

# ***Consumer Confusion: The Sole Focus of Trademark Law***

Qiqi Lou<sup>1,a,\*</sup>

<sup>1</sup>Zhejiang Gongshang University, Hangzhou, 310018, China

a. shidailouqiqi@126.com

\*corresponding author

**Abstract:** In recent years, the expansion of the global marketplace, driven by the digital revolution, has led to a growing complexity in trademark disputes. The balance between protecting intellectual property and preventing consumer confusion has become increasingly delicate. Traditionally, trademark law was designed primarily to prevent consumer confusion and ensure fair competition. However, with the introduction of the dilution concept, this focus has shifted, resulting in expanded trademark rights that can inhibit innovation and free competition. This paper revisits the original intent of trademark law, advocating for a refocus on consumer confusion as the core principle. Through an examination of legislative intent, theoretical underpinnings, and case law, this paper demonstrates the need to reorient trademark protections to ensure they serve the broader goal of market fairness and economic development. This research highlights that excessive protection of trademark rights can lead to monopolistic practices, which ultimately harm both consumers and market competition. It contributes to the ongoing discussion about how to balance trademark rights with consumer protection, aiming to guide future legal reforms that foster both innovation and competition.

**Keywords:** Trademark law, consumer confusion, intellectual property, free market competition, trademark dilution.

## **1. Introduction**

In recent years, supported by the digital revolution, the globalization market has experienced vigorous growth. This expansion has led to a complex web of trademark disputes that has grown increasingly intricate and multifaceted. Keys to these disputes often revolve around balancing the legitimate rights of trademark owners to protect their intellectual property, against the necessity to prevent consumer confusion.

Traditionally, the concept of trademark law was set up to prevent consumers' confusion, offering a mechanism to defend the rights of trademark owners, and thwarting any attempts by other companies to counterfeit their goods or services under another brand's name. However, with the introduction of the dilution concept, the prevention of consumer confusion as the main purpose of trademark law has noticeably shifted. This article deeply explores this deviation in modern trademark law, advocating a return to its roots and focusing exclusively on preventing consumer confusion.

Eminent trademark scholars have noticed that the expansion of trademark rights can have a chilling effect on free and fair competition, creation, and innovation. The key determinant as to whether trademark law should protect trademark owners' control and limitation on the use of their trademarks should be based on what promotes healthy market competition and development. Ultimately, market

advancement is geared to boost economic development, aiming for a win-win for both businesses and consumers.

This article starts from the following three aspects: legislative purpose, theoretical basis and judicial practice, to demonstrate the purpose of trademark law protection. Before beginning, it is necessary to make clear the criteria for judging what trademark law should protect, and which is more conducive to the healthy competition and development of the market.

## 2. Purpose Orientation of Trademark Right

The concept of trademark rights stems from the free market economic system. The result of this laissez-faire approach by producers and sellers often leads to consumer loss. Unscrupulous businesses and those that infringe on others' trademark rights may only seem to violate the rights of the trademark users. However, in the end, it prevents consumers from purchasing goods they believe are produced by a certain source, ultimately misleading consumers and causing them to suffer losses.

As for why trademark law should focus on protecting consumers, apart from consumers being a vulnerable group, it is also a legislative model and thought process designed to guide the market in reverse. Starting with the goal of not misleading consumers, rectifying trademark use in the market becomes a means to achieve this end. Moreover, the regulation and protection of all trademark users can point to the same clear and firm goal and will not deviate due to minor issues.

## 3. Theoretical Basis of Trademark Rights

### 3.1. Trademark Rights and Property Rights

In his influential work *A Semiotic Analysis of Trademark Law* [1], Barton Beebe and other scholars have issued significant warnings regarding the evolving focus of trademark law. Beebe argues that while the traditional primary objective of trademark law is to protect consumers from deceptive or confusing marketing practices, the law has increasingly shifted its emphasis towards the protection of trademark rights as if they were conventional property rights. This shift, according to Beebe, often undermines the original purpose of trademark law, which is to safeguard consumer interests.

It is crucial to understand that trademark rights should not be conflated with property rights in the conventional sense. Unlike tangible property, trademarks essentially embody commercial reputation rather than possessing intrinsic property value. They derive their value primarily through their association with specific goods or manufacturers rather than from any inherent property value. Therefore, attempts to protect trademarks using mechanisms akin to copyright protection are fundamentally misguided. Once a sign is recognized as a trademark, the focus necessarily transitions from the creative efforts involved in its initial creation to the trademark's role in assisting consumers in identifying the source of goods. This function is intimately connected with the average consumer's capacity to recognize and mitigate potential confusion, rather than with any inherent property value of the trademark itself.

In *The Trademark and the Firm* [2], it is noted that while the protection of trademarks can indeed be justified through economic reasoning, the court's ruling in the *Scandecor Developments* case necessitates a reconsideration of why trademark protection should be framed in terms of property rights. One compelling argument is that, similar to how competition law avoids overly affecting industrial practices with respect to vertical constraints, trademark law should also avoid excessive intervention. When one acknowledges that brand competition can generate substantial social benefits, the primary role of the law is to promote such competition effectively. This perspective does not imply that trademarks themselves possess property value in a tangible or worldly sense. Instead, trademarks do not independently constitute property; rather, their value emerges from their application to goods and their involvement in market competition. This application aims to enhance

product profitability and expand market share. The inherent value of trademarks lies in their role as intellectual property rights, rather than in the financial or property sense. Therefore, trademark protection should not be simplistically equated with property rights and protected based solely on civil law rationales.

### 3.2. Trademark Rights and Human Rights Protection

The article *Trade Marks and Freedom of Expression* [3] delves into the complex relationship between trademark dilution and the right to freedom of expression. The prevailing scholarly consensus is that trademark infringement law has expanded excessively, complicating the task of defining the precise scope of exclusive rights held by trademark owners. This over expansion is evident in various trademark infringement cases that have arisen, even those involving relatively mundane activities such as substantive references. The article critically examines the practice of resolving trademark disputes through the concept of "trademark dilution," arguing that this approach tends to excessively extend the scope of trademark rights. This, in turn, transforms trademarks into symbols of power and influence, rather than serving their intended purpose.

Furthermore, some scholars argue that although freedom of expression can sometimes serve as a constraint on trademark rights, it is generally more productive to address these issues by clearly defining the boundaries of trademark law itself, rather than invoking human rights law directly. Specifically, when it comes to determining the permissible use of registered trademarks in legal citations, the focus should be on preventing consumer confusion rather than on whether the use involves humor or satire. The primary concern should be to ensure that trademarks are used in a manner that does not mislead or confuse consumers.

The article also references specific legal cases, such as "Smith v. Wal-Mart Stores," to substantiate and elaborate on these arguments [3]. The protection of trademark rights should not be unduly influenced by perspectives from civil law. Given that trademark law is a specialized branch of intellectual property law, its primary responsibility should be to safeguard the market economic system that supports the use and development of trademarks. The focus should remain on protecting the economic interests associated with trademarks rather than delving into the realm of individual freedom of expression.

## 4. Judicial Practice of Trademark Right

Prominent case law illustrates the tension between expanding trademark rights and preventing consumer confusion: the "Smith v. Chanel" case [4]. In this case, the court rejected Chanel's injunction request against a perfume company that labeled its product as a substitute for Chanel, after they found no discovered possibility of consumer confusion. This case reinforced the central focus of trademark law--the impact on consumers.

This situation leads to our attention and consideration: what role does imitation play in trademark infringement? How do we prevent excessive imitation and protect trademark rights? What is the goal of our protection? Undoubtedly, this is a new issue that needs to be addressed in trademark law. Trademark law should adapt to this new challenge to effectively protect trademark rights and guide public understanding of the use of imitation. As such, we can see that whether it's the purpose of law establishment or the judgment made by the court when applying the law, the ultimate direction is to enable consumers to clearly distinguish the source of goods and protect consumer trust, allowing all goods to be known of their origin in a legitimate way by consumers.

Another case to consider is "Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC" [5]. In this case, Louis Vuitton Malletier S.A. (LVM), a renowned luxury goods manufacturer, claimed that Haute Diggity Dog, a pet product manufacturer, infringed its trademark rights by manufacturing and

selling "Chewy Vuiton" dog toys that mimic its products. In the legal case for trademark dilution, the defendant's imitation did not involve actual trademark use, only imitation. Moreover, the speculative damage to the famous trademark did not have any supporting records, thus not constituting a violation of trademark dilution. Although the defendant's product imitates the plaintiff's trademark to a certain extent, conscious differentiation was made to convey the message that "this is not a Louis Vuitton product". Such mimicry reinforces the distinctiveness of the original trademark without causing harm to its recognizability. Regarding the plaintiff's claim of reputational damage, the court ruled that the plaintiff didn't provide sufficient evidence to prove that the reputation of its trademark had indeed been adversely affected, thus it did not constitute reputational dilution.

This case highlights some key aspects of the *Trademark Dilution Revision Act of 2006* [6]. Notably, this act abolished the prior requirement to "prove actual dilution," easing the burden of proof for trademark owners in pursuing trademark dilution. However, at the same time, the act also limited the definition of "famous trademark," considering only those trademarks widely recognized by American consumers as "famous trademarks." This, to a certain extent, reduces the possibility of trademark dilution lawsuits. From the judgment of this case, it can be seen the court's ultimate protection leans towards whether consumers would be confused because, without confusion, imitations would not cause actual harm to trademark owners, so in this case, we only need to deliberate the protection against trademark dilution.

What the court prioritizes most in the trial of such cases appears to be the impact on consumers. As previously mentioned, while plagiarists may indeed be at fault, they can introduce quality products to the market at lower prices and stimulate competition. Trademark holders are entitled to protect their interests through existing trademark laws. However, this may also result in product monopolies. From a long-term market development perspective, it is reasonable for the court to focus on the impact on consumers. Additionally, a consistent standard applied by the court is whether there is an effect on consumers. This is a crucial consideration, as the court's judgment ultimately determines the case outcome, and the court's standards should be based on reliable and equitable principles derived from judicial practice.

## 5. Conclusion

This paper argues that the primary purpose of trademark law should be to prevent consumer confusion, rather than overemphasizing trademark rights as property rights. The protection of trademark rights should not ignore its root cause - to prevent consumer confusion. Only by adhering to this purpose can both sides of consumers benefit and maintain the integrity of the competitive market. By focusing on legislative intent, theoretical foundations, and judicial practices, it demonstrates that excessive protection of trademarks may hinder market competition and innovation. Several landmark cases highlight how the expansion of trademark rights can lead to monopolistic outcomes, whereas the original intent of trademark law was to ensure fair competition and consumer protection. As mentioned in "Irrelevant Confusion": the goal of trademark law is to facilitate the operation of modern markets by allowing producers to accurately convey the quality of their products to buyers, and the current trademark law extends the concept of confusion too far.

However, the paper has some limitations. The analysis could be improved by including more empirical data to support the theoretical claims, such as examining more case studies or conducting interviews with legal experts. Additionally, the research relies heavily on existing literature and judicial opinions, which could be expanded by incorporating more interdisciplinary perspectives, such as from economics or sociology. Future research could focus on how the rapid development of digital markets and e-commerce will affect the balance between trademark protection and consumer rights. Additionally, exploring how international trademark law could evolve to accommodate the increasing complexity of global trade may offer valuable insights for future legal frameworks.

## References

- [1] Beebe, Barton. *A Semiotic Analysis of Trademark Law*. *UCLA Law Review*, 2004.
- [2] Brennan, D. J. (2006). *The trade mark and the firm*. *Intellectual Property Quarterly*, 3, 283-290.
- [3] Burrell, R., & Gangjee, D. (2010). *Trade marks and freedom of expression: A call for caution*. *IIC - International Review of Intellectual Property and Competition Law*, 41(5), 544-569.
- [4] *Smith v. Chanel*. *Smith v. Chanel, Inc.*, 402 F.2d 562 (9th Cir. 1968). *United States Court of Appeals for the Ninth Circuit*.
- [5] *Louis Vuitton Malletier S.A. v. Haute Diggity Dog LLC*. (2007). *Louis Vuitton Malletier S.A. v. Haute Diggity Dog LLC*, 507 F.3d 252 (4th Cir. 2007). *United States Court of Appeals for the Fourth Circuit*.
- [6] Kaplan, David. *Trademark Dilution Revisited: Balancing Protection and Competition*. Oxford University Press, 2020.129-160.