Trademark Law and the Power of Historical Myth

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Probably because of trademark doctrine's largely utilitarian basis, historical evaluation of trademark law has been deemed largely unnecessary. It would be a mistake, however, to ignore the history behind trademark law. Modern trademark law's story of origin is really the story of the birth of modern advertising. Although trademark regulation has existed in some form for centuries, modern trademark law came into being at the beginning of the twentieth century. Not coincidentally, modern advertising techniques appeared in the United States at the same time. When judges were presented with the new phenomenon of mass-market advertising, they had to decide its worth. In a relatively short period of time, they determined that the goodwill built up through advertising was worthy of legal protection.

Why did the courts decide so quickly to award legal protection to the positive consumer sentiment generated by advertising? The answer lies in a study of the intellectual history of advertising in the early twentieth century. In short order, commercial efforts to promote and sell new products became linked to economic and cultural progress. At the same time, a backlash against the formalist trademark doctrine of the nineteenth century resulted in expanded protection for advertising value and doctrinal limits on the power of judges to ignore this value.

My paper attempts to explain why the legal doctrine crafted a century ago continues to remain in effect. Judges in the formative era perceived advertising as completely effective in its ability to generate ideas of value in consumers' heads and, therefore, deserving of legal protection. At the same time, however, judges believed that consumers would switch their trademark allegiances when presented with new information and new branded products. This judicial perception of advertising has persisted. As a result, the doctrinal innovations of the 1910s and 1920s have withstood attacks from those who criticized advertising's effects on the economy and American culture. In large part, the courts accepted the benign view of advertising presented to them by advertisers.

The second part of the paper argues that the 90-year-old system of protection for advertisers is based on a flawed premise. Recent research in cognitive psychology demonstrates that advertising does, in effect, leave a permanent mark on its audience. The phenomenon of affective decision making reveals that consumers make purchasing decisions based on involuntary and subconscious thought. Based on these new insights into the involuntary functioning of the consumer mind, the paper suggests that trademark doctrine should be altered to avoid privileging marks that are already popular with consumers and are unlikely to ever lose their luster in our subconscious.