

TRADEMARK AND THE CONSUMER

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ABSTRACT

Trademark law is intellectual property's red-headed stepchild, attracting little attention (except for the occasional beating). Part of the reason for this is that it represents a kind of solved problem: There is extraordinary consistency among scholars about trademark's foundational goal, that trademark exists to police the quality of source and attribution information in the marketplace, and in doing so reduce consumer search costs. According to this "consumer search cost" theory, trademarks provide an incentive to owners to ensure quality, to build their reputation, and to distinguish their goods and services; but this incentive is provided only as a component of the true reason for trademark's existence, the marshalling of information about products or services to the benefit of consumers in an effort to reduce their costs of search. Trademark law is, then, a kind of capitalist-driven consumer protection law based on the modern economic conception of the market as the preëminent mechanism of information exchange.

This theory, like most law and economics theories, is wrong. This paper takes a critical look at the consumer search cost theory. We argue that the theory appropriately focuses on the consumer, but doesn't understand much about what consumers actually do when confronted with trademarks. Without understanding how consumers process marks and brands, any theory predicated on what happens to consumers is fundamentally flawed. Drawing on cognitive and social psychology, and on related marketing studies, the central question we ask is "What would trademark law look like if it actually cared about consumer decision-making". From this we derive a number of claims about the (largely negative) role that trademark law has played in marketing and in modern-day life, and derive two norms of consumer autonomy and the role of trademarks in these conceptions of autonomy.