Search Costs in Trademark Law: What Are We Searching For And Have We Found It Yet?

Laura R. Bradford

Abstract

It has now become a commonplace to say that trademarks exist to lower "the costs of search" for consumers seeking desirable goods, but there is widespread confusion about what the term "search costs" means. The term originated in the economics literature of the 1950s and 60s to refer to the costs of gathering information about potential partners to an economic transaction. More recent court decisions, briefs and commentary seem to assume that any activity that distracts consumers from looking for brands they already know and or that causes consumers to expend mental energy increases the "costs of search" and therefore is vulnerable to prohibition under trademark law. This has put modern trademark law on a collision course with free speech and competition interests. Accordingly, critics increasingly decry the search costs principle as inherently flawed and lacking in limitation. This paper argues that the problem is not with the utilitarian approach of lowering consumer information costs, but with a lack of consensus about what "search costs" are and what they should be in a modern marketplace. I analyze the economic and historical roots of the term, and explore how its original definition maps onto contemporary models of product "search." The economic literature that coined the term aimed at a particular problem: lowering information asymmetry between buyers and sellers. Tailoring the search costs concept to its roots can provide a much-needed limiting principle for trademark doctrine. In this way, a "search costs" approach can complement existing First Amendment, natural rights, and categorical exclusion approaches, and in some cases can provide a more optimal balancing of rights.

The paper will identify two sources of definitional confusion in current conceptions of search costs. The first represents a disconnect between the economic and colloquial notions of search. Although the foundational economic work on search primarily examined strategies through which consumers could lower the costs of gathering information about choices without the need for prior sampling, trademark law grounded in natural rights theories of "goodwill" has focused on safeguarding the interests of consumers searching for goods about which they are already familiar. The case law thus often emphasizes the convenience of repeat purchasers at the expense of consumers broadly seeking information about unknown qualities of a new good. In part this represents an effort by trademark owners to use doctrines such as initial interest confusion, dilution and sponsorship confusion to address problems of information overload rather than information scarcity. Although information overload imposes real costs, the use of trademark law to police diversion of attention stretches the concept of "search costs" to incoherency. Furthermore this definitional expansion corrupts the agency model on which enforcement of the law

depends because producer and consumer interests in information filtering substantially diverge.

The second problem source of confusion exacerbates the first. The original economic concept of "search" and its attendant costs arose in a much less dynamic and more fixed product marketplace. It therefore deemphasized an increasingly important element of consumer search: that of identifying the relevant universe of product options as opposed to merely assessing the relevant fitness of a closed set of known choices. A modern conception of search costs must consider both aims equally. However, they will sometimes conflict. The use of familiar marks to describe the characteristics of a new, unrelated product or service can lower the identification costs of search for the new product even while increasing the costs of evaluating the goods sold under the old mark. A coherent concept of "search costs" must embody a way to reconcile these competing aims. The underlying purpose in the economic literature of resolving information asymmetry can provide a mechanism to resolve such conflicts where they arise. Addressing these uncertainties limits the range of conduct which trademark law should address and provides much needed clarity to trademark doctrine.