

Trademarks and Clarity in Consumer Expression

Kevin Collins

Washington University in St. Louis School of Law

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It is widely understood that producers use trademarks to communicate information about the source of goods to consumers. Trademarks, however, do more than this. Because they bear brand messages, they also communicate information about consumers' identities to other consumers. Michigan fans proudly wear hats emblazoned with the University of Michigan mark; rebels sport Harley Davidson t-shirts; ocean-activity enthusiasts attach Salt Life bumper stickers to their cars.

While the role that trademarks play in consumer-to-consumer communication is an open secret, the impact that trademark law's exclusive rights have on consumers' ability to use trademarks to express themselves has not been explored. Where slimming down trademark rights is widely understood to privilege speech interests in fair use cases when consumers modify or parody trademarks, we demonstrate that expansive trademark rights can improve the clarity of consumer speech in the far more common scenario in which consumers display trademarks, largely unaltered, to construct and announce their identities.

One key premise in our argument is that what sporting a trademark means is, in part, that one is like the other people who sport the trademark. That is, the intensity of affiliation with a brand message that a consumer signals by displaying a trademark is determined by the intensity with which other consumers who also display the trademark affiliate themselves with the brand message. If there are no exclusive rights, everyone—from devoted brand-message adherents to individuals just north of indifferent to the brand message—displays the trademark, and the trademark sends a fuzzy intensity signal. If there are exclusive rights, trademark owners can raise prices, drive the least enthusiastic consumers out of the market, and allow the more passionate consumers to broadcast the full extent of their affiliation with greater clarity. In sum, we argue that trademark law can harness trademark owners' profit-minded self-interest to boost the clarity of consumer speech in a way that consumers are unable to achieve on their own.

Our insight provides a policy justification for highly controversial features of existing doctrine. In cases involving merchandizing, post-sale confusion, and counterfeiting, courts today grant trademark protection even though there is no likelihood of consumer confusion. The scholarly consensus is that these cases are misguided because they allow trademark owners to profit at consumers' expense without providing consumers with any benefit in return. We develop a simple economic model to show that limitations on access, while pricing some consumers out of the market, can nonetheless improve the clarity of trademark-enabled speech for other consumers. Under the right circumstances, the benefits of greater clarity outweigh the costs of reduced access, and trademark protection in the absence of confusion improves welfare.