

Trademarks and Consumer Communication

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Trademarks are conventionally framed as tools that help trademark owners communicate information about their goods to consumers. Yet, in the contemporary marketplace, consumers often use trademarks—a Harley Davidson t-shirt, a Red Bull cap, a University of Michigan hoodie, a Swiftie backpack—to communicate something about themselves to other consumers. These trademarks constitute consumer speech as much, if not more, than they constitute trademark-owner speech.

The law governing trademarks has also evolved. Today, trademark owners prevail even when the evidence, at most, an attenuated link between the defendant's actions and consumer confusion about source. Scholars uniformly deride this expansion as a give-away to producers at the expense of consumers. They do so because they assume only producers use trademarks to communicate. This Article shows that once this assumption is relaxed—once we recognize the reality that consumers use trademarks to communicate, too—the proper scope of trademark law becomes far less certain.

More specifically, this Article makes two points. First, we argue that trademark protection can increase the precision of a trademark's brand message and thus the clarity of the vocabulary that consumers have at their disposal to construct their identities. This precision is inversely correlated with the variation in the intensities with which consumers brandishing the mark subscribe to the brand message. By increasing price, the trademark owner restricts the set of consumers sporting a trademark to more passionate adopters, enabling a better, more targeted inferences by those who observe the display the mark—i.e., clearer consumer speech. Second, and more briefly, we query whether this increment of protection generates socially valuable incentives for producers to invest in expanding the number of brand-message bearing trademarks, and thereby increase the nuance that is possible from trademark-enabled consumer speech.

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