
TO PROTECT AND . . . TO PROFIT: THE TRADEMARKING OF THE LAPD AS AN EXAMPLE OF EXPANDING INTELLECTUAL PROPERTY RIGHTS

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I. INTRODUCTION

Recently, the Los Angeles Police Department (“LAPD”) decided to cash in on its recognizable image by officially registering its name, its badge, and its motto with the Patent and Trademark Office (“PTO”).¹ In the United States, the St. Louis and Dallas Police Departments have trademarked their badges, but the LAPD is the first department to attempt such a comprehensive request.² Trademarks are a pervasive part of modern society. One can hardly watch a sports program, go grocery shopping, or even stand in line at Disneyland without being bombarded by these symbols. Usually, individual consumers think about trademarks as brand names, but rarely do they contemplate the meaning of all of these symbols. In fact, if a trademark is functioning properly, the consumer does not have to think much at all. For example, trademarks are so pervasive that if a consumer sees a symbol, such as a “swoosh” on the side of a shoe, he or

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1. See Phillip W. Browne, *For Sale: LAPD Hopes to Cash in Merchandise, Movies*, DAILY NEWS L.A., Nov. 22, 1999, available at LEXIS, News Library; Patt Morrison, *The Trick of Turning LAPD Blue into Greenbacks*, L.A. TIMES, Aug. 5, 1998, at B1. The LAPD’s trademark application is still pending; the filing attorney was sent a letter of suspension on September 21, 2000. PTO, Trademark Electronic Search System, <http://tess.uspto.gov> (search numbers 75791988-91) (last modified Nov. 1, 2001).

2. See Joe Beaird, *LAPD Green: Department Aims to Cash in on Fame*, APBNews.com, Nov. 23, 1999, LEXIS, News Library.

she will immediately assume the shoes are of a certain make and quality. When these associations are made, the trademark is successful.

Legally and economically, however, a trademark is an intellectual property right. This right is exclusionary, meaning that the owner may prohibit others from using the mark.³ An intellectual property right also gives the owner the ability to license the mark's use and thereby profit from it. Intellectual property rights are part of a business's assets, and the valuation of these rights can often propel a company's value beyond its bottom line.

The LAPD's effort to register its marks is aimed at both protecting the Department's name and image by excluding those who would inappropriately use its marks, as well as generating revenue.⁴ On one hand, the Department seeks trademark protection as a means to control the use of its designs and symbols more effectively.⁵ The LAPD claims that the inappropriate use of its symbols has "threaten[ed] to dilute the symbols that represent members of the LAPD" and "creat[ed] confusion [in] the public."⁶ The symbols often turn up on cheap merchandise, such as key chains, t-shirts, or even mousepads—which bear slogans such as "North Hollywood Shootout," "LAPD—We Treat You Like a King," or "Stolen From the LAPD."⁷ Registering the marks would allow the LAPD "to sue people who use the symbols without permission."⁸

The LAPD's marks also show up on the big and small screen. One of the first Hollywood portrayals of the LAPD was on the television program *Dragnet*. Since then, the Department has proceeded to inspire a multitude of productions, from the television series *Adam-12*, to the movie *L.A. Confidential*.⁹ Also, "[b]ecause the LAPD is often the nation's leader in forming specialized police units, such as S.W.A.T., its logos for those groups are frequently copied by other law enforcement agencies."¹⁰

3. This is a simplistic explanation of the law. The law will be explained in greater detail in this Note.

4. Browne, *supra* note 1; Matt Lait, *Trademarks May be Sought to Protect and Serve LAPD*, L.A. TIMES, Aug. 3, 1998, at B1; Baird, *supra* note 2.

5. Lait, *supra* note 4.

6. *Id.* (remarks of Comm'r. Dean Hansell).

7. *Id.* The first slogan refers to the February 1997 event in which ten officers and four civilians were wounded and two bank robbers were killed. The second slogan refers to the infamous Rodney King beating in 1991, an event which not only sparked much controversy in the city of Los Angeles, but also evoked riots. The third slogan is a general message about the quality of police work and level of corruption in the LAPD.

8. Baird, *supra* note 2.

9. Brown *supra* note 1; Lait, *supra* note 4; Baird, *supra* note 2.

10. Lait, *supra* note 4.

Sometimes, the Department approves of these uses, but other times, the use is unauthorized.¹¹

If trademark protection was extended to the LAPD, in addition to forbidding others from using its marks, the Department would have the power to license and to profit from their use. In fact, the revenue-generating value of the marks seems to be the driving force behind the LAPD's decision to seek trademark protection.¹² The Department plans to license the manufacturing and distribution of LAPD merchandise to private organizations.¹³ Licensing agreements would give the Department an additional source of revenue with little effort or capital required. The Department would hire a licensing and marketing agent to manage the intellectual property for a percentage of the royalty fees.¹⁴ Although there is no current estimate as to how much businesses would be willing to pay to use the protected marks, the Royal Canadian Mounted Police have made as much as \$2 million in one year in trademarked merchandising revenues.¹⁵ On the other hand, the New York Police Department, which is plagued with scandals, sells only about \$50,000 a year in merchandise.¹⁶

Much of the money that would be generated would likely come from the entertainment industry. Although the LAPD works closely with Hollywood, it appears that production companies obtain express permission to use the Department's marks—not because they are obligated to do so, but because they fear potential lawsuits.¹⁷ Also, for practical reasons, companies probably strive to maintain good relationships with the police, as they often need assistance while filming, whether in the form of consulting or simply being allowed to park enormous trailers on busy city streets. An officially registered trademark would bolster the Department's legal position and make it easier to ensure that its permission is sought in such cases. Comments in the media, however, have indicated that the industry does not foresee any problems with registration of the marks.¹⁸

11. *Id.*

12. For a discussion on the LAPD's licensing, revenue generating, and merchandising possibilities after receiving an official trademark, see Baird, *supra* note 2; Lait *supra* note 4; Morrison, *supra* note 1.

13. Lait, *supra* note 4.

14. Browne, *supra* note 1; Lait, *supra* note 4.

15. Baird, *supra* note 2.

16. Lait, *supra* note 4.

17. *See id.* Cf. Baird, *supra* note 2. *See also* Ted F. Gerdes, *No Shortcuts in the Clearance Process*, L.A. LAW., Apr. 1990, at 32 (explaining the process of obtaining permission for intellectual property rights and avoiding lawsuits).

18. *See, e.g.*, Browne, *supra* note 1 (including comments from New Line Cinema spokesman, Steve Elser).

This lack of concern is most likely because the entertainment industry already has an informal arrangement with the Department that resembles a licensing agreement.¹⁹ In addition, registering the marks would resolve confusion in the entertainment industry as to what falls under the auspices of intellectual property and when authorization is required to use the marks.²⁰

Fees would apply to entertainment programming only; public affairs and news producers would not be expected to pay for their stories.²¹ Yet, this fee structure raises the question of whether those willing to pay will be able to buy more access to the Department than parties who cannot or will not pay for permissive use. Furthermore, although a trademark would not give the LAPD explicit editorial control over controversial films and other media, the Department could refuse to license products when they consider the use of their marks inappropriate.²² Dean Hansell, a member of the Board of Police Commissioners, has acknowledged the existence of “a small First Amendment cloud on the entrepreneurial horizon, along with the likelihood that some within the department would just love to withhold trademark licensing from unflattering projects.”²³

The trademark attorney who originally handled the LAPD’s trademark registration believes that the Department has a legitimate case, while others think that the courts might not allow a sudden claim in something that others have been selling or profiting from for a long time.²⁴ Still others claim the Department already owns its trademarks by common law and that registering them would simply give the LAPD the right to put an “R” in a circle next to their emblems to signify that the mark is officially registered.²⁵ These differences of opinion most likely stem from an inherent uncertainty in trademark law.

Intellectual property law embodies tensions between competing values, such as protection, access, and competition. Though the Lanham Act,²⁶ the federal statutory authority on trademark law, would appear to be

19. See *infra* III.A.

20. See Gerdes, *supra* note 17.

21. Beard, *supra* note 2.

22. Browne, *supra* note 1.

23. Morrison, *supra* note 1. Granting a state agency property rights over the use of its name may raise some troubling First Amendment issues. These issues, however, are outside the scope of this Note.

24. *Fox the Edge with Paula Zahn* (Fox television broadcast, Nov. 22, 1999), available at LEXIS, News Library, transcript #112206cb.260.

25. See Beard, *supra* note 2.

26. 15 U.S.C. §§ 1051–1127 (2000).

easily and formalistically applied, it is actually a vague and indeterminate source of law.²⁷ Trademark doctrine encompasses the conflict between encouraging competition and protecting entitlements; it “attempts to create by legal rules the perfect balance between protection and access.”²⁸ The Lanham Act codified trademark law’s common law doctrine as it existed in the 1940s. The effect, however, was not to clarify the policy behind trademark law, but to freeze the doctrine—competing tensions included.²⁹

In general, intellectual property law balances protection of one’s work with encouraging development and improvement of the product. The protection granted by intellectual property rights is justified because it achieves the ultimate goal of better products in a more competitive market. The LAPD boasts that the City and the Department stand to gain a great commercial benefit from the royalties that trademark protection will generate.³⁰ The funds would be used to purchase items that are difficult to acquire due to budgetary constraints.³¹ For example, they might purchase police equipment, fund training and community programs, or upgrade Department computers and technology.³² While this ultimate end is legitimate and positive, it is unclear whether granting the LAPD a trademark conforms to the normative justifications in intellectual property law, and particularly, in trademark law. Because the LAPD is a government agency, it is unclear whether the protection of its trademark would encourage either better services or more competitive markets.

Since trademarks were first used, the rights they protect have been expanding. Examples of this expansion can be seen in the shifting focus of the law—from morality and fairness, to consumer harm and ownership rights—as is evident in the amendments to the Lanham Act.³³ Granting the LAPD the right to trademark its name and insignia would be another example of the expansion of trademark rights.

27. “[I]t is doubtful that such a really general and unspecific statute foreclosed courts from making explicit appraisal of the consequences of trademark protection.” Daniel M. McClure, *Trademarks and Unfair Competition: A Critical History of Legal Thought*, 69 TRADEMARK REP. 305, 341 (1979).

28. *Id.* at 354.

29. *Id.* at 340.

30. Browne, *supra* note 1.

31. *Id.*

32. *Id.* “A trademark means money, especially Hollywood money, for a department that seems always to need it.” Morrison, *supra* note 1.

33. *Cf.* PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES 221 (4th ed. 1997).

This Note explores the normative theories that inform trademark law and the historical expansion of the protected rights. It then applies trademark law to the LAPD's situation as an illustration of this expansion. Part II discusses the Lanham Act, the main statutory authority for federal trademark law, as well as the common law origins and diverging policies that inform modern trademark law. Part III explains the LAPD's current legal arrangements with regard to its marks and symbols and analyzes how policies underlying trademark law affect the LAPD's right to trademark protection. Part IV concludes that granting the LAPD trademark protection would be a further expansion of the rights of trademark law, and that if protection is granted, the rights should not part of the political process.

II. THE NORMATIVE LANDSCAPE OF TRADEMARK LAW

A. THE LANHAM ACT

The Lanham Act, codified in 15 U.S.C. §§ 1051–1127, is the current statutory authority for federal trademark protection. The Lanham Act was signed into law on July 5, 1946, and the statute has been amended several times since then.³⁴ The Act provides basic registration information as well as guidelines regarding infringement. Assuming the PTO granted the LAPD protection in its marks, they would probably be classified as “service marks” because they would be used to indicate the Department's police services:

The term “service mark” means any word, name, symbol, or device, or any combination thereof—

(1) used by a person, or

(2) which a person has a bona fide intention to use in commerce . . . to identify and distinguish the services of one person, including a unique service, from the services of others and to indicate the source of the services, even if that source is unknown.³⁵

34. *See id.* Some “housekeeping” amendments were passed in 1962; more amendments containing, among other things, an award for attorneys' fees in exceptional cases, were passed in 1975. *Id.* The Trademark Law Revision Act of 1988 materially changed the Lanham Act by altering trademark law's traditional use requirement, strengthening the evidentiary effect of a registration certificate, reducing the term of registration, and widening the false designation of origin and false description section. *Id.*

35. 15 U.S.C. § 1127 (1994).

A “trademark” is very similar except that it identifies goods, rather than identifying services.³⁶ In general, service marks and trademarks are subject to the same rules.³⁷

To register a mark with the federal government, a person (or business) must apply to the PTO, which actively examines all applications.³⁸ Trademark rights are based on the owner’s use of the mark. Thus, these rights spring directly from the claimant’s use regardless of an official registration with the PTO.³⁹ Although one can now register with the intent to use, the registrant must still prove use to the PTO within six months of the notice of allowance (with subsequent extension possibilities that effectively add up to a period of three years from the time of application).⁴⁰ Should there be competing claims for a trademark, the use requirement helps determine priority. Use of the mark also enables consumers to associate the marks with particular products. Protecting this association is the goal of trademark law. In addition to use, the PTO will verify that “the mark is not deceptive,” “is not confusingly similar to another mark,” and “is not merely descriptive of the goods or deceptively misdescriptive of them.”⁴¹

Once a mark is registered, the Lanham Act gives a registrant a civil right of action against any person who uses in commerce, without the registrant’s consent, “any reproduction, counterfeit, copy, or colorable imitation of a registered mark . . . [which is] likely to cause confusion, or to cause mistake, or to deceive”⁴² In other words, a person infringes on another’s trademark when the person “without authorization, uses a confusingly similar mark on similar goods or services.”⁴³ The ultimate test is “whether the concurrent use of the two marks would be likely to cause consumers to be mistaken or confused about the source of origin or sponsorship of the goods or services.”⁴⁴ Generally, a successful action for infringement requires the parties to be in competition, but an amendment to

36. *Id.*

37. ROBERT P. MERGES, PETER S. MENELL, MARK A. LEMLEY & THOMAS M. JORDE, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 532 (1997). Section 1053 conforms service marks to the provisions and protections of trademarks. *See* 15 U.S.C. § 1053 (2000). For the purposes of this Note, the terms “mark,” “trademark,” and “service mark” are used interchangeably.

38. MERGES ET AL., *supra* note 37, at 595.

39. *Cf.* CRAIG JOYCE, WILLIAM PATRY, MARSHALL LEAFFER & PETER JASZI, *COPYRIGHT LAW* 8–9 (4th ed. 1998).

40. 15 U.S.C. § 1051(d)(1)–(d)(2). *See also* GOLDSTEIN, *supra* note 33, at 223.

41. JOYCE ET AL., *supra* note 39, at 9 (citing 15 U.S.C. § 1052(a), (d), (e)).

42. 15 U.S.C. § 1114.

43. JOYCE ET AL., *supra* note 39, at 9.

44. *Id.*

the Lanham Act also provides protection against the dilution of “famous” trademarks, regardless of competition.⁴⁵

As with any statute, the Lanham Act was not born in isolation. Congress attempted to codify the common law doctrines of unfair competition and trademark, but the statute was “‘inspired by divergent philosophical theories of trade-mark protection which were not effectively reconciled.’”⁴⁶ Even during the passage of the statute, the Senate Committee on Patents spoke of consumer protection, moral justification, and entitlement claims as reasons for the Act:

One [reason for the Act] is to protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get. Secondly, where the owner of a trade-mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats.⁴⁷

The statute is general and unspecific, and the courts continue to apply common law doctrine—even though it is not explicitly codified in the Lanham Act.⁴⁸ This demonstrates that the policy considerations within the common law doctrine are still informing courts’ decisions. In fact, trademark doctrine has not developed much beyond the form of the common law doctrine at the turn of the century.⁴⁹

B. COMMON LAW ORIGINS AND NORMATIVE JUSTIFICATIONS

1. The Utilitarian Balance in Intellectual Property

In general, intellectual property law developed under a tension between utilitarianism and natural rights. Utilitarianism, particularly an economic incentive framework, eventually tipped the scales. The natural rights theory, however, still has some influence on the law. Any normative approach to intellectual property must deal with the reality that intellectual property, unlike real property, is intangible. Because the possession and

45. *Id.* at 10. *See also* 15 U.S.C. § 1125 (c) (2000). Dilution means “the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of—(1) competition between the owner of the famous mark and other parties, or (2) likelihood of confusion, mistake, or deception.” 15 U.S.C. § 1127.

46. McClure, *supra* note 27, at 334 (quoting Sigmund Timberg, *Trade-Marks, Monopoly, and the Restraint of Competition*, 14 LAW & CONTEMP. PROB. 323, 347 (Spring 1949)).

47. S. REP. NO. 79-1333 (1946), *reprinted in* 1946 U.S.C.A.A.N. 1274, 1274.

48. *See* McClure, *supra* note 27, at 341.

49. *See id.* at 340.

use of intellectual property does not necessarily exclude others from possession and use in the same way that real property excludes (i.e., possession and use of ideas is “nonrivalrous”), the traditional economic justifications for real property do not apply to intellectual property.⁵⁰ There is no need to worry about the overuse of an idea, whereas overuse of land is a common real property concern.⁵¹

The fact that any one person can use informational goods without decreasing their availability to any other person “leads to a powerful moral intuition against intellectual property law.”⁵² With so much emphasis on intellectual property rights today, the rule of free access in the public domain is easily forgotten. Intellectual property protection, however, is the exception, not the rule.⁵³ In the United States, society values political freedom, and free competition is linked to this notion. Free competition represents dispersed power in the marketplace as well as freedom of opportunity and choice in one’s profession and trade.⁵⁴ This power and freedom is limited only by one’s talent and ambition.⁵⁵ Legitimate copying is a large part of what makes a free market economy work—“successful competitors [will] offer identical products at lower price[s with] greater quality.”⁵⁶ There is nothing “legally or morally reprehensible about exact copying of things in the public domain.”⁵⁷ In some sense, free copying can even be seen as analogous to free speech.⁵⁸

Of course, the problem with a system in which all information and ideas are immediately part of the public domain is that people may not invest in producing ideas and information. Absent property rights, a producer of information will not be able to recoup the investment spent in producing the information.⁵⁹ The information has little value to the producer unless it can be sold on the market, but to sell it would then reveal it to its competitors, who could freely copy and sell it at a lower price.⁶⁰ If

50. MERGES ET AL., *supra* note 37, at 2.

51. *Id.*

52. GOLDSTEIN, *supra* note 33, at 7.

53. See J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 1:2, at 1-6 (4th ed. 2001).

54. See *id.* § 1:5, at 1-12, 1-13.

55. See *id.*

56. *Id.* § 1:28, at 1-54.

57. *Id.*

58. See *id.* § 1:29.

59. See GOLDSTEIN, *supra* note 33, at 6.

60. See *id.*

the producer is unable to appropriate the value of the information, the producer simply would not invest in producing the information at all.⁶¹

Intellectual property as a solution to the problem of nonappropriability implies that “an information producer will use its property rights to charge consumers for access to its work.”⁶² The problem with allowing an information producer to charge others is that it withholds information from people who cannot or will not pay for it—even though allowing them access would harm no one else.⁶³ Indivisibility implies that “once information has been produced, its use may confer a benefit on the consumer without imposing any additional cost on the producer.”⁶⁴ Anyone can use information without diminishing its availability to anyone else. Because of this unique characteristic, it is economically undesirable to withhold the information.⁶⁵ Doing so decreases the welfare of the excluded consumers but does not increase the welfare of those with access to the information.⁶⁶ Trademark rights seek to strike a utilitarian balance “between the competing demands of appropriability and indivisibility.”⁶⁷ The law grants individuals and businesses private property rights, enabling them to appropriate the value of the information they produce, while also giving them an incentive to produce more.

In contrast, the justification for protection of literary and artistic works in civil law countries is based on a natural rights theory, which holds that authors and artists should receive protection for their work because it is their inherent right.⁶⁸ Early in this country’s history, however, the natural rights theory of intellectual property law was generally rejected. Thomas Jefferson wrote:

Stable ownership is the gift of social law, and is given late in the progress of society. It would be curious then, if an idea, the fungible fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property Society may give an exclusive right to the profits arising from (inventions) as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done

61. *See id.*

62. *Id.* at 7.

63. *Id.*

64. *Id.*

65. *Id.* at 7.

66. *See id.*

67. *Id.*

68. *Id.* at 7–8.

according to the will and convenience of the society, without claim or complaint from anybody.⁶⁹

Jefferson felt that an inventor ought to be able to benefit from his or her invention *for a limited time*,⁷⁰ but only as a means for society to encourage productivity. The Supreme Court appears to have accepted Jefferson's viewpoint—when exclusive ownership of inventions and business ideas is granted, it is done to further social ends rather than to recognize a God-given right.⁷¹ In *Graham v. John Deere Co.*, the court specifically referenced Jefferson's theory that limited exclusive rights should induce desirable ends.⁷² Thus, inclinations of natural rights are still present in intellectual property laws, but the overall utilitarian balance remains the focus.⁷³

2. The Origins of Trademark Protection

Systematic legal protection of trademarks began in the early nineteenth century with the common law of deceit.⁷⁴ Trademark law was originally a sort of “consumer protection” law.⁷⁵ Although trademark law now encompasses a broader range of property-like rights, it still focuses on the effect that infringement will have on consumers and protection of the consumer from confusion and deception.⁷⁶ The fundamental principles of trademark law generally have been the same as the principles of tort law,

69. MCCARTHY, *supra* note 53, § 1:4 at 1-11 (quoting VI *Writings of Thomas Jefferson* 180 (Wash. ed.)).

70. *See id.* § 1:28 at 1-55 (citing V *Writings of Thomas Jefferson* 75-76 (Wash. ed.)).

71. *Id.* § 1:4, at 1-12.

72. 383 U.S. 1 (1965). Specifically the court stated:

[Jefferson] rejected a natural-rights theory in intellectual property rights and clearly recognized the social and economic rationale of the patent system. The patent monopoly was not designed to secure to the inventor his natural right in his discoveries. Rather, it was a reward, an inducement, to bring forth new knowledge. The grant of an exclusive right to an invention was the creation of society—at odds with the inherent free nature of disclosed ideas—and was not to be freely given. Only inventions and discoveries which furthered human knowledge, and were new and useful, justified the special inducement of a limited private monopoly. *Id.* at 8-9.

73. *See infra* text accompanying notes 91-98.

74. GOLDSTEIN, *supra* note 33, at 219. The first instance of trademark use as a designation of ownership or origin dates back to the Middle Ages when merchants would use the marks to designate the proprietor of the goods. *Cf.* FRANK I. SCHECHTER, *THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADE-MARKS* 20-23 (1925). Trade guilds compelled the use of the marks in most cases, and the purpose of the compulsory production mark was to “facilitate the tracing of ‘false’ or defective wares and the punishment of the offending craftsman.” *Id.* at 38, 47. In the cloth and cutlery trades, the trademark evolved “from a mark of origin to a mark of quality and hence from a liability to an asset, of distinct value to the owner of the mark.” *Id.* at 78.

75. JOYCE ET AL., *supra* note 39, at 8.

76. *See McClure, supra* note 27, at 343.

specifically the tort of misappropriation (of the goodwill of the trademark owner) and the tort of deception (the consumer).⁷⁷

Trademark protection differs fundamentally from other types of intellectual property protection because the trademark is not something new, inventive, or creative, as literary works or inventions are.⁷⁸ Trademark law is not premised on the desire to encourage invention and creation, which are the justifications underlying copyright and patent law. There is “no explicit federal policy to encourage the creation of more trademarks,” nor are trademarks implied in the Constitution, as are copyrights and patents.⁷⁹

Instead, trademark protection was consistent with the general economic policy of the United States to encourage competition, discourage monopolies, and strive for economic efficiency. The constitutional authority for the Lanham Act came from Congress’s ability to regulate interstate commerce.

Originally, competitors, and not the consumers, had a greater incentive to police the misuse of their marks.⁸⁰ Property rights in a trademark began “as something like a legal fiction that g[ave] the trademark user a cause of action he would not otherwise have, in order to benefit consumers and the competitive process.”⁸¹ These first trademark cases took a restrictive view of trademark protection.⁸² An ownership right in trademarks, however, gradually developed as trademarks began to be classified as property.⁸³ The rigid requirements that were necessary to prove infringement in the early cases, including intent to deceive and exact copying, transformed into a more lenient “likelihood of confusion” standard.⁸⁴

Trademarks allow consumers to distinguish between goods that otherwise look the same in all observable features. As a consequence, the existence and protection of trademarks “facilitate and enhance consumer decisions” and “create incentives for firms to produce products of desirable

77. MERGES ET AL., *supra* note 37, at 525.

78. *Id.* at 524–25.

79. *Id.* at 525. See also U.S. CONST. art I, § 8, cl. 8.

80. MERGES ET AL., *supra* note 37, at 526.

81. *Id.* at 525.

82. *Id.* The first cases were limited to “the use of a name or mark identical to the trademark in the sale of identical goods, where the infringer’s use was intended to deceive consumers.” *Id.*

83. See *id.* at 526.

84. *Id.*

qualities even when these are not observable before purchase.”⁸⁵ The goal of intellectual property law is to ensure consumers a wide variety of products at the lowest possible price. By prohibiting competitors from using the same symbols and cashing in on the business’s good will and investment, trademark law encourages businesses to invest in symbolic information that signifies the source of their goods and services.⁸⁶ When firms strive to maximize profits, they tend to produce products that are not identical.⁸⁷ Trademarks allow “this tendency to manifest itself with respect to unobservable characteristics of the products.”⁸⁸ There are a plethora of products that are too expensive or too difficult to inspect fully, such as cars, computers, food, and pharmaceuticals.⁸⁹ As a result, consumers rely on trademarks when they cannot inspect a product’s quality quickly and cheaply.⁹⁰

As mentioned above, although the predominant normative justification for trademark protection is utilitarian, there are some threads of natural rights theories present in trademark law. In criticizing the expansion of property rights in trade names, Felix Cohen noted that “[a]ccording to the recognized authorities on the law of unfair competition, courts are not *creating* property, but are merely *recognizing* a pre-existent Something.”⁹¹ Cohen criticized the courts’ early findings suggesting that property rights existed in trademarks as if they were inherent rather than created by the courts. In other words, once a trademark was characterized as property, the owner was entitled to all the natural rights with which any other property owner was endowed.⁹²

A principle of earned entitlements also arises in trademark law. As a business builds its reputation and consumers associate the mark with that reputation, the mark begins to gain value beyond just the association of a product with its source. Trademark protection has been justified as protecting this symbolic representation of a business’s good will.⁹³ When trademark law was in its infancy, “the dominant rationale for relief in such

85. Nicholas S. Economides, *The Economics of Trademarks*, 78 TRADEMARK REP. 523, 526 (1988).

86. *Cf. id.* at 526–27.

87. *Id.* at 527.

88. *Id.*

89. MERGES ET AL., *supra* note 37, at 523.

90. *Id.*

91. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815 (1935).

92. McClure, *supra* note 27, at 318.

93. *See id.* at 308.

cases was ‘the promotion of honesty and fair dealing, because no one has a right to use his own goods as the goods of another.’”⁹⁴ This deontological argument maintained dominance until the late 1800s.⁹⁵ These firm notions of morality subsided as the focus of trademark law shifted from the fraudulent activity of the defendant to the infringement of property rights and its effect on the consumer.⁹⁶ Notions of morality and natural rights, however, have not entirely disappeared as justifications for trademark protection. As recently as 1993, Judge Alex Kozinski of the Ninth Circuit suggested that the courts consider moral claims as one of four factors in assessing the proper degree of protection afforded trademarks.⁹⁷ The natural rights idea, although not dominant, can still play a role in a utilitarian balance.⁹⁸

A utilitarian balance, in the trademark context, is concerned with wealth maximization and seeks the perfect balance between the social benefit of providing economic incentives for development with the social cost of granting a limited monopoly. Trademark defenders stopped arguing “in terms of unfairness, equity, and entitlements” and “sought to show that protection was not anticompetitive.”⁹⁹ Perfect competition became the ultimate goal. The incentive of protection cultivates a more competitive market in the long term and creates economic efficiency. The benefits to society include lower prices and greater product variety through competition.

One of the most important issues “in assessing the need for intellectual property protection is whether innovators have sufficient means to appropriate an adequate return on investment in research and development.”¹⁰⁰ Without trademarks, “firms would produce products with the cheapest possible unobservable qualities.”¹⁰¹ In addition, sellers have superior information regarding the unobservable features of an item as compared to buyers, but the unobservable features of a product are often

94. *Id.* at 314 (citing *Palmer v. Harris*, 60 Pa. St. 156–59 (1869)).

95. *See id.* at 315.

96. *See id.* at 315–16.

97. *See* Alex Kozinski, Essay, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960 (1993). Kozinski argues that the legal status of trademarks has changed from merely identifying sources to being a part of the product itself. *Id.* at 962. The four factors he believes courts should consider in determining the proper scope of trademark protection are the following: moral claims, utilitarian claims, negative goodwill from unlicensed uses, and society’s interest in free and open communication. *Id.* at 966–77.

98. *See* GOLDSTEIN, *supra* note 33, at 7.

99. McClure, *supra* note 27, at 332.

100. MERGES ET AL., *supra* note 37, at 17.

101. Economides, *supra* note 85, at 526.

the crucial determinants of the good's total value.¹⁰² Without trademarks, a consumer's chance of picking a quality product is fairly random.¹⁰³ In other words, if consumers cannot differentiate between products, they will not be able to choose a product based on quality. Therefore, without trademarks, a firm has no incentive to invest in the quality of the unobservable features because it cannot realize a higher price on its goods and recoup the investment.¹⁰⁴

The trademark conveys information to the consumer in an efficient summary form; the consumer identifies a combination of features with the symbol.¹⁰⁵ In the case where the consumer is experienced and frequently buys a particular product, trademarks work because the mark has a reputation with the consumer.¹⁰⁶ Even in cases where a consumer buys the product infrequently, trademarks work indirectly.¹⁰⁷ The consumer may not have had direct experience with the particular product (such as a washing machine or a television), but the consumer will likely have had experience with the overall category of products (such as appliances or electronics). The consumer will associate the trademark of firms with high quality products in a particular product category and use that knowledge to facilitate his or her decision.¹⁰⁸ Trademarks "lower search costs" for the consumer and "foster quality control."¹⁰⁹

There are three essential requirements for the mechanism of trademarks to function correctly.¹¹⁰ First, the consumer must remember the mark; this requirement can be assumed.¹¹¹ Second, the consumer must be able to identify all the features of the product with the trademark. This condition is likely satisfied because the law protects the identification of

102. *See id.*

103. *See id.*

104. *See id.*

105. *Id.* at 526–27.

106. *Id.* at 528.

107. *Id.* at 531.

108. *Id.*

109. William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 275 (1987). The main economic function of trademarks—reducing consumer search costs—can be expressed by the equation $\pi = P + H(T; Y, W)$. *Id.* Landes and Posner "define the full price (π) of a good X as its money price (P) plus the search costs (H) incurred by the buyer in obtaining information about the relevant attributes of X." *Id.* T is the information the firm produces through its trademark; Y represents other factors, such as amount of advertising, the technology available to the firm, and the number of competitors; and W is "an index of the availability of words, symbols, and so on that the firm can use as its trademark." *Id.* at 275–76. T and H share an inverse relationship. *Id.*

110. *See Economides, supra* note 85, at 528.

111. *Id.*

trademarks by forbidding the confusing use of similar symbols.¹¹² The third condition is “that the features of the product do not change between the first and subsequent consumption decisions.”¹¹³ In a stable market, the firm’s prosperity is guaranteed by “its adherence to a high quality level for goods bearing its trademark or trade name.”¹¹⁴

Because trademark law facilitates economic efficiency through consumer choice, it focuses on the consumers and their state of mind. Infringement occurs when “there is any likelihood that an appreciable number of ordinarily prudent purchasers are likely to be misled, or indeed simply confused, as to the source of the goods in question.”¹¹⁵ If the consumer will not be confused, allowing similar marks will not diminish either mark’s economic efficiency—or in other words, raise the consumer’s search costs. Courts look at a variety of factors when deciding whether there will be a likelihood of confusion, including, but not limited to, similarity of the original and allegedly infringing mark, the strength of the original mark, the similarity of the products involved, whether the consumers of the products overlap, sophistication of the buyers, and evidence of actual confusion. The wording and number of factors varies by circuit.¹¹⁶ Generally, a likelihood of confusion exists if the infringer is preventing the trademark from performing efficiently. The consumer can no longer depend on the information and must expend energy to divine the actual quality of the product or service.

3. Expanding Rights

Since its early inception, the trend in trademark law has been an expansion of rights.¹¹⁷ Originally, the law treated trademarks as marks of origin. Protection was aimed at the consumer, who could be duped by unscrupulous dealers plying cheap trade under another’s marks. The law scrutinized the morality and fairness of the offending party’s actions. The standards for infringement then started to shift towards enhancing the competitive advantages of trademarks. Recently, the law has expanded to recognize a property right in trademarks. The ability to register with an

112. *See id.*

113. *Id.*

114. *Id.* at 529.

115. *Mushroom Makers, Inc. v. R.G. Barry Corp.*, 580 F.2d 44, 47 (2d Cir. 1978).

116. DONALD S. CHISUM & MICHAEL A. JACOBS, UNDERSTANDING INTELLECTUAL PROPERTY LAW, § 5F[1][a], at 5-285–5-290 (1992).

117. *See generally* McClure, *supra* note 27 (discussing the development of trademark law).

“intent to use” and the greater protection of marks from dilution are two recent manifestations of the expansion.¹¹⁸

When trademarks became protected as intellectual property, there was no reason to encourage the proliferation of these marks, since their function sprung directly from the secondary association of the mark in the consumer’s mind. At first, the Lanham Act protected only marks already in use. If consumers were not able to identify it, there was no reason to protect it. Doing so would not be economically efficient and actually could cause inefficiency by denying the mark to a business that would make better use of it.

Today, proving that the mark is in use in the marketplace is still a requirement to receive federal protection. One can now register with the mere intent to use the mark, however, by proving actual use to the PTO within six months of the notice of allowance (with subsequent extension possibilities that effectively add up to a period of three years from the time of application).¹¹⁹ The ‘intent to use’ standard recognizes the value of trademarks to businesses rather than to consumers.

In addition to developing products, businesses also develop the marks and the marketing plans that will help create the secondary meanings. It is in their interest to protect these marks until they can receive a payoff for this development investment. In today’s market, having another company use the mark before the developing company can get its product to market could cause problems. A company will lose time and money while a new mark and advertising campaign are developed. While rights do not officially vest until the mark is used, allowing a company to register with the intent to use protects its priority and recognizes a property value in the potential mark.

Even in cases where there is no real likelihood of confusion, courts have not allowed similar marks because of possible dilution,¹²⁰ which occurs when there is a break in the mental association between the mark and the product. Dilution does not require that the marks be used on products in direct competition with each other. In fact, the competitor may even make it apparent that the products are not from the same source. Dilution occurs when the association of the two marks becomes blurred or one mark tarnishes the other.

118. See *supra* note 40 and accompanying text. Also, for a more comprehensive discussion of dilution, see *infra* notes 120–22 and accompanying text.

119. 15 U.S.C. §§ 1051(d)(1)–(d)(2). See also Goldstein, *supra* note 33, at 223.

120. Economides, *supra* note 85, at 529

For example, Landes and Posner pose a situation where “a lounge in Boston calls itself ‘Tiffany’s’ or a peanut vendor in the Bowery calls himself ‘Rolls Royce, Ltd.’”¹²¹ Though there is little likelihood that consumers would think they were actually patronizing Tiffany’s or Rolls Royce, a possibility exists that the consumer will begin to associate both a lounge with an expensive jewelry store or a peanut vendor with a car. The situation of cheap knockoffs also arises when a discount perfume advertises a claim that it smells just like Giorgio or Chanel. Giorgio or Chanel’s communicative value is also diminished because the consumer begins to associate the real perfume with the cheap copy.¹²²

Landes and Posner give three economic reasons—beyond source identification—for extending a property right in trademark to dilution.¹²³ First, the connotation of the name will begin blurring in consumers’ minds, thereby diminishing the communicative value of the mark.¹²⁴ Second, there are external benefits to expanding trademarks. The copier of a trademark appropriates some of the benefits from the original producer’s investment without having to pay for them.¹²⁵ Because the copier has denigrated the mark, it is then more difficult for the investor to reap any reward from a licensing fee.

Finally, confusion in the “resale” market, where consumers compete for advantageous personal transactions, also supports the expansion of property rights in trademarks.¹²⁶ This is particularly true where copiers produce similar goods but do not claim to sell under the legitimate trademark. For example, an advertisement could claim, “This perfume smells just like Chanel No. 5,” or, “This coffee tastes just like Starbucks.” This association is in the “resale” market, where one consumer believes that another consumer is the type of person who would wear Chanel or drink Starbucks coffee—when in fact that consumer is wearing or drinking a copy. The twist is that the confusion does not occur in the trademarked goods market where the consumer buys the copy purposefully; it occurs when other consumers’ conception of the prestige of the product is broken because they assume another consumer uses that product. In fact, preventing this kind of copying would impair competition and accessibility

121. Landes & Posner, *supra* note 109, at 306.

122. *Id.* at 306–07.

123. *Id.* at 307.

124. *Id.*

125. *Id.*

126. *Id.* at 308.

in that product market.¹²⁷ Regardless, products, especially those that depend on reputations of prestige and exclusion, may have their marks diluted. Their value decreases because they are no longer perceived as prestigious or exclusive, regardless of the quality of the product.

Beyond the extension of trademark protection to dilution cases, Judge Kozinski has suggested that at least in some cases, trademarks have taken on an entirely different function from that originally intended.¹²⁸ Products, like sports or movie paraphernalia, take on a functional characteristic of their own. Judge Kozinski notes that trademarks can:

acquire certain functional characteristics that are different from—and sometimes inconsistent with—their traditional role as identifiers of source. Where trademarks once served only to tell the consumer who made the product, they now often enhance it or become a functional part of it. This trend raises questions about whether—and to what extent—the law should protect trademarks when they are pressed into service as separate products.”¹²⁹

For example, consumers may desire a cheap quality shirt because it displays a movie logo. Rather than believing in the quality of the shirt, or caring whether it came from a particular movie studio, the consumer desires the mark itself. This theory goes further in recognizing a property right in trademark by suggesting that the mark itself contains value that is completely independent of the products that display it or the source of those products.

III. TO GRANT PROTECTION: THAT IS THE QUESTION

A. THE SITUATION TODAY

The LAPD has existed for many years without federal trademark protection. Lack of federal protection, however, does not mean that the LAPD has been unable to use its marks, to protect them, or even to profit from them. For example, the Los Angeles Police Revolver and Athletic Club, a private organization affiliated with the Department, sells high-quality LAPD apparel at the Police Academy.¹³⁰ If the Department is granted trademark rights, the Club will probably become a licensee

127. *Id.* at 308.

128. *See* Kozinski, *supra* note 97, at 962.

129. *Id.* at 962–63 (citations omitted).

130. Lait, *supra* note 4.

authorized to manufacture and distribute LAPD merchandise.¹³¹ Hollywood, however has been the more profitable partner to the Department.

Although it may not have received millions of dollars from the use of its name, badge, and logo, the LAPD has benefited from a public relations campaign—basically free of charge.¹³² Beginning with the show *Dragnet* in 1957, producers and police have engaged in an informal exchange.¹³³ The producers of *Dragnet* were given permission to feature the official LAPD badge; subsequently, they donated several buildings to the City that were later used as part of the Police Academy.¹³⁴ More recently, the producers of the reality-based television show *LAPD: Life on the Beat* donated a robot for the bomb squad and provided support for many Department functions.¹³⁵

No legal requirement exists for the entertainment industry to seek permission or to participate in these exchanges—other than to avoid liability based on potential lawsuits.¹³⁶ Through these exchanges, the LAPD and Hollywood have already set up an informal, license-like arrangement. To minimize the risk of suits or harassment, the entertainment industry pays the Department in good publicity, by buying needed facilities and equipment, or by paying for functions. The LAPD, in turn, insists on the technical accuracy of the productions and allows Hollywood to use its marks.

B. FEDERAL PROTECTION

Although the LAPD is not directly barred from registering its name,¹³⁷ no state agency has ever attempted to do so. The PTO may feel that the name is merely descriptive of the services, as it is basically a description of the Department—similar to “clothes washer” or “lawn mowers.” More

131. *Id.*

132. Morrison, *supra* note 1.

133. *See* Beard, *supra* note 2.

134. *Id.*

135. *Id.*

136. *See* Gerdes, *supra* note 17, at 32. The production studios’ use of “clearance” is a preventative process that reveals whether permission is needed or advised in order to minimize or eliminate potential lawsuits for defamation, invasion of privacy, copyright infringement, trade disparagement, and other civil actions. *Id.* There has been confusion in the entertainment industry about when clearance is necessary when dealing with set dressings, wardrobe, and other props. *See, e.g.,* Jordan Stringfellow & Helene Godin, *Legal Affairs: Setting the Stage: Guidelines for Television Prop Clearances*, ENT. L. REP., March 1994, at 3.

137. *See* 15 U.S.C. § 1127 (1994).

importantly, however, granting the LAPD protection would amount to a further expansion of trademark rights. The question is whether a normative justification supports such an expansion.

Under a natural rights theory, the creator of intellectual property deserves protection of his or her creation because it is an inherent right. While natural rights have never been a strong justification for trademark protection, it is possible that under trademark protection and with fierce enforcement, the LAPD's trademarks could come to represent and identify Los Angeles. Because the United States has repeatedly rejected giving inventors and creators an inherent right in their creations, however, it is unlikely to recognize such a right in a municipality. Though there may be a viable argument for an organization having agency over its identity, it would be only one factor in a utilitarian analysis. Moreover, because the utilitarian theory is the dominant theory of intellectual property law and because other theories are usually only part of the balance rather than the sole basis for protection, the question of granting the LAPD a trademark should be viewed through a utilitarian lens—balancing benefits and harms.

The trade-off for granting a person or business a monopoly in its mark is that doing so will encourage investment in developments and improvements in the product or service. In the long run, this consequence should result in better products and a more competitive market. This utilitarian balance views wealth maximization through an aggregate wealth standard—everyone is better off if prices are lower because of increased competition. Granting the LAPD a monopoly, however, would not provide any economic efficiency or long-term improvement in service. All of the models used to illustrate the incentives and the economic efficiency of trademarks are based on the typical business. As any business offers a product or service, the LAPD offers a service as well—protection and law enforcement. Where the LAPD differs significantly from the normal business model, however, is in competition. The LAPD has none. Though other police departments exist, they are not in competition with one another. Their consumers are determined by jurisdiction, not by choice.

Trademarks work because they lower the search costs for consumers. Consumers can depend on the information given about the unobservable features of the product based on the trademark. It assures them of the source of the product and its quality. However, there is no way for consumers to express pleasure or displeasure with police services through the market. Usually, consumers will expect a certain quality of service, and when the service does not meet their expectations, consumers will stop purchasing the products associated with that particular trademark.

Consumers cannot refuse, however, to pay for the service of the police department. The primary recipient of the LAPD services will not have a choice about whose service to employ. Jurisdictions and emergency responses dictate which police department serves a particular citizen.

Perhaps funneling tax money away from the police department or a lack of donations might indicate “consumer choice.” Citizens will probably want the police department to receive money whether good or bad, however, because they associate more money with more protection, regardless of quality. Because these decisions are inextricably tied to the political process, divining their exact meaning is difficult. Trademark law focuses on consumer choice and consumer confusion. Without a competitor in the market, granting the LAPD trademark protection cannot promote economic efficiency because it cannot lower search costs to consumers.

Even in a situation where someone other than the police department uses the mark to pass off his or her services, the standard for infringement—likelihood of confusion to the consumer—probably will not be met. If a citizen were to use the mark, there are much more serious penalties than trademark infringement that the citizen would face, such as the criminal charge of impersonating an officer. If a police department in another part of the state or country decided to copy the LAPD’s motto (“To protect and to serve”) or its badge design, there is little doubt that someone outside of Los Angeles County would believe that the use represented the LAPD. On the other hand, if a production company uses the LAPD’s marks in movies or television shows without permission, there is probably little chance that a movie or television show viewer would confuse the actor and an LAPD officer.

Granting the LAPD trademark protection does not conform to the typical rationale of trademark protection: the creation of economic incentives. The Department’s use of such rights is more akin to a tax on the use of its name and symbols. This indirect tax revenue would come from licensing fees and royalties on goods and merchandise. Though merchandisers would have to give up some of their profits, the entertainment industry would be impacted the most. Fortunately, this tax would appear to have a direct economic impact on those in the City that can afford it most.

While protecting the LAPD’s trademarks under the conventional competition-enhancing justifications may not seem appropriate, perhaps granting the LAPD, or any government agency, a trademark is a part of the

expanded property rights in trademark. The LAPD seems to be more concerned with dilution rather than with actual infringement of its mark. As discussed above, dilution already represents an expanded right from the original protection afforded by trademark law.¹³⁸ Though it is possible for the LAPD's marks to be used in a way that would dilute its reputation, the LAPD's concern with dilution is different from other cases. Usually, dilution occurs when an already protected mark later becomes associated with a product of lower quality. The association in consumers' minds of the two products lowers the value of the original product and mark. For example, the peanut vendor would benefit from a free ride from Rolls Royce, and Rolls Royce's communicative value might be diminished by the association of cars and peanuts. Dilution of the LAPD's mark, however, will not occur if consumers actually begin to associate LAPD services with a cheap shirt.¹³⁹

Unlike Rolls Royce, the LAPD cannot claim that most consumers associate its marks with quality or prestige. Additionally, the dilution comes from the message communicated on the shirt. In most cases, the consumer will not believe the good was authorized by the LAPD. It is precisely because it is unauthorized that the consumer wants to buy it. This is somewhat analogous to a consumer of fake Rolexes on the street. They do not, normally, believe they are buying a genuine Rolex. Where dilution for Rolex occurs in the resale market because of the cheap quality of the infringer's watch, the dilution of the LAPD's mark, however, is a result of its own actions. As with an editorial in the newspaper, the shirt will often serve as a way for society to express dissatisfaction with police services.

Consequently, granting the LAPD a trademark may create the exact opposite incentives of those intended by a utilitarian policy. For example, granting the LAPD intellectual property rights would create an adverse incentive if they used such rights to suppress society's expressions of displeasure with the quality of its service. Instead of increasing the quality of its service, the LAPD could simply enforce its trademark rights more vigorously. Thus, the ultimate goal of better products and lower prices via competition would not be reached by granting the LAPD trademark protection since the monopoly could actually encourage a deterioration in the quality of service.

138. See *supra* notes 121–30 and accompanying text.

139. Some may argue that the LAPD's marks would fit into Judge Kozinski's expanded trademark rights because the marks themselves have value that is disassociated from product and source. If the marks have independent value, perhaps the Department should also profit from that value.

This concern about poor quality of service extends to entertainment licensing as well. Under a scheme where the LAPD hires a manager to oversee its intellectual property rights, the rational manager would be interested in maximizing profits. Entertainment industry investment might produce competing motives. For example, studios could choose to highlight or use other police departments. Because more scandalous behavior is economically advantageous to the entertainment industry, the rational manager would not want to encourage portrayal of proper police procedure and a pristine reputation. The more controversy and scandal, the more profits—not only for the Department, but also for the manager. The city would not want to encourage these kinds of profitable police actions, however. Ironically, the more profits the Department would make, the more they would be able to invest in community programs and better equipment. The disconcerting trade-off would become more funds allocated to community programs in exchange for intentionally disreputable police work—perhaps creating an inevitable cycle.

While funding community programs is a positive goal, the means for achieving the goals will only serve to hurt the City in the long run. The problem with business management of such a mark is the loss of accountability to the community and a separation from the political process. As mentioned above, the good will generated by the police force is tied to the citizens and political leaders who oversee the police force. Pure economic incentives do not necessarily create a positive result for the community, whereas political accountability could temper the possible negative consequences of such a scheme.

In addition to the many possible downfalls to granting protection of the LAPD's mark, the downside of not granting protection is minimal. The Department has already established a good working relationship with the entertainment industry in which it receives free publicity as well as occasional funding. The LAPD also allows other police departments to copy its marks. Finally, cheap merchandise presumably would continue to be made regardless of an official trademark registration.

IV. CONCLUSION

Granting the LAPD trademark protection could have many detrimental results including discouraging investment into and development of police service. When a state agency is allowed to hold a monopoly, public policy requires examining the advantages and disadvantages. Denying the LAPD a trademark is not detrimental either to

the Department or to the community, while granting the LAPD trademark protection could have some negative effects.

Generating more money for community programs is a legitimate goal, but it can be achieved by methods other than trademark law. A direct tax would alleviate such problems. We live in a political economy, however, where taxes are being trimmed rather than expanded. If the community wants to endow the LAPD with more money through trademark protection, despite the possible negative consequences, it must temper the possible adverse incentives by coupling the revenue with the political process. The political process is obviously not without flaws, but it is the best way to make the manager of the Department's intellectual property rights accountable—so that there is no temptation to provide adverse incentives.

Under a typical utilitarian balance, the Department has no incentives to invest in the development and improvement of its services. This development and improvement, as a means of creating better products and a more competitive market, is the ultimate goal of trademark law. As a society, we are willing to grant limited monopolies for long-term results. The results of trademark protection in this case could produce negative long-term effects and provide adverse incentives. This kind of protection continues to expand the scope of intellectual property rights, and specifically trademark protection. Free copying and improvements on others' products are at the heart of a free market economy and the animus behind trademark law. Granting protection to the LAPD, however, would push the envelope of trademark rights beyond consumer protection and even push dilution into a new functionality.

