

EIP

Prickly dispute between tattoo artist and cactus shop dismissed

Henry Martinez (T/A Prick) & Anr. v Prick me Baby One More Time Limited (T/A Prick) & Anr. [2018] EWHC 776 (IPEC)

HH Judge Melissa Clarke dismisses passing off claim in prickly dispute between tattoo artist and cactus shop.

This case involves a dispute between a well-known tattoo artist and a shop selling cacti and other succulents, both trading under the name 'Prick'. Henry Martinez began operating his Shoreditch tattoo parlour, Prick Tattoos, in 2001. Under the pseudonym 'Henry Hate', he became a renowned tattoo artist, most notably creating the iconic 'Cynthia' tattoo for Amy Winehouse. Gynelle Leon, the Second Defendant and sole director and shareholder of the First Defendant, opened a shop called 'Prick' in July 2016, selling cacti. The Claimants alleged passing off.

The Judge considered the well-established "classic trinity" required for passing off established by the Court of Appeal in the 1990 Jif Lemon case, in short: goodwill in the Claimant's good or services; misrepresentation by the Defendant which leads or is likely to lead the public to believe that the goods or services offered by them are the same as, or are connected to, those of the Claimant; and damage suffered or likely to be suffered by the Claimant as a result of the misrepresentation.

On goodwill, the Defendants alleged in their skeleton argument that any goodwill generated by Mr Martinez's broader activities as a visual artist accrued not under the name 'Prick', but rather under the brand 'Henry Hate', his personal trading style, and the name under which he sells non-tattoo artwork. The Judge disagreed, concluding that goodwill generated by the Claimants' tattoo and wider artistic works accrued under both

the 'Prick' and 'Henry Hate' names, albeit in the case of 'Prick' it was geographically limited to two London boroughs close to the tattoo parlour.

On the second requirement, misrepresentation, the Claimants put forward evidence from a number of Mr Martinez's regular clients to the effect that they found the similarities in the names of the two shops confusing. Upon cross-examination, it transpired that at least one of these witnesses was already aware that the cactus shop was unconnected to the tattoo parlour when he wrote the message alleged to indicate he was confused.

Accordingly, the Judge put little weight on his evidence or, for various reasons, that of the other client witnesses. Similarly, the Judge did not accept as amounting to evidence of misrepresentation four alleged instances of deception of ordinary members of the public. Notably, the Judge expressed surprise and scepticism that a member of the public, apparently searching for a cactus shop, could have found herself at henryhate.com, Mr Martinez's personal website.

There being no material misrepresentation, it was not necessary to consider damage to goodwill, and the claim for passing off failed.

This provides another illustration of how critical the nature of the evidence is to the outcome of a passing off case.