

08-3947-CV

United States Court of Appeals
for the
Second Circuit

TIFFANY (NJ) INC. AND TIFFANY AND COMPANY,

Plaintiffs-Appellants,

v.

EBAY INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF *AMICUS CURIAE* YAHOO! INC.
IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, counsel for *amicus curiae* Yahoo! Inc. (“Yahoo”) certifies that Yahoo has no parent corporation, and that no publicly held company owns 10% or more of Yahoo’s stock.

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STATEMENT OF *AMICUS CURIAE*

Yahoo! Inc. (“Yahoo”) submits this brief as *amicus curiae* in support of the position of Defendant-Appellee eBay, Inc. (“eBay”) in the appeal from the judgment entered against Plaintiffs-Appellants Tiffany (NJ) Inc. and Tiffany and Company (collectively “Tiffany”). Tiffany (NJ) Inc. v. eBay, Inc., 576 F. Supp. 2d 463 (S.D.N.Y. 2008). SPA 1-66.

The parties have consented to Yahoo’s filing of this proposed *amicus curiae* brief.¹

This appeal addresses, among other issues, the applicability of nominative fair use to eBay’s advertisements about the sale of Tiffany merchandise. Yahoo operates an online advertising business and, as part of its regular business operations, accepts from its clients advertisements that refer nominatively to the trademarks of others. Yahoo’s interest is to ensure that the nominative fair use doctrine is applied in a manner that protects trademark owners against infringement and dilution, allows advertisers to

¹ Tiffany stated that it consents to a timely filing. Yahoo filed this *amicus* brief within seven days after the filing of eBay’s brief, excluding intermediate Saturdays, Sundays and legal holidays. Fed. R. App. P. 29(e), 26(a)(2).

truthfully promote what they are selling, preserves consumers' easy access to online information about trademark owners and their products, and encourages continued growth and development of online businesses.

Yahoo is a global online network of integrated services and one of the pioneers in the development and commercialization of the Internet. From its website at www.yahoo.com and through affiliates, Yahoo provides a wide range of Internet services to consumers, including services relating to Internet search, email, shopping, finance, news, sports and entertainment. Yahoo's revenues, which enable it to provide most of these services at no charge, come primarily from selling online advertising.

A significant portion of the advertising on Yahoo takes the form of paid text advertisements that are delivered along with regular or "natural" search results. Advertisers contract with Yahoo to have their text advertisements returned when searchers enter specific search terms, or keywords. Yahoo algorithms apply various factors to determine whether an advertisement will be delivered in response to a search using a given keyword. If an advertisement is delivered, the text includes the keyword in a manner that shows how the advertisement is relevant to the keyword.

Yahoo allows advertisers to key their advertisements to terms that are trademarks of others. However, Yahoo permits advertisements keyed to the trademark of another only if the advertiser either: (1) refers to the trademark or its owner in a manner that qualifies as a nominative fair use; or (2) presents content on its website that uses the term in a generic or merely descriptive manner. In addition, Yahoo requires all advertisers to represent and agree that their keyword choices, the text of their advertisements, and the content of their websites do not violate the trademark rights of others.

Yahoo permits two types of nominative fair uses of another's trademark. First, an advertiser who is reselling products of the trademark owner may key its advertisement to the trademark. The text of the advertisement must inform consumers that they may purchase the trademark owner's product at the advertiser's website or otherwise from the advertiser, and it must not create the impression that the advertiser is an authorized reseller unless that is the case.

Second, Yahoo also allows advertisers whose websites have the primary purpose of providing substantial information about the trademark owner or its product – such as detailed product reviews, comparisons provided by unbiased sources, commentary or news information – to key

their advertisements to the trademark. Such an advertiser must not be a competitor of the trademark owner, and the advertisement must disclose the nature of the qualifying substantial information that the searcher will find on the advertiser's website.

If trademark owners complain about text advertisements, Yahoo investigates the advertisements and removes those that do not comply with these nominative fair use guidelines. Yahoo also investigates and removes advertisements when trademark owners notify Yahoo that an advertisement is promoting the sale of counterfeit products.

STATEMENT OF THE CASE

The following portions of the disposition below are relevant to this *amicus curiae* brief because they relate to the application of the nominative fair use doctrine.

Tiffany alleged direct trademark infringement against eBay based on several actions by eBay. Tiffany focused first on eBay's uses of the Tiffany mark on eBay's website. SPA 29-30. eBay advertised the sale of Tiffany jewelry on the eBay home page. EX3358-67. In another location on its website, eBay told sellers and buyers that "Tiffany" and "Tiffany & Co."

were two of the top search terms for searches within eBay’s Jewelry and Watch category. EX3214-16. It also provided lists of popular brand names, including “Tiffany,” on its website, and then directed potential buyers who clicked on the brand name to a seller’s listing that offered Tiffany merchandise. SPA 30.

Tiffany also focused on eBay’s placement of sponsored search advertisements with search engines Yahoo and Google. SPA 30. These eBay advertisements were keyed to the Tiffany mark and included the mark in their text. SPA 30. The District Court provided an example of such an advertisement that would appear on the Google search results page when a consumer entered “tiffany” as the search term: “Tiffany for sale. New and Used Tiffany for sale. Check out the deals now! www.ebay.com.” SPA 37; see also EX2186-93, 2206-09 (eBay advertisements on Google) and EX3368-70 (eBay advertisement on Yahoo).

The District Court held that these uses were permissible under the nominative fair use framework first adopted by the Ninth Circuit in New Kids on the Block v. News Am. Publ’g, Inc., 971 F.2d 302 (9th Cir. 1992). SPA 32-34, 37. With respect to eBay’s advertisements on its own website, the District Court reasoned that Tiffany silver jewelry was not readily

identifiable without the use of the Tiffany trademark, eBay used only so much of the Tiffany mark as was reasonably necessary to identify Tiffany merchandise that was being offered for sale, and eBay did nothing that would suggest sponsorship or endorsement by Tiffany. SPA 32-33. Similarly, with respect to sponsored search advertisements presented with Yahoo and Google search results, the District Court held that eBay's use of the Tiffany marks in those advertisements was "effectively identical" to its use of Tiffany marks on the eBay website. SPA 37.

Tiffany also asserted claims for dilution by blurring and dilution by tarnishment. The District Court applied the nominative fair use defense, codified in the Trademark Dilution Revision Act, 15 U.S.C. § 1125 (2006), as one of two bases for rejecting Tiffany's dilution claim. SPA 62, 64-65.

SUMMARY OF THE ARGUMENT

In advertisements on its own site and in sponsored search advertisements that it ran on the Yahoo and Google services, eBay informed consumers that they could purchase Tiffany product from sellers on eBay's marketplace. The District Court held that these advertisements were permissible nominative fair uses of the Tiffany mark. Tiffany argues that,

because eBay is aware of past instances in which sellers have sold counterfeit Tiffany product on its marketplace, eBay should not be allowed to refer to Tiffany in any advertisements for the sale of Tiffany products.

The nominative fair use doctrine has not been recognized expressly by this Court, although the Court has noted its application in some cases. The doctrine permits reference to another's trademark when that is the only practical way to communicate relevant information about the trademark owner or its products. The most common example, which is at issue in this case, is resale of the trademark owner's products. Other examples include providing information about the trademark owner, such as comparative advertising, criticism, commentary or parody.

Tiffany's position – that nominative fair use is not available to eBay in any case because of its generalized knowledge of counterfeit issues – has a direct bearing on the ability of online services like Yahoo to present advertisements that appear on their face to make permissible nominative references to trademarks of persons other than the advertiser. eBay's prompt and effective response to specific instances of counterfeit sales, and the availability of genuine Tiffany merchandise from eBay sellers, should be sufficient to allow eBay to continue to use the Tiffany marks to advertise

sales on its marketplace. The same principle should apply to Yahoo and other online services that accept advertisements reasonably appearing to qualify as nominative fair uses.

Yahoo focuses its argument on the doctrine of nominative fair use, its applicability to eBay's advertisements and similar advertisements appearing on Yahoo and other online services, and the implications of Tiffany's proposed narrowing of the doctrine. Yahoo's silence on other issues raised in this appeal is not intended and should not be interpreted as agreement with arguments raised by Tiffany or its *amici curiae* on those issues. Yahoo agrees with the arguments presented by eBay.

ARGUMENT

I. THE DOCTRINE OF NOMINATIVE FAIR USE PROTECTS ONLINE ADVERTISEMENTS THAT DISCLOSE THE RELATIONSHIP BETWEEN THE ADVERTISER AND THE TRADEMARK OWNER

Tiffany acknowledges that eBay would be permitted under the doctrine of nominative fair use to advertise the sale of Tiffany merchandise, at least if there were “no problem as to counterfeits.” Appellants’ Br. at 45. Thus, the doctrine certainly reaches eBay’s advertisements, and as discussed

below, it also extends to other permissible references, such as commentary, criticism and comparative advertising.

As the District Court observed, there was some dispute below whether the doctrine of nominative fair use is properly characterized as a substitute for the likelihood of confusion analysis or as an affirmative defense. SPA 31 n.27. The District Court noted differing approaches taken by the Ninth and Third Circuits, which have expressly recognized the doctrine, and further observed that the differences in approach did not change the outcome. *Id.* Whichever approach is applied, the District Court correctly held that eBay’s advertisements were permissible nominative fair uses.

The Ninth Circuit first recognized nominative fair use in its 1992 New Kids on the Block decision, 971 F.2d at 308, for cases where the defendant uses the plaintiff’s mark for the purpose of referring to the plaintiff or its goods or services.² For nominative fair use to apply: (1) the product or

² The Ninth Circuit distinguished nominative fair use from the statutory fair use defense set forth in § 33(b)(4) of the Lanham Act, 15 U.S.C. § 1115(b)(4). 971 F.2d at 306, 308. Section 33(b)(4) permits “use, otherwise than as a mark, . . . of a term or device which is descriptive of and used fairly and in good faith only to describe the goods or services of such party,” This defense addresses cases where the defendant uses a term that it claims is merely descriptive of its own goods or services but which the plaintiff claims as a trademark.

service is one not readily identifiable without use of the mark; (2) the defendant uses only so much of the mark as is reasonably necessary to identify the product or service; and (3) the defendant does nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the mark's owner. 971 F.2d at 308. As the District Court observed, courts in the Ninth Circuit treat this nominative fair use analysis as an alternative to the typical likelihood of confusion analysis. SPA 31 n. 27.

The Third Circuit recognized nominative fair use in Century 21 Real Estate Corp. v. Lendingtree, Inc., 425 F.3d 211 (3d Cir. 2005). Under the Century 21 approach, the plaintiff retains the burden of proving that a likelihood of confusion exists, applying an abbreviated list of likelihood of confusion factors applicable to nominative use situations. Id. at 222, 225-26. If the plaintiff meets this burden, the burden shifts to the defendant to establish nominative fair use as a defense, using a three-part test that is similar to the Ninth Circuit's New Kids on the Block test. Id. at 222, 228-31.

As the District Court noted, this Court has referred to the nominative fair use doctrine without expressly adopting it. SPA 32 n. 28. For example, in Chambers v. Time Warner, Inc., 282 F.3d 147, 156 (2d Cir. 2002), while

reversing the grant of a motion to dismiss, this Court observed that the lower court had “[a]ppl[ied] the standard for non-trademark or ‘nominative’ fair use set forth by the Ninth Circuit in New Kids on the Block” See also Courtenay Commc’ns Corp. v. Hall, 334 F.3d 210, 213 n.1 (2d Cir. 2003) (quoting from the Fifth Circuit’s discussion of “nominative use” in Pebble Beach Co. v. Tour 18 I Ltd., 155 F.3d 526 (5th Cir. 1998)).³

In other decisions not directly referring to nominative fair use, this Court has recognized that there can be permissible uses of another’s mark, not just for resale but for other purposes as well. See, e.g., Polymer Tech. Corp. v. Mimran, 975 F.2d 58, 61-62 (2d Cir. 1992) (resale); Dow Jones & Co., Inc. v. Inter’l Securities Exchange, Inc., 451 F.3d 295, 307-08 (2d Cir. 2006) (marketing options based on S&P and Dow Jones products); Societe Comptoir de L’Industrie Contonniere Etablissements Boussac v. Alexander’s Department Stores, Inc., 299 F.2d 33, 34-37 (2d Cir. 1962)

³ In Pebble Beach, the Fifth Circuit recognized that a “nominative use” is use of a mark to identify the markholder’s products, and further observed that “where a nominative use of a mark occurs without any implication of affiliation, sponsorship, or endorsement—i.e., a likelihood of confusion—the use ‘lies outside the strictures of trademark law.’” Id. at 546 (quoting New Kids on the Block, 971 F.2d at 308). Moreover, in the context of dilution, Congress has expressly recognized several nominative fair uses as excluded from liability. 15 U.S.C. §1125(c)(3)(A)(i) and (ii).

(using Dior name to promote garments legitimately copied from originals); Penthouse Inter'l, Ltd. v. Playboy Enterprises, Inc., 663 F.2d 371, 391 (2d Cir. 1981) (affirming dismissal of counterclaims concerning comparative advertising); Hormel Foods Corp. v. Jim Henson Productions, Inc., 73 F.3d 497, 503 (2d Cir. 1996) (parody). See also Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65, 73-74 (2d Cir. 1999) (use of plaintiff's mark in referring to abstracts from plaintiff's articles was permissible descriptive fair use under § 33(b)(4)).⁴

The District Court found that Tiffany failed to prove that eBay's advertisements created any confusion as to sponsorship or endorsement. SPA 34. As the Third Circuit recognized in Century 21, a nominative fair use may be permissible even if there is some level of confusion. Id. at 232. Similarly, the Supreme Court, in the context of statutory descriptive fair use, recognized that "fair use can occur along with some degree of confusion

⁴ One commentator has noted that "[c]ourts in other circuits have for many years reached results consistent with those in the Ninth Circuit without using a separate 'nominative fair use' test. They have done this by use of their traditional multi-factor likelihood of confusion tests." 4 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 23:11 (4th ed. 2008).

...” KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S. 111, 123 (2004).

Clearly, nominative fair use protects eBay’s advertisements about Tiffany merchandise, both on its own website and presented with Yahoo and Google search results. eBay referred to the Tiffany mark to inform consumers – accurately – that on eBay’s marketplace they would find sellers who were offering genuine Tiffany merchandise. eBay’s advertisements satisfy the requirements for nominative fair use outlined by both the Ninth and Third Circuits. eBay cannot efficiently inform consumers about the availability of Tiffany merchandise without referring to the Tiffany mark; its advertisements use only so much of the Tiffany mark as is reasonably necessary to inform consumers that Tiffany merchandise is available; and it does not create any confusion about eBay’s relationship with Tiffany. SPA 32-33. The same principles apply to advertisements that Yahoo and other online services accept from advertisers who are selling a trademark owner’s product or providing information about trademark owners and their products.

II. TIFFANY’S PROPOSED NARROWING OF THE NOMINATIVE FAIR USE DOCTRINE THREATENS LEGITIMATE ADVERTISING ABOUT TRADEMARK OWNERS AND THEIR GOODS

Tiffany argues that the nominative fair use doctrine should not be applied, apparently even with respect to sales of genuine goods, because eBay is aware of a “substantial problem with the sale of counterfeit TIFFANY silver jewelry.” Appellants’ Br. at 45. Just as eBay’s generalized knowledge of counterfeit issues is insufficient to support Tiffany’s claim for contributory liability, so this generalized knowledge does not eliminate nominative fair use, whether applied as a defense or as an alternative to the typical likelihood of confusion analysis.

Tiffany’s argument, if accepted, would have serious implications well beyond this case, extending to any online service that lawfully permits businesses to refer in their advertising to other trademark owners. The possible existence of some bad actors amidst the many legitimate resellers and other information providers would preclude *any* application of the nominative fair use doctrine for lawful advertisements using the mark and likely would force online services to refuse such advertisements.

An online service would face the risk of claim from a trademark owner for advertisements referring to the trademark owner because some advertisements that reasonably appeared to be permissible nominative uses were later discovered to be improper. The online service might be forced to make the business decision to block any advertisements keyed to the trademark and that refer to the trademark nominatively. This would block legitimate advertisements for resale of the trademark owner's product. It would also block advertisements for sites providing comparisons, reviews, commentary, criticism and other legitimate nominative uses. It could even force the online service to block advertisements from businesses that appear to be using the trademark in a descriptive manner permissible under § 33(b)(4). This in turn would make it more difficult for businesses – large and small, online and “brick and mortar” – to find online services to accept their advertisements, and it also could chill such advertisers' willingness to place legitimate nominative advertisements. In the end, it would become far more difficult for consumers to find information about trademark owners and their products.

Tiffany cites no authority for its extreme position that the nominative fair use defense should be unavailable when an online service that takes

reasonable steps to prevent and respond to counterfeit sales “cannot confirm” future sales as genuine. Appellants’ Br. at 46. Rather, the cases cited by Tiffany relate to acts of counterfeiters or direct infringers, not intermediaries, and are therefore inapplicable. See, e.g., Gucci America, Inc. v. Duty Free Apparel, Ltd., 286 F.Supp.2d 284, 287 (S.D.N.Y. 2003) (defendants were direct sellers of counterfeit goods).

Tiffany’s requirement that an online service confirm goods as genuine – and by implication, confirm advertising as legitimate – would be virtually impossible to achieve in the online world. Many online services never take physical possession of goods that are being sold and are not in a position to confirm the accuracy of statements made in advertisements and on advertiser websites. The volume of advertisements received makes it impossible for such services to “confirm as genuine” the content of every advertisement received. Online services that have reasonable policies for accepting advertisements and responding to complaints – like Yahoo and others – should be able to rely on the nominative fair use defense for advertisements that they accept in accordance with those policies.

The viability of the nominative fair use doctrine is of equal importance whether considered in connection with direct infringement,

which was alleged against eBay in its capacity as an advertiser, or in connection with contributory liability of online services that accept advertisements from others, especially where those services have policies in place relating to permissible nominative fair uses. Such online services should be permitted to accept advertisements if they reasonably believe the advertisers have made nominative or other permissible use of a trademark in their advertisements. The District Court's reasons for finding no liability as to the contributory claim against eBay, based on its application of Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 546 U.S. 844 (1982) and its progeny, applies as well to online services who have nothing more than generalized knowledge that some advertisements they reasonably accepted did not qualify as nominative fair uses. Moreover, if there is no direct liability against an advertiser for an advertisement that makes a permissible nominative fair use, there can be no contributory liability for the online service that accepted that advertisement. Optimum Techs., Inc. v. Henkel Consumer Adhesives, Inc., 496 F.3d 1231, 1246 n. 9 (11th Cir. 2007) (contributory infringement claim requires finding of direct infringement); see also Societe Des Hotels Meridien v. LaSalle Hotel Operating P'ship, L.P., 380 F.3d 126, 133 (2d Cir. 2004).

Tiffany’s demand, if accepted, would undermine important policies that are served by the nominative fair use defense and analogous trademark defenses recognizing permissible uses for such purposes as comparative advertising. As the Ninth Circuit recognized in its New Kids on the Block decision, “[i]t is often virtually impossible to refer to a particular product for purposes of comparison, criticism, point of reference or any other such purpose without using the mark.” 971 F.2d at 306. The court observed that “[m]uch useful social and commercial discourse would be all but impossible if speakers were under threat of an infringement lawsuit every time they made reference to a person, company or product by using its trademark.” Id. at 307. Similarly, in a case involving use of another’s trademark in advertising about goods based on the trademark owner’s goods, this Court has noted that the consumer’s interest in competitive prices “is at least as great as the interest of plaintiffs in monopolizing the name.” Societe Comptoir, 299 F.2d at 37.

Tiffany should not be permitted to defeat these policies through its effort to block an intermediary’s reasonable reliance on the nominative fair use doctrine.

CONCLUSION

For the foregoing reasons, and for the reasons stated in eBay's brief, the judgment of the District Court should be affirmed in its entirety.

Dated: Chicago, Illinois
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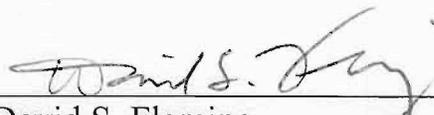
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Pursuant to Rules 29(c)(5) and 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned certifies that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 3,644 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as determined by the word count tool provided with Microsoft Word 2007.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2007 in 14 point, Times New Roman font.

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I hereby certify that on this 3rd day of December 2008, two true bound copies of the foregoing BRIEF OF *AMICUS CURIAE* YAHOO! INC. IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE were served on counsel for Plaintiffs-Appellants, Defendant-Appellee, and *Amicus Curiae*, via United States Postal Service, Express Mail, postage prepaid, and one copy was served via email, addressed as follows:

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