

Owning Markets? Trademark Law and Market Foreclosure

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ABSTRACT

Arguments about market pre-emption and free-riding have long been offered in support of broader trademark rights. Specifically, advocates of broader protection have argued that prior users should have superior rights in a mark against later adopters in ancillary markets because failure to enforce rights against those junior users would impede the senior user's ability to enter those markets. Advocates have also asserted free-riding arguments in this context, suggesting that senior users should have superior rights because the later users are mere free-riders, reaping where they have not sown.

These arguments generally have been tacked on to primary arguments regarding the potential that a later, non-competitive use might cause negatively impact the senior mark owner's reputation (particularly its reputation for quality). And because those primary arguments have been so widely accepted, neither courts nor scholars have expended any serious energy evaluating the market pre-emption or free riding arguments. That has been a mistake. First, the empirical case for the reputational dilution claims is much weaker than one might expect. Consumers in general are quite good at contextualizing their views of quality according to product category. As a result, it is relatively rare for consumers to impute poor quality to a senior mark owner operating in a different market. Second, it is apparent to us that the sentiments behind the market pre-emption and free riding arguments have actually motivated courts in a number of cases to impose liability in questionable cases. But we believe these arguments actually depart fundamentally from the traditional bases of trademark law and theory, and in ways that could prove quite troubling in a competitive economy. We therefore aim here to confront the market pre-emption and free riding arguments directly and to clarify what role, if any, those arguments should have in shaping the scope of trademark law.