

Bounded Rationality, Paternalism, and Trademark Law

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We don't need behavioral economics to understand that trademarks can shape consumer preferences in ways that have little to do with objectively measurable differences in product quality. Scholars, judges, economists, and policymakers have long recognized the monopolistic tendencies of strong marks. While many factors contribute to this phenomenon, the power of persuasive advertising, combined with the bounded rationality of consumers, play especially potent roles. The twentieth century – the so-called “Century of the Self”¹ – witnessed extraordinary growth in the use of psychological tools to shape people's desires, leading to a culture of consumerism and brand hegemony.

Critics have long fretted about the consumer harm that can result from this kind of trademark-based product differentiation. As a trial judge wondered in 1928: “Why should a vendor be able to collect from a purchaser, as a part of the purchase price, money which has been spent in an effort to mislead that very purchaser in making that very purchase?”² In particular, the judge balked at the idea that consumers should pay higher prices for a branded version of the exact same product, based on their misimpression that the advertised version was superior. The concern lies not only in the consumer's overpayment, but with the allocative effects of encouraging investment in persuasive advertising, rather than product innovation or similar productive pursuits. While informative advertising can benefit consumers, advertising that creates artificial brand-based differences between otherwise identical products appears not only costly, but socially wasteful.

Should the law worry about these tendencies of trademarks, or should it view them as endemic to any system that protects marks as indicators of source? More fundamentally, should judges and lawmakers care if advertising shapes consumer preferences in ways that diverge from rational decision-making? How should we think about attempts to “correct” such preferences – as regulation of competition, or paternalistic meddling?

While contemporary trademark scholars have given much attention to the anticompetitive costs of trademarks, they have focused mainly on critiquing – and attempting to cabin – trademark law's expansion. This Essay considers the issue from a different perspective, by considering tools that might counter some of advertising's more pernicious effects.

¹ *The Century of the Self* (2002, film documentary, produced by Adam Curtis).

² *Am. Safety Razor Corp. v. Int'l Safety Razor Corp.*, 26 F.2d 108, 114 (D.N.J. 1928), *rev'd*, 34 F.2d 445 (3d Cir. 1929)