

## **An Impersonation Theory of Trademark Law**

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Trademark and free speech rights are increasingly in conflict due to the expansion of trademark law beyond regulation of competitors and misleading commercial speech, and because there is disagreement over the primary goals of trademark law. Some courts today find liability where consumers are only confused about whether the markholder consented to this expressive use of its mark. For example, the Eighth Circuit banned use of the Mutual of Omaha mark and Indian Head logo in the defendant's "Mutant of Omaha" design on T-shirts and other merchandise that conveyed an anti-nuclear message because 12% of consumers surveyed were confused regarding whether Mutual of Omaha "goes along" with this expression. When the company Think Geek recently advertised a product called "Radiant Farms Canned Unicorn Meat" using the slogan "Unicorn—the new white meat" as part of an April Fools prank on its website which sells merchandise to self-described geeks, the National Pork Board sent a cease and desist letter claiming that Think Geek infringed and diluted its trademark rights in the slogan "The Other White Meat." As unicorns don't exist, this allegation does not make sense if trademark law is focused on the prevention of unfair competition or consumer confusion about the source or quality of products. Yet if trademark law also aims to prevent free riding on another's mark to draw attention to your expression and/or makes consumer confusion about consent to use a mark actionable trademark infringement, trademark holders will continue to send these types of cease and desist letters and potentially suppress expression in political speech, social commentary, news reporting, artistic and literary works, expressive merchandise, commercial advertising, and other forms of noncommercial and commercial expression.

Current trademark theories, such as the consumer search cost theory, do not adequately provide guidance on how to prevent trademark law from stifling or chilling speech in cases involving use of another's mark in expression. This article attempts to fill this gap in the scholarly literature. It develops a new "impersonation theory" for resolving conflicts between trademark and free speech rights in disputes involving expressive uses of marks. Under this theory, courts should only find trademark liability in these types of disputes if the third party is using another's mark to designate the source of its expression, reasonable persons believe this false statement of authorship, and the content of the expression does not dispel the confusion regarding the source of the expression. These types of uses of marks are potentially harmful because the mark is being used "as a mark" to falsely indicate the source of the third party's expression. If reasonable people believe the markholder is the one communicating, the imposter's confusing use of the mark may harm the public and the markholder, especially if consumers rely on this information when they make decisions on whether to purchase goods or services or otherwise interact with the markholder. On the other hand, if the mark is not used by the third party to designate the source of its expression, and consumers are only confused about whether the markholder consented to this expressive use of its mark, free speech rights should trump trademark rights. There is no false or misleading statement of fact in these circumstances that justifies a government restriction on expression.