15 Tex. Intell. Prop. L.J. 331

Texas Intellectual Property Law Journal
Spring 2007

Article

THE (BOUNDEDLY) RATIONAL BASIS OF TRADEMARK LIABILITY

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*332 I. Introduction

"The protection of trade-marks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them."[1]

Federal trademark law stands at a crossroads. In the case of Moseley v. V Secret Catalogue, Inc.,[2] the Supreme Court cast the vitality of the Federal Trademark Dilution Act of 1995 (FTDA),[3] and with it the bifurcated structure of the federal trademark regime, into serious doubt. Since that decision, courts and commentators have debated exactly what trademark dilution is and how it differs from trademark infringement,[4] and practitioners have struggled to advise their clients as to the availability and merits of federal dilution claims.[5] Most recently, ***333** Congress passed the Trademark Dilution Revision Act, a statute designed specifically to abrogate the Court's decision and clarify Congress's intent with respect to the dilution remedy.[6] Whether clarity in the law will follow is still an open question.

Much of this confusion stems from formalist doctrinal architecture that has been handed down over the past 135 years of development in American trademark law. For generations judges, legislators, and scholars have attempted to fit the square peg of trademark law into the round holes of either property law or unfair competition law, often at the expense of the real issues at stake in trademark regimes. It is the position of this article that the modern doctrines of trademark infringement and trademark dilution are best understood not as distinct species of harms to a particular type of property right, nor even as subsets of the law of unfair competition, but rather as related and overlapping categories of consumers' cognitive responses to certain commercial behavior.

The "likelihood of confusion" standard of the Lanham Act[7] has long been used to apply liability for trademark infringement under the rubric of unfair competition. This standard is unhelpful, however, in analyzing dilution, which explicitly rejects the Lanham Act's likelihood of confusion standard, and does not require any actual or potential competition as a prerequisite to liability. The juxtaposition of this doctrinal incompatibility with American trademark law's historical conceptual aversion to property rights has grossly complicated any coherent integration of dilution into the federal trademark regime. Though the tools of doctrinal development have to date been unhelpful in providing a coherent theory of dilution within the broader law of trademarks, the insights of cognitive psychology--which have been brought to bear in other areas of legal analysis under the aegis of "behavioralism"[8]--provide an elegant and robust framework for the positive analysis of all varieties of trademark cases.

Behavioralism posits that human beings are not perfectly rational actors in the model of classical economics, but rather that we exhibit what has been termed "bounded rationality." In particular, numerous studies have documented that we tend to arrive at decisions by means of heuristics: mental short-cuts that generate factual or probabilistic judgments in the face of limited information, time, and resources.[9] While many heuristics are often relatively accurate, and therefore ***334** useful, some heuristics constitute persistent cognitive biases that can generate persistent errors. This article argues that infringement

and dilution are best understood as commercial behavior that manipulates the cognitive biases of consumers, and as such threatens to render their heuristic judgments persistently inaccurate. In this view, trademark liability--whether imposed under the label of infringement or dilution--serves neither to protect property rights of trademark owners, nor to protect them against the unfair trade practices of competitors, but to shape consumer markets in such a way as to conform to the innate cognitive processes of boundedly rational consumers. The trademark regime can thus be understood as a legal apparatus designed (albeit perhaps unconsciously) to accommodate and even harness non-rational human thought processes, rather than suppress or eradicate them. The judicial outcomes of such a regime may be essentially indistinguishable from those of a system of property rights, but it will become clear that this resemblance is more a function of the mechanics of systemic market regulation than of any proprietary interest created under the law.

Part II of this article outlines the theoretical and doctrinal antagonism between the doctrines of trademark dilution and traditional trademark infringement, with an eye to the features of each that have historically kept them distinct from one another. Part III dissects the various species of trademark liability that have developed under this bifurcated trademark regime. Part IV applies the theoretical and empirical insights of cognitive psychology to the elements of trademark doctrine outlined in Part III. Part V collects these insights into a cohesive theoretical framework for all species of trademark liability. The article closes with some practical concerns surrounding the adoption of this framework, anticipating objections, and suggesting future roles for Congress, the courts, and the trademark bar.[10]

II. Schechter's Legacy

In 1927 a New York lawyer by the name of Frank Schechter, then trademark counsel to the BVD company,[11] published an article in the Harvard Law Review lamenting the rigidity and formalism of federal trademark doctrine.[12] At the time, federal trademark protection was limited to the remedies provided in the patchwork of half-measures Congress had enacted since 1881.[13] For over fifty years federal trademark law had been developing step by timid step within the strict boundaries ***335** of the Supreme Court's 1879 ruling in the Trade-Mark Cases,[14] which seemed to have been crafted to keep Congress out of the trademark area altogether.[15] In that ruling, the Court struck down the first federal trademark statute as unconstitutional.[16] The Court held that Congress had no authority under the Patent and Copyright Clause[17] to confer property rights in trademarks.[18] It further held that because the Act of 1870 made no distinction between interstate or foreign commerce on the one hand, and intrastate commerce on the other,[19] Congress had overstepped its bounds under the Commerce Clause.[20] Moreover, the Court expressed in dicta considerable hostility to the idea that trademarks were within the scope of the Commerce power at all.[21]

The legacy of the Trade-Mark Cases--in particular their interpretation of the Patent and Copyright Clause--was to instill in federal trademark doctrine a crippling aversion to anything that resembled a property right. Even after the infirmities of the 1870 Act had been ameliorated,[22] the Supreme Court continued to warn that "[t]here is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark ***336** is employed."[23] The trademark was no more than an indication of a product's connection to its manufacturer, and the trademark right was accordingly understood as quasi-proprietary: it differs from rights "in gross or at large, like a statutory copyright or a patent for an invention," in that it "grows out of its use."[24] In practical terms, this distinction meant that a trademark could only be enforced in the geographic and commercial sphere within which it was actually used by its owner to indicate a product's source. For example, in United Drug Co. v. Theodore Rectanus Co., the Supreme Court rejected a claim of infringement by a manufacturer of medicinal preparations under the name "Regis" in New England against a manufacturer of medicinal preparations under the same name in Kentucky, on the grounds that the two markets were "separate and remote from each other, so that the mark means one thing in one market, [and] an entirely different thing in another."[25] Similarly, the federal statute in place at the time only imposed liability for the use of trademarks on goods of "substantially the same descriptive properties" as those of the trademark owner--in other words, goods that directly competed with those of the trademark owner.[26] The prevailing justification offered by the courts for these doctrines strikes us today as sophistry: "[T]here can be no unfair competition where there is no competition at all."[27]

Such was the state of the law when Schechter penned his famous article. His basic premise was that the historical function of trademarks embodied in Anglo-American law--identifying the origin or ownership of goods-- was an obsolete relic of a localized mode of commerce driven by craftsmen, guilds, and individual merchants.[28] Schechter argued that in a complex modern economy where the manufacturers of goods were often unknown to the purchasers of those goods, ***337** "[t]he true functions of the trademark are . . . to identify a product as satisfactory and thereby to stimulate further purchases by the consuming public."[29] In the commercial reality of the impersonal marketplace, he argued, trademarks served not merely to symbolize the goodwill of their owners in the mind of consumers, but as a vehicle for building and storing such goodwill.[30]

Schechter believed that the framing of trademark doctrine under the rubric of unfair competition--specifically the doctrine of "passing off"--inadequately protected this important function of trademarks.[31] He traced the law's shortcoming specifically to the two features of trademark law outlined above: the resistance to trademark rights that resembled property rights "in gross" rather than "of use," and the concomitant limitation of trademark liability to competing goods within a geographically-defined market.[32] Yet rather than directly challenge the federal courts' hostility to full property rights in trademarks, Schechter proposed an alternative theory of trademark liability derived from German law--dilution.[33] Schechter's theory of dilution rested on the premise that the ability of a trademark to serve as a vehicle for creating and perpetuating goodwill depends on its "uniqueness," and that multiple unrelated uses of an unusual or distinctive mark will prevent that mark from developing a strong, unique hold on the public consciousness.[34] This theory would give the first user of a particularly unique or distinctive mark the right to enforce her mark broadly--not merely within the geographic markets in which she operated, but also in neighboring regions; not merely against competing products, but also against sellers of non-competing goods--all on the theory that any interference with her efforts to build and retain the association of goodwill with her trademark threatens gradually to weaken that association, thereby reducing her incentive to cultivate such goodwill.[35]

Built into Schechter's new theory of trademark law is a tension that was uniquely a product of the legal regime of Schechter's era, yet one that continues to influence trademark doctrine to this day. Schechter was proposing a remedy for an injury that courts of the time had considered but refused to redress: the harm to a trademark owner caused by a second comer's use of the mark on non-competing goods. In order to support the new remedy without running afoul of contemporary doctrine that limited trademark rights to the commercial sphere of their actual use, ***338** Schechter was forced to invent an alternative theory of injury arising from the same conduct he sought a legal remedy against. To that end, he advanced a slippery-slope argument concerning an incidental effect of unauthorized use on the trademark owner--the potential but as-yet-unrealized cumulative effect of repeated unauthorized use of the owner's mark on non-competing goods--rather than the more obvious direct effect of unauthorized use of trademarks on non-competing goods: the invocation of consumer goodwill associated with the mark.[36] Schechter used this somewhat misleading technique despite the fact that the unauthorized invocation of goodwill, rather than its potential long-term erosion, appeared to be his primary concern.[37] The result of this theoretical shell game is a bifurcation of the concept of dilution into two separate and somewhat antagonistic theories. The first theory focuses on the level of uniqueness of the owner's mark, regardless of any benefit a second comer might derive from its use. I will refer to this theory as the "uniqueness theory" of trademark liability. The second theory focuses on a second comer's unauthorized invocation of the goodwill associated with the mark, regardless of the immediate effect on the trademark owner. I will call this the "free-riding theory" of trademark liability. Whether the dilution remedy is properly directed at the trademark owner's injury (the uniqueness theory) or the second comer's benefit (the free-riding theory) is a debate that continues to this day, as will be seen below.[38]

Regardless of the true justification for his proposed remedy, Schechter's call for a radical reconceptualization of trademark law received a cool reception among federal authorities. As Schechter had noted in his own article,[39] the "same descriptive qualities" requirement under the 1905 Act was already being liberalized, and the process continued without any radical statutory or doctrinal innovations.[40] Not until the advent of the revolution in Commerce Clause jurisprudence ushered in by West Coast Hotel Co. v. Parrish[41] was there any serious reformulation of federal trademark law, and even that left dilution squarely out of the picture. A few years after West Coast Hotel Co. was decided, the Lanham Act was passed, laying the groundwork for the next half-century of American trademark law.[42] Rather than broadly rethinking the nature and function ***339** of trademarks, as Schechter suggested, the new statute set off a gradual expansion of liability within the historical traditions of Anglo-American trademark doctrine. For example, section 32 of the Lanham Act--which defines infringement of registered trademarks--eliminated the same-descriptive-properties requirement in favor of a flexible standard for determining infringement that is still largely with us: whether an allegedly infringing use is "likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods."[43] A later amendment removed the explicit reference to "source of origin" from this provision,[44] further loosening but not quite casting off the historical tether on federal trademark law that Schechter had lambasted as an archaism.[45] Meanwhile, judicial interpretation of section 43(a) of the Lanham Act--which by its terms originally prohibited only "false designations of origin"[46] but over time became the primary vehicle for enforcing unregistered trademarks, service marks, and trade dress--broadened the scope of the confusion inquiry, and a 1988 amendment to section 43(a) essentially codified these judicial innovations, prohibiting the commercial use of any mark that "is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person."[47]

Taken together these amendments expanded upon, but never discarded, the Anglo-American common law tradition of

treating trademarks as designators of source or origin. The Lanham Act continues to directly address the consumer's perception of the information a mark conveys about the relationship between the mark's owner and the product bearing the mark; the universe of relevant relationships has simply expanded. The result has been liberalization of some of the more arbitrary doctrines Schechter disdained. For example, the same-descriptive-properties rule that emanated from the antipathy to trademark rights in gross, already weakened in cases such as Yale and Aunt Jemima,[48] gave way under the Lanham Act to a self-consciously flexible standard that extends trademark ***340** infringement liability to "related goods" on a case-by-case basis.[49] Thus, for nearly fifty years federal trademark law gradually broadened the scope of liability to encompass much--but not all-- of the conduct Schechter had complained of, without abandoning the conceptual framework inherited from the previous century of doctrinal development.

In the face of federal complacency, a few states supplemented the federal regime with their own dilution statutes. In 1947, Massachusetts became the first state to enact a dilution statute along the lines suggested in Schechter's article.[50] The trademark bar promoted this trend with a model state trademark statute that included a section on dilution.[51] Nevertheless, by 1995 only about half of the states had enacted any kind of dilution statute.[52] That year, Congress finally responded to the pleas of the trademark plaintiffs' bar for a federal dilution statute and enacted the FTDA.[53] The FTDA created a federal cause of action for trademark dilution,[54] defining the injury in Schechterian terms:

The term "dilution" means the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of --

(1) competition between the owner of the famous mark and other parties, or

(2) likelihood of confusion, mistake, or deception.[55]

The FTDA's provision for relief "regardless of the presence or absence of competition between the owner of the famous mark and other parties" embraced-- even more completely than the "related products" standard[56]-- Schechter's call for a remedy against unauthorized use of a mark "upon non-competing goods."[57] And in defining dilution as "the lessening of the capacity of a famous mark to identify and distinguish goods or services," the text of the FTDA nearly perfectly embodied the uniqueness theory of dilution.[58] The legislative history of the statute, however, ***341** suggests that the lawmakers who crafted it were more swayed by the free-riding theory of dilution, as the committee report stated: "The concept of dilution recognizes the substantial investment the owner has made in the mark and the commercial value and aura of the mark itself, protecting both from those who would appropriate the mark for their own gain."[59] Thus, in adopting Schechter's remedy, Congress fell victim to the contradiction inherent in its underlying justification, even though the doctrines that gave rise to that contradiction had been moribund for decades. Nor did the FTDA revisit the theoretical underpinnings of all trademark law as Schechter had attempted; it simply grafted the dilution remedy on to the corpus of traditional trademark law embodied in the Lanham Act, while leaving traditional trademark law intact.

This tenuous parallel system of trademark remedies is the result of the tension among the competing theories of trademark liability identified in this part: the uniqueness theory, which holds that trademark liability should be imposed to provide manufacturers with the means and incentive to create and preserve consumer goodwill; and the free-riding theory, which holds that trademark liability should be imposed to prevent second comers from misappropriating the consumer goodwill generated by another's trademark. In confronting this theoretical tension while still maintaining their aversion to trademark rights in gross, courts interpreting the FTDA attempted to shoehorn dilution law into the common law theory. The courts thereby exposed not only the incompatibility between the infringement and dilution remedies as currently conceived, but also the inconsistency of modern trademark infringement doctrine with the common law theory of trademarks as identifiers of source.

Early judicial efforts to systematize federal dilution doctrine were generally confused and chaotic.[60] The Supreme Court first stepped into the fray in 2003 in the case of Moseley v. V Secret Catalogue, Inc.[61] The Moseley Court, following an earlier Fourth Circuit opinion,[62] held that to prevail under the FTDA a plaintiff must prove "actual dilution," not mere "likelihood of dilution," although actual economic harm need not be proven.[63] However, where the Fourth Circuit's ***342** requirement of "actual, consummated dilution" had been premised on an understanding of dilution as a harm caused by "a sufficient similarity between the junior and senior marks to evoke an 'instinctive mental association' of the two by a relevant universe of consumers,"[64] the Moseley Court criticized the "mental association" test. The Court reasoned that "the mere fact that consumers mentally associate the junior user's mark with a famous mark" was insufficient to establish actionable dilution because it would "not necessarily reduce the capacity of the famous mark to identify the goods of its owner, the statutory

requirement for dilution under the FTDA."[65] According to Moseley, dilution had little to do with consumer reaction to the defendant's mark, and everything to do with consumer reaction to the plaintiff's mark in a world where the defendant's mark exists.[66]

This feature of the Moseley opinion would seem to mark an inflection point in the theoretical tug-of-war over dilution doctrine. The Moseley Court essentially rejected the free-riding theory of dilution implied by the legislative history of the FTDA in favor of a dilution doctrine that hews as closely as possible to uniqueness theory embodied in the statutory text. By literally reading the FTDA's uniqueness-based description of the dilution injury, the Moseley Court made explicit the internal contradictions of dilution doctrine that Congress and Schechter had attempted to dodge. Although Congress may have intended to promulgate a free-riding theory of dilution[67]--and apparently still has that intent[68]--the Supreme Court obliged (or perhaps dared) Congress to make that intent explicit in statutory language. In order to do so, Congress would have to finally acknowledge what Schechter could not: that the policy underlying the free-riding theory of dilution is essentially an extension of traditional common law infringement policy beyond the formalist limits set by the Trade-Mark Cases and their progeny. The traditional concept of "passing off"--perhaps the earliest recognized cause of action in trademark law and the source from which modern infringement doctrine ***343** developed[69]--envisions an unauthorized use of a mark that deceives the consumer into purchasing a second comer's goods instead of the trademark owner's; the primary distinction between this scenario and free-riding dilution is that in the latter instance the "free ride" does not result in the substitution of a sale of defendant's products for a sale of plaintiff's products (by reason of the absence of market proximity).[70] To extend liability for dilution to the latter case, a dilution statute reflecting an anti-free-riding policy rather than pro-uniqueness policy was necessary.

Congress took a step in this direction in late 2006 with its passage of the Trademark Dilution Revision Act (TDRA).[71] The TDRA was consciously drafted as a rejection of the Moseley Court's insistence on proof of actual (as opposed to likely) dilution.[72] More significantly, the TDRA departs from the uniqueness theory of dilution in favor of the free-riding theory.[73] The FTDA had defined dilution as "the lessening of the capacity of a famous mark to identify and distinguish goods or services," a standard that (as interpreted in Moseley) focused exclusively on the effect of a defendant's use on a plaintiff's mark.[74] The TDRA redefines dilution as an "association arising from the similarity between a mark or trade name and a famous mark that [either] impairs the distinctiveness . . . [or] harms the reputation of the famous mark"[75]--a standard that focuses both on impairment of the plaintiff's mark and on the mental associations drawn by consumers confronted with the defendant's mark, drawing a causal connection between the two phenomena. Moreover, the statute grants special remedies against defendants who "willfully intended to trade on the recognition of the famous ***344** mark"--as clear a statement of anti-free-riding policy as one could imagine.[76] In short, the consumer's mental association between a new mark and a famous existing mark has become the touchstone of dilution under the TDRA, giving congressional blessing to the causal reasoning and anti-free-riding policy that the Moseley Court rejected.[77]

The theoretical parallels between infringement and dilution are mirrored in the practical application of the two doctrines. As will be discussed below,[78] the factors laid out by Congress for establishing a TDRA claim largely mirror those already used by courts to establish an infringement claim, suggesting that dilution and infringement share affinities more complex than a common general policy against free-riding. The remainder of this article will endeavor to identify and explain those affinities as a function of the influence of trademarks on the cognitive psychology of consumer decision-making.

III. The Species of Trademark Liability

Even after the developments discussed in the previous part, federal trademark doctrine remains wedded to the common law's conceptual nexus of a mark and a manufacturer--between a source and its symbol. Although the Lanham Act doctrine of confusion has now broadened from its original scope of source of origin to include concepts such as affiliation, connection, or sponsorship, all of these concepts relate back to the manufacturer; they speak not to the consumer's general beliefs about the trademark-bearing product but to her specific belief about the marked product's relationship to an entity--even an anonymous or unknown entity--that owns the mark.[79] Dilution doctrine, in contrast, appears mainly concerned with the stability of that specific belief; it is designed either to prevent the consumer from associating a famous mark with more than one manufacturer, or to shield that association from the influence of other manufacturers. Ostensibly, then, all of trademark liability doctrine is concerned with the consumer's mental association between a mark and a maker--indeed, courts go so far as to construct an unknown, anonymous manufacturer in the consumer's mind in order to preserve this doctrinal focus.[80] However, as this part will show, courts often assess this ***345** mental association by means of various proxy criteria which, in turn, suggest a different and more generalized concern at the heart of trademark law.

A. Infringement

"[W]hether a claim [is] brought under [15 U.S.C.] § 1114 for infringement of a registered mark, or whether it is brought under [15 U.S.C.] § 1125(a) for infringement of an unregistered mark, the touchstone of the claim is likelihood of confusion."[81] Under the language of these statutes, a court deciding whether infringement exists must determine whether it is likely that purchasers or potential purchasers viewing the defendant's mark will either: (a) be confused into thinking that the product bearing that mark originates with, or is sponsored or approved by, the trademark owner; or (b) be confused into thinking that the defendant is affiliated, connected, or associated with the trademark owner.[82]

1. Species of Confusion

"The most common and widely recognized type of confusion that creates infringement is purchaser confusion of source which occurs at the time of purchase: point of sale confusion."[83] In other words, liability for infringement is usually imposed where a defendant is using a trademark that causes consumers to believe that plaintiff is the source of defendant's goods at the time of a purchase of defendant's goods. However, other types of confusion are grounds for liability. As has already been noted, confusion as to source is no more nor less actionable than confusion as to affiliation, approval, sponsorship, or the like. Moreover, point-of-sale confusion is not the only scenario for which relief is available. A trademark ***346** owner can obtain relief for "initial-interest confusion"--a scenario in which a consumer is attracted to a product due to confusion engendered by defendant's mark, even though any such confusion is dispelled by the point-of-sale.[84] Post-sale confusion, in which potential purchasers or the public at large are confused by defendant's products when they are seen in the possession of prior purchasers, is also actionable.[85] Finally, in some cases a second user of a trademark will overwhelm the marketplace such that consumers erroneously believe that the goods of the smaller first user--who by virtue of priority in time has rights to the trademark--are those of the larger second user; this is known as "reverse confusion."[86] It will become apparent over the rest of this article that these various species of confusion are differentiated from one another (and from other species of trademark liability) only by certain variations in the outcome of a limited set of mental processes underlying all trademark liability.

2. Determining Likelihood of Confusion

No matter which of these scenarios is at issue, the relevant analysis remains the same. The question of likelihood of confusion is generally determined by means of an analysis derived from the 1938 Restatement of Torts, which set forth nine factors to be considered.[87] Although "each of the thirteen federal circuit courts ***347** of appeal has developed its own version of the list and each appears to be jealous of its own formulation of factors,"[88] the lists are all quite similar, as can be seen in Table 1 on the following pages:

Circuit	Factors[89]
	1) Similarity of the marks
	2) Similarity of the goods
	3) Relationship between the parties' channels of trade
First[90]	4) Relationship between the parties' advertising
	5) Classes of prospective purchasers
	6) Evidence of actual confusion
	7) Defendant's intent in adopting its mark
	8) Strength of the plaintiff's mark
	1) Strength of plaintiff's mark

	2) Degree of similarity between the marks
	3) Proximity of the products
Second[91]	4) Likelihood that the prior owner will bridge the gap
	5) Actual confusion
	6) Defendant's good or bad faith
	7) Quality of defendant's product
	8) Sophistication of the buyers
	1) Degree of similarity between the marks
	2) Strength of plaintiff's mark
	3) Price of the goods and other factors indicative of expected consumer care and attention at point-of-sale
	4) Length of time defendant has used the mark without evidence of actual confusion arising
Third[92]	5) Defendant's intent in adopting the mark
	6) Evidence of actual confusion
	7) Similarity of channels of trade and advertising media
	8) Similarity of targets of the parties' sales efforts
	9) Relationship of the goods in the minds of consumers due to similarity of function
	10) Other facts suggesting that the consuming public might expect plaintiff to manufacture a product in the defendant's market, or that plaintiff is likely to expand into that market
	1) Strength or distinctiveness of the mark
	2) Similarity of the two marks
	3) Similarity of the goods/services the marks identify
	4) Similarity of the facilities the parties use in their businesses
Fourth[93]	5) Similarity of the advertising used by the parties
	6) Defendant's intent
	7) Actual confusion
	8) Proximity of the products as they are actually sold

	9) Probability that the senior mark owner will "bridge the gap" by entering the defendant's market
	10) Quality of the defendant's product in relationship to the quality of plaintiff's product
	11) Sophistication of the buyers
Fifth[94]	1) Strength of the plaintiff's mark
	2) Similarity of design between the marks
	3) Similarity of the products
	4) Identity of retail outlets and purchasers
	5) Similarity of advertising media used
	6) The defendant's intent
	7) Actual confusion
	8) Degree of care exercised by potential purchasers
Sixth[95]	1) Strength of the plaintiff's mark
	2) Relatedness of the goods
	3) Similarity of the marks
	4) Evidence of actual confusion
	5) Marketing channels used
	6) Likely degree of purchaser care
	7) Defendant's intent in selecting the mark
	8) Likelihood of expansion of the product lines
Seventh[96]	1) Degree of similarity between the marks
	2) Similarity of the products
	3) Area and manner of concurrent use
	4) Degree of care likely to be exercised by consumers
	5) Strength of the plaintiff's mark
	6) Actual confusion
	7) Defendant's intent to palm off his products as those of another

	1) Strength and distinctiveness of plaintiff's mark
	2) Overall visual and aural similarity of the marks
	3) Relatedness of products
Eighth[97]	4) Competitive proximity
	5) Defendant's intent to pass off its goods as the product of another
	6) Actual confusion
	7) Degree of purchaser care in light of the kind, cost, and conditions of purchase of the product
	1) Strength of the mark
	2) Proximity of the goods
	3) Similarity of the marks
Ninth[98]	4) Evidence of actual confusion
	5) Marketing channels used
	6) Type of goods and the degree of care likely to be exercised by the purchaser
	7) Defendant's intent in selecting the mark
	8) Likelihood of expansion of the product lines
	1) Degree of similarity between the marks
Tenth[99]	2) Defendant's intent in adopting the mark
	3) Similarity of use and manner of marketing between the parties' products
	4) Likely degree of purchaser care
	1) Strength of plaintiff's mark
	2) Similarity between the marks
	3) Similarity between the products
Eleventh[100]	4) Similarity of sales methods
	5) Similarity of advertising methods
	6) Defendant's intent
	7) Actual confusion

***350** The similarities among these circuit-specific lists should be apparent. Every circuit includes factors regarding the similarity of the marks[101] and the defendant's intent.[102] All except the Tenth Circuit include factors regarding strength of the

plaintiff's mark[103] and evidence of actual confusion.[104] All except the Eleventh Circuit (and to some extent the First Circuit) consider the sophistication of, or degree of care likely to be exercised by, purchasers and prospective purchasers.[105] And all the remaining factors address in one way or another the proximity (or overlap) of the commercial spheres in which the two parties' products are found: either in similarity of the products themselves (along dimensions such as the ***351** function of the goods or their relative quality or cost),[106] similarity of the commercial or geographic contexts of their sale (including the venues in which they are sold and the likelihood that the plaintiff will expand the scope of its business to overlap with that of the defendant),[107] similarity of their target audiences,[108] or similarity of the techniques and media used to advertise and market them.[109] Collectively, these factors can be understood as addressing whether consumers are likely to encounter both parties' products (and, hence, their marks) in a similar commercial context, and this article will use the term "proximity of markets" as a shorthand for the various comparisons in this subset of the likelihood of confusion test.

All the various tests for likelihood of confusion--whether comprising four factors or eleven--boil down to the six essential concerns described in the previous paragraph: actual confusion, strength of plaintiff's mark, similarity of marks, proximity of markets, degree of consumer care, and defendant's intent. All these factors purport to measure the likelihood of consumer confusion as to source, affiliation, approval, or the like; but in fact, only one factor actually attempts to take the measurement directly: the "evidence of actual confusion" factor. The remaining factors can be understood as proxy measurements: accessible facts that are believed to have some relevant relationship to the attribute that is the target of inquiry, and are therefore expected to have predictive power as to the value of that target attribute. Although the likelihood of confusion test is ostensibly concerned with the consumer's perception of the relationship between mark and maker, most of the test's proxy measurements are grounded in the circumstances of the consumer's direct interaction with the trademarks in question and the products to which they are attached, without regard to the concept of a mark owner: whether the marks are similar to one another, encountered on similar products, or encountered in similar contexts; whether they are unique or well known; and whether the consumer will give care and thought to the purchase decision in which the trademark is encountered. The one exception to the generalization that proxy measurements of likelihood of confusion are independent of the concept of a manufacturer--defendant's intent--is a relic of the equitable origins of unfair ***352** competition law, but has lately been largely marginalized by the courts precisely because it is not believed to bear a sufficient relationship to consumer confusion.[110] In fact, recent cases suggest that the defendant's intent may be nothing more than an inferential link between similarity of marks and likelihood of confusion.[111] This link is part of a well-worn chain of reasoning: if a defendant knew of the plaintiff's mark, and adopted a similar or identical mark, he must have thought he would confuse consumers and thereby capitalize on plaintiff's goodwill, and he is likely to have succeeded in his efforts to confuse.[112] In this view, the defendant's intent is less of a proxy measurement in its own right than a gloss on the similarity-of-marks inquiry,[113] and in fact it can even be viewed as a logically circular effort to justify the use of similarity of marks as a proxy for likelihood of confusion. In light of these features of the treatment of defendant's intent under trademark law, this article will treat defendant's intent as an offshoot of the similarity-of-marks inquiry and will not address the former factor independently.[114]

In sum, this section has attempted to reduce the various infringement tests to four primal factors that serve as proxies for likelihood of confusion in judicial analysis under the Lanham Act: similarity of marks, proximity of markets, strength of marks, and consumer care. As the next part will demonstrate, courts' use of these proxies to determine likelihood of confusion is something of an inversion; the proxy factors are actually more direct measurements of the harm at issue in trademark cases than is consumer confusion as to source, affiliation, approval, or the like. As will be made clear below, consumer confusion as to the relationship between manufacturers and trademarked products is simply a convenient ***353** framework for rationally discussing this harm, which is not amenable to the deductive, rationalist framework of judicial analysis.[115]

B. Dilution

The federal dilution statute, as amended, makes remedies available to the "owner of a famous mark" against another person's commercial use of a mark that "is likely to cause dilution by blurring or dilution by tarnishment of the famous mark."[116] As will be demonstrated, the similarity of "fame" in dilution doctrine to "strength" in infringement doctrine suggests the first affinity between the two remedies, with the distinction that strength of the plaintiff's mark is a necessary statutory element of a prima facie dilution case,[117] not merely a factor in weighing the relative strength of a claim (as it is for infringement). Whether a dilution claim will actually succeed depends on other factors set forth in the statute, and these factors also share affinities with those developed by courts in the infringement context. This section will first examine the relationship between mark strength and fame, then go on to discuss the other factors used to test for the two species of dilution (i.e., blurring and tarnishment) and the relationship between those factors and the previously identified factors for determining infringement.

1. Strength and Fame

The mark strength factor in infringement doctrine incorporates two legal concepts: inherent distinctiveness and acquired distinctiveness (also known as secondary meaning).[118] Inherent distinctiveness is a judgment about the uniqueness of a trademark in the context of the category of goods on which it is used. Terms that refer to the genus of which a particular product is a species (such as "car" and "cola") are "generic," and are therefore not entitled to trademark protection.[119] At the other end of the distinctiveness spectrum are "arbitrary" words that bear no logical relationship to the products to which they are affixed (such as "Camel" for cigarettes or "Apple" for computers), and "fanciful" words that have been coined ***354** specifically for trademark use (such as "Kodak" or "Xerox").[120] Such terms are entitled to vigorous trademark protection.[121] Between these extremes are "descriptive" marks--terms that describe the products to which they are affixed (such as "Tasty" for food products or "Bright" for flashlights)--and "suggestive" marks--terms that suggest a conclusion about the nature of the goods to which they are affixed but require some thought to reach that conclusion (such as "Tide" for laundry detergent or "Coppertone" for suntan lotion).[122] Suggestive marks are generally afforded protection, although they are not considered as strong as arbitrary or fanciful marks.[123] In contrast, descriptive marks are even weaker and are entitled to protection only upon a showing of acquired distinctiveness or secondary meaning, the second metric of mark strength.[124]

The Supreme Court has held that a trademark has attained secondary meaning when "in the minds of the public, the primary significance of [the mark] is to identify the source of the product rather than the product itself."[125] This is yet another example of the doctrinal preoccupation with the nexus of mark and maker. In addition to direct evidence of such a nexus in the minds of the public (such as testimony or consumer surveys), courts trying to determine whether a mark has attained secondary meaning consider a variety of proxy factors such as the length and exclusivity of the plaintiff's use of the mark, the plaintiff's advertising efforts, publicity surrounding the mark, and the sales success of the plaintiff's products bearing the mark.[126]

Dilution doctrine's version of mark strength--fame--is closely related to the other metrics. The text of the TDRA sets forth various factors for determining fame,[127] which essentially incorporate the factors used to assess the other forms of mark strength. For example, the TDRA considers the scope of a mark's advertising and the sales of goods bearing that mark as evidence of fame; both factors are also ***355** used in the acquired distinctiveness inquiry.[128] The third fame factor--"extent of actual recognition of the mark"[129]--is related to the publicity factor for determining acquired distinctiveness, and may indeed amount to the same inquiry in different words. And the final factor in determining fame--whether a mark has been registered--incorporates the inherent and acquired distinctiveness criteria for registration.[130] While courts are likely to require a heightened showing under these factors to support a finding of fame,[131] and may even expand this list of factors, the difference between fame in dilution doctrine and mark strength in infringement doctrine appears to be one of degree, rather than kind.

2. Dilution by Blurring

The factors for assessing the merits of a blurring claim are almost identical to those used to analyze infringement claims. The TDRA sets out a nonexclusive list of six factors for "determining whether a mark . . . is likely to cause dilution by blurring,"[132] half of which merely restate various measurements of mark strength or fame.[133] Two additional factors establish the relevance of subjective and objective assessments of the existence of the mental association between an accused mark and a plaintiff's mark that is the sine qua non of dilution under the TDRA, affirming that the purpose of dilution doctrine is to deter the same sort of free-riding that is at issue in infringement cases.[134] The remaining factor simply states that "[t]he degree of similarity between the mark or trade name and the famous mark" is relevant to the likelihood of blurring analysis,[135] as of course it is in infringement analysis. In short, the only distinction between the test for blurring and the test for infringement is that the former elides factors such as market proximity and consumer care in favor of a broader and more vague search for actual and intended associations between two marks. Given the lack of any clearly distinguishing characteristics of blurring vis-à-vis infringement, it is quite probable ***356** that the associations that supposedly lead to blurring are no more than the genus of which confusion is a species, and at least possible that the two mental states are in fact identical. As two leading trademark scholars have stated, "[B]lurring often looks too much like a second shot at proving likelihood of confusion under a slightly different verbal formulation . . . [and looking] like little more than confusion analysis with a different paint job."[136]

3. Dilution by Tarnishment

The TDRA provides no list of factors for determining likelihood of tarnishment as it does for likelihood of blurring, stating only that tarnishment is "association arising from the similarity between a mark or trade name and a famous mark that harms

the reputation of the famous mark."[137] Nevertheless, this definition in itself provides at least three criteria that will likely be relevant to assessing a tarnishment claim: fame (i.e., strength) of the plaintiff's mark, similarity between the plaintiff's mark and the accused mark, and the existence of a mental association between the accused mark and the plaintiff's mark. In other words, a tarnishment claim will rise or fall on essentially the same factors as a blurring claim or an infringement claim, and it suffers from the same circular construction. The one distinguishing characteristic of tarnishment claims is that the association in question must be one that harms the reputation of the plaintiff's mark.[138] In this vein, courts considering claims under the pre-TDRA federal statute or state dilution statutes have historically held that the defendant's use must somehow involve shoddy goods or unsavory activity to be actionable under a tarnishment theory; the most typical examples involve commercial uses of famous marks in contexts that suggest sexual activity or drug use.[139]

The near-total overlap between the factors relevant to the two species of dilution claims suggests a conceptual affinity between the doctrines of blurring and tarnishment: where the latter seeks to prevent persons other than the trademark owner from creating negative associations with the owner's mark, the former seeks to prevent persons other than the trademark owner from creating any associations with the mark that would compete with the associations created by its owner. As ***357** will be shown in Parts IV and V below, these related policies are in turn connected to the anti-confusion policy of infringement law, and juxtaposition of the doctrines--including the proxy factors by which they are analyzed--suggests a more generalized theory of trademark law rooted in the cognitive psychology of consumer behavior.

C. Summary

This part has identified a limited set of factors that inform the analysis of all trademark claims. Whether a claim is brought for infringement, blurring, or tarnishment, the strength of the plaintiff's mark, and the similarity of the defendant's mark to the plaintiff's mark will always be a factor in deciding the claim. For tarnishment claims, there is an added requirement that the defendant's use threatens to generate a negative association with the plaintiff's mark. For infringement claims, courts will also consider the proximity of the markets in which the parties' marks appear and the likely degree of consumer care--factors that may well be subsumed in the association inquiry of blurring and tarnishment claims. The fact that the three legal standards for federal trademark claims--likelihood of confusion for infringement, associations that impair the distinctiveness of the plaintiff's mark for dilution by blurring, and associations that harm the reputation of the plaintiff's mark for dilution by tarnishment--are all determined by analyzing this limited and overlapping set of proxy factors suggests a deep connection between the various species of liability. Indeed, as the next part will show, the current legal regime is something of an inversion: the proxy factors are directly linked to the harms at issue in trademark cases, and the diverging legal standards governing the various species of liability are best understood as rationalist efforts to discuss these harms, which operate at a decidedly non-rational level.

IV. The Cognitive Psychology of Trademarks and Consumer Decision-Making

Although the doctrines of infringement and dilution have developed separately, and indeed often in tension with one another, if one examines them in the abstract it becomes apparent that they are really flip sides of the same coin. The doctrines discussed in the previous part are all centrally concerned with a specific cognitive process, i.e., the effect of the sensory stimulus of a trademark on the mental processes of actual or potential consumers. This effect can be understood as an interconnected set of heuristics and related idiosyncrasies of human memory, cognition, and decision-making. While trademark doctrine ostensibly concerns itself with the consumer's perception of the relationship between trademarked products and their manufacturers, we have seen that Congress and the courts tend not to concern themselves as much with this relationship as with a fairly narrow set of proxy criteria. This part will demonstrate that doctrinal constructs such as likelihood of confusion, associations that impair a mark's distinctiveness, and associations that harm the reputation of a mark--insofar as they purport to address the effect of a trademark on a consumer's belief as to the relationship between mark and maker, rather than consumer reaction to the mark itself--are merely rationally ***358** cognizable proxies for the manipulations to which the non-rational cognitive processes triggered by trademarks are particularly susceptible.

As an introduction to this hypothesis, readers may wish to perform a brief self-assessment as follows: Typically, when I see a can with the words "Coca-Cola" emblazoned on it in white script against a red background, do I run through a linear mental process on the order of: "That logo is a trademark of the Coca-Cola Company, whose products I have used in the past and found to be (un)satisfactory and (un)pleasant; therefore this product which bears the same logo must also be a product of the Coca-Cola Company (or otherwise affiliated with or approved by that company); and because that company is likely to strive

for consistency across the products to which it affixes its trademark, this product is likely to be (un)satisfactory and (un)pleasant to me" ? Or rather, when confronted with such a stimulus, does a general impression of (un)pleasantness and (un)desirability simply present itself in my consciousness through no deliberate mental effort on my part? For readers who have the former reaction (if any such readers exist), the arguments presented herein will likely be unpersuasive. But for readers who have the latter reaction, this part will suggest an explanation why.

Let us begin with the unremarkable assumption that a consumer facing a purchase decision will select a purchase option that she believes is most likely to satisfy her needs or wants. The specific needs or wants at issue are not particularly material for present purposes. They could include such disparate criteria as value for the dollar; suitability for a specific purpose; capacity to provide some sort of physical, psychological, or emotional enjoyment; or even social prestige or distinction. How is our hypothetical consumer to determine which particular product from among all her choices is most likely to satisfy her needs or wants? She will usually not be permitted to sample or test the various products, and will thus lack direct evidence from which to rationally deduce their relative capacity to satisfy her criteria. When faced with such uncertainty, human beings tend to estimate the attribute they are trying to measure (the target attribute, in this case, the criteria our hypothetical consumer deems important) by reference to a related attribute (a substitute attribute) that they feel they can measure.[140] These substitute attributes are often determined by means of heuristics.[141] And in the case of our hypothetical consumer, there are obvious stimuli available to trigger and channel her heuristic judgments--trademarks.[142]

***359** Courts dealing with trademark cases and legislators dealing with the legacy of those cases have developed and applied the proxy factors discussed in the previous part as metrics for the proper boundaries of trademark liability, even though those proxy factors do not speak directly to the ostensible subject of trademark doctrine--consumer perceptions of the relationship between a marked product and the mark owner. This disconnect suggests that the proxy factors may play some role in the cognitive processes triggered by a trademark; the cognitive processes, in turn, reflect some feature of consumer psychology other than a belief as to the relationship between a marked product and a manufacturer. Viewing the proxy factors through the lens of cognitive psychology, some potential reasons why courts and legislators may consider them important begin to emerge. Each of these proxies--similarity of marks, proximity of markets, strength of marks, degree of consumer care, and negative associations--can be understood as reflecting non-rational features of human cognition, which influence consumer decision-making in predictable ways. Taken together, these cognitive processes suggest a structure within which certain market behaviors will generate an improperly biased consumer response to a trademark--a response that is the product of empirically unlikely or erroneous consumer beliefs. It is these undesirable responses, and the purchase decisions they cause, that trademark law seeks to prevent by imposing liability against the market behaviors that generate them.

A. Substitution of Attributes and Negative Associations: The Affect Heuristic and Choosing by Liking

The discussion above implies the existence of substitute attributes that inform consumer choice in the absence of information to guide rational decision-making. A likely candidate for generating such a substitute attribute is the affect heuristic.[143] Based on a variety of experimental studies, psychology researchers have concluded that choices and judgments are often made based on automatically generated valences of positive or negative affective responses--emotional states experienced as a sense of goodness or badness concerning a given stimulus.[144] Put simply, we choose what we like, and only after we have decided do we retroactively try to rationalize our decision.[145] It is hypothesized that the emotional component of our ***360** experiences with a given stimulus tags that stimulus with affective content, either consciously or unconsciously, and the pool of these affective tags is automatically drawn on whenever that stimulus is encountered again.[146] For example, drinking a cold beverage on a hot day, getting a product recall notice, seeing an aesthetically pleasing advertisement, or reading a news report that a household product contains a potent carcinogen are all experiences that would modify the affect pool for the products and trademarks involved[147] and would accordingly make a consumer more or less likely to choose products bearing the implicated trademarks.

How can we be confident that our hypothetical consumer will rely on an intuitive sense of affect rather than a more structured reasoning process in making her purchase decision? Experimental data suggest the existence of two parallel systems of human reasoning--one automatic and associative and the other deliberate and rule-based--that work simultaneously and interactively to complete cognitive tasks.[148] From what we know about human cognition, associative (as opposed to linear or logical) judgments such as affective response are often automatic,[149] and "tagging" a stimulus with affect is an extraordinarily easy task.[150] Moreover, such judgments are difficult to displace with subsequent logical ***361** reasoning, which is cognitively demanding and slow.[151] Experimental data have also shown that the affect heuristic is persistent: once a stimulus has been tagged with affective value, later contrary information about the stimulus's actual meaning or significance will often be

insufficient to significantly alter the affective response.[152] Indeed, when we rely on any heuristic judgment in our decision-making, it takes considerable time and effort to alter those judgments based on further, more rational consideration, if we can alter them at all.[153] Put simply, "[P]eople are not accustomed to thinking hard, and are often content to trust a plausible judgment that quickly comes to mind."[154] Thus, particularly in those purchasing contexts where the purchase is not considered for a long period of time,[155] initial intuitive judgments--such as affective reactions to a trademark--are extremely likely to form the sole basis for the ultimate purchasing decision. Consumer psychologists studying the purchasing decision have reached similar conclusions.[156]

The influence of affect and the related phenomenon of "choosing by liking" on purchase decisions begins to shed light on some of the proxy factors identified in the previous part. First of all, trademark liability can begin to be understood as a system of regulation for one of the channels by which affective content is created: the application of words and symbols to products.[157] Moreover, the relevance of ***362** negative associations to claims for dilution by tarnishment becomes clear. By altering the affect pool for a given trademark, uses that generate negative associations lessen the chance that consumers will choose products bearing that trademark. The choosing-by-liking model also suggests roles for the proxy factors dealing with mark strength and consumer care, which are discussed below.

B. Mark Strength: Recognition, Recall, and Familiarity

As discussed above,[158] when courts talk about the strength of a plaintiff's trademark, they are referring to three related legal concepts: inherent distinctiveness, acquired distinctiveness (also known as secondary meaning), and fame.[159] Each plays a different role in the behavioralist model of trademark liability.

1. Inherent Distinctiveness and the Recognition Heuristic

As will be discussed in the next part, the most compelling explanation for the law's privileging of unique marks arises from concern over the competitiveness of the market rather than over the thought processes of consumers.[160] Nevertheless, inherent distinctiveness may also correlate to some features of human memory and decision-making. Much research on human memory has focused on the distinction between two specific and, interestingly, independent memory tasks: recognition and recall.[161] Recognition is described as the belief that one has encountered a stimulus in the past, whereas recall is the ability to retrieve the stimulus and contextual information about it from memory when given an appropriate cue.[162] The first ***363** measure of mark strength, uniqueness, may be related to an interesting distinguishing feature of recognition and recall. Studies have found that low-frequency words--those uncommon in ordinary usage--are more easily recognized when encountered after an initial exposure than are high-frequency words.[163] The word-frequency effect on recall is precisely the opposite, but less stable; when presented with lists of either all high-frequency or all low-frequency words, people tend to more accurately recall high-frequency words.[164] This effect all but disappears when both high-frequency and low-frequency words are presented in a mixed list.[165] To the degree that high-frequency words correlate with generic terms (which admittedly may not be a very high degree), the judicially-developed concept of inherent distinctiveness may reflect this feature of human memory.[166] Thus, one reason the law may be more protective of unique marks is that--absent any other measure of consumer reaction to a trademark-- such marks, once encountered, may more likely be recognized than non-unique marks, and thus no less likely to be recalled than non-unique marks when presented in the same context as such non-unique marks.[167]

Although the word frequency effect gives some general insight into the potential relevance of recognition to inherent distinctiveness, it does not explain how a recognition-based theory of inherent distinctiveness might play a role in consumer decision-making. That gap can be filled by a feature of human cognition known as the recognition heuristic, which has been described as follows:

> Consider the task of inferring which of two objects has a higher value on some criterion (e.g., which is faster, higher, stronger). The recognition heuristic for such tasks is simply stated: If one of two objects is recognized and the other is not, then infer that the recognized object has the higher value.[168] ***364** The existence of this heuristic has been borne out by empirical data, but it is limited in that it is believed to be triggered only in cases where (a) the decision-maker recognizes the stimulus but does not have any additional information about it, and (b) recognition is intuitively perceived to have some correlation to the target attribute.[169] It seems a good fit for the case of the hypothetical consumer from the discussion above, in those instances where she has no distinguishing information about the products she is considering other than their brand names. All else being equal, if she recognizes a trademark affixed to

> one product but not the others, we would expect her to select the product whose trademark she recognized, even if she knew nothing else about it, because she will intuitively conclude that it has a higher value on her target criteria.[170]

2. Acquired Distinctiveness, Fame, and the Role of Familiarity

As with the proxy factors under the various tests for liability, the proxy factors for secondary meaning and fame have little to do with the nexus between a mark and a maker. To the contrary, they all relate in some way to facts that would influence the probability of a significant number of actual or potential consumers having some exposure to the plaintiff's mark, either on the plaintiff's products or in advertising and publicity (and the frequency of such exposure).[171] While such exposures may say nothing about consumer awareness of the relationship between a mark and a manufacturer, they may contribute to the "affect pool" of the mark in the mind of consumers, as well as provide more specific knowledge concerning the products to which the mark is affixed that can be drawn on in future decision-making.[172] Furthermore, such exposure might increase the probability that a mark will be recognized in future encounters, triggering the recognition heuristic described in the previous section.[173] Moreover, as demonstrated below, simple repetition of such exposure may itself influence consumer responses to the mark.

***365** Secondary meaning and fame can be identified with features of memory and their role in heuristic judgment. Again, the associative system of cognition plays an important role. One consumer psychologist has proposed that secondary meaning represents the creation of "associative networks" around a mark in the minds of a substantial number of consumers, and that these networks are activated as part of the recall process triggered by subsequent exposure to the trademark.[174] In other words, through repeated exposure to a mark and experience with the types of goods it is associated with, a consumer comes to recall with increasing ease relevant information about, and experiences with, products bearing the mark whenever she encounters the mark. Conceptually, this concept is similar to the notion of an affect pool--a consumer's experiences with a trademark will tag that mark with layers of meaning that will be automatically drawn on whenever the mark is subsequently encountered and recalled.[175] Still, the separate cognitive processes triggered by knowledge and affect underlie an important distinction between the "associative network" and the "affective pool" in the trademark context: recent research suggests that mental associations characterized by specific knowledge may indeed result from repeated experience with a brand, but that such associations serve only "subsidiary roles" in brand choice, with emotional or affective reactions and attitudes playing the lead role.[176]

The dominance of affective response in consumer choice suggests another mechanism, beyond the affect pool, by which the breadth and frequency of exposure to a trademark might play a role in consumer decision-making. Studies show that simple familiarity with a stimulus increases positive affective response to it.[177] In other words, the more often we are merely exposed to a stimulus, the stronger our affective response to it will be and the more likely we will prefer it.[178] ***366** As discussed above,[179] a hypothetical consumer may try to rationalize a purchase by telling herself she is buying a product of high quality, high safety, high value, or desirability, when in fact she is most likely relying on a simple affective response to the trademark on the product's package. While this affective response may be based on her experience with products bearing the mark, it may also be based on nothing more than affectively loaded advertising of the mark; or, it may simply arise from the fact that she has seen the mark more often than other marks. In short, consumer familiarity with a trademark through any prior exposure--other than one which generates negative affective responses--is likely to increase the positive affective response to products bearing that mark, and influence consumer decision-making accordingly. Thus, secondary meaning and fame, which are generally measured in terms of the likelihood and magnitude of consumer exposure to a trademark, are legal constructs that reflect the affect pool, the influence on affect of repeated exposure and familiarity, and, to a lesser extent, the contribution of repeated exposure to associative networks of meaning connected to the mark. Quite simply, in the absence of negative associations with a mark, the more widespread the mark, the stronger and more positive consumer response is likely to be.

In sum, each of the metrics of mark strength used by courts to assess trademark liability addresses facts that will tend to increase consumer preference for products bearing the mark in question by influencing cognitive functions and constructs, particularly those based on recognition and familiarity, that generate positive affect response.

C. Similarity of Marks and Proximity of Markets: The Roles of Similarity and Context

The discussion thus far is useful in the examination of how trademarks operate, but it is relevant to trademark liability only to the extent that an accused mark might be identical to a plaintiff's mark and used on an identical product, thereby generating an identical response. To account for the law's extension of liability beyond such circumstances (under either modern infringement doctrine or dilution doctrine), the role of similarity and context must be addressed; indeed, the two dimensions interact considerably.[180] Consumer response to a trademark that is similar, but not identical, to another better-known mark--or identical to a better-known mark used on a different type of product--will likely be influenced by three types of cognitive phenomena: illusions, context effects, and anchoring biases.

***367** 1. Mark Similarity and Perceptual/Cognitive Illusions

The interaction of perception and memory often yields idiosyncratic results that could have particular relevance to consumer decision-making. For example, when faced with a word recognition task, we often fail to detect small errors, and even fill in missing information, such that we are actually able to "see" a familiar word even when letters are missing, transposed, or replaced with other letters or abstract characters.[181] Memory can play similar tricks on us, particularly when a novel, distorted, or misplaced stimulus is presented in a context where we would expect to encounter a similar, familiar stimulus. For example, when asked, "How many animals of each kind did Moses take with him on the ark," most people will respond "two," knowing full well that Noah is the Bible's ark-builder.[182] The leading explanation for this phenomenon-- known in the cognitive psychology literature as the "Moses Illusion"--is that when our memory is probed with some stimulus, such as a question, our cognitive system relies on "partial matching" to relate the present experience to the contents of memory:

> [E]verything we see is varied from different perspectives, so we need to perform partial matches to recognize virtually anything. Consequently, people are accustomed to being tolerant of discrepancies, and highly similar terms are allowed to slip by or are folded into existing representations. . . . .
>
> . . . Partial match is sufficient to retrieve information from memory and is itself an important matching process involved in memory retrieval.[183]

The Moses Illusion reveals an important feature of recall tasks: when a stimulus triggers a search of memory, we tend to overlook minor discrepancies between the stimulus and the representation of an item in memory. Similar memory illusions affect recognition tasks: we are more likely to falsely recognize a novel stimulus if it is semantically, morphologically, or phonologically related to familiar stimuli.[184]

***368** Extrapolating these features of human perception and memory to the trademark context, it is easy to see how similarity can play a role in consumer decision-making. Subtle distortions of a known trademark may simply not be noticed by a consumer. The distorted trademark may be erroneously recognized even if completely novel. Indeed, it may even trigger the same affective response and recollection of the same memories as those associated with the known, similar trademark. In either case, the consumer would likely be completely unaware that her response to the mark was based on a perceptual or cognitive error.

2. Market Proximity and Context Effects

The modalities of the illusions described above also suggest a role for market proximity in consumer decision-making. It has been shown, for example, that the Moses Illusion dissipates if the distorted term in the stimulus doesn't semantically match the rest of the stimulus--people balk when asked how many animals Nixon brought on the ark.[185] Put more generally:

> Semantic cohesion of the critical [distorted] term with the embedding context or proposition . . . affects the occurrence of the illusion. When the distorted terms are totally unrelated to the script that is queried, the discrepancy is readily noticed. On the other hand, when the replaced term is related to the remainder of the proposition or the general context of the query, noticing the distortions is quite difficult. In other words, the more consistent the critical terms in the question are with the script or knowledge structure associated with [the memory to be recalled], the harder it is to notice that the wrong term is used.[186]

Just as the context of the sentence used as a memory probe in the Moses Illusion experiments limits the types of distortions that can go unnoticed, market context may influence the effect of a trademark on the consuming public. For example, a twelve-ounce aluminum can emblazoned with the words "Cold-Cola" in white-on-red script would probably automatically trigger associations with Coca-Cola beverages in the average consumer, whereas the same logo on a spray bottle of bathroom

cleaner would cause consumers to shake their heads in befuddlement. The same sort of disconnect is possible along other dimensions of market proximity. We expect to see advertisements for "Goodyear" in automotive magazines, but not food and wine magazines. We expect to find "Microsoft" products in technology stores and on the internet, but not at clothing stores. We expect "Rolex" watches to cost thousands of dollars, not ten dollars.

Marketing research bears out the importance of consistency of mark and context. Examining the marketing strategy of "brand extension"--the introduction of a new type of product under an existing, established brand name--researchers have concluded that consumers respond most favorably to extensions into product ***369** categories that "fit" well conceptually with the parent brand's product category, without being essentially identical to that category.[187] Indeed, sharply incongruent brand extensions not only sour consumers on the extension itself, but they can also generate moderate feedback effects that diminish consumer response to the brand name generally, and to a lesser extent even to the original product bearing the brand.[188] Consumer psychologists attribute these context-sensitive responses to the cognitive burdens of reconciling the associations a mark activates in memory with the novel experience of its extension. When encountered in a new context, the mark triggers a cognitive effort to "resolve and find meaning in the incongruity," and the success of this effort generates a positive emotional response.[189] Where the context is so far removed from that with which the mark is associated that no resolution of the incongruity is possible, the unsuccessful cognitive effort to find some resolution "typically stimulate[s] negative feelings of frustration and helplessness."[190] Once again, affect plays a central role, here as the expression of cognitive response to the interaction of a mark and its context. An accused mark appearing in a commercial context similar, but not identical, to that of a similar plaintiff's mark may get an affective boost from the consumer's effort to integrate the new context into her associations with the mark--with the plaintiff's mark ***370** likely receiving a similar boost. Conversely, an accused mark appearing in a commercial context irreconcilably dissimilar from that of a similar plaintiff's mark will not only likely trigger a negative affective response, but it will also likely cause a feedback of negative affective associations with the plaintiff's mark as used on the plaintiff's products.

3. Anchoring Bias

Similarity of marks and proximity of markets can also affect consumer decision-making by triggering the anchoring-and-adjustment heuristic. Human beings often estimate values in conditions of uncertainty by starting with an initial given value (an "anchor") and then adjusting from that value to arrive at a final answer.[191] The anchor may be derived from a cue presented to the decision-maker or self-generated in the process of searching memory for a candidate response. When we use anchors in our decision-making, we tend to make insufficient adjustments that lead to biases in favor of the initial anchor.[192] These biases manifest themselves even when we are consciously aware (a) that the anchor is irrelevant, and (b) that it may nevertheless inappropriately influence our judgment.[193]

In the typical laboratory test for anchoring effects, an arbitrary value is given to test subjects as a cue prior to a comparative judgment task. In such situations, the initial cue acts as a "prime," activating the cue and information associated with it in memory.[194] When performing a subsequent comparative judgment task, the accessibility of the activated information leads the decision-maker to evaluate the suitability of the cue as an answer.[195] "Because people evaluate hypotheses by trying to confirm them, the comparative assessment generates information disproportionately consistent with the anchor value, thereby biasing the subsequent judgment."[196] In some response tasks when a priming cue is not given, people ***371** attempting to assess a value will "self-generate" an anchor at a starting point they believe is close to the target value and then adjust from that anchor to arrive at a response without performing any more cognitively taxing calculations.[197] Because the adjustment effort is itself taxing, it tends to cease as soon as a minimally plausible value is reached, leading to a bias in favor of the self-generated anchor.[198]

The anchoring-and-adjustment heuristic provides a mechanism for similarity of marks and proximity of markets to affect consumer decision-making even where the consumer is not suffering from any illusion, and even where context effects are playing only a minor role. A consumer confronted with a product bearing an unfamiliar trademark that is similar to a known trademark in the same product category may "self-generate" the known trademark as an anchor in an effort to assess the suitability of the product bearing the novel mark, rather than embarking on a far more taxing effort to educate herself about the meaning and significance of the novel mark. As a result, her response to the novel mark is likely to be biased in the direction of her response to the known mark. Conversely, where a second comer's mark is used in a commercial context different from, but still related to, that of the mark's owner, the owner's mark and product may serve as an anchor, activating associations with the mark and product in the consumer's memory, which then biases her response to the second comer's product in the direction of those associations.[199] In either case, the consumer's response to the novel mark will likely be closer to her response to the known mark than it would be if the two marks were completely dissimilar.

D. Consumer Care: Minimizing Illusions, Mitigating Bias

The last proxy factor analyzed by courts in trademark cases, consumer care, can be understood as reflecting the role that attention plays in the cognitive processes described in this section. For example, the types of perceptual illusions described above often dissipate with sufficient time and attention by the reader,[200] as anyone who has ever done a quick read of a text followed by a close proofread can likely attest. In contrast, memory illusions such as the Moses Illusion seem considerably less susceptible to dissipation by increased attention.[201] The anchoring-and-adjustment heuristic also appears to be influenced by increased ***372** attention, though only in the case of self-generated anchors.[202] A decision-maker with the time, ability, and inclination to devote increased attention and effortful thinking to her decision is able to mitigate the bias that results from the tendency to stop adjusting as soon as a plausible value is reached, largely because she continues to adjust after a decision-maker who did not perform such additional thinking would have stopped.[203] Where an anchor is provided to the decision-maker as a cue rather than being self-generated, however, additional thinking and attention does not appear to significantly affect the resulting bias, mainly because the bias in such cases is akin to a confirmation bias rather than the result of actual adjustment.[204]

In the trademark context, these effects of increased attention and care suggest that some of the effects of mark similarity and market proximity can be dissipated. It appears that increased care can considerably mitigate the illusions and biases that arise from a subtly distorted mark, either by dissipating the illusion that causes the consumer to "see" a known mark in its stead, or by allowing her to continue to adjust her response away from the representation of the known mark she retrieved from memory. In contrast, context effects appear far more difficult to dissipate; a novel mark presented in the same commercial context as a similar known mark is extremely likely to bias consumer response. Similarly, where a novel mark is identical to a known mark, such that it activates memories of the mark itself rather than triggering a search of memory for similar marks, the priming effect of the mark is unlikely to be dissipated by additional attention or care.

E. Interaction of the Proxy Factors

Taken together, the aspects of cognition discussed in this section will influence consumer decision-making in non-rational but somewhat predictable ways. For example, where a plaintiff's mark is strong enough to trigger a positive affective response, an accused mark similar enough to create a perceptual illusion may trigger the same affective response in time-limited or attention-limited purchasing situations. Similarly, an identical accused mark in a different commercial context may trigger a positive affective response if the context is close enough to that of the plaintiff's mark to be cognitively resolvable, such that the representation of the plaintiff's mark in memory serves as a plausible basis to form a judgment about the accused product. Notably, in this case it is unlikely that additional time or attention will dissipate the likely bias toward the affective content of the plaintiff's mark, given that the mark itself is presented as an anchor rather than being self-generated.[205] However, as the degree of mark similarity and ***373** market proximity between the two marks decreases, it becomes far less likely that affective response to the plaintiff's mark will form a basis for the response to the accused mark. Only where the representation of the plaintiff's mark in memory is exceedingly strong--and thus very easy to call to mind--would we expect a consumer to self-generate the plaintiff's mark (and the affective content associated with it) when searching her memory for a basis to analyze an accused mark that is only marginally similar. Finally, where the commercial context of a novel accused mark is so far removed from that of a plaintiff's mark that there appears to be no way to cognitively resolve the difference between them, we would expect the consumer to have a negative affective response to the accused mark, with a moderate negative feedback effect on the plaintiff's mark.

V. A Behavioralist Theory of Trademark Liability

The previous part identified a number of cognitive processes that will influence consumer responses to trademarks and explained how they are connected to the proxy factors applied by courts in setting the boundaries of trademark liability. Despite their potential to generate error and bias, the boundedly rational cognitive processes outlined in the previous part are useful insofar as thoroughly rational approaches to purchase decisions would be grossly time-consuming and inefficient.[206] As discussed above, associative processes such as "choosing by liking" are quick and easy decision-making strategies that spare us the need for more cognitively taxing efforts.[207] But this conservation of effort becomes self-defeating if the speedy judgments of boundedly rational consumers generate choices that are inconsistent with empirical facts or consumer expectations. Because consumer memories of and responses to a known trademark can influence their response to a novel

mark even in the absence of any rational basis for such influence (indeed, even where the consumer knows there is no rational basis for such influence), certain novel marks are likely to lead consumers to make purchasing decisions that they would not make if they were proceeding rationally based on more robust information. Each of the proxy factors discussed above addresses a cognitive bias or susceptibility to error that makes such influence more or less probable. By using the proxy factors as measures for the boundaries of trademark liability, courts are essentially minimizing the effects of these biases and errors by proscribing and deterring the use of trademarks that cause such influence. ***374** In short, the trademark liability regime is best understood as a debiasing strategy.[208] As long as the marketplace reflects the expectations of boundedly rational consumers--for example, by requiring that products bearing identical trademarks have similar properties--the tendency of bounded rationality to introduce error and bias into consumer decision-making will be neutralized.[209]

Shaping the market to ensure that similarly marked products bear similar properties could be a complex undertaking involving costly regulation and inspection regimes. To avoid such complexity, the bulk of federal trademark law delegates this responsibility to manufacturers. The primary mechanism by which this delegation is accomplished is the fundamental principle of trademark law: a one-manufacturer-per-mark rule, accompanied by a private right of action. This mechanism is the pillar of the statutory trademark regime.[210] As law and economics scholars have argued, this simple mechanism gives manufacturers powerful incentives to produce high-quality products.[211] But the one-manufacturer-per-mark rule also has the important benefit of making it empirically more likely that similarly marked products will have similar properties, in at least two ways. First, to the extent that a common manufacturing process is likely to generate relatively consistent products as output, the one-manufacturer-per-mark rule will tend to increase the similarity of similarly marked products. Second, insofar as the incentives described by law and economics scholars are effective, manufacturers in a one-manufacturer-per-mark environment will tend to take steps to ensure the consistency of products bearing their mark, to the extent they are able to do so. Finally, the private right of action accompanying the one-manufacturer-per-mark rule assigns enforcement of the regime to the party in the system with the greatest incentive to monitor the market for behaviors that might generate consumer bias or error: the manufacturer who benefits from boundedly rational consumer decision-making in a market where his mark is exclusively associated with his products.[212]

***375** While this mechanism is a simple and elegant solution to what could be a thorny debiasing problem, standing alone it is not sufficient to prevent consumers from making decisions out of bias or error, due to the effects of the cognitive phenomena discussed in Part IV. Based on that discussion, we can expect consumer decision-making to be improperly influenced in two general ways, which I characterize as "ex ante" and "point-of-sale" manipulation.[213] Ex ante manipulation refers to the ability of experience to alter the "affective pool" and other information associated with a mark in memory;[214] these experiences will occur in advance of the purchasing decision that is the ultimate target of trademark liability. Point-of-sale manipulation refers to features of the purchasing environment that influence the consumer's judgment at the time a purchasing decision is made, including everything from traditional "passing off" to the illusions, context effects, and anchoring effects discussed above.[215] A properly designed liability regime will have to address both ex ante and point-of-sale manipulations; the most obvious way to accomplish this is by proscribing trademark uses that generate them.

An additional layer of rules to encompass subtle trademark manipulations has historically been provided by the courts through the gradual expansion of liability described in Part II and the development of the proxy factors discussed in Part III. The fact that these doctrines developed by fits and starts, within the framework of the statutory regime and in the shadow of the historical aversion to property rights in trademarks, is likely responsible for the law's preoccupation with the relationship between mark and maker, as well as the battle in dilution theory between uniqueness (an ex ante concern) and free-riding (a point-of-sale concern). The result is a confused doctrinal structure that aims somewhat to the side of the manipulations that it could be targeting directly. The remainder of this article explores the ways in which the species of liability described in Part III approximate, or fail to approximate, the point-of-sale and ex ante manipulations that trademark law appears to be trying to prevent. A way out of the dilution dilemma becomes evident upon application of the discussion of Part IV to the disparities between current doctrine and the doctrines implied by behavioralist analysis. Further, because strict adherence to a behavioralist model of trademark liability has the potential to greatly broaden the scope of such liability, this article closes with an analysis of policy objections that may be raised by the model.

***376 A. Understanding the Species of Liability**

Set against a background rule of one manufacturer per mark, analysis of the cognitive phenomena described in Part IV provides a sufficient basis for setting the boundaries of trademark liability in such a way as to prevent most, if not all, of the manipulations of consumer decision-making a second comer's use of a trademark can cause. The discussion in Part IV makes

clear how such manipulations operate; the fact that they correlate to the proxy factors developed by the courts suggests that the federal trademark regime captures, or has the capacity to capture, most of the harms at issue in trademark cases. But by casting their decisions as assessments of consumer beliefs as to the relationship between mark and maker, courts add a needless layer of complexity (or perhaps deception) to the analysis,[216] obscuring the justifications for liability, increasing opportunities for error, and generating distracting and counterproductive policy debates such as those currently wracking dilution law. By casting off the historical tethers that link liability to such consumer beliefs and tying it instead to consumer reactions to a mark itself, Congress and the courts could shift focus from circular policy debates about the purpose of the trademark regime to more productive efforts to assess and calibrate the regime's effects on the marketplace.

The various species of liability outlined in Part III of this article are poor substitutes for a direct assessment of consumers' actual behavioral responses to trademarks. They serve mainly to provide a rationally describable justification for the imposition of liability that is in fact based on boundedly rational behavior. A brief comparison of two subspecies of infringement will demonstrate how this effort to say one thing while doing another leads to unnecessary and misleading complexity. The most basic and longest-recognized form of liability--for infringement based on point-of-sale confusion[217]--can be easily described in terms of the cognitive processes outlined in Part IV. An accused mark that by virtue of cognitive illusions, context effects, and anchoring bias is likely at the point of sale to lead to a purchase decision influenced by consumers' affective reactions to someone else's mark is precisely the type of use courts are likely to find infringing when they apply the proxy factors. This is the quintessential form of point-of-sale manipulation: a consumer's response to a known mark is invoked and manipulated through non-rational cognitive processes, leading to a purchase decision that the consumer would not otherwise have made.

The purportedly distinct doctrine of initial-interest confusion is nothing more than a special case of this general phenomenon, one dominated by anchoring effects. Where a novel mark generates either a fleeting perceptual illusion that is dissipated by consumer attention or triggers the recall of a similar known mark, anchoring effects can continue to bias the affective response to the mark in the ***377** direction of the illusory or recalled image, which explains why courts will impose liability against the users of such marks where the anchor is already used as another's trademark. That a consumer is not confused as to the affiliation, connection, or association of the product's manufacturer or the origin, sponsorship, or approval of the product at the time of sale is considered no barrier to liability in initial-interest cases.[218] This fact strongly supports the hypothesis of this article, that what courts are really measuring in infringement cases is not confusion at all. Absent confusion at the time of sale, it is only the bias generated by anchoring effects that justifies this class of trademark liability. Notably, this bias poses precisely the same risk as point-of-sale confusion--that the consumer will make a purchase decision she would not otherwise make as a result of her boundedly rational reaction to a trademark. By attempting to explain such bias in terms of confusion as defined under the Lanham Act, rather than as a function of bounded rationality, the courts substitute a rationally tractable but descriptively misleading theory of harm for a more descriptively powerful theory that is unfamiliar to the historical tradition of trademark law. The result is an unpersuasive, needlessly complex, misleading, and formalistic doctrinal architecture that obscures the justifications for imposing liability and multiplies the potential for error.

One might be tempted, based on the two prior examples, to believe that the descriptive shortcomings of the current doctrine could be ameliorated by assuming that infringement represents point-of-sale manipulation, and that dilution--with its overt concern for the prospective source-identifying capacity of a plaintiff's mark--must therefore represent ex ante manipulation. This would, unfortunately, be an oversimplification. One barrier to this neat division of doctrines is the fact that in every point-of-sale manipulation lies the seed of an ex ante manipulation. When a consumer makes a purchase decision based on bias or error, her experience with the purchased product will itself influence her future judgment.[219] To the extent her experience is inconsistent with the properties of the mark owner's actual products, the consumer's future decisions will be improperly biased by the results of her earlier purchase decision. Generalizing this dynamic to the market at large, there is an obvious potential for ex ante and point-of-sale manipulations to feed on each other, snowballing to the point where trademarks become completely unreliable as a basis for consumer decision-making.

The doctrine of post-sale confusion illustrates the current doctrine's inability to address this dual and self-reinforcing property of trademark manipulation. This class of liability, based on the influence on future purchasers of other consumers' possession of products bearing an accused mark,[220] would appear to be a form of ex ante manipulation. It is not the immediate effect of the encounter with an accused mark, but the effect of this encounter on a consumer's future decision-making that liability for post-sale confusion ostensibly seeks to curtail. However, one could just ***378** as easily argue that post-sale confusion constitutes a point-of-sale manipulation, albeit one that cannot be plausibly explained in terms of consumer beliefs about the connection between mark and maker. The cases describing post-sale confusion generally deal with "knock-offs" of luxury or status goods, suggesting that it is the affective response to the status conveyed by the mark that leads consumers to

decide to purchase the accused goods.[221] This being the case, the decision to purchase a knock-off can be understood as an anchoring phenomenon, functionally indistinguishable from initial-interest confusion. Indeed, the only real difference between the two scenarios is the lack of any plausible basis to claim that there was even an instant where the consumer in the post-sale confusion scenario was "confused" as outlined under the Lanham Act. In short, courts parsing these three species of infringement have wasted considerable effort attempting to invent strained and divergent justifications for liability against what are in fact minor variations of precisely the same phenomenon.[222] Again, the law's preoccupation with the mark/maker nexus obscures the harms at issue in trademark cases and the justifications for imposing liability.

The interrelationship of point-of-sale and ex ante manipulations, and the concomitant impossibility of neatly assigning the former to infringement doctrine and the latter to dilution doctrine, is also largely responsible for the crippling theoretical debates that have brought federal dilution law to its current state of indeterminacy. Originally conceived as a way to extend trademark rights outside the immediate commercial sphere of the owner's use,[223] dilution can be seen as an obsolete gap-filling measure, capturing point-of-sale manipulations that went unremedied under the infringement doctrine of Schechter's day but are now ***379** subsumed within the broadened infringement provisions of the modern Lanham Act.[224] Yet owing to the antipathy of contemporary doctrine to such broad trademark rights, the original enunciation of dilution theory under the rubric of uniqueness was directed at ex ante concerns, despite its author's apparent concern for point-of-sale manipulations associated with free-riding.[225] It is precisely the dual nature of trademark harms--the tendency of ex ante manipulations to ripen into point-of-sale manipulations, and vice-versa, in a self-amplifying loop--that allowed Schechter to carry out this theoretical pas de deux--one which is being repeated today in the clashes between Congress and the courts.[226] The behavioralist model has the potential to liberate trademark doctrine from this dilemma, by accounting for the interconnectedness of all forms of trademark liability.

Taking as an example the standard dilution-by-blurring scenario of a famous mark being used by a second comer in a commercial context far removed from that of its owner, the discussion of Part IV suggests that the second comer's product will receive an affective boost where the commercial contexts are related enough to be cognitively resolvable, but will generate negative affect where the commercial contexts are too far removed for such resolution.[227] This effect suggests an explanation for the earlier observation that the policies of infringement and free-riding theories of dilution are identical.[228] In cases where the commercial context of an accused mark is close enough to that of the plaintiff's mark to generate a positive affective response, infringement and free-riding dilution will be functionally indistinguishable. Both species of liability proscribe trademark uses in which a novel mark triggers a more positive affective response than it otherwise would due to its similarity to a known mark; the cognitive phenomena that generate such a bias provide a single basis for liability under infringement doctrine and under free-riding theories of dilution. It may be that Congress believes modern infringement doctrine is under-inclusive with respect to this type of point-of-sale manipulation, just as the under-inclusiveness of the "same descriptive properties" standard led Schechter to propose the dilution remedy in the first place. But the legislative decision to remedy this shortcoming by promulgating an almost entirely redundant remedy that by its terms only obliquely addresses the targeted conduct,[229] rather than expanding the scope of the existing remedy, has generated ***380** unnecessary confusion and further complicated the justifications for trademark liability.

Just as the free-riding theory of dilution parallels the point-of-sale manipulations of infringement, the uniqueness theory of dilution could be understood as a foil for infringement's ex ante aspects--the pollution of the affect pool and associative networks surrounding the plaintiff's mark with associations that bear no empirical relationship to the plaintiff's products.[230] Were this the case, we could consider the two doctrines entirely redundant. But there is another ex ante effect that uniqueness-based dilution can create--through both blurring and tarnishment. This effect arises from the negative affective feedback that accrues to a familiar mark when consumers encounter the mark in a cognitively irresolvable context.[231] Due to the limitation of infringement liability to commercial contexts similar to those of the mark owner's actual use (which will almost certainly correlate to contexts that lend themselves to cognitive resolution), such reactions will likely fall outside of the manipulations identified with infringement. Nevertheless, such uses have the potential to cause consumers to make decisions they would not otherwise make with respect to the senior user's products in future purchasing scenarios by altering affective associations with the senior user's mark. However, we have seen that the negative feedback effect on the known mark is likely to be less significant than the negative affective response that will accrue to the novel mark as a result of the contextual incompatibility.[232] In other words, where a diluting use cannot also be described as infringing by virtue of its point-of-sale effects, it is likely to be an unsuccessful marketing strategy. Given that such uses are the antithesis of free-riding, and actually harm the second comer's prospects in the marketplace, one would expect them to be extremely rare, more likely based on coincidence or ignorance of the senior user's mark than any project to manipulate consumer reactions to it.[233] Yet such manipulation appears to be the ***381** only justification for a distinct legal remedy based on the uniqueness theory of dilution that is not already encompassed by other theories.

In sum, the species of liability that exist under current trademark law are largely redundant. Because of the law's focus on consumer beliefs about the connection between mark and maker, rather than their automatic cognitive reactions to trademarks, courts have proposed multiple unpersuasive models in an effort to capture relatively minor variations in certain cognitive processes. These processes are susceptible to two broad classes of manipulation: point-of-sale manipulations, which influence the consumer's judgment at the time a purchasing decision is made, and ex ante manipulations, which influence consumer memories and associations in advance of a purchasing decision. Neither category can be clearly mapped to any current theory of trademark liability, though the tools for detecting and analyzing them exist in the proxy factors developed by the courts for analyzing all species of trademark liability. The discussion in this section suggests that current conceptions of infringement may be under-inclusive to the extent that a dilution remedy is seen as necessary to correct free-riding problems, while the prevailing uniqueness-based conception of dilution provides a unique remedy only for a very small and relatively inconsequential class of trademark manipulations.

From this analysis, several policy prescriptions emerge. First, it is apparent that the maintenance of two separate trademark remedies is unwarranted. Insofar as free-riding dilution is essentially indistinguishable from infringement, and the manipulations addressed solely by uniqueness-based dilution are of such minor concern and remote probability that they do not merit legal intervention, it would appear that there is no real need for a dilution remedy. Second, the scope of infringement liability should be expanded to capture those manipulations that led to the perception of a need for a dilution remedy. The only obstacles to such expansion are relics of the historical development of trademark law such as the requirement of commercial proximity and the focus on the mark/maker nexus, neither of which serve any helpful purpose in a trademark regime focused on debiasing. By recognizing the debiasing policy that appears to underlie both infringement and dilution and discarding the historical formalisms that reduce the correlation between the two, it would be possible to capture nearly all trademark manipulations under a single remedy, vastly reducing the complexity of this area of law and correspondingly reducing the opportunities for wasteful litigation and judicial error.

B. Policy Objections

The suggestion that any species of trademark liability is under-inclusive is likely to give pause to those who argue that current trademark rights are already too broad. In particular, the expansion of infringement liability would invariably dredge up hoary concerns about the granting of "in gross" property rights in trademarks.[234] As described in the previous section, however, trademark rights are ***382** not properly understood as proprietary. Rather, the trademark owner's right is best understood as a private right of action designed to enforce the systemic market regulation necessary to harness the efficiencies of boundedly rational consumer decision-making, which is assigned to the party in the system with the greatest incentive to monitor the market for behaviors that might generate consumer bias or error.[235] That such systemic regulation may resemble a system of property rights in some of its results does not render the right proprietary; to the contrary, the dependence of enforcement on the boundedly rational thought processes of consumers places trademark rights in a state of constant flux, eternally contingent on the changing commercial environment and the minds of the consumers who fill it.[236] Moreover, this article's characterization of infringement doctrine as under-inclusive is ultimately a descriptive judgment, not a normative one. It is my claim that the debiasing program described in this article is a more satisfactory descriptive account of modern trademark doctrine than alternative accounts that rely on unfair competition or property theories. To the extent my claim is valid, the current limitation of infringement liability based on ad hoc judicial assessments of the relationship between the commercial spheres of any two litigants is arbitrary and unjustified. It is precisely the artificiality of this restriction that has given rise to the dilution remedy, which serves no purpose other than to fill the gaps created by these historical and formalistic limitations on infringement law (at considerable costs in terms of the complexity of the legal regime).

Even accepting the non-proprietary nature of the trademark right under the behavioralist model, one might object that the scope of trademark liability outlined in this article, dependent as it is on particularly pliable features of human cognition, has no meaningful limits and could be expanded to a degree that severely limits commercial freedom and even freedom of speech generally. For example, by expanding the scope of liability to aggressively reduce error and bias, the law redistributes power in the marketplace from consumers to producers, reducing consumer autonomy.[237] This is a particularly troubling step when we consider that boundedly rational behavior varies across the population, implying that some of the consumers whose autonomy is restricted by law receive little or no benefit from the law's more muscular protections.[238] Expansive trademark liability can also injure producers and the market as a whole, by contributing to a scarcity of useful marks and thereby raising barriers to entry and generating monopolistic or rent-seeking ***383** behavior.[239] And at its furthest extreme, an overriding concern for manipulation of affective response to trademark could justify all manner of restrictions on comparative

advertising, nominative use, parody, and criticism.

One possible answer to these substantial concerns lies in the administration of a trademark system consciously designed to address bounded rationality. Because the cognitive processes discussed in this article are not susceptible to deductive reasoning, leaving their application to judges is not a particularly reliable method for achieving the law's goal of proscribing trademark uses that generate bias and error in consumer decision-making. Judges are just as susceptible to bounded rationality in adjudication as consumers are in their purchasing decisions.[240] Moreover, the lack of a rational basis for the cognitive phenomena described in this article suggests that they are best measured empirically rather than deductively, and a district judge hearing an application for an injunction in a trademark dispute is a statistical sample of one. As a result, it seems that in all but the most clear-cut cases, trademark plaintiffs should bear a substantial burden of providing an empirical basis for their claims, which would likely take the form of consumer surveys. For example, point-of-sale manipulations would likely be measured by consumer surveys of the type courts have become familiar with through experience with Lanham Act cases,[241] perhaps with a greater focus on controlled experiments simulating actual purchasing decisions rather than the traditional model of stimulus presentation followed by batteries of interrogatories. Ex ante manipulations, in contrast, would likely require the development of new and different types of consumer surveys, perhaps incorporating regionalized longitudinal studies that might in turn become routine parts of trademark enforcement programs.

Even a heavy empirical burden on trademark plaintiffs will not necessarily alleviate all the problems of overbreadth threatened by the expansive theories of liability set forth in this article. However, the courts have many prudential doctrines at their disposal that can act as a pressure release valve on the self-perpetuating engine of liability. For example, the doctrines of genericness (or inherent distinctiveness generally)[242] and functionality[243] allow courts to deny ***384** enforcement of trademark rights, the assertion of which would put the owner's competitors, or the market in general, at a disadvantage due to problems of scarcity. Similarly, the requirement of "commercial" use as a prerequisite for liability allows courts to cut off liability for behavior that has the potential to affect boundedly rational consumer decision-making but simultaneously implicates other normative social values.[244] This requirement gives courts wide latitude to wall off whole areas of human behavior from the reach of trademark liability, from utilitarian spheres such as news reporting and keyword indexing to expressive spheres such as commentary, criticism, parody, and appropriationist art. These prudential doctrines, unlike the cognitive phenomena that are the primary focus of this article, do not necessarily require rigorous empirical analysis; finding a balance between conflicting policy imperatives on a case-by-case basis is a task to which courts are well accustomed.

Furthermore, while trademark law enjoins persons other than the mark owner from manipulating consumer reactions to a trademark, it does so only in very narrow ways. The law leaves the full range of such manipulations open to the mark owner and noncommercial actors for exploitation. For example, a mark owner might pursue an advertising campaign based on overwhelming repetition or affective imagery, generating positive consumer responses that have little or nothing to do with their experience with the mark owner's product.[245] Likewise, a mark owner could leverage the affective reaction to her mark by means of a brand-extension strategy such as those described above.[246] When properly calibrated, such a strategy could generate positive affective reactions to a new trademark or product without any empirical basis for such reactions in consumer experience or in the realities of production. Generalizing this potential even further, the broad array of manipulations to which licensing schemes lend themselves have still greater potential to divorce the affective response to a mark from the empirical realities of products bearing that mark.[247] Similarly, affective content is not solely the result of commercial activity by the mark owner or second comers using the mark on their products: advertising and even noncommercial speech (including everything from factual and opinion reporting in established press to private conversations between individuals) have the potential of altering the affect pool for a trademark in ways that may or may not generate consumer choices that align subjective expectations with objective reality. While remedies against false advertising[248] and doctrines ***385** such as the prohibition against "naked licensing"[249] suggest potential tools to mitigate such abuse by a mark owner and other commercial actors, and defamation law imposes some limits on noncommercial speech, a behavioralist understanding of trademark liability implies a broad range of targets for regulation, some of which may implicate serious First Amendment and other concerns, and all of which require delicate balancing of harms, benefits, and normative commitments.[250]

Finally, some might argue that the model of trademark policy set forth in this article is overbroad insofar as a second comer might use an existing trademark on its products the way one might use it in permissible comparative advertising: to accurately suggest some similarity between the mark owner's products and those of the second comer. In other words, biased consumer decisions may nevertheless be good for the consumer if they turn out to be consistent with those that would be made in conditions of complete information, depending on the circumstances of a particular second comer's use. In reality, this objection is not to the descriptive fitness of the behavioralist model, but to the administrability of a legal regime based on

that model. Allowing second comers to use existing marks where such uses provide accurate information about the second comer's product would obviously invite abuse and gamesmanship, and distinguishing between helpful and misleading uses would be a costly endeavor. Moreover, allowing such uses would warp or eliminate the incentives that allow the state to delegate enforcement to mark owners through the one-mark-per-manufacturer rule accompanied by a private right of action. To be sure, this results in a regime that prohibits some conduct that could aid consumer decision-making. But this result is mitigated by the fact that the second comer can always take advantage of the regime by creating a new trademark or seeking a license of the existing mark. Moreover, the social cost of such prohibitions is likely to be significantly less than the cost of a state-run regulatory apparatus to provide the same information to consumers with the same debiasing protections as the privately enforced trademark regime.

The discussion of these objections clearly illustrates the extent to which the trademark liability regime constitutes a bargain between consumers, producers, and the state over a particular kind of information transfer.[251] The scope and contours ***386** of the regime include tradeoffs, such as acceptance of the costs of potential over-inclusiveness in exchange for the benefits of easy decision making and debiasing. These tradeoffs, in turn, reflect a normative judgment about the benefits of the bargain--just as the regulation (or lack thereof) of other forms of information transfer such as advertising, nominative use, parody, and critique reflect normative judgments about the potential benefits and costs of such regulation. This article's project is not ultimately to challenge these fundamental judgments about the wisdom of trademark rights, but rather to offer a descriptively persuasive explanation for the scope of those rights in an effort to elide counterproductive formalist debates over the doctrinal architecture undergirding those rights and make the trademark regime more transparent, comprehensible, and efficient. That the model discussed herein might lead to a refocused debate over the normative underpinnings of trademark law--a discussion of whether the debiasing game is in fact worth the candle--is merely a happy side effect.

VI. Conclusion

This article has attempted to make the case for a reconception of trademark liability as a debiasing strategy. By drawing parallels between the organically evolving doctrines of trademark law and the cognitive predicates of bounded rationality, it has suggested a model of liability that uses existing doctrinal tools to illustrate the potential for a robust legal regime that would shed the most disingenuous justifications on which liability now rests, while providing protection against all currently actionable trademark injuries. Such a reconception of trademark liability poses particular challenges, notably of administration, overbreadth, and potential market manipulation. However, it is the premise of this article that law functions best when it takes an honest view of its subject, the boundedly rational human, and uses that subject as the measuring stick for doctrine, adapting its methods to achieve the most desirable results. In this respect, a behavioralist model of trademark liability has the potential to not only protect the boundedly rational actor from bias and error, but to harness her cognitive quirks for her own benefit and the benefit of the market as a whole. Whether those benefits justify the costs of the regulatory model is a question that should, and doubtless will, continue to be debated.

Footnotes

[a1] Associate, Cravath, Swaine & Moore, LLP, New York. B.A., Columbia University, 1999. J.D., Harvard Law School, 2002. The views expressed in this article are the author's alone and do not necessarily reflect the position of Cravath, Swaine & Moore, LLP or any of its clients. Special thanks to Barton Beebe and Rebecca Tushnet for their comments. All errors are the author's alone.

[1] Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203, 205 (1942).

[2] 537 U.S. 418 (2003).

[3] Federal Trademark Dilution Act of 1995 (FTDA), Pub. L. No. 104-98, 109 Stat. 985 (1996).

[4] See generally Barton Beebe et al., Trademark Dilution: Moseley and Beyond, 14 Fordham Intell. Prop. Media & Ent. L.J. 849 (2004) (discussing the rippling effects of Moseley on trademark law); see also id. at 863 ("Because there has kind of been a blurring, if you'll pardon the term, between the infringement and unfair competition portions of the statute and the dilution sections

of the statute, it really has left the law as [a] kind of mishmash, where people don't really know where they stand.").

[5] See J. Thomas McCarthy, Dilution of a Trademark: European and United States Law Compared, 94 Trademark Rep. 1163, 1167 (2004) ("Judges and attorneys are unclear as to exactly what 'dilution' is and how to prove it. Consistency and predictability are hard to find. Giving legal advice about the federal anti-dilution law is a high risk endeavor.").

[6] Trademark Dilution Revision Act of 2006 (TDRA), Pub. L. No. 109-312, 120 Stat. 1730 (2006); see 152 Cong. Rec. S1923 (Mar. 8, 2006) (statement of Sen. Leahy) (describing the TDRA as a measure to clarify Congress's intent in the wake of Moseley, and undo that case's central holding).

[7] Trademark Act of 1946 (Lanham Act), Pub. L. No. 79-489, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. §§1051-1129 (2006)).

[8] See generally Behavioral Law & Economics (Cass Sunstein ed., 2000).

[9] The original authoritative collection of research in this field is Judgment Under Uncertainty: Heuristics and Biases (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982) [hereinafter Judgment Under Uncertainty]. A new volume was recently published expanding on the work in the 1982 collection. Heuristics and Biases: The Psychology of Intuitive Judgment (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002) [hereinafter Psychology of Intuitive Judgment].

[10] The arguments and claims of this article are theoretical rather than empirical in nature. Nevertheless, the arguments presented here are reasoned by analogy from empirical work in cognitive and consumer psychology, and it is anticipated that targeted empirical testing would confirm them. Such testing, however, is beyond the scope of the present undertaking and awaits further development.

[11] Beebe et al., supra note 4, at 853.

[12] Frank I. Schechter, The Rational Basis of Trademark Protection, 40 Harv. L. Rev. 813 (1927).

[13] See, e.g., 1 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §5:3, at 5-9 nn.8-9, 15 & 16 (2004) (citing the "crazy quilt of modifications and amendments" between 1905 and the Lanham Act).

[14] In re Trade-Mark Cases, 100 U.S. 82 (1879).

[15] The Court seemed convinced that the states offered ample protection for trademarks, and that Congress's foray into the arena was superfluous:
The right to adopt and use a symbol or a device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of use by all other persons, has been long recognized by the common law and the chancery courts of England and of this country, and by the statutes of some of the States. It is a property right for the violation of which damages may be recovered in an action at law, and the continued violation of it will be enjoined by a court of equity, with compensation for past infringement. This exclusive right was not created by the act of Congress, and does not now depend upon it for its enforcement. The whole system of trade-mark property and the civil remedies for its protection existed long anterior to that act, and have remained in full force since its passage.
Id. at 92.

[16] Act of July 8, 1870, ch. 230, §§77-84, 16 Stat. 198, invalidated by In re Trade-Mark Cases, 100 U.S. 82, 99 (1879).

[17] U.S. Const. art. I, §8, cl. 8.

[18] Trade-Mark Cases, 100 U.S. at 93-94 ("Any attempt, however, to identify the essential characteristics of a trade-mark with inventions and discoveries in the arts and sciences, or with the writings of authors, will show that the effort is surrounded with insurmountable difficulties. The ordinary trade-mark has no necessary relation to invention or discovery.").

[19] The Court blithely assumed that "trade or traffic between citizens of the same State" constituted "perhaps the largest" share of the commerce regulated by the Act. In re Trade-Mark Cases, 100 U.S. 82, 96 (1879).

[20] See id. at 96-99.

[21] Id. at 95 ("Every species of property which is the subject of commerce, or which is used or even essential in commerce, is not brought by this [Commerce] clause within the control of Congress.").

[22] The next attempt at a federal trademark statute was limited to "trade-marks used in commerce with foreign nations, or with the Indian tribes." Act of Mar. 3, 1881, ch. 138, §1, 21 Stat. 502, 502. Marks used in commerce "among the several States" were brought under the federal trademark regime in 1905. Act of Feb. 20, 1905, Pub. L. No. 58-84, §1, 33 Stat. 724, 724.

[23] United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 97 (1918) (emphasis added).

[24] Id.

[25] Id. at 100.

[26] Trademark Act of 1905, Pub. L. No. 58-84, §16, 33 Stat. 724, 728. This principle was reinforced by the Supreme Court, which cited with approval the English rule that trademarks were only enforceable within the class of goods on which they were used by a plaintiff: "If he does not carry on a trade in iron, but carries on a trade in linen, and stamps a lion on his linen, another person may stamp a lion on iron." Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 414 (1916) (quoting Ainsworth v. Walmsley, 1 L.R.Eq. 518, 524 (1866)). While the American preoccupation with property rights in trademarks stemmed from the strictures of the Patent and Copyright Clause, the British rule was based on the early view, long since abandoned, that proprietary rights in trademarks were monopolistic and therefore bad policy. See Blanchard v. Hill, 2 Atk. 484, 26 Eng. Rep. 692 (1742) (denying an injunction against alleged trademark piracy on grounds that to do so would grant monopolistic rights); see also Norma Dawson, English Trade Mark Law in the Eighteenth Century: Blanchard v. Hill Revisited--Another "Case of Monopolies" ?, 24 J. Legal Hist. 111 (2003) (exploring the historical background of the Blanchard case).

[27] Edward C. Lukens, The Application of the Principles of Unfair Competition to Cases of Dissimilar Products, 75 U. Pa. L. Rev. 197, 198 & n.4 (1927) (citing cases). On the view that such pronouncements and the theory behind them actually embody an intellectually coherent normative agenda focusing on the regulation of competition among producers, in sharp contrast to current trademark doctrine's concern with consumer protection, see generally Mark P. McKenna, The Normative Foundations of Trademark Law, 82 Notre Dame L. Rev. (forthcoming 2007).

[28] Schechter, supra note 12, at 814 ("Four hundred years ago a trademark indicated either the origin or ownership of the goods to which it was affixed. To what extent does the trademark of today really function as either? Actually, not in the least!").

[29] Schechter, supra note 12, at 818.

[30] Schechter, supra note 12, at 818-19 ("[T]oday the trademark is not merely the symbol of good will but often the most effective agent for the creation of good will, imprinting upon the public mind an anonymous and impersonal guaranty of satisfaction, creating a desire for further satisfactions.").

[31] Schechter, supra note 12, at 820 (noting that the law of England and the United States aimed "simply to prevent the deceitful sale

or passing off of goods made by one person or firm for goods made by another" (quoting Myron W. Watkins, The Change in Trust Policy, 35 Harv. L. Rev. 815, 831 (1922))).

[32] Schechter, supra note 12, at 821-24.

[33] Schechter, supra note 12, at 831-33.

[34] Schechter, supra note 12, at 824-26.

[35] Schechter, supra note 12, at 825-33.

[36] See generally Schechter, supra note 12, at 824-30.

[37] See Schechter, supra note 12, at 825 (alluding to the "subtle[ty] and refine[ment]" of "[t]rademark pirates" who "proceed circumspectly, by suggestion and approximation, rather than by direct and exact duplication of their victims' wares and marks").

[38] See infra text accompanying notes 56-77.

[39] See Schechter, supra note 12, at 823-24.

[40] Compare Yale Elec. Corp. v. Robertson, 26 F.2d 972, 974 (2d Cir. 1928) ("[A] merchant may have a sufficient economic interest in the use of his mark outside the field of his own exploitation to justify interposition by a court."), with Aunt Jemima Mills Co. v. Rigney & Co., 247 F. 407 (2d Cir. 1917) (finding infringement of a trademark used on syrup in use of the same mark on related products such as pancake batter).

[41] 300 U.S. 379 (1937).

[42] The Lanham Act was introduced by Congressman Lanham the year after West Coast Hotel Co. was decided, but the pressures of war and the vagaries of the legislative process prevented its enactment until 1946. For narrative histories of the formulation and promulgation of the Lanham Act, see Edward S. Rogers, The Lanham Act and the Social Function of Trade-Marks, 14 Law. & Contemp. Probs. 173, 177-81 (1949), and 1 McCarthy, supra note 13, §5:4, at 5-10 to -13.

[43] See Trademark Act of 1946 (Lanham Act), Pub. L. No. 79-489, sec. 32(1), 60 Stat. 427, 437 (codified as amended at 15 U.S.C. §1114(1) (2006)).

[44] Act of Oct. 9, 1962, Pub. L. No. 87-772, §17, 76 Stat. 769, 773.

[45] See supra note 28 and accompanying text.

[46] Lanham Act §43(a), 60 Stat. at 441 (codified as amended at 15 U.S.C. §1125(a) (2006)).

[47] Trademark Law Revision Act of 1988 (TLRA), Pub. L. No. 100-667, sec. 132, §43(a)(1), 102 Stat. 3935, 3946 (codified at 15 U.S.C. §1125(a)(1)(A) (2006)). The TLRA's amendment of section 43(a) of the Lanham Act was made "in large part to codify the case law interpretation of the previous version of §43(a)." 1 McCarthy, supra note 13, §5:9(5), at 5-17; accord Marie V. Driscoll, The "New" 43(a), 79 Trademark Rep. 238, 239 (1989).

[48] See Yale Elec. Corp. v. Robertson, 26 F.2d 972, 974 (2d Cir. 1928) ("[A] merchant may have a sufficient economic interest in the use of his mark outside the field of his own exploitation to justify interposition by a court."); Aunt Jemima Mills Co. v. Rigney & Co., 247 F. 407 (2d Cir. 1917) (finding infringement of a trademark used on syrup in use of the same mark on related products such as pancake batter).

[49] See 4 McCarthy, supra note 13, §§24:5-:6, at 24-11 to -16. Cases illustrating this feature of Lanham Act jurisprudence are discussed infra Part III.A.

[50] 1947 Mass. Acts 300.

[51] Model State Trademark Bill §12 (U.S. Trademark Assoc. 1964); Model State Trademark Bill §13 (U.S. Trademark Assoc. 1992).

[52] See H.R. Rep. No. 104-374, at 3 (1995), as reprinted in 1996 U.S.C.C.A.N. 1029, 1030.

[53] Federal Trademark Dilution Act of 1995 (FTDA), Pub. L. No. 104-98, 109 Stat. 985 (1996).

[54] Id. sec. 3, §43(c)(1) (codified at 15 U.S.C. §1125(c)(1) (2006)).

[55] Id. sec. 4, 109 Stat. at 986 (codified at 15 U.S.C. §1127 (2000)). The statutory definition of "dilution" was subsequently amended and moved to a different section of the Code. Trademark Dilution Revision Act of 2006 (TDRA), Pub. L. No. 109-312, sec. 2(1), §43(c)(2)(B)-(C), 120 Stat. 1730, 1731 (2006) (to be codified at 15 U.S.C. §1125(c)).

[56] See 4 McCarthy, supra note 13, §§24:5-:6, at 24-11 to -16 and text accompanying supra note 49.

[57] Schechter, supra note 12, at 825.

[58] FTDA sec. 4, 109 Stat. at 986. The uniqueness theory is premised on the notion that use of a single mark to identify a potentially unlimited variety of goods reduces its ability to identify any particular good. See supra notes 32-35 and accompanying text.

[59] H.R. Rep. No. 104-374, at 3 (1995), as reprinted in 1996 U.S.C.C.A.N. 1029, 1030.

[60] See, e.g., Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev., 170 F.3d 449 (4th Cir. 1999) (holding that the FTDA required a showing of actual--as opposed to likely--dilution, as well as economic harm); Nabisco, Inc. v. PF Brands, Inc., 191 F.3d 208, 217-22 (2d Cir. 1999) (holding that likelihood of dilution is sufficient to make out an FTDA claim and announcing a sprawling ten-factor test for dilution, all while practically admitting that the court did not fully understand what dilution is); see also I.P. Lund Trading ApS v. Kohler Co., 163 F.3d 27, 49-50 (1st Cir. 1998) (criticizing some factors applied by the Second Circuit in a dilution case under New York law, which factors also appeared in the Nabisco test); V Secret Catalogue, Inc. v. Moseley, 259 F.3d 464, 476 (6th Cir. 2001) (adopting the Nabisco analysis), rev'd, 537 U.S. 418 (2003); Times Mirror Magazines, Inc. v. Las Vegas Sports News, L.L.C., 212 F.3d 157, 168 (3d Cir. 2000) (collating the Nabisco test with an earlier Second Circuit test for state law dilution claims).

[61] 537 U.S. 418, 432-33 (2003).

[62] See Ringling Bros., 170 F.3d 449.

[63] Moseley, 537 U.S. at 432-33.

[64] Ringling Bros., 170 F.3d at 458.

[65] Moseley, 537 U.S. at 433.

[66] Id. at 433-34.

[67] See supra note 59 and accompanying text.

[68] See, e.g., 151 Cong. Rec. H2122 (daily ed. Apr. 19, 2005) (statement of Rep. Sensenbrenner) (stating, in the context of debate over the TDRA, "Unfortunately, there are those in both commercial and noncommercial settings who would seize upon the popularity of a trademark for their own purposes and at the expense of the rightful owner and the public"). Congress is not alone in subscribing to the free-riding theory of dilution. See, e.g., Beebe et al., supra note 4, at 881-83 (characterizing dilution as a doctrine within a historical chain of equitable trademark decisions guarding against misappropriation of goodwill); I.P. Lund Trading ApS v. Kohler Co., 163 F.3d 27, 50 (1st Cir. 1998) ("[I]t appears that an entirely different issue is at stake [in the plaintiff's theory of its dilution claim]--not interference with the source signaling function but rather protection from an appropriation of or free riding on the investment Lund has made in its design."); cf. Allied Maint. Corp. v. Allied Mech. Trades, Inc., 369 N.E.2d 1162, 1165 (N.Y. 1977) (noting that New York's dilution statute was designed to curb the "cancer-like growth of dissimilar products or services which feeds upon the business reputation of an established distinctive trade-mark or name").

[69] See, e.g., McKenna, supra note 27 (arguing that the early historical development of Anglo-American trademark law reflects above all a concern for protecting producers against diversion of their trade through competitors' passing off).

[70] Cf. Thane Int'l, Inc. v. Trek Bicycle Corp., 305 F.3d 894, 911 (9th Cir. 2002) (arguing from the legislative history of the FTDA that "Congress sought to prevent...out-of-market free riding"); Stacey L. Dogan, What Is Dilution, Anyway?, 105 Mich. L. Rev. First Impressions 103, 104 (2006), http://www.michiganlawreview.org/firstimpressions/vol105/dogan.pdf (characterizing this understanding of dilution under the FTDA as "conclusory," "overarching" and at odds with Schechter's theory). This dismissal of concern for diversion of trade reflects the historical shift away from producer-focused trademark policy and toward consumer protection theories of trademark law described by Professor McKenna in his forthcoming article. See McKenna, supra note 27.

[71] Trademark Dilution Revision Act of 2006 (TDRA), Pub. L. No. 109-312, 120 Stat. 1730 (2006).

[72] H.R. Rep. No. 109-23, at 5 (2005), as reprinted in 2006 U.S.C.C.A.N. 1091.

[73] In contrast to the analysis herein, Professor Beebe contends that the statute consciously does not reflect a "misappropriation" theory of dilution, but instead separate and distinct theories of "blurring" and "tarnishment" which rely neither on uniqueness nor free-riding justifications. Barton Beebe, A Defense of the New Federal Trademark Antidilution Law, 16 Fordham Intell. Prop. Media & Ent. L. J. 1143, 1145-47, 1164-65 (2006).

[74] Federal Trademark Dilution Act of 1995 (FTDA), Pub. L. No. 104-98, sec. 4, 109 Stat. 985, 986 (1996) (codified at 15 U.S.C. §1127 (2000)). The statutory definition of "dilution" was subsequently amended and moved to a different section of the Code. TDRA, sec. 2(1), §43(c)(2)(B)-(C), 120 Stat. at 1731 (to be codified at 15 U.S.C. §1125(c)).

[75] TDRA, sec. 2(1), §43(c)(2)(B)-(C), 120 Stat. at 1731.

[76] Id. sec. 2(1), §43(c)(5)(B)(i), 120 Stat. at 1732.

77 As one commentator said when analyzing the new statute, "If experience is any guide, some courts will feel tempted to make the causal leap between mental association and dilution, and conclude that any use that calls to mind a famous mark will probably dilute it." Dogan, supra note 70, at 105.

78 See discussion infra Part III.B.

79 See generally Barton Beebe, The Semiotic Analysis of Trademark Law, 51 UCLA L. Rev. 621 (2004) (extensively exploring the theoretical complexities of the relationship between a mark, a marked product, and the information supposedly conveyed by the mark).

80 The so-called "anonymous source doctrine," which dates back to Schechter's days, continues to be one of the more awkward aspects of trademark law. See Bayer Co. v. United Drug Co., 272 F. 505, 509 (S.D.N.Y. 1921) ("[T]he question is whether the buyers merely understood that the word 'Aspirin' meant this kind of drug, or whether it meant that...it came from the same single, though...anonymous, source from which they had got it before."). The question whether the "anonymous source" is an earnest requirement of trademark protection or a legal fiction created for the purpose of establishing a mark/maker nexus where none exists has led to doctrinal upheaval in the past, and remains open today. The Anti-Monopoly cases represent a confused set of decisions. See generally Anti-Monopoly, Inc. v. Gen. Mills Fun Group, 684 F.2d 1316 (9th Cir. 1982); Anti-Monopoly, Inc. v. Gen. Mills Fun Group, 611 F.2d 296 (9th Cir. 1979). In response, Congress amended the Lanham Act to make the anonymous source doctrine explicit. See Trademark Clarification Act of 1984, Pub. L. No. 98-620, sec. 103(1), 98 Stat. 3335, 3335 (codified as amended at 15 U.S.C. §1127 (2006)) (defining "trademark" as "any word, name, symbol, or device...adopted and used by a manufacturer or merchant...to indicate the source of...goods, even if that source is unknown" (emphasis added)). In that same statute, Congress made a tentative effort to loosen the grip of the mark/maker relationship on one aspect of trademark doctrine, but this effort has been largely unsuccessful. See id. sec.102 (codified as amended at 15 U.S.C. §1064(3) (2006)) (stating that a trademark may be "used as a name of or to identify a unique product or service" without becoming generic); Beebe, supra note 79, at 652-53 (describing §1064(3) as a less-than-successful attempt to force courts "to distinguish between marks that are 'distinctive of plaintiff's product' and marks that are 'distinctive of a product's source,"' while preserving trademark protection over both classes of marks (emphasis added)).

81 ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 940 (6th Cir. 2003) (internal quotation marks omitted); see also KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S. 111, 117 (2004) (noting that a claim of infringement "requires a showing that the defendant's actual practice is likely to produce confusion in the minds of consumers about the origin of the goods or services in question"); Original Appalachian Artworks, Inc. v. Toy Loft, Inc., 684 F.2d 821, 831-32 (11th Cir. 1982) ("[T]he touchstone test for a violation of §43(a) is the likelihood of confusion resulting from the defendant's adoption of a trade dress similar to the plaintiff's." (internal quotation marks omitted)); 3 McCarthy, supra note 13, §23:1, at 23-6 to -9 ("Likelihood of confusion is the basic test of both common law trademark infringement and federal statutory trademark infringement." (footnotes and internal quotation marks omitted)).

82 15 U.S.C. §§1114(1), 1125(a) (2006).

83 3 McCarthy, supra note 13, §23:5, at 23-20.

84 Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons, 523 F.2d 1331, 1342 (2d Cir. 1975); see also Dorr-Oliver, Inc. v. Fluid-Quip, Inc., 94 F.3d 376, 382 (7th Cir. 1996) (characterizing "bait and switch" techniques as actionable under a theory of initial-interest confusion); Jordache Enters. v. Levi Strauss & Co., 841 F. Supp. 506, 514-15 (S.D.N.Y. 1993) (describing initial-interest confusion as a situation in which "potential customers initially are attracted to the junior user's mark by virtue of its similarity to the senior user's mark, even though these consumers are not actually confused at the time of purchase"); Mobil Oil Corp. v. Pegasus Petroleum Corp., 818 F.2d 254, 260 (2d Cir. 1987) (imposing liability where defendant's trademark "Pegasus" could engender initial confusion with plaintiff's graphical flying-horse trademark, even if no such confusion existed at the time defendant closed any transactions). But see Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP, 423 F.3d 539, 549-52 & n.15 (6th Cir. 2005), cert. denied, 126 S. Ct. 2355 (2006) (rejecting initial-interest confusion as a basis for infringement of a product shape trademark in the absence of point-of-sale confusion, and suggesting that initial-interest confusion is largely limited to the context of internet domain names).

85 Hermès Int'l v. Lederer de Paris Fifth Ave., Inc., 219 F.3d 104, 109 (2d Cir. 2000) ("[A] loss occurs when a sophisticated buyer

purchases a knockoff and passes it off to the public as the genuine article, thereby confusing the viewing public and achieving the status of owning the genuine article at a knockoff price."); Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 799 F.2d 867, 872-73 (2dCir. 1986) ("The confusion the [Lanham] Act seeks to prevent in [the post-sale] context is that a consumer seeing the familiar stitching pattern will associate the jeans with appellee and that association will influence his buying decisions."); Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-Lecoultre Watches, Inc., 221 F.2d 464, 466 (2d Cir. 1955) (finding infringement where "plaintiff copied the design of the Atmos clock because plaintiff intended to, and did, attract purchasers who wanted a 'luxury design' clock[, and] some customers would buy plaintiff's cheaper clock for the purpose of acquiring the prestige gained by displaying what many visitors at the customers' homes would regard as a prestigious article"). But see Gibson Guitar Corp., 423 F.3d at 552 (rejecting post-sale confusion as a basis for infringement of a product shape trademark in the absence of point-of-sale confusion).

86 Sands, Taylor & Wood Co. v. Quaker Oats Co., 978 F.2d 947, 957 (7th Cir. 1992) ("Reverse confusion occurs when a large junior user saturates the market with a trademark similar or identical to that of a smaller, senior user."); Banff, Ltd. v. Federated Dept. Stores, Inc., 841 F.2d 486, 490 (2nd Cir. 1988) ("Reverse confusion is the misimpression that the junior user is the source of the senior user's goods.").

87 Restatement of Torts §731 (1938); See 4 McCarthy, supra note 13, §24:29, at 24-55. The Tenth Circuit, in a departure from this model, draws its likelihood of confusion factors from section 729 of the Restatement. Amoco Oil Co. v. Rainbow Snow, 748 F.2d 556, 558 n.5 (10th Cir. 1984) (quoting Restatement of Torts §729); Beer Nuts, Inc. v. Clover Club Foods Co., 711 F.2d 934, 940 (10th Cir. 1983) (quoting Restatement of Torts §729).

88 4 McCarthy, supra note 13, §24:30, at 24-57.

89 The D.C. Circuit has yet to announce the factors it deems relevant in determining likelihood of confusion. 4 McCarthy, supra note 13, § 24:42, at 24-73. The Federal Circuit's test, as articulated by the Court of Customs and Patent Appeals, only comes into play in proceedings before the Patent and Trademark Office (such as registration proceedings), and thus is not directly relevant to liability issues. Application of E.I. Dupont De Nemours & Co., 476 F.2d 1357, 1361 (C.C.P.A. 1973) (setting forth thirteen-factor test for refusing registration based on likelihood of confusion with the mark of a prior user).

90 Boston Athletic Ass'n v. Sullivan, 867 F.2d 22, 29 (1st Cir. 1989).

91 Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492, 495 (2d Cir. 1961); see also TCPIP Holding Co. v. Haar Commc'ns, 244 F.3d 88, 100 (2d Cir. 2001).

92 Interpace Corp. v. Lapp, Inc., 721 F.2d 460, 463 (3d Cir. 1983).

93 Shakespeare Co. v. Silstar Corp. of Am., 110 F.3d 234, 241-42 (4th Cir. 1997) (listing all eleven factors); Pizzeria Uno Corp. v. Temple, 747 F.2d 1522, 1527 (4th Cir. 1984) (listing only the first seven factors).

94 Pebble Beach Co. v. Tour 18 I Ltd., 155 F.3d 526, 543 (5th Cir. 1998); Oreck Corp. v. U.S. Floor Sys., Inc., 803 F.2d 166, 170 (5th Cir. 1986); Roto-Rooter Corp. v. O'Neal, 513 F.2d 44, 45 (5th Cir. 1975). The eighth factor is mentioned only in Oreck, 803 F.2d at 170-71, which also substitutes "strength of plaintiff's mark" for the reference in Roto-Rooter and Pebble Beach to the "type" of the mark, id., suggesting that "type" is merely another word for mark strength as measured along the spectrum of distinctiveness set forth by Judge Friendly in Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9 (2d Cir. 1976). See discussion infra Part IV.B.2.

95 Frisch's Rests., Inc. v. Elby's Big Boy, 670 F.2d 642, 648 (6th Cir. 1982).

96 Helene Curtis Indus. v. Church & Dwight Co., 560 F.2d 1325, 1330 (7th Cir. 1977) (citing Carl Zeiss Stiftung v. VEB Carl Zeiss Jena, 433 F.2d 686, 705 (2d Cir. 1970)).

[97] SquirtCo v. Seven-Up Co., 628 F.2d 1086, 1091 (8th Cir. 1980); see also Co-Rect Prods. v. Marvy! Adver. Photography, Inc., 780 F.2d 1324, 1330 (8th Cir. 1985) (citing SquirtCo, 628 F.2d at 1091).

[98] AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348-49 (9th Cir. 1979).

[99] Amoco Oil Co. v. Rainbow Snow, 748 F.2d 556, 558 n.5 (10th Cir. 1984) (quoting Restatement of Torts §729 (1938)); Beer Nuts, Inc. v. Clover Club Foods Co., 711 F.2d 934, 940 (10th Cir. 1983) (quoting Restatement of Torts §729).

[100] Conagra, Inc. v. Singleton, 743 F.2d 1508, 1514 (11th Cir. 1984).

[101] The factors dealing with similarity of the marks are: Factor 1 in the First Circuit, Factor 2 in the Second Circuit, Factor 1 in the Third Circuit, Factor 2 in the Fourth Circuit, Factor 2 in the Fifth Circuit, Factor 3 in the Sixth Circuit, Factor 1 in the Seventh Circuit, Factor 2 in the Eighth Circuit, Factor 3 in the Ninth Circuit, Factor 1 in the Tenth Circuit, and Factor 2 in the Eleventh Circuit. See supra tbl. 1.

[102] The factors dealing with the defendant's intent are: Factor 7 in the First Circuit, Factor 6 in the Second Circuit, Factor 5 in the Third Circuit, Factor 6 in the Fourth Circuit, Factor 6 in the Fifth Circuit, Factor 7 in the Sixth Circuit, Factor 7 in the Seventh Circuit, Factor 5 in the Eighth Circuit, Factor 7 in the Ninth Circuit, Factor 2 in the Tenth Circuit, and Factor 6 in the Eleventh Circuit. See supra tbl. 1.

[103] Factors regarding the strength of the plaintiff's mark are: Factor 8 in the First Circuit, Factor 1 in the Second Circuit, Factor 2 in the Third Circuit, Factor 1 in the Fourth Circuit, Factor 1 in the Fifth Circuit, Factor 1 in the Sixth Circuit, Factor 5 in the Seventh Circuit, Factor 1 in the Eighth Circuit, Factor 1 in the Ninth Circuit, and Factor 1 in the Eleventh Circuit. See supra tbl. 1.

[104] Evidence of actual confusion factors are: Factor 6 in the First Circuit, Factor 5 in the Second Circuit, Factors 4 and 6 in the Third Circuit, Factor 7 in the Fourth Circuit, Factor 7 in the Fifth Circuit, Factor 4 in the Sixth Circuit, Factor 6 in the Seventh Circuit, Factor 6 in the Eighth Circuit, Factor 4 in the Ninth Circuit, and Factor 7 in the Eleventh Circuit. See supra tbl. 1. The Tenth Circuit's departure from its sister circuits on mark strength and actual confusion is likely attributable to the fact that it based its list on section 729 of the Restatement of Torts, while the other circuits derived their tests from section 731. See supra note 87 and accompanying text.

[105] Factors relating to the sophistication of purchasers are: Factor 8 in the Second Circuit, Factor 3 in the Third Circuit, Factor 11 in the Fourth Circuit, Factor 8 in the Fifth Circuit, Factor 6 in the Sixth Circuit, Factor 4 in the Seventh Circuit, Factor 7 in the Eighth Circuit, Factor 6 in the Ninth Circuit, and Factor 4 in the Tenth Circuit. See supra tbl. 1. Factor 5 in the First Circuit addresses "classes of prospective purchasers," but this factor is grouped with other factors relating to the overlap in the parties' markets, specifically whether they are likely to share a substantial amount of customers. Boston Athletic Ass'n v. Sullivan, 867 F.2d 22, 30 (1st Cir. 1989). The court has said that the relative expertise of the relevant classes of customers is sometimes, but not always, relevant to likelihood of confusion. Id.

[106] Factor 2 in the First Circuit, Factors 3 and 7 in the Second Circuit, Factor 9 in the Third Circuit, Factors 3 and 10 in the Fourth Circuit, Factor 3 in the Fifth Circuit, Factor 2 in the Sixth Circuit, Factor 2 in the Seventh Circuit, Factor 3 in the Eighth Circuit, Factor 2 in the Ninth Circuit, and Factor 3 in the Eleventh Circuit all speak to this issue. See supra tbl. 1. The Tenth Circuit also considers product similarity to some extent, under the rubric of its Factor 3. Beer Nuts, Inc. v. Clover Club Foods Co., 711 F.2d 934, 941 (10th Cir. 1983) ("Confusing similarity is most likely when the products themselves are very similar.").

[107] Factors relating to the commercial or geographic context of sale are: Factor 3 in the First Circuit; Factors 3 and 4 in the Second Circuit; Factors 7 and 10 in the Third Circuit; Factors 4, 8, and 9 in the Fourth Circuit; Factor 4 in the Fifth Circuit; Factor 3 in the Seventh Circuit; Factor 4 in the Eighth Circuit; Factors 2, 5, and 8 in the Ninth Circuit; Factor 3 in the Tenth Circuit; and Factor 4 in the Eleventh Circuit. See supra tbl. 1.

[108] Factors dealing with the similarities of the target audiences are: Factor 5 in the First Circuit and Factor 8 in the Third Circuit. See

supra tbl. 1.

109 Factor 4 in the First Circuit, Factor 7 in the Third Circuit, Factor 5 in the Fourth Circuit, Factor 5 in the Fifth Circuit, Factor 5 in the Sixth Circuit, Factor 5 in the Ninth Circuit, Factor 3 in the Tenth Circuit, and Factor 5 in the Eleventh Circuit all speak to this issue. See supra tbl. 1.

110 See, e.g., Virgin Enters. Ltd. v. Nawab, 335F.3d 141, 151 (2dCir. 2003) (The defendant's intent is not "of high relevance" because "[i]t does not bear directly on whether customers are likely to be confused."); Brookfield Commc'ns v. W. Coast Entm't, 174 F.3d 1036, 1059-60 (9th Cir. 1999) (The defendant's intent "is only relevant to the extent that it bears upon the likelihood that consumers will be confused by the alleged infringer's mark (or to the extent that a court wishes to consider it as an equitable consideration)."); Versa Prods. Co. v. Bifold Co., 50 F.3d 189, 208 (3d Cir. 1995) ("[A] defendant's intent weighs in favor of a finding of likelihood of confusion only...where the product's labeling and marketing are also affirmatively misleading.").

111 See supra note 110.

112 See, e.g., Versa Prods., 50 F.3d at 206 ("[T]here is little or no competitive need to copy another's distinctive symbol or presentation to sell one's product, and...anyone who does so is most likely trying to cash in on the competitor's goodwill...."); Am. Chicle Co. v. Topps Chewing Gum, Inc., 208 F.2d 560, 563 (2d Cir. 1953) (Learned Hand, J.) ("[A]s soon as we see that a second comer...plagiarized the make-up of an earlier comer, we need no more; for he at any rate thinks...that he is likely to succeed [in sowing confusion]." (internal quotation marks omitted)).

113 See Versa Prods., 50 F.3d at 206 (holding that reliance on defendant's intent "largely duplicates the weight given to the substantial-identity-of-appearance factor...in the likelihood of confusion inquiry").

114 Despite courts' avowed program to accord little weight to a defendant's intent, recent empirical analysis suggests that judges rely very heavily on this factor when deciding trademark cases. Barton Beebe, An Empirical Study of the Multifactor Tests for Trademark Infringement, 94 Cal. L. Rev. 1581, 1626-31 (2006) (discussing data showing that a finding against the defendant on the intent factor correlates almost perfectly to a finding against the defendant on the issue of liability). Given the circular reasoning behind the use of this factor as a determinant of liability, and the courts' voluble disavowal of it, the empirical result of Professor Beebe's analysis suggests that judicial discretion in trademark cases may require more stringent channeling. See infra notes 241-44 and accompanying text.

115 See discussion infra Part IV.

116 Trademark Dilution Revision Act of 2006 (TDRA), Pub. L. No. 109-312, sec. 2(1), §43(c)(1), 120 Stat. 1730, 1730 (2006) (to be codified at 15 U.S.C. §1125(c)).

117 See id. sec. 2(1), §43(c)(2)(A), 120 Stat. at 1730-31.

118 Courts rely on concepts of distinctiveness not only in determining liability, but also in determining whether a trademark is entitled to protection in the first place. Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 769 (1992) ("The general rule regarding distinctiveness is clear: An identifying mark is distinctive and capable of being protected if it either (1) is inherently distinctive or (2) has acquired distinctiveness through secondary meaning." (emphasis omitted)). For purposes of this article, however, the relevance of these concepts lies in their effect on determinations of liability for a defendant's use, not in their effect on the protectability of a plaintiff's mark.

119 Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9 (2d Cir. 1976). Terms that may once have signified a particular manufacturer's product but have come, over time, to refer to an entire category of products-- such as "aspirin," "cellophane," and "thermos"--are also considered generic. Id. at 10 (citing Bayer Co. v. United Drug Co., 272 F. 505 (2d Cir. 1921); DuPont Cellophane Co. v. Waxed Prods. Co., 85 F.2d 75 (2d Cir. 1936); King-Seeley Thermos Co. v. Aladdin Indus., Inc., 321 F.2d 577 (2d Cir. 1963)).

[120] Abercrombie, 537 F.2d at 11 & n.12.

[121] See, e.g., Virgin Enters. Ltd. v. Nawab, 335 F.3d 141, 147 (2d Cir. 2003) ("[T]he law accords broad, muscular protection to marks that are arbitrary or fanciful in relation to the products on which they are used.").

[122] Abercrombie, 537 F.2d at 10-11.

[123] Id.

[124] Id.

[125] Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 211 (2000) (quoting Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 851 n.11 (1982)). The Court continues to invoke this definition of secondary meaning despite an apparent effort by Congress to refine the formulation, at least insofar as it pertains to the doctrine of genericness. See supra note 80.

[126] See, e.g., Centaur Commc'ns, Ltd. v. A/S/M Commc'ns, Inc., 830 F.2d 1217, 1222 (2d Cir. 1987); Mktg. Displays, Inc. v. Traffix Devices, Inc., 200 F.3d 929, 937 (6th Cir. 1999), rev'd on other grounds, 532 U.S. 23 (2001); Co-Rect Prods. v. Marvy! Adver. Photography, Inc., 780 F.2d 1324, 1332-33 (8th Cir. 1985); Pebble Beach Co. v. Tour 18 I Ltd., 155 F.3d 526, 541 (5th Cir. 1998); G. Heileman Brewing Co. v. Anheuser-Busch, Inc., 873 F.2d 985, 998 n.12 (7th Cir. 1989).

[127] Trademark Dilution Revision Act of 2006 (TDRA), Pub. L. No. 109-312, sec. 2(1), §43(c)(2)(A), 120 Stat. 1730, 1730-31 (2006) (to be codified at 15 U.S.C. §1125(c)).

[128] Compare id. with Centaur Commc'ns, 830 F.2d at 1222, Mktg. Displays, 200 F.3d at 937, Co-Rect Prods., 780 F.2d at 1332-33, Pebble Beach, 155 F.3d at 541, and G. Heileman Brewing Co., 873 F.2d at 998 n.12.

[129] TDRA, sec. 2(1), §43(c)(2)(A)(iii), 120 Stat. at 1730-31.

[130] 15 U.S.C. §1052(e)-(f) (2006) (permitting the PTO to refuse registration of a mark that is merely descriptive absent a showing that the mark "has become distinctive of the applicant's goods in commerce").

[131] See, e.g., Savin Corp. v. Savin Group, 391 F.3d 439, 449 (2d Cir. 2004) (holding that, to qualify as famous under the pre-TDRA federal dilution statute, a mark must possess "a high degree of...acquired distinctiveness" (quoting TCPIP Holding Co. v. Haar Commc'ns, Inc., 244 F.3d 88, 98 (2d Cir. 2001) (emphasis omitted)).

[132] TDRA, sec. 2(1), §43(c)(2)(B), 120 Stat. at 1731.

[133] Trademark Dilution Revision Act of 2006 (TDRA), Pub. L. No. 109-312, sec. 2(1), §43(c)(2)(B)(ii)-(iv), 120 Stat. 1730, 1731 (2006) (to be codified at 15 U.S.C. §1125(c)) (listing degree of inherent or acquired distinctiveness, degree of the plaintiff's substantially exclusive use, and degree of recognition of the mark as factors in determining likelihood of blurring).

[134] See id. sec. 2(1), §43(c)(2)(B)(v)-(vi) (listing the intent to create an association with a famous mark and the actual existence of such associations as factors in determining likelihood of blurring); see also supra notes 59, 68-77 and accompanying text.

[135] TDRA, sec. 2(1), §43(c)(2)(B)(i), 120 Stat. at 1731.

[136] Graeme B. Dinwoodie & Mark D. Janis, Dilution's (Still) Uncertain Future, 105 Mich. L. Rev. First Impressions 98, 100 (2006), http:// www.michiganlawreview.org/firstimpressions/vol105/dinwoodie.pdf.

[137] TDRA, sec. 2(1), §43(c)(2)(C), 120 Stat. at 1731.

[138] Id.

[139] See, e.g., V Secret Catalogue, Inc. v. Moseley, 259 F.3d 464, 477 (6th Cir. 2001) (agreeing with the district court that defendant's inventory of adult videos, sex toys, and other adult novelties was sufficient to support a tarnishment claim), rev'd on other grounds, 537 U.S. 418 (2003); Kraft Foods Holdings, Inc. v. Helm, 205 F. Supp. 2d 942, 949-50 (N.D. Ill. 2002) (holding that the use of the names "VelVeeda" and "King Velveeda" on a website of sexually explicit images and references to drug use tarnished the "Velveeta" trademark); Hasbro, Inc. v. Internet Entm't Group, Ltd., 40 U.S.P.Q. 2d 1479, 1480 (W.D. Wash. 1996) (finding the plaintiff was likely to prove that the internet domain address "candyland.com" on an adult website tarnished the "CANDY LAND" board game trademark); Coca-Cola Co. v. Gemini Rising, Inc., 346 F. Supp. 1183, 1191-93 (E.D.N.Y. 1972) (holding under the New York dilution statute that the "Coca-Cola" mark was diluted by defendant's modification of a Coca-Cola advertisement in a poster that altered the text to read "Cocaine").

[140] See Daniel Kahneman & Shane Frederick, Representativeness Revisited: Attribute Substitution in Intuitive Judgment, in Psychology of Intuitive Judgment, supra note 9, at 49, 53-56, available at http:// www.mit.edu/people/shanefre/RepRevisited.pdf.

[141] See id. at 53-56.

[142] This is not to say that consumers will always base their purchasing decisions solely on their response to a trademark. Other factors, such as price, will come into play. But insofar as trademark law is concerned with the effects of trademarks on consumer beliefs and behavior, the discussion herein will focus on those effects to the exclusion of other potential influences. In this respect consumer reaction to trademarks is closely related, albeit not identical, to the marketing concept of "brand equity," defined as "the differential effect of brand knowledge on consumer response to the marketing of the brand." Kevin Lane Keller, Conceptualizing, Measuring, and Managing Customer-Based Brand Equity, 57 J. Marketing 1, 2 (Jan. 1993).

[143] Kahneman & Frederick, supra note 140, at 57 ("Affective valence is a natural assessment, and therefore a candidate for substitution in the numerous situations in which an affectively loaded response is required."); see Jon D. Hanson & Douglas A. Kysar, Taking Behavioralism Seriously: The Problem of Market Manipulation, 74 N.Y.U. L. Rev. 630, 732 (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.'").

[144] See Shane Frederick, Automated Choice Heuristics, in Psychology of Intuitive Judgment, supra note 9, at 548, 553 (describing the use of this heuristic as a means of generating choices without deliberate reasoning); Paul Slovic, Melissa Finucane, Ellen Peters & Donald G. MacGregor, The Affect Heuristic, in Psychology of Intuitive Judgment, supra note 9, at 397 (describing the affect heuristic and the empirical data from which it is inferred).

[145] See Frederick, supra note 144, at 550 (describing the affect heuristic as "choosing by liking"); see also R. B. Zajonc, Feeling and Thinking: Preferences Need No Inferences, 35 Am. Psychologist 151, 155 (1980) ("Quite often 'I decided in favor of X' is no more than 'I liked X.'... We buy the cars we 'like,' choose the jobs and houses that we find 'attractive,' and then justify those choices by various reasons....").

[146] See Slovic, Finucane, Peters & MacGregor, supra note 144, at 400; see also Tim Ambler et al., Salience and Choice: Neural Correlates of Shopping Decisions, 21 Psychol. & Mktg. 247, 256 (2004) (discussing neural activation patterns during consumer choice tasks that suggest the visual stimuli of trademarks trigger "semantic processing and the memory-based interpretation of visually presented material," and that "such memories are complex with episodic and, in many cases, affective and cognitive elements...[and] probably involve actual experience of purchasing, usage, or seeing advertisements.").

147 See Ambler et al., supra note 146, at 256. Research has shown that people tend to believe intuitively that there is an inverse correlation between risk and benefit; positive affective feelings can lead a person to underestimate the risk of the stimulus that generates such feelings, while awareness of even small risks can result in outsized reductions in the perceived benefits of the source of that risk. Slovic, Finucane, Peters & MacGregor, supra note 144, at 410-14. Professors Hanson and Kysar have noted that this feature of human decision-making leads inevitably to manipulative market behavior in the form of affect-laden advertising for risky products such as cigarettes. Hanson & Kysar, supra note 143, at 732-33.

148 Steven A. Sloman, Two Systems of Reasoning, in Psychology of Intuitive Judgment, supra note 9, at 379-84. For example, Sloman points to experimental results that show test subjects simultaneously believing two contradictory responses to a test question--one founded on associative judgments of similarity and the other on logical rules of probability--as evidence of the two-systems theory. Id. at 385-91; see generally Ulrike Hahn & Nick Chater, Similarity and Rules: Distinct? Exhaustive? Empirically Distinguishable?, 65 Cognition 197 (1998) (discussing theoretical and empirical distinctions between rule-based and similarity-based cognitive processes).

149 See Sloman, supra note 148, at 379, 380-84 & tbl. 22.1, 393-94 (arguing that "associative" reasoning, which governs associative memory functions, is an automatic form of cognitive processing, to be distinguished from "rule-based" reasoning, which governs more formal logical analysis and requires deliberate sequential processing). But see Gerd Gigerenzer & Terry Regier, How Do We Tell an Association From a Rule? Comment on Sloman (1996), 119 Psychol. Bull. 23 (1996) (critiquing Sloman's dual-system theory on grounds of ambiguity, vagueness, and failure to consider alternative explanations of data).

150 As an illustration of our unconscious susceptibility to affective content, consider a study that showed that flashing an affectively charged image (a smiling or frowning face) for 1/250th of a second immediately prior to the display of a stimulus was enough to bias the test subject's preference for that stimulus, even though the affectively charged "priming" cue was so brief that there was no recognition or recall of it. Slovic, Finucane, Peters & MacGregor, supra note 144, at 401 (citing P. Winkielman, R.B. Zajonc, & N. Schwarz, Subliminal Affective Priming Resists Attributional Interventions, 11 Cognition & Emotion 433 (1997)). This effect persisted even when the stimulus was later presented with an affectively opposite "priming" cue. Id.

151 See discussion infra Parts IV.C.3, IV.D.

152 For example, in one experiment test subjects were given an affectively charged definition for Chinese pictograms, then told that those definitions were inaccurate and asked to memorize "accurate" affectively neutral definitions for the same pictograms. Slovic, Finucane, Peters & MacGregor, supra note 144, at 401. Even after the new affectively neutral meanings had been learned, the test subjects continued to exhibit the earlier affective reaction to the pictograms. Id.

153 See Hanson & Kysar, supra note 143, at 646-54 (discussing a host of empirically demonstrated phenomena illustrating the general principle that initial judgments are extremely persistent, even in the face of contradictory or ambiguous hard data). Surprisingly, attempts at rationalization may actually serve to increase confidence in a faulty intuitive judgment, a phenomenon known as confirmation bias. See Hanson & Kysar, supra note 143, at 647-50, 660-62; Nicholas Epley & Thomas Gilovich, The Anchoring-and-Adjustment Heuristic: Why the Adjustments are Insufficient, 17 Psychol. Science 311, 312 (2006) ("[P]eople evaluate hypotheses by trying to confirm them."). For a general overview of the empirical and theoretical underpinnings of the confirmatory bias, see Hanson & Kysar, supra note 143, at 647-50.

154 Kahneman & Frederick, supra note 140, at 57 ("[P]eople initially believe whatever they are told.... [I]t takes some time and mental effort to 'unbelieve' such dubious statements."). Cf. generally Christian D. Schunn et al., To Calculate or Not to Calculate: A Source Activation Confusion Model of Problem Familiarity's Role in Strategy Selection, 23 J. Experimental Psychol.: Learning, Memory & Cognition 3 (1997) (demonstrating that people tend to retrieve answers to problems from memory, rather than calculate them through logical reasoning when the problem appears familiar to them).

155 See discussion infra Parts IV.C.3, IV.D.

156 See generally, e.g., Girish N. Punj & Clayton L. Hillyer, A Cognitive Model of Customer-Based Brand Equity for Frequently

Purchased Products: Conceptual Framework and Empirical Results, 14 J. Consumer Psychol. 124 (2004) (formulating and empirically testing a model of brand equity that is dominated by affectively-laden "global brand attitude" and "brand heuristic" as first- and second-level determinants, respectively, of consumer decision-making); Ambler et al., supra note 146, at 248 (summarizing research suggesting that emotion and feelings are the primary drivers of consumer decision-making). But see id. at 257 (noting that brain imaging neither supported nor refuted neurophysiological predictions of one theorist of emotion-based choice).

157 Of course, as noted above, there are numerous other avenues for the creation of affective associations, not all of which are regulated by trademark law and some of which are not regulated at all. See supra notes 143-47 and accompanying text. As will be discussed below, the behavioralist model set forth herein implies an inconsistency between the relatively strict regulation of trademark uses and the more permissive or absent regulation of other avenues for affective content, but a full exploration of those implications is beyond the scope of this article. See infra notes 246-51 and accompanying text.

158 See supra Part III.B.1.

159 Courts rely on concepts of distinctiveness not only in determining liability, but also in determining whether a trademark is entitled to protection in the first place. Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 769 (1992) ("The general rule regarding distinctiveness is clear: An identifying mark is distinctive and capable of being protected if it either (1) is inherently distinctive or (2) has acquired distinctiveness through secondary meaning." (emphasis added)). For purposes of this article, however, the relevance of these concepts lies in their effect on determinations of liability for a defendant's use, not their effect on the legitimacy of a plaintiff's mark.

160 See discussion infra Part V.B.

161 See, e.g., Gordon H. Bower, A Brief History of Memory Research, in The Oxford Handbook of Memory 3, 16-19 (Endel Tulving & Fergus I.M. Craik eds., 2000) (discussing features of memory that have been the focus of recent study, including free recall, frequency, and recognition).

162 In the context of consumer psychology, the distinction and its relevance to marketing strategy have been described as follows:
Brand recognition relates to consumers' ability to confirm prior exposure to the brand when given the brand as a cue. In other words, brand recognition requires that consumers correctly discriminate the brand as having been seen or heard previously. Brand recall relates to consumers' ability to retrieve the brand when given the product category, the needs fulfilled by the category, or some other type of probe as a cue. In other words, brand recall requires that consumers correctly generate the brand from memory. The relative importance of brand recall and recognition depends on the extent to which consumers make decisions in the store (where they potentially may be exposed to the brand) versus outside the store, among other factors. Brand recognition may be more important to the extent that product decisions are made in the store.
Keller, supra note 142, at 3 (internal citations omitted).

163 See generally Vernon Gregg, Word Frequency, Recognition and Recall, in Recall and Recognition 183 (John Brown ed., 1976) (collecting research); Colin M. MacLeod & Kristina E. Kampe, Word Frequency Effects on Recall, Recognition, and Word Fragment Completion Tests, 22 J. Experimental Psychol.: Learning, Memory & Cognition 132, 132 (1996) (same).

164 MacLeod & Kampe, supra note 163, at 132-33.

165 MacLeod & Kampe, supra note 163, at 132-33.

166 Of course, the list of high-frequency words will be considerably smaller than the list of generic marks (consider "Shampoo," "DVD Player," "Spinach," etc.), and correlation between the two lists will vary significantly from industry to industry. Accordingly, the most compelling justification for the use of inherent distinctiveness as a factor in apportioning trademark protection and liability remains that discussed infra Part V.B.

[167] See Keller, supra note 142, at 9 ("[C]hoosing a familiar word representing a well-known concept or some other common object or property as a brand name may facilitate brand recall, but ... choosing a more unusual or distinctive word may facilitate brand recognition.").

[168] Gerd Gigerenzer, Peter M. Todd & The ABC Research Group, Simple Heuristics That Make Us Smart 41 (1999).

[169] See generally Daniel G. Goldstein & Gerd Gigerenzer, Models of Ecological Rationality: The Recognition Heuristic, 109 Psychol. Rev. 75 (2002) (setting forth the empirical and theoretical bases for the recognition heuristic).

[170] See Goldstein & Gigerenzer, supra note 169, at 78 (suggesting that where the prerequisites for the recognition heuristic are met such judgments have "ecological rationality," meaning that the correlation of substitute attributes to target attributes may be theoretically validated by environmental mediators that make reliance on the recognition heuristic likely to lead to accurate outcomes). In the consumer context, this explanation seems sound insofar as many of our less significant purchasing decisions--which we likely would not go to the trouble of extensively educating ourselves--are informed not by direct experience but by word-of-mouth and advertising.

[171] Indeed, the "sales success" factor (see supra note 126 and accompanying text) is likely directly linked to affective response, insofar as widespread and repeated purchases of a product imply satisfaction with the product and, concurrently, a positive affective response to its trademark in a large number of consumers.

[172] Such specific knowledge may form "associative networks" around the mark in memory that are activated when encountering the mark. See Jacob Jacoby, The Psychological Foundations of Trademark Law: Secondary Meaning, Genericism, Fame, Confusion and Dilution, 91 Trademark Rep. 1013, 1018-26 (2001). However, such networks likely play only a subordinate role in consumer decision-making. See infra notes 174-76 and accompanying text.

[173] See supra Part IV.B.1. Indeed, this effect of repeated exposure helps explain the inclusion of "[t]he extent of actual recognition of the mark" as a factor in determining fame. Trademark Dilution Revision Act of 2006 (TDRA), Pub. L. No. 109-312, sec. 2(1), §43(c)(2)(A)(iii), 120 Stat. 1730, 1730-31 (2006) (to be codified at 15 U.S.C. §1125(c)).

[174] See Jacoby, supra note 172, at 1029 (arguing that when a significant portion of the relevant public develops associative networks for a product or service, then that product or service can be said to have achieved secondary meaning); see also Barton Beebe, Search and Persuasion in Trademark Law, 103 Mich. L. Rev. 2020, 2032 (2005) ("Trademark law, and the marketing literature with it, has long recognized that the more distinctive a trademark is from other marks, the greater is consumers' 'awareness' of it and the more immediately 'accessible' it is in their memory." (footnotes omitted)).

[175] See supra notes 143-47 and accompanying text.

[176] Punj & Hillyer, supra note 156, at 125-26; see Ambler et al., supra note 146, at 248 (citing references).

[177] Frederick, supra note 144, at 548, 553; see also Ambler et al., supra note 146, at 253-54 (discussing experimental results showing significant correlation between brand familiarity and selection of the brand, and quicker decision-making when faced with a familiar brand than with unfamiliar brands).

[178] Slovic, Finucane, Peters & MacGregor, supra note 144, at 400 ("[W]hen objects are presented to an individual repeatedly, the 'mere exposure' is capable of creating a positive attitude or preference for these objects."); see also, e.g., Robert F. Bornstein, Exposure and Affect: Overview and Meta-Analysis of Research, 1968-1987, 106 Psychol. Bull. 265 (1989) (reviewing studies that document the "mere exposure effect"). This feature of affective response has implications for manipulative advertising similar to those identified by professors Hanson & Kysar. See generally Hanson & Kysar, supra note 143; see also Jon D. Hanson & Douglas A. Kysar, Taking Behavioralism Seriously: Some Evidence of Market Manipulation, 112 Harv. L. Rev. 1420 (1999).

[179] See supra notes 148-56 and accompanying text.

[180] For an earlier and somewhat different view of the interaction of similarity and context in the trademark arena, see Jacoby, supra note 172, at 1034-40.

[181] See generally Timothy R. Jordan, Sharon M. Thomas & Kenneth C. Scott-Brown, The Illusory-Letters Phenomenon: An Illustration of Graphemic Restoration in Visual Word Recognition, 28 Perception 1413 (1999) (citing sources).

[182] See generally Thomas D. Erickson & Mark E. Mattson, From Words to Meaning: A Semantic Illusion, 20 J. Verbal Learning & Verbal Behav. 540 (1981).

[183] Heekyeong Park & Lynne M. Reder, Moses Illusion, in Cognitive Illusions: A Handbook on Fallacies and Biases in Thinking, Judgment and Memory 275, 285 (Rüdiger F. Pohl ed., 2004).

[184] See, e.g., Henry L. Roediger III & Kathleen B. McDermott, Creating False Memories: Remembering Words Not Presented in Lists, 21 J. Experimental Psychol.: Learning, Memory, & Cognition 803 (1995) (subjects falsely recognized words that were semantically related to words in studied lists); Jeffery J. Franks & John D. Bransford, Abstraction of Visual Patterns, 90 J. Experimental Psychol. 65 (1971) (subjects falsely recognized unstudied transformations of prototype shapes with levels of recognition decreasing as degree of transformation increased); Mitchell S. Sommers & Bryan P. Lewis, Who Really Lives Next Door: Creating False Memories with Phonological Neighbors, 40 J. Memory & Language 83 (1999) (subjects falsely recognized unstudied phonological neighbors of words in previously aurally-presented lists); see generally Henry L. Roediger, Kathleen B. McDermott & Kerry J. Robinson, The Role of Associative Processes in Producing False Remembering, in 2 Theories of Memory 187 (Martin A. Conway, Susan E. Gathercole & Cesare Cornoldi eds., 1998) (collecting recent research on memory illusions).

[185] Park & Reder, supra note 183, at 281-82.

[186] Park & Reder, supra note 183, at 283.

[187] See, e.g., David A. Aaker & Kevin Lane Keller, Consumer Evaluations of Brand Extensions, 54 J. Marketing 27 (1990) (identifying the role of "fit" in the success of brand extensions); Paul A. Bottomley & Stephen J.S. Holden, Do We Really Know How Consumers Evaluate Brand Extensions? Empirical Generalizations Based on Secondary Analysis of Eight Studies, 38 J. Marketing Res. 494 (2001) (confirming the hypothesis of Aaker and Keller against subsequent critiques).

[188] Sandra J. Milberg, C. Whan Park & Michael S. McCarthy, Managing Negative Feedback Effects Associated with Brand Extensions: The Impact of Alternative Branding Strategies, 6 J. Consumer Psychol. 119, 132-33 (1997) (demonstrating negative "feedback" effects on parent brands of ill-fitting product extensions); Barbara Loken & Deborah Roedder John, Diluting Brand Beliefs: When Do Brand Extensions Have a Negative Impact?, 57 J. Marketing 71 (1993) (same); Deborah Roedder John, Barbara Loken & Christopher Joiner, The Negative Impact of Extensions: Can Flagship Products Be Diluted?, 62 J. Marketing 19 (1998) (finding that "flagship products" are less vulnerable to negative feedback extensions than the brand itself). Some consumer psychologists have already attempted to make the leap connecting the dilution concept of the brand extension literature with the dilution injury set forth in the Federal Trademark Dilution Act. See generally Maureen Morrin & Jacob Jacoby, Trademark Dilution: Empirical Measures for an Elusive Concept, 19 J. Pub. Pol'y & Mktg. 265 (2000). However, as discussed infra Part V.A, the two concepts cannot be neatly mapped onto one another as the law currently stands.

[189] Joan Meyers-Levy, Therese A. Louie & Mary T. Curren, How Does the Congruity of Brand Names Affect Evaluations of Brand Name Extensions?, 79 J. Applied Psychol. 46, 47 (1994).

[190] Meyers-Levy, Louie & Curren, supra note 189, at 47. The inability to resolve the conflict can be seen as a kind of cognitive dissonance, a mental contradiction that generates negative affective response. See generally Eddie Harmon-Jones, Cognitive Dissonance and Experienced Negative Affect: Evidence that Dissonance Increases Experienced Negative Affect Even in the Absence of Aversive Consequences, 26 Personality & Soc. Psychol. Bull. 1490 (2000) (demonstrating that a common laboratory

model for generating cognitive dissonance causes test subjects to experience negative affect). Similarly, the positive response to the ability to resolve an incongruity is consistent with that portion of cognitive dissonance theory that posits attitude change as a strategy to reduce the psychological discomfort that arises from dissonance. See generally Andrew J. Elliot & Patricia G. Devine, On the Motivational Nature of Cognitive Dissonance: Dissonance as Psychological Discomfort, 67 J. Personality & Soc. Psychol. 382 (1994) (demonstrating a model of cognitive dissonance wherein the dissonance motivates the individual to reduce psychological discomfort by changing the attitude that generates the dissonance).

191 See, e.g., Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, in Judgment Under Uncertainty, supra note 9, at 3, 14-18.

192 Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, in Judgment Under Uncertainty, supra note 9, at 3, 14-18. For example, in one famous study subjects were asked to estimate the percentage of African countries in the United Nations membership after watching a wheel containing numbers from one to one hundred being spun. The wheel was rigged to land either on ten or sixty-five. When the wheel landed on the lower number, subjects' mean estimate was that African countries comprised only twenty-five percent of the United Nations; when the wheel landed on the higher number, the mean estimate was forty-five percent. Tversky & Kahneman, Judgment Under Uncertainty: Heuristics and Biases, in Judgment Under Uncertainty, supra note 9, at 14.; see also Hanson & Kysar, supra note 143, at 667.

193 See Hanson & Kysar, supra note 143, at 668 ("What is striking about this demonstration is that the anchor provided to the subjects was overtly random and irrelevant, yet still it had a significant impact on the subjects' intuitive judgments." (emphasis omitted)); Gretchen B. Chapman & Eric J. Johnson, Incorporating the Irrelevant: Anchors in Judgments of Belief and Value, in Psychology of Intuitive Judgment, supra note 9, at 120, 125 (summarizing evidence that neither warning subjects not to be influenced by the anchor nor awareness by subjects of the anchor's irrelevance could eliminate biases in favor of the anchor).

194 Fritz Strack & Thomas Mussweiler, Explaining the Enigmatic Anchoring Effect: Mechanisms of Selective Accessibility, 73 J. Personality & Soc. Psychol. 437, 444 (1997).

195 See Chapman & Johnson, supra note 193, at 130-33.

196 Epley & Gilovich, supra note 153, at 312 (internal citation omitted); see also Chapman & Johnson, supra note 193, at 133 ("[A]nchors have their effect because decision makers consider reasons why their value for the target item is like the anchor, but show relative neglect for reasons why their value for the item is unlike the anchor."). In essence, the anchoring and adjustment heuristic for externally provided anchors appears to be a species of confirmation bias. See Chapman & Johnson, supra note 193, at 133-34 (discussing the connection between anchoring phenomena and confirmation bias).

197 Epley & Gilovich, supra note 153, at 312.

198 Epley & Gilovich, supra note 153, at 314-15.

199 The qualification of this hypothesis, that the commercial context of the marks be related, takes into account the previous discussion concerning the cognitive dissonance and negative affect that arises from encountering a known stimulus in a completely foreign context. See supra note 190 and accompanying text.

200 See Jordan, Thomas & Scott-Brown, supra note 181, at 1413.

201 Park & Reder, supra note 183, at 286-87.

202 See generally Epley & Gilovich, supra note 153.

[203] Epley & Gilovich, supra note 153, at 317.

[204] Epley & Gilovich, supra note 153, at 312, 315-16; see supra note 196 and accompanying text.

[205] The resistance of the bias generated by identical marks to amelioration through increased care counsels for unique treatment of identical marks in liability regimes. Indeed, federal infringement law imposes stricter penalties for counterfeiting than for other types of infringement. See 15 U.S.C. §1117(b)-(c) (2006) (establishing statutory and treble damages for counterfeiting).

[206] That trademarks serve to lower consumer search costs is a fundamental tenet of the dominant law-and-economics model of trademark law. See generally William M. Landes & Richard A. Posner, Trademark Law: An Economic Perspective, 30 J.L. & Econ. 265 (1987); see also Brian A. Jacobs, Note, Trademark Dilution on the Constitutional Edge, 104 Colum. L. Rev. 161, 189-93 (2004); 1 McCarthy, supra note 13, §2:5, at 2-7 to -10. However, the standard economic analysis is something of an inversion of the argument of this article: where law-and-economics scholars presume that the legal regime creates the efficiencies that justify its rules, this article proposes that the cognitive processes of consumers are themselves the engines of efficiency, and the legal regime is constructed to harness those efficiencies while mitigating the errors that inevitably accompany them.

[207] See supra notes 140-42, 148-56 and accompanying text.

[208] Cf. Christine Jolls & Cass R. Sunstein, Debiasing Through Law, 35 J. Legal Stud. 199, 207-08 (2006) (describing product bans as an insulating strategy to eliminate the effects of optimism bias with respect to risky products). What this article refers to as a "debiasing strategy" would likely be referred to (or perhaps denigrated) by Jolls and Sunstein as an "insulating" strategy. See id. at 225 n.21 (distinguishing between the authors' definition of "debiasing" and "insulating" strategies, the latter of which accepts boundedly rational behavior as given and seeks to reduce or eliminate its effects on legal outcomes).

[209] Cf. Frederick, supra note 144, at 554 ("The success of using one's immediate affective response as a choice heuristic depends on how closely it corresponds to the actual value or subsequent utility.").

[210] See 15 U.S.C. §§1051, 1091 (2006) (establishing trademark registers on the basis of a one-manufacturer-per-mark rule); 15 U.S.C. §§1114-15, 1125 (providing remedies and private rights of action in trademark cases to, inter alia, the trademark registrant or senior user).

[211] See supra note 206.

[212] See Glynn S. Lunney, Jr., Trademark Monopolies, 48 Emory L.J. 367, 417 (1999) ("Ownership was assigned to the person who adopted the mark for her trade, not because she had created it or its favorable associations, but because such person was conveniently placed and strongly motivated to vindicate the broader public interest in a mark's ability to identify accurately the source of the goods to which it was attached."). This mechanism is the essential bargain of the trademark regime: "the trademark producer's willingness to assume the [consumer's] costs of search in order to gain the benefits of persuasion." Beebe, supra note 174, at 2066. As Professor Beebe's analysis suggests, the one-mark-per-manufacturer baseline and the privileged position of the first comer give trademark law an inherently circular and expansionist structure. See Beebe, supra note 174, at 2066-69.

[213] As should be evident from the discussion in the text, ex ante and point-of-sale manipulation correlate to the cognitive processes of memory encoding and memory retrieval, respectively. See generally Scott C. Brown & Fergus I.M. Craik, Encoding and Retrieval of Information, in The Oxford Handbook of Memory 93 (Endel Tulving & Fergus I.M. Craik eds., 2000) (outlining developments in understanding human memory processes).

[214] See supra notes 146-47, 171-78 and accompanying text.

[215] See supra Parts IV.C-D.

[216] The legal fiction of the anonymous source is perhaps the clearest manifestation of the wasteful complexity of trademark law's obsession with legal history and the deleterious effects of that obsession on legal processes and outcomes. See supra note 80 and accompanying text.

[217] See supra note 83 and accompanying text.

[218] See supra note 84 and sources cited therein.

[219] See supra notes 146-47, 174-76 and accompanying text.

[220] See supra note 85 and accompanying text.

[221] See supra note 85 and sources cited therein. As Professor Beebe notes:
[F]irms produce trademarks as status goods, ... consumers consume trademarks to signal status, and ... courts routinely invest trademarks with legal protection in an effort to preserve this status-signaling function. The culture industries--and what industries aren't?--have long sold trademarks as commodities in their own right. Entire areas of trademark doctrine cannot be understood except as systems of rules designed to facilitate the commodification--indeed, the "industrial production"--of social distinction.
Beebe, supra note 79, at 624 (footnote omitted).

[222] This discussion omits the fourth and final infringement theory-- reverse confusion--not because the theory is incompatible with the behavioralist model, but because reverse confusion is a special case where administrability concerns trump the policy of exploiting bounded rationality to streamline consumer decision-making. At first blush, the concept of reverse confusion would seem to challenge this article's contention that trademark liability exists to harness the affect-driven bounded rationality of consumers; after all, the doctrine proscribes use of a trademark that generates a strong affective response in favor of one that does not, or at least does so to a lesser degree. See supra note 86 and accompanying text. But rather than engage in a complex and costly fight over which manufacturer's use of a mark generates the strongest affective response, trademark law imposes a bright-line rule of priority-in-time, which combined with the notice system of the Federal Register, attempts to avoid such disputes entirely. See generally 15 U.S.C. §§1051, 1091 (2006) (establishing the Principal and Supplemental Trademark Registers and the procedures for their operation); cf. Pierre J. Schlag, Rules and Standards, 33 UCLA L. Rev. 379, 387-88 (1985) (outlining generic arguments for and against bright-line notice rules in legal systems such as property law). Like all bright-line rules, the priority-in-time rule in trademark law will invariably lead to undesirable results at the margins--such as the proscription of a mark that eases consumer decision-making--but this may be deemed an acceptable exchange for the increased administrability of the system as a whole.

[223] See supra notes 22-35 and accompanying text.

[224] See supra notes 39-49 and accompanying text; see generally Gerard N. Magliocca, One and Inseparable: Dilution and Infringement in Trademark Law, 85 Minn. L. Rev. 949 (2001) (arguing that dilution is a transitional remedy designed to overcome the obsolescence of infringement doctrine in times of changing economic and technological conditions).

[225] See supra notes 37-38 and accompanying text.

[226] See supra notes 2-6, 54-78 and accompanying text.

[227] See supra notes 187-90 and accompanying text.

[228] See supra notes 67-77 and accompanying text.

[229] See supra notes 54-59, 67-77, 134-39 and accompanying text.

[230] See supra note 219 and accompanying text.

[231] See supra notes 188-90 and accompanying text. For most well-known marks, the typical tarnishing contexts of sexual activity and drug use will generally be cognitively unresolvable, suggesting that tarnishment is merely a special case of the more general ex ante manipulation of uniqueness-theory blurring. See supra note 139 and accompanying text (describing the typical association of tarnishment with drugs and sexual activity).

[232] See supra notes 186-89 and accompanying text.

[233] The rarity of such manipulations is further suggested by the unlikelihood that a consumer would independently recall (without cueing) a known mark in a commercial context far enough removed from its typical context that the distance would generate unresolvable cognitive dissonance resulting in negative affective response. Given the low baseline probability of such recall, and taking into account earlier discussions about the unique anchoring effects attributable to identical marks, we would expect the type of ex ante manipulation discussed in this paragraph to manifest itself only where the known mark is extremely strong and perceptually indistinguishable from the novel mark, which is consistent with the Supreme Court's holding in Moseley. Compare supra notes 199-205 and accompanying text (discussing the unique cognitive effects of identical marks) with Moseley v. V Secret Catalogue, 537 U.S. 418, 434 (2003) (noting the strong probative value of identical marks in dilution cases). However, to the extent that many dilution cases involve explicitly referential use of well-known marks in situations that arguably do not involve commercial trademark use, see, e.g., Pillsbury Co. v. Milky Way Prods., Inc., 215 U.S.P.Q. 124, 134 (N.D. Ga. 1981); Coca-Cola Co. v. Gemini Rising, Inc., 346 F. Supp. 1183, 1191-93 (E.D.N.Y. 1972), tarnishment could also be seen as analogous to defamation claims, though this aspect of the remedy may not survive the TDRA. See Beebe, supra note 73, at 1172-74 (arguing that the TDRA includes a source-designation requirement that would preclude its use to enjoin, for example, appropriationist art).

[234] See supra notes 11-27 and accompanying text.

[235] See supra notes 210-12 and accompanying text.

[236] See Beebe, supra note 174, at 2022 ("Trademark law is arguably the most difficult of the intellectual property laws to contemplate, and its outcomes when applied to facts are the most difficult to predict. This is because it requires...the capability...to think through the consumer and see the marketplace only as the consumer sees it." (footnotes omitted)).

[237] Cf. Beebe, supra note 174, at 2066-69 (arguing that the expansion of trademark liability is a self-perpetuating phenomenon in which producers assume consumer search costs in exchange for the concomitant ability to exert a stronger persuasive influence over the consumer).

[238] See Jolls & Sunstein, supra note 208, at 226 ("In responding to problems of bounded rationality, it is preferable, when possible, to develop legal approaches that avoid imposing significant costs on those who do not engage in boundedly rational behavior." (citation omitted)).

[239] Cf. Stephen L. Carter, The Trouble with Trademark, 99 Yale L.J. 759, 768-75 (1990) (outlining the problem of scarcity of useful trademarks); Landes & Posner, supra note 206, at 289-92 (discussing the interrelationship of elasticity of supply of trademarks and the ability of early market entrants to extract rents).

[240] See Beebe, supra note 114, at 1598-1614 (describing judicial use of heuristics to circumvent the multi-factor analyses of trademark doctrine); see generally Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, Inside the Judicial Mind, 86 Cornell L. Rev. 777 (2001) (empirically demonstrating the susceptibility of federal magistrate judges to a variety of cognitive illusions and biases).

[241] See, e.g., Shari Seidman Diamond, Reference Guide on Survey Research, in Reference Manual on Scientific Evidence 229, 235

(2d ed. Federal Judicial Center 2000), available at http:// www.fjc.gov/public/pdf.nsf/lookup/sciman00.pdf/$file/sciman00.pdf (noting the routine use of survey evidence in Lanham Act cases).

242 See supra note 119 and accompanying text.

243 See, e.g., Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 165 (1995) (holding that a product feature cannot serve as a trademark "if exclusive use of the feature would put competitors at a significant non-reputation-related disadvantage"); Wallace Int'l Silversmiths, Inc. v. Godinger Silver Art Co., 916 F.2d 76, 81 (2d Cir. 1990) (noting that a trademark will not be enforced where liability "would significantly hinder competition by limiting the range of adequate alternative designs").

244 See 15 U.S.C. §§1114(1)(a), 1125(a)(1), 1125 (c)(1) (2006).

245 See supra notes 143-47, 167-69, 176-78 and accompanying text.

246 See supra Part IV.C.2.

247 See, e.g., Beebe et al., supra note 4, at 863-66 (providing an overview of the commercial popularity and success of extensive trademark licensing).

248 See generally Jean Wegman Burns, Confused Jurisprudence: False Advertising under the Lanham Act, 79 B.U. L. Rev. 807 (1999) (charting the development and shortcomings of false advertising remedies under the Lanham Act).

249 See Rudolph J. Kuss, The Naked Licensing Doctrine Exposed: How Courts Interpret the Lanham Act to Require Licensors to Police Their Licensees & Why This Requirement Conflicts with Modern Licensing Realities & the Goals of Trademark Law, 9 Marq. Intell. Prop. L. Rev. 361, 362-71 (2005) (providing an overview of naked licensing doctrine).

250 Such regulatory targets and their analysis are beyond the scope of the present article, but could include the marketing of generic products, comparative advertising (and indeed advertising in general), and the press. Moreover, affective content could be influenced by completely random or coincidental circumstances that have little to do with any conceivable purchasing criteria. For example, if a consumer were hit by a Toyota when crossing the street, or drinking a 7-Up when she received a call informing her of the death of a loved one, she might develop negative affective responses to the products and marks involved in those events even though her experience with such products is otherwise positive. Although this article will not endeavor to explore these implications of a behavioralist model of consumer decision-making, it is worth noting that even if regulation were feasible, normative objections to heavy regulation in most of these areas, as in many areas where heuristics play a role, are significant. Cf. Jolls & Sunstein, supra note 208, at 225-34.

251 See supra note 212.