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The Semiotic Analysis of Trademark Law
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The Chicago School of law and economics has long offered a totalizing and, for many, quite definitive theory of American trademark law. This theory conforms to a programmatic thesis: "Trademark law, like tort law in general . . . can best be explained on the hypothesis that the law is trying to promote economic efficiency." n1 The Chicago School asserts that trademarks serve two efficiency-enhancing functions: First, trademarks lessen consumer search costs by making products and producers easier to identify in the marketplace, and second, trademarks encourage producers to invest in quality by ensuring that they, and not their competitors, reap the reputation-related rewards of that investment. n2 As a historiographical proposition, the school [*624] further asserts that American trademark law has evolved over time an efficient system of rules designed to facilitate these two functions. n3 The influence of this analysis is now nearly total. It has been adopted at the highest levels of American law. n4 No alternative account of trademark doctrine currently exists.

Though powerful, the economic analysis of trademark law remains incomplete. It cannot explain, predict, or justify certain outcomes in the law, nor can it articulate the need for necessary reforms. This is nowhere more apparent than in its treatment of the concepts of trademark "distinctiveness" and trademark "dilution." The economic analysis falls short for two reasons. First, trademark doctrine is a hybrid doctrine. It is not simply an economic doctrine elaborating the principles of the market. It is also, and at the same time, a semiotic doctrine elaborating the principles of sign systems, of language. If there is a "language of commodities," n5 then trademark doctrine is its grammar, and this grammar must be understood not simply in economic, but also in linguistic terms. The second reason follows in part from the first. In asserting that trademarks do no more than facilitate search and encourage quality, the Chicago School has long declined to acknowledge what is obvious: that firms produce trademarks as status goods, that consumers consume trademarks to signal status, and that courts routinely invest trademarks with legal protection in an effort to preserve this status-signaling function. The culture industries - and what industries aren't? - have long sold trademarks as commodities in their own right. Entire areas of trademark doctrine cannot be understood except as systems of rules designed to facilitate the commodification - indeed, the "industrial production" n6 - of social distinction.

This Article undertakes a semiotic analysis of trademark law in an effort to explain and reform what the economic analysis cannot. The Article [*625] proceeds in five parts. Part I introduces semiotic thought and sets forth, in simplified form, certain concepts that are indispensable to a semiotic account of trademark law and the trademark system. Part II analyzes the internal structure of the trademark. Traditionally, trademark commentators have conceived of the trademark as a three-legged stool, a relational system consisting of a "signifier" (the tangible form of the mark), a "signified" (the semantic content of the mark, its meaning), and a "referent" (the product to which the mark is affixed). Much of twentieth-century trademark doctrine was developed in light of this framework. In recent decades, however, the structure of the trademark has changed radically. Consistent with what Henri Lefebvre has called the "decline of referentials" n7 in modern culture, the trademark need no longer identify any particular commodity (other than itself) in order to receive protection. While the realities of trademark merchandising have forced a merger of signifier and referent, firms' efforts to assert exclusive rights over functional product features have forced a

merger of signified and referent. In many cases, the trademark referent is now little more than a legal fiction. The modern trademark is dyadic in structure.

Part III proposes a revised theory of trademark distinctiveness. The concept of distinctiveness is the hinge on which trademark law turns. Yet for all of its importance - or perhaps precisely because of its importance - distinctiveness has never been adequately theorized. Traditional notions of "inherent" and "acquired" distinctiveness tend to confuse more than they clarify. This part argues that trademark law should reconceptualize trademark distinctiveness as consisting of source distinctiveness and differential distinctiveness. Corresponding to the semiotic relation of signification, source distinctiveness describes the extent to which a trademark's signifier is distinctive of its signified. Corresponding to the semiotic relation of value, differential distinctiveness describes the extent to which a trademark's signifier is distinctive from other signifiers in the trademark system. This reconceptualization recommends, among other things, a new approach to trademark infringement analysis. To determine whether a trademark falls within the subject matter of anti-infringement protection, a court should consider whether or not it possesses source distinctiveness. To determine the scope of anti-infringement protection an eligible trademark should receive, a court should consider the extent of its differential distinctiveness.

Part IV proposes a doctrinal history of the relation between source distinctiveness and differential distinctiveness. Specifically, it tells the story of the fall of the former and the rise of the latter as the cynosure of the law. The [*626] result of this inversion has been the emergence in recent times of trademarks as "floating signifiers." As Rosemary Coombe has noted, the brand name is the "quintessential self-referential sign." n8

Part V analyzes the concept of trademark dilution. When Frank Schechter, the founder of dilution doctrine in America, first argued in the 1920s that "the preservation of the uniqueness of a trademark should constitute the only rational basis for its protection," n9 he failed to specify which form of uniqueness antidilution protection should protect: the uniqueness of the trademark signifier in itself as against all other signifiers in the trademark system, or merely the uniqueness of the relation between that signifier and the source it signifies. Since Schechter's time, trademark commentary has embraced the latter, "blurring" form of antidilution protection on the unstated assumption that it entails a limited grant of property rights in the intramark relation of source distinctiveness, while the former entails an unlimited grant of property rights in intermark relations of differential distinctiveness. Yet despite the best efforts of courts and commentators, the blurring form of antidilution protection has proven to be no less absolute than its alternative. This part explains the semiotic logic that drives this result. It also seeks to bring semiotic learning to bear on a number of ambiguities and unresolved questions in dilution doctrine relating to the subject matter and scope of antidilution protection, and argues, most notably, that trademark tarnishment is not a form of trademark dilution and that the requirement that a trademark be inherently distinctive to qualify for antidilution protection is incoherent....

V. Two Modes of Trademark Dilution

Dilution is as difficult a concept to understand in trademark law as value is in semiotic thought. This is not surprising. The law's recognition of the phenomenon of dilution is essentially the law's recognition of the semiotic relation of value. Antidilution protection entails the protection of a trademark signifier's set of relations of difference with all other signifiers in the trademark system.

Yet courts have clearly been uncomfortable with granting such a broad expanse of property rights and so they have sought repeatedly to reconfigure antidilution protection as the protection not of intermark relations of value, but of intramark relations of signification. Under the rubric of "blurring," they have sought to reduce antidilution protection to a form, albeit a topsy-turvy form, of anti-infringement protection. Two modes of antidilution protection have thus uneasily coexisted since the passage into law of the Federal Trademark Dilution Act (FTDA): n286 a "radical" mode that would grant exclusive rights over system-wide relations of value and a "compromise" mode that would only grant exclusive rights over sign-specific relations of signification. The problem is that the compromise mode invariably evolves into the radical mode. Antidilution protection is by its nature absolute and unlimitable. This part seeks to explain why.

A. Schechter's Original Theory of Trademark Dilution

Because trademark commentary has traditionally been at such a loss to explain the nature of dilution, courts and commentators have tended to return to Schechter's writing on the issue on the assumption that the original founder of the concept must have understood it and that we need only try to figure out what he was trying to say. This elevation of Schechter to the status of prophetic and all-knowing framer has not served us particularly well. As we saw in Part IV, Schechter had much to say about the importance of a mark's uniqueness. On the nature of dilution and its prevention, however, he was practically Delphic. "Rational Basis" is a ten-page article, most of which is given over to criticism of then current doctrine. It defines dilution as the "gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name by its use upon non-competing goods." n287 As he did in "Rational Basis," Schechter provided in testimony before Congress various examples of diluting uses, including "dupont shoes, buick [*685] aspirin, schlitz varnish, kodak pianos and bulova gowns." n288 As Schechter explained:

If "Kodak" may be used for bath tubs and cakes, "Mazda" for cameras and shoes, or "Ritz-Carlton" for coffee, these marks must inevitably be lost in the commonplace words of the language, despite the originality and ingenuity of their contrivance, and the vast expenditures in advertising them which the courts concede should be protected to the same extent as plant and machinery. n289

"Rational Basis" argues that "the preservation of the uniqueness of a trademark should constitute the only rational basis for its protection." n290 In defending this thesis, the article finesses the concern that antidilution protection will result in in gross rights and "an undesirable monopolization of language." n291 Schechter agrees that trademark producers should not be allowed to "farm out" their mark to others without also controlling the quality of the goods to which the mark is attached, but "this rule that a trademark must be appurtenant to a going concern should not in any way set limits to the extent of protection of such a mark when so appurtenant." n292 Moreover, since, in Schechter's view, only inherently distinctive marks should receive antidilution protection, there would be little risk that a firm's antidilution rights in a mark would limit the commercial speech of other firms: Aside from plaintiff's mark, "all the rest of infinity is open to defendant." n293

Schechter believed antidilution protection was necessary for two reasons. First, he believed, with some justification, that the anti-infringement law of his time did not adequately protect the senior user against junior uses of its mark on noncompeting goods. The law more or less subscribed to a simple maxim: "If there is no competition, there can be no unfair competition." n294 In other

words, if there is no diversion of a plaintiff's trade, there can be no trademark infringement. n295 Thus, the use of the mark *borden on ice* [*686] cream was held not to infringe on the use of the mark *borden on milk*. n296 The scope of trademark protection horizontally along the product axis in Schechter's time was, by modern standards, extraordinarily narrow. This provided an opening for an unscrupulous firm to sell its goods under a famous mark when its goods were unrelated to those traditionally sold under that famous mark, in the hope that the persuasive appeal of the famous mark would attract buyers even if they well knew that the goods did not come from the firm with which they normally associated the mark. Because there was no confusion as to source, the injunction against trademark infringement would not reach such uses. Schechter's solution was to grant to owners of qualifying marks an extraordinarily broad, essentially absolute scope of rights along the product axis, so that Kodak, for example, could enjoin the use of its mark on any other product, regardless of how far afield that product's characteristics lay from photographic film - in other words, regardless of actual consumer confusion as to source. In Schechter's view, the provision of such a broad scope of protection horizontally along the product axis was the only means of protecting the differential distinctiveness of a qualifying mark and preventing the mark's "disassociation from the particular product with which it has been used." n297

Second, and not generally recognized, Schechter believed that antidilution protection would bring greater predictability to the law. Though he had the critical instincts of a realist, he sought to rationalize trademark law by returning it to formalism. At least in his trademark jurisprudence, Schechter was emphatically not an empiricist. As any structural semiotician would, he preferred the predictability of *langue* to the vagaries of *parole*. He preferred system to event. Near the end of his authoritative history of trademark law, he digresses to criticize the consumer-confusion basis for trademark protection:

Any theory of trade-mark protection which . . . does not focus the protective function of the court upon the good-will of the owner of the trade-mark, inevitably renders such owner dependent for protection, not so much upon the normal agencies for the creation of good-will, such as the excellence of his product and the appeal of his advertising, as upon the judicial estimate of the state of the public mind. This psychological element is in any event at best an uncertain factor, and "the so-called ordinary purchaser changes his mental qualities with every judge." n298

[*687] Schechter believed that the bright line rules of antidilution doctrine, at least as he envisioned it, would relieve the courts of having to make an "estimate of the state of the public mind." n299 The subject matter of antidilution protection would be limited to arbitrary and fanciful marks, n300 categories whose boundaries were relatively easy to determine. As for the dilution inquiry itself, this would consist of a purely formal question: are the marks at issue closely similar? If so, then there is dilution. Because antidilution protection would enjoin even the slightest "whittling away," it did not matter how extensively defendant was using its closely similar mark. The vagaries of the consumer confusion test could thus be avoided.

There is a two-fold irony to Schechter's justifications for antidilution protection. The first is that, for the kind of marks Schechter hoped to protect, the scope of anti-infringement protection has by now expanded so broadly, particularly horizontally along the product axis, that antidilution protection is no longer necessary to protect their uniqueness or product identification. n301 Under current law, the junior use of marks such as *coke*, *kodak*, *microsoft*, and *nike* would likely be held to con-

fuse consumers as to source regardless of the good or service to which such marks might be affixed. Of this, Schechter might have approved. But the second irony is bitter in nature. Modern antidilution protection is characterized by precisely the kind of unpredictability and discretion that Schechter hoped to avoid in first setting forth the concept. This is the subject of the next subpart.

B. The Ambiguities of Antidilution Doctrine Then and Now

1. The Meaning of "Uniqueness"

As mentioned in Part IV, Schechter was of two minds about the nature of differential distinctiveness and, consequently, of dilution. In the end, he never specified what exactly he meant by "uniqueness" when he urged that "the preservation of the uniqueness of a trademark should constitute the only rational basis for its protection." Two interpretations have been offered: first, that he meant to refer to the uniqueness of the link between the mark and the product to which it is affixed, and second, that he meant to refer to the [*688] uniqueness of the mark in itself, irrespective of to what product it is affixed. The first interpretation suggests that Schechter intended antidilution protection to protect vertical relations of signification, that is, the mark as an identifier uniquely of a source or product. The second suggests that he intended it to protect horizontal relations of value, that is, the mark as a unique identifier, regardless of its source or product. The first would appear to be a kinder, gentler mode of antidilution protection than the second. As does anti-infringement protection, the first would appear only to enhance the trademark owner's exclusive rights over relations internal to the trademark, relations between the trademark's signifier and signified or referent, rather than over relations external to the trademark between the trademark's signifier and all other signifiers in the trademark system.

Remarkably, this ambiguity in "Rational Basis" is recapitulated, apparently inadvertently, n302 in the language of the FTDA. Section 45 of the Lanham Act defines "dilution" in the following terms:

The term "dilution" means the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of -
(1) competition between the owner of the famous mark and other parties, or
(2) likelihood of confusion, mistake or deception. n303

The section 45 definition conceives of dilution as involving the "blurring" of the vertical relation of signification between the trademark's signifier and its signified or referent. Section 43(c) of the Act, however, speaks of commercial activities which "cause[] dilution of the distinctive quality of the mark." This usage has been read to suggest that dilution involves some diminution in the mark's "distinctiveness per se," n304 that is, in its differential distinctiveness.

Federal courts have struggled to determine which of these two forms of dilution the FTDA was designed to prevent. Most notably, in the 1999 case of Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Division of Travel Development, n305 which remains the most thorough and thoughtful analysis of dilution by a federal court, the Fourth Circuit distinguished between two different modes of harm that federal antidilution protection [*689] could, theoretically, seek to address. The first involves a loss of what the court terms a mark's "'distinctiveness' as such, in the narrow sense of its singularity as a word symbol." n306 In the court's view, this conception of harm stems from Schechter's "radical dilution proposal, whose practical effect if fully adopted would be

to create as the whole of trademark protection law property rights in gross in suitably "unique' marks." n307 The court notes with relief that this conception of dilution "never has been legislatively adopted by any [state] jurisdiction in anything approaching that extreme form," n308 and further argues, that with respect to the FTDA, "we simply cannot believe that Congress could have intended, without making its intention to do so perfectly clear, to create property rights in gross, unlimited in time . . . even in "famous' trademarks." n309

The Ringling Bros. court instead determines that "the end harm at which [the FTDA] is aimed is [the loss of] a mark's selling power, not its "distinctiveness' as such." n310 The court offers no definition of "selling power," other than to refer to a mark's "selling power as an advertising agent for its goods or services." n311 The court thus takes advantage of the ambiguity of a term which Schechter himself left undefined and which is mentioned nowhere in the FTDA to equate dilution with the blurring of the link, of the vertical relation of signification, between the mark and the product to which it is affixed. n312 The result is that antidilution protection is reduced to little more than the protection of a mark's "typicality," that is, "its ability to conjure up a particular product category." n313

It is less clear that other courts appreciate the difference between the two modes of dilution identified in Ringling Bros. In the 1999 Second Circuit case of Nabisco, Inc. v PF Brands, Inc., n314 for example, the court states that the "antidilution statutes rest on a judgment that the "stimulant effect' of a distinctive and well-known mark is a "powerful selling tool' that deserves [*690] legal protection." n315 This seems to refer to the distinctiveness as such of the mark, as does the court's reference to the possibility that an unauthorized use of a mark may reduce "the public's perception that the mark signifies something unique, singular, or particular." n316 Yet the Nabisco court then suggests that antidilution protection seeks to protect the "selling power" that a mark "has engendered for a product in the mind of the consuming public." n317 Similarly, in the 2000 case Federal Express Corp. v. Federal Espresso, Inc., n318 the Second Circuit refers to "blurring" as involving a mark's loss of "its ability to serve as a unique identifier," n319 which suggests a loss of differential distinctiveness, but then the court adds, "of the plaintiff's product," n320 which suggests instead a loss of distinctiveness of source or product. Other circuits have similarly conflated the two modes of harm. n321

2. Proving Dilution

In the 2003 case *Moseley v. V Secret Catalogue, Inc.*, n322 the Supreme Court appears to have resolved the question of whether the FTDA seeks to protect the trademark's distinctiveness as such (its intermark relations of value) or rather the trademark's distinctiveness of a source or product (its intramark relations of signification). Though the Court declined explicitly to define dilution, it stated, arguably in dicta, that the "statutory requirement for dilution under the FTDA" is a showing that the defendant's mark will "reduce the capacity of the famous mark to identify the goods of its owner." n323 This would appear to be a decisive repudiation of what the Third Circuit called Schechter's "radical dilution proposal" and its entailment of "in gross property rights."

The Moseley Court's endorsement of the kinder, gentler product-identification mode of dilution did not constitute its primary holding, however. The Court resolved a far more urgent problem in the law when it [*691] held that the text of section 43(c)(1) "unambiguously requires a showing of actual dilution, rather than a likelihood of dilution." n324 This holding has been interpreted as a major setback for trademark producers. After all, proving actual blurring is tantamount to proving a negative. Conceived of as an impairment of the immediacy of the relation of signification between

signifier and signified or referent, dilution is essentially an inverted theory of trademark infringement. Where anti-infringement protection is a shield that prevents consumer confusion as to source, antiblurring protection is a sword that promotes consumer identification as to source (or product). n325 The blurring theory of dilution seeks to give the consumer better than 20/20 vision. Proving that a defendant's use has degraded the typicality of a mark is especially difficult when the mark is famous, as it must be to receive protection under the FTDA. The enormous difficulties of proving actual blurring are what compelled several circuits to conclude in the years leading up to *Moseley* that Congress intended to impose a "likelihood of dilution" requirement on plaintiffs. As the Seventh Circuit stated in the 2000 case *Eli Lilly & Co. v. Natural Answers, Inc.*, n326 "it is hard to believe that Congress would create a right of action but at the same time render proof of plaintiff's case all but impossible." n327

But while *Moseley* did indeed represent one step back for trademark producers, it also represented many more steps forward. In *Ringling Bros.*, the Fourth Circuit held that the plaintiff must show actual dilution, and so, in this sense, the Fourth Circuit was on the winning side of *Moseley*. But the Fourth Circuit also held in *Ringling Bros.* that actual dilution may not be presumed simply from the close similarity or identity of the plaintiff's and the defendant's marks. n328 It did so for a very good reason. If the identity of the plaintiff's and the defendant's marks was sufficient on its own to show actual dilution, then, at least in such cases, the plaintiff would by force of this presumption enjoy exactly the same regime of in gross rights that [*692] Schechter's "radical" "'distinctiveness' as such" conception of dilution would provide. n329

In *Moseley*, the Supreme Court explicitly repudiated the *Ringling Bros.* holding on this issue. n330 The Court instead held open the possibility that "direct evidence of dilution such as consumer surveys will not be necessary if actual dilution can be reliably proved through circumstantial evidence - the obvious case is one where the junior and senior marks are identical." n331 Thus what *Moseley* took away in holding that actual dilution must be shown, it gave back in allowing, if not encouraging, the possibility that when the plaintiff's and the defendant's marks are identical, actual dilution may be presumed. Reports of the death of Schechter's "radical" antidilution proposal are apparently exaggerated.

3. The Subject Matter of Antidilution Protection

The Supreme Court left at least two issues unresolved in *Moseley*. The first is the question of whether marks must be inherently distinctive of source, rather than merely descriptive with secondary meaning, to qualify for federal antidilution protection. n332 The Court acknowledged the existence of this question in two cryptic footnotes to the opinion, but answered it in neither. n333 The Second Circuit has held in a series of cases that, under the language of section 43(c)(1), only inherently distinctive marks so qualify. n334 The Second Circuit's reasoning boils down to essentially one argument: that the term "distinctive" in the FTDA means "inherently distinctive." The circuit's reading of the statutory language, though ingenious, is wholly unpersuasive. For at least a century-and-a-half of American trademark jurisprudence, "distinctiveness" has been used as a generic term to refer collectively to two species of distinctiveness: inherent distinctiveness and acquired [*693] distinctiveness. The FTDA itself posits as one factor in determining whether a mark is "famous" the "degree of inherent or acquired distinctiveness of the mark." The legislative history also supports the proposition that Congress meant to use the term generically. n335

Even so, the Second Circuit's heart is in the right place. Underlying its strained textual interpretation is a policy argument, the force of which is undeniable. Like the Fourth Circuit in *Ringling Bros.*, the Second Circuit is concerned about the grant of in gross property rights, particularly in terms that are commonplace source-identifiers. In the 2001 case of *TCPIP Holding Co. v. Haar Communications, Inc.*, n336 Judge Pierre Leval sets forth what might be termed the "American Airlines argument":

Descriptive marks, often asserting geographical identity or nation-wide prominence, or claiming merit or strength, abound in the U.S. marketplace. A few well-known examples are American, National, Continental, Metropolitan, Pacific, Southern, Texas, Chicago, Federated, United, Consolidated, Allied, First National, Acme, Merit, and so forth. Some of the holders of these inherently weak marks are huge companies; as a function of their commercial dominance, their marks have become famous. It seems unlikely that Congress could have intended that the holders of such non-distinctive marks would be entitled to claim exclusivity for them throughout all areas of commerce. Innumerable good-faith junior users of the same weak marks, who have developed goodwill in these marks, would be denied further use of their marks to their detriment and that of their customers. And nation-wide, throughout all areas of commerce, the use of ordinary, descriptive marks like American would be restricted to one famous user (and others whose use pre-dated the plaintiff user's achievement of fame). n337

Judge Leval is certainly correct that if *American Airlines* falls within the subject matter of federal antidilution protection, then its holder could conceivably enjoin any other company from using the signifier *American* in the American marketplace if such company began its use after *American Airlines* became a "famous" mark. The same would hold true of the other examples Judge Leval gives.

The Second Circuit seeks essentially to impose a functionality limitation on the subject matter of antidilution protection. The argument is that certain marks, specifically, those which are descriptive, are sufficiently functional that their owners should not be given the in gross, marketwide property [*694] rights entailed by antidilution protection. While the benefits of limiting consumer confusion are judged to outweigh the costs in functionality of anti-infringement protection for such marks, antidilution protection is a whole other order of magnitude, extending across the product axis into every conceivable noncompeting good or service. Where anti-infringement rights in such marks are limited by the requirement that consumer confusion must be shown, antidilution rights are absolute.

The problem is that while some imposition of a functionality limitation makes sense, drawing the line at inherently distinctive marks will not satisfy the goals of the limitation. On the one hand, it would deny antidilution protection to marks which, in Congress's judgment, should receive protection. In *TCPIP*, Judge Leval cites approvingly the examples Congress gives in the FTDA's legislative history of marks that should receive protection: "The three marks cited as possible beneficiaries of the [FTDA] were Dupont, Buick, and Kodak - all highly distinctive, arbitrary or fanciful marks." n338 Of course, Dupont and Buick are not, in fact, inherently distinctive. Both were used as surnames and are thus per se descriptive under basic trademark doctrine. On the other hand, the granting of absolute, antidilution rights in suggestive and arbitrary marks, both of which fall within the category of inherent distinctiveness, could conceivably result in the same functionality loss as

the granting of such rights in descriptive marks. If I affix the signifier atlas to the computers I manufacture, my trademark is arbitrary and thus deserving of antidilution protection under the Second Circuit's standard. But that protection would allow me to enjoin the use of the term by any company in the marketplace, including companies that might use the term descriptively. The same would hold true for most words in the dictionary, even those whose use would be deemed "highly suggestive." Ultimately, to meet the goals of the Second Circuit's functionality limitation, only fanciful marks should receive antidilution protection, for they are, by definition, invented signifiers and exclusive rights to their use will not deplete the language's stock of potential source-identifiers.

How then can we limit the subject matter of federal antidilution protection to prevent the outright ownership of commonplace words? First, we should abandon the requirement that marks be inherently distinctive of source. Indeed, we should abandon any restriction based on distinctiveness of, that is, based on intramark relations of signification between the signifier and signified. As the Second Circuit rightly points out, this is far too generous a framework for determining the subject matter of antidilution protection. By showing that its mark is distinctive of source, the plaintiff secures rights [*695] that involve distinctiveness from other marks, rights which are absolute. Instead, we should fit the semiotic relation underlying the subject matter of antidilution protection to the semiotic relation underlying the scope of that protection. In both cases, the value-relations of the mark, rather than its signification-relations, should be considered. The plaintiff should be required to show that its mark is absolutely distinctive from other marks in order to receive exclusive rights in such absolute intermark distinctiveness. In other words, we should impose the requirement logically called for by the Second Circuit's reasoning: Only fanciful marks - that are also "famous" - should receive federal antidilution protection.

4. Is Tarnishment a Form of Dilution?

A second issue that the Moseley Court left undecided is the question of whether "tarnishment" is a form of trademark dilution prohibited under the FTDA. n339 It is well understood that a trademark's signifier does more than denote the trademark's source or product. It also tends to connote various characteristics of the source or product, such as quality, prestige, exclusiveness, or "wholesomeness." n340 These characteristics form part of the trademark's signified. The question, then, is how can the law protect these connotations? How can the law prevent a defendant from using or invoking plaintiff's mark in such a way that consumers, otherwise unconfused as to source, may begin to associate the mark with shoddy quality or low prestige, perhaps even with scandalous conduct? In the 2002 case *New York Stock Exchange v. New York, New York Hotel* n341 the Second Circuit faced precisely such a situation. The New York Stock Exchange (NYSE) sued the operator of a Las Vegas casino, claiming that, among other things, the casino's use of a facade evocative of the NYSE's famous facade and its use of the phrase "New York, New York \$ lot Exchange" constituted trademark infringement and trademark dilution. On appeal from summary judgment, n342 the Second Circuit held that the NYSE could not show trademark infringement because the casino's uses were so clearly parodic in nature. Consumers were [*696] simply not confused as to source. n343 Nor, for similar reasons, could the NYSE show dilution by blurring. Because "the humor or parody in the Casino's use of the modified NYSE marks depends upon the fact that the Casino is not claiming to be associated with NYSE," there is "no diminution of the capacity of NYSE's marks to serve as a unique identifier of its products and services." n344 The Second Circuit held, however, that the NYSE could show "tarnishment" of its business reputation. The court explained that "tarnishment occurs where a trademark is "linked to products of shoddy quality, or is portrayed in an unwhole-

some or unsavory context,' with the result that "the public will associate the lack of quality or lack of prestige in the defendant's goods with the plaintiff's unrelated goods." n345 To the extent that the casino's evocation of the NYSE might associate securities trading on the NYSE with mere gambling and with stacked odds, the Second Circuit held that the casino's uses could tarnish the NYSE brand's apparent connotations of rational action and fair dealing. n346

The tarnishment claim at issue in New York Stock Exchange proceeded not from the FTDA or any other section of the Lanham Act, but from New York law, specifically from section 360-1 of the New York General Business Law. This section, typical of state law, provides:

Likelihood of injury to business reputation or of dilution of the distinctive quality of a mark or trade name shall be a ground for injunctive relief in cases of infringement of a mark . . . or in cases of unfair competition, notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services. n347

Importantly, the tarnishment claim that the Second Circuit considered was not a dilution claim, but rather a claim of "injury to business reputation." Under most state laws and in the view of many trademark commentators, these two forms of injury are, in the words of the Restatement Third of Unfair Competition, "conceptually distinct." n348 While "dilution of the distinctive quality of a mark" may in some sense constitute "injury to business reputation," "injury to business reputation" does not necessarily entail, as it did not in New York Stock Exchange, "dilution of the distinctive quality of the mark."

Unlike most state law, the Lanham Act makes no explicit mention of injury to business reputation. When the United States Trademark [*697] Association first proposed a federal antidilution provision in 1987, it proposed adding a new subsection to section 43(a) to address trademark tarnishment. n349 When the FTDA was enacted in 1995, however, no such subsection was created. Though the drafters of the FTDA stated in the House Report accompanying the FTDA bill that the language of the FTDA was intended to prohibit tarnishment, n350 the plain meaning of the actual statutory language passed into law does not. n351

Remarkably, this has not prevented a wide array of federal courts from reading into the FTDA a federal cause of action against tarnishment. They have done so on the assumption, made in light of the FTDA's legislative history, that the FTDA's definition of dilution "encompasses traditional state law doctrines of blurring and tarnishment." n352 Of course, the FTDA's definition of dilution does no such thing, nor does our traditional theory of dilution, be it dilution of source distinctiveness or of differential distinctiveness. There is ultimately no ambiguity here. The term "dilution" need not be itself a "floating signifier." It has a specific meaning: It involves the "dilution," the attenuation, the lessening, of the immediacy of relations of reference. In the case of the dilution of source distinctiveness, it involves a lessening of the immediacy of the relation of reference between the trademark's signifier and its signified or referent. In the case of the dilution of differential distinctiveness, it involves a lessening of the immediacy of relations of difference (which are a form of negative reference) between the trademark's signifier, on the one hand, and all other signifiers in the trademark system, on the other. The prohibition against dilution is a prohibition against interference in relations of meaning, not in what is ultimately meant. The concept of dilution goes to form, not substance.

[*698] The federal courts' reading of antitarnishment protection into the FTDA is probably the clearest sign of just how undisciplined our analysis and application of antidilution protection has been. Consider the subject matter limitations of the FTDA. By its terms, section 43(c) protects only those trademarks which qualify as "famous." This limitation makes sense when applied in connection with antiblurring protection. It is at least arguable that only truly renowned marks require, in order to protect their renown, the wide grant of property rights called for by antiblurring protection. But there is no good reason, and certainly none stated in the FTDA's legislative history, to limit antitarnishment protection to the category of famous marks. n353 It is likely that section 43 will be amended at some point explicitly to include a cause of action for damage to business reputation. Until then, federal courts that find a prohibition against tarnishment in the FTDA's prohibition against dilution, on the misguided assumption that the former is a form of the latter, will do so in error.

5. Dilution and the Problem of Mediation

The final ambiguity in dilution doctrine worth addressing here goes to the problem of mediation. As explained above, the problem of mediation involves the problem of whether the signifier points to the signified or to the referent within the triadic sign. This appears in the context of antidilution protection as the problem of whether "blurring" involves a blurring of the link between trademark and product or between trademark and source. Conventional blurring theory would appear to be fairly clear on this issue. The formulations and examples of blurring mentioned so far in this part all involve a blurring of product identification, a lessening of typicality. Thus, in the 1998 case *Luigino's, Inc. v. Stouffer Corp.*, n354 the Eighth Circuit distinguished between infringement and dilution: "Infringement depends on a likelihood of consumer confusion over the source of a product, while dilution by blurring "concerns the lessening of the capacity of a famous mark to identify and distinguish goods or services." n355

[*699] Yet a closer look at the case law suggests that things are not nearly so simple. In the 1996 case of *Hormel Foods Corp. v. Jim Henson Prod., Inc.*, n356 the Second Circuit describes dilution as "grounded on the idea that a trademark can lose its "ability . . . to clearly and unmistakably distinguish one source' through unauthorized use." n357 Similarly, in the 1998 case *Jews for Jesus v. Brodsky*, n358 the Northern District of New Jersey stated that blurring occurs when "a prospective customer sees the plaintiff's mark used by other persons to identify different sources of different goods and services, thus weakening the distinctive significance of the mark to identify and distinguish the source." n359 These and other similar usages n360 suggest that blurring involves a blurring of source identification.

Still other usages suggest that blurring involves a blurring of both product and source identification. For example, in *Paco Sport, Ltd. v. Paco Rabanne Parfums*, n361 the Southern District of New York stated that "blurring occurs when the senior user's trademark loses some of its power to serve as a unique identifier of the senior user's goods or services, because the public begins to associate the designation with another source." n362 In *Brown v. It's Entertainment, Inc.*, n363 the Eastern District of New York similarly stated that "blurring occurs when a claimant's mark is used on a number of different goods so that they are unable to tell the true source so that the mark loses its "ability to stand as a unique identifier of the plaintiff's product." n364

The problem of mediation is important to antidilution doctrine because of the related problem of "self-blurring." Many companies, particularly those which produce famous marks, have long since

themselves blurred the link between their trademark's signifier and the product to which that signifier was originally attached. n365 If antidilution protection protects the integrity of the link between trademark and product, then how can antidilution protection conceivably be used to protect the link between, say, nike and the numerous diverse products, ranging from track shoes to radios, to which the nike signifier is now affixed? Of what product is nike [*700] or virgin or sony now typical, the typicality of which must be protected? I argued above that "source" is now little more than a legal fiction in trademark law. The trademark identifies "source" only to the extent that it identifies some anonymous entity that produced or was at least in some way affiliated with the production of previous products bearing that trademark. In the context of antidilution product identification protection, "product" has similarly become a legal fiction. In essence, it stands for a line of products, perhaps related, perhaps unrelated, whose one commonality is that each bears the signifier the other bears.

Blurring would appear, then, to involve the blurring of the link between trademark and source, even if that source is anonymous. This formulation resolves the problem of self-blurring. Marketing literature suggests that brand extensions do not blur the source identification link but actually enhance it. n366 Nevertheless, this formulation raises a larger conceptual problem. If the trademark is no longer pointing to a product, and if the source it points to is anonymous, that is, based only on the identity of the trademark signifier across uses on an array of referents, then what semiotic relation is really being blurred? The answer is that it is the identity of the trademark signifier itself that is being diluted - "vitiation of identity" Schechter would have said n367 - irrespective of to what source or product the signifier refers. What is at issue, in other words, is not relations of reference, but relations of difference. What is being protected is not the trademark's distinctiveness of source or product, but its distinctiveness from all other trademarks, including, most importantly, identical marks. Because "product" and "source" are both little more than legal fictions in current trademark doctrine, the notion of blurring has become very abstract indeed. I mentioned in Part II the Peircean distinction between token and type: Each appearance of a word or other sign is a token that invokes that word or sign's one type. Ultimately, in protecting the identity of the trademark signifier itself, antiblurring protection preserves the uniqueness of the relation not between the trademark's signifier and its signified or referent, but between the trademark signifier's one type and the many tokens of that type in the marketplace. A defendant "blurs" this relation when it establishes a new similar or identical type to which plaintiff's or defendant's tokens might also refer. Antidilution protection thus necessarily provides exclusive, essentially in gross rights to types. [*701]

C. The Absolutism of Antidilution Rights

Hostile courts have long engaged in a tradition of "drawing the teeth" n368 of antidilution statutes, most brazenly through restrictions on the subject matter of antidilution protection, like those imposed by the Second Circuit in TCPIP, or through the imposition of nearly insurmountable evidentiary requirements, like those imposed by the Fourth Circuit in Ringling Bros. The most effective, because the most elusive, threat to Schechter's original "radical" proposal, however, has been the development of the blurring theory of dilution, a compromise theory that seeks to protect intrasign relations of reference just as anti-infringement protection does. Schechter's own indecisiveness about the nature of differential distinctiveness openly invited the development of this theory and the courts have made the best of it.

Yet Schechter's "radical" proposal has survived, and if Moseley is any indication, it has only gotten stronger. There is a simple semiotic explanation for the radical proposal's perdurability. The Ringling Bros. court vaguely hinted at this explanation when it noted that Schechter's proposal is only coherent in its radical form:

The cases demonstrate that once the dilution concept is sought to be given any form other than that of Schechter's simple original proposal it begins to lose its coherence as a legally enforceable norm. Specifically, it becomes difficult to identify the legal interest sought to be protected from "dilution," hence the legal harm sought to be prevented. n369

By its very nature, antidilution protection is either absolute or it is meaningless. As if by its own semiotic logic, the concept of dilution will resist any attempts to limit its reach. This is because "dilution," either in its radical or compromise forms, necessarily involves global intermark relations of value in addition to local intramark relations of signification. Consider Saussure's discussion of semiotic value in the Course:

The idea of value . . . shows that to consider a term as simply the union of a certain sound with a certain concept is grossly misleading. To define it in this way would isolate the term from its system; it would mean assuming that one can start from the terms and construct the system by adding them together when, on the contrary, it is from the interdependent whole that one must start and through analysis obtain its elements. n370

[*702] The blurring theory of dilution has sought to consider the trademark as simply the union of a certain trademark with a certain source or product. In doing so, it has sought to isolate the trademark from the trademark system. This has proven to be impossible, however, because relations of signification, which blurring seeks to protect, require relations of value. Distinctiveness of requires distinctiveness from, and while distinctiveness of is by its nature limited to relations within the mark, distinctiveness from is not. To protect against any mitigation, any "whittling away," of distinctiveness of, the law must prevent any mitigation of distinctiveness from, and this entails a commitment to global, absolute, systemic protection.

Stated differently, the blurring of a trademark signifier's distinctiveness of its signified or referent is powerful evidence of dilution, but it is not dilution itself. Blurring is merely one effect of the lessening of the trademark signifier's distinctiveness from other signifiers. To prevent this blurring, this effect, the law must address its cause. The law does so by preserving the differential distinctiveness of the trademark's signifier, for this differential distinctiveness makes possible the signifier's distinctiveness of its signified or referent.

Try as we might to limit it, Schechter's original concept, even in its product or source identification form, resists our efforts. "Radical" outcomes spring even from compromise premises. This, I think, accounts for why the concept has for so long proven to be "bewilderingly intangible." n371 Strong judges simply cannot accept that exclusive rights should be given in types, and so they have repeatedly, and no doubt in some cases consciously, misinterpreted the concept in an effort to misinterpret it out of existence.

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