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PROTECTION OF TRADEMARKS AGAINST DILUTION: A SEMIOTIC PERSPECTIVE²

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Introduction

This article deals with the cultural meaning of trademarks and the social significance of its legal protection. It focuses on the US legal system. Trademarks are symbols designed to enable the consumer to identify without confusion the source of various goods and services. Today, however, trademarks are much more than source identifiers. They are culturally meaningful signs. Thus, for example, the trademark “Coca-Cola,” in addition to conveying information about the origin of soft drinks, is associated with freedom, youth, joy and globalization. The trademark “Chanel” stands not only for fragrances and apparel, but also for exclusivity, intelligence and European chic. The cultural meaning of the Olympic rings and Mickey Mouse, both registered trademarks, can hardly be gaped in a few words. Famous trademarks embed values, visions and ideals we believe in. As

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cultural signs, they occupy a rather central place in our society. The cultural meaning of a trademark is carefully built up by its owner by means of advertising and other marketing techniques. These techniques create associative links between the trademark and various positive cultural signs such as freedom, youth, intelligence, etc. This article argues that these links are reciprocal. That is, while the trademark begins to carry some of the meaning of the cultural signs it has been linked to, these cultural signs also absorb some of the commercial flavor of the mark.

Keywords: *cultural significance of trademarks, legal protection of trademarks, identification of the origin of goods and services, marketing and branding, the US legal system*

I. An Analytical Semiotic Model

This Part develops a semiotic model, which will then be used to analyze the cultural meaning of trademarks. This model adopts the fundamental structure and terms of the semiotic model developed by M. Ross Quillian,³ but it alters one of its basic assumptions (hereinafter: “the Q model”).

First, the term “cultural sign” should be clarified. Semiotics defines a sign as anything which implies something, symbolizes something in a given culture.⁴ A cultural sign can take many forms: for example, the word “love” stands in English, among other things, for a romantic relationship. There are, however, other signs which denote the idea of love – for instance, flowery hearts, a diamond ring, a romantic couple walking on a beach. Note that various signs convey the same idea differently. The notion of romantic love is a cultural sign in itself, a sign signifying one of the central ideals of modern Western society. Cultural signs give meaning to the world around us. Reality does not have any meaning unless interpreted. Signs give significance to our experiences; they allow us to shape and share our opinions and observations⁵. Furthermore, cultural signs represent the conventions of a given society. They determine whether certain things will be regarded as natural or anomalous, as important or negligible, as just or unjust.

The Q model likens our mind to a mass of nodes (signs) interconnected by different kinds of associative links. The meaning of every single node is determined by the configuration of linkages connecting it to the other nodes.⁶ Not only the links themselves, but also their character is important.⁷ Thus, the node “love” has associative links to the node “flowery hearts,” as well as to the nodes “a diamond ring” and “a romantic couple walking on a beach.” However, each of the associative links denotes the notion of love differently. Taken together, all the nodes and links between them build up the semantic network of our culture.

Umberto Eco used the Q model to argue that the structure of the semantic network is not fixed and unchangeable. On the contrary, social conventions can be challenged, that is,

³ M. Ross Quillian, Semantic Memory, in *Semantic Information Processing* 227–270 (Marvin Minsky ed., 1977).

⁴ Umberto Eco, *A Theory of Semiotics* 69 (1976).

⁵ See David Glen Mick, *Consumer Research and Semiotics: Exploring the Morphology of Signs, Symbols, and Significance*, *The Journal of Consumer Research* Vol. 13, No.2 196, 198 (1986).

⁶ Quillian, *supra* note 2, at 234–240.

⁷ *Id.* at 242–243.

existing links can be altered and new ones can be created.⁸ Eco suggested that the role of “aesthetic text” is to challenge and modify the existing structure of the semantic network. Unusual, unexpected and strange combinations make us reconsider the widely accepted meaning of cultural signs.⁹

The Q model assumes that the nodes are interconnected by *one-way* links.¹⁰ However, in my opinion, the opposite assumption, that the links between nodes are always *reciprocal*, describes our perception more closely. Links between the nodes can be best described by an analogy to the material world – every action has an equal but opposite reaction. Whatever attracts or repels another is equally attracted or repelled by that other.¹¹ The same is true for the semantic network: when the meaning of sign X is created or modified, this is done by establishing links between sign X and other signs. The significance of these other signs, however, will also inevitably change by virtue of being connected to sign X.

For example, the use of the swastika by political groups to express their critique of certain practices, such as social discrimination or an ongoing war, strengthens the message of protest, invests it with some of the sign’s power. Linking the thing being protested to one of the most terrifying symbols of our culture suggests that it is an abomination. However, this very link is able to affect the meaning of the swastika as well. Using the swastika to criticize suggests implicitly that the sign symbolizes not only Nazi crimes, but also, to some extent, certain other activities, which are much more debatable. If the swastika becomes a regularly utilized means of expressing critique, its terrifying effect would be eventually reduced.

The existence of reciprocal forces in the semantic field is sometimes a subject of legislative concern. Thus, the German Criminal Code prohibits the use of the swastika for the purposes of propaganda.¹² German courts have explicitly recognized that the law in Germany prohibits the use of the swastika in order to prevent the effect of habituation.¹³ Another example is the British Trademark Act of 1994, which prohibits the use of royal images in commerce.¹⁴ Despite a very different attitude toward the signs, both provisions have the effect of preserving the signs’ cultural meaning. Using images of the British Monarchy in commercial advertising may create a royal aura around the advertised products. However, such advertising will inevitably have a cheapening effect on those images, impairing their uniqueness and solemnity.

⁸ Eco, *supra* note 3, at 124, 126–129.

⁹ *Id.* at 261–276.

¹⁰ Quillian, *supra* note 2, at 239.

¹¹ Newton’s third law.

¹² Sections 86 and 86a. Germany suggested banning the display of the swastika across the European Union. Hindu leaders strongly oppose this suggestion. This is a good example of a political discourse about the legitimate meaning of a cultural sign.

¹³ LG Stuttgart 18 KLS 4 Js 63331/05 vom 29.09.2006. This decision was overruled by the Federal Court of Justice of Germany, but the Court reaffirmed that the purpose of the statute is, *inter alia*, to prevent the Nazi symbols from being accustomed to: BGH 3 StR 481/06 vom 15.03.2007. See also BGH 3 StR 495/01 vom 31.07.2002.

¹⁴ Section 99.

II. The Dilution of Culture

This Part will show how the process of creating cultural meaning around commercial trademarks interferes with the meaning of the cultural signs utilized in this process.

Existing cultural signs are often chosen to serve as trademarks. This is normally done with the purpose of creating positive associations with the trademark right from the start. Thus, shoes were named after the Greek Goddess of Victory, Nike, to convey the message of success, overcoming and victory. Over the years, the trademark grew so strong that it turned into the sign's primary meaning, while its original significance grew weaker and became a kind of secondary meaning. Additional examples are the word "Cadillac," whose initial meaning is the name of a 17th century French explorer, but today it is primarily associated with automobiles and the word "Ajax," which today primarily denotes cleaning products of the Colgate-Palmolive Company or a computer program offered by Microsoft, but not the hero of Greek myth.

Not every time when an existing cultural sign is used as a trademark, the trademark meaning will become the dominant one. However, attaching a trademark connotation to the cultural sign will always alter its significance to some extent. For example, the trademarks "Mercedes" and "Tiffany" have absorbed some of the feminine essence embodied in the names. However, the names, too, have gained an additional significance, which can annoy their today's bearers. Another example is the Walt Disney's castle trademark. The trademark was inspired by the German Neuschwanstein Castle, build in the 19th century. Undoubtedly, the Walt Disney Company gained some of the magic of this castle by adopting its image as a trademark. However, the castle is today strongly associated with Walt Disney as well. This association gives the Neuschwanstein Castle a connotation of popularity, triviality and kitsch.

The influence of trademarks is not limited to cases, in which an existing cultural sign is chosen to serve as a mark. A culturally meaningful trademark must incorporate certain ideas and values. In order to reach this goal, the trademark should be linked to cultural signs that denote these ideas and values. For example, to invest a trademark with the spirit of romantic love, advertising can, among other things, display it together with the word "love," flowery hearts, a diamond ring or a romantic couple walking on a beach. All of our society's ideals – happiness, freedom, love, professional success – all are eventually exploited by advertising which attempts to link them to commercial trademarks. This process strengthens the cultural significance of the advertised trademarks and of consumption in general. However, the significance of the social ideals exploited by advertising is affected as well. Although each advertisement pulls a given sign towards another product or service, they all have a common message: the way to happiness, freedom, love, professional success, etc. lies through the consumption of commercial goods and services.

Even if not every single advertisement succeeds in fastening the promoted trademark to the desired cultural ideal, their cumulative effect successfully links consumption to important social values, giving it a central place in modern society. People attribute great importance to consumption and associate it with happiness, pleasure, freedom and self-reward.¹⁵

¹⁵ See Bruno S. Frey & Alois Stutzer, *Happiness and Well-Being: How the Economy and Institutions Affect Happiness* 29 (2002): "The material standard of living is regularly mentioned by a majority of respondents as being one of the most important elements of well-being. Consumption has become one of the central activities of modern life." See also Fromm, *The Sane*

However, because of the existence of reciprocal forces in the semantic field, this process has a flip side. Cultural ideals to which consumption has been linked start incorporating the materialistic values as well. If consumption denotes happiness then, necessarily, happiness also denotes consumption to a certain extent. If a luxury cruise, dinner in a restaurant or an expensive piece of jewelry symbolize true love, then the notion of true love also includes these consuming practices to some extent. Constantly linking cultural ideals to the banal context of consumption dilutes and hollows their distinct meaning. As Andrew Wernick notes, even in church, it is hard to hear the word “paradise” without thinking on the multitude of goods to which this idea has been promotionally linked.¹⁶

Frequently cultural signs with a strong and distinctive significance, cultural icons, are chosen to serve as rhetorical figures in advertising. Thus, Cadillac uses the slogan “Life, Liberty, and the Pursuit;” McDonald’s has frequently featured the Statue of Liberty in its advertising; Mercedes-Benz has used a Stradivarius violin as a metaphor for high quality and uniqueness. Because of their symbolic power, cultural icons are especially susceptible to being used in advertisement. Here, like in the examples of the swastika and images of the British Royalty discussed above, the very act that strengthens the advertising message weakens the power of the employed cultural sign. The same advertisement that suggests that Mercedes cars are as unique as Stradivarius violins simultaneously implies that Stradivarius violins are as common as Mercedes cars.

Advertising is only one of the marketing techniques designed to invest trademarks with cultural meaning. All such techniques interfere with the meaning of the cultural signs they use. Thus, for example, the sponsorship of various cultural events by commercial corporations invests the trademarks of these corporations with some of the elevated spirit of the events. At the same time, however, the sponsorship invests the cultural events with some of the commercial spirit, with the flavor of glossy marketing, evoking a somewhat more suspicious and a less serious attitude towards them. The commercialization of the Olympic Games between the years 1984 and 2000 is a good example of this phenomenon. During that time, trademarks appeared on every object related to the Games, including the athletes themselves, marking the Games with the spirit of a large-scale marketing event.¹⁷ The same applies to “product placement,” marketing technique, in which commercial trademarks are integrated into the plots of entertainment in a manner that makes them appear a natural part of the story. As James Bond checks his Omega watch, Omega absorbs some of Bond’s charm, intelligence and a suave sense of humor. Yet, by this very action, James Bond himself absorbs some of the lifeless metal glow, some unsavory association with marketing, thereby becoming somewhat less authentic and credible.

The phenomenon described in this section will be referred to hereinafter as “the dilution of culture.”

Society 123 (1955): “Modern man, if he dared to be articulate about his concept of heaven, would describe a vision which would look like the biggest department store in the world, showing new things and gadgets, and himself having plenty of money with which to buy them.”

¹⁶ Andrew Wernick, *Promotional Culture: Advertising, Ideology, and Symbolic Expression* 189 (1991).

¹⁷ Matthew McAllister, *Sponsorship, Globalization and the Summer Olympics*, in *Undressing the Ad: Reading Culture in Advertising* 35, 41–43 (Katherine Toland Frith ed., 1997).

III. The Legal Attitude towards the Dilution of Culture

a) Cultural Signs Registered as Trademarks

The US legal system, as well as legal systems in other Western countries, does not recognize public interest in preserving cultural signs from commercialization. Exceptions to the registrability of trademarks are designed to protect the interests of private parties and to prevent consumer confusion. Thus, trademarks that falsely suggest a connection with institutions or persons, living or dead, or consist of a name, portrait, or signature identifying a particular living individual without his or her consent are not registrable.¹⁸ Cultural signs, which neither consist of existing trademarks nor suggest a connection to an institution or to a living or a recently deceased individual,¹⁹ are not protected from being appropriated as commercial trademarks, as the examples of Nike, Cadillac, Neuschwanstein Castle, Mercedes and Tiffany demonstrate. The only exceptions are the flag and other official insignia of the United States and other countries.²⁰

A great number of signs in our culture do suggest a connection to institutions or to living or recently deceased individuals. These signs cannot be registered as trademarks without the consent of their legal owners. Thus, for example, nobody can register the words “Michael Jordan,” “Salvador Dali” or “NBA” as trademarks for any sort of products without the consent of the respective rights holders. However, this means only that the decision whether to turn them into trademarks or not lies with the rights holders. Thus, Michael Jordan chose to merchandise his name as a brand of Nike shoes, Salvador Dali’s heirs created a brand of a perfume out of his name and the National Basketball Association licenses its name to be used as a brand of chocolate.

When considering the impact on the cultural meaning of a sign, it does not make much of a difference whether turning it into a trademark is done with or without the consent of its legal owner. The associative link between the cultural sign and its trademark significance is even strengthened by such consent. Imagine that the legal system did not restrict the use of famous names as trademarks and that Nike called one of its shoes “Air Jordan” simply as a tribute to Michael Jordan. In this case, the name “Jordan” would probably be less associated with a brand of shoes than it is today, when Michael Jordan personally endorses the Nike sneaker.

b) Marketing Techniques Exploiting Cultural Signs

As we have seen, provisions regulating trademark registration hardly restrict the possibility to commercialize cultural signs. The same is true for provisions applying to marketing techniques that exploit cultural signs while building meaningful trademarks.

¹⁸ 15 USC 1052 (a), (c).

¹⁹ It is clear that using a trademark consisting of a name of a famous individual may falsely suggest a connection to this individual only when he or she is recently dead. By contrast, when a trademark consists of a name of a historical figure, like Napoleon, no such connection could be reasonably assumed. The right of publicity, which protects famous individuals from appropriation of the commercial value of their personalities, may protect them against registration of their insignia as trademarks. See Katya Zakharov, *The Right of Publicity: How Much of It Can Be Protected by Privacy and the Law of Trademarks?*, 2003 GRUR Int. 118, 125–126 (2003).

²⁰ 15 USC 1052 (b).

These techniques are generally categorized as commercial speech, which does not enjoy the full protection of the First Amendment. The limited protection of commercial speech manifests itself, *inter alia*, in the rule that commercial speech can be restricted, if it includes false or misleading statements.²¹ However, this rule does not constitute a serious limitation on marketing techniques aimed at imbedding trademarks with cultural meaning. All these techniques attempt to convey the message that trademarks embody certain cultural values. For example, the Coca-Cola Company's sponsorship of the Olympic Games suggests that the trademark "Coca-Cola" embodies such values as internationality, competitiveness and striving for perfection, and that these values can be identified with or even realized, at least to some extent, by the consumption of Coca-Cola products. Such messages are so incredible that they cannot be supported with any logical arguments; they influence the consumer on a purely emotional level. Interestingly, for the same reason such messages are able to escape entirely the scrutiny of the legal system. Since no reasonable consumer is expected to take them seriously, such messages are not regarded as misleading.²²

What does limit the possibility to employ cultural signs in marketing are private rights, specifically intellectual property rights. Some cultural signs are protected by copyright, trademark right or the right of publicity. For instance, Bart Simpson, Taylor Swift, Rihanna, James Bond, Mikhail Gorbachev and Queen's "Bohemian Rhapsody" are all meaningful cultural signs, which are also protected as private property. Yet, as in the case with the registration of trademarks, this is not protection against commercialization. This protection implies merely that no commercial use of the cultural sign may be made *without* the consent of the rights holder. However, such consent is often given in exchange for a sufficient fee. Thus, all the cultural signs mentioned in this paragraph were used to promote commercial products or services. And as is the case with turning cultural signs into trademarks, using them in marketing techniques makes the associative link with commerce stronger, when the right holder of the sign approves the use.

c) Commercial Colonization

The influence of marketing techniques on our culture is not limited to the messages they convey directly. Today advertising and sponsorship are the central source of income for the main media channels – television, radio and the printed press. This allows the advertisers to exercise considerable control over the content of these media.²³ As time goes by, commercial conglomerates discover more and more ways to use media to convey their promotional messages. A good example of this tendency is the practice of product placement mentioned above. This practice was still rare in the mid-1990s, but today nearly every movie, reality show, game-show and sitcom include product placement. Product placement has no limits. Media previously thought to be inappropriate for commercial marketing, such as novels

²¹ See, e.g., *Kasky v. Nike*, 27 Cal.4th 939 (Cal. 2002).

²² More generally, promises of future performance in advertising are considered "puffing" and are not actionable as fraud: see, e.g., *American Computer Trust Leasing v. Jack Farrell Implement Co.*, 763 F. Supp. 1473, 1487 (D. Minn. 1991).

²³ See, e.g., Matthew P. McAllister, *The Commercialization of the American Culture* 40 et seq. (1996); Ben H. Bagdikian, *The Media Monopoly* 115 et seq. (1983); Edwin Baker, *Advertising and a Democratic Press*, 140 U. Pa. L. Rev. 2097, 2139 et seq. (1992).

and songs, have lost their immunity.²⁴ Product placement has expanded into video games, Internet magazines and blogs as well.²⁵

This trend illustrates a more general tendency. As soon as corporations discover the potential of a certain medium to attract an audience, they attempt to place their marketing messages on it. If the medium is especially successful, it is often purchased altogether. Thus, for example, in 1982 the Coca-Cola Company purchased Columbia Pictures, in 2006 Google Inc. bought YouTube, and in 2022, Amazon's acquired MGM. No medium of mass communication is immune to marketing. In the world of capitalism and free market competition, every product ultimately reaches the one who values it the most, that is, is willing to pay the highest price for it.²⁶ Audience is a very precious product for corporations, which are interested in exposing potential consumers to their marketing. Therefore, very communication medium that attracts an audience is almost inevitably destined to convey marketing messages.

As soon as a communication medium becomes sponsored or owned by advertisers, commercial interest gradually gains control over its content. Thus, for example, Coca-Cola banned the use of 7-Up and Pepsi products in movies produced by Columbia Pictures shortly after purchasing the company. Entertainment content is increasingly designed and structured to seamlessly integrate promotional messages into its narratives.²⁷ Since advertisers are almost always willing to pay more than the audience to the owner of a given medium, they eventually have decisive influence over its content. At times corporations wishing to promote their products even initiate the creation of artistic projects. Thus, in 2005 McDonald's offered rewards to hip-hop artists who mentioned the Big Mac in their songs and more recently, Mattel launched its own film studio and produced the 2023 *Barbie* movie to promote its toy brands.

Since one of the main goals of almost every marketing message is the creation of a strong and meaningful trademark, it can be said that the process of creating meaningful trademarks has a deep influence on our cultural environment. But what is the nature of that influence? It can be said that commercial corporations promote a certain ideology. Consider two following examples. In 1971 Janis Joplin wrote a song entitled "Mercedes Benz." In the song she asks the Lord to buy her a Mercedes Benz, a color TV and a night on the town. The song was written as a social commentary on the fact that people relate happiness to consump-

²⁴ John Burkhalter & Carol Curasi, Music and Its Multitude of Meanings: Exploring What Makes Brand Placements in Music Videos Authentic, 24 J. BRAND MGMT. 213 (2017); Cristel A. Russell & Barbara B. Stern, The Effects of Product Placement in Fictitious Literature on Consumer Choice, 33 Psychol. & Mktg. 985 (2016).

²⁵ Jisu Huh & Hye-Jin Kim, *Native Advertising in Online News: Effects of Persuasion Knowledge and Brand Familiarity on Brand Attitudes*, 29 J. PROMOTION MGMT. 1 (2020); Ana I. Valenzuela, Bart J. Wojdowski & Nathaniel J. Evans, *Disclosure of Sponsored Content: Examining the Role of Brand Prominence and Persuasion Knowledge in Native Advertising*, 39 PSYCHOL. & MKTG. 2261 (2022).

²⁶ Richard Posner, *Economic Analysis of Law* §§ 1.1–1.2, at 5-13 (3d ed. 1986); A. Mitchell Polinsky, *An Introduction to Law and Economics* 10 (2d ed. 1989).

²⁷ Brian Gillespie et al., *Fitting Product Placements: Affective Fit and Cognitive Fit as Drivers of Consumer Evaluations of Brand Placements*, 35 J. BUS. RSCH. 1 (2018).

tion and material possessions. Ironically, in 1995 Mercedes Benz got a license from Janis Joplin's step-sister, who owned the rights to the song, to use it in its own commercial. The second example is the vagrant style created by hippies in the 1960's. This style was meant to convey the antiestablishment beliefs of this counterculture group, but was immediately adopted by clothing manufacturers and presented in advertising as a novelty in dressing style. By the early 1970s, much of the hippie style had been already integrated into the mainstream American culture²⁸.

These two examples demonstrate how commercial interest can entirely distort, hijack the meaning of a cultural sign, when this meaning clashes with the commercial ideology. The strongest message of their ideology is the endorsement of the values of capitalism in general and consumer culture in particular. Several big media sponsors have even formulated in explicit rules that the media content must not bear any kind of critique on advertising, on the consumer culture and, more generally, any negative claims concerning the capitalist world order.²⁹ The ideology promoted by commercial corporations has already acquired a dominant position in our society; it is usually taken for granted and very rarely questioned. The more media falls into the hands of advertisers, the deeper these values will be ingrained into our culture, making it increasingly materialistic and consumption-oriented.

As the time goes by, marketing techniques capture more and more of the space around us. Sidewalks, buildings, beaches and every place our eye naturally falls on bear messages designed to make us remember certain trademarks. Marketing messages saturate our public space and constantly invade the private sphere. Some scholars equate, quite properly, commercial overload with air pollution.³⁰ The legal system does not provide us with protection against the downpour of commercial messages. Quite the contrary, since the commercial messages are regarded as "neutral," they can reach us in places where political messages cannot, for example, in situations of "captive audience."³¹ The very omnipresence of promotional messages further endorses the commercial ideology. The more we are used to these messages, the more they seem as a natural and indispensable part of our life. Our environment, saturated with marketing, tells us implicitly that commercial messages have the legitimacy to reach us everywhere, to appear in every possible medium. We become conditioned with the idea that consumption and marketing have the right to occupy a central place in our life.

Thus, although commercial speech is not regarded as a primary subject of the First Amendment, for all intents and purposes it is commercial speech that dominates our social and cultural discourse. This process is made possible by the logic of capitalism and free market economy: the divine right of capital³² has no limits. Capital can control or purchase

²⁸ Bagdikian, *supra* note 22, at 189–190.

²⁹ Baker, *supra* note 22, at 2149 et seq.

³⁰ See, e.g., Dennis D. Hirsch, *Protecting the Inner Environment: What Privacy Regulation Can Learn from Environmental Law*, 41 Ga. L. Rev. 1, 23 et seq. (2006).

³¹ See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (The court upheld the city's policy of selling advertising space on buses only to "innocuous and less controversial" commercial advertising, but not to political advertising. Users of buses should not be "subjected to the blare of political propaganda.")

³² A term coined by Marjorie Kelly. See Marjorie Kelly, *The Divine Right of Capital: Dethroning the Corporate Aristocracy* (2001).

whatever it wishes. When it wishes to enter the cultural scene, hardly any structure will stay immune to its power. Under these circumstances, there is hardly anything that can hamper the dominance of the commercial ideology.

IV. The Doctrine of Dilution

As shown in the previous Part, the process of creating meaningful trademarks interferes with the meaning non-commercial cultural signs and promotes the consumption ideology. The legal system hardly interferes with this process. This Part will demonstrate that the legal system does protect trademarks themselves as cultural signs, thereby securing the dominance of the consumption ideology.

The traditional purpose of trademark law is to protect the trademark as a symbol identifying a single source of goods or services. In terms of the Q model, it is designed to protect the mental link between the trademarked sign and the goods of the trademark owner, the link identifying the trademark owner as the origin of the respective goods.

As discussed above, trademark owners today invest much effort in creating additional cultural significance for their trademarks. As time goes by, this additional significance is becoming more and more important. Thus, many companies today invest more resources in marketing than in the quality of their goods.³³ Trademark law seems to approve of and encourage these developments by granting a great degree of protection to the cultural meaning of trademarks. This happens in the first place due to the protection of trademarks against dilution.

The doctrine of dilution was first introduced into the United States in the late 1920s. Since then, it has been gradually taking roots and increasingly expanding its scope in the federal and the state law.³⁴ The concept of dilution was codified in the federal law in 1996. Ten years later, Congress substantially reviewed the Federal Dilution Protection Act, enacting the Trademark Dilution Revision Act (hereinafter “TDRA”) of 2006. Among other things, the TDRA codified the two branches of the dilution doctrine, “blurring” and “tarnishment,” which will be discussed below.

a) Dilution by Blurring

Dilution by “blurring” occurs, when a well-known trademark is used for goods so substantially different from those it is known for that no consumer confusion is likely. Protection against “blurring” prevents a “gradual whittling away” of the uniqueness and the distinctiveness of a famous trademark caused by the fact that it ceases to be associated exclusively with its owner.³⁵

³³ See Valérie Meunier, *Theory of Industrial Organization*, available at http://www.econ.au.dk/fag/2157/e06/Notes/Intro_Chap1.pdf 1 (2006); Terry L. Andras & Srinivasan Srinivasan, *Advertising Intensity and R&D Intensity: Differences Across Industries and Their Impact on Firm Performance*, 2 *INT’L J. BUS. & ECON.* 167 (2003).

³⁴ For the historical development of the doctrine see Robert N. Klieger, *Trademark Dilution: the Whittling away of the Rational Basis for Trademark Protection*, 58 *U. Pitt. L. Rev.* 789 (1997).

³⁵ J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* §§ 24.70–24.71 (5th ed. 2025). See Frank Schechter, *The Rational Basis of Trademark Protection*, 40 *Harv. L. Rev.* 813 (1927).

Thus, dilution by “blurring” actually protects famous trademarks from additional commercial association. It is very doubtful, though, that such protection is desirable. Cultural signs are generally not protected from alteration of their meaning which occurs when they are adapted as trademarks. Thus, Nike, the Greek Goddess, was not protected from an additional meaning imposed on it by a brand of shoes. By contrast, “Bacardi” is protected from becoming a brand of jewelry,³⁶ the circus trademark “The Greatest Show on Earth” – from association with used cars,³⁷ the “Lexus” mark for cars – from becoming a brand of personal care products,³⁸ and even “Fasny,” New York’s firemen’s organization, is protected from being associated with private schools.³⁹ This approach is unjustified. The legal system allows trademark owners to exploit cultural signs without limitation while creating a meaningful trademark. Trademarks are created entirely from the spirit and significance of the various signs of our culture. However, when others wish to use the meanings of these cultural signs, now incorporated in a commercial trademark, the legal system does not let this happen. Such attitude creates an asymmetrical relationship between the various signs, letting the cultural meaning flow only in one direction – from the cultural public domain into commercial trademarks, subject of private property.

Trademark owners have a strong economic motivation to incorporate the notions of exclusivity, superiority and uniqueness into their trademarks. However, we, as a society, hardly have any great interest in these commercial cultural icons. It can hardly be argued that the public interest in the distinctive meaning of “Bacardi” is greater than in the meaning of Nike (the Goddess). Here it may be useful to recall Wernick’s remark that even in church it is hard to disassociate the notion of paradise from commercial products.⁴⁰ Why should trademarks, as cultural signs, or, better said, idols, enjoy a better status? Allowing famous trademarks to be used for unrelated products, without creating confusion, would indeed dilute their distinctive cultural meaning, and thus somewhat weaken the commodity fetishism⁴¹ currently dominating our society. In other words, if we constantly come across “Rolls Royce” peanuts, “Chanel” floor wax and the like, perhaps the idolized status of famous trademarks in our culture would be somewhat shaken. I see no reason why the legal system should act to prevent this from happening and try to preserve the somewhat pagan consumer culture promoted by commercial corporations.

The protection against dilution by blurring becomes even more difficult to understand when the trademark itself is created out of an existing cultural sign. Thus, one court has held that the use of the name “Tiffany’s” by a Boston restaurant diluted the famous jewelry

³⁶ *Bacardi & Company Ltd. v. Bacardi Mfg Jewelers Co., Inc.*, 174 U.S.P.Q. 284 (N.D. Ill. 1972), *aff’d*, 475 F.2d 1406 (7th Cir. 1973).

³⁷ *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Celozzi-Ettelson Chevrolet, Inc.*, 855 F.2d 480 (7th Cir. 1988).

³⁸ *Toyota Jidosha Kabushiki Kaisha d/b/a Toyota Motor Corp. v. Natural Health Trends Corp.*, 2005 U.S. Dist. LEXIS 10442 (C.D. Cal. 2005).

³⁹ *Fireman’s Association of the State of New York v. French American School of New York*, 2007 WL 1628372 (N.Y.A.D. 3 Dept.).

⁴⁰ Wernick, *supra* note 15, at 189.

⁴¹ A term introduced by Karl Marx in *Karl Marx, Capital 163 et seq.* (1976).

trademark.⁴² A similar conclusion was reached in another case concerning the name “Tiffany & Co.” used by the defendant for a movie theater.⁴³ Thus, the legal system holds the view that “Tiffany” should signify jewels and only jewels. But why? Tiffany is a female name that has been appropriated as a trademark. As discussed above, such appropriation added a commercial connotation to this name, thus somewhat altering its cultural meaning. That is, the legal system sees nothing wrong with the fact that, when we meet a person named Tiffany, in our mind it might create an association with the jewelry store. However, should we recall a restaurant or a movie theater when we come across a Tiffany’s jewelry store, this would be the kind of evil the legal system seeks to prevent. It is inapprehensible, what kind of values stand behind such an approach.

The TDRA of 2006 approves the practice of protecting famous trademarks consisting of existing cultural signs against dilution by explicitly stating that the protection against dilution is not limited to inherently distinctive trademarks, such as invented words.⁴⁴

b) Dilution by Tarnishment

The most far-reaching protection of the cultural meaning of trademarks is granted by the second branch of the dilution doctrine, tarnishment.⁴⁵ Tarnishment occurs when a famous trademark is used in a manner that clashes with its image as created and maintained by its owner.⁴⁶ The protection against tarnishment was criticized by legal scholars.⁴⁷ Some of them even doubted that the Federal Anti-Dilution Act embraced the notion of tarnishment.⁴⁸ This doubt was shared by the Supreme Court in *Moseley v. Victoria Secret Catalogue, Inc.*⁴⁹ One of the primary purposes of enacting the TDRA of 2006 was to resolve this ambiguity and explicitly incorporate protection against tarnishment into the federal anti-dilution law.⁵⁰

The protection against “tarnishment” is limited by an explicit exclusion of “fair use,” reflecting the legislator’s concern about the First Amendment rights. The TDRA elaborated

⁴² *Tiffany & Co. v. Boston Club, Inc.*, 231 F. Supp. 836 (D. Mass. 1964).

⁴³ *Tiffany & Co. v. Tiffany Productions*, 264 N.Y.S. 459 (N.Y. Sup. Ct.1932), *aff’d*, 260 N.Y.S. 821 (N.Y. App. Div. 1932). See also *Tiffany & Co. v. Classic Motor Carriages, Inc.*, 10 U.S.P.Q.2d 1835 (T.T.A.B. 1989).

⁴⁴ 15 USC 1125 (c) (1).

⁴⁵ For an opposite view see Robert G. Bone, A Skeptical view of the Trademark Dilution Revision Act, 11 *Intell. Prop. L. Bull.* 187, 189–191 (2007): “Dilution by tarnishment is the least problematic [...] [type] of dilution.”

⁴⁶ *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 31 (1st Cir. 1987).

⁴⁷ See, e.g., Klieger, *supra* note 33; Natalie A. Dopson, The Federal Trademark Dilution Act and Its Effect on Parody: No Laughing Matter, 5 *J. Intell. Prop. L.* 539 (1998); Robert S. Nelson, Unraveling the Trademark Rope: Tarnishment and its Proper Place in the Laws of Unfair Competition, 42 *IDEA* 133 (2002); Julie Zando-Dennis, Not Playing Around: the Chilling Power of the Federal Trademark Dilution Act of 1995, 11 *Cardozo Women’s L.J.* 599 (2005).

⁴⁸ See, e.g., Robert C. Denicola, Some Thoughts on the Dynamics of Federal Trademark Legislation and the Trademark Dilution Act of 1995, 59 *Law & Contemp. Probs.* 75, 88–90 (1996); Miles J. Alexander & Michael K. Heilbronner, Dilution under Section 43(c) of the Lanham Act, 59 *Law & Contemp. Probs.* 93, 124 (1996).

⁴⁹ 123 S. Ct. 1115, 1124 (U.S. 2003).

⁵⁰ 15 USC 1125 (c).

on this exclusion, which was previously formulated rather laconically.⁵¹ Whether this elaboration broadens the scope of the “fair use” defense is, however, questionable.⁵²

The body of case law dealing with tarnishment is quite substantial. For the purpose of the current analysis, I would like to consider the influence of the three following factors on the outcome of the decisions: 1) The Role of the Trademark in the Conveyed Message; 2) The Nature of the Conveyed Message; 3) The Likelihood of Consumer Confusion.

1) The Role of the Trademark in the Conveyed Message

When the tarnishing expression in question bears a clear critical comment *on the trademark owner*, the courts usually regard it as protected speech. Thus, in one case an environmental nonprofit organization used a mocking caricature of Reddy Kilowatt, a cartoon character the plaintiff used to promote its electric utilities. The obvious purpose of this use was to criticize the policy of the plaintiff, and the court denied trademark infringement.⁵³ In a similar case, infringement claims were denied where an environmental group ran a political ad criticizing the policies of the U.S. Forest Service. The ad featured the well-known figure of Smokey Bear trying to hide a chain saw behind his back, with the slogan “Say it ain’t so, Smokey.”⁵⁴ The same conclusion is usually reached when the tarnishing use intends to criticize the values represented by the trademark more generally. Thus, in one case the defendant produced photographs of Barbie dolls in various sexualized poses, often juxtaposed with vintage household appliances. Doing so, he attempted to criticize the objectification of women associated with Barbie. The court found the use non-infringing.⁵⁵ The same result was reached in a case concerning the song “Barbie Girl” that mocked the brand values of the “blond bimbo girl” whose “life is plastic.”⁵⁶

However, when a trademark is used to express something different than critique on its owner or the values represented by the mark, courts usually establish a trademark infringement. Such conclusion was reached regarding an athletic competition for homosexuals called the “Gay Olympic Games,”⁵⁷ t-shirts imprinted with a black version of Mickey and Minnie Mouse⁵⁸ and magazine caricature, which altered the Michelob’s slo-

⁵¹ 15 USC 1125 (c)(3).

⁵² Some scholars argue that the revision expanded the scope of the “fair use” defense: see, e.g., McCarthy, *supra* note 34, § 24.123; Kent D. Stuckey et al, *Internet and Online Law* § 7.03 (2008).

Others believe that the scope of the defense has not been changed: see, e.g., Marc L. Dellfliche & Sarah Silbert & Christina Hillson, *Life after Moseley: the Trademark Dilution Revision Act*, 16 *Tex. Intell. Prop. L.J.* 125, 142 (2007).

⁵³ *Reddy Communications, Inc. v. Environmental Action Foundation, Inc.*, 199 U.S.P.Q. 630 (D.D.C. 1977).

⁵⁴ *LightHawk, The Environmental Air Force v. Robertson*, 812 F.Supp. 1095 (W.D.Wash.1993).

⁵⁵ *Mattel Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003).

⁵⁶ *Mattel Inc. v. MCA Records, Inc.*, 28 F. Supp. 2d 1120 (C.D. Cal. 1998).

⁵⁷ *San Francisco Arts & Athletics v. International Olympic Committee*, 483 U.S. 522 (1987).

⁵⁸ *Walt Disney Co. v. Powell*, 698 F. Supp. 10 (D.D.C. 1988), *aff’d in part and vacated in part, remanded*, 897 F.2d 565 (D.C. Cir. 1990).

gan “One Taste and You’ll Drink It Dry” into “One Taste and You’ll Drink It Oily” in order to comment on oil spill into the river from which the Michelob brewery took its water.

Such decisions extensively protect trademarks as cultural signs, allowing trademark owners to control social and political connotations of their marks. Thus, without the permission of their legal owners, the Olympic symbol may not be employed in the gay’s struggle for equality, Mickey and Minnie Mouse are not allowed to engage in the social discourse concerning racial discrimination and the Michelob’s mark may not become associated with pollution issues.

Let us examine the example of the “Gay Olympic Games” more closely. The Olympic Games are a very strong cultural sign in our society. Its meaning is created due to the athletes participating in the Games, the public watching and discussing them, press and literature. And yet, there is a single entity that owns all the symbols related to the Games – the Olympic Committee. Between the years 1984 and 2000 the Committee chose to commercialize the Olympic Games extensively thereby diluting their cultural meaning. Doing so, it deprived the public of the purity of one of its strongest cultural signs for its own economic gain. However, when a gay rights group wishes to employ the Olympic symbols to convey a message of social acceptability, the Committee has the right to prevent it from doing so. This situation appears to be especially peculiar if we recall that the Olympic Games originate in the ancient Greece, where they were part of its homosexual culture. The participation in the Games was limited to young males, who competed naked, as the festival was meant, in part, to celebrate the beauty of the male body.

The whole concept that a cultural sign may have an owner is fundamentally flawed. Cultural signs in general and trademarks in particular shape our social and cultural heritage. Cultural signs reflect the values and the conventions of our society. These values and conventions should not evolve under the supervision of trademark owners. The Olympic Committee should have no right to make decisions with respect to the cultural meaning of the Olympic Games and, particularly, on whether or not they should be associated with homosexuals. By letting the Olympic Committee make a decision on this issue, we allow a single private entity to determine whether or not our cultural perception of wholesome and prestigious athletic games should include the notion of homosexuality. This situation is undesirable. The society should be able to establish the meaning of its cultural signs in a free and uncontrolled dialogue. The general attitude of the Western legal systems, according to which cultural signs are not protected against alteration of their meanings but in exceptional cases, is the only acceptable position in a democratic society. This position should not change when the cultural sign in question is a registered trademark. The meaning embedded in cultural signs should always be considered as something that belongs to the public and never as private property of certain entities.

In tarnishment cases courts often emphasize that the defendants have adequate alternative avenues of communicating their messages without using another’s trademark.⁵⁹

⁵⁹ *Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 402 (8th Cir. 1987); *Anheuser-Busch, Inc. v. Balducci Publications*, 28 F.3d 769, 778 (8th Cir. 1994); *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1403–1404 (9th Cir. 1997); *Interbank Card Ass’n v. Simms*, 431 F. Supp. 131, 133 (M.D. N.C. 1977).

This attitude significantly simplifies the complex cultural reality. In the cases mentioned above trademarks were used as rhetorical figures, in order to make the conveyed messages more convincing and more memorable. And although there are plenty of rhetorical figures that are not protected as trademarks, it cannot be argued that there is no need to use another's trademarks to convey one's messages. Every cultural sign has a distinct meaning or, in terms of the Q model, a distinct configuration of links leading to it. The social message conveyed through black Mickey and Minnie Mouse can hardly be explained in words. Similarly, there are no equivalents to "Gay Olympic Games" or „One Taste and You'll Drink It Oily.“

Of course, the cultural meaning of a trademark is diluted when it is used to express an idea wholly unrelated to it. However, trademark owners, too, often employ meaningful cultural signs as rhetorical figures, thereby diluting their distinctive significance. Thus, for instance, the legal system is not concerned with the public interest in protecting the phrase "Life, Liberty, and the Pursuit of Happiness" against dilution occurring while it is used as a rhetorical figure that builds the Cadillac trademark. At the same time, the interest of Michelob prevents the use of its trademark as a rhetorical figure to convey a message against pollution. I see no reason why trademarks should be regarded as cultural signs of a higher rank and protected against modifications of their meaning. Once trademarks enter the scene of playing with words, of making a sophisticated use of the existing cultural signs to convey their messages, they should themselves obey the rules of this game.

Let us imagine cultural meaning as a material having certain, limited mass. That is, we have only a limited capacity of considering things important, exciting, interesting, etc. Attaching great importance to some issues necessarily implies attaching less importance to other issues. When trademarks become the center of our attention, when they encompass a significant portion of cultural meaning, they necessarily deprive other issues of this meaning, pushing them aside. If the legal system prevents trademark dilution through expressive speech on issues unrelated to the mark, it prevents redistribution of the cultural meaning and reinforces distribution that favors the key position trademarks hold in our culture. For example, not letting to use the Michelob trademark to convey a message against pollution prevents the cultural meaning of Michelob from leaking out into the discussion on environmental issues.

2) The Nature of the Conveyed Message

Even when the defendant's messages specifically target trademarks, they are not always secured from liability for tarnishment. Whether the trademark use would be permitted or enjoined depends largely on the question of *what* message about the trademark it conveys. Thus, courts invariably allow expressions whose messages are easily decipherable and readily understandable.⁶⁰ Reddy Kilowatt and Smokey Bear cases, discussed above, are illustrative examples of this principle. However, when the message is somewhat more allegorical, less specific and does not criticize anything in particular, its destiny is rather hard to predict.

⁶⁰ See, e.g., *WHS Entertainment Ventures v. United Paperworkers Intern. Union*, 997 F. Supp. 946 (M.D. Tenn. 1998): flyers that listed violations of a saloon and included a parody of the saloon's trademark were not found to violate the mark. See also the already mentioned Barbie cases: *supra* notes 54–55.

Although it is a well-established principle that the First Amendment protects not only those whose jokes are funny,⁶¹ it seems that a witty parody is much more likely to be protected than a stupid joke. Thus, in one case the defendant sold t-shirts bearing the inscription “Miami Mice” and featuring two comical cartoon mice resembling the characters of the “Miami Vice” television series and appearing in similar settings. The court concluded that the t-shirts parodied the tough, courageous, and stylish detectives of “Miami Vice” and did not infringe its trademark.⁶² In another case the use of the acronym “BUFU” – “By Us, Fuck You” in a satirical movie was held to be a protected parody of the trademark “FUBU” – “For Us By Us.” Demonstrating his own good sense of humor, Justice Owen noted that the plaintiff’s action was “UFUB” – “Utterly Frivolous Under Biopsy.”⁶³

By contrast, where a magazine published a satirical pictorial essay entitled “Monkeying Around with Tarzan and Jane” depicting Tarzan and his wife Jane engaging in explicit sexual activities and conversation, the court didn’t find the joke funny.⁶⁴ Noting that the essay “poked fun” at the image of Tarzan and Jane, the court nevertheless found that the First Amendment did not protect the defendant, who “blatantly infringed” the trademarks. The “Monkeying Around” essay would irreparably harm the reputation of Tarzan and Jane as persons of high moral standards, admirable traits of character and clean and attractive appearances, it concluded. Similarly, t-shirts bearing an imprint resembling the General Electric trademark reading “Genital Electric,”⁶⁵ posters with “Enjoy Coca-Cola” logo with the second word altered so as to read “Enjoy Cocaine” and “Garbage Pail Kids” stickers showing the “Cabbage Patch Kids” dolls in violent and sometimes noxious settings⁶⁶ were all enjoined as trademark infringements.

An early post-TDRA tarnishment case dealt with the use of the words “Chewy Vuiton” for dog toys. Giving a generous interpretation to the newly formulated “fair use” defense, a Virginia federal district court declined dilution claims and recognized “Chewy Vuiton” as a protectable parody and a humorous play on Louis Vuitton’s high-end image.⁶⁷ Several scholars regarded this decision as a confirmation of the expanded protection the trademark parodies will be entitled to after the TDRA.⁶⁸ However, this promising start did not prove to mark a new era for trademark parodies. Just about half a year later,

⁶¹ See *Yankee Publishing Inc. v. News America Publishing, Inc.*, 809 F. Supp 267, 280 (S.D.N.Y. 1992); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994).

⁶² *Universal City Studios, Inc. v. T-Shirt Gallery, Ltd.*, 634 F. Supp. 1468 (S.D. N.Y. 1986). See also *Universal City Studios, Inc. v. Casey & Casey, Inc.*, 622 F. Supp. 201 (S.D. Fla. 1985), *aff’d*, 792 F.2d 1125 (11th Cir. 1986).

⁶³ *GTFM LLC v. Universal Studios Inc.*, 2006 WL 1377048 (S.D.N.Y. 2006).

⁶⁴ *Edgar Rice Burroughs, Inc. v. High Soc. Magazine, Inc.*, 7 Media L. Rep.1862 (S.D. N.Y. 1981).

⁶⁵ *General Electric Co. v. Alumpa Coal Co.*, 205 U.S.P.Q. 1036 (D Mass 1979).

⁶⁶ *Original Appalachian Artworks, Inc. v. Topps Chewing Gum*, 642 F. Supp. 1031 (N.D. Ga. 1986).

⁶⁷ *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 464 F. Supp. 2d 495, 507 (E.D. Va. 2006).

⁶⁸ See, e.g., Deborah R. Gerhardt, *The 2006 Trademark Dilution Revision Act Rolls Out a Luxury Claim and a Parody Exemption*, 8 N.C. J. L. & Tech. 205, 226–227 (2007).

a district court of Utah gave its somewhat less parody-friendly ruling in *Harris Research, Inc. v. Lydon*.⁶⁹ In this case the defendant offered for sale t-shirts and stickers that bore an image resembling the famous “Chem Dry” trademark, but reading “Chem-Who?” accompanied by the slogan “Stickin It to the Little Guy.” Stating that the defendant’s use harmed the reputation of the trademark by creating a negative association, the court concluded that the mark was tarnished.⁷⁰

Although it is a well-established principle that the First Amendment protects not only those whose jokes are funny,⁷¹ it seems that a witty parody is much more likely to be protected than a stupid joke. Courts do not see any point in such jokes as “Monkeying Around with Tarzan and Jane,” “Enjoy Cocaine,” “Genital Electric” or “Garbage Pail Kids.” However, these jokes do have a point. Just consider that while the sales of “Cabbage Patch Kids” dolls were around 40 million, more than 800 million “Garbage Pail Kids” stickers were sold.⁷² That means that someone does understand the point of these expressions and, unlike the courts, finds it amusing. Put simply, the point of such expressions is an allegorical message that challenges the serious, wholesome and all-important aura surrounding the famous trademarks. In other words, the reputation of Tarzan and Jane as persons of high moral standards, admirable traits of character and clean and attractive appearances, that the court was so concerned about, is precisely what “Monkeying Around” challenges. The fact that people show interest in such expressions is the best evidence of their unwillingness to accept the “licensed” meanings of trademarks imposed on them by trademark owners.

When courts enjoin speech tarnishing trademarks because it lacks a clear critical message, they ignore the cultural reality in which meaning is not always based on facts and logic. The meaning of a trademark is mostly created by linking it to various cultural signs that initially have nothing to do with it. However, no one ever doubts the legitimacy of marketing techniques attempting to convince us of the connection between Coca-Cola and sportsmanship or between Omega and intelligence, although this connection is wholly arbitrary and based on nothing but psychological influence and rhetoric. However, when someone wishes to challenge the cultural meaning of a trademark, to suggest its connection to somewhat less wholesome cultural signs, the legal system would not let this happen unless the suggested relation has some readily conceivable point. Thus, the trademark owners have a very significant privilege in the discourse over the cultural meaning of their marks.

And it is a very substantial restriction indeed. Speech based on nothing, mere rhetoric, can be much more powerful than any logical persuasion, since it cannot be rebutted. It is a well-known fact that customers are much more loyal to a brand when their loyalty is

⁶⁹ 505 F.Supp.2d 1161 (D. Utah 2007).

⁷⁰ *Id.* at 1166.

⁷¹ See *Yankee Publishing Inc. v. News America Publishing, Inc.*, 809 F. Supp 267, 280 (S.D.N.Y. 1992); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994).

⁷² *Original Appalachian Artworks, Inc. v. Topps Chewing Gum*, 642 F. Supp. 1031, 1032 (N.D. Ga. 1986).

based not on rational reasoning, but on mere emotional preference.⁷³ A consumer who has some concrete logical reason, such as a low price, for preferring one brand to another, is likely to switch brands when this reason disappears. However, a consumer who intuitively and inexplicably prefers the brand is likely to stay loyal in the face of changing circumstances. The same is true for expressions challenging the “licensed” meaning of trademarks. Thus, while the image of “Reddy Kilowatt” can be rehabilitated if its owner shows more concern for environmental issues, there is nothing to be done against “Genital Electric.” Given the clear evidence that many people are interested in tarnishing expressions and do see their point, restricting them is, in fact, suppressing the resistance to the “licensed” reality and imprisoning the public in the ideological visions dictated by trademark owners.

This legal situation also has an additional anti-democratic effect on the cultural discourse. The fact that some expressions do not amuse the judges, but seem vulgar or tasteless to them, stems from the fact that the judges belong to a different social group than the target audience of these expressions. Privileging the speech that appeals to them, the courts exert what Pierre Bourdieu calls “symbolic violence.”⁷⁴ That is, belonging to the cultural elite, the judges silence the voices of other classes by condemning their aesthetic judgments.⁷⁵ It is quite obvious that at the end of the day those with a more sophisticated sense of humor have more rights to speak about trademarks. Sophisticated sense of humor is part of the “cultural capital”⁷⁶ of the ruling class. Using this criterion, the courts reaffirm its social dominance.

3) The Likelihood of Consumer Confusion

Interestingly, in most of the tarnishment cases courts come to the conclusion that the defendant’s use is likely to confuse the consumers. Thus, courts assumed that the consumers would believe the owners of the respective trademarks to have approved the “Enjoy Cocaine”⁷⁷ and the “Genital Electric”⁷⁸ t-shirts, the “Monkeying Around” essay,⁷⁹ the “One Taste and You’ll Drink It Oily” caricature⁸⁰ and many other uses.⁸¹ The likelihood

⁷³ Celia Lury, *Brands: the Logos of the Global Economy* 86–87 (2004); C. N. Allen, *A Psychology of Motivation for Advertisers*, 25 *J. of Applied Psych.* 378, 383 (1941); Amitai Etzioni, *How Rational We?*, *Sociological Forum*, Vol. 2, No. 1, 1, 10 (1987).

⁷⁴ “[A] gentle violence, imperceptible and invisible even to its victims, exerted for the most part through the purely symbolic channels of communication and cognition[.]” Pierre Bourdieu, *Masculine Domination* 1–2 (2001).

⁷⁵ See generally Pierre Bourdieu, *Distinction: a Social Critique of the Judgment of taste* (1984).

⁷⁶ A concept introduced by Pierre Bourdieu: *Id.* at 2 et seq.

⁷⁷ *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183, 1188–1191 (E.D. N.Y. 1972).

⁷⁸ *General Electric Co. v. Alumpa Coal Co.*, 205 U.S.P.Q. 1036, 1036–1037 (D Mass 1979).

⁷⁹ *Edgar Rice Burroughs, Inc. v. High Soc. Magazine, Inc.*, 7 Media L. Rep. 1862, 1863 (S.D. N.Y. 1981).

⁸⁰ *Anheuser-Busch, Inc. v. Balducci Publications*, 28 F.3d 769, 775 (8th Cir. 1994).

⁸¹ See, e.g., *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema Ltd.*, 467 F. Supp. 366, 377 (S.D.N.Y. 1979); *Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 398–401 (8th Cir. 1987); *Anheuser-Busch, Inc. v. Balducci Publications*, 28 F.3d 769, 774–775 (8th Cir. 1994);

of consumer confusion in such cases leads the courts to establishing a traditional trademark infringement, providing an additional basis for enjoining the tarnishing speech. The TDRA strengthens this line of judicial practice making tarnishing use impossible to exempt when consumer confusion is likely. Unlike the previous anti-dilution law, the TDRA confines the “fair use” exemption to dilution cases, thus making clear that traditional trademark infringement involving likelihood of consumer confusion will never be considered as a “fair use.”⁸²

However, the very phenomenon of confusion in tarnishment cases is much more alarming than the consequences of this confusion for trademark owners, let alone the consumers. Consumer confusion in such cases means that the “licensed” culture has taken deep roots in our society. It means that the public is so much used to the idea that virtually every trademark use must be authorized, that even when the trademark is used to convey a message wholly unrelated to it or when it is made fun of, people are still likely to believe that the trademark owner must have approved the use. In other words, the public has already learned to accept the position of trademark owners as powerful censors of speech related to their marks. If we were told about a society where people believed that every poster bearing the name or the likeness of their political leader must have been approved by him, we would probably assume that those people live under a strict dictatorship. Meanwhile, we ourselves have already learned to accept the same type of censored reality, where trademarks play the dictator’s role.

Of course, everybody should have the right not to speak. However, outside of a trademark context if nobody explicitly ascribes to a person things she did not say, the question whether somebody would mistakenly believe that she approved the speech simply does not arise. Imagine that a survey shows that the public believes that a politician must approve a caricature mocking her. This would rather raise serious concerns as to the democratic awareness of the public than lead to the conclusion that the caricature should be enjoined.

Protection against confusion is, undoubtedly, the central purpose of trademark law. However, although one court noted that the purchaser of a book parodying a famous trademark has the same right not to be confused as a purchaser of a can of peas,⁸³ there is a significant difference between confusion related to the source of goods and confusion related to the source of speech. In other words, the question “have you made this product?” is entirely different from the question “have you said that?” or, rather, “have you given your consent for people to talk about you like that?” Put in terms of the Q model, these are two links of a different kind.

What is curious about trademark law is that while it formally intends only to protect consumer beliefs, it actually acts to generate them.⁸⁴ Courts should thoroughly consider

Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1403–1405 (9th Cir. 1997); Mutual of Omaha Ins. Co. v. Novak, 836 F.2d 397, 400–401 (8th Cir. 1987).

⁸² 15 USC 1125 (c)(3).

⁸³ Rogers v. Grimaldi, 875 F.2d 994, 997–98 (2d Cir.1989), cited approvingly in Charles Atlas, Ltd. v. D C Comics, Inc., 112 F. Supp. 2d 330, 337 (S.D. N.Y. 2000).

⁸⁴ See Robert C. Denicola, Freedom to Copy, 108 Yale L.J. 1661, 1668 (1999); Mark A. Lemley, The Modern Lanham Act and the Death of Common Sense, 108 Yale L.J. 1687, 1708 (1999);

the political consequence of reinforcing the belief that to mock a trademark or to use it as an expressive tool one needs to get an approval of its owner. They should ask themselves if the censored reality thus created is the reality we want to live in.

V. The Property Rhetoric of Trademark Law

Courts deciding on trademark cases often use the rhetoric of property to justify the outcomes of their decisions. Trademark owners have a property right in their trademarks, they reason, and therefore, also the exclusive right to decide in which discourses their trademarks will be used and to protect their property against injury caused by undesirable associations.⁸⁵ Choosing this rhetoric, courts escape the necessity to cope with the conflicting interests underlying the trademark cases. Does the public interest to use trademarks as expressive tools, mock them, shake their idolized status outweigh the interest of trademark owners to preserve the “licensed” meaning of their marks?

The property rhetoric obscures the real conflicts, making the outcomes of the decisions seem inevitable. However, this feeling is a delusion rather than reality. Regarding the trademark right as property, rather than just a right to be protected against unfair competition,⁸⁶ is a regulatory decision made by the legal system. The scope of this property right depends entirely on the extent to which the legal system in general and courts in particular are willing to protect it. It cannot be argued that the property right of the trademark owner is the right to protect the economic value of the trademark, since its value *is* the outcome of the legal protection. Therefore, this argument is circular.⁸⁷

The property rhetoric of trademark law allows for a very far-reaching suppression of free speech. This happens because free speech is extensively protected only against governmental restrictions, but not against restrictions stemming from private property rights. Governmental restrictions on speech are subject to severe judicial scrutiny. They must be “narrowly tailored” to serve compelling public interests.⁸⁸ Yet when the restriction of speech stems from private property rights, specifically, intellectual property rights, no such constraints are recognized. Extensive as they may be, such restrictions on

Ross D. Petty, *Of Tartans and Trademarks*, 94 *Trademark Rep.* 859, 876; James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 *Yale L.J.* 882 (2007).

⁸⁵ See, e.g., *Chemical Corp. of America v. Anheuser-Busch, Inc.*, 306 F.2d 433, 437 (5th Cir. 1962); *Interbank Card Ass'n v. Simms*, 431 F. Supp. 131, 133–134 (M.D. N.C. 1977); *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 206 (2d Cir.1979); *Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 402–403 (8th Cir. 1987); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 541 (1987); *Walt Disney Co. v. Powell*, 698 F. Supp. 10, 12 (D.D.C. 1988).

⁸⁶ Trademark law is considered to be part of unfair competition law: *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97 (1918); *Union Nat'l Bank v. Union Nat'l Bank*, 909 F.2d 839, 844 n.10 (5th Cir. 1990); *Keebler Co. v. Rovira Biscuit Corp.*, 624 F.2d 366, 372 (1st Cir. 1980).

⁸⁷ See Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *Colum. L. Rev.* 809, 815 (1935).

⁸⁸ See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Kusper v. Pontikes*, 414 U.S. 51, 58–59 (1973); *Republican Party of Minnesota v. White*, 122 S.Ct. 2528, 2530 (2002).

free speech are not regarded as problematic. No balance of interests is usually made in such cases – the free speech interest simply has to retreat.⁸⁹ As one court has put it, “the First Amendment is not a license to trammel on legally recognized rights in intellectual property.”⁹⁰ One court explicitly noted the absence of any governmental involvement in connection with the asserted First Amendment violations.⁹¹

However, the distinction between private and governmental censorship is a type of disguise. As legal realists teach us, the state is the one that creates and enforces property rights.⁹² The state is the one that decides to grant commercial conglomerates the power to control the cultural meaning of their trademarks. We must strip the veil of the property rhetoric to see if granting such power makes good law.

Intellectual property rights are generally granted for the purpose of encouraging creation of the protected intangible assets.⁹³ Trademark rights particularly are traditionally granted in order to encourage the investment in the quality of goods or services and in commercial goodwill.⁹⁴ Protection of trademarks against consumer confusion as to the origin of goods or services wholly satisfies this purpose. When the cultural meaning of a trademark is regarded as a part of the property right in the mark, this encourages its owner to invest in the creation of such meaning, rather than in the quality of its goods or services.

As described above, the cultural meaning of trademarks is created by marketing techniques that dilute the non-commercial signs of our culture, populate our living environment and come to control the contents of our communication media. They strengthen materialistic values in our society, whereas empirical studies show that such values have an adverse effect on personal well-being.⁹⁵ I believe, there is every reason to discourage, rather than encourage, commercial corporations from creating cultural meaning to their trademarks.

Trademark law deals with a very special kind of property – the property in semantic links. To a certain extent, it determines what people should believe about trademarks. The original purpose of trademark law is to protect the semantic link implying that the

⁸⁹ See, e.g., *Interbank Card Ass’n v. Simms*, 431 F. Supp. 131, 134 (M.D. N.C. 1977): “The Court finds that [...] the defendant in the name of the First Amendment cannot as a matter of law infringe upon the plaintiff’s service mark or trademark in the Master Charge credit cards and window stickers.”; *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 206 (2d Cir.1979): “The propriety of a preliminary injunction where such relief is sought is so clear that courts have often issued an injunction without even mentioning the first amendment.”

⁹⁰ *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979).

⁹¹ *Interbank Card Ass’n v. Simms*, 431 F. Supp. 131, 133–134 (M.D. N.C. 1977).

⁹² Joseph William Singer, *Legal Realism Now*, 76 Cal. L. Rev. 465, 487–494 (1988).

⁹³ Art. I, § 8 of the United States Constitution: “The Congress shall have power [...] [t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

⁹⁴ McCarthy, *supra* note 34, §§ 2.3–2.4.

⁹⁵ Tim Kasser, *The High Price of Materialism* 5–22 (2002).

trademark owner is the origin of the respective goods or services. However, when the cultural meaning of a trademark is considered to be a part of the property right of its owner, it actually means that the trademark owner also has the right that people associate its trademark with certain positive values that constitute its “licensed” meaning. This is a very far-reaching right to control what people think.

The trademark right should be limited to the possibility to establish and protect the semantic link pointing at the trademark owner as the origin of its goods or services. When someone uses a trademark to misrepresent himself as the trademark owner, this use changes nothing in the semantic network. Since the consumers believe that the origin of goods or services is the trademark owner, no alterations in the semantic network occur. The fact that the indication is false changes nothing from the semiotic perspective.⁹⁶ The semantic link is merely exploited, but not modified. The protection of this semantic link against such exploitation is the primary target of trademark law.

However, uses that modify the existing semantic links should never be enjoined. In a democratic society the major role of speech is to present multiple views, so that the discourse over the various social issues resembles a dialogue rather than a monologue. Any type of speech that modifies the existing structure of the semantic network, either by adding a new link or by altering an existing one, should be most extensively protected. This kind of speech constitutes what Eco calls “aesthetic text.”⁹⁷

When a famous trademark is used for goods so distant from its original field that no confusion is caused, a new link is created to the trademark thereby weakening the existing ones. And when a trademark is used as a figure of speech to convey an idea unrelated to it or in a context that clashes with its image, new associative links emerge, altering the semantic configuration that forms its “licensed” cultural meaning. Although not such uses constitute “speech” in the traditional sense, they all should be protected under the First Amendment. Such uses alter something in the semantic network and thus, should be considered “aesthetic text,” that is, symbolic communication protectable as speech. The fact that such uses are often made by commercial entities should not lead to a different conclusion, since the reason for protection is the right of the public to hear. That is, the mentioned uses are valuable not because of the user’s freedom of speech, but because of the right of the public to be exposed to alternative interpretations of trademarks, the right to hear something else than the authoritarian tone of the “licensed” cultural meaning cherishing the exclusivity and the solemnity of commercial trademarks.

Just as the name of a political candidate symbolically connotes the ideology her party endorses, famous trademarks are the ultimate symbols of the commercial ideology. This ideology has already acquired a dominant position in our culture. Any use that alters the “licensed” meaning of a trademark in any way weakens the hegemony of the commercial ideology to some extent. Any such use, even if made for commercial benefit and even if not constituting “speech” in the traditional sense, is analogous to voicing a counter-hegemonic view and should therefore be permitted, and even encouraged. Protect-

⁹⁶ Eco, *supra* note 3, at 179. For a somewhat different analysis of this issue see Jacob Jacoby, *The Psychological Foundations of Trademark Law: Secondary Meaning, Genericism, Fame, Confusion and Dilution*, 91 *Trademark Rep.* 1013, 1042–1045 (2001).

⁹⁷ Eco, *supra* note 3, at 261–276.

ing trademarks from alteration of their meaning, the legal system implicitly favors the commercial ideology over alternative world views and helps the efforts of commercial corporations to make it seem natural and indisputable.

Moreover, when the legal system protects the cultural meaning of a trademark, it actually encourages the creation of such meaning by making this practice profitable. The process of creating cultural meanings to commercial trademarks charges the cultural signs exploited in this process with a commercial connotation. Thus, it can be said that today trademark law implicitly encourages the creation of a certain type of meaning to cultural signs – the commercial meaning. This situation is undesirable. The legal system should as much as possible refrain from favoring a certain type of meaning to cultural signs. As discussed above, cultural signs reflect social values and conventions. In a democratic society, cultural signs should reflect, as much as possible, the real values and beliefs of the society members; their meaning should evolve in a free dialogue between individuals. The legal system should avoid pushing this dialogue in a certain direction by favoring a certain meaning of cultural signs over other meanings.

The commercial ideology has a very strong position in our society *inter alia* because mythological and historical figures, as well as values like love and happiness have commercial connotations to some extent. In a democratic society generally there is a very high interest in a multitude of views. In our society particularly there is a significant interest in shaking the hegemony of the commercial ideology. The greater the number of important cultural signs that are free from commercial connotations, the weaker this hegemony will be and the more space will be left for alternative social values. Therefore, the legal system should avoid, as much as possible, encouraging the commercialization of cultural signs.

The cultural meaning of trademarks is built upon the public lands of our society, that is, in the area of our culture. It exists in our minds and thoughts. Nobody should be allowed to claim a property right over this territory.

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Ассаф Захарова Катя. Захист торговельних марок від розмивання: семіотичний підхід

Анотація

У цій статті розглядається культурне значення торговельних марок та соціальна значущість їх правової охорони. Основна увага приділяється правовій системі Сполучених Штатів. Торговельні марки є символами, призначеними для того, щоб споживач міг безпомилково ідентифікувати походження різних товарів і послуг. Проте сьогодні торговельні марки є значно більшим, ніж просто позначення джерела походження. Вони виступають культурно значущими знаками. Так, наприклад, торговельна марка «Coca-Cola», окрім передавання інформації про походження безалкогольних напоїв, асоціюється зі свободою, молодістю, радістю та глобалізацією. Торговельна марка «Chanel» означає не лише парфуми та одяг, а й ексклюзивність, інтелект та європейський шик. Культурне значення олімпійських кілець і Міккі Мауса, які також є зареєстрованими торговельними марками, навряд чи можна передати кількома словами. Відомі торговельні марки втілюють цінності, бачення та ідеали, у які люди вірять. Як культурні знаки вони посідають досить центральне місце в сучасному суспільстві. Культурне значення торговельної марки ретельно формується її власником за допомогою реклами та інших маркетингових інструментів. Ці інструменти створюють асоціативні зв'язки між торговельною маркою та різними позитивними культурними символами, такими як свобода, молодість, інтелект тощо. У статті стверджується, що ці зв'язки є взаємними. Тобто, хоча торговельна марка починає нести частину значення тих культурних символів, з якими її пов'язують, самі ці культурні символи також частково набувають комерційного змісту, пов'язаного з відповідною маркою.

Ключові слова: культурне значення торговельних марок, правова охорона торговельних марок, ідентифікація походження товарів і послуг, маркетинг і брендинг, правова система США

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пенсацією творцям. Обґрунтовується також доцільність запровадження моделі output-based remuneration, яка може врівноважити інтереси авторів і розробників ШІ.

Ключові слова: штучний інтелект, авторське право, машинне навчання, тренування ШІ, вільне використання творів, доктрина fair use, теорії права інтелектуальної власності.

План

I. Вступ

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C. Вплив догм інтелектуальної власності на майбутнє навчання ШІ

IV. Висновки

I. Вступ

Постановка проблеми. Творці з ЄС, США та України розпочали справжнє протистояння проти “хтивих” великих компаній розробників ШІ через використання їхніх творів без належної атрибуції та винагороди (див. *Фігура 1*). Harvard Law Review з посиланням на джерела описує, що нову технологію називають “нічим іншим, як машиною плагіату”, створеною “жадібними й безпринципними компаніями, які прагнуть витіснити людський таланти з індустрії мистецтва”.¹ В українських ЗМІ схожі наративи простежуються у справі з видавництвом «А-БА-БА-ГА-ЛА-МА-ГА» через обкладинку книги «Жінка зі сну. “Антологія англійських готичних оповідань”», яку згенерував ШІ (див. *Фігура 2*). Користувачі соціальних мереж активно відстоювали інтереси ілюстраторів, які через згенеровані у декілька кліків обкладинки недоотримують винагороду.² Проте за емоційними твердженнями постають важливі юридичні питання, а саме: яким чином авторське право має відповідати на виклики, поставлені новою технологією – ШІ, особливо в частині навчання ШІ на об'єктах, що охороняються авторським правом.

¹ Recovering Personality in Copyright.s Originality Inquiry. Harvard Law Review, 11 February 2025. <https://harvardlawreview.org/?p=17018>. (дата звернення: 26.01.2025).

² Див.: 1) Ярова Майя. Уанет лютує через обкладинку книги «А-БА-БА-ГА-ЛА-МА-ГА». Її створив ШІ. (Scroll Media, 23 January 2025). <https://scroll.media/2025/01/23/skandal-ai-a-ba-ba-ga-la-ma-ga/> (дата звернення: 26.06.2025). 2) «А-ба-ба-га-ла-ма-га» зробила обкладинку за допомогою ШІ. Далі були дискусії, звинувачення та промокоди. The Village Україна, 29.01.2025. <https://www.village.com.ua/village/culture/culture-situation/359337-laquo-em-a-ba-ba-ga-la-ma-ga-em-raquo-zrobila-obkladinku-za-dopomogoyu-shi-dali-buli-diskusiyi-zvinuvachennya-ta-promokodi>. (дата звернення: 26.06.2025.)