

In the
Supreme Court of the United States

ERIK M. UNDERWOOD and
MY24HOURNEWS.COM, INC.,

Petitioners,

v.

BANK OF AMERICA CORPORATION,

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In determining whether a person has established ownership rights in a trademark or service mark in connection with services provided on a website, the Tenth Circuit has held that the person must show, among other things, that the use of the mark clearly identified and distinguished the services offered on the website. The questions presented are:

1. Whether courts, in determining if use of a trademark is associated with an online service, are required to consider all of the evidence in context as a whole instead of considering each piece of evidence in isolation.
2. Whether a court must consider evidence of how a website's mark is associated with the website's service in search engine results when the trademark owner intentionally codes its site to create the association in a consumer's search engine results.

PARTIES TO THE PROCEEDINGS

Petitioners and Plaintiffs-Appellants below

Erik M. Underwood

My24HourNews.com, Inc.

Respondent and Defendant-Appellee below

Bank of America Corporation

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners Erik Underwood and My24HourNews.com, Inc., state that Petitioner Erik Underwood is a natural person and there is no parent or publicly held company owning 10% or more of Petitioner My24HourNews.com, Inc. or any parent company.

LIST OF PROCEEDINGS

The proceedings directly related to this petition are:

Underwood v. Bank of America Corp., No. 22-1402 (10th Cir. 2024) (Apr. 18, 2024)

Underwood v. Bank of America Corp., No. 1:18-cv-02329-RM-MEH (D. Colo. 2022) (Aug. 9, 2022)

Underwood v. Bank of America Corp., Nos. 19-1349, 20-1087 (10th Cir. 2021) (Apr. 30, 2021)

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Tenth Circuit is reported at 2024 U.S.P.Q.2d 727 and is also available at 2024 U.S. App. LEXIS 9446 and 2024 WL 1670592. (App.1a) The opinion of the district court is not reported but is available at 2022 U.S. Dist. LEXIS 141811 and 2022 WL 3212929. (App.15a). The prior opinion of the court of appeals in this case, which remanded the case to the district court, is reported at 996 F.3d 1038. (App.48a).



JURISDICTION

The Court of Appeals for the Tenth Circuit issued its order and judgment on April 18, 2024. The Court of Appeals for the Tenth Circuit denied Underwood's timely petition for rehearing on May 28, 2024. (App.54a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).



STATUTORY PROVISIONS INVOLVED

15 U.S. Code § 1127 – Construction and definitions

[. . .]

The term “**trademark**” includes any word, name, symbol, or device, or any combination thereof—

- (1) used by a person, or
- (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter,

to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.

The term “**service mark**” means any word, name, symbol, or device, or any combination thereof—

- (1) used by a person, or
- (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter,

to identify and distinguish the services of one person, including a unique service, from the services of others and to indicate the source of the services, even if that source is unknown. Titles, character names, and other distinctive features of radio or television programs may be

registered as service marks notwithstanding that they, or the programs, may advertise the goods of the sponsor.

[. . .]



STATEMENT OF THE CASE

It is well established that trademark rights are established through use of a mark in commerce. *Iancu v. Brunetti*, 588 U.S. 388, 421 (2019) (“Rights to a trademark itself arise through use, not registration.”); *Hana Fin., Inc. v. Hana Bank*, 574 U.S. 418, 419 (2015) (“Rights in a trademark are determined by the date of the mark’s first use in commerce.”). For this reason, courts are frequently required to decide between competing claims of first use of a mark in commerce. This involves the question of what types of use are sufficient to establish rights in a mark.

Trademark owners employ a diverse myriad of methods to use their mark in commerce and associate with their product or service in the minds of consumers with their selected mark. The “front door” for consumers to walk through to interact with online services allow for a variety of new ways for trademark owners to present their mark to consumers and associate their services with their selected mark. Afterall, there is no rigid requirement for how a mark must be used to establish such rights, or what evidence a mark owner must present to prove it had established those rights. *See, e.g., In re Sones*, 590 F.3d 1282, 1289 (Fed. Cir. 2009) (rejecting the application of a “rigid, bright-line rule”). Indeed, the Lanham Act—the federal trademark

statute—does not require that a mark owner use the mark in any specific way. Instead, it provides mark owners flexibility by only requiring that the mark be used “to identify and distinguish the services of one person, including a unique service, from the services of others and to indicate that the source of the services, even if that source is unknown.” 15 U.S.C. § 1127.¹

In the absence of specific statutory guidance, courts have established standards for determining whether use of a mark is sufficient to establish rights in the mark. Until recently, every court of appeals that considered the standard for weighing evidence of first use has agreed that this inquiry requires looking at all evidence *together*. *See, e.g., W. Fla. Seafood, Inc. v. Jet Rests., Inc.*, 31 F.3d 1122, 1125-26 (Fed. Cir. 1994) (“[O]ne should look at the evidence as a whole, as if each piece of evidence were part of a puzzle which, when fitted together, establishes prior use.”); *New W. Corp. v. NYM CO. of Cal.*, 595 F.2d 1194, 1200 (9th Cir. 1979) (noting that all prior use must be “taken together.”).

This mode of analysis is consistent with the very purpose of trademark laws: to protect the ability of consumers to distinguish among competing producers. *United States Patent & Trademark Office v. Booking.com B.V.*, 591 U.S. 549, 566 (2020). For that reason, the meaning of a mark is “viewed through the eyes of a consumer.” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 974 (Fed. Cir. 2018). And

¹ Petitioner has relied on the definition of “service mark” because this case involves the provision of services. The definition of trademark, which is used in connection with the provision of goods, is similar. Except for this distinction, the terms “trademark” and “service mark” are generally used interchangeably.

consumers view marks in the context in which they are used. For example, considering all evidence together allows courts to recognize “clear interrelationships” that would impact a consumer’s understanding of a mark. *W. Fla. Seafood*, 31 F.3d at 1126.

This framework also provides trademark owners with the flexibility of design choices and marketing options when selecting and positioning their mark in the minds of a consumer. Allowing a trademark owner flexibility accounts for overt commercial use, and more subtle commercial use, of a mark in association with a service. The 10th Circuit’s approach, unfortunately, favors the overt user at the expense of a user that opts for more subtle, muted or restrained approach to the presentation of one’s mark with an associated service.

In its two opinions in this case, however, the Tenth Circuit deviated from the course charted by every other court of appeals that has considered the issue. The question before the Tenth Circuit was whether Petitioners had established rights in the ERICA mark by using it in connection with services provided on Petitioner’s website before Respondent adopted its own Erica mark. But the Tenth Circuit not only considered the statements on the website in isolation rather than in the context it would be viewed by a consumer, but also refused to consider evidence of how Petitioners advertised and/or described their services on a search engine. This led to an analysis devoid of context whose conclusions contradicted themselves and other record evidence.

I. Background

Petitioners began using their ERICA mark on the www.my24erica.com website at least as early as 2015.

Petitioner specifically used the mark to describe the source of the search engine and personal assistant services available on the My24Erica.com website, thereby establishing common law rights in the ERICA mark.

Respondent subsequently adopted the name Erica for its online personal assistant. Petitioners filed this action for trademark infringement to protect their rights in the ERICA mark. Respondent moved for summary judgment, arguing that Petitioners failed to establish protectable rights in the ERICA mark before Respondent adopted its mark. The district court granted summary judgment against Petitioners, ruling that Petitioners could not establish priority in the ERICA mark. On appeal, the Tenth Circuit ruled that in order to establish priority, Petitioners were required to show, as relevant to this appeal, that the ERICA mark “as it appeared on the [] website display, clearly identified and distinguished the services offered on the website.” *Underwood v. Bank of Am. Corp.*, 996 F.3d 1038, 1057 (10th Cir. 2021) (“*Underwood I*”). The case was remanded to the district court for further proceedings.

On remand, Petitioners identified several statements on the My24Erica.com website that showed the connection between the ERICA mark and the search engine and personal assistant services offered on the website. Petitioners also identified certain website code that caused search engines such as Google to describe ERICA as a search engine and personal assistant application. The district court nonetheless granted summary judgment against Petitioners, finding that Petitioners could not establish a connection between the ERICA mark and the services offered on the website, and Petitioners again appealed. The court of appeals affirmed

the district court’s decision. *Underwood v. Bank of Am. Corp.*, 2024 U.S.P.Q.2d 727, 2024 U.S. App. LEXIS 9446 (10th Cir. 2024) (“*Underwood II*”).

II. The Tenth Circuit Adopted a Context-Free Test That The Court Should Reject

In denying Petitioner’s appeal, the Tenth Circuit considered each piece of evidence in isolation, leading to an internally-inconsistent result and creating a circuit split with every other court of appeals that has considered the proper way to examine evidence of priority. The Court should step in and resolve the circuit split to preserve the uniformity of the trademark laws.

In its decision, the Tenth Circuit focused primarily on two statements on the My24Erica.com website. It concluded that the first statement used the ERICA mark to refer to an aspirational search engine application that was not available, while the second statement used the ERICA mark to refer to a person named Erica that was providing curated movie suggestions. *Underwood II*, 2024 U.S. App. LEXIS 9446, at *9-11. But the Tenth Circuit refused to consider how a consumer would understand the use of ERICA when these statements were considered together, much less how they would be understood in the context of the other record evidence.

In other words, the Tenth Circuit here did exactly what other courts of appeal have found is improper: “dissect[ing] the evidence to the point it refused to recognize, or at least it overlooked, the clear interrelationships existing between the several pieces of evidence submitted.” *West Fla. Seafood*, 31 F.3d at 1126. It did not consider all the evidence “taken together.” *New W. Corp.*, 595 F.2d at 1201. It did not “look at the

evidence as a whole, as if each piece of evidence were part of a puzzle.” *West Fla. Seafood*, 31 F.3d at 1125-26. And it did not consider the “clear interrelationships existing between the several pieces of evidence submitted” or consider the evidence “in light of the evidence as a whole, rather than individually.” *Id.* At 1126.

This case demonstrates the problems with the Tenth Circuit’s context-free approach. Even with respect to the evidence it considered, the Tenth Circuit’s decision arrives at two inconsistent conclusions: it relied on a statement that ERICA described a service to conclude that ERICA mark must describe a service that was not yet available, *Underwood II*, 2024 U.S. App. LEXIS 9446, at *9-10, and it relied on a statement showing that ERICA described services actually provided on the website to conclude that the ERICA mark must refer to a person named ERICA, *id.* at *11. But the first statement contradicts the second conclusion, and the second statement contradicts the first conclusion. Taken together, these statements prove Petitioner’s ownership of the ERICA mark: they show that the ERICA mark was used to identify a service that was being provided on the My24Erica.com website.

The other evidence submitted by Petitioners further undermines the Tenth Circuit’s conclusion. For example, the Tenth Circuit considered certain statements on the My24Erica.com website as allegedly showing that ERICA referred to an aspirational service that was still in development. *Id.* at *9-10. But it refused to consider how these statements would be understood in view of other statements on the same webpage explaining that “[t]his movie and multimedia database search engine and social media platform is just the

beginning of ERICA” and inviting users to “enjoy using ERICA!”

ERICA, is an artificial intelligence mobile search engine that infuses software and holographic digital technology seamlessly together; to create an environment where your digital device is alive and interactive with the consciousness of E.R.I.C.A. Currently, ERICA is in further development to implement the full vision on mobile and search engines to verbally tell you information and deliver entertainment news, restaurant reviews, financial updates, and so much more. This movie and multimedia database search engine and social media platform is just the beginning of ERICA.

From My24HourNews.Com, enjoy using ERICA!

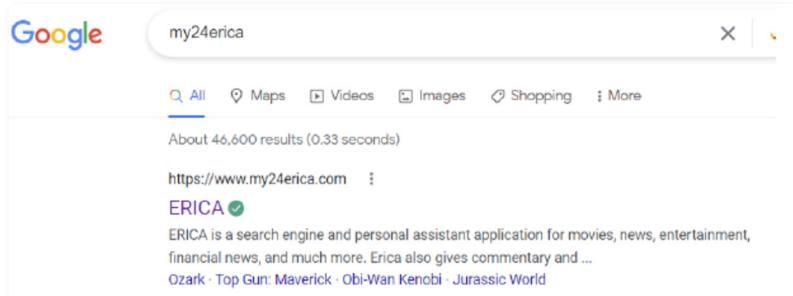
TEXT FROM MY24HOURNEWS.COM WEBSITE

Transcription:

ERICA, is an artificial intelligence mobile search engine that infuses software and holographic digital technology seamlessly together; to create an environment where your digital device is active and interactive with the consciousness of E.R.I.C.A. Currently, ERICA is in further development to implement the full vision on mobile and search engines to verbally tell you information and deliver entertainment news, restaurant reviews, financial updates, and so much more. This movie and multimedia database search engine and social media platform is just the beginning of ERICA.

From My24HourNews.Com, enjoy using ERICA!

(App.60a-61a). The Tenth Circuit also failed to evidence showing that search engines described ERICA as “a search engine and personal assistant application . . .”



GOOGLE SEARCH ON THE TERM “MY24ERICA”

Transcription:

Google my24erica

About 46,600 results (0.33 seconds)

<https://www.my24erica.com>

ERICA

ERICA is a search engine and personal assistant application for movies, news, entertainment, financial news, and much more. Erica also gives commentary and . . .

(App.58a). This further evidence flatly contradicts the inferences the Tenth Circuit drew from the specific and isolated statements addressed in the opinion below.

The Tenth Circuit could only have reached its conclusions in this case by considering each statement individually, devoid of context that would show contradictions between those conclusions and the submitted evidence. As every other court of appeals that has considered this issue has agreed, this approach was improper. *See W. Fla. Seafood*, 31 F.3d at 1125 (“[W]hether a particular piece of evidence by itself establishes prior use is not necessarily dispositive as to whether a party has established prior use . . .”).

III. The Tenth Circuit Improperly Disregarded Evidence of Use of the ERICA Mark on Search Engines

The Tenth Circuit further erred by refusing to consider evidence of how the ERICA mark was displayed by search engines based on coding provided by Petitioners specifically to cause search engines to explain the association between the mark and the services available on My24Erica.com.

Search engines have a significant role in the online ecosystem. As other courts have recognized, “[a] great majority of Internet users arrive at a particular website after searching specific terms via an Internet search engine or by following links from another website.” *Smith v. Wal-Mart Stores, Inc.*, 537 F. Supp. 2d 1302, 1328 (N.D. Ga. 2008). Using sophisticated algorithms, search engines respond to a consumer’s query with a list of companies that provide the potentially desired service. The results contain the website’s trademark and description of services that are coded into a website’s header tags for presentation in search results. As Underwood explained in the proceedings below, a online service’s presentation in search engine results search engine provides a “front door” for consumers to walk through after noting the mark and the service in the search engine results. This interplay between how a website is coded, and how search engines present the online service based upon that coding, plays a large role in how the website is viewed by consumers.

In this case, Underwood clearly identified the connection between the ERICA mark and the services offered on the My24Erica.com website through search engines. In particular, Underwood coded the website to include a metatag including the text: “ERICA is a

search engine and personal assistant application for movies, news, entertainment, financial news, and much more.” This metatag caused search engines to display this text as a description of the My24Erica.com website. This alone should have been sufficient to find that Underwood established the connection between the ERICA mark and the search engine and personal assistant services on My24Erica.com website.

Yet the Tenth Circuit refused to consider this evidence. In *Underwood I*, the Tenth Circuit confirmed that it would only consider use of the ERICA mark “on the website display.” *Underwood I*, 996 F.3d at 1057. And when Underwood presented this evidence to the Tenth Circuit in *Underwood II*, it refused to consider it. Indeed, this text is mentioned nowhere in the Tenth Circuit’s decision in *Underwood II*.

The Court should grant *certiorari* to clarify that text included in a website’s code that is displayed by a search engine—essentially the front door for the website—should be considered in determining how a consumer would understand the connection between a mark and the services offered on the website.



REASONS FOR ALLOWANCE OF WRIT

The writ should be granted as to the first question presented to resolve a circuit split. Prior to the Tenth Circuit’s decision in this case, every court of appeals that had addressed the issue had concluded that all evidence of use must be considered together. This includes the United States Court of Appeals for the Federal Circuit. *W. Fla. Seafood*, 31 F.3d at 1125-26.

But the Tenth Circuit adopted a different test that allows courts to conclude that the same mark can have two contradictory meanings. The Court should grant the writ to resolve this circuit split and confirm that evidence of prior use must be considered in context.

The need to resolve a circuit split is particularly acute here because of the particular importance of the Court of Appeals for the Federal Circuit in trademark matters. That court has jurisdiction over appeals from the United States Patent and Trademark Office (“USPTO”). 15 U.S.C. § 1071. The USPTO handles registration of trademarks. 15 U.S.C. § 1051. This necessarily involves decisions on whether the registrant has shown proper use of the mark to justify trademark ownership. *Accord. In re Bose Corp.*, 546 F.2d 893, 897 (CCPA 1976) (noting that specimens of use submitted to the USPTO” must be carefully considered in determining whether the asserted mark has been used as a trademark with respect to the goods named in the application”). And in making such determinations, the USPTO has relied on the same standard as the Federal Circuit. *In re Force Mgmt. Holdings I, LLC*, 2019 TTAB LEXIS 398, at *7 (TTAB Nov. 14, 2019) (rejecting the “false premise” that the analysis is “limited to the presentation page displaying the mark”); *In re Safriland Hunting Corp.*, 24 USPQ2d 1380, 1381 (TTAB 1992) (requiring consideration of product packaging and “other evidence bearing on the question of what impact applicant’s use is likely to have on purchasers and potential purchasers.”).

In other words, a party may rely on a body of evidence with clear interrelationships to obtain trademark protection under the law as understood by the Federal Circuit and the USPTO. But that same party

would be unable to defend that mark in the Tenth Circuit because courts there would only be required to look at the evidence in isolation. And this inability to protect its trademark rights in the Tenth Circuit would have significant consequences elsewhere. Nearly every court of appeals recognizes that a mark owner's failure to police its rights weakens the mark owner's rights. *See, e.g., Int'l Bancorp, LLC v. Societe Des Bains De Mer Et Du Cercle Des Etrangers a Monaco*, 329 F.3d 359, 397 (4th Cir. 2003) (noting that a failure to police a mark can lead to purchasers learning to ignore the mark as a source identifier); *Rockwell Graphic Systems, Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 179 (7th Cir. 1991) ("The trademark owner who fails to police his mark both shows that he doesn't really value it very much and creates a situation in which an infringer may have been unaware that he was using a proprietary mark because the mark had drifted into the public domain."). And a sufficient failure to police a mark could result in abandonment of the mark. *See, e.g., Warner Bros., Inc. v. Gay Toys, Inc.*, 724 F.2d 327, 334 (2d Cir. 1983) (noting "abandonment through failure to police"). Resolving the circuit split is thus appropriate to maintain the integrity of the United States trademark law and the benefits it provides to consumers.

Petitioner is not aware of any other court of appeals that has addressed the significance of search engines in establishing trademark rights for services provided through a website, nor has this Court had the opportunity to do so. However, this is an important question that should be decided by this Court. Search engines are one of the main ways consumers discover and access the services available on a website. *Smith*,

537 F. Supp. 2d at 1328 (“A great majority of Internet users arrive at a particular website after searching specific terms via an Internet search engine or by following links from another website.”). On the Internet, they act as the website’s front door, or at least as a billboard on the highway. And because websites, unlike physical stores, are by their nature available throughout the country, this is a question with nationwide importance.

Recognizing that unpaid search engine listings constitute trademark use is also inconsistent with other decisions from the courts of appeal. For example, courts of appeal have agreed that the use of a trademark as a search engine keyword is a “use in commerce” under the Lanham Act for purposes of infringement. *Network Automation, Inc. v. Advanced Sys. Concepts*, 638 F.3d 1137, 1145 (9th Cir. 2011); *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 127 (2d Cir. 2009). These cases address a different issue and do not create a direct circuit split. But it would not make sense for this Court to sanction both the Tenth Circuit’s decision here, which disregarded visible trademark use because it was on a search engine rather than the My24Erica.com website, and also these other decisions that recognize that invisible² use of a trademark on a search engine is a “use in commerce” under the Lanham Act.

The Court should take this case to make clear that a mark owner may rely on evidence showing that

² For example, Google’s Adwords program involves the sale of keywords to advertisers, whose advertisements are shown to users when that keyword is entered as a search query. *Rescuecom*, 562 F.3d at 125.

consumers would have understood the connection between a mark and the services available on the website based on the description provided by the website and made visible on a search engine.

Respectfully submitted,

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