

Identifying Information

Name:	Craig, Carys
School:	Osgoode Hall Law School

Paper Information

Title:	On Gripe Sites and Trademark Rights: Taking Stock of Cooperstock
Abstract:	<p>The case of <i>United Airlines v. Cooperstock</i> (2017 FC 616) concerns the use of United Airlines' copyright- and trademark-protected corporate logos on a consumer complaints website, www.untied.com, owned and operated by McGill professor Dr. Jeremy Cooperstock. United brought an infringement action before the Federal Court of Canada alleging copyright and trademark infringement and passing off. It was held, at first instance, that parodic versions of the United Airlines' logos were commercial uses likely to cause consumer confusion and depreciation of goodwill (i.e. dilution), and so constituted trademark infringement for which no defence was available. It seems clear that reliance on the inherent limits of trademark protection failed to appropriately constrain the owner's claim to exclusivity in this case, thereby restricting critical speech, chilling the flow of information between consumers, and impinging upon the defendant's constitutional right of free expression. The decision is now on appeal, but it is not too early to draw some valuable lessons from this troubling ruling. First, and most obviously, Canada's trademark law (like many other domestic trademark regimes around the world) is in need of reform to enact explicit statutory exceptions for fair uses. Secondly, limits and exceptions in the trademark system could benefit from the judicial endorsement of a positive concept of 'user rights' similar to that articulated by the Supreme Court of Canada in its recent copyright jurisprudence. The third lesson, however, is that such developments may nonetheless be insufficient to appropriately limit trademark rights. After all, the court also held that the use of the logo also constituted copyright infringement, notwithstanding the availability of a statutory fair dealing defence for parody and the court's explicit recognition of 'user rights.' This paper will argue that, if trademark 'user rights' are to have any real traction in the legal landscape, a more compelling account is needed of how trademarks fit within and further the public interest. The persistent idea that the trademark owner is the entitled property owner deserving of protection—with the power to control the meaning of his mark, and the right to peacefully enjoy its economic value at all costs—is bolstered by the notion of corporate personality and authorship. If such assumptions are to be unsettled, trademark law requires a fuller account of the communicative and social value of marks as indicators of trade source and incubators of meaning, but also, therefore, as sites of discursive struggle, expression and dialogic exchange. It is in the expressive qualities of commercial symbols and their communicative power that we can find the justification for—and so the necessary limits of—the rights that the law affords. Whether for copyright or for trademark law, statutory defences and user rights are necessary, but not sufficient, to ensure a system that functions in the public interest, and in a manner consistent with values of free expression and the demands of a vibrant, participatory culture.</p>