

Texas Tech Board of Barristers Advanced Moot Court Problem

2026

No. 25-20812

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2026

TEXAS STEM UNIVERSITY; HILL WAMMOND,

Petitioners,

vs.

HEMOCOURT CLOTHING LLC,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Thirteenth Circuit

QUESTIONS PRESENTED:

- I. Whether Homecourt Clothing's use of the "Men of Rome" mark is exclusively ornamental, or indicative of source.
- II. Whether the advertisement created and distributed by Homecourt Clothing infringes upon Hill Wammond's right of publicity.

**UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT**

No. 25-12924

TEXAS STEM UNIVERSITY; HILL WAMMOND,

Plaintiffs-Appellants,

vs.

HEMOCOURT CLOTHING LLC,

Defendant-Appellee.

**On appeal from the United States District Court
For the District of Travis**

Before the Chief Judge Gianfranco Laddaga, Circuit Judge Kameron Schultz, and Circuit Judge Kiera Figgins:

Chief Judge Laddaga delivered the opinion of the Court, in which Judge Figgins joined. Judge Schultz filed a dissenting opinion.

LADDAGA, Chief Judge:

In the early spring of 2024, with the clock running out on the collegiate men’s basketball regular season, Hemocourt Clothing LLC, Defendant-Appellee (“Hemocourt Clothing”), an online retailer, launched a webpage titled “Men of Rome Designs.” Hemocourt Clothing released 31 products in purple and gold, all featuring the “Men of Rome” trademark. In conjunction with the newly released lineup of products, Hemocourt Clothing debuted an advertising campaign that featured a series of different men’s and women’s basketball players.

One advertisement in the campaign featured a young man of surprisingly short stature with a purple and gold armband on each arm. Hemocourt Clothing hoped its products would give them a competitive edge in the collegiate apparel market. However, their attempted slam dunk was

blocked when Plaintiff-Appellant STEM University filed a claim in the United States District Court for the District of Travis against Homecourt Clothing. STEM University argued that Homecourt Clothing infringed upon its “Men of Rome” trademark by using it on each product in its new merchandise lineup.

On the same day, Plaintiff-Appellant Hill Wammond filed an action against Homecourt Clothing for violating his right of publicity by using his likeness in one advertisement within its campaign. By order of the District Court, these cases were consolidated. Appellants’ full-court press was unsuccessful, as Homecourt Clothing filed a motion for summary judgment on both claims. The District Court granted the motion pursuant to Fed. R. Civ. P. 56 (“Rule 56”).

After reviewing the proceedings below, we affirm the District Court’s order granting Appellee’s motion for summary judgment under Rule 56.

I. Background

The controlling facts of this case are uncontested. Plaintiff-Appellant STEM University is a public university in the state of Red. It first opened its doors in 1861. STEM University’s men’s basketball team rose to prominence in 1956, when it was one of the first Division I programs to provide full athletic scholarships to its players. STEM University quickly established a dynasty, winning the championship four of the next five years and reaching the finals three other times before 1966. Photos of the star players from these championship teams—twins Grant and Charlie McGee, Kaden Thompson, Alex Cooper, and many others—still line the concourse of the team’s home arena. The players’ jerseys in every photo feature the “Men of Rome” mark. Following its blazing start in the men’s college game, STEM struggled to regain its championship pedigree. Until recently, the team had not reached the postseason since the late 1990s.

In 2024, the men’s basketball team reentered the national spotlight, making back-to-back runs to the Elite Eight of the NCAA tournament. The program’s resurgence is thanks to the

recruitment of top “five-star” high school recruits in each of the last four seasons. The best and most anticipated of those recruits was Hill Wammond, a freshman phenom during the 2023-2024 season, known for his dunking ability, despite his small build, and signature purple and gold armbands on each arm. Wammond wears his signature arm bands in every game and has done so since high school. Many fans now attend his college games with similar arm bands to support him.

In 2016, STEM University phased out its “Men of Rome” mark as the primary for all its men’s Division I sports teams, opting to have every team be referred to as the Centurions. Currently, no men’s teams use the “Men of Rome” mark as their primary mark.¹ The men’s basketball team currently has two jerseys: a purple jersey with gold lettering across the chest that says “Centurions,” and a white jersey with purple lettering that says “STEM” across the chest.

A variety of commercial brands have reacted to STEM’s resurgence. While every player on the team has benefited from the team’s recent success, Hill Wammond has benefited substantially by increasing the number and value of his NIL² deals. One company took particular notice of the team’s rise to the top of the rankings: Homecourt Clothing. In 2024 and through 2025, Homecourt Clothing launched and maintained a page entitled “Men of Rome Designs” on its website; the title appeared prominently at the top of the webpage and featured the “Men of Rome” mark, followed by “Designs” in a purple font. This page contained 31 Men of Rome-related historic memorabilia from the historic ’56–’66 period, such as decals, tickets, buttons, programs, pennants, and banners. Customers could also purchase various items with the “Men of Rome” mark, including t-shirts, sweatshirts, hats, magnets, tumblers, mugs, pennants, wall art, and

¹ While the “Men of Rome” mark is no longer the primary mark of the men’s sports teams at STEM University, STEM University owns an incontestable registration in the mark, pursuant to 15 U.S.C. § 1065, and it has not abandoned the mark. STEM University still uses the mark, but its men’s teams are referred to as Centurions, no longer as Men of Rome.

² NIL refers collectively to Name, Image, and Likeness, the process by which college athletes are allowed to receive financial compensation through marketing and promotional efforts.

puzzles. None of the products listed featured the current primary Centurion logo, which is now used by every STEM University team.

Homecourt Clothing sells these various merchandise items through its website at HomecourtClothing.com. Homecourt Clothing's merchandise contains Homecourt Clothing's trademark, "Homecourt Clothing," on the hangtag and on the item itself. On items of clothing, "Homecourt Clothing" appears on the tag sewn on the inside of each item. Its additional trademark, the outline of a basketball court with "HC" inside the court's center circle, the "HC Mark", is stitched somewhere on each item, such as the end of the right sleeve on shirts, or the right side of baseball hats. The retailer ships all merchandise in packaging bearing "Homecourt Clothing" and the HC Mark in a repetitive pattern. On every webpage in its web domain, "Homecourt Clothing" appears at the center of the top, and the HC Mark appears at the bottom left corner. Additionally, every webpage on the domain contains the following disclaimer at the bottom:

Our products are not affiliated with, licensed, sponsored, or endorsed by any college, team, league, event, or licensing entity. All products are designed by Homecourt Clothing and manufactured for Homecourt Clothing.

Regarding the second issue, Hill Wammond sued Homecourt Clothing to enjoin it from producing and distributing advertisements promoting its "Men of Rome" products. These advertisements first appeared in late February 2024 across multiple platforms. The advertisements ran until the conclusion of the 2024 NCAA Women's and Men's Basketball Tournament. These advertisements contained a series of men's and women's basketball players in a hand-drawn, 2D animation style. The advertisements drew on shining moments from important games throughout the 2024 season as well as the men's and women's tournaments and would follow a standard formula: the athlete depicted performed poorly until they stumbled upon Homecourt Clothing merchandise, put on the merchandise, and then completed their big moment from a real game. Specifically, after donning the Homecourt Clothing merchandise, the athletes acquired

superhuman abilities, and their opponents took on a cartoonish quality.

One of the advertisements opens with a young man sullenly practicing basketball and playing one-on-one with another person. At the start, he can be seen struggling to score. He misses threes and turns the ball over repeatedly. He's too short, resulting in his shots getting blocked, and sweat keeps running down his arms and onto the ball, hindering his ability to handle the ball effectively. After walking to the bench to rest, he notices a gold jersey bearing the "Men of Rome" mark—made and sold by Homecourt Clothing—and purple and gold arm bands with the "Men of Rome" mark printed on it. He puts the jersey over his tank top and slips one armband onto each arm. After donning the clothing, his leg muscles greatly increased in size. Immediately, he plays better, his skills becoming superhuman: he can soar multiple feet in the air and shoot with ease from halfcourt. The advertisement concludes with him dribbling down the court, running between an opponent's legs before leaping from the 3-point line and dunking over another opponent.

At STEM University's games in the 2024 NCAA Tournament, fans of all ages tried desperately to get Hill Wammond to sign "Men of Rome" products, including the very jersey from the commercial. Fans would congregate near the exit tunnel or courtside with these products in hand, urging Hill to put his autograph directly on the items.

The District Court granted Appellee's motion for summary judgment. Appellant timely appealed. As this appeal comes before us pursuant to Rule 56, we view all facts in light most favorable to the appellant and review the issue *de novo*. *Morris v. City of Colo. Springs*, 666 F.3d 654, 660 (10th Cir. 2012).

II. Discussion

We conclude that the District Court properly granted Homecourt Clothing's motion for summary judgment.

1. Trademark Infringement³

The Lanham Act defines trademarks as words, designs, or symbols used to distinguish goods “from those manufactured or sold by others and to indicate the source of the goods.” 15 U.S.C. § 1127. A trademark’s primary function is to identify where the product originates. *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 146 (2023). Simply put: “a trademark is not a trademark unless it identifies a product’s source.” *Id.* While trademarks ensure that consumers can rely upon source identifiers and be protected from counterfeiters, producers also reap protections from trademark law because producers “will reap the financial, reputation-related rewards associated with a desirable product.” *Qualitex Co. v. Jacobson Prods. Co., Inc.*, 514 U.S. 159, 164 (1995).

The Ninth Circuit has established a two-step test for aesthetic functionality. *Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc.*, 457 F.3d 1062, 1072 (9th Cir. 2006). Aesthetic functionality may only enjoy limited application, but it remains a viable theory. *Id.* at 1073. It remains viable here. “[A]esthetic functionality has been limited to product features that serve an aesthetic purpose wholly independent of any source-identifying function.” *Id.* Homecourt Clothing’s use of the “Men of Rome” mark is not source-identifying; instead, the mark serves an aesthetic purpose wholly independent of any source-identifying function.

Consumers’ use of items, whether t-shirts or bumper stickers, indicates the expressive nature of the consumer and their desire to express support, not the expressive intent of Homecourt Clothing. *See Int’l Ord. of Job’s Daughters v. Lindeburg & Co.*, 633 F.2d 912, 918 (9th Cir. 1980) (“Our jewelry, clothing, and cars are emblazoned with inscriptions showing the organizations we belong to, the schools we attend, the landmarks we have visited, the sports teams we support, the

³ The parties in the matter have stipulated that the challenged use in this matter is not a work of artistic expression. As such *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), does not apply to the facts of this case.

beverages we imbibe.”). When a fan of a sports team or aspiring future student of a university wears merchandise with a team name or school logo, the wearer is not doing so because they believe that the sports team or university itself was the source that designed, manufactured, or sponsored the goods. Instead, that fan or future student wears the merchandise to express their fandom or hope to attend a particular academic institution.

Even if some consumers misconstrued the “Men of Rome” mark on the merchandise as an indicator of source, Homecourt Clothing’s repetitive use of “Homecourt Clothing” on the hangtag and inside neck label and its stitched HC Mark on an item of merchandise, Homecourt Clothing engaged in clear labeling. Similarly, Homecourt Clothing engaged in clear labeling on its webpage and the packaging of its products. Homecourt Clothing’s only use of the “Men of Rome” trademark was ornamental. *Cf. Jack Daniel's*, 599 U.S. at 160 (“VIP’s conduct is its own admission that it is using the Bad Spaniels (née Jack Daniel’s) trademarks as trademarks, to identify product source.”). By far, the mark that appears the most—from the loading of Homecourt Clothing’s webpage to the opening of their delivered merchandise—belongs to Homecourt Clothing. Homecourt Clothing uses its HC Mark in a bona fide manner to identify

Homecourt Clothing as the source of the merchandise; it does not use the “Men of Rome” mark in such a manner. *See Abitron Austria GmbH v. Hetronic Int’l, Inc.*, 600 U.S. 412, 428 (2023) (recognizing that “the bona fide use of a mark in the ordinary course of trade, where the mark serves to identify and distinguish [the mark user’s] goods . . . and to indicate the source of the goods”).

In this case, it is essential to emphasize the unique features of a merchandising case and distinguish the differences between consumer confusion over the *source* of a product and consumer confusion about what the law requires. Homecourt Clothing has not committed the “cardinal sin” of trademark law by using STEM University’s trademark to indicate source; Homecourt Clothing

has not used the STEM University's "trademark as a trademark." *Jack Daniel's*, 599 U.S. at 157.

STEM University holds the burden of proving that Homecourt Clothing's use of the "Men of Rome" mark serves a trademark function, establishing infringement rather than ornamental or expressive function. *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004); see *Jack Daniel's*, 599 U.S. at 153 (describing use of a mark "as a designation of source of the infringer's own goods" as the use "the Lanham Act most cares about").

Homecourt Clothing has not used the "Men in Rome" mark as a source identifier. Instead, it has been used in an ornamental and expressive function, permitting consumers to "identify [themselves] by displaying emblems expressing allegiances" to the STEM University men's basketball team. *Int'l Ord. of Job's Daughters*, 633 F.2d at 918. Institutions like STEM University yield their trademark as an overbroad merchandising right to block competition. Such institutions have unfairly found protection huddled within trademark law simply because consumers connect the marks adorned on merchandise with the trademark owners. The dissent thinks it scored a hat trick by applying *Boston Hockey* in this case; unfortunately for the dissent, we are dealing with basketball, and the dissent applied *Boston Hockey* in a way that the Fifth Circuit itself acknowledged could "slightly tilt the trademark laws from the purpose of protecting the public to the protection of the business interests of plaintiffs." *Bos. Pro. Hockey Ass'n, Inc. v. Dallas Cap & Emblem Mfg., Inc.* (Boston Hockey), 510 F.2d 1004, 1011 (5th Cir. 1975). This court now tilts them back away from the "extraordinary extension of the protection heretofore afforded trademark owners." *Int'l Ord. of Job's Daughters*, 633 F.2d at 919.

Generally, courts apply the eight-factor *Sleekcraft* test to determine a likelihood of confusion. *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348–49 (9th Cir. 1979). However, there is no need to reach a likelihood of confusion analysis because the *Sleekcraft* factors necessarily require trademark use. See, e.g., *Fleischer Studios, Inc. v. A.V.E.L.A., Inc.*, 925 F.Supp.2d 1067,

1077 (C.D. Cal. 2012). As a matter of law, Homecourt Clothing's non-trademark use of the "Men of Rome" mark cannot give rise to any likelihood of confusion over the source of the goods.

Therefore, we conclude that the District Court properly granted Homecourt Clothing's motion for summary judgment.

2. Right of Publicity

The right of publicity grants one the right to control the commercial value of their name, image, and likeness to prevent others from exploiting them without permission. One's right of publicity is a cognizable property interest. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977). The State of Red's Right of Publicity law is similar to many other states. It requires three elements to be met: (1) the knowing use of a person's name or likeness, (2) on merchandise or for the purpose of advertising or selling, (3) without that person's prior consent. Neither party disputes that Appellee used the advertisement to promote its "Men of Rome" merchandise.

While the illustrated man in Homecourt Clothing's advertisement has no clear name, he has the same build as Hill Wammond and wears the same purple and gold arm bands. Of course, his height and muscles are very exaggerated in the advertisement than would be possible in real life. The big moment of the dunk, and the celebration that closes the advertisement, is the same celebration that Hill Wammond did after dunking on an opponent in a heated rivalry game towards the end of the regular season. Unlike in the advertisement, he did not dunk from the three-point line. Nonetheless, someone reasonably familiar with men's college basketball could easily recognize the player featured in real life.

When faced with a challenge regarding a right of publicity, one may raise a First Amendment affirmative defense that the work is protected because "it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame." *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 407 (2001). The

First Amendment is “given broad scope.” *Id.* at 403.

The “transformative test protects the right of publicity,” shielding “celebrities from literal depictions or imitations for commercial gain by works which do not add significant new expression.” *Kirby v. Sega of Am., Inc.*, 144 Cal. App. 4th 47, 58 (2006).

The advertisement does not literally depict Hill Wammond. Distinctions exist between the advertisement and Wammond both aesthetically and physically. The player in the commercial does not put on STEM University’s men’s basketball jersey; he puts on a jersey made and sold by Homecourt Clothing. Because such “distinctions exist, the First Amendment bars claims based on appropriation of [her] identity or likeness.” *Id.* at 61. To the extent the depiction in the advertisement's second half resembles Hill Wammond, it is “distorted for the purposes of lampoon, parody, or caricature.” *Winter v. DC Comics*, 30 Cal. 4th 881, 890 (2003).

Homecourt Clothing's advertisements are entitled to First Amendment protection because the advertisement does not threaten Hill Wammond’s right of publicity and, instead, transforms his likeness into a creative, superhuman character, leaving a lane open for him to profit from his likeness himself.

Accordingly, we affirm the District Court’s granting of Homecourt Clothing’s motion for summary judgment.

III. Conclusion

The District Court properly granted Defendant-Appellee’s motion for summary judgment regarding both the trademark and the right of publicity issues.

We affirm.

SCHULTZ, Circuit Judge, dissenting.

The majority fundamentally misunderstands and misapplies the intellectual property rights present in this case. Under the majority’s approach, any trademark that consists of a logo or emblem would lose its protection once used to decorate an item of merchandise. Additionally, at a time when student athletes can finally profit from their name, image, and likeness, the majority here undercuts these long overdue gains, allowing a retailer to blatantly profit off a rising star’s likeness, patching up a portion of the watershed decision by the NCAA in July 2021 that allowed student athletes to engage in NIL activities. The District Court should not have granted Appellee’s motion for summary judgment.

I. Trademark Infringement

The majority’s impulsive desire to correct what it deems as missteps in trademark law is misplaced. No such missteps exist.

Homecourt Clothing argued that it was entitled to summary judgment because it merely used the “Men of Rome” mark on merchandise for ornamental or expressive use, not as a source identifier. Contrary to Homecourt Clothing’s assertion—and the majority’s holding—the mere fact that the “Men of Rome” mark is used as a decorative element does not render its use merely ornamental. A trademark does not just indicate source; it also shows a secondary source. “[A] mark tells the public who is responsible for a product.” *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 146 (2023). The majority correctly identifies a trademark’s primary function—to identify where the product originates; however, the presence of a primary function necessarily indicates that a trademark may serve multiple functions, such as being aesthetically pleasing or conveying a message. *See Keene Corp. v. Paraflex Indus., Inc.*, 653 F.2d 822, 825 (3d Cir. 1981).

Further, the secondary source doctrine requires that Homecourt Clothing’s ‘merely ornamental’ argument fail. *See, e.g., Concord Music Grp. Inc. v. STAX. PTY Ltd.*, 2023 WL

2977495, *3 (C.D. Cal. Apr. 6, 2023) (rejecting mere ornamentality defense where defendant used plaintiff recording label's STAX mark on a shirt, because the mark could indicate plaintiff as a secondary source). Because trademarks can communicate a secondary source, the granting of Appellee's summary judgment was premature. There is a genuine dispute of material fact as to the secondary source.

The majority opinion also applies the incorrect test. This case is best analyzed by applying *Boston Hockey. Bos. Pro. Hockey Ass'n, Inc. v. Dallas Cap & Emblem Mfg., Inc.* (Boston Hockey), 510 F.2d 1004, 1011 (5th Cir. 1975). Source of origin is not “the only focal point of confusion.” *Id.* at 1012. Under *Boston Hockey*, confusion is self-evident because of the nature of the reproduction of the mark. *Id.* Here, Homecourt Clothing duplicated the “Men of Rome” mark, applied it to various products, and “sold [those products] to the public knowing that the public would identify them as being [STEM University's mark].” *Id.* An argument as to confusion to the source is unpersuasive, because the “Men of Rome” mark “is the triggering mechanism for the sale of” Homecourt Clothing's merchandise. *Id.* Releasing merchandise “bearing trademarks universally associated with” STEM University men's basketball team's championship history at a time when the team has reinserted itself into national championship contention “support[s] the inescapable inference that many would believe that the product itself originated with or was somehow endorsed by [STEM University].” *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 389 (5th Cir. 1977).

Even if Homecourt Clothing will not admit to intending to create an association between its merchandise and STEM University, sports fans hold an “indisputable desire to associate with college sports teams by wearing team-related apparel,” and just “because some consumers might not care” about official licensing of products, that does not negate the likelihood of confusion. *Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll. v. Smack Apparel Co.*, 550 F.3d 465, 485

(5th Cir. 2008) (“Whether or not a consumer cares about official sponsorship is a different question from whether that consumer would likely believe the product is officially sponsored.”); *see also Univ. of Ga. Athletic Ass’n v. Laite*, 756 F.2d 1535, 1546 (11th Cir. 1985) (stating that under *Boston Hockey*, confusion “need not relate to the origin of the challenged product” but can relate only to “the public’s knowledge that the trademark . . . originates with the plaintiff.”); *Bos. Athletic Ass’n v. Sullivan*, 867 F.2d 22, 33-34 (1st Cir. 1989) (adopting *Boston Hockey*’s presumption of confusion if consumers associate the mark at issue with the mark owner).

Because Homecourt Clothing’s misuse of STEM University’s reputation and goodwill as embodied in the “Men of Rome” mark has created clear confusion, I would not affirm the motion for summary judgment.

II. Right of Publicity

Additionally, Homecourt Clothing’s advertisement lacks a significant transformative or creative contribution. While the artistic skill to accomplish the advertisement is undeniable, the advertisement’s economic impact stems from the fame and recognition of Hill Wammond. The sum and substance of the advertisement rests on the depiction of Hill Wammond.

The superhuman aspects in the second half of the advertisement do not ‘transform’ the likeness of Hill Wammond enough to receive First Amendment protections. Looking past the animation and stylized depiction, Homecourt Clothing’s advertisement at its core depicts Mr. Wammond himself. The focus of the advertisement is a young man with the same build, playstyle, mannerisms, and accessory choice as Hill Wammond, with traits and mannerisms he is already known for having in real life. Someone reasonably familiar with men’s college basketball can easily recognize the player featured in the advertisement. Considered individually, the components of the man in the advertisement say little; however, put together, little doubt remains about who Homecourt Clothing’s advertisement means to depict. Homecourt Clothing’s violation

of his right of publicity cannot be outweighed by its First Amendment defense.

The majority vastly overemphasizes the weight placed on protecting artistic expression. Hill Wammond's fans clearly associate him with the advertisement. Homecourt Clothing's use of Mr. Wammond's likeness affects his ability to profit from it in other advertisements. Hill Wammond clearly has "marketable celebrity identity value," and "[t]he law protects [his] sole right to exploit this value." *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992), *as amended* (Aug. 19, 1992).

"Speech that does no more than propose a commercial transaction, for example, is commercial speech." *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 970 (10th Cir. 1996). The core purpose behind Homecourt Clothing's advertisement is to sell its merchandise. By not compensating Hill Wammond for his likeness, Homecourt Clothing lines its pockets while likely keeping Hill Wammond out of the potential rotation for other similar products, retailers, or advertisements.

Because Hill Wammond has alleged facts that Homecourt Clothing appropriated his identity, the District Court erred by rejecting his right of publicity claim on summary judgment.

III. Conclusion

By affirming the District Court, the majority steps far out of bounds of the confines and protections of intellectual property law, simultaneously weakening trademark protections and diminishing college athletes' rights of publicity. I would reverse the District Court's order granting Appellee's motion for summary judgment.

APPENDIX A

Red Right of Publicity Statute

Any person who knowingly uses another's name, voice, photograph, or likeness in any form, without such prior consent, and doing so for commercial use, shall be liable for any damages sustained by the person injured as a result thereof. Any profits from the unauthorized use shall be considered for computing the actual damages.