

TWO-TIERED TRADEMARKS

Abstract

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Trademark protection has become a two-tiered system. Over the last century, courts have both moved from rules to standards and increased the complexity of trademark law. These transitions have not been part of a systemic and coherent plan for trademark law, but the result of individual courts attempting to achieve what particular judges in particular cases perceived as justice. Seeking perfect justice, courts have made trademark litigation both sharply more expensive and more unpredictable. For those entities with the resources to afford the cost and uncertainty of the system, trademark law produces reasonably sensible outcomes in most cases. However, many entities can no longer afford participation in the system at all. They can afford neither to defend themselves against overreaching assertions of trademark infringement nor to assert their own trademark rights even against straightforward acts of infringement. Unfortunately, courts cannot correct these problems because they will never see these cases. In this paper, I explore what changes, substantive and procedural, might restore full participation in the trademark system.