FAKE IP CASES

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Abstract

A surprising number of intellectual property disputes involve “fake” IP – assertions of rights in items that do not fit well into the IP regime in which they find themselves. Some of these fake IP cases involve things that probably should not be protected by any sort of intellectual property right; many customer lists, for example, are claimed as trade secrets but likely deserve no protection whatsoever. Other cases involve situations in which the wrong IP right is asserted, as in the case of the structure and design of a traffic sign alleged to be protected by federal trademark law when the item clearly belongs in the patent realm.

In this essay, I trace the course of several high-profile fake IP cases and note that at very few point in these cases do any of the courts even acknowledge, much less address or discuss, the marginal nature of the claims asserted. One lesson to be learned from this may be nothing more than the old canard that bad facts make bad law. But beyond that, it would behoove courts to take note of the fake IP cases that come before them. When the item at issue falls at the edges of a particular right’s subject matter, it is much more likely that the suit is being brought for purely anti-competitive purposes, and those suits seem much more likely to disrupt the fragile détente between IP rights and competition law. Courts ought to evince some skepticism in these cases, point out the marginal nature of the rights asserted, and, perhaps, apply some doctrine more strictly.