

Trademark Exhaustion in Cyberspace

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The Internet has revolutionized sales of secondhand items. Over the past ten years, casual sellers of used goods have migrated from garage sales, swap meets, and classified ads to eBay and Craigslist, and have turned side hobbies into lucrative businesses. This explosive market has affected the sales of new goods and has troubled manufacturers, who are seeking to curtail the growth of this secondary market.

Most of these on-line sales should be protected by an exhaustion principle known as the first-sale doctrine, a well-known defense to infringement claims that applies across patent, copyright, and trademark law. Simply stated, once manufacturers sell a product, they may not interfere with secondary sales of the product. Yet in an effort to stifle independent dealers of secondhand goods, manufacturers are increasingly relying on a trademark claim of source or sponsorship confusion. Moreover, despite a demonstrably false copyright-infringement claim, manufacturers misuse copyright law's Section 512's take-down provision to remove secondary sale items from the Internet, with the ultimate goal of decreasing the competition of secondary markets—small dealers are faced with either defending themselves in court or ceasing operations.

The authors argue that courts are erroneously moving towards a weakening of the first-sale doctrine's function of limiting manufacturers' power to control the Internet resale market. The authors assert that, in the context of the Internet secondary market, there should be a presumption of no affiliation between the reseller and the manufacturer, and that actual deception should be required. The authors propose a comprehensive standard by which resellers and auction websites can navigate the minefield of Internet secondary-market sales so that it more closely resembles the doctrine's interpretation in a brick-and-mortar setting.

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