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Trademark Law and Consumer Centrality - Part I

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The conventional wisdom provides two traditional justifications for trademark law. The first is the "consumer protection" rationale. If there were no trademark law, an unknown soft drink manufacturer could freely use Coca-Cola's COKE trademark on its goods. If it did so, consumers would be defrauded; they would buy the unknown's products thinking that they were Coca-Cola's. Trademark law prevents this sort of fraud from occurring and thereby protects consumers from fraud.

The second justification is the "producer incentive" rationale. In the preceding COKE example, it is not just the consumer who is happy that fraud has been prevented. Coca-Cola is equally happy, if not more so, because every time a consumer is fooled into buying someone else's product, thinking that it's COKE, Coca-Cola loses a sale (and may suffer a hit to its reputation as well). So by prohibiting fraud on consumers, trademark law gives Coca-Cola confidence that others cannot free-ride on its mark, which in turn gives the company the confidence it needs to invest in making COKE the best product it can be.

These two rationales have an impressive pedigree. The legislative history of the federal trademark statute, the Lanham Act, explicitly refers to them: "The purpose underlying any trade-mark statute is twofold. One is to protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get. Secondly, where the owner of a trade-mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats." And almost every trademark treatise and casebook dutifully recites these twofold purposes in its introduction to the topic.[1]

Yet presenting these two justifications as separate rationales for trademark law obscures their true relationship. Both arise from the need to ensure that consumers are able to distinguish one producer's goods from those of its competitors. This ability on the part of consumers obviously underlies the first rationale for trademark protection, because trademark's exclusive rights prevent one producer from passing off its products as those of another. But consumers' ability to accurately distinguish producers' goods also underlies the second rationale; to the extent that trademark law incentivizes investment in high-quality products and building a reputation, it does so because Coca-Cola knows that its investment in quality cola will not be undermined by low-quality competitors (the "pirates and cheats") who pass off their shoddy goods as COKE. When it comes to the purpose of trademark law, then, the consumer's welfare is central, and the producer's welfare is derivative. In the end, it is more accurate to say that trademark law contemplates not two separate rationales, but one: preventing the defrauding of consumers.

Why does the conventional wisdom present this one rationale as two? One possibility is that in the world of trademark law, there are two separate *constituencies*, each of which wants a fraud-free marketplace. The first is the consumer, who does not care to be defrauded. The second is the producer – the originator of the mark – who does not care to see its mark used to defraud consumers and thereby divert its sales. I have demonstrated that the concerns of these two constituencies are coterminous, but they are separate constituencies nonetheless, and I suspect that that separateness is at the root of the conventional wisdom's two rationales.

Another possible reason for the failure to recognize the centrality of the consumer is that once passing off occurs, only the producer is likely to litigate. In theory, of course, each consumer who is injured by passing off could sue for fraud, but in practice the injury to any individual consumer would probably be too small to justify the expense of filing suit. In contrast, the producer who has rights in the infringed mark can essentially aggregate the consumer injuries into a single high-value claim, because every defrauded consumer represents a lost sale to the rightsholder. Indeed, this is essence of trademark law – allowing the producer to step into the collective shoes of the defrauded consumers and vindicate their rights through an infringement claim.

In the final analysis, then, trademark law confers exclusive rights on producers of goods and services – but it does so for reasons of consumer welfare, and the interest that producers have in trademark exclusivity derives from the consumer injury. In reality, the producer acts as an agent of the defrauded consumer. In Part II of this essay, we will examine what happens when the interest of the producer/agent and the interest of the consumer/principal diverge, and the ways in which trademark law does and does not cope with that divergence.

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1. There are other justifications for trademark law as well – particularly when it comes to dilution liability and other expanded trademark protections – but the two discussed here are the most widely accepted.