

Case No. 16-1225

*In The Supreme Court of
the United States*

November Term, 2016

Pattel, Inc.,
Petitioner,

v.

Cammy Gardashyan,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE
FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENT

Team #105

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 42 U.S.C. §1973b and 1973l. The Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and issued an opinion June 5, 2016. This Court has jurisdiction under 42 U.S.C. §1973b(a)(5) and 28 U.S.C. §1254.

STATEMENT OF THE ISSUES

1. When a defendant's use of a plaintiff's mark results in a likelihood of confusion pursuant to § 1114 of the Lanham Act, and the mark is used in reference to the plaintiff, should a nominative fair use test be used?
2. In the absence of a statutory nominative fair use affirmative defense, should the court adopt the nominative fair use test as an affirmative defense or as a part of the likelihood of confusion analysis?
3. Assuming a nominative fair use test is adopted, how should the test be articulated and applied to the present case?

STATEMENT OF THE CASE

I. Factual Background

A. The Cammy Gardashyan Brand.

Cammy Gardashyan is a young entrepreneur who has worked hard to build her brand. In 2007, after several years in the entertainment industry, Ms. Gardashyan landed a television show entitled “Keeping Up with the Gardashyans.” The show was an unprecedented success. This success led to worldwide interest in Ms. Gardashyan’s personal life. Leveraging this attention, Ms. Gardashyan began to build her brand.

Ms. Gardashyan created a strong online and social media presence. She amassed tens of millions of followers on sites like Facebook, Twitter, and Instagram. As Ms. Gardashyan’s following grew, she began to release a variety of products tied to her mark. Millions of consumers have purchased products associated with the Cammy Gardashyan brand. The total earnings from Ms. Gardashyan’s personal brand exceed fifty million dollars.

Cammy Gardashyan is a household name. Ms. Gardashyan attracts fans from ages five to one hundred years old. She is in the headlines of entertainment news websites, television shows, and on social media daily. People of all ages recognize her. Cammy Gardashyan usually wears her hair long, black, and straight, and she is known for her “curvy” figure. Her signature style is known to include animal prints, knee-length skirts or dresses, and shiny high-heeled shoes. Ms. Gardashyan’s style has been recognized by many fashion magazines.

CG CAMMY GARDASHYAN™ is a trademark owned by Cammy Gardashyan. The Cammy Gardashyan mark consists of a stylized “CG” displayed back to back, and the words “CAMMY GARDASHYAN” appears underneath in capital letters and in standard, block typeface. Gardashyan uses the trademark to protect her lucrative personal brand, which she has built, in part, through several popular reality television shows. The goods and services that have been produced under the trademark include jewelry, clothing, cosmetics, perfumes, handbags, and footwear. These goods bear Gardashyan’s name and mark. Cammy Gardashyan’s fame is both national and worldwide.

B. The Fashionista Bambi Doll.

In 2014, Pattel, Inc. began to design the Fashionista Bambi Doll. Pattel, Inc. is a toy manufacturing company. When creating the Fashionista Bambi dolls, the Pattel designers looked to Cammy Gardashyan. The Fashionista Bambi doll has long, black, straight hair. The Bambi doll is dressed in Cammy Gardashyan’s signature style. The Bambi doll wears a leopard print top, knee-length skirt, and sparkly high-heeled shoes. Furthermore, the doll has a talking feature. When the doll speaks it declares: “I want to be a fashionista, just like Cammy Gardashyan.” The same text is featured on the front of the Bambi Doll box in 20pt font. While the box also states “Pattel, Inc. and Fashionista Bambi are not sponsored by or affiliated with Cammy Gardashyan,” that text is confined to the back lower portion of the box, in small, ten point font.

Pattel routinely designs dolls inspired by modern-day movie and television stars, musicians, and fashion models. To enhance profitability, Pattel follows a yearly practice of analyzing and assessing market trends for its toy products. In 2015 Pattel used this practice in order to design the top-selling Bambi doll for that year. Seeing Cammy Gardashyan's dramatic rise in fame following her 2014 televised wedding, Pattel decided that the 2015 Bambi doll was going to be "inspired" by Cammy Gardashyan.

On January 2015, the Fashionista Bambi doll was released for sale nationwide. Cammy Gardashyan did not authorize Pattel's use of her name and mark. Within the twelve months that the Fashionista Bambi dolls were manufactured, Pattel had successful profits of forty-five million dollars just from the thirty-five million Fashionista Bambi dolls it sold that year.

II. Procedural History

Gardashyan filed suit seeking a permanent injunction against Pattel on February 9, 2015. Gardashyan argued that the use of her her mark "Cammy Gardashyan" constituted trademark infringement. The District Court for the Central District of Bel Air granted Pattel summary judgment on all counts, holding that Pattel's use of the names and marks constituted a nominative fair use. The court found there was a likelihood of confusion, but that Pattel is nonetheless entitled to a nominative fair use affirmative defense.

The Fourteenth Circuit Court of Appeals reversed. The court first found that the nominative fair use analysis should be part of the likelihood of confusion

inquiry rather than an affirmative defense. The court then held that the plaintiff bears the burden of proving likelihood of confusion and in nominative fair use cases, additional factors will be used to analyze whether the defendant's use constitutes a nominative fair use.

From this decision, the Supreme Court granted certiorari.

III. Circuit Split

Among the circuits that have considered the question, there is a circuit split on the proper analysis to use in nominative fair use cases. The Third Circuit recognizes nominative fair use as an affirmative defense, even after a plaintiff has shown likelihood of confusion. See *Century 21 Real Estate Corp. v. Lendingtree, Inc.*, 425 F.3d 211, 222 (3d Cir. 2005). The Second, Fifth, and Fourteenth Circuits all analyze nominative fair use cases as part of the likelihood of confusion inquiry. See, e.g., *Int'l Info. Sys. Sec. Certification Consortium, Inc. v. Sec. Univ., LLC*, 823 F.3d 153 (2d Cir. 2016); *Bd. of Supervisors for Louisiana State Univ. Agric. & Mech. Coll. v. Smack Apparel Co.*, 550 F.3d 465 (5th Cir. 2008); *Gardashyan v. Pattel, Inc.*, 1135 F.3d 759 (14th Cir. 2016). The Ninth Circuit has instead chosen to replace its likelihood of confusion test with a nominative fair use test in these cases. See *New Kids on the Block v. News Am. Pub., Inc.*, 971 F.2d 302 (9th Cir. 1992).

The First and Fourth Circuits have noted the divergent approaches but declined to take a position. See *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 424 (1st Cir. 2007) (declining to take a position on whether to adopt a

nominative fair use analysis, but noting that the First Circuit has recognized the principles underlying nominative fair use analysis); *Swarovski Aktiengesellschaft v. Bldg. No. 19, Inc.*, 704 F.3d 44, 53 (1st Cir. 2013) (noting the different approaches to nominative fair use doctrine and declining to take a position on whether it should be used as part of the plaintiff's case-in-chief or as an affirmative defense); *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 155 (4th Cir. 2012) (“[W]e are not adopting a position about the viability of the nominative fair-use doctrine as a defense to trademark infringement or whether this doctrine should formally alter our likelihood-of-confusion test in some way.”).

SUMMARY OF THE ARGUMENT

There is no need for a separate nominative fair use test because the likelihood of confusion analysis sufficiently addresses the preeminent concern in nominative fair use cases that the defendant's use of the alleged infringing trademark will cause consumer confusion. The likelihood of confusion factors are flexible, and can easily be adapted to handle nominative fair use cases.

If this Court decides to adopt a nominative fair use test, it should adopt the Fourteenth Circuit's test analyzing nominative fair use cases under a likelihood of confusion analysis. This would be consistent with the Lanham Act and would address the unique concerns posed in nominative fair use cases. Creating a affirmative defense would be inconsistent with the Lanham Act. Congress explicitly provided affirmative defenses within the Lanham Act. If Congress desired to

provide greater protections for nominative fair use, then Congress would have done so. Concerns of equity weigh against the courts affording the defendants greater equity,

Under the Fourteenth Circuit test, Gardashyan has satisfied her burden of proof that there is a likelihood of confusion resulting from Pattel's use of the mark. The record shows Pattel intentionally created a doll that consumers would recognize as Gardashyan, and featured Gardashyan's mark prominently on front of the doll box. The use of Gardashyan's mark was not necessary, and would likely confuse consumers. Thus, this Court should affirm the Fourteenth Circuit's decision.

STANDARD OF REVIEW

Determining what test are proscribed by the Lanham Act is a question of statutory interpretation, and therefore a question of law. *See Chandris, Inc. v. Latsis*, 515 U.S. 347, 369 (U.S. 1995) (Stating that statutory interpretation is a question of law). Questions of law are reviewed de novo. *Pierce v. Underwood*, 487 U.S. 552, 558 (U.S. 1988).

ARGUMENT

I. This Court Should Not Adopt A Nominative Fair Use Test.

A. The Likelihood Of Confusion Analysis Is Sufficient To Address The Concerns Raised In Nominative Fair Use Cases.

Under the likelihood of confusion analysis, courts consider whether the defendant's use of the allegedly infringing mark is likely to cause confusion among consumers. *See Gardashyan v. Pattel, Inc.*, 1135 F.3d 759 (14th Cir. 2016). Courts consider a variety of factors pursuant to this analysis, usually including the following: (1) strength of the trademark; (2) similarity of the marks; (3) proximity of the products and their competitiveness with one another; (4) evidence that the senior user may "bridge the gap" by developing a product for sale in the market of the alleged infringer's product; (5) evidence of actual consumer confusion; (6) evidence that the imitative mark was adopted in bad faith; (7) respective quality of the products; and (8) sophistication of consumers in the relevant market. *Int'l Info. Sys. Sec. Certification Consortium, Inc. v. Sec. Univ., LLC*, 823 F.3d 153, 160 (2d Cir. 2016) (citing *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492 (2d Cir. 1961)). Under this analysis, no single factor is dispositive and the test is focused on whether there is a likelihood of confusion under the totality of the circumstances. *Id.* at 160-61.

Even with the protection afforded against trademark infringement, there are two possible ways that a defendant's use can be considered "fair use": (1) classic fair use where the defendant uses the plaintiff's mark to describe the defendant's own product, and (2) nominative fair use where the defendant uses the plaintiff's mark

to identify the plaintiff's product. *Id.* at 358; *see also Swarovski Aktiengesellschaft v. Bldg. No. 19, Inc.*, 704 F.3d 44, 49 (1st Cir. 2013) (noting that confusion in trademark infringement cases can take the form of confusion about source of the product or good (classic fair use) or confusion about endorsement or affiliation (nominative fair use)); *Int'l Info. Sys. Sec. Cert. Consortium, Inc. v. Sec. Univ., LLC*, 823 F.3d 153, 161 (2d Cir. 2016) (observing that the two types of confusion relevant to infringement claims are confusion as to source and confusion as to sponsorship, affiliation, or connection).

Thus, even though nominative fair use operates differently, it is, at its core, concerned with the same outcome as classic fair use: the confusion of consumers. *See Swarovski*, 704 F.3d at 49. All of the factors considered under the likelihood of confusion test are directed toward assessing whether the defendant's use of the mark is likely to confuse consumers under the totality of the circumstances. These factors can easily be adapted to assessing confusion about the source of a mark as well as confusion as to the plaintiff's affiliation with the mark. For example, evidence of actual consumer confusion would reveal that the defendant's use of the mark did not properly explain the relationship between the plaintiff and defendant. Further, if the trademark at issue is strongly associated with the plaintiff and the defendant's mark is very similar to that of the plaintiff but does not include a disclaimer explaining that the plaintiff is not affiliated with the good or service, consumer confusion would be more likely.

The Sixth Circuit adopted this approach in *PACCAR Inc. v. TeleScan Techs, L.L.C.*, 319 F.3d 243 (6th Cir. 2003), concluding that a finding of a likelihood of confusion precludes a fair use defense. *See also Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 791 (5th Cir. 1983) (stating that under the fair use defense, “anyone is free to use the term in its primary, descriptive sense so long as such use does not lead to customer confusion as to the source of the goods or services”).

This decision is consistent with both the plain language and intent of the Lanham Act. The Lanham Act is concerned with the likelihood of confusion resulting from a defendant’s use of another’s trademark. The plain language of the statute addresses uses that are “likely to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1114 (2012). Thus, in order for a plaintiff to prevail on a trademark infringement claim, he or she must show that the defendant’s use of the trademark is likely to cause confusion. *See Prestonettes, Inc. v. Coty*, 264 U.S. 359, 368 (1924) (Holmes, J.) (“When the mark is used in a way that does not deceive the public we see no such sanctity in the word as to prevent its being used to tell the truth. It is not taboo.”).

II. Any Nominative Fair Use Test Adopted Should Be Addressed Within the Likelihood of Confusion Analysis.

A. Congress Did Not Include Nominative Fair Use As An Affirmative Defense.

The Lanham Act does not include a nominative fair use as an affirmative defense. In comparison, the plain language of the statute provides for several

different affirmative defenses available for a defendant's use, including a fair use, or classic fair use, affirmative defense. *See* 15 U.S.C 1115(b)(4) (a defendant's use of a trademark is protected if it is "descriptive of and used fairly and in good faith only to describe the goods or services of such party"). Thus, Congress has proven that it knows how to explicitly provide an affirmative defense when it so desires.

This court should assume that if Congress intended provide an affirmative defense for nominative fair use, then Congress would have expressed that desire in the text of the statute. *See Fmc Corp. v. Holliday*, 498 U.S. 52, 66 (1990) ("If Congress had intended such an irrational result, surely it would have expressed it in straightforward English."). The judiciary has a duty not to add substance to a statute when Congress has decided to leave it out. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). Thus, if this Court should adopt a nominative fair use test, it should not do so as an affirmative defense because Congress chose not to include nominative fair use an affirmative defense.

B. The Third And Ninth Circuit Approaches Are Misguided.

1. The Third Circuit's Reliance On KP Permanent Makeup To Support A Nominative Fair Use Affirmative Defense Is Misguided Because KP Permanent Make-up Addresses Only Classic Fair Use, Not Nominative Fair Use.

In *KP Permanent Make-up*, this Court considered whether the Plaintiff's use of the Defendant's mark constituted trademark infringement. 543 U.S. 111 (2004). Specifically, the Court addressed whether a party raising the statutory affirmative defense of fair use has a burden to negate any likelihood of confusion about the origin of the goods or services affected. *KP Permanent Make-Up*, 543 U.S. at 114.

This Court held that it was improper for the Ninth Circuit to require the defendant to prove no likelihood of confusion. *Id.* at 124. This Court first noted that “Congress said nothing about likelihood of confusion in setting out the elements of the fair use defense.” *Id.* at 118. Further, Congress was intentional in its phraseology, describing the burden of the trademark holder as showing the mark is “likely to cause confusion, or to cause mistake, or to deceive,” and describing the affirmative defense of fair use showing the mark was “used fairly.” *Id.* This language does not indicate any intent to place an affirmative burden on the defendant to negate the likelihood of confusion.

This Court then rejected the plaintiff’s argument that the “used fairly” language was meant to incorporate the likelihood of confusion test from the common law of unfair competition, noting that even under this common law, some confusion regarding the use of works from another’s trademark was allowed. *Id.* at 119. Further, the fact that likelihood of confusion should be taken into consideration in the analysis in no way suggests that “an assessment of confusion may be dispositive” or that a defendant should be required to negate it entirely. *Id.* at 119-20. In so holding, this Court merely explained the nature of an affirmative defense.

Thus, the Third Circuit’s reliance on *KP Permanent Make-up* to support its conclusion that nominative fair use may be used as an affirmative defense was misguided. *See Century 21 Real Estate Corp. v. Lendingtree, Inc.*, 425 F.3d 211 (3d Cir. 2005). In *Century 21*, the Third Circuit established a two-part test to use in nominative fair use cases, with the plaintiff bearing the burden of proving there is a

likelihood of confusion, after which the burden shifts to the defendant to show that its nominative use of plaintiff's mark is nonetheless fair. *Id.* at 221. The Third Circuit reasoned that because *KP Permanent Make-up* recognized that the plaintiff's burden is to show likelihood of confusion and the defendant's only burden is to prove its affirmative defense of fair use, then the same analysis applies in nominative fair use cases. *Id.*

As outlined above, the Third Circuit's reliance on *KP Permanent Make-up* to support this proposition is misplaced. The *KP Permanent Make-up* Court only addressed the classic fair use defense, which is explicitly addressed in the text of the Lanham Act. Thus, this holding should be interpreted as applying only to classic fair use cases. Further, while addressing the use of a classic fair use defense, this Court specifically noted that "Congress said nothing about likelihood of confusion in setting out the elements of the fair use defense in § 1115(b)(4)," *id.* at 118, and concluded that the defendant should not be required to show non-confusion, *id.* at 119-20.

2. The Ninth Circuit's Approach Eliminating The Likelihood of Confusion Analysis to Only Consider a Nominative Fair Use Test Is Misguided.

The Ninth Circuit has adopted a test in which nominative fair use analysis replaces the likelihood of confusion analysis in nominative fair use cases. *See New Kids on the Block v. News Am. Pub., Inc.*, 971 F.2d 302 (9th Cir. 1992); *Cairns v. Franklin Mint Co.*, 292 F.3d 1139 (9th Cir. 2002). To qualify for protection as a nominative fair use, there are three requirements: (1) the product or service in question must be one not readily identifiable without use of the trademark; (2) only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and (3) the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder. *New Kids on the Block*, 971 F.2d at 308.

In *Playboy Enterprises, Inc. v. Welles*, the Ninth Circuit explained its approach as recognizing that because nominative fair use involves a defendant using a trademark that is identical to the plaintiff's mark, applying the likelihood of confusion analysis with its focus on the similarity of the marks "would lead to the incorrect conclusion that virtually all nominative uses are confusing." 279 F.3d 796, 801 (9th Cir. 2002). Thus, the court seemed to reason that the likelihood of confusion test would disadvantage the defendant when applied in nominative fair use cases "by making confusion an all but foregone conclusion." *See Century 21*, 425 F.3d at 220 (analyzing the Ninth Circuit's analysis).

While this approach correctly recognizes the need for additional factors that can be used to evaluate the unique nature of nominative fair use cases, its elimination of the likelihood of confusion analysis misses the mark. The Ninth Circuit mischaracterized the function of the likelihood of confusion analysis. Both nominative fair use and classic fair use recognize that even when there is the possibility of confusion, a defendant's use of a mark may nonetheless be "fair."

Thus, the likelihood of confusion analysis is not designed to lead to the conclusion that virtually nominative uses are confusing, but rather to evaluate the likelihood that the defendant's use will lead to consumer confusion, which the Lanham Act is directed toward preventing. Thus, the court adopted this approach in an attempt to deal with the unique nature of nominative fair use cases in which a defendant uses a plaintiff's mark to describe the plaintiff's own mark in recognition that there are some situations where a trademark has become the most informative name for the product referenced.

3. Concerns of Equity Weigh Against Allowing Nominative Fair Use As An Affirmative Defense.

In trademark infringement cases, the plaintiff bears the burden of proving a likelihood of consumer confusion. Since this is the only requirement spelled out in the Lanham Act, once a plaintiff has satisfied this burden of proof, the defendant should not be allowed "a second bite at the apple" by asserting an affirmative defense. The defendant will have ample opportunity to rebut the plaintiff's showing that there is a likelihood of confusion during its case in chief without having the benefit of an additional opportunity to raise such arguments

through an affirmative defense. Such an approach would afford defendants broader protection than that which is provided under the Lanham Act. *See Gardashyan*, 1135 F.3d at 361.

III. Evaluating Nominative Fair Use Cases As Part Of The Likelihood Of Confusion Inquiry Is Well-Adapted To Addressing The Concerns Raised In Nominative Fair Use Cases.

The Second Circuit has thus far been the leader in arguing that nominative fair use cases are best addressed as part of the likelihood of confusion analysis. *See, e.g., Int'l Info. Sys. Sec. Certification Consortium, Inc.*, 823 F.3d at 168. In *International Information Systems*, the Second Circuit considered whether the defendant's use of the plaintiff's certification mark (CISSP®), used to certify that an information systems security professional met plaintiff's requirements for competency, constitute infringement. 823 F.3d at 156-57. The defendant Security University offered classes providing information security training and ran ads in which one of the teachers was described as Master CISSP. *Id.* at 157. The court first reasoned that many of the likelihood of confusion factors do not fit in nominative fair use cases and then concluded that to remedy this defect, additional factors specifically addressing nominative fair use should be added to the analysis. *Id.* at 168.

The Fifth Circuit has also incorporated its nominative fair use analysis into the likelihood of confusion inquiry. *See Bd. of Supervisors for Louisiana State Univ. Agric. & Mech. Coll. v. Smack Apparel Co.*, 550 F.3d 465, 489 (5th Cir. 2008) (noting that while it usually requires that nominative fair use be considered as part of the

likelihood of confusion analysis, “we have declined to require any particular method for the consideration in cases where the nominative use is not a significant factor in the liability determination).

IV. The Fourteenth Circuit’s Test For Nominative Fair Use Cases Should Be Adopted, And Gardashyan Has Satisfied Her Burden Of Proof.

A. The Fourteenth Circuit’s Test Adequately Addresses Both The Likelihood Of Consumer Confusion And The Need To Allow Appropriate Nominative Fair Use.

The Fourteenth Circuit likewise adopted a test in which nominative fair use cases are analyzed using a combination of factors designed to assess the likelihood of confusion and the possibility that the defendant’s use of the mark was nominative. In nominative fair use cases, the Fourteenth Circuit considers eleven factors to analyze whether there is a likelihood of confusion:

- (1) strength of the trademark;
- (2) similarity of the marks;
- (3) proximity of the products and their competitiveness with one another;
- (4) evidence that senior use may bridge the gap by developing a product for sale in the market of the alleged infringer’s product;
- (5) evidence of actual consumer confusion;
- (6) evidence that imitative mark was adopted in bad faith;
- (7) respective quality of the products;
- (8) sophistication of consumers in the relevant market;
- (9) whether the use of the plaintiff’s mark is necessary to describe (a) plaintiff’s product or service and (b) defendant’s product or service;
- (10) whether the quantum of the plaintiff’s mark used by the defendant was appropriate; and
- (11) whether the defendant’s conduct or language reflects the true and accurate relationship between the plaintiff and defendant’s products or services.

Gardashyan, 1135 F.3d at 363-64.

This test is an appropriate reflection of the Lanham's Act central concern with consumer confusion and the recognition that nominative fair use is appropriate in some circumstances. The first eight factors are derived from the traditional likelihood of confusion analysis. *See Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97, 115 (2d Cir. 2009). The final three factors are designed specifically to address the unique nature of nominative fair use cases while still balancing the need to prevent consumer confusion.

Under the first of these factors, the inquiry is balanced in examining whether both the plaintiff and the defendant need the mark to describe their products. Significantly, as the Third Circuit noted in *G.D. Searle & Co. v. Hudson Pharmaceutical Corp.*, this prong does not require that the court find the mark is indispensable to either party to conclude that it is necessary. 715 F.2d 837, 842 (3d Cir. 1983). The second prong is designed to ascertain whether the defendant appropriately circumscribed its use of the plaintiff's mark, tailoring the use to only that which is necessary to describe the product. *Gardashyan*, 1135 F.3d at 364-65. The third factor "focuses on what the defendant did to suggest sponsorship," and involves (1) analyzing the defendant's failure to either state or explain some aspect of the relationship, and (2) if there is a disclaimer, whether the disclaimer accurately portrays the relationship between the plaintiff and defendant. *Id.* at 365.

B. Gardashyan Has Satisfied Her Burden Of Proof Under The Fourteenth Circuit's Likelihood Of Confusion Analysis For Nominative Fair Use Cases.

Here, Gardashyan has satisfied her burden of proof that Pattel's use of her name and mark on the Fashionista Bambi doll created a likelihood of confusion that the doll was affiliated with Gardashyan herself. Gardashyan has dedicated several years to building the strength of her brand, most prominently embodied in her unique signature style. The Fashionista Bambi doll intentionally designed the doll to resemble Gardashyan and prominently displayed language on the box that when the doll speaks, it says "I want to be a fashionista, just like Cammy Gardashyan." This sends a message to consumers, confirming that the resemblance of the doll to Gardashyan is in fact intentional, which is especially true given the prominent placement and large size of this text.

With regard to the nominative fair use factors, the use of Gardashyan's signature style is necessary to identify Gardashyan and her brand. It is not however necessary to identify the defendant's Fashionista doll since the defendant could certainly create a fashionista doll without intentionally invoking the image that Gardashyan has worked so hard to maintain. Further, the amount of Gardashyan's mark that Pattel used is inappropriate.

Finally, while the defendant included a disclaimer, it is not sufficient to effectively communicate the relationship between Gardashyan and the doll. This is best evidenced in contrasting the placement of the message using Gardashyan's name with the placement of the disclaimer. While the former is featured prominently on the front of the box in twenty-point font, the former is placed on the back of the box at the bottom in ten-point font. Thus, a consumer

would have to work much harder to both identify and read the disclaimer to comprehend the true nature of the relationship between Gardashyan and the doll, while all of the doll's features and the message prominently displayed on the front of the box communicate to a consumer instantly that the doll is affiliated with Gardashyan.

CONCLUSION

The Court of Appeal's decision should be affirmed.

Dated: October 26, 2016

Respectfully submitted,
s/ Team #105

Team #105
Counsels for Plaintiff-Respondents

CERTIFICATE OF COMPLIANCE

Pursuant to the Competition Guidelines:

We certify that this brief complies with the typeface requirements and the type style requirements because it has been prepared in a proportionally spaced typeface, 12-point Century Schoolbook, using Microsoft Word 2013.

We further certify that this brief complies with the volume limitation imposed because, excluding the parts of the brief exempted, this brief contains [4608] words.

We further also certify that the electronic version of this brief we submitted is identical to the paper copy we submitted.

We further certify that, consistent with written competition, we have not prepared this brief with the assistance of a third party.

s/ Team #105

Dated: October 25, 2016