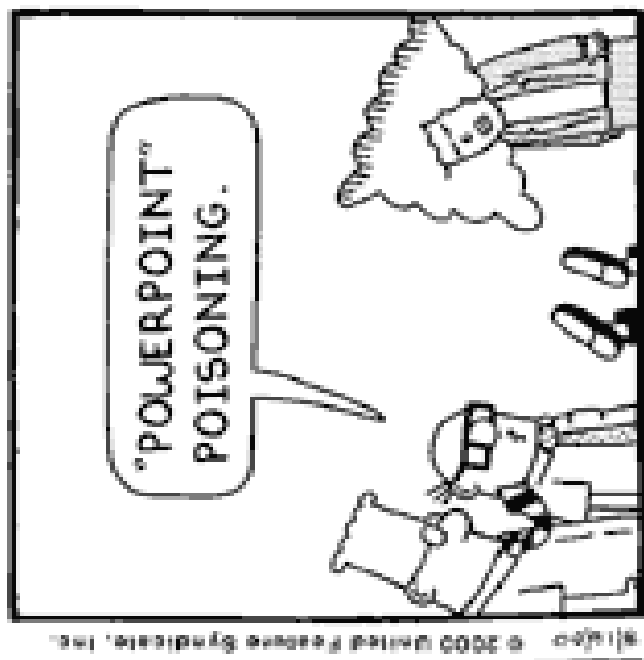
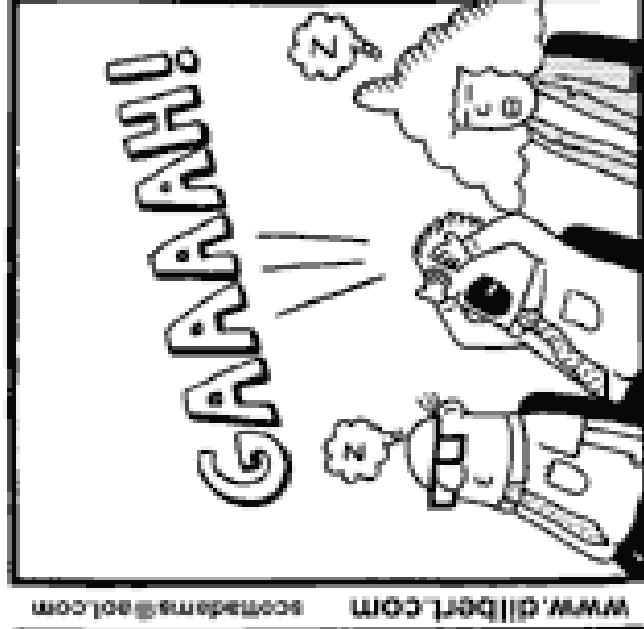
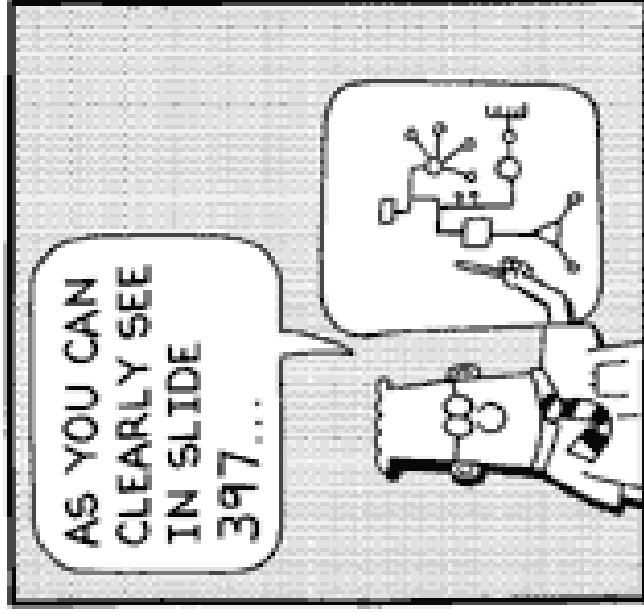


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“Copies, Confusion and Counterfeits in Cyberspace”



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Trademarks are “protected”  
against both counterfeiting  
and “colorable imitations.”  
Counterfeit products present  
the easiest cases. Copying of  
product features = quagmire  
of trade dress analysis.

## Counterfeit Questions

- Are consumers confused?
- Should trademark law care about popularity?
- Why does trademark law care about “illegitimate prestige”?
- How many sales are actually lost?
- What is the effect on profits?

# Policing Costs

- Trademark holders do not want to pay them, and have has some success imposing them on secondary actors who lack specific knowledge, *contra Tiffany v. eBay*.
- Distorts and inhibits market for secondhand items
- Why is eBay different than a swap meet?

A colorable imitation is defined by the Lanham Act as “any mark which so resembles a registered mark as to be likely to cause confusion or mistake or to deceive.”

# Copying

- Endemic for clothing and accessories design, because market requires it
- Inspiration comes from history, competitors, cultural observations
- Legitimate market response to consumer demand – do consumers' desires count for anything?

# Product Features Are Not Monopolizable Through Trademark

1. Knock offs are not a trademark violation, period.
  - Product features rarely have primary secondary meaning
  - Post sale confusion doctrine shouldn't be extended beyond trademark to design attributes (if it should exist at all...)
  - “Illegitimate prestige” is not a trademark problem
  - Nerds are people too
2. Knock offs are not “unfair competition,” see e.g. the Sears and Compcoco cases

# The Sears/Compo Cases



# Trademark Deployed as “Copyright Supplement”

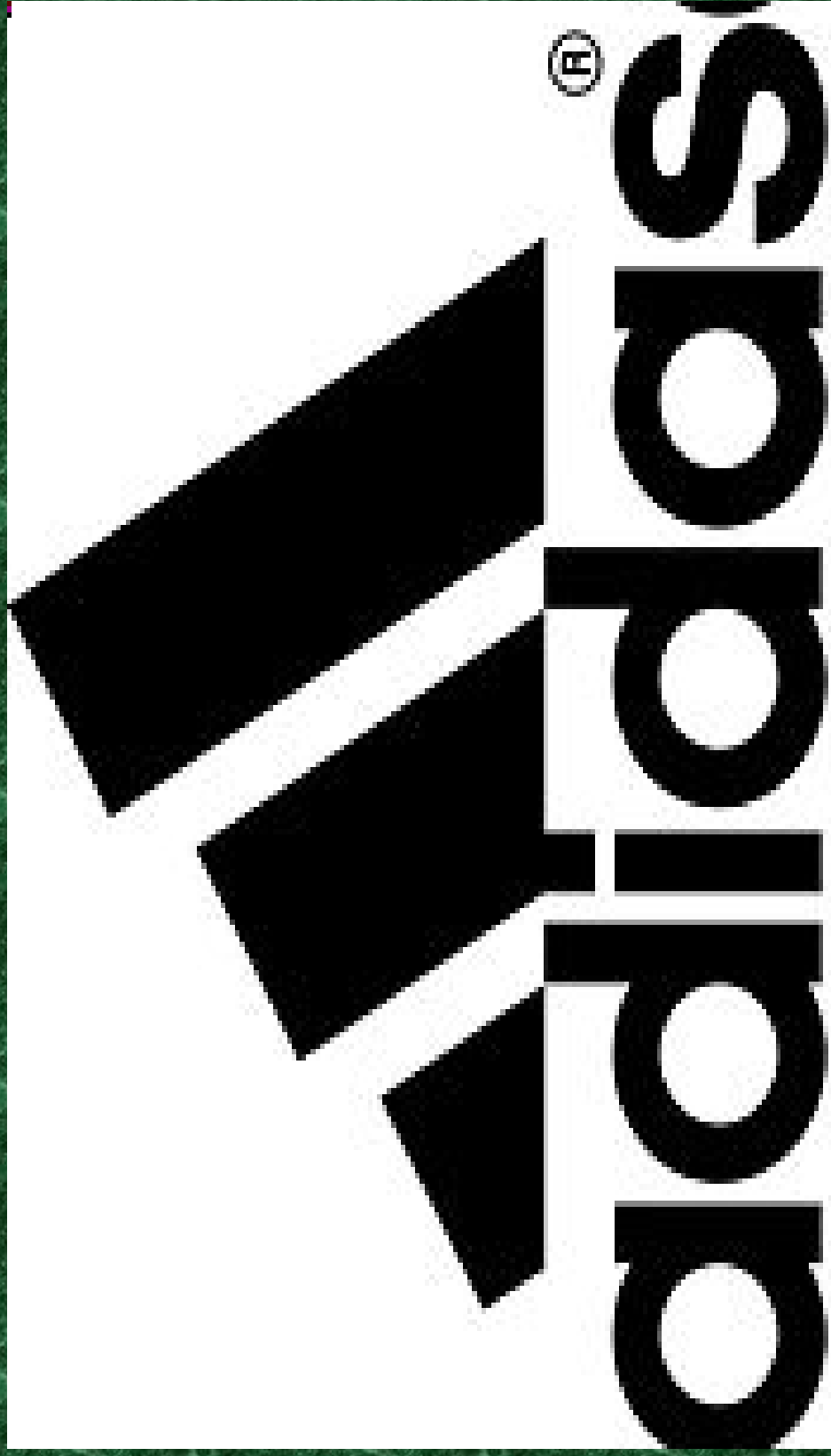
- Instrumental muddling of “counterfeit” and “knock off” to derogate copying, consumers of copies
- Deployment of class signifiers keyed to faux authenticity and originality constructs
- Ultimate agenda: “authorized” v. “unauthorized” knock offs, with authorized versions sold under obfuscating trademarks.

Judges decide whether there is  
“likelihood of confusion” based  
on their subjective reactions.  
Evidence of actual confusion is  
not required, and often not  
available.

# No Confusion



*Adidas v. Payless*  
\$100 million per stripe





Alexander McQueen's "Faithful"

motorcycle jacket bootie (below

left) was copied by Steve

Madden's Seryna bootie (below

right), has a plain zipper pull  
and minor differences related to  
the quality of materials and  
sharpness of the fold-over  
points.



# Faux Knock Offs:

Love Jozi didn't merely create a diffusion line, it secretly created a faux *counterfeit* line.

The logo for Love Jozi, featuring the brand name in a white, serif font on a black rectangular background. The letter 'J' is stylized to resemble a fountain pen nib. A registered trademark symbol (®) is located at the top right of the text.

LOVE JOZI®

A counterfeit logo for Luv Jozi, featuring the brand name in a white, bold, sans-serif font on a black rectangular background. The letter 'J' is stylized to resemble a fountain pen nib. A trademark symbol (™) is located at the top right of the text.

LUV JOZI™

# Changes in Cyberspace?

- Easier to find and police knock offs
- Easier to monitor unauthorized uses of trademarks
- Fosters alternative distribution channels (both authorized and unauthorized)
- Easier to locate and purchase used items; chilling effect if policing costs externalized