

TRADEMARKS AS COMPETITION LAW: THE **ANTI**-ANTITRUST

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TRADEMARK LAW (FEAT. **BORK & AREEDA**)

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Theories of Trademark Law



Search costs



Quality incentives



Natural rights



Property



Competition

Antitrust Law at a Glance

What it does...

- Forces rivalry, forbidding exclusivity or cooperation

Why...

- To pursue efficiency, with a bias towards consumer welfare

And how...

- Via decision theory, considering errors, self-correction, and clarity

Trademarks as Competition Law

What they do...

- Forbid rivalry, forcing exclusivity or cooperation



Trademarks as Competition Law

Why...

- To pursue efficiency, with a bias towards producer welfare

Causes of Action

- Traditional confusion
- Post-sale/initial interest
- Dilution

Outer Limits

- Distinctiveness/genericness
- Functionality
- Deception

Institutional Features

- No consumer standing
- Rights, not duties

Trademarks as Competition Law

Why...

- To pursue efficiency, with a bias towards producer welfare

Unfair Competition

- False advertising
- Interference with business relationships
- Trade secret misappropriation
- Rights of publicity

Trademarks as Competition Law

And how...

- Via decision theory, considering errors, self-correction, and clarity

Decision-Making Structure

- Extensive, uncritical use of per se rules
 - In favor of validity (e.g., inherently distinctive)
 - In favor of infringement (e.g., likelihood of confusion / dilution)
 - Open standards are reserved for negotiating speech concerns
- Consistent, cumulative advantage accrues to plaintiffs
- Intervention expands via self-fulfillment over time

And how...

- Via decision theory, considering errors, self-correction, and clarity

**Validity errors mimic
antitrust errors**

- False positives defer to the market, false negatives restrain it
- Greater faith in the market should lead to stronger gatekeeping

**Infringement errors
invert antitrust errors**

- False negatives defer to the market, false positives restrain it
- Greater faith in the market should lead to weaker rights

And how...

- **Via decision theory, considering errors, self-correction, and clarity**

**Self-correction
depends on entry and
exit**

- **Intervention should avoid unnecessarily amplifying barriers to entry and incumbent advantages**

**Self-correction also
depends on consumer
behavior**

- **Intervention is less necessary as information costs and brand loyalty decrease**

And how...

- Via decision theory, considering errors, self-correction, and clarity

Clarity is relatively less important for competitors

- Criminal enforcement is narrow, ex ante information is readily available, and chilling concerns are less serious
- Flexible standards are more justifiable

Clarity is relatively more important for the public

- Speech-related concerns are frequent, ex ante information is unavailable, and chilling concerns are more serious
- Clear rules are more justifiable



Trademarks as Competition Law

Policy prescriptions

- Strengthen validity gatekeeping
 - Reconsider per se distinctiveness
- Soften infringement doctrine
 - Reconsider per se confusion
 - Create per se speech harbors
- Avoid further circularity in enforcement scope
- Reconsider rich-get-richer presumptions

Apologetics

- Rule-of-reason genericness
- Per se dilution

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