



KATY PERRY'S LEFT SHARK: ATTEMPTING TO PROFIT FROM A VIRAL PHENOMENON

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In an era where information can often go viral on social media, the most successful of memes are often the most unexpected. How does intellectual property tackle a viral phenomenon?

Popstar Katy Perry knows something about this. During her halftime show at the SuperBowl last February, an unexpected character stole the show: the now famous "Left Shark". Within minutes, the awkward shark dancing to the singer's left became a viral sensation and the hashtag #leftshark spread like wildfire. According to the website knowyourmeme.com, it was the rapper Snoop Dogg who first drew the public's attention to the beleaguered Left Shark [<http://knowyourmeme.com/memes/super-bowl-xlix-halftime-shark>].

In a previous edition of the ROBIC newsletter, we examined the protection available for hashtags. But what about protecting the other aspects of a spontaneous and unpredictable viral phenomenon? There are several possible avenues, but each comes with its own challenges. Let's begin with trade-marks. In the days following her show, Katy Perry filed a trade-mark application in the United States for the term "Left Shark", related to the use of products such as phone cases, clothing and toys. This isn't very surprising, given the importance of merchandising in the entertainment industry.

What would have happened in Canada?

It remains to be seen whether the trade-mark will be accepted, but this shark is already in turbulent waters. For instance, in Canada, a trade-mark must be distinguishable, so that consumers can identify the source of the associated products or services. However, in the case of an accidental viral phenomenon, such as the Left Shark, the term is already very well-known with the public. Consumers identify the trade-mark with the misadventures of Katy Perry's shark and internet users were the ones to collectively make the expression famous and not Katy Perry through any marketing efforts of her own. Furthermore, who is the true author of the expression

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“Left Shark”? Can Katy Perry claim to have coined the term? Determining the term’s origin could be problematic. Although it is uncertain whether the expression “Left Shark” can be protected, what about the shark costume itself? This is the question that led Katy Perry to oppose Fernando Sosa, a man who started selling a design for a 3D printable model of the Left Shark on shapeways.com. We addressed various issues related to 3D printing in a previous edition of our newsletter [http://newsletter.robic.ca/nouvelle_princ.aspx?lg=EN&id=45].

Copyright is an interesting option: it automatically exists in every original work. The Left Shark character is not an artwork in itself, but the costume could be. However, the owner of the copyright must be clearly identified: if the Left Shark costume were created by a designer who participated in the production of the show then who would own the rights? This would depend on whether the designer has assigned his/her rights, and to whom, especially considering that such a transferring of rights must always be made in writing.

Another challenge may arise when commercializing the Left Shark costume, as Katy Perry has done (you can now buy an official Left Shark onesie). According to Canadian law, she opened the door to an exception to copyright protection by producing a “useful article”, since the article is reproduced in a quantity of more than 50 copies, provided that those copies were originally produced under the authority of the would-be copyright holder. Now we promise that this is our last plug, but the protection of clothing and costumes was explored in depth in this excellent article [<http://www.robic.ca/admin/pdf/841/333F-CMB.pdf>] by our colleague Catherine Bergeron. That’s it for the digression.

In this particular context, the protection offered by an industrial design is recommended. Industrial designs protect the visual characteristics of an object, such as the Left Shark costume, for 10 years following the registration of the industrial design.

This brief overview of intellectual property, as it relates to Katy Perry’s Left Shark, illustrates the troubled waters that one must navigate when attempting to tame an unexpected viral phenomenon. In any case, it’s worth the effort— you can’t buy this kind of publicity!



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