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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 ≤ 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