

Trademark Capacities

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A trademark is created when new, source-signifying meanings are added to existing words (or new words are coined). However, trademark law fails in critical ways to reflect what we know about semantic shift (how words gain or lose meanings over time, and how new words are added to the public lexicon). While linguistics, the study of symbols and their meanings, has made limited inroads in trademark law and scholarship, the existing literature has yet to mine historical and cognitive perspectives on semantic shift. This article is part of a larger project to fill that gap and use research on semantic shift to repair trademark theory and doctrine. Analyzing trademark law through the lens of semantic shift illuminates where the law can better track consumer perception and how it can better handle confusing ambiguity. Although trademark law traditionally turns on protecting consumers from confusing ambiguity, many of the doctrines built into our federal trademark law ignore consumer perception in whole or in part. For example, the doctrine of trademark incapacity bars trademark protection for terms that were once seen as product designations. The trademark incapacity doctrine is grounded in dual misconceptions about the static nature of language and the role of consumer perception in shaping trademark law's competitive structure. With regard to stasis in language, a shift from product category to trademark is a form of semantic restriction - the narrowing of a term designating a whole category to a prototypical member - by some accounts the most frequent and most natural form of semantic shift. And disconnecting trademark's competition policy from consumer perception can lead to unnecessary increases in consumer search costs. This article proposes replacing the doctrine of trademark incapacity with three approaches that better track the consumer perception and competitive concerns that ground trademark protection.

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