

# DEATH OF *DAWN DONUT*: THE DEMISE OF CONCURRENT TRADEMARKS

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## I. INTRODUCTION

Although trademarks are all around us, most consumers take them for granted. As such, many of us are unaware of how we use trademarks every day to make decisions. When a consumer reaches for a carton of Tropicana brand orange juice instead of one of the other brands sitting on the grocery store shelf, she is making an informed consumer decision. The Tropicana trademark on the box sends a variety of signals to consumers, including that the company they associate with the Tropicana mark actually made the product. The mark also signals that the juice is consistent with that company's demonstrated standards of quality. The mark may even signal that Tropicana orange juice is of such high quality that it warrants a premium price. Though subtle, the factual, subliminal, and psychological impacts of a trademark reduce ambiguity in the marketplace and improve the clarity of consumer decisions.

Society has decided that trademarks bring value to commercial transactions. As such, it is good public policy to provide mark owners protection for their marks. These marks,<sup>1</sup> indicating the origin of goods and services, are protected by trademark rights so that consumers can rely on their expectations of form, quality, and performance.<sup>2</sup> In the United States, trademarks enjoy both federal protection and common law protection.<sup>3</sup> However, these rights are tempered by other public policy concerns, most notably, allowing the good faith, fair and concurrent use of the marks by other

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1. Trademarks are loosely defined. A wide range of icons can indicate the source or origin of goods and services. Words, names, symbols, devices, or combinations of those elements can receive trademark protection. The Lanham Act specifically recognizes trademarks, service marks, certification marks, and collective marks. Trademark Act of 1946 (Lanham Act), 15 U.S.C. §§ 1052-1054 (2000). For the purposes of this paper, said marks will be referred to collectively as trademarks.

2. PETER B. MAGGS & ROGER E. SCHECHTER, TRADEMARK AND UNFAIR COMPETITION LAW 26 (6th ed. 2002).

3. See *infra* Part II.A and notes 48-54 (addressing the overlap in legal regimes). Preemption issues are beyond the scope of this paper.