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Kraft v. Cracker Barrel: A Summary of Judge Posner's Opinion and an Alternative Reverse Confusion Theory of Liability

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In a unanimous opinion authored by Judge Posner, the Seventh Circuit recently upheld the district judge's granting of plaintiff Kraft Foods Group Brands LLC's motion to preliminarily enjoin defendant Cracker Barrel Old Country Store, Inc.'s sale of food products to grocery stores under the **CRACKER BARREL trademark**. The opinion is worth examining given the commercial prominence of the litigants and the always interesting insights of Judge Posner. Additionally, at the conclusion of this short article, I will posit an alternative theory of reverse consumer confusion potentially applicable to the facts of this dispute.

The parties' respective reputations are well established and known. Kraft is a leading manufacturer of food products and Cracker Barrel operates one of the country's best-known chain of restaurants. Their dispute arose when Cracker Barrel announced its intention to begin selling branded food products – not including cheese – in grocery stores, expanding the channels of commerce in which it had previously sold such items, i.e., its restaurants and website. Kraft filed suit and moved to preliminarily enjoin Cracker Barrel's expansion, claiming that its sale of products bearing the Cracker Barrel logo in grocery stores would result in consumer confusion with cheese Kraft sells under its registered CRACKER BARREL trademark. The trial court granted Kraft's motion, enjoining Cracker Barrel's sale of all food items in any retail locations other than its aforementioned established channels of trade. Cracker Barrel appealed the decision to the Seventh Circuit on the grounds that the injunction was overbroad, Kraft's likelihood of confusion survey evidence was defective, and the trial court incorrectly analyzed the likelihood of confusion factors.

The Seventh Circuit upheld the injunction based on the combined similarity of the parties' marks, goods, and channels of trade: "It's not the fact that the parties' trade are so similar that is decisive, nor even the fact that the products are similar (low-cost packaged food items. It is those similarities coupled with the fact that, if [Cracker Barrel] prevails in this suit, similar products with confusingly similar trade names will be sold through the same distribution channel – grocery stores, and often the same grocery stores – and advertised together." In Judge Posner's estimation, these similarities – despite the differences in the parties' respective logos and regardless of where the products are located in relation to each other in grocery stores – might lead consumers to "think all the products Kraft products," i.e., traditional forward confusion. The likelihood of confusion was exacerbated by the fact that both products at issue were inexpensive; thus, consumers were unlikely to scrutinize

their respective labels.

True to his reputation, Judge Posner next weighed the cost of confusion to Kraft – a sullied reputation and decline in sales in the event customers attribute their "bad experience" with a Cracker Barrel product to Kraft – against the benefit to consumers of "having a variety of products to choose among." Judge Posner determined, however, that "balancing . . . these competing interests with any precision [is] not [a] feasible undertaking[] in a preliminary-injunction proceeding."

Notably, in upholding the injunction, the Court did not accord any weight to the survey evidence presented by Kraft and relied on by the trial court. On the contrary and "for future reference," Judge Posner penned a missive against consumer surveys which, he opined, "are prone to bias." Relying on recent academic literature, Judge Posner identified the following perennial problems with consumer surveys: surveys rarely emulate the environment in which a customer normally encounters trademarks; parties may suppress surveys with results unsupportive of their interests; and experts tend to advocate for "the side that hired them." As applied to the instant case, Judge Posner termed Kraft's expert witness a "professional expert witness" and noted that his survey methodology – emailing customers photographs of products – did not emulate the context in which customers are likely to encounter the marks, i.e., in grocery stores and with actual dollars on the line.

Instead of survey evidence, Judge Posner posited alternative expert opinions potentially helpful in assessing the likelihood of confusion. For one, Kraft could have retained an expert to statistically assess the "lift (greater sales) if any [Cracker Barrel] hams obtain by proximity to Kraft['s] label." However, Judge Posner admitted that such a study depends on the products being offered together in grocery stores and is necessarily impossible to conduct after a preliminary injunction has issued. Judge Posner also opined that expert opinion as to the buying habits of consumers could be helpful in determining the likelihood of confusion and put some meat on the ill-defined and often inconsistent description of trademark law's "ordinary consumer."

Although Kraft relied on a **theory of forward confusion**, it is worth noting an alternative theory of confusion which neither party briefed but on which Kraft might have relied, that is, reverse confusion. The Seventh Circuit has previously defined "reverse confusion" as "when a large junior user saturates the market with a trademark similar or identical to that of a smaller, senior user . . . [who] is injured because 'the public comes to assume that the senior user's products are really the junior user's or that the former has somehow become connected to the latter. The result is the senior user loses the value of the trademark.'" *Sands, Taylor & Wood Co. v. Quaker Oats Co.*, 978 F.2d 947, 957 (7th Cir. 1992) (quoted case omitted.) As applied to this case, Kraft might argue that consumers – or, at least, an appreciable subset of consumers – are likely to believe that Kraft and Cracker Barrel entered a license agreement allowing for the use of Cracker Barrel's name on Kraft's cheese. Such cross-pollination between food brands is not unusual, e.g., Lay's K.C. Masterpiece Chips or Budweiser and Clamato Chelada. This theory is supported by evidence of record that unaided awareness of the Cracker Barrel restaurant brand is greater than that of Kraft's Cracker Barrel product and that, after years of dormancy, Kraft stepped-up its advertisement of the Cracker Barrel product to differentiate it from the restaurant brand. Although Kraft may have believed that forwarding a theory of reverse confusion was tantamount to admitting the weakness of its brand, courts have ruled that a brand may have market power in its industry and still be susceptible to reverse confusion. *See A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 235 (3d Cir. 2000)

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