

All Brands Great and Small

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This work in progress explores trademark law's comparative treatment of large and small brands. Although trademark law makes some explicit concessions to large brands—e.g., in the law of dilution—in other areas we generally prefer to treat large and small brands alike. This egalitarian impulse is admirable but misapplied when it comes to trademarks.

So, for example, trademark law gives powerful brands merchandising monopolies. Some of us don't like that because of the costs imposed on consumers. Others justify the practice on desert or anti-free riding rationales. Whatever. But giving a merchandising right to a brand like NIKE is not a reason to extend it to one like LETTUCE TURNIP THE BEET, which cannot make similar investment or anti-free riding arguments. And merchandising rights in the hands of small brands create doctrinal difficulties distinct from limiting such rights to large ones.

These difficulties and others like them should not be justified by appeals to "fairness." Brands are not people, and trademark law should serve people, not brands. Just as the needs of trademark holders vary based on their markets, the consumer interest in strong trademark rights will depend on marketplace context.