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Reverse Passing Off: A Risky Trick Play in Trademark Cases

“Reverse passing off” sounds like a trick football play, but in fact it’s a relatively rare form of trademark infringement that could become more common as businesses seek workarounds for supply chain disturbances under COVID-19. When supply chains dry up, businesses may be tempted to follow the adage, “desperate times call for desperate measures,” including purchasing replacement products and rebranding them for sale to eager customers. However, far from being a brilliant quick fix, these tactics can move your business farther from the goal post or even cost you the game.

In a typical trademark infringement case, Party A accuses Party B of offering and selling goods under a trademark that is confusingly similar to Party A’s trademark. In this situation, each party is offering its own product, but Party A believes consumers are likely to think Party B’s product comes from, or is somehow affiliated with, Party A because Party B is using a trademark that is confusingly similar to Party A’s trademark. “Passing off,” sometimes referred to as “palming off,” is a related claim but involves substitution. For example, a company was found to have engaged in passing off when it substituted sewing machine parts made by other manufacturers in response to orders for SINGER brand sewing machine parts.

“Reverse passing off” also involves substitution, only this time it is the marks that are substituted. Rather than manufacturing its own products, Party B purchases Party A’s products, removes or obscures Party A’s trademark, and then sells the product under Party B’s trademark. For example, Liz Claiborne sued one of its sweater manufacturers for reverse passing off when the manufacturer sold overruns of LIZ CLAIBORNE brand sweaters using the manufacturer’s mark, MADEMOISELLE, without authorization. The two identical sweaters, one bearing the LIZ CLAIBORNE trademark and one bearing the MADEMOISELLE trademark, even ended up next to each other on the same rack in the same store.

Significantly, the defendant may be liable for reverse passing off even where the defendant's mark is entirely dissimilar to the plaintiff's mark. Rather than applying the typical multifactor likelihood of confusion test for trademark infringement, a plaintiff in a reverse passing off case need only show that the defendant falsely designated the origin of the plaintiff's products, such that consumers would likely believe the product originated with the defendant, and this confusion would harm the plaintiff.

Notably, when the replacement part is merely a component of the final product, not the product itself, the analysis may be different. Further, reselling a competitor's product without removing the competitor's trademark may also lead to a different conclusion, depending on the circumstances.

Bottomline – remove reverse passing off from your playbook and, if you're thinking of calling an audible, seek advice from an experienced trademark counsel first. For more information, please contact [Connie Lindman](#), [Matthew Clark](#) or any attorney in Frost Brown Todd's [Intellectual Property Practice](#).

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a [Coronavirus Response Team](#). Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.

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