

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

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CIVIL MINUTES - GENERAL

Case No. SA CV 99-320 AHS (EEx) ✓
SA CV 99-321 AHS (EEx)

Date September 12, 2000

Title Playboy Enterprises, Inc. v. Netscape Communications
Playboy Enterprises, Inc. v. Excite, Inc.

DOCKET ENTRY

[I hereby certify that this document was served by first class mail or Government messenger service, postage prepaid, to all counsel (or parties) at their respective most recent address of record in this action on this date.]

Date: _____ Deputy Clerk _____

PRESENT: HON. ALICEMARIE H. STOTLER, JUDGE (IN CHAMBERS)

Debra Beard
Deputy Clerk

Not Present
Court Reporter

ATTORNEYS PRESENT: None

PROCEEDINGS: RULING GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND RULING ON DEFENDANTS' EVIDENTIARY OBJECTIONS; DENYING DEFENDANTS' MOTIONS TO STRIKE

I. Procedural History

On August 28, 2000, the Court heard the arguments of counsel and took the motions under submission. Having read the extensive materials submitted by the parties and having considered the written and oral arguments as well as the authorities submitted, the Court by this ruling GRANTS defendants' motions in both pending actions and DENIES defendants' motions to strike. Defendants' unopposed Request for Judicial Notice is GRANTED.

II. Discussion

Where a defendant does not use the plaintiff's mark as its trademark, there is no liability. See New Kids on the Block v. News America Publishing, Inc., 971 F.2d 302, 307 (9th Cir. 1992). A non-trademark use of a mark is a use to which the infringement laws simply do not apply. Id.

Defendants' use of the words "playboy" and "playmate" in their search engines does not equate to commercial exploitation of plaintiff's ("PEII") trademarks. Defendants do not use PEII's trademarks qua trademarks. Although PEII uses its trademarks to identify its goods and

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services, defendants do not.

Dilution

PEII does not produce evidence of blurring or tarnishment to sustain its claim of dilution. Blurring requires that the defendant make use of the mark on its products - there is simply no evidence that either Excite or Netscape have done so here. Furthermore, PEII's product line is constantly associated with other forms of adult entertainment. According to the evidence of record, neither defendants nor the advertisers with whom defendants contract use PEII's trademarks to identify their goods.

Infringement

PEII maintains that defendants have infringed its marks by using them in commerce in a manner that is likely to cause confusion about the source of the goods/services/products under 15 U.S.C. § 1114. There is, however, no evidence that consumers confuse PEII products with the services of defendants.

In short, there is no evidence that defendants make actionable use of plaintiff's trademarks. The case authority favors defendants' position, and the evidence adduced by plaintiff is insufficient to support its theories of trademark infringement. Because it accurately states the uncontroverted facts and cites the applicable authorities, the Defendant's Statement of Uncontroverted Facts and Conclusions of Law is modified, and, as modified, is adopted by the Court and filed this date.

The Court has read and considered the expert testimony offered by plaintiff, and defendants' motions to strike the expert testimony of Ford and Bruner are denied. The Court has this date filed plaintiff's proposed Orders.

III. Rulings on Defendants' Evidentiary Objections

| <u>A. Declaration of Allan Madhazy</u> | <u>Ruling</u> |
|--|-------------------|
| 1. Paragraphs 7-8 and Exhibits B-C. | overruled ("o/r") |
| 2. Paragraph 9. | o/r |
| 3. Paragraph 11. | o/r |
| 4. Paragraph 12. | o/x |
| 5. Paragraph 16. | o/r |
| 6. Paragraph 18 and Exhibit J. | Sustained ("s") |
| 7. Paragraph 20 and Exhibit L. | o/r |

- 8. Paragraph 21. s
- 9. Paragraph 22. o/r
- 10. Paragraph 23. o/r

B. Declaration of Matthew D. Moren

- 1. Exhibit 8. s
- 2. Exhibit 9. o/r
- 3. Exhibits 18-22. o/r
- 4. Exhibit 31. o/r
- 5. Exhibits 32-33, and 64. o/r
- 6. Exhibit 34. o/r
- 7. Exhibit 35. o/r
- 8. Exhibit 39. o/r
- 9. Exhibits 51-55. o/r

C. Declaration of Philip P. Blum

- 1. Paragraph 2. o/r
- 2. Exhibit 1. o/r
- 3. Exhibit 2. o/r
- 4. Exhibits 4-6. o/r

In accordance with the foregoing, the clerk is directed to enter judgment for defendants in both actions.

The Clerk shall serve this minute order on counsel for all parties in this action and provide an advance copy by telecopier.

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY
 FAX DELIVERY ON PLAINTIFF DEFENDANT (OR PARTIES)
 AT THEIR RESPECTIVE MOST RECENT FAX NUMBER OF RECORD
 IN THIS ACTION ON THIS DATE.

DATE: 9/13/00

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