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Ron Coleman's blog on trademark, copyright, Internet law and free speech

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February 27, 2014 | [3 Comments](#)

Lady calls me up...

Written by: [Ron Coleman](#)



Did you ever wonder what happened in the [Val Colbert declaratory judgment action against Chanel?](#) Yeah, I forgot about it too, and evidently I was not alone. Because something did happen, and no one seemed to notice.

But more about that in a minute. Here's why I even thought of it.

Lady calls me up — can I do anything for her? She sells, or someone else sells but she sells them for her, or the other way around — anyway, there were these listings on eBay, for buttons that were removed from authentic designer clothing. In other words, authentic designer buttons, being sold detached from the clothing they came in with.

And eBay, it appears, removed these listings, and there ought to be a law!

There is a law, actually. It's the law of contracts, and, all things being equal (yes, they never are, but let us say it), it's the law that governs almost everyone's relationship with eBay, which is a private company. Your contract with eBay, as a seller or a buyer, is of course subject to its rules and regulations. And just like Mom's and Dad's rules and regulations, and those of almost any private party that are not restricted by the criminal law or civil rights concerns, those rules can be whatever the parties agree to. Or, in the case of eBay, whatever anyone who wants to play has to agree to, because for most of us, eBay will not negotiate.

eBay **will** negotiate with others, however — others who are not like you and me because they are rich, if only

(though seldom only) in brand equity. These parties have, at least in theory, the ability to upset the nice way it's going for eBay, litigation-wise, on IP issues such as [secondary liability for trademark infringement](#).

And these parties, many of whom are designers, really really really hate it when people do anything — anything! — well, anything other than burn it up or shoot it into outer space — with the hardware, buttons or other stuff bearing their logos but not the stuff they were originally attached to. I should not have to explain why they hate this. And by all indications, they have made this fact clear to eBay, which, despite what you think, mostly wants to work with these outfits. For the goose does continue to lay very nicely the golden eggs.



And eBay hears it.

So, we know, again, that eBay can remove your listing for any reason or for no reason, almost all the time. Many of the reasons it does have for such removals do exist, however, and they [have to do with intellectual property](#) — and not always with infringement, much less counterfeiting. No, your authentic stuff may be pulled from eBay even though it is authentic, [as eBay explains](#):

If we removed your listing, it's probably because it either violated the law or one of our policies. Or, it may have been removed because the item's rights owner (for example, Coach or Louis Vuitton) asked us to remove it. This can happen even if your item is genuine.

So how about the buttons, the ribbons, the hardware? For your non-listing pleasure, [here is the specific rule that you agreed to](#) when you agreed to sell on eBay which addresses that question:

Some brand name products come with accessories, a warranty, or protective packaging as part of the purchase. For example, a watch may be packaged in a custom box and may come with the manufacturer's warranty.

If the manufacturer doesn't offer the accessories or other extras as a separate purchase, those items can't be listed on eBay without the accompanying branded product. . . .



- Accessories or packaging without the accompanying product. Examples include:
 - Dust bags
 - Plastic tags (including a tag with a serial number)
 - Ribbons
 - Tissue paper

- Box for a branded watch without the accompanying watch
- Empty jewelry pouch, tin, or other container that may be used to hold and sell a similar or identical product
- Warranty or certificate (blank, valid, or expired) without the accompanying product

No, buttons are not on the list, at least not explicitly. They are included, however, in “Accessories or packaging without the accompanying product,” presumably.

▼ Why does eBay have this policy?

For a safer buying and selling experience on eBay, we prohibit listings for certain products that may be used to facilitate the sale of counterfeit items or enable fraud.

There you have it. It’s a lot easier to pass off a fake designer garment or other product as genuine if you can include in your listing a high-resolution close-up of genuine accessories.

Now, as it happens, this rationale, quite legitimate, also prevents traffic in such accessories for uses that themselves may also be quite legitimate. This would include using such accessories or hardware to replace lost or broken ones on genuine products, or just collecting them to appreciate their beauty, or because you have OCD.

And it would also include unapproved, unofficial, legally murky (perhaps) uses such as... transforming them, the way Val Colbert did, as shown in the photo at the top of this post.

Oh yes, right — what happened with that lawsuit?

It was very quietly dismissed, it appears, mere weeks after it was filed. See?:

Date Filed	Doccket Entry
11/21/2013	1 COMPLAINT with fee; Demand filed by Baton Jewelry by Val Colbert, LLC (Filing fee 5498.00 receipt number 1130-4908218) (Attachments: which includes the Consent To Proceed Before U.S. Magistrate Court. (Entered: 11/22/2013))
11/22/2013	2 Electronic Summons Issued as to Chanel, Inc. (jsh) (Entered: 11/22/2013)
12/06/2013	3 ORDER DECLINING CASE. Case reassigned to Judge Robert L. Vining. Is for all further proceedings. Judge Charles A. Parnell. Is no longer changed to 1:11-cv-1987-RLV. Please make note of this change in order to facilitate the docketing of pleadings in this case. Signed by Judge Ch
12/30/2013	4 NOTICE of Voluntary Dismissal Without Prejudice filed by Baton Jewelry by Val Colbert, LLC (Herman, John) (Entered: 12/30/2013)
12/11/2013	Check's Entry of Dismissal APPROVING ; Notice of Voluntary Dismissal without prejudice pursuant to Fed.R.C.P. 41(a)(1)(B) (jsh) (Entered: 12/11/2013)
12/11/2013	Civil Case Terminated. (jsh) (Entered: 12/11/2013)

I had to go onto PACER to find that. Nothing more, it seems, was reported.

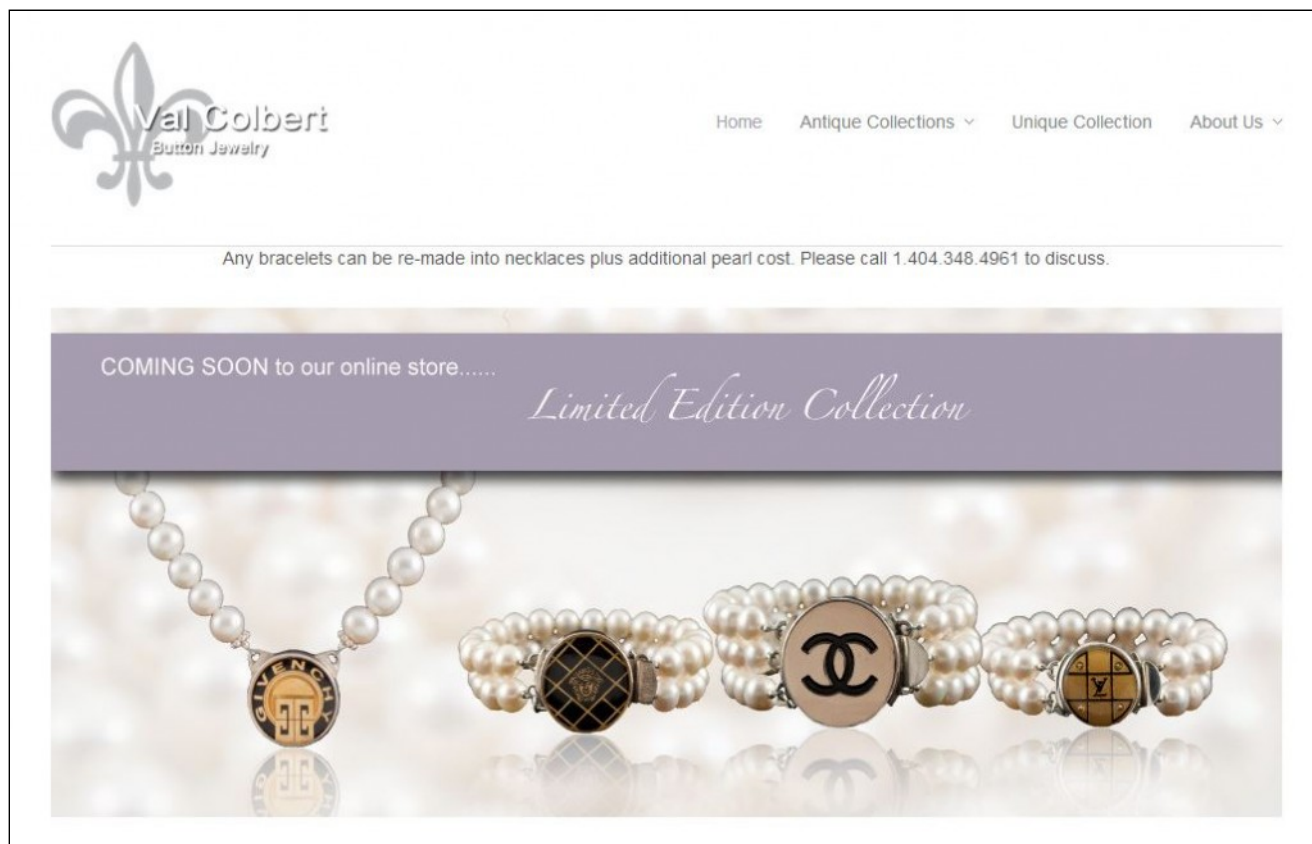
But I will report you this: You won’t find any more items for sale on the [Val Colbert website](#) bearing identifiable designer names or marks on them any more. I know because [I looked](#). Beautiful stuff, though!

Did you read that closely? I am playing with you!

I said “for sale” on the website. At least, not right now.

If you are paying close attention, though, and you point your browser there, you might see something yes-with-designer on it — something intriguing and interesting, if you’ve read this far, that you could very easily miss — as I very nearly did!

You might see this:



Those are, I believe, designer logos, no?

We can speculate. I’m guessing a licensing program, fully-approved, quality-controlled and royalties a-generating. Better than to fight, no?

But that’s just a guess. Evidently we’ll know what really happened... “soon.” Till then, see you on eBay. Not!

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Tags: [eBay](#), [Transformative use](#), [Val Colbert](#)



Author:Ron Coleman

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3 Responses to “Lady calls me up...”

1.



[tim maguire](#)

March 29, 2014 at 6:29 am [# Edit](#)

I would argue that buttons are not accessories. If I buy a button-down shirt, the buttons are part of the shirt, not the packaging. Neither are they grouped with the cufflinks and watch, which are purchased separately.

Next, since apparently ebay won't do the takedown on its own initiative, Chanel must request it, I'd wonder about tortious interference with contract. Afterall, my contract with ebay gives them the right to take down the materials, but I have no contract with Chanel that they can base their request on. If it's fair use and/or falls under first sale, then I probably have a case.

But then I'd look at how much a lawsuit would cost and probably try to figure something else out. Because the cost of litigation acts itself as a significant warping factor in our rights regime.

o



[Ron Coleman](#)

March 31, 2014 at 9:07 am [# Edit](#)

I follow — in fact, when writing the piece I had the same question in the back of my mind — but it's a decent enough approximation, I think, for purposes of distinguishing between the stuff they sell and the stuff they don't sell but which you get when you buy the other stuff.

o



[Ron Coleman](#)

June 16, 2014 at 12:47 pm [# Edit](#)

I agree with you about buttons. Are they really accessories?

And yes, in theory you could go after the brands and, yes, the cost. On the other hands, based on how this case went I don't believe they want the trademark question to be adjudicated. So it is possible that someone whose online business based on these recycled bits is getting hurt enough might find it worthwhile to test the waters. If so, they should have no trouble finding me!

Search... 

The question of whether consumers are [likely to be confused](#) is the signal [inquiry](#) that determines if a trademark infringement claim is valid. This blog is about trademark law, copyright law, free speech (mostly as it relates to the Internet) and legal issues related to blogging.



As for me, I'm a [partner and commercial litigator at Goetz Fitzpatrick LLP with offices in New York and New Jersey](#) (but active nationwide) and, [some say, "IP maven"](#)* with a special interest in copyright and trademark infringement involving the Internet--including advising clients how to avoid them.



For more information, or to learn more about retaining me, please [click here](#).

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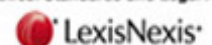
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4.

[Likelihood TM Blog: RT @abayeh3](#): Excited for the panel starting now "What's Copyrightable/What's Not" [#IPLSpring](#)
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5.

[Likelihood TM Blog: RT @HooverInst](#): Hoover hosts [#patent](#) reform conference, "The American [#Innovation](#)
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- [Most popular law blogs this month on Justia](#) (sometimes)
- [All IP law blogs, by popularity, on Justia](#)
- [All copyright law blogs, by popularity on Justia](#) (whoa!)
- [Alltop's law blogs](#) and
- [Cision.com's Top 50 Law Blogs](#)

Then there's [this](#) kind of odd thing.

It's easy it is to game almost any ranking system, not that I've tried to. As such. These are just what they are.

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**The term [maven](#) is used to mean "wise guy" here and is not meant to suggest that I am certified or otherwise authorized under bar rules to claim "expertise" in any field of legal practice. But try me.*

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