

# *Trademark Litigation as Consumer Conflict*

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Trademark litigation is typically a battle between competing sellers who argue over whether a relevant class of consumers is likely to be confused by the defendant's conduct. In this narrative, the plaintiff effectively represents two parties. She defends her trademark and simultaneously protects consumers who may be confused by the defendant's behavior. For his part, the defendant tries to rebut the evidence of potential confusion and asserts any applicable defenses.

This is an unfair fight. While plaintiffs enlist consumers on their behalf, defendants, relatively speaking, are left to fend for themselves. Trademark's seller-conflict narrative gives short shrift to the interests of non-confused consumers who may benefit from a defendant's purportedly infringing behavior. This is especially problematic given the ease with which courts apply pejorative labels, like misappropriation and free riding, to the conduct of trademark defendants.

The resulting "two-against-one" storyline may be of little consequence to traditional trademark actions based on source confusion at the point of sale, but it skews analysis of non-traditional infringement claims, like initial interest and post-sale confusion, in which the case for consumer harm is dubious. To be sure, many cases do invoke the "public interest" and other general policy considerations, such as the promotion of competition. The generality of these concerns, however, often yields to the plaintiff's ability to summon specific groups of likely-to-be-confused consumers, even when the purported confusion appears minimal or non-material. Similarly, those existing trademark doctrines that protect the interests of "absent" consumers are often inapplicable to non-traditional settings.

More rational results are available by appreciating trademark litigation's parallel status as a conflict between consumers. In this view, both the junior and the senior users are proxies for different classes of consumers. Focusing on the interests of benefited and harmed consumers minimizes the effect of the moral rhetoric that plays an outsized role in trademark litigation. Calling a junior user a "free rider" is one thing; condemning its customers is another. Appreciating trademark's consumer-conflict dimension enables a fuller assessment of the public interests at stake in litigation. A jurisprudence sensitive to these concerns would be less likely to entertain efforts to expand trademark's scope.