

# The Tide Rolls Out: Appeals Court Rules Against 'Bama in Suit Against Painter of Famous Football Scenes



By David Roy Ellis

This past summer, before the college football season began, the U.S. Court of Appeals for the Eleventh Circuit in Atlanta ruled in favor of an artist who painted famous historical scenes of the University of Alabama's Crimson Tide football team. The University sued the painter, Daniel Moore, for trademark infringement, unfair competition, and breach of contract for depicting its renowned crimson and white uniforms in his paintings without permission. *Univ. of Alabama Board of Trustees v. New Life Art, Inc.* (11th Cir. 2012).

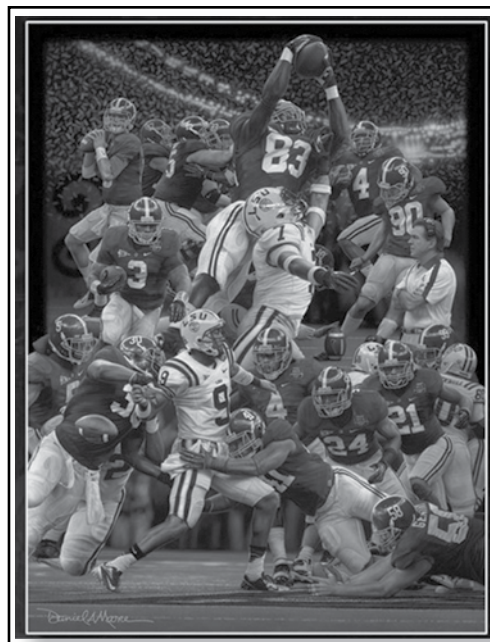
For over thirty years, since 1979, Moore has painted famous scenes from Alabama's storied football history and sold them to the team's rabid fans. His paintings feature realistic portrayals of the Crimson Tide's uniforms, including helmets, jerseys, and crimson and white colors. Moore's popular paintings have also been reproduced as prints and calendars, and on mugs, t-shirts, and other articles.

For a dozen years, Moore painted historical Alabama football scenes without any kind of formal or informal relationship with the University. After 1991, he signed a dozen licensing agreements with the University to produce and market specific items, which often included Alabama trademarks on the border or packaging, or came with a certificate or stamp saying they were officially licensed products. He did not pay royalties for any of these items, nor did the University ask him to do so.

During that time, the University issued Moore press credentials so he could have access to the team and obtain material for his work. However, in 2002, the University told Moore that he would need to license all of his Alabama-related products because they featured the University's trademarks.

In particular, the University said that Moore needed permission to portray

the University's uniforms, including the jersey and helmet designs and the crimson and white colors. Moore contended that he did not need permission because the uniforms were being used to realistically portray historical events. The parties could not resolve the matter, and in March 2005, the University sued Moore in federal court for breach of contract, trademark infringement, and unfair competition.



The University claimed that Moore's unlicensed paintings, prints, calendars and other items infringed the University's trademarks because his depiction of the University's football uniforms with the crimson and white colors created a likelihood of confusion on the part of buyers that the University sponsored or endorsed his artwork and products. The University argued that its uniforms are "strong" trademarks, worthy of protection against use without its permission.

The district court found that Moore's depiction of the uniforms in paintings and prints was protected by the First Amendment and also was a fair use, and that there was little likelihood of confusion

among consumers. However, it also ruled that, although the University's trademark rights were weak, Moore's depiction of the uniforms on mugs, calendars and other "mundane products" was likely to cause customer confusion.

On appeal, the Circuit Court concluded that Moore's First Amendment interests in artistic expression so clearly outweighed whatever consumer confusion might exist that there was no trademark infringement with respect to the paintings, prints, and calendars. The court said that Moore did not violate the University's trademark rights because the uniforms in his artworks are artistically relevant to the underlying works. It also said that Moore never explicitly misled consumers as to the source of the items, and his interests in artistic expression outweighed any risk of confusion as to the endorsement.

The court therefore concluded that Moore may continue to sell his paintings, prints, and calendars without the University's permission. As to mugs and other "mundane products," the court remanded the case to the lower court because there were some disputed issues of fact remaining in the case.

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