Trademark Implications of Online Word of Mouth

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What’s Unique/Special/Different About Internet?

- **Rise of online word of mouth**
  - Consumer opinions reach beyond social network
  - Intermediaries generating/disseminating consumer opinions
  - Effect: TM owners have less control over brand perception influences

- **Increased competition for consumer attention**
  - Only \( \leq 20 \) spots on first search results page matter
  - TM owners face new competitors for these spots
  - Consumer opinions can “follow” TM owner
Normative Value of Online Word of Mouth

- Social benefits from robust flow of online word of mouth
  - Consumers value online word of mouth
  - TM owners should bear consequences of their choices
  - Critical part of invisible hand

- Trademark law can excise online word of mouth
  - But TM owners will use it only to excise unwanted opinions
  - Result: consumers will form lopsided brand perceptions

- TM law should foster online word of mouth, not squelch it
Implications for Trademark Law

- **Trademark “Use in Commerce”**
  - Not just jurisdictional requirement
  - But, world can’t be cleaved into commercial/non-commercial spheres
    - Online word of mouth has commercial effect
    - Word of mouth producers may want legitimate compensation for their labor/costs
    - Intermediaries make commercial referential uses
  - Solution: use in commerce = commercial vendor uses TM as its source identifier

- **Likelihood of Consumer Confusion**
  - Need to focus on product source confusion, not content source confusion
  - Presumptively, no LOCC for online word of mouth

- **Fair Use**
  - Doctrinally narrow
  - Fair use cases often really aren’t use in commerce