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Trademark Infringement: "Likelihood Of Confusion"

[Kristie Prinz](#)

Q. I am selling jeans on eBay under a similar brand to another company that also sells jeans. That company ended my auction under eBay's VERO program for violating its intellectual property rights. I did not advertise my auction, nor did I claim to sell the other company's merchandise. In fact, I wrote up a disclaimer notice in my auction stating that these jeans did not belong to the other company. Also, my jeans do not have the other company's brand name on it. Can I legally sell my jeans under these facts?

-- *Anonymous***A.**

Based on the facts you have provided, your issue with eBay appears to be the least of your problems right now. Assuming the owner of the other company owns the trademarks on the brand name at issue, then that company may have a valid claim of trademark infringement against you.

Section 32 of the Lanham Act states:

Any person who shall, without the consent of the registrant--

1. use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or
2. reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive, shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) hereof, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive.

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When does an unauthorized use create a "likelihood of confusion" as to the source of the goods in question? Courts typically look at seven factors to make this determination, which are as follows:

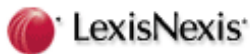
1. the strength of the mark;
2. the similarity of the marks;
3. the relatedness of the goods;
4. the evidence of actual confusion;
5. the sophistication of the buyers;
6. the defendant's intent in selecting the mark;
7. the likelihood of expansion of the product lines.

In the case at hand, the fact that the your mark is very similar to the other company's mark and the fact that the goods are very related suggests that the other company could potentially have a valid claim of infringement against you, assuming that such company owns the rights in its mark.

My advice would be to consult as soon as possible with an intellectual property litigator in your jurisdiction who specializes in trademark litigation. An intellectual property litigator will be able to look at the marks at issue, and address your risks to be sued on grounds of intellectual property infringement looking at the specific facts at hand. After you are armed with the information on the issue, such attorney should be in a position to further advise you regarding your best course of action.

-- *Kristie Prinz*

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