

No Trademark Infringement by Fictitious Batman Clean Slate Program

There is no trademark confusion between an actual computer program and a fictitious program with a similar name used in the Batman movie *The Dark Knight Rises*.

The Seventh Circuit affirmed a trial court's granting of a motion to dismiss a trademark infringement action brought by Fortres Grand Corporation, which argued that sales of its desktop management program "Clean Slate" declined after Warner Bros. Entertainment called a fictitious software program in the movie "clean slate." The name "Clean Slate" is trademarked by Fortres as a computer program used to protect public access computers.

The court explained that the Fortres Clean Slate program "wipes away any user changes to a shared computer (wiping the slate clean, so to speak). It is the kind of program that might be used at schools, libraries, hotels, etc., to keep public computers functioning properly and free of private data."

On the other hand, in *The Dark Knight Rises*, the fictitious "clean slate" program "enables an individual to erase all traces of her criminal past from every database on earth so that she may lead a normal life (that is, to wipe her slate clean)." As part of promotion for the movie, two websites were created, which contained descriptions of the clean slate hacking tool and its operation and an image of a fictional patent. Nothing was available for purchase from the websites.

Fortres claimed that it noticed a significant decline in sales of its Clean Slate software after the movie was released. "It believes that this decline in sales was due to potential customers mistakenly believing that its Clean Slate software is illicit or phony on account of Warner Bros.' use of the name 'the clean slate' in *The Dark Knight Rises*," the appellate court observed. Fortres said Warner Bros.' use caused "reverse confusion."

"To state a claim for infringement based on reverse confusion, Fortres Grand must plausibly allege that Warner Bros.' use of the words 'clean slate' in its movie to describe an elusive hacking program that can eliminate information from any and every database on earth has caused a likelihood that consumers will be confused into thinking that Fortres Grand's Clean Slate software 'emanates from, is connected to, or is sponsored by [Warner Bros.],' " the appellate court wrote. It found that the complaint failed to make such a plausible allegation.

The appellate court noted that the products were dissimilar—a movie versus a computer program—and that the software is available on the internet while the movie was shown first in theatres. "Warner Bros.' descriptive use of the words 'clean slate' in the movie's dialogue to describe a program that cleans a criminal's slate is unlikely to cause confusion," the appellate court opined.

The court discounted Fortres' argument that there must be confusion because its sales declined after the movie was released because potential customers thought the Clean Slate program was the

hacking tool referenced in the movie. “Whoever these unusually gullible hypothetical consumers are, Fortres Grand has not and could not plausibly allege that consumers are confused into thinking Fortres Grand is selling such a diabolical hacking tool licensed by Warner Bros. Fortres Grand’s real complaint is that Warner Bros.’ use of the words ‘clean slate’ has tarnished Fortres Grand’s ‘clean slate’ mark by associating it with illicit software. But this type of harm may only be remedied with a dilution claim,” which Fortes Grand did not make in the case.

Fortres Grand Corporation v. Warner Bros. Entertainment Inc., Seventh Cir. No. 13-2337, issued August 14, 2014.