Denver Law Review

Volume 56 | Issue 2 Article 14

February 2021

Unfair Competition, Patents, Trademarks, and Copyrights

Robert Dorr

Duane Burton

Recommended Citation

Robert Dorr & Duane Burton, Unfair Competition, Patents, Trademarks, and Copyrights, 56 Denv. L.J. 573 (1979).

UNFAIR COMPETITION, PATENTS, TRADEMARKS, AND COPYRIGHTS

By Robert Dorr* and Duane Burton**

I. SUMMARY OVERVIEW

During the period of this survey the Tenth Circuit considered four cases involving patents, trademarks and unfair competition. There were no published cases involving copyrights.[1]

First, in *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*,[2] the court held that a trademark owner who cannot afford to advertise correctionally while another infringes his trademark can recover, as general compensatory damages, an amount sufficient to enable him to so advertise in the future. The court further held that reverse confusion, in which the public is led to believe that the prior user of a trademark is infringing the mark of the subsequent user, is actionable

Big O sued Goodyear for infringement of its common law trademark "BIG FOOT" and for unfair competition. Goodyear contended that: (1) Big O's evidence of confusion was in the form of reverse confusion and, therefore, was not actionable; (2) liability for trademark infringement could not be imposed without a showing that Goodyear intended to trade on the goodwill of Big O or to represent Goodyear's products as being those of Big O's; and (3) the recovery of expenses for corrective advertising should be limited to those actually incurred prior to the trial. The court, in response to Goodyear's contentions, stated that the logical consequence of Goodyear's position would be the immunization

* Partner, Burton & Dorr, B.S., 1968, Milwaukee School of Engineering; M.S., 1970, Northwestern University; J.D., 1974, University of Denver.

** Partner, Burton & Dorr, B.S., 1951, Colorado State University; J.D., 1957, University of Colorado.

[1] Eggenhofer v. Koury, Nos. 76-1817-76 (D. Colo. Feb. 21, 1978), a copyright case, made its second trip to the Tenth Circuit but was designated "Not for Routine Publication." Previously, the Tenth Circuit had remanded Eggenhofer's appeal from the denial of a preliminary injunction to the district court for a written statement of findings of fact and conclusions of law. The case, upon retrial, turned essentially upon matters of contract rather than copyright law.

[2] 561 F.2d 1365 (10th Cir. 1977), *aff'g* 408 F. Supp. 1219 (D. Colo. 1976), *cert. dismissed*, 434 U.S. 1052 (1978).

from unfair competition liability of a company with a well-established trade name and with the economic power to advertise extensively for a product name taken from a competitor. Such conduct constitutes unquestionably unfair competition. The court did, however, reduce the amount of the judgment seventy-five percent by relying upon the Federal Trade Commission practice that requires businesses which engage in misleading advertising to spend twenty-five percent of their advertising budget on corrective advertising.[3] The $19,600,000 judgment of the District Court, as modified by the reduction in damages. was, therefore, upheld on appeal.

In *Education Development Corp. v. The Economy Co.*,[4] the Tenth Circuit affirmed the trial court's holding that "Continuous Progress" was not properly registered as a trademark because when it is used with educational materials, it is merely descriptive of a concept of education. In this case, the plaintiff had commenced use of the words "Continuous Progress" in 1968 and had obtained federal registration in the United States Patent and Trademark Office in 1970. The court noted that plaintiff had used "Continuous Progress" in its promotional material in that term's ordinary sense to describe the educational concept present in the product. Defendant's predecessor in interest had commenced using the words "Continuous Progress" two years before plaintiff, and the defendant had attempted to obtain federal registration but had been rejected by the Patent and Trademark Office. Defendant successfully contended that "Continuous Progress" was merely descriptive of educational material notwithstanding its own prior attempt to register the term as a trademark.

In *Celebrity, Inc. v. A & B Instrument Co.*,[5] the court affirmed the trial court's award of combined damages for patent infringement and unfair competition. Fifty thousand dollars was awarded to the company manufacturing the patented product, and eighty thousand dollars was awarded to the company marketing the device as damages for violation of the Oklahoma Deceptive Trade Practices Act.[6] Since the infringement was willful, the district court trebled the damages for patent infringement

---

[3] 561 F.2d at 1375-76.

[4] 562 F.2d 26 (10th Cir. 1977).

[5] 573 F.2d 11 (10th Cir.), *cert. filed* 46 U.S.L.W. 3723 (1978).

[6] OKLA. STAT. tit. 78, § 52.

and also awarded attorneys' fees. Payment of a royalty on a product frees that product from any further control under the patent. Thus, upon payment of the royalty to the manufacturing company, the marketing company would not have been entitled to any damages *except for* the infringer's violation of the Oklahoma Deceptive Trade Practices Act. Moreover, while a judge can increase the damages awarded for patent infringement under federal law,[7] if a jury is involved the jury must make an award of punitive damages. Although the trial judge trebled the damages,[8] no punitive damages were awarded because punitive damages are not allowed under the Oklahoma Deceptive Trade Practices Act.

In *Eickmeyer v. Commissioner,*[9] the court reversed the Tax Court's ruling that the granting of assignments and "exclusive" licenses by a patent owner were transfers of undivided interests entitling the patent owner to long-term capital gain treatment under Section 1235 of the Internal Revenue Code. The court found that the patent owner had granted non-exclusive licenses rather than assignments of an undivided interest in a patent since the patent owner (1) retained the power to create additional interests by making additional assignments and (2) retained the right to payment of royalty based upon use, including not only payments by the patent owner's assignees or transferees, but also subassignees. Additionally, the court noted that the transfers made by the patent owner withheld in each instance the right to exclude others from the use of the patent.[10]

II. BIG O TIRE DEALERS, INC. v. GOODYEAR TIRE & RUBBER CO.[11]

The recent *Big O Tire Dealers* case represents a classic instance of trademark infringement, and reveals the disregard with which the large competitor has come to treat the small. What makes the case an illuminating example of modern unfair competition is the unique philosophy of the Big O franchise system and the extreme degree to which Goodyear frustrated and disregarded that philosophy.

---

[7] 35 U.S.C. § 285 (1976).

[8] *See* 35 U.S.C. § 284 (1976).

[9] 580 F.2d 395 (10th Cir. 1978).

[10] For further discussion of this case *see* notes 24-60 and accompanying text in the *Tax Overview*, this issue.

[11] 561 F.2d 1365 (10th Cir. 1977), *aff'g* 408 F. Supp. 1219 (D. Colo. 1976).

A. *Background.*

In 1962, the Big O Tire Dealers' franchise system was created and its founders embraced a business philosophy which addressed major deficiencies in the tire industry.[12] Big O Tire Dealers' goal was the marketing of private brand tires. The expansion of the dealership network was substantial,[13] and in 1973 Big O's goal of marketing a private brand tire became economically feasible. Big O selected several trademarks, one of which was BIG FOOT, to allow customers to readily identify Big O's product line and to distinguish it from others.[14] Once a distinctive trademark had been created, Big O could develop in implementation of its philosophy separate areas of goodwill—an "honest dealership" goodwill and a "product line" goodwill.[15]

In April 1974, Big O began marketing BIG FOOT 60 and BIG FOOT 70 tires.[16] Consonant with its philosophy of developing superior product reputation, Big O provided a remarkable tire guarantee.[17] Big O Tire Dealers also spent significant sums in the development of television and radio commercials advertising the BIG FOOT line of tires.[18] At the time of the trial, Big O's total net worth was approximately $200,000

The defendant, Goodyear Tire & Rubber Co.,[19] sought a

---

[12] Brief for Plaintiff-Appellee at 7, Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 561 F.2d 1365 (10th Cir. 1977) [hereinafter cited as Brief] That philosophy was composed of the following elements: (1) there is a compelling need to deal honestly and fairly with the public; (2) a successful franchise system requires sufficient and proper guidance for independent dealers; and, (3) incentive and service are enhanced by allowing franchise dealers to retain a greater portion of their profits.

[13] At the time of suit, the Big O Tire Dealers' organization was composed of approximately two hundred independent dealers in fourteen states. 408 F. Supp. at 1222.

[14] *See* Arnold & Durkee, *Trademark and Unfair Competition in Franchised Business Operations*, 59 TRADEMARK REP. 896 (1969); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 48-49 (9th Cir. 1971) (function of trademark).

[15] Brief at 8.

[16] The first BIG FOOT tire molds were manufactured in the fall of 1973; the first interstate shipments of the tires, manufactured by Uniroyal, were in February 1974; BIG FOOT tires were prominently displayed at a Reno, Nevada, tire convention in March 1974. In April 1974, Big O dealers began sales to the public. 408 F. Supp. at 1223.

[17] Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., Doc. No. 76-1199, Joint Appendix p. 610-611a [hereinafter cited as Joint Appendix]. Upon product failure, Big O would replace free of charge any tire throughout its lifetime down to 2/32 of an inch of tread.

[18] Joint Appendix, 630-31a, 639-641a

[19] Goodyear is the world's largest tire manufacturer, selling its tires as original equipment and as replacements through a nationwide network of 1,700 Goodyear-owned retail

trademark to "quickly personalize" its recently introduced Custom Polysteel Radial and considered the word BIGFOOT for use in upcoming proposed nationwide television promotion as a distinctive "nickname" to distinguish its new tire from the "tire clutter."[20] Despite the earlier discovery in its trademark search on June 28, 1974, of the use of the mark BIG FOOT[21] by Big O Tire Dealers, Goodyear selected BIGFOOT on July 10, 1974, for its advertising campaign.[22] During August 1974 Goodyear's regional managers were advised of this campaign by Goodyear's vice-president for advertising. The vice-president disclosed:

> First, we are putting six million dollars behind the launch between now and New Year's day . . . . Second, we are once again putting most of our marbles on TV, because no other advertising medium can be so efficient and so dramatic . . . Third, we are going to back up the advertising . . . with national magazine ads, newspaper announcements, radio spots, point of sale displays, product literature, promotional gimmicks, and sales training . . . . Starting on the NFL Monday Night Football Game of September the 16th, and roaring right on through the big year-end Bowl games, we will run 163 commercials in exclusive positions in major football and other prime time telecasts . . . . [W]hat all this means is that we will reach about 80 per cent of all males in the USA about five times a month all during the fall introductory period. You think they won't know about BIGFOOT? You bet they will![23]

stores, approximately 4,600 authorized independent tire dealers and approximately 60,000-80,000 other independent tire dealers. 408 F. Supp. at 1223. For the year ending December 31, 1975, Goodyear Tire & Rubber Co. and domestic and foreign subsidiaries had consolidated net sales of $5,452,500,000 (an increase of $196,226,000 over the previous year) and total assets of $4,173,675,000. The Goodyear Tire & Rubber Co., Annual Report 1976, at 1, 26, 33.

Goodyear chose BIGFOOT because it was "distinctive and memorable," served as a "memory device" and as a "handle" with which consumers could identify custom Polysteel tires with Goodyear. Joint Appendix 836a, 988a, 1056a.

[20] Joint Appendix, 2116a.

[21] "On the cover of the page of the report it is shown that the mark searched was 'BIG FOOT' for tires and that a full search was requested and conducted. Printed on the face of Exhibit 299 is 'S.N. 010,921'—the serial number of the Plaintiff's now registered trademark for Big O vehicle tires." Brief at 11.

[22] 408 F. Supp. at 1225.

For illustrations of the duty of care to be exercised in selecting a trademark, see McNeill Labs. Inc. v. American Home Prods., 416 F. Supp. 804 (D.N.J. 1976); General Foods Corp. v. Borden, Inc., 191 U.S.P.Q. 674 (N.D. Ill. 1976); Jockey Int'l., Inc. v. Burkard, 185 U.S.P.Q. 201 (S.D. Ca. 1975); *Trademarks and the Concept of Greater Care*, 5 PAT. L. REV. 325 (1973); Tanner, *Exxorcising Esso-Name Change Brings Exxcedrin Headaches and Costs Approxximately $100 Million*, Wall St., J., Jan. 9, 1973, at 44, col. 1.

[23] 408 F. Supp. at 1225-26.

On August 24, 1974, Goodyear officials also received actual notice from their Salt Lake City district manager that other tires, not from Goodyear, displayed the name BIG FOOT.[24] After various initial contacts, the president and two directors of Big O Tire Dealers met on September 10, 1974, with Goodyear's vice president for advertising and its manager of consumer marketing. In that meeting the Big O officials made it clear that Big O objected to any use of the BIG FOOT or BIGFOOT trademark by Goodyear.

> [Big O's President] pointed out that the Big O dealers' organization would be severely damaged if the dealers came to the conclusion that Big O was not able to protect an exclusive right to use of this trademark. The Big O representatives also made it clear that they were not interested in money; but, that they were concerned about preserving an exclusive use of this trademark.[25]

Because the program "was too far along and too expensive to stop,"[26] the promotional campaign was continued as scheduled, irrespective of Big O's interests and rights. Goodyear evidenced a degree of smugness about the whole situation; a member of its board of directors stated to a representative of Big O that Goodyear might obtain all the benefits it desired from the use of the trademark during the pendency of litigation.[27]

On September 16, 1974, on the Monday Night Football telecast, Goodyear commenced its massive ten million dollar advertising campaign.[28] Goodyear's own counsel described the advertising campaign as "an overwhelming saturation"[29] and "an explosion all over the country."[30] The resulting concurrent use of BIGFOOT by Goodyear and of BIG FOOT by Big O created various forms of confusion in the marketplace. Some customers thought

[24] 408 F. Supp. at 1227. At this time Goodyear's commercials were still in the preparatory stage. Joint Appendix at 950, 951a.

[25] 408 F. Supp. at 1227-28.

[26] *Id.* at 1228.

[27] Joint Appendix 1909a, see also 1130a-33a and 1067-75a.

[28] By August 31, 1975, (the closing of trial), Goodyear had spent $9,690,029 advertising "BIGFOOT." 561 F.2d at 1368. *Compare* Phoenix Mfg. Co. v. Plymouth Mfg. Co., 286 F. Supp. 324 (D. Mass. 1968) (the larger competitor waged the "biggest advertising campaign in its history" knowingly using the smaller competitor's trademark) *with* Westward Coach Mfg. Co. v. Ford Motor Co., 388 F.2d 627 (7th Cir. 1968) (distinguishable because the smaller competitor had no goodwill, use of same trademark was on dissimilar product, and mark was weak).

[29] Joint Appendix at 313a.

[30] Joint Appendix at 523a.

their Big O BIG FOOT tires were manufactured by Goodyear or that Big O dealers were somehow associated with Goodyear. When other potential customers came to Big O dealers asking for BIGFOOT (Goodyear's tire was a radial tire), salesmen had to explain that Big O's BIG FOOT was a bias belted tire. "The necessity for such an explanation gave an obvious negative quality to such customer contact."[31] Because of Goodyear's continued and voluminous advertising and because of the disparity in size between the companies, an implication of a wrongful and dishonest use arose from Goodyear's advertising—it appeared to members of the public that Big O had stolen Goodyear's trademark![32] Writing for the trial court, Judge Matsch summarized these events: "The saturation was persistent, consistent and complete. Goodyear made no effort to avoid sending its message into the area already occupied by Big O's product. Big O was simply overrun and overwhelmed."[33]

B. *Legal Theories of* Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.

Prevailing on theories of trademark infringement and trademark disparagement in the ensuing action,[34] Big O Tire Dealers, Inc. was awarded by the jury compensatory damages of $2,800,000, punitive damages of $16,800,000,[35] and was granted a full injunction against Goodyear's use of BIGFOOT. Goodyear's use of the identical trademark, BIGFOOT, on an identical product line, vehicle tires, constituted a *per se* trademark infringement.[36] Goodyear's conduct also constituted what the court chose

---

[31] 408 F. Supp. at 1229.

[32] *Id.* at 1230. The court remarked that Goodyear's knowledge of Big O's mark and the scope of Goodyear's advertising raised a presumption that Goodyear officers must have foreseen these consequences *Id.*

[33] *Id.* at 1240.

[34] An accounting for profits was denied the plaintiff. An accounting is awarded where (1) the remedy at law is inadequate, (2) the wrongdoer is unjustly enriched, or (3) the deterrence of willful infringement and public protection are deemed necessary. The court determined that the punitive damages awarded served as a sufficient deterrent and that plaintiff was not entitled to an accounting of profits. *Id.* at 1241-42.

[35] Goodyear, however, prevailed on plaintiff's allegation of false designation of origin under § 43 of the Lanham Act, 15 U.S.C. § 1125(a) (1946), because it had made no effort to pass its tires off as those of Big O. 408 F. Supp. at 1224-25. The jury instruction for this cause of action was narrowly drafted by the court to embrace only "palming off" situations. *Id.* at 1247. The court seemed to neglect the expansive reading § 43a has been and is given.

[36] Goodyear's use of BIGFOOT created instant confusion in the consuming public.

to call trademark disparagement. Disparagement was defined in the jury instructions as follows:

> [No. 17, *Disparagement*]
>
> To establish a claim for trademark disparagement, the plaintiff must show by the preponderance of the evidence:
> 1. That the defendant published some false statement or statements to the plaintiff's customers or potential customers which could reasonably be understood to cast doubt or confusion about the validity of plaintiff's trademark.
> 2. That the defendant acted with malice.
> 3. That such false statements had an adverse economic effect upon the plaintiff's business.
>
> [No. 19, *Malice*]
>
> To act with malice means to act with the intent to vex, injure or annoy.[37]

The disparagement instruction followed no direct precedent, yet, as the court stated: "there is nothing which is really new or novel, conceptually, in the elements of this theory."[38] Additionally, the court noted that business goodwill is protectable against the effects of false advertising.[39] Analogizing to the law of defamation, the district court stated:

> The facts of this case fit within these traditional principles. Some of Goodyear's advertising expressly said that BIGFOOT tires were available only from Goodyear. All of it had the effect of creating that impression. Big O was selling and offering for sale tires called BIG FOOT. That extrinsic fact made Goodyear's advertising false. The additional extrinsic facts of the differences in the methods

"[t]oday, the Keystone of that portion of unfair competition law which relates to trademarks is the avoidance of a likelihood of confusion in the minds of the buying public." J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 2:3 at 46 (1973) (citing Safeway Stores, Inc. v. Safeway Properties, Inc., 307 F.2d 495 (2nd Cir. 1962)).

[37] 408 F. Supp. at 1248. The instructions also defined the term publish ("Words are published when they are communicated or circulated in any manner to any person other than the officers of the plaintiff," *i.e.*, Goodyear's use of BIGFOOT in its advertising) and stated that in determining whether the use of BIGFOOT in Goodyear's advertising cast doubt upon the plaintiff's rights to use BIG FOOT, the plain and natural meaning of the words used in the plain and popular sense in which the consuming public would understand them should be considered. *See* Nims, *Unfair Competition by False Statements or Disparagement*, 19 CORNELL Q. 63 (1933); Note, *Injury to Public Relations by a Noncompetitor*, 41 ILL. L. REV. 661 (1947).

[38] 408 F. Supp. at 1233.

[39] *Id.* at 1234 (citing Paramount Pictures, Inc. v. Leader Press, Inc., 106 F.2d 229 (10th Cir. 1939)). *See also*, Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814 (N.D. Cal. 1977); Stearns v. McManis 543 S.W. 2d 659 (Tex. Civ. App. 1976).

of advertising used by the two companies and the difference in their size, created the innuendo of an improper and unauthorized use of BIG FOOT by Big O. Big O had the exclusive right to the use of BIG FOOT as a trademark for tires. The result of the reasonable implication from Goodyear's advertising was the disparagement of Big O's trademark.[40]

C. *Damages*

As stated above, Big O was awarded compensatory damages of $2,800,000 and punitive damages of $16,800,000. Compensatory damages were awarded for the diminution of Big O's goodwill due to the acts of Goodyear. Specifically, the jury was allowed to consider in its determination of damages the plaintiff's contention that it would be required to conduct an informational advertising campaign "to place Big O Tire Dealers, Inc. in whatever position with respect to the words BIG FOOT for tires that it may have enjoyed prior to [Goodyear's advertising]."[41] The damages were apparently calculated as a percentage of the cost of Goodyear's advertising.[42] That this method of assessing damages had never been used before in a trademark infringement or trademark disparagement case did not disturb the court. Since the fact of damage as evidenced in the resulting consumer confusion was established with reasonable certainty, the trial court indicated that the wrongdoer should bear the risk as to the uncertainty of measuring that damage.[43]

The court treated summarily Goodyear's contention that it should be granted judgment notwithstanding the verdict for plaintiff's alleged failure to provide evidence of plaintiff's reduction of goodwill or evidence supporting compensatory damages. The court stated:

> Whether the wrong done by Goodyear should be characterized as common law trademark infringement or trademark disparagement,

---

[40] 408 F. Supp. at 1234.

[41] *Id.* at 1231.

[42] Big O Tire Dealers were represented in 14 of the 50 states, or 28% of the states; 28% of the cost of Goodyear's $10,000,000 nationwide saturation advertising is $2,800,000. *Id.* This was not an unprecedented method of damage calculation. *See* Maytag Co. v Meadows Mfg. Co., 45 F.2d 299 (7th Cir. 1930); Paramount Pictures, Inc. v. Leader Press, Inc., 106 F.2d 229 (10th Cir. 1939); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946); Compania Pelineon De Navegacion, S.A. v. Texas Petroleum Co., 540 F.2d 53 (2nd Cir. 1976); D. DOBBS, THE LAW OF REMEDIES, § 6.7 at 505 n.7, 8 (1973).

[43] 408 F. Supp. at 1232. The Tenth Circuit reduced the amount of damages by a substantial 75%. *See* text accompanying note 3 *supra*.

> the result of it has been confusion in the minds of the public with respect to the relationship between Big O and Goodyear. That confusion did not exist before September 16, 1974. *That confusion is, in itself, damage.* The appearance of dishonesty and wrongful conduct by Big O harms its reputation within the trade and with the public. It is reasonable to redress that wrong by giving the plaintiff enough money to conduct an advertising program of its own.[44]

The jury award of punitive damages was supported by evidence upon which the jury could find beyond a reasonable doubt that Goodyear acted with malice or a wanton and reckless disregard of the plaintiff's rights.

> What Goodyear did was to determine that the plaintiff was an insignificant competitor and that Goodyear's investment of time, money and effort was too great to give up the use of the BIGFOOT material even though it would clearly damage and perhaps destroy the plaintiff's use of its trademark. Goodyear then proceeded with an intentional and deliberate infringement of the plaintiff's trademark. In short, Goodyear elected to ignore completely the property rights of Big O. It is difficult to characterize such conduct in any manner more favorable than as a wanton and reckless disregard of the plaintiff's rights.[45]

Moreover, because of the disparity in size between the two competitors, the court said that Goodyear should be presumed to have foreseen the results of its conduct.

> Having unleashed this extraordinary effort to identify the name BIGFOOT with this Goodyear tire and the defendant company, after learning of the Big O BIG FOOT tires, the officers at Goodyear must be presumed to have foreseen that one of the consequences of such concurrent but disproportionate use would be the creation of an innuendo that Big O was trading off of Goodyear in violation of the law.[46]

Thus, the $19.6 million award did not represent Big O's specific lost sales but rather the extent to which its business reputation and goodwill were harmed and the degree to which Goodyear's injurious conduct reflected a total disregard of Big O's rights.

The Tenth Circuit agreed with Judge Matsch's analysis:

> Goodyear argues a finding of malice is not supported by the record in this case. We disagree. The record shows that on January

---

[44] 408 F. Supp. at 1232 (emphasis added).

[45] *Id.* at 1233. But "[w]hile the mere difference in size and economic power between competitors is not unfair, the competition becomes unfair if that power is used with a complete disregard of the property rights of the smaller company." *Id.* at 1232.

[46] *Id.* at 1230.

> 2, 1975, after the filing of this lawsuit, Goodyear modified its "Bigfoot" television advertising by adding "only from Goodyear." The record shows Goodyear knew of Big O's "Big Foot" tires at least by August 26, 1974, and there was adequate time to remove reference to "Bigfoot" from Goodyear's advertising before the September 16, 1974 telecast.[47]

D. *Conclusion*

Factually, *Big O Tire Dealers* illustrates an instance in which an enormous competitor effectively wields an unfair tool of competition with absolute disregard for the rights of a less potent competitor. The unfair tool was the use of a consciously misappropriated trademark—the hallmark of another competitor which symbolized its reputation for honesty and fair dealing and its product integrity—in a massive advertising scheme which Goodyear knew would destroy the value of the trademark. Goodyear's wanton and reckless disregard of Big O's rights can be made no more manifest than through reiteration of the fact that Goodyear used Big O's BIG FOOT trademark notwithstanding (1) actual notice to Goodyear executives from one of its own tire dealers, and (2) meetings between officials of Goodyear and Big O in which the rights of Big O were clearly made known.[48]

The legal analysis of *Big O Tire Dealers* represents a significant step towards the protection of the efforts of a small competitor. The efforts of Big O to develop goodwill and reputation were essentially recognized by the courrt as property rights[49] embodied in its use and development of the trademark BIG FOOT; as such, these efforts were protectable against disparaging advertising. What the court recognized tacitly was Big O's right to conduct a competitive enterprise and Goodyear's duty not to interfere with that endeavor through unfair methods of competition. Because Goodyear's advertising, creating instant reverse confusion, was an unlawful usurpation of a small competitor's efforts to develop

[47] 561 F.2d 1365, 1373. Goodyear's disregard for Big O's rights was evident in its attitude towards the legal resolution of their respective rights. At one point, with full knowledge of Big O's BIG FOOT, Goodyear suggested it would bring suit against Big O. When it was suggested that Big O might bring suit, Goodyear stated that the case would take long enough to allow Goodyear to reap the benefits from its proposed advertising. 408 F. Supp. at 1229. The ability of Big O to obtain legal protection for its trademark was an obviously minor consideration.

[48] "In short, Goodyear elected to ignore completely the property rights of Big O." *Id.* at 1233.

[49] 408 F. Supp. at 1232.

and maintain favorable customer contacts, *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.* stands as notice that large competitors cannot persist in an attitude of indifference toward the rights of other competitors.