

such as t-shirts and guitars bearing the band's logo, there was a potential for injury arising from the advertisement of *non-media* goods. Additionally, because Densmore claimed the reunited band's actions caused damage to his 'reputation and stature', as well as resulted in mental anguish and emotional distress, potential damages, if successful, would be covered under the policy's 'bodily injury' clauses. Because these other claims were *potentially* covered under the insurance policy, the Ninth Circuit held the district court erred in dismissing the breach of contract claim and summarily dismissing the implied covenant of good faith and fair dealing claim for the same reasons.

Practical significance

While insurance policy endorsement clauses in insurance policies are a valid means of limiting insurance defense obligations, courts will construe those clauses very narrowly.

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■ The American Red Cross dispute

Johnson & Johnson v The American National Red Cross,
552 F. Supp. 2d 434 (SDNY 2008), 14 May 2008

The US District Court, Southern District of New York, held that the American National Red Cross's licensing of the Red Cross name and emblem violated neither the Geneva Convention nor US federal law governing the use of the Red Cross name and emblem. The court based its decision on a finding that licensing the Red Cross name and emblem to commercial entities in order to raise funds for Red Cross activities was itself an activity within the scope of the authority granted to the American National Red Cross.

Legal context

The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field ('Geneva Convention') was promulgated in its current form in 1949 and subsequently ratified by most nations, including the United States. It provides for each nation's creation of a National Red Cross Society to implement the humanitarian work contemplated by the

Geneva Convention, including emergency medical relief in times of both war and peace.

Under Article 44 of the Geneva Convention,

National Red Cross... Societies may, in time of peace, in accordance with their national legislation, make use of the name and emblem of the Red Cross for their other activities which are in conformity with the principles laid down by the International Red Cross Conference.

Article 53, however, generally prohibits the use of the Red Cross emblem by 'individuals, societies, firms or companies either public or private'. The official commentary to Article 44 adds, in part:

Red Cross organizations, to raise funds, have sometimes sold objects bearing the red cross. Such practices are likely to lessen, in varying degrees, the standing of the emblem, and are therefore prejudicial to the good name of the Red Cross as a whole... Conscious of the honour, as well as the responsibilities, which this implies, they must jealously watch over what has been entrusted to them.

Upon ratification of the Geneva Convention, the United States reserved the right to allow parties within US territory to continue to use the Red Cross emblem with respect to most uses, such as to promote the sale of medical supplies and first aid kits, provided that such use had begun before 5 January 1905.

The National Red Cross Society in the United States has been The American National Red Cross, commonly known as the American Red Cross ('ARC'), whose activities are governed in part by the Charter Act enacted in 1910 under US law pursuant to an earlier Geneva Convention. Certain provisions of the Charter Act relating to use of the Red Cross emblem were transferred in 1948 to section 706 of the US federal criminal code, 18 USC §706, which makes it a crime for anyone other than prior users of the Red Cross emblem ('grandfathered users') or the ARC and its duly authorized employees and agents to use the Red Cross emblem.

Facts

Johnson & Johnson ('J&J'), a grandfathered user of the Red Cross emblem, filed an action in the US District Court, Southern District of New York, against the ARC and four of its licensees, alleging, among other things, interference with prospective economic advantage, unfair competition, and dilution of trade mark rights. J&J contended that the ARC had no right to license the Red Cross emblem to other entities and that the ARC's activities in this area unfairly competed with J&J's exercise of its grandfathered rights and its business dealings with other companies interested in using cross symbols to promote their products. The ARC counterclaimed, seeking to invalidate J&J's trade marked use of the Red

Cross emblem which, it argued, did not qualify as a grandfathered use.

The parties moved for summary judgment on their respective claims. The court addressed whether the ARC's licensing activities were illegal under the Geneva Convention or US law, as embodied in section 706 and the Charter Act, and whether J&J's grandfathered rights were valid.

For more than a century, the ARC had entered into arrangements to use the Red Cross emblem in a commercial context, such as on the packaging of medical suppliers' products. J&J itself had offered to enter into a commercial arrangement with the ARC as early as 1913, and had in 1986 entered into a so-called 'cause marketing' arrangement with the ARC whereby it made use of the ARC's goodwill for their mutual benefit by stating in advertising that it would donate a stated sum of money to the ARC for each sale made of J&J products when certain promotional coupons were redeemed. J&J did not dispute that the ARC had the right to make commercial use of the Red Cross emblem. Rather, the parties' arguments concerning J&J's claims centred on whether licensees qualified as employees or agents of the ARC under section 706.

J&J meanwhile had used a Red Cross emblem on medicines and pharmaceutical preparations, dental, medicinal, and surgical appliances, and cosmetics and toilet preparations since before 1905. The ARC challenged J&J's application of these prior uses to its current use of a Red Cross emblem in connection with first aid and emergency kits, and in its registration of J&J trade marks related to first aid and hospital products.

Analysis

The court noted that section 706, while restricting other entities' use, placed no limitation on the ARC's own use of the Red Cross emblem. Under a plain reading of the statute, therefore, ARC was not precluded from any use it saw fit, including its licensing activities which had been practised since well before the current version of the Charter Act. The court discounted the parties' emphasis on whether licensees qualified as employees or agents under section 706, since that language merely reflected the ARC's status as a corporate entity. The question was whether the scope of ARC's permitted use of the Red Cross emblem included licensing for commercial gain. Given the longstanding practice of ARC to license the Red Cross emblem for commercial gain, including J&J's own participation in such practice, the court reasoned, the question had to be answered in the affirmative.

The court found the legality of ARC's licensing under the Geneva Convention to be a more difficult question. Again, however, the court upheld ARC's licensing activities. It pointed to the absence of any explicit prohibition on such use in the Geneva Convention. The court discounted

the commentary to the Geneva Convention on the dangers of cheapening the Red Cross emblem through licensing as mere non-binding admonishment rather than a prohibition on such use.

With respect to J&J's use of a Red Cross emblem, the court found that J&J's present uses of the emblem in connection with medical products were legally equivalent to its pre-1905 uses because they also related to the sale of J&J's medical products in a similar manner. The court accordingly dismissed the counterclaims against J&J.

Practical significance

The decision highlights both extensive commercialization in the US of the Red Cross emblem by the ARC, which may be at odds with the commentary to the Geneva Convention on permissible uses of the emblem, as well as the fact that the US derogates from the norms of the Geneva Convention by allowing grandfathered users besides the ARC to use a Red Cross emblem. While this decision allows for the licensing of the Red Cross symbol under US law, the court also seemed to indicate that another court or tribunal might reach the opposite conclusion. The policy issue is whether the need of humanitarian organizations like the Red Cross to preserve the integrity of their emblems outweighs the benefits to such organizations of raising funds through licensing.

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Copyright

■ Copying of open source software in violation of artistic licence was not licensed

Jacobsen v Katzer, No. 2008-1001, US Court of Appeals for the Federal Circuit, 13 August 2008

Conditions contained in an artistic licence for open source software preclude a subsequent user from being licensed if conditions are not followed.

Legal context

The use of open source software has become widespread in the United States and elsewhere. Typically included with open source software are artistic licences which set