

## THICK MARKS THIN MARKS

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Trademarks are repositories for a variety of meanings, from traditional source identification to more nebulous conceptions of brand identity. Determining what parts of this range receive protection is a recurring issue. Courts reveal the answers in part by adjusting the “thickness” of protection trademarks receive. My draft explores the concept of trademark thickness—defined here as the extent to which courts protect a trademark’s features independently of surrounding context or distinguishing characteristics with the defendant’s mark—and what it tells us about modern trademark doctrine.

Thickness of protection is an issue in routine trademark litigation because trademarks receive protection against more than counterfeits. How much more varies from case to case. A court deciding whether CRAFT is too much like KRAFT will ask, for example, about the relevant markets. A CRAFT cheese grater is more likely to infringe the KRAFT foods mark than a CRAFT computer.

The concept of thickness of protection has more interesting uses. It lets courts limit spillovers from trademark rights. Trade dress claims create risks to competition insofar as claimed features may be useful to competitors. One response would be to declare them functional and deny protection. But if a court is unsure, another approach is to accept the mark, but require near identity before finding a likelihood of confusion. This form of thin protection limits the risk that the initial trade dress claim will cause competitive harm.

Calibrating trademark thickness is also a vehicle by which courts resolve non-traditional and controversial trademark claims. Judges receptive to the expansion of trademark rights often grant thick protection that elides the distinction between the categories of meanings potentially embodied by a mark. This approach may be understood as an information-economizing tool, but it carries costs. The scope that a mark needs in the realm of source identification is not necessarily appropriate for claims concerning, say, a false perception of affiliation. Thick protection buys the clarity of a rule at the expense of ignoring this nuance.

In contrast, courts that reject expansive trademark claims sometimes do so by according thin protection to the trademarks at issue. While disposing of the case at hand, the move frustrates the development of precedent. Treating a mark as thin enables a court to resist a broad trademark claim

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*without* disturbing its doctrinal underpinnings. This method softens the impact of trademark's growing scope, but in a way that limits the benefit to future defendants.

Courts should think more clearly and explicitly about when thick protection is appropriate. Many of the extended meanings of a mark are built out of its source-identification function. When this is the case, the case for thick protection seems to be strongest with respect to the core of source identification but less so with respect to meanings that are made from it. Some doctrinal developments in trademark law reflect this view; others suggest the opposite.