

TYPES NOT MAPPED YET March 27, 2023 | TTR not mapped yet | Gayle L. Mercier, Matthew A. Braunel

# Subleasing and false advertising: How trademark law can help property managers

Imagine owning a building in which you are renting out living space at your set prices and then coming across an advertisement that those same living spaces are available for a nightly, weekly, monthly or even annual fee. The scenario is actually playing out right now for many landlords.

There has been an explosion of online marketplaces listing homes, condos, apartments, rooms and even garages for rent as alternatives to hotels. Many of these listings are posted by individuals (who we will refer to in this hypothetical as “ABbers”) who are renting out their spaces, otherwise referred to as subleasing. Some ABbers have even created sophisticated business models around the online sublease marketplace - forming limited liability companies to engage with subleasers, hiring professional photographers and marketers and even using SEO or search engine optimization to ensure their listing ranks high on customers’ searches. However, quite often, the ABber has a lease that prohibits such subleases.

What are the legal remedies that they can take to prevent and stop the practice? First, property managers can invoke the breach of the sublease prohibition to begin eviction proceedings. But, ABbers who are profiting from this model can be motivated to resist.

In this scenario, property managers can look to trademark law for a solution. Believe it or not, trademark law - specifically false advertising - has relevance here.

The Lanham Act, signed into law in 1946 by then-President Harry S. Truman, governs federal trademark law in the United States. The Act provides the foundation for federal registration of trademarks, civil remedies for infringement and trademark counterfeiting. In addition, the Act prohibits false advertising. While many Lanham Act cases involve competitors using confusingly similar names or trademarks or making claims about a competitor’s product, the Lanham Act specifically prohibits misrepresentations about a person’s *own* goods, services or commercial activities when made in commercial advertising or promotion (15 U.S.C. 1125(a)(1)(B)). The Lanham Act has provisions that allow for monetary awards to aggrieved businesses, but also emphasizes the need to protect consumers from confusion or harm and is frequently used as a basis for issuing temporary, preliminary and permanent injunctions prohibiting certain conduct (15 U.S.C. 1116, 1117).

In this hypothetical, the ABber makes an implicit misrepresentation about his or her own services or commercial activities when listing what they are promoting as their property in the online marketplace. Consumers may perceive that the ABber has the authority to sublease the property when that authority has been reserved to the property manager because the ABber does not own the property. The Lanham Act expressly prohibits the misrepresentation about the ABber’s own services or commercial activities. The regional circuits have developed their own specific tests for determining liability, but most Courts require the Plaintiff to show: (1) a literal or implicit false or misleading statement; (2) actual deception or that deception or confusion is likely; (3) the deception materially influences the buyer’s purchase decision; (4) the false statements were made in interstate commerce; and (5) some injury to the plaintiff.

The Property Manager can seek an injunction prohibiting the continued false advertising that would stop the ABbers’ ongoing advertising, impacting the ABbers’ business model. Eviction proceedings as a result of the ABber violating his or her own lease can be simultaneously pursued as well.

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