

SEMANTIC SHIFTS IN TRADEMARK LAW

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Abstract

Each new trademark is also a new entry in the collective lexicon. The exclusive right to use the mark is both acquired by the owner and bestowed by the consumer. Thus, in light of the traditional view that trademark protection is justified to the extent it prevents consumer confusion, it would be reasonable to think that trademark doctrine would focus entirely, or at least primarily, on consumer comprehension of trademarks. Surprisingly, however, trademark law turns heavily on mark owner behavior at all stages of the trademark's lifecycle.

While this tendency might seem startling at first, it can be better understood in light of linguistic theories of semantic shift. These theories regarding the evolution of word usage provide a unifying framework to understanding the acquisition of trademark rights, limits on their reach and enforcement, and their potential loss. Properly understood, mark owner behavior, as well as behavior by junior users, licensees, and lexical intermediaries, provide critical context for the consumer's comprehension of the mark.

Analyzing the lifecycle of the trademark through the lens of semantic shift has several payoffs. First, semantic shift highlights the strengths and limits of the traditional hierarchy of conceptual trademark strength. Following from that, *ex ante* genericness should not categorically bar the development of source significance. Second, the transformative effort of the mark owner provides important context for consumer comprehension, and thus can serve a vital function in determining whether a mark has acquired secondary meaning, and whether a junior user's mark is likely to confuse consumers. Third, while fanciful marks are likely perceived as inherently strong precisely because they lean towards monosemy – singular, rather than shared meaning – that same affinity makes fanciful marks particularly vulnerable to a shift toward *ex post* genericness. Finally, the genericness standard should be modified to better reflect the capacity of consumers to hold multiple concepts in mind simultaneously.