Free Speech and International Obligations to Protect Trademarks - *Abstract*

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There is growing interest both domestically and internationally in the potential conflict between trademark law and the right of freedom of expression. In the United States, this may be due to the recent expansion of trademark rights at the same time the U.S. Supreme Court has increased constitutional scrutiny of commercial speech regulations. Although it is much discussed today, this clash between trademark and free speech rights was not much of a concern when the United States and other countries agreed to protect a minimum level of trademark rights pursuant to international treaties such as the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (the "TRIPS Agreement"). The TRIPS Agreement does not expressly acknowledge free speech interests. Possibly members believed the agreement covered only core trademark rights that were unlikely to conflict with free expression. Maybe they discounted the harm to expression caused by protecting trademark rights because commercial speech received less (or no) protection from restriction in the United States and elsewhere. Whatever the reason, the TRIPS Agreement is silent on how, and whether, free speech interests should be taken into account when construing the members' international trademark obligations.

Today, there is an increased recognition that strict enforcement of trademark law may harm the free flow of ideas and information. In response, some nations are using different means to protect free expression in trademark law, such as by adopting speech-protective trademark rules, narrowly interpreting trademark claims, broadly construing exemptions and defenses, and/or invoking the constitutional right of freedom of expression to trump trademark rights. These various methods for resolving the conflict between trademark and free speech rights may raise concerns regarding a nation's compliance with its international obligations to protect trademarks.

This Essay argues the World Trade Organization (WTO) should acknowledge the flexibilities in the TRIPS trademark provisions and generally defer to nations who are attempting to strike the proper balance between trademark and free speech rights. First, the text of the TRIPS Agreement contains sufficient flexibility to allow nations to protect expression in their trademark laws. Second, there are strong policy reasons for the WTO to avoid an activist interpretation of TRIPS that adopts a particular solution to this conflict. The WTO could freeze the development of international and national trademark law in this area. Treaties are difficult to amend. Nations may not agree on specific speech-protective trademark rules worthy of implementation. They should be able to experiment at a national level, especially since the role of trademarks in society and the constitutional status of commercial speech are both evolving. There are good reasons for nations to adopt more categorical safe-harbors for certain uses of trademarks. Trademark rules can better protect free expression in several ways. They create more predictability in trademark litigation, allow judges to dispose of speech-harmful claims early, and reduce the discretion of fact-finders to discount the value of expression they dislike. Yet such rigidity is problematic at an international level. Nations need flexibility when deciding how to best protect freedom of expression in trademark law. They need to be able to respond to changes in the law, technology, and society in new and unexpected ways. For these reasons, the WTO should acknowledge the potential conflict here, but avoid adopting inflexible rules that attempt to strike a certain balance between trademark and free speech rights.