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Fixing Informational Asymmetry Through Trademark Search

Jessica Silbey

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Amanda Levendowski, *Trademarks as Surveillance Transparency*, 36 **Berkeley Tech. L. J.** __ (forthcoming 2021), available at SSRN.

I call this paper a "Levendowski special." It follows the signature format of much of Professor Levendowski's prior work which, as in the latest article, recruits a legal tool typically aimed at one set of problems for the purpose of cleverly addressing a different set of problems. Her past articles harnessed copyright law to "fix artificial intelligence's implicit bias" (2018) and to "combat revenge porn." (2014). This paper draws on Professor Levendowski's expertise working in private practice as a trademark attorney to address the problem of surveillance technology opacity. It is a primer on how to investigate trademark filings for hard-to-access information about surveillance technologies.

Levendowski laments and hopes to provide a partial solution to the informational asymmetry between law enforcement and the public about surveillance technologies. Private companies create surveillance technology – doorbell cameras, facial recognition tools, license plate readers – which are frequently used by law enforcement and embedded in communities. Community members are often unaware of the networks of surveillance until years later. Professor Levendowski explains that journalists and regulators often have difficulty investigating or tracking these surveillance tools because of weak or misaligned disclosure regimes.

But trademark filings – a process that aims to promote information clarity for consumers and other trademark owners – require specific public disclosures about the terms of the use of the good or service. And these trademark filings, as the article's author demonstrates, reveal surprising and sometimes secret information about what surveillance technologies do, how they function, and sometimes who is financing them. These filings are usually made coincident with the product being used in commerce or sometimes before the product goes on the market. And so timely and rewarding disclosure of information is possible if an investigator knows how and where to look.

Trademark filings disclose several useful pieces of information about the surveillance technologies. For example, trademark filings declare when the product was first used in commerce (or when the trademark registrant intends that the product will be used in commerce). Trademark filings do this with a declared date of use in commerce and also a "specimen of use" filed with the proposed trademark. Sometimes this information, filed by a trademark attorney, unwittingly undermines the company's desire for secrecy about its technology. For investment and fundraising purposes, trademark filings are sometimes made before there is a public announcement of the product or before a demonstration of a technology's efficacy. This filing would thus show the technology works and is in service before the company has announced as much publicly. In her search of the trademark registration system and attached specimens proving commercial use, Professor Levendowski uncovered: surveillance technology that was subject to non-disclosure agreements; the identities of surveillance targets; and the specific terms of financial arrangements between a company and law enforcement.

Levendowski's paper has many such surprising disclosures—including what some who are familiar with trademark registration procedure would consider unforced errors. Trademark attorneys do not have to file specimens of use that disclose confidential contracts, financing arrangements, or client information. In fact, it is possible that once this paper circulates among the relevant readers, there may be fewer such revelations. Trademark attorneys can redact documents and choose more carefully how to demonstrate use in commerce. They could coordinate better with the company's other legal and corporate counsel to make sure the right hand knows what the left hand is doing. Does Professor Levendowski mean her article to be a tool that is so short-lived in utility?

Levendowski responds by doubling down. First, working with Dyllan Brown-Bramble at Georgetown Law Center (a former student of the well-regarded and innovative course “Computer Programming for Lawyers” taught by Professor Paul Ohm), Levendowski built a “Trademark Watcher” tool to use with her clinic students at Georgetown Law Center. This tool will help uncover as quickly and efficiently as possible many more of these revelations that are already part of the PTO record. So we can expect that the case studies she describes in her article are just the tip of the iceberg. Second, she hopes that this search tool and the paper – while it may lead to more careful practice by some trademark lawyers in the future – will nonetheless immediately provide a critically important investigative tool for journalists and advocates seeking to right the balance of surveillance transparency. Third, as a former trademark law practitioner, Levendowski is uniquely positioned to propose reform to the requirements for specimens of use at the Trademark Office. By doing so, she could transform what was previously an accidental disclosure into a required one, e.g. financial arrangements or roll-out plans for next phase technology. Doing so may require connecting the required disclosure with the purpose of trademark law. But since information clarity about sponsorship, affiliation, and use is a core trademark goal, the reform effort would align with long-standing legal principles.

I look forward to witnessing the benefits that flow from this article and hope they may be enduring. Surveillance transparency is hard to achieve for the reasons Professor Levendowski explains, which have to do with the entrenched features of capital systems and organizational infrastructures that promote hierarchies of control and minimize accessibility of information. Her cogent and incisive article may be just the effort to set us on a new and productive path. Perhaps it will succeed at aligning trademark’s consumer-oriented regime, whose goal is fair competition, with justice-enhancing disclosures about surveillance technologies which, when used en-mass and in secret, undermine community well-being and consumer autonomy.

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