

IN CLOSING

THE TROJAN DOCTRINE: TRADEMARKS AND THE LAW OF THE HORSE

EUGENE VOLOKH*

Trademark law desperately needs the Trojan Doctrine. Rather than defining the doctrine, I begin with an illustration. Magellan's Travel (former slogan: "Safe Travel Begins at Magellan's") specializes in books and equipment for travelers. Magellan was a famous explorer, so on the surface the trademark makes perfect sense. Many people, when asked who Magellan was, will say that he was the first person to circumnavigate the globe.

In fact, Magellan never circumnavigated the globe, but was killed half-way across, in the Philippines. The whole voyage also managed to do in 250 out of 270 members of Magellan's crew, apparently also the likely fate of those who shop at Magellan Travel, especially if they are carrying Amelia Earhart Luggage.

The Trojan Doctrine, I suggest, should invalidate trademarks if consumers—had they only thought hard about the phrase—wouldn't dream of buying a product with such an inapt name. One might think of this as a sort of doctrine of "tertiary meaning." I don't know what precisely is harmful about such trademarks, but surely there must be something.

Consider Rembrandt Toothpaste, which supposedly whitens teeth. Sparkling teeth are good, and Rembrandt van Rijn is good. And yet Rembrandt's paintings are mostly done in deep, dark colors. The subjects almost never show their teeth, for reasons familiar to those who know Renaissance hygiene. Are the Rembrandt Toothpaste people sending us a hidden message about the efficacy of their product? Are they trying to spread artistic illiteracy? There ought to be a law.

* Professor of Law, UCLA School of Law (volokh@law.ucla.edu). The author would like to thank Randy Barnett, Tom Berg, Leanne Freeman, and Jim Ho. In fact, he does thank them.

Other examples abound. I foolishly bought a Random House Unabridged Dictionary before thinking the matter through more deeply. On reflection, I realize that randomness is the quality I least want in a dictionary—or in a house—either in the sequence of the entries or their content. I would much prefer a Well-Organized House Unabridged Dictionary. Falsely misled, I have been irreparably harmed. I was even tempted to drive a Mitsubishi Mirage or a Chevy Nova, until I recognized that I should instead get a car that is real and doesn't explode.

But as defective trademarks go, these are nothing compared to the mark that gives the Trojan Doctrine its name. When you think of Trojan, what do you first think of? Some say the war. Some say the USC football team. (By the way, why does USC name its football team after *the losers*?)

Some say the condoms, to which we will return shortly. But surely the most significant Trojan of all is the Trojan horse, the Trojan term that has even made its way into the English language itself. (It can be found immediately between “zither” and “stymie” in my Random House.)

So let us think about Trojan condoms through the deconstructive lens of our equine friend. Here, in brief, is the story of the Trojan horse. Troy withstood the Greeks' siege for years, managing to keep the invaders outside its portals. But in a moment of weakness, seduced by the Greeks' deception, Troy opened its gates and let in a large horse. From this horse, in the middle of the night, lots of little men flooded out and destroyed the city.

A fine name for a condom.