

TRADEMARK AND THE CONSUMER

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ABSTRACT

Trademark law is intellectual property's red-headed stepchild, attracting little attention (except for the occasional beating). Part of the reason for this is that it represents a kind of solved problem: There is extraordinary consistency among scholars about trademark's foundational goal, that trademark exists to police the quality of source and attribution information in the marketplace, and in doing so reduce consumer search costs. According to this "consumer search cost" theory, trademarks provide an incentive to owners to ensure quality, to build their reputation, and to distinguish their goods and services; but this incentive is provided only as a component of the true reason for trademark's existence, the marshalling of information about products or services to the benefit of consumers in an effort to reduce their costs of search. Trademark law is, then, a kind of capitalist-driven consumer protection law based on the modern economic conception of the market as the preëminent mechanism of information exchange.

This theory, like most law and economics theories, is wrong. This paper takes a critical look at the consumer search cost theory. We argue that the theory appropriately focuses on the consumer, but doesn't understand much about what consumers actually do when confronted with trademarks. Without understanding how consumers process marks and brands, any theory predicated on what happens to consumers is fundamentally flawed. Drawing on cognitive and social psychology, and on related marketing studies, the central question we ask is "What would trademark law look like if it actually cared about consumer decision-making". From this we derive a number of claims about the (largely negative) role that trademark law has played in marketing and in modern-day life, and derive two norms of consumer autonomy and the role of trademarks in these conceptions of autonomy.

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For the longest time trademark has been the red-headed stepchild of intellectual property scholarship. Copyright law has undergone a renaissance in an era when digital technology and the internet has changed virtually every assumption about the production, dissemination and use of copyright content. Consequently, there has been an explosion of academic commentary, judicial pronouncements, and policy bromides in copyright law over the last twenty years. Patent law has also flourished in the new technological era, although its expansion has been fueled by biotechnology and genetic manipulation, as much as digital technologies. Whatever the underlying reasons, the range and scope of scholarship in patent law is unparalleled in US intellectual history, and the fundamental assumptions about patent law are in flux in the most interesting ways. There has never been a better time to be a copyright or patent scholar.

But trademark? Not so much.

There was a brief flurry of scholarly interest in trademark law in the dying days of the twentieth century, as a result of the rise of cybersquatting and generally the abusive registration of domain names.¹ However interesting the conceptual questions might have been in this arena, the practical issues were resolved by the application of one national law and one international arbitration mechanism,² and that was the end of that. There have, of course, been a range of issues that have emerged within trademark, in areas like initial interest confusion and in trademark dilution, and the significance of trademark to international trade has gathered apace: the entire superstructure of merchandising and licensing of Nike sneakers, Disney characters, and every college-football-themed t-shirt is built on the (surprisingly-shaky)³ foundation of trademark law.

But for all that trademark law has grown in importance, there has been relatively little discussion of the foundational basis of trademark law, compared to its sister regimes. The reason for this is obvious and straightforward: for the better part of the last three decades trademark theory has represented a “solved problem.” There has been truly extraordinary consistency among

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1 **cite

2 ACPA and UDRP. Cite**

3 Stuff about bare licensing

scholars about trademark’s foundational goal. The received wisdom is that trademark exists to police the quality of source and attribution information in the marketplace, and in doing so reduce consumer search costs.⁴ According to this the so-called “consumer search cost” theory, trademarks provide an incentive to owners to ensure quality, to build their reputation, and to distinguish their goods and services; but this incentive is provided only as a component of the true reason for trademark’s existence, the marshalling of information about products or services to the benefit of consumers. Trademark law is, then, a kind of capitalist-driven consumer protection law based on the modern economic conception of the market as the preëminent mechanism of information exchange.⁵ Trademark law generates exclusive rights in trademarks which are property rights if truth be told, even if the formalist account says otherwise⁶ but it does so only that consumers may rely on them as indicators of the course of the product or service, and thereby reduce their search costs.⁷

Consumer search cost theory, in common with the application of law-and-economics in other areas, has operated as a kind of brake on the development of trademark theory. Once consumer search was accepted as the descriptive and normative theory of trademark, it seemed that there was little for trademark scholars to do but fill in the blanks that Landes and Posner couldn’t be bothered completing.

But recently the unloved step-child has grown up into a compelling and fascinating adult. There have been a number of attacks on the central tenet of consumer search cost theory; some based in historical accounts of the development of trademark law,⁸ some in semiotics,⁹ and some in cultural

4 ****All of them here.

5 Cite**

6 *Short note about rights in gross

7 The consumer search cost literature is by now vast, but significant mileposts marking the journey from *** include ***more research needed here, because these need to be put in order***: Gary A. Becker and George J. Stigler, *De Gustibus Non Est Disputandum*, 67 *Amer. Econ. Rev.* 76 (1977) (presenting a theory of consumer search costs in advertising) John F. Coverdale, *Trademarks and Generic Words: An Effect-on-Competition Test*, 51 *U. CHI. L. REV.* 868 (1984); Isaac Ehrlich and Lawrence Fisher, *The Derived Demand for Advertising: A Theoretical and Empirical Investigation*, 72 *AMER. ECON. REV.* 366 (1982) (presenting theory and evidence for consumer search costs in advertising generally, albeit not distinguishing advertising from branding and trademark); I.P.L. Png and David Reitman, *Why Are Some Products Branded and Others Not?* 38 *J.L.&Econ.* 207 (1995) (providing empirical evidence of consumer search costs in brand identification); Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 *EMORY L.J.* 367, 417 (1999) (**); William M. Landes and Richard A. Posner, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 166-209 (6th ed., Harvard Univ. Press 2003) (summarizing the consumer search cost literature, providing a formal theory of search costs in trademark law, and applying it to a number of areas of trademark law) (hereinafter “Economic Structure of IP”). **More recent stuff** Stacey L. Dogan & Mark A. Lemley, *Trademark and Consumer Search Costs on the Internet*, 41 *HOUS. L. REV.* 777 (2004); Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 *EMORY L. REV.* 461 (2005); Stacey L. Dogan & Mark A. Lemley, *Grounding Trademark Law Through Trademark Use*, 92 *Iowa L. Rev.* _ (forthcoming 2007) (draft available at <http://ssrn.com/abstract=961470>); Stacey L. Dogan & Mark A. Lemley, *A Search-Costs Theory of Trademark Defenses* (forthcoming 2007) (draft available at <http://ssrn.com/abstract=977320>).

8 Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 *NOTRE DAME L. REV.* 1839 (2007)

theory.¹⁰ Within the last few years there has emerged a debate about whether trademark theory can best be advanced by recognizing or rejecting its relationship with the standard incidents of property.¹¹ Even more recently an argument has emerged over “trademark use” theory. This theory, advanced by several sources, but most notably Stacey Dogan and Mark Lemley in the scholarly literature¹² and by Google in the courts,¹³ argues that a defendant can only be liable for trademark infringement if she uses the plaintiff’s trademark as a trademark, and not in any other way.¹⁴ This thesis has been the subject of an extended critique by Graeme Dinwoodie and Mark Janis,¹⁵ and others.¹⁶ In short, where once broad agreement marked trademark theory, now all is up for grabs and we are once again confronted with serious questions about what exactly trademark is good for.

In this Article we argue that trademark is, or should be, good for the consumer. Like much of recent scholarship we are critical of the consumer search cost theory but not for the same reasons as those presented by other critics. Our concern is that this theory doesn’t understand much about what consumers actually do when confronted with trademarks, and without this understanding any theory predicated on what happens to consumers is fundamentally flawed. Our central question then is “What would trademark law look like if it actually cared about consumer decision-making?” And our theoretical anchor is cognitive and social psychology¹⁷ rather than economics.

9 **Beebe; Michael Pulos, *A Semiotic Solution to the Propertization Problem of Trademark*, 53 UCLA L. REV. 833 (2006).

10 ***

11 ***Check and revise. Needs work this note, from Barnes. Michael Pulos, *A Semiotic Solution to the Propertization Problem of Trademark*, 53 UCLA L. REV. 833 (2006); Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 CARDOZO L. REV. 105 (2005); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005); Uli Widmaier, *Use, Liability, and the Structure of Trademark Law*, 33 HOFSTRA L. REV. 603 (2004); Stacy L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777 (2004) and, for a list of earlier articles, Vincent Chiappetta, *Trademarks: More Than Meets the Eye*, 2003 U. ILL. J.L. TECH. & POL’Y 35, 35 n. 1 (2003). ***

12 Stacey L. Dogan & Mark A. Lemley, *Grounding Trademark Law Through Trademark Use*, 92 IOWA L. REV. __ (forthcoming 2007) (draft available at <http://ssrn.com/abstract=961470>)

13 See e.g. Brief of Defendant-Appellee, *Rescuecom Corp. v. Google, Inc.*, No. 06-4881-cv (2d Cir. Feb. 12, 2007) (copy available at <http://claranet.scu.edu/tempfiles/tmp30925/rescuecomappelleebrief.pdf>) **Insert other Google cases***

14 See, also Margeth Barrett, *Internet Trademark Suits and the Demise of “Trademark Use”*, 39 U.C. Davis L. Rev. 371 (2006); Uli Widmaier, *Use, Liability and the Structure of Trademark Law*, 33 Hofstra L. Rev. 603 (2004); Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 Emory L.J. 507 (2005).

15 Graeme B. Dinwoodie and Mark D. Janis, *Confusion Over Use: Contextualism in Trademark Law*, 92 IOWA L. REV. __ (forthcoming 2007) (draft available at <http://ssrn.com/abstract=927996>); Graeme B. Dinwoodie and Mark D. Janis, *Lessons from the Trademark Use Debate*, 92 IOWA L. REV. __ (forthcoming 2007) (draft available at <http://ssrn.com/abstract=1001130>).

16 Mark P. McKenna, *Trademark Use and the Problem of Source in Trademark Law*, 92 IOWA L. REV. __ (forthcoming 2007)??***

17 Much of the relevant work will be focused on consumer behavior and marketing, but the ***.

The case we're making here is for a trademark law focused narrowly on consumers' interests in reducing search costs (but also much much more). One might say that, even if some of this protection isn't warranted in terms of search costs, it allows producers to create desired images and that people place some real value on these "artificially" differentiated products. One might also allow for deviations from a model driven by consumer search costs for the sake of broader marketplace incentives. But because we understand consumer-based justifications of trademark law to focus predominantly on search, that's all we're concerned with here. If other consumer interests warrant broader or different protection than what we propose here, advocates need to make the case for those doctrines on the basis of those interests.

Second, we distinguish emphatically between effects on consumers' ability to make purchasing decisions and find the products they desire and effects on a mark's commercial magnetism. Certain third-party uses of a mark may not interfere with a consumer's ability to choose in a purchasing contexts. Those uses might, however, mean that the mark loses its attractiveness to consumers in the long run. We don't accept that as a basis for protection because we focus on decision-making with extant desires.

Typical overview to be inserted here

I. CONSUMER SEARCH COST THEORY AND THE PSYCHOLOGICAL FUNCTION OF SYMBOLS

Modern trademark law differs from its historical antecedents.¹⁸ As recently as 1946, if one asked a trademark lawyer the basis of the protection conferred by a mark, he or she¹⁹ would point to the moral and property right inherent in the mark and the efforts that the trademark owner had put into developing the mark.²⁰ As a Senate Report of that time noted, "where the owner of a trademark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its appropriation by pirates and cheats."²¹ Trademark law developed to proscribe particular types of unfair competition, and is still sometimes characterized as a branch of this legal domain.²² But where trademark was once focused on the value of the business reputation of a mark owner and the corresponding diminution of this value by the alleged trademark infringer, the protection of business reputation is no

¹⁸ Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839 (2007) (demonstrating that American trademark law initially protected a party against improperly diverted trade by recognizing property rights derived from a natural rights theory of property, not consumer confusion as some commentators suggest)

¹⁹ But, you know, probably he.

²⁰ Daniel M. McClure, *Trademarks and Unfair Competition: A Critical History of Legal Thought*, 69 TRADEMARK REP. 305 (1979) (discussing the development of trademark doctrine)

²¹ S. REP. NO. 79-1333, at 3 (1946), reprinted in 1946 U.S.C.C.A.N. 1274, 1274.

²² 3 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:1 (4th ed. 2004).

longer seen as the dominant normative foundation for trademark law.²³ Nowadays the consumer is sovereign, and where business reputation is protected it is only done so as a by-product of consumer protection.²⁴

Solicitude for the consumer is expressed in the modern core principle that liability is attendant upon consumer confusion, and there is extensive evidence that care for the consumer animates much of the modern thinking about trademark law. This can be seen in legislative pronouncements that removed limitations on trademark infringement which limited infringement to confusion as to origin and in doing so extended actionable confusion to areas like affiliation, endorsement and sponsorship.²⁵ Judicial extensions have also been consistently framed as involving concern for the consumer, and these extensions have included the creation of principles such as initial interest confusion,²⁶ reverse confusion,²⁷ and post-sale confusion.²⁸ Courts have also extended trademark into previously uncharted regions like trade dress and the protection of product design, under the rubric that consumers will be confused if similar products and designs are not prohibited.²⁹ Equally, judicial limitations on trademark extensions usually sound in consumer protection. Thus, judicial conclusions about the nominative fair use of trademark—that is, where the defendant is using the mark as a descriptor or as a name—has often focused on whether the consumer will be confused,³⁰ and not on public policy considerations of whether people will be unable to discuss their world if forbidden from using trademarks.³¹ Whatever the policy merits or demerits of

²³ But see Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839 (2007) (demonstrating that American trademark law initially protected a party against improperly diverted trade by recognizing property rights derived from a natural rights theory of property, and that this justification can still be found in modern trademark law)

²⁴ **cite

²⁵ 15 U.S.C. § 1125(a) (2000). See also Pub. L. No. 87-772, § 17, 76 Stat. 769, 773–74 (1962) (codified as amended at 15 U.S.C. § 1114) (expanding actionable confusion by deleting earlier legislative requirements as to “origin” and “purchasers”)

²⁶ *Grotrian, Helfferich, Schulz, Tb. Steinweg Nachf. v. Steinway & Sons*, 365 F. Supp. 707 (S.D.N.Y. 1973) (finding something like initial interest confusion actionable); *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036 (9th Cir. 1999) (holding initial interest confusion actionable). *Playboy Enters., Inc. v. Netscape Comm’ns Corp.*, 354 F.3d 1020 (9th Cir. 2004) (same). See generally J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:6 (4th ed. 2004). On the appropriateness of initial interest confusion see ***

²⁷ *A & H Sportswear, Inc. v. Victoria’s Secret Stores, Inc.*, 237 F.3d 198 (3d Cir. 2000) (finding reverse confusion actionable). On the validity of reverse confusion see ***

²⁸ *Ferrari S.P.A. Esercizio v. Roberts*, 944 F.2d 1235 (6th Cir. 1991) (finding post-sale confusion actionable). On the validity of post-sale confusion see ***

²⁹ *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 775 (1992) (holding that trade dress of a restaurant is protected by the Lanham Act as source-identifier); *Truck Equip. Serv. Co. v. Fruehauf Corp.*, 536 F.2d 1210, 1217–18 (8th Cir. 1976) (holding that product designs are protected by the Lanham Act as source-identifiers).

³⁰ Mark P. McKenna, *Trademark Use and the Problem of Source in Trademark Law*, ___ at ms (reviewing recent caselaw on nominative fair use and concluding “[i]f these recent decisions reflect the proper understanding of nominative fair use, then it, like statutory fair use, cannot honestly be called a defense. Instead, uses of a plaintiff’s mark to describe the plaintiff simply are excused to the extent they do not cause confusion.”)

³¹ *See New Kids on the Block v. News America Publishing, Inc.*, 971 F.2d 302, 308 (9th Cir. 1992). (articulating the test for nominative fair use of a trademark “where the defendant uses a

these legislative numerous pronouncements and judicial decisions, they nonetheless rely on the rhetoric of protecting the consumer from being deceived, thrown into confusion, or merely temporarily befuddled.³²

The central focus on the consumer also animates concern about statutory and judicial extensions that do not implicate confusion. Thus, the introduction of the principle of trademark dilution³³ has met with academic and judicial resistance because it is seen as having little to do with consumers and everything to do with the grant of quasi-property rights to owners of famous marks.³⁴ It is unsurprising that there has thus emerged a justification of dilution as warranted on the basis that consumers have “internal” search costs, and that tarnishment or blurring of famous brands increases these costs.³⁵ A similar dynamic has operated in relation to the recent laws extending trademark protection to domain names.³⁶ Critics charge that there is no justifiable basis for extending trademark in this way because consumers are not deceived.³⁷ Defenders quickly prepare evidence of consumer confusion, and the battle lines are then redrawn over methodology and veracity. A similar issue emerges as courts relax prohibitions on assignments in gross:³⁸ as bare licenses come to be more important to modern trademark practice,

trademark to describe the plaintiff’s product, rather than its own, and (1) the product or service in question must be one not readily identifiable without use of the trademark; (2) it uses only so much of the mark or marks as is reasonably necessary to identify the product or service; and (3) it does nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.”). For robust theoretical defenses of this defense *see* Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65. NOTRE DAME L. REV. 397 (1990) (presenting a cultural and communication theory explanation for the significance of nominative fair use). ***See also ***examples of spillover literature on the question from the econ side: E.g. David W. Barnes, Trademark Externalities, Seton Hall Research paper, at ms 41, available at <http://ssrn.com/abstract=1010163>

32 **Some snarky comment here

33 Federal Trademark Dilution Act, 15 U.S.C. § 1125(c) (2000); Trademark Dilution Revision Act, 15 U.S.C. § 1125(c) (2006).

34 For scholarly resistance see e.g. See Wendy J. Gordon, *Introduction*, 108 YALE L.J. 1611, 1614 n.19, 1615 (1999) (calling dilution a “disaster”); Mark A. Lemley, *The Modern Lanham Act And the Death of Common Sense*, 108 YALE L.J. 1687, 1698 (1999) (“dilution laws represent a fundamental shift in the nature of trademark protection”); **other academic examples*. Judicial resistance can be seen in the reluctance to impose the terms of the Act by focusing on the absence of actual dilution, see e.g. *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003) (refusing relief based on absence of actual dilution and setting precedent for subsequent courts). For an examination of the subsequent judicial response and the reluctance of the courts to find actual dilution *see* Christine Haight Farley, *Trademark Dilution Law: What’s Behind the Rhetoric?*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. J. 101, 102-04 (2006) (providing examples of judicial reluctance after *Moseley*). This led to the recent changes in the law that loosened the required element to be only a “likelihood” of dilution, in exchange for tightened fame requirements. See Trademark Dilution Revision Act, 15 U.S.C. § 1125(c) (2006).

35 *See* Maureen Morrin & Jacob Jacoby, *Trademark Dilution: Empirical Measures for an Elusive Concept*, 19 J. PUB. POL’Y & MARKETING 265 (2000); *Ty, Inc. v. Perryman*, 306 F.3d 509 (7th Cir. 2002). *See also* Richard A. Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 75 (1992) (“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.”).

36 Anti-Cybersquatting Consumer Protection Act of 1999, 15 U.S.C. § 1125(d) (2000).

37 *** Detail academic concerns

38 **cites

commentators have expressed concern that signifiers unmoored from goods will lead to consumer deception.³⁹ Courts upholding these assignments and licenses are careful to frame their decisions in terms of the consumer.⁴⁰

In short then, the care and feeding of the consumer has been central to most developments in trademark law over the recent decades. And trademark's recent focus on the consumer is an amazingly happy discovery, because has an intuitive appeal for proponents on both ends of the political spectrum. On the right, the underlying economic foundations of this theory provide a comfortable basis for appeals to rigor and rationality. On the left, the requirement that consumer be confused limits the ability of trademark owners to extend their property rights in the way that has characterized modern copyright and patent law.⁴¹ More than this however it fits with the Chicago School's dominance within the legal academy, and consumer confusion has been adopted and explained by the law and economics movement. The movement to the consumer has therefore generated the totalizing theory that can explain and guide trademark's development,⁴² and few scholars have made much headway in rejecting either consumer confusion as the core principle of trademark,⁴³ or Chicago School economics as the defining descriptive and normative trademark theory.⁴⁴

In the section that follows therefore we explain the nature of consumer search cost theory and detail why it is inadequate to explain what is going on with the consumer and trademark.

A. The Law and Economics of Consumer Search

The consumer search cost theory is derived from the law & economics movement, and the definitive account is generally accepted to be Landes & Posner's work on the economics of trademark law.⁴⁵ The theory argues that we grant a trademark monopoly to reduce consumer search costs by generating stability in marks and the products to which they are affixed. "Suppose, then, that a consumer has a favorable experience with brand *X* and wants to buy again," posit Landes and Posner:

39 **Cites.

40 ***Find the cases. From the Janis piece?***

41 See Dan Hunter, *Culture War*, 83 TEXAS LAW REVIEW 1105, 1110-5 (2005) (detailing the expansion of these intellectual property regimes and the reasons for the expansion).

42 **beebe' comment about this

43 Include McKenna, The Use stuff of Stacey and Mark, etc. cf the Dinwoodie & Janis piece.

44 McKenna, Beebe***.

45 William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J. L. & ECON. 265 (1987); William M. Landes & Richard A. Posner, *The Economics of Trademark Law*, 78 TRADEMARK REP. 267 (1988); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 166-209 (2003).

“...Rather than reading the fine print on the package to determine whether the description matches his understanding of brand X...the consumer will find it much less costly to search by identifying the relevant trademark and purchasing the corresponding brand...A trademark conveys information that allows the consumer to say to himself, “I need not investigate the attributes of the brand I am about to purchase because the trademark is a shorthand way of telling me that the attributes are the same as that of the brand I enjoyed earlier.””⁴⁶

The theory provides a justification for a range of trademark doctrines, including bare licensing,⁴⁷ trademark genericide,⁴⁸ and the functionality doctrine,⁴⁹ *inter alia*. It has been adopted by a huge range of scholars. It has transformed trademark law by shaking it out of its early unthinking solicitude to business reputational interests by asking what is the effect of various aspects of trademark law on the consumer.⁵⁰

We should be grateful for this admirable new focus on the consumer, instead of the more problematic emphasis on property-owners. But the consumer search cost theory utterly misunderstands what consumers are actually doing. Consumers are not really searching, they are trying to decide. They are seeking to make a decision about what they should do with a branded product or service. This decision might be a decision to buy the product or not buy the product; the decision might be whether the quality or the nature of the product is appropriate to their needs and desires. Trademark’s true role in assisting the consumer is to reduce the likelihood of erroneous decisions.

Now, it is certainly true that part of the consumer decision-making process involves search. Take the canonical example of the consumer confronting Coca-Cola: She wants to buy the same drink that she enjoyed yesterday that was labeled “Coca-Cola.” In one very odd sense her “search costs” are reduced by trademark’s insistence in the long term stability of the source attribution of “Coca-Cola” (or the ribbon device) to “The Coca-Cola Company of Atlanta, GA”. But to call this decision of hers “search” is plainly odd. She wants to buy the same drink. Without trademark, what search strategies could she engage in to determine that the can in front of her contains the same product as yesterday’s Real Thing?⁹ Some other consumer protection law might mandate truth-in-labeling for the origin of the drink, and so she could scan the labels looking for the cola that comes from the appropriate address in Atlanta. But the consumer isn’t interested in search, she’s interested in making the best decision in the circumstances and the role of trademark is to ensure that this happens.

⁴⁶ WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 167 (2003) (footnote omitted)

⁴⁷ LANDES & POSNER at 184-6; lemley & Dogan, *Merchandising Right* **.

⁴⁸ LANDES & POSNER at 187-97.

⁴⁹ LANDES & POSNER at 197-201.

⁵⁰ Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839 (2007).

Examining the other standard examples for trademark protection reveals the same sort of mismatch between what trademark is doing for the consumer, and what the search theory suggests it should doing. Consider the situation where a competitor is passing off his cola as stemming from Coca-Cola. This is, of course, a canonical trademark infringement, but again, it is hard to see how this involves search by the consumer. Confronted with two identical cans, one containing the Real Thing and one containing Fake Cola, how is the consumer to have her search costs reduced?

At this point we will connect the problems with consumer search theory to questions of efficiency as the only normative basis for trademark, and then move on to cognitive psychology and why this provides a different basis for understanding trademark's function.

B. Decisionmaking and the Psychological Function of Symbols.

“[T]he protection of trade-marks is the law's recognition of the psychological function of symbols.”⁵¹

Behavioral decision research has its roots in the concept of “bounded rationality” offered by Herbert Simon in the 1950s.⁵² The field came to life as an intense area of inquiry with the groundbreaking research of Daniel Kahneman and Amos Tversky in the 1970s.⁵³ Both Simon and Kahneman eventually won the Nobel Prize in Economics for their work, though neither of them are economists (Tversky passed away too early to receive the prize with Kahneman). Since the 1970s, behavioral decision research has boomed, cutting across psychology, economics, law, medicine, marketing, negotiations, and many other areas of application.

We take the basic insights of behavioral decision research, which is to say cognitive and social psychological research into how people make decisions, and explain how they affect consumer decision-making. From this we can then generate an alternative theory about what trademark law's underlying normative theory should be if it were focused on protecting the consumer.

I. Heuristics

Amos Tversky and Daniel Kahneman are well known for demonstrating a series of heuristics that humans use to prune decision trees. The main ones they identified are the representativeness heuristic, the availability heuristic, and the simulation heuristic.

⁵¹ *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 205, 205 (1942).

⁵² March, J., & Simon, H. *Organizations*. Chapter 6, New York: Wiley, 1958; Simon, H.A. *Models of Man: Social and Rational*. New York: John Wiley and Sons, Inc., 1957

⁵³ Kahneman and Tversky, 1979; Tversky and Kahneman, 1974

The representativeness heuristic is used to make assessments about the likelihood that an object, event or person is a member of a category.⁵⁴ Consider the following description: “Steve is very shy and withdrawn, invariably helpful, but with little interest in people, or in the world of reality. A meek and tidy soul, he has a need for order and structure, and a passion for detail.”⁵⁵ Subjects asked to guess whether Steve is a farmer, a trapeze artist, a librarian, a salvage diver, or a surgeon usually choose “librarian”. The explanation for this isn’t found in the statistical distribution of librarians, but rather the degree to which the description accords with attributes commonly associated with librarians. The reason that humans use the representativeness heuristic is that we often have limited data about the distribution of the sample set, and more importantly, even when we do have the data we are notoriously bad at calculating.

The availability heuristic is used to evaluate the likelihood of events based on the facility with which they come to mind.⁵⁶ People overestimate the likelihood of all manner of events if they are easy to recall, and underestimate those if they are hard to recall.

The general point about all of the heuristics is that they are mechanisms to deal with the limitations on our memory and cognitive processing system. There is no magic in these heuristics as such, and numerous bad law & economics articles fetishize the heuristics (especially the availability heuristic). The heuristics of themselves are relatively unimportant, they are just examples of ways in which humans winnow down the choices that were presented with, so that we can make decisions. Thus, returning to our starting point, if we think about trademark law not about efficient search but instead as consumer decision-making under conditions of constraint and uncertainty, the heuristics explain and define the cognitive limitations that we all share. This generates a number of responses against the consumer search theory, and against specific doctrines in trademark law

II. Framing

If we really wanted to conceive of trademark law as part of a body of law motivated by reducing search costs, we believe that we would conceptualize trademark law not as a part of the law of unfair competition, but as part of a broader body of law relating to marketplace navigation.

In this body of law, confusion ought not be fetishized. To begin with, it is clear that, though it can sometimes increase search costs, confusion is not the only problem consumers encounter in the marketplace. Information overload,

⁵⁴ Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124-1131 (1974)

⁵⁵ Id

⁵⁶ Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 PSYCHOLOGICAL REVIEW 237-51 (1973)

for example, is a real problem that makes marketplace navigation more challenging. We address the information overload problem in section _ below.

Second, even once we focus on confusion, we need to parse it into several different types. Confusion as to source, the only type of confusion deemed actionable in trademark law, is not clearly special here. Confusion as to other things—like product attributes, also can interfere with consumers’ ability to search. And given the breadth of “source” in modern trademark law, we even need to be much more specific when we talk about “source confusion.” Some kinds of what modern trademark law would call “source confusion” might comfortably be included within a search cost model—confusion as to the actual producer of a product. But it is not at all clear that confusion relating to some of the other relationships commonly considered “source” relationships in trademark law—i.e. sponsorship or affiliation—should be included as a categorical matter. To know, we would need to determine whether and in what circumstances consumers form views about these more attenuated relationships—whether, for example, they understand what “sponsorship” or “affiliation” mean. But we also need some way to determine when consumers would rely on those views in any way to navigate the marketplace. Absent some reason to think that, when making their purchasing decisions, consumers generally do rely on their beliefs about whether the Cardinals are somehow affiliated with the producers of merchandise bearing a Cardinals logo, it makes little sense for the law to respond to any confusion about such a relationship. [

III. What We Know About Consumer Processing of Brands

Marketing literature describes a brand in large part in terms of its “brand attribute associations.” These associations relate to brand positioning—the way in which a brand is situated in the wider commercial marketplace.⁵⁷ According to Aaker and Keller, the most-used brand positioning device is product attributes or characteristics. But brands also can have associations with use situations, a type of product user, a place, or a product class.⁵⁸ To state the concept another way, brands are at the center of a web of associations that exposure to the brand can stimulate. This web of associations can be referred to as a brand’s “association set.” The association set includes product attributes or characteristics, but it can also include a variety of other associations, most of which are created by advertising.

Brand extension decisions then depend on the likelihood that some positive brand associations will transfer effectively from the original product to the new product. Ironically, trademark law often acts as though the only issue with respect to goodwill transfer is the extent of advertising and goodwill associated with a mark. Marketing literature suggests that the issue is actually much more complex, and depends on whether the associations with a brand in its original

⁵⁷ David A. Aaker and Kevin Lane Keller, *Consumer Evaluations of Brand Extensions*, 54 *J. Mktg.* 27, 28 (Jan. 1990)

⁵⁸ *Id.* Aaker and Keller offer as examples Lowenbrau’s association with relaxing with good friends, Mercedes with wealthy, discriminating people, Toyota with Japan. They also note strong product class associations for Budweiser, Chevrolet, Levi’s, and Bank of America, and that the product class associations can themselves have additional associations.

context necessarily mean anything in a new context. A particular brand belief or association that is highly valued in one context may not be in another.⁵⁹ As a result, the extent of transfer from the original product to the extended product depends on, in addition to the strength of the association, other factors such as the appropriateness of the association and whether cues are present to activate an association.⁶⁰

Related to the association set is the concept of brand attitude. Brand attitude “is based on certain attributes such as durability, incidence of defects, serviceability, features, performance, or ‘fit and finish.’”⁶¹ Brand attitude differs from the specific associations, however, because it contains elements of affect not necessarily linked to a particular attribute or association. Indeed, this affect component of brand attitude may be stored and retrieved in memory from the underlying attribute information.⁶² Several marketing scholars have concluded that brand attitude is a global assessment of quality that is at a higher level of abstraction than a particular attribute of a product.⁶³

Whether particular associations or overall assessments of quality transfer to the extended product in many cases is a function of the perceived fit between the original product and the new one.

Marketing literature focuses on the “fit” between the product on which the parent brand is used and the product to which it is extended, and focuses also on parent brand dominance in product category.

Dominance refers to the extent to which a particular brand is recalled in response to a category cue: a dominant brand, like CREST, is one that tends to be recalled first when prompted with the category cue, like “toothpaste.” Significantly, however, brand dominance does not map well onto trademark concepts of distinctiveness, strength, or fame. First, dominance is highly contextual—a dominant brand is recalled in response to a category cue. It measures the real world accessibility of a brand when searching within a context. It therefore has little to do with the extent to which the mark is distinctive in the sense of trademark law—dominant brands all are strong in the sense that they are well known as source indicators in their product categories, but dominance is not directly related to the inherent distinctiveness of a mark. Dominant terms might be descriptive terms or surnames with secondary meaning.⁶⁴ Moreover, strength is a blunt instrument for measuring

⁵⁹ Aaker and Keller note that the associations with Betty Crocker may not work well for fashion products designed to appeal to young women. They also cite a study by Zeithaml suggesting that thickness is a valued association in tomato-based juices, but not in children’s fruit flavored drinks, and pulp is related to high quality in orange juice but to low quality in apple juice. *Id.* at 28.

⁶⁰ *Id.* at 29.

⁶¹ *Id.* at 29.

⁶² *Id.*

⁶³ Zeithaml (1988); Aaker & Keller (1990) at 29.

⁶⁴ One possible response to this is to assume that descriptive terms or surnames may have more difficulty becoming dominant because they will have to become identified with a source. But for any mark to become the dominant brand, it will have to acquire significant secondary meaning. A fanciful mark encountered by only a handful of people will not be top of mind. And perusal of

dominance. Strength evaluates consumers' exposure to a mark and speculates about the effectiveness of advertising and exposure in making consumers know of a mark. But it does not evaluate marks relative to other marks in the same product category, which obviously is precisely what dominance is about. It is probably true that dominant marks also are strong marks, but it by no means follows that strong marks are dominant. There can only be one, or at most a few, dominant marks in a product category.

Finally, the dilution concepts of "fame" and "distinctiveness" as used in that context⁶⁵ do not track the dominance construct well. Distinctiveness, here, seems to measure the difference between the mark at issue and other marks. On this score, EXXON would be quite distinctive, and APPLE not as much, even though APPLE is arbitrary as applied to computers. Fame measures the extent to which a mark is well-known generally (at least setting aside the silly notion of "niche fame"). These concepts may well overlap, but they do not do so necessarily. EXXON is probably both distinctive (in that it is unique compared to other marks) and famous in that it is widely known. But marks could be extremely distinctive (one of a kind) and not well-known – therefore not famous – or they could be very well-known but not particularly distinctive as compared to other marks (APPLE is a good example here).

Of these concepts, fame probably overlaps more with dominance in that dominant marks might often be famous. But the big difference is that dominance is determined in terms of market segments, and fame is not. A brand may be dominant in its category but not widely known by consumers because that market is not widely known. Famous marks, on the other hand, are probably more likely to be dominant, though there may be more than one famous brand in any given product category.

Here again, it is significant that dominance is a relative determination as against other marks in the same product category. Distinctiveness in terms of uniqueness of a mark as compared to other marks has little direct overlap with the determination of dominance. All a dominant brand needs to be is sufficiently distinct from other brands *within its market category* so that it can be identified and recalled as compared to rival brands. But the mark need not be distinctive as against other marks in other product categories – thus, Interbrand's 2006 Best Global Brands list is loaded with brands that are

the Interbrand Best Global Brands list reveals a number of surnames that have become quite famous and valuable marks (e.g., MCDONALD'S, DELL, WRIGLEY'S, JOHNSON & JOHNSON, ARMANI). See http://www.ourfishbowl.com/images/surveys/BGB06Report_072706.pdf.

⁶⁵ One reason why dilution law has been plagued by incomprehensibility is that the dilution discourse has repurposed trademark concepts with particular meanings and used them to mean something else altogether. "Distinctiveness" traditionally referred to the extent to which a mark gave information about the product or service to which it was attached. So a mark was deemed immediately protectable if it was "inherently distinctive" – if the mark only suggested something about the product or gave no particular information about it. In that case, it was presumed that consumers would process the mark as a source indication. Abercrombie. Likewise for marks that did convey information about the product, they could only sometimes serve as trademarks, and only when they were descriptive, not generic, and acquired secondary meaning. Those terms were deemed to have acquired distinctiveness of source. Dilution discourse muddied the waters by focusing on "distinctiveness" as a reference to the extent to which a mark was distinctive, not of source, but from other marks. See Beebe Semiotics. In the former case, distinctiveness determinations depended on the relationship between the mark and the product. In the latter, the issue is about the relationship between the mark and other marks.

distinctive within their product class, but not at all unique if other product categories are considered – FORD, APPLE, etc.

Confirming the notion that consumers evaluate stimuli, including brands, within a particular context, quite a bit of marketing research demonstrates that brand extensions (efforts by brand owners to apply the brand to an increased range of products or services) are evaluated by consumers in terms of the “fit” between the prior and subsequent uses. Fit in this context can mean one of a couple of different things. One fit measure is “complementarity” – the extent to which consumers view two product classes as complements. Products are considered complements if both are consumed jointly to satisfy some particular need.⁶⁶ Another fit measure is “substitutability” – the extent to which consumers view two product classes as substitutes. Substitute products tend to have a common applications and use context such that one product can replace the other in usage and satisfy the same needs. Aaker and Keller describe ski clothing as a complementary extension for the ROSSIGNOL brand, which originally made downhill skis. Cross-country skis or ice skates might be substitute extensions. The last fit measure is “transferability” – the perceived ability of a firm operating in the first product class to make a product in the second product class. In other words, this fit measure relates to consumers’ perceptions of the extent to which the company can use its people, facilities and skills to make the second type of product.

Significantly, all of these measures of fit make sense only in relation to the original product or product class. Thus while it is undeniably true that modern marketing focuses on brand identity and producers’ ability to create associations with a brand, it is also abundantly clear that the meaning field of a particular mark has as a central component the product or product class to which the mark has been applied.

Moreover, at least one strand of the psychological literature suggests pretty clearly that, as long as the mark is not used by others in connection with negative images, ANY use of a mark by others not only does not harm well-known marks, but actually increases its value. Several studies indicate that mere familiarity with a mark increases its likeability. There may be a number of reasons for this, some rational and some not. It may be that familiarity suggests that a brand has been around a long time and therefore reliable. It may be that individuals simply come to believe that they like what they are familiar with – sort of as a matter of rationalization. Whatever the reason, though, it may be that if consumers recognize APPLE Vacations as the same mark as APPLE Computers, far from seeing the former as infringing, Apple Computers should thank the vacation company, and probably send them a check.

Maureen Morrin found that, contrary to the theories promulgated by Swann and others, exposure to extension information did not slow down respondents ability to make brand-category associations for parent brands. Indeed, quite the opposite – exposure to extension information actually facilitated parent

⁶⁶ See Aaker & Keller, *Consumer Evaluations of Brand Extensions*, 54 J. Mktg. 27, 30 (1990).

brand retrieval by activating the parent brand's associational network.⁶⁷ Moreover, while Morrin found that non-dominant brands benefited more from the facilitation effects of extensions, dominant brands benefited as well.⁶⁸ Also, for non-dominant brands, while high fit extension had greater facilitating effects than low fit extensions, even low fit extensions facilitated matching as compared to pre-exposure matching. For dominant brands, fit seemed not to affect categorization speed, which increased post-exposure.

Once these factors are taken into account, it becomes clear that the evidence that use of a mark on diverse products or services falls well short of conclusive that it has any negative impact on the parent brand. At best, the evidence is quite mixed and suggests that no categorical conclusion can be made about when such uses will have a negative impact on the brand. More realistically, in my view, the research suggests the opposite – that uses of a brand on other products or services has either a positive effect on the brand or none at all.

IV. Trademark Law and the Tyranny of Choice Problem

The other main body of research into consumer confusion is the “Tyranny of Choice” problem made famous by Barry Schwartz.⁶⁹ Schwarz reports on studies on happiness conducted by numerous researchers, including David Myers of Hope College and Robert Lane of Yale University. They report that individual happiness rises with increased consumer choice up to a point, and then tails off sharply when the degree and scale of choice extends beyond a certain point. Schwartz's work focuses on differing search strategies by different people, classing them as either maximisers or satisficers: maximizers seek to maximize the outcome of their search on a number of criteria, engaging in an assessment of all potential outcomes, whereas satisficers choose the first (or near first) option that they encounter above their reserve point for the decision. Thus, confronted with a supermarket selection of 20 breakfast cereals, the maximizer will engage in a min-max assessment of all the available brands, whereas the satisficer will simply take the first (or second) cereal she encounters which she likes.

The “Tyranny of Choice” effect is important for studies of unhappiness under conditions of affluence (which is Schwartz's interest) but also for marketing purposes. Various studies and reports indicate that a significant percentage of the population are maximisers under some conditions, and will be unable to make decisions where there are so many choices that they effectively become paralyzed by the difficulty of making their decision. Various marketing studies have demonstrated “choice fatigue” and consumer unhappiness as a consequence of too much choice.⁷⁰

⁶⁷ Maureen Morrin, *The Impact of Brand Extensions on Parent Brand Memory Structures and Retrieval Processes*, 36 J. Mktg. Research 517, 520 (1999).

⁶⁸ *Id.* at 521 (noting that respondents were able to respond approximately 641 milliseconds faster to category matching for non-dominant parent brands and 247 milliseconds faster for dominant parent brands).

⁶⁹ Schwartz Book. Also http://www.godspy.com/culture/tyranny_of_choice.cfm

⁷⁰ Brewer, “Simplicity is the consumer's choice...”. Matthews “Fazed and Confused”

Trademark law might seem, at first blush, to have little to do with the tyranny of choice problem. Trademarks can help consumers choose between products in the marketplace, helping them seek out and find products they want. The tyranny of choice problem is not a problem dealing with inability to choose between competing alternatives; the difficulty is in making any decision at all. But in fact, we argue, modern trademark law may well exacerbate the problem.

Beginning around the 1930's, a group of academics criticized legal protection of trademarks on the ground that it encouraged wasteful advertising. This was not the first time critics had contended that trademark law protected monopolies — at various points during its history, opponents of trademark protection have argued that granting one party the exclusive right to use a particular mark was tantamount to granting a monopoly.⁷¹ But these new critics took a different approach. Influenced by Edward Chamberlain and his work *The Theory of Monopolistic Competition*, they were concerned that trademark protection would encourage advertising and allow producers to differentiate their products on the basis of irrational emotional responses rather than observable product qualities. Advertising, they argue, very often lacks serious informational value, and instead serves only a persuasive function that provides little or no consumer benefit.⁷²

Supporters of trademark rights responded to these concerns about property and monopoly by focusing on the limited scope of trademark rights and arguing that, by preventing consumer confusion, the law actually enabled competition and benefited consumers.⁷³ Advertising, according to these advocates, promotes social welfare because it provides information to consumers and may signal quality.⁷⁴

Even those who believe advertising is a positive force do not really deny that its purpose is differentiation. Nor could they do so persuasively; modern marketing literature makes it abundantly clear that the goal is to create brand identity so that producers need not compete on price or product

⁷¹ When Parliament and the American Congress debated enacting trademark laws, lawmakers frequently raised concerns about fraudulent uses and sales of trademarks and about the monopolies that would result from recognition of trademarks as property. See, Schechter, *HISTORICAL FOUNDATIONS* at 140-41, 162-64.

⁷² See, e.g., Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 *YALE L.J.* 1165 (1948); Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 *EMORY L.J.* 367 (1999). Chamberlain's work also animated the Federal Trade Commission's opposition to broad trademark protection. See Lunney, *supra* note __ at 368 n.8 (and sources cited therein).

⁷³ See, e.g., Pattishall, *supra* note __ at 979-80. These counterarguments were made during the debates over the Lanham Act. See S. Rep. No. 1333 (1946), reprinted in 1946 *U.S.C.C.A.N.* 1274, 1274-75 ("Trademarks, indeed, are the essence of competition, because they make possible a choice between competing articles by enabling the buyer to distinguish one from the other."). The line of argument was not altogether new, however. See *Dixon Crucible Co. v. Guggenheim*, 2 *Brewst.* 321 (Pa. 1869) (noting historical concerns about creating monopolies in trade but concluding that the "more enlightened position" is that protection of marks is an encouragement to competition).

⁷⁴ See, e.g., WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 173-74 (2003); Paul Milgrom & John Roberts, *Price and Advertising Signals of Product Quality*, 94 *J. POL. ECON.* 796 (1986) (arguing that advertising investment alone can signal product quality even when the informational content of the ads is nothing).

characteristics. Producers create such brand identity in large part through advertising that creates new product dimensions — emotional or lifestyle dimensions — that consumers use to differentiate products or brands.

Where advertising advocates disagree with Brown and those who maintain his objection, however, is that they do not regard these other product dimensions as artificial in any way. Consumers value those product characteristics, even if they are not tangible, and commentators should judge those choices.

We need not take a side in this dispute. Where all agree — and where they must — is that the modern marketplace, in which trademark law plays an important role, encourages and rewards advertising that multiplies the dimensions along which consumers must evaluate products or services. Whether these additional dimensions are good or bad, they are *more*, and that in itself makes the marketplace more difficult for consumers to navigate.

At some point, broad trademark protection imposes long-term search costs by multiplying the dimensions consumers must consider. While this general principle does not allow us to identify the ideal scope of protection, we think it should lead to a presumption against expansion. Given the risk that broader protection will work to benefit brands seeking to build brand personality or identity, which will exacerbate the choice problem, advocates of broader protection should have to make a compelling case for any proposed expansion. Where the evidence is tentative or ambiguous, the potential impact on the tyranny of choice problem should counsel against any expansion.

V. Consumer “Confusion”

Let’s deal first with the literature on actual confusion. Numerous studies demonstrate high degrees of consumer discernment when it comes to reading the signals of branding. So, Warlop and Alba’s⁷⁵ study on trade dress confusion shows that the visual uniqueness of a brand enhances the speed with which it can be identified by consumers in a crowded purchasing environment, and the accuracy with which it can be differentiated from its competitors. So if brand uniqueness enhances accuracy of differentiation, isn’t the negative implication that consumers cannot differentiate as effectively when brands lack visual uniqueness? But as against the traditional view of trade dress infringement, consumers are not confused when similarly packaged items have clearly distinguishable brand names. Then why can’t that accurately differentiate? Thus similarity and substitutability are not isomorphic. More than this, their study shows that blatant imitation of a market leader may confer benefits to the imitator if visual similarity is interpreted as a valid signal of benefit similarity. This is true only so long as consumers can hold both things at the same time, right? They have to be able to clearly and accurately differentiate, and then also be able to draw conclusions about associated benefits of the second product. So then we can argue that, while it might cost producers some sales in the sense that it makes others better able to compete, this is a net benefit to consumers because the

⁷⁵ Warlop & Alba, “Sincere Flattery: Trade Dress Imitation and Consumer Choice”

don't lose the signaling function related to source and still gain valuable information. This means that consumer welfare is enhanced by similarities in trade dress where the similarity goes to associations of benefits. This is not the same as suggesting that consumers are confused (since they're not) but rather an indication that similar trade dress is problematic under current property and business reputation conceptions of trademark law.

Related to this is the recognition of the “schemer schema”. Boulding & Kirmani⁷⁶ demonstrate that consumers use a large range of visual and other contextual cues to assess the likelihood that a competitor is seeking to induce a purchase by generating actual confusion. Absent this particular motivation, Warlop and Alba show that visual similarity will enhance the consumer's evaluation of an entrant except when other contextual cues arouse suspicion. Their results suggest that consumers understand that a copycat appearance represents a firm's attempt to suggest similarity of quality between itself and an established brand, and moreover that similarity between the original brand and the “copycat” brand does not generate confusion. Instead, the more similar the brands the more likely that the original brand will be used as a standard of comparison for the latter entrants to the marketplace.

Finally, there is the literature on persuasion which demonstrates that from about 7 years old, people are aware of persuasion techniques and discount signals that are read as persuasive. This makes product experience extremely significant, as well as making neutrality extremely valuable. It also indicates some role for protection against misrepresentation in relation to brands but only for people under 7.

Preliminary conclusions

This is very cursory—even more cursory than the discussion above. I'd like your thoughts on what the conclusions and thesis of should be.

First point: Consumers do not understand the nature of the similar brands as being confusing, but rather as an association between something that they understand (the original mark) and something they don't understand (the following mark). This suggests much narrower confusion liability, and it also argues for a really broad idea of comparative advertising. The literature shows that third party uses of strong marks in fact *reinforce* the original brand beliefs rather than harming it. So if you see “Coke” food products, it actually makes you remember all your Coke associations first. This is directly related to Rochelle Dreyfuss and the “semantic democracy/expressive genericity” thing, but no-one else has framed it this way.

Second point: many trademark doctrines don't bear up to any kind of scrutiny if you have read the literature. For example, the Sleekcraft factors that looks to the cost of the product and the education of the consumer is mostly nonsense. Humans know how to read the signals, and the only issue is the degree of care

⁷⁶ Boulding & Kirmani 1993

they exercise in that reading. In almost all purchasing decisions there is enough time for the consumer to understand the nature of the decision she is making.

Another example: initial interest confusion doesn't make any sense at all. Not much point in expanding on this, but the issue here isn't actually about consumer confusion at all. It's about deception that is a wholly different thing (and can be regulated or not through fraud laws). Consumers rely heavily on context in making decisions. Initial interest confusion isn't a consumer-focused doctrine in any conditions in which the diversion is easily overcome (the only trouble I have with ruling it out altogether from a consumer standpoint would be a situation where the original diversion locked someone in to a not-insubstantial time commitment before it could be overcome. Probably never on the Internet, but maybe if a billboard gets you to pull off the road for a restaurant that isn't there

Finally, dilution law makes essentially no sense, not under the old actual dilution requirement or under the new likelihood test. These are conceptions that do not speak in any way to the ability of consumers to read the brand, except in the absence of contextual cues. Dilution doesn't make sense because the only condition in which it even conceivably takes place is when consumers encounter the mark in a complete vacuum. And that never happens. When dilution advocates talk about the harm of dilution, they talk about the association set of a term and argue that a third party's use of that term interferes with the association set so that all of your brand attributes aren't immediately retrieved. But unless we're talking only about trademarks with no ordinary language meaning fanciful marks like EXXON then they're cheating by pretending that a consumer exposed to "Shell" activates only trademark-related meaning. The reason it's legitimate to think of trademarks as having particular TM-related association sets is because we assume that context allows consumers to rule out seashells. But precisely that same context has to be accounted for when we imagine what happens when someone encounters another "shell."