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Battle pits Vermont man against restaurant chain

I spent a week this past summer in Burlington, Vt., and environs. Vermont is a state of rugged individualists. They drive a lot of Subarus and like hiking in the mountains. They like their beer brewed locally (e.g. Magic Hat, Rock Art breweries). And they really like their vegetables, cheese and meat home grown and artisanal. The restaurants don't just tell you that your dinner is locally grown, they tell you which little farm down the road it came from.

This was all very important background information to help me understand the latest cause célèbre in the trademark world. It involved a rugged Vermont individualist named Bo Muller-Moore. Bo has a one-man, T-shirt operation in Montpelier. His biggest seller is a T-shirt that simply says "Eat More Kale." He hand-screens the shirts in a workshop above his garage and sells them at farmers markets and on his website at eatmorekale.com. He said some friends asked him to make shirts with this phrase at least 10 years ago and he's been selling them ever since. Bo said the message is about eating healthier, eating locally produced food and supporting small business. The message is as pure as Vermont maple syrup.

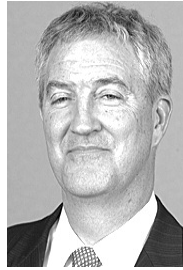
One company, however, is not pleased with Bo and his artisanal T-shirts. CFA Properties Inc. operates the Chick-fil-A fast-food restaurants. It has about 1,500 Chick-fil-A locations in 39 states (none in Vermont — true Vermonters wouldn't think of eating highly processed fast-food chicken). In 1995, CFA began a clever advertising campaign, in which some orthographically challenged cows hold signs saying "Eat Mor Chikin." CFA registered the slogan as a trademark for restaurant services and for various clothing items, including T-shirts.

In 2006, CFA sent a cease-and-desist letter to Bo Muller-Moore and his Eat More Kale website claiming that he was violating CFA's trademark. Bo never stopped making the T-shirts, however, and the matter seemed to fade away.

It came to the surface again recently when Bo filed a federal trademark registration application for the Eat More Kale slogan. This prompted another cease-and-desist letter from CFA, asserting that Eat More Kale violates its valuable trademark rights in Eat Mor Chikin.

Most T-shirt makers would normally back down from a corporate Goliath trying to police an important trademark. In fact, CFA's letter lists 30 examples of others who chose to drop use of an eat more ... slogan upon receipt of a demand by CFA to back off. Not Bo Muller-Moore. "Our plan is not to back down," Bo said.

His flinty resistance has made Bo a media darling for the time being. Chick-fil-A has been scorned and labeled a "trademark bully" in the blogosphere. Anderson Cooper of CNN even put CFA on his Ridiculist. The governor of Vermont, Peter Shumlin, has announced his support for



Inside IP Law

By William T. McGrath

William T. McGrath is a member of Davis, McGrath LLC, where he handles copyright, trademark and Internet-related litigation and counseling. He is also associate director of the Center for Intellectual Property Law at The John Marshall Law School. He can be contacted at wmcgrath@davismcgrath.com.

the T-shirt guy and a legal defense fund has been set up.

CFA claims in its Oct. 4 letter that Muller-Moore's slogan infringes its trademark because it will cause consumer confusion. Most reasonable observers would find that notion truly bizarre. Even acknowledging that CFA's trademark registration covers T-shirts and other clothing as well as restaurant services, it seems highly unlikely that any rational person would think that a handcrafted T-shirt made in a Vermont garage and promoting the virtues of a little known but highly nutritious vegetable is really emanating from or in some way endorsed by Chick-fil-A.

A claim of dilution might be closer to the mark. Trademark dilution does not require that there be a likelihood of confusion. Rather, "dilution by blurring" occurs when a third party adopts a mark that would "impair the distinctiveness" of a famous trademark, even if there would be no confusion. The doctrine is meant to prevent the erosion of the strength of a famous mark that could occur in the absence of confusion. An example might be if a pharmaceutical company came out with Microsoft brand aspirin.

Dilution is not easy to prove. First, the trademark owner must establish that the mark is famous; that is, it must be widely recognized by the consuming public as a designation of source of the goods or services of the mark's owner. It is not clear that CFA's slogan has achieved the degree of fame necessary to meet the high standards imposed by the dilution laws. By way of example, Nike, Pepsi, Starbucks and Viagra have all been found to be famous in dilution cases; the "longhorn" logo of the University of Texas was held not to be famous (although it was widely

known among college football fans, it was not famous among the entire population of the United States). In addition, CFA would have to show that its slogan was famous before Bo Muller-Moore began making his Kale shirts back in 1998. That could be a tough sell for CFA.

To prove dilution by blurring, trademark owners must also show that an "association" arises from the similarity between the challenged mark and the famous mark. If you saw an Eat More Kale T-shirt, would you be likely to associate it with Eat Mor Chikin? And if you did, is it likely to impair the distinctiveness of CFA's slogan?

The dilution statute recognizes certain conduct that is not dilution. One is parody, although Muller-Moore does not seem to be invoking that defense. He is not making fun of Chick-fil-A's motto — he is sending his own independent Vermont value-based message: Eat healthfully; eat locally; support small business. That message may provide him with a different defense. There is an exception for any "noncommercial" use of a mark. This exception is designed to preclude courts from enjoining speech that is protected by the First Amendment. Though his healthy message is obviously being made in a commercial context, some commentators have argued that a use that intertwines both commercial and noncommercial speech is a noncommercial use. See, e.g., Lockridge, "When Is a Use in Commerce a Noncommercial Use?" 37 Fla. St. U.L. Rev. 337 (2010).

When the media heat on Chick-fil-A became intense, it issued a statement that it supports the "entrepreneurial spirit" of small business, but that "the law does not allow us to differentiate between a large company and a small entrepreneur ... We must legally protect and defend our 'Eat Mor Chikin' trademarks in order to maintain rights to the slogan." Perhaps the most cutting response to that bit of corporate-speak was seen on the Consumer Law & Policy Blog, which opined that trademark law does not require owners to send "foolish and abusive communications" to defend their trademark rights.

While Muller-Moore seems to have come out on top in the media blitz, one still might ask "What was he thinking?" By filing a federal trademark application, he seems to have kicked the dog that had lain dormant for five years. Why did he feel compelled to seek a federal registration for the Kale slogan? One hopes he is not intending to become a trademark bully himself. No true Vermonter would do that.

In any event, it appears the exposure has been good for Muller-Moore. As an investigative reporter, I felt duty bound to order an Eat More Kale T-shirt from his website last week. I noted with interest that due to the intense demand, orders could not be filled before Christmas.