

The logo for Astrachan Gunst Thomas features a stylized, swirling blue graphic behind the text. The text "astrachan gunst thomas" is written in a lowercase, sans-serif font, with "astrachan" and "thomas" in a darker blue and "gunst" in a lighter blue.

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## **Vuitton Has a "Dog" In The Fight**

By: Jim Astrachan

High fashion has gone to the dogs – literally, and the United States District Court for the Eastern District of Virginia was asked to referee the recent dog fight. We all know Louis Vuitton, the French purveyor of fine and very expensive luggage, shoes, watches and whatever. Do we also know that "whatever" includes pricey dog collars, leashes and carriers? Ah, the French; they love their dogs.

Enter Haute Diggity Dog, a manufacturer and distributor of designer dog collars and other pet goodies. Recently, HDD caught the eye and ire of Louis Vuitton when it launched a series of designer collars it called *Chewy Vuiton*.

Those familiar with the real Louis Vuitton knows that its products bear the multiple interlocking LV initials, usually on every square inch of the exposed plastic-coated surface. To pull off its parody on the famous Louis Vuitton trademark, HDD marked its collars with a CV logo and sold them under the mark *Chewy Vuiton*. It was not as though Louis Vuitton was above selling doggie fashions – it was not. But this imitation was more than Louis Vuitton could bear and it filed suit against HDD and its retailer alleging copyright and trademark infringement.

There was no question that HDD had put goods into commerce bearing some resemblance to Louis Vuitton's goods. The question for the court to decide, and it did on summary judgment, was whether the HDD goods infringed Louis' trademark and copyright or were HDD's products a parody and therefore a permissible fair use under the trademark and copyright laws. To make the trademark determination the court applied the 4<sup>th</sup> Circuit's seven part *Pizza Uno* test, which is a variation of the 2<sup>nd</sup> Circuit's *Polaroid* test. In one form or another, these tests have been adopted in every Circuit. Application of these factors allows the courts to determine whether a junior trademark user's actions are likely to cause confusion among an appreciable group of prospective consumers, the gravamen of a trademark infringement action.

Here's how the court gnawed the trademark bone and applied the *Pizza Uno* factors:

Strength. Usually, the stronger the mark, the more this factor favors the plaintiff in an infringement case. But where the mark is ultra-strong, as it is with *Louis Vuitton*, and the mark is being parodied, the opposite may be true. That is because a parody must be conveyed to the consumer through simultaneous and contradictory messages. The first message is that this is the original item, and the second message is that this is not the original, and that the original is being parodied. If the parodied mark is really strong, consumers will immediately recognize it, and will just as quickly realize that the original is not the parodied object. The strength of the Vuitton mark makes the Chewy Vuitton dog collar an obvious parody. It takes only a moment to realize it's not a Louis Vuitton product. Instead the court held, HDD offers "entertainment...by juxtaposing the irreverent representation of the trademark with the idealized image created by the mark's owner."

Similarity of the Marks. The marks are very similar. *Chewy Vuitton* vs. *Louis Vuitton* – CV vs. LV. That was HDD's clear intention; unless it made its mark mimic Louis Vuitton's mark, parody would not work. The two marks had to be similar.

Proximity of the Products. The products were pretty much the same. Although HDD does not make people luggage, it makes dog accessories, and so does Louis Vuitton.

Sophistication of Buyers. The court concluded that persons in the market for a genuine French Louis dog collar would not be fooled by a Chewy. They would take the time to examine the Chewy and would realize that the Chewy was not made by Louis.

Channels of Distribution. Genuine Louis are not sold in stores with names like Woofie's Pet Boutique in small towns like Ashburn, Va. Louis Vuitton sells its goods in very upscale boutique stores and in very hi-end department stores. The average buyer of a Louis would know that and would not believe she was buying a real Louis in a pet boutique.

Actual Confusion Parody. Louis Vuitton was unable to show evidence of actual confusion, often a key factor in the analysis, unless you count the older German Shepard with cataracts who confused the logos.

HDD's Good Faith in Adopting the Mark. To create a parody, HDD had to act intentionally; it had to use a colorable imitation of LV's mark. But it purposefully stayed away from duplicating Vuitton's actual mark. Although bad faith is often the most critical factor in a likelihood of confusion analysis, it did not count here.

On balance, almost every one of the *Pizza Uno* factors favored HDD and the court granted summary judgment its favor, on the grounds that no jury could conclude there was actionable trademark infringement. Hmmm?

The court also dismissed the copyright case, holding that in order for HDD to create a workable parody it was essential to take enough, and no more, of Louis Vuitton's copyrighted property to conjure up images of Louis Vuitton in the minds of consumers. In other words, this was a fair use.

An interesting enough case that might have caused a less scrappy litigant to just bark or raise its hind leg in salute and walk away. As for me, I am wondering whether the court should have required a trier of fact to determine whether there was infringement or non-actionable parody, and not decide this matter on summary judgment.

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