahoo and Alta Vista search results for Stayart as a link on the Pm 10kb Loading Cialis – Online Pharmacy website. Sometimes clicking this link led to one of six websites showing a movie screen with Stayart's name, and sometimes it led to this <http://jewellery-makin.doorway.orge.pl/bev-stayart.html> website, as well as additional websites advertising AdultFriendFinder.com (R. 21, p. 13).

A link from a site that uses a plaintiff's name without authorization to a pornographic website creates a psychological association of plaintiff's name in the mind of the viewer, even if the viewer knows that the trademark owner is not sponsoring the pornographic site. Courts have frequently held that the use of trademarks in domain names to point or link to pornographic websites violates the Lanham Act. Ford Motor Co. v. Lapertosa, 126 F. Supp. 2d 463, 466 (E.D. Mich. 2001). See also, Lucent Technologies v. Johnson, 2000 WL 1604055 at *3 (C.D. Cal. 2000) (concluding that defendant's use of LUCENTSUCKS.COM for a website offering pornography violates the Lanham Act); Hasbro, Inc. v. Internet Entertainment Group, Ltd., 40

U.S.P.Q. 2d 1479 (W.D. Wash. 1996) (use of CANDYLAND.COM to link website showing sexually explicit pictures violates the Lanham Act); Archdiocese of St. Louis v. Internet Entertainment Group, Ltd., 1999 WL 66022 (E.D. Mo. 1999) (use of “PAPAL.VISIT.COM” and “PAPALVISIT-1999.COM” to link websites advertising adult entertainment violated the Lanham Act).

In sponsorship confusion cases, the plaintiff may be injured without “passing off” and diversion of trade. International Kennel Club of Chicago, Inc. v. Mighty Star, Inc., 846 F. 2d 1079 (7th Cir. 1988) (loss of control over reputation -- those who attend plaintiff’s dog shows would perceive, erroneously, that plaintiff is engaged in a distasteful commercial enterprise); James Burroughs Limited v. Sign of Beefeater, Inc., 540 F. 2d 266, 276 (7th Cir. 1976) (same).

Cf. Wesley-Jensen Div. of Schering Corp. v. Bausch & Lomb, Inc., 682 F. 2d 862, 867 (7th Cir. 1983):

Courts readily find irreparable harm in trademark cases because of the victim’s inability to control the nature and quality of the infringer’s goods, not because the infringer’s goods are necessarily inferior. Even if the infringer’s goods are of high quality, the victim has the right to insist that its reputation not be imperiled by another’s actions.

Stayart need not establish that a “significant” number of persons believe the false endorsement is true. See, Stayart’s Brief, at 34 [citing cases]. This is equally true with respect to Stayart’s state claims. Cf. J. Thomas McCarthy, McCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:12 (4th ed. 1996):

[A]n infringement of one’s right of publicity is triggered if a more than insignificant number of people identify the object person from the defendant’s commercial use.

C. Stayart has adequately asserted “likelihood of confusion” among consumers under the Lanham Act.

Appellees erroneously urge this Court to engage in “merits analysis” of Stayart’s case. Without permitting discovery or engaging in any fact-finding, final determinations of contested issues of fact cannot be resolved at the motion to dismiss stage of the proceedings. Cf. Vulcan Golf, LLC v. Google Inc., 552 F. Supp. 2d 752, 769 (N.D. Ill. 2008) (“[T]he court declines to make such a determination as a matter of law given that the ‘likelihood of confusion’ is a fact-specific inquiry best left for decision after discovery.”)

Stayart’s complaint states that consumers were misled by Appellees’ misappropriation of her name, contrary to Appellees’ repeated posturing. For example, ¶ 132 of Count I states (Jt. Apx., 31):

132. Yahoo’s unauthorized use of Plaintiff’s name is likely to cause confusion or mistake and to deceive consumers as to the endorsement, sponsorship, affiliation, connection or association of Bev Stayart with Cialis® and an online pharmacy selling this drug.

Similarly, ¶ 136 of Count I states (Jt. Apx., 32):

136. Yahoo’s unauthorized use of Plaintiff’s name is likely to cause confusion or mistake and to deceive consumers as to the endorsement, sponsorship, affiliation, connection or association of Bev Stayart with these six separate pornographic videos, all containing computer spyware.

And ¶ 140 of Count I asserts (Jt. Apx., 32):

140. Yahoo’s unauthorized use of Plaintiff’s name is likely to cause confusion or mistake and to deceive consumers as to the endorsement, sponsorship, affiliation, connection or association of Bev Stayart with this website captioned “Free Streaming Porn HOTTEST DAILY PORN.”

Similar allegations are made in Count IV against Overture Services (Jt. Apx., at 37, ¶ 164) and in Count VII against Various (Jt. Apx., at 41, ¶ 189).

Stayart has, therefore, properly pled herself into court, not “out of court” (Joint Brief, at 15, 39-40), notwithstanding her allegation that she has not participated “in any way in the prescription drug or adult services market.”

Appellees then continue (Joint Brief at 26-27):

Second, to satisfy Heath’s commercial harm requirement, a plaintiff must allege actual consumer reliance on allegedly misleading statements by Defendant. Id. at 575. No such reliance has been alleged, nor could it be alleged, in the present case; there is no cause for consumers to seek out and exhaustively research “Bev Stayart.” The only plausible conclusion based on the allegations is that no actual consumer reliance could have occurred. Accordingly, Appellant’s claim should be rejected under the L. S. Heath & Son standard without leave to amend.

There is no “Heath standard” for a false endorsement claim under § 43(a) of the Lanham Act. And Stayart has properly alleged consumer reliance in her false endorsement claims against Appellees!

Section 43(a) of the Lanham Act is broad enough to allow persons to vindicate property rights in their identities against misleading commercial use by others, even absent a competitive relationship. See, e.g., Abdul-Jabbar v. Gen. Motors Corp., 85 F. 3d 407, 410 (9th Cir. 1996) (unauthorized use of basketball player’s birth name); Waits v. Frito-Lay, Inc., 978 F. 2d 1093 (9th Cir. 1992), cert. denied, 506 U.S. 1080 (1993) (unauthorized use of singer’s distinctive voice in a commercial).

D. Stayart's emotional injury does not require dismissal of her Lanham Act claims.

In an attempt to distance themselves from the Lanham Act, Appellees urge that Stayart's only "actual perceived injury is personal and emotional" (Joint Brief, at 27).

The fact that Stayart may have suffered emotional injury from the egregious false endorsement claims in this case is, of course, understandable. Such injury in no way undermines Stayart's legitimate Lanham Act claims.

Emotional distress damages are recoverable under state law for name appropriation. See, e.g., RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49, *comment d* (1995):

[P]rotection is available under the right of privacy for the personal interest in controlling the use and exploitation of one's own identity. Private individuals . . . frequently suffer greater emotional than pecuniary harm from an unauthorized commercial appropriation of their identity.

See also, RESTATEMENT (SECOND) OF TORTS § 652(H) (1977):

One who has established a cause of action for invasion of privacy is entitled to recover damages for:

(b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion;

and Wis. Stats. 995.50(4):

Compensatory damages [for invasion of privacy] are not limited to damages for pecuniary loss, but shall not be presumed in the absence of proof.

Stayart has six state claims for invasion of privacy against Appellees, which are joined with her claims for false endorsement under the Lanham Act. The existence of these related state claims explains and justifies the references in the record to Stayart's damages for emotional distress.

II. Stayart has more than adequately alleged false endorsement under the Lanham Act.

To succeed on her Lanham Act claim, Stayart must establish that she owns a protectible trademark, and that the use of this mark by defendants is likely to cause confusion among consumers. Segal v. Geisha NYC LLC, 517 F. 3d 501, 506 (7th Cir. 2008) (citing 15 U.S.C. § 1125). The “mark” at issue is Stayart’s identity. Waits v. Frito-Lay, Inc., 978 F. 2d 1093, 1110 (9th Cir. 1992); see also, Stayart v. Yahoo! Inc., 651 F. Supp. 2d 873, 881 (E.D. Wis. 2009). And a complaint “should not be dismissed if it is possible to hypothesize facts, consistent with the complaint, that would make out a claim.” Petri v. Gatlin, 997 F. Supp. 956, 965 (N.D. Ill. 1997).

A. Stayart has alleged “use in commerce” of her name under the Lanham Act.

Appellees urge that the commercial “use” of Stayart’s name did not constitute “use in commerce” (Joint Brief, at 28-31), citing 1-800 Contacts, Inc. v. WhenU.com, Inc., 414 F. 3d 400 (2d Cir. 2005).

This Second Circuit case held that the Lanham Act trademark use requirement did not extend to the triggering of pop-up advertisements because a word (including a trademark) to retrieve information from a computer database is not identical to using the mark in connection with the sale of goods or services.

However, the United States Supreme Court found that courts must construe the words “in commerce” liberally, because the Lanham Act “confers broad jurisdictional powers upon the courts of the United States.” Steele v. Bulova Watch Co., 344 U.S. 280, 283 (1952).

Strangely, Appellees fail to mention a more recent decision of the Second Circuit which held that the sale and purchase of trademarks as search terms does constitute a

“use in commerce” under the Lanham Act. Rescuecom Corp. v. Google, Inc., 562 F. 3d 123 (2d Cir. 2009). This decision now brings the Second Circuit in conformity with the courts in other circuits that have considered keyword advertising issues, many of which have found that use of trademarks in keyword advertising does constitute “use in commerce.”

Appellees’ reliance on the holding in 1-800 Contacts is erroneous because it is no longer followed in the Second Circuit.

B. Yahoo need not use Stayart’s name on its own products or services.

A false endorsement claim under the Lanham Act does not require Stayart to allege that Yahoo used her name on “Yahoo!’s products or services” (Joint Brief, at 31-32). No such language appears in 15 U.S.C. § 1125(a).

Appellees confuse the way in which valid rights to a trademark are acquired with the infringing use of a trademark. (See, Stayart’s Brief, at 43).

The Lanham Act requires a party to use a term “in the ordinary course of trade” affixed to goods or in the sale of goods and services in order to qualify for trademark protection. 15 U.S.C. § 1127. The Lanham Act defines infringing use of a trademark to include both on and in connection with goods and services. 15 U.S.C. § 1114(1)(a) (emphasis added). Those goods and services need not be the defendant’s goods and services.

C. Stayart has alleged that her name is unique and distinctive.

Stayart has alleged in her complaint that she has a unique and distinctive name for purposes of Lanham Act protection, which Appellees irrationally deny (Joint Brief, at 32-35).⁴

Stayart asserts that she is the only “Beverly Stayart” or “Bev Stayart” on the Internet (R. 1; Jt. Apx., p. 4).

Both her names refer to her and only to her. There are no multiple meanings for “Beverly Stayart” or “Bev Stayart.” Thus, “coke” may mean one thing in a supermarket, another thing in a steel mill, and still another in the drug trade. But “Beverly Stayart” or “Bev Stayart” as search terms are equivalent to the brand or trademark Beverly Stayart or Bev Stayart.

As set forth by the Court in Peaceable Planet, Inc. v. Ty, Inc., 362 F. 3d 986, 989 (7th Cir. 2004), cert. denied, 543 U.S. 869 (2004):

Some names are so common -- such as “Smith,” “Jones,” “Schwartz,” “Wood,” and “Jackson” -- that consumers will not assume that two products having the same name therefore have the same source, and so they will not be confused by their bearing the same name.
(citations omitted.)

The exact opposite is true in this case. The unauthorized use of Stayart’s name on websites will falsely cause Internet searchers to assume that she (and no one else) endorsed them or is somehow affiliated with them. And Congress has drafted the

⁴ Appellees claim that “It is not plausible that one can commercially exploit an unrecognizable name that has no commercial value” (Joint Brief, at 34-35). Stayart has asserted that she has a unique and distinctive name with commercial value.

Lanham Act expansively to prohibit misleading the public through any “word, term, name, symbol or device, or . . . combination thereof.” 15 U.S.C. § 1125(a)(1)(A) (emphasis added).

Appellees’ reliance on Pesina v. Midway Mfg. Co., 948 F. Supp. 40 (N.D. Ill. 1996) (Joint Brief, at 33-35) is misplaced, as this case is easily distinguishable.

In Pesina, the plaintiff, a martial artist, asserted that his likeness was used without his permission in a video game. 948 F. Supp. at 42. But he had agreed to serve as a model for a character. Id., at 41. Plaintiff’s likeness was extensively altered prior to being incorporated into the game and, thus, was not recognizable. Id., at 42. Also, plaintiff failed to show that his identity was “inextricably intertwined” in the public’s mind with the cartoon character in the game. Id. Since he had no public recognition, and was not a “celebrity,” the plaintiff’s false endorsement claim under the Lanham Act failed, but only after summary judgment. Id., at 43.

Here, Stayart did not agree to endorse pornographic websites, sexual dysfunction products, or an Internet dating service. She asserts that she has a unique and distinctive personal name with commercial value. She maintains that she has public recognition on the Internet by virtue of almost 17,000 “hits” during the last three years on a genealogy website. She alleges that she has been actively involved in issues of interest to the public (i.e., the humane treatment of animals). Appellees insist this Court affirm the dismissal of her case, as a matter of law, without giving her the opportunity to prove any of her allegations!

One cannot draw a “bright” line where fame begins or ends. Stayart developed a strong public following for her animal rights campaigning on the Internet, as well as her

genealogy posts at www.saponitown.com. She built up her fame over time, with her name gaining in prestige and popularity. She is a competitive keyword phrase on the Internet. See, Stayart's Brief, at 26-27. Stayart's "fame" or lack thereof only affects her damages, not whether she has a cause of action under the Lanham Act or state law.⁵ As expressed by one authority (J. Thomas McCarthy, 1 THE RIGHTS OF PUBLICITY AND PRIVACY § 4:3 (2d ed. 2008) at 197:

The ephemeral and relative nature of "celebrity" and "fame" make such concepts much too slippery to use as any firm ground for overall legal analysis.

D. Stayart has adequately asserted "likelihood of confusion" among consumers under the Lanham Act.

Stayart has adequately asserted "likelihood of confusion" among consumers in her complaint. See, Reply Brief, at 6-7.

The quick and effortless nature of "surfing" the Internet makes it unlikely that consumers can avoid confusion through the exercise of due care:

In the internet context, in particular, entering a website takes little effort -- usually one click from a linked site or a search engine's list; thus, web surfers are more likely to be confused as to the ownership of a web site than traditional patrons of a brick-and-mortar store would be of a store's ownership.

Northern Light Tech. Inc. v. Northern Lights Club, 97 F. Supp. 2d 96, 115 (D. Mass. 2000), aff'd, 236 F. 3d 57 (1st Cir. 2001).

Proof of intent to confuse or mislead creates a presumption of likelihood of confusion. Homeowners Group, Inc. v. Home Mktg. Specialists, Inc., 931 F. 2d 1100, 1111 (6th Cir. 1991). This rule applies here based on each Appellee's alleged conduct.

⁵ Cf. Arnold v. Treadwell, 642 F. Supp. 2d 723, 735 (E.D. Mich. 2009) (Lanham Act contains no requirement that a plaintiff be a celebrity; model's lack of celebrity did not defeat her false endorsement Lanham Act claim.).

Yahoo deliberately read the deceptive metatag “bev stayart” embedded in the hidden source code of all the illegitimate and misleading web pages involved in this case, and then chose to display the pages as legitimate “search results” for her on its directory, even after Stayart sent a letter to Yahoo and Overture Services, requesting that they remove them as false endorsements. See, Stayart’s Brief, at 39-40.

Various used “bev stayart” as the title tag in the hidden source code of a website which contained no other content except a banner ad for AdultFriendFinder.com. See, Stayart’s Brief, at 13-14. Because the banner ad for AdultFriendFinder.com is the only content of this website, Various is the content provider.

Appellees refer this Court to Kournikova v. General Media Communications, Inc., 278 F. Supp. 2d 1111 (C.D. Cal. 2003) (Joint Brief, at 36) on the issue of “likelihood of confusion.” This decision does not support the dismissal of Stayart’s false claims.

In Kournikova, the court, on summary judgment, rejected a tennis player’s false endorsement claim against an adult magazine publisher, featuring photos of a topless sunbather falsely identified as plaintiff. 278 F. Supp. 2d at 1113. The court found that no reasonable reader would believe the plaintiff endorsed the magazine because the cover headline (“CAUGHT UP CLOSE ON NUDE BEACH”), and the context, made it clear that neither the plaintiff, nor the person in the photos, had voluntarily posed for the magazine. Id., at 1120-30. The claim was rejected only because no endorsement was suggested from the perspective of consumers.

There exists a genuine issue of fact for consumers as to whether Stayart endorsed the websites, products, and services at issue, which cannot be resolved on a motion to

dismiss. See, Burck v. Mars, Inc., 571 F. Supp. 2d 446 (S.D.N.Y. 2008) (the implication of an endorsement is an issue of fact).

Appellees' reliance on Muzikowski v. Paramount Pictures Corp., 477 F. 3d 899 (7th Cir. 2007), as supporting their position (Joint Brief, at 40), is absurd. Plaintiff waived his false advertising claim under the Lanham Act in the district court. He did not contest Paramount's statement that a movie ("Inspired by a true story!") was "literally true." This case was also decided on summary judgment, not on a motion to dismiss. 479 F. 3d at 908.

Nor are Stayart's "worries" in this case "hypothetical" (Joint Brief, at 41). Her public success as an animal rights activist depends on her well-earned reputation and goodwill. Stayart has a reasonable interest under the Lanham Act in preventing the false and misleading implication that she endorses pornography, sexual dysfunction drugs, or an Internet dating service using sexually explicit advertising.

The confusion resides in the fact that the public is deceived:

into believing that good will, or investment, of another, are enjoyed by or is a part of another's business, so that the ordinary public would be led to believe that, in dealing with such person, it was also dealing in some way with the other.

Dodge Bros. v. East, 8 F. 2d 872, 875 (E.D.N.Y. 1925); Heath Engineering Co. v. HFE, Inc., 176 U.S.P.Q. 89 (Colo. Dist. Ct. 1972) ("The Court has the duty to the public to see that it is not misled.").

E. "Initial interest confusion" supports Stayart's Lanham Act claim against Various.

Under the "initial interest confusion" theory of trademark liability, in the Internet context, the wrongful act is the defendant's use of the plaintiff's mark to divert

consumers to a website that “consumers know” is not the plaintiff’s. Brookfield Communications, Inc. v. West Coast Entm’t. Corp., 174 F. 3d 1036, 1062 (9th Cir. 1999).

It exploits another’s name, reputation and goodwill. Cf. Dorr-Oliver, Inc. v. Fluid-Quip, Inc., 94 F. 3d 376 (7th Cir. 1996) (treating initial confusion as a trade identity version of the false advertising technique of “bait and switch”); Koppers Co., Inc. v. Krupper-Koppers GmbH, 517 F. Supp. 836, 844 (W.D. Pa. 1981) (“[s]ecuring the initial business contact by the defendant because of an assumed association between the parties is wrongful even though the mistake is later rectified”).

Various erroneously contends that this doctrine does not assist Stayart against it in this case (Joint Brief, at 41-43).

To the contrary, this is yet another way in which Stayart can establish “likelihood of confusion.”

Various regularly uses “bait and switch” tactics to lure consumers to its Internet dating service. See, Stayart’s Brief, at 27. Consumers using innocuous search terms such as “flowers,” “travel” or “vacations” are instead bombarded by Various with sexually explicit, graphic pop-up ads for AdultFriendFinder.com. (R. 21, p. 16; R. 25-2, Appendix 5).

Various pulled the same stunt in this case. It used “bev stayart” as the title tag in the hidden source code of a website. Various’ disingenuous assertion that this is a “third-party site” is unsupported in the record (Joint Brief, at 11). Various’ AdultFriendFinder.com banner ad alone is the entire content of this website. Either

Various created it or paid its agent to create it, because nothing else appears on this website.⁶

Various' use of Stayart's name is classically competitive under the Lanham Act. It has used her name in order to promote its Internet dating service -- its website -- to an audience expecting to reach Stayart.

Appellees further assert that "[Stayart] cannot state a claim [for false endorsement] because she has not demonstrated 'that the public believes that the mark's owner sponsored or otherwise approved the use' of her name" (Joint Brief, at 42), citing Landham v. Lewis Galoob Toys, Inc., 227 F. 3d 619, 626 (6th Cir. 2000) (emphasis added).

Appellees also cite Landham for the assertion that the plaintiff must be a "celebrity" to bring a false endorsement claim (Joint Brief, at 34).

The Landham case is easily distinguishable. The plaintiff was a minor character actor and sued a film studio and a toy manufacturer for creating an action figure that depicted a character played by the plaintiff in a film.

The toy was only 1.5 inches tall and had no eyes or mouth, so it bore no personal resemblance to the plaintiff. The creator of the toy also testified that he purposefully avoided any such resemblance.

The plaintiff's false endorsement claim under the Lanham Act was dismissed on summary judgment, not on the basis of a motion to dismiss. The Sixth Circuit held that the plaintiff failed to show that the buying public was likely to be genuinely confused about whether the plaintiff had endorsed a fictional toy character.

⁶ Various operates through "marketing affiliates" (R. 1; Jt. App., p. 11). The relevant inquiry, which will be answered after discovery, is who supplied the ad copy.

Demonstration of actual “proof” is not relevant on a motion to dismiss. What is relevant is whether plaintiff’s complaint sufficiently alleges the “confusion” element. London v. Carson Pirie Scott & Co., 4 U.S.P.Q. 2d 1148, 1152 (N.D. Ill. 1987). There is nothing else for Stayart to “demonstrate.”

III. The district court abused its discretion in failing to retain jurisdiction over Stayart’s state law claims.

The district court abused its discretion in failing to retain jurisdiction over Stayart’s six state law claims on the basis of diversity. See, Stayart’s Brief, at 46-50. Given the availability of compensatory damages, punitive damages and attorney fees under Wisconsin law, Stayart should be allowed to amend her Complaint to allege at least \$75,000 in damages for her invasion of privacy counts.

In response, Appellees claim, in ipse dixit fashion, that Stayart’s “statements and allegations . . . are purely speculative and conclusory.” (Joint Brief, at 44-45).

However, if Stayart is allowed to replead and allege, in good faith, that the amount in controversy exceeds \$75,000, it must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. Morales v. Fagen, Inc., 654 F. Supp. 2d 863, 868-69 (C.D. Ill. 2009).

The district court made the statement that “[g]iven the likelihood that her damages are de minimus” it “does not seem likely that Stayart could make a good faith allegation that her damages are more than \$75,000.” Stayart v. Yahoo! Inc., 651 F. Supp. 2d 873, 889 (E.D. Wis. 2009).

“De minimis non curat lex” is the common law principle whereby judges will not sit in judgment of extremely minor transgressions of the law. However, damages are a matter of a jury’s opinion, not the district court. Cf. Gutierrez-Rodriguez v. Caragena,

882 F. 2d 553, 577-78 (1st Cir. 1989) (“Translating legal damage into money damages -- especially in cases which involve few significant items of measurable economic loss -- is a matter peculiarly within the jury’s ken.”). Million dollar verdicts today no longer shock the judiciary; indeed, billion dollar verdicts have been awarded in recent cases.

Transgressions of the law on the Internet are not minor. As one court in Virginia articulated:

In that the Internet provides a virtually unlimited, inexpensive, and almost immediate means of communication with tens, if not hundreds of millions of people, the dangers of misuse cannot be ignored.

In re Subpoena Duces Tecum to American Online, Inc., 2000 WL 1210372 (Va. Cr. Ct.), rev’d on other gds, 261 Va. 350, 542 S.E. 2d 377 (Va. Sup. Ct. 2001).

Nothing in cyberspace ever goes away. As stated in Bursac v. Suozzi, 868 N.Y.S. 2d 470 479 (N.Y.S. Ct. 2008):

Any person with a computer terminal, in any part of the world, can instantly access . . . [another] website and, with powerful search engines, type in any number of keyword entries. . . . The Internet has no sunset and postings on it will last and be available until some person purges the website, perhaps in decades to come.

Cf. Mark Rowlands, THE PHILOSOPHER AND THE WOLF (2009), at 100:

A failure to do one’s duty, both morally and epistemic, a failure grounded in unwillingness rather than inability, underwrites most of the evil in the world. However, there is one further ingredient of evil, without which neither failure is of any consequence: the helplessness of the victim.

IV. The Communications Decency Act does not bar Stayart’s Lanham Act Claims.

A. Intellectual property claims have no CDA immunity.

Stayart has prudential standing under the Lanham Act, and she also has

adequately stated false endorsement claims against Appellees. Section 230 of the Communications Decency Act (“CDA”), 47 U.S.C. § 230(c)(1), does not provide Appellees any immunity. Section 230(e) of the CDA expressly precludes applying immunity to “intellectual property” claims. See, Stayart’s Brief, at 35-36.

Courts have uniformly refused to apply CDA immunity to Lanham Act claims. Guici America, Inc. v. Hall & Assoc., 135 F. Supp. 2d 409 (S.D.N.Y. 2001); Ford Motor Co., v. Great-Domains.com, Inc., 60 U.S.P.Q. 2d 1446 (E.D. Mich. 2001); Whitney Information Network, Inc. v. Verio, Inc., 2006 WL 66274 (M.D. Fla. 2006).

Appellees rely instead on Kruska v. Perverted Justice Found., Inc., 2008 WL 2705377, at *4 (D. Ariz. 2008), stating that the court dismissed a § 43(a) Lanham Act claim because of a domain registrar’s CDA immunity (Joint Brief, at 48, 61, 63).

The pro se plaintiff in Kruska had no Lanham Act claim for false endorsement, as Appellees are well aware. The complaint in Kruska contains seven counts, none of which involved the Lanham Act or § 43(a). See, R. 27, Appendix K, Document 27-7, CV ‘08 0054 PHX SMM, Civil Complaint, Kruska v. Perverted Justice Foundation, filed January 10, 2008.

In Kruska, the court mentioned that “Kruska’s claim that § 43(a) of the Lanham Act defeats the immunity provision in the CDA has no support in statute or case law.” Kruska, at *3.

Although Appellees cite Kruska three separate times, this statement nonetheless fits the definition of dicta, i.e., observations in a court’s opinion which are not essential to the outcome of the case before it. See, e.g., Arcam Pharm. Corp. v. Faria, 513 F. 3d 1 (1st

Cir. 2007). Appellees deceptively portray this remark as a “holding” in the case, instead of as mere dicta.

Appellees claim that a “false endorsement” claim under the Lanham Act is not an “intellectual property” claim under § 230(e) of the CDA, but no legal support is offered for such assertion (Joint Brief, at 62). Further, the fact that Stayart’s self-esteem may have been damaged by the misconduct of Appellees does not magically transform valid intellectual property claims into “defamation” claims, somehow requiring dismissal under the CDA (Joint Brief, at 63-65). Such damages are nonetheless recoverable under the right of privacy (Reply Brief, at 8). Cf. Eick v. Perk Dog Food, 347 Ill. App. 293, 106 N.E. 2d 742, 745 (1st Dist. 1952):

[O]bjections to the recognition of the right of privacy stemming from the fact that damages for violation of the right are based on mental suffering are not well founded.

Congress clearly intended § 230 immunity to have limits. Internet actors enjoy no immunity when they violate the Lanham Act or state intellectual property laws.

B. Disputed issues of fact preclude statutory immunity.

Immunity under the CDA is an affirmative defense. It is highly unusual for a court to dismiss a complaint on the basis that a defendant has proved an affirmative defense. Designer Skin, LLC v. S & L Vitamins, Inc., 2007 WL 841471 (D. Ariz.).

With regard to Various, the district court stated (651 F. Supp. 2d at 886):

. . . Stayart’s complaint relates to the content of the AdultFriendFinder banner ad that was associated with the <http://jewellery-makin-doorway.orge.pl/bev-stayart.html> URL. . . . Various’ role in the creation of the banner ad is unclear. At the pleading stage, the Court is unable to conclude that Various is entitled to immunity.

The same is true with respect to Yahoo! None of the language contained in the challenged snippets (Pm 10kb Loading Cialis – Online Pharmacy and I give it my Seal of approval! Nigel Barker.tv) of Yahoo’s search results for “bev stayart” is found on any of the associated web pages (see, Stayart’s Brief, at 8-13; 37-38).

Yahoo’s role in the creation of this content is also unclear. Therefore, the district court’s conclusion that Yahoo is entitled to CDA immunity is incorrect and internally inconsistent, warranting reversal (see, Stayart’s Brief, at 41). Appellees never addressed this issue, thereby validating Stayart’s contention.

Cf. Thomas D. Hyucke, Student Note, *Licensed Anarchy: Anything Goes on the Internet? Revisiting the Boundaries of Section 230 Protection*, 111 W. VA. L. REV. 581, 601 (2009):

Section 230(c)(1) requires courts to evaluate whether an ICS is also an ICP for the statements in question; thus, based on the definition of ICP, courts are required to “consider whether a party ‘is responsible, in whole or in part, for the creation or development of information.’” Several courts have managed to ignore the plain language definition of ICP, thereby improperly broadening the protection of Section 230(c)(1).

If granted discovery, and allowed leave to amend her complaint, Stayart will assert that Yahoo, and no third party, created all of the contested snippet language. Stayart’s current factual allegations are sufficient to create a reasonable inference that Yahoo is responsible, in whole or in part, for the creation of these snippets.

See, Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 38 Med. L. Rptr. 1065, 1072 (4th Cir. 2009) (Jones, J., concurring in part and dissenting in part):

While the present federal pleading regime is a significant change from the past, it remains true that a plaintiff in federal court need not allege in its initial pleading all of the facts that

will allow it to obtain relief. Otherwise, the summary judgment process under Rule 56 would have little meaning.

V. Stayart's state law claims are valid.

Should this court reach the merits of Stayart's state claims, it should hold that they are valid.

Wisconsin does not require that Stayart be a "celebrity" to sue for the commercial misappropriation of her name, as Appellees maintain (Joint Brief, at 68). Stayart has asserted that she has a unique and distinctive name, which refers to her and only her, and which has commercial value, contrary to Appellees' claim (Id.).

Stayart's interest in her name and identity were created over time solely by her own actions, warranting their protection. See, Hirsch v. S.C. Johnson & Son, Inc., 90 Wis. 2d 379, 280 N.W. 2d 129, 134 (1979):

Protection of the publicity value of one's name is supported by public-policy considerations, such as the interest in controlling the effect on one's reputation of commercial uses of one's personality and the prevention of unjust enrichment of those who appropriate the publicity value of another's identity.

To suggest that no benefit accrued to Appellees because of their misuse of Stayart's name (Joint Brief, at 69) is wholly unrealistic. Cf. Uhlaender v. Henricksen, 316 F. Supp. 1277, 1283 (D. Minn. 1970):

A name is commercially valuable as an endorsement of a product or for financial gain only because the public recognizes it and attributes good will and feats of skill or accomplishments of one sort or another to that personality.

For example, with respect to Various, on April 12, 2009, Stayart entered the <http://jewellery-makin.doorway.orge.pl/bev-stayart.html> website in a computer browser. Two sexually explicit banner ads (four photos each) for AdultFriendFinder.com now

appeared on the website instead of only one banner ad associated with “bev stayart.”

When Stayart clicked the “View Now!” icon on one of these photos, a Registration Form appeared with the headline, “Join for free now to hook up with someone near Elkhorn!” (R. 21, p. 17).

On April 15, 2009, Stayart again typed the same URL in the browser. This time, another website appeared:

http://banners.adultfriendfinder.com/piclist?background_color=%23F3F3F3&border_color...

The source code showed “bev stayart” as the title and “adultfriendfinder.com” in the body of this document. Various is the registered owner of this website (R. 21, pp. 17-18; R. 25-5, Appendices 8 and 9). An AdultFriendFinder.com banner ad is the only content of this website, attributing four sexually explicit images to Elkhorn, Wisconsin, Stayart’s residence. Under each image is the invitation, “View Now!”

This is the opposite of “de minimis” (Joint Brief, at 69). This is flagrant!

See, Conrad v. Madison Festivals, Inc., 2009 WL 3018031 (W.D. Wis.). The pro se plaintiff was the “Banana Lady,” producing children’s health and wellness events. The defendants produced the “Kids Expo,” at which the plaintiff performed in 2008, in exchange for a vendor booth at the show. The defendants asked her to appear again in 2009, but she declined.

The defendants sent out a postcard promoting the 2009 expo, using a photo of plaintiff performing as the “Banana Lady.” The plaintiff had not agreed to the use of her image. When she demanded a fee, the defendants apologized but no money changed hands.

The plaintiff sued in federal court for false endorsement/association and false advertising under the Lanham Act, as well as the violation of statutory and common-law right of publicity under Wisconsin law. The court allowed such claims to proceed.

Chief Judge Barbara B. Crabb in Madison, Wisconsin, stated (2009 WL 3018031 at *4):

Wisconsin recognizes a right of publicity under both statutory and common law. . . . Plaintiff's allegation that defendants . . . "cashed in" on her image as the Banana Lady in its advertising is sufficient to state a claim of right of publicity under Wisconsin law. Hirsch, 90 Wis. 2d at 397, 280 N.W. 2d 129 ("All that is required is that the name clearly identify the wronged person."); 5 McCarthy at § 28:7.

CONCLUSION

For the reasons set forth herein and in her initial Brief, Plaintiff-Appellant Beverly Stayart prays that this Court will reverse the district court's judgment in favor of Defendant-Appellees Yahoo!, Inc., Overture Services, and Various, Inc., or, in the alternative, reverse the district court's refusal to retain jurisdiction over Stayart's state claims and allow her to replead the existence of diversity jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)(7)

This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief contains 6,978 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 12-pt. Times New Roman.

/s/ Gregory A. Stayart

ANTI-VIRUS CERTIFICATE FORM

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DOCKET NUMBER: 09-3379

I, Gregory A. Stayart, certify that I have scanned for viruses for the PDF version of the Appellant's Reply Brief that was submitted in this case and that no viruses were detected.

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Trend Micro Internet Security Pro version 17.1.1365 was used.

/s/ Gregory A. Stayart

Date: February 19, 2010

CERTIFICATE OF SERVICE

I, Gregory A. Stayart, the attorney, hereby certify that on February 19, 2010 I caused two (2) copies of the foregoing Reply Brief, as well as one (1) electronic copy of the Reply Brief in PDF format on a CD-ROM, to be served upon the following by first-class mail, postage prepaid:

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