

REGULATING POISONED FLOWERS: RESOLVING FOCAL POINT PROBLEMS (MARKERS, SPOILERS AND TRADE-MARKS) IN CYBERSPACE*

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*Okay . . . why not make the petals poisonous only when in the possession of someone who purchased them? If they are stolen, or if they blow away, then let the petals lose their poison.*¹

ABSTRACT

In cyberspace a dynamically coded focal point doesn't just provide a salient reference. It can actually deliver a person's augmented presence to a location. Placing reliable focal points as navigational markers in coded space is a good thing, and indexing them is even better because these support the public good by providing a virtual map to cyberspace, thereby promoting access, navigation, information-activity and trust among augmented presences. In an objective cyberspace which relies upon a virtual map featuring dynamically coded focal points that function as markers, addresses, magnets, roadblocks or detours, I propose that conduct which (a) alters the virtual map, (b) plants deceptive focal points, (c) ambushes a user of focal points with uninvited or false invitations, or (d) expropriates, blocks or spoils focal points otherwise available, should be recognized as an actionable focal point offense. The focal point offense can be specified and can be determined by a rationally demonstrable "nature and place of use" analysis. Moreover, it can be limited by a "common remedy" purposely designed to be flexible, proportionate and graduated to promote a modest re-coding of cyberspace to preserve its foundational values.

The specified focal point offenses in cyberspace constitute independently actionable misrepresentation or deceit, misappropriation or theft, spoilage or unfair competition. All focal point offenses use expressions that function as markers or spoilers in space, and some of the more effective focal points incorporate trademarks. While some focal point offenses might also constitute trademark infringement, it is not immediately helpful to try to resolve focal point offenses in cyberspace by ordinary principles of trademark law as developed in ordinary space. "Ordinary" trademark law, as currently misapplied to focal point conflicts in cyberspace, has raised curiously novel defenses and other aberrations that more frequently obscure than reveal what is happening in cyberspace while defacing trademark law itself. Ordinary trademark factors even when carefully applied are not able reliably to predict a "likelihood of confusion" by attenuated or invisible trademarked expressions in cyberspace, much less resolve the real problems caused by focal point offenses in space.

This Article extends an argument I began in a series of prior Articles and is intended to persuade juridical actors to adopt the proposed new solution. I claim the new approach does three things: (1) it works—it provides a highly practical resolution of cyberspace focal point conflicts, including those which incorporate trademarks, because it more reliably gets to the correct result, for the right reason, persuasively explained than does any other proposed resolution, (2) it is efficient because it allocates

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¹ LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 6 (1999).

costs and benefits among cyberspace actors in a Pareto-optimal manner, and (3) it is authorized, predictable and principled because it is recognizably derived from existing patterns of law already regulating misrepresentation, misappropriation, and unfair competition, and it can easily coexist with trademark law. I also claim it is better in all three respects than any other competing explanation of, or proposal for how to deal with invisible or attenuated trademark conflicts in cyberspace.