

**[J-162A-B-2008] [MO: Baer, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 116 MAP 2007
	:	
Appellant	:	Appeal from the Order of the Court of
	:	Common Pleas of Centre County entered
v.	:	on November 15, 2007, at No. CP-14-CR-
	:	0001200-2007 dismissing Count 1 as
	:	unconstitutional and quashing the criminal
	:	information
OMAR A. OMAR,	:	
	:	
Appellee	:	SUBMITTED: December 2, 2008

COMMONWEALTH OF PENNSYLVANIA,	:	No. 20 MAP 2008
	:	
Appellant	:	Appeal from the Order of the Court of
	:	Common Pleas of Centre County entered
v.	:	on January 25, 2008, at No. CP-14-CR-
	:	2020-2007
	:	
	:	
DANIEL J. O'CONNOR,	:	
	:	ARGUED: December 2, 2008
Appellee	:	

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE

DECIDED: October 5, 2009

I join the Majority Opinion. I write separately to make the following observations.

The tension between the Majority Opinion and the Dissenting Opinion of Madame Justice Greenspan, in my view, rests in the fact that no person could rationally doubt that trademark counterfeiting is a serious offense against the laws of this Commonwealth that is

worthy of the General Assembly's exercise of its police powers. Further exacerbating the tension is that, notwithstanding the facial deficiencies of the statute, appellees were engaged in the very sort of profiteering activity that the statute unquestionably could properly target. See Dissenting Slip Op. of Greenspan, J. at 12 ("Clearly, the conduct of these Appellees was a violation of Nike and Penn State's trademarks, and Appellees' behavior was illegal. That Appellees should have their convictions overturned due to overbreadth of the Statute . . . has an aura of injustice.").

If the law were such that persons properly ensnared by this statute lacked standing to bring facial challenges,¹ the dispute here would be avoidable. But, as I understand controlling law from the U.S. Supreme Court, in First Amendment cases, even unquestioned scoundrels are permitted to forward facial challenges -- essentially as faux, vicarious champions of the rights of others not before the court who have refrained from constitutionally protected speech or expression due to the very existence of the statute. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) ("[T]he Court has altered its traditional rules of standing to permit -- in the First Amendment area -- attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."); accord Commonwealth v. Davidson, 938 A.2d 198, 208 (Pa. 2007).²

¹ Generally speaking, constitutional rights cannot be asserted vicariously. See Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973) ("Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.").

² Interestingly, the overbreadth doctrine does not always apply in commercial speech cases. As the U.S. Supreme Court has explained, "[a]lthough it is true that overbreadth analysis does not normally apply to commercial speech, that means only that a statute whose overbreadth consists of unlawful restriction of commercial speech will not be facially (continued...)

And so we have no choice but to accept this litigation as it is presented. I recognize the force of the concern expressed in Justice Greenspan's Dissenting Opinion, which has marshaled a substantial argument in favor of a finding that the General Assembly meant to criminalize "only the **deceptive** use of a recognized word or mark in the context of **a sale or distribution.**" Dissenting Slip Op. of Greenspan, J. at 8. But the argument so forcefully made relies on non-textual sources, in my judgment. And, in the criminal arena in particular, where we are construing the purported criminal reach of a statute, and where notice of what is criminalized is essential, the proper starting point is the language of the statute. As the U.S. Supreme Court has explained:

Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language This proposition is not altered simply because application of a statute is challenged on constitutional grounds. Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature.

United States v. Albertini, 472 U.S. 675, 680 (1985); accord Heller v. Frankston, 475 A.2d 1291, 1296 (Pa. 1984).

Respectfully, in my judgment, this case does not present, as the Dissenting Opinion suggests, merely a poorly drafted statute. See Dissenting Slip Op. of Greenspan, J. at 1-2

(...continued)

invalidated on that ground -- our reasoning being that commercial speech is more hardy, less likely to be 'chilled,' and not in need of surrogate litigators." Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 481 (1989) (citations omitted). However, even where the principal attack is the application of a statute to commercial speech, if "the alleged overbreadth . . . consists of its application to non-commercial speech, [] that is what counts," id., and that is the scenario before this Court today, see Majority Slip Op. at 8 (noting appellees' argument that "the use of the word 'Nike' on a sign at a protest rally, such as 'Nike uses sweatshop labor' would fall within the reach of the Trademark Counterfeiting Statute because the activity would involve the unauthorized use of a word or term used by another to identify goods or services").

(arguing that “[t]his Court should not declare a criminal statute to be unconstitutional under the void-for-vagueness or overbreadth standards merely because the drafters utilized clumsy grammar, as is the case here”). As the Majority Opinion determines, “the plain language of the statute as written” (Majority Slip Op. at 11) prohibits a substantial amount of constitutionally protected speech when judged in relation to the statute’s legitimate sweep. See id. at 11-12 (describing broad definitions of relevant terms set forth in statute and concluding that “[w]hen the relevant definitions are inserted into the definition of the offense, the statute criminalizes the use of any items bearing an unauthorized reproduction of terms or words used by a person to identify that person’s goods or services”). The Dissenting Opinion finds “latent” ambiguity (Dissenting Slip Op. of Greenspan, J. at 8) only by looking to the structure and supposed purpose and intent of the statute, in contravention of Section 1921 of our Statutory Construction Act, see 1 Pa.C.S. § 1921(b) (“When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”). Nevertheless, the statute, on its face, is unambiguous, and we may not disregard those obvious deficiencies to essentially rewrite the statute so as to keep trademark counterfeiting illegal until the General Assembly manages to define the offense in a constitutional manner. Accordingly, I am constrained to agree that the statute is unconstitutionally overbroad, and I join the Majority Opinion.