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source

### Elements of trademark infringement

(regular passing-off theory)

- 1. The plaintiff owns
- 2. a valid trademark, and
- 3. that mark or a similar symbol was used by the defendant in commerce in connection with the sale, offering for sale, distribution or advertising of any goods or services
- 4. resulting in a likelihood of confusion

#### Likelihood of confusion factors

- Fed: the DuPont factors
- 1st: the Pignons factors
- 2d: the Polaroid factors
- 3d: the Lapp factors
- 4th: the Pizzeria Uno factors
- 6th: the Frisch factors
- 8th: the SquirtCo factors
- 9th: the Sleekcraft factors

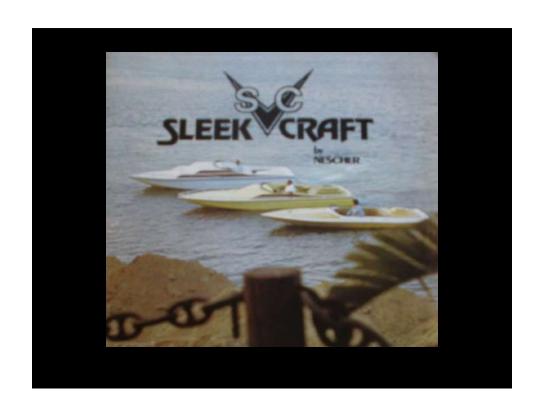
Different circuits have different lists of factors ...

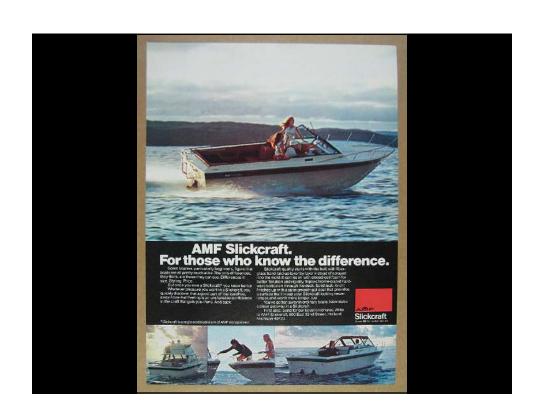
> but substantively, it's all essentially the same analysis.

[shown-in-class images of Polaroid and Polarad products omitted from this print-out]

[shown-in-class image of Squirt soda can omitted from this print-out]

"Squirt"
"Quist"





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Notwithstanding the circuits' slightly different lists, here's a synthesized list you can use ...

# Likelihood of confusion factors (synthesized list)

- the strength of plaintiff's mark
- similarity between plaintiff's and defendant's marks
- the proximity of the products in the marketplace
- the likelihood that the senior user will bridge the gap by beginning to sell in the market of the defendant's product
- evidence of actual confusion
- the sophistication of consumers in the relevant market
- defendant's good faith (or lack thereof) in adopting its own mark
- the quality of the defendant's product

inherently distinctive	fanciful arbitrary suggestive		misdescriptive	inherently distinctive product packaging	
can acquire distinctiveness	merely descriptive	primarily geographically descriptive	deceptively misdescriptive	non-inherently distinctive product packaging product design color	primarily a surname
unprotectable	generic	primarily geographically deceptively misdescriptive	deceptive	functional	names/likenesses of living people without consent gov't symbols

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## **SONY**

- sells consumer electronics
- the brand familiar to you

## **PONY**

 for an electronic 3-D terrain navigation and horsehealth monitoring device for horse riders that costs \$9,000 per unit