

## *Consumers, Producers, and the Scope of Trademark Infringement*

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In this Article, I use the relative ability of consumers and producers to reduce or eliminate consumer confusion to clarify the law of trademark infringement. Courts presently determine whether trademark infringement exists by applying a multi-factor test examining whether a defendant's use of a mark creates a likelihood of confusion among consumers. Many have criticized the test as difficult to understand and inconsistently applied. It has therefore become difficult to identify a coherent account of how courts decide trademark infringement cases. Such uncertainty creates aggressive behavior by trademark owners who can easily come up with a plausible claim that a defendant's use of a similar mark is infringing, and it encourages defendants to become increasingly risk averse, abandoning existing marks for new ones simply to avoid the costs of litigation or the unpredictable chance that a court will impose liability.

It is possible that extremely broad trademark rights serve the public interest by eliminating the possibility of consumer confusion. However, closer reflection shows that trademark liability needs to be limited in order to avoid the socially wasteful uses of trademark. Common sense and psychology tell us that consumers will sometimes pay enough attention to distinguish otherwise similar marks. Moreover, even in situations where consumers are unlikely to eliminate confusion on their own, it may still be socially wasteful to impose trademark liability because the producer cost of eliminating confusion would be extremely high.

The foregoing suggests that a cogent account of trademark infringement should pay attention to the ability of consumers and producers to eliminate consumer confusion. Trademark should be vigorously applied when consumers find it difficult to eliminate confusion and when producers can do so relatively cheaply. Conversely, trademark liability should not exist when consumers are likely to eliminate confusion on their own and producers find it relatively expensive to do so.

Unfortunately, existing law does a poor job of this at best. The existing multi-factor test asks courts to determine whether consumers are likely to be confused, but it does not explicitly direct courts to consider how likely consumers are to avoid confusion on their own and, if not, how easy it would be for producers to fix the problem. This Article will show how paying explicit attention to the issues identified here can improve the law and create a more coherent understanding of the multi-factor test for trademark infringement.