

Trademarks

- 1 -

There's currently a debate about whether tmks owners shd be entitled to control strangers' usage of their tmks where the offending usage causes no confusion as to source. Usually the debate is conducted on usual lines: on the eco side, whether the increase in incentives (for both production and devt) justifies the decrease in quantity & competitive sources. On the authors' rights side, whether the originators shd have any particular rights in tmks cuz of origination.

These arent the only issues.

First: why is tmk protected in confusion cases? Felix is wrong? Legal protection CREATES value where value must rest on the accuracy of what the mark connotes. Everyone wants a truthful smt of source; legal protection makes it possible to have that. Pr Dilemma analogy.

Re nonconfusion cases. The various types of nonconfusing tmk uses should be distinguished. Re affiliational marks, it's far less clear that protection creates or secures value. Maybe protection avoids premature or over-exploitation (DeNicola), but it must be recognized that eco arg is much more tenuous than the one for confusion.

What about status marks which confuse only NONpurchasers. What value does their protection serve? It allows people to self-designate their social class. They want it. So there's more eco "value". But is it a good thing? That's far from clear. (Veblen.)

Head-to-head policy conflict: consumer sovereignty and paternalism. (Plus the irony that the con-sov types want to rely not only on voluntary actions, but on arguably paternalistic govt enforcement, in order to increase this value.)

To the extent we're doubtful about the status-preservation goal, we shd be reluctant to use state mechanisms to serve it.