

### Identifying Information

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### Paper Information

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| Title:    | Trademarks, Captive Speakers, and the First Amendment   |
| Abstract: | <p>The Supreme Court has ruled that the prohibition on disparaging trademarks is an unconstitutional restriction on free speech. One can debate the merits of the Supreme Court decision. But the question currently pending is whether to likewise find the scandalous trademark prohibition unconstitutional. The portion that relates to obscene material would not be included in First Amendment protection. But a portion of scandalous marks is beyond the obscenity standard. This paper intends to explore the unique positioning of trademarks as creating captive speakers and how that implicates the First Amendment analysis. In another work, I explored how consumers, forced to use a trademark to refer to the associated goods or services, become captive speakers. Unlike the Cohen “captive audiences,” these captive speakers cannot simply turn away, but rather must either use the trademark or have tremendous difficulty accessing/using the underlying goods or services. In light of its unique positioning, this paper intends to explore parallels between the USPTO’s regulation of trademark registrations and the FCC regulation in <i>FCC v. Pacifica</i>. Trademarks are accessible and utilized by nearly every one to engage in commerce and are perhaps even more uniquely pervasive and intrusive into the home than the broadcast of indecent language.</p> |