

What the United States Can Learn From Australian Trade Mark Law

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This paper evaluates the Australian approach to balancing trademark rights against the public interests of competition and free speech, and argues that the United States can learn from our friends down under when lawmakers consider proposed reforms of U.S. trademark law. Some scholars in the United States have argued in favor of a trademark use requirement for infringement claims or for abolishing or limiting the trademark dilution cause of action, among other restrictions on trademark rights. Although Australia lacks a constitutional right to freedom of expression, Australian trademark law contains statutory safe harbors for certain unauthorized uses of trademarks that may better protect competition and free speech compared to the United States. For example, the Australian Trade Marks Act explicitly requires the registered mark to be used “as a trade mark” for infringement liability and includes a comparative advertising defense. There is also no cause of action for dilution in Australia. In addition, the Australian Trade Marks Act provides a remedy for small businesses and others harmed by a trademark bully’s groundless threats to sue for infringement of a registered mark. By filing a “threats action,” the threatened party may obtain a judicial declaration that the threat is groundless, damages for any loss caused by the threat, and an injunction to prevent additional unsupported claims of infringement. It will be useful to consider the language and effect of these statutory trademark provisions in Australia when the United States debates whether to adopt speech-friendly reforms of U.S trademark law or other proposed legislation, such as a federal “Anti-SLAPP” statute, that makes it easier for judges to dismiss trademark lawsuits that attempt to stifle the free flow of information or ideas.