Trademarks as the Anti-Antitrust

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This article posits that trademark law functions as a distinct yet crucial form of competition law, operating in an inverse relationship to contemporary antitrust principles. That is, antitrust law promotes efficiency by requiring rivalry where its absence would dissipate wealth, whereas trademark law promotes efficiency by forbidding rivalry where it would do the same. This is wholly distinct from the recognized tension between patent or copyright and antitrust; the former are deliberate suspensions of the latter, harnessing short-run monopolistic harms to incentivize long-run innovation gains. Instead, trademarks and antitrust both adopt a long-run view, but solve inverse market failures—too much versus too little competition between producers.

Viewing trademark law as the inverse of antitrust law first proves descriptively useful, helping to explain the contours of: trademark validity (e.g., genericness and functionality); trademark infringement (e.g., causes of action beyond consumer confusion); and the broad freedoms afforded trademark owners (e.g., tolerance of deception and misuse). Moreover, the antitrust-trademark dialectic carries normative freight. First, it provides potential for "unfair competition law"—in which trademark law is said to reside—to have actual coherency. Second, it suggests the need for a more sophisticated decision theory of trademark law, which has hitherto relied almost entirely on per se rules. Third, it offers a stronger framework for contending with speech-related concerns. And finally, it reveals answers to challenging antitrust puzzles regarding single-product markets and intrabrand competition.