Mendoza Law, LLC

1000 University Ave., W. Suite 222
Saint Paul, MN 55104
651-330-8062 (Main)
www.mendozalawoffice.com

Anthony S. Mendoza, Esq.
Direct Dial: 651-340-8884
tony@mendozalawoffice.com

ESTABLISHING A "LIKELIHOOD OF CONFUSION" UNDER THE MINNESOTA UNIFORM DECEPTIVE TRADE PRACTICES ACT

A party does not need to prove actual confusion or misunderstanding under the Minnesota Uniform Deceptive Trade Practices Act (UDTPA) in order to establish a "likelihood of confusion" under the UDTPA. But there is very little case law decided by Minnesota state courts that sheds light on how to apply the "likelihood of confusion" test under the UDTPA. However, in *Scott v. Mego Int'l, Inc.*, a case decided in 1981, the Minnesota federal district court held that a party must show *some* likelihood of confusion or misunderstanding, the same element that must be shown to prevail on a claim of common law or statutory trademark infringement.

Mego involved a dispute over the use of the name "Micronauts." The plaintiff, Greg Scott, made miniature military figures made of tin and lead and were designed primarily for use in war gaming. The defendant, Mego, a New York based toy company, began marketing a series of toys also named Micronauts. Mego's Micronauts were futuristic space age toys designed for children ages 6 to 11. Mego felt the toys would appeal to children at the time based on the popularity of films such as "Star Wars" and "Star Trek." Among the several trademark infringement related claims brought by the plaintiff against Mego was a claim under the UDTPA.

The court noted that the principal focus in analyzing likelihood of confusion is whether the consuming public is *likely* to be confused as to the origin or sponsorship of the goods. The court ruled that the following familiar trademark infringement factors must be considered in determining the likelihood of confusion under the UDTPA: (1) the strength of plaintiff's designation, (2) the degree of similarity between the plaintiff's and defendant's marks, (3) the relative nature of products involved, (4) the marketing of the products, including the manner in which the products, are provided, and their respective trade channels, (5) the degree of care likely to be employed by consumers due to the price and other characteristics of the products, (6) the frequency and casualness of the purchase, and (7) whether defendant is deliberately trafficking in the plaintiff's mark.

The *Mego* Court examined the relevant factors and did not find merit in Scott's claim. There was no evidence that Mego passed off its goods as those of Scott. Furthermore, the evidence did not establish that Mego engaged in any deception or made any false or misleading representation of fact that would disparage the goods, service, or business of Scott. Mego adopted the Micronauts trademark without any knowledge of Scott's Micro Nauts trademark. Mego's advertising for Micronauts contained references to the Mego name, and each package contained the Mego logo. With respect to the final factor—intent, i.e., whether the Mego was deliberately trafficking in the plaintiff's mark—the *Mego* court observed that "[a]lthough intent is not an element of trademark infringement, intent to pass off goods as the product of another "raises an inference of likelihood

of confusion." Nonetheless, the court found no evidence of an intent on the part of Mego to infringe on Scott's Micronauts trademark.

Despite the lack of state law precedent regarding claims under the UDTPA, *Mego* is helpful in providing a framework and guidance with respect to the types of conduct that might give rise to claims under the Minnesota UDTPA.