

*Trade Marks and Free Speech: A Call for Caution* by: Robert Burrell

Over the past fifteen or so years there has been growing interest in the relationship between trade marks and freedom of expression. In particular, a constellation of the increased cultural importance of brands, legislative expansion of trade mark law, the incautious application of traditional trade mark principles to the internet and the aggressive trade mark enforcement strategies of companies like Mattel have led a sizeable number of academics, particularly in the United States, to worry about the potential conflict between trade mark protection and expressive freedom. While sharing many of the concerns about the potential overreach of trade mark law, this paper will suggest that we need to be careful before focusing too quickly on the narrow question of how the tension between trade marks and expressive freedom is to be mediated. In particular, this paper will argue, first, that this focus concedes too readily that trade mark rights should have an extensive reach; secondly, that outside of the United States in particular, a focus on using free speech doctrine to constrain trade mark rights is unlikely to prove effective; and thirdly, and somewhat paradoxically, this focus may go too far, in that it is likely to lead to the creation of privileged spaces for things such as 'trade mark parodies', spaces are likely to become detached from the underlying free speech rationale.