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GOLDILOCKS AND THE THREE FEDERAL DILUTION STANDARDS: AN EMPIRICAL REVIEW

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*102 I. What is Trademark Dilution?

The Federal Trademark Dilution Act of 1995 (FTDA) amended § 45 of the Lanham Act, 15 U.S.C. § 1127, to define dilution as "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."[1] Although at the time the FTDA was passed, approximately twenty-five states had made dilution actionable, Congress reasoned that a "federal dilution statute [was] necessary because famous marks ordinarily are used on a nationwide basis . . . and some courts [were] reluctant to grant nationwide injunctions for violation of state law."[2] Congress's intent in passing this legislation was to protect "the substantial investment the owner has made in the mark and the commercial value and aura of the mark itself"[3] even in the absence of direct competition and confusion.[4] Congress felt confusion "leads to immediate injury, while dilution is an infection, which if allowed to spread, will inevitably destroy the advertising value of the mark."[5] Some actionable examples members of Congress contemplated in passing this legislation were "DUPONT shoes, BUICK aspirin, and KODAK pianos."[6]

Dilution law, in contrast to trademark infringement law, is directed at protecting trademark holders rather than consumers.[7] Dilution does not require actual or even likely confusion in potential purchasers;[8] its protection is broad and is designed at its core to protect the mental associations that firms invest large sums of money creating and maintaining. It is no surprise, then, that dilution law finds much of its grounding in cognitive psychology.[9]

***103** It is well known that marketing can have powerful psychological effects. In fact, there are entire fields of marketing designed to modify consumer perceptions of brands.[10] These techniques have been coined "neuromarketing."[11] Neuromarketing research indicates that marketers can succeed not only in inciting demand but in changing consumer opinions.[12] Most shockingly, marketers can change opinions formed even after a product has been consumed and judgments about the product have been made.[13]

There is extreme value, then, in the enigmatic workings of influencing the consumer subconscious.[14] Dilution law protects associations, snap judgments, and sub-cognitive brand information that lurk in the inner depths of the consumer's mind.[15] The obvious problem, though, in protecting such intangibles is measurement. How does one measure whether the strength of subliminal associations or subconscious positive feelings have been harmed or diminished--especially in light of the fact that its very operation is somewhat mystifying?

Since the FTDA was signed into law, courts have struggled in determining exactly what is required for a successful showing of dilution, mostly because of these inherent measurement difficulties. Some federal courts at first took the more concrete route and held that to levy a successful dilution claim, the FTDA requires "actual economic harm to the famous mark's economic value by lessening its former selling power."[16] In contrast, other courts ruled that "'[c]ontextual factors' have long been used to establish infringement . . . [so there is] no reason why they should not be used to prove dilution."[17] The Supreme Court resolved this circuit split in Moseley v. V Secret Catalogue, Inc.[18]

*104 II. The Significance of the Moseley Decision

In Moseley, the petitioners owned and operated a retail store under the name "Victor's Little Secret," which sold adult novelties and gifts.[19] Victoria Catalogue, Inc., the famous sellers of the upscale lingerie brand, "Victoria's Secret," sought to enjoin the Moseleys from using a trade name so similar to its own, claiming such a use would dilute its valuable brand identity.[20] The Supreme Court decided in Moseley that in order for a plaintiff to wage a successful trademark dilution claim under the Trademark Act of 1995, it must demonstrate "actual dilution" through a showing of harm.[21] The Court reasoned that the statutory text "unambiguously requires a showing of actual dilution, rather than a likelihood of dilution."[22]

Although the Moseley decision cleared up ambiguity over the standard for an FTDA claim, it failed to offer substantial guidance on how one might prove "actual dilution." What precisely or even broadly constitutes actual dilution is noticeably absent from the opinion. However, Justice Stevens did intimate that in the case of identical marks actual harm may be presumed, and also that in situations with non-identical marks survey evidence may contribute to the required proof, but no mention of what these surveys should demonstrate or what else a plaintiff can use as proof was discussed.[23]

Moseley also failed to address at least one other important dilution question--what breeds of dilution the FTDA actually embraces.[24] Many state anti-dilution laws recognize dilution as either "blurring" or "tarnishing."[25] Dilution through blurring occurs "where the defendant uses or modifies the plaintiff's trademark to identify defendant's goods and services, raising the possibility that the mark will lose its ability to serve as a unique identifier of the plaintiff's product."[26] Dilution by tarnishment occurs when a trademark is "'linked to products of shoddy quality, or is portrayed in an unwholesome or unsavory context,' with the result that 'the ***105** public will associate the lack of quality or lack of prestige in the defendant's goods with the plaintiff's unrelated goods.'"[27] This bifurcation (later explicitly adopted by the Trademark Dilution Revision Act of 2006 (TDRA)) allows a broader range of dilution claims to be brought because use of a junior mark that either (1) connects the senior mark with lewd or negative imagery or shoddy quality (tarnishment), or in some way (2) disrupts the mental association consumers had with the brand (blurring) is recognized.[28] However, Moseley, although not deciding the issue, seriously questioned whether the FTDA protected tarnishment at all:
Whether [tarnishment] is actually embraced by the statutory text, however, is another matter. Indeed, the contrast between the state statutes, which expressly refer to both "injury to business reputation" and to "dilution of the distinctive quality of a trade name or trademark" and the federal statute which refers only to the latter, arguably supports a narrower reading of the FTDA.[29]

Moseley was not only viewed as setting a harsh standard for dilution by commentators, and one that missed the mark in terms of the original law's intent, but was also heavily criticized for not offering clarity as part of this tradeoff.[30] In the years following Moseley, Stevens's reasoning regarding identical marks proved to be the most directly applicable aspect of the opinion.[31] It provided a quick, fairly easy, and tangible test that lower federal courts naturally gravitated towards.[32] Yet, for non-identical marks, the standard appeared to be opaque.[33]

*106 III. The Trademark Revision Act of 2006

Three years later, Congress, apparently uneasy with the new "actual dilution" standard of proof and the doubt Moseley cast on dilution via tarnishment,[34] passed the Trademark Dilution Revision Act of 2006 (TDRA).[35] The Act, signed into law on October 6, 2006,[36] legislatively overruled the Moseley decision.[37] During congressional hearings on the Act, an International Trademark Association (ITA) representative testified that "[b]y the time measurable, provable damage to the mark has occurred much time has passed, the damage has been done, and the remedy, which is injunctive relief, is far less effective."[38] The House report displayed the frustration caused by Moseley, stating it "create[d] an undue burden for trademark holders who contest diluting uses and should be revised."[39] Congress lessened this burden by adopting a new Trademark Dilution Act; the new relevant language reads:

> Subject to the principles of equity, the owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.[40]

This revision, most importantly, provides that using a mark that is "likely to cause dilution" is sufficient to trigger liability under the Lanham Act, making clear that evidence of actual harm is not required.[41] The Act also provides that marks that are only locally famous do not qualify for protection.[42] The text of the revised ***107** Act now also overtly refers to both dilution by blurring and dilution by tarnishment of the famous mark, provides elements of proof for each, and lists relevant factors for a court to consider.[43] Furthermore, by only referencing dilution by blurring and tarnishment, the revised Act implicitly quashes the looming notion that other forms of previously-recognized dilution causes of action besides blurring and tarnishment exist under the federal statute (e.g., dilution via diminishment).[44]

The new statute requires a plaintiff in an action alleging blurring to show, in addition to the preliminary requirements (i.e., use in commerce,[45] famousness, distinctiveness, use by the alleged diluter of the junior mark after the senior mark has become famous),[46] (1) an association rooted in similarity between the marks and (2) a likelihood that the senior mark's distinctiveness is impaired as a result of such association.[47] For tarnishment, the plaintiff must show, in addition to the preliminary elements, that there is (1) an association rooted in similarity between the marks and (2) a likelihood that the association causes harm to the senior mark's reputation.[48] Therefore, once an association due to similarity is proved between the two marks, a plaintiff must show either that the association diminishes the senior mark's distinctiveness or that there was harm to the mark's reputation (or both). However, even according to the more lenient statutory text of the TDRA, mere association between the marks will not suffice.

*108 IV. Criticism of Dilution and the Conceptual Muddying of Two Separate Standards

Professor Farley is one among many who have criticized the elusive nature of dilution, claiming that
[f]or the last decade, the biggest question in trademark law has been how to prove dilution. This is a clear sign of something. Can no smart attorney, judge, trademark owner, or social scientist figure out what dilution is and how to prove it? If not, why not? I contend that it is because dilution cannot be concretized. It cannot be brought into the realm of the real. It exists only in the realm of the imaginary. In intellectual property law today, this realm is powerful and a bit scary.[49]

The difficulty with dilution highlighted by Farley is most likely a function, at least in part, of measurement and the difficulty of conceptually keeping confusion and dilution and their respective standards of proof separate and distinct. Courts routinely meld confusion and dilution language together, even though two separate standards exist for proving each.[50] For instance, in Nabisco, Inc. v. PF Brands, Inc., the court stated, "[w]hen consumers confuse the junior mark with the senior, blurring has occurred."[51] And in Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, the court incorrectly framed dilution in terms of actual confusion, stating, "dilution [of a trademark] by blurring occurs when consumers mistakenly associate a famous mark with goods and services of a junior mark, thereby diluting the power of the senior mark to identify and distinguish associated goods and services."[52] However, not all cases follow this pattern. In Edina Realty, Inc. v. TheMLSonline.com, the court carefully distinguished between likelihood of confusion and actual dilution.[53] In describing that evidence of actual confusion does not necessarily equate to evidence of dilution, the court stated
[p]laintiff primarily relies upon a handful of phone calls and emails from consumers, which may indicate a likelihood of confusion. Even assuming that this is evidence of actual confusion caused by defendant's use of plaintiff's mark, it does not prove actual dilution. Plaintiff has presented no evidence that the ability of the Edina Realty mark to serve as a unique identifier of plaintiff's services has been weakened.[54]

*109 V. Dilution and Infringement: A Non-Reciprocal Relationship

Although Edina Realty provides a nice distinction between how to think about dilution and infringement, its treatment of confusion evidence is questionable.

Edina Realty operates under the premise that even evidence of actual confusion cannot satisfy the level of proof required to establish actual dilution[55]--this conceptually is a bit knotty.[56] As discussed earlier, dilution was designed to protect marketing investments by firms that have succeeded in creating associations and snap judgments regarding their marks in the mind of consumers.[57] And dilution is either impairment of a mark's distinctiveness or harm to its reputation, which occurs as a result of another using a similar mark.[58] Assuming famousness, timing, and similarity requirements are met, how could it be possible for actual consumer confusion to exist over two marks without at least an ancillary impairment of the capacity to identify the mark? Consumer confusion by its very nature is some evisceration of the capacity of a mark to identify its source.[59] In the case of confusion, not only has an association or a snap judgment been harmfully interfered with, but the senior mark no longer identifies or solely identifies the very source it is intended to or once did (at least in the minds of a significant population of consumers). Therefore, once it has been determined conceptually that confusion or a likelihood of confusion exists, a weakening of the mark's capacity should be presumed for dilution to be properly squared with its statutory definition as long as the preliminary requirements of dilution are met. This is likely what the Louis Vuitton and Nabisco courts were referring to when they inadvertently confused the concepts by linking together the definitions of dilution and confusion and when they considered confusion evidence when applying an actual dilution standard. The language used in Nabisco, Eldorado Stone, and Levi Strauss lends support to the conclusion that once actual confusion is established, dilution should be presumed ***110** (assuming, of course, the statutory preliminary requirements are met).[60] Cases under the TDRA support this interpretation.[61]

VI. Dilution Review when Confusion Evidence is Absent: Extra Sensitive or "Scalpel" Analysis

One way to think of confusion may be as "matured blurring," where two marks have blurred to such a degree that consumers can no longer tell them apart. Before such maturity ensues, however, and before customers are likely to be confused or actually confused by the two marks, there exists a sensitive period of time--sometimes brief, sometimes long--where the mere existence of the junior mark begins to weaken the presence of the senior mark. In some cases, it may even be that this presence will never lead to (nor has the capacity to lead to) full scale confusion, but this does not undercut the logical conclusion that once confusion can be established that dilution should not be presumed. Dilution, as Congress has made clear, was enacted as a safeguard to prevent damage to a mark before it was too late; as such, true dilution occurs before the blurring of a mark has matured into confusion.[62] In sum, a mark can dilute without confusing (e.g., tarnishment or un-matured blurring), but the author believes it would make little conceptual sense that a mark could confuse but not dilute (assuming the preliminary statutory dilution factors are met). This proof framework described by the preceding two paragraphs is depicted in Diagram 1.

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***112** Diagram 1 depicts a variety of relationships regarding dilution and infringement standards of proof. As depicted, each notch along the spectrum satisfies the proof requirements of any previous standard.[63] For instance, the following relationships are depicted (where --> represents: sufficient to prove):

1) Actual Confusion --> Likelihood of Confusion[64]

2) Actual Dilution --> Likelihood of Dilution[65]

3) Likelihood of Confusion --> Likelihood of Dilution[66]

4) Actual Confusion --> Likelihood of Dilution[67]

The authorities suggest that, far from actual confusion having no role in the dilution analysis, proof of actual confusion and likelihood of dilution should be sufficient to establish actual dilution and likelihood of dilution, respectively. ***113** However, confusion evidence should not be necessary to show dilution. Therefore, a problem does not arise when courts consider actual confusion in a dilution analysis, but when they seek it. As the Lanham Act makes clear, actual confusion is unnecessary to prove either infringement or dilution.[68] This is why courts--if dilution is to have any meaning at all--must approach dilution analysis, as McCarthy cautions, not with a "sledge hammer but with a scalpel."[69] This is especially true in cases where confusion has not yet blossomed from potential dilution because these are the true cases that federal dilution law was designed to protect.[70] Scalpel analysis is critically important in cases where no confusion exists because, although actual confusion should satisfy both the likelihood of dilution and actual dilution standards, if such proof is available the dilution remedy has already fallen short of its goal. Because it is impossible to "un-ring a bell" once it has been rung, Congress's intent in passing the dilution statute was to prevent large scale harm after the first clues that harm to a famous mark may be approaching or--as some plaintiffs have put it--they are trying to stop a swarm of bees after a "solitary sting" or large scale pollution after a "single drop of iodine."[71] If actual confusion can be demonstrated, serious damage to the mark has already occurred, and the limited remedy afforded under the dilution statute, an injunction, may do little good--ineffectively serving as a band-aid on a gunshot wound.

To explore scalpel analysis further, let us assume a hypothetical, similar to the situation in WAWA, Inc. v. Haaf, where there are two competing 24-hour convenience store brands, "Wawa" and "HAHA."[72] Further, assume customers indicate (via market surveys) that there is no confusion or likelihood of confusion ***114** (and therefore no infringement), that HAHA and Wawa are both separate and independent 24-hour food chains, and that consumers do not believe they are affiliated in any way. However, when consumers think of Wawa convenience stores, they also think of HAHA convenience stores (there is a mental association between the two marks, but again the consumers are not confused) and vice versa, due to the similarity in the names themselves and similarity in the service and goods sold by each.

Under these facts, tarnishment might occur if, for example, HAHA introduced a large adult movie and merchandise section to all of its convenience stores. Consumers might then come to associate the HAHA mark with deli foods and adult-themed merchandise. Consumers may then begin to associate the pornographic practices of HAHA with Wawa, even though they are not confused, because they associate the two brands broadly.[73] We also have here more than mere association; we have association coupled with negative impressions of the junior brand, HAHA, which spill over to the senior brand, Wawa.[74]

As demonstrated above, scalpel analysis can be relevant in tarnishment cases, but it can be of even more help in blurring cases. For example, if consumers simply found it difficult to keep advertising, exclusive products, or promotions between the two companies entirely distinct, then blurring might be occurring.[75] Under these facts, even though consumers are not confused in the traditional sense, (i.e., they are aware that HAHA and Wawa are not affiliated with one another and are separate providers of a similar service) there can still be impairment of Wawa's distinctiveness in the mind of customers if Wawa stores can no longer keep consumers as interested in their products and aware of their promotions at the same rates they were able to before HAHA began operating. This is similar to the outcome in Nabisco where the court found Pepperidge Farm would have lost some ability to distinguish its brand in the mind of consumers via its distinctive goldfish crackers, regardless of whether its consumers were actually confused as to the cracker's origin, had the court not enjoined Nabisco's similar cracker production.[76]

***115** One way to demonstrate the blurring effect would be through consumer surveys designed to isolate any diminutive effect caused by the similarity of the marks, as distinct from natural competitive forces. However, as this article will discuss, this is often not an easy task. After all, it is likely that any 24-hour deli competitor, regardless of its name, would have a diminutive effect on Wawa's consumer base and similarly affect marketing and merchandising efforts. As was noted in I.P. Lund Trading ApS v. Kohler Co., "demand for one product [or service] is almost always lessened whenever a competing product achieves a measurable degree of success."[77] On these facts, it might even be easy to show a correlation between HAHA's market entry and economic harm. But linking this economic harm to the specific name choice of "HAHA" and not to general market competition is where the surveying difficulty lies.

Scalpel analysis urges that courts, upon initial review, treat dilution claims, when confusion evidence is absent, in a sensitive fact-intensive way. Courts should dig as deep as possible into all relevant evidence, particularly social science evidence and surveys, considering all implications to distinguish as much as possible between natural competitive effects and dilutive effects. Such careful analysis will prevent courts from ignoring a mere bee sting when the swarm may be looming.

The actual WAWA court (on facts slightly different than those recounted for the scalpel analysis exercise above) found the plaintiff "established that its mark [would] be diluted either through blurring or parody."[78] To reach this conclusion, the court applied Judge Sweet's dilution test from Mead Data, Inc. v. Toyota Motor Sales.[79] The Sweet test calls for six points of inquiry in deciding whether dilution via blurring has occurred.[80] Those six points are "[s]imilarity of the marks," "[s]imilarity of the products covered by the marks," "[s]ophistication of customers," "[p]redatory intent," "[r]enown of the senior mark," and "[r]enown of the junior mark."[81] This test has drawn criticism as a result of its application of confusion-like factors in the dilution context, which, as illustrated above, are conceptually different;[82] such improper analysis is akin to grabbing the sledgehammer when the scalpel is needed. The Lund court noted that "[t]he Sweet factors have been criticized by both courts and commentators for introducing factors that 'are the offspring of classical likelihood of confusion analysis and [that] ***116** are not particularly relevant or helpful in resolving the issues of dilution.'"[83] The Lund court further noted how one commentator complained that "few of [the Sweet] factors bear any relation to whether a particular junior use will debilitate the selling power of a mark."[84] The Sweet test and the criticism it has received further highlight the conceptual confusion with dilution. But criticism of the Sweet test aside, the judge in WAWA found that the marks HAHA and Wawa were similar in sight and sound, that the mark Wawa was renowned and HAHA was not, that the products sold by each store were similar, and that their customers were not sophisticated.[85] He also found some evidence of predatory intent, finding the claim that the defendant, Mr. Haaf, named his store after the first two letters of his and his wife's last name dubious (the relevance of this factor is not explained).[86] In reaching its conclusion, the court also considered survey evidence, which indicated that 29% of consumers thought of Wawa when they saw the HAHA mark.[87] This case was pre-Moseley, and the court did not apply the "actual dilution" standard; nonetheless, the court reached its finding that dilution had occurred as a result of the survey evidence (that tended to show a mental association in the mind of consumers between the two marks) and the Mead balancing test.[88]

VII. Proving Actual Dilution

Circuit court decisions have extensively set up, added to, discussed, expounded upon, and criticized various likelihood of dilution factors,[89] but have rarely provided extensive discussion of the ways one can demonstrate actual harm. Yet, the "actual dilution" standard remains relevant. Even after the TDRA, actual dilution is still an important standard for several reasons. First, "twenty-two [] states have adopted a dilution statute similar to the FTDA as interpreted by Moseley ***117** (e.g., requiring actual dilution)."[90] Second, establishing actual dilution is a powerful tool for plaintiffs seeking to bring dilution claims. Proving actual dilution when likelihood of dilution will suffice enhances the strength of the claim,[91] which could lead to more favorable settlement outcomes for plaintiffs. Third, federal courts have ruled that plaintiffs seeking monetary relief for acts prior to October 6, 2006 must show proof of actual dilution.[92]

Justice Stewart once famously set forth the following phrase, "I know it when I see it," in fashioning an appropriate test for determining what constitutes obscene material under prior Supreme Court precedent.[93] Although cliché, this test, in all its vagueness, seems to apply equally as well to dilution. However, what any federal judge wants to "see"--even in light of the Moseley actual dilution standard--to find dilution is anybody's guess. As the court noted in Ty v. Softbelly's, "we are not sure what question could be put to consumers that would elicit a meaningful answer [as to whether dilution has occurred] either in [Moseley] or this one."[94]

There is no doubt that actual dilution is a difficult standard for plaintiffs to meet,[95] and, if anything is clear, it is that mere association, even close similarity (as distinguished from identity), between the marks is not enough.[96] For instance, in Louis Vuitton Malletier v. Dooney & Bourke, Inc., the plaintiff, a French designer famous for use of an intertwined "LV" on high quality hand bags, launched a new line of handbags using the "LV" mark printed in bright colors on a white or black background.[97] Vuitton sued the defendant, Dooney & Bourke, under theories of both infringement and dilution for using a pattern of bright intertwined DBs, also ***118** on handbags, which Vuitton argued created a confusingly similar look to their new line.[98] In evaluating the dilution claim, the court stated "[a]ssuming Vuitton can prove fame and distinctiveness[,] it must still offer evidence of actual dilution . . . [because s]imilarity in the marks--even a close similarity--will not suffice to establish per se evidence of actual dilution."[99] The court demanded evidence that the "mark has reduced the capacity of Vuitton's Multicolor mark to identify handbags and accessories manufactured by Vuitton."[100] Although the court did not suggest what such evidence might look like, it did note that "the mere fact that consumers mentally associate the junior user's mark with a famous mark is not sufficient to establish actionable dilution."[101] Because no actual evidence of dilution was shown, the court dismissed the dilution claim.[102] Louis Vuitton Malletier is but one example of many illustrating the difficulty of proving actual dilution.

Below are several federal court decisions which either hint at, apply, or provide a starting point for techniques aimed at how one may attempt to establish actual dilution.

A. Cases Applying and Discussing the Actual Dilution Standard of Proof

The court in Kellogg Co. v. Toucan Golf, Inc. recognized that "[d]ilution law, unlike traditional trademark infringement law, does not exist to protect the public. It is not based on a likelihood of confusion standard, but only exists to protect the quasi-property rights a holder has in maintaining the integrity and distinctiveness of his mark."[103] In this case, Kellogg, seeking to protect its intellectual property rights in the popular breakfast cereal "Froot Loops" and mascot "Toucan Sam," brought a trademark infringement and dilution action against Toucan Golf, Inc. (TGI) for its use of a toucan drawing on golf equipment.[104] The court ruled that "Kellogg ha[d] failed to present evidence that any segment of the population recognize[d] Toucan Sam as the spokesbird only for Froot Loops in lesser numbers than it did before TGI started using its toucan marks."[105] Accordingly, the court affirmed the district court's denial of Kellogg's dilution claims.[106]

***119** Kellogg is somewhat instructive in that it does suggest what the court would have liked to have seen for it to find dilution--namely survey evidence that some people recognize[d] Toucan Sam in lesser numbers than they did before any use of a Toucan logo by TGI.[107] However, this kind of proof requires a preliminary measure of consumer consensus that ceases to exist once the junior use begins. Therefore, an implicit assumption of such proof is the unrealistic requirement that plaintiffs should anticipate and plan for potential dilution claims through market surveys measuring consumer perceptions regularly, before any evidence of potential dilution surfaces.

In Starbucks Corp. v. Wolfe's Borough Coffee, Inc. (Starbucks I), the plaintiff brought an action seeking to enjoin the defendant from marketing coffee under the label "Mister Charbucks."[108] The court considered the plaintiff's survey evidence that indicated "31% of the consumers surveyed associated the term 'Charbucks' with Starbucks, and that 43% of consumers surveyed would have a negative impression of a coffee called 'Charbucks.'"[109] Recognizing that actual dilution does not have to be proved directly, the court ruled that "[t]he weight and significance of the survey data and [any] other evidence" is the province of the fact finder and allowed the dilution claim to withstand summary judgment.[110]

In Savin Corp. v. Savin Group, the plaintiff, Savin Corporation, was engaged in the business of marketing, selling, and distributing business equipment.[111] The defendants, The Savin Group, were New York based professional engineers, who had registered the internet domain name www.thesavingroup.com and www.savineengineers.com.[112] The plaintiff, who had previously and registered and operated www.savin.com, brought a dilution and infringement action against the Savin Group to enjoin the use of plaintiff's "Savin" name in defendant's domain names.[113] The court held that "where a plaintiff who owns a famous senior mark can show the commercial use of an identical junior mark, such a showing constitutes circumstantial evidence of the actual-dilution element of an FTDA claim."[114] The court stressed that for this "presumption of dilution to apply, the marks must be identical," reasoning that "[s]trictly enforcing the identity requirement comports well with the purposes of the FTDA . . . [as] the class of ***120** parties protected by the FTDA is narrow."[115] Here, the court said that the question of whether or not the two Savin marks were identical was a matter for remand.[116]

The Savin court, taking its cue from Moseley, provided another possible method by which a plaintiff could show actual dilution. Savin provided that use of an "identical" famous mark creates a presumption of actual dilution.[117] Despite making efforts to painstakingly justify narrowly interpreting the similarity requirement, stating "[i]t cannot be overstated, that for the presumption of dilution to apply, the marks must be identical,"[118] Savin broadly recognized that "[o]ftentimes, the issue of whether marks are identical will be context-specific and/or media-specific and factually intensive in nature."[119] The court implied that marks, which upon a first glance do not perfectly match, may nonetheless be identical for dilution purposes (i.e., marks that are spelled the same but appear different in their respective logos, are pronounced differently, or have descriptors added to the core term in website URLs may nonetheless still be "identical").[120]

If nothing else, the above cases illustrate the lack of clear guidance for courts in deciding dilution cases. Kellogg indicates that courts accept, at least theoretically, measurement of the senior mark's brand strength before and after the use of a junior allegedly diluting mark that indicates some loss in consumer perception and recognizability as evidence of dilution.[121]

While Kellogg provides some guidance on potential, but rather unlikely proof, Starbucks I may provide a more practical approach.[122] The survey evidence ***121** provided in Starbucks I showed both association and negative impact.[123] Specifically, the results indicated "31% of consumers associated 'Charbucks' with Starbucks" and "43% would have a negative impression of a coffee called 'Charbucks.'"[124] The court had before it evidence that 1) consumers associated Charbucks with Starbucks and 2) Charbucks was viewed negatively by consumers.[125] Although the evidence provided in Starbucks I was found not strong enough to merit summary judgment, the district court did find it sufficient to create an issue of fact.[126]

A judge or a jury would have to connect some dots to reach a finding of dilution given the Starbucks I survey evidence (i.e., that proof of a mental association between a senior and junior mark and negative impressions of the junior mark leads to an inference that the senior mark is similarly negatively affected).

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Diagram 2: Starbucks I Dilution by Deduction Possibilities

***122** A potential problem with viewing the statistics this way is that the consumers who identified an association between the two brands may not have been the same consumers that would have a negative impression of Charbucks coffee. It is at least theoretically possible that there is no overlap between the two groups;[127] for instance, devout Starbucks customers, who would never associate Starbucks with an imposter brand, could possibly be the only ones with negative impressions of the imposter brand. Of course, the more likely situation is somewhere between Scenario 1 and Scenario 4 (see Diagram 2), where at least some customers overlap, but the possibility that Scenario 1 may exist should cause concern. The more relevant statistic would seem to be, of those finding an association, how many had a negative impression of Charbucks, and further, whether such a negative impression of Charbucks coffee (the junior brand) would negatively affect consumer impressions of Starbucks (the senior brand) or weaken its capacity to identify its goods. Bad consumer impressions of Charbucks could mean only that customers would have reservations about the Charbucks coffee brand; it does not necessarily mean that any of the ill-will towards Charbucks would carry over to Starbucks--for this, questions designed to test the direction and extent of the negative impressions should have been included. Interestingly, the district court opinion did not report these relevant statistics and, after holding a bench trial, found the proffered evidence did not meet the actual dilution standard.[128] However, if the right dots were connected (namely a connection between the negative attitudes towards Charbucks and Starbucks), this type of evidence may have provided sufficient proof of dilution.[129]

On appeal, the Second Circuit remanded the case, ordering the district court to apply the TDRA retroactively and to lower the governing standard to a likelihood of dilution.[130] The Second Circuit expressed no opinion as to the sufficiency of the proof.[131] Worthy of note is that the appellate brief now contained the relevant statistic discussed above: "Of the respondents who mentioned 'Starbucks' as something that comes to mind upon hearing 'Charbucks,' 62% stated that they would have a negative impression of a coffee named 'Charbucks.'"[132] Since this statistic is best depicted by Scenario 3 and forecloses any Scenario 1 ***123** occurrence, it is a more reliable measure; yet it does not provide all the proof needed for a finding of dilution, as it still does not connect negative impressions of a coffee called Charbucks in any way to the senior mark Starbucks. In this way, Starbucks I provides us with an interesting yet incomplete method of proving dilution since Starbucks I provided only two steps of a three step proof. Whether or not the full three step method would be treated as sufficient by the courts under actual dilution or even likelihood of dilution remains to be seen.

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Diagram 3: Actual Dilution by Deduction

Another interesting dilution case that considered survey evidence is Newport Pacific Corp. v. Moe's Southwest Grill, LLC.[133] In Moe's Southwest Grill, the plaintiff, Newport Pacific Corporation, operated a chain of restaurants under the name "Mo's."[134] Mo's had six restaurants on the Oregon coast that operated under its marks.[135] The restaurants were family-style with a coastal-style design theme.[136] Mo's was known for its clam chowder and was considered generally to be a seafood restaurant, although a few other types of dishes appeared on the menu.[137] Moe's Southwest Grill, on the other hand, was not known for serving ***124** seafood dishes and was known primarily for its self-service Mexican-style restaurants, which served burritos, tacos, quesadillas, and fajitas.[138]

Plaintiff's expert witness, Dr. Itamar Simonson, conducted a series of surveys to estimate the actual dilution of Mo's mark resulting from the entry of Moe's Southwest Grill.[139] Dr. Simonson telephoned 472 consumers from the Oregon area and asked if they had heard of Mo's, Sizzler, Arby's, Baja Fresh, McCormick & Schmick's, Olive Garden, and two control phantom names, Mary's and Gary's.[140] If the customers indicated that they had heard of Mo's, additional questions were asked of them.[141] He concluded that (1) approximately 61% of the surveyed customers had heard about Mo's, (2) 30% of the consumers in the target area came to associate Mo's with the type of food of Moe's (namely Mexican or Southwestern food), and (3) customers in the control areas were 16% more likely to identify Mo's as serving seafood.[142]

Dr. Simonson also conducted a likelihood of confusion survey in which he concluded that the rate of confusion between the two chains, Moe's and Mo's, was 14%; he reached this conclusion by detailing a hypothetical experience that he and a friend had at Moe's.[143] He explained the two dishes he and his friend ordered and asked the survey participants if they knew where the two had eaten.[144] If they answered "yes," follow-up questions were asked.[145] Interestingly, it seems that both surveys measured confusion.

The survey Dr. Simonson designed to test actual dilution seems to be nothing more than an alternate measure of confusion. It aimed to uncover the number of consumers that associated Mo's trade name with the type of food Moe's served. If people were wrongly associating Mo's with the type of food Moe's served, this would seem to evince that consumers were confused about the type of dishes Mo's actually served. Such evidence should provide greater evidence than is needed to establish dilution. One should have been able to illustrate that dilution was ***125** occurring, for instance, via survey evidence that would have tended to show that when Moe's entered the market, consumers in general could not identify the type of food Mo's served in the same numbers they used to, regardless of the type of food they later attributed to it. Suppose before Moe's market entry, 40% of customers correctly identified seafood when asked what type of food Mo's served, then after the entry of Moe's, only 15% of consumers made the same correct connection. It would not be necessary to show that consumers were confusing the type of food Moe's served with the type of food Mo's served. The plaintiff would have simply needed to demonstrate that since Moe's, a similarly named food chain, began operating, customers were having trouble identifying the characteristics of Mo's and that Mo's had lost some capacity to identify its goods.

The court did note some fundamental flaws with the Simonson studies.[146] One flaw was that the survey was conducted entirely by telephone, and when spoken, the words "Moe's" and "Mo's" are indistinguishable.[147] The court stated "a consumer indicating that he had heard of 'Mo's could have been referring to any of these businesses because there were not adequate follow-up questions to identify the specific restaurant the consumer knew."[148]

The court ultimately found that because Mo's was primarily used in Oregon, it could not meet the famousness requirement of the FTDA and that Mo's was not a household name.[149] However, on the infringement claim, the court found that the 14% confusion rate from Simonson's survey, even considering the inherent flaws, was enough to favor plaintiffs on the actual confusion prong of the likelihood of confusion analysis.[150]

Although it is impossible to know, because the court never reached the dilution claim, courts like Moe's Southwest Grill may be receptive to considering traditional confusion evidence as evidence of dilution. The argument can be made that since dilution may signal the precursor to infringement, a lower statistical value should be tolerated when confusion evidence is presented; Moe's Southwest Grill leaves the door open for this type of argument, especially when trying to establish proof under the lower likelihood of dilution standard.[151] In Adidas America, Inc. v. Kmart Corp., the plaintiff alleged that defendant diluted its distinctive "three-stripe" shoe design, the senior mark, by marketing, selling, and offering two-and four-striped imitations that were confusing similar to plaintiff's distinctive ***126** design.[152] The defendant argued that no evidence of actual dilution was shown, but the judge ruled that expert opinion evidence satisfied the proof requirement.[153] The court stated that the evidence was enough to establish dilution under both an actual dilution standard and a likelihood of dilution standard.[154] The expert opinion, written by Dr. Erich Joachimsthaler, concluded that presence of the two- and four-striped shoe varieties were

(1) reducing [plaintiff's] brand equity within the footwear market; (2) affecting the strength of the [senior] mark negatively in the minds of consumers; (3) eviscerating the perception of the [senior] mark as signifying quality and a premium product; and (4) impacting consumer loyalty associated with the [senior] mark.[155]

Although one section of Joachimsthaler's report did review consumer surveys that were conducted by experts in connection with other Adidas lawsuits (against Payless, Steve Madden, Fortune Dynamic, and Target) regarding confusingly similar versions of Adidas' three-stripe mark, this section of the report was ancillary to the main discussion, which reviewed the Adidas brand history, strategy, and market at length.[156] Further, no individualized consumer study was conducted to test for possible dilutive or confusion effects as a result specifically of the K-Mart brand shoe.[157] Interestingly, the court does not cite to Joachimsthaler's review of the confusion surveys. In fact, the four categories that the judge listed as probative in Adidas were sections of the report with no mention of consumer survey evidence at all (these areas were brand equity, consumer perception of mark strength and of product quality, and customer loyalty).[158]

Joachimsthaler's report began with a general case for the importance of brand identity,[159] and specifically the value of the Adidas brand.[160] He provided a history of the Adidas brand and discussed how Adidas built its brand and expanded ***127** globally.[161] He then talked specifically about the three-stripe design and what, in his expertise, it means to consumers.[162] He concluded that the three-stripe mark serves a dual purpose; first, it "enable[s] consumers to identify the [A]didas brand in various usage contexts" and second, "the Three Stripes symbol and the Superstar design are visual means by which consumers express allegiance to and identification with the values of the [A]didas brand."[163] He went on to discuss how Kmart's sale of similarly designed shoes harms the Adidas mark on a variety of "asset levels," which Joachimsthaler defined as (A) awareness,[164] (B) associations,[165] (C) perceived quality,[166] and (D) loyalty.[167]

In sum, the above cases suggest at least five judicially alluded to methods that a plaintiff may attempt in order to establish actual dilution: (1) conducting pre- and post-brand strength surveys,[168] (2) showing an association between the senior and junior marks, then showing negative consumer impressions or reactions of the junior mark's products or services, and then connecting those negative impressions to the senior mark's reputation or ability to distinguish its goods or services,[169] (3) showing a commercial use of a mark that is "identical" (broadly defined) to the famous mark,[170] (4) presenting traditional confusion evidence (possibly even at values that would be considered weak in the infringement context),[171] and (5) introducing non-survey expert opinions.[172]

***128** Courts overwhelmingly favor the third category of proof, identical marks, in finding dilution.[173] In fact, while language from federal cases make all of the above methods potentially successful methods for establishing actual dilution, many of them have not actually been given the imprimatur of the court by a successful plaintiff's verdict, the major exception, of course, being identity between the marks. Professor Robert Bird has observed that "post-Moseley trademark dilution plaintiffs may have difficulty showing dilution by a non-identical mark."[174] Bird conducted an empirical analysis of dilution cases that have been decided in federal courts since Moseley.[175] To generate an appropriate pool of cases from which to conduct his analysis, Bird searched all federal court decisions from March 2003 through March 2006 for cases citing Moseley.[176] He then culled the decisions to eliminate cases that provided only a negligible dilution discussion (for instance, where the court faced a preliminary question of famousness or merely instructed a lower court to apply Moseley).[177] He marked whether each case received an infringement-favorable or dilution-favorable result, which he defined as a decision which allowed plaintiffs to move closer to trial or a successful decision on the merits, whether it was a denial of an opponent's summary judgment motion or a remand to reconsider an initial dismissal by an appellate court.[178] His results indicated that out of forty-four cases, plaintiffs achieved a dilution-favorable result seventeen times, and out of these seventeen cases, thirteen occurred when the junior mark was identical or virtually identical to the senior mark.[179] Of the remaining four, only two relied on either consumer surveys or expert testimony.[180] Yet out of the twenty-seven plaintiffs receiving a dilution-unfavorable result, thirteen were ***129** criticized by the courts because the evidence they proffered merely established an association between the two marks and nothing more.[181] These results indicate that federal courts seemed to be unsure what to require in the way of survey evidence. Plaintiffs are also still experimenting with various survey techniques and trying to find methods that actually get at the dilution question (just as in Starbucks I and Moe's Southwest Grill). Such techniques have received continued academic attention.

B. Specific Survey Designs

Survey Methods	Description	Designed to Test
Exposure	One group is exposed to the junior mark, one is not; both groups are asked their impressions of the senior mark, and the results are compared.[182]	Blurring
Benchmark	Periodic surveys of brand impression are undertaken and previous studies are compared with studies after the launch of a junior mark.[183]	Blurring
Attribute Association	One group is exposed to the junior mark, one is not; both groups are asked to make associations with senior mark and both groups are compared.[184]	Tarnishment
Mark Quality	One group is exposed to the junior mark, one is not; both groups are asked to make assessment of the senior mark's quality and both groups are compared.[185]	Tarnishment
Response Latency	One group is exposed to the junior mark, one is not; the amount of time it takes for each group to recognize the senior mark is recorded and compared.[186]	Blurring
Product Association	Two groups are formed, one having knowledge of the junior mark, the other not having knowledge. Both groups are asked what product is associated with the senior mark.[187]	Blurring

Aided Recall	Participants are asked about what products come to mind when given a particular product category. Responses of participants who are aware of the junior mark are compared with those who do not.[188]	Blurring
Other Methods	Description	Designed to Test
Identity & Near Identity of the Marks	A junior identical mark carries a presumption that it will dilute a senior famous mark. Some courts have interpreted this "identity" presumption quite broadly.[189]	Blurring / Tarnishment
Confusion Evidence	Surveys designed to find confusion are presented. Because strong evidence in this category should suffice to find likelihood of confusion, a finding of 1-15% may serve as a precursor to dilution.[190]	Blurring
Non-Survey Expert Witness Analysis	Marketing and brand expert testimony. Examples of topics include discussion of 1) a reduction in brand equity; (2) weakening of the strength of the senior mark in the minds of consumers; (3) weakening of the perception that the senior mark stands for quality, and (4) impact of junior mark on consumer loyalty.[191]	Blurring / Tarnishment

***131 Table 1: Review of Dilution Survey and Other Proof Methods**

Although proof of actual dilution is difficult to obtain via survey evidence, several designs attempt to measure the existence of actual dilution among consumers.[192] The Exposure Study method sends one group of mock consumers advertisements of the junior user's brand for a period of time; another group acts as the control group and receives no information relating to the junior mark.[193] Then, both groups are asked what comes to mind when the senior brand is presented.[194]

Another group of surveys, termed Benchmark Surveys, would have seemingly satisfied the Kellogg court. Under this survey design, explored by Edwards and colleagues, the senior mark owner conducts two surveys--one before any potentially dilutive product or service has entered the market and one after such product or service has appeared.[195] The design limitations of benchmark surveys may prevent their effective use in courts. For instance, Edwards et al. noted potential measurement difficulty relating to the timing of the first benchmark and differing market conditions at the time of the surveys.[196] Theoretically, for such surveys to be useful, they must be conducted on a consistent and periodic basis.

Some survey designs distinguish between whether blurring or tarnishment is sought.[197] For example, the Solicitor General's brief in Moseley made two suggestions for testing tarnishment.[198] The first one is Attribute Association, where consumers are asked to name attributes they associate with a particular famous mark; the results of consumers who are aware of the junior mark are compared with those who are not.[199] "If . . . [there are] fewer positive attributes or ***132** more negative attributes than consumers who are not aware of the junior mark, an inference of dilution might be warranted."[200] The second method identified in the Moseley brief is Mark Quality, where consumers are asked about mark quality to determine whether those consumers who are aware of a junior mark give significantly different ratings than consumers who are not aware of the mark.[201]

Similarly, Morrin and Jacoby and Pullig, Simmons, and Netemeyer have tested surveys designed to capture blurring.[202] These surveys measure Response Latency in brand recognition.[203] Namely, these surveys seek to determine whether the existence of the junior mark causes a delay in the identification (or snap judgment) by the consumer of a senior mark, as measured in actual response time (i.e., does it take longer for a consumer to think of a particular product's attribute after being exposed to a junior mark).[204]

In Product Association Surveys, two groups of people, one in which the persons have been exposed to the junior mark and another of persons not so exposed, are asked to identify the products or goods put out under the senior mark.[205] If the results show a lower association of the mark with the goods or services or both put out under the mark's name within the group exposed to the junior mark, the results tend to indicate that the weakened capacity is due to the diluting affect of the junior mark.[206] This type of survey is similar to that used in Moe's Southwest Grill, except the survey in Moe's went even further by trying to establish that not only do (1) consumers now associate seafood with Mo's to a lesser extent, but that (2) they now associate Mo's with Mexican food.[207] While the second step may be necessary to show confusion between the two food providers, it is not necessary to establish dilution.

In Aided Recall, survey participants are guided towards the product category, but not given the name of the actual product, service, or mark of interest.[208] For instance, in unaided recall, survey questions are usually of the form, "Name all brands in product category X that you are familiar with."[209] In Aided Recall, a ***133** participant would be asked instead: "Which of the following brands in product category X are you familiar with?"[210] In one example of aided recall conducted by researchers, groups of respondents were asked to retrieve a brand's name after only being exposed to distinctive aspects of the brand.[211] The experimenters concluded measureable dilution had occurred.[212]

The above methods of proof gleaned from case analysis and survey procedures, while important considerations for any plaintiff preparing to mount an action in dilution, do not address the question of whether the courts' application of dilution law is leading to the results which Congress intended or whether dilution is serving any unique function at all--for that, another inquiry is needed.

VIII. Empirical Results

A. Analysis of Bird's Post-Moseley, Pre-TDRA Cases

When Congress adopted the original FTDA in 1995, it made clear that an action of dilution was to be distinct from infringement.[213] Congress emphasized that the "essence of dilution" was the protection of a famous mark in situations where consumer confusion was absent.[214] Commentators have noted that "[d]ilution laws are intended to address specific harms; they are not intended to serve as mere fallback protection for trademark owners unable to prove trademark infringement."[215] Bird's case survey provides a starting point for answering the question of whether or not courts are actually treating dilution as it was intended by Congress[216], alternatively as duplicative of infringement,[217] or merely as an additional ground on which to hold defendants liable once infringement is found.[218]

	Infringement Favorable Result	Dilution Favorable Result	Total	Percent
Type I	No	Yes	2	5%
Type II	No	No	19	43%
Type III	Yes	Yes	12	27%
Type IV	Yes	No	8	18%

* Three cases brought dilution claims without any claims of infringement (only 7%). All reached a dilution favorable result.[219]

*134 Table 2: Grouping of Bird's Forty-Four Post-Moseley Dilution Cases

Considering Bird's collection of forty-four dilution cases decided after Moseley but before the TDRA, (methods of selection discussed supra) thirty-one contained infringement and dilution claims that either fell or stood together.[220] Of the thirteen remaining cases, only five cases reached a dilution-favorable result in the absence of any finding of likelihood of confusion (in three of these cases, plaintiffs lodged a claim of dilution without alleging trademark infringement).[221] Ironically, dilution under an actual dilution standard, what many in the trademark community initially considered a weaker proof standard than infringement under Moseley, appears to be an even more stringent standard as applied by the federal courts.[222] In further support of this observation is the fact that, of the forty-one cases where both dilution and infringement claims were levied, courts reached an infringement-favorable result in twenty of those cases while reaching a dilution-favorable result in only fourteen.[223]

The two Type 1 cases constitute the few cases revealed where dilution acted as the sole basis for potential liability.[224] In Estate of Ellingtown v. Gibson Piano Ventures, Inc., although the court found a majority of the likelihood of confusion factors to weigh in favor of the defendants on the plaintiff's infringement claim, the ***135** court found blurring actionable.[225] The court found evidence of an "expert report describing how, as a result of defendants' use of the 'Ellington' mark, plaintiff ha[d] lost the ability to use its mark in connection with the 'crown jewel' of the Duke Ellington intellectual property rights--the piano," sufficient for trial.[226] Of Bird's forty-four cases, this is the only case not in the Internet domain context to come out favorably on dilution and not infringement. This could be the only post-Moseley case (not in the Internet domain name context) where dilution served in the way it was truly intended. The other case to find dilution without infringement was Savin.[227] The Savin court did not find that consumers would likely be confused between the source of Savin Corp.'s office supply equipment and Savin Group's engineering services.[228] Yet the court entertained plaintiff's dilution claim, noting that genuine issues of triable fact as to whether Savin as applied to office equipment was famous and whether or not plaintiff's and defendant's use of the mark were identical (which the court reasoned under Moseley would suffice as evidence of actual dilution).[229]

Of Bird's sample, 93% of the dilution claims were coupled with a trademark infringement claim.[230] Further, only a single case was brought that sounded solely in dilution law with no other related cause of actions coupled with it (i.e., a claim under the Anticybersquatting Consumer Protection Act (ACPA) (see Section B below) and only two cases of the entire sample of forty-one reached a dilution-favorable result without also reaching an infringement-favorable result when both claims were brought.[231]

B. Dilution and the ACPA

Interestingly, courts that have looked favorably upon dilution in the absence of claims of consumer confusion have focused primarily on issues arising in the Internet domain name context.[232] In this way, federal dilution law may be serving as a shortcut to bypass the ACPA. In order to bring a successful claim under the ACPA, a plaintiff alleging another's use of a famous mark in connection with an ***136** Internet domain name must establish (1) the junior user had a bad faith intent to profit, (2) the use occurred after the senior mark became famous, and (3) the use of the mark by the defendant is identical or confusingly similar to or dilutive of the famous mark.[233] The remedy under the ACPA is a forfeiture of the domain name or a transfer of the domain name to the senior mark holder.[234] Interestingly, the ACPA seems to provide the same remedy as dilution law, while requiring more elements to mount a successful claim.[235] Under the ACPA, plaintiffs still need to establish the famousness of the senior mark and either that the junior mark dilutes, is confusingly similar, or is identical to the senior mark, plus an additional bad faith requirement.[236] If the plaintiff can establish confusing similarity, he or she will likely succeed in an infringement suit.[237] Further, if it can be shown that the junior mark dilutes the senior mark, an injunction may be issued.[238] Dilution would seem, then, to provide an easier means for enjoining domain names similar to famous marks without the need of establishing the defendant's bad faith intent to profit. Plaintiffs are keen to this distinction, and many of the Internet cases brought as a garden variety dilution claim are claims that, if brought under the ACPA, would likely not have met the bad faith element.[239] One function of dilution law in practice, then, is to provide a work-around or end-run on the ACPA for famous marks for plaintiffs who wish to cancel a similar domain name but cannot prove a bad faith intent to profit on the part of the defendant. For instance, in Avlon Industries v. Robinson, the court found that the defendant's registration of fifteen domain names involving various permutations of plaintiff Avlon's "Keracare" mark constituted dilution of the mark.[240] The products being sold by the defendant were authentic retail products originating with the plaintiff, so neither a finding of likelihood of confusion with regard to their source or bad faith on the part of the defendant would be likely; however, summary judgment was granted on the dilution claims.[241] The plaintiff did not bring an action under the ACPA.

When dilution law is not being used to avoid the bad faith requirement in Internet domain name cases, it appears to just be duplicative of the ACPA. In ***137** Pinehurst v. Wick, Inc., for instance, the plaintiff was the holder of the trademark, "Pinehurst Resort and Country Club," which was used in connection with the furnishing of golf services.[242] The defendants, who were in the business of registering and selling domain names, registered the Internet domain names "Pinehurstresort.com" and "Pinehurstresorts.com."[243] The plaintiff sued the defendants for both dilution and cybersquatting under the FTDA and the ACPA, respectively.[244] The court stated that "[t]hrough Defendants' registration and use of their Pinehurst domain names[,] they have reduced Plaintiff's control over its unique association with its service marks[,] . . . which has reduced the selling power of Plaintiff's marks."[245] The court found violations of both the FTDA and the ACPA and entered summary judgment for the plaintiff on both counts.[246] In Nike, Inc. v. Circle Group Internet, Inc., the court found that the defendant's use of www.justdoit.net was confusingly similar to the plaintiff's popular "Just Do It" slogan that consumers had come to associate with Nike through extensive marketing efforts.[247] Infringement likely would not have been found on these facts because the defendant at no time provided goods or services in connection with the domain name--it was used only as a redirect to another of the defendant's websites.[248] The court entered summary judgment in favor of the plaintiff on the ACPA, however, and denied defendant's motion to dismiss on the dilution claims.[249]

C. Analysis of Post-Moseley, Post-Bird, Pre-TDRA Cases

Of Bird's cases, forty-three of forty-four--98% of the cases--coupled the dilution claim with either an infringement claim or a claim for cybersquatting under the ACPA.[250] Only two cases found dilution without finding infringement when both claims were brought.[251]

In an effort to expand on Bird's findings in the face of the 2006 Trademark Dilution Revision Act, the article includes a review of cases from April 2006 (Bird's analysis stopped in March 2006) to January 2007 using similar selection ***138** methods to those employed by Bird.[252] Dilution and infringement-favorable results were defined the same as in Bird's analysis. West's popular legal search database was used to locate cases in the relevant time period that contained the words "trademark dilution." Sixty-two cases were found; cases were culled to eliminate results in which the only claims addressed were state dilution claims, courts ruled on pre-trial motions with no or little analysis of the dilution claims, or the dilution analysis played either a negligible role or no role at all towards the actual decision. Cases where the plaintiff's mark did not meet the famousness threshold, although included in Appendix 1, were left out of the following analysis so comparisons to Bird's results could be made. The final sample contained seventeen cases (all case citations are provided in Appendix 1) that applied the 1995 FTDA and were not included in Bird's initial sample. In all seventeen cases, plaintiffs alleged both infringement and dilution at the district court level.

	Infringement Favorable Result	Dilution Favorable Result	Total	Percent
Type I	No	Yes	0	0%
Type II	No	No	3	17.5%
Type III	Yes	Yes	9	53%
Type IV	Yes	No	3	17.5%

* In two cases, although an infringement claim was also levied, the court only addressed the merits of the dilution claim. Both were dilution-favorable (12%).

Table 3: This Article's Extended Grouping of Post-Moseley Cases[253]

Consistent with Bird's results, the extended post-Moseley results indicate that courts are grabbing the sledge hammer instead of the scalpel. In twelve of seventeen cases--71% of the cases reviewed--the dilution claims either succeeded or failed together with claims of infringement. In Bird's survey, 70% of the dilution claims succeeded or failed with claims of infringement.[254] There were no Type 1 cases, meaning none of the cases resulted in dilution-favorable outcomes that reached an unfavorable infringement result. In Bird's survey, only 2 cases (5%) were Type 1.[255] Further, 64% of the cases that did achieve a dilution-favorable result rested on the fact that the marks involved were identical. Similarly, ***139** in the Bird survey, 76% of those dilution claims that reached a favorable decision were decided on the grounds that the marks in question were identical.[256]

Table 4 below combines all the actual dilution cases reviewed into one table. The combined results reveal that 71% of the dilution claims stood or fell with their dilution claim counterparts.[257] Only 12% of the cases found dilution when there was no infringement found (which ironically is the category of cases for which dilution law was most designed to protect). Of the dilution favorable cases, 71% were decided on the grounds that the marks were identical.

	Infringement Favorable Result	Dilution Favorable Result	Total	Percent
Type I	No	Yes	2	3.5%
Type II	No	No	22	36%
Type III	Yes	Yes	21	34%
Type IV	Yes	No	11	18%

* Three cases brought dilution claims without any claims of infringement; all reached a dilution-favorable result (5%).

**In two cases, although an infringement claim was also levied, the court only addressed the merits of the dilution claim. Both were dilution-favorable (3.5%).

Table 4: Combination of this Article's and Bird's Post-Moseley (Actual Dilution) Cases

The teachings from these cases advise that, in order to wage a successful dilution claim in federal court under the actual dilution standard, plaintiffs fare best when the contested marks are identical and their marks are ultra-famous. These teachings, while relevant, come from cases decided before the passage of the TDRA.

IX. Cases Applying the TDRA

Although it has only been several years since the passage of the TDRA, a sizeable amount of dilution cases have been decided under the new Act. This article also includes a generated pool of post-TDRA cases. Federal cases from October 6, 2006 (date the TDRA was signed into law) until January 1, 2008, where courts applied the TDRA likelihood of dilution standard, were reviewed.[258] The ***140** initial search revealed fifty-six cases, which were filtered to twenty-two using the same criteria reviewed above.

	Infringement Favorable Result	Dilution Favorable Result	Total	Percent
Type I	No	Yes	1	4.5%
Type II	No	No	7	32%
Type III	Yes	Yes	13	59%
Type IV	Yes	No	0	0%

*In one case, although an infringement claim was also levied, the court only addressed the merits of the dilution claim. The result was dilution favorable (4.5%).

Table 5: This Article's Post-TDRA Cases

Just as in the actual dilution cases, Type 1 cases appear to be infrequent under the likelihood of dilution standard; here there was only one such case. Further, dilution and infringement seem to still stand or fall together; this was true in an overwhelming 91% of the cases. What does bode well for plaintiffs under the likelihood of dilution standard is that plaintiffs received a dilution-favorable result in 68% of the cases, as opposed to 46% of the total actual dilution cases. According to these preliminary results, plaintiffs are approximately 22% better off under the new relaxed standard.

The one Type I case, Starbucks II (discussed supra), involved a remand by the appellate court instructing the district court to apply the likelihood of dilution standard, as opposed to the actual dilution standard it previously applied in Starbucks I.[259]

Suppose, for instance, that consumers are perfectly able to keep "Charbucks" and "Starbucks" distinct in their mind, although when consumers hear Charbucks, they think of Starbucks, and vice versa, and there is no evidence of confusion as to the source or affiliation of products. Let us further assume that due to the shoddy quality of Charbucks coffee and coffee products, consumers subconsciously demand less Starbucks because of its association to Charbucks. There is no evidence that can tie the lost sales directly to the introduction of the Charbucks brand since it can be argued that general market forces are the culprit (i.e., either there was a general decrease in coffee demanded by consumers around the same time Charbucks opened for business or there was a loss of sales through competitive forces). We know that, under an actual dilution standard, this is not ***141** enough.[260] But would evidence of negative consumer perception of Charbucks be enough to establish dilution of Starbucks under the TDRA? Would substantial loss of sales occurring with the entry of Charbucks into the market and proof that consumers have a negative association with products from Mr. Charbucks be enough to create an inference of dilution under a likelihood of dilution standard? It certainly would follow that negative consumer perception of Charbucks would damage the goodwill and brand reputation of Charbucks itself--but does that necessarily imply a weakening of the capacity of the Starbucks mark to identify and distinguish its goods and services? Would the answer to this turn on how strong the association was between the two brands? Or to what degree Charbucks coffee was determined to be of inferior or lesser quality than Starbucks coffee?

Starbucks III, which addressed the remand from the appellate court instructing the district court to apply the TDRA, may answer some of these questions.[261] The district court still did not find a likelihood of dilution under the TDRA between Mr. Charbucks and Starbucks.[262] Regarding tarnishment, the court considered the statistics presented above, but reasoned that the fact that 62% of those who associate Starbucks and Charbucks have negative impressions of Charbucks "says nothing, however, about the likelihood that those respondents' negative impressions of a coffee called 'Charbucks' would affect detrimentally their perception of Starbucks. It would be just as reasonable to conclude that their negative impressions of a hypothetical coffee named "Charbucks" were based on their strong allegiance to Starbucks."[263] The court sought stronger evidence that the negative impression of Charbucks would somehow affect Starbucks' reputation or capacity to identify and sell their products.[264] In other words, the provided statistic did not foreclose the possibility that those who had a negative impression of Charbucks would limit those perceptions to the Charbucks brand and not the Starbucks brand. Further, the court found it relevant that Starbucks was not able to prove that Charbucks was of shoddy quality.[265] The court stated that "the record lacks sufficient evidence of inferior quality to sustain Plaintiff's burden of demonstrating that the association of Defendant's mark with Plaintiff's is likely to harm the reputation of Plaintiff's marks."[266]

***142** On the blurring claim, the court determined that the marks were not similar enough to merit a finding of dilution.[267] The court stated that the

Defendant's marks appear on packaging very different from that used by Starbucks. There is no evidence that Defendant uses 'Charbucks' as a standalone term. Rather, it is used with 'Mr.' or 'Mister' on Defendant's distinctive packaging or in product lists. For these reasons, the marks at issue here are not substantially similar. This dissimilarity alone is sufficient to defeat Plaintiff's blurring claim.[268]

As long as we are not in a Scenario 1 situation[269] and some of the negative attitudes exhibited towards Charbucks are held by customers who actually mentally associate the two brands, then it is possible that Charbucks's negative attributes are beginning to spill over to Starbucks and some sort of subliminal dilution is occurring.

This raises the point as to whether association and consumers' negative impressions together are enough, assuming significant strength, to show dilution under the TDRA, which indicates only that there must be some "impair [ment] of the distinctiveness of the famous mark."[270] It is at least possible that courts will find mere association "plus" negative impression creates a presumption of impairment under the TDRA (although this did not satisfy the Starbucks III court). However, it is more likely that courts will require an additional link (just as Starbucks III suggested) connecting the bad impressions of the junior brand to some cognizable affect on the senior brand's reputation or capacity to identify since such proof may be above and beyond what the new statutory factors require the court to review. However, further cases are needed to flesh out these exact boundaries with regard to proof under the TDRA.

At least one court has hinted in dicta that mere witness conjecture may be enough to meet the likelihood of dilution test.[271] Yet, it is also important to keep in mind that even though the standard has been lowered, establishing evidentiary sufficiency, even under the likelihood standard, is essential to succeed on a dilution claim. In Autozone, Inc. v. Strick, the court was faced with infringement and dilution claims levied by AutoZone, an operator of quick-oil-change businesses, against Strick, a competitor using the names "Oil Zone" and "Wash Zone" for its ***143** goods and services.[272] The court held that plaintiff failed to show that confusion or dilution existed between plaintiff's "AutoZone" mark and defendant's "Oil Zone" and

"Wash Zone" marks.[273] The court recognized the change in the dilution standard, stating that the FTDA now makes clear that a "plaintiff can have a successful dilution claim regardless of whether it can show actual or likely confusion."[274] However, the court noted that the plaintiff still bears the burden of showing "at least a likelihood of dilution" and that, even with a change of the law favoring plaintiffs, AutoZone did not met its burden because it provided no evidence that had any bearing on the dilution question.[275]

A. "Identity" as a Buzzword under the TDRA

As the statutory text reminds, "'dilution by blurring' is association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark."[276] The TDRA itself does not require that the marks in question be identical or near identical.[277] In fact, it makes clear that the marks need not be identical by urging that "[t]he degree of similarity between the mark or trade name and the famous mark[] is one factor of several for establishing dilution."[278] Despite this wording, courts often use strong language in asserting a preference for near identity between the marks.[279] This appears to be the courts using "identity" as a term of art, however, and not identity under its literal dictionary definition. For instance, in Jada Toys Inc. v. Mattel, Inc., the court stated that "the mark used by the alleged diluter must be identical, or nearly identical, to the protected mark."[280] Yet the court found that "Hot Rigz" diluted the "Hot Wheels" mark, two clearly non-identical terms.[281] Courts, then, appear to be using identity as a buzzword for degree of similarity.

*144 B. Degree of Similarity as an Indicator for How Much Additional Proof Needed under TDRA Claims

The degree of similarity of the marks is a crucial factor and does dictate how much additional proof a court will require--the less identical two marks are, the more evidence a court wishes to see before finding dilution.[282] In Jada Toys, the court considered evidence from two surveys.[283] In the first survey, participants were exposed to "Hot Rigz" and asked who they believe "puts out or makes" the toy with that name.[284] 28% indicated it was Mattel or a company with Mattel's permission.[285] In a second survey, respondents were shown a "Hot Rigz" package and asked who they thought put out the product.[286] 7% said Mattel or the same company that produced Hot Wheels.[287] The court found the surveys did more than associate one mark with another; they created the impression that Mattel either produced or allowed the production of "Hot Rigz."[288] The court found this evidence satisfied the likelihood of dilution standard, even though the marks were clearly not identical.[289] On the other hand, perfect identity of the marks often leads to a presumption of dilution; this is commonly seen in counterfeiting cases.[290]

Yet, the majority of dilution claims involve similar, but non-identical, marks being used in the same or related industry.[291] In Eldorado Stone, LLC v. Renaissance Stone, Inc., the plaintiff manufactured home and building facades.[292] Several Eldorado Stone employees defected from Eldorado and started a competing business called Renaissance Stone.[293] Defendants made products similar to the plaintiff's in style and name.[294] One design at issue was Renaissance's "Rustic Ledge Saratoga," which the plaintiff alleged diluted Eldorado's "Rustic Stone ***145** Belmont."[295] In upholding a jury verdict finding dilution, the court relied on expert testimony from a construction specialist who worked regularly with stone veneer products and had twenty-seven years of experience in masonry.[296] He testified that

I am advised that Renaissance Stone is offering a product called "Rustic Stone" and "Cliffledge." Over the years I have come to know and work with Eldorado's Rustic Ledge and Cliffstone products, I believe that when ordering products, an architect or builder could easily be confused by the names selected by Renaissance Stone. "Rustic" is not a color or a type of stone, rather it is a term that, in the stone veneer industry, I immediately associate with Eldorado's product.[297]

The court found regarding the expert testimony that "[s]uch evidence supports the jury's finding of a likelihood of dilution."[298]

C. A Paragon among TDRA Cases (Nike v. Nikepal)

Nike, Inc. v. Nikepal International, Inc. provides a textbook case of a straightforward application of the likelihood of dilution standard under the TDRA.[299] Nike sued the user of the mark "Nikepal.com," claiming their use of the word Nike in their mark Nikepal used in connection with medical supplies was likely to dilute the Nike mark.[300]

The court looked to Nike's advertising budget, sales, and notoriety as expressed via expert witnesses and periodicals about famous brands and found that Nike met the famousness requirement.[301] The court then reviewed the factors listed under the TDRA: (1) it found there was a high degree of similarity between the marks; (2) it used the traditional sliding scale to determine the degree of distinctiveness that inhered within the mark and found that, at the very least, the mark was suggestive and therefore inherently distinctive; (3) it found that Nike enjoyed "substantially exclusive use" of the mark (although there were several other third parties using the mark, the court reasoned "substantially exclusive" does not mean totally exclusive); (4) it found a high degree of recognition based on millions of Nike products being sold; (5) it found that there may have been nefarious intent on the part of the NikePal mark creator, in that he claimed to have ***146** flipped to a page in the dictionary and added pal to the word--the court did not find this testimony credible; and (6) the court found an actual association between the two marks based on Nike products being offered on some unused domain names NikePal had registered and on a survey that asked managers at labs (most responsible for ordering laboratory equipment) what, if anything, came to mind when they heard NikePal, 87% said Nike.[302] This formulaic approach of applying the provided TDRA statutory factors is noted in several recent cases applying the likelihood of dilution standard and appears to be the current trend for TDRA dilution analysis.[303]

Nike also may be a case that would have come out differently on an infringement analysis since here the channels of distribution differed, the sophistication of the consumers differed, the products differed, the marks were not actually identical, and the evidence did not show actual confusion. The court, however, did not reach the infringement claim.[304]

The survey evidence only served to establish a mental association between the two marks and did not ask any questions aimed at establishing diminished effectiveness of the mark to identify its goods.[305] It relied on the survey evidence to establish association and its inherent distinctiveness.[306] Nike then relied on customer notoriety, substantially exclusive use, and similarity of the marks to establish the additional "plus" needed to satisfy the new dilution statute.[307]

D. Likelihood of Dilution under the TDRA is an Association "Plus" Standard

As was seen in the actual dilution cases, confusion over what is required to prove a certain standard leads to confusion among litigants, lawyers, and judges. For non-identical marks, the bar was set higher than most plaintiffs could meet and, in many cases, these were the same plaintiffs who the drafters of the original FTDA intended to embrace.

None of the factors listed under the TDRA require a probing review into harm or potential harm. Rather, the factors look to similarity of the marks themselves and use of the marks in order to presume harm. Not a single prong suggests a review of elaborate empirical evidence or consumer surveys seeking to find diminution of brand value. At most, Factor 6 suggests a consumer survey inquiring ***147** into general association between the marks.[308] The factors merely look to readily ascertainable features of the marks. The TDRA looks to the (1) similarity of the marks, (2) degree of distinctiveness of the famous mark, (3) extent to which the famous mark holder exclusively uses the mark, (4) degree recognition of the famous mark, (5) junior mark user's intent in using the mark, and (6) actual association between the marks.[309]

Although not directly flowing from the text of the TDRA, cases decided under the statute on the whole seem to suggest an association plus test.[310] In other words, successful plaintiffs must first clearly establish a mental association between their senior mark and the junior mark. Once such association is established, a "plus" factor is then needed. There appears to be a variety of ways to establish such a plus factor. For instance, it may come from a presumption after weighing the listed factors under the TDRA as in Nikepal,[311] testimony of some product confusion as in Eldorado Stone,[312] weak survey evidence showing that 7% of consumers are confused as to a products source as in Jada Toys,[313] or complete identity of the marks as in Diane Von Furstenberg Studio.[314]

Association can be established in a variety of ways, such as consumer surveys empirically measuring association.[315] Association can also often be presumed from the closeness of the marks.[316] The closer to identical the marks are, the less need there is for additional evidence.[317]

***148 X. Common Categories and General Trends among Dilution Cases**

The TDRA sample of cases revealed that, under the likelihood standard, courts presumed dilution due to identity of the marks in only 13% of the cases.[318] Courts were also about 20% more willing to dismiss for failure to meet the famousness requirement.[319] Under the actual dilution standard, courts dismissed for failure to meet famousness about 37% of the time, and

67% of the trademark-favorable results were due to a finding of identical marks.[320] The 54% decrease in finding dilution based on identity of the marks between the two standards could indicate that courts are taking advantage of the likelihood of dilution standard's leniency. Also, courts are willing to consider other probative factors at higher rates--factors that courts were not previously receptive to when Moseley was the law.[321] Rather than considering circumstantial evidence of harm, courts under Moseley often preferred to stretch the definition of "identical" to find similar marks "identical" to fit within the Moseley blueprint.[322] Under the TDRA, this approach is not needed to meet the statutory language.[323]

Marks	Industry	Actual Dilution Success (n=58)	Likelihood Dilution Success (n=22)	Sig*	Total Cases
Identical	Same/Similar	64%	81%	N	36 (34+2)
Counterfeiting		86%	-	-	9
Expired Distribution Agreement, Unauthorized Redistribution/Repacking		86%	80%	N	12
Fair Use (Nominative/Metatag, Parody), First Sale/Refurbish		36%	100%	N	14
Identical	Different	67%	-	-	7
Similar	Same/Similar	8%	75%	Y	17
Similar	Different	0%	33%	N	10
Misc Categories					
Trade Dress Dilution	67%	67%	N	9	
Cybersquatting	-	-	-	1	

*Change in percentage statistically significant at a 99% confidence level

***149 Table 6: Dilution Claims Common Categories and Favorable Verdict Rates under Actual Dilution and Likelihood of Dilution Standards of Proof**

In reviewing the cases outlined in Appendix 1 and Appendix 2, common trends in the types of dilution claims brought are noticeable. Dilution claims typically came in one of about six different varieties: (1) identical marks used in same or similar industry (counterfeiting, unauthorized distribution, repackaging, or normative fair use), (2) identical marks used in a different industry, (3) similar marks used in the same or a similar industry, (4) similar marks used in a different industry, (5) trade dress dilution, and (6) cybersquatting.

Because the final sample included only twenty-two cases decided under the likelihood of dilution standard, many of the categories displayed in Table 6 under the likelihood of dilution standard did not contain enough cases to calculate meaningful percentages or draw statistically significant comparisons. They did, however, reveal some preliminary trends that can be verified as more cases are decided under the newer standard.[324] Cases under the actual dilution standard produced a more systematic distribution; all categories included six to thirteen cases, with the exception of cybersquatting. Percentages for any category that contained two or less cases were not included. The cybersquatting category only included one case; this case involved the registering of many variants of the plaintiff's mark and then immediately seeking to sell these websites.[325] Trade dress cases enjoyed a relatively high and unchanged success rate between the two standards. These cases usually involved plaintiffs challenging some design aspect ***150** of a competing product, such as the number of stripes in a particular shoe design,[326] the style of intertwined letters on handbags,[327] or stitching on the back pocket of blue jeans.[328] Identity between the marks is rarely an issue in trade dress cases; it is the degree of similarity between the designs that has always been the key factor.[329] Therefore, the change in proof standards between the TDRA and FTDA was not likely to drastically affect results in the trade dress category and appears, so far, not to have.

A. Category A: Identical Mark Used in a Similar Industry

Under both an actual dilution and likelihood of dilution standard, the cases in which plaintiffs fared best were cases where an identical mark was used in the same or a similar industry.[330] It is likely that the success rate is due mainly to the fact that, in many of these cases, dilution appeared to merely serve as additional support for a direct action in trademark infringement. In a series of cases brought by Lorillard Tobacco Co., the plaintiff levied dilution and infringement claims against activity by the defendants who appeared to be blatantly counterfeiting its "Newport" brand cigarettes.[331] Counterfeiting is an issue specifically addressed in the remedies for trademark infringement section of the Lanham Act,[332] and it has been a harm traditionally remedied under infringement and not dilution law.[333] Further, traditional breach of contract claims were often also backed with dilution and infringement claims whenever intellectual property was at issue.[334] At least some courts were keen to such attempts and did not seem particularly impressed with these types of claims (e.g., as one court ruled, "The Plaintiffs have attempted to morph a breach of contract case into one for trademark infringement. The Court, ***151** however, finds the Plaintiffs' attempt unavailing, and their claim for trademark infringement is hereby [dismissed].")[335]

Another popular breed of dilution cases in this category arose out of attempts by plaintiffs to control how a competitor or third party can refer to its brand. Often the competitor or third party was merely using the trademark to refer to the underlying product or service for purely descriptive purposes.[336] For example, State Farm Insurance sued a repair shop for dilution because it used the following phrase: "We Handle State Farm Claims, See Us First! Lifetime Warranty."[337]

B. Category B: Identical Mark Used in a Different Industry

When Frank Schecter, dilution law's founder, first explained his theory, its purpose was to stop improper consumer associations that resulted from unauthorized use of ultra-famous brands on new products or services.[338] In this way, the original conceptualization of dilution was designed to afford protection to the group of cases in the current category, identical marks in a different industry. Yet, out of all eighty-one cases surveyed between both standards listed in Table 6, this category contained only seven total cases-- the smallest out of any category on the table (aside from cybersquatting). Ironically, the category of cases dilution was actually designed to protect seems to be the least frequent beneficiary. The silver lining is that for plaintiffs who did bring such claims, they succeeded 67% of the time, which is the second highest dilution favorable rate for any category listed in Table 6.

C. Category C: Similar Mark Used in a Similar Industry

Category C may be where the real story is with regard to a change in the legal standard. In Category C cases, dilution-favorable results increased from 8% to 75%. This 67% increase was the only statistically significant percent change listed ***152** in Table 6.[339] Under an actual dilution standard, closely related but non-identical marks used in a related industry were difficult cases to prove for the reasons discussed above, particularly since plaintiffs often did not enjoy the Moseley identity presumption.[340] The early cases reveal that similarly-situated plaintiffs are faring better under a likelihood of dilution standard for these types of cases.[341]

D. Category D: Similar Mark Used in a Different Industry

The two categories where non-identical marks are at issue, Categories C and D, revealed extremely low dilution-favorable rates under an actual dilution standard. In fact, in zero of seven cases where similar marks were used in different industries did the courts find that dilution occurred. Such a finding may comport with the traditional concept of dilution law; using a similar mark in a different field was never intended to be actionable under dilution law.[342] Some examples of cases in this category include a suit by the owners of the mark "Autozone" in connection with automobiles and related equipment against the mark "Powerzone" used on electronics,[343] "Toucan Sam" used in connection with cereal against "Toucan Gold" used in connection with golf equipment,[344] and "Monster" used on audio-visual equipment versus "Monster Garage" used as a television show name where teams turn garage junk into working machines.[345]

Overall, the further the plaintiffs' fact patterns got from a fact pattern likely to support a trademark infringement result, namely identical marks used in a similar industry, the worse dilution plaintiffs fared. A switch from an actual to a likelihood standard of proof had the most effect on categories where non-identical but similar ***153** marks were at issue. When similar marks were used in a similar industry or even a completely different industry, plaintiffs had improved results under a likelihood standard.[346]

Looking at the entire sample of cases, plaintiffs achieved infringement-favorable results 56% of the time under a likelihood of confusion standard. Cases decided under an actual dilution achieved a dilution-favorable result for plaintiffs 41% of the time and under likelihood of dilution 65% of the time. The results show a trend that out of these three standards: actual dilution is the hardest standard for plaintiffs to prove, followed by likelihood of confusion and then likelihood of dilution (the least demanding on plaintiffs).

Finally, this article includes a frequency analysis over the past twelve years since Congress has made dilution actionable.[347] The results indicate that each year since the initial passage of the FTDA, there has been a steady increase in dilution cases addressed by the federal judiciary, with a peak of about 103 to 109 cases between 2000 and 2002. After Moseley, the numbers began to modestly decline, hitting a six-year low in 2004. The TDRA appears to have spurred up dilution claims again: in 2006 and 2007, more dilution claims have been filed than in any year since dilution has been made actionable by Congress. Any litigation deterrence effect as a result of Moseley's actual dilution standard seems to have been eviscerated.

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Diagram 4: Yearly Number of Federal Trademark Dilution Cases

*154 XI. Conclusion

From 1995 until 2002, dilution law developed under a hodge-podge of federal legal standards, some requiring a showing of actual harm, while others were satisfied with circumstantial factors. Then, in 2003, Moseley established "actual dilution" as the law of the land, but did not shed light on the type of evidence required to succeed under this standard.[348] Under Moseley, some courts embraced new survey techniques and expert testimony designed to capture dilutive effects; however, the majority of courts grew weary of these efforts and preferred to see a defendant's use of an identical or near-identical mark as the method of showing actual dilution, sticking closely to the text of Moseley.[349] Next, in 2006, the TDRA relaxed the standard of proof by setting out, in straightforward language, the elements required for both blurring and tarnishment actions (and explicitly recognizing each), and the Act cleared up confusion over the question of local fame.[350] This change provided apparent stability in a previously tumultuous legal landscape and resulted in a noticeable spike in dilution litigation.[351]

Federal courts, under all of the various dilution standards, have found it exceedingly difficult to keep the conceptual differences and legal functions of dilution and infringement distinct.[352] It is clear that sufficient evidence of confusion should, on its face, satisfy any question of whether or not dilution is occurring (assuming the preliminary requirements, i.e., fame and use in commerce, are met), but that confusion is not necessary for such a showing of dilution.[353] This is a distinction courts appear to have trouble making.[354] The conceptual muddying of confusion and dilution standards has contributed to the difficulty plaintiffs have experienced in providing sufficient proof to establish dilution.

Although courts prefer evidence of actual confusion, in the situations where there is no confusion evidence, courts have to be the most cautious when analyzing a dilution claim. In these situations, courts should employ scalpel analysis since these are the very cases where potential harm lurks that can mature into full-blown consumer confusion if dismissed prematurely. It is in these situations, where confusion evidence is non-existent or weak, that courts must sensitively look at other circumstantial factors for evidence of a weakened capacity to identify. There are many techniques that have been used in order to establish dilution, including a plethora of survey methods, expert testimony, similarity of the marks, and ***155** circumstantial factors evident in the marketplace.[355] Even though many of these approaches did not meet the rigid actual dilution requirement,[356] under the new likelihood of dilution standard, their previous failure may translate into newfound success and plaintiffs should not hesitate to re-test these methods under the new, relaxed TDRA standard.

Courts appear to be applying the new TDRA standard as basically an association-plus test, where there must be (1) a root association between the two marks and (2) some "additional plus" factor gleaned from some combination of the above techniques.[357] No evidence of harm must be demonstrated.[358]

Since the TDRA is a recent advancement in the law, further research is needed as new cases are decided to fully substantiate the claims raised herein. However, preliminary empirical results indicate that plaintiffs under the TDRA will fare better than before, especially when attacking non-identical but similar marks used in the same or similar industry, and overall that plaintiffs can expect more favorable treatment from courts under the new likelihood of dilution standard. Such results breathe new life into dilution law. By opening the door further to successful outcomes in connection with challenging similar marks in related fields, dilution law is expanding under the TDRA. Rather than merely serving as backup claims to primary infringement and ACPA actions, which appeared to be happening under actual dilution, with the TDRA, Congress may have finally designed dilution law to provide plaintiffs with an independent purpose.

***156 Appendix 1: Likelihood of Dilution Case Table (Split across pages)**

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TI Favorable Result	TD Favorable Result	Court Reasoning Addressing Dilution Claim	Category
Y	Y	Identical marks plus evidence of consumer confusion.	A3
No ruling[363]	Y	Plaintiff has pleaded successfully all the elements of a dilution claim, but on remand, plaintiff must show actual dilution.	M1
Y	Y	Questions of fact existed as to whether “actual dilution” was caused.	A3
Y	Y	Identical marks.	A1

	Case Name	Court Level	Claimed Established Mark	Allegedly Infringing Mark
5	Top Tobacco, L.P. v. North Atlantic Operating Co., Inc.[364]	Dist.	“Top” and Spinning Top Logo	“Fresh-Top Canister”
6	Nautilus Group, Inc. v. Icon Health & Fitness, Inc.[365]	Dist.	“Bowflex”	“CrossBow”
7	Fuel Clothing Co., Inc. v. Safari Shirt Co.[366]	Dist.	“Fuel”	“Fuel” and “Fuel: Surf Skate Moto”
8	Texas Tech University v. Spiegelberg[367]	Dist.	“Double T,” “Red Raiders,” “Masked Rider,” “Raider Red,” “Wreck ‘em Texas Tech,” and “Raiderland”	“Wreck ‘em Tech,” “Raiderland,” and “Raider Red”
9	Lorillard Tobacco Co. v. Yazan’s Service Plaza, Inc.[368]	Dist.	“Newport”	“Newport”

TI Favorable Result	TD Favorable Result	Court Reasoning Addressing Dilution Claim	Category
N	N	Failed to prove famousness.	X
Y[369]	N	No evidence of actual “confusion” was presented (the court specifically mentioned survey evidence).	C
Y	N	Failed to prove famousness and no evidence of actual dilution shown.	X
Y	Y	Identical marks.	A2

Y	Y	Identical marks.	A1

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TI Favorable Result	TD Favorable Result	Court Reasoning Addressing Dilution Claim	Category
Y	Y	Identical marks.	B
Y	Y	Identical marks.	A1
N	N	Plaintiff failed to show that defendant "used" the plaintiff's mark under the meaning of the Lanham Act.	A3
N	N	Failed to prove famousness.	X
Y	N	No actual dilution shown (no consumer surveys and mark not identical). The court did find that likelihood of dilution was shown.	C

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TI Favorable Result	TD Favorable Result	Court Reasoning Addressing Dilution Claim	Category
N	N	Repackaged products were genuine, no evidence they were linked to shoddy products or portrayed in an unwholesome context.	A2
Y	N	Survey evidence not sufficient. Plaintiff has not shown the defendant's use of a similar mark has "reduce[d] the capacity of [plaintiff's] mark to identify" clothing and other goods manufactured by plaintiff.	C
Y	N	Failed to prove famousness.	X
?[379]	Y	Eames designs acquired distinctiveness sufficient for an FTDA claim.[380]	M1

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TI Favorable Result	TD Favorable Result	Court Reasoning Addressing	Category

		Dilution Claim	
Y	Y	Sufficient actual dilution was shown to create an issue of fact. Expert opinion showed defendant's use (1) reduced brand equity within the footwear market; (2) affected the strength of the mark negatively in the minds of consumers; (3) eviscerated the perception of the mark as signifying quality and a premium product; and (4) impacted consumer loyalty associated with the mark.	M1
Y	Y	Identical marks.	A1
N	N	Plaintiff offered no indication that it is likely to prove actual dilution of its trademark.	C

Category breakdown for Bird's cases (cases correspond to the case numbers given in Bird's Table 1)

A: # 24

A1: # 23, 32, 33, 41, 42

A2: # 22, 25, 28, 34, 39

A3: # 6, 9, 11, 13, 14, 20, 36, 38

B: # 3, 5, 17, 31

C: 1, 2, 4, 8, 12, 15, 16, 21, 26, 44

D: 7, 10, 19, 27, 30, 37, 40

Misc (Trade Dress): 18, 29, 35

Misc (Cyber Squatting): 43

***167 KEY**

Category	Explanation
A	Identical Mark Used in Similar Industry
A1	Counterfeiting
A2	Unauthorized Distribution

A3	Fair Use
B	Identical Marks Used in a Different Industry
C	Similar Marks Used in a Similar Industry
D	Similar Marks Used in a Different Industry
M1	Tradedress Dilution
M2	Cybersquatting

X Symbol denotes a case excluded from the analysis because it did not meet the threshold famousness requirement.

***168 Appendix 2: Actual Dilution Case Table (Split across pages)**

	Case Name	Court Level	Claimed Established Mark	Allegedly Infringing Mark
1	Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC[384]	App.	"Louis Vuitton"	"Chewy Vuitton"
2	Starbucks II[385]	App.	"Starbucks"	"Mister Charbucks" or "Mr. Charbucks"
3	Adidas America, Inc. v. Payless Shoesource, Inc.[386]	Dist.	Three-stripe trademark and Superstar trade dress	Two- and four-stripe footwear
4	Componentone, L.L.C. v. Componentart, Inc.[387]	Dist.	"ComponentOne"	"Component-Art"

Infringement Favorable Result	Dilution Favorable Result	Dilution Reasoning	Category
N	N	The use of famous marks in parodies was found not to cause a loss of distinctiveness.	D
N	Y[388]	Case remanded for the district court to apply the proper standard under the TDRA.	C
Y	Y	Court found Adidas submitted sufficient evidence to create a genuine issue of material fact as to actual dilution under the FTDA. Therefore, Adidas had necessarily satisfied the lesser standard of likelihood of dilution under the TDRA.	M1
(unclear if claim was brought)	N	Failed to prove famousness.	X

	Case Name	Court Level	Claimed Established Mark	Allegedly Infringing Mark
5	Biosafe-One, Inc. v. Hawks[389]	Dist.	"biosafeone.com"	"newtech-bio.com"

6	State Farm Mutual Auto. Insurance Co. v. Sharon Woods Collision Center, Inc.[390]	Dist.	"State Farm" + Red Ink Trade Dress	"We Handle State Farm Claims, See Us First! Lifetime Warranty"
7	Grand Heritage Management, LLC v. Murphy[391]		"Grand Heritage Management"	"Grand Heritage," "GHRC," and use of "Grand Heritage" e-mail accounts.
8	S&L Vitamins, Inc. v. Australian Gold, Inc.[392] [#]	Dist.	"AG Tanning Lotion" products and marks	AG's Products using AG's Marks
9	World Triathlon Corp., Inc. v. Dawn Syndicated Productions[393]	Dist.	"Ironman," "Ironman Triathlon," and "Ironman Triathlon World Championship"	"Ironman" in connection with a dating reality show.

Infringement Favorable Result	Dilution Favorable Result	Dilution Reasoning	Category
N	N	Failed to prove famousness.	X
Y	Y	Issues of fact remain as to fair use both as a defense to infringement and as a protected use under the dilution statute.	A3
Y	Y	Dilution is actionable, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.	A2
Y	N	Failed to prove famousness.	X
N	N	Plaintiff failed to demonstrate that there was a likelihood that a consumer would form a different impression of plaintiff's products due to defendant's limited use of the word "Ironman."	B

	Case Name	Court Level	Claimed Established Mark	Allegedly Infringing Mark
10	Registrar Accreditation Board, Inc. v. Keneally[394]	Dist.	RAB accredited certificates	RAB accredited certificates
11	Nike Inc. v. Nikepal International, Inc.[395]	Dist.	"Nike"	"Nikepal"
12	Diane Von Furstenberg Studio v. Snyder[396]	Dist.	Diane Von Furstenberg Studio ("DVF") marks	Diane Von Furstenberg Studio ("DVF") Marks
13	Eldorado Stone, LLC v. Renaissance Stone, Inc.[397]	Dist.	"Cliffston," "Rustic Ledge," and other Eldorado marks	"Cliffledge," "Rustic Stone," and other marks similar to P's registered trademarks.
14	Verilux, Inc. v. Hahn[398]	Dist.	"Sunshine in a Box," "Sunshine Simulator," "Sunshine in a Lamp," and "Sunshine Lamp"	"Indoor Sunshine"

Infringement Favorable Result	Dilution Favorable Result	Dilution Reasoning	Category
Y	Y	Factual questions remain whether dilution of RAB's marks occurred	A2

		or was likely.	
(Court did not reach)	Y	Applied factors under the TDRA and found likelihood of dilution.	D
Y	Y	Identical marks.	A1
Y	Y	Eldorado presented sufficient evidence to show that Renaissance's conduct lessened the capacity of Eldorado's marks to identify and distinguish its products. Court relied on testimony of actual confusion from those with knowledge of the industry.	C
N	N	Failed to prove famousness.	X

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Infringement Favorable Result	Dilution Favorable Result	Dilution Reasoning	Category
N (mark generic)	N	Court found "Raaga" was not a distinctive mark; also Vista failed to demonstrate that its "Raaga" mark was well-known throughout the country.	A
Y	Y	Use of the mark on goods commonly associated with narcotics was likely to tarnish.	A1
N	N	Defendant's globe logo was found not likely to diminish the capacity of the Pan Am Globe logo to identify and distinguish goods and services.	M1
N	N	Failed to prove famousness, and no competent evidence of likelihood of dilution of the plaintiff's mark by reason of defendant's activities was presented.	X

	Case Name	Court Level	Claimed Established Mark	Allegedly Infringing Mark
19	Nacco Materials Handling Group, Inc. v. Lilly Co.[403]	Dist.	"Yale" (R) marks	"Yale" (R) marks
20	Dan-Foam A/S v. Brand Named Beds, LLC[404]	Dist.	"Tempur-Pedic"	"Tempur-Pedic"
21	Jarrito, Inc. v. Los Jarritos[405]	Dist.	"Jarritos"	"Los Jarritos"
22	Cosi, Inc. v. WK Holdings, LLC[406]	Dist.	"Cosi" and "Cosi Corners"	"Kozy's" and "Kozy's Corner"

23	Hamzik v. Zale Corp./Delaware[407]	Dist.	"The Dating Ring"	"Dating Ring" (in meta tags)
24	Google Inc. v. American Blind & Wallpaper[408]	Dist.	Sale through AdWords program. "American Blind," "American Blinds," and "Americanblinds.com"	"American Blind" and "American Blinds"

Infringement Favorable Result	Dilution Favorable Result	Dilution Reasoning	Category
N	N	Plaintiff has attempted to morph a breach of contract case into one for trademark infringement. The "Toyota" name was found not to be a junior mark, which would lessen the ability of Yale to identify its own goods. "Toyota" was found itself to be a separate famous mark.	A2
Y	Y	Identity of marks creates a presumption of actual dilution.	A2
N	N	Failed to prove famousness in the US.	X
[not ruled on]	N	Failed to prove famousness.	X
Y	?	Failed to prove famousness.	X
Y	N	Failed to prove famousness.	X

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Infringement Favorable Result	Dilution Favorable Result	Dilution Reasoning	Category
Y	Y	Defendant was found to have infringed on plaintiff's trademarks by producing blue jeans and Capri pants that were confusing similar to those produced by LS & Co. In sum, plaintiff showed defendant's use was likely to dilute.	M1
Y	Y	Unlike cases involving permissible parodies, this case involves products and services that are similar and are in competition; therefore, likelihood of dilution was established by plaintiff.	A3
Y	Y	Enough evidence of dilution presented.	A2
N	N	Failed to prove famousness.	X

N	N	Even with the law favoring the plaintiff, no evidence of likelihood of dilution was shown.	C
N	N	No reasonable jury could mentally associate the marks. In addition, the marks are not likely to dilute (applying the TDRA factors).	D

	Case Name	Court Level	Claimed Established Mark	Allegedly Infringing Mark
31	Software Publishers Ass'n v. Scott & Scott, LLP[415]	Dist.	"SIIA"	"thesiia.com," "siiaaudit.com," "siiaaudits.com," and "siiadefense.com."
32	Jada Toys Inc. v. Mattel, Inc.[416]	App.	"Hot Wheels"	"Hot Rigz"

Infringement Favorable Result	Dilution Favorable Result	Dilution Reasoning	Category
Y	Y	Plaintiff's complaint sufficiently pleads the requisite elements.	A3
Y	Y	A reasonable trier of fact could conclude that the survey evidence presented by plaintiff was sufficient to establish the existence of a likelihood of dilution. Court cites TDRA factors for dilution and famousness.	C

***181 KEY**

Category	Explanation
A	Identical Mark Used in Similar Industry
A1	Counterfeiting
A2	Unauthorized Distribution
A3	Fair Use
B	Identical Marks Used in a Different Industry
C	Similar Marks Used in a Similar Industry
D	Similar Marks Used in a Different Industry
M1	Trade Dress Dilution
M2	Cybersquatting

X Symbol denotes a case excluded from the analysis because it did not meet the threshold famousness requirement.

Footnotes

[a1] Justin Gunnell is an associate in the New York office of Latham & Watkins LLP. He received his J.D. from Cornell Law School and B.A. in Policy Analysis and Management with Honors from Cornell University.

[1] Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, §4, 109 Stat. 985 (codified as 15 U.S.C. §1127 (2000) (superseded in part by Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312 §2, 120 Stat. 1730 (codified as 15 U.S.C. §1125 (2006))); H.R. Rep. No. 104-374, at 2-3 (1995), as reprinted in 1996 U.S.C.C.A.N. 1029, 1029.

[2] H.R. Rep. No. 104-374, supra note 1, at 3.

[3] H.R. Rep. No. 104-374, supra note 1, at 3.

[4] See H.R. Rep. No. 104-374, supra note 1, at 3.

[5] H.R. Rep. No. 104-374, supra note 1, at 3 (citing Mortellito v. Nina of Cal., Inc., 335 F. Supp. 1288, 1296 (S.D.N.Y. 1972)).

[6] H.R. Rep. No. 104-374, supra note 1, at 3. Worthy of mention is the fact that specific brands had successful dual identities at the time the FTDA was passed. For example, Dove Chocolate and Dove Soap; Delta Air Lines and Delta Faucets; Parker Pens and Parker Games; Ford Models and Ford Motors; and Domino Pizza and Domino Sugar all existed in 1995.

[7] H.R. Rep. No. 104-374, supra note 1, at 3.

[8] H.R. Rep. No. 104-374, supra note 1, at 3.

[9] Rebecca Tushnet, Gone in Sixty Milliseconds: Trademark Law and Cognitive Science, 86 Tex. L. Rev. 507, 508 (2008).

[10] Id. at 512-17.

[11] Id. at 508.

[12] Id. at 514 (noting that "consumers transfer feelings about advertising, packaging, and trademarks to the product itself" and offering as examples studies that show "food tastes better to children when it's wrapped in a McDonald's wrapper" and that people who like Coke better in nonblinded taste tests reverse their preference in blind taste tests").

[13] Id. at 515 (citing Bruce F. Hall, A New Model for Measuring Advertising Effectiveness, J. Advertising Research, Mar.-Apr. 2002, at 23-24) (stating that "exposure to advertising can transform 'objective' sensory information, such as taste, in a consumer's memory prior to the judgment process, and after the consumer had tasted the product").

[14] Id. at 537.

[15] Tushnet, supra note 9, at 537.

[16] Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev., 170 F.3d 449, 461 (4th Cir. 1999).

[17] Nabisco, Inc. v. PF Brands, Inc., 191 F.3d 208, 224 (2d Cir. 1999).

[18] Moseley v. V Secret Catalogue, Inc., 537 U.S. 418 (2003), remanded to No. 3:98CV-395-S, 2008 WL 2152189 (W.D. Ky. May 21, 2008).

[19] Id. at 422.

[20] Id. at 423.

[21] Id. at 433.

[22] Id. (stating that injunctive relief is only warranted where another's use of a mark or trade name "'causes dilution of the distinctive quality' of the famous mark" (quoting 15 U.S.C. §1125(c)(1) (2006) (emphasis added))).

[23] Id. at 434.

[24] Although Moseley was not explicit on this point, lower federal courts have addressed the issue (post-1995 revision) and found that tarnishment and blurring were "breeds" of dilution under federal law. See, e.g., World Wrestling Fed'n Entm't, Inc. v. Bozell, 142 F. Supp. 2d 514, 529 (S.D.N.Y. 2001).

[25] Graeme B. Dinwoodie & Mark D. Janis, Dilution's (Still) Uncertain Future, 105 Mich. L. Rev. First Impressions 98, 99 (2006).

[26] Perkins Sch. for the Blind v. Maxi-Aids, Inc., 274 F. Supp. 2d 319, 325 (E.D.N.Y. 2003) (quoting N.Y. Stock Exch., Inc. v. N.Y., N.Y. Hotel, LLC, 293 F.3d 550, 557 (2d Cir. 2002)) (applying New York anti-dilution law).

[27] Hormel Foods Corp. v. Jim Henson Prods., Inc., 73 F.3d 497, 507 (2d Cir. 1996) (quoting Deere & Co. v. MTD Prods., Inc., 41 F.3d 39, 43 (2d Cir. 1994)).

[28] Id. at 506-07.

[29] Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 432 (2003).

[30] David W. Hill & Lynn M. Jordan, Dilution of Famous Marks in the U.S.: The Victoria's Secret Case and Its Progeny, Va. Intell. Prop. L. Newsline, Mar. 2004, at 1, 7, available at http:// www.vsb.org/sections/ip/00003785.PDF ("Rather than creating finality, the Moseley opinion has caused controversy, uncertainty, and confusion.").

[31] See, e.g., Lorillard Tobacco Co. v. Van Dyke Liquor Market, Inc., 471 F. Supp. 2d 822, 833 (E.D. Mich. 2007); Texas Tech Univ. v. Spiegelberg, 461 F. Supp. 2d 510, 523 (N.D. Tex. 2006); Lorillard Tobacco Co. v. Yazan's Service Plaza, Inc., No. 05-70804, 2006 WL 2990508, at *10 (E.D. Mich. Oct. 19, 2006); Gen. Motors Corp. v. Phat Cat Carts, Inc., 504 F. Supp. 2d 1278, 1286 (M.D. Fla. 2006); Lorillard Tobacco Co. v. Applewood Party Store, Inc., No. 05CV70913, 2006 WL 2925288, at *7 (E.D. Mich. Oct. 16, 2006); Ford Motor Co. v. Cross, 441 F. Supp. 2d 837, 850 (E.D. Mich. 2006).

[32] See, e.g., Van Dyke Liquor Market, 471 F. Supp. 2d at 833; Spiegelberg, 461 F. Supp. 2d at 523; Yazan's Service Plaza, 2006 WL 2990508, at *10; Phat Cat Carts, 504 F. Supp. 2d at 1286; Applewood Party Store, 2006 WL 2925288, at *7; Cross, 441 F. Supp. 2d at 850. Each of these cases cite Moseley for the proposition that direct evidence of dilution is unnecessary when the junior and senior marks are identical.

[33] See generally infra Part VII.

[34] H.R. Rep. No. 109-23, at 5 (2005), as reprinted in 2006 U.S.C.C.A.N. 1091, 1094.

[35] Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312 §2, 120 Stat. 1730 (codified as 15 U.S.C. §1125 (2006)).

[36] Id.

[37] Cf. 15 U.S.C. §1125(c)(1) (permitting injunctive relief where the use of a famous mark is "likely to cause dilution" rather than the "actual dilution" standard provided under Moseley).

[38] Trademark Dilution Revision Act of 2005: Hearing on H.R. 683 before the H. Subcomm. on Courts, the Internet, and Intellectual Property and the H. Comm. on the Judiciary, 109th Cong. 3 (2005) (statement of Anne Gundelfinger on behalf of the International Trademark Association).

[39] H.R. Rep. No. 109-23, supra note 34, at 5.

[40] Trademark Act of 1946 §43, 15 U.S.C. §1125(c)(1) (2006) (emphasis added).

[41] Cf. 15 U.S.C. §1125(c)(1).

[42] Cf. id. at §1125(c)(2)(A). Under this section, "a mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner." Id. (emphasis added). This legislatively overruled the Ninth Circuit's application of the FTDA to marks famous in only niche markets. Compare id., and Thane Int'l, Inc. v. Trek Bicycle Corp., 305 F.3d 894, 908 (9th Cir. 2002) (holding that "[t]he [FTDA] protects a mark only when a mark is famous within a niche market and the alleged diluter uses the mark within that niche.").

[43] Id. at §1125(c)(2)(B)-(C) (2006).

[44] Cf. id. (explicitly recognizing dilution by blurring and tarnishment, but omitting definition of dilution by diminishment). See generally Deere & Co. v. MTD Prods., Inc., 41 F.3d 39, 44 (2d Cir. 1994) (outlining what is sometimes referred to as dilution by "diminishment," where "sellers of commercial products...increase sales by poking fun at widely recognized marks of [competing or] noncompeting products."). Although the TDRA does not recognize any forms of dilution other than blurring and tarnishment, the actual harm put forward in Deere still seems convincingly to fit under the general harm of blurring. It may even be properly considered a special variant of blurring, but it appears to be blurring nonetheless. For if poking fun at another brand diminishes that brand's capacity to identify its mark, dilution has occurred regardless of the means used to dilute the mark. This special variant likely has unique features. For example, it may trigger First Amendment or parody defenses at disproportionate rates; therefore, grouping these types of claims may have analytical advantages, but as a practical matter, it may be best to consider it a variant of blurring--not a stand-alone theory of dilution.

[45] The use in commerce requirement is often strictly construed. See generally Crown Realty & Dev., Inc. v. Sandblom, No.

06-1442-PHX-JAT, 2007 WL 177842, at *2 (D. Ariz. Jan. 22, 2007) (finding that despite defendant offering to sell domain name and writing letters to newspapers proclaiming ownership, there was insufficient use in commerce to sustain a claim under the FTDA reasoning that "[a]lleging the Defendants could make money using the Crown name is very different from alleging they actually are using the name to make money").

46 15 U.S.C. §1125(c)(1).

47 Id. at §1125(c)(2)(B).

48 Id. at §1125(c)(2)(C).

49 Christine H. Farley, Why We Are Confused about the Trademark Dilution Law, 16 Fordham Intell. Prop. Media & Ent. L.J., 1175, 1187 (2006).

50 See, e.g., Nabisco, Inc. v. PF Brands, Inc., 191 F.3d 208, 221 (2d Cir. 1999); Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 464 F. Supp. 2d 495, 504 (E.D. Va. 2006).

51 Nabisco, 191 F.3d at 221. It may be that courts presume dilution where the consumers are confusing the junior mark with the senior mark; however the language the court uses here does not acknowledge any distinction and more readily describes a case of infringement not dilution.

52 Louis Vuitton, 464 F. Supp. 2d at 504 (emphasis added).

53 Edina Realty, No. Civ. 04-4371JRTFLN, 2006 WL 737064, at *4-6 (D. Minn. Mar. 20, 2006).

54 Id. at *7.

55 Id.

56 What the Edina Realty court could have possibly meant, but did not articulate, was that several instances of consumer confusion cannot meet the actual standard--not that establishing actual confusion itself could never meet the actual dilution standard.

57 Supra Part I.

58 Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 421-22 (2003).

59 Consumer confusion occurs when "consumers... believe that the products or services offered by the parties are affiliated in some way," Homeowners Group, Inc. v. Home Mktg. Specialists, Inc., 931 F.2d 1100, 1107 (6th Cir. 1991), or "when consumers make an incorrect mental association between the involved commercial products or their producers." Rosa Parks v. Laface Records, 329 F.3d 437, 446 (6th Cir. 2003) (quoting Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 966 (10th Cir. 1996)).

60 See Nabisco, Inc. v. PF Brands, Inc., 191 F.3d 208, 221 (2d Cir. 1999) ("When consumers confuse the junior mark with the senior, blurring has occurred."); Eldorado Stone, LLC v. Renaissance Stone, Inc., No. 04CV2562 JM(CAB), 2007 WL 2403572, at *5 (S.D. Cal. Aug. 20, 2007) (finding that confusion evidence--a witness who testified that he believed that defendant's products were the plaintiff's products--satisfied the likelihood of dilution standard); Levi Strauss v. Fox Hollow Apparel Group, LLC, No.

C-06-3765#SC, 2007 WL 1140648, at *6 (N.D. Cal. Apr. 17, 2007) (supporting a finding of likelihood of dilution with confusion evidence: "Defendants produced 'blue jeans and capri pants that are confusingly similar to those produced by LS & CO."') (emphasis added).

61 See, e.g., Nabisco, 191 F.3d at 221; Eldorado Stone, 2007 WL 2403572, at *5; Levi Strauss, 2007 WL 1140648, at *6.

62 Statement of Anne Gundelfinger, supra note 38, at 3.

63 It is assumed that proof of likelihood of confusion does not satisfy actual dilution nor vice versa. They are directly across from one another in Diagram 1, but this was done in an attempt to imply no relational association, not a reciprocal one.

64 Infinity Broad. Corp. v. Greater Boston Radio, II, Inc., No. 93-11161-WF, 1993 WL 343679, at *11 (D. Mass. Aug. 18, 1993) (holding that "[e]vidence of actual confusion is not invariably necessary to prove likelihood of confusion; [but]...'absent evidence of actual confusion...there is a strong presumption that there is little likelihood of confusion"' (quoting Pignons S.A. de Mecanique de Precision v. Polaroid Corp., 657 F.2d 482, 490 (1st Cir. 1981))); Marshall Leaffer, Sixty Years of the Lanham Act: The Decline and Demise of Monopoly Phobia, US Intellectual Property Law and Policy 85, 125 (Hugh Hansen ed., 2006) (sufficient "actual confusion constitutes strong [in some instances the strongest] evidence of likelihood of confusion."). Of course several instances of confusion do not suffice to establish sufficient or true actual confusion or likelihood of confusion. See Renaissance Greeting Cards, Inc. v. Dollar Tree Stores, Inc., 405 F. Supp. 2d 680, 698(E.D. Va. 2005), aff'd, 227 Fed. App'x 239 (4th Cir. 2007) ("[T]he company's failure to uncover more than a few instances of actual confusion creates a 'presumption against likelihood of confusion in the future."' (quoting Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 263 (5th Cir. 1980))). Since "actual confusion" never was, nor is, a legal standard under the Lanham Act, little scholarly and judicial attention has been given to defining its proper bounds. Instances of actual confusion are a factor to be considered in likelihood of dilution analysis. However "actual dilution," as used here, is a term of art and refers not to particular instances of actual confusion, but sufficient proof of consumer actual confusion.

65 "Because [Plaintiff] has proffered sufficient evidence to demonstrate actual dilution, it has necessarily satisfied the lesser standard of likelihood of dilution." Adidas-Am., Inc. v. Payless Shoesource, Inc.,546 F. Supp. 2d 1029, 1066 (D. Or. 2008).

66 See discussion of Eldorado Stone, Nabisco, and Levi Straus, supra. See also Horphag Research Ltd. v. Garcia, 475 F.3d 1029, 1037 (9th Cir. 2007) (holding that confusion evidence satisfies dilution claim: "Garcia has blurred the sharp connection between Horphag's product and the mark Pycnogenol. Horphag's employee Victor Ferrari testified that numerous consumers who contacted Horphag learned, after purchasing Garcia's product, that the product they purchased was not Horphag's Pycnogenol. He also received calls asking whether Garcia 'was selling a real Pycnogenol product.' This testimony represents evidence that Garcia's actions have lessened the ability of the mark Pycnogenol to uniquely identify Horphag's product.").

67 Assuming that actual confusion satisfies likelihood of confusion, supra note 64, and likelihood of confusion suffices to establish likelihood of dilution, supra note 66, it necessarily follows that actual dilution satisfies a likelihood of dilution standard. See also Jada Toys Inc. v. Mattel, Inc., 518 F.3d 628, 636 (9th Cir. 2008) (use of actual confusion evidence from consumer surveys used in reaching a finding of dilution).

68 15 U.S.C. §1114(1)(a) (2006) (establishing likelihood of confusion, mistake, or deception as the standard for proving infringement); 15 U.S.C. §1125(c)(1) (2006) (establishing that an owner of a famous mark is entitled to an injunction if likelihood of dilution exists regardless of the presence or absence of actual dilution).

69 4 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §24:67 (4th ed. 1996) ("An antidilution law is a potent legal tool, which must be carefully used as a scalpel, not a sledgehammer."). Although McCarthy seemingly uses this phrase to caution against using dilution law to chill broad categories of speech, this article uses it to refer generally to the sensitive analysis dilution claims require.

70 Brian T. Yeh, Congressional Research Service, Protecting Famous, Distinctive Marks: The Trademark Dilution Revision Act of 2006 9 (2006), available at http://ipmall.info/hosted_resources/crs/RL33393-061016.pdf. According to Yeh, "traditional trademark

infringement law prevents consumers from being misled and purchasing a product that is not what they expected; it also ensures that the owner of the trademark is not deprived of a sale. Dilution law is designed to preserve the capacity of a famous mark to identify and distinguish the goods or services to which it is attached." Id. (emphasis added); see supra Diagram 1 (depicting these cases as the "Scalpel Zone").

71 Gregory J. Battersby & Charles W. Grimes, Trademark & Copyright Disputes 6-249 (Aspen Publishers NY Supp. 2006).

72 See generally WAWA Dairy Farms v. Haaf, No. 96-4313, 1996 WL 460083, (E.D. Pa. Aug. 8, 1996), aff'd without opinion, 116 F.3d 471 (3d Cir. 1997).

73 See generally Hasbro, Inc. v. Internet Entm't Group, Ltd., No. C96-130WD, 1996 WL 84853 (W.D. Wash. Feb. 9, 1995) (finding that adult themed website, www.candyland.com, was tarnishing Hasboro's "Candyland" mark, which it had used for years to market a children's board game).

74 Basically this is "association plus," a standard which is discussed in greater detail, infra, Part IX.D.

75 See Nabisco, Inc. v. PF Brands, Inc., 191 F.3d 208 (2d Cir. 1999). Nabisco, Inc., in conjunction with Nickelodeon, released a product consisting of a variety of character themed cheese-flavored, bite-sized crackers to promote Nickelodeon's show entitled "CatDog"; one of the crackers was goldfish-shaped. Id. at 212-13. Pepperidge Farm, which owns the famous and distinctive "Goldfish" mark for the shape of its crackers, successfully enjoined Nabisco's use of the same by a dilution under a blurring theory. Id. at 213-22.

76 Id. at 222.

77 I.P. Lund Trading ApS v. Kohler Co., 163 F.3d 27, 49 (1st Cir. 1998).

78 WAWA Dairy Farms v. Haaf, No. 96-4313, 1996 WL 460083, at *4 (E.D. Pa. Aug. 8, 1996).

79 Id. at *3-4 (applying the six factor analysis described in Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., 875 F.2d 1026, 1035 (2d Cir. 1989)).

80 WAWA, 1996 WL 460083, at *3.

81 Id.

82 See supra Part IV.

83 I.P. Lund Trading, ApS v. Kohler Co., 163 F.3d 27, 49 (1st Cir. 1998) (stating that although the criticisms of the Sweet factors are "well taken," the district court's reliance on them to find a likelihood of dilution by blurring was "inappropriate" because some of the factors "such as predatory intent, similarity of products, sophistication of customers, and renown of the junior mark work directly contrary to the intent of [dilution] law").

84 Id. (quoting Robert N. Klieger, Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection, 58 U. Pitt. L. Rev. 789, 826 (1997)).

85 WAWA, 1996 WL 460083, at *3.

[86] Id.

[87] Id. at *3.

[88] Id. at *3-4. The proof here would likely not pass muster under Moseley's actual dilution standard; in spite of similarity between the marks and a mental association in consumers' minds, seemingly absent was any proof of any weakening in the capacity of Wawa to distinguish its goods or proof of actual harm. Furthermore, the marks were not identical.

[89] See, e.g., Eli Lilly & Co. v. Natural Answers, Inc., 233 F.3d 456, 468(7th Cir. 2000); Fed. Exp. Corp. v. Fed. Espresso, Inc., 201 F.3d 168, 176(2nd Cir. 2000); Nabisco, Inc. v. PF Brands, Inc., 191 F.3d 208, 216(2nd Cir. 1999); Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc., 875 F.2d 1026, 1035 (2nd Cir. 1989).

[90] Caroline G. Chicione et al., INTA Dilution and Well-Known Marks Committee, U.S. State Dilution Laws 3 (Oct. 2004), available at http:// www.inta.org/membersonly/downloads/ref_state.pdf. "These states include Alaska, Arizona, Arkansas, Connecticut, Hawaii, Idaho, Illinois, Iowa, Kansas, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, Pennsylvania, South Carolina, Tennessee, Utah, Washington, West Virginia, and Wyoming." Id.

[91] See supra Diagram 1.

[92] Dan-Foam A/S v. Brand Named Beds, LLC, 500 F. Supp. 2d 296, 308 (S.D.N.Y. 2007) (stating that "the TDRA's relaxed likelihood of dilution standard applies only to pre-October 6, 2006 claims seeking prospective relief" and that "actual dilution under Moseley still applies when a pre-October 6, 2006 claimant seeks monetary relief").

[93] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

[94] Ty Inc. v. Softbelly's, Inc., 353 F.3d 528, 535 (7th Cir. 2003).

[95] Jessica C. Kaiser, Victor's Not so Little Secret: Trademark Dilution Is Difficult but Not Impossible to Prove Following Moseley v. V. Secret Catalogue, Inc., 80 Chi.-Kent L. Rev. 425, 448 (2005).

[96] Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 433 (2003) ("The mere fact that consumers mentally associate the junior user's mark with the famous mark is not sufficient to establish dilution.").

[97] Louis Vuitton Malletier v. Dooney & Bourke, Inc. 454 F.3d 108, 112 (2d Cir. 2006).

[98] Id. at 113.

[99] Id. at 119.

[100] Id.

[101] Id.

102 Id.

103 Kellogg Co. v. Toucan Golf, Inc., 337 F.3d 616, 628 (6th Cir. 2003).

104 Id. at 619-620.

105 Id. at 628.

106 Id. at 629.

107 Id. at 628.

108 Starbucks Corp. v. Wolfe's Borough Coffee, Inc. (Starbucks I), No. 01 Civ.5981LTSTHK, 2004 WL 2158120 (S.D.N.Y. Sept. 28, 2004), vacated, 477 F.3d 765 (2d Cir. 2007).

109 Id. at *8.

110 Id. at *8.

111 Savin Corp. v. Savin Group, 391 F.3d 439, 446 (2d Cir. 2004).

112 Id. at 446-47.

113 Id. at 447.

114 Id. at 451.

115 Id. at 453 (emphasis added).

116 Id. at 454.

117 Savin Corp. v. Savin Group, 391 F.3d 439, 453 (2d Cir. 2004).

118 Id. (emphasis added).

119 Id.

120 Id. Savin's approach is not shared by all courts; some have interpreted Moseley to mean that if identical marks are at issue, circumstantial rather than direct evidence can be used to prove actual dilution rather than having identity suffice in and of itself. Michael Lafeber & Kristen Haugen, ABA Intellectual Property Roundtable, The Dilution Dilemma--Litigating Dilution Claims and the Trademark Dilution Revision Act of 2005 §II.D (2005), available at http:// www.abanet.org/litigation/committees/intellectual/roundtables/1105_outline.pdf. This report identifies these cases as following the

Savin approach: Savin Corp. v. Savin Group, 391 F.3d 439 (2d Cir. 2004); Scott Fetzer Co. v. Gehring, 288 F. Supp. 2d 696 (E.D. Pa. 2003); Nike, Inc. v. Variety Wholesalers, Inc., 274 F. Supp. 2d 1352 (S.D. Ga. 2003), aff'd, 107 Fed. App'x 183 (11th Cir. 2004). Id. The report also identifies, in contrast, courts requiring further circumstantial evidence, even when identical marks are at issue: Lee Midleton Original Dolls, Inc. v. Seymour Mann, Inc., 299 F. Supp. 2d 892 (E.D. Wis. 2004); and Nike, Inc. v. Circle Circle Group Internet, Inc., 318 F. Supp. 2d 688 (N.D. Ill. 2004).

121 But, how long after? And how or if one must show some identifiable causal connection between the market introduction of the junior mark followed by some loss of distinctive capacity in the senior mark--rather then just a correlative effect--are questions the court does not answer.

122 Starbucks I, No. 01 Civ.5981LTSTHK, 2004 WL 2158120 (S.D.N.Y. Sept. 28, 2004), vacated, 477 F.3d 765 (2d Cir. 2007).

123 Id. at *5-6.

124 Id. at *8.

125 See infra Diagram 3.

126 Starbucks I, 2004 WL 2158120, at *6.

127 See supra Diagram 2, Scenario 1.

128 Starbucks I, 2004 WL 2158120, at *8.

129 Id. at *8.

130 Starbucks Corp. v. Wolfe's Borough Coffee, Inc. (Starbucks II), 477 F.3d 765, 766 (2d Cir. 2007).

131 See id.

132 Proof Brief for Plaintiffs at 20, Starbucks II, 477 F.3d 765 (No. 06-0435). It is unknown whether this was the same brief supplied at the district court level. Starbucks III refers to this statistic as "newly-calculated," further supporting the notion that this statistic was an afterthought that was not provided in Starbucks I. Starbucks Corp. v. Wolfe's Borough Coffee, Inc. (Starbucks III), 559 F. Supp. 2d 472, 480 (S.D.N.Y. 2008).

133 Newport Pac. Corp. v. Moe's Sw. Grill, LLC, No. 05-995-KL, 2006 WL 2811905 (D. Or. Sept. 28, 2006).

134 Id. at *1.

135 Id.

136 Id.

137 Id.

138 Id. at *2.

139 Newport Pac. Corp. v. Moe's Sw. Grill, LLC, No. 05-995-KL, 2006 WL 2811905, at *4 (D. Or. Sept. 28, 2006).

140 Id.

141 Id.

142 Id.

143 Id.

144 Id. Those surveyed were presented with the following scenario and question: "We ate at [MOE's/MIKE's], which is part of a chain. I ordered tacos with beans, tofu, shredded cheese, salsa, and lettuce. A friend came with me to [MOE's/MIKE's] and ordered a salad that included lettuce, beans, cucumbers, salsa, shredded cheese, black olives, and grilled chicken. My question is whether or not you have heard or know about the [MOE's/MIKE's] chain where that person ate?" Id.

145 Newport Pac. Corp. v. Moe's Sw. Grill, LLC, No. 05-995-KL, 2006 WL 2811905, at *4 (D. Or. Sept. 28, 2006).

146 Id. at *5.

147 Id.

148 Id.

149 Id. at *11.

150 Id. at *14.

151 See infra Part IX.A.

152 Adidas Am., Inc. v. Kmart Corp., No. CV05-120-ST, 2006 WL 2044857, at *1 (D. Or. June 15, 2006).

153 Id. at *12.

154 Id.

155 Id. (citing Expert Report of Dr. Erich Joachimsthaler In Opposition to Defendants' Motion for Summary Judgment and In Support of Plaintiffs' Motion for Partial Summary Judgment at 65, 70, 72, 80, 89-93, Adidas, 2006 WL 1461275 (No. CV05-120-ST)).

[156] Id. at *38.

[157] Id.

[158] Adidas Am., Inc. v. Kmart Corp., No. CV05-120-ST, 2006 WL 2044857, at *12 (D. Or. June 15, 2006).

[159] Expert Report, supra note 155, at 6 ("A strong corporate brand can add between 5 and 7 percent to a company's stock price ....").

[160] Expert Report, supra note 155, at 7 ("In the 2005 BusinessWeek survey, a number of apparel and footwear brands were represented in the top 100, including Nike (number 30 with a brand value of $10.11 billion), Gap (number 40, $8.19 billion), and Levi's (number 96, $2.65 billion). Adidas made this list, ranking 71st with a brand value of $4.03 billion.").

[161] Expert Report, supra note 155, at 19-21.

[162] Expert Report, supra note 155, at 19-21.

[163] Expert Report, supra note 155, at 19-21.

[164] Expert Report, supra note 155, at 25 ("Kmart is attempting to exploit this confusion to trade on Adidas' brand awareness in order to build sales of its own shoes.").

[165] Expert Report, supra note 155, at 30 ("[A]didas' unique set of associations, a considerable source of its brand strength, will be negatively affected by these attempts of Kmart to replicate its design....").

[166] Expert Report, supra note 155, at 34 ("The possibility of confusion between the Kmart shoes and the Adidas models combined with the Kmart shoes' significantly lower price point...will damage consumer perceptions of [A]didas as a source of premium quality footwear.").

[167] Expert Report, supra note 155, at 35 ("Adidas will lose a repeat purchase opportunity when customers are confused as to the source of the Kmart product and either purchase the Kmart item instead because they are unable to differentiate between the two brands, or elect not to purchase Adidas shoes the next time they are in the market because of negative perceptions that develop as a result of this confusion.").

[168] See Kellogg v. Toucan Golf, 337 F.3d 616, 628 (6th Cir. 2003).

[169] See Starbucks I, No. 01 Civ.5981LTSTHK, 2005 WL 3527126, at *29 (S.D.N.Y. Dec. 23, 2005)

[170] See Savin Corp. v. Savin Group, 391 F.3d 439, 452 (2nd Cir. 2004). Some courts have discussed whether the identity requirement alone is sufficient to constitute dilution or if a showing of identity or virtual identity entitles the Plaintiff to proffer further circumstantial evidence of dilution. See Nike, Inc. v. Circle Group Internet, Inc., 318 F. Supp. 2d 688, 695 (N.D. Ill. 2004).

[171] See Newport Pac. Corp. v. Moe's Sw. Grill, LLC, No. 05-995-KL, 2006 WL 2811905, at *5 (D. Or. Sept. 28, 2006). In Moe's, customers were confused at a rate of 14%. Id. at *16. Although there are no hard and fast rules, generally values at or lower than 10% are considered weak. See, e.g., 6 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §32:189 (4th ed. 1996) ("When the percentage results of a confusion survey dip below 10 percent, they can become evidence which will indicate that confusion is not likely.").

[172] See Adidas-Am. v. Payless Shoesource, Inc., 546 F. Supp. 2d 1029, 1065-66 (D. Or. 2008).

[173] See, e.g., Lorillard Tobacco Co. v. Van Dyke Liquor Market, Inc., 471 F. Supp. 2d 822, 833 (E.D. Mich. 2007); Texas Tech Univ. v. Spiegelberg, 461 F. Supp. 2d 510, 523 (N.D. Tex. 2006); Lorillard Tobacco Co. v. Yazan's Service Plaza, Inc., No. 05-70804, 2006 WL 2990508, at *10 (E.D. Mich. Oct. 19, 2006); Gen. Motors Corp. v. Phat Cat Carts, Inc., 504 F. Supp. 2d 1278, 1286 (M.D. Fla. 2006); Lorillard Tobacco Co. v. Applewood Party Store, Inc., No. 05CV70913, 2006 WL 2925288, at *7 (E.D. Mich. Oct. 16, 2006); Ford Motor Co. v. Cross, 441 F. Supp. 2d 837, 850 (E.D. Mich. 2006).

[174] Robert C. Bird, The Impact of the Moseley Decision on Trademark Dilution Law, May 17, 2006, at 8, http://ssrn.com/abstract =903003.

[175] Id. at 7.

[176] Id.

[177] Id.

[178] Id. at 7-8.

[179] Id. at 8, 18-21 tbl.1.

[180] Bird, supra note 174, at 8.

[181] Bird, supra note 174, at 8; see Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 433 ("Mere mental association between a junior user's mark and a famous mark is not enough to show dilution.").

[182] Bird, supra note 174, at 23.

[183] Kellogg v. Toucan Golf, 337 F.3d 616, 628 (6th Cir. 2003); G. Kip Edwards, et al., Proof of Dilution in the United States, http:// wwwinta.org/membersonly/downloads/ref_proof.pdf.

[184] Starbucks I, No. 01 Civ.5981LTSTHK, 2005 WL 3527126, at *29 (S.D.N.Y. Dec. 23, 2005); Brief for the United States as Amicus Curiae Supporting Petitioners in Part at 22, Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 23 (2003) (No. 01-1015), available at http:// www.uspto.gov/go/com/sol/ambriefs/VSecret.pdf; Bird, supra note 174, at 23.

[185] Brief for the United States, supra note 184, at 19-23 (citing William G. Barber, How to Do a Trademark Dilution Survey (or Perhaps How Not to Do One), 89 Trademark Rep. 616, 630 (1999) for dilution survey techniques).

[186] Maureen Morrin & Jacob Jacoby, Trademark Dilution: Empirical Measures for an Elusive Concept, 19 J. Pub. Pol'y Marketing 265, 268-72 (2000); Chris Pullig et al., Brand Dilution: When Do New Brands Hurt Existing Brands?, 70 J. Marketing 52, 52-65 (2006).

187 Lafeber & Haugen, supra note 120, at §II.D (citing 4 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §24:94.2 (4th ed. 1996)).

188 Joel H. Steckel et al., Dilution through the Looking Glass: A Marketing Look at the Trademark Dilution Revision Act of 2005, 96 Trademark Rep. 616, 625 n.32, available at http://www.ams-inc.com/publications/reprints/dilution_article.pdf.

189 See supra note 170 and accompanying text.

190 See supra note 171 and accompanying text.

191 Adidas-Am. v. Payless Shoesource, Inc., 546 F. Supp. 2d 1029, 1065-66 (D. Or. 2008).

192 Bird, supra note 174, at 23.

193 Bird, supra note 174, at 23.

194 Bird, supra note 174, at 23.

195 Edwards, supra note 183.

196 Edwards, supra note 183.

197 Bird, supra note 174, at 12-14.

198 Brief for the United States, supra note 184.

199 Brief for the United States, supra note 184, at 23.

200 Bird, supra note 174, at 23.

201 Brief for the United States, supra note 184, at 22.

202 Morrin & Jacoby, supra note 186, at 268; Pullig, supra note 186, at 52.

203 Morrin & Jacoby, supra note 186, at 268; Pullig, supra note 186, at 54.

204 Morrin & Jacoby, supra note 186, at 268; Pullig, supra note 186, at 54.

205 Lafeber & Haugen, supra note 120, at §II.D.

206 Lafeber & Haugen, supra note 120, at §II.D.

207 Newport Pac. Corp. v. Moe's Sw. Grill, LLC, No. 05-995-KL, 2006 WL 2811905, at *4 (D. Or. Sept. 28, 2006).

[208] Darrell Blaine Lucas & Steuart H. Britt, Advertising Psychology and Research: An Introductory Book 88 (1950).

[209] Joel H. Steckel et al., Dilution through the Looking Glass: A Marketing Look at the Trademark Dilution Revision Act of 2005, 96 Trademark Rep. 616, 625 n.32, available at http://www.ams-inc.com/publications/reprints/dilution_article.pdf.

[210] Id.

[211] Tushnet, supra note 9, at 521-22.

[212] Tushnet, supra note 9, at 522.

[213] H.R. Rep. No. 104-374, at 4 (1995), as reprinted in 1996 U.S.C.C.A.N. 1029, 1030.

[214] FTDA House Report 1995, supra note 2, at 3.

[215] I.P. Lund Trading v. Kohler Co., 163 F.3d 27, 48 (1st Cir. 1998) (emphasis added).

[216] Bird, supra note 174, at 18-21; see infra Table 2.

[217] See Bell v. Starbucks U.S. Brands Corp., 389 F. Supp. 2d 766, 779 (S.D. Tex. 2005). The Bell court entered summary judgment on federal dilution claim based solely on evidence of confusion: "Defendants have produced evidence that a significant percentage of consumers surveyed believed that a beer called 'Starbock' or 'Star Bock' was put out by, affiliated or connected with, or approved or sponsored by [d]efendants. This evidence goes beyond a mere mental association. It shows that [p]laintiff's mark lessens [d]efendants' ability 'to identify and distinguish goods and services."' Id. Under this dilution standard, once a mark meets the famousness requirement, whenever infringement is found, it logically leads to the determination that dilution must follow.

[218] See, e.g., Lorillard Tobacco Co. v. Van Dyke Liquor Mkt., Inc., 471 F. Supp. 2d 822 (E.D. Mich. 2007) (finding dilution in sale of counterfeit Newport cigarettes); Chanel, Inc. v. French, No. 05-61838-CIV, 2006 WL 3826780 (S.D. Fla. Dec. 27, 2006) (finding dilution in sale of "knock-off" designer bags).

219 Note: Case 43 (Pinehurst v. Wick, 256 F. Supp. 2d 424 (M.D.N.C. 2003)) in Bird's Table 1 should read that no trademark infringement claim was brought in.

[220] Bird, supra note 174, at 18-21; see supra Table 2 Type II and Type III cases.

[221] Bird, supra note 174, at 18-21.

[222] See Paul Heald, Sunbeam Products, Inc. v. The West Bend Co.: Exposing the Malign Application of the Federal Dilution Statute to Product Configurations, 5 J. Intell. Prop. L. 415, 416-17 (1998) ("[A] suit for dilution is easier to prove than infringement because the troublesome factual question of consumer confusion is not relevant.").

[223] Bird, supra note 174, at 18-21.

[224] See supra Table 2.

[225] Estate of Ellingtown v. Gibson Piano Ventures, Inc., No. 103CV0804WTLDFH, 2005 WL 1661729, at *9 (S.D. Ind. Jun. 24, 2005).

[226] Id.

[227] Savin Corp. v. Savin Group, 391 F.3d 439 (2d Cir. 2004); see supra notes 111-120 and accompanying text.

[228] Savin, 391 F.3d at 462.

[229] Id. at 450.

[230] Bird, supra note 174, at 18-21.

[231] Bird, supra note 174, at 18-21.

[232] See supra Table 2.

[233] 15 U.S.C §1125(d)(1)(A) (2006).

[234] Id. at §1125(d)(1)(C), (d)(2)(D)(i).

[235] Id. at §1125(d)(2)(D).

[236] Id. at §1125(d)(1)(A).

[237] Cf. id. at §1125(d)(1)(A)(II).

[238] See id. at §1125(d)(1)(A)(ii)(II), (d)(1)(C), (d)(2)(D)(i) (calling for "forfeiture or cancellation of the domain name or the transfer of the domain name" to the holder of the senior mark for violations of the statute, including uses of marks that are identical, confusingly similar, or dilutive).

[239] See supra Part VII.A.

[240] Avlon Indus. v. Robinson, No. 01 C 3615, 2005 WL 331561, at *3 (N.D. Ill. Feb. 8, 2005).

[241] Id.

[242] Pinehurst v. Wick, Inc., 256 F. Supp. 2d 424, 425-26 (M.D.N.C. 2003).

243 Id. at 426.

244 Id. at 427.

245 Id. at 431.

246 Id. at 430, 432.

247 Nike, Inc. v. Circle Group Internet, Inc., 318 F. Supp. 2d 688, 689 (N.D. Ill. 2004).

248 Id. at 689-90.

249 Id. at 695.

250 Bird, supra note 174, at 18-21.

251 Bird, supra note 174, at 18-21.

252 All Federal Cases (Westlaw database identifier "ALLFEDS") were searched using the following search string: Trademark /s Dilution & ("Actual Dilution" "Economic Harm" "Moseley").

253 Table 3 represents cases decided using an "actual dilution" standard after Bird's initial analysis. These cases are post-Moseley, but pre-TDRA.

254 See supra Table 2.

255 See supra Table 2.

256 Bird, supra note 174, at 18-21.

257 See supra Table 4.

258 The search string used was: trademark /s dilution and ('likelihood of dilution' 'likely to cause dilution').

259 Starbucks II, 477 F.3d 765, 766 (2d Cir. 2007), remanded to Starbucks III, 559 F. Supp. 2d 472 (S.D.N.Y. 2008) (denying injunction and affirming its findings of fact and conclusions of law reached in No. 01 Civ. 5981, 2005 WL 3527126 (S.D.N.Y. Dec. 23, 2005)).

260 See Starbucks I, No. 01 Civ.5981LTSTHK, 2004 WL 2158120 (S.D.N.Y. Sept. 28, 2004).

261 Starbucks III, 559 F. Supp. 2d 472 (S.D.N.Y. 2008).

[262] Id. at 480.

[263] Id.

[264] Id.

[265] Id.

[266] Id.

[267] Starbucks III, 559 F. Supp. 2d 472, 477 (S.D.N.Y. 2008).

[268] Id.

[269] See supra Diagram 2.

[270] 15 U.S.C. §1125(c) (2006).

[271] Sanofi-Aventis, Inc. v. Advancis Pharm. Corp., 453 F. Supp. 2d 834, 854 (D. Del. 2006) ("In their post-trial briefing, plaintiffs contend that they demonstrated actual dilution through testimony by their brand strategy specialist, who testified that the ADVANCIS mark weakens associations made with AVENTIS, and testimony by an executive, who testified that ADVANCIS 'clutters the crispness' of plaintiffs' brand image.... The court concludes that the conjecture of these two witnesses demonstrates a likelihood of dilution, not actual dilution.") (emphasis added).

[272] Autozone, Inc. v. Strick, 466 F. Supp. 2d 1034, 1036-37 (N.D. Ill. 2006).

[273] Id. at 1044.

[274] Id. at 1045.

[275] Id.

[276] 15 U.S.C. §1125(c)(2)(B) (2006) (emphasis added).

[277] See id. §1125.

[278] Id.

[279] See, e.g., Jada Toys, Inc. v. Mattel, Inc., 518 F.3d 628 (9th Cir. 2008).

[280] Id. at 634 (quoting Thane Int'l, Inc. v. Trek Bicycle Corp., 305 F.3d 894, 905 (9th Cir. 2002)).

[281] Id. at 635-36.

[282] Id. at 636.

[283] Id.

[284] Id.

[285] Jada Toys, Inc. v. Mattel, Inc., 518 F.3d 628, 636 (9th Cir. 2008).

[286] Id.

[287] Id.

[288] Id.

[289] Id.

[290] See Dan-Foam A/S v. Brand Named Beds, LLC, 500 F. Supp. 2d 296, 323 (S.D.N.Y. 2007); Diane Von Furstenberg Studio v. Snyder, No. 1:06CV1356(JCC), 2007 WL 3143690, at *5 (E.D. Va. Oct. 23, 2007).

[291] See infra Table 6.

[292] Eldorado Stone, LLC v. Renaissance Stone, Inc., No. 04cv2562 JM(CAB), 2007 WL 460826, at *1 (S.D. Cal. Jan. 23, 2007).

[293] Id.

[294] Eldorado Stone, LLC v. Renaissance Stone, Inc., No. 04cv2562 JM(CAB), 2005 WL 5517732, at *4, *6 (S.D. Cal. May 31, 2005).

[295] Id.

[296] Id.

[297] Expert Report and Affidavit of Jamie Scholl at 1, Eldorado Stone LLC v. Renaissance Stone, Inc., 2007 WL 2403572 (S.D. Cal. Aug. 20, 2007) (No. 04CV2562 JM(CAB)).

[298] Eldorado Stone, 2007 WL 2403572, at *5.

[299] See Nike, Inc. v. Nikepal Int'l, Inc., No. 2:05-cv-1468-GEB-JFM, 2007 WL 2782030 (E.D. Cal. Sept. 7, 2007) (amended Sept. 17, 2008).

[300] Id. at *1.

[301] Id. at *5-6.

[302] Id. at *6-8.

[303] See, e.g., Starbucks III, 559 F. Supp. 2d 472 (S.D.N.Y. 2008); Tiffany (NJ) Inc. v. eBay, Inc., No. 04 Civ. 4607(RJS), 2008 WL 2755787 (S.D.N.Y. July 14, 2008).

[304] Nike, 2007 WL 2782030, at *8.

[305] Nike, Inc. v. Nikepal Int'l, Inc., No. 2:05-cv-1468-GEB-JFM, 2007 WL 2782030, at *4 (E.D. Cal. Sept. 7, 2007) (amended Sept. 17, 2008).

[306] Id.

[307] Id. at *8.

[308] Cf. Trademark Dilution Revision Act of 2006, 15 U.S.C. §1125(c)(2)(B)(vi).

[309] Id. §1125(c)(2)(B).

[310] See, e.g., Jada Toys, Inc. v. Mattel, Inc., 518 F.3d 628, 636 (9th Cir. 2008); Diane Von Furstenberg Studio v. Snyder, No. 1:06CV1356(JCC), 2007 WL 3143690, at *5 (E.D. Va. Oct. 23, 2007); Nike, Inc. v. Nikepal Int'l, Inc., No. 2:05-cv-1468-GEB-JFM, 2007 WL 2782030, at *6-8 (E.D. Cal. Sept. 7, 2007) (amended Sept. 17, 2008); Eldorado Stone LLC v. Renaissance Stone, Inc., No. 04CV2562 JM(CAB), 2007 WL 2403572, at *4 (S.D. Cal. Aug. 20, 2007).

[311] Nike, 2007 WL 2782030, at *6-8.

[312] Eldorado Stone, 2007 WL 2403572, at *4.

[313] Jada Toys, 518 F.3d at 636.

[314] Diane Von Furstenberg Studio, 2007 WL 3143690, at *5.

[315] See, e.g., Nike, 2007 WL 2782030, at *1.

[316] See, e.g., Diane Von Furstenberg Studio v. Snyder, No. 1:06CV1356(JCC), 2007 WL 3143690, at *4 (E.D. Va. Oct. 23, 2007).

[317] See, e.g., Levi Strauss & Co. v. Fox Hollow Apparel Group, LLC, No. C-06-3765#SC, 2007 WL 1140648, at *3 (N.D. Cal. Apr. 17, 2007).

[318] See infra Appendix 2.

[319] See infra Appendix 2.

[320] See infra Appendix 1.

[321] See infra Appendices 1, 2.

[322] See infra Appendix 1.

[323] See 15 U.S.C. §1125(c)(1) (2006).

[324] As a further caution, sorting the cases involved some close calls by the author; for instance, whether "foxwood" and "foxwoods" are "identical" or whether beer and coffee are similar in that they are both beverages or different because a consumer looking for their morning coffee is not likely to substitute beer. However, particular attention was given to staying consistent in the method of classification even when close calls arose. 0

[325] Technically, such a case could fit under either the "identical marks different industry" or the "similar marks different industry" category depending on the domain names registered. However, because the defendant's business is technically selling domain names, it seemed sufficiently more accurate to separate out these types of cases from the general pool.

[326] Adidas Am., Inc. v. Kmart Corp, No. CV-05-120-ST, 2006 WL 2044857, at *12 (D. Or. June 15, 2006).

[327] Louis Vuitton Malletier S.A. v. Dooney & Bourke, Inc., 454 F.3d 108 (2d Cir. 2006).

[328] Levi Strauss & Co. v. Fox Hollow Apparel Group, LLC, No. C-06-3765#SC, 2007 WL 1140648 (N.D. Cal. Apr. 17, 2007).

[329] See, e.g., id.

[330] See supra Table 6.

[331] Lorillard Tobacco Co. v. Van Dyke Liquor Market, Inc., 471 F. Supp. 2d 822 (E.D. Mich. 2007); Lorillard Tobacco Co. v. Yazan's Service Plaza, Inc., No. 05-70804, 2006 WL 2990508 (E.D. Mich. Oct. 19, 2006); Lorillard Tobacco Co. v. Applewood Party Store, Inc., No. 05CV70913, 2006 WL 2925288 (E.D. Mich. Oct. 16, 2006).

[332] 15 U.S.C. §1114 (2006).

[333] See id. at §1125(a) (providing the standard for "likelihood of confusion" trademark infringement); 18 U.S.C. §2320 (2006) (providing additional penalties for intentional or knowing uses of counterfeit marks that meet the infringement standard).

[334] See, e.g., Texas Tech Univ. v. Spiegelberg, 461 F. Supp. 2d 510, 516 (N.D. Tex. 2006) (analyzing a situation where a store selling clothes and souvenirs with a university logo could not reach agreement for contract extension and was later sued by the university for dilution.).

[335] Nacco Materials Handling Group, Inc. v. Lilly Co., No. 05-2165 B, 2007 WL 1720043, at *6 (W.D. Tenn. June 5, 2007) (citation omitted).

[336] Although there are times when use of another's trademark, even when invoked for referential purposes, may still be improper blurring or tarnishment (e.g., some parody uses), these cases represent a clear minority of identical mark/similar industry cases.

[337] State Farm Mut. Auto. Ins. Co. v. Sharon Woods Collision Ctr., Inc., No. 1:07cv457, 2007 WL 4207158, at *1 (S.D. Ohio Nov. 26, 2007); see also Scott Fetzer Co. v. House of Vacuums, Inc., 381 F.3d 477 (5th Cir. 2004) (discussing second-hand dealer and repairer of vacuums who was sued for advertising that dealt with "Kirby" vacuums).

[338] Frank I. Schechter, The Rational Basis of Trademark Protection, 40 Harv. L. Rev. 813, 825-831 (1927).

[339] Keeping in mind we are dealing with two separate samples, a Z statistic was calculated--z = 3.047--in order to compare the percent change. The result was significant at a 99% confidence interval.

[340] See, e.g., Enterprise Rent-A-Car Co. v. Advantage Rent-A-Car, Inc., 330 F.3d 1333 (Fed. Cir. 2003) (holding that "We'll Even Pick You Up" did not dilute "Pick Enterprise, We'll Pick You Up"); Metavante Corp. v. Medavant, Inc., No. 05-C-1275, 2006 WL 1277903 (E.D. Wis. May 5, 2006) (holding at preliminary injunction stage that "MedAvant" did not dilute "Metavante" for technology support services); Corbond Corp. v. Core Foam, Inc., 356 F. Supp. 2d 910 (W.D. Wis. 2005) (holding that "Corefoam" did not dilute "Corbond" on foam insulation products); Golden W. Fin. v. WMA Mortgage Servs., No. C 02-05727 CRB, 2003 WL 1343019 (N.D. Cal. Mar. 13, 2003) (holding that "World Lending Group" did not dilute "World Savings").

[341] See, e.g., Jada Toys, Inc. v. Mattel, Inc., 518 F.3d 628 (9th Cir. 2008) (stating that fact issue existed as to whether "Hot Rigz" was likely to dilute "Hot Wheels"); Eldorado Stone, LLC v. Renaissance Stone, Inc., No. 04cv2562 JM(CAB), 2007 WL 2403572 (S.D. Cal. Aug. 20, 2007) (holding "Rustic Stone" dilutive of "Rustic Ledge" for building materials).

[342] See supra note 336 and accompanying text.

[343] AutoZone, Inc. v. Strick, 466 F. Supp. 2d 1034 (N.D. Ill. 2006).

[344] Kellogg Co. v. Toucan Golf, Inc., 337 F.3d 616 (6th Cir. 2003).

[345] Monster Cable Prods., Inc. v. Discovery Commc'ns, Inc., No. C03-03250 WHA, 2004 WL 2445348 (N.D. Cal. Nov. 1, 2004).

[346] See supra Table 6.

[347] Data was compiled by searching each year (from 1995-2007) for decisions that contained the term "trademark dilution" within the same paragraph as "Lanham" or "1125" (in an attempt to best capture only federal claims); see infra Diagram 4.

[348] See Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 433 (2003).

[349] See supra Part VII (proving actual dilution).

[350] Cf. 15 U.S.C. §1125(c) (2006).

351 See supra Graph 1.

352 See supra Part IV.

353 See supra Part IV.

354 See supra Part IV.

355 See supra Part VII.

356 See infra Appendix 1.

357 See supra Part IX.D.

358 See supra Part III.

359 Horphag Research Ltd. v. Garcia, 475 F.3d 1029, 1036-37 (9th Cir. 2007).

360 Alpha Kappa Alpha Sorority, Inc. v. Converse Inc., 175 F. App'x 672, 681 (5th Cir. 2006).

361 Tenn. Walking Horse Breeders' & Exhibitors' Ass'n v. Nat'l Walking Horse Ass'n, No. 1:05-0088, 2007 WL 325774, at *13-14 (M.D. Tenn. Jan. 13, 2007) (noting that questions of fact remained about whether NWHA's use of the acronym "TWHBEA" caused actual dilution of TWHBEA's design mark).

362 Lorillard Tobacco Co. v. Van Dyke Liquor Mkt., Inc., 471 F. Supp. 2d 822, 833 (E.D. Mich. 2007).

363 The plaintiff lost both claims at the district court level. Alpha Kappa Alpha Sorority, 175 F. App'x at 675. On appeal, the Fifth Circuit ruled that the plaintiff had abandoned its appeal on the infringement claim, since it was only briefly mentioned. Id. at 676. Therefore, there was no ruling from the appellate court on merits of the trademark infringement claim, just the dilution claim.

364 Top Tobacco, L.P. v. N. Atl. Operating Co., Inc., No. 06 C 950, 2007 WL 118527, at *8 (N.D. Ill. Jan. 4, 2007), aff'd, 509 F.3d 380 (7th Cir. 2007).

365 Nautilus Group, Inc. v. Icon Health & Fitness, Inc., No. C02-2420RSM, 2006 WL 3761367, at *4 (W.D. Wash. Dec. 21, 2006).

366 Fuel Clothing Co., Inc. v. Safari Shirt Co., No. CV05-1220-HV, 2006 WL 3751237, at *5 (D. Or. Dec. 18, 2006).

367 Texas Tech Univ. v. Spiegelberg, 461 F. Supp. 2d 510 (N.D. Tex. 2006).

368 Lorillard Tobacco Co. v. Yazan's Serv. Plaza, Inc., No. 05-70804, 2006 WL 2990508, at *10 (E.D. Mich. Oct. 19, 2006).

369 In a separate action, the district court ordered a preliminary injunction. Nautilus Group, Inc. v. Icon Health & Fitness, Inc., 308 F.

Supp. 2d 1208 (W.D. Wash. 2003), aff'd, 372 F.3d 1330 (Fed. Cir. 2004).

370 Gen. Motors Corp. v. Phat Cat Carts, Inc., 504 F. Supp. 2d 1278, 1286 (M.D. Fla. 2006).

371 Lorillard Tobacco Co. v. Applewood Party Store, Inc., No. 05CV70913, 2006 WL 2925288, at *4 (E.D. Mich. Oct. 11, 2006).

372 Rescuecom Corp. v. Google, Inc., 456 F. Supp. 2d 393 (N.D.N.Y. 2006).

373 Newport Pac. Corp. v. Moe's Sw. Grill, LLC, No. 05-995-KI, 2006 WL 2811905 (D. Or. Sept. 28, 2006).

374 Sanofi-Aventis v. Advancis Pharm. Corp., 53 F. Supp. 2d 834, 854 (D. Del. 2006).

375 Farouk Sys., Inc. v. Target Corp., Inc., No. H-06-1103, 2006 WL 2583449, at *4 (S.D. Tex. Sept. 6, 2006), aff'd, 2008 WL 181130 (5th Cir. Jan. 22, 2008).

376 Phillips-Van Heusen Corp. v. Calvin Clothing Co., Inc., 444 F. Supp. 2d 250, 257 (S.D.N.Y. 2006).

377 SMJ Group, Inc. v. 417 Lafayette Rest. LLC, 439 F. Supp. 2d 281, 292 (S.D.N.Y. 2006).

378 Herman Miller, Inc. v. A. Studio S.R.L., No. 1:04-CV-781, 2006 WL 2456218, at *15 (W.D. Mich. Aug. 22, 2006).

379 Id. at *1. Only summary judgment on the dilution claims were before the court.

380 Id. at *4, *9.

381 Adidas Am., Inc. v. Kmart Corp., No. CV-05-120-ST, 2006 WL 2044857, at *12 (D. Or. June 15, 2006).

382 Ford Motor Co. v. Cross, 441 F. Supp. 2d 837, 850 (E.D. Mich. 2006).

383 Metavante Corp. v. Medavant, Inc., No. 05-C-1275, 2006 WL 1277903, at *5 (E.D. Wis. May 5, 2006).

384 Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252, 267 (4th Cir. 2007). Note: Cases decided after the passage of the TDRA but not mentioning a specific standard were counted as decided under a likelihood of dilution standard.

385 Starbucks II, 477 F.3d 765 (2d Cir. 2007).

386 Adidas Am., Inc. v. Payless Shoesource, Inc., 546 F. Supp. 2d 1029, 1066 (D. Or. 2008).

387 Componentone, L.L.C. v. Componentart, Inc., No. 02:05cv1122, 2007 WL 4302108, at *3 (W.D. Pa. Dec. 6, 2007).

388 The appellate court remanded, instructing the district court to apply the likelihood of dilution standard. Starbucks II, 477 F.3d at

766.

389 Biosafe-One, Inc. v. Hawks, 524 F. Supp. 2d 452, 466-67 (S.D.N.Y. 2007).

390 State Farm Mut. Auto. Ins. Co. v. Sharon Woods Collision Ctr., Inc., No. 1:07cv457, 2007 WL 4207158, at *9 (S.D. Ohio Nov. 26, 2007).

391 Grand Heritage Mgmt., LLC v. Murphy, No. 06 Civ. 5977(NRB), 2007 WL 3355380, at *8 (S.D.N.Y. Nov. 7, 2007).

392 S&L Vitamins, Inc. v. Australian Gold, Inc., 521 F. Supp. 2d 188, 202 (E.D.N.Y. 2007).

393 World Triathlon Corp., Inc. v. Dawn Syndicated Prod., No. 8:05-CV-983-T-27EAJ, 2007 WL 2875456, at *10 (M.D. Fla. Sept. 28, 2007).

394 Registrar Accreditation Bd., Inc. v. Keneally, No. 03-11894-RWZ, 2007 WL 3104753, at *10 (D. Mass. Sept. 28, 2007).

395 Nike Inc. v. Nikepal Int'l, Inc., No. 2:05-cv-1468-GEB-JFM, 2007 WL 2782030, at *8 (E.D. Cal. Sept. 18, 2007).

396 Diane Von Furstenberg Studio v. Snyder, No. 1:06cv1356(JCC), 2007 WL 3143690, at *2 (E.D. Va. Oct. 23, 2007).

397 Eldorado Stone, LLC v. Renaissance Stone, Inc., No. 04cv2562 JM(CAB), 2007 WL 2403572, at *5 (S.D. Cal. Oct. 23, 2007).

398 Verilux, Inc. v. Hahn, No. 3:05cv254(PCD), 2007 WL 2318819, at *11 (D. Conn. Aug. 10, 2007).

399 Vista India v. Raaga, LLC, 501 F. Supp. 2d 605, 623-24 (D.N.J. 2007).

400 Pepsico, Inc. v. #1 Wholesale, L.L.C., No. 07-CV-367, 2007 WL 2142294, at *4 (N.D. Ga. July 20, 2007).

401 Pan Am. World Airways, Inc. v. Flight 001, Inc., No. 06 Civ. 14442 (CSH), 2007 WL 2040588, at *19 (S.D.N.Y. July 13, 2007).

402 Irby v. Thompson, No. 05 Civ. 9935 (LTS)(KNF), 2007 WL 2012406, at *5 (S.D.N.Y. July 11, 2007).

403 Nacco Materials Handling Group, Inc. v. Lilly Co., No. 05-2165B, 2007 WL 1720043, at *7 (W.D. Tenn. June 5, 2007).

404 Dan-Foam A/S v. Brand Named Beds, LLC, 500 F. Supp. 2d 296, 323 (S.D.N.Y. 2007).

405 Jarrito, Inc. v. Los Jarritos, No. C05-02380 JSW, 2007 WL 1302506, at *18 (N.D. Cal. May 2, 2007), reconsideration granted, 2007 WL 1795726 (N.D. Cal. June 20, 2007).

406 Cosi, Inc. v. WK Holdings, LLC, No. 05-2770, 2007 WL 1288028, at *2 (D. Minn. May 1, 2007).

407 Hamzik v. Zale Corp./Del., No. 3:06-cv-1300, 2007 WL 1174863, at *4 (N.D.N.Y. Apr. 19, 2007).

408 Google Inc. v. Am. Blind & Wallpaper, No. C03-5340 JF(RS), 2007 WL 1159950, at *3 (N.D. Cal. Apr. 18, 2007).

409 Levi Strauss v. Fox Hollow Apparel Group, LLC, No. C-06-3765 SC, 2007 WL 1140648, at *3 (N.D. Cal. Apr. 17, 2007).

410 Harris Research, Inc. v. Lydon, 505 F. Supp. 2d 1161, 1166 (D. Utah 2007).

411 Pet Silk, Inc. v. Jackson, 481 F. Supp. 2d 824, 832 (S.D. Tex. 2007).

412 Bay State Sav. Bank v. Baystate Fin. Servs., LLC, 484 F. Supp. 2d 205, 218 (D. Mass. 2007).

413 Autozone, Inc. v. Strick, No. 03 C 8152, 2007 WL 683992, at *1 (N.D. Ill. Mar. 1, 2007).

414 Century 21 Real Estate LLC v. Century Ins. Group, No. CIV 03-0053-PHX-SMM, 2007 WL 484555, at *16 (D. Ariz. Feb. 9, 2007).

415 Software Publishers Ass'n v. Scott & Scott, LLP, No. 3:06-cv-0949-G, 2007 WL 92391, at *8 (N.D. Tex. Jan. 11, 2007).

416 Jada Toys Inc. v. Mattel, Inc., 518 F.3d 628, 636 (9th Cir. 2008).