Trademark and the Dynamic Construction of the Consumer

The consumer plays a central role in trademark and unfair competition law. Courts routinely state that trademark law exists to protect consumers against confusion in the marketplace for goods and services. Cases frequently turn on whether a person’s trademark or trade dress confuses consumers about the true source or affiliation of the goods in question. Accordingly, courts must measure consumer sensitivity to differences in the trademarks and trade dress of competing goods. If consumers are easily confused, courts should insist that competitors identify their products with marks so dissimilar that, with due apologies to Geico, even a caveman could tell the difference. If consumers are not easily confused, courts could allow the use of marks displaying subtle differences.

Courts do not agree about consumer sensitivity. Some boldly assert that consumers bring considerable sophistication to, for example, the purchase of wines, while others claim that consumers understand relatively little about differences in products and marks. This makes trademark law inscrutable. Competitors entering a field do not know if their use of a particular word, slogan, color, packaging shape, or product configuration will expose them to litigation, even if the proposed mark is reasonably distinguishable from those of competitors. Additionally, the law’s ambiguity encourages mark holders to sue or at least threaten litigation against competitors as a way of suppressing competition even when confusion is unlikely. Lawyers advising new businesses therefore give very conservative advice, counseling clients to steer clear of anything that might cause consumers to even think of a competitor because these thoughts could form the basis of consumer confusion. In short, even though the law holds open the possibility that consumers can deal with trademarks and trade dress in subtle ways, commercial entities generally behave as if consumers are insensitive and unsophisticated.

This could be a good thing. After all, if the purpose of trademark is to give consumers clear signals about the source of goods, isn’t it good if those signals are unmistakably clear? There are, however, some wrinkles, for modern trademarks and trade dress do more than simply identify the source of goods. In some cases, a trademark or trade dress conveys information about the nature and quality of the product. Packaging sometimes tells a consumer that a store brand is similar to a well-established name brand. In other cases, a product’s trade dress encompasses aesthetic or design elements that customers affirmatively desire, separate and apart from any connection between those elements and a particular source.

The law of trademark should not, at least in principle, allow mark holders to stop competitors from using competing but similar marks in this fashion as long as consumers are not confused about the source of competing products. But therein lies the rub. If consumers are easily confused, courts will be quicker to identify competing marks as infringing. This in turn will probably force at least some competitors to use trademarks or trade dress that very clearly do not confuse, but also fail to convey certain information to consumers or provide consumers with desired aesthetic or design features. Accordingly, our society can build its trademark law in two different ways. The first believes that consumers can deal with subtlety. It would find infringement only when consumer confusion seems quite obvious, thereby permitting a host of nuanced distinctions in trademark and trade dress that convey information and value to consumers. The second believes that consumers cannot deal with subtlety. Under this regime, courts would easily accept claims of consumer confusion, thereby ensuring large, extremely blunt distinctions between marks while depriving consumers of information and value.

The foregoing shows that the proper construction of trademark depends on the actual ability of consumers. Sophisticated, sensitive consumers will benefit more from the complex signals trademarks
send as long as they’re not confused about who makes the goods in question. Of course, if consumers lack the necessary abilities, they will be harmed by those complex signals. Clearer signals will remedy this problem, but at the cost of relatively inefficient transmission of information and value. In short, society should prefer a trademark regime of the first sort to the second as long as consumers have the necessary abilities.

But do consumers have the necessary abilities? Existing case law treats this question as an empirical one that can be answered either through actual evidence of consumer behavior or through a fact finder’s knowledge about consumers. Under this view, consumer abilities are taken as given and the law simply conforms to this reality by adjusting tests for consumer confusion appropriately.

This Article takes a different approach to the problem of consumer sensitivity by asserting that trademark law itself can give, or at least help give, consumers the abilities society desires. This approach rejects the notion that consumer abilities are given and immutable. Instead, it believes that consumers develop abilities of discernment in response to the kinds of commercial signals used every day. If those signals require sensitivity to subtle differences, consumers will develop them. If those signals require no sensitivity, consumers will not use — and eventually lose — whatever powers of discernment they already have. In short, trademark law can actually shape consumers to behave in a way that makes trademarks more useful.

This idea may come across as implausible to those raised on H. L. Mencken’s statement that “No one ever went broke underestimating the intelligence of the American people.” Nevertheless, intuition and academic literature support the proposition that consumers will become more discerning if they are expected to. From the intuitive perspective, consider how Internet domain names could cause confusion. A person seeking information about travel to Patagonia might encounter websites with very similar domain names, www.patagonias.net and www.patagoniaaz.com. An Internet novice might think that these websites are related, but regular experience with the Internet would quickly teach him that very small differences between domain names probably signal major differences in source or affiliation. And indeed, today’s Internet user is surely quite aware of this. Similarly, academic research about the so-called expectation effect has established that people perform better simply because they are expected to. Thus, test subjects who are told that they are good at the test perform better than subjects told that they are not. Indeed, rats will navigate mazes more effectively if their trainers are told that they are working with talented rats. Accordingly, the Article recommends that courts give consumers more credit for discernment in trademark cases because doing so will push society towards a trademark regime that will confer more benefits than the existing one which takes such a dim view of consumers. Indeed, the Article worries that if courts continue finding that consumers lack discernment, consumers will respond by becoming even more inattentive, thereby forcing future courts to shape trademark in ways that are progressively less beneficial.