

Trademark Law and Agency Costs

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At the heart of trademark law is a desire to prevent fraud on consumers. But consumers do not have trademark rights. Producers do. Therefore, when a producer brings a trademark infringement suit, it essentially acts as an agent vindicating the interest of its principal, the consumer. Modern trademark law, however, is full of doctrines that help the agent but harm the principal. This happens in at least two ways. First, modern trademark law increasingly creates opportunities to artificially increase prices even when there is no consumer fraud. Second, and perhaps even worse, modern trademark law often ignores the existence of consumer fraud when there is money to be made by trademark owners. If trademark law is to remain faithful to its core principal of preventing consumer fraud, it must adopt legal mechanisms that more closely align the producer agent with the consumer principal.

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