

Hedonic Trademarks

Irina D. Manta

Associate Professor, Maurice A. Deane School of Law at Hofstra University
irina.manta@hofstra.edu | [SSRN](#)

A number of scholars have recently critiqued the traditional search-costs model of trademark infringement doctrine and have proposed alternatives driven by consumer decision-making theories and contractarian understandings of trademarks. While I agree that the search-costs model is problematic in parts, some of the other suggested frameworks suffer from difficulties of their own. For one, these alternative approaches draw up a dichotomy between “pure” experiences of trademarked goods as opposed to “altered” experiences, with the latter representing the mindsets of consumers after trademark owners have influenced them via advertising and other devices in an effort to build up goodwill. This article posits, however, that this binary setup most reminiscent of the decision between the red pill and the blue pill in the movie *The Matrix*—with one standing for the “truth” about trademarked products and the other a “fake reality” filled with manufactured perceptions about goods—is a false choice. Indeed, in today’s world, many goods and their brands have become inextricably tied with one another and consumers experience the two together. In that sense, it is not necessarily relevant whether consumers prefer Pepsi to Coke when no labels are attached because we may actually be interested in human experience and level of hedonic benefits as a whole, and labels do enter that holistic perception. A theory of trademarks that considers hedonic values may also better explain doctrines such as dilution and post-sale confusion because intellectual property becomes rivalrous and consumers’ experience of the original goods can suffer even when search costs do not increase. In short, the model presented here tries to resolve the tension between the information transmission understanding of trademarks, which seeks to protect consumers from deception, and the misappropriation theory, which focuses on producers’ investments in goodwill. This article shows how the trademark system is based in part on an understanding of producers as providers of hedonic values to consumers. Current trademark doctrines attempt to support this process while maximizing global hedonic and economic utility, and they include First Amendment-based safe harbors such as criticism and parody that provide a necessary and beneficial tradeoff.