



# Trademark Infringement

Identity & Origin  
Trademark

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Konomark  
Most rights sharable

# source

## Elements of trademark infringement

(regular passing-off theory)

1. The plaintiff owns
2. a valid trademark, and
3. that mark or a similar symbol was used by the defendant in commerce in connection with the sale, offering for sale, distribution or advertising of any goods or services
4. resulting in a likelihood of confusion

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## Likelihood of confusion factors

- Fed: the DuPont factors
- 1st: the Pignons factors
- 2d: the Polaroid factors
- 3d: the Lapp factors
- 4th: the Pizzeria Uno factors
- 6th: the Frisch factors
- 8th: the SquirtCo factors
- 9th: the Sleekcraft factors

Different  
circuits have  
different lists of  
factors ...

but  
substantively,  
it's all  
essentially the  
same analysis.



“Squirt”  
“Quist”





**AMF Slickcraft.**  
**For those who know the difference.**

Some boaters, particularly beginners, regard boats as all pretty much alike. The only differences, they think, are how they are used. Different boats, they think, are used for different things.

Whoever chooses you will find a Slickcraft, you quickly discover that almost any of the available, easy-to-handle boats is an unbeatable combination of the craft that gets you there. And back.

Slickcraft quality starts with the hull, with floor-panels that have a layer of foam in place of ordinary fiberglass. The hull is reinforced with a layer of kevlar for better vibration and rigidity. Impact-resistant fiberglass is used for the deck. Solid hull, solid structure, up with a cast-in-place gel-coat that provides a surface that keeps your Slickcraft looking new longer, and worth more for longer.

There's gelcoat on the hull and on the deck. Now make a clean getaway in a Slickcraft.

For more information on Slickcraft boats, write to AMF Slickcraft, 600 East 52nd Street, Hayward, Michigan 48020.



\*Slickcraft has regional distributors of AMF, not approved.



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Notwithstanding the circuits' slightly different lists, here's a synthesized list you can use ...

## Likelihood of confusion factors (synthesized list)

- the strength of plaintiff's mark
- similarity between plaintiff's and defendant's marks
- the proximity of the products in the marketplace
- the likelihood that the senior user will bridge the gap by beginning to sell in the market of the defendant's product
- evidence of actual confusion
- the sophistication of consumers in the relevant market
- defendant's good faith (or lack thereof) in adopting its own mark
- the quality of the defendant's product

inherently distinctive	fanciful arbitrary suggestive		misdescriptive	inherently distinctive product packaging	
can acquire distinctiveness	merely descriptive	primarily geographically descriptive	deceptively misdescriptive	non-inherently distinctive product packaging product design color	primarily a surname
unprotectable	generic	primarily geographically deceptively misdescriptive	deceptive	functional	names/likenesses of living people without consent gov't symbols

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## SONY

- sells consumer electronics
- the brand familiar to you

## PONY

- for an electronic 3-D terrain navigation and horse-health monitoring device for horse riders that costs \$9,000 per unit



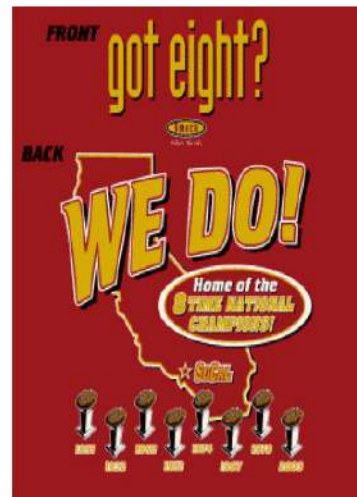
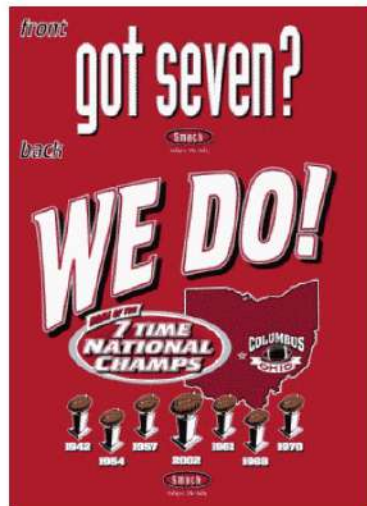


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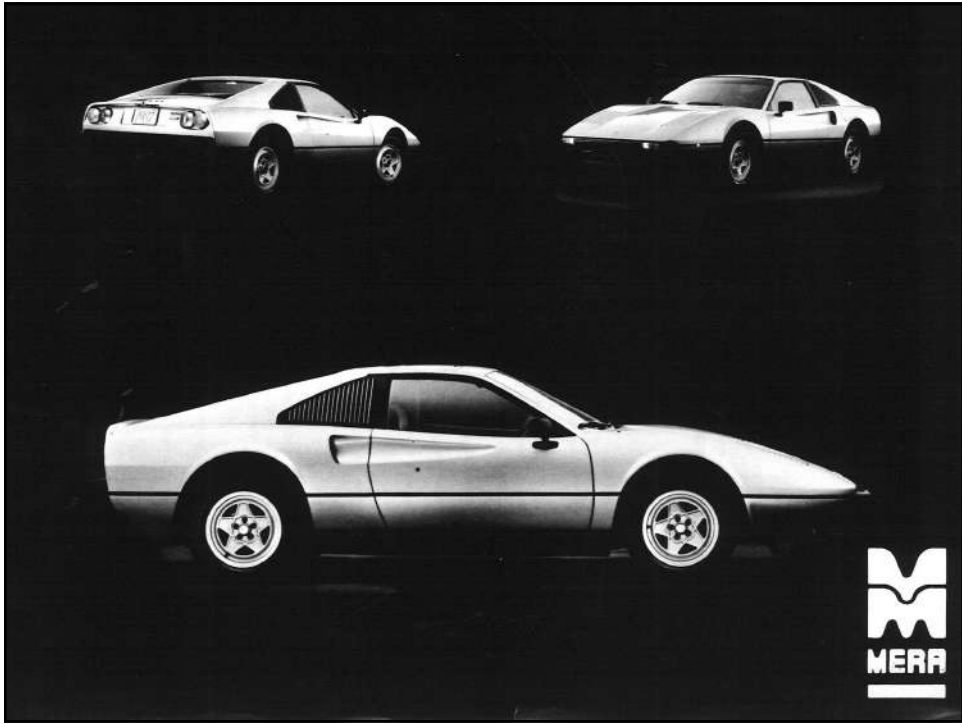
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LICENSED ONLY BY THE FIRST AMENDMENT









This shows how courts are often willing to stretch trademark doctrine in a way that becomes entirely divorced from its roots in protecting indications of source.

In a similar litigation against another firm, the court offered that some people might think "the mark's owner sponsored or otherwise approved the use of the trademark [design]." Ultimately, the court fixated on "the [defendant's] intent of deriving benefit from the reputation of Ferrari," even (astoundingly) saying, "When a mark is chosen with the intent of deriving benefit from the reputation of the senior user, then that fact alone may show confusing similarity." *Ferrari SPA Esercizio Fabriche v. Roberts*, (E.D. Tenn. 1990).