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News & Types: Commercial, Competition & Trade Update

Fictional "Clean Slate" Computer Program Used In Batman Movie Is Not Infringing Existing Trademark

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Practices: Commercial, Competition & Trade, Litigation

A recent decision of the 7th Circuit Court of Appeals discussed the concept of "confusion" with respect to an unusual trademark infringement claim.

The Dark Knight Rises was released in July 2012 as the final installment of three Batman movies. Like the other Batman movies, *The Dark Knight Rises* was extremely successful, grossing over $1 billion worldwide. The plot involved a fictional computer program called "the clean slate" that would enable an individual to erase all traces of her criminal past from every database on earth, so that she could lead a normal life. Unlike the court's opinion, this update will not go into the details of the plot. Readers who want more information on the plot can see the movie or even read the opinion, which includes a "spoiler alert." (*Fortres Grand Corporation v. Warner Bros. Entertainment Inc.*, 7th Circuit Court of Appeals, No. 13-2337, August 14, 2014)

But not everyone was a fan of *The Dark Knight Rises*. Fortres Grand Corporation is a computer security company that offers a software product called "Clean Slate®" that restores a computer to its original configuration, discarding unwanted computer changes. It is especially popular with providers of shared computers, such as libraries, schools, and hotels.

After the release of the movie, Fortres Grand noticed a decline in sales of "Clean Slate®" software. It claimed the decline was due to customers being confused by the fictional "clean slate" software program in *The Dark Knight Rises*.

There was much more to the claim than the similarity of names. In this regard, the case illustrates how the use of social media and the Internet can intensify what looks like an unwitting and insignificant similarity.

For example, two websites were created that purported to be connected with the fictional Rykin Data Corporation, the fictional developer of the fictional "clean slate" software that was the subject of the fictional *Dark Knight* movie. (Although the court described these websites as being created "as part of the marketing of the movie", Warner Bros. said the sites were created by fans of the movie who were not connected with Warner Bros.) The websites described the "clean slate" software from the movie and an image of a fictional patent. While looking authentic, they did not offer anything for sale or download. As the court states, ". . . they were purely an informational extension of the fictional Gotham City universe."

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The lower, district court concluded that Fortres Grand had failed to allege a plausible theory of consumer confusion and dismissed Fortres Grand's claim. Fortres Grand appealed.

Judge Manion, the author of the 7th Circuit opinion, noted that Fortres Grand's claims depend on whether it is plausible that Warner Bros.' use of the words "clean slate" is "likely to cause confusion." But, for trademark infringement purposes, the confusion must be about "origin, sponsorship, or approval . . ."

Fortres Grand originally made a "traditional" trademark infringement claim involving an existing user of a mark (i.e., Fortres Grand) claiming against a subsequent user of a similar mark (i.e., Warner Bros.). Fortres Grand argued that consumers could be confused that *The Dark Knight Rises* was sponsored by Fortres Grand. But it abandoned that argument on appeal.

So Fortres Grand argued "reverse confusion", in which the existing user (here, Fortres Grand) claims that consumers believe that the producers of the *Dark Knight* movie originated, sponsored, or approved of Fortres Grand's "Clean Slate®" software. To prevail on this "reverse confusion" claim, 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.]"

One problem that the court had to confront is what are the products to compare to determine trademark infringement? In this case, the "clean slate" software in the *Dark Knight* movie is fictional. The actual product is the movie. So should the court compare "Clean Slate®" to the fictional "clean slate" software or to the *Dark Knight* movie?

The court, although noting the dearth of cases that deal with confusing similarities when one of the products is fictional, concluded that the comparison must be with the actual creative work, not a fictional product. The court cited the U.S. Supreme Court's emphasis on confusion of "the tangible product sold in the marketplace." (emphasis added) So the court had to determine whether the *Dark Knight* movie (not the fictional "clean slate" software) could be confused with Fortres Grand's "Clean Slate®" program.

The answer might seem obvious. What is similar about a movie and a software application? But, to the court, it was not so simple. As the court put it, "The question is whether the products are the kind that the public attributes to a single source."

The court cited a similar case involving the Disney movie *Tron*. Disney promoted tie-in products using the "Tron" name, such as video games, toys, and telephones. But McGraw Edison had already been making electrical fuses with the "Tron" trademark. In that case, the court concluded that it was plausible that the source of entertainment based electrical products (i.e. Disney products) could be confused with the source of pre-existing electrical products (i.e., McGraw Edison).

However the court found critical differences in the *Tron* case and the claim of Fortres Grand.

> "The problem here is that Fortres Grand wants to allege confusion regarding the source of a utilitarian desktop management software based solely on the use of a mark in a movie and two advertising

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> websites. Warner Bros., unlike Disney, does not sell any movie merchandise similar to Fortres Grand's software which also bears the allegedly infringing mark. Fortres Grand mentions that Warner Bros. sells video games. Desktop management software and video game software may be similar enough to make confusion plausible, but Fortres Grand does not allege that the *video games* bear the "clean slate" mark. Nor does Fortres Grand allege that desktop management software is a commonly merchandised movie tie-in (as a video game might be). Accordingly, the only products available to compare – Fortres Grand's software and Warner Bros.' movie – are quite dissimilar, even considering common merchandising practice. Fortres Grand has alleged no facts that would make it plausible that a super-hero movie and desktop management software are "goods related in the minds of consumers in the sense that a single producer is likely to put out both goods."

In addition, the court characterized the "Clean Slate®" trademark as "non-famous", citing it as a variation of the Latin *tabula rasa* and other uses of "clean slate", such as in a community program giving convicts fresh starts and even as the name of a 1994 movie about an investigator with amnesia. The common use of the term "clean slate" weakened a trademark infringement claim.

Incredibly, Fortres Grand even cited Internet "chatter", speculating whether "clean slate" in the *Dark Knight* movie, could actually work. But, the court indicated, this is not an allegation of actual confusion with Fortres Grand's "Clean Slate®". Rather, these were "gullible hypothetical consumers" who are not confusing "clean slate" with the Fortres Grand product and may actually be unaware of Fortres Grand.

In a footnote, the court cites Fortres Grand's argument that its drop in sales meant there must have been some confusion. As evidence, Fortres Grand noted online searches for "clean slate" return hundreds of results relating to the fictional *Dark Knight* movie and, as a result, Fortres Grand had to spend money for "corrective advertising." Said the court, ". . . [P]roof that internet searchers are more interested in exploring the feasibility of a fictional hacking tool than in Fortres Grand's desktop management software is not proof that they are confused about the source of Fortres Grand's software." But it is fascinating to consider whether Internet search engine results could be used as evidence of confusion in other cases.

The day after the 7th Circuit issued its opinion, Fortres Grand issued a press release critical of the court's opinion, citing the court's "failure to recognize the current system of commerce and product research, the ubiquity of social engineering in computer security, the role of social media in shaping consumer opinion, and the apparent authority that any disparate fragments of content and social media posts can convey." On the other hand, Warner Bros., on the day of the court's opinion, issued a press release promoting the sale of its "Batman 25th Anniversary Two-Disc Edition" referring to the original 1989 *Batman* movie that started the Batman movie franchise and that was continued with *The Dark Knight Rises*.

The Fortres Grand case illustrates how social media and the Internet can impact trademark usage. While Fortres Grand was not successful in its trademark infringement claim, it is likely courts will have to deal with the magnifying effects on trademark law of the Internet and social media.

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