

Irrelevant Confusion¹

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Trademark law centers its analysis on consumer confusion. With some significant exceptions, the basic rule of trademark law is that a defendant's use of a mark is illegal if it confuses a substantial number of consumers and not otherwise.

As a general matter, this is the right rule. Trademark law is designed to facilitate the workings of modern markets by permitting producers to accurately communicate information about the quality of their products to buyers, and therefore to encourage them to invest in making quality products in circumstances in which that quality wouldn't otherwise be apparent. If competitors can falsely mimic that information, they will confuse consumers, who won't know whether they are in fact getting a high quality product and therefore won't be willing to pay as much for that quality. I won't pay as much for an iPod if I think there is a chance it is a cheap knock-off masquerading as an iPod.

The law of false advertising operates as an adjunct to trademark law. While trademark law prevents competitors from misrepresenting the source of their products by mimicking another's brand name, the law of false advertising prevents false or misleading statements about the quality of one's own or a competitor's products. Like trademark law, false advertising law is designed to protect the integrity of markets by allowing consumers to rely on statements made by sellers.

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Unfortunately, trademark law has taken the concept of confusion too far. Between 1930 and 1980, courts expanded the concept of confusion beyond confusion as to the source of a product to include the possibility that consumers are confused as to whether the trademark owner sponsors or is affiliated with the defendant's goods. This expansion began for plausible reasons: consumers might be confused to their detriment in a variety of circumstances in which the plaintiff and the defendant do not actually compete directly. But sponsorship and affiliation confusion has taken on a life of its own, resulting in a large number of cases in which companies or individuals are prevented from doing things that might conceivably confuse consumers, but do not confuse consumers in any way that harms their decision-making process or that the law should care about. In Part I, we offer a number of examples of "confusion" that courts have found actionable even in circumstances in which that confusion was unlikely to matter to the operation of the market. Part II explains how we arrived at this unfortunate pass.

We suggest in Part III that trademark law should focus its attention on confusion that is actually relevant to purchasing decisions. We would make the source of the goods the central element of confusion analysis. It is confusion as to source that is most obviously relevant to the purposes behind trademark law. That does not mean, however, that confusion as to the relationship between plaintiff and defendant can never be actionable. Confusion as to affiliation should be actionable when consumers are likely to believe that the trademark owner stands behind or guarantees the quality of the goods the defendant sells. Even if consumers understand that individual franchisees, rather than the

McDonald's Corporation, actually make their hamburgers, they are likely to expect that McDonald's stands behind whatever quality that brand represents.

Finally, the fact that confusion as to sponsorship or affiliation should not generally be trademark infringement does not mean that it will never be actionable. Some statements that create confusion as to sponsorship or affiliation will be actionable as a form of false advertising. We address the scope of false advertising in Part IV. Notably, proof of a false advertising claim requires the plaintiff to demonstrate that the misrepresentation is material – that it is likely to affect a product purchasing decision. Indeed, the statute specifies the sorts of misrepresentations that are forbidden. We continue the discussion in Part V, which explores some of the implications of shunting some cases into the false advertising framework, and discusses how to handle some close cases.