

# *Trademark Use and the Problem of Source in Trademark Law*

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This paper mediates a scholarly dispute over the existence and desirability of a "trademark use" doctrine. It argues that "trademark use" is a predicate of liability under the Lanham Act, but those who advocate treating trademark use as a threshold question put much more weight on that concept than it can bear. Courts are unable to consistently apply trademark use as a distinct element of the plaintiff's prima facie case because "trademark use" is not separable from the question of likelihood of confusion. Under modern trademark law, courts can determine whether a defendant has made "trademark use" of a plaintiff's mark only by asking whether consumers are likely to view the defendant's use as one that indicates the source of the defendant's products or services. "Trademark use," then, is not a concept capable serving the limiting function advocates hope. But neither is a failure to apply the doctrine to blame for seemingly ever-expanding trademark rights. The real problem in modern trademark law is that the scope of trademark rights depends entirely on consumer beliefs about "source." As long as that is true, trademark law has no ability to constrain its own expansion. Consumer beliefs are highly suggestible and based in part on assumptions about the law, particularly when the issue relates to a concept like "source" which encompasses entities in almost any imaginable relationship with the producer - whether or not consumers understand those relationships or care about them.