

EMOTION, DILUTION, AND THE TRADEMARK CONSUMER

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The protection of trade-marks is the law's recognition of the psychological function of symbols.

—*Mishawaka Rubber & Woolen Manufacturing v. S. S. Kresge*¹

I. INTRODUCTION

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

1. 316 U.S. 203, 205 (1942).

2. See, e.g., Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. 101 (2008); George F. Loewenstein et al., *Risk as Feelings*, 127 PSYCHOL. BULL. 267 (2001); Rachel F. Moran, *Fear Unbound: A Reply to Professor Sunstein*, 42 WASHBURN L.J. 1 (2002); Paul Slovic, *What's Fear Got to Do With it? It's Affect We Need to Worry About*, 69 MO. L. REV. 971 (2004).

3. Michael Holtje et al., *Psychology and BAPCPA: Does Greater Disclosure Affect Consumer Credit Behavior?*, 26 AM. BANKR. INST. J. 20 (2007); George Loewenstein & Ted O'Donoghue, *"We Can Do this the Easy Way or the Hard Way": Negative Emotions, Self-Regulation and the Law*, 73 U. CHI. L. REV. 183, 195-200 (2006); Cass R. Sunstein, *Boundedly Rational Borrowing*, 73 U. CHI. L. REV. 249 (2006); cf. Oren Bar-Gill, *Bundling and Consumer Misperception*, 73 U. CHI. L. REV. 33 (2006) (referring to consumer "misperception" of credit risks but not exploring the sources of consumer myopia).

4. See generally Tim Ambler et. al., *Saliency and Choice: Neural Correlates of Shopping Decisions*, 21 PSYCHOL. & MARKETING 247 (2004); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999) ("[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.'"); Loewenstein & O'Donoghue, *supra* note 3, at 188-96; Girish N. Punj & Clayton L. Hillyer, *A Cognitive Model of Consumer-Based Brand Equity for Frequently Purchased Products: Conceptual Framework and Empirical Results*, 14 J. CONSUMER PSYCHOL. 124 (2004).

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 irrationally to pay a premium for trademarked products that are not functionally superior to generic substitutes.⁷ Accordingly, what one thinks about the emotional influence of popular brands tends to dictate one's views about the proper scope of trademark protection.⁸

5. See generally Ambler et al. *supra* note 4; George Loewenstein & Jennifer S. Lerner, *The Role of Affect in Decision Making*, in HANDBOOK OF AFFECTIVE SCIENCE 619 (Richard J. Davidson ed., 2003); Barbara Mellers et al., *Emotion-Based Choice*, 128 J. EXPERIMENTAL PSYCHOL.: GEN. 332 (1999); Michel Tuan Pham et al., *Affect Monitoring and the Primacy of Feelings in Judgment*, 28 J. CONSUMER RES. 167 (2001); Punj & Hil-lyer, *supra* note 4; R. B. Zajonc, *Feeling and Thinking: Preferences Need No Inferences*, 35 AM. PSYCHOLOGIST 151, 155 (1980) [hereinafter Zajonc, *Feeling and Thinking*]; David J. Arkush, *Situating Emotion: A Critical Realist View of Emotion and Nonconscious Cognitive Processes for the Law* (Aug. 20, 2007) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1003562; cf. Colin F. Camerer, *Wanting, Liking, and Learning: Neuroscience and Paternalism*, 73 U. CHI. L. REV. 87 (2006) (finding that human learning functions coordinate liking and wanting but noting that in cases of behavioral disorders we want things even though we don't like them).

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

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).

8. Compare Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547 (2006) [hereinafter Bone, *Hunting Goodwill*] (arguing that protecting positive feelings as part of the sellers goodwill is unnecessary); Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367, 437-39 (1999) (arguing that protection for the value of trademarks beyond the basic identification of source, such as the protection of trademark prestige or "selling power," exceeds the costs of competition and is socially wasteful) with Shahar J. Dilbary, *Famous Trademarks and the Rational Basis for Protecting "Irrational Beliefs"*, 14 GEO. MASON L. REV. 605 (2007) (finding that consumers derive value from the intangible auras of branded products and arguing for strong trademark protection); William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 270, 274-75 (1987) (rejecting the irrational characterization of consumer response to

This Article argues that 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.⁹ 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 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.

trademark advertising and condemning any free-riding on the allure of strong trademarks).

9. In the last twenty years, advances in the understanding of human emotional processes have led to re-evaluations of long-standing assumptions in fields as diverse as criminal law, commercial law, and securities regulation. For representative criminal law articles, see, e.g., Katherine K. Baker, *Gender and Emotion in Criminal Law*, 28 HARV. J.L. & GENDER 447 (2005); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1331-35 (1997); Arkush, *supra* note 5, at 78. For sources related to emotions and commercial law, see, for example, sources cited *supra* at note 3. For representative literature on securities regulation and investor behavior, see generally, Peter H. Huang, *Emotional Impact Analysis in Financial Regulation: Going Beyond Cost-Benefit Analysis* (Institute for Advanced Study, School of Social Science, Economics Working Paper No. 62, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=870453 (arguing that financial regulators should consider the impact of policies on investor confidence and overall market mood); Peter H. Huang, *How Do Securities Laws Influence Affect, Happiness, & Trust?*, 3 J. BUS. & TECH. L. 257 (2008); Peter H. Huang, *Regulating Irrational Exuberance and Anxiety in Securities Markets*, in THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR 501 (Francesco Parisi & Vernon L. Smith eds., 2005); Peter H. Huang, *Moody Investing and the Supreme Court: Rethinking the Materiality of Information and the Reasonableness of Investor*, 13 SUP. CT. ECON. REV. 99 (2005); Peter H. Huang, *Trust, Guilt, and Securities Regulation*, 151 U. PA. L. REV. 1059, 1075-89 (2003).

Trademark dilution is a relatively recent innovation.¹⁰ Trademark law traditionally aims to improve the quality of market information through prohibitions on deceptive uses of trade symbols.¹¹ 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.”¹²

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.”¹³ Examples of recent uses of famous marks found to be dilutive include the use of the mark “Perfume-bay” for E-bay, the mark “Nikepal” for Nike, and the name “Hot Rigz” for “Hot Wheels” toy cars.¹⁴

Trademark owners think that dilution is harmful but have had trouble explaining their reasoning. Proponents of dilution regulation have linked the dilution cause of action to the goal of lowering search costs.¹⁵ They

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.

12. See, e.g., *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163-64 (1995) (“[T]rademark law . . . ‘reduce[s] the customer’s costs of shopping and making purchasing decisions’”); WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* at 168 (2003).

13. Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 825 (1927).

14. *Perfumebay.com Inc. v. eBay, Inc.*, 506 F.3d 1165 (9th Cir. 2007); *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628 (9th Cir. 2008); *Nike Inc. v. Nikepal Int’l Inc.*, 84 U.S.P.Q.2d (BNA) 1820 (E.D. Cal. 2007).

15. See, e.g. Jerre B. Swann, Sr., *Dilution Redefined for the Year 2002*, 92 TRADEMARK REP. 585, 585 (2002); Jacob Jacoby, *Dilution in Light of Victoria’s Secret: The Psychology, Varieties and Measurement of Trademark Dilution*, 9-11 (NYU Ctr. for Law & Bus. Working Paper No. CLB-03-020, 2008), available at <http://w4.stern.nyu.edu/>

argue that promiscuous use of well-known 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.¹⁶ 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.¹⁷

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.¹⁸ Famous

emplibrary/03-020.pdf [hereinafter Jacoby, *Dilution in Light of Victoria's Secret*]; see also Dogan, *supra* note 11, at 104; Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 EMORY L.J. 461, 493 (2005) ("[P]roperly understood, dilution is targeted at reducing consumer search costs, just as traditional trademark law is."); Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1704 n.90 (1999) ("The information consumers can obtain and process is in part a function of how clear the association between mark and product remains in their minds; 'clutter' therefore imposes real costs on consumers."); J. Thomas McCarthy, *Proving a Trademark Has Been Diluted: Theories or Facts?*, 41 HOUS. L. REV. 713, 727-28 (2004). McCarthy argues:

[T]here is potential harm to both consumers and mark owners if a once-unique designation loses its uniqueness. The argument is that this makes it harder for consumers to link that designation with a single source--the hallmark of a strong trademark. Under this theory, dilution increases the consumer's search costs by diffusing the identification power of that designation.

Id.; Richard A. Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 75 (1992). Posner states:

A trademark seeks to economize on information costs by providing a compact, memorable, and unambiguous identifier of a product or service. The economy is less when, because the trademark has other associations, a person seeing it must think for a moment before recognizing it as the mark of the product or service.

Id.

16. See Swann, *supra* note 15, 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. LANDES & POSNER *supra* note 1212, at 207; Jacob Jacoby, *The Psychological Foundations of Trademark Law: Secondary Meaning, Genericism, Fame, Confusion and Dilution*, 91 TRADEMARK REP. 1013, 1047 (2001) [hereinafter Jacoby, *Psychological Foundations*].

18. 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. 1175, 1184 (2006) (arguing that the harm of dilu-

marks have always existed side-by-side with lesser-known siblings. Ford Motor Company and 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.¹⁹ Protecting the appeal of advertising symbols from dilution also seems to squarely conflict with free speech interests in promoting criticism of, discussion about, and comparison with well-known brands.²⁰ Not surprisingly, courts have found the harm threatened by dilution “dauntingly elusive” to comprehend; accordingly, they have been reluctant to enforce the law as written.²¹ Nonetheless, trademark owners have successfully lobbied Congress to shore up and reinforce the trademark dilution action in the Trademark Dilution Revision Act of 2006.²² Part II of this Article explains the traditional justifications for trademark regulation and demonstrates how dilution proponents have attempted to reconcile the law with these aims, with limited success.

Part III of this Article argues that trademark dilution law is so difficult to understand because it aims at emotion and only indirectly at information.²³ The emotion referred to here is of the most basic kind: “affect”

tion is illusory and the law is based on an unjust enrichment rationale); David S. Welkowitz, *Reexamining Trademark Dilution*, 44 VAND. L. REV. 531, 542-44 (1991) (claiming that trademark owners have failed to demonstrate any actual harm flowing from dilution).

19. Barton Beebe, *A Defense of the New Federal Trademark Antidilution Law*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1143, 1150 (2006) [hereinafter Beebe, *A Defense*]; see also Transcript of Oral Argument, *Moseley v. Victoria's Secret Catalogue*, 537 U.S. 418 (2003) 2002 WL 31643067 at *10-11 (posing the questions whether the two uses of Ford, and also Delta Airlines, Delta Plumbing and Delta Dental caused the same kind of harm as dilution).

20. See, e.g., Rebecca Tushnet, *Gone in Sixty MilliSeconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 548-52 (2008).

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

22. See, e.g., Beebe, *A Defense*, *supra* note 19 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).

23. 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 116-118, 158-180 (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.,

or the automatic negative or positive response that a mark generates when viewed by a consumer.²⁴ Research on brands and emotion teaches that familiar trademarks offer value to consumers by lowering the amount of effort required in purchasing decisions.²⁵ 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.²⁶ Dilutive conduct can thus undercut the reliability of trademarks as sources of information for buyers. This, in a nutshell, is the harm caused by “blurring” famous marks.

Understanding the dilution cause of action through the lens of emotion clarifies an elusive doctrine, but reveals reasons to be wary of over-enforcement. Properly understood, dilution regulation aims to preserve the signaling value of brand familiarity for consumers. Because consumer markets suffer from information asymmetries in which sellers possess better information than buyers, buyers depend on signals from sellers and other third parties in making purchasing decisions.²⁷ Brand advertising

Brown, *supra* note 7, at 1182; Swann, *supra* note 15, 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 171-213. 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 15, 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.

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

25. *See infra* text accompanying notes 214-249.

26. *See infra* text accompanying notes 54-56.

27. For example, buyers might use the relative price, or warranty information, third party rating systems or comparative advertising by competitors as signals about the underlying quality of goods that cannot be effectively evaluated before purchase. *See generally* Tülin Erdem & Joffre Swait, *Brand Equity as a Signaling Phenomenon*, 7 J. CONSUMER PSYCHOL. 131, 132-33 (1998) (discussing different kinds of market signals); Amna Kirmani & Akshay R. Rao, *No Pain, No Gain: A Critical Review of the Literature on Signaling Unobservable Product Quality*, 64 J. MARKETING 66, 66-69, 75-76 (2000)

and the resulting brand familiarity can be one such type of signal. Familiar brands offer lower risk and decreased evaluation costs. Consumers rationally rely on familiarity as a signal that the seller has a substantial investment in the brand that will be forfeited if it fails to adequately police quality. Familiarity also can convey that others in the marketplace have found the seller's goods satisfactory. Consumers therefore can rely on low-cost emotional responses to familiarity as sources of information about goods rather than using more costly methods of direct evaluation.²⁸ Dilution regulation seeks to shore up the signaling value of brand advertising by ensuring that only the seller responsible for making a brand familiar to consumers can capture the rewards of positive consumer response.²⁹ It also prevents illicit follow-on uses that muddy the clarity of this signal.³⁰

Situating the dilution doctrine within the larger universe of strategies that sellers use to communicate about product quality also readily reveals its costs. Part IV of this Article explores some of these costs. 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 product. Brand familiarity as a signal 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.³¹ In addition, encouraging consumer reliance on brand

(presenting a typology of different market signals); Phillip Nelson, *Advertising as Information*, 82 J. POL. ECON. 729 (1974) [hereinafter Nelson, *Advertising as Information*] (advertising as a seller signal); George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213, 224 (1961); Joseph E. Stiglitz, *The Causes and Consequences of the Dependence of Quality on Price*, 25 J. ECON. LITERATURE 1, 1-48 (1987) (price signals).

28. See *infra* text accompanying notes 171-180.

29. Cf. Ill. High Sch. Ass'n v. GTE Vantage Inc., 99 F.3d 244 (7th Cir. 1996).

[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.

Id. at 247; see also LANDES & POSNER, *supra* note 12, at 172 (free-riders who appropriate the strong brands of others destroy the informational capital built up in the brand).

30. McCarthy, *supra* note 15, at 727-28.

31. See *infra* Part IV; 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

familiarity can discourage product innovation because familiarity has been shown to provide a competitive advantage even if the specific attributes of the underlying product or brand are not objectively superior.³² Legal protection for familiarity also may reduce the kinds of information available to consumers about existing products. 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 from copying adds to already lopsided incentives to increase brand advertising at the expense of these other methods.³³

Even the conduct sought to be regulated, trademark blurring, can 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.³⁴ 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 blurring strategy to ease their own entry into the market. For example, Tiffany’s chose its singular blue color and McDonald’s its clown spokes-character to free-ride on the appeal of well-known products of the time.³⁵ This kind of advertising may lower the immediate signaling value of strong brands, but consumers benefit in the long-term from learning easily about new options.³⁶

In addition, free-riding can serve as a signal about the quality of the famous, blurred mark for the same reasons claimed for brand advertising. Just as familiarity of a mark can convey information about producer in-

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).

32. William E. Baker, *When Can Affective Conditioning and Mere Exposure Directly Influence Brand Choice?*, 28 J. ADVERT. 31, 44-45 (1999); *cf.* Beales et al., *supra* note 29, at 508.

33. *See infra* text accompanying notes 309-314.

34. *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).

35. *See infra* text accompanying notes 286-298.

36. *Cf.* Kratzke, *supra* note 8, at 211 (stating that the paramount objective of trademark law should be to promote inter-brand competition).

vestment 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. Typically interlopers that evoke famous marks in advertising subtly reveal to consumers alternative understandings such as that some segment of the public thinks the brand is pretentious, a bad value, or simply over-exposed.³⁷ 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 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. Part IV of this Article proposes revising trademark dilution law to prohibit only commercial uses of exact copies of famous marks.³⁸ Trivial alterations or exact uses of famous marks on unrelated goods increase consumer costs without adding new information, but nontrivial 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.³⁹

37. See *infra* text accompanying notes 321-325. 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 *infra* notes 317-318.

38. 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).

39. 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 21, at 1057 (arguing for a different approach to low-value uses such as counterfeiting of famous marks and high-value uses such as parody and satire). *But cf.* Tushnet, *supra* note 20 at 566 (endorsing strict fame, uniqueness, and identity requirements as one possible way to limit the dilution regime). An identity requirement does find support in the caselaw. See, e.g., Mo-

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.⁴⁰ However,

seley 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 at *6 (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) (stating that 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).

40. The use of behavioral research in the context of trademark law has recently been strongly criticized. Tushnet, *supra* note 20, 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 more negative effect on subsequent consumer recognition and recall of famous marks. *See, e.g., Swann, supra* note 15, at 606-14; Jacoby, *Psychological Foundations, supra* note 17 at 1049; Jacoby, *Dilution in Light of Victoria's Secret, supra* note 15, at 9, 20-21; *see also* Maureen Morrin & Jacob Jacoby, *Trademark Dilution: Empirical Measures for an Elusive Concept*, 19 J. PUB. POL'Y & MARKETING 265 (2000). Such attempts have rightly drawn criticism for being methodologically imprecise and devoid of real-world context. *See* Tushnet, *supra* note 20, at 528-46. Not all behavioral studies suffer from these specific flaws. 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 et 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) (stating that because different parts of the brain are more or less associated with affective or cognitive processing, brain imaging studies done while people engage in different kinds of economic tasks can 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 historical purchase data

consumers are complex creatures with divergent and sometimes competing motivations. Trademark law has suffered in recent years from an automatic equation of consumer uncertainty or negative response to a legally cognizable injury. Consumers value convenience in the short term and greater choice in the long term. There are two types of search costs: (i) the costs of finding goods from a known producer, and (ii) more broadly, the costs of identifying options for any consumptive choice. Sometimes, as with dilution regulation, lowering the first kind of search cost may increase the second.⁴¹ Acknowledging dueling consumer interests calls into question trademark law's reliance on momentary snapshots of consumer

following changes in branding strategy 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) [hereinafter, Swaminathan, *Sequential Brand Extensions*] (household scanner panel purchase data); Vanitha Swaminathan et al., *The Impact of Brand Extension Introduction on Choice*, 65 J. MARKETING 1, 12-14 (2001) [hereinafter, Swaminathan, *The Impact of Brand Extension Introduction*] (same). 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 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* note 20, 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).

41. 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).

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 by themselves can no longer remain the sole indicators of legal injury in trademark law.

II. 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.⁴² Trademarks are an efficient and simple means of communicating information.⁴³ Sellers use advertising and trade symbols to inform likely buyers about desirable qualities and characteristics of their goods.⁴⁴ Trademarks ensure that consumers associate these characteristics with the right product.

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.”⁴⁵ 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.⁴⁶ Consumers can rely on source indicators to quickly locate goods and services that match their tastes for quality and price.⁴⁷

42. 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.

43. Mark Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1688 (1999).

44. Kratzke, *supra* note 11, at 216; Lunney, *supra* note 8, at 432; Nelson, *Advertising as Information*, *supra* note 27, at 735.

45. 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 15, 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.”).

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

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

This interest in informational clarity serves both a public and private purpose. Glynn Lunney has explained how trademarks improve allocative efficiency⁴⁸ in the marketplace by allowing consumers to efficiently 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”).⁴⁹

This feedback loop ideally facilitates an efficient marketplace that produces the socially optimal types and amounts of goods at the best prices.⁵⁰ In this way, the consumer acts as a proxy for the interests of society in distributing resources efficiently.⁵¹

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.⁵² A system that does not protect the

48. 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).

49. 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.

50. 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.

51. Kratzke, *supra* note 11, at 212.

52. *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

informational integrity of trade symbols causes consumers to expend extra resources in searching for desired goods, and thus increases “search costs.”⁵³

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.⁵⁴ 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.⁵⁵ This would cost consumers in time, but would allow a new competitor more easily to 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.⁵⁶

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.”⁵⁷ 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.”⁵⁸ 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.⁵⁹

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).

53. 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.

54. Landes & Posner, *supra* note 8, at 269.

55. See *id.*

56. Kratzke, *supra* note 11, at 208; LANDES & POSNER, *supra* note 12, at 168.

57. Schecter, *supra* note 16, at 831.

58. Jacoby, *Dilution in Light of Victoria’s Secret*, *supra* note 15, at 20; see Tushnet, *supra* note 40, at 518 (describing prevailing cognitive model for dilution law as resting on the notion of increased “internal” search costs).

59. LANDES & POSNER, *supra* note 11, 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.”⁶⁰ 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.⁶¹

Of the two, blurring has caused more head-scratching among courts and commentators.⁶² 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.”⁶³ 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 (e.g., 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.⁶⁴

60. Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, § 2, 120 Stat. 1730, 17301 (to be codified at 15 U.S.C. § 1125(c)(32)(B)).

61. Long, *supra* note 21, at 1057.

62. See, e.g., Beebe, *A Defense*, *supra* note 19, at 1148-49 (discussing problems in the interpretation of trademark blurring); Farley, *supra* note 18, at 109-110 (discussing problems in defining dilution by blurring).

63. Trademark Dilution Revision Act, § 2 (to be codified at 15 U.S.C. § 1125(c)(2)(B)).

64. 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

Some courts have held that the mere fact of association of one mark with another is enough to “impair distinctiveness.”⁶⁵ The distinctiveness of the senior mark is diminished if it no longer brings to mind the senior user alone.⁶⁶ 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.”⁶⁷ 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.”⁶⁸ 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.”⁶⁹

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* Schechter *supra* note 16, 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 one unique producer. Reading distinctiveness to refer to the public’s acquired understanding fits well with the statute’s mandate to only protect only already “famous” marks. However, trademark law has not historically wrestled with this notion of distinctiveness from others, as opposed to distinctiveness of source per se. Trademark law’s tools for measuring source distinctiveness are ill-designed for this new kind of inquiry. *See* Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 702 (2004).

65. *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.”).

66. *Id.*

67. *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 434 (2003).

68. *Id.*

69. 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)(32)(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 Co. v. Art Van Furniture*, No. CV-14463, 2008 WL 4724756 at *15 (E.D. Mich. Oct. 24, 2008) (finding a 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).

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."⁷⁰ Schechter equated selling power with uniqueness.⁷¹ 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.⁷² Dilution thus occurs when a "mark's propensity to bring to mind a particular product or source is weakened."⁷³ 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.⁷⁴ Consumers will no longer register an immediate impression related to the original source when they see the mark.⁷⁵

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.⁷⁶

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

70. Schechter, *supra* note 16, at 819.

71. *Id.*

72. Jacoby, *Dilution in Light of Victoria's Secret*, *supra* note 40, at 1048; Morrin & Jacoby, *supra* note 40, at 274; Swann, *supra* note 15, at 624.

73. *Jordache Enters., Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482, 1489 (10th Cir. 1987).

74. Beebe, *A Defense*, *supra* note 19, 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 15, at 20; Swann, *supra* note 15, at 620, 624.

75. Jerre B. Swann, Sr., *Dilution Redefined for the Year 2000*, 37 HOUS. L. REV. 729, 751 (2000).

76. *Ty Inc. v. Perryman*, 306 F.3d 509, 511 (7th Cir. 2002).

“core nodes” in memory around which consumers organize all of their information about the product and brand.⁷⁷ Follow-on uses, even when not confusing, add new associations to this cognitive network that reduce the strength of pre-existing brand beliefs.⁷⁸ 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.⁷⁹

Professor Barton Beebe has called this definition “empirical in orientation.”⁸⁰ 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.⁸¹ In this formulation, dilution by blurring increases “search costs” in a measurable way: consumers must take more time and expend more cognitive resources to connect the mark to the senior user’s goods and larger goodwill.⁸²

77. Jacoby, *Dilution in Light of Victoria’s Secret*, *supra* note 15, at 16-17; Jacoby, *Psychological Foundations*, *supra* note 1740, at 1024.

78. Jacoby, *Dilution in Light of Victoria’s Secret*, *supra* note 15, at 20; Jacoby, *Psychological Foundations*, *supra* note 40, at 1049.

79. Jacoby, *Dilution in Light of Victoria’s Secret*, *supra* note 15, at 20-21.

80. Beebe, *A Defense*, *supra* note 62, at 1149

81. *Id.*

82. 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 19, at 1148-49 (arguing that blurring protects only memory of product type) with Swann, *supra* note 75, 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.

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.⁸³

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.⁸⁴ 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.⁸⁵ 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 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

83. Jacoby, *Dilution in Light of Victoria’s Secret*, *supra* note 15, at 22. Dilution has thus been described as an impairment to the brand’s ability to convey information. Swann, *supra* note 15, 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.*

84. *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 434 (2003).

85. Jacoby, *Dilution in Light of Victoria’s Secret*, *supra* note 15, at 20-21 (citing studies claiming that first brand awareness is best predictor of brand switching behavior).

change in consumer behavior.⁸⁶ 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.⁸⁷ 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 Professor 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.⁸⁸ Furthermore, the context in which we encounter such names is likely to counteract any distraction offered by the second user. As Professor 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.⁸⁹

Further, it’s not clear that simple association between two entities is harmful. Imitation is the sincerest form of flattery. As Professor 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.⁹⁰

86. Bone, *Hunting Goodwill*, *supra* note 8, at 559; Welkowitz, *supra* note 18, at 542; Beebe, *A Defense*, *supra* note 19, at 1150, 1165-70; Farley, *supra* note 18, at 110; Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev., 170 F.3d 449, 463-65 (4th Cir. 1999).

87. Beebe, *A Defense*, *supra* note 19, 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.jjnissenbreads.com> (last visited October 7, 2008).

88. Rochelle Cooper Dreyfuss, *Reconciling Trademark Rights and Expressive Values: How to Stop Worrying and Learn to Love Ambiguity*, in *TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH* 261 (Graeme B. Dinwoodie & Mark D. Janis eds., 2008).

89. Tushnet, *supra* note 40, at 529.

90. Graeme W. Austin, *Trademarks and the Burdened Imagination*, 69 *BROOK. L. REV.* 827, 895 (2004).

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.⁹¹

Finally, many kinds of information are likely to cloud the informational salience of marks; dilution aims at only a trivial subset.⁹² 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.⁹³ Even the use of products in everyday life is likely to stimulate individual associations that will conflict or drown out any managed brand “personality.”⁹⁴ 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.⁹⁵ In-

91. Tushnet, *supra* note 40, at 536-39; see Chi-Ru Jou, *The Perils of a Mental Association Standard of Liability: The Case Against the Subliminal Confusion Cause of Action*, 11 VA. J.L. & TECH. 2, 58-60 (2006).

92. See, e.g., Tushnet, *supra* note 40, at 547-552.

93. 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).

94. Tushnet, *supra* note 40, at 540.

95. 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. For further discussion of this point, see *infra* text accompanying note 274. 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 21 at 1065 (advocating a social welfare balancing approach to dilution liability).

deed, trademark owners often sue satirists and critics under a dilution theory.⁹⁶

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.⁹⁷ 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.⁹⁸ Some judges have been downright hostile, claiming that trademark owners “must have had some kind of a lobby” to get such a statute passed.⁹⁹ 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.¹⁰⁰ 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. 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.¹⁰¹ 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

96. *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).

97. Long, *supra* note 21, at 1030-31 (attributing some of the judicial unwillingness to enforce the doctrine to the ambiguous nature of the harm).

98. *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.”).

99. 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).

100. *See generally* Beebe, *A Defense supra* note 19 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).

101. *See infra* Sections III.C.1 & III.C.2.

and thus a flimsy bedrock for a legal regime.¹⁰² Yet the last twenty years of research on cognitive processing and consumer decision-making suggests that emotion and affect are vital to reasoned deliberation, and that the stigmatization of emotion's part in the trademark debate should be reconsidered.¹⁰³ The next Part sets out the two existing accounts of the influence of emotion in trademark use and then suggests a third model that more accurately explains trademark owners' concerns about dilution by blurring.

III. 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 good's producer but the larger desire-driven claims made in the product's advertising.¹⁰⁴ As advances in communication and transportation made wide-

102. One recent exception is an article by Jeremy N. Sheff, *The (Boundedly) Rational Basis of Trademark Liability*, 15 TEX. INTEL. 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.

103. See *infra* text accompanying notes 152-249.

104. 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 informa-

spread distribution of commercial goods possible, producers sought to compete outside local markets.¹⁰⁵ 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,”¹⁰⁶ “youth,”¹⁰⁷ “mildness,”¹⁰⁸ or “achievement.”¹⁰⁹

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.¹¹⁰ 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.”¹¹¹ In Schechter’s formulation, the mark itself sells the goods by its connection to desirable qualities.¹¹² 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.¹¹³ This “dilution” would whittle away the singular identity of the mark and its hold on the public mind.¹¹⁴ Where

tion—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.

105. *See* Bone, *Hunting Goodwill*, *supra* note 8, at 580.

106. Marlboro, at least for men. ROBERT HEATH, *THE HIDDEN POWER OF ADVERTISING: HOW LOW INVOLVEMENT PROCESSING INFLUENCES THE WAY WE CHOOSE BRANDS* 27 (2001); *see* BRAND EQUITY & ADVERTISING: ADVERTISING’S ROLE IN BUILDING STRONG BRANDS 126-127 (David A. Aaker & Alexander L. Biel eds., 1993).

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

108. Neutrogena. *See* Barbara Loken & Deborah Roedder John, *Diluting Brand Beliefs: When Do Brand Extensions Have a Negative Impact?*, 57 J. MARKETING 71, 742 (1993).

109. Nike. HEATH, *supra* note 106, at 89 (Nike slogan encapsulates the concept of achievement).

110. Schechter, *supra* note 16 note at 819.

111. *Id.* at 818.

112. *Id.* at 819.

113. *Id.* at 831.

114. *Id.* at 825.

a mark owner had spent vast resources cultivating an image of excellence for a particular 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.¹¹⁵

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.¹¹⁶ 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."¹¹⁷ Brown argued that such ads used a "bewildering manipulation" of emotional urges to mesmerize consumers into assessing identical goods differently based on an illusory brand personality.¹¹⁸ 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.¹¹⁹

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

115. *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."

116. *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).

117. Brown, *supra* note 7, at 1171-75.

118. *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.

119. Brown, *supra* note 7, at 1171-75.

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.¹²⁰ By legitimating the claims that advertised brands delivered benefits like cachet or sex appeal unavailable from functionally equivalent and cheaper offerings, such laws helped to insulate established producers from competition.¹²¹ Brown was not alone in hoping that dilution of famous brands would occur and so force consumers to more carefully analyze how they spent their hard-earned dollars.¹²²

This critique persists in modern scholarship.¹²³ 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.¹²⁴ 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.¹²⁵

120. *Id.* at 1187-94.

121. *Id.* at 1184-85 (urging a legal distinction between the informational and persuasive function of trade symbols); *Id.* at 1187-94 (denouncing dilution as unwarranted protection of the persuasive function).

122. *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 116, 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 & 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).

123. *E.g.*, Robert N. Klieger, *Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection*, 58 U. PITT. L. REV. 789, 856-63 (1997).

124. *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).

125. Beebe, *A Defense*, *supra* note 19, at 1148-49; Bone, *Hunting Goodwill*, *supra* note 8, at 552-53, 622 (criticizing the extension of trademark protection beyond product

B. Rational Maximizers: Useful Product Information Influenced by Emotion

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.¹²⁶ 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.¹²⁷ 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 choices.¹²⁸ 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.¹²⁹ 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

and firm goodwill to encompass the "inherent goodwill" of the mark); Lunney, *supra* note 8, at 437.

126. Swann, *supra* note 15, at 594.

127. See, e.g., Dilbary, *supra* note 8 (arguing that consumers derive value from the intangible auras of branded products).

128. Lee Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J.L. & ECON. 337, 337-52 (1972); Phillip Nelson, *The Economic Consequences of Advertising*, 48 J. BUS. 213, 219, 224 (1975) [hereinafter Nelson, *Economic Consequences*]; Nelson, *Advertising as Information*, *supra* note 27, at 732 (hypothesizing that the more brand advertising a consumer encounters, the more likely he is to try the advertised brand).

129. Nelson, *Economic Consequences*, *supra* note 128, 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.").

market should be free to respond to these values.¹³⁰ 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).¹³¹ 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.¹³² These "emotional" perceptions are no less rationally self-interested than logical preferences tied to quality and price.¹³³ 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.¹³⁴

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.¹³⁵ Newcomer brands that free-ride on positive brand associations may change these associations by adding new connotations.¹³⁶ The new brand's associations may make the senior brand less appealing to its core constituency and so may mislead those consumers into changing their preferences.¹³⁷

Second, some studies suggest that advertising (regardless of the content of the advertisement) is itself a reliable indicator of quality.¹³⁸ Heavy

130. 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).

131. Swann, *supra* note 15, at 618.

132. Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1730 (1999).

133. Swann, *supra* note 15, at 618 ("Consumers thus logically, rationally and emotionally are interested in more than quality and price.").

134. Bone, *Hunting Goodwill*, *supra* note 8, at 603; Nelson, *Economic Consequences*, *supra* note 128, at 213.

135. Dilbary, *supra* note 8, at 607-08, 622-28, 663-64; *cf.* Swann, *supra* note 15, at 618 ("Mental as well as physical expectations are entitled to insulation.").

136. Dilbary, *supra* note 8, at 664.

137. Swann, *supra* note 15, 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).

138. Nelson, *Economic Consequences*, *supra* note 128, at 214; Nelson, *Advertising as Information*, *supra* note 27, at 732; LANDES & POSNER, *supra* note 12, at 174; *cf.* Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981) (presence of nonsalvageable capital is a means of enforcing quality promises).

advertising of a brand suggests lower risk because it signifies a level of investment in the brand by the underlying firm.¹³⁹ 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.¹⁴⁰ If the firm ceases to police quality or introduces inferior products to its line, its entire investment in the brand is jeopardized.¹⁴¹ Therefore, consumers rationally place higher confidence in brands that appear to have a greater backing because they represent a lower risk of inconsistent quality.¹⁴²

The safety valve of this information model is the consumer's rational self-interest.¹⁴³ 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.¹⁴⁴ The correlation between advertising and higher sales suggests that consumers do pay attention to advertising.¹⁴⁵ A possible inference from this

139. Klein & Leffler, *supra* note 138, at 94; Cynthia A. Montgomery & Birger Wernerfelt, *Risk Reduction and Umbrella Branding*, 65 J. BUS. 31 (1992) (brand investments signify less quality variation and lower risk); Nelson, *Advertising as Information*, *supra* note 27, at 734, 752; Birger Wernerfelt, *Umbrella Branding as a Signal of New Product Quality: An Example of Signaling by Posting a Bond*, 19 RAND J. ECON. 458 (1988).

140. Klein & Leffler, *supra* note 138, at 627; Wernerfelt, *supra* note 139, at 459.

141. Klein & Leffler, *supra* note 138, at 100.

142. 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 139 (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 27, at 732; Nelson, *Economic Consequences*, *supra* note 128, at 214.

143. Nelson, *Economic Consequences*, *supra* note 128, at 215; Nelson, *Advertising as Information*, *supra* note 27, at 734.

144. Nelson, *Economic Consequences*, *supra* note 128, at 215. *But see* HEATH, *supra* note 106, 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).

145. *See, e.g.*, HEATH, *supra* note 106, at 11 (the most successful companies spend the most on advertising); JEAN JACQUES LAMBIN, *ADVERTISING, COMPETITION AND MARKET CONDUCT IN OLIGOPOLY OVER TIME 94-95* (1976) (reporting the results of an analysis of ten years' worth of sales data for 107 brands in 8 Western European countries).

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.¹⁴⁶ Her own self-interest will lead her to disregard advertising for brands that fail to meet her tastes.¹⁴⁷ 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.¹⁴⁸ 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.¹⁴⁹ Further, there may be reason to believe that the supposedly irrational emotive preferences linked to heavily-advertised brands may lead to objectively

146. Nelson, *Advertising as Information*, *supra* note 27, at 751; Nelson, *Economic Consequences*, *supra* note 128, at 215-17.

147. Nelson, *Advertising as Information*, *supra* note 27, at 734, 751; Nelson, *Economic Consequences*, *supra* note 128, 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 144 *supra*.

148. *See* Nelson, *Advertising as Information*, *supra* note 27, 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 128, 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).

149. *See supra* text accompanying notes 130-136.

better product choices, albeit not for the reasons that the consumer imagines.¹⁵⁰

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 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.¹⁵¹ 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.

150. 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* 343-348 (Assar Lindbeck ed., 1992).

151. See *supra* text accompanying notes 45-47, 77-78.

C. Cognitive Misers: Using Emotion to Minimize Cognitive Decision-Making Costs

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.¹⁵² 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.¹⁵³ 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.¹⁵⁴ As discussed more fully below, modern consumer research suggests that such impulses often arise in response to second-order sources of information, such as stimulus familiarity, as a proxy for consideration of the persuasive or functional benefits of a product.

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.¹⁵⁵ Emotions are part of the nervous system, arising from evolutionarily old parts of the mammalian brain that propel behavior in histori-

152. E.g., W. Bentley MacLeod, *Complexity, Bounded Rationality and Heuristic Search*, CONTRIBUTIONS TO ECON. ANALYSIS & POL'Y art. 8, 2-3 (Sept. 30, 2002), <http://www.bepress.com/bejeap/contributions/vol1/iss1/art8>; Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99, 100 (1955).

153. SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* (1984); Ellen C. Garbarino & Julie A. Edell, *Cognitive Effort, Affect, and Choice*, 24 J. CONSUMER RES. 147, 148 (1997).

154. See *infra* text accompanying notes 171-213.

155. E.g., Richard P. Bagozzi et al., *The Role of Emotions in Marketing*, 27 J. ACAD. MARKETING SCI. 184 (1999); Antoine Bechara & Antonio R. Damasio, *The Somatic Marker Hypothesis: A Neural Theory of Economic Decision*, 52 GAMES & ECON. BEHAV. 336 (2005); Yaniv Hanoch, “Neither an Angel nor an Ant”: *Emotion as an Aid to Bounded Rationality*, 23 J. ECON. PSYCHOL. 1 (2002); Macleod, *supra* note 152, at 42; Paul Slovic et al., *Rational Actors or Rational Fools: Implications of the Affect Heuristic for Behavioral Economics*, 31 J. SOCIO-ECON. 329 (2002) [hereinafter Slovic et al., *Rational Actors*].

cally advantageous ways.¹⁵⁶ Emotions generally identify goals and desires, leading individuals to pursue those desires in conscious and subconscious ways.¹⁵⁷

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.¹⁵⁸ 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.¹⁵⁹ Damasio concluded that the impaired ability to experience emotion was responsible for the man’s inability to arrive at a decision.¹⁶⁰

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.¹⁶¹ We retrieve these feelings again upon encountering or remembering a known object or situation.¹⁶²

Without such somatic tones we might be paralyzed by inaction.¹⁶³ 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 thought.¹⁶⁴

156. STEVEN PINKER, *HOW THE MIND WORKS* 370-74 (1997); Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405, 438-39 (2005).

157. Jones & Goldsmith, *supra* note 156, at 438-39.

158. ANTONIO R. DAMASIO, *DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* (1994).

159. *Id.* at 193-94.

160. *Id.*

161. *Id.* at 173-75; Slovic et al., *Rational Actors*, *supra* note 155, at 332.

162. DAMASIO, *supra* note 158, at 174; Bechara & Damasio, *supra* note 155, at 340; Slovic et al., *Rational Actors*, *supra* note 155, at 332.

163. DAMASIO, *supra* note 158, at 173, 193-94.

164. PINKER, *supra* note 156, 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; Zajonc, *Feeling and Thinking*, *supra* note 5, at 157.

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.¹⁶⁵ 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.¹⁶⁶ Thus, emotion is what gives us the impetus to make decisions.¹⁶⁷

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.¹⁶⁸ 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.¹⁶⁹ In other cases, such as aesthetic appreciation of art objects, snap affective judgments often lead to more satisfying results than sustained analyses.¹⁷⁰

2. *Emotion as a Heuristic in Consumer Decision-Making*

Emotion is especially important in what social psychologists have termed “low-involvement” processing situations. Recent studies on consumer purchasing behavior suggest that consumers use one of two processes in evaluating advertising and making purchasing decisions.¹⁷¹

165. PINKER, *supra* note 156, at 386; Slovic, *supra* note 2, at 973.

166. DAMASIO, *supra* note 158, at 174.

167. *See id.* at 190-95 (feelings of good and bad act as “stop,” “go,” and “turn” signals necessary for some aspects of decision-making); *id.* at 198-99 (somatic markers, or good/bad feelings are one of three prerequisites for decision-making, along with attention and working memory).

168. *See id.* at 190-95.

169. Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977, 1984-85, 2005 (2001).

170. 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 40, at 29; *see also* Macleod, *supra* note 152, 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).

171. Camerer et al., *supra* note 40, 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 155, 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 Empiri-*

Where individual motivation and interest is high (for example, the purchase is expensive, risky, or otherwise significant to the consumer), the consumer is likely to use what has been called “high-involvement,” elaborative, or “System II” processing.¹⁷² 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.¹⁷³ 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.¹⁷⁴

The second form of processing, which has been termed “low-involvement” or “System I” processing, is more beneficial for advertisers.¹⁷⁵ 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.¹⁷⁶ Consumers

cal Case for Two Systems of Reasoning, 119 PSYCHOL. BULL. 3 (1996); see also Kahan, *supra* note 2, at 107.

172. See Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1451 (2003).

173. *Id.*

174. 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).

175. Kahneman, *supra* note 172, at 1451.

176. See Norbert Schwarz, *Feelings as Information: Mood Influence Judgments and Processing Strategies*, in *Heuristics & Biases: The Psychology of Intuitive Judgment* 534, 539 (Thomas Gilovich et al. eds., 2002) (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 Reisenzein, *Effects of Mood on Evaluative Judgments: 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).

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 dominant role.¹⁷⁷ In a low-involvement strategy, the consumer’s primary goal is to conserve taxed cognitive resources.¹⁷⁸ 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.¹⁷⁹

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.¹⁸⁰ 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.¹⁸¹ 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 con-

177. Slovic et al., *The Affect Heuristic*, *supra* note 171, at 1335.

178. *Cf.* Frederick, *Cognitive Reflection*, *supra* note 176, at 26.

179. Pham et al., *supra* note 5, at 175; Siemer & Reizenzein, *supra* note 164, 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.

180. *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, *supra* note 176, at 288 (1999); Slovic et al., *The Affect Heuristic*, *supra* note 171, at 1336.

181. Some models of consumer perception and choice embrace this theory. *See, e.g.*, Richard P. Bagozzi et al., *supra* note 155, at 185-88 (describing appraisal theories of emotion in which emotions are thought to result from specific evaluative judgments or cognitions). *But see* R.B. Zajonc, *On the Primacy of Affect*, 39 AM. PSYCHOLOGIST 117, 118-22 (1984) [hereinafter Zajonc, *On the Primacy of Affect*] (detailing evidence against appraisal theories and in favor of independence of affective and cognitive processes); Robert B. Zajonc & Hazel Marcus, *Affective and Cognitive Factors in Preferences*, 9 J. CONSUMER RES. 123, 126-27 (1982) (stating that emotion operates independently of cognition and often precedes cognitive appraisal on which emotions are thought to be based).

sumers 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.¹⁸² Familiarity operates on many levels to increase certainty and reduce effort.¹⁸³ 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.¹⁸⁴ In low involvement situations, consumers do not want to take the time to consult branches of memory for specific brand attributes; they want to know immediately whether they “like” the choice.¹⁸⁵

Familiarity induces preference for many reasons. First, consumers tend to rely on decision heuristics when operating in conditions of uncertainty.¹⁸⁶ 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.¹⁸⁷ This set typically includes a subset of those brands about which the consumer is already aware.¹⁸⁸ If the consumer

182. See *infra* text accompanying notes 186-207.

183. *Id.*

184. 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 152, at 23 (quality of decision-making using an affect heuristic is affected by the quality of the heuristic but 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 decision making, instead of attempting to recall and process specific brand associations.”); see also *infra* note 200 for sources cited therein.

185. See Zajonc, *Feeling and Thinking*, *supra* note 5, at 151.

186. MacLeod, *supra* note 152, at 40; Simon, *supra* note 152, 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).

187. See James R. Bettman et al., *Constructive Consumer Choice Processes*, 25 J. CONSUMER RES. 187, 190 (1998); Sarah Coates, Laurie T. Butler & Dianne C. Berry, *Implicit Memory: A Prime Example for Brand Consideration and Choice*, 18 APPLIED COGNITIVE PSYCHOL. 1195, 1196 (2004).

188. Coates et al., *supra* note 187, 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

lacks the knowledge or motivation necessary to conclusively distinguish between even these options, she may rely on further heuristics to help make the decision.¹⁸⁹ She may, for example, choose based on price.¹⁹⁰ 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.¹⁹¹ 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.¹⁹² 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.¹⁹³

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 the mark itself.¹⁹⁴ Rather, the process of evaluating the mark itself may stimulate significant positive emotions.¹⁹⁵ Experiments have confirmed that repeated exposure to a stimulus alone increases positive feelings toward the stimulus.¹⁹⁶ This is known as the

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).

189. Frederick, *Automated Choice Heuristic*, *supra* note 184, at 554; Strebinger et al., *supra* note 188, at 20.

190. *See* Strebinger et al., *supra* note 188, at 14, 16 (noting the tendency of consumers to use price as a heuristic).

191. *See* Frederick, *Automated Choice Heuristic*, *supra* note 184, at 554; Strebinger et al., *supra* note 188, at 15-16.

192. Frederick, *Automated Choice Heuristic*, *supra* note 184, at 554.

193. Strebinger et al., *supra* note 188, at 20 (reporting the common heuristic that "[w]ith a well-known brand, nothing much can go wrong").

194. Chris Janiszewski, *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 153, 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 176 at 142-43; Zajonc & Marcus, *supra* note 181, at 125.

195. WALKER, *supra* note 188, at 58; Garbarino & Edell, *supra* note 153, at 147.

196. John A. Bargh, *Conditional Automaticity: Varieties of Automatic Influences in Social Perception and Cognition*, in *UNINTENDED THOUGHT* 3 (James S. Uleman & John A. Bargh eds., 1989); Frederick, *Automated Choice Heuristic*, *supra* note 184, at 553-54; Slovic et al., *The Affect Heuristic*, *supra* note 171, at 1336.

“mere exposure” effect.¹⁹⁷ 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.¹⁹⁸ 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.¹⁹⁹ 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.²⁰⁰ Studies suggest that consumers are often unaware of the true

197. Baker, *supra* note 32, at 32; Robert F. Bornstein, *Exposure and Affect: Overview and Meta-Analysis of Research, 1968-1987*, 106 PSYCHOL. BULL. 265, 278 (1989) (“The first twenty years of research on . . . [the] mere exposure effect leaves little doubt that the exposure-affect relationship is a robust, reliable phenomenon.”).

198. Piotr Winkielman & John T. Cacioppo, *Mind at Ease Puts a Smile on the Face: Psychophysiological Evidence That Processing Facilitation Elicits Positive Affect*, 81 J. PERSONALITY AND SOC. PSYCHOL. 989, 994 (2001); *see also* Piotr Winkielman et al., *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, *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)”).

199. Baker, *supra* note 32; Bornstein, *supra* note 197 at 280-81.

200. Baker, *supra* note 32, at 44 (noting that consumers may chose familiar brands over those with superior attributes); Garbarino & Edell, *supra* note 153, at 156; Norbert Schwarz & Leigh Ann Vaughn, *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 198, at 207, 211; *cf.* Kenneth Heilman, *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 194, at 3377 (finding that mere exposure to a product results in an increased preference for that product); Prakash Nedungadi, *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 being chosen even if its evaluations are unchanged); Rob Walker, *The Brand-ness of Strangers*, NY TIMES MAGAZINE, Nov. 16, 2008 at 26

source of the positive affect toward the brand, and misattribute it to the brand or product's likeability, credibility, or suitability.²⁰¹

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.²⁰² The information from advertising also indirectly impacts purchasing decisions.²⁰³ 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.²⁰⁴ Accordingly, brand familiarity has emerged as one of the most powerful predictors of consumer choice.²⁰⁵

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 rational-

(describing a study in which subjects who were subconsciously primed with exposure to a brand showed a marked increase in preference for that brand over subjects who were not primed).

201. Camerer et al., *supra* note 40, 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); Timothy D. Wilson et al., *A Model of Dual Attitudes*, 107 PSYCHOL. REV. 101; Zajonc & Markus, *supra* note 181, at 126-27.

202. E.g., Scott A. Hawkins & Stephen J. Hoch, *Low-Involvement Learning: Memory without Evaluation*, 19 J. CONSUMER RES. 212, 215-16, 223 (1992) (familiarity with a claim increases credibility, especially in low-involvement settings); Catherine W. M. Yeung & Robert S. Wyer, Jr., *Affect, Appraisal, and Consumer Judgment*, 31 J. CONSUMER RES. 412 (2004).

203. Rajeev Batra & Michael Ray, *How Advertising Works at Contact*, in PSYCHOLOGICAL PROCESSES AND ADVERTISING EFFECTS: THEORY, RESEARCH AND APPLICATION 13, 37, 39 (Linda F. Alwitt & Andrew A. Mitchell eds., 1985).

204. *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 188, at 32.

205. 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, 5-15 (2000) (finding brand awareness to be a powerful influence on brand choice); Batra & Ray, *supra* note 203, at 36 (finding that familiarity is the major determinant of purchase intentions in low-involvement conditions); Strebinger et al., *supra* note 188, at 32 (listing all the pathways through which brand awareness influences choice).

ly 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.²⁰⁶ Furthermore, their very familiarity suggests a sufficient level of investment by an underlying firm to guarantee a minimum quality level. Where a 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.²⁰⁷

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.²⁰⁸ Some brain imaging studies done on purchasers while making shopping decisions support this theory.²⁰⁹ 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.²¹⁰ One such study, which measured brain activity levels of purchas-

206. See, e.g., Bornstein, *supra* note 197, 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).

207. Hanoch, *supra* note 155, at sec. 5.1.

208. 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); Piotr Winkielman et. al, *supra* note 198, at 204, 211; cf. 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).

209. 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).

210. Semantic memory is the area of long-term memory that stores words, meanings and general facts. Alex Martin and 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).

ers 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.²¹¹ 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.²¹² 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 with positive emotions, arousal and focused attention.²¹³ This research, although very preliminary, sug-

211. Ambler et al., *supra* note 4, at 256 (finding no difference in activity of semantic memory based on familiarity of a brand).

212. Deppe et al., *supra* note 209, 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). McClure found 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. *Id.*

213. *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 209, at 180; *see also* Heilman, *supra* note 200, 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).

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 212, 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

gests 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.²¹⁴ 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.²¹⁵ But 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 would never reach this level of concern about specific product or producer qualities. If such consumers are concerned primarily with whether 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.²¹⁶

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 gen-

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 213, at 177-78 (stating that consumers rely on recalled attributes when overall evaluations of two product choices are relatively equal); Baker, *supra* note 32, 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 212, at 385 (hypothesizing the independence of systems measuring sensory preference and systems measuring informational preference).

214. *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.

215. *See, e.g.*, David A. Aaker, *Measuring Brand Equity Across Products and Markets*, 38 CAL. MGMT. REV. 102, 102-20 (1996); Keller, *supra* note 214, at 1-22; Punj & Hillyer, *supra* note 4, at 125.

216. *Cf.* Brown, *supra* note 7, at 1194 (noting the advertising maxim that "Repetition is reputation").

erated by famous marks. But 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.²¹⁷ 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.²¹⁸ 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.²¹⁹ 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.²²⁰ 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.²²¹ Interestingly, incongruity may not

217. See Loken & John, *supra* note 108, 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 153, at 156 (same).

218. 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. Advantage remains so long as the personality remains distinctive.").

219. Dacin & Smith, *supra* note 142, 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."); Erdem & Swait, *supra* note 27, at 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).

220. 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 198, at 193-96 (same).

221. See Loken & John, *supra* note 108, at 73; see also Winkielman et. al, *supra* note 198, at 206 (noting that "conceptual fluency," defined as the semantic congruency between items, also is associated with positive affect).

cause our conscious beliefs about the brand and the original product to change. These beliefs are well-rehearsed and resistant to alteration.²²² 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.²²³ We may find that the brand requires more effort to evaluate and a negative tone associated with risk could appear.²²⁴ At the extreme, this could cause an involuntary switch from an overall positive to an overall negative affect toward the brand.²²⁵

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.²²⁶ 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.²²⁷ 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.²²⁸ Because

222. 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).

223. Erdem & Swait, *supra* note 27, at 137-38.

224. See Qinggou 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).

225. Dacin & Smith, *supra* note 142, at 233 (“product judgments are negatively related to consumers’ uncertainty in their beliefs about a product.”); Ma et al., *supra* note 224, at 1031-34; Swann, *supra* note 15, 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).

226. Ma et al., *supra* note 224, at 1031-34.

227. Dacin & Smith, *supra* note 142, at 233; Erdem & Swait, *supra* note 27, at 137-38.

228. 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 40, at 347 (evaluating scanner

affective reactions arise automatically and faster than cognitive appraisals,²²⁹ such effects occur whether or not the consumer is consciously aware that the new use of a mark is unauthorized.²³⁰

data for toothbrush and toothpaste purchases); Swaminathan et al., *The Impact of Brand Extension Introduction*, *supra* note 40, 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 108, 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 40, 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).

229. *See* Piotr Winkielman et al., *supra* note 198, at 195, 209; sources cited *supra* note 179.

230. Some survey-based studies suggest that use of a sub-brand or other device to signal a distance between the parent and the extension insulates the parent brand from negative spillover effects. *See, e.g.*, Amna Kirmani et al., *The Ownership Effect in Consumer Responses to Brand Line Stretches*, 63 J. MARKETING 88, 89 (1999) (finding that signaling a difference between the main brand and the extension prevents dilutive effects on the main brand); Sandra J. Milberg et al., *Managing Negative Feedback Effects Associated with Brand Extensions: The Impact of Alternative Branding Strategies*, 6 J. CONSUMER PSYCHOL. 119, 136-37 (1997) (finding that sub-branding may prevent negatively evaluated brand extensions from harming the parent brand); Tushnet, *supra* note 40, at 543, 543 n.17. This might suggest that negative spillovers are unlikely to occur in the case of trademark blurring because the consumer will differentiate between authorized and unauthorized uses. Tushnet, *supra* note 40, at 543. However, one has to be cautious both ways with behavioral research. These studies only examined changes in the subject's conscious beliefs about a brand after a limited exposure to a potentially dilutive alliance. Real spillover effects would take time to develop. *See* Swaminathan et al., *The Impact of Brand Extension Introduction* *supra* note 40, at 2 (noting the inability of survey studies to measure spillover effects over time). Furthermore, survey-based measures of conscious brand beliefs do not effectively capture the impacts on automatic affective responses. Because some studies reveal that behavior or affect can change without a corresponding change in conscious beliefs, it may be that the two evaluation systems can work independently, at least under some conditions. *See, e.g.*, Zajonc, *On the Primacy of Affect*, *supra* note 181, at 117-23 (1984) (detailing studies suggesting that affect precedes conscious cognition and appraisal, and that changes in affect and cognition are not always correlated). Finally, some trademark "blurring" may not provide the quick and easy debiasing information necessary to avoid dilutive effects. Trademark dilution is usually considered non-confusing because of the larger context in which it occurs. The oft-cited examples of Kodak pianos and Buick shoes are supposedly not confusing because the product line is so dissimilar we wouldn't automatically assume a connection with the famous brand, not because the new marks offer immediately apparent signals of difference from the famous ones. Because changes in affect are linked to demands on cognitive resources, the harder consumers have to work to distinguish uses, the more likely affect changes are to appear. Thus, such studies support denying liability where the allegedly dilutive mark is obviously different from the famous mark, the balance I suggest in Part

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.²³¹ If we see the same things too often, we resent having to use effort to evaluate them repeatedly.²³² Brand owners manage this advertising wearout by varying advertising campaigns and redesigning logos from time to time.²³³ The research is mixed as to whether wearout even exists, and if so, to what extent it impacts familiar brands.²³⁴ Nevertheless, real-world brand managers express concern about it.²³⁵ A few studies support the notion that blurring could lead to wearout because market newcomers are more likely to choose promotional strategies that are known to produce wearout effects.²³⁶ 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.²³⁷ Advertising for new products typically tries to grab the consumer's attention and challenge them to change their

IV.D. They do not really speak to the harder case of identical marks used in contextually different ways.

231. See, e.g., Bobby J. Calder & Brian Sternthal, *Television Commercial Wearout: An Information Processing View*, 17 J. MARKETING RES. 173, 185 (1980) (finding that evaluations of television commercials and advertised products became more negative after multiple repetitions); cf. Walker, *supra* note 200, at 26 (describing a study that found that some exposure to a brand increased preference for it, but that too much exposure caused fewer subjects to choose that brand).

232. Donald E. Berlyne, *Novelty, Complexity and Hedonic Value*, 8 PERCEPTION PSYCHOPHYSICS 279 (1970) (proposing that affective consequences of exposure are a function of learning and satiation, with learning leading to positive affect and satiation creating boredom that leads to negative affect); Calder & Sternthal, *supra* note 231, at 185; Margaret C. Campbell & Kevin Lane Keller, *Brand Familiarity and Advertising Repetition Effects*, 30 J. CONSUMER RES. 292 (2003).

233. See Christie L. Nordheim, *The Influence of Level of Processing on Advertising Repetition Effects*, 29 J. CONSUMER RES. 371, 371 (2002).

234. Douglas R. Scott & Debbie Solomon, *What Is Wearout Anyway?*, 38 J. ADVERTISING RES. 19 (1998); cf. Swaminathan, *Sequential Brand Extensions* *supra* note 40, at 441 (hypothesizing that multiple product extensions increase consumer interest and knowledge across different segments of society).

235. E.g., Bill Britt, *Disney's Global Goals*, MARKETING, May 17, 1990, at 26; Richard Gibson, *The End of the Line? Overkill on Extensions*, WALL ST. J., June 18, 1990, at B1.

236. See, e.g., Nordheim, *supra* note 233, at 372-82 (measuring the effect of levels of processing on wearout of affective response to advertising); cf. Campbell, *supra* note 232 (finding that ads for familiar brands wearout more slowly than the same ads attributed to unfamiliar brands).

237. Scott & Solomon, *supra* note 234, at 22-23.

behavior.²³⁸ This second kind of ad stimulates more elaborative processing and is more likely to lead to wearout.²³⁹ 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.²⁴⁰

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.²⁴¹ Furthermore, some studies measure changes in people’s affect or beliefs through direct focused questioning designed to stimulate thoughtful responses.²⁴² 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.²⁴³

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 exposure to diluting uses found no significant effects for familiar marks such as Continental Airlines and Avon.²⁴⁴ It may be that our positive impressions of these kinds of brands are so well-established that it would take negative reinforcement of cataclysmic

238. *Id.*

239. *See* Nordheim, *supra* note 233, at 373, 380 (demonstrating that wearout is more likely where consumers think more extensively about the content or presentation of advertising).

240. *Id.* 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 40, 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 231, at 185 (finding that variations of ad executions forestalled wearout for the ads but not the advertised product).

241. Tushnet, *supra* note 40, at 542.

242. *See, e.g.,* Aaker & Keller, *supra* note 228; Loken & John, *supra* note 108 at 71-84.

243. Johar et al., *supra* note 194; Demetrios Vakratsas & Tim Ambler, *How Advertising Works: What Do We Really Know?*, 63 J. MARKETING 26, 36 (1999).

244. Morrin & Jacoby, *supra* note 40, at 14.

proportions to unseat them.²⁴⁵ 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.²⁴⁶ The tipping point may be high for well-known brands, but there is no reason to believe it doesn't exist.²⁴⁷ 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.²⁴⁸

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.²⁴⁹

245. John et al., *supra* note 222, 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 40, at 2 ("The beliefs associated with the core parent brand are likely to be of varying strength across different segments of consumers.").

246. *See, e.g.*, John Carreyrou & Cecilie Rohwedder, *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; *see also* Suzy Menkes, *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 235, at B1.

247. *E.g.*, Camerer et al., *supra* note 40, 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).

248. *See* Swaminathan, *Sequential Brand Extensions supra* note 40 at 440-41; Aker & Keller, *supra* note 228.

249. 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 harms 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

IV. 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 critic’s 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.²⁵⁰ 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.²⁵¹ 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.²⁵² 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

“crowded field.” *Cf.* *Nautilus Group, Inc. v. Savvier, Inc.*, 427 F. Supp. 2d 990, 995 (W.D. Wash. 2006) (arguing 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 thousand cuts.” Thus whatever the state of the research in support of the harm of dilution by blurring, trademark law already, perhaps inadvertently, internalizes some of its core assumptions.

250. *See supra* note 179 for sources cited therein.

251. *See supra* text accompanying notes 82-83.

252. *See supra* text accompanying notes 82-83.

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.²⁵³ The common assumption is that all prominent uses of similar marks on unrelated goods cause blurring by disassociating 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.

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 more considered 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 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.²⁵⁴

Recall that our primary goals with regard to trademark protection are to lower search costs and to increase the overall quality of information ex-

253. Long, *supra* note 21, at 1059; Swann, *supra* note 15, at 622.

254. See Kratzke, *supra* note 16, at 214-29 (arguing that trademark law's paramount concern should be the interests of consumers as served by competition among brands, and that trademarks serve this interest by efficiently providing information about available choices).

changed in the marketplace in the service of inter-brand competition.²⁵⁵ 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.²⁵⁶ 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 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.²⁵⁷ 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

255. See *supra* text accompanying note 15.

256. Fed. Express Corp. v. Fed. Espresso, Inc., 201 F.3d 168 (2d Cir. 2000); Nike Inc. v. Nikepal Int'l Inc., 84 U.S.P.Q.2d (BNA) 1820 (E.D. Cal. 2007).

257. Cf. Park & Hastak, *supra* note 174, 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 169, 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).

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.²⁵⁸ 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.²⁵⁹

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 strategies when making a purchasing decision.²⁶⁰ 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

258. See *supra* text accompanying notes 217-230.

259. E.g., Sheff, *supra* note 102, at 358-61.

260. See *supra* text accompanying note 150.

to make an informed choice.²⁶¹ 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.²⁶²

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.²⁶³ They are willing to accept the risk of a less than optimal choice in exchange for lower decision making costs.²⁶⁴ 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.²⁶⁵ 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.

261. 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).

262. Posner, *supra* note 169, 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).

263. Frederick, *Cognitive Reflection*, *supra* note 176, at 26.

264. See *supra* text accompanying notes 170-188.

265. Cf. Frederick, *Automated Choice Heuristic*, *supra* note 184, 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).

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 pure “mental processes” divorced from any specific tangible result.²⁶⁶ 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.²⁶⁷ 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.²⁶⁸ Constraints on consumer’s time and motivation to search will always favor familiar brands because they will always seem less risky.²⁶⁹

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 1985.²⁷⁰ Consumers may have good reasons for continuing to

266. 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*, No. 2006-1268, 2009 WL 162408 (Fed. Cir. Jan. 26, 2009).

267. *Comiskey*, 2009 WL 162408 at *6 (noting that patent’s subject matter restrictions are designed to weed out monopolies that will not enrich the public); *id.* at *7 (stating that mental processes provide the basic blocks of scientific inquiry and therefore should not be the subject of exclusive rights) (quoting *Gottschalk v. Benson*, 407 U.S. 63, 67 (1972)).

268. *Baker*, *supra* note 32, 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).

269. 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 27, at 140 n.2 (arguing that uncertainty and information costs influence which brands are included in consideration sets); Lynch et al., *supra* note 213, 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).

270. Steve Hartman, *Brand Equity Impairment—The Meaning of Dilution*, 87 TRADEMARK REP. 418, 429-30 (1997). Federal dilution protection was not passed until 1998, although some states offered dilution protection as early as 1926.

patronize familiar sellers, but the law insulates such tendencies by proper-tizing brand familiarity. Protection against dilution may be tantamount to giving property rights in market leadership.

3. *Enforcing Different Advertising Standards for Established Producers and Market Newcomers Promotes Neither Accuracy nor Competition*

Dilution regulation in practice treats advertising designed to appeal to affective biases differently depending on whether such communications come from an established producer or a market newcomer. Although other areas of the law offer precedent for excluding affectively biasing information in the interest of accurate decision-making, such rules are usually applied consistently to every party engaging in persuasion. For example, the Federal Rules of Evidence require judges to exclude otherwise relevant evidence from jurors if the probative value of that information is substantially outweighed by the danger of unfair prejudice.²⁷¹ “Unfair prejudice” means an undue tendency to influence a decision on an improper basis; this is commonly, though not necessarily, an emotional one.²⁷² Rule 403 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.²⁷³ In such situations, considerations of economy and fairness mitigate in favor of excluding the information at the outset.

In the trademark context, owners 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 (essentially arguing that the informational value provided by free-riding is substantially outweighed by its prejudicial value). This analogy can 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. We believe that consumers benefit by considering

271. Fed. R. Evid. 403.

272. *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 a defendant, the most successful method being the introduction of an inflammatory picture. *Id.*

273. *Id.*

relevant criticism and commentary in making purchasing decisions. By contrast, dilution law proponents argue that free-riding is entirely opportunistic,²⁷⁴ and in such cases 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.²⁷⁵ These cases typically concern the commercial connection of a famous mark to products connected with sex, drugs, or violence.²⁷⁶ If blurring is a form of tarnishment, as has been argued above, perhaps it should comply with a similar balancing test.

It would be troubling, however, to apply a rule requiring relevance selectively only to some commercial speakers. At trial, the rules of evidence apply equally to each adversarial party. Neither side 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. If preserving the quality of information availa-

274. See, e.g., *Ty Inc. v. Perryman*, 306 F.3d 509, 512 (7th Cir. 2002) (Posner, J.) (noting an example of a “Tiffany’s” restaurant in Kuala Lumpur as an example of trademark free-riding that might dilute; the restaurant owner selects the name solely to benefit from the fame of the 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 the name “Nikepal” from randomly pointing in the dictionary).

275. See *Ty Inc.*, 306 F.3d at 511 (arguing that because of the inveterate tendency of the human mind to proceed by association, people will connect the jeweler Tiffany’s to the 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 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 a pornographic film that prominently featured plaintiff’s trademarks because of tarnishment of reputation of a famous cheerleading squad); *Coca-Cola Co. v. Gemini Rising, Inc.* 346 F. Supp. 1183 (E.D.N.Y. 1972) (enjoining a poster that connected the Coke beverage to the slogan “Enjoy Cocaine”).

276. Long, *supra* note 21, at 1057.

ble to the consumer is the goal of trademark dilution law, then it is problematic to have two different standards for the trademark owner and for follow-on speakers. 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.²⁷⁷ 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.²⁷⁸ Some examples from the case law include a medical equipment importer called “Nikepal,”²⁷⁹ a perfume and beauty products site called “Perfumebay,”²⁸⁰ an erotic novelty shop called “Victor’s Little Secret,”²⁸¹ a state tourism board that promotes its ski industry as “The Greatest Snow on Earth,”²⁸² a Syracuse coffee shop called “Federal Espresso,”²⁸³ a coffee bean variety known as “Charbucks”²⁸⁴ and a moving company’s whimsical depiction on its vans of a brown sofa emerging from a candy bar wrap-

277. *E.g.*, Dogan *supra* note 16 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 40 (arguing that dilution law violates First Amendment commercial speech doctrine rules because it fails to distinguish harm caused blurring from similar harms caused by protected critical and parodic speech).

278. *E.g.* Franklyn, *supra* note 275 (arguing for replacing dilution with a cause of action that explicitly targets free-riding on famous marks); Tushnet, *supra* note 40 (advocating a limited dilution cause of action aimed at deterring unfair competition through misappropriation of brand value).

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

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

281. *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003).

282. *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 170 F.3d 449 (4th Cir. 1999).

283. *Fed. Express Corp. v. Fed. Espresso, Inc.*, 201 F.3d 168 (2d Cir. 2000).

284. *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 477 F.3d 765 (2d Cir. 2007).

per evocative of the Hershey chocolate bar's trade dress.²⁸⁵ 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.²⁸⁶ The free-riding restaurant introduces irrelevant associations with the prestigious Tiffany's mark and so degrades its salience for consumers.²⁸⁷ 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.²⁸⁸ 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.²⁸⁹ 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 2000.²⁹⁰ Even in 1841, the blue was like-

285. *The Hershey Co. v. Art Van Furniture*, No. CV-14463, 2008 WL 4724756 at *15 (E.D. Mich. Oct. 24, 2008) (finding a reasonable likelihood of success that Hershey would succeed at trial on its claim that the "couch bar" blurred its trade dress).

286. *See supra* text accompanying note 76.

287. *Id.*

288. Katie Sweeney, *Charles Tiffany Found All that Glittered in Jewelry*, INVESTOR'S BUS. DAILY, Oct. 26, 2007.

289. FirstMention.com, Tiffany's, <http://firstmention.com/tiffanys.aspx> (last visited Sept. 29, 2008).

290. U.S. Trademark No. 2,359,351 (filed Aug. 24, 1998) (issued June 20, 2000).

ly 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 its use in portraits of female members of the royal court at Versailles in the 1700s.²⁹¹ 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.²⁹² 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.²⁹³ 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"²⁹⁴ and extension of rights across national boundaries for well-known source-identifiers²⁹⁵ might make Tiffany's conduct actionable as dilution. Tiffany's arguably made its name by blurring Nattier's trademark shade of blue.

291. 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.

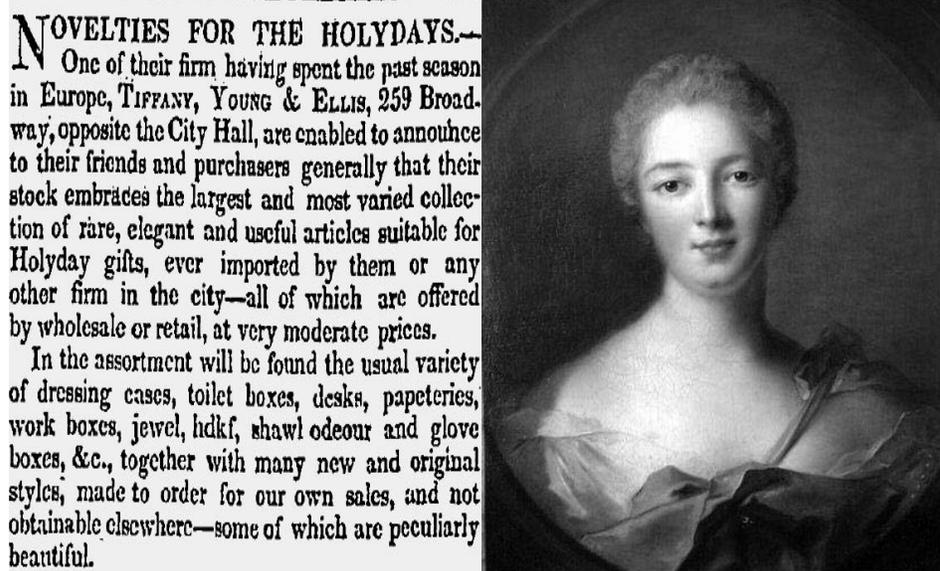
292. Bordes, *supra* note 291, at 184.

293. Connie Glaser, *Tips from Tiffany's*, BIZJOURNALS, Sept. 17, 2007, http://www.bizjournals.com/extraedge/consultants/winning_at_work/2007/09/17/column144.html.

294. See *Romm Art Creations, Ltd. v. Simcha Int'l, Inc.*, 786 F. Supp. 1126 (E.D.N.Y. 1992) (painting style can operate as a trademark).

295. 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).

Figure 1: Tiffany's first newspaper advertisement in 1841 vs. J.M. Nattier's 1748 portrait of Madame de Pompadour



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.²⁹⁶ 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.²⁹⁷ The resulting "Ronald McDonald" would not necessarily have caused confusion with Bozo, but the presence of the same actor with

296. See, e.g., *Quality Inns Int'l, Inc. v. McDonald's Corp.*, 695 F. Supp. 198 (D. Md. 1988).

297. 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.

Id.

the same voice in a similar costume surely would have sustained a blurring claim had the cause of action been available at the time.²⁹⁸ 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.²⁹⁹ 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.³⁰⁰ Coke's advertising campaign may have been an attempt to create associations with a more successful beverage company.³⁰¹

Modern free-riders similarly use the "atmospherics" surrounding well-known brands to communicate information about their own products.³⁰² Rochelle Dreyfuss has written that modern brands have replaced classic literature as the basis for rhetorical and 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."³⁰³ 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 suc-

298. *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).

299. *See, e.g.*, Snopes.com, Coca-Cola Invents Santa Claus? (Dec. 25, 2007), <http://www.snopes.com/cokelore/santa.asp>.

300. *Coca-Cola's Santa Claus, Not the Real Thing!*, PR NEWSWIRE, Dec. 15, 2006, available at WestLaw, 12/15/06 PR Newswire 16:56:00; Wikipedia, Santa Claus, http://en.wikipedia.org/wiki/Santa_Claus (last modified Sept. 19, 2008); *see also* White Rock Collectors Association, Santa Claus and White Rock from 1915, <http://www.whiterocking.org/santa.html> (last visited Sept. 26, 2008).

301. Coca-Cola would later sue a competitor for similar conduct involving the 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).

302. *Cf.* Litman, *supra* note 132, 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).

303. Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 424 (1990).

cinctly that the product was an herbal alternative to Prozac, the leading antidepressant drug made by Eli Lilly.³⁰⁴ The Seventh Circuit found the use dilutive of Lilly's trademark.³⁰⁵ The Court suggested that Natural Answers could have achieved the same informational effect legally with a name such as "Natural Answers' Herbal Mood Elevator."³⁰⁶ 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.³⁰⁷

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.³⁰⁸ 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.

304. *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456, 465 (7th Cir. 2000).

305. *Id.* at 469.

306. *Id.* at 465.

307. *Cf. Siegfried & Evans, supra* note 269, 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).

308. *See infra* text accompanying notes 319-320.

Consumer product markets suffer from information asymmetries because sellers have better information than buyers about the true value of goods and services.³⁰⁹ 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.³¹⁰ 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.³¹¹ 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.³¹² 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.³¹³ Therefore, sellers have an incentive to oversupply brand-specific information and under-supply product-specific information.³¹⁴

309. See Nelson, *Information and Consumer Behavior* *supra* note 148 at 311-12; Stigler, *supra* note 27.

310. Ekelund et al., *supra* note 261, at 34.

311. Beales et al., *supra* note 29, at 508.

312. *Id.*

313. 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).

314. Beales et al., *supra* note 29, at 509.

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.³¹⁵ It also allows competitors to legally free-ride off the recognition of the senior owner's mark.³¹⁶

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.³¹⁷ 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.³¹⁸

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.³¹⁹ Consumer interest in this information will bring atten-

315. I am indebted to Bruce Kobayashi for this point.

316. Dogan, *supra* note 16, at 106 (noting that the Pepsi challenge was a form of free-riding on Coca-Cola's brand).

317. Beales et al., *supra* note 29, at 508; Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets* (Mass. Inst. of Tech. Dep't of Econ., Working Paper No. 05-18, 2005), available at <http://ssrn.com/abstract=728545> (noting that sellers may not inform consumers about hidden add-on mark-ups in competing products if the add-ons have close substitutes because the information will not benefit the discloser).

318. *E.g.* *New Kids on the Block v. News 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).

319. 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 un-

tion to the new product. The free-rider will benefit in a way that cannot effectively be shared by its competitors,³²⁰ And the new advertising can offer indirect information about the senior mark.

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.³²¹ 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.³²² 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. The blurring information may eventually alter a consumer’s prefe-

derlying 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.

320. 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. 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.

321. *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).

322. 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. 252.

rence 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.³²³ Consumers thus have no functional reason to prefer persuasive advertising over informational ads.³²⁴ This suggests that sellers over-supply persuasive advertising, and that consumers would benefit from a shift in advertising from persuasive to informational strategies.³²⁵ Decreasing the monopoly profits available for familiarity divorced from function might help to instigate such a shift.

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.³²⁶ 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.

323. Brown, *supra* note 7.

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 232 (suggesting that sellers oversupply advertising relative to consumer preferences).

326. *See supra* text accompanying notes 228-230.

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.³²⁷ The risk with such debiasing efforts is that they are prone to regulatory capture and displace more targeted private attempts to address information asymmetries.³²⁸ 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 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.³²⁹ 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.

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.*

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).

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.³³⁰ Uses of exact replicas of famous marks are likely to cause confusion no matter what segment of the market they target.³³¹ 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.³³² A nontrivial 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.

V. 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.

What *cannot* decide the question is naked data from consumer surveys. In dilution cases, plaintiffs offer as evidence that people associate a

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 123.

332. *See Bone, Enforcement Costs, supra* note 38 (arguing that dilution prohibitions lower the costs of enforcing famous marks in situations where confusion is likely).

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. 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.

333. Nike Inc., 84 U.S.P.Q.2d (BNA) at 1820; Jacoby, *Dilution in Light of Victoria's Secret*, *supra* note 15, at 10.

334. Morrin & Jacoby, *supra* note 40, at 271.

335. Julie Manning Magid et al., *Quantifying Brand Image: Empirical Evidence of Trademark Dilution*, 43 AM. BUS. L.J. 1, 34, 38 (2006).