TRADEMARK DILUTION AND EMOTION

Laura R. Bradford,
George Mason University School of Law

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Laura R. Bradford

Assistant Professor
George Mason University School of Law
3301 Fairfax Drive
Arlington, VA 22201
(703) 993-9547
lbradfor@gmu.edu

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Laura R. Bradford*

Abstract

The law generally ignores the role of emotions in consumer decision-making, although emotions are widely acknowledged to play a dominant role in shaping preferences concerning risk, borrowing, consumption and choice. Trademark law has been especially suspicious of the role that emotion plays in increasing demand for branded goods. This article argues that trademark law, and trademark dilution doctrine in particular, can benefit from an updated understanding of the influence of emotion on consumer decision-making. Modern consumer emotion research provides a sturdier justification for dilution protection than economic or cognitive science doctrines standing alone. This is because trademark fame, or familiarity, signals information about risk and quality to consumers through quick and efficient innate emotional response mechanisms. However, while reliance on fame lowers effort or “search costs” for buyers, it doesn’t do much to promote trademark law’s other stated aim: the efficient exchange of information about consumer preferences concerning specific product features, functions or quality. Instead, overly strict protection of mark familiarity through the law of trademark dilution can burden competitors who signal product quality and reliability using communication strategies besides fame. Therefore, this Article argues in favor of a very narrow dilution regime that will conserve the signaling value of mark fame for consumers but avoid unduly burdening competitor efforts to communicate product value through other means.
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Introduction

“The protection of trade-marks is the law’s recognition of the psychological function of symbols.”1

The law generally ignores the role of emotions in consumer decision-making, although emotions are widely acknowledged to play a dominant role in shaping preferences concerning risk,2 borrowing,3 consumption4 and choice.5 Trademark law has been especially suspicious of the role that emotion plays in increasing demand for branded goods.6 Some have argued that emotional advertising causes consumers

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6 See, e.g., Smith v. Chanel, Inc., 402 F.2d 562, 567 (9th Cir. 1968). The court stated: The primary value of the modern trademark lies in the “conditioned reflex developed in the buyer . . . .” To the extent that advertising of this type succeeds, it is suggested, the trademark is endowed with sales appeal independent of the quality or price of the product to which it is attached; economically irrational elements are introduced into consumer choices . . . .
irrationally to pay a premium for trademarked products that are not functionally superior to generic substitutes. Accordingly, how one feels about consumer susceptibility to the emotional influence of popular brands tends to influence one’s views on the proper scope of trademark protection.

This article argues trademark law can benefit from an updated understanding of the influence of emotion on consumer decision-making. Psychological research in this area is relatively new. Yet it already reveals a number of insights that can be useful for trademark theory. Specifically, research on emotion and choice can shed light on one of trademark law’s most elusive and controversial doctrines: trademark dilution. Modern consumer emotion research provides a sturdier justification for dilution protection than economic or cognitive science doctrines standing alone. This is because trademark fame, or familiarity, signals information about risk and quality to consumers through quick and efficient innate emotional response mechanisms. However, while reliance on fame lowers effort or “search costs” for buyers, it doesn’t do much to promote trademark law’s other stated aim: the efficient exchange of information about consumer preferences.

Id. See also Triangle Publ’ns, Inc. v. Rohrlich, 167 F.2d 969, 980 n.13 (2d Cir. 1948) (Frank, J. dissenting) (“[Broad trademark protection] enables one to acquire a vested interest in a demand ‘spuriously’ simulated through ‘the art of advertising’ . . . .”).

7 See, e.g., EDWARD CHAMBERLAIN, THE THEORY OF MONOPOLISTIC COMPETITION (5th ed. 1946); Ralph S. Brown, Jr., Advertising and the Public Interest: Legal Protection of Trade Symbols, 57 YALE L.J. 1165 (1948).


concerning specific product features, functions or quality. Instead, overly strict protection of mark familiarity through the law of trademark dilution can burden competitors who signal product quality and reliability using communication strategies besides fame. Therefore, this Article argues in favor of a very narrow dilution regime that will conserve the signaling value of mark fame for consumers but avoid unduly burdening competitor efforts to communicate product value through other means.

As set out in Part II, trademark dilution is a relatively recent innovation. Trademark law traditionally aims to improve the quality of market information through prohibitions on deceptive uses of trade symbols. Symbols that confuse consumers reduce the efficiency of the market by causing consumers to purchase the wrong good. More broadly, protection for the informational integrity of trade symbols allows consumers to spend less time and effort searching for desired goods, and so lowers “search costs.”

Trademark dilution law extends these prohibitions to interferences with the uniqueness of a trademark. For example, consumers may or may not think that “Chevrolet shoes” were made by the car company, but their presence in the marketplace would diminish or “dilute” the singularity of the original Chevrolet mark. The harm protected against, as classically described, is “the gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name by its use on non-competing goods.”

Trademark owners think that dilution is harmful but have had trouble explaining their reasons. Proponents of dilution regulation have linked the dilution cause of action to the goal of lowering search costs. They argue that promiscuous use of well-known

10 The first federal dilution law was passed in 1995. Federal Trademark Dilution Act of 1995, Pub. Law. 104-98, codified at 15 U.S.C. § 1125(c). Before this trademark dilution protection was available on a patchwork basis from state law. The first state anti-dilution law was passed in 1947 in Massachusetts. 11 Stacey L. Dogan, What is Dilution, Anyway?, 105 Mich. L. Rev. First Impressions 103, 106 (2006) (“Trademark law has never aimed to provide exclusive rights in marks, but has focused on preserving informational clarity in the marketplace.”); see also William P. Kratzke, Normative Economic Analysis of Trademark Law, 21 Mem. St. U. L. Rev. 199, 216-217 (1991) (arguing that law should grant exclusive rights in trademark interests to facilitate the transmission of informational and identifying messages); Lunney, supra note 8, at 431-32.


symbols will cause the mark’s meaning and significance to decline, and therefore also the mark’s utility as a means for quickly locating goods. In this formulation, free-riding on the familiarity of well-known marks increases “internal search costs,” or the amount of mental time and effort consumers must expend to connect the mark to its original owner and larger goodwill.16

Critics are skeptical that a few extra seconds of cogitation, assuming they are required, justifies a race to the federal courthouse if consumers are not actually confused about who makes a particular good.17 Famous marks have always existed side-by-side with lesser-known siblings. Ford motor cars and the Ford modeling agency are both market leaders and neither seems to suffer from the presence of the other, though the consumer presumably must work at the margin to distinguish them.18 Protecting the appeal of advertising symbols from dilution also seems squarely to conflict with free speech interests in promoting discussion about and comparison with well-known brands. Courts have not surprisingly found the harm threatened by dilution “dauntingly elusive” to comprehend; accordingly, they have been reluctant to enforce the law as written.20 Nonetheless, trademark owners have successfully lobbied Congress to shore

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15 See Swann, supra note 14, at 598-611 (arguing that dilution lowers a mark’s ‘communicative clarity’ and ability to cut through clutter for consumers); Frank I. Schecter, The Rational Basis of Trademark Protection, 40 HARV. L. REV. 813, 830 (1927); see also Amstar Corp. v. Domino’s Pizza, Inc., 615 F.2d 252, 259-60 (5th Cir. 1980).


17 See, e.g., Bone, Hunting Goodwill, supra note 8 at 559 (arguing that uses that cause a consumer to reflect a bit longer but do not confuse consumers do not interfere with a trademark’s core purpose of protecting the informational clarity of marks); Christine Haight Farley, Why We Are Confused About the Trademark Dilution Law, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1157, 1184 (2006) (arguing that the harm of dilution is illusory and the law is based on an unjust enrichment rationale); David S. Welkowitz, Reexaming Trademark Dilution, 44 VAND. L. REV. 531, 542-44 (1991) (claiming that trademark owners have failed to demonstrate any actual harm flowing from dilution).


20 Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev., 170 F.3d 449, 451 (4th Cir. 1999) (labeling the dilution cause of action as ‘dauntingly elusive’); Clarisa Long, Dilution, 106
up and reinforce the trademark dilution action in the Trademark Dilution Revision Act of 2006.21

Part III of the Article argues that trademark dilution law is so difficult to understand because it aims at emotion and only indirectly at information.22 The emotion referred to here is of the most basic kind: “affect” or the automatic negative or positive response that a mark generates when viewed by a consumer.23 Research on brands and emotion teaches that familiar trademarks offer value to consumers by lowering the amount of effort required in purchasing decisions.24 Consumers experience positive feelings from the ease of evaluating familiar marks and accordingly infer positive qualities for the brand and the underlying product. Positive and negative emotions in this way serve as second-order sources of information about the quality and risk of the underlying good. Those who use famous marks in ways inconsistent from the owner risk making the marks more costly to evaluate, and thus may cause consumers to automatically feel more negatively toward the original brand and affiliated products.25 Dilutive conduct can thus undercut the reliability of trademarks as sources of information for buyers.26 This, in a nutshell, is the harm caused by “blurring” famous marks.

COLUM. L. REV. 1029, 1031 (2006) (finding that the judicial enforcement of dilution law has diminished over time).

21 See e.g., Beebe, A Defense supra note 18 at 1155 (noting that the Trademark Dilution Revision Act was the result of extensive work by the International Trademark Association, a trade association of mark holders and their attorneys and the American Intellectual Property Law Association, a bar association of corporate intellectual property attorneys).

22 The role of emotion in trademark law has been the subject of some controversy, and it is important to clarify what I mean when I refer to consumer emotions. See infra text accompanying notes 113-115, 155-177 (describing traditional and modern account of emotion’s impact on decision-making). Traditionally, commentators have referred to “emotions” as the feelings that arise in reaction to the content of advertising. However, this paradigm, like most trademark theory, focuses on seller communications and intentions and assumes that buyers understand such communications at face value. See, e.g., Brown, supra note 7, at 1182; Swann, supra note 14, at 591-94. I am interested in emotion in a different sense, namely, as a mediator of information exchange between sellers and buyers. Contrary to the assumptions of most trademark theory, buyers do not passively process advertising on its face, but use a variety of strategies, including automatic emotional response, to extract information from advertising without having to allocate too much attention to it. See infra text accompanying notes 179-202. The problem with dilution then is not, as some overzealous commentators have argued, that it changes the meaning of the famous mark, e.g. Swann, supra note 14, at 598, 601 (arguing that dilution protects a mark’s singular identity and meaning), but that it changes how reliable that mark is to buyers as a source of information about quality. The distinction is important because any legal regime that sought to ensure that consumers only experienced positive reactions to famous brands would face significant conflicts with the First Amendment and free competition, and I do not wish to advocate in favor of any such regime.

23 See, e.g., Slovic, supra note 2 at 971-72 for a similar definition of “affect.”

24 See infra text accompanying notes 179-202.

25 See infra text accompanying notes 214-237; see also.

26 See POSNER & LANDES, supra note 12, at 172 (free-riders who appropriate the strong brands of others destroy the informational capital built up in the brand); McCarthy, supra note 14, at 727-28 (dilution by blurring muddies the clarity of the famous mark’s identification power); cf. III. High Sch. Ass’n v. GTE Vantage Inc., 99 F.3d 244 (7th Cir. 1996) (stating that trademark dilution laws: protect the trademark owner from the erosion of the distinctiveness and prestige of a trademark caused by . . . a proliferation of borrowings that, while not degrading the original seller's mark, are so numerous as to deprive the mark of its distinctiveness and hence impact . . ., even though there is no confusion of source.)
Understanding the dilution cause of action through the lens of emotion clarifies an elusive doctrine, but reveals reasons to be wary of over-enforcement. The emotion literature suggests, in contradiction to the claims of dilution regulation proponents, that much of the “selling power” of famous marks is due primarily to their familiarity and not any specific benefit, tangible or intangible, of the underlying product. Brand familiarity as a signal of quality is convenient for consumers, but it also is anti-competitive. Privileging the signaling value of familiarity disadvantages market newcomers, and therefore reduces the choices available to buyers. In addition, encouraging consumer reliance on brand familiarity can discourage product innovation. Legal protection for familiarity also may reduce the kinds of information about existing products available to consumers. Sellers have a variety of avenues available with which to communicate information about unobservable product characteristics. These include price, warranty, third-party certifications, and advertising about product features. Granting proprietary rights in the consistency of brand signaling when these arguably more informative forms of quality signaling are not protected adds to already lopsided incentives to increase brand advertising at the expense of these other methods.

Even the conduct sought to be regulated, trademark blurring, can actually serve as a useful signal of quality. The law already accepts that some unauthorized uses of familiar marks are more helpful than harmful; the paradigmatic case is comparative advertising. The statement “better than brand X,” made by a competitor is helpful because it alerts consumers to new choices. In the same way, a slogan, name, logo, or design that communicates that a product is “X-like,” especially in a distinct market, may also offer useful information. Use of a familiar symbol to call attention to a new product is nothing new. Many brand leaders who now zealously condemn blurring previously relied on a

27 See infra text accompanying notes 318-325; see also Howard Beales, et al., The Efficient Regulation of Consumer Information, 24 J.L. & ECON. 491, 508 (1981) arguing that use of market share as a quality signal may cause the first entrant in a product class to maintain its high share by force of historical monopoly rather than the superiority of its product). This would be the case when the consumer values avoiding risk and conserving effort over optimal product selection. Studies suggest that many consumers approach product choice with these preferences. See, e.g., Wayne D. Hoyer, An Examination of Consumer Decision Making for a Common Repeat Purchase Product, 11 J. CONSUMER RES. 822 (1984).


30 See infra text accompanying notes 307-312.

31 Smith v. Chanel, Inc., 402 F.2d 562, 567 (9th Cir. 1968); see also Landes & Posner, supra note 8 at 307-09 (arguing that dilution protection should not be used to prevent competitors from advertising that they have a comparative product).
blurring strategy to ease their own entry into the market. Examples include McDonalds, Coca-Cola and Tiffany’s each of whom in their infancy chose now-famous aspects of their brand to piggyback on the appeal of better-known sellers of the time.\(^{32}\) This kind of subtly comparative advertising may lower the immediate signaling value of strong brands, but consumers benefit in the long-term from learning about conceptually-related new options.\(^{33}\)

In addition, free-riding can serve as a signal about the quality of the goods of the owner of the famous mark for the same reasons long claimed for brand advertising. Just as familiarity of a mark can convey information about producer investment in quality, the use of a famous mark by an interloper, even if not overtly critical or parodic, can alert consumers to risks inherent in the dominant brand. Such risks might include that some segment of the public thinks the brand is pretentious, a bad value or simply over-exposed.\(^{34}\) Even if consumers process the new message only subconsciously, automatically, and involuntarily, as they do with much authorized brand advertising, a resulting increase in negative feelings about the dominant brand may well be welfare-enhancing and efficient.

Whether consumers respond to advertising “rationally” or “emotionally” is ultimately a red herring. What matters is whether consumers can easily find reliable information about the risks and benefits of different products. Thus, the optimal dilution regime will protect consumer interests in the reliability of branding signals, but avoid undermining competition or incentives to provide reliable information through other means.

Acknowledging consumer interests on both sides of the dilution debate facilitates a more tailored application of the dilution cause of action. The last section of this article proposes revising trademark dilution law to prohibit only commercial uses of exact copies of famous marks.\(^{35}\) Trivial alterations or exact uses of famous marks on unrelated goods increase consumer costs without adding new information, but non-trivial alterations are likely to add more than they detract from the quality of information exchanged in the marketplace, and therefore should not be subject to dilution liability.\(^{36}\)

\(^{32}\) See infra text accompanying notes 285-298.

\(^{33}\) Cf. Kratzke, supra note 11 at 211 (stating that the paramount objective of trademark law should be to promote inter-brand competition).

\(^{34}\) See infra text accompanying notes 320-322. As detailed infra, non-competitors may have greater incentives than direct competitors to expose these kinds of flaws because competitors risk undermining the appeal of the product category if they undermine a dominant seller, or at the very least, will have to share any market gains from lowering the dominant brand’s appeal with other sellers of the same product. See sources cited infra at notes 315-316.

\(^{35}\) Subject to the usual defenses for expressive, descriptive and critical use. One might argue that a formulation this narrow renders dilution law irrelevant since use of a mark identical to a famous one is likely to be confusing in any product market. However, use of a dilution analysis in such situations can lower enforcement costs. See, e.g., Robert G. Bone, Enforcement Costs and Trademark Puzzles, 90 VA. L. REV. 2099 (2004) [hereinafter Bone, Enforcement Costs] (arguing that dilution prohibitions lower the costs of enforcing famous marks in situations where confusion is likely).

\(^{36}\) Of course, if such a use is likely to cause confusion, it will be subject to a trademark infringement suit. Others have advocated variations of a cost-benefit social welfare analysis for trademark dilution. See, e.g., Long, supra note 20 at 1057 (arguing for a different approach to low-value uses such as counterfeiting of
More broadly, a greater understanding of how consumers rely on brand signals reveals both the potential and the limitations of cognitive psychology in shaping trademark regulations. Trademark law has historically relied on judicial assumptions about consumers to determine trademark rights and liabilities in a variety of contexts. Behavioral research offers empirical data against which to test these assumptions.37

famous marks and high-value uses such as parody and satire), but not the precise formulation outlined above. (But cf. Tushnet, supra note 19 at 566 (endorsing strict fame, uniqueness and identicality requirements as one possible way to limit the dilution regime.) An identicality requirement does find support in the caselaw. See, e.g., Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 434 (2003) (suggesting a lighter burden of proof for demonstrating dilution where a defendant has used an identical mark). Interestingly, although some courts claim to require identity or near identity between marks for dilution liability, in practice they require merely that the junior mark be similar enough to call to mind the famous mark. See, e.g., Nike Inc. v. Nikepal Int’l Inc., 84 U.S.P.Q.2d (BNA) 1820 (E.D. Cal. 2007) (finding mark Nikepal to be functionally identical to Nike because a majority of consumers think of the latter when viewing the former); see also Thane Int’l, Inc. v. Trek Bicycle Corp., 305 F.3d 894, 907 (9th Cir. 2002) (finding that a reasonable fact finder could conclude that the marks “TREK” and “OrbiTrek” were nearly identical to one another); Nabisco, Inc. v. PF Brands, Inc., 191 F.3d 208, 218 (2d Cir. 1999) (marks must be similar enough that the junior mark conjures an association with the senior); accord Fed. Express Corp. v. Fed. Espresso, Inc., 201 F.3d 168, 176 (2d Cir. 2000) (opining that the marks “Federal Express” and “Federal Espresso” were sufficiently similar to support a dilution cause of action); cf. Eli Lilly & Co. v. Natural Answers, Inc., 233 F.3d 456, 469 (7th Cir. 2000) (evaluating confusion and dilution using the same similarity standard).

37 The use of behavioral research in the context of trademark law has recently been strongly criticized. Tushnet, supra note 19, at 510, 528-546 (2008). And indeed, much of the existing scholarship in this area is worthy of criticism. Trademark advocates seeking to explain trademark dilution to a wary judiciary have mined the cognitive literature for studies that purport to show dilutive conduct’s negative effect on subsequent consumer recognition and recall of famous marks. See, e.g., Swann, supra note 14, at 606-14; Jacoby, Psychological Foundations, supra note 16 at 1049; Jacoby, Dilution in Light of Victoria’s Secret, supra note 14, at 9, 20-21; see also Maureen Morrin & Jacob Jacoby, Trademark Dilution: Empirical Measures for an Elusive Concept, 19 J. PUB’Y & MARKETING 265 (2000). Such attempts have rightly drawn criticism for being methodologically imprecise and devoid of real-world context. See Tushnet, supra note 16, at 528-46. Not all behavioral studies suffer from these specific flaws however. Although consumer survey data is notoriously imprecise and subject to manipulation, as Tushnet details, new research techniques offer the potential of more precise methods to measure consumer motivation in purchasing. Id. at 544-46; see, e.g., Ambler at al., supra note 4 (using neuroimaging techniques to examine relative activity in brain areas associated with different processing tasks during shopping activity); Punj & Hillyer, supra note 4 (same). These techniques have been especially useful for gauging the influence of emotion on economic decision-making. See Colin Camerer et al., Neuroeconomics: How Neuroscience Can Inform Economics, 43 J. ECON. LITERATURE 9, 14 (2005) (using brain imaging studies done while people engage in different kinds of economic tasks to provide insights about the mix of affective and cognitive processes in these tasks); P. Kenning & H. Plassmann, NeuroEconomics: An Overview from an Economic Perspective, 67 BRAIN RES. BULL. 343, 343, 352 (2005). Economic studies using actual purchase data also offer relatively unbiased sample sets through which to examine consumer behavior. See, e.g., Tülin Erdem, An Empirical Analysis of Umbrella Branding, 35 J. MARKETING RES. 339, 347 (1998) (using scanner data for toothbrush and toothpaste purchases to show a negative effect on parent brand purchases after the introduction of a poor quality brand extension); Vanitha Swaminathan, Sequential Brand Extensions and Brand Choice Behavior, 56 J. BUS. RES. 431 (2003) (household scanner panel purchase data) (hereinafter, Swaminathan, Sequential Brand Extensions); Vanitha Swaminathan et al., The Impact of Brand Extension Introduction on Choice, 65 J. MARKETING 1, 12-14 (2001) (same) (hereinafter, Swaminathan, The Impact of Brand Extension Introduction). Although no research method is flawless and uncertainties remain even with these relatively more objective measures, lawmakers need not wait for perfect certainty to gain insights from cognitive and behavioral studies. For one thing, because trademark
However, trademark law too often automatically equates evidence of consumer uncertainty or negative response to a legally cognizable injury. Consumers are complex creatures with divergent and sometimes competing motivations. For example, we value convenience in the short term and greater choice in the long term. Sometimes, as with dilution regulation, serving the first interest may burden the second. Acknowledging dueling consumer interests calls into question trademark law’s reliance on momentary snapshots of consumer perception by themselves as conclusive arbiters of long-term welfare. An emphasis on fleeting reactions, which tend to reflect short-term interests, fails to reconcile convenience with long-term interests in enhanced competition.

Accordingly, this article argues that behavioral insights are properly understood as data to be weighed in constructing rules, but that consumer perceptions in isolation should no longer remain the sole indicators of legal injury in trademark law.

I. Trademarks, Information and Competition

A. The Informational Purpose of Brands

The goal of trademark law is broadly accepted as improving the quality of information in the marketplace. Trademarks are an efficient and simple means of communicating information. Sellers use advertising and trade symbols to inform likely buyers about desirable qualities and characteristics of their goods. Trademarks ensure that consumers associate these characteristics with the right product.

laws rest on the utilitarian justification of improving consumer welfare, some model of consumer behavior is necessary to judge the effects of different proposals. Models informed by credible research are superior to naked assumptions drawn from the personal experience of a reviewing judge. Indeed, Professor Tushnet is not even uniformly critical of the cognitive and behavioral research so much as she is critical of how they have been used by advocates of dilution protection. In several places, she herself relies on cognitive studies to refute assertions by dilution proponents. Tushnet, supra at 536-42 (citing studies showing a positive effect on memory and a liking for multiple and varied uses of familiar terms, called “reaffirmation effects”); id. at 543 n.177 (arguing that poor quality brand extensions are unlikely to harm sales of the senior brand because of research studies demonstrating an absence of negative spillover effects to parent brands where consumers were given a way to distinguish the extension from the senior brand, such as through sub-branding).

38 A second example would be prohibitions on uses of trademarks in keyword advertising. Some trademark owners have sought to prohibit unrelated companies from purchasing ads designed to appear when the owner’s trademark is used as a search term on an internet search engine. For example, a search for “Delta Airlines” might call up sponsored links for United and Southwest. Purveyors of complementary products, such as travel insurance or travel guides, might advertise as well. So long as the ads are labeled as such, most consumers find the links more helpful than distracting. They do, however, provide more clutter on a user’s screen after a search and can momentarily delay the consumer’s clicking over to the desired vendor. See, e.g., Brookfield Commc’ns v. W. Coast Entm’t Corp., 174 F.3d 1036, 1064 (9th Cir. 1999) (finding a momentary diversion of keyword advertising actionable as an initial interest confusion).

39 Dogan, supra note 11, at 106 (“[T]rademark law has never aimed to provide exclusive rights in marks, but has focused on preserving informational clarity in the marketplace.”); see also Kratzke, supra note 11, at 216-17 (trademark law should grant exclusive rights in trademark interests to facilitate the transmission of informational and identifying messages); Lunney, supra note 8, at 431-32.


41 Kratzke, supra note 11, at 216; Lunney, supra note 8, at 432; Phillip Nelson, Advertising as Information, supra note 29 at 735.
For the consumer, one brand name can serve as a repository for “a complex constellation of associations and images that comprises a consumer’s knowledge of the brand and his attitudes towards it.” Any relevant information about the underlying good, including advertising claims, community reputation, and the individual’s previous experience with that product becomes associated with the trademark and is easily accessible to the consumer upon encountering the mark in commerce. Consumers can rely on source indicators to locate goods and services that match their tastes for quality and price quickly and easily.

This interest in informational clarity serves both a public and private purpose. Glynn Lunney has explained how trademarks improve allocative efficiency in the marketplace by allowing consumers efficiently to express preferences to producers:

By enabling consumers to connect information to precise product[s] more accurately, trademarks help consumers express more accurately their preferences and tastes for the varying mix of product features, quality and prices that each finds desirable. Trademarks can, therefore, help ensure that the pricing signals received by producers from the market (or “expressed demand”) more accurately reflect consumers’ actual tastes and preferences (or “actual demand”).

This feedback loop ideally facilitates an efficient marketplace that produces the socially optimal types and amounts of goods at the best prices. In this way, the consumer acts as a proxy for the interests of society in distributing resources efficiently.

42 Kratzke, supra note 11, at 204-05 (citing John F. Coverdale, Comment, Trademarks and Generic Words: An Effect-On-Competition Test, 51 U. CHI. L. REV. 868, 875 (1984)); see also Jacoby, Dilution in Light of Victoria’s Secret, supra note 14, at 16 (“For consumers, a brand name functions as a core node around which other information in memory is connected and around which new information can be organized.”).

43 See LANDES & POSNER, supra note 12, at 167; Kratzke, supra note 11, at 207.

44 LANDES & POSNER, supra note 12, at 166-68.

45 Allocative efficiency is the market condition whereby resources are allocated in a way that maximizes the net benefit attained through their use. Allocative efficiency refers to a situation in which the limited resources of a country are allocated in accordance with the wishes of consumers. An allocatively efficient economy produces an optimal mix of commodities from the general consumer perspective. See Lunney, supra note 8 at 444 & n. 275; Glynn S. Lunney, Jr., Reexamining Copyright's Incentives-Access Paradigm, 49 VAND. L. REV. 483, 489, 598 (1996).

46 Lunney, supra note 8, at 432; see also Smith v. Chanel, Inc., 402 F.2d 562 (9th Cir. 1968). The court stated:

[Trademark] makes effective competition possible in a complex interpersonal marketplace by providing a means through which the consumer can identify products which please him and reward the producer with continued patronage. Without some such method of product identification, informed consumer choice, and hence meaningful competition in quantity could not exist.

Id.

47 Kratzke, supra note 11, at 216 (noting that advertising helps to make the market efficient because it enables consumers to transmit accurate messages concerning their choices of resource allocation.); Lunney, supra note 8, at 432.

48 Kratzke, supra note 11, at 212.
Because of the importance of this information exchange, trademark law prohibits behavior that confuses the information or identification function of trade symbols in the mind of the consumer. Symbols that deceive consumers reduce the efficiency of the market by causing consumers to unwittingly purchase a different good.\footnote{Id. at 272; see also Stacey L. Dogan & Mark A. Lemley, Trademarks And Consumer Search Costs on the Internet, 41 HOUS. L. REV. 777, 788-89 (2004) (stating that trademark law maximizes efficiency by lowering search costs and has “historically limited itself to preventing uses of marks that ‘defraud[ed] the public’ by confusing people into believing that an infringer's goods were produced or sponsored by the trademark holder).} A system that does not protect the informational integrity of trade symbols causes consumers to expend extra resources in searching for desired goods, and thus increases “search costs.”\footnote{See, e.g., Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163-64 (1995) (“Trademark law . . . ‘reduce[s] the customer’s costs of shopping and making purchasing decisions.’”); LANDES & POSNER, supra note 12, at 168.}

Regulation of trade symbols is not without its own costs. Trademark protection increases information costs for competitors and new entrants who may lack significant advertising capital. In the absence of protected trademarks, consumers would need to re-evaluate each product choice with every purchase.\footnote{Landes & Posner, supra note 8, at 269.} If they sought a quality cereal with a pleasing shape, for example, they could not rely on the shorthand of the General Mills and Cheerios, and their previous experience with these brands to guide them. They would have to evaluate the price, ingredients, nutrition, shape, color and whatever other attributes were easily ascertainable for each product every time they went to the store.\footnote{See Id.} This would cost consumers in time, but would allow a new competitor to more easily capture consumer attention to promote attributes of the new product that may be preferable to more established choices. We allow this disadvantage to new entrants because we believe it is outweighed by the informational benefits of trademarks in the form of lower search costs.\footnote{Kratzke, supra note 11, at 208; LANDES & POSNER, supra note 12, at 168.}

**B. Trademark Dilution and Internal Confusion**

Legal prohibitions have also been extended to behavior that lessens the “selling power” of previously popular marks, or “trademark dilution.”\footnote{Schecter, supra note 15, at 831.} Trademark dilution laws prohibit the use of famous marks on non-competitive goods when such use is likely to lessen the distinctiveness of the mark. Commentators have defined dilution’s harm as one of “internal search costs.”\footnote{Jacoby, Dilution in Light of Victoria’s Secret, supra note 14, at 20; see Tushnet, supra note 37, at 518 (describing prevailing cognitive model for dilution law as resting on the notion of increased “internal” search costs).} Internal search costs are created when the presence of additional users of distinctive marks forces consumers to work harder to remember the original mark and to connect it with its associated goodwill.\footnote{LANDES & POSNER, supra note 12, at 207.} By distracting consumers
from their original associations with branded goods, dilution thus diminishes the efficiency of the marketplace.

Trademark dilution can happen in two ways, either through blurring or tarnishment. The recent Trademark Dilution Revision Act defines dilution by tarnishment as an “association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.” Tarnishment has typically been understood as the connection of a famous mark with unsavory products and services, such as those promoting sex, drugs, or violence.

Of the two, blurring has caused more head-scratching among courts and commentators. Blurring is defined in the Trademark Dilution Revision Act as “association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark.” The cause of action is deceptively simple on its face: it is aimed at the use of famous marks (like Google) by unrelated users on a new class of goods or services (say, Google Petroleum). Consumers are unlikely to think that the oil producer is run by the search engine. Yet the presence of the second mark may lessen the ability of the first to serve as a distinctive identifier for the search engine.

Blurring has proven difficult to define explicitly because of the lack of specificity in the statutory definition as to what kind of “association” will be enough to impair a trademark’s “distinctiveness.” Distinctiveness is a term of art in trademark law that refers to a word’s or a symbol’s ability to uniquely identify one source or producer for goods or services. Some courts have held that the mere fact of association of one mark

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58 Long, supra note 20, at 1057.
59 See, e.g., Beebe, A Defense, supra note 21 at 1148-49 (2006) (discussing problems in the interpretation of trademark blurring); Farley, supra note 17, at 109-110 (discussing problems in defining dilution by blurring).
60 Trademark Dilution Revision Act, § 2 (to be codified at 15 U.S.C. § 1125(c)(2)(B)).
61 It is a relative term. An invented word like “Kodak” is more inherently “distinctive” than a descriptive word like “pretty” to designate the source of a product. This is because consumers are more likely to recognize it as a designator of source than a description of the product’s features. However, even descriptive words and pictures can “acquire” distinctiveness by becoming widely associated in the public mind with a specific commercial source. Thus “American Airlines” is a distinctive trademark despite the fact that its terms are entirely descriptive of any U.S. consumer aviation company. This understanding of distinctiveness does little to illuminate what kind of conduct the blurring cause of action aims to discourage. Trademark’s taxonomy of “distinctive” marks suggests an impairment of distinctiveness occurs when a mark is rendered less capable of serving as a unique source identifier. This might suggest uses of a mark to refer to an entire class of goods or services rather than those of just one producer. E.g., Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4 (2d Cir. 1976) (defining a taxonomy of distinctiveness in which generic terms for classes of goods have the least amount of distinctiveness). The statutory definition of dilution negates any such reading; the cause of action is limited to uses as “designations of source.” Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, § 2, 120 Stat. 1730, 1730 (to be codified at 15 U.S.C. § 1125(c)(1) & (3)). This statutory formulation has historically been aimed at uses of marks on non-similar goods. See Schecter supra note 15 at 831 (proposing a new dilution cause of action aimed at uses on non-competing goods). Or the statute might aim at uses that undercut “acquired” distinctiveness by lessening the public’s learned understanding that the mark signifies
with another is enough to “impair distinctiveness.” 62 The distinctiveness of the senior
mark is diminished if it no longer brings to mind the senior user alone. 63 The Supreme
Court in Moseley v. V Secret Catalogue Inc criticized this simplistic equation by stating
that “[b]lurring’ is not a necessary consequence of mental association.” 64 The Court
required some showing that the association was likely to “reduce the capacity of the
famous mark to identify the goods of its owner.” 65 However, in 2006, Congress revised
the dilution act in the wake of the Moseley decision, and seemingly returned to an
emphasis on pure mental association by including it in two of the six factors used to
gauge the existence of “blurring.” 66

Efforts to explain why a mental association between two marks will lessen the
source-identifying potency of the senior mark have tended to focus on what Professor
Frank Schechter, the original proponent of dilution regulation, called a mark’s “selling
power.” 67 Schechter equated selling power with uniqueness. 68 Modern trademark
theorists have refined this definition to account for a mark’s ease of recall in memory and
ability to convey product-specific information. 69 Dilution thus occurs when a “mark’s
propensity to bring to mind a particular product or source is weakened.” 70 Proponents
claim that blurring interferes with the speed and accuracy of recall of a senior mark
because encumbering a brand with divergent associations can impair its memorability. 71

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62 Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 904 (9th Cir. 2002) (“The distinctiveness of the mark is
diminished if the mark no longer brings to mind the senior user alone.”).
63 Id.
65 Id.
at 15 U.S.C. § 1125(c)(2)(B)). The other factors include: (i) degree of similarity between the marks, (ii)
degree of inherent or acquired distinctiveness of the famous mark, (iii) the extent to which the owner of the
famous mark is engaging in substantially exclusive use of the mark, (iv) the degree of recognition of the
famous mark. The two factors concerning association are (v) whether the defendant intended to create an
association with the famous mark, (vi) any actual association between the marks. Id; see also The Hershey
likelihood of blurring where defendant moving van company intended to create an association with the
Hershey bar trade dress by portraying a couch wrapped in similar-looking trade dress on the side of its
vans).
67 Schechter, supra note 15, at 819.
68 Id.
69 Jacoby, Dilution in Light of Victoria’s Secret, supra note 37, at 1048; Morrin & Jacoby, supra note 37, at
274; Swann, supra note 14, at 624.
70 Jordache Enters., Inc. v. Hogg Wyld, Ltd., 828 F.2d 1482, 1489 (10th Cir. 1987).
71 Beebe, A Defense, supra note 59, at 1148 (stating that blurring is when D’s use of a mark is similar or
identical to P’s and blurs the link between the P’s mark and the goods or services to which the mark is
traditionally attached); Jacoby, Dilution in Light of Victoria’s Secret, supra note 14, at 20; Swann, supra
note 14, at 620, 624.
Consumers will no longer register an immediate impression related to the original source when they see the mark. 72

Judge Posner offered what is perhaps the most influential explanation of trademark blurring harm in Ty Inc. v. Perryman:

There is concern that consumer search costs will rise if a trademark becomes associated with a variety of unrelated products. Suppose an upscale restaurant calls itself “Tiffany.” There is little danger that the consuming public will think it’s dealing with a branch of the Tiffany jewelry store if it patronizes this restaurant. But when consumers next see the name “Tiffany” they may about both the restaurant and the jewelry store, and if so the efficacy of the name as an identifier of the store will be diminished. Consumers will have to think harder—incur as it were a higher imagination cost—to recognize the name as the name of the store… So “blurring” is one form of dilution. 73

Marketing experts have provided psychological models that explain why follow-on uses of a mark can cause an increase in internal search times. These explanations focus on the ability of trademarks to serve as “core nodes” in memory around which consumers organize all of their information about the product and brand. 74 Follow-on uses, even when not confusing, add new associations to this cognitive network that reduce the strength of preexisting brand beliefs. 75 For example, the brand Nike quickly brings to mind “shoes,” and also perhaps qualities associated with these shoes such as “sports,” “winning,” “achievement,” and ”success” for a large segment of the purchasing public. In the Nike example, if someone uses the mark for couches, then people might be less likely immediately to think of “shoes,” and all the associated positive properties of those sneakers, the next time they see the mark. Thus, although the consumer has not been misled by externally deceptive information, she will now take longer, and require more effort, to sort relevant from irrelevant associations. 76

Professor Barton Beebe has called this definition “empirical in orientation.” 77 For a judge to find that a junior mark “blurs” a senior mark, the judge must find that the junior mark causes consumers to “think for a moment” before recognizing that the senior mark refers to the goods of the senior mark’s owner. 78 In this formulation, dilution by blurring increases “search costs” in a measurable way: consumers must take more time

73 Ty Inc. v. Perryman, 306 F.3d 509, 511 (7th Cir. 2002).
75 Jacoby, Dilution in Light of Victoria’s Secret, supra note 14, at 20; Jacoby, Psychological Foundations, supra note 37, at 1049.
76 Jacoby, Dilution in Light of Victoria’s Secret, supra note 14, at 20-21.
77 Beebe, A Defense, supra note 59, at 1149
78 Id.
and expend more cognitive resources to connect the mark to the senior user’s goods and larger goodwill. 79

This existing “cognitive” account of trademark dilution by blurring is purely informational. As one commentator has noted about dilution by blurring:

[T]here is no evaluative component; there is no ‘I like’ or ‘I dislike,’ there is no ‘that’s good,’ or ‘that’s bad.’ The association is simply informational. Where there used to be a single commercial association, [a] name is now associated with two commercial entities . . . increasing the consumer’s mental search costs. 80

However, it is implicit in this definition that increased search costs will cause consumers to change their behavior in inefficient ways. In deciding that insufficient evidence of actual dilution was presented in the Moseley decision, the Court focused on what Victoria’s Secret had not shown: that a consumer who saw the allegedly diluting mark “Victor’s Little Secret” did not “form any different impression” or in any way “change his conception” of the more well-known Victoria’s Secret. 81 The Court linked a lessening of the capacity to identify and distinguish between brands with an involuntary alteration in the consumer’s conception of the senior brand. Similarly, dilution theorists point to cognitive research studies connecting these increased internal search times with decreased sales. 82 Implicitly then, the harm flowing from “internal search costs” is an involuntary change in the consumer’s preference for goods bearing a certain brand. What is missing in trademark decisions and commentary is a clear explanation of why mental association of two unrelated businesses, which may infinitesimally increase consumer’s

79 There is some disagreement as to whether blurring extends just to a consumer’s memory of the proper product category, e.g. Audi for cars and not shoes, or to the whole constellation of associations with a mark that make up what practitioners refer to as goodwill. In this broader formulation, use of Audi for shoes would interfere not only with recall of product category but also specific product attributes such as “speed” and high-tech engineering. Compare Beebe, A Defense, supra note 59, at 1148-49 (arguing that blurring protects only memory of product type) with Swann, supra note 72, at 750-53 (arguing that blurring extends brand connotations and experiential ‘promise’). Attempts to limit the notion of dilution just to information about product category seem like previous efforts to distinguish between “informational” and “persuasive” functions of trademarks: attractive as a theory but nearly impossible to put into practice. For example, the more narrow conception of dilution as protection of product class association would seem to exclude any protection for well-known marks such as Sony or Virgin that already are associated with a variety of product classes.

80 Jacoby, Dilution in Light of Victoria’s Secret, supra note 14, at 22. Dilution has thus been described as an impairment to the brand’s ability to convey information. Swann, supra note 14, at 617. At the extreme, commentators have suggested that the impairment to a brand’s informational value is worse than confusion. In a straight infringement case, consumers understand what the mark signifies, but mistakenly believe the defendant’s goods also exhibit those properties. Assuming the infringement is halted before becoming widespread, the information conveyed by the mark never changes. In the dilution case, the second user alters the specific information conveyed by the mark by introducing irrelevant associations, so that consumers can no longer rely on the mark in any situation for useful product information. Id.


82 Jacoby, Dilution in Light of Victoria’s Secret, supra note 14, at 20-21 (citing studies claiming that first brand awareness is best predictor of brand switching behavior).
internal mental search times, is likely to cause any such change in conception or behavior.

Many commentators have questioned whether the mere association of one item with another is likely to cause either internal confusion or a change in consumer behavior. Brands like Ford and Nissan have coexisted for years with twins or near twins in the modeling and bakery industries and neither seems to have suffered much for it. It seems entirely plausible that over time, the association between the two producers would dissipate as consumers learn to distinguish two similarly named but non-competing businesses. As Rochelle Cooper Dreyfuss has pointed out, most of us have friends and relatives who share similar names, and yet we are capable of distinguishing our friend Dave from our cousin Dave. Furthermore, the context in which we encounter such names is likely to counteract any distraction offered by the second user. As Rebecca Tushnet notes, when we say “Delta” in the back of a cab with our luggage on the seat next to us, the cab driver is unlikely to think we want to visit the plumbing supplier.

Further, it’s not clear that simple association between two entities is harmful. Imitation is the sincerest form of flattery. As Graeme Austin has written:

Implicit in Judge Posner’s approach is the idea that consumers care that they must think harder. . . . If dilution imposes an imagination “cost,” it follows that the ordinarily prudent consumer is somebody who prefers to have her imagination unburdened by conflicting messages about brands. But this is not necessarily so, or even more likely so. . . . [It] might . . . be more fun than costly.

Other commentators have suggested that the fact that one product references another may strengthen the association of the brand with the senior producer in the minds of consumers.

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83 Bone, Hunting Goodwill, supra note 8, at 559; Welkowitz, supra note 17, at 542; Beebe, A Defense, supra note 59, at 1150, 1165-70; Farley, supra note 17, at 110; Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev., 170 F.3d 449, 463-65 (4th Cir. 1999).
84 Beebe, A Defense, supra note 59, at 1150 (“No one can seriously suggest that the typicality of the trademark ford has been significantly diminished by the coexistence in the American marketplace of a modeling agency--or of millions of people, for that matter--with the same name.”); see also Nissan Motor Co. v. Nissan Computer Corp., 378 F.3d 1002, 1014 (9th Cir. 2004) (noting widespread third party use of names identical or similar to “Nissan”). For example, Nissen bread was established in 1899. See J.J. Nissen, http://www.jjinissenbreads.com (last visited October 7, 2008).
86 Tushnet, supra note 37, at 529.
Finally, many kinds of information are likely to cloud the informational salience of marks; dilution aims at only a trivial subset. For example, uses of trademarks in the context of news reporting, criticism and parody are mostly exempted from dilution liability, although one could imagine such uses introducing distracting stimuli to individual consumers about their chosen brands. Even the use of products in everyday life is likely to stimulate individual associations that will conflict or drown out any managed brand “personality.” Proponents of dilution law have been unable to articulate a principled rationale that would distinguish the effects of such activities from the blurring harms sought to be prevented. Indeed, trademark owners often sue satirists and critics under a dilution theory.

Courts have also proven wary of such a seemingly untethered cause of action. Professor Clarissa Long has documented how judicial willingness to find liability under the federal statute has waned over the years. Before the enactment of the 2006 Trademark Dilution Revision Act, courts had become so uncomfortable with the ephemeral nature of the harm in federal dilution actions that they required plaintiffs to provide some evidence of actual dilution before they would enjoin use of a mark. Some judges have been downright hostile, claiming that trademark owners “must have had

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89 See, e.g., Tushnet, supra note 37, at 547-552.
90 Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, § 2, 120 Stat. 1730, 1730 (to be codified at 15 U.S.C. § 1125(c)(3)) (exempting such uses except where the famous mark is used as a “designation of source” for the second user’s goods or services).
91 Tushnet, supra note 37, at 540.
92 This criticism, while true, does not seem fatal. These stimuli may seem distracting to producers, who would like to exclude all negative information from consumer consideration, but dilution seems aimed at only irrelevant information. That is, the baseline for dilution cannot be the idealized image that the producer presents to the consumer in hopes she will adopt it. The baseline must be all of the information that a consumer would normally consider, directly and indirectly, in making a choice. Associations that arise organically due to word-of-mouth, personal experience, or newspaper coverage are arguably relevant to the mark, and are the kinds of things that we as a society want consumers to factor in purchasing decisions. Thus, while such associations may cloud the positive marketing communications that producers would like to attach to the mark, on the whole they increase the overall quality of information in the marketplace and help consumers to make better decisions. The argument against dilution by blurring is thus that it clouds the mark’s salience without offering any relevant product or brand-specific information. The use of the mark by unrelated newcomers to grab attention can be seen as almost entirely random. The use then lowers the mark’s informational salience in a way that is unlikely to aid consumers in making better decisions. That, at least, is the case in favor of regulating dilution by blurring. Alternatively, one could frame the exceptions for parody and criticism as an example of legislative social welfare balancing: the benefits to society by allowing free expression of this kind outweighs whatever indirect harms might result from blurring consumer associations. See, e.g., Long, supra note 20 at 1065 (advocating a social welfare balancing approach to dilution liability).
93 E.g., Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252 (4th Cir. 2007) (dismissing trademark dilution case against maker of parody dog toy luggage); Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894 (9th Cir. 2002) (same against song critiquing commercialism of Barbie toy).
94 Long, supra note 20, at 1030-31 (attributing some of the judicial unwillingness to enforce the doctrine to the ambiguous nature of the harm).
95 Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 433 (2003); accord Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev., 170 F.3d 449, 453 (4th Cir. 1999) (“[W]e agree with its basic points that “dilution” under the federal Act consists of (1) a sufficient similarity of marks to evoke in consumers a mental association of the two that (2) causes (3) actual harm to the senior marks' economic value as a product-identifying and advertising agent.”).
some kind of a lobby” to get such a statute passed.\footnote{Transcript of Oral Argument, Ringling Bros.-Barnum & Bailey v. Utah Div. of Travel Dev., 935 F. Supp. 763 (E.D. Va. 1996) (No. 96-788-A).} Congress’ recent amendments to the Federal Trademark Dilution Act have clarified some of the definitional uncertainties, but have also eliminated many of the judicial doctrines created to cabin the statute’s reach.\footnote{See generally, Beebe, A Defense supra note __ at 1156- 1161 (noting that the TDRA does away with judicially-created limitations on the dilution cause of action including a requirement that the plaintiff demonstrate “actual dilution” or its mark rather than a “likelihood of dilution” and the requirement in some circuits that a mark be inherently distinctive to receive anti-dilution protection).} Willingness to implement the revised statute remains to be seen.

This article argues that the failure to communicate a coherent harm for dilution by blurring depends in part on the lack of explicit acknowledgement of the important role that emotion plays in shaping consumer preferences.\footnote{See infra Sections III(2) & III(3).} As detailed more fully below, blurring has the potential to alter our emotional response to familiar trademarks even if it does not alter our conscious appraisal of the underlying product or producer.\footnote{One recent exception is an article by Jeremy N. Sheff, The (Boundedly) Rational Basis of Trademark Liability, 15 TEX. INTELL. PROP. L.J. 331 (2007). Sheff argues that both confusion and dilution rules are justified as correctives against conduct that would otherwise unfairly manipulate the cognitive biases of consumers, including the pervasive tendency to rely on emotional response as a heuristic, and so render such biases pervasively inaccurate. Id. at 333, 358-361. Although I agree with Sheff’s description of the goals of dilution law, for the reasons set out further infra, I think the question of which consumer preferences are “accurate” and which are manipulated is a much more complicated question.} Both sides of the dilution debate avoid discussion of emotion presumably because of a sense that it is an irrational and untrustworthy basis for decision-making, and thus a flimsy bedrock for a legal regime.\footnote{See infra text accompanying notes __-__ .} Yet the last twenty years of research on cognitive processing and consumer decision-making suggest that emotion and affect are vital to reasoned deliberation, and that the stigmatization of emotion’s part in the trademark debate should be reconsidered.\footnote{Id at 333, 358-361.} The next section sets out the two existing accounts of the influence of emotion in trademark use, and then suggests a third model that more accurately explains the concerns of trademark owners with regard to dilution by blurring.

\section*{II. Three Conceptions of Emotion in Consumer Decision-making}

The concept of a consumer’s voluntary and involuntary response to branded goods has its roots in a decades-old debate about the proper role of emotion in advertising and trademark law. Three schools of thought have developed to explain how consumers are influenced by emotion in their appreciation of advertising and the use of trademarks. These models—the irrational weigher, the rational maximizer, and the cognitive miser—are sketched out below, along with their respective accounts of the benefits and problems of emotional decision-making.

As advertising in the early twentieth century shifted from informative to persuasive strategies, trademarks came to symbolize not just a goods’ producer but the larger desire-
driven claims made in the product’s advertising. As advances in communication and transportation made widespread distribution of commercial goods possible, producers sought to compete outside local markets. They turned to strategies to build an identity for their wares that would resonate with masses of unknown consumers. Through clever imagery, suggestive turns of phrase, and celebrity endorsers, some trademarks came to symbolize not just a specific producer, but powerful images such as “freedom,” “youth,” “mildness,” or “achievement.”

Trademark scholars of the time disagreed over how much the law should recognize the new persuasive force of trade symbols. Frank Schechter, in an influential 1927 Harvard Law Review article, was the first to argue for a cause of action that would recognize a mark’s “selling power” apart from its value as a source-identifier. Schechter argued that the function of a trademark in modern commerce was no longer to identify a producer but was to “identify a product as satisfactory and thereby to stimulate further purchases by the consuming public.” In Schechter’s formulation, the mark itself sells the goods by its connection to desirable qualities. Thus, Schechter sought to expand the ambit of trademark protection to include not just deceptive uses, but non-confusing uses of the mark on unrelated goods as well. This “dilution” would whittle away the singular identity of the mark and its hold on the public mind. Where a mark owner had spent vast resources cultivating an image of excellence for a particular

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101 Often this imagery had little direct relevance to the advertised product. It was not intended to inform about product choices directly, but to speak to people in general about “what the mass of unregenerative mankind wanted.” Joseph J. Seldin, The Golden Fleece: Selling the Good Life to Americans 18-19 (Macmillan 1963); see also Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co., 316 U.S. 203, 205 (1942) (the object of much modern advertising is “to impregnate the atmosphere of the market with the drawing power of a congenial symbol”). In the markets of the nineteenth century, producers targeted advertising to local consumers already in search of a product. Such consumers typically already knew the names of local producers, and primarily used trademarks to connect existing goodwill with the right seller. Advertising touted information – sales, promotions, specific qualities – directly relevant to a decision to buy. As railroads, telephones, radios and other devices brought regional and national competition and advertising, the function of advertising changed. Producers now needed to convince strangers to embrace their offerings. Building demand was a special challenge amidst a population accustomed to rural self-sufficiency. See Bone, Hunting Goodwill, supra note 8, at 580. Producers shifted away from informational advertising toward campaigns designed to evoke a more personal connection with the targeted buyer.

102 See Bone, Hunting Goodwill, supra note 8, at 580.


104 Mountain Dew. The brand also claims to embody energy and exhilaration. See Theresa Howard, Being True to Dew, Brandweek, Apr. 24, 2000, at 28.


106 Nike. Heath, supra note 103, at 89 (Nike slogan encapsulates the concept of achievement).

107 Schechter, supra note 15 at 819.

108 Id. at 818.

109 Id. at 819.

110 Id. at 831.

111 Id. at 825.
product, Schechter thought that the advertising impression should be insulated from misappropriation to the same extent as the use of the producer’s plant or machinery.112

A. Irrational Weighers: Consumers Misled By Emotion Make Bad Choices

In the 1940s, a second school of thought arose that was more skeptical of the influence of persuasive advertising on purchasing behavior. This “Irrational Weigher” school argued that emotional advertising manipulated consumers into overvaluing branded goods.113 Professor Ralph Brown made the most prominent of these critiques in an influential 1948 article titled Advertising and the Public Interest. He distinguished between “informative” advertising (about price and attributes) and “persuasive” advertising that sought to “impregnate the brand with these powerful emotional stimulants, and so influence consumers to spend money on impulsive, unnecessary and expensive branded goods.”114 Brown argued that such ads were mesmerizing consumers, using a “bewildering manipulation” of emotional urges, into assessing identical goods differently based on an illusory brand personality.115 This emotional response led people to pay a premium for goods that did not differ significantly from more generic choices, and so undercut market efficiency.116

To Brown, a trademark’s only legitimate function was as a designator of source. He saw no value in the irrational emotional appeal of the brand and opposed protection of its commercial magnetism. Brown denounced dilution laws as the protection of irrational desires stimulated by advertising that conflicted with actual consumer interest.117 By legitimating the claims that advertised brands delivered benefits like cachet or sex appeal unavailable from functionally equivalent and cheaper offerings, such laws insulated established producers from competition.118 Brown was not alone in hoping that dilution

112 Id. at 829-30. Schechter advocated such protection only for “coined” trade symbols, i.e., words that the producers had made up themselves instead of using existing terms in the language. In 1927, these were the only kinds of symbols that could be fully protected as “trade marks.”

113 See, e.g., Brown, supra note 7, at 1171-75; see also CHAMBERLAIN, supra note 7, at 246-50; Sigmund Timberg, Trade-Marks, Monopoly and the Restraint of Competition, 14 LAW & CONTEMP. PROBS. 323, 325-26 (1949).

114 Brown, supra note 7, at 1171-75.

115 Id. at 1182. Further, “[t]he classical economists who enthroned the consumer never dreamed that he would be making his decisions under a bombardment of stupefying symbols.” Id. Because of manipulative power of persuasive advertising, the consumer is choosing only between “one illusion and another . . . Persuasive advertising is, for the community as a whole, just a luxurious exercise in talking ourselves into spending our incomes.” Id. at 1182-83. Brown undoubtedly was influenced by the then-dominant behavioral school of psychology. Behaviorists focused on environmental stimuli and stressed the power of “reinforcement learning,” which involved learning by repetitious exposure to an idea. Such theories “fed fears of advertising’s power to brainwash consumers during the 1940s and 1950s.” Bone, Hunting Goodwill, supra note 8, at 603 n.318.

116 Brown, supra note 7, at 1171-75.

117 Id. at 1187-94.

118 Id. at 1184-85 (urging a legal distinction between the informational and persuasive function of trade symbols); 1187-94 (denouncing dilution as unwarranted protection of the persuasive function).
of famous brands would occur and so force consumers to more carefully analyze how they spent their hard-earned dollars.119

This critique persists in modern scholarship.120 For example, modern commentators have proposed that prohibitions against dilution are inefficient because they promote the creation of brand personalities that appeal to consumer hearts rather than minds.121 These commentators have translated Brown’s admonition to limit protection to the informative component of brands into claims that dilution laws should protect only against a lessening of the connection of a famous mark to its underlying product, but not extend to any lessening of the unique personality of the mark itself or its larger emotion-laden goodwill.122

B. Rational Maximizers: Consumers Rely on Emotional Responses for Useful Product Information

More recently, the economics literature has taken up Schechter’s cause and defended the protection of persuasive advertising and the emotional valence of trade symbols. This “Rational Maximizer” literature offers two reasons for accepting the emotional connection with brands. First, maximists argue that emotional appeal is part of the product or service sold under the brand.123 If consumers believe themselves better off because a certain car or candy might make them more attractive, then purchase of such items will increase subjective well-being.124 In this view, “emotional” preferences are not different from, and are no less valid than, utilitarian ones, and consumer welfare increases with the facilitation of either kind of choice. Second, economists have provided evidence that persuasive, emotion-based advertising provides important informational cues to consumers, even if consumers do not fully understand how they use the information. For example, advertising can raise price elasticity simply by alerting consumers to new

119 Id. at 1204. Contemporary economists agreed that consumers, once so manipulated, were drawn by blind habit back to the same goods so that emotively charged trademarks could confer a monopoly-like power. Chamberlin, supra note 7, at 272-74; Timberg, supra note 113, at 326 (arguing that trademarks influence consumers to make economically irrational purchasing decisions). In the 1930s and 1940s, some commentators supported grade marks that carefully described exact quantity and quality as a superior alternative to trademarks. See, e.g., Leverett S. Lyon et al., Government and Economic Life 362-78 (Victor Abramson ed., 1939); Margaret G. Reid, Consumers and the Market (1939); Carl A. Auerbach, Quality Standards, Informative Labeling, and Grade Labeling as Guides to Consumer Buying, 14 Law & Contemp. Probs. 362 (1949).


121 Id. at 857.; Bone, Hunting Goodwill, supra note 8, at 620 (arguing that protecting positive feelings as part of a seller’s goodwill is socially wasteful and unnecessary); Kratzke, supra note 11, at 222 (arguing that protection of trademark value beyond its informational function distorts competition); see also Lunney, supra note 8, at 437-39 (arguing that to the extent that protection of a firm’s goodwill includes protection of the emotional content of the good, the benefits of such protection are not worth the costs).

122 Beebe, A Defense, supra note 59, at 1148-49; Bone, Hunting Goodwill, supra note 8, at 552-53, 622 (criticizing the extension of trademark protection beyond product and firm goodwill to encompass the ‘inherent goodwill’ of the mark); Lunney, supra note 8, at 437.

123 Swann, supra note 14, at 594.

124 See, e.g., Dilbary, supra note 8 (arguing that consumers derive value from the intangible auras of branded products).
choices. Adherents to this “advertising as information” school then tend to support regulation of dilution as useful protection against clutter—against the devaluation of the information, both for identification and persuasion purposes, which trade symbols provide. These two reasons are explored more fully below.

First, the rational maximizer school of thought argues that little reason exists to prefer choices based on product functions and price over less tangible “emotional” responses to brands. If consumers find more value in goods for the status they confer, for their ability to link purchasers to desired communities, or for other abstract emotional properties, then the market should be free to respond to these values. People consume goods and services for more than just utilitarian reasons; we use acquired goods to scale the last three rungs of Maslow’s pyramid (social needs, ego needs, and self-actualization). A woman who believes L’Oreal hair dye makes her “worth it,” or a man who believes smoking Marlboros makes him more macho may derive more satisfaction from using these products than they would from using generic substitutes. These “emotional” perceptions are no less rationally self-interested than logical preferences tied to quality and price. Society has no reason to value one set of preferences over another, so long as the consumer receives the satisfaction she wants from using the advertised good.

Because emotional preferences can create utility for consumers, rational maximizers argue that the expression of these preferences is just as important to an efficient marketplace as the expression of functional preferences. Newcomer brands that free-ride on positive brand associations may change these associations by adding new connotations. The new brand’s associations may make the senior brand less

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126 Nelson, *Economic Consequences*, supra note 125, at 213 (“The idea that advertising changes tastes seems to have a particular appeal to advertising’s critics. But this idea is consistent with advertising operating in perfectly competitive markets and with advertising improving welfare. . . . We economists have no theory of taste changes, so this approach leads to no behavioral predictions.”).

127 Dilbary, *supra* note 8, at 661, 664 (arguing that persuasive advertising creates a separate intangible value for consumers apart from the underlying physical product and that allowing producers to capitalize on that additional value through premium pricing is not anti-competitive).


130 Swann, *supra* note 14, at 618 (“Consumers thus logically, rationally and emotionally are interested in more than quality and price.”).


132 Dilbary, *supra* note 8, at 607-08, 622-28, 663-64; cf. Swann, *supra* note 14, at 618 (“Mental as well as physical expectations are entitled to insulation.”).

133 Dilbary, *supra* note 8, at 664.
appealing to its core constituency and so may mislead those consumers into changing their preferences.134

Second, some studies suggest that advertising (regardless of the content of the advertisement) is in itself a reliable indicator of quality.135 Heavy advertising of a brand suggests lower risk because it signifies a level of investment in the brand by the underlying firm.136 A firm that devotes substantial advertising revenue and additional product lines to a single brand uses its accumulated investment, in addition to the expected future cash flows from products under the brand, as collateral to guarantee future quality consistency.137 If the firm ceases to police quality or introduces inferior products to its line, its entire investment in the brand is jeopardized.138 Therefore, consumers rationally place higher confidence in brands that appear to have a greater backing because they represent a lower risk of inconsistent quality.139

The safety valve of this information model is the consumer’s rational self-interest.140 The neoclassical economic model assumes that consumers will respond to advertising only so long as it gives them reliable information at less cost than other search strategies, such as random sampling.141 The correlation between advertising and higher sales suggests that consumers do pay attention to advertising.142 A possible

134 Swann, supra note 14, at 615 (“Any interference with consumers’ associations with, or feelings about, such a brand would undermine its essence.”); see also Dilbary, supra note 8, at 664-65 (dilution law protects consumer investment in externality of brand image).
137 Klein & Leffler, supra note 135, at 627; Wernerfelt, supra note 136, at 459.
138 Klein & Leffler, supra note 135, at 100.
139 Peter A. Dacin & Daniel C. Smith, The Effect of Brand Portfolio Characteristics on Consumer Evaluations of Brand Extensions, 31 J. MARKETING RES. 229, 232 (1994); Montgomery & Wernerfelt, supra note 136 (noting that branded goods may not be higher in quality but will have lower quality variation). Furthermore, companies differ in their ability to use resources efficiently to produce quality goods; those that are the most efficient will have the most extra capital to spend on advertising. Nelson, Advertising as Information, supra note 29, at 732; Nelson, Economic Consequences, supra note 125, at 214.
140 Nelson, Economic Consequences, supra note 125, at 215; Nelson, Advertising as Information, supra note 29, at 734.
141 Nelson, Economic Consequences, supra note 125, at 215; but see, Heath, supra note 103, at 78 (finding advertising messages and brand associations are stored in implicit memory regardless of the level of conscious attention paid to the ad); Stewart Shapiro et al., The Effects of Incidental Ad Exposure on the Formation of Consideration Sets, 24 J. CONSUMER RES. 94 (1997) (arguing exposure to advertising influences a consumer’s willingness to include a product in a consideration set even if the consumer does not consciously attend to the communication).
142 See, e.g., Heath, supra note 103, at 11 (the most successful companies spend the most on advertising); JEAN JACQUES LAMBIN, ADVERTISING, COMPETITION AND MARKET CONDUCT IN OLIGOPOLY OVER TIME.
The inference from this data is that advertising provides better information at less cost than other available search strategies.

Because the rational maximizer model concentrates on the seller’s incentives to maximize quality, it treats the consumer’s subjective understanding of why she chooses the advertised brand as irrelevant. Whether or not she is consciously aware of the efficiency of using heavy advertising as a decision heuristic, its use is assumed to lead her to a welfare-maximizing result. Her own self-interest will lead her to disregard advertising for brands that fail to meet her tastes. Although the consumer may misattribute the cause of her preference for the advertised brand to persuasive claims made about the brand, members of the “advertising as information” school would defend her reliance on advertising because it leads to efficient product choices. Signaling through brand atmospherics is thus equivalent to signaling through price premiums, discounts, warranties or any other kind of strategy through which buyers can gain information about product quality from sellers.

Accordingly, the modern take on the emotional component of brand preference is that these expectations are entitled to insulation from confusion in the same way that utilitarian expectations are. This model posits “emotion” to be another kind of information that consumers can use to weigh the costs and benefits of specific consumptive choices. Belief in the emotional claims made about the brand will increase consumer satisfaction upon purchase, making the consumer subjectively better off. Further, there may be reason to believe that the supposedly irrational emotive preferences linked to heavily-advertised brands may lead to objectively better product choices, albeit not for the reasons that the consumer imagines.

The irrational weigher and the rational maximizer models take a different view of the utility of a trademark’s emotional appeal, but otherwise share a similar conception of

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94-95 (1976) (reporting the results of an analysis of ten years’ worth of sales data for 107 brands in 8 Western European countries).

143 Nelson, Advertising as Information, supra note 29, at 751; Nelson, Economic Consequences, supra note 125, at 215-17.

144 Nelson, Advertising as Information, supra note 29, at 734, 751; Nelson, Economic Consequences, supra note 125, at 215. Note that consumers may not be able to easily disregard advertising even if they would like to. See, e.g., sources cited at note 141 supra.

145 See Nelson, Advertising as Information, supra note 29, at 751; see also Phillip Nelson, Information and Consumer Behavior, 78 J. POL. ECON. 311, 311 (1970) (consumers are only “dimly aware” of the consequences of their product choices); cf. Nelson, Economic Consequences, supra note 125, at 213-14 (arguing information offered by persuasive advertising is not the content of the message but the fact that the producer considers the brand worth advertising); id. at 217 (arguing that advertising’s primary function for experience goods is to tell consumer which brands advertise the most; the substance of the advertising message is irrelevant).

146 See supra text accompanying notes 127-133.

147 Nelson’s research is characteristic of the neoclassical economic school of thought, which assumed that although people did not actually go through the calculations necessary to discover their subjective expected utility, they used decision-making strategies, such as relying on advertising that would allow them to behave as if they had. Herbert A. Simon, Rational Decision-Making in Business Organizations, Nobel Memorial Lecture (Dec. 8, 1978), in ECONOMIC SCIENCES, 1969-1980: THE SVERIGES RIKSBANK (BANK OF SWEDEN) PRIZE IN ECONOMIC SCIENCES IN MEMORY OF ALFRED NOBEL 343-48 (Assar Lindbeck ed., 1992).
trademarks as sources of information in decision-making. Both models embrace a Cartesian cost-benefit decision-making process in which consumers examine the attributes of different product choices and select the good that best meets their needs. The models differ solely as to the kinds of information consumers are encouraged to consider in weighing costs and benefits. The irrational weigher model values functional concerns like price and quality over emotional appeal, whereas the rational maximizer model considers emotional appeal to be just as viable a consideration. In either model, whether consumers make practical judgments about features or associative judgments about identities, they are weighing product features and choosing, in a utility-maximizing way, the brand that best meets their needs.

Much of the literature debating the wisdom of dilution protection adopts either one or the other of these two models. Recall that many proponents of dilution theory claim that blurring lessens the ability of famous marks to act as core information “nodes” around which consumers organize a variety of information. If one believes that most of the information that consumers associate with famous marks is emotionally manipulative and functionally irrelevant, then one will not worry about non-confusing uses that might “blur” the connection to this universe of marginalia. However, if one believes that such associations offer useful, easily accessible information, then one will favor protection against opportunistic uses of the mark that could diminish the strength of these connections.


1. The Intertwined Roles of Emotion and Reason

In the last twenty years, a more integrated approach to emotion in consumer decision-making has emerged that undermines both the irrational weigher and rational maximizer views. One weakness of both visions of the consumer is that neither accounts for limitations on consumer time and resources. Each view assumes that consumers use trademarks when trying to solve the problem of optimal product selection. Yet, much research suggests that consumers often use trademarks to solve a different problem: how to use the least amount of cognitive effort in choosing a product. Humans have limited cognitive resources and so allocate them judiciously. In this respect, people have been described as “cognitive misers” who will expend only the effort required to make a satisfactory, rather than optimal, decision. Because emotional responses arise automatically, consumers short on time, motivation, or information often rely on positive or negative “emotional” impulses as the least costly route to making a decision.

148 See supra text accompanying notes 42-44, 74-75.
151 See infra text accompanying notes 172-182.
A growing body of literature suggests that emotions do not operate in opposition to reason, but are in fact critical to any form of decision-making.\(^{152}\) Emotions are part of the nervous system, arising from evolutionarily old parts of the mammalian brain that propel behavior in historically advantageous ways.\(^{153}\) Emotions generally identify goals and desires, leading individuals to pursue those desires in conscious and subconscious ways.\(^{154}\)

Recent neuroscience research suggests that the ability to experience certain outcomes as relatively more positive than others drives decision-making. Antonio Damasio, a cognitive neurologist, pioneered this theory using work with patients with frontal lobe damage. This damage caused them to become “emotionally flat,” while retaining all of their other cognitive abilities. Such patients, although showing no diminishment in memory, attention, or logical reasoning, were profoundly damaged in their decision-making capabilities.\(^{155}\) For example, one patient could reason endlessly between one of two possible dates for an appointment, but was unable to reach a decision as to either one, or even to decide to stop deliberating.\(^{156}\) Damasio concluded that the impaired ability to experience emotion was responsible for the man’s inability to arrive at a decision.\(^{157}\)

Such research suggests that before individuals can effectively deliberate between options, they need a mechanism to focus on the possible consequences of their decisions and to measure the relative desirability of different outcomes. Scientists have posited the existence of “somatic markers” that lead us to classify stimuli as “good” or “bad” as we experience them.\(^{158}\) We retrieve these feelings again upon encountering or remembering a known object or situation.\(^{159}\)

Without such somatic tones we might be paralyzed by inaction.\(^{160}\) The pleasant or unpleasant sensation attached to an image leads the body to react instinctively, much in the same way it reacts unconsciously to hunger, pain, fatigue, or other internal stimuli. Such reactions happen automatically and cause an instant reaction without conscious
Scientists theorize that such mechanisms enabled primitive humans to run when they encountered dangerous situations without first having to pause to plan how to react. In the same way, modern humans rely on somatic tones in weighing abstract outcomes. We are instinctively drawn in or repulsed by the affective markers our experiences have assigned to each outcome. Thus, emotion is what gives us the impetus to make decisions.

Because individuals are not always aware of the degree of attraction or aversion (the “emotional valence”) they may harbor toward a specific object or event, emotion can act as an unconscious shortcut or heuristic. Individuals are drawn to one option, ignoring or dismissing the rest, for reasons they cannot consciously describe. In some cases, the strength of emotional impulse leads people to overreact to the negative, as is the case with the commonly-held preference for driving over flying, though flying is statistically safer. In other cases, such as aesthetic preference, snap affective judgments often lead to more satisfying results than sustained analyses.

2. Emotion as a Heuristic in Consumer Decision-Making

As both the irrational weigher and the rational maximizer models recognize, emotion is especially important in consumer decision-making. Consumers pressed for time and overwhelmed by information often rely on easily-accessible emotional reactions in making shopping decisions. In contrast to the earlier models, however, a large body of consumer and marketing research suggests that such emotional responses often are not directly related to remembered attributes of products or satisfactory experience. Instead such research suggests that positive emotional reactions arise for buyers as part of automatic, innate responses to easily-ascertained criteria such as the relative familiarity of a brand name. Individuals rely on such relatively effortless determinations as proxies for more sustained thinking about the risk and attractiveness of individual objects or choices.

161 PINKER, supra note 153, at 384-86; Matthias Siemer & Rainer Reisenzein, The Process of Emotion Inference, 7 EMOTION 1, 6 (2007) (emotional judgments require less time than cognitive judgments and often precede them); Slovic, supra note 2, at 973-974; Pham et al., supra note 5, at 175; Zajone, Feeling and Thinking, supra note 5, at 157.
162 PINKER, supra note 153, at 386; Paul Slovic, supra note 2, at 973.
163 DAMASIO, supra note 155, at 174.
164 See id. at 190-95 (feelings of good and bad act as “stop”, “go” and “turn” signals necessary for some aspects of decision-making), 198-99 (somatic markers, or good/bad feelings are one of three prerequisites for decision-making, along with attention and working memory).
165 See id. at 190-95.
167 In one study, students were asked to pick a favorite poster from a set of posters. The students who were required to give reasons for their choice ended up less satisfied with the poster than those allowed to choose without explanation. Camerer et al., supra note 37, at 29; see also MALCOLM GLADWELL, BLINK 10-17 (2005) (describing how automatic and unconscious evaluation strategies sometimes work faster and more accurately than conscious deliberation); Macleod, supra note 149, at 41 (surveying the economic literature on bounded rationality and noting studies in which consumers with less information performed objectively better in making decisions than those with more information).
Recent studies on consumer purchasing behavior suggest that consumers use one of two processes in evaluating advertising and making purchasing decisions. Where individual motivation and interest is high (for example, the purchase is expensive, risky, or otherwise significant to the consumer), a consumer is likely to use what has been called “high-involvement,” elaborative, or “System II” processing. Consumers using this method behave much the same way that classic trademark theory imagines: they evaluate the attributes of different products and weigh the pros and cons of each choice. In System II processing, individuals will attempt to correct for automatic emotional biases through careful consideration of the implications of different choices. Advertising and branding materials are important sources of information, but purchasers likely evaluate their claims against the purchaser’s own experience, the testimony of other credible sources and any other available diagnostic information.

The second form of processing, which has been termed “low-involvement” or “System I” processing, is more beneficial for advertisers. This processing strategy is relied on by consumers with few cognitive resources available for purchasing decisions due to distractions, time constraints, information constraints, or lack of motivation. Consumers using System I processing primarily rely on heuristics, such as emotional impulse, to make purchasing decisions.

In these low-involvement situations, the somatic markers hypothesized by Damasio, the “good/bad” classification that we automatically assign to stimuli, play a

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168 Camerer et al., supra note 37, at 15-54 (discussing the application of dual-process theories to economic problem-solving generally); Slovic, supra note 2, at 972 (2004); Slovic et al., Rational Actors, supra note 152, at 330-32; Paul Slovic et al., The Affect Heuristic, 177 EUR. J. OPERATIONAL RES. 1333, 1334-36 (2007) [hereinafter Slovic et al., The Affect Heuristic]; see generally DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY (Shelly Chaiken & Yaacov Trope eds., 1999); Steven A. Sloman, The Empirical Case for Two Systems of Reasoning, 119 PSYCHOL. BULL. 3 (1996); see also Kahan, supra note 2, at 107.


170 Id.

171 See Jong-Won Park & Manoj Hastak, Memory-Based Product Judgments: Effects of Involvement at Encoding and Retrieval, 21 J. CONSUMER RES. 534, 544-45 (1994) (hypothesizing that high-involvement consumers make a more extensive search of memory for fact-based information about a product at purchase than low-involvement consumers).

172 Kahneman, supra note 169, at 1451.

173 See Norbert Schwarz, Feelings as Information: Mood Influence Judgments and Processing Strategies in Heuristics and Biases, supra note 181 at 534, 539 (summarizing research showing that reliance on feelings as a basis of judgment is more likely when the subject has little other information or when relatively few cognitive resources are available for the decision); Baba Shiv & Alexander Fedorikhin, Heart and Mind in Conflict: The Interplay of Affect and Cognition in Consumer Decision Making, 26 J. CONSUMER RES. 278 (1999) (demonstrating more reliance on affect-based decision-making under conditions of cognitive strain); Matthias Siemer & Rainer Reisenztein Effects of Mood on Evaluative Judgements: Influence of Reduced Processing Capacity and Mood Salience 12 COGNITION AND EMOTION, 783, 785, 799 (1998) (hypothesizing that use of feelings as a basis for judgment is enhanced in conditions of low motivation and demonstrating that reliance on feelings increases where time constraints and competing task demands limit attentional resources); see also Gita Venkataramani Johar, et al., MAPPing the Frontiers: Theoretical Advances in Consumer Research on Memory, Affect, and Persuasion, 33 J. CONSUMER RES. 139, 140-41 (2006) (describing strategies that consumers use to process persuasive communications).
dominant role. In a low-involvement strategy, the consumer’s primary goal is to conserve taxed cognitive resources. Because affective classification happens automatically without the consumer having to exert any effort at all, reliance on automatic affective markers will provide the least costly route to a decision. The more taxed or limited the cognitive resources, the more likely the individual will rely primarily on automatic positive or negative emotional cues to arrive at a choice. Unlike System II decision-making, the consumer will make little attempt to elaborate on or refine the action tendencies suggested by emotion.

To know whether such reliance is utility-maximizing or utility-diminishing, one has to know more about the origin of the somatic marker. Rational maximizers would argue that individuals collapse overall product experience and word of mouth into one global brand attitude reflecting the sum of these parts. In this case, the overall brand attitude is a rough but accurate proxy for the consumer’s overall preference. Irrational weighers would posit that the positive valence of a given brand stimulus may be an objectively poor reflection of rational consumer preferences because consumers mindlessly internalize the pleasant suggestions made in advertising.

The cognitive miser model suggests a third option. According to some studies, a large component of the affect generated from contemplating a known mark stems from the familiarity of the mark itself. Familiarity operates on many levels to increase certainty and reduce effort. To a certain extent, the positive feelings generated by viewing a familiar mark are independent of any larger associative network of stored factual information about the brand. In low involvement situations, consumers do not

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176 Pham et al., *supra* note 5, at 175; Siemer & Reizenzein, *supra* note 161, at 6 (emotional judgments require less time than cognitive judgments and often precede them); Slovic, *supra* note 2, at 973-974; See generally Zajonc, *Feeling and Thinking*, supra note 5.
177 See generally Tim Ambler et al., *supra* note 4; Hanson & Kysar, *supra* note 4, at 732-33 (“[O]ur affective responses to products more often than not determine the purchasing decision, regardless of whether we experience the decision as having resulted from ‘reasons.’”); Shiv & Fedorikhin, *Heart and suprastructure*, supra note 168, at 1336.
179 See infra text accompanying notes 183-204.
180 Id.
181 E.g. Shane Frederick, *Automated Choice Heuristics*, in *Heuristics & Biases: The Psychology of Intuitive Judgment* 548, 551 (Thomas Gilovich et al. eds., 2002) [hereinafter Frederick, *Automated Choice Heuristic*] (noting the vulnerability of automated choice heuristics, such as affective impressions, to the outsized influence of familiarity); MacLeod, *supra* note 149, at 23 (quality of decision-making using an affect heuristic is affected by the quality of the heuristic, and not the underlying beliefs about choices); cf. Punj & Hillyer, *supra* note 4, at 125 (“[C]onsumers rely heavily on [the global attitude toward a brand] in
want to take the time to consult branches of memory for specific brand attributes; they want to know immediately whether they “like” the choice.182

Familiarity induces preference for many reasons. First, consumers tend to rely on decision heuristics when operating in conditions of uncertainty.183 Faced with a nearly endless number of possible choices and decision inputs for many common purchasing decisions, people commonly reduce uncertainty by constructing a decision set of only a few options, and disregard the rest.184 This set typically includes a subset of those brands about which the consumer is already aware.185 If the consumer lacks the knowledge or motivation necessary to conclusively distinguish between even these options, she may rely on further heuristics to help make the decision.186 She may, for example, choose based on price.187 Matt Groenig’s Homer Simpson, for example, advocated a decision strategy of always choosing the second least expensive bottle of wine on a menu. Along with price, the most common deciding factor is brand familiarity.188 The use of a decision rule of thumb allows consumers to modularize purchasing and off-load much of the cognitive strain of considered decision-making.189 Familiarity suggests a lack of risk in such circumstances. Therefore, familiarity is a useful proxy when a satisfactory (rather than optimal) decision is all that is required.190

Second, familiar brands require less effort to evaluate, and so produce positive feelings all by themselves. Significantly, familiarity enhances positive affect independently of the characteristics of the underlying products, mark owner, or even of decision making, instead of attempting to recall and process specific brand associations.”); see also infra note 197 for sources cited therein.

182 See Zajonc, Feeling and Thinking, supra note 5, at 151.
183 MacLeod, supra note 149, at 40; Simon, supra note 149, at 104, 114; Thomas Gilovich & Dale Griffin, Introduction—Heuristics and Biases: Then and Now, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 1-5 (Thomas Gilovich et al. eds., 2002).
185 Coates et al., supra note 184, at 1196; Andreas Strebinger et al., Brand Equity & Consumer Information Processing: A Proposed Model 17 (July 1998) (unpublished manuscript, on file with the Vienna University of Economics and Business Administration) (presented at the American Marketing Association’s Marketing Exchange Colloquium in Vienna, 1998). The question of remembering which brands are typical of the kind of product sought is relevant only in those conditions where consumers are not already directly confronting an array of labeled choices as they would in a supermarket. When brand information is present and obvious, familiarity will still induce liking, however, because of the ease of identifying a familiar brand as a known quantity. Cf. ROB ROB WALKER, BUYING IN: THE SECRET DIALOGUE BETWEEN WHAT WE BUY AND WHO WE ARE 58 (2008) (consumers must be familiar with a brand to desire it).
186 Frederick, Automated Choice Heuristic, supra note 181, at 554; Strebinger et al., supra note 185, at 20.
187 See Strebinger et al., supra note 185, at 14, 16 (noting the tendency of consumers to use price as a heuristic).
188 See Frederick, Automated Choice Heuristic, supra note 181, at 554; Strebinger et al., supra note 185, at 15-16.
189 Frederick, Automated Choice Heuristic, supra note 181, at 554.
190 Strebinger et al., supra note 185, at 20 (reporting the common heuristic that “[w]ith a well-known brand, nothing much can go wrong”).
the mark itself.\textsuperscript{191} Rather, the process of evaluating the mark itself may stimulate significant positive emotions.\textsuperscript{192} Experiments have confirmed that repeated exposure to a stimulus alone increases positive feelings toward the stimulus.\textsuperscript{193} This is known as the “mere exposure” effect.\textsuperscript{194} The dominant explanation for the “mere exposure” effect is that the positive reaction to familiar stimuli is a function of ease of recall rather than a conscious appraisal of prior experience with the stimulus.\textsuperscript{195} For example, in experiments using nonsense Chinese ideographs, participants experienced an enhanced affect for an ideograph after repeated exposure whether or not they recognized it as something they had seen before and regardless of the absence of any objective meaning for the stimulus.\textsuperscript{196} In the context of advertising and brands, this research suggests that consumers will be more positively disposed toward a brand name, logo, or design after repeated exposure to it, regardless of that consumer’s considered evaluation of the underlying product or the actual brand.\textsuperscript{197} Studies suggest that consumers are often

\textsuperscript{191} Chris Janiszewski, \textit{Preattentive Mere Exposure Effects}, 20 J. CONSUMER RES. 376 (1993) (concluding that mere exposure to a product results in an increased preference for that product); see generally Garbarino & Edell, supra note 150, at 147, 156 (finding that ease or difficulty of processing affected consumer choice in some contexts independently of choice attributes); Gita Venkataramani Johar, et al supra note 173 at 142-43; Zajonc & Marcus, supra note 178, at 125.

\textsuperscript{192} Walker, supra note 185, at 58; Garbarino & Edell, supra note 150, at 147.

\textsuperscript{193} John A. Bargh, \textit{Conditional Automaticity: Varieties of Automatic Influences in Social Perception and Cognition, in UNINTENDED THOUGHT 3} (James S. Uleman & John A. Bargh eds., 1989); Frederick, \textit{Automated Choice Heuristic, supra note 181, at 553-54; Slovic et al., The Affect Heuristic, supra note 168, at 1336.}


\textsuperscript{195} Piotr Winkielman & John T. Cacioppo, \textit{Mind at Ease Puts a Smile on the Face: Psychophysiological Evidence That Processing Facilitation Elicits Positive Affect}, 81 J. PERSONALITY & SOC. PSYCHOL. 989, 994 (2001); see also Piotr Winkielman et. al., \textit{The Hedonic Marking of Processing Fluency: Implications for Evaluative Judgment, in THE PSYCHOLOGY OF EVALUATION: AFFECTIVE PROCESSES IN COGNITION AND EMOTION 189, 197, 203-04} (Jochen Musch & Karl C. Klauer eds., 2003) (feeling of processing fluency gives rise to hedonically positive feelings); cf. Robert F. Bornstein & Paul R. D’Agostino, \textit{The Attribution and Discounting of Perceptual Fluency: Preliminary Tests of a Perceptual Fluency/Attributional Model of the Mere Exposure Effect}, 12 SOC. COGNITION 103, 105-07 (1994) (hypothesizing that subjects try to explain the fluency experience by attributing it “to liking (or, for that matter, to any of a variety of stimulus properties that the subject is asked to rate”).

\textsuperscript{196} Bornstein, supra note 194 at 280-81.

\textsuperscript{197} Baker, supra note 28, at 44 (noting that consumers may chose familiar brands over those with superior attributes); Garbarino & Edell, supra note 150, at 156; Norbert Schwarz & Leigh Ann Vaughn, \textit{The Availability Heuristic Revisited: Ease of Recall as Distinct Sources of Information, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 103, 111} (Thomas Gilovich et al. eds., 2002) (arguing that using ease of recall as a judgment heuristic may lead to the opposite conclusion than considered evaluation of recalled content); Piotr Winkielman et al., supra note 193, at 207; cf. Kenneth Heilman, \textit{Emotional Experience: A Neurological Model, in COGNITIVE NEUROSCIENCE OF EMOTION 328, 360} (Richard Lane & Lynn Nadel eds., 2000) (automatic emotional responses are modular and cognitively impenetrable. These responses become the substrate for further cognitive elaboration, which is highly penetrable); Janiszewski, supra note 191, at 377 (finding that mere exposure to a product results in an increased preference for that product); Prakash Nedungadi, \textit{Recall and Consumer Consideration Sets: Influencing Choice without Altering Brand Evaluations, 17 J. CONSUMER RES. 263 (1990) (finding that increasing a brand's accessibility in memory via priming can influence the probability of the brand's being chosen even if its evaluations are unchanged); Rob Walker, \textit{The Brand-ness of Strangers NY TIMES}
unaware of the true source of the positive affect toward the brand, and misattribute it to the brand or product’s likeability, credibility, or suitability.198

Third, initial familiarity with a brand influences how the consumer processes subsequent information. To avoid incongruence, people tend to interpret information in line with initial expectations. Once a consumer has formed a positive impression of a familiar brand, she will feel more positively towards subsequent exposures, such as advertisements.199 The information from advertising also indirectly impacts purchasing decisions.200 Thus, familiarity with a brand can lead to an endlessly reinforcing positive feedback loop with advertising increasing familiarity and positive associations, and familiarity and positive associations increasing receptiveness to advertising claims.201 Accordingly, brand familiarity has emerged as one of the most powerful predictors of consumer choice.202

This reliance on familiarity can be seen as either irrational or adaptive. Under a theory where consumers are irrationally emotional, advertisers manipulate consumers into feeling more positively toward their brands by barraging them with irrelevant commercial messages designed to condition them to the stimulus. Under an adaptive theory, consumers rationally prefer more familiar objects because they have relatively more experience with these objects. Assuming nothing bad happened during the individual’s past encounters with the brand, the branded object poses less risk than a completely novel option.203 Furthermore, their very familiarity suggests a sufficient level of investment by an underlying firm to guarantee a minimum quality level. Where a

198 Camerer et al., supra note 37, at 17; Chris Janiszewski & Tom Meyvis, Effects of Brand Logo Complexity, Repetition, and Spacing on Processing Fluency and Judgment, 28 J. Consumer Res. 18, 18 (2001); Zajonc & Markus, supra note 178, at 126-27.
201 Id. at 39 (charting the multiple pathways by which advertising exposure, brand familiarity and attitudes toward specific advertising influence each other and impact consumer intentions); see Strebinger et al., supra note 185, at 32.
202 Ambler et al., supra note 4, at 253 (finding familiarity with a brand to be a good predictor of choice); Emma K. Macdonald & Byron M. Sharp, Brand Awareness Effects on Consumer Decision Making for a Common, Repeat Purchase Product: A Replication, 48 J. BUS. RES. 5 (2000) (finding brand awareness to be a powerful influence on brand choice); Strebinger et al., supra note 185, at 32 (listing all the pathways through which brand awareness influences choice); Batra & Ray, supra note 200, at 36 (finding that familiarity is the major determinant of purchase intentions in low-involvement conditions).
203 See e.g., Bornstein, supra note 194, at 282 (hypothesizing that preference for the familiar is an adaptive trait that evolved in humans over many generations; the effects protect an organism from interaction with unfamiliar substances or creatures until there is some evidence that they are not dangerous).
consumer needs only a satisfactory product, and is not inclined to bear the costs of further search, use of familiarity as a proxy may be a utility-maximizing decision strategy.204

To the extent that consumers rely on familiarity as a proxy, however, they are not relying on a complex associative memory network of product information to make a choice.205 Some brain imaging studies done on purchasers while making shopping decisions support this theory.206 Such studies, although preliminary, reveal divergent levels of brain activity when consumers confront familiar versus unfamiliar brands, but the differences do not involve semantic memory, as classic trademark theory would suggest.207 One such study, which measured brain activity levels of purchasers as they made purchase decisions in a supermarket setting, showed little difference in the level of activity in the memory recall centers of the brain for choices involving familiar versus unfamiliar brands.208 Another study found that choices involving familiar, favorite brands tended to stimulate less activity in working memory and reasoning centers of the brain than choices between unfamiliar brands.209 These results are inconsistent with what one would expect if consumers were accessing an information-rich store of associations in choosing familiar brands. Instead, such studies reveal that the primary activity difference for familiar or favorite brands relates to brain areas thought to be associated

204 Hanoch, supra note 152, at sec. 5.1.
205 See, e.g., Punj & Hillyer, supra note 4, at 125-26, 130 (finding that strength of preference is largely independent of brand associations and depends on the choice of heuristic used by the consumer); cf. Piotr Winkielman et. al, supra note 195, at 204 (hypothesizing that positive affective responses in response to processing fluency are generated very early and do not result from analysis of the stimulus object’s features); John G. Lynch, Jr. et al., Choices From Sets Including Remembered Brands: Use of Recalled Attributes and Prior Overall Evaluations, 15 J. CONSUMER RES. 169, 171 (1988) (positing that consumers rely to a greater extent on an overall brand evaluation rather than specific recalled attributes in making product decisions); but see id. at 177-78 (stating that consumers will rely on recalled attributes if overall evaluations are not diagnostic for the task at hand, such as when the consumer has formed relatively equal overall evaluations of two product choices).
206 Ambler et al., supra note 4, at 256; Michael Deppe et al., Nonlinear Responses Within the Medial Prefrontal Cortex Reveal When Specific Implicit Information Influences Economic Decision Making, 15 J. NEUROIMAGING 171 (2005).
207 Semantic memory is the area of long-term memory that stores words, meanings and general facts. Alex Martin & Linda L. Chao, Semantic Memory and the Brain: Structure and Processes, 11 CURRENT OPINION NEUROBIOLOGY 194, 194 (2001). Semantic memory includes generalized knowledge that does not involve memory of a specific event. See Endel Tulving & Daniel L. Schacter Priming and Human Memory Systems, 247 SCIENCE 301, 301 (1990). It is thought to be distinct from implicit memory, which involves emotional conditioning, unconscious reflexes and procedural skills. Id. at 301, 306; see also Larry R. Squire, Memory and the Hippocampus: A Synthesis From Findings with Rats, Monkeys, and Humans, 99 PSYCHOLOGICAL REV. 195, 210 (1992) (noting independence of declarative (semantic) memory from skill- and emotion-based implicit memory).
208 Ambler et al., supra note 4, at 256 (finding no difference in activity of semantic memory based on familiarity of a brand).
209 Deppe et al., supra note 206, at 178 (finding reduced activity in neural networks associated with reasoning-based decision for choices involving favored brands); but see Samuel M. McClure et al., Neural Correlates of Behavioral Preference for Culturally Familiar Drinks, 44 NEURON 379, 385 (2004) (finding that presence of brand information for Coke in soda taste tests instigated greater activity in semantic memory areas of the brain versus choice between blind options; interestingly, knowledge of brand information for Pepsi did not produce the same effect).
with positive emotions, arousal and focused attention.\textsuperscript{210} This research, although very preliminary, suggests that familiar brands act primarily through an affect heuristic that, in low-involvement conditions, is largely independent of a larger associative information network.

3. Familiarity as Trademark Selling Power

This research calls into question exactly what dilution law aims to protect by shoring up a mark’s “selling power.” Trademark owners and many marketing experts have equated this concept with a mark’s ability to stimulate certain positive associations in the minds of consumers.\textsuperscript{211} The ability of a brand name to stimulate positive brand associations in memory is the leading definition of “brand equity” or overall brand value in marketing literature.\textsuperscript{212} However, because consumer research suggests that consumers often do not reexamine in detail their brand knowledge each time they encounter a mark, this “brand equity” concept is not a convincing explanation of “selling power.” Consumers in low-involvement cases never reach this level of concern about specific product or producer qualities. If such consumers are concerned primarily with whether

\textsuperscript{210} See Ambler et al., supra note 4, at 256-57 (finding higher activity rates for familiar vs. unfamiliar brands in the right parietal lobe; the brain area that is associated with spatial attention and working memory); Deppe et al., supra note 206, at 180; see also Heilman, supra note 197, at 335 (noting that the firing of attentional neurons in the parietal lobe appears to be associated with the significance of the stimulus to the monkey, such that relevant stimulus are associated with higher firing rates than unimportant stimuli). It should be noted that one famous study that looked only at a comparison of two familiar brands, Coke and Pepsi, did find that differential levels of activity in areas of the brain associated with semantic memory accounted for differences in preferences between two familiar brands. Specifically, the study found that subjects equally preferred Coke and Pepsi in blind taste tests, but more chose Coca-Cola when they had brand information. McClure, supra note 209, at 379. Neuroimaging results from that study indicated that access to positive memories about the brand changed the subject’s functional preference. Id. at 385. A more recent reconstruction of that study using patients with impaired emotional functioning but no memory deficits showed no change in preference when brand information was present. Michael Koenigs & Daniel Tranel, Prefrontal Cortex Damage Abolishes Brand-Cued Changes in Cola Preference, 3 SCAN 1, 1-6 (2008). These two studies together show that emotional processing was crucial to the subjects’ ability to form a brand-related preference, but suggest that at least in the Coke-Pepsi context, emotional impulse was preceded by a search of brand associations in memory. But these two studies do not indicate that affective reactions always depend on retrieved memories about a stimulus and cannot arise independent of such information. Affective judgments have often been revealed to be faster than factual deliberation, which suggests the two can happen independently. See, e.g., Ambler et al., supra note 4, at 254; Pham et al., supra note 5, at 175. A better explanation for the difference in results between the McClure and Ambler/Deppe studies would be that when confronted with two brands of roughly equal familiarity, such as Coke and Pepsi, consumers drop back to more detailed examination of relevant affective associations. E.g., Lynch et al., supra note 210, at 177-78 (stating that consumers rely on recalled attributes when overall evaluations of two product choices are relatively equal); Baker, supra note 28, at 1 (finding that familiarity with a brand did not provide a competitive advantage against equally well-known, established competitors). In such circumstances consumers would be forced to abandon pure System I processing and fall back on at least some System II recall of attribute information. Cf. McClure et al., supra note 209, at 385 (hypothesizing the independence of systems measuring sensory preference and systems measuring informational preference).

\textsuperscript{211} E.g., Kevin Lane Keller, Conceptualizing, Measuring, and Managing Consumer-Based Brand Equity, 57 J. MARKETING 1, 2 (1993); Punj & Hillyer, supra note 4, at 125.

\textsuperscript{212} See, e.g., David A. Aaker, Measuring Brand Equity Across Products and Markets, 38 CAL. MGMT. REV. 102, 102-20 (1996); Keller, supra note 211, at 1-22; Punj & Hillyer, supra note 4, at 125.
they like the mark, and this determination is greatly informed by how familiar the mark is, then “selling power” probably stands for little more than the consumer’s general familiarity with a famous mark.213

This leads to a second important question: why is anyone is worried about diluting or blurring “selling power” if it is nothing more than the awareness of a mark? Recall that much of the positive reaction to familiar marks stems from their effectiveness at reducing cognitive effort. It is unsurprising that newcomers might want to trade on the positive affect generated by famous marks. Presumably, trademark owners should want newcomers to use the brand and so make it even more familiar.

However, the marketing literature does suggest two ways that follow-on uses of a mark could increase the brand’s cognitive costs for consumers, and so reduce its effectiveness as a sales tool.214 These are “inconsistency” and “wearout” effects.

First, studies suggest that inconsistent uses of familiar brands can cause a loss of credibility and diminished confidence in the brand signal. I refer to this as the “inconsistency effect.” Familiar trademarks are reassuring because we think we know what they are.215 If we start to encounter a mark in incongruent settings, even if we don’t consciously evaluate the new context or its relationship to the familiar brand, our confidence in our understanding of the brand starts to wane.216 Inconsistency in this context could refer to an aesthetic conflict, such as if a familiar mark is encountered in an unexpected color, size or style.217 Inconsistency can also refer to a conceptual conflict. This would occur when a mark associated with one type of goods is associated with another conflicting type, such as when a brand associated with “mild” products is used on something known to be harsh and abrasive.218 Interestingly, incongruity may not cause

213 Cf. Brown, supra note 7, at 1194 (noting the advertising maxim that “Repetition is reputation”).

214 See Loken & John, supra note 105, at 71 (noting two ways in which brands can be diluted: wearout and lowering of brand equity); cf. Tülin Erdem & Joffre Swait, Brand Credibility, Brand Consideration, and Choice, 31 J. CONSUMER RES. 191, 192 (2004) (noting that high levels of cognitive effort may induce a negative affect and decrease the likelihood of a brand being considered and chosen by a consumer); Garbarino & Edell, supra note 150, at 156 (same).

215 Cf. Gregory S. Carpenter, et al., Market-Driving Strategies: Toward a New Concept of Competitive Advantage, in KELLOGG ON MARKETING (Dawn Iabucci ed., 2000) (“Brands with distinctive personalities are competitively unique, easier to remember and are more positively viewed. The advantage remains so long as the personality remains distinctive.”).

216 Dacin & Smith, supra note 139, at 232 (“[P]eople have greater confidence in their judgments when they perceive the sample to be homogenous . . . than when they perceive it to be heterogeneous.”); Tülin Erdem & Joffre Swait, Brand Equity as a Signaling Phenomenon, 7 J. CONSUMER PSYCHOL. 131, 137-38 (1998) (concluding that clarity of brand signals, defined by consistency of the marketing mix, is an important component of the brand’s credibility).

217 Incongruity here could be purely a function of decreased “processing fluency” such as when a mark doesn’t correspond with its prototype in memory. See Piotr Winkielman et al., Prototypes Are Attractive Because They Are Easy on the Mind, 17 PSYCHOL. SCI. 799 (2006) (finding that the prototypicality of a stimulus, its “averageness,” is associated with increased processing fluency and positive affect); Winkielman et. al, supra note 195, at 8 (same).

218 See Loken & John, supra note 105, at 73; see also Winkielman et. al, supra note 195, at 17 (noting that “conceptual fluency,” defined as the semantic congruency between items, also is associated with positive affect).
our conscious beliefs about the brand and the original product to change. These beliefs are well-rehearsed and resistant to alteration.\footnote{Deborah Roedder John et al., The Negative Impact of Extensions: Can Flagship Products Be Diluted?, 62 J. MARKETING 19, 20 (1998); see also Stephen J. Hoch, Product Experience Is Seductive, 29 J. CONSUMER RES. 448, 451 (2002) (stating that existing brand associations block the learning of new attribute associations).} What might change is our level of confidence in these beliefs; our willingness to rely on the mark as a decision heuristic therefore would decline.\footnote{Erdem & Swait supra note 29, at 137-38.} We may find that the brand requires more effort to evaluate and a negative tone associated with risk could appear.\footnote{See Qinggouo Ma et al., Event-Related Potential N270 Correlates of Brand Extension, 18 NEUROREPORT 1031, 1031-34 (2007) (measuring activity in areas of the brain associated with conflict and negative emotion after viewing inconsistent brand extensions).} At the extreme, this could cause an involuntary switch from an overall positive to an overall negative affect toward the brand.\footnote{Dacin & Smith, supra note 139, at 233 (“product judgments are negatively related to consumers’ uncertainty in their beliefs about a product.”); Ma et al. supra note 221, at 1031-34; Swann, supra note 14, at 613-14 (“[U]ltimately, consumers would subconsciously ask ‘why should I try to remember a term that may not lead to a known, but to a variety of experiences.’”); but see Kathryn A. Braun-LaTour et al., Mood, Information Congruency, and Overload, 60 J. BUS. RES. 1109, 1115 (2007) (finding that consumers may respond positively or negatively to conceptually incongruent messages depending on the mood and type of the processing being relied on).}

Psychologists have observed evidence of inconsistency effects when examining reactions to proposed extensions of brands to new product lines. When observers perceive a lack of fit between the physical or conceptual attributes of a second product labeled with a well-known brand, areas of the brain correlated with conflict and negative emotion light up.\footnote{Ma et al., supra note 221, at 1031-34.} Similarly, if unrelated third parties repurpose brands on products with a poor “fit” to the consumer’s existing impressions, consumers may lose confidence in their assessment of the brand’s signaling value.\footnote{Dacin & Smith, supra note 139, at 233; Erdem & Swait, supra note 29, at 137-38.} At worst, the negative emotions they experience as a result of the poor fit could be translated into a negative reaction to the senior mark.\footnote{Initial studies measuring the impact of the negative assessments of brand extensions found no impact on the overall attitudes to the parent brand. E.g., David A. Aaker & Kevin Lane Keller, Consumer Evaluations of Brand Extensions, 54 J. MARKETING 27 (1990). However, these studies relied on hypothetical, instead of real, brands and measured attitudes through focused survey questioning. Later studies that focused on real world purchase data found that a negative opinion of an actual extension translated into decreased sales of the parent brand. Erdem, supra note 37, at 347 (evaluating scanner data for toothbrush and toothpaste purchases); Swaminathan et al., The Impact of Brand Extension Introduction, supra note 37, at 12-14 (evaluating household purchase data). Other studies found evidence of negative spillover to brand attribute beliefs from extensions to incongruent products. E.g., Loken & John, supra note 105, at 71-84. Another study found that after seeing an incongruent brand use, participants viewed subsequent brand extensions less favorably. Kevin Lane Keller & David A. Aaker, The Effects of Sequential Introduction of Brand Extensions, 29 J. MARKETING RES. 35 (1992); see also Swaminathan, Sequential Brand Extensions supra note 37, at 440-41 (finding that negative evaluations of brand extensions lowered the likelihood of trying subsequent extensions but did not effect the purchases of the parent brand).} Because affective reactions arise automatically and faster than
cognitive appraisals,226 such effects occur whether or not the consumer is consciously aware that the new use of a mark is unauthorized.227

Second, the marketing literature suggests that although familiarity leads to a positive affect, certain kinds of over-familiarity lead to boredom and a negative affect. Although repeated exposure to a stimulus initially leads to liking, unvaried exposure eventually causes boredom.228 If we see the same things too often, we resent having to use effort to evaluate them repeatedly.229 Brand owners manage this advertising wearout by varying advertising campaigns and redesigning logos from time to time.230 The research is mixed
as to whether wearout even exists, and if so, to what extent it impacts familiar brands. Nevertheless, real-world brand managers express concern about it. A few studies support the notion that blurring could lead to wearout because market newcomers are more likely to choose promotional strategies that are thought to produce wearout effects. Established brands tend to rely on evocative advertising strategies meant not to challenge the consumer, but merely to remind him in a background way about the mark. Advertising for new products typically tries to grab the consumer’s attention and challenge him to change his behavior. This second kind of ad stimulates more elaborative processing and is probably more likely to lead to wearout. These studies suggest that advertising strategies adopted by newcomers could hasten wearout for familiar brands if they cause audience members to think more deeply about the brand.

It is difficult to measure the strength of inconsistency and wearout effects. Much of the existing research in this area comes from laboratory studies that imperfectly reflect the crowded conditions of the marketplace. It is not clear that student reactions to carefully studied blank “tombstone” ads in an experimental setting bears any relationship to consumer reactions to incidental encounters with the hundreds of ads and trademarks that consumers typically see in a day. Furthermore, some studies measure changes in people’s affect or beliefs through direct focused questioning designed to stimulate thoughtful responses. Few of us pause long enough to consider our reactions to brands and logos in this way, and engaged consideration of our reactions may inadvertently change them.

Furthermore, famous brands may be impervious to the effects of inconsistency and wearout. One study designed to measure the delay in memory recall of brands after

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233 See, e.g., Nordheilm, supra note 230, at 372-82 (measuring the effect of levels of processing on wearout of affective response to advertising); cf. Campbell, *supra* note 229 (finding that ads for familiar brands wearout more slowly than the same ads attributed to unfamiliar brands.)


235 *supra* note 231.

236 See Nordheilm, *supra* note 230, at 373, 380 (demonstrating that wearout is more likely where consumers think more extensively about the content or presentation of advertising).

237 *supra* note 231. The research on wearout is far from settled. Some have suggested that multiple uses of similar brand names will enhance consumer interest and learning about a brand, thus enhancing affect toward the famous mark. See Tushnet, *supra* note 37, at 536-39. Because so many free-riders attempt witty word play with famous marks, consumer appreciation of and memory for the original mark might be enhanced by these new opportunities to learn. On the other hand, the follow-on activity might enhance interest in the new brands while contributing to a sense of tedium about the original. Cf. Calder & Sternthal, *supra* note 228, at 185 (finding that variations of ad executions forestalled wearout for the ads but not the advertised product).

238 Tushnet, *supra* note 37, at 542.


exposure to diluting uses found no significant effects for familiar marks such as Continental Airlines and Avon.\textsuperscript{241} It may be that our positive impressions of these kinds of brands are so well-established that it would take negative reinforcement of cataclysmic proportions to unseat them.\textsuperscript{242} Still, history is not without examples of once-famous brands that lost their footing and their customer base through poor image management. Gucci, for example, came close to bankruptcy in 1994 after the brand was licensed on everything from toilet paper to tote bags.\textsuperscript{243} The tipping point may be high for well-known brands, but there is no reason to believe it doesn’t exist.\textsuperscript{244} Further, even if flagship products were completely impervious to dilution, blurring still might negatively impact the ability of the famous mark owner to launch new products and extensions because of the effort required to distinguish authorized from unauthorized new uses.\textsuperscript{245}

Current behavioral research cannot establish that cognitive or affective changes are certain or even likely to result from conduct defined as “blurring” under current law. However, it can provide a theoretical model that better explains the concerns expressed by trademark owners. Under the cognitive miser theory of consumer decision-making, the harm of dilution is a feeling of dislike or anger that may result from the extra cognitive effort required to evaluate a brand. Because emotional valence is so important to purchasing decisions in low-involvement situations, that negative response might cause an involuntary and, ultimately inefficient change in purchasing behavior.\textsuperscript{246}

\textsuperscript{241} Morrin & Jacoby, supra note 37, at 14.
\textsuperscript{242} John et al., supra note 219, at 19, 20 (stating that consumer’s network of beliefs linked to flagship products tends to extreme, strongly held, and resistant to change). But see Swaminathan et al., The Impact of Brand Extension Introduction supra note 37, at 2 (“The beliefs associated with the core parent brand are likely to be of varying strength across different segments of consumers.”).
\textsuperscript{243} \textit{See}, e.g., John Carreyrou & Cecilee Rohwedder, \textit{Style & Substance: In Again at Gucci: Licensing - PPR Says It May Start to Sell Franchises, Product Rights For Smaller Designer Brands}, WALL ST. J., Mar. 5, 2004, at A9; \textit{see also} Suzy Menkes, \textit{A License to Kill; Fashion Houses Move to Tighten Brand Control}, INT’L HERALD TRIB., July 4, 2000, at 9 (discussing a trend in fashion to not license famous brands to outside manufacturers because of risks of declining image, poor quality control, and poor valuation by potential investors); Gibson, supra note 232, at B1.
\textsuperscript{244} \textit{E.g.}, Camerer et al., supra note 37, at 25 (stating that people tend to disregard information that conflicts with well-defined beliefs until an accumulation of evidence leads to an abrupt recategorization).
\textsuperscript{245} \textit{See} Swaminathan, \textit{Sequential Brand Extensions supra note 37 at 440-41; Keller & Aker, supra note 225.
\textsuperscript{246} A final reason for trademark owners to be concerned by uncontrolled use by third parties, whatever its cognitive effects for consumers, is that the law assumes that such use lowers the distinctiveness of the senior mark. The presence of many variations of a famous mark in the marketplace will decrease the first mark’s effective scope of protection. For example, trademark owners who fail to object to similar uses of their mark on unrelated goods risk losing the ability to object to any new use because adjudicators may assume that any additional use is unlikely to create confusion in what is already a “crowded field.” \textit{Cf.} Nautilus Group, Inc. v. Savvier, Inc., 427 F. Supp. 2d 990, 995 (W.D. Wash. 2006) (stating that protection of even strong marks is weakened by presence of a ‘crowded field’); Moose Creek, Inc. v. Abercrombie & Fitch Co., 331 F. Supp. 2d 1214, 1225 (C.D. Cal. 2004) (same). Similarly, the new Trademark Dilution Revision Act of 2006 instructs courts to consider the extent to which a senior mark owner is making “exclusive use” of the mark as a factor in gauging the likelihood of blurring. Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, § 2, 120 Stat. 1730, 1730 (to be codified at 15 U.S.C. § 1125(c)). The more uses of similar marks a defendant can point to, even on unrelated goods, the less chance any new use will be found to “blur” the distinctiveness of the senior mark beyond what has already occurred. In this respect it pays for trademark owners to object to even trivial third party use to prevent the weight of those sorts of uses from undercutting the law’s recognition of the mark’s distinctiveness: a legal “death by a
III. Implications

A. Blurring is a Form of Tarnishment

One benefit of this research is that it offers a theoretical model for the harm that dilution causes that is intuitively easier to understand. Dilution harms trademark owners not because it causes consumers to “think for a minute,” but because that pause may cause the consumer to become frustrated with the mark and punish the brand.

The introduction of emotion to the equation answers many of the concerns about the elusive harm underlying the blurring doctrine. In particular, the emotional explanation of dilution answers the question of why a consumers’ behavior toward a senior mark might change even if she is not consciously confused about whether the mark’s owner has authorized a subsequent “blurring” use. Affective reactions to marks are automatic and can precede cognitive appraisal. Therefore, assuming there is sufficient similarity between two marks, a consumer is likely to imbue a second product with the halo of a famous mark’s reputation even if further cognitive elaboration reveals the mistake. She may react less positively toward the senior mark after a sufficient exposure to blurring not because she believes the blurring uses were authorized, but because she now reflexively finds the senior mark less credible and therefore more taxing. Essentially, the term dilution refers to an alternative form of “confusion” that is pre-conscious and automatic. Those who blur a famous mark may receive the benefits of its automatic positive response even if they are not entitled to it, and too many such users may cause a change in a consumer’s automatic response to the mark even without conscious confusion about the source of the mark.

This model reverses the common understanding of blurring and tarnishment. Tarnishment, defined as uses of a mark on unrelated goods that cause harm to the senior user’s reputation, is sometimes referred to as a “subset” of blurring. The common assumption is that all prominent uses of similar marks on unrelated goods cause blurring by dissociating the mark from the senior owner. However, only some uses with particular kinds of products are thought to negatively influence the consumer’s opinion of the original mark. In fact, it’s probably more accurate to say that blurring is a subset of the ways in which a mark may be tarnished. Through wearout or inconsistency, blurring may slowly cause the same kind of negative change in affective valence that occurs immediately with tarnishment. Both tarnishment and blurring eventually cause the consumer to feel worse about the senior brand.

247 See supra note 176 for sources cited therein.
248 See supra text accompanying notes
249 See supra text accompanying notes
250 Long, supra note 20, at 1059; Swann, supra note 14, at 622.
B. Information Quality and Property Rights in Mental Processes

That dilution has the potential to be harmful does not answer the question of whether we should forbid it. This section examines the likely harms flowing from dilution by blurring and considers the extent to which these harms implicate any larger societal interests, as opposed to private harms to individual producers. One interesting aspect of dilution theory is that the harm at issue, an unconscious and involuntary response to advertising that frustrates an individual’s real preferences, is similar to the original critiques of persuasive advertising. But proponents of dilution law cannot have it both ways. If “involuntary” alteration of consumer preferences is wrong, then the positive feelings generated by persuasive advertising are at least as problematic as any negative ones stimulated through dilutive conduct. If persuasive advertising can be valuable even if consumers don’t understand how they use it, then perhaps the same might can be said for dilution by blurring. Because the law has no inherent interest in product preference per se, dilution regulations must stand or fall on whether they implicate societal interests in promoting competition by allowing effective communication about products and services.251

Recall that our primary goals with regard to trademark protection are to lower search costs and to increase the overall quality of information exchanged in the marketplace in the service of inter-brand competition.252 Protection against dilution by blurring is relatively easy to square with trademark law’s first goal. Protecting the automatic allure of familiar marks certainly helps to lower search costs. Reliance on preconscious impulse serves a consumer’s interest in acquiring goods with the lowest possible expenditure of cognitive effort.

The second goal – to increase the quality of the information exchange to stimulate competition – poses a harder case. The argument in favor of excluding arguably non-confusing blurring such as the coffee shop Federal Espresso or the medical equipment importer Nikepal from the marketplace relies on one of two assumptions about consumer behavior.253 Consumers will either (1) inadvertently favor lower quality products because of their automatic positive response to a well-known mark, or they may (2) avoid high-quality products sold under the original mark because they perceive increased risks to the brand that are not real. These arguments do not necessarily hold up in light of the current understanding of how automatic emotional processes guide purchasing decisions.

Let’s consider the low-quality, dilutive product first. If people automatically judge products associated with well-known marks as more credible and less risky, then they may embrace a good that uses a famous mark but has no relationship to it. Thus, they will buy more risk than they intended. A consumer, for example, might be

251 See Kratzke, supra note 11, at 214-29 (arguing trademark law’s paramount concern should be the interests of consumers as served by competition among brands; trademarks serve this interest by efficiently providing information about available choices).
252 See supra text accompanying notes 39–49.
marginally more inclined to purchase “Mercedes Climbing Ropes” because the familiar mark subconsciously will suggest a lack of risk. Because the rope producer lacks the car company’s incentives to ensure quality, it might operate cheaply, using low quality materials that will fail under stress. In this case, the consumer could suffer a grave harm. The law forbids the use of confusing trademarks to prevent just this kind of mistaken purchase. However, if the consumer can easily ascertain from context that the rope comes from a source unrelated to the high-quality car, she will most likely correct for the attribution bias herself because she has an interest in not being misled. It is unlikely that consumers buy important goods solely because of a brand signal they consciously know to be false. If the use of the signal alerts the consumer to an option that, on further reflection, she would like to purchase even though it is unrelated to the well-known good, it is hard to see much immediate harm to the consumer or the larger market.

The longer-term concern is that the inconsistent use of the senior brand symbol will lower the credibility of the senior brand. The brand’s ability to generate an automatic positive response may be compromised. In this way, free-riders might cause people to involuntarily change their preferences for the senior brand, thus lowering the producer’s incentives to invest in quality brands generally. This will also prevent communication of ‘real’ preferences to producers, interfering with the efficient allocation of resources to production of the goods that are most desirable to consumers.

This argument engages in an interesting paternalism about preferences. It’s not quite the approach imagined by Ralph Brown: that only deliberative, conscious consideration of product features is rational and worth protection. It’s also not quite the approach envisioned by the rational maximizers: that the law should protect the consumer’s ability to focus without distraction on the positive attributes of the mark and product. Consumers in many circumstances do not bother to retrieve brand associations with this level of detail and semantic meaning. Instead they use the familiarity and consistency of a stimulus as a rough proxy for a more detailed semantic evaluation. The preference expressed by the consumer in these cases is for an easy, safe choice without much effort. It is worth asking whether protecting convenience, divorced from more specific informational content, draws the correct balance between lowering search costs and promoting beneficial competition.

1. *Lowering Brand Credibility does not necessarily frustrate Consumer Preferences*

First, it is not clear that the lowering of one brand’s credibility through blurring will actually frustrate consumer preferences. Recall that consumers have a choice of

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254 *Cf.* Park & Hastak, *supra* note 171, at 544 (arguing that consumers will rely less on automatic evaluations where they are highly motivated, such as when a purchase is important to them); Posner, *supra* note 166, at 1985 (theorizing that people are generally knowledgeable about their emotional dispositions and can recognize when emotions are likely to lead them astray as well as take steps to modify their reliance on emotions).

255 See *supra* text accompanying notes 214-227.

strategies when making a purchasing decision. This choice may dictate how much the “emotional” valence of a given trademark will influence their behavior. As previously discussed, consumers have a choice of relying on deliberative, high-cost System II decision-making, and automatic, low-cost System I decision-making. It follows that consumers will rely on deliberative methods when they deem the choices of sufficient importance and they have sufficient information to make an informed choice. Consumers themselves are probably at least partially aware of their susceptibility to familiarity heuristics, and will take steps to counter these influences when they judge it important to do so.

If the consumer would prefer to rely on System I decision-making, she has implicitly determined that she does not mind being slightly misled by automatic judgment heuristics. Consumers rely on System I processes when they prefer to conserve cognitive resources. They are willing to accept the risk of a less than optimal choice in exchange for lower decision-making costs. In this sense, consumers can be seen as complicit in allowing automatic affective responses to guide decision-making. Although their expressed preference might differ from the choice they would have made if they had unlimited time and resources to choose, it accurately reflects their combined preference for the product and the amount of time spent searching for it. Thus, blurring is likely to have the greatest impact on product choice in situations where consumers lack clearly defined functional preferences. If one choice has been “blurred,” the consumer can substitute another familiar brand that also meets her taste for risk-aversion and cognitive cost-avoidance. Such substitution harms the senior producer, undoubtedly. Social welfare, on the other hand, has declined little if the consumer finds a substitute that adequately meets her needs.

2. Property Rights in Positive Feelings is Beyond the Scope of IP Law

Second, granting proprietary rights in reflexive positive feelings also seems to be a departure from the conventions of intellectual property law. Even in areas of law designed to reward producers, such as patent and copyright, we refuse to grant rights in

257 See supra text accompanying notes.
258 Indeed, research suggests that consumers rely to a greater extent on licensing and certification information than on seller experience claims in the case of high-cost, infrequently purchased credence goods and services. See Robert B. Ekelund, Jr. et al., Advertising and Information: An Empirical Study of Search, Experience and Credence Goods, 22 J. ECON. STUD. 33, 41 (1995).
259 Posner, supra note 166, at 1985 (2001) (theorizing that people are generally knowledgeable about their emotional dispositions and can recognize when emotions are likely to lead them astray as well as take steps to modify their reliance on emotions).
260 Frederick, Cognitive Reflection, supra note 173, at 26.
261 See supra text accompanying notes.
262 Cf. Frederick, Automated Choice Heuristic, supra note 181, at 557-58 (noting theories of adaptive decision-making that trade off effort and accuracy by tailoring use of heuristics to importance of the decision); Gerd Gigerenzer et al., How Good are Fast and Frugal Heuristics?, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 559, 580 (Thomas Gilovich et al., eds., 2002) (noting that consumers probably trade off simplifying versus complex decision strategies against the time and effort they are willing to spend).
pure “mental processes” divorced from any specific tangible result. We do this out of a concern for competition; it is not desirable for any one entity to own the ability of all people to use their wits in a certain way. Awarding property rights for the ability to signal general familiarity and consistency may raise similar monopoly concerns. No competitor can ever compete effectively with a category leader on this basis. The established brand will always be more familiar. Constraints on consumer’s time and motivation to search will always favor familiar brands because they will always seem less risky.

Market leaders benefit from such effects even without dilution law. For example, one study comparing twenty-two leading brands in 1925 found that in all but three of the product classes, the same brand was still the leader in 1985. Consumers may have good reasons for continuing to patronize familiar sellers, but the law insulates such tendencies by propertizing brand familiarity. Protection against dilution may be tantamount to giving property rights in market leadership.

3. Dilution Laws Incompletely Protect Consumers from Affectively Biasing Advertising

Most advertising is designed to appeal to affective biases, but dilution regulation protects consumers from only a tiny subset of such efforts. While some areas of law, notably the Federal Rules of Evidence, support the exclusion of information if its relevance to an important determination is outweighed by its tendency to emotionally bias the decision-maker, such rules apply equally to all speakers. If preserving the quality of information available to the consumer is the goal of trademark dilution law, then it is problematic to have two different standards for trademark owners and for follow-on speakers.

263 Copyright law explicitly excludes ideas and processes. 17 U.S.C. § 102(b) (2000). Patent law also excludes protection for “mental processes” that are divorced from any technological embodiment or tangible effect. Diamond v. Diehr, 450 U.S. 175, 185 (1981); In re Comiskey, 499 F.3d 1365, 1380 (Fed. Cir. 2007).

264 In re Comiskey, 499 F.3d at 1380 (noting that patent’s subject matter restrictions are designed to weed out monopolies that will not enrich the public).

265 Baker, supra note 28, at 44 (finding that brand familiarity superiority inoculates established brands from competitor attempts to use familiarity to influence choice; the dominant brand is always more familiar).

266 Anusree Mitra & John G. Lynch, Jr., Toward a Reconciliation of Market Power and Information Theories of Advertising Effects on Price Elasticity, 21 J. CONSUMER RES. 644, 645 (1995) (stating that consumers tend to simplify their purchasing decisions by making their selection from smaller subsets of all possible available brands); Erdem & Swait, supra note 29, at 140 n.2 (arguing that uncertainty and information costs influence which brands are included in consideration sets); Lynch et al., supra note 210, at 171 (theorizing that consumers consult the most accessible inputs first in making decisions; if the first input is diagnostic, the search terminates); cf. John J. Siegfried & Laurie Beth Evans, Empirical Studies of Entry and Exit: A Survey of the Evidence, 9 REV. INDUS. ORG. 121, 139 (1994) (hypothesizing that consumer’s risk-aversion favors established players).

The analogy to the federal evidence rules can help to illustrate the point. At first glance, dilution prohibitions seem to embody similar concerns to evidentiary standards that permit judges to exclude otherwise relevant evidence from jurors if the probative value of that information is substantially outweighed by the danger of unfair prejudice.\(^{268}\) “Unfair prejudice” means an undue tendency to influence a decision on an improper basis; this is commonly, though not necessarily, an emotional one.\(^{269}\) This evidentiary standard assumes that certain kinds of information and suggestion may so captivate the listener’s attention and imagination that she is not capable of disregarding it.\(^{270}\) In such situations, considerations of economy and fairness mitigate in favor of excluding the information at the outset.

In the trademark context, owners make a similar argument about tarnishment and blurring. They essentially argue that commercial free-riding on famous trademarks offers little relevant information and has a tendency to elicit emotional responses that cause objectively poor decisions—in other words that the informational value provided by free-riding is substantially outweighed by its tendency to prejudice. This analogy helps to explain why dilution law does not target parody, news reporting and general idiosyncratic personal experience; not because such uses do not blur the senior mark, but that their relevance to the senior producer outweighs any likely harm. While most people agree that consumers benefit by considering relevant criticism and commentary in making purchasing decisions, dilution law proponents argue that free-riding is entirely opportunistic,\(^{271}\) and in such cases that the balance tips the other way.

Courts have found these kinds of concerns most persuasive in the tarnishment context. Judges are willing to forbid uses of marks that are likely to incite disgust or fear out of concern that such emotions, once stimulated, will be difficult to put aside even when the consumer knows the use is unauthorized.\(^{272}\) These cases typically concern the

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\(^{268}\) Fed. R. Evid. 403.

\(^{269}\) United States v. Puckett, 405 F.3d 589, 598 (7th Cir. 2005). Typically the kinds of evidence excluded under this rule fall into one of three categories: (1) evidence which seeks to affect the jurors' perception of a party, either favorably or unfavorably, because of evidence of past crimes or bad acts, bad habits, or a party's past good acts; (2) evidence damaging the position of a party because of the party's association with certain groups, as by showing that a party is insured or associated with an unpopular political group; and (3) evidence which will incite the jury's rage or desire for revenge against defendant, the most successful method being introduction of inflammatory picture. \(Id.\)

\(^{270}\) Id.

\(^{271}\) See, e.g., Ty Inc. v. Perryman, 306 F.3d 509, 512 (7th Cir. 2002) (Posner, J.) (noting example of a “Tiffany’s” restaurant in Kuala Lumpur as an example of trademark free-riding that might dilute; restaurant owner selects the name solely to benefit from fame of senior Tiffany’s mark); David J. Franklyn, Debunking the Dilution Doctrine: Toward a Coherent Theory of the Anti-Free-Rider Principle in American Trademark Law, 56 HASTINGS L.J. 117, 141 (2004) (arguing that trademark free-riders select their marks to capitalize on fame they did not create, that they select their marks solely due to similarity with well-known marks, and that allowing such use grants no discernable benefit to society); cf. Nike Inc. v. Nikepal Int’l Inc., 84 U.S.P.Q.2d (BNA) 1820, 1823 (E.D. Cal. 2007) (noting that defendant argued that he had picked name “Nikepal” from randomly pointing in the dictionary).

\(^{272}\) See Ty Inc., 306 F.3d at 511 (arguing that because of inveterate tendency of human mind to proceed by association, people will connect jeweler Tiffany’s to strip joint Tiffany’s even if they know the two are unrelated); Cynthia Grey v. Campbell Soup Co., 650 F. Supp. 1166, 1175 (C.D. Cal.1986) (“Grey's use of DOGIVA and CATIVA . . . injures Campbell's business reputation because of the association which the
commercial connection of a famous mark to products connected with sex, drugs or violence. If blurring is a form of tarnishment, as has been argued above, perhaps it should comply with a similar balancing test.

The analogy of dilution to a Rule 403 balance fails however because Rule 403 is applied to all advocates while dilution applies selectively. At trial, neither party is permitted to introduce evidence with low probativeness that has a tendency to bias the preferences of the factfinder. In trademark law, we allow and even encourage trademark owners regularly to provide information of dubious relevance and a large propensity to appeal to affective biases. We ask trademark consumers to do the work of parsing relevant from irrelevant information in this context. Dilution regulation protects consumers only from the biasing effects of competitor or newcomer speech. If we acknowledge that much of the brand information that owners seek to protect can also be called “more prejudicial than probative,” it’s unclear that we should protect the integrity of this information against free-riding. Holding owners of established marks to materially different informational standards than market newcomers seems unlikely to increase competition or the quality of information in the marketplace.

C. Free-Riding as Information

An alternative approach, more in line with the “advertising as information” school, is to acknowledge the value that simple, familiar brands offer to consumers in a crowded marketplace, and to recognize similar, competing value offered by others who free-ride on those symbols for their own purposes. Most critiques of dilution law focus on the law’s propensity to be used against traditionally high-value First Amendment speakers such as satirists and expressive critics. Few commentators offer any defense of the pure commercial “free-rider,” typically a small, upstart that uses a famous trademark in a hapless way to grab attention. Some examples from the case law include a medical equipment importer called “Nikepal,” a perfume and beauty products site called “Perfume-bay,” an erotic novelty shop called “Victor’s Little Secret,” a public makes between DOGIVA and CATIVA treats for animals and GODIVA premium quality food products which are intended for human consumption.”); Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 467 F. Supp. 366 (S.D.N.Y. 1979) (enjoining pornographic film that prominently featured plaintiff’s trademarks because of tarnishment of reputation of famous cheerleading squad); Coca-Cola Co. v. Gemini Rising, Inc. 346 F. Supp. 1183 (E.D.N.Y. 1972) (enjoining poster that connected Coke beverage to slogan “Enjoy Cocaine”);

Long, supra note 20, at 1057.

274 E.g., Dogan supra note 11, at 106 (arguing that the focus on free-riding in dilution law is misguided because even artists, critics and competitors looking to draw functional comparisons “free-ride” on famous brands in making their points); Tushnet, supra note 37 (arguing that dilution law violates First Amendment rules because it fails to distinguish harm caused blurring from similar harms caused by protected critical and parodic speech).

275 E.g. Franklyn, supra note 272 (arguing for replacing dilution with a cause of action that explicitly targets free-riding on famous marks); Tushnet, supra note 37 (advocating a limited dilution cause of action aimed at deterring unfair competition through misappropriation of brand value).

276 Nike Inc., 84 U.S.P.Q.2d (BNA) at 1820.

277 Perfumebay.com Inc. v. eBay, Inc., 506 F.3d 1165 (9th Cir. 2007).

state tourism board that promotes its ski industry as “The Greatest Snow on Earth,” a Syracuse coffee shop called “Federal Espresso,” a coffee bean variety known as “Charbucks” and a moving company’s whimsical depiction on its vans of a brown sofa emerging from a candy bar wrapper evocative of the Hershey chocolate bar’s trade dress. Each represents a blatant attempt to harness someone else’s trademark for commercial value. Nonetheless, for the same reasons that persuasive advertising might offer useful cues about quality even if consumers don’t consciously understand those cues, blurring may offer useful information to consumers. Blurring refers to a long-standing strategy used by newcomers to ease entry in crowded marketplaces. Consumers can benefit through blurring by learning about new product choices. Consumers also benefit by learning additional information about a brand owner and its products. Overregulation of the use of these symbols may be as socially harmful as under-regulation.

1. Blurring Eases Barriers to Entry

Dilution of well-known symbols for commercial gain has a long and distinguished pedigree. The use of a familiar symbol can attract consumer attention to an unfamiliar product. Such references inevitably free-ride on the famous marks, but few other strategies are as effective at commanding attention in oversaturated marketplaces.

A few historical examples can illustrate the point. Recall that the paradigmatic case of blurring involves the simultaneous use of the mark “Tiffany’s” on a jewelry store and an unrelated restaurant. The free-riding restaurant introduces irrelevant associations with the prestigious Tiffany’s mark and so degrades its salience for consumers. But of course, the Tiffany’s brand did not always have the magnetism it does now. In 1837, Tiffany & Young (later Tiffany, Young & Ellis) opened as one of dozens of novelty and jewelry stores in lower Manhattan. Perhaps in recognition of the lack of inherent distinctiveness in a personal name such as “Tiffany,” the store chose a different branding mechanism to set itself apart. Tiffany’s first newspaper advertisement was tinted with a singular shade of blue. This shade of blue continues to play an important role in Tiffany’s marketing efforts and was registered as a federal trademark in the United States in 2000. Even in 1841, the blue was likely to be eye-catching but not only for aesthetic reasons. The color would already have been familiar to wealthy, well-educated consumers. A French painter Jean-Marc Nattier had pioneered

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281 Starbucks Corp. v. Wolfe’s Borough Coffee, Inc., 477 F.3d 765 (2d Cir. 2007).
282 Hershey, 2008 WL 4724756 at * 15 (finding a reasonable likelihood of success that Hershey would succeed at trial on its claim that the “couch bar” blurred its trade dress).
283 See supra text accompanying note 73.
284 Id.
its use in portraits of female members of the royal court at Versailles in the 1700s. For French gentry of the time, the ability to commission a Nattier portrait, complete with his trademark combinations of silver and blue, was a token of relative affluence and influence. Subsequently, at roughly the same time that Tiffany’s adopted the color, the Empress Eugenie of France chose the hue as her signature color for dresses and upholstery. The blue was thus a useful shorthand to a certain kind of consumer for European refinement and elite connections. Under the limited unfair competition laws then available, Nattier’s estate would have had no conceivable cause of action against Tiffany’s for use of the color. Nowadays, however, broader conceptions of what can operate as a “mark” and extension of rights across national boundaries for well-known source-identifiers might make Tiffany’s conduct actionable as dilution. Tiffany’s arguably made its name by blurring Nattier’s trademark shade of blue.

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NOVELTIES FOR THE HOLYDAYS.—
One of their firm having spent the past season in Europe, TIFFANY, YOUNG & ELLIS, 259 Broadway, opposite the City Hall, are enabled to announce to their friends and purchasers generally that their stock embraces the largest and most varied collection of rare, elegant and useful articles suitable for Holyday gifts, ever imported by them or any other firm in the city—all of which are offered by wholesale or retail, at very moderate prices.

In the assortment will be found the usual variety of dressing cases, toilet boxes, desks, papeteries; work boxes, jewel, hat, shawl odeour and glove boxes, &c., together with many new and original styles, made to order for our own sales, and not obtainable elsewhere—some of which are peculiarly beautiful.

Tiffany’s first newspaper advertisement in 1841 vs. J.M. Nattier’s 1748 portrait of Madame de Pompadour

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288 Philippe Bordes, Jean-Marc Nattier. Versailles, 142 BURLINGTON MAG. 183, 184 (2000); see Neil Steinberg, Happiness in a Box, CHI. SUN TIMES, Nov. 7, 1999, at 13. Of course, even before Nattier, robins had pioneered use of the color on their eggs.
289 Bordes, supra note 288, at 184.
292 E.g., Grupo Gigante SA De CV v. Dallo & Co., 391 F.3d 1088 (9th Cir. 2004) (recognizing rights of a foreign producer even without commercial use of the mark in the territorial United States because the mark was famous among the relevant class of producers). This rule has not been universally followed. See, e.g., ITC Ltd. v. Punchgini, Inc., 482 F.3d 135, 163-65 (2d Cir. 2007) (finding no famous mark exception to the use requirement in federal trademark law).
Nor is Tiffany’s the only owner of a famous trademark to engage in a little blurring on its way up. McDonald’s is another trademark owner who has been aggressive about policing free-riders who capitalize on the informational salience of its marks. But McDonalds itself was once a scrappy upstart trying to capture attention. As many newcomers do, its proprietor, Ray Kroc, turned to a symbol that was already well-known and popular among his targeted market. He hired Willard Scott, the actor who had just played the popular Bozo the Clown character on a popular children’s TV show, to create a purposefully similar character to promote his own brand. The resulting “Ronald McDonald” would not necessarily have caused confusion with Bozo, but the presence of the same actor with the same voice in a similar costume surely would have sustained a blurring claim had the cause of action been available at the time. Whether the inability to free-ride on Bozo’s familiarity would have prevented McDonald’s from becoming the “famous brand” it is today is unknowable.

A third example is Coca-Cola, who in the 1930s used illustrations of Santa Claus to persuade consumers to drink its beverage even in cold weather. Not only was Coca Cola “free-riding” off of St Nicholas’ positive emotional associations, it was not even the first company to do it. White Rock Ginger Ale, the brand leader for mineral water and ginger ale, had already used Santa Claus in its advertising for 15 years. Coke’s advertising campaign may have been an attempt to create associations with a more successful beverage company.

Modern free-riders similarly use the “atmospherics” surrounding well-known brands to communicate information about their own products. Rochelle Dreyfuss has written that modern brands have replaced classic literature as the basis for rhetorical and

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294 See WILLARD SCOTT, THE JOY OF LIVING 132-33 (1982). Willard Scott stated: At the time, Bozo was the hottest children's show on the air. You could probably have sent Pluto the Dog or Dumbo the Elephant over and it would have been equally as successful. But I was there, and I was Bozo... There was something about the combination of hamburgers and Bozo that was irresistible to kids. That's why when Bozo went off the air a few years later, the local McDonald's people asked me to come up with a new character to take Bozo's place. So, I sat down and created Ronald McDonald.
295 Cf. Nabisco, Inc. v. PF Brands, Inc., 191 F.3d 208 (2d Cir. 1999) (finding goldfish cracker character too similar and likely to blur Nabisco’s famous goldfish-shaped snack).
298 Coca-Cola would later sue a competitor for similar conduct involving use of polar bears in advertising. Coca-Cola later dropped the claim that use of even a non-similar polar bear by another drink company would cause trademark dilution. See Polar Corp. v. Coca-Cola Co., 871 F. Supp. 1520 (D. Mass. 1994).
299 Cf. Litman, supra note 129, at 1735 (arguing that if we think that atmospherics underlying famous brands offer something valuable to consumers, then we should prefer to let different producers compete to offer that value instead of assigning monopoly rights to one party).
literary allusion: “Betty Crocker has replaced Hestia in the public consciousness. Accordingly, it is not surprising that speakers and writers are drawn to those devices that are, by dint of heavy advertising, universally familiar.”

Professor Dreyfuss was referring mostly to noncommercial writers and speakers, but commercial speakers are also interested in communicating forceful messages with economy. For example, Natural Answers, Inc., the makers of an herbal mood uplifter, chose the mark “Herbrozac” to communicate succinctly that the product was an herbal alternative to Prozac, the leading antidepressant drug made by Eli Lilly. The Seventh Circuit found the use dilutive of Lilly’s trademark. The Court suggested that Natural Answers could have achieved the same informational effect legally with a name such as “Natural Answers’ Herbal Mood Elevator.” The same argument could be made about any clever slogan: Nike could have called its shoe Speedy Shoe instead of referring to the Greek goddess of victory, but most people would agree that something is lost in the translation. Furthermore, if we agree that Natural Answers can legally say “just like Prozac” in its advertising, it seems formalistic to deny use of the phrase as a slogan or even a mark.

If we are unwilling to say ex post that we would be better off if Bozo and not Ronald were still on the air and White Rock and not Coke still ruled the shelves, then we should be cautious about limiting the ability ex ante of newcomers to adopt similar free-riding strategies. Each of the historical examples above could be offered as an argument in support of strong dilution regulation: Nattier, Bozo and White Rock are not household names anymore. One could argue that the blurring of their trade symbols quickened their decline. It seems more likely, however, that free-riding brought better products to customer attention and the older brands collapsed under their own weight. The companies behind Herbrozac, Charbucks and Nikepal may seem of little concern now, but perhaps they will be tomorrow’s Tiffany’s, Coca-Cola and McDonalds.

2. **Blurring Can Increase Useful Product Information Available to Consumers**

Dilution by blurring may also produce beneficial effects by correcting for persistent failures of information supply in product markets. Current intellectual property regimes reward brand advertising over product-related, informational advertising. By lowering the incentives to advertise based on brand, blurring could increase the level of useful product information in the marketplace. This might lead to gains in social welfare that outweigh the costs of lost convenience.

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301 Eli Lilly & Co. v. Natural Answers, Inc., 233 F.3d 456, 465 (7th Cir. 2000).
302 Id. at 469.
303 Id. at 465.
304 *Cf.* Siegfried & Evans, *supra* note 266, at 123 (noting that two stage entry is a common pattern in which a small firm first enters into a niche and then later expands into the mainstream of the industry).
305 See infra text accompanying notes 309-312.
Consumer product markets suffer from information asymmetries because sellers have better information than buyers about the true value of goods and services. Many products require use and experience for proper evaluation. Some products, such as vitamins or education, resist effective evaluation by users and users must take it on faith that sellers have given them what they need. Sellers know the value of such goods, but buyers do not (at least before purchase). Buyers must depend on signals from the sellers or other credible parties to form judgments ex ante about the quality of different choices. Advertising is one form of signaling. Trademarks are another. As discussed above, sellers with well-known trademarks have an incentive to provide truthful advertising and to police the quality of goods sold under the mark.

However, sellers may under-provide product information and over-provide brand information. Sellers have an incentive to provide information to consumers that will cause them to prefer the seller’s goods or services, but only to extent that the marginal benefits of providing that information equal the marginal costs. All else being equal, sellers may under-provide general product information because other sellers of the same product can free-ride off of that expenditure. Unless the seller has a patent or other ability to exclude competitors from acquiring beneficial features of a product, it has little incentive to make these attributes the center of their advertising campaigns. Thus, while providing general information about products provides a social benefit, it will be undersupplied to the extent that sellers cannot capture that benefit as additional revenue to themselves. By contrast, sellers can capture the benefits of brand-specific advertising because they can exclude others from using their brands. Brand advertising diverts customers from competitors, but may do little to increase social welfare overall. Therefore, sellers have an incentive to oversupply brand-specific information and undersupply product-specific information.

Comparative advertising is one way to correct this asymmetry. By allowing competitors to factually compare their products to more established brands by name, the law encourages newcomers to provide informational advertising about product features. This increases the amount of useful product-related information available to the market. It also allows competitors to legally free-ride off the recognition of the senior owner’s mark.

307 Ekelund et al., supra note 258, at 34.
308 See generally sources cited supra note 29.
309 Beales et al., supra note 27, at 508.
310 Id.
311 Advertising serves a beneficial function by giving consumers information about product choices and so increases price elasticity. However many studies suggest that informational advertising does a better job at this than persuasive brand-oriented advertising. E.g. William Boulding et al., The Long-Term Differentiation Value of Marketing Communication Actions (Mktg. Scis. Inst., Working Paper No. 92-133, 1992) (informational advertising increases elasticity but persuasive advertising decreases it).
312 Beales et al., supra note 27, at 509.
313 I am indebted to Bruce Kobayashi for this point.
314 Dogan, supra note 11, at 106 (noting that the Pepsi challenge was a form of free-riding on Coca-Cola’s brand).
However, direct competitors to the mark owner may undersupply comparative factual information for reasons similar to the original sellers. Competitors have some incentive to provide critical information about product and brand flaws of dominant sellers, but information that discourages consumers from patronizing one seller will equally benefit all other sellers in that product class. In non-oligopolistic markets, competitors may undersupply information about dominant sellers because they cannot capture all of the gains to themselves. Furthermore, the relatively narrow comparative advertising exception still favors the owners of famous marks because they can rely exclusively on affect-laden advertising using the familiar mark.

Those who blur famous trademarks can exploit these asymmetries and may even help correct for them. Users of a mark in unrelated markets have a greater incentive to exploit critical or alternative understandings of the senior mark. Consumer interest in this information will bring attention to the new product. The free-rider will benefit in a way that cannot effectively be shared by its competitors. Meanwhile such advertising inevitably offers indirect information about the senior mark.


316 See, e.g., ALLEN P. ADAMSON, BRAND SIMPLE 41-42 (2006) (recounting effect of Minute Maid ad campaign revealing to consumers that leading powdered mix lemonade brand, 'Country Time,' contained no real lemons; consumers didn’t remember that Minute Maid contained more lemons, they just stopped buying Country Time and distrusted the entire brand category).

317 E.g. New Kids on the Block v. New Am. Publ’g, Inc., 971 F.2d 302, 307-308 (9th Cir. 1992) (stating that second users that attempt to “appropriate the cachet” of well-known marks to themselves are not eligible for nominative fair use defense).

318 Companies that adopt slogans or symbols that blur more famous trademarks are guided by the same rational self-interest that governs the senior mark owner. Economists assume that because advertising raises expectations, it will only be efficient for those companies that can deliver on the heightened expectations of consumers. Adoption of a well-known mark involves a variation of the same cost-benefit analysis. The use ensures attention from consumers with relatively little advertising cost. In this respect the newcomers are misappropriating the advertising expenditures of the bigger players. However, free-riding will only be efficient for those who will benefit in a sustained manner from the increased attention. Blurring requires less expenditure, but any kind of promotion requires costs. Use of a well-known mark will raise consumer expectations about the underlying product. Only those companies that have the capacity to meet consumer expectations will benefit from the use. Those that fall short will receive a negative response from consumers. Such companies may receive a short-term bump from the exposure, but the same would be true of an initial choice to advertise. Free-riders who fail to meet expectations will either switch to promotion strategies that highlight their true competitive advantages (e.g. lower cost) or will cease advertising altogether. In this latter case, blurring will cease to be an issue for the senior mark owner and its consumers. For the same reason that the choice to advertise can signal quality, the choice to anchor advertising messages in a famous symbol usually signals some kind of relevance to the message conveyed by the familiar symbol.

319 Blurring is likely to reveal new information about the senior brand because uses of famous brands that do not reveal new information will be confusing. Classic trademark law already forbids any use of a mark that is likely to confuse consumers. Any attempt by a newcomer, or an established player, to masquerade behind the senior producer’s mark will be enjoined as pure trademark infringement. Laws against blurring thus chiefly regulate uses of marks that alter the context of the mark sufficiently to preclude confusion.
For example, many blurring defendants use the senior mark in a way that reveals whimsical or critical opinions of the brand owner and its products. Haute Diggity Dog, the maker of a “Chewy Vuitton” luggage dog chew toy, presumably chose to mock “Louis Vuitton” because some people see the brand as pretentious. Similarly, the sale of “Charbucks” coffee by a small retailer in New Hampshire publicizes a common perception that Starbucks coffee tastes burnt. Even the Syracuse coffee joint Federal Espresso mocks the over-caffeinated pace which services such as Federal Express make possible. Because in each case the defendant uses the famous mark in its own “source-identifier,” none of these uses are protected by statutory exclusions for parody or criticism. Such uses are profitable for blurrers because consumers may appreciate seeing the famous mark unmasked and, as a result, may reward the junior user with attention. Even if consumers do not consciously process the implied criticism offered by the blurrer, the increased effort required to process the senior user’s mark accurately reflects the informational complexity of a well-known brand. This complexity more accurately reflects the state of market opinion than enforced message consistency. The blurring information may eventually alter a consumer’s preference for associating herself with the original brand, but that may be a welfare-enhancing choice.

Even if the new message offers no new information, allowing others to benefit from the familiarity effects of famous marks would lower incentives to invest in persuasive brand advertising. Advertising signals quality because of the perceived investment in the product by the underlying firm. Both product-related (informative) advertising and brand-related (persuasive) advertising can send this signal. Consumers thus have no functional reason to prefer persuasive advertising over informational ads. This suggests that sellers over-supply persuasive advertising, and that consumers would benefit from a shift in advertising from persuasive to informational strategies. Decreasing the monopoly profits available for familiarity divorced from function might help to instigate such a shift.

Furthermore, although trademark dilution articles all invoke the specters of “Kodak pianos,” “Buick shoes” etc., it is difficult to see why anyone would adopt such a mark. Because famous brands are invariably associated with the senior mark owner, it will be difficult for the junior user to differentiate his own product or create his own goodwill in the second mark. Perhaps for this reason, very few of the reported cases actually concern exact use of a well-known mark by a free-rider in a new market.

320 Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252 (4th Cir. 2007) (dismissing trademark dilution case against maker of dog toy luggage).
321 However, courts may still find them not likely to dilute on the basis of the statutory blurring factors. See, e.g., Starbucks Corp. v. Wolfe's Borough Coffee, Inc., 559 F.Supp.2d 472, 477-79 (S.D.N.Y. 2008); Haute Diggity Dog, 507 F.3d at 266-67.
322 Cf. Yochai Benkler, Freedom in the Commons 52 DUKE L.J. 1245, 1259-60 (2003) (proprietary search results are bland and hew to a party line, “open” results give a much richer impression of Barbie’s impact and meaning for different subsets of the culture).
323 Brown, supra note 7, at ___.
324 Furthermore, some empirical research suggests that persuasive advertising can lower price elasticity for certain goods, while informational advertising can raise it. E.g., William Boulding et al., The Long-Term Differentiation Value of Marketing Communication Actions (Mktg. Scis. Inst., Working Paper No. 92-133, 1992).
325 Cf. Vakratas & Ambler supra note 229 (suggesting that sellers oversupply advertising relative to consumer preferences).
One must be careful here, though. If blurring reached a level at which it lowered
the incentives to invest in familiar brands and in product quality generally, that could
harm social welfare. This would harm consumers because without the signaling effect of
strong brands, they would have to work harder to make judgments about risk. Without
quality control, they would face a greater risk of poor quality choices. However, there
are two reasons to think that the effects of increased blurring on seller advertising would
be minimal. First, because consumers sometimes use System II decision-making, sellers
will still have incentives to make quality products and to provide information about
quality that might influence purchase decisions. If consumers rely less on System I
processing, they may spend more time comparing actual product features. Sellers may
then choose to provide more product-related advertising and less brand-related,
emotionally charged information. For the reasons discussed above, this would probably
increase social welfare. Second, the research suggests that inconsistency effects must be
significant before attitudes toward a familiar brand will change. The ability to police
against confusing uses likely will exclude a lot of potential free-riding. Because the
impact of most free-riding is likely to be small, dilution laws should be targeted in scope.

3. Other Alternatives to Dilution Regulation Exist

In the absence of dilution regulation, private efforts to help consumers reduce
search costs would still exist. Regulation of blurring can be compared to government
attempts to “debias” the presentation of information to assist consumers in making better
choices. The risk with such debiasing efforts is that they are prone to regulatory
capture and displace more targeted private attempts to address information
asymmetries. In the case of dilution, regulatory debiasing overcorrects for the problem
by distorting market information in favor of strong brands. It removes a beneficial source
of information about flaws in established choices from the market. It also forbids
competition over the meaning of familiar symbols, and so creates incentives for wasteful
advertising expenditures on brand atmospherics instead of more useful advertising on
product attributes.

Dilution law also represents a preference for brand strength as the primary
heuristic through which consumers increase convenience and lower their “internal search
costs.” Strong brands may not represent the optimal social or industrial policy for
achieving this goal, however. If widespread blurring lowered the ability to rely on the
risk-reduction signals of super-brands, consumers would most likely adopt alternative
strategies to conserve time and effort. Markets will always suffer from information
asymmetry because sellers have better information about the quality of their goods than
buyers do. However, technology is providing new ways beyond advertising and branding
to correct this asymmetry. For example, in online markets made up of relatively

326 See supra text accompanying note 244.
327 See, e.g., Richard A. Epstein, Behavioral Economics: Human Errors and Market Corrections, 73 U.
CHI. L. REV. 111 (2006) (criticizing government attempts to debias consumer information markets as ill-
advised and prone to capture and over-correction).
328 Id.
unknown sellers (such as eBay and Etsy, a hand-made crafts site), users rely on aggregated satisfaction ratings to lower the risks of dealing with new sellers. As the costs of aggregating buyers’ reactions go down, the need to rely exclusively on quality signals generated by sellers also declines. In other markets, buyers can rely on the credibility of third-party taste-makers to lower the costs of search. Many consumers go to specialized markets (such as Whole Foods) despite a comparative lack of familiar brands on its shelves because they trust the store to cater to their tastes for premium and naturally-produced items. As markets everywhere become more segmented, the need for universal “famous” brands to lower risk declines.

The choice of whether to protect against blurring thus depends on a complicated balancing between consumer interests in convenience and equally legitimate interests in competition. Famous brands can provide valuable quality signals to overburdened consumers, but blurring can ease market entry for newcomers. Both sides of the dilution debate attempt to make an easy case out of a situation that is in fact quite nuanced.

D. Limiting Dilution to Use of the Exact Mark

One way to balance the competing concerns underlying trademark dilution would be to continue to prohibit commercial uses of identical or nearly identical marks, but to allow greater latitude for more than trivial variations. Uses of exact replicas of famous marks are likely to cause confusion no matter what segment of the market they target. Dilution protection can lower enforcement costs by removing the need to meet trademark’s more onerous multi-factored confusion test for this special class of marks. A non-trivial variation, however, such as Charbucks, Herbrozac, Chewy Vuitton, Federal Espresso, McDental, “Greatest Snow on Earth”, etc., usually signifies either harmless word-play or implicit comparison. Revising the federal dilution law to require identity between marks would conserve consumer confidence in the brand signal while allowing newcomers to use it to draw attention to their own offerings.

IV. Beyond Dilution: Decoupling Consumer Survey Results and the Efficient Market

Whether regulation of trademark dilution is a game worth the candle is not as easy as dilution law’s critics contend. The ability of consumers to rely on the credibility of established brands offers real benefits. On the other hand, the ability of new producers to reference stronger marks eases barriers to entry. Arguments exist on both sides as to which policy (protecting against blurring or allowing it to occur) is the best policy.

329 See, e.g., Wujin Chu & Woosik Chu, Signaling Quality by Selling through a Reputable Retailer: An Example of Renting the Reputation of Another Agent, 13 MARKETING SCI. 177 (1994).
330 Some circuits embrace this kind of standard, but individual decisions vary widely as to what will be found “nearly identical” with a famous mark. See, e.g., Nike Inc. v. Nikepal Int’l Inc., 84 U.S.P.Q.2d (BNA) 1820 (E.D. Cal. 2007) (articulating a near identity standard but finding that “Nikepal” is nearly identical with Nike).
331 See, e.g., Klieger, supra note 120 at ___.
332 See Bone, Enforcement Costs, supra note 35 (arguing that dilution prohibitions lower the costs of enforcing famous marks in situations where confusion is likely).
What cannot decide the question is naked data from consumer surveys. In dilution cases, plaintiffs offer as evidence that people associate a junior mark with a famous one,333 evidence of an increase in the time required to connect a famous mark with its original owner,334 or direct evidence of an increase in negative feelings about the senior mark after exposure to blurring.335 Evidence of association, without proof of confusion, does not indicate any diminishment in the effectiveness of the senior mark, however. An increase in time or effort to evaluate a mark may generate negative feelings towards the mark, just as the convenience of a familiar brand automatically generates positive feelings. These feelings are not diagnostic by themselves. They must be situated within a larger network of preferences about price, product attributes, optimal number of sellers, optimal attributes of sellers, types of retailers, and larger social policy questions. Momentary irritation tells us nothing about what balance of interests the consumer ultimately prefers. Only the individual consumer herself can integrate these competing motivations. Perhaps she ought to be given more chance to do so.

334 Morrin & Jacoby, supra note 37, at 271.