1. Introduction

Building blocks of the research; why, what, how, and what was done before, plus five questions

1.1 BASICS

If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress.¹

In 1942, Justice Frankfurter stated the abovementioned quote. At its core, this book questions whether such optimism remains valid in times of social media. More specifically, this book investigates whether the trademark logo that is uploaded on social media without permission of the trademark holder is sufficiently protected and enforced. Answering this question in the negative, the book proposes a paradigm shift.

The unauthorized use of the trademark logo on social media can spread exponentially, because of the dynamics and topology of and interactivity between social networks.² In a relatively short period of time this can damage beyond repair a reputation³ which had been diligently built up over a relatively long period of time. The damage to the reputation can devalue the trademark, alienate customers and erode shareholder value. In addition, capital can be destroyed in the ensuing legal conflicts between stakeholders. These legal battles potentially repress commerce

¹ Frankfurter J. in Mishawaka Rubber & Wollen Mfg. v S.S. Kresge Co. (Mishawaka Rubber), 316 U.S. 203, 205 (1942).
³ ‘Who steals my purse steals trash; ’tis something, nothing; / ’Twas mine, ’tis his, and has been slave to thousands; / But he that filches from me my good name / Robs me of that which not enriches him, / And makes me poor indeed’. William Shakespeare, THE TRAGEDY OF OTHHELLO, THE MOOR OF VENICE 1605 (Gretchen Schultz, ed., Newburyport: Focus Publishing 2010), Act 3, Sc. 3.
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of the trademark holder, distract social media providers from their primary activities and stifle creativity of internet users. The parlous state of the present situation is bound to lead to an unacceptable level of legal uncertainty for all stakeholders involved.

Paradigm Shift

The possible scope, scale and impact of damage resulting from unauthorized use of a trademark logo on social media are incomparable with that of a trademark logo offline. The social media phenomenon has radically changed the balance of interest between trademark holders and third party users of their trademark, without any adaptation to the laws of trademark infringement and trademark dilution.

After determining that the current system is not sufficient to control the new situation, this book proposes a paradigm change to lay the foundation for the protection and enforcement of the trademark logo on social media. In so doing, the book will demonstrate that on the one hand the trademark logo is worth protecting on social media, and on the other hand, that the enforcement without judicial review is both needed and compatible with the fundamentals of a democratic society.

Throughout the book, two assumptions are made: first, that the trademark holder should be protected against unauthorized use of his trademark logo on social media; second, that technology should be used to restore an equitable equilibrium.

The unauthorized use of the trademark logo is a serious problem. In order to resolve it the authorized use of the trademark logo on social media should be made transparent, otherwise any transgression remains undeterminable for even the most well-intentioned internet users. The sheer volume of the number of cases of unauthorized use of the trademark logo makes a case-by-case solution unfeasible. Therefore, this book advances automatic enforcement as a prerequisite for a solution. The limitations to internet intermediary liability regimes, relevant to social media providers, do not provide any real safety against legal conflicts for any of the stakeholders; instead, they aggravate the problem. This book therefore asserts that an abolition of these so-called safe harbour provisions is another prerequisite for a solution.

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4 Not unlike Creative Commons’ licence system, which enables copyright holders to make transparent what kind of use of their works is authorized. Creative Commons, accessed 9 February 2015 at: http://creativecommons.org.

5 In the US the safe harbour provisions can be found in the Digital Millennium Copyright Act (DMCA), 1998, which can be found in the United
The paradigm shift does not require any derogation of the acquis in the US and EU to guarantee the right to freedom of speech, parody and critical comments. One should realize, however, that rights to freedom of speech, parody and critical comments are in no jurisdiction absolute. This paradigm shift leaves enough room for an equitable balancing of the interests of the stakeholders. Based on the paradigm change and the special properties of the trademark logo, the solution proposed is the protection and automatic enforcement of the moral rights of integrity of the trademark logo, the abolishment of the safe harbour provisions, while allowing freedom of speech, parody and critical comments taking into account a few fair formalities. This solution can be either enacted into law or, pending any such codification, tested as a contractual solution in the ‘walled gardens’ of social media.6

**Literature Review**

Since the problem of the unauthorized use of the trademark logo on social media is underdeveloped in the literature, the review below will give a broad overview of the epistemology on the theories of the trademark in general. This review can serve as theoretical building blocks and context in regard to the specific challenges the stakeholders face over the conflict of the unauthorized use of the trademark logo on social media. Also, the interrelationships between the themes will be demonstrated.

Trademarks can be seen as monologic or dialogic. The philosopher Bakthin7 came up with this distinction, related to literature. Monologic literature only gives its opinion, while dialogic literature carries on a continual dialogue with other works of literature and other authors. If one perceives the trademark as monologic, then its meaning, defined by the trademark holder will remain unchanged if the trademark holder so wishes. However, if one perceives the trademark as dialogic, then consumers are able to change the meaning given by the trademark holder.

**States Code, Title 17 Chapter 5, Article 512.** In the EU, in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce). Chapter 7 is dedicated to this subject.

6 The term ‘walled gardens’ will be explained in Chapter 9.3 ‘Walled Garden Phenomenon’.

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The implications of a dialogic perspective are serious, since internet users can easily find, copy and paste unauthorized trademark logos that can be uploaded and shared on and among social media sites. Coombe asserted that creating meaning to an image is not a top-down process, but instead involves dialogue between the corporate author and the consumer. According to Coombe, intellectual property laws stifle dialogic practices and prevent other people from expressing their identity.

A trademark holder codifies his trademark with meaning, the consumer decodes that meaning, and third parties might be able to recodify meaning to the trademark.

According to Professor Aoki, trademark holders should know that ‘recodifications of symbols are always capable of being deployed against the grain’.

A person that appropriates pre-existing materials and then re-creates improvised structures is called a bricoleur, a term coined by the anthropologist Claude Lévi-Strauss, as the visual semiotician Chandler explained. On social media one can assert that internet users that recodify the trademark logo are such virtual bricoleurs. In his book Remix, Professor Lessig made a case for the freedom of internet users to remix existing copyright works, to improve, integrate or change these

8 The trademark Lonsdale was hijacked by white supremacists in the Netherlands, Belgium, France and Germany who reinterpreted the Lonsdale name by revealing just the third, fourth, fifth and sixth letters, ‘NSDA’, short for NSDAP, the former Nazi party, under their bomber jackets. Lonsdale tried to change these associations with the brand by supporting anti-racist initiatives. Joerie van den Bergh, and Mattias Behrer, Chapter Seven Happiness: Gen Y’s Adoration for Branded Emotions, in BRANDING TO GENERATION Y: HOW COOL BRANDS STAY HOT 181 (London: Kogan Page, 2009).


10 Id, at 1854.


works into new works.\textsuperscript{13} Although Remix is about copyright law, it is also relevant to the study of the trademark logo.

Professor Wilf explained that authorship in trademark could be re-defined to include a public act of interpretive association, because it lacks the idea of individual authorial production.\textsuperscript{14} Coombe characterized trademarks as free-floating symbols, which she considered to be in the public consciousness, and which are vulnerable to people who assume the right to reinterpret and change them.\textsuperscript{15}

According to Professor Fisher all persons in an attractive society would be able to participate in the process of meaning-making.\textsuperscript{16} Professor Litman asserted that trademark symbols earn value when the public invests in the meaning of these brands.\textsuperscript{17} Professor Dreyfuss also held that the public can contribute to a brand’s value.\textsuperscript{18} According to Lessig, there is a connection between the possibilities of internet users to participate in a remix procedure and the flourishing of culture.

Once the trademark logo is unauthorizedly used in an environment such as social media, recodification can take place. This recodification is obviously aggravated where the internet users upload an altered version of the trademark logo.

According to Professor Katyal, trademarks are paradoxically immutable, but instable entities open to constant reinterpretation and re-signification.\textsuperscript{19}

Instable trademarks caused, according to sociologist and philosopher Baudrillard, a hyper-reality, which can be characterized as the fragmentation of the public sphere and a lack of commonly shared meaning of signs.\textsuperscript{20} Professor Hughes articulated that the interests of non-owners in

\textsuperscript{14} Steven Wilf, Who Authors Trademarks?, 17 CARDOZO ARTS & ENT. L.J. 4, 10 (1999).
\textsuperscript{15} Coombe, supra note 9, at 1880.
\textsuperscript{17} Jessica Litman, Breakfast with Batman: The Public Interest in the Advertising Age, 108 YALE L.J. 1717, 1730 (1999).
\textsuperscript{19} Sonia K. Katyal, Stealth Marketing and Antibranding: The Love that Dare Not Speak Its Name, 58 BUFF. L. REV. 795 (2010).
stable trademarks might outweigh groups that want to be able to change the meaning of trademarks.\textsuperscript{21} Hughes clarified that even for the latter group the knowledge of the original meaning of the mark is essential as a reference to the recodification, otherwise no one will notice a difference of meaning. Professor Assaf explained that the interest in protecting cultural heritage coincides with a need to fix the meaning of that heritage.\textsuperscript{22}

Holders of trademark logos that are unauthorizedly used on social media might be most harmed by the instability of meaning.

Already in 1899 the economist and sociologist Veblen explained the evolution of social classes through the consumption of goods.\textsuperscript{23} Professor Pollack gave a description of the trademarks used as signifiers of social status throughout history.\textsuperscript{24} A modern example of using a trademark to signify social status can be observed on social media where for this purpose often trademark logos of luxury goods are unauthorizedly uploaded and shared.

That consumers use the trademark to help them assume an identity is outlined by Drescher.\textsuperscript{25} Hughes wrote that the trademark is used on the one hand to express a need for individuality, but on the other hand to identify with a collective.\textsuperscript{26}

From an economic or moral point of view it is challenging to use trademark law to protect the status-signalling qualities of the mark, according to Professor Harrison.\textsuperscript{27}

Frankfurter wrote that ‘the creation of a market through an established symbol implies that people float on a psychological current engendered

\begin{footnotesize}
\begin{enumerate}
\item Hughes, supra note 21, at 956–7. See also Shahar J. Dilbary, Famous Trademarks and the Rational Basis for Protecting ‘Irrational Beliefs’, 14 GEO. MASON L. REV. 605, 634–6 (2007).
\end{enumerate}
\end{footnotesize}
by the various advertising devices which give a trademark its potency’.28 Professor Ralph Brown stated that the goodwill and advertising function might not be beneficial to society at large.29 Heath and Scott argued that products with a trademark logo might be purchased, even though this might be based on irrational projections, for reasons of self-realization through the internalization of the portrayed values.30 The consumer, however, purchases the advertised mental image together with the physical commodity of a product, as Professor Economides explained.31 Brown found out that, although it might be irrational to buy illusions, the reality is that consumers are irrational.32 Lemley stated hesitantly, in a free market, everybody should perhaps be able to make their own choices, whether these choices are irrational or not.33

Author and activist Klein in her international bestseller No Logo criticized the philosophy of brands in the global economy that value the image bestowed on their trademarks more than the products they are manufacturing.34 One implication of such a philosophy is that these brands outsource their production to Third World countries where the production takes place under suboptimal circumstances, to put it euphemistically, cutting loose the link between trademark and source of origin. However, trademark logos can also help make the trademark holder accountable.

Rogers argued in 1909 that the trademark is not that important since ‘it is just the shadow of the goodwill’.35 This perception has definitely changed. After the gap between mark and source, and between mark and product, became so wide, the mark only referred to itself, as professor of

28 Mishawaka Rubber, supra note 1.
29 Ralph S. Brown, Jr., Advertising and the Public Interest: Legal Protection of Trade Symbols, 57 YALE L.J. 1165, 1181 (1948).
32 Ralph S. Brown, Jr., supra note 29, at 1181.
34 Naomi Klein, NO LOGO: TAKING AIM AT THE BRAND BULLIES (Toronto: Knopf Canada, 2000).
history, film and media studies Poster observed. Later, Coombe also described the mark as quintessentially self-referential. Professor Welkowitz stated that the trademark is the product. Judge Kozinski wrote about the use of the logo used as a separate commodity, totally distinct from its original and traditional function. Lemley contended trademarks as assets with their own intrinsic value. Anthropologist and geographer Harvey asserted that ‘given the ability to produce images as commodities more or less at will, it becomes feasible for accumulation to proceed at least in part on the basis of pure image production and marketing’. 

The author and lawyer Johnson made clear that a trademark holder does want to give his trademark enough meaning, but not too much so that it will be threatened by genericide when its meaning includes a product category.

Professor Dreyfuss, who observed that trademarks have become independent commodities, proposed the protection of the expressive

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40 Lemley, supra note 33, at 1693.


42 An example is Walkman; in the Netherlands Sony made a mistake in advertisements by referring to mobile tape-players of its competitors as ‘walkmen of other brands’, committing genericide to their own trademark name ‘Walkman’. Lecture by Professor Bernt P. Hugenholtz, attended at IViR, University of Amsterdam, 2006.

dimension of trademarks.44 Trademarks have become valuable commodities, according to Litman.45 She also described the value of the trademark as being more dependent on the perception of consumers than the product itself.46

Even before social media, Judge Kozinski noticed a growing tendency of consumers that use trademarks not just to identify products, ‘but also to enhance or adorn them, even to create new commodities altogether’.47 Half a century before, Frankfurter in the Mishawaka Rubber case formulated it like this: trademarks are used to ‘impregnate the atmosphere of the market with the drawing power of a congenial symbol’.48 Frankfurter also wrote: ‘If it is true that we live by symbols, it is no less true that we purchase goods by them’.49

The internet can be described as a platform for free social, cultural and political discourse and production,50 with information being communicated that is crucial to a democratic society. The division between producers and consumers is no longer useful since each can generate content, according to Professor Tushnet.51

Johnson wrote that the rapid development of the internet has meant an explosion in unauthorized use of commoditized trademark signs in new and innovative ways by internet users, which led to a flood of trademark-related litigation and legislation.52

Beside trademark law, cyberlaw and information law are possible theoretical frameworks to study these challenges. Lipton asserted that cyberlaw does not suggest a focal point other than internet-related technologies53 and deals with a plethora of different topics, including fair use or other exceptions to propertization, formation and interpretation of contracts made electronically and freedom of speech in relation to internet communications. Lipton argued that information law with its focal point on information has a better chance to develop into a coherent framework of law, which comprises a set of principles that can exist

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44 Dreyfuss, supra note 18.
45 Litman, supra note 17, at 1728.
46 Id.
47 Kozinski, supra note 39, at 961.
48 Mishawaka Rubber, supra note 1.
49 Id.
52 Johnson, supra note 43.
alongside other laws such as tort, contract and intellectual property laws. The normative framework of information law, suggested by Lipton, is balancing the control rights of property and privacy with the access right in information. This might be partly relevant for the trademark, which has arguably informational components, for example the source of origin.

Property implies ownership, which implies possession, which implies exclusory control, even though the control is never absolute. Intellectual property rights such as trademarks are intangible, but they have owners. To look at intellectual property as property is useful since property is a highly efficient way to support commercial transactions of an asset. Professor Llewelyn highlighted the potential of the commercialization of intellectual property rights. Litman wrote that the reason for the existence of property is its alienability, to sell or license it. Professor Calabresi and Melamed introduced a classification of property, liability and alienability rules that can partly be applied to the trademark logo: the trademark holder can assign or license them according to these views.

However, there has also been criticism about seeing trademarks as property. Lipton expressed her concern about the potential of over-propertization of information rights. Professor Lemley opposed the propertization of trademark law, in particular merchandising rights, and recommended courts to use other rationales for its protection. Professor Denicola made an analysis of the merchandising of famous symbols. Professors Dogan and Lemley suggested weighing the costs and benefits of the property rationale. One implication of seeing trademark

54 Even though information cannot be physically possessed, it can be controlled, although not in an absolute sense. Id., at 730.
56 David Llewelyn, INVISIBLE GOLD IN ASIA: CREATING WEALTH THROUGH INTELLECTUAL PROPERTY (Singapore: Marshall Cavendish Business, 2010).
57 Litman, supra note 55, at 1295.
60 Lemley, supra note 33, at 1714.
as a property right, as Professors Desai and Rierson suggested, is that the investment in the brand is seen as an indicator of potential harm.\footnote{Deven R. Desai and Sandra L. Rierson, *Confronting the Genericism Conundrum*, 28 CARDOZO L. REV. 1789, 1797–9 (2007).}

Jou wrestled with the question when the moral rights of the newcomer outweigh those of the existing trademark holder.\footnote{Chi-Ru Jou, *The Perils of a Mental Association Standard of Liability: The Case Against the Subliminal Confusion Cause of Action*, 11 VA. J.L. & TECH. 2, 66 (2006).}

Many authors are defeatist in the challenge to control their trademarks on social media. Examples are Sammons, who suggested that trademark holders should accept that they lost control and focus on what they can control,\footnote{Stephanie Sammons, ‘With Blogging and Social Media, Focus on What You Can Control’, 18 September 2010, Build Online Influence, accessed 13 June 2015 at: http://www.stephaniesammons.com/with-blogging-and-social-media-focus-on-what-you-can-control/.} and Standfield, who advised for the same reason to focus on one’s own websites.\footnote{Alyson Standfield, ‘Social Media Is only a Tool’, Artbizblog, 23 February 2011, accessed 14 June 2015 at: http://www.artbizblog.com/2011/02/social-media-is-a-tool.html.}

Hughes argued that ‘society’s increasing dependency on trademarks creates a pressure to remove them from private control’.\footnote{Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 322 (1988).} According to Schaffer-Goldman, ‘words and images do not worm their way into our discourse by accident; they’re generally thrust there by well-orchestrated campaigns intended to burn them into our collective consciousness. Having embarked on that endeavour, the originator of the symbol necessarily – and justly – must give up some measure of control’.\footnote{Regina Schaffer-Goldman, *Cease-and-Desist: Tarnishment’s Blunt Sword in Its Battle Against the Unseemly, the Unwholesome, and the Unsavory*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1241, (2010).} In other words: trademark holders expose the public to countless advertisements and therefore the public is entitled to take some control over the trademarks and their meaning.

Professor Coombe observed law as a central locus for the control and dissemination of those signifying forms with which identities and differences are made and remade.\footnote{Rosemary J. Coombe, *Tenth Anniversary Symposium: New Direction – Critical Cultural Legal Studies*, 10 YALE J.L. & HUMAN. 463 (1998).}
The expansion of trademark law, with trademark dilution, based on investment and advertising functions, has been both criticized and advocated at the same time. Professor Coombe asserted that an expansion of intellectual property could strip us of our humanity, while Professor Beebe discussed the trademark holders’ need for a broadened scope of trademark protection. Professor Lemley reluctantly made the point that the goal of continued expansion of trademark rights is to obtain property rights in trademarks.

Matos counted the blessings of the use of brands as source identification in order to prevent opaqueness of the source which leads to deception and confusion of consumers. The only function of trademarks, from symbols to myths, was as a signifier of the source of origin, according to Ralph Brown.

Beebe analysed trademark law semiotically: one can distinguish between the signifier (trademark), signified (goodwill) and represent (source and/or product). The essential function of the trademark is considered to indicate the source of origin, so that consumer confusion or misrepresentation is avoided. Diamond, commissioner of patents and trademarks, made clear that the function of trademarks as an indicator of source could already be found in Ancient Rome. The essential function of the trademark can be divided into source identification, product distinction and quality functions, argued Professor Simon Fhima, which all protect against confusion. According to Professor Dreyfuss, some level of confusion might be unavoidable in times of keyword triggered advertisements.

70 Coombe, supra note 9.
72 Lemley, supra note 33, 1687–714.
74 Brown, Jr., supra note 29, at 1167.
78 Rochelle Cooper Dreyfuss, Reconciling Trademark Rights and Expressive Values: How to Stop Worrying and Learn to Love Ambiguity, in TRADEMARK
Introduction

Justice Frankfurter, the economist Stigler, and the economist Landes and judge Posner proposed that trademarks are crucial to shorthand the economic search costs for consumers, to repeat enjoyable purchases and avoid those one did not enjoy. In contrast, Larson gave examples of sites that use the trademark logo in a confusing and deceptive way. For Schechter, who introduced the dilution doctrine to the US, the preservation of the uniqueness of a trademark should constitute the only rational basis for its protection.

According to the economist Aldred, it is assumed that trademark holders invest in the reputation of their trademark by keeping the quality of the products or services constant. Professors Altman and Pollack asserted that a trademark is sometimes a more convincing selling point than the quality of the product to which it refers and that often the competition is between trademarks rather than between the quality of the products. Levin stated that consumers associate some product features with the product, rather than with the brand. Therefore the goodwill can be misappropriated when an unauthorized manufacturer uses a feature to

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79 Frankfurter J: ‘A trademark is a merchandising shortcut which induces a purchaser to select what he wants, or what he has been led to believe he wants’. Mishawaka Rubber, supra note 1.


benefit from the status or social image that the brand owner has developed, without confusing consumers as to the source of the goods.

After trademarks could be assigned and licensors failed to exercise adequate control over the licensee’s level of quality in the case of a so-called naked licence, the connection between trademark and its source of origin was lost, explained Beebe.87

Subsequently, it was thought that the trademark could indicate the product which had a certain quality, independent from the source. This led to the anonymous source theory, where the source is deemed constant but not known, according to scholar Sakulin.88

In 197589 and 198990 there were the ‘patch’ cases with which US courts wrestled. It was about companies that unauthorizedly reproduced the trademark as a patch unattached to any product. Therefore it was hard to determine trademark infringement, since the mark did not refer to the source. The actual product that the defendant sold, the court wrote, is not the ‘trademark symbol’, but ‘fabric and thread emblems’.91 The use of trademark rights to enforce a monopoly in the production of merchandise of, for example, a sports team in the absence of confusion, has been met with criticism, including that of the philosophers Scott, Oliver and Ley-Pineda.92

Shull posed the question whether universities should allow their students to use their trademark logos.93 It is an interesting question that could be applied to the use of trademark logos on social media by internet users: should trademark holders authorize internet users to use their trademark logos under certain conditions?

87 Beebe, supra note 71, at 2029.
89 Boston Prof’l Hockey Ass’n v Dallas Cap & Emblem Mfg., 510 F.2d 1004 (5th Cir. 1975).
90 Boston Athletic Ass’n v Sullivan, 867 F.2d 22 (1st Cir. 1989).
91 Id.
Manas used the example of gripe sites such as NoHarvard to see whether they are confusing or not to the public.\textsuperscript{94} Consumer opinion websites do not tend to lead the viewer to believe the trademark owner is the sponsor of the site, according to Rochat.\textsuperscript{95} By asking visitors to click on another entity’s trademark logo to gain access to their own site would raise trademark infringement concerns if those seeing the link were led to believe that the one who linked was affiliated with the owner of the trademark mark logo, explained Professor Effross.\textsuperscript{96} Scott Brown explained how third party programmes can use trademark logos without authorization, implying false endorsements or by naming the application in a way that supports a generic understanding of the trademark.\textsuperscript{97} Brown also showed how third party applications that integrate two or more original programmes can lead to confusion.\textsuperscript{98}

Aoki stated that ‘symbols have the ability to convey meaning across the globe because they are not restricted by language barriers, and they often have a uniformity of meaning that is understood across cultures’.\textsuperscript{99} Because of these special characteristics, a trademark logo can also be used as a solution to potential trademark infringement challenges. Professor Strowel and Ide\textsuperscript{100} dealt with the \textit{Shetland Times} case, whereby it was settled that \textit{Shetland News} could use the \textit{Shetland Times}’ headlines, as long as the \textit{Shetland Times} logo was put next to the links, to show the source.

However, in the \textit{Total News} case the opposite was settled: the links of \textit{Total News} could be used, but without the \textit{Total News} logo.\textsuperscript{101} Professor O’Rourke realized that the trademark logo is special and stated that using

\textsuperscript{94} Alayne E. Manas, \textit{Harvard as a Model in Trademark and Domain Name Protection}, 29 RUTGERS COMPUTER & TECH. L.J. 475 (2003).
\textsuperscript{97} Scott Brown, \textit{‘I Tweeted on Facebook Today: Re-Evaluating Trademark Genericide of Internet-Based Trademarks’}, 7 I/S: J.L. & POL’Y FOR INFO. SOC’Y 457 (2012).
\textsuperscript{98} Id.
\textsuperscript{99} Aoki, supra note 11, at 541.
\textsuperscript{101} Total News, No. 97 Civ. 1190 (PKL) (S.D.N.Y. filed 28 February 1997).
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an address as a hyperlink intrudes less on the linked site’s trademark rights than would use of a fanciful logo.  

The trademarked logo is also being used as a deterrent to copyists in fashion, asserted Molho, who wrote a biography about Giorgio Armani, an Italian fashion designer. Likewise, Blakley asserted that trademarks are the only effective way of protection for the fashion industry.

Professor Baker argued that commercial expression does not induce people to think critically, therefore does not qualify for protection under the right to freedom of expression. In contrast, according to Kozinski, the link between commercial and non-commercial use has not merely blurred but disappeared.

Schaffer-Goldman wrote: ‘If the anti-dilution statute were construed as permitting a trademark owner to enjoin the use of his mark in a non-commercial context found to be negative or offensive, then a corporation could shield itself from criticism by forbidding the use of its name in commentaries critical of its conduct’. Gatewood also pointed to the challenges to freedom of expression when non-commercial use of trademarks is banned.

Professor Blanke gave an overview of the history of parody. Parody coincides with being famous asserted Cantwell. According to him trademark holders, ‘like public figures, who seek the public spotlight must accept the concomitant risk of public ridicule in the form of


107 Regina Schaffer-Goldman, supra note 68.


parody'.\textsuperscript{110} Cantwell asserted that if humans had to bear this fate, than certainly the trademark logo does not deserve greater protection than is afforded to a human.\textsuperscript{111} Denicola stated that famous trademarks are the functional equivalent of famous names, and found it not surprising that the US Constitution – which does not explicitly mention the protection of the trademark – demands restraint in the recognition of trademark right when the right to freedom of speech is at stake.\textsuperscript{112}

Professor Dreier applied some reservation to the freedom of speech, based on the relatively new US constitutional law and human rights law in comparison to the much older private law.\textsuperscript{113} Sakulin asserted that intellectual property lawyers might have the same concerns.\textsuperscript{114}

The protection of the right of speakers is very important, but as Professor Heymann demonstrated, it is also important to protect the right of listeners: they deserve to receive non-fraudulent information.\textsuperscript{115} Heymann was afraid that the presence of a trademark logo can convey to consumers the false message of affiliation, even though the entity might have used the trademark logo unauthorizedly, so that the trademark holder of the used trademark logo had no involvement with the production of the goods.\textsuperscript{116}

It is argued that the mere brandishing of intellectual property laws can be sufficient to not only stop offensive uses but also innocent uses. This is called the ‘chilling effect’.\textsuperscript{117} As Coombe observed: ‘Hegemonic power is operative when threats of legal action are made as well as when they

\begin{itemize}
\item \textsuperscript{110} Michael K. Cantwell, Confusion, Dilution, and Speech: First Amendment Limitations on the Trademark Estate, 87 T.M.R. 547, 583 (1997).
\item Id.
\item \textsuperscript{112} Robert C. Denicola, Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of the Trade Symbols, WIS. L. REV. 158, 198 (1982).
\item \textsuperscript{114} Sakulin, supra note 88, at 110.
\item Id.
\item \textsuperscript{117} Chilling effect: the mere brandishing of intellectual property laws is usually sufficient to stop offensive uses. Examples can be found on the site ‘Chilling Effects’, accessed 13 June 2015 at: http://www.chillingeffects.org/.
\end{itemize}
are actually acted upon’. Beside the chilling effects of trademark infringement, there are the chilling effects of trademark dilution on corporate parody, which is dealt with by Schlosser.

Outline of the Book

Part I (Chapters 2–4) introduces the conflict, under the ambit of trademark law (stage of the legal conflict), between trademark holders, social media providers and internet users (protagonists of the legal conflict) over the unauthorized use of the trademark logo on social media. After that the conflict is deconstructed into its constituent elements (analysis of the legal conflict). In Part I the question will be answered whether an automated enforcement solution for the unauthorized trademark logo on social media is the only feasible solution.

Part II (Chapters 5–7) elaborates on the problems of protection and enforcement of the trademark logo on social media. It explores the misrepresentation of the trademark logo, and covers confusion or a likelihood of confusion that lead to trademark infringements, and the defences of trademark infringement: trademark use outside the course of trade and nominative fair use. It then deals with the misappropriation of the trademark logo, trademark dilution or a likelihood of dilution. This will be followed by the defences against dilution: fair use and exceptions, including parody, satire and comments. Finally, Part II covers the internet intermediary liability, notice-and-takedown obligations and the limitation on internet intermediary liability (also known as the safe harbour provisions). Part II answers two questions: whether the current trademark law is insufficient to protect against the unauthorized use of a trademark logo, and whether the safe harbour provisions of the law of intermediary liability of trademark infringement are ineffective.

Part III (Chapters 8–9) offers a paradigm shift: toward the moral right of integrity of the trademark logo. The question to be answered is why this has not been the case yet? and how this can be changed? A rationale will be proposed for a moral right of integrity of the trademarked logo, which is a feasible solution for the problems outlined in Part II. Finally a description will be given of the walled gardens of social media as testing grounds for the proposed solution. Part III answers two questions: whether the unauthorized use (including non-commercial use) of the

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118 Coombe, supra note 69, at 9.
trademark logo on social media should be protected by the moral right of integrity? and whether a contractual solution (walled gardens of social media) can pave the way for an automated solution for the trademark logo on social media?

Part IV (Chapter 10) provides the conclusions.