

Covid-19 Instagram Account Crude But Not Confusing

Arizona Bd. of Regents, v. John Doe, 2021 WL 3631269 (D. Ariz. Aug. 17, 2021)

By: Lisa Holubar & Nick Wheeler | August 20, 2021

In the latest trademark case spurred by Covid-19, the District Court of Arizona (“the court”) denied Arizona Board of Regents’ (“ASU”) motion for default judgment for a permanent injunction against an Instagram user because the vulgar Covid-related messages from the user (“John Doe”) did not rise to the level of trademark infringement.

ASU owns various trademarks for “ASU” or “Arizona State University” for different goods and services. ASU also owns trade dress for the school’s maroon and gold colors which are used in ASU’s promotional materials as well as ASU’s social media accounts. Around July 19, 2020, John Doe created an Instagram account called “asu_covid.parties.” The account touted itself as “throwing huge parties at ASU.” John Doe’s first message used the ASU logo and ASU’s maroon and gold trade dress. His later messages did not use ASU’s trade dress or colors but continued to use ASU’s logo and word marks. Doe’s messages touted that it would throw parties “like... if COVID never existed” and that masks would be banned for health and security reasons. Doe’s messages were laced with profanity and made numerous criticisms of ASU for requiring masks and Covid-19 testing, including: “Do not let Führer Crow force you to wear a mask or test.” After Instagram would not remove or modify Doe’s account, ASU filed a trademark complaint naming Facebook (the parent of Instagram) and Doe as defendants. Facebook was dismissed after it agreed to disable the account and to prevent Doe from creating new accounts. Doe filed an answer to the complaint, but the court struck it as it was filled with “obscenities, inflammatory language, and insults directed toward [ASU] and its counsel.” Doe thereafter refused to participate in the case. ASU moved for default judgment and permanent injunction.

The court noted it had discretion whether to enter a default judgment under the seven *Eitel* factors. Although several of the factors favored entry of default, the merits of the claims and the sufficiency of the complaint factors did not. ASU claimed the unauthorized use of its marks likely caused confusion as to ASU’s affiliation, endorsement, or sponsorship of Doe’s “hoax” party, Doe’s “covid.parties” account, and the account’s messages. The court disagreed and found that a reasonably prudent consumer would not be deceived or confused into believing that ASU was the “source or origin” of the messages. The court explained only one of the posts used both the ASU logo and ASU’s trade dress, and that no university would drop the “f-bomb” in a party invitation. Likely anticipating said conclusion, ASU also argued that “even if a consumer were to conclude, after reading one or more posts by [Doe] that the account may not be affiliated with ASU, there is nevertheless actionable initial interest confusion.” The court disagreed and said Doe’s comments were too crude to create initial confusion and, stated more broadly that “it cannot be the case that every social media post written by a college student that happens to use the school’s colors and/or logo in the post creates initial interest confusion and qualifies as an actionable trademark violation.” The court thus dismissed the case.

This court’s decision will likely serve as precedent for individuals who create parody social media accounts of schools and other public institutions. This case is also of note due to its narrow view of initial interest confusion, a doctrine developed when e-commerce was in its nascent stages, but which has fallen out of favor as online shopping has evolved. Indeed, days before this decision, an Eighth Circuit litigant petitioned

for certiorari to resolve whether courts can impose trademark liability based on initial interest in a mark, even where consumers are not confused as to source by the time they complete their purchases.