



MARTHA'S GREEK TRAGEDY

By: Jim Astrachan

When Martha Stewart's conviction on four criminal charges was reported last week reactions were varied. Some folks pondered the effect Martha's conviction would have on the 550 employees at Martha Stewart Living Omnimedia, her publicly traded corporation. Others thought about her investors; the ones that lost 23 percent of value as soon as the jury's verdict was reported and more than half of value since this thing began. I thought of trademarks; here's why.

Once upon a time no one outside Martha's small circle of acquaintances knew who Martha Stewart was. Her name meant nothing other than to identify the photo on her driver's license or to hold a table at a restaurant. Today MARTHA STEWART is not Martha Stewart. Without any doubt it is the most valuable asset owned by Martha Stewart Living Omnimedia. And it is a trademark registered with the PTO and protected under a myriad of federal trademark laws.

No doubt the MARTHA STEWART mark is severely damaged. Even the board of Martha's company is meeting to determine whether it needs to change the mark under which its products are sold. What a mess!

Might the registration of the mark also be in danger of cancellation? No at first glance, but the answer may not be so simple. Registration of a mark will be refused by the PTO when the mark takes on airs of scandal, immoral purpose or degradation of an identifiable group. CBS's cancellation of the *Martha Stewart Living* TV show following her conviction is likely a keen indication of how the public now perceives Martha and the famous mark to which she is super-glued.

Also barred are marks that disparage identifiable groups. Not too long ago Native Americans effectively petitioned The Trademark Trial and Appeal Board to cancel the Washington football team's registration of REDSKINS on the grounds that the mark denigrated Native Americans. A federal judge eventually overturned the cancellation on the grounds that the petitioners had failed to prove that the mark was denigrating *at the time it was first registered*, a requirement she read into the statute.

More similar to MARTHA STEWART is the opposition to federal registration of the marks, O.J., O.J. SIMPSON and THE JUICE. O.J. filed for registration and after his acquittal on murder charges the marks were published for opposition by the PTO, a standard pre-registration process. Some members of the public opposed the registrations on the grounds they found these marks to be deeply offensive to family values and moral standards, in general. The PTO denied the opposers standing, but a federal court of appeals, the same court that hears appeals

from the TTAB ruled the opposers did have standing. Taking to task the TTAB, the court admonished that without review, PTO employees may not assume they know the views of a substantial composite of the public. The court held that one purpose of publishing a mark prior to registration is to elicit the public's view for consideration. The message sent is that the public view is important and must be considered if evidence is presented.

Judge Newan disagreed with the majority and wrote "a person with no interest in the trademark for which registration is sought - a 'mere intermeddler; a 'self appointed guardian of the register' - does not meet even the minimal statutory requirements to oppose registration." Nevertheless, the majority decision made clear that a member of the public may oppose a registration if he or she disapproves of the registration on moral grounds. The PTO and TTAB must follow this decision.

Does this open the door for any aggrieved member of the public to object to a mark that he or she considers scandalous or immoral? Maybe. The original Trademark Act provided little guidance to the meaning of these words: "Giving offense to the conscience."; "exciting reprobation."; "Calling out condemnation."; "disgraceful to reputation."; "shocking to the sense of truth, decency or propriety". Early trademark decisions found scandalous or immoral MADDONA applied to non-religious wine and BLACKTAIL applied to adult magazines. It is not a stretch to believe that these definitions from the original Trademark Act could be applied by some to MARTHA STEWART.

There is more than sufficient reason to believe that if, post-conviction, Martha attempted for the first time to register MARTHA STEWART a member of the public would file an

opposition, and the chances are good he or she would succeed. Perjury and obstruction of justice are very bad things and many people interviewed were jubilant over the verdict. If the trial court's interpretation of the statute in the REDSKINS case applied to the existing MARTHA STEWART registration it would not be cancelled because of the inability to prove it was scandalous or immoral at the time it was registered. However, that decision does not bind any other trial court judge who might hear this case.

Personally, Martha is in a big mess, but the mess her conduct caused her company, its employees and investors highlights the real problem: The use of a living, breathing person as the brand around which a company is built and its products are sold is super-risky.

People do things right and wrong and Martha's bad acts affect the brand. Martha ignored the affect her bad conduct would have on the value of the brand. For \$50,000 she caused millions in damages, not only to her company but also to its licensees, such as K-Mart. One thing is clear - the damage to MARTHA STEWART caused by Martha Stewart will be the basis of subsequent litigation. There is still flesh left on the bones to pick.

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