

## Tableware Designer Gets Heavenly Results on Its Pearly Plates

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The US Court of Appeals for the Fifth Circuit reversed a district court decision, reversing the dismissal of a copyright claim based on lack of standing and finding ownership of the copyright in the claimant based on an assignment of that claim. The Fifth Circuit also found that the plaintiff had a protectible trade dress under the Lanham Act based on secondary meaning. *Beatriz Ball, LLC v. Barbagallo Co., LLC*, Case No. 21-30029 (5th Cir. July 12, 2022) (Jones, Haynes, Costa, JJ.) (*per curiam*).

Beatriz Ball, the founder of Beatriz Ball, LLC, alleged that Pampa Bay was marketing and distributing products that infringed on Ms. Ball's registered copyrights and unregistered trade dress for its "Organic Pearl" line of tableware. Ms. Ball brought suit against Pampa Bay in Louisiana federal court, asserting claims for copyright infringement under the Copyright Act and unfair competition under § 43 of the Lanham Act.

Pampa Bay has marketed and distributed products similar to the Organic Pearl collection but made with cheaper materials since 2016. Ms. Ball alleged that Pampa Bay infringed upon her copyright and its unregistered trade dress because the products are confusingly similar and look and feel like the Organic Pearl trade dress in every way. The district court ruled against Ms. Ball, finding that it had not established that its unregistered trade dress acquired "secondary meaning" as is required for protection of an unregistered trade dress under the Lanham Act. The district court further held that Ms. Ball lacked standing to bring the copyright claims as a result of a lack of legal interest because when "Beatriz Ball Collection" transferred ownership in the copyrights to "Beatriz Ball, LLC," the language of the assignment did not specifically transfer the right to a cause of action for prior infringements predating the assignment. The assignment clause in issue read:

**Assignment.** Assignor [Beatriz Ball and Beatriz Ball Collection] hereby irrevocably conveys, transfers, and assigns to Assignee [Beatriz Ball, LLC], and Assignee hereby accepts, all of Assignor's right, title and interest in and to any and all copyrights, whether registered or not and whether or not applications have been filed with the United States Copyright Office or any other governmental body. This assignment expressly includes any and all rights associated with those copyrights.

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The district court found that because the assignment did not specifically transfer the assignor's right to causes of action for prior infringements, the LLC lacked standing to challenge infringements pre-dating the assignment. The district court therefore never reached the merits of the copyright claim.

On appeal, the Fifth Circuit first reviewed the standing issue to determine if the LLC owned the copyrights at the time of the alleged infringement or if the right to vindicate prior infringements had been effectively assigned to Ms. Ball. Reversing the district court's ruling, the Court concluded that the LLC had standing to bring the suit as the actual copyright holder. The Court reasoned that § 411(b)(1), which provides that a registration with "inaccurate information" can support an infringement action if the misstatements were either unknowing or immaterial, made the original assignment sufficient. The Court, citing to the 2022 Supreme Court of the United States decision in *Unicolors v. H&M*, reasoned that nonlawyer employees mistakenly listed the company's trade name—instead of its proper corporate designation, Beatriz Ball, LLC—on the copyright applications and found that "[e]verything in the record suggests that this was an innocent, inadvertent error made by workers unfamiliar with the legalese and misled by inconsistent instructions from the Copyright Office." The Court determined that the mistakes on the copyright registrations were quintessential examples of unknowing errors because the employees had no idea that the applications were inaccurate.

After determining that the LLC had standing to bring the suit as the actual copyright holder, the Fifth Circuit turned to the issue of whether the "Organic Pearl" trade dress was protectable under the Lanham Act. Trade dress here refers to a product's total image and overall appearance. To prevail on the claim, the LLC had to prove that its trade dress qualified for protection and was infringed by demonstrating a likelihood of confusion for potential consumers. Because the trade dress was unregistered, it would only be protectable based on a showing of secondary meaning, established when the primary significance of a mark is shown to identify the source of the product rather than the product itself. The district court had reviewed all seven factors in the Fifth Circuit test for secondary meaning and only found one factor to favor of the LLC Ball. However, the Court determined that the district court had erred in its analysis of three of the factors, including the significance of the sales volume of the collection based on the LLC's offer of evidence showing the sales of the collection. The Court also determined that the district court had evaluated the wrong evidence in determining the nature of use of the mark or trade dress in newspapers and magazines because it did not consider third-party promotions of the collection. The district court lastly erred in determining the defendant's intent in copying the trade dress because it did not compare the totality of the features of the collection with Pampa Bay's products and instead analyzed isolated features.

The Fifth Circuit reversed and remanded the case. Judge Costa concurred in the opinion but wrote separately to discuss the difference in deference given a trial judge's detailed and intensive factfinding versus that of a jury's unexplained verdict. Judge Costa noted that "there is good reason for the seeming anomaly of giving less deference to bench trials: Larger and more representative groups are the ones more likely to reach the correct outcome."

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