

Trademark Law and Social Value

Stacey Dogan

Professor & Law Alumni Scholar, Boston University School of Law
Boston, MA

Trademark scholars take for granted the notion that trademark law should limit itself to preventing harm, either to the trademark holder or the public. In practice, however, trademark law has long retreated from a strictly harm-based model and toward one aimed at those who profit from use of others' marks. At the same time, the trend toward a benefits-capturing model has been neither uniform nor universal. Courts have emphasized the social value of some uses of trademarks, and have crafted or broadened certain defenses even in the face of profit motives. When courts appreciate a tangible social value from an unauthorized use, they often craft limiting principles to protect such use. But their sympathies are context-specific rather than generalized. Despite scholars' best efforts to dissuade them, courts and legislatures are instinctively troubled by what they perceive as exploitation of trademark holders' reputations. Overcoming that instinct requires more than a blanket statement that free riding benefits society; it requires a demonstration that the particular use before the court promotes some legitimate social value. This project aims to examine the roots of trademark law's anti-exploitation impulse, and to consider its implications. On a general level, the analysis suggests that trademark law would benefit from a more honest conversation about why we value - or don't value - particular uses of trademarks. More specifically, in a world in which the public benefit from unauthorized use requires articulation and demonstration on a context-specific basis, scholars and advocates concerned about trademark law's expansion should consider directing their efforts toward projects that demonstrate such social value.

Email: sdogan@bu.edu

Dogan