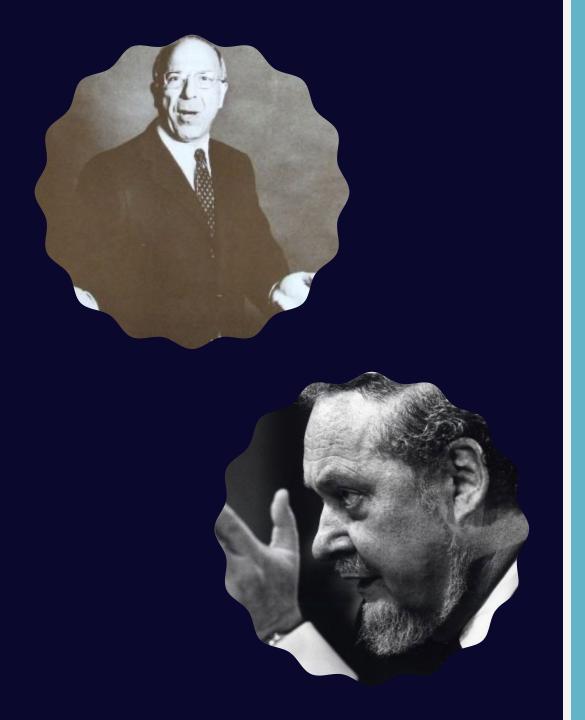
TRADEMARKS AS COMPETITION LAW: THE ANTI-ANTITRUST

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Theories of Trademark Law











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

What they do...

• Forbid rivalry, forcing exclusivity or cooperation









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

Why...

• To pursue efficiency, with a bias towards producer welfare

Unfair Competition

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

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





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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