Free Speech Challenges to Trademark Law After *Matal v. Tam*

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Trademark laws and free speech are on a collision course. In *Matal v. Tam*, the U.S. Supreme Court recently clarified that trademark laws are speech regulations subject to First Amendment scrutiny when it held that the federal trademark law denying registration to potentially disparaging marks was unconstitutional. *Tam* opens the door to wide-ranging free speech challenges to trademark laws in the United States. It is clear after *Tam* that trademark laws regulate the content (and sometimes the viewpoint) of speech protected by the First Amendment, and courts should evaluate the constitutionality of trademark laws to determine if they violate the free speech right. The *Tam* Court declined to decide which constitutional test should be used when evaluating free speech challenges to trademark laws regulating nonmisleading expression, but the Justices' analysis provides some guidance on this issue and suggests legislatures and courts must balance the benefits of each trademark law against that law's harm to expression.

While some people may complain about the "constitutionalization" of trademark law after *Tam*, this Essay argues that the free speech doctrines developed in the Court's First Amendment jurisprudence can significantly inform debates about the merits of trademark theories and doctrines. Any advocate of a particular trademark theory—such as the protection of property rights in an investment to justify dilution law—must prove, at a minimum, that there is a substantial government interest in furthering that goal. Moreover, current First Amendment doctrine requires trademark laws regulating nonmisleading commercial speech to directly and materially further that trademark purpose and be narrowly drawn so as to not endanger free speech more than necessary to achieve that goal. If the trademark law suppresses, punishes, or chills noncommercial expression or restricts expression based on its viewpoint or ideas, the law is presumptively unconstitutional. It can only survive constitutional scrutiny if the trademark law is narrowly tailored to achieve a compelling government interest and is the least restrictive means for furthering that trademark goal. Moreover, if the challenged trademark law is unconstitutionally vague, this may be another reason to find the law invalid.

This Essay then applies this free speech framework to certain controversial trademark laws and explains when legislatures and courts should conclude those laws satisfy or fail First Amendment scrutiny after *Tam*. Trademark laws should generally be found constitutional when they directly and materially further the government interests of (1) preventing fraudulent, deceptive, or misleading uses of trademarks; (2) promoting fair competition; or (3) facilitating the communication of information about the source of goods or services. Trademark dilution laws will not survive constitutional scrutiny after *Tam*, and the legislature needs to add more statutory defenses to the infringement statutes to make those vague laws more consistent with the First Amendment. Some trademark registration laws will also fail constitutional scrutiny after *Tam*, and not just laws prohibiting registration of offensive marks. While *Tam* and *In re Brunetti* held that laws refusing registration to offensive marks can unconstitutionally chill the use of slurs or profanity as marks, nonmisleading expression by competitors and other companies is also chilled without a sufficient constitutional justification when the government registers marks containing expression that was inherently valuable before it was used as a mark, such as descriptive terms, popular phrases, colors, and common shapes. The government can further the primary goals of trademark law and make trademark laws more consistent with the free speech right in the First Amendment by refusing to register marks containing inherently valuable expression or only protecting narrow rights in such marks.