

Use of Others' Trademarks As Meta Tags Found to Be Intent to Cause Confusion in a Trademark Infringement Case

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In a case that has significant ramifications for companies that use the trademarks of others in their metatags to attract hits to their web sites, the Seventh Circuit has held that use of third party trademarks as a meta tag can demonstrate an "intent to cause confusion" in a trademark infringement case.

Meta tags are html code that are often used to describe the subject matter of a web site. Most Internet search engines search the meta tag field when conducting searches. A web site may therefore attract hits by placing terms within its meta tags, even if such terms are not used in or relevant to the web site.

In *Eli Lilly & Company v. Natural Answers, Incorporated* (No. 00-1375 (7th Cir. 11/21/2000)), Eli Lilly, as owner of the trademark "Prozac," brought suit against Natural Answers for trademark infringement, trademark dilution and violations of state unfair competition laws due to Natural Answers' use of the term "Herbrozac" for a herbal supplement. Natural Answers marketed Herbrozac as a mood-enhancing herbal supplement. In addition to its use of "Herbrozac" as a brand name, Natural Answers also used the term "Prozac" in the meta tags to its web site, though "Prozac" did not appear on the web site itself.

While noting that the effort to use "Prozac" in the metatag to attract traffic to its web site was a failure from Natural Answers' perspective because Internet searchers were overwhelmed with sites related to Prozac, the court found that Natural Answers' use of the term "Prozac" in its metatags was "probative of wrongful intent [to confuse consumers]" and that such use of another's trademark is "significant evidence of intent to confuse and mislead." Use of the trademark of another in a meta tag can clearly demonstrate an intent to confuse consumers, which is a required element of any trademark infringement claim.

Companies and individuals with web sites that use the trademarks of third parties in metatags must be cognizant of the heightened risks of trademark infringement. Many web site operators have assumed that by avoiding use of a trademark in the text of a web site, they are avoiding liability for trademark infringement. Although some cases have gone the other way, *Eli Lilly* demonstrates that use of a trademark in a meta tag can, at the least, be a significant factor in finding trademark

infringement under certain circumstances.

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