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a failure to provide protection of property under Virginia law, the court concluded that Goldstar's claim failed under the FTCA.

Goldstar also argued that the United States had voluntarily acted to provide police protection, creating a duty to exercise due care in the performance of such act. Goldstar contended that a voluntarily assumed duty is actionable under the FTCA. The Fourth Circuit rejected this argument because a voluntary act of the government falls within the discretionary function exception of the FTCA. The court applied the United States Supreme Court rule that the discretionary exception applies when the relevant conduct involves an element of governmental choice in addition to public policy considerations. The court quickly determined that the military operation in Panama was a matter of public policy, and then considered whether the government's decision regarding proper police protection involved an element of choice. The court determined that no international directive mandated the United States' decision, and no expressly articulated standard limited the Government's discretion. Therefore, the court concluded that the decision to provide protection was purely discretionary, and within the FTCA's exceptions. Accordingly, the Fourth Circuit affirmed the district court's dismissal of the action for lack of subject matter jurisdiction.

The *Goldstar* opinion is significant because it determined that the Hague Convention is not self-executing. While other circuits have held the Geneva Convention is not self-executing and therefore not a waiver of sovereign immunity,[661] *Goldstar* is the first time a circuit explicitly reached this conclusion about the Hague Convention.[662] Unless the Government specifically creates a new cause of action for which it waives immunity, federal courts will not have jurisdiction to hear the case.

T. TRADE REGULATION

Anheuser-Busch v. L & L Wings

962 F.2d 316 (4th Cir.), *cert. denied*, 113 S. Ct. 206 (1992)

In *Anheuser-Busch, Inc. v. L & L Wings, Inc.*,[663] the United States Court of Appeals for the Fourth Circuit addressed trademark infringement issues involving the parody defense. Section 1114(1)(a) of the Lanham Trade-Mark Act (Lanham Act)[664] protects a registered trademark holder from

661. *See* Linder v. Portocarrero, 963 F.2d 332, 334 (11th Cir. 1992) (holding that Geneva Convention did not create privately enforceable rights and, therefore, was not self-executing); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 809 (D.C. Cir. 1984) (holding that Geneva Convention was not self-executing).

662. *But see* Dreyfus v. Von Finck, 534 F.2d 24, 30 (2nd Cir. 1976) (concluding that Hague Convention did not confer any private rights with regard to expropriation of property). One possible implication of the Second Circuit's *Dreyfus* opinion is that the Hague Convention is not self-executing, but the court did not directly address the question.

663. 962 F.2d 316 (4th Cir.), *cert. denied*, 113 S. Ct. 206 (1992).

664. 15 U.S.C. § 1114(1)(a) (1988).

another's use of a trademark that is likely to cause consumer confusion.[665] For example, an unauthorized use of a trademark that confuses an ordinary customer as to the source or sponsorship of the good constitutes a violation of the Lanham Act.[666]

The Fourth Circuit has held that determination of the likelihood of consumer confusion is an issue of fact.[667] The burden is on the plaintiff to convince the trier of fact that the defendant's use of the trademark is, more likely than not, to cause consumer confusion. In *Pizzeria Uno Corp. v. Temple*,[668] the Fourth Circuit identified seven factors relevant to a trademark infringement determination: the strength of the plaintiff's mark, the degree of similarity between the two marks; the similarity of the goods they identify; the similarity of the facilities used in the businesses; the similarity of the advertising; the defendant's intent; and, the presence of actual confusion.[669] This is not an exhaustive list of factors and no one factor is dispositive.[670]

In *Anheuser-Busch*, Anheuser-Busch brought suit against Venture Marketing, Inc. and L & L Wings, Inc., in the United States District Court for South Carolina for manufacturing and selling T-shirts that allegedly infringed on Anheuser-Busch's trademark for Budweiser beer. Anheuser-Busch argued that the defendants' T-shirt design was confusingly similar to the Budweiser beer label and likely to mislead consumers into believing that Anheuser-Busch sold or sponsored the T-shirt. The T-shirt design, the purpose of which was to advertise Myrtle Beach, South Carolina, consisted of a beer can with a red, white and blue label reading "Myrtle Beach" and "King of Beaches." A slogan underneath the beer can read "This Beach is for You."

The defendants argued that their T-shirt design did not constitute a violation of the Lanham Act because it was parody. Parody is a form of artistic expression that intentionally mimics or copies an original work in an effort to amuse the public.[671] The founder of Venture Marketing testified that he designed the T-shirt to parody the Budweiser beer label. In so doing, he intentionally imitated the nonverbal portion of the Budweiser label and mimicked the verbal phrases on the Budweiser label.

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665. Anheuser-Busch, Inc. v. L & L Wings, Inc., 962 F.2d 316, 317 (4th Cir.), *cert. denied*, 113 S. Ct. 206 (1992) (citing 15 U.S.C. § 1114(1)(a) for proposition that Lanham Act protects registered trademark holder from another's use of trademark that is likely to cause consumer confusion).

666. *Id.* at 318 (citing Ford Motor Co. v. Summit Motor Products, Inc., 903 F.2d 277, 293 (3rd Cir. 1991)).

667. *Id.* at 325 n.1 (Powell, J., dissenting). The Fourth Circuit considers the likelihood of confusion to be a factual determination amenable to jury resolution unlike the Second and Sixth Circuits that treat it as a legal determination. *Id.*

668. 747 F.2d 1522 (4th Cir. 1984).

669. Pizzeria Uno Corp. v. Temple, 747 F.2d 1522, 1527 (4th Cir. 1984).

670. *Anheuser-Busch*, 962 F.2d at 319.

671. *See* Jordache Enterprises, Inc. v. Hoggs Wyld, Ltd., 828 F.2d 1482, 1486 (10th Cir. 1987) (holding that intent to parody existing trademark does not support inference of likelihood of confusion as intent to parody is not intent to confuse public).

At trial, the jury rendered a verdict for the defendants finding that the T-shirt design did not create a likelihood of consumer confusion. The district court, however, granted Anheuser-Busch's motion for a judgment notwithstanding the verdict, holding that the only reasonable conclusion which the evidence permitted was that the unauthorized use of the trademark created a likelihood of confusion. The defendants appealed.

On appeal, Anheuser-Busch argued that the similarity of format alone constituted a trademark infringement. In rejecting this argument, the Fourth Circuit declared that the Lanham Act's test for trademark infringement does not focus on how closely the registered trademark is duplicated, but rather on whether the use by the alleged infringer is likely to create consumer confusion. The Fourth Circuit emphasized that the Lanham Act provides protection only from uses that create a likelihood of consumer confusion. The Fourth Circuit determined that the jury examined the T-shirt as a whole and reasonably concluded that consumer confusion was unlikely.

The Fourth Circuit reversed the district court's verdict, holding that the trial judge improperly substituted his judgment on the issue of the likelihood of consumer confusion for that of the jury's. Accordingly, the Fourth Circuit remanded the case with instructions to reinstate the jury verdict for the defendants.

In overturning the jury verdict, the district court placed dispositive weight on the *Pizzeria Uno* factors that weighed in Anheuser-Busch's favor. These factors were the unquestionable strength of plaintiff's trademarks, the identical goods the marks identified, and the parties' similar facilities and advertising. The Fourth Circuit held that the district court misconstrued the nature of the *Pizzeria Uno* factors. According to the Fourth Circuit, the factors are to serve only as a guide, not as a rigid formula. The Fourth Circuit further noted that the factors are not of equal importance and that no single factor is always relevant in any given case.

The Fourth Circuit suggested that the district court would have seen the awkwardness in applying the factor analysis if the district court had properly addressed the parody issue. The keystone to parody is imitation. Factors such as the strength of the trademark and the similarities of the marks are not dispositive in the context of parody because parody entails evoking the original work. The Fourth Circuit stressed that the most important factor in the case was whether the plaintiff's trademark and the defendants' T-shirt design looked alike in the eyes of the ordinary consumer. When a jury reasonably concludes there is no likelihood of confusion because of differences between the marks, consideration of the remaining *Pizzeria Uno* factors is unnecessary. The Fourth Circuit stated that unless a threshold of intrinsic similarity is reached, the remaining extrinsic factors are insufficient by themselves to establish a likelihood of confusion.

Despite the similarities between the plaintiff's trademark and the defendants' T-shirt design, the Fourth Circuit found three conspicuous differences that provided the jury with a legally sufficient evidentiary basis to conclude that the T-shirt design would not cause consumer confusion: first, the T-shirt made no reference to Anheuser-Busch or Budweiser; second, the

analogous language descriptive of the beach replaced the Budweiser label descriptions; and third, the shirt design substituted beach slogans for the Budweiser beer slogans. The Fourth Circuit stated that when no evidence of actual confusion is present, as in the case at bar, a jury can reasonably conclude that, despite similarities, no likelihood of confusion exists because of the differences in the marks. If the jury concludes that because of the differences between the two marks no likelihood of consumer confusion exists, consideration of the remaining *Pizzeria Uno* factors is unnecessary.

Anheuser-Busch argued further that the T-shirt design was not parody because the defendants' purpose was to draw on the commercial magnetism of the Budweiser label to make money and not to make a commentary about Budweiser beer. While conceding that the defendants were motivated by profit, the Fourth Circuit pointed out that the relevant intent in trademark cases is the intent to confuse the ordinary consumer, not the intent to make a profit. An alleged infringer, in the context of parody, may intend to benefit from the original trademark without ever intending or causing consumer confusion. The Fourth Circuit found that the substantial differences in the trademark and T-shirt provided ample evidentiary support for the jury's conclusion that the T-shirt design was a commentary on the pleasures of beach life and that the design did not generate consumer confusion.

Retired Supreme Court Justice Powell, sitting by designation, dissented. Contrary to the majority's findings, Justice Powell found evidence of actual confusion based on the testimony of one of the defendants' purchasers. In addition, Justice Powell disagreed with the majority that a parody defense provides an exception to the presumption of likelihood of confusion that arises when a party intentionally copies or patterns an existing mark. Justice Powell concluded that parody was simply a merchandising shortcut on the defendants' part and not a valid defense to the charges brought under the Lanham Act.

The Fourth Circuit has not yet broached the issue of parody protection under the First Amendment. In *Anheuser-Busch*, the Fourth Circuit elected to reinstate the jury verdict on statutory grounds and declined to address the defendants' contention that the First Amendment provided an independent basis for reinstating the jury's verdict.[672]

672. Anheuser-Busch, Inc. v. L & L Wings, Inc., 962 F.2d 316, 321 n.2 (4th Cir.), *cert. denied*, 113 S. Ct. 206 (1992).