VEBLEN BRANDS AND INVISIBLE HANDS:
HOW TRADEMARKS CREATE A MARKET FOR SUPPRESSED SPEECH

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Much trademark commentary for the past twenty years has focused on the expanding scope of trademark rights and resulting pressures on First Amendment principles of free expression. One strain of commentary focuses on the trademark as the subject matter of speech: the expansion of the domain of actionable confusion under the 1988 amendments to the Lanham Act followed by the creation of a federal dilution cause of action in 1995 are argued to give trademark owners too much control over what others may say about their marks. A second strain of commentary focuses on trademarks as lexemes: when marks take on a set of non-source-identifying meanings in popular culture, it is argued that the public has an interest in accessing and even modifying those meanings in verbal discourse without interference from the mark owner. In both strains of commentary, the battle lines over trademark-related speech are drawn between the interests of the mark owner on the one hand and the interests of speakers on the other.

This article investigates an area in which trademark law intersects with principles of free expression in a different way: the doctrine of post-sale confusion. Post-sale confusion cases often rest their reasoning on an insight that can be traced back to Thorstein Veblen: consumers conspicuously use some trademarked products to send a social message (typically of wealth-based social status), and this message is understood by others in the consumers’ social environment. While social norms may suppress overt expressions of such messages, conspicuous consumption of expensive goods allows the expression to be accomplished symbolically. However, as the post-sale confusion cases recognize, if the symbols used to send such messages are freely available to anyone, a classic problem of information economics arises: the message loses its credibility due to indiscriminate use. This problem is analogous to the “lemons” problem that is said to justify trademark protection, with an important difference. Whereas other forms of infringement liability concern themselves with the credibility of information about products, post-sale confusion liability concerns itself with the credibility of information about purchasers. By extension, whereas the “lemons” guarded against by other forms of trademark infringement liability are products, the “lemons” at issue in post-sale confusion liability are people.

With this understanding, it seems that the primary function of post-sale confusion liability is to correct the “lemons”-type market failure with respect to social hierarchy by creating a market for Veblen Brands: trademarks that represent specialized symbolic expressions of an otherwise suppressed message of social status. The effectiveness of the symbolic message depends on the proper working of the market, which in turn rests on a system of government licenses for, restraints against, and punishments of particular expressive conduct, privately enforced through the property-like rules of trademark law. This system, by design, draws mark owners into an expressive alliance with their own customers, in opposition to those customers’ social competitors and the mark owners’ business competitors.

This article ultimately questions whether the trademark system has any legitimate interest in creating, maintaining, and regulating the market for Veblen Brands, and if so, whether the First

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Amendment permits the law of trademarks to be used in that way. In examining these questions, two conclusions emerge. The first is that post-sale confusion doctrine shares more in common with copyright law than with trademark law, even though the market for Veblen Brands would seem to bear no relationship to copyright’s traditional purpose of promoting the advancement of knowledge. The second conclusion is that post-sale confusion doctrine supplants social suppression of some speech with legal suppression of other speech, aligning the state with those who would engage in the socially suppressed expression (consumers of Veblen Brands), in opposition to those who would facilitate the social suppression of such expression by either proscription or subversion. Such a use of trademark law represents government regulation of non-commercial speech that is difficult to justify under the First Amendment.