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 (15 U.S.C. § 1052(a)) was unconstitutional. The opinions of the Justices indicate that trademark laws regulate the content of expression, and courts should evaluate the constitutionality of trademark laws to determine if they violate the free speech right. None of the Justices said that trademark laws are content-neutral speech regulations, or that highly-deferential rational basis review or no constitutional review of trademark laws is appropriate. The *Tam* Court declined to decide which test should be used when evaluating free speech challenges to other trademark laws, but the Justices' analysis of the constitutionality of the disparagement clause provides some guidance on this issue and suggests that courts should balance the benefits of the 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 many debates about the best trademark theories and doctrines can be significantly informed by evaluating the constitutionality of trademark laws under free speech doctrines developed in the Court's First Amendment jurisprudence. Any advocate of a particular trademark theory—such as the protection of property rights in an investment to justify dilution law or the grant of trademark rights in popular slogans, colors, or representational shapes—must prove, at a minimum, that there is a substantial government interest in furthering that trademark goal. If the trademark law suppresses or chills noncommercial expression or targets expression based on its viewpoint or ideas, that government interest must be compelling and the law is presumptively unconstitutional. Moreover, First Amendment doctrines require the law to be narrowly drawn to serve the asserted trademark goal and not endanger free speech more than necessary. Legislatures and courts evaluating the constitutional validity of trademark laws should therefore (1) identify the purpose of the specific trademark law and decide if that trademark goal is sufficiently important, (2) evaluate the fit between the specific law and that goal, and (3) determine whether the law harms expression no more than necessary to achieve that goal.

This Essay applies this free speech framework and concludes that trademark laws regulating commercial and noncommercial expression will fail First Amendment scrutiny unless they directly prevent fraud or deception, promote fair competition, or facilitate the communication of truthful source-identifying information. Trademark dilution laws will not survive constitutional scrutiny after *Tam*, nor will laws granting exclusive trademark rights in expression that was inherently valuable before it was adopted or used as a mark. The government can make trademark laws more consistent with the free speech right by eliminating claims for dilution, adding more statutory defenses to the infringement statute, and refusing to register or protect trademark rights in descriptive words and symbols; common, informational, or culturally-significant phrases, symbols, and designs; and colors, representational shapes, and other nontraditional marks that intrinsically communicated a non-source-identifying message that was valuable in the marketplace before this matter was claimed as a mark.