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AN INTERDISCIPLINARY APPROACH TO BRAND STRENGTH

By Jerre B. Swann *

I. INTRODUCTION

Trademark lawyers spend a lifetime studying trademarks. Some marketing professionals spend a lifetime more broadly studying brands.1 Some psychologists,2 economists3 and linguists4 devote significant resources to the study of brands. No area of law merits an interdisciplinary approach more than trademark law.5

With respect to trademark strength, or the marketing subheading of “brand equity,”6 courts, in large measure, have

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1. See David A. Aaker, Managing Brand Equity (1992); David A. Aaker and Erich Joachimsthaler, Brand Leadership (2000). A strong brand encompasses more than a device used to source-differentiate a product. It extends, inter alia, to all the words, symbols and dress used with an offering, its associations and images, and typically the product itself. It is a bundle of functional and psychosocial attributes, benefits and “value satisfiers.” J. Paul Peter & Jerry C. Olson, Consumer Behavior & Marketing Strategy 74-81 (7th ed. 2005).


4. See Roger Shuy, Linguistic Battles in Trademark Disputes (2002); also see American Thermos Prods. Co. v. Aladdin Industries, Inc., 207 F. Supp. 9, 20 (D. Conn. 1962), citing a renowned etymologist, Kemp Malone, for the proposition that generic use of many strong brands is “a characteristic of the general public, and a familiar phenomenon in linguistics, that people tend to adopt and use the shortest and simplest word which will adequately communicate the idea or call to mind the object or product that they want to tell about.”

5. I strongly believe that trademark law ought to be taught on an interdisciplinary basis and hope to develop a course that involves a university’s marketing department equally with its law school.

6. The father of brand equity, David Aaker, defines it as “a set of assets and liabilities linked to a brand, its name and symbol, that add to or subtract from the value provided by a product or service to a firm and/or to the firm’s customers.” Among brand assets, Aaker lists brand loyalty, brand awareness, perceived quality and brand associations. Aaker, supra note 1, at 15-16. Kevin Lane Keller, defines consumer-based brand equity as “the differential effect that brand knowledge has on consumer response to the marketing of that brand.” Kevin Lane Keller, Strategic Brand Management 45 (1998). Before marketing existed as a discrete science, the first giant of American trademark law, Edward S. Rogers,
intuitively gotten it right. Judge Friendly listed brand strength as a confusion factor in the first synthesis of such factors more than forty years ago.\footnote{Polaroid Corp. v. Polarad Electronics Corp., 287 F.2d 492 (2d Cir. 1961).} In *James Burrough, Ltd. v. Sign of the Beefeater, Inc.*,\footnote{540 F.2d 266, 276 (7th Cir. 1976).} Judge Markey observed in 1976 that:

A mark that is strong because of its fame or uniqueness, is more likely to be remembered and more likely to be associated in the public mind with a greater breadth of products . . ., than is a mark that is weak because it is relatively unknown or very like similar marks or very like the name of the product.

Courts occasionally, however, get it wrong;\footnote{In *Kenner Parker Toys v. Rose Art Indus., Inc.*, 963 F.2d 350, 353 (Fed. Cir. 1992), for example, the Trademark Trial and Appeal Board had treated the strength of a brand “as a liability in assessing likelihood of confusion[, reasoning that consumers might more easily recognize variances from a famous mark. . . .” In doing so, the Board had relied on a statement in *B.V.D. Licensing v. Body Action Design*, 846 F.2d 727, 729 (Fed. Cir. 1988) that the “fame of a mark cuts both ways with respect to likelihood of confusion. The better known it is, the more readily the public becomes aware of even small differences.” For cognitive reasons set forth below, the Board was in error, particularly under conditions of low involvement that characterize much of consumer processing. Richard E. Petty and John T. Cacioppo, *Communications and Persuasion: Central and Peripheral Routes to Attitude Change* (1986). For cognitive reasons, the Federal Circuit in *Kenner Parker* was correct in reversing the Board and observing that as “a mark’s fame increases, the [Lanham] Act’s tolerance for similarities in competing marks falls.” 963 F.2d at 353. Nonetheless, copycats invariably argue, with patent-like precision, that they have “invented around” a strong brand or visual symbol, and without the benefit of cognitive reasoning, courts occasionally fall prey to their pleas. See *Conopco, Inc. v. May Department Stores Co.*, 46 F.3d 1556 (Fed. Cir. 1994).} the time may have come for another evolution in the protection of strong brands; and courts need, at minimum, to develop meaningful tools for measuring brand strength, to avert sometimes bizarre distortions of confusion factor analysis.\footnote{As an example, the Court in *Dieter v. B&H Indus. of Southwest Fla.*, 880 F.2d 322 (11th Cir. 1989), did not disagree with a lower court holding that “Shutterworld” was descriptive of indoor shutters and that plaintiff had not shown secondary meaning, but reversed a finding of non-infringement because: (i) the mark had been registered for more than five years, (ii) was “presumed to be at least descriptive with secondary meaning, and [(iii)] was therefore a relatively strong mark.” 880 F.2d at 329. Because “Shutterworld” was incontestable, and defendant used “Shutterworld” on security shutters, the result in *Dieter* appears to be correct. As Professor McCarthy has noted, “cases where a defendant uses an identical mark on competitive goods . . . are ‘open and shut’ and do not involve protracted litigation to determine liability for trademark infringement.” 3 Thomas J. McCarthy, *Trademarks and Unfair Competition* § 23.20 (4th ed. 2004). The *Dieter* case, however, had nothing to do with brand strength.}
Set forth below, therefore, is an interdisciplinary review of brand strength. Each separate discipline requires more study than a still practicing lawyer can devote just to master fully its separate vocabulary, and probably no topic has prompted more marketing and cognitive exploration than “brand equity.” The discussion, therefore, is necessarily tentative and incomplete.

Nonetheless, my avocational review of the literature establishes that there have been explosive developments since the 1960s in marketing and consumer psychology, and that a staggering volume of empirical evidence has been assembled as to all facets of the relationship between consumers and brands. In the 1970s, greater attention to economics wrought an upheaval in antitrust law, but there has been no similar effort systematically to correlate science and trademark law. Largely, the developments in the “sciences” of trademarks appear to support existing legal formulations. They additionally possess untapped potential in terms of leading to more predictable, accurate and consumer-beneficial outcomes in trademark conflicts, and they may even presage a new era in the scope of brand protection.

II. THE STRUCTURE AND CHARACTERISTICS OF STRONG BRANDS

At a given time, very little information can be actively processed—can be consciously attended to. Virtually all knowledge is stored in memory and retrieved as a consequence of external cues or internal searching. Analogies have been drawn to what can appear on a computer screen and what exists in a computer’s memory.


12. See, for example, the opening paragraph of Swann, Aaker and Reback, supra note 11.

13. Peter & Olson, supra note 1, at 54.

Brand information is stored in memory in clusters (called schemas). Brand structures are typically represented as having a central node or nodes (consisting of the trademark and related symbols) that are linked to other nodes containing attributes, benefits, images, beliefs and experiences associated with the brand.15 A hypothetical Nike network16 is depicted below:

The linked nodes may possess positive ("high quality") or negative ("poor service") valences. They may vary in salience—the strength with which they are linked to the core—and thus in the likelihood that they will be called to mind when the core is activated.17 Strong brands typically have more elaborate schemas of strongly linked, unique and positive associations; they are very familiar to consumers, are often market-share leaders and/or are noted for high quality.18 By the process of spreading

15. See Peter & Olson, supra note 1, at 58-60.

16. Id. at 59. My Nike schema also contains "Just do it" at the core (as part of the "glue" that holds the schema together), has a "high quality" node, and retains a weak link to manufacturing conditions in Asia.

17. See Hoyer & MacInnis, supra note 2, at 104.

18. The literature with respect to the characteristics of strong brands is excellently collected and analyzed in Steve Hoeffler and Kevin Lane Keller, The Marketing Advantages of Strong Brands, 10 Brand Management 421 (2003).
activation,\textsuperscript{19} as one cued node stimulates another in the network's structure, the mention of a strong brand accesses a wealth of information.

Budweiser, for example, rapidly triggers for me a quality beer product, the name of its source, other brands of that maker, a price range, a taste expectation,\textsuperscript{20} a distinctive red and white can livery, category leadership, “This Bud’s for you,” Superbowl commercials, humor, Clydesdales, Spuds MacKenzie, green frogs, lizards, and a responsible drinking message. And the nodes are so strongly linked that, for me, seeing green frogs in a beer context instantaneously activates the brand, almost to the same extent as does the trademark itself (even though the frog commercials have been long discontinued). Indeed, spreading activation operates so efficiently with respect to the brand, and the brand is so accessible in memory, that if I see Coors, I think beer and I then think Bud.

Strong brands are often pioneers or have pioneer-like qualities—they have taught us how to think about a product category.\textsuperscript{21} Strong brands for appreciable percentages of consumers are often prototypical or have the characteristics of prototypes—they are deemed to be the best example of a product category.\textsuperscript{22} As one consequence, they have well-developed pathways from memory to consciousness,\textsuperscript{23} and it may be as much a function of their familiarity as their good brand management\textsuperscript{24} that many of the top thirty brands of the 1930s are still in the top thirty today.\textsuperscript{25} When I think laundry detergent, I think TIDE and conjure up its package.

\textsuperscript{19} See Jacoby, supra note 11, at 1020 (“when a particular node is activated, some of this activation will spread to adjacent nodes. If the activation level is sufficient, the other nodes may be retrieved [i.e., brought forth from memory] as well.”).

\textsuperscript{20} When taste-tested on an unbranded basis, many beer brands produce tightly clustered results, reflecting that “even fairly knowledgeable consumers can have difficulty distinguishing different brands of beer.” Keller, supra note 6, at 46-47. With branded taste-testing, however, the results will dramatically diverge, and differences in such salient categories reflect brand equity. Id. at 50-53. The Coca-Cola Company’s blind taste tests reflected a significant preference for the sweeter, more Pepsi-like taste of New Coke. Consumers were outraged, however, when the taste of Classic Coke was removed from the market, necessitating its rapid return. Peter & Olsen, supra note 1, at 89. Consumers wanted their brand back.


\textsuperscript{22} Hoyer & MacInnis, supra note 2, at 109-10.

\textsuperscript{23} Id. at 188-89.

\textsuperscript{24} Intelligent brand stewardship is, of course, critical. As a simple example, the Betty Crocker image would not have the same sales appeal were it not for her gradual makeover into a cool, modern-looking appearance with a hint of Hispanic heritage. The Pillsbury Doughboy has slimmed dramatically over time.

\textsuperscript{25} Hoyer and MacInnis, supra note 2, at 159.
As Scott Davis notes, “the strongest brands in the world own a place in the consumer’s mind, and when they are mentioned almost everyone thinks of the same things.”26 Strong brands are “cultural icons”27 and “old friends.”28 Their “halo”29 or aura can approach the mystic:

When queried about why they buy brands such as Coca-Cola ... or Mercedes-Benz, consumer responses typically reflect little insight into the appeal of brands. “Coca-Cola tastes better than Pepsi,” some will argue. . . . “Mercedes-Benz is an incredibly well-engineered car; it will last forever.” These reasons may or may not be true, but few consumers can reliably distinguish between brands of soft drinks, and most consumers in the United States keep their cars for only a few short years. Rather than deriving value from the product, buyers often seek and gain much more value from the brand. . . .30

From an economic perspective, strong brands are not mere “reflections of an organization,”31 but possess stand-alone value.32 From a linguistic perspective, “[b]rands today are a type of universal language.”33 From a marketing perspective, “the shortage of time [in consumers’ lives today] requires that [strong] brands help ‘edit’ the overwhelming array of choices in a crowded

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28. Shirley Young, Brand Equity, The Executive Speaker 10 (December 1989) (“When you become familiar with a brand, like a person, it becomes an old friend. It is special. We know what a friend is like. We know what to expect from him or her. We have shared experiences that build our friendship.”).

29. “Strong brands often have a halo that enables them to capture rents in many different ways,” John Roberts, Pamela Morrison, Murali Chandrashekaran, and Alastair Gordon, “Measuring Sources and Outcomes of Brand Equity,” Australian & New Zealand Marketing Academy Conference (2004).


32. Landes and Posner, supra note 3, at 283 n.32. A well-known practitioner, Joan Dillon, equates brand strength with the ability to sell a T-shirt bearing the brand, i.e., with the willingness of consumers to pay to identify themselves with the brand and to become walking billboards as to their allegiance.

marketplace"—under current conditions of clutter, “strong brands [function as] simplifiers.” Cognitively, “a [strong and] unique brand name and cohesive brand identity are probably the most powerful pieces of information for consumers.”

A. The Benefits of Strong Brands to Consumers

By reason of their substantial and easily accessed informational content, strong brands afford a host of benefits to consumers.

1. Reduced Informational Search Costs

Courts have recognized for decades the economic maxim that strong brands, in particular, “convey valuable information to consumers at lower costs. Easily identified trademarks reduce the costs consumers incur in searching for what they desire, and the lower the costs of search the more competitive the market.” In today’s cluttered environment, reduced search costs are significant not only in monetary, but in psychological, terms:

Given a choice consumers do not want to go through the mentally exhausting and unsure process of trying a new brand. They do not want to have to work their way through the proliferation of new products and services offered to them in any given category every year. Brands are the shorthand that consumers use to guide their all important purchasing decisions.

Even with nutritional labeling and other requirements imposed on modern packaging, the characteristics of many products remain unobservable. A brand, however, can convey

34. Duane Knapp, The Brand Mindset 176 (2000). “As consumers’ lives become more complicated, rushed and time-starved, the ability of a brand to simplify decision making and reduce risk is invaluable.” Philip Kotler and Kevin Lane Keller, Marketing Management 274 (12th ed. 2006).

35. Steven M. Cristol and Peter Sealey, Simplicity Marketing 23 (2000).


37. Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1429-30 (7th Cir. 1985). Virtually all brands possess this, and one or more other characteristics of strong brands, but the differences in degree often approach differences in kind. Perhaps the clearest example of consumer efficiency facilitated by brands is a typical trip to a supermarket. The average shopper, in forty-five minutes without assistance, must sort through 20,000 or more items to fill a cart with purchases for a week, and only with clear brands and packaging is the process possible. See Peter & Olsen, supra note 1, at 54.

38. Davis, supra note 26, at 141.
information as to a product’s preparation (ALMOND JOY is uniquely confected), protective properties (a baby sitting in a MICHELIN tire communicates safety), performance (CREST fights cavities), provenance (JACK DANIELS is Tennessee “sippin” whiskey), purpose (GATORADE replaces expended fluids and energy), price (MOTEL 6 is inexpensive) and panache (RITZ CARLTON is luxurious). A single strong brand can convey product-related attributes, user imagery, usage imagery, personality, and functional, experiential and symbolic benefits, and “the strength of a brand association increases both the likelihood that the information will be accessible and the ease with which it can be recalled by ‘spreading activation.’” The schemas of strong brands are rich, open treasuries of data.

2. Reduced Risk

“Inherently, brands exist as soon as there is perceived risk,” and risk can be social, emotional, physical, functional, financial or time related. Specifically, strong brands reduce consumer perceptions of risk: faced with purchasing a home computer, “[a] consumer’s logic [might be]: I could do some research to determine what a microprocessor is and how much better Intel is than its competitors, or I could just pay a little more and get Intel. An easy decision. . . .”

Generally, a strong brand is a “set of consistent promises. It implies trust, consistency, and a defined set of expectations. A brand helps customers feel more confident about their purchase decision.” The informational content and risk avoidance characteristics of strong brands are often overlapping/complementary attributes. The familiarity of a strong brand breeds comfort, not contempt.

39. Keller, supra note 6, at 311.
40. Id. at 105.
43. Keller, supra note 6, at 8. Perceived risks increase when “little information is available about” an offering; “the offering is new”; “the offering has a high price”; “the offering is technologically complex”; “there are fairly substantial quality differences between brands, so the consumer might make an inferior choice”; “the consumer has little confidence or experience in evaluating the offering”; or “the opinions of others are important, and the consumer is likely to be judged by the acquisition, usage, or disposition decision.” Hoyer & MacInnis, supra note 2, at 68.
44. Davis, supra note 26, at 31.
45. Hoeffler and Keller, supra note 18, at 425.
3. Prices, Innovation and Quality

Strong brands facilitate price and variety competition, and foster the maintenance of quality.46 As a salient example, the operations of entities such as WAL-MART and HOME DEPOT are keyed to: (i) enticing manufacturers with high volume opportunities; (ii) obtaining quantity discounts; and (iii) generating high traffic and sales—all (iv) in support of a masterbrand47 promise of “brand name goods” at “every day low prices.”48

With brands, moreover, as with computers, “there is always someone who can outspec you.”49 With a singular focus on weight control, WEIGHT WATCHERS frozen entries were eclipsed by HEALTHY CHOICE, which recognized a consumer desire for food that was low in fat and sodium as well as in calories.50 MAXWELL HOUSE may have been “good to the last drop,” but “mountain grown” FOLGERS had more personality;51 and, in a declining category, only STARBUCKS, by offering “a brief reprieve in a hectic day,” is now growing at double-digit rates.52 Reflecting both price and variety benefits, point-to-point airline discounters are largely responsible for the economic woes of once dominant hub-and-spoke carriers.

Finally, brands truly are “hostages” in the minds of consumers,53 and strong brand owners know that consumers punish inconsistent quality. A classic example is SCHLITZ, which was once the second leading beer brand and one of dilution’s poster children.54 In 1974, however, Schlitz (a) switched to “accelerated batch fermentation,” reducing fermenting time from twelve days to four, (b) replaced barley malt with corn syrup, producing a lighter taste, and (c) used cost savings to engage in aggressive discounting. Its premium, macho image evaporated and, beset by

48. Swann, Aaker and Reback, supra note 11, at 803.
49. Aaker, supra note 1, at 125 (quoting Regis McKenna).
50. Id. at 270-73.
51. Keller, supra note 6, at 97. For seminal research as to brand personality, see Jennifer Aaker, Dimensions of Measuring Brand Personality, 34 J. Mktg. Research 347 (1997).
52. Tybout and Carpenter, supra note 30, at 91.
54. It was cited as an example of a famous mark that its owner should be able to prevent from being used on varnish. Hormel Foods Corp. v. Jim Henson Productions, 73 F.3d 497, 506 (2d Cir. 1996).
other blunders, it became in six short years a “one-billion dollar marketing disaster.”

4. Emotional and Self-Expressive Needs

The “unique” quality of a strong brand often is its ability to satisfy emotional and self-expressive needs. A person can feel energetic when drinking PEPSI, cool when driving a Chrysler 300C with a HEMI engine, important while shopping at NORDSTROM, caring when buying a HALLMARK card, and “arrived” when wearing a ROLEX watch. Strong brands possess a personality, a positive “halo.”

It has been observed that “we are known by the brands we keep.”

“[M]any persons purchase branded goods for the purpose of demonstrating to others that they are consumers of the particular goods”—in other words to impress.... They advertise themselves (much as sellers of goods advertise their goods) by wearing clothes, jewelry or accessories that tell the world that they are people of refined (or flamboyant) taste or high income.

Many brands, indeed, are “badges” used to convey “information about [a] person to others.” While some decry badge branding, “perception advertising provides consumers with products (mental images) that they value, and which would be scarce in its absence.” Properly, therefore, prestigious associations are judicially protected.

55. Aaker and Joachimsthaler, supra note 1, at 20.

56. Upshaw and Taylor, supra note 47, at 38. Alternatively, “we are what we have.” Aaker, supra note 1, at 99 (quoting Russell Belk).

57. Landes and Posner, supra note 3, at 305.

58. Keller, supra note 6, at 99.


60. Economides, supra note 3, at 535.

61. Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-LeCoultre Watches, Inc., 221 F.2d 464, 466 (2d Cir. 1955) (recognizing that many goods are purchased “for the purpose of acquiring . . . what many visitors at the customers’ homes would regard as a prestigious article.”). See Zaichowsky, supra note 11, at 34 (“The fake goods that copy luxury goods are much sought after by consumers because the consumer can ‘pass themselves off’ as being associated with the luxury goods and get an elevated emotional feeling without the luxury price tag.”).
5. Social Needs

“[F]or many people, brands serve the function that fraternal, religious and service organizations use to serve—to help people define who they are and then help them communicate that definition to others.”62 NASCAR fans and HARLEY-DAVIDSON owners have a pervasive sense of community and enjoy a social experience rooted in the brand.63 By marketing leather jackets, sunglasses, shaving cream and a plethora of other products, Harley has created a total “consumer lifestyle.”64 The JEEP brand, reinforced by Camp Jeep and Rubicon Trail imagery, connotes membership in an independent “go anywhere, do anything” community. Reacting to a particular gestalt or charisma, consumers “don’t [just] buy [such] brands; they join them . . . . [They] bond to a brand, and one generation . . . can lead you to the next . . . .”65

6. Value Propositions

Many strong brands today are thus “value propositions” that encompass not only functional benefits, but satisfy emotional and self-expressive needs.66 The associations in strong brand schemas have been displayed in pyramidal form: at the base are features and attributes of a product or service, including a perception of quality; a level up are emotional benefits the brand affords to consumers; and at the peak are self-expressive, self-esteem and cultural values that a brand may provide.67 Source, product,
quality, and unique mental associations all merge into brand. A strong brand is no longer a mere species; it is a genus in and of itself.\textsuperscript{68} Strong brands today are “integrated holistic experiences,”\textsuperscript{69} and “the psychological response to a brand can be as important as the physiological response to the product.”\textsuperscript{70}

**B. The Benefits of Strong Brands to Their Owners**

Strong brands do not confer benefits on consumers as a matter of accident. They do so because of corresponding advantages earned by owner investments.

1. **Consumer Mind Share**

Foremost, strong brand owners have earned “a unique, credible, sustainable, fitting, and valued place in customers’ minds.”\textsuperscript{71} “[A]ll definitions [of brand equity] rely on brand knowledge structures in the minds of consumers . . .”\textsuperscript{72} and “[b]y paying very high prices for companies with [strong] brands, [acquiring firms] are actually purchasing [accessible] positions in the minds of potential consumers.”\textsuperscript{73}

2. **Value Premiums**

Because they provide more information and certainty to consumers, and satisfy psychological as well as physiological needs, strong brands are worth more to consumers and command a value premium. Cognitively, “the losses of switching away from a known brand loom larger than the potential gains from using a lesser-known [discounted] brand.”\textsuperscript{74} To an economist:

> The fact that two goods have the same chemical formula does not make them of equal quality to even the most coolly rational consumer. That consumer will be interested not in the formula but in the manufactured product and may therefore be willing to pay a premium for greater assurance that the good will actually be manufactured to the specifications of the formula. Trademarks enable the consumer to economize on a

\textsuperscript{70} Keller, *supra* note 6, at 6 (1998).
\textsuperscript{71} Davis, *supra* note 26, at 3.
\textsuperscript{72} Hoeffler and Keller, *supra* note 18, at 421.
\textsuperscript{73} Kapferer, *supra* note 41, at 16.
\textsuperscript{74} Hoeffler and Keller, *supra* note 18, at 425.
real cost because he spends less time searching to get the quality he wants.75

“Brand equity [may thus be analyzed/calculated as] the difference between the value of the brand to the consumer and the value of the product without that branding.”76

3. Enhanced Advertising

The “number of stimuli to which we are exposed at any given time is potentially overwhelming,” and attention is necessarily “selective.”77 Whether because of their familiarity or personalities, strong brands will “stand out” on store shelves, an advertising page or a television screen, much as will the face of a friend or relative in a crowded sea of faces, and will command attention.

We are better able to recognize and recall prototypical or pioneer brands in a product category. . . . Because they have been frequently rehearsed and recirculated, the memory trace for prototypical brands is strong. These brands are also linked to many other concepts in memory, making their activation highly likely. The fact that we tend to remember these brands may explain why they have been so successful over time and why so many companies fight to establish themselves as category leaders.78

Research demonstrates that “familiar brands are selectively given more exposure, attention, comprehension and retention by consumers,” who “will selectively pay more attention to [their] advertising.”79 The owners of strong brands thus get “dramatically more impact” from the same communications budget.80

4. Channel Power

As David Aaker observed in Trademarks and Marketing:

Strong brands have a proven ability to drive sales, and can provide manufacturers with a bargaining chip in the “channel” game. Loyal customers generate “pull” for the brand: if a retailer does not stock what they are looking for, consumers

75. Landes and Posner, supra note 3, at 277.
76. Keller, supra note 6, at 44 (quoting Josh McQueen of Leo Burnett).
77. Hoyer & MacInnis, supra note 2, at 85.
78. Id. at 188-90.
79. Hoeffler and Keller, supra note 18, at 424.
80. Aaker, supra note 1, at 186. The “halo effects” of a strong brand—i.e., the positive feelings it generates—positively bias the evaluation of brand advertising. Hoeffler and Keller, supra note 34, at 425.
will be unhappy. For some retailers, stocking certain brands is the ante for establishing credibility: without the dominant NIKE and ADIDAS brands, . . . an athletic shoe store might seem lacking in selection to potential consumers, who will then remove the store from their consideration set. . . .

Retailers obviously “respond to the wishes of consumers and actively promote” strong brands. Moreover, “to the extent that ‘you are what you sell,’ brands help to create an image and establish a position for a store” (and being available in the “right” stores, in turn, enhances brand strength).

5. Increased Sales

Current theory as to consumer choices in selecting, consuming and disposing of products teaches that “consumers make choices in order to accomplish goals”: Four of the most important goals for consumer decision making are (a) maximizing the accuracy of the choice, (b) minimizing the cognitive effort required to make the choice, (c) minimizing the experience of negative emotion when making the choice, and (d) maximizing the ease of justifying the decision.

Strong brands address each goal. Strong brands satisfy “[consumer] needs (utilitarian function), allow [consumers] to express their personality (value-expressive function), bolster [any] perceived weakness [consumers] have (ego-defensive function), or simplify [consumer] decision making (knowledge function).”

Consumers, moreover, do not endeavor to remember all available brands, but tend to recall a subset of two to six brands known as a consideration or evoked set, and when consumers form such subsets, “[w]ell-known brands are more easily recalled . . . because the memory links associated with these brands tend to be stronger. . . . Brand familiarity helps consumers recognize which of the many available brands in the store should be attended to. . . .”

81. Swann, Aaker and Reback, supra note 11, at 810. Dr. Aaker has done a case study of the Nike and Adidas brands in Aaker and Joachimsthaler, supra note 1, at 165-96.
82. Keller, supra note 6, at 64.
83. Id. at 14.
85. Id. at 210.
86. Keller, supra note 6, at 101.
87. Hoyer & MacInnis, supra note 2, at 203-04.
Strong brands thus facilitate sales because consumers typically “begin their search with well-known and regarded brands that are seen as being more likely to satisfy their needs.”

Increasing awareness “increases the likelihood that the brand will . . . receive serious consideration for purchase.”

6. Brand Extensions

Given, inter alia, the proliferation of brands and the fragmentation of advertising avenues, the cost to create a new brand is huge. The success rate of new brands, however, is dismal. The ability to extend a strong brand into a new area is thus a substantial component of its equity.

From an extension standpoint, it is “easier for consumers to create an association to new information when extensive, relevant knowledge structures already exist in memory.” The elaborate memory structures of strong brands, therefore, “facilitate the formation of linkages to new associations,” and “well-known and well-regarded brands can extend more successfully and into more diverse categories.”

88. Hoeffler and Keller, supra note 34, at 424.

89. Keller, supra note 6, at 91. After awareness of BRUNO MAGLI shoes increased as a result of becoming evidence in the civil trial of O.J. Simpson, sales increased 30 percent. Scott Walton, Bruno Magli: Shoe Sales Are up Because of Ad Campaign, Atlanta Journal and Constitution (January 16, 1997).

90. “It cost $9,000 a minute to fight World War II. It cost $22,000 a minute to fight the Vietnam War. A one-minute commercial on the Super Bowl will cost you almost $2 million.” Jack Trout, Differentiate or Die 71 (2000). Even as of 1992, it cost “approximately $100 million” to bring a new brand to market. Cathy J. Cobb-Walgren, Cynthia A. Ruble and Naveen Donthu, Brand Equity, Brand Preference, and Purchase Intent, 24 J. Advertising 25 (1995). In 1882, as an interesting contrast, a son of one of the founders of Procter & Gamble persuaded its skeptical board to spend $11,000 to launch an IVORY soap campaign, boasting that the product was “99 and 44/100ths percent pure.” Peter & Olson, supra note 1, at 105.


92. Keller, supra note 6, at 104. This cognitive reality may be appropriated by third parties, as well as used by brand owners: For example, in a remarkable moment of candor, the defendant in Federal Express Corp. v. Federal Espresso, Inc., 201 F.3d 168, 170 (2d Cir. 2000), admitted thinking that “Federal Espresso ‘would be an easy name to remember [for a coffee shop] because of its similarity to ‘Federal Express,’ which she knew to be a well-known . . . trademark.'”

93. Hoeffler and Keller, supra note 18, at 424.

94. Id. at 428.
C. The Benefits of an Interdisciplinary Analysis

The “sciences” have not always been kind to brands. In the 1930s, the Harvard School of Economics postulated that “[b]y successfully differentiating a standardized product from competitors’ products and achieving brand loyalty, a producer could insulate his market share from price competition . . . [and] create high barriers to entry.”95 Edward Chamberlain of the Harvard School believed that “the public interest would be best served by permitting unlimited confusion through imitation, so that it would be almost impossible to accomplish advertising differentiation. He would thus [have] scrap[ped] the identification function, leaving the public to be protected against debased imitations by standard grades, etc.”96 Harvard School views provoked Justice Department opposition to the Lanham Act.97

Fortunately, the Chicago School of Economics98 has supplanted the Harvard School and appreciates, inter alia, that by making possible a choice between goods, brands are “the essence of competition.”99 As Edward Rogers intuitively noted, before the advent of Harvard or Chicago School thinking:100

Producers would have no incentive to make a good article if buyers could not definitely ascertain its source. Inferiority could effectually hide itself in anonymity. If the bad could not be discriminated from the good, all would be bad. As one consequence, “the [once] hostile view of brand advertising has been largely . . . rejected by [modern] economics.”101

Moreover, many premium brands are shelved next to strong value and store brands (and even less expensive, albeit weaker,

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96. Ralph S. Brown, Jr., Advertising and the Public Interest: Legal Protection of Trade Symbols, 57 Yale L.J. 1165, 1195 n.126 (1948).
98. The Landes and Posner article cited in note 3, supra, is an eminently comprehensible treatment of Chicago School thought for trademark lawyers.
100. Rogers, supra note 6, at 20. As Craswell notes in his article, supra note 46:
[Without brands,] consumers could only learn about the quality distribution of the industry as a whole, [and] a manufacturer would gain little or nothing from improving his product’s quality. Consumers would be unable to recognize high- or low-quality brands, so sales would tend to go to the manufacturers who reduced their price by cutting corners on quality. The result would be a race to produce inferior products, rather than competition to produce better ones.
“generic brands”); and “Marlboro Monday,” the day Philip Morris was compelled to cut the price of its flagship brand by fifty cents a pack (having lost market share to generics and value brands) reflects that “strong brands cannot command an excessive premium.” 102 In economic terms, because “the full cost of a good to a consumer equals the price plus the consumer’s [economic and emotional] cost of search,” 103 brand premiums may be appropriately viewed as returns on investments in search-reducing components of brand equity. 104

Still, some trademark defendants grouse that the brand owner is gouging the public and some trademark commentators write as if Chamberlain continues to be “a leading authority on product differentiation as a barrier to competition.” 105 It is essential for trademark lawyers to be in a position to rebut such aberrations. In addition, the trademark issues in several recent Supreme Court cases have involved instances of owner overreaching 106 which properly have drawn rebukes. In such an atmosphere, there is a need (in addition to discouraging overreaching 107) to reacquaint the Supreme Court with its previously articulated views as to the benefits of brands. 108

102. Keller, supra note 6, at 33, 62. “One in five items sold in U.S. stores is a store-branded product that can reduce/constrain the value of manufacturer brand names.” Peter & Olson, supra note 1, at 408.


105. See, for example, Robert N. Klieger, Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection, 58 U. Pitt. L. Rev. 789, 861 n. 422 (1997), which is an example of how a failure to understand the economics of trademarks can lead to facile conclusions.


107. Whenever rules are created for higher echelon marks, there is a danger that lawyers will engender “doctrinal creep.” Mark A. Lemley, The Modern Lanham Act and the Death of Common Sense, 108 Yale L.J. 1687, 1697 (1999). As an example of this destructive propensity, from August 1999 through April 2001, approximately 1700 notices of opposition or petitions to cancel were filed with the Trademark Trial and Appeal Board asserting dilution as a ground. Ellen Seeherman, Address at the American Intellectual Property Law Association’s Spring Meeting (May 9, 2001). Lawyers seized on dilution irrespective of the fame of their clients’ marks. If, therefore, the suggestions herein for the enhanced protection of strong marks find any favor with the courts, both practitioners and the courts must appropriately limit their scope.

108. See, e.g., Park ‘N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 193 (1985) (“Because trademarks desirably promote competition and the maintenance of product quality, Congress determined that a sound public policy requires that trademarks receive nationally the greatest protection that can be given them.”).
Finally, I am convinced that understanding the sciences can facilitate the resolution of trademark issues. Even if pending amendments to the FTDA are enacted, dilution occurs in the mind, and the concept will not be understood and consistently applied without a cognitive understanding of how dilution results in structural changes to schemas and uniqueness dispersion. Likewise, product configuration has gyrated wildly from no protection, to protection on the same basis as packaging, to protection only upon a showing of secondary meaning. My review of cognitive principles (guided by Michael Tarr) suggests that: (i) all three are wrong; (ii) a century of effort in the area may have been largely wasted; and (iii) only by understanding how consumers process shapes will results be reached that are beneficial to consumers.

III. THE ROLE OF STRONG BRANDS IN INFRINGEMENT ANALYSIS

A. Science Confirms Existing Law

From a legal perspective, a “strong mark casts a long shadow which competitors must avoid.” Marketing and cognitive psychology support the legal maxim.

To illustrate, ADIDAS has initiated a number of trademark enforcement actions against athletic shoes bearing four parallel stripes in the mid-foot area of the configuration. As if they were confronted with a design patent claim, defendants argue that four is not three; and to some consumers, the fourth stripe is a “just noticeable difference” from the ADIDAS Three-Stripe mark.

110. West Point Mfg. Co. v. Detroit Stamping Co., 222 F.2d 581, 589 (6th Cir. 1955); see In re Morton-Norwich Prods., Inc., 671 F.2d 1332, 1336 (C.C.P.A. 1982) (“[T]here exists a fundamental right to compete through imitation . . . which . . . can only be temporarily denied by the patent or copyright laws.”)
111. See Stuart Hall Co. v. Ampad Corp., 51 F.3d 780, 787 (8th Cir. 1975) (treating product configuration and packaging essentially as equals under a “trade dress” banner).
112. Wal-Mart, 529 U.S. 205.
113. See Swann and Tarr, supra note 11.
114. Kenner, 963 F.2d at 353.
115. For purposes of full disclosure, I am listed as lead counsel for plaintiff in those actions.
117. A just noticeable difference (j.n.d.) is the minimum difference that can be detected between two stimuli. By keeping each alteration under the j.n.d. threshold, brand owners
With a series of consumer surveys, however, ADIDAS has established in each instance that there is a likelihood of appreciable consumer confusion. The explanation for the consistent results flows from a marketing analysis and the application of consumer psychology.

First, ADIDAS, together with its Three-Stripe mark and other visual symbols, was the prototypical athletic shoe brand in the 1960s and early 1970s. While there had been earlier well-known brands, ADIDAS taught generations of Americans how to think about athletic shoes.

In the 1980s, with the death of its founder and his son, the brand stumbled and was overtaken first by NIKE and then by REEBOK. In the early 1990s, however, the brand began to reemerge; was benefited, inter alia, by a “retro” craze that was fueled by the events of September 11, 2001; and is today the second largest shoe brand in the world. ADIDAS and the Three-Stripe mark constitute a strong brand.

Second, consumers use memory to interpret stimuli in the marketplace; and they often process or edit incoming information so as to make it more congruent with prior beliefs or experiences. Expectation drives perception. The Three-Stripe mark has strong, well developed pathways from memory to consciousness, and it is thus “accessible . . . and likely to . . . enter into the process . . . of identifying and interpreting incoming [parallel stripe] stimuli.” Survey results reflect the simple fact are able to make, over time, significant changes in their symbols. See, e.g., Michael R. Solomon, Consumer Behavior 60-61 (6th ed. 2004), tracing the evolution of the Campbell’s soup can. A j.n.d. is not, of course, an absolute or constant value, but depends on context. If two similar images are placed side-by-side in an environment devoid of other images, small differences will be detected. If, however, the same images are viewed separately or are placed among a large number of images, the j.n.d. threshold will be higher and the images may be perceived as the same.

118. Aaker and Joachimsthaler, supra note 1, at 165-96.
119. Id.
120. Nostalgia for the “old days” is a powerful selling tool. When, for example, Volkswagen brought the Beetle back to the market, it advertised, “If you sold your soul in the 80s, here’s your chance to buy it back.” Schmitt, supra note 69, at 194-97.
121. Jacoby, supra note 11, at 1034.
122. See, for example, Neil E. Beckwith and Donald Lehmann, The Importance of Halo Effects in Multi-Attribute Attitude Models, 12 J. Mktg. Research 265 (1975), dealing with the presence of halo effects, and William R. Dillon, Narendra Mulani and Donald G. Fredrick, Removing Perceptual Distortions in Product Space Analysis, 21 J. Mktg. Research 184 (1984), dealing with how to remove “halo error.”
123. Zaichowsky, supra note 11, at 74.
that some consumers convert four stripes to three—they overwrite the fourth stripe.\textsuperscript{125}

Additionally, we are daily confronted with too many stimuli to even notice, much less to give careful attention to, everything we see. Consumers, therefore, necessarily engage in categorization.\textsuperscript{126} If we observe a small object that appears to have feathers and wings, we assign to it the label, “bird.” We do not have time to check for the existence of all avian characteristics—we use a few characteristics as a shorthand to enhance our efficiency in processing information.\textsuperscript{127}

Likewise, when we see what appears to be a strong, familiar and highly accessible brand, particularly in an initial-interest or post-sale context,\textsuperscript{128} “rarely do [we] exhaustively consider all [its] features . . . [and] then compare it to stored memory to reach a conclusion.”\textsuperscript{129} Rather, we categorize it based on a quick assessment of a few features.\textsuperscript{130} We engage in “pattern matching,”\textsuperscript{131} and “[w]hen stimulus information offers a sufficient match to a schema possessed by the perceiver, the schema is called up from memory and used . . . to guide inferences.”\textsuperscript{132} When a marketplace stimulus shares salient characteristics with a strong, accessible schema in memory, there can be an almost spontaneous reaction that things that are visually or conceptually similar or seem related, must go or belong together.\textsuperscript{133}

With respect to the ADIDAS brand, therefore, we do not need to see the brand name itself, or to tick off its other symbols, before we can make an identification. We do not take time to count stripes. The survey evidence reflects that when many consumers see four parallel stripes in the mid-foot area of an athletic shoe, they efficiently and instantly invoke the ADIDAS category.\textsuperscript{134} The

\textsuperscript{125} Id. at 1039.

\textsuperscript{126} Hoyer & MacInnis, supra note 2, at 115-16.

\textsuperscript{127} See Swann and Tarr, supra note 11, at 1192-93.

\textsuperscript{128} Consumers are less “involved” in such contexts. For a discussion of involvement, see Hoyer & MacInnis, supra note 2, at 153 et seq.

\textsuperscript{129} Jacoby, supra note 11, at 1035.


\textsuperscript{132} Jacoby, supra note 11, at 1039.


\textsuperscript{134} The survey results are particularly compelling, given that the stimulus was left with the respondent throughout the interview, replicating a more “involved” scenario than
ADIDAS Three-Stripe mark casts a long shadow. Three stripes extends to four.

**B. Science Suggests an Extension of the Law**

An understanding of the schemas or structural characteristics of strong brands facilitates a review of trademark enforcement efforts over the ages, and may suggest the next (modest) evolution.

1. **Brands From Inception Through the Mid-19th Century**

In the Middle Ages and after, a trademark signaled source. The precise meaning of the signal could vary:

a. a brand could serve a “liability” function by identifying an artisan responsible for defective goods;

b. a brand could serve a “preclusive” function by effectively demarking the territory of a guild’s monopoly; or

c. a brand could serve an “ownership” function, permitting merchants more easily to recover their goods from shipwrecks or piracy.

In each instance, however, brand and source were synonymous. The word “brand” came from the Old Norse word “brandr,” which meant to burn (as livestock are still source-branded today). A strong brand’s schema consisted almost exclusively of a trademark core node and a strongly linked source node.

Accordingly, source *diversion*—interference with the source node—was the focus of trademark protection. As of the late 19th century, “the law of unfair competition ha[d] been crystallized into a single sentence—*no one has any right to sell his goods as the goods of another.*”

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135. See Frank I. Schechter, *The Historical Foundations of the Law Relating to Trade Mark Law* (1925). Schechter was well known for his comprehensive review of brand origins two years before his now more famous dilution article. See Handler, *supra* note 97, at 270-71 (recounting a 1928 conversation between Justices Oliver Wendell Holmes and Harlan Fiske Stone).

136. A 1266 English law required bakers to mark every loaf “to the end that if any bread bu faultie in weight, it may bee then knowne in whom the fault is.” Keller, *supra* note 6, at 27.

137. *Id.* at 2.

138. Rogers, *supra* note 6, at 129 (emphasis in original). In *Yale Elec. Corp. v. Robertson*, 26 F.2d 972, 973 (2d Cir. 1928), Judge Learned Hand concurred: “the law of unfair competition [comes] down very nearly to this—... one merchant shall not divert customers from another by representing what he sells as emanating from the second.”
be no unfair competition.” A brand—Pillsbury—was a merely species of a genus—flour—and merited protection only as to “colorable imitations” on goods of “the same descriptive properties.” Source was king.

2. Brands From the Mid-19th to the Mid-20th Century

As, however, the distance between producer and consumer grew, the consumer’s ability to assess quality by direct access to the producer was attenuated. Strong manufacturer brands thus emerged with a tightly linked quality node added to the product/source structure.

In the early years of the 20th century, a gifted legal seer, Frank I. Schechter, recognized that trademarks had come, indeed, to function principally as quality signals, not source signals. He thus endeavored to articulate a theory of trademark protection that would shield the quality function of a strong, unique brand (which he regarded as its “selling power”) from being eroded by third-party use on noncompeting goods (to which a brand was vulnerable under then existing law). While he met with little direct success, his views were largely accommodated over the decades by a growing recognition that mark owners have a


143. Schechter, *supra* note 135, at 166. The link between brand image and perceived quality has since been empirically confirmed. Jacob Jacoby, Jerry C. Olson and Rafael A. Haddock, 55 J. Applied Psychology 570 (1971).

144. “[T]he true functions of the trademark are . . . to identify a product as satisfactory and thereby to stimulate further purchases by the consuming public.” Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 Harv. L. Rev. 813, 818 (1927).

145. Schechter quoted from a German case: “[W]hen the public hears or reads the word ‘Odol,’ it thinks of the complainant’s mouth wash, and . . . an article designated with the name ‘Odol’ leads the public to assume that it is of good quality. Consequently, . . . [Odol] would lose in selling power if everyone used it as the designation of his goods. . . .” *Id.* at 831-32.
separate interest in the “reputation” of their marks.\textsuperscript{146} The process was protracted,\textsuperscript{147} but had three distinct highlights.

First, in 1928, Judge Learned Hand appreciated that protecting only a brand’s source function, against a direct competitor seeking to palm off its goods as those of the brand’s owner, was too restrictive, and he articulated a need for greater deference to a brand owner’s rights in prose that, even for him, was particularly compelling:

[I]t has of recent years been recognized that a merchant may have a sufficient economic interest in the use of his mark outside the field of his own exploitation to justify interposition by a court. His mark is his authentic seal; by it he vouches for the goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owners reputation, \textit{whose quality no longer lies within his own control}. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a \textit{reputation}, like a face, is the symbol of its possessor and creator, and another can use it only as a mask.\textsuperscript{148}

Second, in 1946, Congress adopted the Lanham Act,\textsuperscript{149} which, \textit{inter alia}, expanded statutory protection beyond the “similar goods” limitation of earlier law. Third, in 1961, as noted above, Judge Friendly distilled a list of marketplace factors to assess when third-party use on different goods might imperil a brand’s “reputation.” By the mid-20th century, quality was a strong brand schema’s most salient node.

3. Brands in the 21st Century

Since 1961, brand schemas literally have exploded.\textsuperscript{150} In the current environment, protecting the source and quality functions

\begin{itemize}
\item \textsuperscript{146} See Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 205 (2d Cir. 1979).
\item \textsuperscript{147} See Jerre B. Swann, \textit{Dilution Redefined for the Year 2000}, 90 TMR 823, 834-41 (2000).
\item \textsuperscript{148} Yale Elec. v. Robertson, 26 F.2d at 974 (emphasis added).
\item \textsuperscript{149} Pub. Law No. 79-489, Chapter 540, 60 Stat. 427 (1946) (codified at 15 U.S.C. §§ 1051, \textit{et seq}).
\item \textsuperscript{150} “By the 1950s and 1960s, . . . demand for high-quality, national brands was exploding, driven in large part by increased personal income, population growth, and a large middle class of active consumers. . . . Concomitantly, marketing has developed over the past half-century from an intuitively understood concept located in a single organizational department to a scientific study integrated with management strategy. Today, marketing draws on theoretical concepts and insights from anthropology, economics, psychology and sociology in order to understand consumer behavior. The accumulated knowledge in the field of consumer behavioral processes and of constructs such as perception, learning, memory, involvement, motivation, attitude, self-concepts, brand personality, group
\end{itemize}
of a strong brand, indeed, may no longer be paramount: “[Q]uality and service are [now] an expectation [for strong brands], not a tie breaker. . . . [Q]uality is a given these days, not a difference.”151

Beyond quality, marketers today appreciate the consumer demand for value propositions that satisfy a range of needs. Consumers today do not buy commodities, but “experiences . . . whose contents are largely image driven, intangible and symbolic.”152 It may thus be time for the next step forward in brand protection concepts.

To illustrate, consider the sometimes transformative characteristics of brand symbols:

[O]pening a Tiffany [blue] package will feel different from opening a Macy’s package—the feeling will be more intense, more special. Further, the wearing of a Tiffany bracelet may even make the wearer feel more attractive and confident. . . .

The associations of prestige and quality are hypothesized to actually change the use experience.153

TIFFANY’s schema consists of far more than a “source” signal for “quality” jewelry.

Can, however, TIFFANY preserve all the components of its unique network? Can it prevent, for example, a competitor seeking to free ride on TIFFANY’s emotional capital by adopting TIFFANY “blue” boxes, albeit clearly labeled to avoid confusion? Source and quality signals transmitted by a single color (with secondary meaning) can be protected from third-party use that is likely to confuse,154 but can the psychological impact of “Tiffany blue” be protected when consumers appreciate that it has a different sponsor?

Based on early decisions under the Federal Trademark Dilution Act,155 the answer may have been yes.156 Variety signals are even more vulnerable to “dispersion” than are quality influences, and consumer lifestyles, all of which are relevant to trademark issues, is now substantial.” Swann, Aaker and Reback, supra note 11, at 790.

151. Trout, supra note 90, at 28. Perceived quality is still a pillar of brand equity, Aaker, supra note 1, at 15-16, 78-103, and a trademark is still a “trustmark,” Larry Light, Keynote Address at INTA (May 1, 2000) (albeit more as to sensation than as to source). A brand today, however, “signals” far more than quality. See Thomas D. Dresher, The Transformation and Evolution of Trademarks, 82 TMR 301 (1992).


153. Aaker, supra note 1, at 16.


156. See, e.g., Nabisco, Inc. v. PF Brands, Inc., 191 F.3d 208 (2d Cir. 1999).
signals.\textsuperscript{157} Given, however, the Supreme Court’s decision in Moseley v. V. Secret Catalogue,\textsuperscript{158} requiring a brand owner to show “actual dilution” to support a claim, predicting the outcome today would be far more problematic.

Even if currently pending amendments to the FTDA are enacted, protection of TIFFANY blue from use by another jeweler might founder on the new Act’s disdain for a niche dilution theory.\textsuperscript{159} The proposed legislation’s stringent definition of fame might raise a bar that a single element of a brand’s schema, particularly in a high-end niche arena, might not be able to meet. While TIFFANY is a famous brand by any measure, TIFFANY blue is less pervasive, and one component of TIFFANY’s emotional capital and self-esteem brand equity may now thus have an exposed flank.

The “sciences” suggest that clearly there is a problem. Cognitive research establishes that copycat packaging, even though bearing a clearly distinguishable brand name so as to avoid confusion, is either (a) interpreted by the consumer as an indicator of quality or (b) benefits from a “halo effect” of a leading brand’s packaging.\textsuperscript{160} As long as the copycat is priced below the leading brand, its packaging similarity is “generally interpreted in a positive light”\textsuperscript{161}—\textit{i.e.}, there is association and, as a consequence, there is a free-riding effect.\textsuperscript{162}

The problem, of course, is that the ride is free only for the copycat. To illustrate, cognitive research has shown that the speed and accuracy with which a copycat brand can be recalled are increased (it taps into the well-developed pathways from memory

\textsuperscript{157} Swann, \textit{supra} note 11, at 614-18.

\textsuperscript{158} 537 U.S. 418 (2003).

\textsuperscript{159} Niche dilution draws opprobrium from \textit{Syndicate Sales, Inc. v. Hampshire Paper Corp.}, 192 F.3d 633, 639-41 (7th Cir. 1999), where the court postulated the possibility of design dilution in the market for funeral flower baskets sold to wholesalers and retailers. Not only are famous designs unlikely in such a narrow category, but copycats would likely produce confusion, not blurring. Legitimate niche dilution should not, however, be totally discounted, as the decision in \textit{Nabisco v. PF Brands}, note 156, \textit{supra}, indicates.


\textsuperscript{161} \textit{Id.} at 23, 26. Research additionally establishes that consumers expect products in copycat packages to have the same attributes as the imitated brand. George Miaoulis and Nancy D’Amato, \textit{Consumer Confusion & Trademark Infringement}, J. Mktg. 48 (April 1978).

\textsuperscript{162} As observed in note 147, \textit{supra}, this same free-riding effect was the catalyst for Schechter’s dilution article. 40 Harv. L. Rev. at 831-32.
to consciousness that a strong brand enjoys), but for the strong brand, speed and accuracy are impaired.\textsuperscript{163}

The disparity stems, it is submitted, from the premise that “brand equity occurs when the consumer has a high level of awareness and familiarity with the brand and holds some strong, favorable, and \textit{unique} brand associations in memory”\textsuperscript{164}

Visual uniqueness of a brand enhances the speed with which it can be identified in crowded purchase environments and the accuracy with which it can be differentiated from its competitors.\textsuperscript{165}

[B]rands with distinctive personalities have advantages so long as the personality remains distinctive.\textsuperscript{166}

By accessing a strong brand schema, a copycat may enhance its appeal, but can do so only at the expense of its host which, by necessity, loses a measure of uniqueness.\textsuperscript{167}

From a marketing perspective, therefore, copycat branding, \textit{even if it avoids likely confusion}, jeopardizes a key component of brand equity. In economic terms, a “trademark seeks to economize on information costs by providing a compact, memorable, and unambiguous identifier of a product. . . . The economy is less when, because the trademark has other associations [generated by a copycat], a person seeing it must think for a moment before recognizing it as the mark of the product. . . .”\textsuperscript{168} Linguistically, the

\begin{footnotesize}
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\item \textsuperscript{164} Keller, \textit{supra} note 6, at 50-52 (emphasis added).
\item \textsuperscript{165} Warlop and Alba, \textit{supra} note 160, at 21. “[B]rands with unique and well-known packages are more easily identified on the retailer’s shelf.” Zaichowsky, \textit{supra} note 11, at 55.
\item \textsuperscript{167} Uniqueness was a persistent Schechter theme who observed that even as of 1927, a brand’s primary purpose was “the creation and retention of custom . . . [necessitating] the preservation of [its] uniqueness.” Schechter, \textit{supra} note 144, at 822. In \textit{Nabisco v. P.F. Brands}, 191 F.3d at 217 (footnotes omitted), the Second Circuit accurately encapsulated Schechter’s views:

[Dilution statutes] rest on a judgment that the “stimulant effect” of a distinctive and well-known mark is a “powerful selling tool” that deserves legal protection. . . . This power derives not only from “the merit of the goods upon which [the mark] is used, but equally [from the mark’s] own uniqueness and singularity.” . . . Even when an unauthorized use of the mark does not cause consumer confusion, it can “reduce [] the public’s perception that the mark signifies something unique, singular, or particular.” . . . The junior use thereby diminishes the “selling power that a distinctive mark or name with favorable associations has engendered for a product in the mind of the consuming public.”

\end{itemize}
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creation of a second meaning for a symbol impairs clarity.\textsuperscript{169} Cognitively, the strong brand's mental structure is altered and access to it is impaired.\textsuperscript{170}

4. The Next Evolution

There have thus been dramatic changes in the mental clusters that exist for strong brands, more dramatic than those that led to the adoption of the Lanham Act. Those changes have occurred as a result of enormous investments in brand information, and they possess the above enumerated and substantial benefits for consumers. It may be time, therefore, to recognize that we are no longer dealing with the simple brand structures of the past and to consider new avenues for protecting the total schema of a modern mark.

We have entered the information age, and strong brands are among the most informative words in our vocabulary.\textsuperscript{171} In the Internet and globalization ages, and amid clutter, brands must be impactful: “urgent, powerful, and not-to-be-ignored.”\textsuperscript{172} Strong brands today cannot quietly suffer a dispersion of their uniqueness.\textsuperscript{173}

One approach would be to consider the proscription of free riding on the singular, non-functional elements of a strong brand's schema.\textsuperscript{174} Cognitively, dilution occurs (often glacially) when a brand's structure is altered as a consequence of association with an alien (but like-appearing) stimulus, and uniqueness gradually fades—but the cognitive realities may be difficult to explain. Free riding, on the other hand, is a complementary and relatively easily grasped concept (in both marketing and law), it occurs in real time,

\begin{itemize}
\item \textsuperscript{169} See, Swann, supra note 11, at 599-604.
\item \textsuperscript{170} “[T]he signal value of a stimulus is directly related to its singularity; . . . a unique signal can carry more information; [but] . . . with multiple uses, a signal's strength gradually fades into background white noise.” Id. at 612. “[T]he more [extraneous] propositions related to a concept, the less activation will be received by each when the concept is activated.” R. Reed Hunt & Henry C. Ellis, Fundamentals of Cognitive Psychology 195 (6th ed. 1999). Also see Jacoby, supra note 11, at 1049-50, describing a “fan” effect that occurs when a brand has multiple associations.
\item \textsuperscript{171} Swann, supra note 11, at 591-96.
\item \textsuperscript{172} Remarks of Paul Reidl, President of INTA, at the 128th Annual Meeting, 2006.
\item \textsuperscript{173} The fact that source was the most tightly linked schema node for more than a millennium and that quality was paramount for more that a century may suggest that the emergence of brands as value propositions in less than fifty years is precipitous, but more “information” has been produced in the last 30 years than in the previous 5000, Trout, supra note 90, at 74, and the informational content of brands has simply kept pace.
\item \textsuperscript{174} Free riding has long been a component of dilution analysis. Swann, supra note 147, at 863-64.
\end{itemize}
and the tortures of elucidating to a court how a strong brand is “whittled away” may be effectively side-stepped. In its essence, dilution is the trading on a brand’s associations and memory traces as opposed to trading on the core node itself, and may be better expressed in the language of unfair competition than in the more ephemeral context of “blurring.”

There clearly should be more than just “a possible concern with situations in which . . . someone is taking a free ride on the investment of the trademark owner in the trademark.” Dilution, indeed, has always had its “roots in the idea that investments in the future of a brand that make it appealing to consumers should not be undermined by others who seek a free ride, whether on the work that produced the goodwill underlying the mark or the mark itself.” Courts, traditionally, have reacted viscerally to efforts to partake of the “magic” of another’s mark or to capture “its ready-made public acceptance.” Elevating free riding to a stand-alone vice may thus give modern strong brands the protection that they may not receive under current concepts.

The goods of “the same descriptive properties” limitation worked well enough for the source-based brands of 1900, but it foundered when quality was added to the mix. The requirement of likely confusion accounts for both source and quality, but it may fall short when user imagery, usage imagery, personality, and experiential as well as symbolic benefits are added to the mix. Clearly, cases like Conopco, Inc. v. May Department Stores Co. should not become embedded precedent. It may well be that the

175. Ty Inc. v. Perryman, 306 F.3d 509, 512 (7th Cir. 2002).


The protection of trade-marks is the law’s recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trade-mark owner has something of value. If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress.

179. 46 F.3d 1556 (Fed. Cir. 1994)
label word mark on which the Federal Circuit relied in that case was “overridden” by expectation, it is equally likely that the copycat brand there at issue was categorized as, or pattern matched with, the genuine article without the word mark receiving attention. Based, however, on empirically verified cognitive principles, it is certain that the copycat basked in the halo of the imitated package and eroded the uniqueness component of its brand equity.

As noted by Judy Zaichowsky in her just published *The Psychology Behind Trademark Infringement and Counterfeiting*: [Creating] a positive attitude toward [a] product . . . is a major task for marketers. While there are several complex, time-consuming, and expensive ways to build positive attitudes . . ., a very simple way is just to associate [a] good to an object toward which consumers already have a very positive attitude. When it takes the form of imitating the nonfunctional components of a strong brand, such basking in another’s halo is to “reap where [one] has not sown,” and, like dilution, should run afoul of the law irrespective of confusion.

There is implicit support in the case law for an interdiction, *per se*, of free riding. In *University of Georgia v. Laite*, for example, the court enjoined the defendant’s use of “Battlin’ Bulldog Beer,” not because consumers believed that the university had entered the brewing business, “but because the cans would catch the attention of University of Georgia football fans.” In *Boston Athletic Assn. v. Sullivan*, the court was moved to action because the “defendants intentionally referred to the Boston Marathon . . . in order to create an identification with the event and, thus, to sell their shirts.” In *Boston Professional Hockey Assn., Inc. v. Dallas Cap & Emblem Mfg.*, the court held that Lanham

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180. Jacoby, supra note 11, at 1039.
181. See Zaichowsky, supra note 11, at 50 (“An academic study of brand imitation dealing with manufacturers of private labels and national brands found that the similarity in physical appearance of originals and imitators was significantly related to consumer perceptions of a common business origin between them.”).
182. See Warlop and Alba, supra note 162, confirming the premise “that positive attitudes can be developed through simple association with well-liked objects, and that these positive attitudes can lead to purchase of the associated product, as well as the original product.” Zaichowsky, supra note 11, at 48.
183. Zaichowsky, supra note 11, at 67-68.
185. 756 F.2d 1535, 1545-46 (11th Cir. 1985).
186. 867 F.2d 22 (1st Cir. 1989).
187. 510 F.2d 1004, 1012 (5th Cir. 1975).
Act requirements were satisfied because “the trademark, originated by the team, [was] the triggering mechanism for the sale of the [team’s] emblem.” In Chemical Corp. of America v. Anheuser-Busch,188 the court clearly was “swayed by its instinctive reaction upon reading the record that this is a brazen and cheap effort by defendant below to capitalize on the good will created by the tremendous expenditure in advertising by the plaintiff”—enjoining, under common law, defendant’s use of “Where there’s life, there’s bugs.”

Beyond the common law, dilution is defined in many countries as a use that “would be likely to take unfair advantage of or be detrimental to the distinctive character” of a well-known mark,189 and such language expressly captures free riding. If cases like University of Georgia and Chemical Corp. of America are not thus interpreted and applied to interdict appropriation of strong brand memory traces and halos, such language should be incorporated into the FTDA. Just as trademarks have evolved, we have moved legally from source as king to the salience of quality; we should now move to brand imagery as an object of trademark concern.

Campbell’s Soup began life as a product of the Joseph Campbell Preserve Company. Over time, Campbell’s Soup, dressed in red and white, acquired a reputation for quality. Today, Campbell’s Soup is “M’m M’m Good.” Brands have traveled the road from source to quality to experience. The law must follow.

IV. THE MEASUREMENT OF BRAND STRENGTH

Trademark lawyers have used a variety of means to assess brand strength: (a) a mark’s positioning on the distinctiveness spectrum (coined to generic);190 (b) incontestability;191 and (c) weighing “fame” factors—advertising, sales, duration of use.192 The first, I submit, has very little value: the initially descriptive PLAY DOH is far stronger than many of its coined brethren.193 The second, I submit, is of no value.194
As for the “fame” factors, it is a mixed bag. With respect to advertising, for example, there is research indicating that “advertising is the primary mechanism for creating psychological differentiation among brands,” and there is some “correlation between share of market and share of voice.” There are case studies, however, reflecting that inconsistent advertising reduces brand equity. “[T]he question is not the extent of the promotional efforts, but their effectiveness.”

More to the point, the Abercrombie spectrum, incontestability and fame factors are all, in varying degrees, abstractions. At bottom, there “are [only] two basic approaches to measuring customer-based brand equity”: The “indirect” approach attempts to assess potential sources of customer-based brand equity by measuring brand knowledge (i.e., brand awareness and brand image, what is in the minds of consumers). The “direct” approach attempts to assess the differential impact of brand knowledge on consumer response to the firm’s marketing program [in terms of market share, value premiums and the like].

Brands (a) exist in the mind and (b) impact the marketplace. Their strength should not be measured abstractly, particularly where strength plays a controlling role in, e.g., a free-riding assessment. The “indirect” measure of brand awareness has two components: recognition (aided awareness) and recall (unaided awareness). Recall is critical when decisions are made outside the store, e.g., in forming a consideration set from an internal search of memory. Recognition is “critical for in store decisions [where we react to external stimuli] because it helps us identify . . . the brands we want to buy.”

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195. Cobb-Walgren, supra note 90, See Peter & Olson, supra note 1, at 434.
199. The owners of many strong brands capture consumer awareness and attitudes on a tracking basis.
200. Hoyer & MacInnis, supra note 2, at 186. “[T]he most common form of purchase decision is just pure and simple recognition of the product.” Zaichowsky, supra note 11, at 32.
Awareness can be, of course, a double-edged sword. As an example, the marketing department of the now-defunct EASTERN AIR LINES once reported to management that it had good news and bad news: EASTERN was the most recognized brand in the New York to Florida market, but it was also the most detested. Customers formed WHEALS (we hate Eastern Air Lines) Clubs, and for some, the company became a carrier of last resort (as did PAN AMERICAN in international markets). EASTERN possessed negative brand equity; its quality node bore a negative valence.

“Direct” measures—market share and value premiums—can also be ambiguous. General Motors, for example, has a still significant market share that would suggest strength, but it has slowed the decline of that share by deep discounting, which is generally the antithesis of brand equity. A reputation for fair pricing, on the other hand, can be a source of brand strength, and premiums do not exist for some very strong brands: e.g., SOUTHWEST AIRLINES. “Direct” measures, therefore, need to account for total “revenue premiums,” a measure that combines market share and value premiums in a total assessment. 201 SOUTHWEST’s low revenue per seat-mile must be viewed in the context of the total seats it fills (its high load factors) and the total profit it generates.

David Aaker uses his “Brand Equity Ten” to assess strength along five mental and marketplace dimensions: loyalty measures, perceived quality/leadership measures, associations/differentiation measures, awareness measures, and market behavior measures. 202 For many strong brands, case studies exist with the gravitas of having assessed strength outside the adversarial context. 203 Several organizations independently assess brand strength and value on an annual basis, both nationally and internationally. Marketers and cognitive psychologists thus have a rich array of tools to describe brand strength beyond dry summaries of advertising, sales and years of use.

V. CONCLUSION

Edward Rogers noted in 1914 that “relief in [trademark] cases cannot be made to depend upon principles of law evolved in past centuries . . . when conditions were different, affairs less complex,

201. Ailawadi, Lehmann and Neslin, supra note 198.

202. Aaker, supra note1, at 316-38. Also see Kotler and Keller, supra note 34, at 278-81, for a discussion of other brand equity models.

203. See Keller, supra note 6, Appendix B, “Intel Corporation: Branding an Ingredient.”
and when parasitic ingenuity was less highly developed.”204 Schechter wrote in 1927 that:

“There is no part of the law which is more plastic than unfair competition and what was not reckoned an actionable wrong 25 years ago may have become such today.”... “Many earlier dicta, probably some earlier decisions, are not now safe guides.” These vigorous judicial expressions of impatience with the old theories of trade-mark protection are indicative of a desire to keep abreast of and to serve the needs of modern business.205

The pace of change has accelerated, not abated.

The only way to keep abreast is constantly to return to the roots of trademarks, both as they have existed and as they have evolved over time. The only way to understand the role of trademarks in current commerce is to explore all of their facets—marketing, psychological, economic and linguistic. Strong brands are under attack today not only by parasites, but also by some pundits.206 Never has it been more important to understand the benefits of “value propositions” to consumers and their owners. Never has it been as necessary to understand the marketing, cognitive, economic and linguistic costs of “free” riding.

Ending, in such an environment, with a discussion of the measurement of strength is, arguably, to end with a whimper, not a bang. If, however, strong trademarks are to be afforded the protection from free riding that I suggest, we must be very certain that only proper candidates are selected. I have often noted my agreement with Professor McCarthy that a dilution statute that extends to any mark with a modicum of secondary meaning “becomes a rogue law that turns every trademark, no matter how weak, into an [economically irrational] weapon.”207 Treating as strong any mark with modest advertising and/or five years or more of use208 could have similar consequences—it would play into the hands of strong brand detractors. We have to be certain of a mark’s strength to extend its reach.

When, however, we have made an appropriate strength assessment, we must appreciate that we are dealing with a far more elaborate and accessible schema than existed in past years—

204. Rogers, supra note 6, at 281.
205. Schechter, supra note 144, at 813.
207. 4 McCarthy, supra note 10, at § 24:108.
208. Such a mark is entitled to full protection from a trespass by a second comer onto its shadow. The only question is as to the length and width of the shadow.
a schema that simultaneously conveys valuable information and creates numerous opportunities for free riding. Edward Rogers closed his 1914 work by quoting from an anonymous opinion of the Seventh Circuit:209

Property, even as distinguished from property in intellectual production, is not, in its modern sense, confined to that which may be touched by the hand, or seen by the eye. . . . It is needless to say, that to every ingredient of property thus made up—the intangible as well as the tangible, that which is discernible to mind only, as well as that susceptible to physical touch—equity extends appropriate protection. Otherwise courts of equity would be unequal to their great purposes; and every day as business life grows more complicated, such inadequacy would be increasingly felt. . . . Are we to fail our plain duty for mere lack of precedent? We choose, rather, to make precedent.

For the present needs of strong marks, it is likely that precedent already exists to prevent trading on their elaborate networks, but such precedent must be maximized in the context of a full interdisciplinary understanding. To the extent that precedent is deemed not to exist, the common law flexibility of unfair competition must be revived with an infusion from modern marketing and cognitive psychology to thwart what Edward Rogers would likely characterize as new rounds of “parasitic ingenuity.”

209. Rogers, supra note 6, at 281.