

Hedonic Trademarks

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A number of scholars have recently critiqued the traditional search-costs model of trademark infringement doctrine and have proposed alternatives driven by consumer decision-making theories and contractarian understandings of trademarks. While I agree that the search-costs model is problematic in parts, some of the other suggested frameworks suffer from difficulties of their own. For one, these alternative approaches draw up a dichotomy between “pure” experiences of trademarked goods as opposed to “altered” experiences, with the latter representing the mindsets of consumers after trademark owners have influenced them via advertising and other devices in an effort to build up goodwill. This Article posits, however, that this binary setup most reminiscent of the decision between the red pill and the blue pill in the movie The Matrix—with one standing for the “truth” about trademarked products and the other a “fake reality” filled with manufactured perceptions about goods—is a false choice. Indeed, in today’s world, many goods and their brands have become inextricably tied with one another and consumers experience the two together. In that sense, it is not necessarily relevant whether consumers prefer Pepsi to Coke when no labels are attached because we may actually be interested in human experience and level of hedonic benefits as a whole, and labels do enter that holistic perception. Hedonic harms to consumers, should they be of sufficient magnitude, could prove significant for doctrines such as dilution and post-sale confusion because intellectual property may become rivalrous and consumers’ experience of the original goods has the potential to suffer even when search costs do not increase. In short, the model presented here tries to resolve the tension between the information transmission conception of trademarks, which seeks to protect consumers from deception, and the misappropriation theory, which focuses on producers’ investments in goodwill. This Article shows how a robust trademark system must account for the possibility that producers serve as providers of hedonic values to consumers. A trademark system that seeks to maximize global hedonic and economic utility would need to include First Amendment-based safe harbors such as criticism and parody. In this context,

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deeper empirical exploration of hedonic trade-offs is likely to become an important source of information in drawing the contours of trademark law.

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“You create the world of the dream, you bring the subject into that dream, and they fill it with their subconscious.”¹

I. INTRODUCTION

Many individuals’ notion is that products are divided between the things that we “actually” need and those that advertising convinces us to want.²

¹ INCEPTION (Warner Brothers Pictures 2010).

² Herbert Marcuse deemed this the creation of “false needs.” HERBERT MARCUSE, ONE-DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY 4–5 (1964). See generally PAMELA WALKER LAIRD, ADVERTISING PROGRESS: AMERICAN BUSINESS AND THE RISE OF CONSUMER MARKETING (1998) (linking the advancement of advertising with the modernization of society); VANCE PACKARD, THE HIDDEN PERSUADERS (2007) (providing the best-known critique of the early uses of motivation research to influence consumer desires); JOSEPH J. SELDIN, THE GOLDEN FLEECE: SELLING THE GOOD LIFE TO AMERICANS (1963) (providing a historical account of advertising); Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 104–05 (2006) (describing economic and psychological critiques of advertising); Jeremy N. Sheff, *Biasing Brands*, 32 CARDOZO L. REV. 1245, 1295–1313 (2011) (cautioning against producers’ manipulation of consumers and calling for regulatory solutions). But see Raymond A. Bauer, *Limits of Persuasion*, HARV. BUS. REV., Sept.–Oct. 1958, at 105, 106–07 (criticizing Vance Packard’s arguments about companies’ ability to sway consumers and arguing in part that “[a]s the persuaders become more sophisticated, so do the people to be persuaded”); see also GERALD ZALTMAN, HOW CUSTOMERS THINK: ESSENTIAL INSIGHTS INTO THE MIND OF THE MARKET 127 (2003) (calling Vance Packard’s work “highly misleading”). For a parody of

Similarly, when it comes to branded goods, a great number of people believe that there is one form of perception that we would have of a brand based purely on our experience of the goods as contrasted with the perception that we adopt as a blend of our “real” experience and the sometimes misleading or at least exaggerating input of advertising.³ These dichotomies are reflected in the popular media, from literary representations⁴ to successful motion pictures. The public’s fascination with alternate realities remains unabated, from Neo’s choice in *The Matrix* between the red pill that represents the real world and the blue pill that would send him back to a virtual reality controlled by machines,⁵ to the more recent choice in the movie *Inception* between reality and several other dimensions consisting of dream states.⁶ Other movies have focused on changing characters’ perceptions by altering their memories, whether by erasing negative memories of the past like in *Eternal Sunshine of the Spotless Mind*⁷ or creating positive memories that had not been present previously like in *Total Recall*.⁸ The closest analogy to the advertising-related dichotomies, however, may be *The Truman Show*, where Jim Carrey’s character breaks out of the manufactured televised world in which he has grown up and in which some moments he perceives as real are actually commercials for the viewers at home.⁹

the 1960s advertising industry and fictionalized accounts of related themes, see the series *Mad Men* (AMC television broadcast 2007).

³ See, e.g., JoAndrea Hoegg & Joseph W. Alba, *Taste Perception: More than Meets the Tongue*, 33 J. CONSUMER RES. 490 (2007) (discussing consumers’ significant preference for the taste of orange juice labeled with a nationally known brand as opposed to a store brand although both samples consisted of the juice with the former brand). For an example of the use of branding to promote healthier lifestyle choices, see Brian Wansink et al., *Can Branding Improve School Lunches?*, 166 ARCHIVES PEDIATRICS & ADOLESCENT MED. 967, 968 (2012).

⁴ See, e.g., DAVID FOSTER WALLACE, *INFINITE JEST* (1996); GREEN PEYTON WERTENBAKER, *THE CHAMBER OF LIFE* (1929), available at <http://generation.feedbooks.com/book/2585.pdf>.

⁵ *THE MATRIX* (Warner Brothers Pictures 1999).

⁶ *INCEPTION*, *supra* note 1.

⁷ *ETERNAL SUNSHINE OF THE SPOTLESS MIND* (Universal Pictures 2004). Adam Kolber has written about the issues surrounding memory-dampening drugs in the legal context. Adam J. Kolber, *Therapeutic Forgetting: The Legal and Ethical Implications of Memory Dampening*, 59 VAND. L. REV. 1561 (2006). The erosion of identity associated with memory loss has been explored in a number of works, including in the literary realm. See, e.g., RAY BRADBURY, *FAHRENHEIT 451*, at 40 (1953) (“[I]f she died, he was certain he wouldn’t cry. For it would be the dying of an unknown, a street face, a newspaper image, and it was suddenly so very wrong that he had begun to cry, not at death but at the thought of *not crying* at death . . .”).

⁸ *TOTAL RECALL* (TriStar Pictures 1990). A remake of the movie came out last year whose poster quizzically asks “What Is Real?” See *Total Recall*, IMDB, <http://www.imdb.com/title/tt1386703/> (last visited April 20, 2013).

⁹ *THE TRUMAN SHOW* (Paramount Pictures 1998). This and other movies may have even influenced the delusional, often paranoid, beliefs of psychiatric patients who believe that their lives are being filmed and shown to an audience for its entertainment. Joel Gold &

Robert Nozick explores this idea of what he terms the “experience machine” in his work *Anarchy, State, and Utopia*.¹⁰ Nozick presents the following thought experiment: imagine that we could choose between living our real lives and plugging into a machine that induces pleasurable experiences indistinguishable from reality—would we, given the choice, decide to be hooked up to such a machine as opposed to continuing with our real lives?¹¹ He concludes that we should refuse to plug into the machine because we want not only experiences but rather the ability to perform actions, because we would like to be a particular kind of individual, and because the machine sets limits on the types of things that we can experience.¹² This Article will argue, however, that in the world of branded goods, there is no actual way to step out of the experience machine. It will show that experiencing a good for its “inherent” qualities is elusive and that our perceptions are necessarily subject to outside influences that our brain incorporates into the experience of products.¹³ Consumers can gain a variety of hedonic enjoyments from using goods with a specific brand, including experiencing emotions tied to the mental associations that arise from the history or the marketing of the brand, acquiring the ability to convey elements of identity or status, and so on.¹⁴ Hence, this Article will show that there is hardly such a thing as experiencing a product apart from its brand and that the mainstream understandings of trademarks have all been incomplete to a greater or lesser degree because they have disregarded this state of affairs.

As part of its project, this Article will seek to resolve a long-standing tension in trademark law between the information transmission model, which posits that the law should protect consumers’ interests against deception and inferior goods, and the not-always-compatible misappropriation model, which views the goal of the law as protecting the goodwill in which producers have invested.¹⁵ The questions that arise on the way to developing such a framework challenge us to consider the fundamental aims of trademark law. The conversations about whether the law is truly “about” consumers or producers—while very important in their own right—have to some extent obfuscated the matter of the ultimate prescriptive objective of a trademark system. Consistent

Ian Gold, *The “Truman Show” Delusion: Psychosis in the Global Village*, 17 COGNITIVE NEUROPSYCHIATRY 455, 456 (2012).

¹⁰ ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 42 (1974).

¹¹ *Id.*

¹² *Id.* at 43. At the same time, people can experience things in virtual worlds that they cannot when unplugged. I thank Eric Goldman for his comments on this subject.

¹³ That being said, this Article does not endorse the view that individuals live in a world that consists of multiple realities. See generally PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1966).

¹⁴ I would like to thank Laura Heymann for her comments on this point.

¹⁵ See Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 550 (2006) (discussing the friction between these two theories and stating that “the information transmission model has no need for the idea of goodwill at all”).

with my previous work,¹⁶ I situate the endeavor of intellectual property law as a whole and of each of its branches individually in a scheme oriented toward the maximization of societal utility. I take a broad view of the forms of utility that we should count in this calculus and include both economic components and other types of gratification such as emotional rewards. This understanding fits in with the emerging literature on the role of hedonic values in legal analysis and the importance of considering the role of the law on personal happiness rather than only financial well-being.¹⁷ Accordingly, I “equate human welfare with the subjective, individual experience of positive feeling. On this view, the measure of welfare for a period of any duration, from a couple of minutes to an entire lifetime, is the aggregate of a person’s moment-by-moment experiences of positive and negative feeling.”¹⁸ I will show how trademarks fit into and can maximize this understanding of welfare.¹⁹

I posit that difficult empirical inquiries will litter any path that we choose to take in framing trademark law, and that we must not let fear of imperfection regarding the eventual outcome paralyze our thinking in this regard.²⁰ Unlike some other scholars, I view trademarks as part of a similar creation incentives paradigm as other forms of intellectual property such as copyright and patents even though we might not have strong grounds to “affirmatively encourage the creation of new brands”²¹ per se. Indeed, consumers experience goods and

¹⁶ I used this understanding of the foundations of intellectual property most recently in Irina D. Manta, *Reasonable Copyright*, 53 B.C. L. REV. 1303 (2012).

¹⁷ This approach has prominently been championed in the works of John Bronsteen, Chris Buccafusco, and Jonathan Masur. See John Bronsteen et al., *Welfare as Happiness*, 98 GEO. L.J. 1583 (2010) [hereinafter Bronsteen et al., *Welfare*]; John Bronsteen et al., *Well-Being Analysis vs. Cost-Benefit Analysis*, 62 DUKE L.J. (forthcoming 2013) [hereinafter Bronsteen et al., *Well-Being Analysis*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989202. See generally LAW AND HAPPINESS (Eric A. Posner & Cass R. Sunstein eds., 2010). For a contemporary social critique of hedonic analyses, see Deirdre N. McCloskey, *Happyism*, NEW REPUBLIC (June 8, 2012, 12:00 AM), <http://www.tnr.com/article/politics/magazine/103952/happyism-deirdre-mccloskey-economics-happiness>.

¹⁸ Bronsteen et al., *Welfare*, *supra* note 17, at 1591.

¹⁹ As one author and marketing consultant quipped: “[Consumers] don’t devote themselves to brands because they want to provide free marketing for corporations. They do it because some special brands offer up a vision that people can identify with, one that they want to involve themselves in more deeply.” ALEX WIPPERFÜRTH, BRAND HIJACK: MARKETING WITHOUT MARKETING 7 (2005).

²⁰ A similar point has been made in the context of measuring happiness in the legal context generally. See Bronsteen et al., *Welfare*, *supra* note 17, at 1611 (“Even if it were true that pleasure is a hopelessly messy and complicated phenomenon, comprising innumerable different shades of feeling and including even certain sorts of painful emotions, that would not invalidate the project of measuring subjective well-being and trying to promote it.”).

²¹ Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137, 141 (2010); see also William E. Ridgway, *Revitalizing the Doctrine of Trademark Misuse*, 21 BERKELEY TECH. L.J. 1547, 1560 (2006) (“[D]istinctive marks do not suffer any kind of public goods problem: their creation is nearly costless and, to a large extent, they are their own reward.”). But see Clarisa Long, *Dilution*, 106 COLUM. L. REV. 1029, 1060 (2006) (“On

trademarks so holistically (such as in studies in which different labels greatly affected the reported enjoyment of certain products like wines and beers)²² that the robustness of the trademark system could well influence the level of creation and sale of the goods themselves. And there is little question that this is a significant matter of concern for the economy and general welfare. While other scholars have written about the role of trademarks themselves as commodities or parts thereof,²³ this Article explicitly ties that realization to consumer experience and suggests that we draw doctrinal conclusions accordingly.

The Article will first focus on the three main strands that have dominated the thinking on trademarks in recent years, namely the search-costs theory, the consumer-choice theory, and the contractarian theory. It will demonstrate that

[Congress's] view, famous marks present a classic public goods problem. The cost of creating a public good—in this case a valuable mark with positive consumer associations—is high, but once the public good is created the cost to third parties of using it is low.”). Part of the disagreement here may be rooted in different understandings of what it means to create a trademark. See, e.g., Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 CARDOZO L. REV. 105, 166 (2005) (distinguishing between the creation of a mark and the investments spent in advertising and marketing to increase its value). For a public goods analysis of copyrightable works, see generally Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635 (2007).

²² A stark example of this phenomenon is a study in which subjects drank the same wine that was labeled as coming either from California or North Dakota, and the subjects who drank the wine with the former label rated both the actual wine and accompanying food as significantly better than the other group did. See Brian Wansink et al., *Fine as North Dakota Wine: Sensory Expectations and the Intake of Companion Foods*, 90 PHYSIOLOGY & BEHAV. 712, 713–15 (2007). In an earlier experiment involving beer, researchers found label-induced differences on some of the measures they used. See Ralph I. Allison & Kenneth P. Uhl, *Influence of Beer Brand Identification on Taste Perception*, 1 J. MARKETING RES. 36, 37–39 (1964). But see G. A. Mauser, Allison & Uhl Revisited: *The Effects of Taste and Brand Name on Perceptions and Preferences*, 6 ADVANCES CONSUMER RES. 161, 164–65 (1979) (failing to fully replicate the results of Allison and Uhl’s study and attributing that difference to variations in the methodology and the range of stimuli used).

²³ See, e.g., Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 624 (2004) (“[F]irms produce trademarks as status goods, . . . consumers consume trademarks to signal status, and . . . courts routinely invest trademarks with legal protection in an effort to preserve this status-signaling function. The culture industries—and what industries aren’t?—have long sold trademarks as commodities in their own right.”); Deven R. Desai, *From Trademarks to Brands*, 64 FLA. L. REV. 981 (2012) (describing the relationship between trademarks, brands, and products); Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 402 (1990) (terming the value of trademarks above that of signifiers “surplus value”); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1728–29 (1999) (discussing the meaning of the increased value of trademarks); Rothman, *supra* note 21, at 125 n.63 (“Trademarks have in some instances become the commodities themselves rather than signifiers of a producer of the good or service, or of the product itself. For example, the Nike swoosh is valuable separate and apart from the running shoes that were first marked with the trademarked swoosh.”).

the search-costs theory is incomplete, as scholars have pointed out, and does not comport with some of the existing trademark doctrines. It will also show that the consumer-choice theory runs into an important obstacle, which is its reluctance to acknowledge that any choice relies on the existence of desirable elements from which an individual can choose. Finally, it will demonstrate that the contractarian theory contains great internal tensions and ultimately struggles to meet its goal to escape the empirical problems of other models. This Article will then present a view of the law grounded in the psychological experience of trademarks. It will use research from cognitive psychology and marketing to provide an approach that explains the shape of trademark doctrine that we see today. As part of this endeavor, it will help to clear up one commonly accepted misconception: that all intellectual property is necessarily non-rivalrous.²⁴

This point is worth foreshadowing here. Imagine that a fast-food chain begins selling “Gucci burgers.”²⁵ Because the fast-food and fashion industries exhibit little overlap, consumers are unlikely to be confused by this use of the Gucci name, which will preclude a finding of direct, so-called point-of-sale trademark infringement.²⁶ It is also difficult to believe that search costs will rise

²⁴For a discussion of the role of rivalry in the economic analysis of intellectual property law, see John P. Conley & Christopher S. Yoo, *Nonrivalry and Price Discrimination in Copyright Economics*, 157 U. PA. L. REV. 1801 (2009); Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212, 246–48 (2004).

²⁵There is actually at least one place that does sell precisely that, namely a pub called “The Bag and Kettle” located in a Maine ski resort. See Eric, *The Bag and Kettle in Sugarloaf Maine*, SKI MONSTER BLOG (Feb. 21, 2013, 2:53 PM), <http://theskimonster.com/blog/posts/the-bag-and-kettle-sugarloaf-maine/>. I would like to thank Eric Goldman for our conversation on this point. A recent actual lawsuit involving the unlicensed use of a famous fashion mark, this time in advertising, came up in *Louis Vuitton Malletier, S.A. v. Hyundai Motor America*, No. 10 Civ. 1611(PKC), 2012 WL 1022247 (S.D.N.Y. Mar. 22, 2012), where the court found in favor of Louis Vuitton on a dilution claim after a Hyundai television commercial used a brief shot of a basketball adorned with a pattern similar to LV’s toile monogram on a chestnut-brown background. For a discussion of the case, see Eric Goldman, *Brief Brand Reference in TV Ad Constitutes Trademark Dilution—Louis Vuitton v. Hyundai*, TECH. & MARKETING L. BLOG (Apr. 2, 2012, 8:55 AM), http://blog.ericgoldman.org/archives/2012/04/brief_brand_par.htm; Rebecca Tushnet, *Delayed but Long Post on LV v. Hyundai*, REBECCA TUSHNET’S 43(B)LOG (May 30, 2012, 9:20 AM), <http://tushnet.blogspot.com/2012/05/delayed-but-long-post-on-lv-v-hyundai.html>.

²⁶15 U.S.C. § 1114(1)(a) (2006) (requiring that the use of a mark be “likely to cause confusion, or to cause mistake, or to deceive” for a finding of infringement). That being said, (1) some consumers may actually be confused and (2) while there may not be high levels of confusion at this stage, this could change if high-end designers enter the fast-food market. A designer has actually proposed a campaign called “McFancy,” which would place temporary McDonald’s stores at the most upscale “Fashion Weeks” events and would be “part art installation, gathering spot and, of course, a restaurant that offers a traditional McDonald’s menu but packaged in a way that makes a playful yet stylish nod to the lifestyle of the highly desirable, influential consumers that attend Fashion Weeks.” *McFancy McDonald’s by TCH/Access Agency*, COOL HUNTER (Jan. 14, 2010), <http://www.thecoolhunter.net/article/detail/1682/mcfancy-and-mcmagic-by-access-agency>. The pictures accompanying the story suggest that these stores would include items such as fries labeled Hermes and Gucci,

in any meaningful way; after all, consumers are unlikely to expend more time on finding Gucci fashion products just because they saw or perhaps even ate a Gucci burger. There is nothing particularly offensive about burgers, so a claim for tarnishment is unlikely to stand.²⁷ And yet, many people experience instinctual discomfort about the idea of having Gucci burgers in the marketplace. I suspect that this discomfort goes beyond an opposition to free riding, and scholars have in fact ably explained why free riding by itself should not be legally actionable.²⁸ The reason that the idea of Gucci burgers irks people may lie in the possibility that consumers can no longer experience Gucci purses with the same level of satisfaction after having seen some critical number of Gucci burgers. Moreover, the concern is that a potential reduction in satisfaction (and hence, I would argue, in utility) occurs without a genuine accompanying increase in the type of expression that the First Amendment seeks to protect,²⁹ unlike in situations where a mark is used as part of parody or commentary.³⁰ Especially in the case of status goods, society may thus suffer a global loss of utility if the upshots of Gucci burgers are minimal: the relative social increase in pleasure of devouring a Gucci as opposed to a differently branded burger may not make up for the social decreases in pleasure associated with the consumption of the original Gucci goods.³¹ This effect would only be compounded over time, with each additional Gucci-branded good bringing pleasures of lesser and lesser increase to the consumer and continuing to

Burberry burgers, and Paul Smith sundaes. *See id.* I would like to thank Will Baude for drawing my attention to this project.

²⁷The Lanham Act defines dilution by tarnishment as “association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.” 15 U.S.C. § 1125(c)(2)(C) (2006). A number of the cases that successfully made tarnishment claims revolved around uses related to drugs, sex, or nudity. *See* GRAEME B. DINWOODIE & MARK D. JANIS, *TRADEMARKS AND UNFAIR COMPETITION: LAW AND POLICY* 625–35 (3d ed. 2010) (citing, *inter alia*, *Toys “R” Us, Inc., v. Akkaoui*, No. C96-3381CW, 1996 WL 772709 (N.D. Cal. Oct. 29, 1996) (granting preliminary injunction to the plaintiff based on the defendant’s use of the website name and shopping service “Adults ‘R’ Us,” which sold an assortment of sexual devices and clothing)).

²⁸*See* discussion *infra* Part III.A.1.

²⁹It is understood that criticism of a brand could easily bring about greater hedonic loss to a brand than a competitive use would, but we generally allow such criticism due to the offsetting benefit to society of having this type of discourse. I would like to thank Bill McGeveran for his comments on this point.

³⁰For a discussion of non-deceptive trademark infringement and the First Amendment, see *infra* Part III.C.

³¹Or, as Rebecca Tushnet put it, “[W]hat good does the existence of Buick aspirin do for anyone?” Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 554 (2008). The psychology literature further shows that people would rather forego a gain than suffer a loss of the exact same magnitude. *See, e.g.*, Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341, 342 (1984). Absent an overwhelmingly larger gain on the part of Gucci burger consumers than the corresponding loss for original Gucci consumers, this may also militate against allowing Gucci burgers to exist, although this issue merits deeper study.

decrease pleasure to the consumer of Gucci fashion goods.³² This Article responds to the fact that the mainstream trademark theories have not captured the problem of such possible hedonic (in addition to potentially economic) losses. Scholars have criticized dilution doctrine for many years³³ and questioned the existence of harm in dilution cases,³⁴ and they have eyed other areas of the law such as post-sale confusion with suspicion as well.³⁵ This Article provides a possible answer as to how these doctrines relate to a world in which the experiences of goods versus experiences of brands have become more impossible to disaggregate than ever. Understanding these mechanisms is crucial to effectively grapple both with current doctrine and determine its future course as consumers' experiences of brands evolve. In short, the possibility of hedonic harm matters, we must attempt to measure it empirically, and we must evaluate to what extent the trademark system can reduce it without creating offsetting hedonic harms and other costs in the process.

The Article will begin by critiquing in Part II the existing principal theories of trademark infringement doctrine and will show how they face significant tensions and do not capture the experiential component of trademarked goods. Part III will first discuss the concept of free riding in trademark law and then provide an alternative understanding of modern trademark doctrine that accounts for the hedonic experience of branded products. This Part will also respond to potential concerns about the hedonic model. Part IV will conclude.

³² See *infra* notes 104–07 and accompanying text.

³³ While dilution by blurring and by tarnishment often receive separate treatment, this Article will generally refer to them together because both phenomena could cause similar harm that differs more in degree than in kind (blurring is understood as the weakening of the mark through the mechanism of diffusion, and tarnishment as diffusion and addition of negative connotations). See Long, *supra* note 21, at 1036–37 (describing the contents and roots of the doctrines of blurring and tarnishment). The *Santa Clara Computer & High Technology Law Journal* devoted a symposium issue to the topic of dilution several years ago, which is available at <http://digitalcommons.law.scu.edu/chtj/vol24/iss3/>.

³⁴ See, e.g., Tushnet, *supra* note 31, at 536 (arguing that “dilution does not harm many famous trademarks because adding associations to low-frequency words does not interfere with retrieval or recognition”); see also Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 848–59 (2010) (discussing the failure of antidilution laws to fulfill their stated goals); Paul J. Heald & Robert Brauneis, *The Myth of Buick Aspirin: An Empirical Study of Trademark Dilution by Product and Trade Names*, 32 CARDOZO L. REV. 2533, 2575 (2011) (expressing skepticism about the concept of harm from dilution); Kenneth L. Port, *The “Unnatural” Expansion of Trademark Rights: Is a Federal Dilution Statute Necessary?*, 18 SETON HALL LEGIS. J. 433, 447 (1994) (calling dilution “a remedy without a wrong”).

³⁵ Jeremy N. Sheff, *Veblen Brands*, 96 MINN. L. REV. 769, 804–30 (2012) (criticizing the doctrine of post-sale confusion on the basis of policy and First Amendment arguments).

II. CRITIQUES OF TRADITIONAL AND RECENT TRADEMARK THEORIES

A. *The Search-Costs Model*

The search-costs story of trademarks and of its related infringement doctrines is probably the best known of all in this context.³⁶ The theory posits that consumers will expend the optimal amount of time on finding the products that they seek if a well-functioning system of trademarks provides information as to the source and the quality of any given good.³⁷ While the former function of source identification prevailed in ancient times,³⁸ the quality function later predominated in its importance.³⁹ In short, in this model, a trademark overcomes the problem of information asymmetry that stems from producers' superior knowledge of their goods, and "[t]he economic role of the trademark is to help the consumer identify the unobservable features of the trademarked product."⁴⁰ Put differently, instead of researching the attributes of every good to determine whether it corresponds to or resembles a previously experienced or recommended brand, a consumer expends a lower cost by simply looking for a specific trademark and making purchases accordingly.⁴¹ Trademark law thus "aims to promote rigorous, truthful competition in the marketplace by

³⁶ Mark McKenna has stated that "it would be nearly impossible to overstate the extent to which the search-costs theory now dominates as *the* theoretical justification of trademark law." Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 75 (2012) [hereinafter McKenna, *Consumer Decision-Making Theory*]. Of course, a number of other theories describing trademark doctrine have been developed over time, including McKenna's own account of trademarks as a device to primarily protect producers' rather than consumers' interests. See Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839 (2007); see also Beebe, *supra* note 23 (explaining the trademark law framework as a sign system).

³⁷ The best known formal exposition of this model originated in the work of Bill Landes and Richard Posner. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 166–209 (2003); William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265 (1987) [hereinafter Landes & Posner, *Trademark Law*]. See generally Nicholas S. Economides, *The Economics of Trademarks*, 78 TRADEMARK REP. 523, 525–27 (1988).

³⁸ See, e.g., Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 814 (1927).

³⁹ Economides, *supra* note 37, at 527. Schechter already pointed out in the 1920s that consumers in the modern economy actually often do not truly know the origin of a good, which is a sign that the source-identifying role of trademarks has withered. Schechter, *supra* note 38, at 814–15.

⁴⁰ Economides, *supra* note 37, at 526.

⁴¹ Landes & Posner, *Trademark Law*, *supra* note 37, at 269. These authors also point out that there is a lowered cost to asking for "Sanka" as opposed to "the decaffeinated coffee made by General Foods." *Id.* at 268–69; see also John F. Coverdale, Comment, *Trademarks and Generic Words: An Effect-on-Competition Test*, 51 U. CHI. L. REV. 868, 869–70 (1984) (viewing trademarks as a tool that enables consumers to distinguish between different producers' goods).

preserving the clarity of the language of trade.”⁴² The courts have explicitly endorsed this view of trademarks when explaining the problems that result from infringement.⁴³

Indeed, search-costs theory provides a powerful explanatory tool for numerous real and hypothetical situations of infringement. To give a blatant example, if several brown carbonated sodas that taste completely differently from one another are all sold with Coca-Cola labels, consumers will have significant difficulty locating the product that they originally associated with this brand if they wish to do so.⁴⁴ Once potential disappointment sets in after buying and drinking soda that turns out to be different, a customer may also refuse to take the risk again in the future and will shy away from sodas with the Coca-Cola label as this designation has proven misleading in the past. Consumers generally experience a reduction in overall utility in these types of situations. This problem translates to clothes or furniture that turn out less durable than anticipated based on specific labels or, in more extreme situations, to cases in which products reveal themselves as downright dangerous as a result of trademark infringement. One such example would be counterfeit drugs that either fail to treat disease or actively harm patients through their ingredients.⁴⁵ While not all trademark infringement has caused actual harm by the time litigation occurs, demonstrating likelihood of confusion suffices for a plaintiff to emerge victorious.⁴⁶ The reasons behind this test are manifold but include the desire of the legal system to prevent harm if its likelihood is sufficiently high, and also the wish to optimize enforcement costs.⁴⁷

Mark McKenna attributes the popularity of the search-costs theory to a number of factors, including the general dominance of the law and economics movement as well as the theory’s focus on consumers.⁴⁸ He explains, however, that the recent expansion of trademark doctrines such as initial interest confusion, reverse confusion, post-sale confusion, and confusion as to affiliation and sponsorship—unwelcome developments according to many

⁴² Stacey L. Dogan & Mark A. Lemley, *A Search-Costs Theory of Limiting Doctrines in Trademark Law*, 97 TRADEMARK REP. 1223, 1226 (2007). For a more extensive collection of articles that discuss various aspects of search-costs theory, see McKenna, *Consumer Decision-Making Theory*, *supra* note 36, at 75 n.16.

⁴³ See, e.g., *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163–64 (1995) (describing the importance of reducing search costs when consumers seek products by the same manufacturers as those the consumers have experienced in the past).

⁴⁴ Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099, 2106 (2004). Indeed, less successful competitors have an incentive to use the popular Coca-Cola mark specifically to attract consumers to their own products. *Id.*

⁴⁵ Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J.L. & TECH. 469, 502 (2011).

⁴⁶ For the best known test of trademark infringement, which has been replicated with slight variations in other circuits, see *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961).

⁴⁷ See Bone, *supra* note 44.

⁴⁸ McKenna, *Consumer Decision-Making Theory*, *supra* note 36, at 76–77.

intellectual property scholars—can be in part traced to the search-costs model.⁴⁹ McKenna states that the adherents of the search-costs theory tend to conflate any type of trademark confusion with an increase of costs in purchasing decisions, which is particularly inaccurate when it comes to confusion related to some non-competing goods; second, McKenna argues, searches and their costs are only a part of the purchasing process, and trademark theory should focus on the latter as a global matter rather than over-emphasize the search aspect.⁵⁰

Psychologists have attempted to connect the search-costs model to legal doctrines such as dilution as part of what Rebecca Tushnet has dubbed an “internal” version of the model—one focused on examining the cognitive underpinnings of the consumers’ experience of blurring.⁵¹ The basis of this understanding is the so-called associative network theory, which holds that

information stored in long-term memory consists of networks containing nodes (concepts) connected by links (relations or associations). The associations include relations such as category membership and the possession of attributes. During memory retrieval, when a particular node is activated, a fixed amount of activation is hypothesized to spread outward along all links connected to that node. If the amount of activation that travels outward along a link to a connected node (e.g., for a product category) is sufficient to reach the connected node’s threshold level of activation, that node is brought from long-term memory into working memory; that is, the person retrieves that information and becomes conscious of it. When additional associations are added to a preexisting network, the speed of retrieval is typically slowed, especially if the information bears little semantic relatedness to that already existing in the network.⁵²

Unlike for cases of trademark dilution, however, additional nodes that consist of brand extensions can actually improve retrieval, possibly because activation survives within the network of a single brand.⁵³ In short, when it comes to dilution, if Hyatt Legal Services begins competing with Hyatt Hotels, upon hearing the name “Hyatt” consumers may begin activating a network in their minds associated with the legal services in a way that will impede retrieval of the hotel network; this would decrease the strength of the original Hyatt mark and could even completely eradicate it if Hyatt Legal Services becomes popular

⁴⁹ *Id.* at 78–79.

⁵⁰ *Id.* at 83–84.

⁵¹ Tushnet, *supra* note 31, at 518.

⁵² Maureen Morrin & Jacob Jacoby, *Trademark Dilution: Empirical Measures for an Elusive Concept*, 19 J. PUB. POL’Y & MARKETING 265, 267 (2000); see also Alexander F. Simonson, *How and When Do Trademarks Dilute: A Behavioral Framework to Judge “Likelihood” of Dilution*, 83 TRADEMARK REP. 149, 152–61 (1993) (explaining a similar mechanism for dilution).

⁵³ Maureen Morrin, *The Impact of Brand Extensions on Parent Brand Memory Structures and Retrieval Processes*, 36 J. MARKETING RES. 517, 520 (1999).

enough that the “Hyatt” name leads to mental retrieval of the legal services only.⁵⁴

Maureen Morrin and Jacob Jacoby conducted a series of experiments to test this theory and found that diluting uses by junior users can decrease the accuracy and somewhat the speed of retrieval of information about the senior user, and that dilutive uses reduce category recall of senior users while increasing that of junior users.⁵⁵ Morrin and Jacoby’s methodologies have received their share of criticism, including for the questionable size of the effects they observed (e.g., information recall differences of only milliseconds) and lack of clarity about the applicability of their findings to actual consumer decisions in the marketplace.⁵⁶ If dilution or for that matter initial interest confusion or post-sale confusion do not significantly increase search costs or general enforcement costs,⁵⁷ does and should this mean that they lose their justification? After reviewing some of the other (albeit less) dominant views of trademark doctrine, this Article will give an account of the function of marks that supplements the understanding that search-costs theory provides.

B. *The Consumer Decision-Making Theory*

In response to what he perceives as the significant flaws of search-costs theory and inspired by false advertising law, Mark McKenna has proposed a reconceptualization of trademark law to refocus it on deceptive actions

that interfere with consumers’ purchasing decisions. . . . [According to McKenna,] courts should find trademark infringement only when the defendant’s use of the plaintiff’s trademark creates a risk that consumers will be deceived into buying goods or services they otherwise would not have or refraining from buying what they otherwise would have.⁵⁸

In a number of situations involving confusion between products that are direct competitors, such as in the Coca-Cola example, McKenna explains that search-costs theory and his consumer decision-making theory yield the same result; he is, however, combating the idea that just because consumer confusion increases search costs when it comes to competing goods, all confusion necessarily generates additional search costs and hence, trademark law needs to

⁵⁴ Morrin & Jacoby, *supra* note 52, at 267–68. For a collection of legal scholarly articles discussing dilution theory as part of an increase of mental burdens and search costs, see McKenna, *Consumer Decision-Making Theory*, *supra* note 36, at 109 n.124.

⁵⁵ Morrin & Jacoby, *supra* note 52, at 274.

⁵⁶ Tushnet, *supra* note 31, at 528–32. *But see* Laura R. Bradford, *Emotion, Dilution, and the Trademark Consumer*, 23 BERKELEY TECH. L.J. 1227, 1238 n.40 (2008) (explaining that research methodologies have become increasingly sophisticated in their ability to measure likely behavior in the marketplace).

⁵⁷ *See* Bone, *supra* note 44 (discussing the relevance of enforcement costs to the optimal delineation of substantive trademark rights).

⁵⁸ McKenna, *Consumer Decision-Making Theory*, *supra* note 36, at 72.

punish all confusion to keep search costs low.⁵⁹ His view rests on the major requirement, however, that “trademark law should treat consumers’ preferences as essentially fixed and exogenous to the trademark system, and courts should intervene only where a use threatens to prevent a consumer from acting on those preferences.”⁶⁰ This understanding, however, is potentially in tension with what McKenna calls “the close relationship between trademark and false advertising law.”⁶¹

Indeed, this is where the experience machine enters the picture. As McKenna notes, advertising not only transmits information but also creates new desires on the part of consumers.⁶² As a result of the deep relationship between marks and advertising, as well as other factors, people genuinely have different physiological responses to some products than others. For example, brain scans reveal that even though Pepsi might win out in blind taste tests, individuals who drink Coke have a different cerebral experience when drinking branded as opposed to unbranded Coke; similarly, women’s heart rates increase by twenty percent if they see a blue Tiffany box.⁶³ While McKenna raises concerns as to the consumerist and status-signaling function of brands in some of these contexts, he also states that “[t]o tell consumers they cannot have the emotional or experiential value they derive from brands because it is not ‘real’ is remarkably paternalistic, and it implies that consumers are fools incapable of determining what they want.”⁶⁴ McKenna’s consumer decision-making theory centers on the concept that the law should only intervene in cases of deception, and he is consequently skeptical of doctrines such as initial interest confusion, post-sale confusion, sponsorship confusion, and dilution.⁶⁵ One of the examples he uses in the dilution context is the *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC* case,⁶⁶ in which a company named Chewy Vuitton created and sold dog toys whose designs imitated Louis Vuitton’s fashion products.⁶⁷ Under McKenna’s theory, such use likely would not have been actionable even

⁵⁹ *Id.* at 82–83.

⁶⁰ *Id.* at 73; see also Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 414–16 (2010) (arguing that courts should presumptively view confusion about source or quality as relevant, but that other forms of confusion should have an impact on litigation outcome only if they materially affect consumers’ purchasing decisions).

⁶¹ McKenna, *Consumer Decision-Making Theory*, *supra* note 36, at 113 (citing Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. 1305, 1312 (2011)).

⁶² *Id.* at 114–15.

⁶³ *Id.* at 118–19.

⁶⁴ *Id.* at 120; see also Shahar J. Dilbary, *Famous Trademarks and the Rational Basis for Protecting “Irrational Beliefs,”* 14 GEO. MASON L. REV. 605, 622 (2007) (arguing that trademarks sometimes serve to increase personal utility in private rather than only functioning as signaling devices).

⁶⁵ McKenna, *Consumer Decision-Making Theory*, *supra* note 36, at 125–36.

⁶⁶ 507 F.3d 252 (4th Cir. 2007).

⁶⁷ McKenna, *Consumer Decision-Making Theory*, *supra* note 36, at 135 (citing *Louis Vuitton*, 507 F.3d at 258).

minus the parody defense that succeeded in the actual case, because the case was not about consumer deception but rather a threat to change the meaning of the mark.⁶⁸

This is where the model in this Article parts ways with McKenna's theory because it appears that the latter relies on a key assumption whose consequences are then not necessarily integrated into his conclusions on dilution and other non-confusion-based doctrines. Specifically, any consumer decision-making framework has to rely on the fact that (1) there will be options among which consumers will actually *want to* choose⁶⁹ and (2) that their set of options will be the one advancing maximal societal utility. By narrowing liability to cases that involve only source confusion or confusion as to the plaintiff's responsibility for the quality of a defendant's products,⁷⁰ the consumer decision-making theory divorces the trademark system from a discussion of global utility. This is puzzling from both descriptive and prescriptive vantage points. This Article will argue in Part III that, as a descriptive matter, the doctrines of initial interest confusion, post-sale confusion, sponsorship confusion, and dilution are likely all rooted in part and often on an implicit level in a wish to protect consumer and overall utility. Whether they do so in actuality depends in part on one's understanding of what the empirical measures should be in the first place, but in the model advanced in this Article, emphasis on hedonic experiences of trademarks can potentially provide some degree of support for all of these doctrines except probably initial interest confusion.

C. The Contractarian Understanding

Jeremy Sheff's motivation to develop a contractarian theory of trademarks stemmed from his dissatisfaction with the preexisting economic models.⁷¹ Essentially, the contractarian theory grounds trademark law in the safeguarding of consumer autonomy and need to protect the consumer as an end in himself; the model states, among other things, that a seller would violate this autonomy

⁶⁸ *Id.* at 135.

⁶⁹ Ralph Brown would have likely opposed the argument I am making here because to him, it is advertising that undercuts consumers' ability to choose. See Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165, 1182–83 (1948) ("The choice between one highly advertised dentifrice and another is, in important respects, no choice at all. . . . It is only a choice between one illusion and another."). As I discussed in the context of Nozick's experience machine, see *supra* notes 10–12 and accompanying text, I disagree with this characterization. As one might expect based on his views of advertising, Brown was a vocal critic of dilution, calling it "[t]he clearest, most candid, and most far-reaching claim on behalf of persuasive values." Brown, *supra*, at 1191.

⁷⁰ See Lemley & McKenna, *supra* note 60, at 415.

⁷¹ See Jeremy N. Sheff, *Marks, Morals, and Markets*, 65 STAN. L. REV. (forthcoming 2013) (manuscript at 2–3) [hereinafter Sheff, *MMM*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021394.

if she delivered a good to a consumer that was made by a different producer than the one the consumer wished to choose.⁷² Sheff argues that “[t]his view of trademark as promise . . . offers a much more defensible descriptive consumer-focused account of the courts’ treatment of product quality in infringement cases than does the search-costs theory of consequentialism.”⁷³ As I will show in this section, while his proposal seeks to avoid some of the empirical hurdles of the search-costs theory, it is ultimately problematic on its own terms for two key reasons. The first is that the contractarian theory of trademarks (just like the contractarian argument for prohibiting insider trading on which the theory relies in part) contains important internal tensions. The second is that it runs into empirical problems of its own, which—rather than being confronted directly—are redirected toward the democratic process with little guidance as to the methodology through which said process is supposed to develop the correct answers.

I will begin by taking a closer look at the contractarian model for prohibiting insider trading to which Sheff analogizes for support.⁷⁴ Like other contractarian frameworks, the one for insider trading asks “what preferences individuals would express if they were asked to give their opinions about a potential set of rules, assuming that they did not know their position in life in advance and there were no forms of coercion.”⁷⁵ Some scholars have argued for making insider trading unlawful because individuals “would not agree to be part of a system where their disadvantage in access to knowledge could be turned into disadvantages in the distribution of other resources.”⁷⁶ Others have countered, however, that this is not necessarily accurate in that individuals do not all make the same risk assessments; indeed, some people would prefer to allow particular forms of insider trading if this could help to avoid disastrous losses such as the ones to the investors in the WorldCom breakdown.⁷⁷ It has been argued that allowing insider trading under a certain set of conditions could facilitate the prevention of such disasters as well as improve stock valuations.⁷⁸ If one accepts the empirical claims implicit in this argument—or if one at least believes that respecting individual autonomy, as contractarianism asks us to do, mandates allowing people to endorse these empirical claims—a strict

⁷² *Id.* at 44–45.

⁷³ *Id.* at 45.

⁷⁴ *See id.* at 31–32.

⁷⁵ Robert E. Wagner, *Gordon Gekko to the Rescue?: Insider Trading as a Tool to Combat Accounting Fraud*, 79 U. CIN. L. REV. 973, 995 (2011) (citing Kim Lane Scheppele, “It’s Just Not Right”: *The Ethics of Insider Trading*, 56 LAW & CONTEMP. PROBS. 123, 152 (1993)). Note that I am not focused on or drawing any conclusions about the wisdom of insider trading regulations as a whole but am rather only interested in its contractarian justification and only to the extent that it is used as a parallel to explain trademark law through a contractarian lens.

⁷⁶ *Id.* (citing Scheppele, *supra* note 75, at 162).

⁷⁷ *See id.* at 996.

⁷⁸ *Id.* at 1015.

contractarian theory of prohibiting insider trading cannot hold.⁷⁹ In my view, this is one illustration of how contractarianism is unable to escape difficult empirical questions given that the answers to those questions heavily influence the types of *ex ante* choices that individuals would or would not want to be able to make if placed behind John Rawls's famous veil of ignorance.⁸⁰

This leads me to my second point, which is a critique of the reasoning employed to avoid the problem that a contractarian theory of trademarks ultimately relies on empirical assumptions just like consequentialist theories such as the search-costs model do. Sheff heavily faults law and economics because it “unsatisfyingly attempts to dodge fundamental normative questions by replacing them with empirical questions that are in practical terms impossible to answer.”⁸¹ He similarly criticizes Jennifer Rothman's work on initial interest confusion⁸² for “mak[ing] our rules of trademark law dependent on fiendishly complex and generally unanswerable questions about the balance of welfare gains and transaction costs that might be causally related to a particular marketing practice (or worse, to a rule that permits or forbids such a practice).”⁸³ Sheff explains that both the consequentialist supporters and critics

⁷⁹ See *id.* at 996. Some of the application of this idea to the trademarks contractarian model may hinge on which version of contractarianism one chooses, but both of the possibilities Sheff mentions are problematic. Wagner's comments respond to what Sheff terms “modern contractualists [who] . . . would allow for some limited interference with individuals' decisionmaking, but only to the extent that the individual would (at least hypothetically) consent to such interference as a useful aid to that individual's rational and informed decisionmaking.” Sheff, *MMM*, *supra* note 71, at 26. The other possibility is the traditional Kantian model, which would prohibit any activity that interferes with an individual's choices whether the interference was beneficial or not “and even if he consented (or would hypothetically consent) to the interference—on the theory that it is the individual's duty to . . . pursue his own ends, and he may not be used as a means to any end (even one believed to be in his interest).” *Id.* It seems to me that any offering of products to a consumer already arguably constitutes interference in his choices and that any attempt to sell goods to an individual while ultimately hoping to profit financially is to use him as a means to an end on some level. This may look a little different under other formulations of the categorical imperative. For instance, under the third formulation, an individual may use others as means as long as she simultaneously still views them as ends, which may relax the tension a bit but still requires many steps before a theory of trademarks can be developed on this basis, if at all. See IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 43 (James W. Ellington trans., Hackett Pub. Co. 3d ed. 1993) (1785).

⁸⁰ See JOHN RAWLS, *A THEORY OF JUSTICE* 136–42 (1971). Or, as John Bronsteen, Chris Buccafusco, and Jonathan Masur have put it, any theory rooted in individuals' preferences “ultimately collapses into a subjective theory of well-being. Indeed, the two may be one and the same.” Bronsteen et al., *Welfare*, *supra* note 17, at 1616–17.

⁸¹ Sheff, *MMM*, *supra* note 71, at 5. He also argues that “adopting a contractualist approach to problems in consumer protection law encourages policymakers and critics to formulate and defend substantive principles of consumer autonomy, rather than resting on unprovable empirical assumptions about consumer behavior to justify a particular allocation of rights and duties in consumer markets.” *Id.* at 59.

⁸² See Rothman, *supra* note 21.

⁸³ Sheff, *MMM*, *supra* note 71, at 54–55.

of broad trademark rights face “inescapable empirical uncertainty.”⁸⁴ He continues:

[T]he consequentialist’s only possible answer is to demand more data—no matter how futile or unreasonable the demand may be. A great strength of the relativistic approach that incorporates the contractualist perspective is that it frees us from the fool’s game of arguing these empirical questions in the absence of relevant data, without requiring us to adopt a misappropriation theory that lacks discernable boundaries. . . . [T]he only question is whether the marketing tactic in question is inconsistent with due respect for the consumer’s autonomy, and the debate on that question can be focused through the other-regarding consequentialist exercise.⁸⁵

He views judges as capable of engaging in this exercise, at most in need of correction by the democratic process, which can include debate over different normative visions in a way that is “more likely to lead to satisfying policy outcomes, in [his] view, than insisting on a normative position that can only be satisfactorily justified by expert analysis of data that will never materialize.”⁸⁶

There are a number of significant problems with these claims, including that his conclusions fall prey to some of the same flaws to which he points in search-costs theory. First, the argument that courts or democracy are better equipped to decide what constitutes a violation of autonomy than what will optimize search costs is a fairly unsupported empirical assertion that would be tremendously difficult to falsify even if incorrect. Second, what are the methods through which courts or the legislative process are supposed to discover whether a violation of autonomy has taken place? And how will said methods yield non-falsifiable answers? Sheff states that he is “invit[ing] a debate over the *substance* of what we want our consumer markets to look like, rather than over the plausibility of various alternative and ultimately unprovable causal inferences regarding how players in those markets might respond to one or another legal rule.”⁸⁷ How can a debate over substance take place without a discussion of which legal methods will empirically yield specific results? While I sympathize with the frustrations over the difficulties of the search-costs and any other consequentialist models, the contractarian model does not hold a comparative edge. It poses just as many empirical difficulties *and* adds another layer of complication, which is the need to define and get the relevant individuals to agree on the elusive concept of autonomy and what its violations entail.⁸⁸ As has been shown in the insider trading context, this project is bound

⁸⁴ *Id.* at 55.

⁸⁵ *Id.* (footnote omitted).

⁸⁶ *Id.* at 57.

⁸⁷ *Id.* at 56.

⁸⁸ One may disagree with the particular criteria I use to compare the validity of the contractarian theory with that of other models. If one rejects especially falsifiability as a criterion to assess the validity of a theory, however, one must show what should take its place and will lead to an objective evaluation.

to struggle on its own terms, and the contractarian model is no more likely to yield clear boundaries than the search-costs framework.⁸⁹

The main lesson from this examination of the contractarian model is that no theory is likely to escape the genuine empirical difficulties that any trademark system poses. There is no way around asking what practical effects particular laws will have and how we can best measure these effects. Short of becoming victim to the nirvana fallacy, all that any theory of trademarks can do is show how it is an improvement over other models rather than engage in futile attempts to avoid altogether the debates inherent in this area of the law.

III. EXPERIENTIAL TRADEMARKS: THEORY AND IMPLICATIONS

In this spirit, Part III will present what I view as a piece that is missing or at least too easily discarded in discussions about the less straightforward types of trademark infringement doctrines. One of the more cynical stories about why trademark law has taken the particular shape we observe today is a public choice tale, especially in the context of dilution doctrine. The Supreme Court ruled in the *Moseley v. V Secret Catalogue, Inc.*⁹⁰ case in 2003 that actual dilution of famous marks rather than simply a likelihood of dilution was required under the Federal Trademark Dilution Act (FTDA) for a valid legal claim to exist.⁹¹ In response, Congress passed the Trademark Dilution Revision Act of 2006 (TDRA),⁹² which specified that only likelihood of dilution was necessary under the FTDA and added some other measures to protect famous marks. Lobbying played a key role in the passage of the TDRA, with both the owners of famous marks and groups such as the International Trademark Association and the American Intellectual Property Law Association pushing for the legislation.⁹³ While one can therefore see how, on a pragmatic level, the maximization of global welfare is far from being the only factor that drives trademark policy, this does not necessarily make doctrines like dilution outliers in the world of trademark law. I will show in this Part how a consequentialist analysis that incorporates hedonic values can help to explain the current shape of the law and resolve some of the tensions that scholars like Mark McKenna

⁸⁹ At most, a Kantian-like approach to trademarks could provide what Robert Nozick has termed side constraints, meaning here, for example, that trademark doctrine would need to be developed based on consequentialist principles but would not be permitted to impose dignitary harms. See NOZICK, *supra* note 10, at 26–33. This tells us relatively little about the shape of trademark law as a descriptive or prescriptive matter, though. I would like to thank Bailey Kuklin for the conversation we had on this subject. For an in-depth discussion of Kantian approaches to legal issues, see Bailey Kuklin, *Constructing Autonomy: A Kantian Framework* (unpublished manuscript) (on file with author).

⁹⁰ 537 U.S. 418 (2003).

⁹¹ *Id.* at 433.

⁹² Pub. L. No. 109-312, 120 Stat. 1730 (2006).

⁹³ See Manta, *supra* note 45, at 511. I have explained how this type of lobbying has also played a role in the development of certain harsher sanctions in the trademark and copyright world than in the patent world. See *id.*

and Jeremy Sheff have critiqued in their works. Whether incorporating hedonic values fully justifies the current scope of protection remains subject to empirical evaluation of the size of the likely harm as compared against the costs of dilution law itself, including enforcement and transaction costs as well as the hedonic cost to the potential or actual customers of dilutive goods.

A. *Dilution as Hedonic Loss*

If most or all dilution does not actually create significant search costs for consumers, deceive consumers as required for infringement under McKenna's theory, or violate autonomy as understood in Sheff's contractarian model, why prohibit it? What is the possible issue with the Gucci burger? This section will first discuss whether dilution and other phenomena pose a problem as a matter of free riding on another actor's Lockean-style labor contribution and conclude that free riding per se need not reduce utility and should therefore not be actionable.⁹⁴ Combined with a loss of hedonic utility, however, free riding could potentially cause a net decline of overall utility.⁹⁵ The case law that equates free riding with doctrines like dilution may thus turn out to be less mysterious if we are open to the possibility that while judges have not always clearly articulated the precise harm to consumers, they have already implicitly accepted the idea that not only producer but also consumer utility will be maximized by limiting competitors' use of the original trademarks even in situations that span separate markets and lack the element of confusion. As mentioned, whether current doctrine optimally supports the maximization of global societal utility is subject to further studies and analysis, but the first step is to understand the basic role of hedonic harm in dilution.

⁹⁴ For a discussion of Lockean labor theory in the context of intellectual property, see generally Adam Mossoff, *Saving Locke from Marx: The Labor Theory of Value in Intellectual Property Theory*, 29 SOC. PHIL. & POL'Y 283 (2012); Adam Mossoff, *The Use and Abuse of IP at the Birth of the Administrative State*, 157 U. PA. L. REV. 2001 (2009).

⁹⁵ This issue also deserves consideration along a temporal axis. Establishing a relationship between a consumer and a brand takes time, and dilution has the potential to disrupt this process at any number of stages, from the early contacts that the consumer has with the product to a much later moment when long-term trust exists. While producers may be able to overcome dilution in many cases, this will require diverse and sometimes expensive forms of damage control because dilution at each stage could cause a unique set of hedonic losses that vary in type and depth. This does not imply that dilution is unable to carry some degree of countervailing benefits, which in most cases it does, but this helps to explain why it is a phenomenon worthy of consideration.

1. *And I'm Free, Free Riding*⁹⁶

One defense of dilution and related doctrines is that they seek to prevent junior users from free riding on the labor and investments of the senior user. David Franklyn has argued that the desire to counteract free riding is the real driving force behind the success of many plaintiffs in dilution-based lawsuits, as evidenced by the fact that these plaintiffs win when unable to show actual harm from dilution but able to demonstrate the existence of free riding.⁹⁷ Indeed, one could make a variety of moral arguments against one actor's ability to profit from the work of another. At the same time, Mark Lemley and Mark McKenna have explained that "[t]he claim that trademark owners are injured by not being able to control use in a remote market is ultimately a circular claim—mark owners are injured if, but only if, we define their trademark rights *ex ante* to include control over that remote market."⁹⁸ They emphasize the circularity of the claim that the harm to owners comes from the fact "that if someone benefits from the use of a mark they own, that benefit belongs to them, and therefore they have been injured by not being paid a license fee for the right to authorize that use."⁹⁹ Lemley and McKenna's point is well-taken that the sheer fact that an owner could obtain compensation if awarded a specific right does not, in and of itself, mean that he *has* that right. Similarly, if a person looks at me funny in the street, that does not constitute a cognizable harm even though I would benefit (at least in the short run) from having the law force her to pay me a thousand dollars, whether to obtain a license to look at me funny or as subsequent compensation for having done so. From a utilitarian perspective, if company B is able to free ride on company A's goodwill while increasing society's welfare, we should want company B to do so.¹⁰⁰ At the same time, while the costs of establishing a valuable trademark are high, "the cost of duplicating someone else's trademark is small . . . [and t]he incentive to incur this cost (in the absence of legal regulation) will be greater the stronger the trademark,"¹⁰¹ with the risk that various forms of unauthorized use "will eventually destroy the information capital embodied in a trademark, and the

⁹⁶ I hope Tom Petty will forgive me for this, but I only paraphrased him with love. See TOM PETTY, *Free Fallin'*, on FULL MOON FEVER (MCA Records 1989) ("And I'm free, free fallin'").

⁹⁷ David J. Franklyn, *Debunking Dilution Doctrine: Toward a Coherent Theory of the Anti-Free-Rider Principle in American Trademark Law*, 56 HASTINGS L.J. 117, 118 (2004).

⁹⁸ Lemley & McKenna, *supra* note 21, at 141.

⁹⁹ *Id.* at 145.

¹⁰⁰ This is making several assumptions, including that we can measure these values to some relevant degree and that we have the capacity to implement a regime fine-grained enough that it will be able to allow Company B's actions without also permitting other companies to free ride on Company A in a way that promotes general disutility.

¹⁰¹ Landes & Posner, *Trademark Law*, *supra* note 37, at 270.

prospect of free riding may therefore eliminate the incentive to develop a valuable trademark in the first place.”¹⁰²

The battle, then, is about what forms of free riding trademark law should allow given that when an owner acquires a mark, he neither does nor should get control over every conceivable use of a particular word.¹⁰³ Lemley and McKenna summarize a number of studies that generally do not support the idea that consumers’ global assessments of brands are negatively affected by a particular brand extension.¹⁰⁴ There have been instances, however, that have gone the other way. In 1994, Gucci almost went bankrupt after licensing its brand to products such as toilet paper and tote bags.¹⁰⁵ Deborah Roedder John and her colleagues have concluded on the basis of their studies that “the risk of brand and line extensions does not stop at the parent brand level. Inconsistent extensions carry the risk of diluting important consumer beliefs about individual products that carry the parent brand name.”¹⁰⁶ Plus, “even if flagship products were completely impervious to dilution, blurring still might negatively impact the ability of the famous mark owner to launch new products and extensions because of the effort required to distinguish authorized from unauthorized new uses.”¹⁰⁷ In other words, dilution law will possibly protect the brand from financial decline in some instances and against future direct trademark infringement in other cases.

Lemley and McKenna, however, propose that mark owners should have to prove harm before invoking dilution law as a shield, and they argue that “[i]f mark owners can neither show confusion about source or responsibility for quality nor that the alleged confusion is material, then any ‘injury’ the mark owner suffers is not a trademark injury.”¹⁰⁸ The great difficulty of showing such injury *even if that injury is real*, however, is precisely part of what drove Congress to pass the TDRA.¹⁰⁹ Of course, accepting the TDRA’s requirement to show likelihood of dilution still leaves room for shaping doctrine in many different ways, especially because courts have a lot of latitude in delineating

¹⁰² *Id.*

¹⁰³ See *Ringling Bros.–Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 170 F.3d 449, 459 (4th Cir. 1999) (arguing against giving property rights in gross).

¹⁰⁴ See Lemley & McKenna, *supra* note 21, at 158–60.

¹⁰⁵ Bradford, *supra* note 56, at 1277. “Self-dilution” is generally not a concern because brand owners generally do not wish to weaken their own brands and they try to correct their marketing practices when it does occur, such as in Gucci’s case. At the same time, Shahar Dillbary discusses some instances in which owners have used their own brands to mislead consumers into buying lower-quality goods and proposes changes in the application of false advertising law to stem this practice. See J. Shahar Dillbary, *Trademarks as a Media for False Advertising*, 31 CARDOZO L. REV. 327 (2009).

¹⁰⁶ Deborah Roedder John et al., *The Negative Impact of Extensions: Can Flagship Products Be Diluted?*, 62 J. MARKETING 19, 31 (1998).

¹⁰⁷ Bradford, *supra* note 56, at 1277.

¹⁰⁸ Lemley & McKenna, *supra* note 21, at 188.

¹⁰⁹ See *supra* text accompanying notes 90–93 for a discussion about the passage of the TDRA in response to the *Moseley* case.

just how high the likelihood of dilution must be to constitute an actionable harm. What is fascinating in this context, however, is that most arguments about dilution have roughly followed this pattern so far: Dilution (perhaps) harms producers by diminishing their gains. Consumers are, at most, hurt indirectly, in that dilution (perhaps) decreases producers' incentives to create and sell products that consumers may like. Consumers themselves are not directly hurt by dilution because, by definition, they are not actually confused by the product that they purchase.¹¹⁰ And the arguments about doctrines like post-sale confusion follow similar patterns. But is this really right? The next section will discuss another possible harm for consumers: the hedonic loss of experiencing a product with a diluted trademark.

2. *Protecting Trademarks as Hedonic Devices*

Laura Bradford has cautioned against awarding trademark rights on the basis of the positive feelings that consumers may have about these marks.¹¹¹ Her concern is based in part on fearing that “[a]warding property rights for the ability to signal general familiarity and consistency may raise . . . monopoly concerns. No competitor can ever compete effectively with a category leader on this basis. The established brand will always be more familiar.”¹¹² Yet, a trademark system founded on the maximization of general utility cannot ignore the individual hedonic utility that consumers derive from using products that have specific brands, and that these brand-product combinations can only serve as optimal hedonic devices when certain conditions are fulfilled.¹¹³ So far, however, the mainstream theories of trademarks have either disregarded the existence of such hedonic utility or dismissed it as unimportant or outside the scope of legal protection. Such a position can perhaps be made to work, at least in part, if the only form of utility we care about is financial.¹¹⁴ That is not the stance of the critics of hedonic values, however—rather, they may view hedonic values as a threat precisely because of the way these can lead to an expansion of

¹¹⁰ See, e.g., Lemley & McKenna, *supra* note 21, at 154 (“[M]uch of the rhetoric used by both courts and commentators to justify dilution has focused on the idea of a trademark as a property right that confers control over noncompeting uses whether or not consumers are hurt.”). Meanwhile, Eric Goldman describes that at an academic symposium on the subject of dilution in 2007, two dozen trademark academics sought to “find some justification—ANY justification—for the trademark dilution doctrine. We struck out, of course.” Goldman, *supra* note 25.

¹¹¹ See Bradford, *supra* note 56, at 1283.

¹¹² *Id.*

¹¹³ Again, brands' optimality as hedonic devices must be measured in the context of global utility, which includes taking into account the hedonic benefit that junior users provide and the costs of law enforcement as well as transaction costs, plus any other costs and benefits to society as a whole. I thank Eric Goldman for his comments on this topic.

¹¹⁴ For a critique of traditional cost-benefit analysis that only centers on financial values, see generally Bronsteen et al., *Well-Being Analysis*, *supra* note 17.

trademark protection in some areas and thus interfere with other non-monetary values such as expression.¹¹⁵

While we speak about the five senses in common parlance and sometimes separate out “perception” from “cognition,” all sensory and conscious as well as subconscious experiences are processed in one central organ, the brain.¹¹⁶ There is no “actual” or “pure” experience of a glass of soda.¹¹⁷ Even leaving aside phenomena such as (open or subliminal) advertising, our experiences of products with sensory components are colored by a variety of memories and genetic backgrounds. Using soda as an example, “[f]or modern humans, behavioral preferences for food and beverages are potentially modulated by an enormous number of sensory variables, hedonic states, expectations, semantic priming, and social context.”¹¹⁸ When it comes to the epic contest between Coke and Pepsi, an individual’s knowledge of what brand of soda he or she was tasting made all the difference in one study: it accounted for both a change in expressed behavioral preferences and a measurable contrast in cerebral responses as measured via functional Magnetic Resonance Imaging (fMRI) even though the soda sample used consisted of Coke across every condition.¹¹⁹ Indeed, subjects displayed a significant preference for the soda that had the Coke label over both unlabeled Coke soda and over Coke soda labeled Pepsi.¹²⁰ This result could arise from multiple factors, including the marketing power of

¹¹⁵For a discussion of some scholars’ rejection of the so-called “atmospherics” surrounding trademarks, see *infra* note 163 and accompanying text.

¹¹⁶Chris Buccafusco has argued that the boundaries and differences between copyright and patent law can be explained through the traditional distinctions that have been drawn between the human senses. See Christopher Buccafusco, *Making Sense of Intellectual Property Law*, 97 CORNELL L. REV. 501 (2012).

¹¹⁷In their work on hedonic analysis of the law, John Bronsteen and his coauthors have stated that well-being “depends solely on how a person feels rather than on any other (for example, more objective) consideration or fact . . . [and] can be influenced only by those things that affect a person’s sensory, emotional, or cognitive experience of life.” Bronsteen et al., *Welfare*, *supra* note 17, at 1601. They add: “Anything that is outside this veil of experience and has no effect on it is irrelevant to the quality of a person’s life.” *Id.* at 1601–02. That being said, some claims about a product are objective (e.g., stating that a soda has zero calories), and a manufacturer that lies in those regards can run afoul of false advertising laws.

¹¹⁸Samuel M. McClure et al., *Neural Correlates of Behavioral Preference for Culturally Familiar Drinks*, 44 NEURON 379, 379 (2004).

¹¹⁹*Id.* at 385. This result replicates the findings of earlier studies that had less sophisticated methodologies. See, e.g., Mary E. Woolfolk et al., *Pepsi Versus Coke: Labels, Not Tastes, Prevail*, 52 PSYCHOL. REP. 185, 185 (1983) (suggesting that labels more heavily influence consumer preference for specific sodas than the products themselves do). For a general discussion of the use of fMRI and other techniques to understand consumer preferences, see ZALTMAN, *supra* note 2, at 111–28.

¹²⁰McClure et al., *supra* note 118, at 385.

Coke thanks to advertising and so on¹²¹ but also the personal memories that a label may trigger in a way that the taste itself does not.¹²²

This is one example in which talking about the “quality” of a good becomes very difficult.¹²³ What does it mean to ensure through trademark law that the Coke brand can maintain its quality-indicating function?¹²⁴ When people buy Coke, they have a whole host of expectations as to how the soda will taste, how carbonated it will be, and so on. But as we can see from the research, how it tastes, for instance, is affected by the existence of the label itself. The same is true for status goods: the qualities that people expect from a Gucci bag do not just relate to how durable the leather of a purse will be but are rather also intertwined with the meaning of the label itself. And if that’s the case, the question becomes who should be able to control the meaning of that label and in what ways.¹²⁵

The path toward answering that question again leads back to an examination of societal utility. What will increase the incentives for product creation and for maximal hedonic appreciation of goods, among other values?¹²⁶ The answer to the former is debatable in that an argument can be

¹²¹ As Deven Desai has put it, “A sip of Coke means imbibing an entire culture.” Desai, *supra* note 23, at 983.

¹²² Mark Lemley mentions the relationship between childhood memories and soda preferences. Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1692–93 (1999).

¹²³ See Lemley & McKenna, *supra* note 21, at 157–62.

¹²⁴ For a discussion of the traditional understanding of this function in trademark law, see *supra* notes 37–40 and accompanying text.

¹²⁵ The attempt to narrowly define what should constitute a relevant quality to a given consumer smacks of some degree of what Dan Kahan and other scholars have termed “cognitive illiberalism,” a phenomenon whereby individuals “simultaneously experience overconfidence in the unassailable correctness of the factual perceptions we hold in common with our confederates and unwarranted contempt for the perceptions associated with our opposites.” Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 843 (2009). For a discussion of the dangers of cognitive illiberalism in the copyright context, see Manta, *supra* note 16, at 1307.

¹²⁶ This Article does not seek to diminish the complexities of this question. For example, individuals’ tastes and hence hedonic losses can vary for any number of reasons. See, e.g., Meghan R. Busse et al., *Projection Bias in the Car and Housing Markets* (Nat’l Bureau of Econ. Research, Working Paper No. 18212, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2101959 (describing individuals’ tendency to assume that future tastes will resemble present ones). Another complication is that not all hedonic losses create equally lasting effects. See generally Cass R. Sunstein, *Illusory Losses*, 37 J. LEGAL STUD. S157, S164 (2008). Last, some research suggests that people generally experience larger hedonic gains from spending money on nonmaterial experiences rather than goods, which they may do in increased amounts in a world with weaker brands. See Travis J. Carter & Thomas Gilovich, *The Relative Relativity of Material and Experiential Purchases*, 98 J. PERSONALITY & SOC. PSYCHOL. 146, 146 (2010) (concluding that experiential purchases are simpler to perform and lead to greater well-being). There is a limit, however, to the sheer amount of time that individuals can spend on nonmaterial experiences, so while individual

made that Gucci burgers would not have started selling if the owner did not think he would be able to free ride off of the Gucci name. An important question, subject to further empirical investigation, is whether consumers get a particularly significant hedonic “kick” out of eating Gucci-labeled food—one large enough to trump the hedonic loss resulting to the owners of Gucci purses. This may distinguish situations of dilution, occurring in unrelated markets, from those of direct confusion in related ones. A customer is likely to get a high level of enjoyment out of wearing a fake Gucci bag that she believes to be real (an enjoyment that may be cut short if the bag falls apart or if someone with more expertise points out the fake nature of the good). Direct confusion may not fall squarely into the hedonic model and may remain better explained by traditional theories such as the search-costs model if it turns out that, at times, the global hedonic gains from counterfeits outweigh the losses to the originals.¹²⁷ In the dilution paradigm, the Gucci burger may not provide the Coke-label enjoyment induced in Samuel McClure’s fMRI study.¹²⁸ At the same time, as mentioned, it could reduce the enjoyment that the wearer of an original Gucci bag experiences, for instance by detracting from the exclusive nature of the brand.¹²⁹ This effect would likely multiply with every additional diluting good,

discrete experiences of this sort may carry a hedonic edge in studies, there is likely to be a fairly low limit on the number of such experiences that individuals will be able to and will want to have within a given amount of time. Some material goods will also transcend this barrier more than others to the extent that their users focus on their experience rather than just purchase of them. Nonmaterial experiences further have the real potential to provide unhappiness if they prove disappointing, sometimes more so than material goods. See Leonardo Nicolao et al., *Happiness for Sale: Do Experiential Purchases Make Consumers Happier than Material Purchases?*, 36 J. CONSUMER RES. 188, 197 (2009). A more detailed exploration of these issues will also need to account for the role that hedonic adaptation plays in people’s experiences of brands. See generally Shane Frederick & George Loewenstein, *Hedonic Adaptation*, in WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 302 (Daniel Kahneman et al. eds., 2003) (presenting research showing how individuals generally revert to their previous levels of happiness over time after even major positive or negative life events). John Bronsteen, Chris Buccafusco, and Jonathan Masur have described in their work about the effect of hedonic adaptation on settlements that it is in the early stages of adaptation that “hedonic reactions are most intense.” John Bronsteen et al., *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516, 1534 (2008). Conversely, applying this idea to brands may mean that consumers experience the greatest hedonic gain right after they purchase a new product and that they only experience reduced benefits later. This is likely to vary greatly by type of product, but to the extent that social scientists attempt to better measure the effect of brands on hedonic experiences, longitudinal studies may prove important in gaining a clearer picture.

¹²⁷ While we normally think of direct confusion as the greatest threat within the trademark infringement system, empirical research may show that the loss in hedonic utility is often larger with dilution, and a system solely based on immediate hedonic values could perplexingly even allow direct confusion while prohibiting dilution. I would like to thank Jonathan Masur for the conversation we had on this subject.

¹²⁸ See McClure et al., *supra* note 118.

¹²⁹ And unlike where a brand accidentally weakens its own brand, as in Gucci’s decision to put the mark on tote bags and toilet paper, see *supra* note 105 and accompanying text,

and it is not evident (although not impossible) that this would be offset by the hedonic gains from the diluting goods.

There are a variety of ways in which this hypothesis could be tested, and I will sketch out some basic ideas along those lines here. Researchers could begin by measuring the physical responses to or ask for the opinions of subjects about a number of branded purses. Then, one could expose subjects to an environment that contains a product (or several) such as the Gucci burger and perform a renewed measure of subjects' responses to the original goods.¹³⁰ Of course, if this was a survey done for actual litigation purposes, a measured reduction in hedonic enjoyment would not be sufficient for a plaintiff to win. Rather, this would simply constitute evidence toward meeting the "likelihood of dilution" standard. To the extent scholars have asked to see actual harm from dilution, one harm could be that the benefit we get from places that sell Gucci burgers generally do not compensate for the cost, even in situations where incentives to produce are not immediately affected. Indeed, maybe Gucci burgers are enough of a blip to leave Gucci's revenues themselves unaffected.

For an approximate measure of the hedonic benefit of such Gucci burgers, one could serve study subjects burgers named either "Gucci burger" or given a name that connotes luxuriousness without using an existing famous trademark. For example, one of the world's most expensive burgers is called "Le Burger Extravagant" (and retails at \$295).¹³¹ One could then measure whether the Gucci burger provides a higher hedonic benefit than the one with the control name, and by how much. This data could be compared to the data on the hedonic losses incurred by the owner of original Gucci goods who encounters the Gucci burgers of the junior user of the mark as delineated in the study above.¹³² Over time, these experiments are likely to become more refined and hence the results more reliable. Some things will certainly remain difficult to measure, such as the level of second-order innovation that would follow from allowing versus disallowing particular dilutive uses.¹³³

In the context of measuring various value trade-offs, one could argue that a small, local mom-and-pop establishment selling Gucci burgers is unlikely to become a destination for many users of original Gucci goods. Given the national and sometimes global nature of most businesses today, this story is beginning to erode, however. The mom-and-pop shop can set up a website (www.gucciburgers.com), if nothing else, which rich and poor people alike can

there is no corrective mechanism in the dilution context because the junior user's incentives are not aligned with those of the consumers of the original goods.

¹³⁰For a broader discussion of methods to measure hedonic values, see generally Bronsteen et al., *Welfare*, *supra* note 17, at 1595–1600.

¹³¹Tom, *Top 10 Most Expensive Burgers*, MOST EXPENSIVE JOURNAL (Aug. 5, 2012), <http://most-expensive.net/burgers-world>.

¹³²I appreciated my conversation with Rebecca Tushnet on this subject.

¹³³I would like to thank Eric Goldman for his comments on this point.

encounter in cyberspace.¹³⁴ Also, while Gucci customers may never eat a Gucci burger, other individuals may, and their opinion of Gucci and of those who use the company's products could change for the negative.¹³⁵ This brings us to the topic of post-sale confusion as well as other doctrines and how hedonic loss relates to them.

B. *Expanding Hedonic Valuation to Other Trademark Doctrines*

Post-sale confusion is a doctrine that applies to situations in which the buyers of a counterfeit good are not confused themselves, but the public at large is confused when encountering those goods down the line.¹³⁶ In the context of a case involving fake Rolex watches, where the defendant claimed that the purchasers knew that the watches were not real, the court explained:

Individuals examining the counterfeits, believing them to be genuine Rolex watches, might find themselves unimpressed with the quality of the item and consequently be inhibited from purchasing the real time piece. Others who see the watches bearing the Rolex trademarks on so many wrists might find themselves discouraged from acquiring a genuine because the items have become too commonplace and no longer possess the prestige once associated with them. The fact that such bogus watches can be obtained at cheap prices only aggravates the problem.¹³⁷

¹³⁴ It is noteworthy that the existing Gucci burger is only sold in one local establishment, "The Bag and Kettle," and does not form a part of the establishment's website name. See *supra* note 25. This could help to explain why it has never led to legal action by the original Gucci company in that the company either does not know about it or does not view it as sufficiently problematic to pursue any claims. I confirmed via phone conversation with "The Bag and Kettle" co-owner Jay Reynolds on February 26, 2013 that the original Gucci company never gave him any trouble and that the establishment chose the name to connote a high-end burger.

¹³⁵ Paul Heald and Robert Brauneis performed a study on the likely harms of dilution and compared the period before the FTDA was passed (i.e., 1995) with that after to conclude that it is unlikely that dilution was causing significant problems even before the legislation. See Heald & Brauneis, *supra* note 34, at 2575. Their study, however, focused on economic harm alone rather than hedonic values, plus the FTDA was passed when the Internet was still in its fairly early stages and did not play nearly as dominant a role as it does today in advertising and promoting dilutive uses of marks.

¹³⁶ See, e.g., *Ferrari S.P.A. v. Roberts*, 944 F.2d 1235 (6th Cir. 1991) (involving post-sale confusion via replicas of luxury cars).

¹³⁷ *Rolex Watch U.S.A., Inc. v. Canner*, 645 F. Supp. 484, 495 (S.D. Fla. 1986); see also *United States v. Torkington*, 812 F.2d 1347, 1349 (11th Cir. 1987) (holding that post-sale confusion in the context of luxury watches was sufficient for a cognizable claim under the Lanham Act); Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 964 (1993) ("They're buying the fakes precisely *because* they're fake; these folks want to pretend to own a Rolex without paying the price—which also means Rolex is not losing any sales because the people buying twenty dollar fakes wouldn't have bought the real thing."). That people who buy fakes would never buy the original product is possible yet not certain, and

An older case dealing with imitation luxury Swiss clocks similarly identified the harm in such cases as a producer loss of either consumers, reputation, or both.¹³⁸ The possible reduction of hedonic enjoyment by current and potential purchasers of the original goods is a component and precursor of both of these types of losses.¹³⁹ In that sense, a loss of hedonic enjoyment may be able to serve as a proxy for these other kinds of harms. While quantifying any of these harms is no easy feat, hedonic losses may be measurable or at least approximated through experimental methods that are more immediate and better at establishing causality than methods tracking losses of revenue and reputation;¹⁴⁰ indeed, these latter types of losses may not become apparent for months or years (and perhaps sometimes in ways that will become very difficult to remedy once the losses have actually occurred).

Another form of actionable confusion, namely that related to sponsorship or affiliation, similarly possibly protects not only the producers' revenues but also consumers' experiences of goods. The Lanham Act specifically condemns acts that are "likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person."¹⁴¹ Lemley and McKenna have criticized sponsorship and affiliation confusion, arguing that the law should instead concern itself only with confusion "about who is responsible for the quality of the defendant's goods or services."¹⁴² From the perspective of

the real question is what this does not only to Rolex's sales but also to the enjoyment of those individuals who are willing to pay the price for the original product.

¹³⁸ *Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-Lecoultrre Watches, Inc.*, 221 F.2d 464, 466 (2d Cir. 1955).

¹³⁹ Courts are reluctant to let consumers of the fake goods "acquire the prestige value of the senior user's product by buying the copier's cheap imitation." 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:7, at 23-37 (4th ed. 2008). Allowing these consumers to do this would cheapen the experience of the users of the original good, both possibly literally (i.e., the producer would make less money if consumers bought fewer original goods) and, more relevantly here, in an immediate hedonic sense. Indeed, dilution "protects consumers' *ex ante* expectations from the time of purchase against the diminution of their intangible property from the hazard of a possible externality." Dilbary, *supra* note 64, at 635.

¹⁴⁰ See *supra* notes 130-33 and accompanying.

¹⁴¹ 15 U.S.C. § 1125(a)(1)(A) (2006).

¹⁴² Lemley & McKenna, *supra* note 60, at 427. They add that these other types of confusion should at most be actionable through a mechanism similar to a false advertising claim. *Id.* In a survey of interest in this context, a great number of individuals proved incorrect about what companies were sponsors of the 2012 Olympics and in fact sometimes named those companies' exact competitors, which could raise the question of how well consumers understand sponsorship affiliations in the first place. See Laurel Wentz, *Consumers Don't Really Know Who Sponsors the Olympics*, ADAGE GLOBAL (July 27, 2012), <http://adage.com/article/global-news/consumers-sponsors-olympics/236367/>. While certainly not every sponsorship relationship proves a wise marketing decision, the survey took place about a week before the Olympics had actually begun and consumers may have

hedonic loss, however, a perceived affiliation between two entities has the power to change the experience of a branded product. McKenna has pointed out that consumers do not necessarily blame a host brand even when its partners make mistakes.¹⁴³ While that could be true in some instances, the finding may no longer hold if consumers are exposed to negative information of this sort more than once. Further, even if they do not have a significantly decreased reported opinion of the brand as a whole, their experience of the brand may well change based on the false perceived relationship between two entities.

At this time, we do not have clear empirical data one way or another. On the one hand, this militates toward disallowing a legal claim (after all, no harm has been conclusively established). There are a number of arguments in the other direction, though. First, there are many legal situations where we allow a claim to proceed even if no harm has been shown in a completely bulletproof way or at all. Rather, the level of harm often goes toward the question of remedies. In criminal law and in torts, the risk of harm can be sufficient to lead the state or a plaintiff to victory.¹⁴⁴ As to the question of whether the risk is sufficiently high in the trademark context, one cannot answer without examining the countervailing benefits, such as that some products will become cheaper, some consumers of diluting goods will experience hedonic gains that they would not otherwise have had, and a number of companies will be able to attract consumers to their products without fear of litigation.¹⁴⁵ At the same time, producers may no longer be able to enter some of the additional markets that they could have, and consumers of an original good may experience hedonic loss because of the wider dissemination of a symbol. As to the former, producers may be discouraged from the targeted expansions of the original brand that they could have pursued because they now have to deal with a

been less informed at that time than later on. *See id.* Perhaps some companies are also worried about pushing their affiliation with the Olympics too hard, lest they experience what occurred in the past when consumers “rejected Coke’s omnipresence at the Atlanta Olympics, calling it the ‘Red Rash.’” WIPPERFÜRTH, *supra* note 19, at 5.

¹⁴³Mark P. McKenna, *Testing Modern Trademark Law’s Theory of Harm*, 95 IOWA L. REV. 63, 114–15 (2009).

¹⁴⁴“[I]nchoate crimes can be prosecuted as crimes, just as inchoate torts are compensable as torts.” Adam J. Hirsch & Gregory Mitchell, *Law and Proximity*, 2008 U. ILL. L. REV. 557, 576 (2008). For a philosophical approach to the question of what constitutes harm, see Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963 (2003).

¹⁴⁵I would like to thank Lisa Ramsey for our conversation about this last benefit. Even (or especially?) outright counterfeiting has a number of benefits, particularly when the consumer of a counterfeit is using that good as a means to fit in socially rather than as a means of self-expression. *See generally* Keith Wilcox et al., *Why Do Consumers Buy Counterfeit Luxury Brands?*, 46 J. MARKETING RES. 247 (2009). On the flipside, some researchers have suggested that “[o]ne way to dissuade counterfeiting would be to emphasise personal image. For consumers who value the opinion of their peers, it will be embarrassing if they are found to be using fake designer goods.” Ian Phau et al., *Targeting Buyers of Counterfeits of Luxury Brands: A Study on Attitudes of Singaporean Consumers*, 17 J. TARGETING, MEASUREMENT & ANALYSIS FOR MARKETING 3, 11 (2009) (footnote omitted).

change in how much increased blurring of their brand any additional commercial use of it can bring. In other words, because of Gucci burgers, the original Gucci runs a higher risk of blurring with every additional product that it wants to bring to market. And if there is such a risk to be borne, it is not clear why it should be shouldered by the original owner rather than by the free rider. As discussed, this is not to say that free riding is necessarily a problem or unethical in itself. But when it comes to sponsorship or affiliation, brand owners carefully monitor their relationships with other companies and the effect that these relationships have on brand image.¹⁴⁶ At the end of the day, this forces us to ask the larger question of who should have control over commercial uses of a trademark when there is a risk of harm and that risk is realistic yet not conclusively proven.¹⁴⁷

Compared to copyright, where there is a long-standing debate about individual ownership versus accessibility through the public domain,¹⁴⁸ the public benefit of loosening doctrines like sponsorship confusion is unlikely to be as significant. Advocates of weakened trademark regimes face a few tensions, of which I will mention one: they can only claim with some difficulty that developing a new mark is not all that hard while insisting that competitors and the public must have commercial access to the mark in the name of meaningful competition or free speech.¹⁴⁹ In addition, some research has

¹⁴⁶ This calculation contains its own commercial hazards as it is, like one can see in Gucci's own expansion debacle in the mid-90s that I discuss in the text accompanying note 105.

¹⁴⁷ See, e.g., Thomas R. Lee, *Demystifying Dilution*, 84 B.U. L. REV. 859, 898 (2004) (arguing that in the case of dilution, "the actionable wrong is the loss of control over the link between the famous mark and a single source, not the consequential harms that may follow it"). One of the less often considered limits of that control is that companies can sometimes use legal but possibly unsavory means to decrease society's opinion of competitors' brands, such as when fashion designers allegedly gave reality television star Snooki purses made by their competitors because association with her would arguably shed a negative light on those products. See Simon Doonan, *How Snooki Got Her Gucci: The Dirt on Purses*, N.Y. OBSERVER (Aug. 17, 2010, 9:55 PM), <http://observer.com/2010/08/how-snooki-got-her-gucci-the-dirt-on-purses/>. See generally Deven R. Desai & Spencer Waller, *Brands, Competition, and the Law*, 2010 BYU L. REV. 1425 (2010) (analyzing the relationship between branding and business competition).

¹⁴⁸ See generally Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990); Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483 (1996). For a recent empirical study on the subject of copyright and innovation in the music world, see Michael A. Carrier, *Copyright and Innovation: The Untold Story*, 2012 WIS. L. REV. 891.

¹⁴⁹ This is not to say that this resolves all possible conflicts between owners' interests and the right to free speech. When it comes to analyzing the drafting and application of trademark law, as Lisa Ramsey has explained, "[f]or speech restrictions to be constitutional, the government interest must generally be 'substantial' for commercial speech and 'compelling' for noncommercial speech." Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 SMU L. REV. 381, 422 (2008). Empirical data on the hedonic

yielded disconcerting results as to how the conscious use of counterfeit goods renders its users less ethical, and we do not know how these results may apply in the context of goods that dilute or exhibit some of the other actionable characteristics discussed here.¹⁵⁰

Last in this section, I would like to say a few words about initial interest confusion in the context of hedonic loss. Initial interest confusion, as the name suggests, refers to situations in which consumers are confused at first, but this confusion evaporates before any actual purchase takes place.¹⁵¹ This doctrine has fallen under increased criticism¹⁵² as it has been progressively applied to the Internet context.¹⁵³ The case against initial interest confusion based on the hedonic value of trademarks is probably trickier than that for the other doctrines discussed in this Article. The argument would have to go that consumers get less enjoyment out of goods because they wasted some time and energy buying those goods (or other goods by the same original producer). While plaintiffs could try to establish that this is the case, it is unlikely to succeed.¹⁵⁴ That kind

value of marks may affect but will not by itself provide answers as to whether particular statutes or doctrines are constitutional.

¹⁵⁰ For instance, one study found that wearing counterfeit sunglasses led individuals to feel less authentic and increased the occurrence of unethical behavior on their part as well as their likelihood to view others as unethical. Francesca Gino et al., *The Counterfeit Self: The Deceptive Costs of Faking It*, 21 PSYCHOL. SCI. 712, 714 (2010).

¹⁵¹ This concept was first discussed, without that exact label, in *Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons*, 523 F.2d 1331, 1342 (2d Cir. 1975). It also arose when Mobil Oil sued Pegasus Petroleum because the former feared confusion based on shared use of flying horse symbols. *Mobil Oil Corp. v. Pegasus Petrol. Corp.*, 818 F.2d 254, 255–56 (2d Cir. 1987). Meanwhile, in *Elvis Presley Enterprises, Inc. v. Capece*, the court discussed the harm of initial interest confusion consisting of the defendant leading customers to pay a cover charge before entering an establishment, which meant that the defendant financially benefitted even if any confusion cleared up by the time customers actually entered the bar in question. 141 F.3d 188, 204 (5th Cir. 1998).

¹⁵² See, e.g., Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 EMORY L.J. 507, 565–70 (2005) (criticizing the doctrine, in part for “commit[ing] the cardinal sin of enabling a finding of trademark infringement when the junior user is making associative or referential uses of a trademark”); Michael Grynberg, *The Road Not Taken: Initial Interest Confusion, Consumer Search Costs, and the Challenge of the Internet*, 28 SEATTLE U. L. REV. 97 (2004) (proposing a change of focus for the doctrine away from protecting the original owner’s goodwill and toward a model based on search costs); Rothman, *supra* note 21, at 121–59 (providing several critiques of initial interest confusion, including that it violates the Lanham Act and the First Amendment, among other issues).

¹⁵³ See, e.g., *Playboy Enters., Inc. v. Netscape Commc’ns Corp.*, 354 F.3d 1020, 1031 (9th Cir. 2004) (reversing summary judgment based on free riding on the plaintiff’s mark through the sale of banner ads keyed to the trademarked words “playboy” and “playmate”); *Brookfield Commc’ns, Inc. v. West Coast Entm’t Corp.*, 174 F.3d 1036, 1062 (9th Cir. 1999) (basing the finding of infringement on the defendant’s free riding on the plaintiff’s mark through the use of metatags—i.e., words embedded in a website’s HTML code to direct search results).

¹⁵⁴ While my conclusions differ for some of the examples they give in the context of other doctrines, when it comes to initial interest confusion, I agree with Lemley and

of loss is conceivable mainly for products where the amount of uses of this sort is overwhelming such that shopping for, say, an original Gucci purse becomes an ordeal to a large enough degree that the potential consumer would rather give up altogether or at least do it more rarely than she normally would. Like McKenna and Lemley, I do not see initial interest confusion as a fundamentally incorrect doctrine, but construing a genuine harm is indeed tenuous in many instances.¹⁵⁵ The shopping experience itself, as divorced from any particular trademark, could become less enjoyable,¹⁵⁶ but that type of harm appears too remote to become cognizable under trademark law. Initial interest confusion is thus probably best captured through a judicial focus on deceit rather than hedonic loss, especially because consumers can also enjoy real gains from non-deceptive comparison shopping.

C. Criticisms of the Hedonic Model of Trademarks

Considering the hedonic value of marks as part of a trademark infringement regime is controversial, and critics are likely to raise a number of objections. The first is the problem of measuring hedonic loss. I delineated some preliminary thoughts on this topic,¹⁵⁷ but social scientists would certainly need to become involved in developing the specific methods we should employ. As I have mentioned throughout this Article, the empirical hurdles in trademark law are real, and they arise in virtually any way that we decide to shape the system (short of scrapping the entire enterprise). At the same time, this Article recognizes the realities of the marketplace: that we live in a time in which trademarks are so valuable that we now encounter them in virtual worlds like *Second Life*¹⁵⁸ and that people are willing to pay money for Diesel-branded game elements in *The Sims 3*.¹⁵⁹ These are powerful examples of how individuals spend money on the sheer experience of a mark without expecting any particular objective quality (for instance, I promise you that the Diesel jeans in the Sims game will be no more durable than the generic ones). The difficulties of the empirical project at hand should not make us shy away from

McKenna that it is difficult to show that consumers were injured “by Google selling ad space opposite search results [or] by web sites momentarily diverting surfers’ attention with a URL.” Lemley & McKenna, *supra* note 21, at 156.

¹⁵⁵ *Id.* Unlike Jennifer Rothman, I do not necessarily see a conflict with the statutory text of the Lanham Act. See Rothman, *supra* note 21, at 122–24. That being said, her point is well-taken that courts have at times used perhaps overly liberal interpretations of the word “confusion” when actually applying the doctrine. *Id.*

¹⁵⁶ For example, some potential consumers may prefer to have an easier time looking up a brand online whereas others like to see a variety of links show up in their searches.

¹⁵⁷ See *supra* Part III.A.2.

¹⁵⁸ For a discussion of trademark issues in *Second Life* and related worlds, see, for example, Theodore C. Max, *Trademarks in the Veldt: Do Virtual Lawyers Dream of Electric Trademarks?*, 101 TRADEMARK REP. 282 (2011).

¹⁵⁹ *The Sims 3 Diesel Stuff Pack*, ELECTRONIC ARTS, <http://www.ea.com/the-sims-3-diesel-stuff> (last visited July 4, 2012).

it. As I have hopefully shown so far, a system that only views marks as reducers of search costs or as indicators of a small subset of qualities is one that is letting (empirical) perfection be the enemy of the good.

Furthermore, the measurement problem is not unique to trademark law. We validate all sorts of difficult-to-measure legally cognizable harms, such as emotional distress¹⁶⁰ or losses of personal or professional reputation.¹⁶¹ If anything, uncertainties about the level of harm in such cases affect the level of damages rather than leading to calls of abolishing the doctrines altogether. When it comes to trademarks, hedonic loss would normally not even affect the level of damages because (1) for many of the cases that fall under the doctrines discussed, the plaintiffs can generally only seek injunctions¹⁶² and (2) the plaintiffs are the mark owners rather than the consumers who suffer the hedonic loss, so the plaintiffs would probably not directly be able to seek higher damages on this basis.

Another argument against recognizing hedonic losses is the potential negative effect on market competition. Jessica Litman has argued that just because what she terms the “atmospherics” of a mark have value, this does not mean that said value should be protected, and she asks:

If the customers want to move on, to get in bed with other products that have similar atmospherics, why shouldn't they? . . .

. . . If the thing itself is valuable, if it is in some sense itself a product, then we want other purveyors to compete in offering it to consumers in their own forms and on their own terms.¹⁶³

While we have no clear empirical evidence showing that acts like dilution diminish producers' overall income, we also have no such evidence in the other

¹⁶⁰ For a discussion of the measurement of experiences such as emotional distress in the present and as technology advances, see Adam J. Kolber, *The Experiential Future of the Law*, 60 EMORY L.J. 585 (2011).

¹⁶¹ For some examples such as defamation and others, see Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 744 n.309 (1990).

¹⁶² The Lanham Act specifies that the remedy for dilution is an injunction unless willful dilution can be proven. 15 U.S.C. § 1125(c)(5) (2006). Further, most of the newer state anti-dilution statutes both only provide damages in cases of actual rather than likely dilution and only do so for willful dilution, so “damages are unlikely to be awarded under state dilution law in cases where federal law would not allow them.” David S. Welkowitz, *State of the State: Is There a Future for State Dilution Laws?*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 681, 705 (2008).

¹⁶³ Litman, *supra* note 23, at 1730–31; see also Robert N. Klieger, *Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection*, 58 U. PITT. L. REV. 789, 858 (1997) (“Where product differentiation results from differences in the products’ tangible characteristics or quality, informed consumers rationally pay the premium. But where product differentiation is built primarily on a nonrational or emotional basis, through the efforts of the ad-man, consumer willingness to pay the premium proves economically inefficient.” (footnotes omitted) (internal quotation marks omitted)).

direction.¹⁶⁴ We are further faced with a situation in which we already have anti-dilution laws, and it is difficult to conclusively establish the hypothetical effect of dilutive uses in their absence. And while some producers (and their consumers) are able to gain from the sale of dilutive branded goods, we do not know what entrepreneurial ventures these producers would have chosen to pursue if dilution was not an option.¹⁶⁵ As long as we do not lock up the trademark registration system by allowing one owner to monopolize generic or descriptive terms,¹⁶⁶ someone interested in commercially using the Gucci mark has numerous alternative options for trademarks and designs under most circumstances.

In the realm of copyright, some free riding in the form of copying is unavoidable in areas such as musical expression.¹⁶⁷ In trademarks, while free riding per se is also not necessarily problematic (hence my skepticism about rooting initial interest confusion doctrine in hedonic loss), the question is at which point that free riding both capitalizes on the value specifically added by the original mark owner *and* causes hedonic and other losses. When it comes to copyrighted works, the consumers of original goods will generally not suffer hedonic losses because of a new creator's works,¹⁶⁸ so our focus in that area is properly on the direct financial loss to the original owner and related incentives only. The same could be said for the patent system.

A third objection is that hedonic appreciation of trademarks is not something that we want to encourage. One variant of this criticism is that to the extent consumers enjoy status goods such as Gucci purses, we should not incentivize their behavior and we should appreciate the equalizing pressure

¹⁶⁴There is no doubt that the traditional circularity problem of all trademark law remains present here—i.e., the question is what boundaries we believe to be correct as to owners' rights in the first place, which then correlate with specific income levels.

¹⁶⁵That being said, one must acknowledge that we also cannot say with certainty that the owners of the original marks would not have been more innovative in the absence of dilution law—it is at the very least a theoretical possibility.

¹⁶⁶The exception would be descriptive terms that have acquired secondary meaning, but the Supreme Court has also explicitly stated in *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 117–21 (2004), that use of those descriptive marks is subject to fair use. Problems certainly remain in this context, such as when entities falsely claim to have rights in descriptive and generic terms, including through the mechanism of cease and desist letters that can chill competition and speech. I have addressed some related issues in Irina D. Manta, *Bearing Down on Trademark Bullies*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 853 (2012).

¹⁶⁷Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277, 341 (2006).

¹⁶⁸This is somewhat based on my intuition and deserves further study. For a discussion of some of these issues, see Rebecca Tushnet, *Indefinitely Renewable Copyright: Batman Versus the Utility Monster*, REBECCA TUSHNET'S 43(B)LOG (Aug. 16, 2005, 5:43 PM), <http://tushnet.blogspot.com/2005/08/indefinitely-renewable-copyright.html>.

valve that phenomena like dilution provide.¹⁶⁹ Another variant is that even if the goods in question are not status goods, we should not want to incentivize advertising expenses and a consumer focus on cognitively manufactured rather than inherent product qualities. I mainly have two responses. First, a move away from protecting status goods would require a reconceptualization of the entire trademark system, at least unless one is basically willing to draw a fairly artificial line as to the proper level of protection of status goods. It appears that the market economy in the United States and other capitalist countries uses status goods as carrots to inspire hard work on the part of the individuals who want to obtain these goods one day.¹⁷⁰ If one believes that status goods have a detrimental effect on human psychology or the economy,¹⁷¹ then a more fundamental discussion of values will have to take place in the policymaking arena, and American society will have to undergo substantial changes. It is not a question for trademark scholarship to decide in a vacuum.

My other response to the third objection is that, as I have explained previously, the dichotomy between real and manufactured qualities is an artificial one. All that matters is what our brains perceive. While that can mean that in some situations, a consumer of a counterfeit good can experience very similar or perhaps identical enjoyment of the good if he does not know it is a counterfeit¹⁷²—which would seem to militate in favor of even counterfeits from a hedonic perspective—other consumers' experiences are potentially hurt by not only counterfeits but also dilutive uses. Not only that, but should the consumer of the counterfeit good find out the truth, he could be sorely disappointed and experience net hedonic loss. While doctrines based on deception alone can mostly cover this latter problem, they cannot handle the loss to the third parties who are the buyers of the original, undiluted goods. As this Article has shown, shared use of a trademark may take on a rivalrous nature such as to diminish the

¹⁶⁹ See, e.g., Sheff, *supra* note 35, at 772–73 (criticizing post-sale confusion as a use of government power to enforce particular hierarchies in the social rather than commercial context).

¹⁷⁰ See generally ROLAND MARCHAND, *ADVERTISING THE AMERICAN DREAM: MAKING WAY FOR MODERNITY, 1920–1940* (1985) (exploring how advertisers have incentivized a prevailing consumption ethic). Meanwhile, in communist countries, anything perceived as a status good tends to become the object of a lively black market. See, e.g., Nick Miroff, *Cuba's Craigslist*, GLOBALPOST (May 30, 2010), <http://www.globalpost.com/dispatch/cuba/090723/cubas-craigslist> (“On this Communist-run island, the black market is a vast, irrepressible force, an underground river of unlicensed services, goods pilfered from government stores and coveted items carried in from abroad. Cuban authorities go to great lengths to curtail it; they cannot.”).

¹⁷¹ For a skeptical take on the relationship between technological progress as encouraged by the patent system and human happiness, see Estelle Derclaye, *Eudemonic Intellectual Property: Patents and Related Rights as Engines of Happiness, Peace, and Sustainability*, 14 VAND. J. ENT. & TECH. L. 495 (2012).

¹⁷² Think of this consumer as being (temporarily) stuck inside the experience machine. See discussion *supra* Part I.

enjoyment of original goods without an equivalent resulting benefit, though, as I have stated, this remains subject to further empirical study.

The fourth problem that I would like to address here is the objections rooted in First Amendment concerns to dilution and related doctrines. While this subject deserves broader treatment and a fuller normative analysis once more empirical data on hedonic loss becomes available,¹⁷³ I will offer a few purely descriptive thoughts for now on why courts—properly cognizant of these issues especially in artistic contexts—are unlikely to recognize any absolute bar against dilution-style doctrines based on these types of constitutional objections.¹⁷⁴ As a matter of background, the Supreme Court has long held that the regulation of deceptive or misleading speech is constitutional.¹⁷⁵ In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*,¹⁷⁶ the Court explicitly rejected the petitioner's First Amendment challenge to the respondent's attempt to prohibit uses of the word Olympic and various related symbols. As part of the case, the petitioner unsuccessfully argued that it should be able to use and sell merchandise under the title "Gay Olympic Games" based on the political content of the speech that it wanted to express.¹⁷⁷ The Court explained that "Congress reasonably could conclude that most commercial uses of the Olympic words and symbols are likely to be confusing. *It also could determine that unauthorized uses, even if not confusing, nevertheless may harm the USOC by lessening the distinctiveness and thus the commercial value of the marks.*"¹⁷⁸ Additionally, the Lanham Act already explicitly excludes fair use and noncommercial uses from becoming the object of dilution causes of action.¹⁷⁹ Thus, even though over the years, various circuit courts have become

¹⁷³For more extensive discussions of the relationship between trademark law and the First Amendment, see generally Robert C. Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158 (1982); Laura A. Heymann, *The Public's Domain in Trademark Law: A First Amendment Theory of the Consumer*, 43 GA. L. REV. 651 (2009); Ramsey, *supra* note 149; Lisa P. Ramsey, *Descriptive Trademarks and the First Amendment*, 70 TENN. L. REV. 1095 (2003); Rebecca Tushnet, *Trademark Law as Commercial Speech Regulation*, 58 S.C. L. REV. 737 (2007).

¹⁷⁴In other words, rather than provide a prescriptive theory of the validity of dilution and related doctrines under the First Amendment, my goal is to briefly delineate why I suspect that these doctrines will withstand constitutional scrutiny to provide context for my analysis of the effect of incorporating hedonic calculations into trademark law holding other doctrines equal.

¹⁷⁵*See, e.g., Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

¹⁷⁶483 U.S. 522, 523 (1987).

¹⁷⁷*Id.* at 535–40.

¹⁷⁸*Id.* at 539 (emphasis added). For a highly critical look at the trademark enforcement surrounding the 2012 London Olympics, see Nick Cohen, *Censorship Olympics*, SPECTATOR, July 14, 2012, at 14, available at <http://www.spectator.co.uk/issues/14-july-2012/censorship-olympics/>.

¹⁷⁹15 U.S.C. § 1125(c)(3) (2006). One may argue that these exceptions have been applied too narrowly, but even enlarging these defenses need not conflict with a hedonic

more liberal in upholding First Amendment challenges in artistic contexts¹⁸⁰ and though some forms of parody have been victorious,¹⁸¹ there is currently little indication of any fundamental constitutional danger to the general principles behind current dilution and related doctrines.¹⁸²

The Supreme Court's recent decision in *United States v. Alvarez*¹⁸³ and its discussion of the relationship between trademark law (meaning especially dilution) and the First Amendment likely provides no exception, as a brief sketch will indicate.¹⁸⁴ In *Alvarez*, the Court affirmed that the Stolen Valor Act, which sought to prohibit individuals from falsely claiming that they had obtained particular military medals, should be struck down.¹⁸⁵ Both Justice Breyer's concurring opinion¹⁸⁶ and Justice Alito's dissent¹⁸⁷ make references to trademark law and dilution.¹⁸⁸ Justice Breyer states in part: "Trademarks identify the source of a good; and infringement causes harm by causing confusion among potential customers (about the source) and thereby diluting the value of the mark to its owner, to consumers, and to the economy."¹⁸⁹ While these statements arose in a concurrence, they are noteworthy for a number of reasons. First, nothing in Justice Kennedy's or in the dissenting opinions appears to depart from this understanding, and—in light of judicial precedent—chances are that a majority of the court would likely subscribe to Justice

analysis of marks. To the contrary, related empirical studies may in fact turn out to weaken claims for expansive rights for some types of marks.

¹⁸⁰ See Kerry L. Timbers & Julia Huston, *The "Artistic Relevance Test" Just Became Relevant: The Increasing Strength of the First Amendment as a Defense to Trademark Infringement and Dilution*, 93 TRADEMARK REP. 1278 (2003). For a discussion of the use of corporate brands for purposes of artistic or political expression, see Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489, 492–95 (2006).

¹⁸¹ See *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 256–57 (4th Cir. 2007) (upholding summary judgment in favor of a plush dog chew toys manufacturer accused of diluting a brand associated with luxury handbags).

¹⁸² Empirical studies of the hedonic value of brands will yield new insights and shape trademark law in the commercial context, but I currently do not foresee that they will significantly alter the current balance between doctrines like dilution and uses that receive First Amendment protection. Any expansion of trademark rights has to take into account the effects on both economic and hedonic utility but also the value of living in a society that enjoys broad free speech rights. I would like to thank Lisa Ramsey for the conversation we had on this subject.

¹⁸³ 132 S. Ct. 2537 (2012).

¹⁸⁴ For a general discussion of this topic, see Rebecca Tushnet, *The Stolen Valor Act and Advertising/Trademark Law*, REBECCA TUSHNET'S 43(B)LOG (June 28, 2012, 12:16 PM), <http://tushnet.blogspot.com/2012/06/stolen-valor-act-and.html>.

¹⁸⁵ 132 S. Ct. at 2551.

¹⁸⁶ *Id.* at 2554 (Breyer, J., concurring).

¹⁸⁷ *Id.* at 2559 (Alito, J., dissenting).

¹⁸⁸ None of these statements form part of the actual holding of the case, of course, and so all conclusions derived from them contain some level of speculation as to the Court's future holdings.

¹⁸⁹ *Alvarez*, 132 S. Ct. at 2554 (Breyer, J., concurring).

Breyer's views on this point; relevantly, we know that a total of five Justices, and hence a majority, signed onto either Justice Breyer's concurrence or Justice Alito's dissent.¹⁹⁰ Justice Alito specifically provides a likely endorsement when he states that "[i]t is well recognized in trademark law that the proliferation of cheap imitations of luxury goods blurs the 'signal' given out by the purchasers of the originals."¹⁹¹ Second, Justice Breyer writes about recognizing the harm of dilution to not only owners and the economy generally but also *consumers* specifically.

One wrinkle, as Rebecca Tushnet and others have commented,¹⁹² is that Justice Breyer is not entirely clear when he says that "trademark statutes are focused upon commercial and promotional activities that are likely to dilute the value of a mark. Indeed, they typically require a showing of likely confusion, a showing that tends to assure that the feared harm will in fact take place."¹⁹³ The dilution portion of the Lanham Act actually does not require "a showing of likely confusion" but rather defines dilution as "association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark."¹⁹⁴ Tushnet states: "Either Breyer is deeply confused about what trademark law currently is and how infringement and dilution are proven, or he sees much better than we admit in reducing trademark law to dilution and presumptions to proof."¹⁹⁵ I see a few possible interpretations of Justice Breyer's statement. For one, he was not necessarily wrong by suggesting that most trademark cases ("typically") revolve around a showing of confusion. For another, I would draw a distinction between requiring a risk of harm and presuming proof. As mentioned previously in this Article,¹⁹⁶ trademark law is not unique in the difficulties that it presents when it comes to measuring harm. And to the extent someone should bear the risk of that harm, it is not clear why that burden should fall on the producer and consumers of the original good. Odds are that Justice Breyer was speaking in some generalities, but the message is clear: he, Justice Alito, and likely at least several of the other Justices—while some of them willing to strike down the False Valor Act—have no intention to let the First Amendment become a fatal hurdle to dilution and related doctrines.

¹⁹⁰ The way that the case unfolded procedurally is that a total of four Justices signed on to Justice Kennedy's opinion, two Justices to Justice Breyer's opinion, and three Justices to Justice Alito's dissent. *Id.* at 2541. I would like to thank Will Baude for his comments on this point.

¹⁹¹ *Id.* at 2559 (Alito, J., dissenting) (internal quotation marks omitted).

¹⁹² See, e.g., Tushnet, *supra* note 184.

¹⁹³ Alvarez, 132 S. Ct. at 2554 (Breyer, J., concurring).

¹⁹⁴ 15 U.S.C. § 1125(c)(2)(B) (2006). Barton Beebe has explained that "[w]hile trademark infringement involves the infringement of source distinctiveness, trademark dilution involves the dilution of differential distinctiveness." Beebe, *supra* note 23, at 676.

¹⁹⁵ Tushnet, *supra* note 184.

¹⁹⁶ See *supra* notes 160–62 and accompanying text.

Further, while Justice Kennedy's opinion in *Alvarez* does not directly discuss trademarks, it gives us another clue as to the Court's views on the matter. Justice Kennedy writes that "[t]he remedy for speech that is false is speech that is true"¹⁹⁷ and suggests, in the context of the Constitution's requiring the alternative least restrictive of speech, that the government could establish a database that lists the winners of the Congressional Medal of Honor and hence counteracts fictitious claims such as the ones by the respondent.¹⁹⁸ When it comes to infringing or diluting speech in the trademark context, there is little to no opportunity for effective counterspeech, which is another important distinction between the Stolen Valor Act and the Lanham Act. This provides further evidence that the current Court, building on existing precedent, is unlikely to shake up the status quo that has left dilution and related doctrines largely unscathed by First Amendment challenges, although it may still strike down individual problematic applications of dilution law in this context.¹⁹⁹

The expressive content of Gucci burgers is likely trivial in most contexts,²⁰⁰ and the First Amendment neither does nor necessarily should protect this use of a competitor's mark. There will certainly be borderline cases of various sorts, but it is difficult to envision why or how the Constitution would bar dilution and related doctrines as an absolute matter. The real debate will continue to be about how extensively concepts like fair use²⁰¹ or parody should apply.²⁰² This

¹⁹⁷ *Alvarez*, 132 S. Ct. at 2550.

¹⁹⁸ *Id.* at 2551.

¹⁹⁹ I thank Rebecca Tushnet for her comments on this point.

²⁰⁰ For what it is worth by way of anecdotal data, the owner of the one place of which I know that currently sells Gucci burgers in Maine fairly clearly displayed no particular attachment to the name when I spoke to him on the phone. He said that someone came up with the idea in a meeting and it stuck, and it sounded to me as if it was no more than a "cool" name to him without significant expressive content. *See supra* note 25. Of course, this is just my interpretation of a short phone conversation and should be taken as such.

²⁰¹ When it comes to nominative fair use, for instance, it is unlikely that empirical studies of hedonic values will change our perspective in that uses in that realm are unlikely to reduce consumers' hedonic appreciation of the original goods by enough to overcome the sometimes significant benefits of such uses.

²⁰² Another debatable topic is how exactly to interpret the fame requirement of dilution law. *See, e.g.*, Xuan-Thao Nguyen, *Fame Law: Requiring Proof of National Fame in Trademark Law*, 33 CARDOZO L. REV. 89, 94 (2011) (proposing that proof of fame should consist, at minimum, of recognition on the part of seventy percent of the American public). An interesting point to consider within that question and as related to hedonic analysis is what types of marks suffer the most from dilution. Maureen Morrin and Jacob Jacoby have suggested that "some brands, such as Continental Airlines, are so familiar to consumers . . . that recall of their original product category is largely immune to trademark dilution." Morrin & Jacoby, *supra* note 52, at 272. This suggests that some of the most famous brands might be initially resistant to dilution, though this may be limited to a fairly small subset of relevant brands (Continental Airlines produced perfect recall by the control group) and could change if the level of dilution becomes more significant than that used in the study, which would not take much. *See id.* Also, while stronger brands may be slower to experience dilution, they will often likely become subject to hedonic loss on the part of

parallels some of what one can observe in copyright law, where we ultimately also disallow non-deceptive forms of speech if they breach the boundaries of fair use, whether this takes place for a commercial purpose or not.²⁰³ For instance, we do not let someone photocopy and distribute a hundred pages out of a Harry Potter novel, even if she prints “Not endorsed by J.K. Rowling” on the cover and no matter whether the aim is to profit financially or to make a greater political or artistic statement.²⁰⁴ While not conclusive, the evidence we have from legal precedent in trademark cases, the Supreme Court’s recent statements in *Alvarez*, and the parallels to copyright law thus suggest that current dilution law and related doctrines fit within the rest of our First Amendment jurisprudence and intellectual property generally.

IV. CONCLUSION

This Article set out to accomplish several goals. One was to uncover the hidden variable in the trademark violation equation, namely consumers’ hedonic appreciation of marks, and how it affects doctrines such as dilution, sponsorship confusion, post-sale confusion, and initial interest confusion. It has shown, subject to further empirical investigation, that the first three may be directly tied to the concept of hedonic loss while the last one contains a tenuous link at best. It has critiqued some of the main schools of thought in the trademark world and has shown how they do not account for consumers’ experience of marks, which is an integral part of their experience of the products that contain the marks. Trademarks are *The Matrix*’s equivalent of not a blue or red but rather a purple pill because in the world of brands, experience is reality, entirely or at least as a tightly intertwined element. If one of the main roles of trademarks is to protect the quality-indicating function of marks, then all relevant qualities should matter. While dilution and some related doctrines

consumers more significantly than lesser known (yet still famous) brands. Some of this may be related to whether a brand has acquired what Alex Wipperfurth has termed consumer “loyalty” (think of a true fan of Southwest or JetBlue Airlines) as opposed to fleeting “retention” (an example of which would be someone who sticks with United or American Airlines for the frequent flyer benefits but would not mind switching at the drop of a hat). See WIPPERFÜRTH, *supra* note 19, at 248–55. Odds are that companies that achieve loyalty generally do so by providing greater amounts of long-term hedonic benefits. If dilution takes place early on in the trajectory of an otherwise successful emerging brand, that brand may never even have the opportunity to work toward said loyalty, although there are also possible opportunity costs in the other direction (e.g., as mentioned previously, dilution could force the original owner to become more creative). For a discussion of the effect of dilution at different points in time in the relationship between a producer and consumer, see *supra* note 95.

²⁰³I would like to thank Mark McKenna for the conversation that we had on this subject.

²⁰⁴If nothing else, this type of use would undoubtedly fail the prong of the fair use test that evaluates “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3) (2006).

may have come about in part due to mark owners' political efforts targeted toward ensuring maximal profitability from existing, well-known trademarks, owners have thus possibly also indirectly served as protectors of consumers' experiences and global welfare. Whether they have done so optimally remains to be seen as we seek out and publicize more empirical data on different types of hedonic gains and losses.

The dichotomy between deceptive trademark infringement, such as in cases involving likelihood of confusion at the point of sale, and non-deceptive infringement such as dilution is insignificant in many respects. The hypothetical Gucci burgers and their brethren potentially risk harming the original brands by altering consumer perception without an equivalent hedonic upside. Whatever theoretical argument can be made that this may favor creativity by competitors is countered by one that creativity may actually suffer due to the promotion of unoriginality. This Article does not attempt to delineate the exact contours of optimal trademark infringement law, but it rather argues that dilution, sponsorship confusion, and post-sale confusion are normatively relevant concepts in an intellectual property framework based on utilitarian notions. The thesis here thus pushes back against the story that cleanly aligns dilution with producers' interests and lack thereof with consumers'.

The ideal for lawsuits by trademark owners is that they culminate in gains for both the plaintiffs and their consumers.²⁰⁵ The next step after embracing the importance of hedonic enjoyment to trademark law should be an empirical exploration of the proper boundaries of dilution and related doctrines and of what level of enforcement can best balance the protection of current hedonic values and the need for competition and expression. I am agnostic as to the outcome of empirical studies examining the hedonic gains and losses resulting from possible dilutive and other questionable uses.²⁰⁶ This Article contends, however, that the outcomes of such studies ought to influence our thinking about trademark policy and the crafting of related statutes and doctrines. The model presented here is thus both a return to the roots of trademark law and a somewhat radical departure from the existing scholarly discourse. It is a return in that it forces consideration of the most fundamental goals of trademarks, and I have argued in this Article that this should explicitly include not only the maximization of economic utility but also of hedonic enjoyment. The model is a departure because it embraces values that many other scholars have discarded as meaningless atmospherics outside the purview of trademark law. As author Clarence Day has stated, however, "information's pretty thin stuff, unless mixed with experience."²⁰⁷ Modern trademark law seeks to ensure that the consumer

²⁰⁵ Trademark owners are likely the most logical enforcers in such cases due to their interests in the litigation and their larger resources, but they also serve as "the public's avengers." Dilbary, *supra* note 64, at 629.

²⁰⁶ We may, for instance, find that hedonic losses are significant for dilutive uses of luxury brands but not for those of other famous but non-luxury brands.

²⁰⁷ CLARENCE DAY, JR., *THE CROW'S NEST* 4 (1921). The original context of the quotation is an indictment of ivory-tower thinking, in the form of a description of book

both gets the experiences he wants and wants the experiences he gets, and that is how it should be.

lovers who got to heaven: “[T]hey sat in the harp store-room all eternity, and read about heaven. They said they could really learn more about heaven, that way. And in fact, so they could. They could get more information, and faster. But information’s pretty thin stuff, unless mixed with experience.” *Id.*