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# The Mark of a Real Trademark Bully

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Seems as though there is a lot of discussion and news reports these days about bullying and how to put a stop to it: School bullying, workplace bullying, and cyber-bullying, to name a few of the most common types. Fair enough, as I recall, my seventh grade PE teacher was a real bully.

However, for those of you who haven't heard yet, there also is growing interest in examining a brand new type of bully, and they are calling this creature the "trademark bully".

That's right, the U.S. Patent and Trademark Office (USPTO) is currently seeking information about various litigation tactics, including whether "you think trademark "bullies" are currently a problem for trademark owners, and if so, how significant is the problem?" If you have an opinion on these questions, please share your views below, and the USPTO would like to hear from you here.

So, what is a "trademark bully" you ask? The USPTO's survey provides this definition: "A trademark 'bully' could be described as a trademark owner that uses its trademark rights to harass and intimidate another business beyond what the law might be reasonably interpreted to allow."

The USPTO's "trademark bullying" inquiry apparently stems from some language in the Trademark and Technical Conforming Amendment of 2010, directing the Secretary of Commerce to "study and report" to Congress on "The extent to which small businesses may be harmed by litigation tactics attempting to enforce trademark rights beyond a reasonable interpretation of the scope of the rights granted to the trademark owner."

Beyond a "reasonable" interpretation of the scope of rights granted to the trademark owner? Of course, the plaintiff and defendant will never agree on what might be considered a "reasonable" interpretation of the scope of plaintiff's trademark rights, even in the most routine trademark cases, so whose perspective decides what is reasonable for the purpose of applying the trademark bully label, and what are the consequences, if guilty? Moreover, who decides what "might be" reasonable under the circumstances, since those additional qualifying terms appear in the USPTO query?

In addition, I've heard before that "reasonable" minds can differ on just about anything. And, in my experience that is especially so when it comes to arguing and deciding trademark disputes, where litigants argue over and decision makers are asked to carefully balance the evidence according to a number of multi-factor tests, including likelihood of confusion, trademark fame, likelihood of dilution, and bad faith intent to profit, to name just a few. This isn't exactly black and white material. Then, add to all that, an understanding that trademark rights are dynamic, not static, their scope can shrink or grow over time, and also recognize that trademark attorneys have an ethical duty to zealously represent their clients.

So, even with all that, we're still to decide how to apply the trademark bullying label based on mere reasonableness? Sorry, but that seems, well, unreasonable to me.

I guess my concern with a mere reasonableness standard is that the requisite level of culpability sounds like nothing more than a simple negligence standard. Indeed, the traditional definition of "bullying" seems to require much more, i.e., a pattern of *intentional* harm:

Bullying is an act of repeated aggressive behavior in order to intentionally hurt another person, physically or mentally. Bullying is characterized by an individual behaving in a certain way to gain power over another person.

If we learned anything about intentional conduct, at least in the context of trademark fraud cases, we learned that unreasonable legal positions, negligence, and even gross negligence are insufficient to trigger liability. A specific intent requires a much higher level of culpability under the Federal Circuit's landmark decision in In re Bose, although it is presently unclear whether recklessness will suffice.

In the end, I'm not convinced the trademark system needs an overhaul, or even a new cause of action, to deal with what have been only very rare and infrequent encounters with real trademark bullies, at least in my twenty years of experience. Moreover, there seem to be enough existing legal tools to handle a real trademark bully, namely, one that brings frivolous, bad faith, vexatious or objectively baseless litigation. Rule 11 sanctions apply not only in federal court, but in TTAB proceedings before the USPTO too. In addition, it should not be forgotten that attorneys fees can be and have been awarded in "exceptional" federal district court cases under the Lanham Act, even in favor of a trademark defendant, and even to the tune of $2.5M.

Honestly, the closest I think I've been to a real "trademark bully" ended up looking much worse, something more along the lines of a trademark monster. And, it appears from the comments to John Welch's recent post on the TTABlog that many others have seen the same trademark monster running loose.

How would you identify a trademark bully and do you think we need new laws to handle them?

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