

Registering Discontent: Registration in Modern American Trademark Law

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More than seventy years after the modern federal trademark statute was enacted, we have lost sight of the initial concept of registration—a benefit accorded to a specific subclass of protectable marks—and have not replaced it with anything coherent. The result is a system that is half reliant on legal fictions and half reliant on attempts to engage in empirical fact-finding, and which dominates depends on the day and the court. This paper addresses three interrelated questions in current law: the appropriate balance between protecting consumers from confusion and helping producers structure their behavior; the appropriate difference between the standard for registrability and the standard for finding likely confusion in the marketplace; and the appropriate difference between the treatment of registered and unregistered marks. None of the tensions in current law can be entirely resolved to favor only one side. But by understanding their relationship, we may be able to improve the system.