An Information Theory of Bad Faith Trademark Use

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Trademark law protects a mark as a unique commercial symbol for a firm's goods and services if the mark owner either adopts an inherently source identifying signifier, or shows that a descriptive signifier has acquired source identifying meaning. The mark owner must disclose evidence that its mark points back to a singular if anonymous source to qualify for trademark protection. The information the mark owner must reveal is difficult to generate unless the owner has engaged in reasonable and relatively costly efforts to communicate with consumers.

When a competitor enters the market selling a similar product bearing a similar mark, the owner may bring an action for trademark infringement. To secure relief from allegedly infringing activity, the owner must establish that if the new entrant continues on its current course, consumer confusion is likely. One key factor courts consider, in assessing likely confusion, is whether the defendant's adoption of its mark was in bad faith, or otherwise signals problematic intent. Scholars criticize the focus on bad faith, because unlike other likelihood of confusion factors, the new entrant's intent seems irrelevant to a consumer's perception about confusing overlap between competitors.

This article argues these critiques are somewhat misguided in light of theories about how information is transmitted in communication systems. Properly calibrated legal systems can incentivize better information flow and appropriate behavior by commercial actors using information forcing default rules. Defendants who run afoul of the bad faith inquiry are frequently engaging in behavior that increases consumer confusing noise in the market, reducing consumers' ability to receive sufficiently clear signals about the goods and services they would prefer to purchase. Courts should thus continue to consider bad faith in trademark litigation, with some modest adjustments.