

Trademarks and Clarity in Consumer Expression

[WORKING DRAFT July 28, 2025]

It is widely understood that producers use trademarks to communicate information about the source of goods to consumers. Trademarks, however, do more than this. Because they bear brand messages, they also communicate information about consumers' identities to other consumers. Michigan fans proudly wear hats emblazoned with the University of Michigan mark; rebels sport Harley Davidson t-shirts; ocean-activity enthusiasts attach Salt Life bumper stickers to their cars.

While the role that trademarks play in consumer-to-consumer communication is an open secret, the impact that trademark law's exclusive rights have on consumers' ability to use trademarks to express themselves has not been explored. Where slimming down trademark rights is widely understood to privilege speech interests in fair use cases when consumers modify or parody trademarks, we demonstrate that expansive trademark rights can improve the clarity of consumer speech in the far more common scenario in which consumers display trademarks, largely unaltered, to construct and announce their identities.

One key premise in our argument is that what sporting a trademark means is, in part, that one is like the other people who sport the trademark. That is, the intensity of affiliation with a brand message that a consumer signals by displaying a trademark is determined by the intensity with which other consumers who also display the trademark affiliate themselves with the brand message. If there are no exclusive rights, everyone—from devoted brand-message adherents to individuals just north of indifferent to the brand message—displays the trademark, and the trademark sends a fuzzy intensity signal. If there are exclusive rights, trademark owners can raise prices, drive the least enthusiastic consumers out of the market, and allow the more passionate consumers to broadcast the full extent of their affiliation with greater clarity. In sum, we argue that trademark law can harness trademark owners' profit-minded self-interest to boost the clarity of consumer speech in a way that consumers are unable to achieve on their own.

Our insight provides a policy justification for highly controversial features of existing doctrine. In cases involving merchandizing, post-sale confusion, and counterfeiting, courts today grant trademark protection even though there is no likelihood of consumer confusion. The scholarly consensus is that these cases are misguided because they allow trademark owners to profit at consumers' expense without providing consumers with any benefit in return. We develop a simple economic model to show that limitations on access, while pricing some consumers out of the market, can nonetheless improve the clarity of trademark-enabled speech for other consumers. Under the right circumstances, the benefits of greater clarity outweigh the costs of reduced access, and trademark protection in the absence of confusion improves welfare.

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*Identity is the Rome to which all discussions of modern Western consumption lead.*¹

*[W]hat is needed is an effort to understand what the buying and selling of signs truly implies*²

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INTRODUCTION

Under the conventional account, society protects a trademark to enable a clear channel of communication from the producer to the consumer as to the source of a good.³ It is only, say, because Nike has exclusive rights to prevent others from using a swoosh symbol in contexts that are likely to cause consumer confusion that the swoosh can reliably signal to consumers that Nike—and not some other company—produced or sponsored any shoes bearing the symbol.

¹ YIANNIS GABRIEL & TIM LANG, *THE UNMANAGEABLE CONSUMER* (3rd ed. 2015).

² Giovanni Ramello & Francesco Silva, *Appropriating Signs and Meaning: The Elusive Economics of Trademark*, 15 INDUS. & CORP. CHG. 937 (2006).

³ Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547 (2006); Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413 (2009); Glynn S. Jr. Lunney, *Trademark Monopolies*, 48 EMORY L.J. 367 (1999); Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67 (2012).

While such producer communication unquestionably lies at the heart of trademark policy and discourse, it is well-known that many modern consumers are *expressive consumers* who also value trademarks as tools for talking about themselves. Many contemporary trademarks carry *brand messages* that, when displayed, “have the ability to embody, inform, and communicate desirable consumer identities” to other consumers and the world at large.⁴ Consumers wear t-shirts displaying a Salt Life logo to signal their affinity with ocean-related activities.⁵ Hats emblazoned with the trademarked names of universities declare a consumers’ allegiance to the universities, whether as sports teams or institutions of higher education.⁶ “Swiftie” merchandise announces that the wearer is a Taylor Swift fan.⁷ In these examples, consumers display trademarks to say something to other consumers about their hobbies, their personality or their passions.⁸

We explore the relationship between the scope of trademark protection and the usefulness of marks for consumer self-expression. More specifically, we argue that construing trademark protection broadly and enforcing exclusive rights even when there is no likelihood of consumer confusion at the point of sale can sometimes allow consumers to speak more clearly.⁹

Black-letter doctrine requires proof that trademark infringement leads to a likelihood of “core” consumer confusion: the alleged infringer’s actions must garble producer-to-consumer communication and give consumers the inaccurate impression that the trademark owner produces or sponsors their goods.¹⁰ However, in cases involving

⁴ Nicola Stokburger-Sauer, S. Ratneshwar & Sankar Sen, *Drivers of consumer-brand identification*, 29 INT’L J. RSCH. MKTG. 406, 406 (2012). Brand messages are distinct from the messages about product source and quality that trademarks convey in producer-to-consumer communication. *See infra* Section II.A (explaining the consumer-identity theory of brands).

⁵ The Jacksonville beach start-up and national retailer, Salt Life, owns several marks associated with its tradename. *See, e.g.*, SALT LIFE, Registration No. 3,808,444 (word mark, restaurant and bar services); SALT LIFE, Registration No. 5,091,373 (word mark, clothing and apparel); SALT LIFE, Registration No. 4,301,899 (word mark, decals).

⁶ Pa. State Univ. v. Vintage Brand, LLC, 614 F. Supp. 3d 101 (M.D. Pa. 2022) (addressing an allegation that Penn State’s trademarks were infringed).

⁷ SWIFTIE, Registration No. 5,668,097.

⁸ When discussing “expressive uses” of trademarks, most scholars focus on a smaller and more active group of individuals who modify trademarks to speak about a brand or trademark owner, including those who craft clever trademark parodies for good-natured humor or trenchant social commentary. *See infra* Section II.C.1 (discussing consumers’ use of trademarks in parodies and other forms of commentary). Our interest in expressive consumers shifts the focus to a distinct and larger group that uses trademarks, and their brand messages, largely as they find them to broadcast information about their personalities.

⁹ Our analysis inverts the conclusion about the relationship between expression and trademark strength that other scholars have reached when examining “expressive uses” of trademarks. *See supra* note 8. When individuals express themselves through trademark parodies, the expression may be promoted by expanding a set of trademark defenses. *See infra* Section II.C.1 (discussing consumers’ use of trademarks in parodies and other forms of commentary). When consumers express themselves by displaying trademarks and affiliating themselves with brand messages, we argue that consumer expression may be enhanced by broadening *prima facie* infringement.

¹⁰ *See infra* notes 36–40 and accompanying text (defining core confusion).

marks that consumers are likely to use to affiliate themselves with brand messages, courts today regularly stretch trademark protection to find infringement even when no such confusion exists. Cases involving merchandizing, post-sale confusion, and counterfeiting all fit this pattern.¹¹ Trademark scholars roundly criticize this expansion.¹² Without core consumer confusion, the alleged infringer’s conduct does not undermine the reliability of a trademark as signal of source, so granting the trademark owner exclusive rights does not generate any benefits under the classic, producer-communication account of trademark law. Furthermore, this stretch causes harm as it transforms trademark owners into monopolists who can raise prices for, and reduce consumer access to, trademarks as expressive goods. Trademark scholars often explain the courts’ penchant for finding infringement in the absence of core consumer confusion by suggesting that the courts have fallen under the sway of specious “if value, then right” reasoning and privileged producer interests over consumer interests.¹³

We think there is more to this story in a world where consumers use marks to speak about themselves. We start by noting trademark-facilitated consumer speech is not an atomistic affair. The utility that you derive from publicly displaying a trademark for identity reasons is not independent of the utility that I derive from displaying that same trademark.¹⁴ The meaning that any given consumer conveys by wearing a trademark is contingent on the traits of other consumers who also sport the mark. A brand’s adherents form a *reference group*, and the identities of the consumers in the reference group rub off onto the meaning of the trademark.¹⁵ When this occurs, the higher prices that follow from enforcing trademarks even when there is no likelihood of core consumer confusion yield not only harmful access costs but an unexpected benefit for consumers as well. By shrinking the reference group to those most passionate about what the brand message conveys, higher prices generate a *clarity boost* in the identity message that those who brandish the mark are able to send. Granting rights to exclude others from selling expressive goods to trademark owners provides consumers with the option of saying that they are truly devoted to the brand message—an option that they lack when trademark owners do not have exclusive rights. A *clarity/access* tradeoff thus underpins the welfare analysis of extending trademark rights beyond situations in which there is a likelihood of core consumer confusion. The extension is good policy when the benefits of the clarity boost are larger than the costs of reduced access.

¹¹ See *infra* notes 88–112 and accompanying text (discussing these lines of cases).

¹² See *infra* notes 113–114 and accompanying text (reviewing this argument).

¹³ See *infra* notes 115 and accompanying text (presenting this explanation).

¹⁴ Trademark scholarship on Veblen goods and Barton Beebe’s theory of trademark distinctiveness are two exceptions to this general assumption of atomistic speech. See *infra* Section II.C.2 (distinguishing our analysis from these two veins of trademark scholarship).

¹⁵ See *infra* notes 119–122 and accompanying text (defining reference groups). Acknowledging that reference groups influence the meaning of trademarks moves beyond a dyadic, marketer-consumer model of trademark meaning in which producers are in full control and each consumer receive the marketer’s meaning in isolation. It recognizes that consumers “leave their mark, their fingerprints, on the brand,” Thomas C. O’Guinn & Muñoz, Jr. Albert, *Collective Brand Relationships*, in *HANDBOOK OF BRAND RELATIONSHIPS*, 173, 189 (Joseph W. Priester, Deborah J. Macinnis, & C. Whan Park eds., 2009), albeit in a rather passive manner.

To see this clarity boost in action, picture a crowded beach. A devoted beachgoer wants everyone on the beach, including strangers, to know not only that they dabble in sunbathing but that they have a deep passion for salt-water sports. To do so, they elect to wear a t-shirt emblazoned with the Salt Life logo, whose brand message is something like “I like salt-water sports.”¹⁶

In the absence of exclusive rights, the Salt Life mark does a mediocre job for the devoted salt-water sports enthusiast. Discount stores sell such t-shirts on the cheap, and, at the low price, people with any degree of enthusiasm for salt-water sports—from hard-core surfing enthusiasts to people who enjoy sitting under a sun umbrella and getting their toes wet in the waves—purchase and wear a Salt Life t-shirt. The mark becomes ubiquitous on the beach. To the extent that the intensity with which the Salt Life trademark conveys its brand message is determined by the personality traits of the reference group members who sport it, consumers cannot use the mark to clearly convey the depth of their passion. Mark-bearers who are just north of “meh” in their attachment to salt-water sports impose a negative congestion externality on the devotees.

Now add in trademark protection. The trademark owner will increase the price and thereby the scarcity of t-shirts bearing the Salt Life mark. The causal beachgoer will decide to purchase other t-shirts, rather than pay for one bearing the Salt Life mark.¹⁷ Only true salt-water-sports lovers committed to the lifestyle exalted by the brand remain as bearers of the mark, i.e., as members of the reference group. In sum, when producers possess exclusive rights, our devoted enthusiast can use the mark to more clearly communicate information about the full intensity of one facet of their personality. This is information that the trademark cannot communicate in the absence of trademark exclusivities. Moreover, granting expansive rights trademark law harnesses the trademark owner’s profit motive and puts it to use. The trademark owners’ incentives to raise prices and restrict output provide a benefit for consumers that they cannot obtain on their own. After all, the enthusiastic salt-water-sports consumer can’t readily pay the “meh” consumer not to display the mark.

The clarity boost echoes a familiar refrain in trademark theory. This theory has long recognized that vesting producers with exclusive rights to a word or symbol can sharpen it into a more pointed communicative tool for producer-to-consumer communication. The clarity boost highlights the benefits of sharpened meaning for consumers who use trademarks for expressive purposes. Paralleling how they allow trademark owners to more reliably convey otherwise hard-to-observe qualities of their

¹⁶ <https://www.iconixbrand.com/salt-life-brand-acquired-by-iconix-international-inc-in-partnership-with-the-hilco-consumer-retail-group/>. Interestingly, the Salt Life brand started off as a graphic decal and thus as a prime example of a trademark-as-good. *Id.*; *cf. infra* Section I.B.2.a (discussing the trademark-as-good).

¹⁷ This abandonment of the mark comes at a low price because the low-intensity consumer presumably derived little value from the speech, given that they were just north of “meh” in their enthusiasm for the mark’s brand message. *See infra* note 135 and accompanying text.

products, trademark exclusivities allow consumers to more clearly convey otherwise hard-to-observe qualities of their own personalities.¹⁸

The Article unfolds in three parts. Part I paints the backdrop. Part I.A briefly reviews the producer communication theory of trademark law, emphasizing that the benefits of protection only materialize where there is a likelihood of core confusion. Part I.B turns to consumer self-expression. Part I.B.1 offers an overview of the consumer-identity theory of brands to explain why and how consumers use trademarks to express themselves. Part I.B.2 then notes that trademark scholars, when calling for limiting trademark rights to situations in which there is a likelihood of core consumer confusion, have focused on the access costs that those rights create.

Part II explains our contributions to trademark theory, namely the clarity boost that trademark protection generates for passionate consumers who display trademarks to express themselves and the clarity/access tradeoff to which it leads. Part II.A grounds the basic intuition in the concept of a brand's reference group. The intensity with which a trademark conveys a brand message is determined by the average intensity with which the reference group consumers subscribe to the brand message. When a wide range of intense and non-intense adherents alike adopt a brand, a trademark's intensity signal is unclear or fuzzy. However, if more intense adherents were the predominant adopters of the brand—as would occur, for example, if exclusive rights allowed trademark owners to increase price—then the reference group clusters together more closely around the high-intensity end of the spectrum, clarifying the message sent by the display of the trademark.

Part II.B develops a formal economic model of the clarity/access tradeoff to explore one of its most intriguing implications: the idea that the society can harness the self-interested profit motive of a trademark owner to provide a benefit that redounds to the benefit of all, consumers included. Notably, the model reveals that the trademark owner will not, in fact, act in society's best interest. To maximize profits, the trademark owner will raise prices beyond what is in best interest of society. The analysis shows that courts face a dilemma in establishing trademark protection. On the one hand, a court might elect to grant exclusive rights to the trademark owner. Leveraging the right, the trademark owner then sets prices too high. That action results in too much clarity as the final increments of additional clarity come with a high price tag in terms of an overly large restriction on market access. On the other hand, a court might deny exclusive rights, eliminating costly restrictions on access but giving up on providing devoted consumers with the clarity boost that could aid them in their identity-construction project. Unsurprisingly, the best choice depends on the value that consumers place on clarity—a value that is likely to differ from brand message to brand message, and thus from trademark to trademark.

Part II.C draws connections between our analysis and previous trademark scholarship. By focusing on what consumers who display marks signal while acknowledging

¹⁸ The parallel is imperfect. For example, the communicating producers possess the exclusive rights under the producer-communication theory, whereas the communicating consumers do not possess the exclusive rights under the consumer-communication theory. *Cf. infra* Section II.B.2 (discussing how trademark owners pursuing a self-interested profit motive can function as private attorneys general and augment consumer welfare).

that consumer speech is not atomistic, our analysis resembles trademark scholars' analyses of Veblen goods and theories that frame trademarks as markers of pure, meaningless difference among consumers. However, our analysis goes in a new direction. The assumption underlying Veblen goods is that all consumers want to signal wealth, the only question being whether they have the resources to do so. By contrast, we focus on differentiation according to consumer tastes, identity, hobbies, or passions—differentiation emphasized by the consumer-identity theory of brands. In our framework, one identity-trait (an ardent deep-sea fisherman) is not inherently better than some another trait (a devoted fan of the University of Michigan). Likewise, we consider marks that have meaning beyond the establishment of difference for its own sake. For instance, a hat sporting the University of Michigan logo suggests its wearer adores Michigan and dislikes Ohio State, not merely that she differs from someone in a St. Louis Cardinals hat or carrying a Trader Joe's bag.

Finally, Part III turns to doctrinal implications. The clarity boost provides a previously overlooked justification for some—but certainly not all—of the courts' controversial holdings in merchandizing, post-sale confusion, and counterfeiting cases that stretch trademark infringement beyond situations in which there is a likelihood of consumer confusion.¹⁹ As with many other areas of intellectual property, the proper calibration of the scope of trademark rights depends on a tradeoff, which here is a tradeoff between the benefit of clarity in consumer speech and the cost of reduced consumer access to the mark as an expressive good. The key to implementing the clarity/access tradeoff in trademark doctrine is thus to identify a set of factors suggesting that consumers derive significant value from being able to clearly communicate the extent to which they subscribe to a trademark's brand message. When the value of clarity is sufficiently high, the clarity/access tradeoff supports more expansive trademark rights that reach beyond consumer confusion.

I. THE BACKDROP

The conventional analysis of trademark protection recognizes that trademark rights impact two distinct channels of communication. Addressing the core of trademark policy, Section I.A briefly examines how, due to the protection granted by the Lanham Act, trademark owners can use trademarks to reliably communicate information about their goods to consumers. Section I.B then expands the frame to recognize a second communicative function of trademarks: consumers use some trademarks to communicate information about themselves to each other.

A. *Producer-to-Consumer Communication*

Producers use trademarked words and symbols in connection with the sale of goods in commerce to communicate information about those goods to consumers.²⁰

¹⁹ Technically, the clarity boost provides additional normative for exclusive rights even when there is a likelihood of consumer confusion. In this situation, however, the conventional producer-communication theory already provides a weighty justification for exclusive rights, meaning that the clarity boost does not suggest any doctrinal change.

²⁰ In full, a trademark can be a “word, name, symbol, or device.” 15 U.S.C. § 1127. The text focuses on words and symbols for simplicity, but our insights generalize to all types of trademarks.

Roughly parsed, trademarks allow producers to communicate two types of information to consumers.²¹ First, trademarks convey information about source. They tell consumers that a certain producer manufactures, sponsors or is affiliated with the products to which they are attached.²² Potential consumers can quickly glance at a trademark on a good and know that a certain producer stands behind the good in some way.²³ Second, over time, trademarks allow producers to communicate information about the hard-to-observe characteristics of their products. Consumers may initially purchase a cereal bearing a particular trademark at random. Then, when they eat it, they may develop a link in their minds between the trademark and the crunchiness of the cereal in milk. Alternatively, it may be the cereal producer’s informative advertising²⁴, or word of mouth among consumers, that initially connects the trademark to crunchiness in the consumer’s mind.²⁵

Of course, the words and symbols that constitute trademarks are not “naturally” meaningful as indicators of source or product quality. They are only capable of reliably channeling information from producers to consumers because they enjoy protection under the Lanham Act.²⁶ Without trademark protection, multiple producers could try

²¹ William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J. L. & ECON. 265, 269 (1987). In discussing how trademark protection fosters competition, Glynn Lunney notes that trademarks foster an information flow in the opposite direction: trademarks help consumers to send “pricing signals” to producers “that more accurately reflect consumers’ actual tastes and preferences.” Lunney, *supra* note 3, at 432.

²² 15 U.S.C. § 1114(1)(a); 15 U.S.C. § 1125(a).

²³ Trademarks do not need to communicate the corporate name of the producer of the goods. They need only communicate that trademark indicates a single, if anonymous, source. *P & P Imports LLC v. Johnson Enterprises, LLC*, 46 F.4th 953, 960–61 (9th Cir. 2022); J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 3.9 (5th ed. 2024).

²⁴ Ralph S. Jr. Brown, *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165, 1168–1170 (1947) (distinguishing informative and persuasive advertising).

²⁵ Nicholas S. Economides, *The Economics of Trademarks Articles and Reports*, 78 TRADEMARK REP. 523, 535 (1988). Trademarks can transmit information about a product’s qualities from producers to consumers only if trademark owners maintain a reasonable degree of consistency in their goods. Landes & Posner, *supra* note 21, at 269, 270.

²⁶ Landes & Posner, *supra* note 21, at 270 (“It should be apparent that the benefits of trademarks . . . presuppose legal protection of trademarks.”).

to use the same words and symbols to “say” different things, leading to garbled meaning.²⁷ Two different and unrelated computer companies could use “Apple” in connection with the sale of computers. In our actual world with trademark protection, the line of communication running from producers to consumers becomes far less noisy.²⁸

In turn, this more reliable communication enables an array of benefits that redound to the benefit of (honest) producers and consumers alike.²⁹ Most obviously, it cuts down on the number of consumers who actually get confused and who acquire goods unsuited to their preferences.³⁰ In addition, it reduces the cost of shopping; consumers can more easily identify the goods that they want to buy.³¹ Glancing at a trademark in a supermarket aisle to gather information about a product and its source is far easier than repeatedly reading lists of ingredients or only patronizing stores operated by trusted individuals. Yet further, trademark protection provides producers with incentives to market high-quality goods and invest in informative advertising.³² To capture the benefits of quality-induced loyalty, producers need consumers to know which products are associated with a given producer and which ones are not. Trademark protection makes this sorting easier for consumers and, as a result, it ensures that producers can capture the repeat business tomorrow that follows from providing and advertising high-quality products today.³³

²⁷ Some trademark scholars describe a source indicator as rival resource, or something closely akin thereto, and unrestricted use of a source indicator as a tragedy of the commons. William P. Kratzke, *Normative Economic Analysis of Trademark Law*, 21 MEM. ST. U. L. REV. 199, 205–06 (1990) (“When more than one seller uses a trademark to convey conflicting informational and identificatory messages, the mark loses value as a transmitter of any informational and identificatory message. When that occurs, the trademark *does* become a ‘commons,’ tragic overuse of which destroys its value.”); Landes & Posner, *supra* note 21, at 269 (allowing two unrelated companies to use the same trademark on similar goods “would be like allowing a second rancher to graze his cattle on a pasture the optimal use of which required that only one herd be allowed to graze”). Cf. William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 484–88 (2003) (extrapolating from trademark meaning to suggest that cultural meanings of copyrighted works can also be rivalrous and that overuse of copyrighted works can generate negative externalities).

²⁸ Landes & Posner, *supra* note 21, at 274 (“A proper trademark is not a public good; it has social value only when used to designate a single brand.”).

²⁹ Cf. Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L. J. 1687, 1695 (1999) (“Consumer surplus is not diminished by fraud . . .”).

³⁰ Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 400–01 (1990).

³¹ *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163–64 (1995); Landes & Posner, *supra* note 21, at 268–69; Lunney, *supra* note 3, at 431–32.

³² Cf. George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 QUART. J. ECON. 488 (1970) (noting that, without reliable source-identification, producers lack incentives to market high-quality goods).

³³ *Qualitex Co.*, 514 U.S. at 164; Bone, *supra* note 3, at 555–56; Economides, *supra* note 25, at 526; Landes & Posner, *supra* note 21, at 270.

Finally, by improving producer communication trademark law can accomplish its overarching goals of enabling efficient communication of information in the marketplace and fostering competition.³⁴ Importantly, this goal is achievable because a trademark owner’s exclusive rights do not prevent competitors from selling identical goods under their own trademarks and competing with the original trademark owner on the price and quality of those goods.³⁵

The fact that trademark law’s function is to make producer-to-consumer communication more reliable leads to a built-in limitation on the reach of trademark infringement. It is black-letter law that trademark owners must prove a likelihood of consumer confusion to prevail in a trademark infringement suit.³⁶ Actionable confusion is not limited to a mistaken belief about source or origin, i.e., a mistaken belief that the trademark owner manufactured the trademarked goods.³⁷ It also clearly encompasses confusion as to sponsorship or affiliation.³⁸ However, to the extent that the producer-communication theory provides trademark law’s justification, not everything that can be called confusion should be actionable. Confusion should only be actionable when it undermines the reliability of the producer-to-consumer communication—that is, when it jams the producer’s speech and makes it harder for consumers to interpret which marks go with which producer.³⁹ To instrumentalize this limit, Mark Lemley and Mark McKenna propose that, to be actionable, confusion must lead to consumers mistakenly believing that a trademark owner stands behind the quality of the goods to

³⁴ BARTON CARL BEEBE, *TRADEMARK LAW: AN OPEN-SOURCE CASEBOOK* 21 (11th ed. 2019); Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli*, 54 EMORY L.J. 461, 471–72 (2005); Economides, *supra* note 25, at 526; cf. Kratzke, *supra* note 27, at 202 (“[R]esolution of all questions in trademark law should cost-effectively promote interbrand competition . . .”).

³⁵ Trademark theory that focuses on making producer-to-consumer communication more reliable requires a line to be drawn between trademarks and the goods to which they are attached. *See infra* notes ___. Trademark law’s functionality doctrine play an important role in drawing that line. *See infra* notes ___.

³⁶ 15 U.S.C. 1114(1)(a) & 1125(a)(1). *See also* Bone, *supra* note 3, at 621 (“[T]here is no economic justification for a general rule, principle, or presumption prohibiting free riding on goodwill.”); Brown, *supra* note 24, at 1199–2002 (arguing that trademark law should not recognize misappropriation of goodwill as an actionable harm absent a likelihood of consumer confusion). Courts use multi-factor tests to identify a likelihood of consumer confusion. *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979); *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492, 495 (2d Cir. 1961).

³⁷ In the early twentieth century, trademark law defined the source of goods narrowly as the goods’ manufacturer. *Hanover Start Milling Co. v. Metcalf*, 240 U.S. 403 (1916); *Borden Ice Cream Co. v. Borden’s Condensed Milk Co.*, 201 F. 510 (7th Cir. 1912).

³⁸ *Int’l Info. Sys. Sec. Certification Consortium, Inc. v. Sec. Univ., LLC*, 823 F.3d 153 (2d Cir. 2016).

³⁹ Lemley & McKenna, *supra* note 3, at 422 (finding it “impossible to establish meaningful limits on what sorts of confusion are actionable” in contemporary trademark cases); Lunney, *supra* note 3, at 371 (discussing “expansion” in trademark law’s “bundle of ownership rights” that has, “despite some pretense on the issue, [] been only tenuously connected to concerns over material consumer deception.”).

which the mark is attached.⁴⁰ For short, we call this type of confusion *core* consumer confusion.

Moving to the cost side of the ledger, the exclusive rights granted by the Lanham Act generate only minimal costs when the only costs to producer-to-consumer communication are considered. In a perfect world, each producer would own a different, perhaps arbitrary mark. Consumers would know as much, eliminating search costs. Then producers would compete. In other words, under ideal conditions, trademark protection would not enable trademark owners to obtain monopoly power or charge supra-competitive prices.⁴¹ Of course, conditions are not always ideal, meaning that trademark owners can sometimes use their Lanham Act rights to inflict costs on their competitors, even when the trademarks are only wound up with producer-to-consumer communication and do not play any role at all in consumer-to-consumer communication.⁴²

B. *Consumer-to-Consumer Communication*

As sketched in the previous section, the notion that trademarks convey information about the goods to which they are attached from producers to consumers lies

⁴⁰ Lemley & McKenna, *supra* note 3, at 427; *see also* Lunney, *supra* note 3, at 417 (noting that remedies should only be available “should another adopt a mark sufficiently similar to threaten the mark’s ability to indicate product source”); McKenna, *supra* note 3, at (“[C]ourts 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.”). Lemley and McKenna recognize that some additional types of confusion relating to sponsorship or affiliation should be actionable, but they argue that they would be best addressed using doctrine akin to false advertising, where the plaintiff bears a burden to show a material effect on consumer behavior. Lemley & McKenna, *supra* note 3, at 444–48.

⁴¹ *See supra* notes 34–35 and accompanying text (noting that trademarks are intended to foster inter-brand market competition).

⁴² For example, competitors may labor under word-scarcity costs. The words that function as effective trademarks may not be plenteous, and some trademark owners may be able to obtain exclusive rights to prime real estate in consumers’ minds. Barton Beebe and Jeannie Fromer argue that, although the strings of letters that can serve as trademarks are infinite, the set of words that can serve as effective trademarks is not plentiful. Barton Beebe & Jeanne C. Fromer, *Are We Running out of Trademarks: An Empirical Study of Trademark Depletion and Congestion*, 131 HARV. L. REV. 945 (2018); *see also* Daniel J. Hemel & Lisa Larrimore Ouellette, *Trademark Law Pluralism*, 88 U. CHI. L. REV. 1025 (2021) (addressing “distance costs” that arise when trademarks are difficult to remember). *But see* Landes & Posner, *supra* note 21, at 274 (“[T]he distinctive yet pronounceable combinations of letters to form words that will serve as a suitable trademark are as a practical matter infinite . . .”). In addition, although several trademark doctrines are designed to minimize them, competitors may have to endure product-description costs. One trademark owner may tie up exclusive rights to a word that all competitors in a market need to be able to use to compete on a level playing field. For example, GM could obtain exclusive rights to “car” or “roomy.” The well-established *Abercrombie* doctrine minimizes the magnitude of the product-description costs that trademark owners can inflict on competitors, *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4 (2d Cir. 1976), as does the descriptive fair use doctrine. 15 U.S.C. § 1115(b)(4). To facilitate comparative advertising, trademark law allows for nominative fair use. MCCARTHY, *supra* note 23, at 23:11. Under this doctrine, competitors can use a trademark to identify the trademark owner and explain why their product is better.

at the heart of trademark theory. In contemporary society, however, trademarks are also signals that consumers use to convey information about themselves to other consumers (or, more broadly, to the world at large). Part I.B.1 draws from a marketing literature that develops a consumer-identity theory of brands to explain why and how expressive consumers use trademarks in consumer-to-consumer communication. Part I.B.2 then examines how trademark scholarship opining on the desired scope of trademark rights has to date considered the value that consumers derive from using trademarks to communicate. Most significantly, trademark scholars rely on the access costs that exclusive rights impose on expressive consumers to critique a line of cases in which courts find infringement in the absence of a likelihood of consumer confusion.

1. *The Consumer-Identity Theory of Brands*

In the mid-twentieth century, marketing and branding practices focused on the Four Ps (product, place, price and promotion), and, consonant with the dominance of producer-to-consumer communication in trademark theory, marketing was all about telling consumers that your firm made a more desirable product than your competitors did.⁴³ Today, marketing scholarship looks at brands differently. While this scholarship is a multi-stranded affair, we focus on one of its largest strands: the *consumer-identity* theory of brands.⁴⁴

Several premises lie at the foundation of the consumer-identity theory of brands. The first is psychological: individuals have internal drives to develop self-identities.⁴⁵

⁴³ The marketer's goal was to find the mixture of the Four P's that maximized producer profits. TILDE HEDING, CHARLOTTE F. KNUDTZEN & MOGENS BJERRE, BRAND MANAGEMENT: RESEARCH, THEORY AND PRACTICE 30 (2015). The consonance with the producer-communication theory can be seen in the American Marketing Association's contemporaneous definition of a brand: "A name, term, sign, symbol, or design . . . which is intended to identify the goods or services of one seller . . . and to differentiate them from those of competitors." *Id.* at 9.

⁴⁴ *Id.* at 9. For an overview of other branding theories, some of which are complements to, rather than substitutes for, the consumer-identity theory, see generally *id.* (discussing seven brand theories). Labels for the separate strands are rather fluid. The core tenets of what we call the consumer-identity theory have also been identified as "personality" and "relationship" theories. HEDING, KNUDTZEN, & BJERRE, *supra* note 43 at 101–36. However, these theories tend to treat the brand as an animate entity with a personality and analogize the consumer-brand relationship to an interpersonal relationship. Susan Fournier, *Consumers and Their Brands: Developing Relationship Theory in Consumer Research*, 24 J. CONS. RSCH. 343 (1998). We do not adopt this animistic stance.

⁴⁵ Some accounts of the consumer-identity theory take this drive as a given that has always been true. Stokburger-Sauer, Ratneshwar, & Sen, *supra* note 4, at 406 ("Striving for a sense of self (i.e., answering the question, 'Who am I?') is a fundamental aspect of the human condition."). Other accounts view it as a development that is more recent and culturally contingent. For example, some scholars argue that, where location of birth, occupation, and social class defined individuals' senses of self in earlier centuries, the "loosening of restrictions on social class created freedom to construct and express who we are" in the twentieth century. HELEN EDWARDS & DEREK DAY, CREATING PASSION BRANDS: HOW TO BUILD EMOTIONAL BRAND CONNECTION WITH CUSTOMERS 52 (2005); see also ANTHONY GIDDENS, MODERNITY AND SELF-IDENTITY: SELF AND SOCIETY IN THE LATE MODERN AGE (1991); Grant McCracken, *Culture and Consumption: A Theoretical Account of the Structure and Movement of the Cultural Meaning of Consumer Goods*, 13 J. CONS. RSCH. 71, 80 (1986) ("[C]ontemporary North American culture leaves a great deal of the individual undefined . . .").

An “identity is subjective; it is an individual’s answer to questions such as ‘Who am I?’ and ‘In what ways am I different from others?’”⁴⁶ More concretely, an identity is “any category label with which [an individual] self-associates that is amenable to a clear picture of what a person in that category looks like, thinks, feels and does.”⁴⁷ An identity is not static; individuals actively craft and recraft their identity.⁴⁸ Nor does the pursuit of an identity ever reach a climactic epiphany when a consumer finally unearths a “true” or “correct” identity. To the contrary, in a post-modern turn, the consumer-identity theory transforms “identity [into] something with which the individual can play.”⁴⁹

The second premise is that consumption is one way, among many, for individuals to appropriate the symbolic resources that they need to construct self-identities. The relevant self is a belief or mental construct, so individuals can construct their self-identities by cobbling together symbols and signs.⁵⁰ When the self-seeking subject transforms from an individual into a consumer, the market for consumer goods becomes a symbolic playground on which consumers can play their identity games. “[C]onsumers are, above all, frequently presented as thirsting for identity and using commodities to quench this thirst.”⁵¹ In part, consumers construct their identities by construing the tangible products that they purchase as signals of identity-relevant meanings. In addition to being useful items, “modern goods are . . . essentially psychological things which are symbolic of personal attributes and goals and of social patterns and strivings.”⁵² “[W]e are what we have and possess”: the self is an “extended

⁴⁶ GABRIEL & LANG, *supra* note 1, at 90.

⁴⁷ Americus Reed, Mark R. Forehand, Stefano Puntoni & Luk Warlop, *Identity-based consumer behavior*, 29 INT’L J. RSCH. MKGT. 310, 310 (2012).

⁴⁸ Richard Elliott & Kritsadarat Wattanasuwan, *Brands as symbolic resources for the construction of identity*, 17 INT’L J. ADVERT. 131, 132 (1998) (“The self is not a given, but it is something the person creates.”); *id.* (“The self is . . . not . . . a fixed entity which the individual can simply adopt. . .”). This means that an identity “is the product of psychological work; it must be nurtured and defended, worked for and fought over.” GABRIEL & LANG, *supra* note 1, at 90.

⁴⁹ EDWARDS & DAY, *supra* note 45, at 9. Nor is a self-identity even always internally coherent. Identities are the result of “creative bricolage” rather than top-down planning. GABRIEL & LANG, *supra* note 1, at 94. In fact, it is often accurate to say that a single individual can subscribe to multiple identities at the same time—e.g., doting parent, powerful professional, weekend warrior—that are sometimes in tension or outright conflict. Elliott & Wattanasuwan, *supra* note 48, at 133 (discussing how individuals “construct, maintain, and express each of their multiple identities”).

⁵⁰ Elliott & Wattanasuwan, *supra* note 48, at 132 (arguing that self-identity is “a *symbolic project*, which the individual must actively construct out of the available symbolic materials” and “weave[] into a coherent account of who he or she is . . .”).

⁵¹ GABRIEL & LANG, *supra* note 1, at 86; *see also* HELGA DITTMAR, *THE SOCIAL PSYCHOLOGY OF MATERIAL POSSESSIONS: TO HAVE IS TO BE* (1992). In addition to using consumption to construct self-identities, individuals can alternatively seek identity in “personal and family histories, membership of occupational and professional groups, work and personal achievement, [and] character and temperament.” GABRIEL & LANG, *supra* note 1, at 93.

⁵² Sidney J. Levy, *Symbols for sale*, HARV. BUS. REV., 119 (1959); *see also id.* (“The things people buy are seen to have personal and social meanings in addition to their functions.”).

self” that stretches beyond our biological bodies to include the subset of our material possessions that carry identity-relevant, symbolic meanings.⁵³

The third premise involves only a small step from the second: in part, consumers construct their identities by consuming trademarks *per se*. Many trademarks are imbued with *brand messages* that, when consumer display the trademarks, “have the ability to embody, inform, and communicate desirable consumer identities” to other consumers.⁵⁴ Brand messages convey different information than trademarks are understood to convey in producer-to-consumer communication.⁵⁵ Trademarks that convey brand messages are thus “signaling systems with a great communicative and symbolic power” that “allow an individual who adopts them to share a belief, to communicate a point of view in respect to society and to experiment multiple personalities, hiding or overcoming his/her original one, [and] interpreting new ones.”⁵⁶ They have “the ability to embody, inform, and communicate desirable consumer identities”⁵⁷ and to “serve as powerful repositories of meaning purposively and differentially employed in the substantiation, creation and (re)production of concepts of self in the marketing age.”⁵⁸ In sum, trademarks—and especially those that signify strong identity brands—offer “more meaning for your money”: they “have more colour, more symbolic content, more utility as units in the project of self. Consumers will orient towards theses beacons of belief, or steer away from them, but they are far less likely to ignore them.”⁵⁹

⁵³ Russell W. Belk, *Possessions and the Extended Self*, 15 J. CONS. RSCH. 139, 139 (1988); Elliott & Wattanasuwan, *supra* note 48, at 134 (“[C]onsumers are what they own, since their possessions are viewed as major parts of their extended selves.”).

⁵⁴ Stokburger-Sauer, Ratneshwar, & Sen, *supra* note 4, at 406.

⁵⁵ For example, the “beachiness” of the Salt Life brand message is not dependent on which producer manufactured, sponsored, or licensed the trademarked good, and it says nothing about the quality of the good that bears the mark. For some trademarks, however, the distinction between information about product source and quality, on the one hand, and the brand message, on the other hand, can be difficult to cleanly separate. For example, consider the PATAGONIA trademark. PATAGONIA, Registration No. 1,294,523. This trademark conveys information about the source and quality of the goods to which it is attached: the goods are likely to be made in a sustainable manner. It also conveys a brand message: those who display the trademark care about the environment. Notably, it conveys this brand message with sincerity in part because the goods are made in a sustainable manner.

⁵⁶ EDWARDS & DAY, *supra* note 45, at 9.

⁵⁷ Stokburger-Sauer, Ratneshwar, & Sen, *supra* note 4, at 406.

⁵⁸ Fournier, *supra* note 44, at 365.

⁵⁹ EDWARDS & DAY, *supra* note 45, at 51. The degree to which consumers can use brands for identity construction depends on the strength of their responses to survey prompts like the following:



- I use this brand to communicate who I am to other people.
- This brand helps me look good in the eyes of people I care about.
- This brand gives an impression of my personality to others. To what extent does this brand communicate something specific about the person who uses it?
- How much does this brand symbolize what kind of person uses it?

Sankar Sen, Allison R. Johnson, C. B. Bhattacharya & Juan Wang, *Identification and Attachment in Consumer-Brand Relationships*, 12 in BRAND MEANING MANAGEMENT 151, 159 (2015). Sen et al. developed these survey prompts to measure consumers’ *identification* with brand. They developed

To fix ideas, Table 1 lists several brands, trademarks, and personal attributes associated with the brands. Marks can be used to express everything from “I love the beach” (Salt Life) to “I am open to a new friendship” (Swiftie) to a rebel streak (Harley Davidson) to a political affiliation (Ben and Jerry’s Ice Cream, Patriot Mobile).

a different set of prompts to measure consumers’ *attachment* to brands. *Id.* Consumers’ brand usage is only wound up with “impression management” issues when brand messages operate on the level of social-symbolism rather than self-symbolism. *See infra* notes 171-174 and accompanying text.

Table: Examples of Brands, Marks, and Associated Meanings

Owner	Mark	Some Associated Meanings
Red Bull		Adventuresome
Salt Life		Beachy
Lululemon		healthy, active
Harley Davidson		grit, freedom, rebellion
Taylor Swift	SWIFTIE	friendly, open
Keds Shoes		dance, musical theater devotee
Ben and Jerry's Ice Cream		progressive
Patriot Mobile Company		conservative
Crocs		confident in one's own skin
Patagonia		environmentally conscious
Teflar		inclusive

Of course, trademarks often do not convey identity-relevant brand messages when they are initially registered or used in commerce. Trademark owners must often create them.⁶⁰ To explain how trademark owners accrete brand messages onto trademarks, the consumer-identity theory of brands usually piggybacks on Grant McCracken's concept of meaning transference.⁶¹ The range of possible identities that consumers could

⁶⁰ Some trademarks acquire brand messages without any active effort on the part of the trademark owner. Word-of-mouth notoriety may weld brand messages to trademarks and, setting aside the role that paid influencers often play in initiating and maintaining word-of-mouth campaigns, such notoriety may arise through a bubbling up of consumer-driven, cultural memes rather than a top-down, producer-driven process. While the resources that the producer must expend to weld a brand message to a trademark is relevant in some debates over trademark scope, it is not relevant to the clarity boost. *See infra* note 116.

⁶¹ McCracken, *supra* note 45, at 71.

seek to adopt starts out as a set of ideas in the “culturally constituted world.”⁶² In a first step, advertising generated and broadcast by trademark owners transfers one or more identities from the culturally constituted world to a trademark. It does this by bringing a representation of the identity and the trademark “together within the frame of a particular advertisement,” and welding or “conjoin[ing] the two elements” together as the signified and signifier of a sign.⁶³ In a second step, the consumption of trademarked goods by consumers transfers the brand message from the trademark to the consumers’ identities.⁶⁴ A consumer’s implicit syllogistic reasoning is paramount in this transference: consumers of Brand X are rugged individuals, and I am a consumer of Brand X, so I am a rugged individual. When an individual consumes an identity-relevant trademark, the consumer becomes part of the referent of the trademark *qua* sign.⁶⁵

The transference of identity-relevant meanings from culture at large to consumers via trademarks and their brand messages does not always occur solely through the orderly and predictable, producer-driven process that McCracken theorizes.⁶⁶ For many trademarks, consumers “leave their mark, their fingerprints, on the brand,” and play important roles in shaping the content of the brand messages that trademarks convey in consumer-to-consumer communication.⁶⁷ Producers may generate an “imagined”

⁶² *Id.* The culturally constituted world is “the world of everyday experience in which the phenomenal world presents itself to the individual’s sense fully shaped and constituted by the beliefs and assumptions of his/her culture.” *Id.*

⁶³ McCracken, *supra* note 45, at 74; *see also* Elliott & Wattanasuwan, *supra* note 48, at 135 (“Advertising is recognized as one of the most potent sources of valorized symbolic meanings.”).

⁶⁴ McCracken, *supra* note 45, at 78.

⁶⁵ In semiotic terms, Barton Beebe describes demise of the rise of trademarks as tools for consumer communication—and, more broadly the rise of the trademark-as-good, *see infra* Section I.B.2.a—as a shift in the nature of a trademark as a sign. When trademarks are all about producer-to-consumer communication, Beebe suggests that trademarks point to producers. To reflect this, he proposes that the semiotic qualities of trademarks are best understood through a Peircian triadic model of a sign, in which signs point to tangible, real-world referents. In contrast, he proposes that trademarks that expressive consumers can use in consumer-to-consumer communication are best understood through a Saussurian dyadic model of the sign, which has no room for real-world referents. Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 657–61 (2003). The consumer identity theory of brands suggests that trademarks that are used in consumer-to-consumer communication still operate within the triadic model. The shift simply swaps out one real-world referent for another. When the focus is on producer-to-consumer communication, the referent is the producer. In contrast, when the focus is on consumer-to-consumer communication, the referent is the consumer who displays the trademark.

⁶⁶ McCracken himself recognized this. McCracken, *supra* note 45, at 75.

⁶⁷ O’Guinn & Muñiz, Jr., *supra* note 15, at 184. Polemically stated, marketers “do not create the brand [messages]; society does.” *Id.* at 176; *see also id.* (“The marketer is a relatively powerful social actor, but by no means the only one.”). Making space for consumers as actors who influence brand messages gave rise to a paradigm shift in marketing literature. HEDING, KNUDTZEN, & BJERRE, *supra* note 43, at 26 (discussing a shift from a “positivistic” to a “constructivist” approach to brand meaning). Legal scholars, too, have recognized that consumers play important roles in shaping the public meaning of trademarks. *See infra* notes 142–146 and accompanying text (noting that trademark scholars have leaned on consumers’ involvement in trademark meaning-making to support limitations on trademark rights in conventional “expressive use” cases).

meaning or a “marketer-preferred meaning” as a brand message,⁶⁸ but consumers—like most all participants in communication—also contribute to the meaning-making process.⁶⁹ In short, consumers can engage in “co-creation” of brand messages with marketers.⁷⁰ Some consumers come close to ignoring the marketer-preferred meaning and instead attribute deeply personal and idiosyncratic meanings to brands, perhaps because their brand associations arise not from the regularity of the mediated experience created by mass advertising but instead from the lived experience of individual happenstance.⁷¹ The deviation of other consumers’ understanding of a trademark’s brand message from the marketer-preferred brand message is a matter of degree. For example, consumers who inhabit divergent information milieus may read the same advertisement to convey distinct variations on the marketer-preferred brand message.⁷² In yet other situations, consumer reactions—including complaints, critiques, parodies, and commentaries—may over time alter the content of the brand messages.⁷³

In sum, the consumer-identity theory reveals an obvious and simple truth about trademarks in the contemporary world: consumers purchase some trademarked goods

⁶⁸ Albert M. Muniz Jr. & Thomas C. O’Guinn, *Brand Community*, 27 J. CONS. RSCH. 412, 176, 184 (2001); O’Guinn & Muñiz, Jr., *supra* note 15, at 176, 184.

⁶⁹ In post-modern terms, readers are authors, too. Elliott & Wattanasuwan, *supra* note 48, at 134 (“[E]ach individual may ascribe different and inconsistent cultural meanings to a product depending on the extent to which they share the collective imagination.”); McCracken, *supra* note 45, at 75 (“[T]he viewer/reader is the final author in the process of transfer” of meaning from culturally constituted world to goods in advertising.); cf. O’Guinn & Muñiz, Jr., *supra* note 15, at 174 (defining a brand as a “vessel for popular meaning”). This recognition of readers as authors has given rise to insightful copyright scholarship. See, e.g., Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445 (2007).

⁷⁰ Deven R. Desai, *From Trademarks to Brands*, 64 FLA. L. REV. 981 (2012); Deborah R. Gerhardt, *Consumer Investment in Trademarks*, 88 N.C. L. REV. 427, [] (2010).

⁷¹ Elliott & Wattanasuwan, *supra* note 48, at 135 (distinguishing meanings derived from lived and mediated experiences). For example, a consumer may feel attached to a brand of coffee because their grandmother drank that brand during Sunday afternoon visits. Sen, Johnson, Bhattacharya, & Wang, *supra* note 59, at 154.

⁷² On average, consumers have larger roles as meaning-makers when advertising leaves the brand message more “open.” Elliott & Wattanasuwan, *supra* note 48, at 141.

⁷³ For example, Crocs were originally designed as a comfortable boating shoe. In the mid-2000, fashion critics denounced the shoe as ugly. Born from consumers experiences, an ugly shoe trend materialized, and the brand embraced it. Today, Crocs markets itself as a brand for consumers dedicated to comfort, a person who is less interested in looks than function. Crocs didn’t originate this message. Instead, Crocs embraced the message established from the ground up and tried to leverage it into more sales. *How Crocs Disrupted the Shoe Industry*, THE STYLE HISTORIAN™, <https://www.thestylehistorian.com/articles/the-story-behind-crocs>. To take another example, many consumers may associate “Red Bull” with recklessness and indifference to danger to themselves or others, rather than adventure. See S. Adam Brasel & James Gips, *Red Bull “Gives You Wings” for better or worse: A double-edged impact of brand exposure on consumer performance*, 21 J. CONS. PSYCH. 57, 62 (2011) (“Consumers racing a car with a Red Bull paint job performed either considerably faster or slower than they did in other branded cars. Red Bull’s personality associations of speed, power, aggressiveness, and recklessness either pushed consumers to the edge of their ability, leading to very fast races overall, or pushed them beyond their ability, leading to higher off-track times and slower races overall.”).

because they value the trademarks as tools for self-expression and identity construction. Whether society is better off when consumers use trademarks, and market commodities more broadly, to construct and express their identities remains an open question. Some commentators focus on the benefit of the practice,⁷⁴ but others suggest that consumers should look elsewhere for the materials needed to construct their self-identities.⁷⁵ This is not a debate that we can resolve, or even to which we can meaningfully contribute. For better or worse, we assume a sovereign consumer, and we respect the ability of consumers to make choices that maximize their own welfare. Consumers are clearly purchasing trademarks to help in the project of identity construction, and we are not well situated to second guess their decisions.

2. *Expressive Consumers and Access Costs*

In many judicial opinions and scholarly articles on trademark law, the value that consumers derive from trademarks in consumer-to-consumer goes unremarked. One significant exception to this generalization, however, merits note. Trademark scholars have taken account of the value that expressive consumers derive from trademarks when critiquing several lines of cases in which courts regularly find infringement in the absence of a likelihood of consumer confusion.⁷⁶ More specifically, they have relied on the access costs that exclusive rights in these cases impose on expressive consumers as part of their explanation of why courts are reaching the wrong conclusion.⁷⁷ Section I.B.2.a discusses how granting exclusive rights to trademark owners in the absence of a likelihood of core consumer confusion imposes access costs on expressive consumers. Section I.B.2.b discusses how commentators have invoked these access costs as

⁷⁴ Belk, *supra* note 53, at 159–60 (“Possessions help us manipulate our possibilities and present the self in a way that garners feedback from others who are reluctant to respond so openly to the unextended self.”); EDWARDS & DAY, *supra* note 45, at 54 (arguing that the use of consumption for identity-construction to fight one of the “drawbacks of postmodern freedom,” namely fluidity); *id.* (“[I]n an ever-changing world, the reassurance offered by consistent brands is ‘a vital element in their added value.’”); Muniz & O’Guinn, *supra* note 68, at 426–27 (arguing that brands bring consumers into much-needed communities in an era of bowling alone).

⁷⁵ Belk, *supra* note 53, at 159–60 (“Research on materialism suggests some of the negative consequences of relying on possessions to provide meaning in life.”); EDWARDS & DAY, *supra* note 45, at 54 (noting “many commentators have viewed this trend with distaste”). Relatedly, in his seminal trademark article from the middle of the twentieth century, Ralph Brown famously dismissed the entire enterprise of non-informative advertising as “just a luxurious exercise in talking ourselves into spending our incomes.” Brown, *supra* note 24, at 1183. Advertising that welds a brand message to a trademark is, however, only a subset of persuasive advertising. *See infra* note ___ and accompanying text.

⁷⁶ For additional examples of trademark scholarship that considers consumers’ speech interests in sculpting the desired scope of trademark exclusivities, *see infra* Section II.C (contextualizing the clarity boost within prior scholarship addressing consumers’ speech interests).

⁷⁷ The absence of any discussion of trademarks as vehicles for consumer-to-consumer communication in cases in which there is a likelihood of consumer confusion in producer-to-consumer communication is not surprising. In such cases, the benefit of avoiding consumer confusion outweighs whatever access costs trademark rights may impose on consumers, and whatever clarity boost trademarks rights may generate just further solidifies the justification for finding infringement.

part of their argument against finding infringement in merchandizing, post-sale confusion, and counterfeiting cases.

a. Trademarks-as-Goods

To appreciate the access costs of trademark protection borne by expressive consumers, it is important to recognize that the shift from a producer-communication theory of trademarks to a consumer-communication theory is not simply a shift in who uses trademarks to communicate or what content trademarks communicate. The shift is far more fundamental.

When they convey information from producers to consumers, trademarks have purely instrumental value. If there were another channel through which information about price and quality could be reliably communicated, consumers would not be harmed if the trademark disappeared entirely.⁷⁸ Once the consumer gets their hands on the desired goods, the trademarks have outlived their value. No one wants a mark for its own sake, like on a bumper sticker, t-shirt, or hat.

In contrast, the consumer-identity theory of brands asserts that trademarks have intrinsic value because they help expressive consumers construct and speak about their identities.⁷⁹ Consumers value trademarks because they are signs: words or symbols with brand messages culturally “welded” thereto that consumers can use to express themselves in inter-consumer communication.⁸⁰ Where the producer-communication theory assumes a clear distinction between the trademark and the good, the consumer-communication theory collapses the distinction and opens the door the trademark-as-good.⁸¹ Consumers view goods emblazoned with certain trademarks as superior to

⁷⁸ For example, if there were trusted store employees paid to stand next to every shelf to explain the source and qualities of the goods on offer, and if consumers were willing to spend the time to listen to the store employees, any trademark would be redundant. Similarly, setting aside a desire to preserve resale value, consumers would also be indifferent if the trademarks were erased or discarded after purchase.

⁷⁹ Attributing “intrinsic” value to the signifier of a sign could be a semiotic faux pas. A sign is never contained within, or intrinsic to, a signifier, i.e., the letters or symbol that an observer perceives. Part of the sign always resides elsewhere in a signified, which only exists either in the material world or in the mind of an interpreter. The signifier is only meaningful because, thanks to a social convention, the observer knows that the signifier stands for the signified. Beebe, *supra* note 65, at 648–51 (discussing the common nature of the erroneous elision of the signifier and sign in trademark discourse). Nonetheless, we draw a distinction between trademarks with instrumental and intrinsic value to distinguish, first, those trademarks that consumers value as means to the end of obtaining the underlying goods, and, second, those trademarks that consumers value because they enjoy consuming and displaying the trademark itself.

⁸⁰ Bone, *supra* note 3, at 598 (noting “the public meanings associated with the mark itself, independent of the product to which it is connected and independent of any particular brand or firm.”); Ramello & Silva, *supra* note 2, at 947 (arguing that “individuals . . . consume the[] meaning” of trademarks). When discussing trademarks with intrinsic semiotic value to consumers, courts often describe the type of utility at issue as “ornamental” or “aesthetic,” but this is a misleading description. *See infra* note 90 and accompanying text.

⁸¹ As Robert Bone summarized this point, the producer-communication theory “assumes that a trademark conveys information about a separate and distinct product,” and it gets fouled up when a trademark “is—and is intended by the seller to be—and important part of the product itself, in

goods without the trademarks, even when they know with certainty that the two goods come from the same producer and otherwise possess the same physical qualities.⁸² A trademark thus “becomes an economic object in its own right.”⁸³ Expressive consumers no longer purchase trademarked goods. They purchase copies of trademarks.⁸⁴

The shift to trademarks as goods with intrinsic value, which occurs when expressive consumers use trademarks to construct and announce their self-identities, radically alters the nature of the costs that trademark protection generates. When trademarks are channels for producer-to-consumer communication, trademark exclusivities support a competitive market in which producers can sell identical products and compete on price and product quality.⁸⁵ Losses generated by market power and supra-competitive pricing may well exist, but they are byproducts of imperfections in the system.⁸⁶ In contrast, when trademarks take on intrinsic value, trademark exclusivities do the opposite. They act more like copyrights and patents, buffering producers from competition in the market for the goods that consumers desire. Monopoly power, inflated prices, and reduced access are to be expected.⁸⁷

the sense of being something of value that consumers want when they make a purchase.” Bone, *supra* note 3, at 619. Bone frames shift from instrumental to inherent trademark value as an expansion in the age-old concept of goodwill. One well-established function of trademark rights is allowing trademark owners to protect consumers’ goodwill. To the extent that protecting goodwill is synonymous with protecting a reputation among consumers for goods with particular properties other than the properties of trademark itself—what Bone terms “brand” or “firm” goodwill—then trademark rights only protect a trademark’s instrumental value. *Id.* at 551, 556. However, “[t]he goodwill concept has an elastic quality capable of . . . incorporating more and more elements of value along the way,” and the goodwill protected today also today includes “inherent” goodwill or goodwill that is lodged within the trademark itself. *Id.*

⁸² For a sampling of legal scholarship noting the rise of intrinsic trademark value and the emergence of the trademark-as-good, albeit often using different terminology, see Beebe, *supra* note 65, at 656–61; Bone, *supra* note 3, at 550, 619–20; Desai, *supra* note 70, at 990–91; Dogan & Lemley, *supra* note 34, at 471–72; Dreyfuss, *supra* note 30, at 397–98; Alex Kozinski, *Trademarks Unplugged Essay*, 68 N.Y.U. L. REV. 960, 443–44 (1993); Lemley, *supra* note 29, at 1688; Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L. J. 1717, 1725–28 (1999); Lunney, *supra* note 3, at 371, 395–420.

⁸³ Ramello & Silva, *supra* note 2, at 952.

⁸⁴ Trademarks can develop intrinsic value for consumers, and the concept of trademarks-as-goods can emerge, in a variety of ways. This Article highlights the semiotic utility of trademarks. Protected trade dress may also have superior functional features, even though trademark law’s functionality screen is supposed to deny protection to such features. *TraFFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23 (2001) (applying the utilitarian functionality doctrine). Alternatively, trademarks or trade dress may have aesthetic or ornamental value to consumers. In theory, the doctrine of aesthetic functionality invalidates trademarks when their attractiveness puts competitors at a non-reputation-related disadvantage. Justin Hughes, *Cognitive and Aesthetic Functionality in Trademark Law*, 36 CARDOZO L. REV. 1227 (2015) (exploring the denial of trademark protection due to aesthetic functionality). However, courts rarely use this doctrine to invalidate trademarks.

⁸⁵ See *supra* note 34 and accompanying text.

⁸⁶ See *supra* notes 41–42 and accompanying text.

⁸⁷ Assumption of downward sloping demand curve. Consumers must come to value certain trademarks with certain brand messages as better tools for consumer-to-consumer communication than others.

b. Infringement without Core Confusion

The access costs that protection for trademarks-as-goods generates figure prominently in a scholarly critique of several lines of contemporary trademark cases. These lines of cases have two characteristics in common. First, the trademarks at issue carry brand messages of some kind, and they have value to consumers as vehicles for communicating with other consumers. Second, courts regularly construe actionable confusion expansively, stretching infringement beyond situations in which the core consumer confusion that justifies granting exclusive rights to a trademark owner to make producer-to-consumer communication more reliable exists. Cases involving merchandizing, disclaimers and post-sale confusion, and counterfeiting all fit the bill.

Merchandizing goods employ a trademark as a dominant feature of the goods' design.⁸⁸ T-shirts bearing the name of a school, the logo of a sports team, or likeness of a rock band are merchandizing goods, as are hats emblazoned with trademarks, keychains in the shape of corporate logos, and bumper stickers bearing corporate trademarks. (Merchandizing goods are trademarks-as-goods reduced nearly to their essence: "the mark *is* the product."⁸⁹) Many of the trademarks that constitute merchandizing goods—and especially those that defendants will be inclined to sell without authorization—are also examples of trademarks that consumers value in consumer-to-consumer communication. Consumers wear hats and t-shirts that prominently feature trademarks because the trademarks have accreted brand messages that consumers can use to construct their identities.⁹⁰ As one court observed in a merchandizing case:

⁸⁸ Michael Grynberg, *Living with the Merchandising Right (or How I Learned to Stop Worrying and Love Free-Riding Stories)*, 25 YALE J.L. & TECH. 1, 10 (2023) ("A merchandising market . . . is one in which the trademark serves primarily as a desired product feature (and the mark's source-designation function is irrelevant or secondary).").

⁸⁹ Dogan & Lemley, *supra* note 34, at 472; *see also* Pa. State Univ. v. Vintage Brand, LLC, 614 F. Supp. 3d 101, 107 (M.D. Pa. 2022).

⁹⁰ To explain why consumers derive utility from merchandizing goods, courts and commentators frequently state that consumers inherently value the "ornamental," "decorative," or "aesthetic" features of the displayed trademarks. Robert C. Denicola, *Institutional Publicity Rights: An Analysis of the Merchandising of Famous Trade Symbols*, 62 N.C. L. REV. 603, 605–15 (1983); Dogan & Lemley, *supra* note 34, at 462 & n.8; Lunney, *supra* note 3, at 395–99. In most cases, however, this characterization misses the mark as a descriptive matter. Consumers rarely think that the design of the trademark on merchandizing goods will provide visual pleasure or conceptual interest. Rather, they value the semiotic utility from the trademark, namely its ability, when displayed, to signify a brand message to an audience. As a strategic matter, however, it is understandable that defendants in trademark suits apply the "ornamental" and "aesthetic" labels to trademarks on merchandizing goods because these labels draw direct connections to trademark doctrines that invalidate trademarks and thus provide defenses to allegations of trademark infringement. MCCARTHY, *supra* note 23, at 23:15 (merely ornamental trademarks fail to function as marks); Hughes, *supra* note 84 (exploring the denial of trademark protection due to aesthetic functionality). We make no argument about whether semiotic utility should, as a legal matter, be categorized as a species of utility that triggers any of these invalidity doctrines. Our only point is that using words like "ornamental," "decorative," and "aesthetic" in their plain-English meaning to describe the trademarks at issue in merchandizing cases does more to obfuscate than clarify. It is semiotic meaning, not beauty, that drives the sale of most merchandizing goods.

We commonly identify ourselves by displaying emblems expressing allegiances. Our jewelry, clothing, and cars are emblazoned with inscriptions showing the organizations we belong to, the schools we attend, the landmarks we have visited, the sports teams we support, the beverages we imbibe. [T]hese inscriptions frequently include names and emblems that are also used as . . . trademarks . . .⁹¹

In trademark cases alleging infringement of merchandizing goods, courts regularly find infringement in the absence of a likelihood of core consumer confusion. According to Stacey Dogan and Mark Lemley, they have used two different rationales to reach this result.⁹² The first, now largely historical, rationale can be traced back to *Boston Professional Hockey Ass’n v. Dallas Cap & Emblem Manufacturing* and adopts a *per se* approach that “presume[s] confusion based solely on the consumer’s mental association between the trademark and the trademark holder.”⁹³ Unauthorized merchandizing goods always infringe, and trademark owners always win, even “when consumers are purchasing the products not for their guaranteed quality but to signal their support for or affiliation with the trademark holder.”⁹⁴ Whenever the brand message is affiliation with the trademark-owning institution, the sale of merchandizing goods bearing the insignia amounts to trademark infringement. The second rationale is more subtle. Courts say that they are limiting the liability of sellers of unauthorized merchandizing goods to situations in which there is core consumer confusion, but they fail to enforce the requirement to show a likelihood of core confusion with any reasonable vigor. That is, courts, “apparently moved by sympathy for the trademark holder, nominally focus on a likelihood of confusion but stretch the facts or adopt unsupported assumptions to conclude that consumers . . . will be confused.”⁹⁵

⁹¹ Int’l Order of Job’s Daughters v. Lindeburg & Co., 633 F.2d 912, 918 (9th Cir. 1980); *see also* Boston Prof. Hockey Ass’n v. Dallas Cap & Emblem Mfg., Inc., 510 F.2d 1004, 1011 (5th Cir. 1975) (arguing the point of a patch to be attached to merchandizing gear is “to show public allegiance to or identification with the teams”).

⁹² Dogan & Lemley, *supra* note 34, at 472–78.

⁹³ *Id.* at 474. In *Boston Professional Hockey*, the defendant sold unauthorized embroidered patches in the shape of the insignias of professional hockey teams that consumers could affix to their own clothing. *Boston Prof. Hockey Ass’n*, 510 F.2d at 1008. The district court ruled in favor of the defendant, concluding that, although they clearly understood that the insignias referred to hockey teams, consumers did not necessarily expect that the hockey teams were connected with the manufacture or sale of the patches. *Id.* at 1012. The Fifth Circuit reversed, holding that “[t]he confusion . . . requirement is met by the fact that the defendant duplicated the protected trademarks and sold them to the public knowing that the public would identify them as being the teams’ trademarks.” *Id.*

⁹⁴ Pa. State Univ. v. Vintage Brand, LLC, 614 F. Supp. 3d 101, 106 (M.D. Pa. 2022).

⁹⁵ Dogan & Lemley, *supra* note 34, at 477. Even if core confusion were required to show infringement in merchandizing cases, there is a “circularity” problem. Lunney, *supra* note 3, at 395–99. Trademark infringement turns on whether actual consumers are likely to be confused, and whether consumers are likely to be confused turns on what those consumers believe the law to be. If a consumer believes that the use of a trademark signifier on merchandizing goods requires the authorization of the trademark owner as a legal matter, then the unauthorized sale of merchandizing goods creates confusion, even if the consumer’s understanding of trademark law is

Cases alleging post-sale confusion skirt the requirement to show a likelihood of core consumer confusion in another way: they expand actionable confusion on two dimensions. They look to confusion, first, in the minds of observers other than the consumer who purchases the trademarked good and, second, at a time later than the point of sale.⁹⁶ For an example of actionable post-sale confusion, consider *Lois Sportswear, Inc. v. Levi Strauss & Co.*, an infringement case that Levi Strauss & Co. (Strauss) filed to protect the famous pattern of arcuate stitching that it used on the back pockets of its jeans.⁹⁷ The alleged infringer, Lois Sportswear, used the same stitching pattern on the back pockets of its jeans, but it did its best to eliminate consumer confusion at the point of sale in the minds of the purchasers with a disclaimer on labeling that was removed by consumers after purchase.⁹⁸ The court found actionable trademark infringement based on confusion in the minds of potential consumers of Strauss's jeans who saw the (not confused) purchasers wearing the defendant's jeans. Such "post-sale confusion would involve consumers seeing [defendant's] jeans outside of the retail store, perhaps being worn by a passer-by," and "[t]he confusion ... prevent[ed] in this context is that a consumer seeing the familiar stitching pattern will associate the jeans with appellee and that association will influence his buying decisions."⁹⁹ Thanks to the doctrine of post-sale confusion, Lois Sportswear is found to be an infringer even though it did not undermine the trademark owned by Levi Strauss & Co. as a vehicle for the transmission of information from the producer to the consumer who purchased the trademarked goods.¹⁰⁰

inaccurate. See Grynberg, *supra* note 88, at 84 ("The merchandising right is bad for reasons beyond its imposition of a tax on consumers. Its poor fit with trademark doctrine has negative ripple effects that are unjustified by the considerations giving rise to the right. We also gain nothing from the merchandising right.").

⁹⁶ Liability when only post-sale confusion exists is intimately connected with enabling trademarks to function as Veblen goods, a subject we discuss below. See *infra* 152–157.

⁹⁷ 799 F.2d 867 (2d Cir. 1986). For additional cases finding infringement on the basis of post-sale confusion, see *Levi Strauss & Co. v. Blue Bell, Inc.*, 632 F.2d 817 (9th Cir. 1980); *Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-Le Coultre Watches, Inc.*, 221 F.2d 464 (2d Cir. 1955); *Ferrari S.P.A. Esercizio v. Roberts*, 944 F.2d 1235 (6th Cir. 1991); *Rolex Watch U.S.A., Inc. v. Canner*, 645 F. Supp. 484 (S.D. Fla. 1986). Courts find statutory support for post-sale confusion in a 1962 amendment to the Lanham Act that deleted the requirement that protection is limited to uses of marks that are likely "to deceive purchasers." *Ferrari S.P.A. Esercizio*, 994 F.2d at 1244.

⁹⁸ *Id.* at 872; cf. *Home Box Off., Inc. v. Showtime/The Movie Channel Inc.*, 832 F.2d 1311, 1315 (2d Cir. 1987) ("In many circumstances a disclaimer can avoid the problem of objectionable infringement by significantly reducing or eliminating consumer confusion by making clear the source of a product."). To negate point-of-sale confusion the disclaimer must be effective. Courts differ in their approaches to determining the efficacy of disclaimers. MCCARTHY, *supra* note 23, at 23:15 (collecting cases). Many of these approaches cast doubt on the efficacy of disclaimers, but the empirical evidence backing up this skepticism is suspect. Barton Beebe, Roy Germano & Joel Steckel, *Disclaimers of Affiliation Can Dispel Consumer Confusion: Evidence from Two Survey Experiments* (August 21, 2024), <https://ssrn.com/abstract=4934563>.

⁹⁹ *Lois Sportswear*, 799 F.2d at 872–73.

¹⁰⁰ Mistaken impressions about quality among plausible future consumers may justify infringement holdings in some post-sale confusion cases when operating within the producer-communication

Although it often goes unremarked, cases centered on post-sale confusion not only skirt the requirement to show core consumer confusion, but they also usually involve trademarks that have value as vehicles for inter-consumer communication. The only plausible explanation for why competitors would copy a trademark without authorization and sell a good bearing the trademark with a disclaimer is that the trademark is at least part of the good that consumers desire.¹⁰¹ More specifically, Strauss’s pocket stitching possessed intrinsic value because it allowed purchasers to send a signal to other consumers. Wearing Strauss’s jeans conveyed a brand message in the 1980s.¹⁰²

Finally, counterfeiting is hard core or first-degree trademark infringement.¹⁰³ Proving a counterfeiting cause of action requires two showings. First, the defendant must affix a counterfeit mark to the same class of goods or services as the owner of a registered mark.¹⁰⁴ Second, the defendant must knowingly offer to sell, distribute, manufacture, or import those goods or services.¹⁰⁵

Like civil trademark infringement, counterfeiting requires, in theory, proof that the defendant’s use was likely to cause consumer confusion.¹⁰⁶ When such a likelihood of confusion exists, there is no question that anti-counterfeiting causes of action are justified because they increase the reliability of producer-to-consumer communication. However, in many counterfeiting cases, the trademark owner prevails even though the direct purchaser is not confused. The low price, the location of the sale, or a disclaimer

theory. If the good bearing the allegedly infringing trademark is poorly made, then members of the public may see the deteriorating good, mistakenly believe it to be a good manufactured or sponsored by the trademark owner, draw a negative inference about the quality of the trademark owner’s goods, and elect not to purchase the trademark owner’s goods in the future. When this chain of events comes to pass, the defendant’s conduct does interfere with producer’s communication to potential consumers regarding product quality. This chain of events, however, is less likely to come to pass than it initially may seem. Kal Raustiala & Christopher Jon Sprigman, *Rethinking Post-Sale Confusion Commentary*, 108 TRADEMARK REP. 881, 888–89 (2018). Furthermore, courts regularly stretch post-sale confusion liability beyond what is necessary to prevent the garbling of the trademark owner’s speech. For example, courts often decide post-sale confusion cases without making any findings about whether it is potential customers, rather than the general public, that is confused or whether the defendant’s good is of poor quality. In fact, in *Lois Sportswear*, the court noted that the defendant’s jeans were “designer jeans” of a high enough quality to constitute a different market from the plaintiff’s jeans, and yet it still found actionable post-sale confusion. *Lois Sportswear*, 799 F.2d at 874.

¹⁰¹ See *supra* Section I.A.2.a (discussing trademarks-as-goods). There could be reasons other than consumer expression that turns a trademark into a good, e.g., it could protect preferred aesthetics or functionality. See *supra* note 84.

¹⁰² Bone, *supra* note 3, at 610–11.

¹⁰³ MCCARTHY, *supra* note 23, at 25:10. Counterfeiting results in criminal penalties and enhanced civil damages above what results from simple trademark infringement. 16 U.S.C. § 1117(b) & (c).

¹⁰⁴ A mark is “counterfeit” if it involves “a spurious mark which is identical with, or substantially indistinguishable from, a registered mark.” 15 U.S.C. § 1116(b)(i). A spurious mark is one that is false or inauthentic. *United States v. Petrosian*, 126 F.3d 1232, 1234 (9th Cir. 1997).

¹⁰⁵ 18 U.S.C. § 2320 (imposing liability for those that “traff[ic] in goods or services and knowingly uses a counterfeit mark on or in connection with such goods or services”).

¹⁰⁶ 15 U.S.C. § 1114; 18 U.S.C. § 2320(f)(1)(A)(iv). See also *Arcona, Inc. v. Farmacy Beauty, LLC*, 976 F.3d 1074, 1078 (9th Cir. 2020) (“The plain language of the statute thus shows that “likely to cause confusion” is a requirement for a counterfeiting claim.”).

often alerts the purchaser that the product is not endorsed, manufactured, or affiliated with the owner of trademark. (Does anyone believe that a purse purchased for twenty dollars on Canal Street is a genuine good?) As in post-sale confusion cases, the actionable confusion that the courts identify is by parties other than the purchaser at a time after the purchase. In sum, once again, counterfeiting liability exists even though there is no interference with producer-to-consumer communication and thus no harm under the traditional, producer-centric theory of trademark law.¹⁰⁷

For example, in *United States v. Torkington*, a private investigator for Rolex went to a flea market.¹⁰⁸ He purchased several fake Rolex watches for twenty-seven dollars. It was undisputed that the investigator knew the watches were fake.¹⁰⁹ The district court dismissed the criminal charges, finding that the government failed to prove confusion given the lack of confusion by the investigator.¹¹⁰ The appellate court reversed, holding that criminal liability could attach so long as a member of the purchasing public might be confused.¹¹¹

In addition, as in post-sale confusion cases, the trademarks at issue in counterfeiting cases often carry brand messages and are valuable for consumer-to-consumer communication. Again, the simplest reason why consumers would purchase goods knowing them to be counterfeit is because the trademark is a good that consumers desire to use for communicative purposes.¹¹²

Trademark scholars have been critical of the courts' expansive trademark protection in these cases. Grossly summarized, the critique deploys two arguments. First, given the absence of core consumer confusion, this expansive trademark protection does not generate any benefits under the classic producer-communication account of trademark theory. The defendants' conduct simply does not interfere with producer-to-consumer communication.¹¹³ Second, this expansive trademark protection imposes

¹⁰⁷ The same quality-related argument made in the context of post-sale confusion can also gain traction in some counterfeiting cases. See *supra* note __ and accompanying text. However, proving that the defendant's goods are low-quality is not a required element of criminal or civil liability for counterfeiting. *United States v. Farmer*, 370 F.3d 435, 441 (4th Cir. 2004) ("It is no defense for Farmer to claim that his shirts were of the same quality as shirts assembled under Nike's or Hilfiger's control: the whole point is that deciding whether shirts pass muster is reserved to Nike and Hilfiger, not to Farmer.").

¹⁰⁸ 812 F.2d 1347 (11th Cir. 1987).

¹⁰⁹ *Id.* at 1349.

¹¹⁰ *Id.* at 1350.

¹¹¹ *Id.* at 1354. See also *Wang v. Rodriguez*, 830 F.3d 958, 962 (9th Cir. 2016) ("[T]he mistake or confusion need not be on the part of the buyer of the counterfeit goods."); *United States v. Yamin*, 868 F.2d 130, 133 (5th Cir. 1989) (same); *United States v. Gantos*, 817 F.2d 41, 42 (8th Cir. 1987) ("At the time of each sale Gantos did not represent the watches to be genuine Rolex. Indeed, Gantos affirmatively told the agent that the watches were Rolex copies.").

¹¹² See *supra* notes 101–102 and accompanying text.

¹¹³ *Dogan & Lemley*, *supra* note 34, at 478–81; *Lemley*, *supra* note 27, at 1706; *Lemley & McKenna*, *supra* note 3, at 445 n.125; *Litman*, *supra* note 82, at 1729–30; *Lunney*, *supra* note 3, at 372 (arguing that "property-based trademark ... lacks the offsetting efficiency advantages associated with deception-based trademark's quality control and certification functions").

access costs on consumers. When trademarks are themselves the goods that consumers value, granting exclusive rights to trademark owners creates monopoly power, and trademark owners price some consumers out of the market.¹¹⁴ To explain why courts are drawn to finding infringement in the absence of a likelihood of core consumer confusion, trademark scholars suggest that the courts have fallen under the seductive sway of a “property” conception of trademarks, or specious “if value, then right” reasoning, that indefensibly privileges producers at the expense of consumers and society.¹¹⁵

We agree with this argument, as far as it goes. Trademark rights do not improve producer-to-consumer communication in the absence of core consumer confusion. They do impose access costs on consumers who value the trademarks themselves as a goods to be owned and displayed, rather than simply as signals of source. “If value, then right” reasoning is specious. Our view, however, diverges in that we also seek to consider the benefits that exclusive rights generate for trademark-enabled consumer-to-consumer communication. Granting trademark owners exclusive rights in the absence of core consumer confusion can benefit not only producers but consumers, too, by improving the clarity of trademark-enabled, consumer speech.

¹¹⁴ Dogan & Lemley, *supra* note 34, at 481–84 (“a merchandising right would . . . inevitably increase[] the cost of . . . products”); Paul Heald, *Filling Two Gaps in the Restatement (Third) of Unfair Competition: Mixed-Use Trademarks and the Problem with Vanna*, 47 S.C.L. REV. 783, 787–88 (1996) (arguing that exclusive rights to merchandizing goods mean that “consumers will pay higher prices than the would in the presence of open competition”); Lemley, *supra* note 27, at 1706; Lunney, *supra* note 3, at 372 (“[P]roperty-based trademark appears presumptively anticompetitive—it generates market power and associated efficiency losses without the offsetting efficiency gains that are thought to justify deception-based trademark.”).

¹¹⁵ Dreyfuss, *supra* note 30, at 405; *see also* Bone, *supra* note 3, at 617; Brown, *supra* note 24, at 1199–2000; Lemley, *supra* note 29, at 1687–88, 1693–97; Lunney, *supra* note 3, at 371–72. A common rhetorical presumption in intellectual property is that the more squarely one views an exclusive right as a property right, the stronger that right is or should be. *See, e.g.,* Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1030 (2005) (discussing an externality-reducing theory of property); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873 (1997) (arguing that copyright was expanding due to a strand of law-and-economics scholarship pushing for the proprietization of information). The best explanation for why courts have come to grant exclusive rights even when evidence of consumer confusion is tenuous is perhaps a moral-rights theory of just deserts—one should not be able to reap where one has not sown—and most commentators reject it. Bone, *supra* note 3, at 617; Dreyfuss, *supra* note 30, at 403–07; Rochelle Cooper Dreyfuss, *We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent - Deconstructing the Lanham Act and Right of Publicity*, 20 COLUM.-VLA J.L. & ARTS 123, 142 (1995); Lunney, *supra* note 3, at 439–40. *See generally* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540 (1993) (discussing the invocation of Lockean labor theory to justify intellectual property rights). *But cf.* Litman, *supra* note 82, at 1730–31, 1734 (arguing that, if a moral-rights argument is to carry the day, then granting producers exclusive rights is inappropriate because consumers should be viewed as co-creators of trademark value). A small minority of commentators have offered justifications for exclusive trademark rights in the absence of consumer confusion. Bone, *supra* note 3, at 619–21 (supporting a narrow merchandizing right based on an incentive-to-create justification); Denicola, *supra* note 90, at 637–41 (positioning a merchandizing right as a solution to consumer overexposure to a trademark).

II. THE CLARITY BOOST

The previous Part revealed that trademark commentary has identified the access costs that trademark protection—and protection in the absence of a likelihood of consumer confusion in particular—creates for consumers who use trademarks to express their self-identities. While fully agreeing that these access costs exist, this Part argues that this commentary has only considered half of the picture. Granting trademark protection to producers can also benefit expressive consumers by enabling the most passionate among them to convey the intensity of their affiliation with a brand message with greater clarity. This clarity boost means that the impact of trademark protection on trademark-enabled consumer expression should not be viewed as a categorical cost. Rather, it hinges on a clarity/access tradeoff.

The argument proceeds as follows. Part II.A lays out the intuition that animates the clarity boost. Part II.B develops a formal model of the clarity/access tradeoff that we use to investigate one of the tradeoff's most intriguing features, namely the extent to which a social planner can rely on producers acting in their own profit-motivated self-interest to improve the welfare of consumers who use trademarks for expressive purposes. Part II.C contextualizes the clarity boost within prior trademark scholarship.

A. *Reference Groups and Trademark Meaning*

We make four assumptions on our way to identifying the clarity boost. First, we assume that some trademarks signify brand messages, and some consumers display these trademarks to construct and announce their identities. The content of this brand message could be, for example, “I like rock climbing,” “I like deep-sea fishing,” or “I am high-energy and adventurous.” We assume that, for simplicity, the trademark owner initially determines the content of the trademark's brand message through advertising¹¹⁶ and that this content remains fixed over time.¹¹⁷

¹¹⁶ See *supra* notes 60–65 and accompanying text (outlining McCracken's theory of meaning transference). This assumption of producer-made meaning is only for simplicity. Whether a producer welds brand messages onto trademarks through advertising or meaningful words and symbols bubble up through dispersed cultural practices is relevant in some discussions about the justification of trademark scope. For example, it matters if the focus is on “property” theories of trademarks adopting a reap-what-you-sow stance, see *supra* note 115 and accompanying text, or if trademark owners argue that they should get expansive protection because they need incentives pay for the advertising needed to weld brand messages to trademarks. However, focusing exclusively on the clarity boost, the difference between producer-created and socially created brand messages is not relevant to the justification for more expansive trademark rights. Expressive consumers who use meaningful marks created through both processes can benefit from greater clarity.

¹¹⁷ This assumption of the brand message being fixed—or, less rigidly stated, that significant changes in the brand messages that trademarks convey are not persistent and pervasive—is a limiting assumption in our model of the clarity boost that fails to capture the full complexity of how trademarks operate in consumer-to-consumer communication in the wild. The contents of brand messages do change over time for reasons that are beyond the control of trademark owners. See *supra* notes 66–73 and accompanying text. A concerned consumer may criticize a trademark owner's practices or positions on social issues. A brand parodist may catalyze a shift in a brand message. See *infra* notes 142–146 and accompanying text. Another company may tarnish a non-famous brand. Cf. *infra* note 176 (discussing dilution by tarnishment). Given that some degree of

Second, we assume that consumers can subscribe to a brand message with different degrees of intensity. That is, not all consumers' personalities resonate with a trademark's brand message to the same extent. Some consumers are low-intensity consumers who enjoy rock climbing or deep-sea fishing, but not much more than they enjoy a bevy of other activities. That is, they have an attitude towards rock climbing or deep-sea fishing that is just north of "meh". Other consumers, in contrast, are high-intensity consumers. These are the consumers who have rock climbing, deep-sea fishing, or adrenaline-fueled activities in general deeply embedded into their personalities.¹¹⁸

Third, we assume a trademark conveys not only brand message, but that it also conveys information about the intensity with which a consumer subscribes to the brand message. Here, we assume that the intensity information that a trademark conveys is not determined in its entirety by producers. Rather, we assume that consumers "leave their mark, their fingerprints, on" the brand message that a trademark conveys in consumer-to-consumer communication.¹¹⁹ We assume that the intensity of a mark's meaning arises from consumers paying attention to other consumers who have already adopted a brand—a group that marketing scholars refer to as the *reference group*¹²⁰—and, more specifically, to the personal characteristics of those consumers. The intensity with which a trademark conveys a brand message is determined by the intensity with which consumers who are already sporting the trademark affiliate themselves with the brand message. Consumers tweak their understandings of the intensity with which a trademark conveys the brand message to match their perception of the average intensity with which the people that they observe in the reference group subscribe to the brand message. If only fanatical rock climbers sport a trademark, the mark signifies a high-intensity attachment to the brand message. However, when more low-intensity consumers display the mark, the lower the average intensity within the reference group, and thus the lower the intensity of the affiliation with the brand message that the trademark conveys. Here, meaning transference occurs not when producer-created

stability in the content of a brand message is a necessary precondition for a trademark to convey the intensity of an adopter's passion for the brand message with clarity, someone who prizes clarity above all else might advocate for laws that stabilize brand meaning or, at least, give trademark owners in greater power to prevent shifts in brand meaning. We, however, decline to adopt that position.

¹¹⁸ Some consumers are also negative-intensity consumers who loath rock climbing or deep-sea fishing. These consumers are not relevant to our analysis.

¹¹⁹ O'Guinn & Muñoz, Jr., *supra* note 15, at 189.

¹²⁰ That is, "the symbolic meanings of brands [is] derived in part from cultural sources of meaning, such as . . . reference groups. . . ." Jennifer Edson Escalas & James R. Bettman, *Self-brand connections: The role of reference groups and celebrity endorsers in the creation of brand meaning*, in HANDBOOK OF BRAND RELATIONSHIPS 107, 107 (Deborah J. Macinnis, C. Whan Park, & Joseph Priester eds., 2009). *See also* [cites]. More specifically, we borrow the marketing literature's concept of *value-expressive reference groups*. William O. Bearden & Michael J. Etzel, *Reference Group Influence on Product and Brand Purchase Decisions*, 9 J. CONS. RSCH. 183, 184 (1982). Reference groups come in many other forms as well. Generally speaking, "a reference group is a person or group of people that significantly influences an individual's behavior." *Id.* Reference groups can exert different types of influence. For example, *informational* influence helps individuals to make more informed purchasing decision, and *utilitarian* influence results from individuals seeking to achieve rewards or avoid punishments. *Id.*

advertising images rub off on the content brand message, as it did in McCracken's schema, but when characteristics of reference-group members rub off on the intensity with which the trademark conveys its brand message.¹²¹ "That is, associations about reference groups become associated with brands those groups are perceived to use"¹²² Where consumers' use of brands to announce their identities presumes that there is a crowd watching any given consumer,¹²³ it is the inverse relationship that is at issue here: any given consumer's understanding of a trademark's meaning arises from watching the crowd.¹²⁴ Importantly, reference group members may not be actively trying to convey information about the degree of the fit between a brand message and their personalities. They may just passively display a trademark, enabling other consumers to draw their own conclusions.

Fourth, and finally, we assume that consumers care about being able to signal their intensity type in a clear manner. The clarity of this signal hinges on the variation that exists within the intensities of the consumers that make up the reference group. If the intensity-types in the reference group cluster tightly together, the mark conveys its intensity with great clarity. Alternatively, if the intensity-types in the reference groups are dispersed across a larger portion of the intensity spectrum, the mark conveys its intensity with less clarity.

The consumer may care about the clarity of the intensity signal for a number of reasons. Clarity may simply enable the consumer to more perfectly express their identity to others. Alternatively, the value of clarity to a consumer might be more instrumental. Clarity may enable the consumer to be more discriminating in choosing whom to meet and interact with. By facilitating a more targeted search, finely tailored reference groups lessen the cost of locating a fellow traveler. For example, consider the thoughts of a commentator in an online forum:

I can recall a time I went into an Urban Outfitters to get a couple of plain t-shirts. When I went up to the checkout counter, the girl who worked there had on a Led Zeppelin shirt. Sweet! I thought. It just so happened that I was deep in my Zeppelin phase at the time and couldn't stop listening to I, II, and IV. "What's your favorite album?" I asked. And she said, "Oh, I'm not sure. I don't really listen to them. My dad just had this shirt, so I took it from him." You can imagine my

¹²¹ McCracken's theory of meaning transfer posits a dyadic, marketer-consumer relationship. Consumers operate in isolation from one another, and marketers might as well be sending their advertisements in tight-beam transmissions directly into individual consumers' minds. To appreciate another point of weakness in producers' control over trademark meanings, as well as the full extent of consumers' impact on brand messages, it is critical to pay attention to interactions among consumers. O'Guinn & Muñiz, Jr., *supra* note 15, at 173 (critiquing the presumption of a dyadic producer-consumer relationship in some brand scholarship).

¹²² Jennifer Edson Escalas & James R. Bettman, *You Are What They Eat: The Influence of Reference Groups on Consumers' Connections to Brands*, 13 J. CONS. PSYCH. 339, 339 (2003); *see also* Jennifer Edson Escalas & James R. Bettman, *Self-Construal, Reference Groups, and Brand Meaning*, 32 J. CONS. RSCH. 378 (2005).

¹²³ *See supra* notes 171–59 and accompanying text.

¹²⁴ [check] Escalas & Bettman, *supra* note 120, at 107.

disappointment.... [P]eople who wear shirts of bands they don't know[—i]t's annoying, frustrating, and reduces something genuinely meaningful to someone to just an image.¹²⁵

Or, if consumers are predisposed to interact with people whose identities diverge from their own, more finely tailored reference groups can, alternatively, lessen the cost of locating a traveler with whom one has little in common.

With these assumptions in place, appreciating the clarity boost that follows from granting producers exclusive rights to their trademarks requires only a small step. When trademarks are the goods that consumers desire, trademark owners will act like monopolists and increase price.¹²⁶ Consumers who are less committed to the brand messages that trademarks convey will be priced out of the market. The price increase culls the low-intensity consumers out of the market of adopters, and thus out of the reference group. The smaller the reference group and the more the intensity-types of reference group members cluster around the high-intensity end of the spectrum, the more clearly the trademark allows passionate adopters to signal their passion. By pricing low and middling identity-type consumers out of the market, the monopolist reduces the spread in the identity types of the reference-group members and increases the clarity of the trademark meaning for consumers who have high enough identity types that they are willing to pay the higher price to sport the trademark.¹²⁷

In other words, consumers who wear a trademark but who only subscribe to the brand message with a “meh” enthusiasm generate negative externalities that are borne by the more fanatical trademark adopters. Specifically, these moderate-intensity consumers decrease the ability of the gung-ho consumers to accurately convey information about themselves to other consumers. The “meh” consumers pollute the reference group, thwarting the passionate consumers’ ability to clearly signal their identities.

Iconix Luxembourg Holdings SARL v. Dream Pairs Europe Inc.—a trademark infringement case premised on post-sale confusion that is currently before the Supreme Court of the United Kingdom—offers an example of the clarity boost in action and how it might provide a justification a finding of infringement in the absence of core consumer confusion.¹²⁸ The plaintiff’s trademark is the double diamond mark of the Umbro

¹²⁵ <https://www.quora.com/Do-you-just-hate-it-when-a-person-wears-band-shirts-of-bands-that-they-dont-listen-to>

¹²⁶ See *supra* Section I.B.2.a. But cf. Denicola, *supra* note 90, at 640–41 (suggesting that consumer demand for meaningful symbols is elastic and that competition between symbol providers restrains price increases).

¹²⁷ Higher prices will not cause all low-intensity types to leave the market. Some low-intensity consumers may have enough money that they are indifferent to the price increase. Other low-intensity consumers may have idiosyncratic attachments to the brand. See *supra* note 71 accompanying text. With that said, as long as some low-intensity types leave the market, the clarity of the mark will improve.

¹²⁸ *Iconix Luxembourg Holdings SARL v. Dream Pairs Europe Inc.* [2024] EWCA Civ. 29.

sportswear brand.¹²⁹ The defendant’s mark is the logo of Dream Pairs brand, a stylized “P” within a “D.”



The trial court concluded that there was no likelihood of consumer confusion at the point of sale. The court reasoned, in part, that the trademarks were graphically different. The plaintiff’s mark is “a pair of sideways-sitting stretched-out diamonds,” whereas the defendant’s mark “presents as a tilted, broken, slightly rounded-off square with a P-like form in the middle.” This lack of similarity cut against a likelihood of consumer confusion at the point of sale. In addition, the court found that the Amazon webpage through which the Design Pairs shoes were sold provided enough information about source (e.g., Design Pairs, not Umbro) to weigh against consumer confusion at the point of sale. The court of appeals did not disturb the district court’s finding.¹³⁰

The bulk of the contention lay in the issue of post-sale confusion. Iconix argued that, after sale when Design Pairs shoes are worn, not only will the shoes be “muddy,” obscuring the differences between the marks, but the viewing public will look down on the shoes, leading to a perspectival foreshortening of the Design Pairs mark into a set of nested diamonds and a great deal of similarity with the Umbro mark. The trial court rejected this basis for finding post-sale confusion, but the appellate court reversed and held Design Pairs liable for trademark infringement, finding that foreshortening represented “a realistic and representative scenario for assessing the post-sale impact of the use of the [the Umbro trademark] upon the perception of the average consumer.”¹³¹

In sum, *Iconix* offers an example of an infringement allegation in which there is no core consumer confusion, yet that is nonetheless actionable under a theory of post-sale confusion. (Some readers may disagree with the conclusion on similarity of the marks when viewed by post-sale observers that the appellate court reached, but we accept it for this analysis. The analysis would be the same if Design Pairs used a mark identical to Umbro’s mark and a clear disclaimer dispelled confusion at the point of sale.) Following the conventional argument in trademark commentary, an infringement holding is not good policy: granting exclusive rights does not improve producer-to-consumer communication, and it imposes costs on consumers who are unable to purchase a shoe with the Design Pair emblem. However, the clarity boost provides a possible counterargument.

¹²⁹ United Kingdom Registered Trade Mark Number 991668. Trademark number 903266459 was also at issue.

¹³⁰ The appellate court questioned part of the reasoning that the district court employed to find a lack of visual similarity, noting that the sustainability of the reasoning “is a nice question which it is unnecessary to resolve.” Para. 27.

¹³¹ Para. 34.

Umbro is a well-established brand in England with a long history of providing uniforms (“kits”) and shoes for athletes and teams. Its trademarks have developed a brand message. Iconix’s goods are not only for players who want good performance but for dedicated fans who want to signal affiliation as well:

Whether it’s football, futsal or rugby, come rain or shine, relegation or promotion, you’ll find the double diamond. We make the shirts, shorts, boots, shin pads, goalie gloves, and whatever else it is you need to succeed on the pitch or off it. For the players. For the fans.

Wear with pride. Play with passion.¹³²

Furthermore, it is plausible to imagine that football and rugby fans value being able to signal the intensity of their passion for the game. If this is true, then exclusive rights generate a clarity boost.

In the absence of exclusive rights, the Umbro trademark will be seen on a larger set of consumers, some of whom purchased goods from Iconix and some of whom purchased goods from Design Pairs. Presuming Design Pairs shoes are sold at a lower price or, if not, that the Design Pairs brand message diverges from the Umbro brand message, more consumers who have a “meh” attitude toward Umbro’s brand message will be perceived to be sporting Umbro’s trademark, and thus be perceived as part of the reference group. These less-than-passionate adopters impose a negative communication externality on the true fans of the game.¹³³

Now assume trademark protection for Iconix that extends far enough to label Design Pairs an infringer. The causal sports fan who is responsible for the negative externalities decides to purchase differently branded gear, rather than pay for gear bearing the Umbro mark. Only true football (or futsal or rugby) enthusiasts committed to the lifestyle exalted by the brand remain as bearers of the mark, i.e., as members of the reference group. In sum, when producers possess exclusive rights, our true sports enthusiasts can use the mark to more clearly communicate information about the full intensity of one facet of their personality. The higher price culls the reference group of consumers to those most passionate about what the brand message conveys. This culling, in turn, feeds back into the brand’s signal quality, creating clearer channels of communication among passionate consumers.

Importantly, the value that consumers derive from greater clarity is, in part, dependent on the trademark and, yet more so, brand message at issue. For some brand messages, consumers derive significant utility from being able to accurately signal their identity types. Trademarks involving brand messages about lifestyle—rock climbing, deep-sea fishing, a rebel streak—are good examples.¹³⁴ Section III.A below addresses

¹³² <https://www.umbro.com/en/our-story/>. *But cf. id.* (“Nobody owns it. It’s where we all belong.”).

¹³³ *Cf.* Shoaib M. Farooq Padela, Ben Wolliscroft & Alexandra Ganglmair-Wooliscroft, *Brand Externalities: A Taxonomy*, 41 J. MACROMARKETING 356 (2020) (developing an extensive taxonomy of distinct brand externalities).

¹³⁴ A lifestyle brand is one that embodies a passion or set of lifestyle choices of the consumer. Stefania Saviolo & Antonio Marazza, *LIFESTYLE BRANDS: A GUIDE TO ASPIRATIONAL MARKETING* 48 (2013) (“Lifestyle Brands [make consumers think] ‘when I buy or use this brand, the type of people I relate to are’”); John E. Armenta, *Patriotism as a Lifestyle (Brand)*, 7 J. VET. STUD.

factors that are indicative of trademarks in which consumers are likely to value clarity in greater detail.

B. Modeling the Clarity/Access Tradeoff

The restriction of the market for communicative trademarks-as-goods does not yield an unadulterated benefit for consumers. As explored in Section I.B.2, it also generates costs, as the trademark owner prices some consumers out of the market. The welfare impact of granting trademark owners exclusive rights to trademarks-as-goods, even in the absence of a likelihood of consumer confusion, implicates a clarity/access tradeoff.

This section develops a model of the clarity/access tradeoff. In Section II.B.1, the goal is simply to formalize that both clarity benefits and access costs increase with the extent of the market restriction, and also that the size of the clarity boost, and thus the optimal resolution of the tradeoff, depends on the extent to which consumers value clarity. In Part II.B.2, the model allows us to dig deeper into a curious aspect of the clarity boost: the clarity boost relies on producers following their own self-interest—namely acting like monopolists and raising price—to achieve a benefit that consumers cannot achieve on their own—namely communicating more precisely about their intensity types and thus expressing their self-identities more clearly. The model reveals that producer and consumer welfare are not completely aligned, and that the social planner who uses the trademark regime to achieve clarity boosts must choose between the better of two less than ideal choices.

1. The Importance of the Value of Clarity

The model adopts the four assumptions outlined in the previous section. We assume that trademarks convey brand messages created and fixed by trademark owners and that consumers vary in the extent to which those brand messages are integrated into their personalities. We capture the integration of the brand message into a consumer's personality with the variable θ , which we call the consumer's identity value or type and which varies between 0 and 1. When θ is low, and it approaches 0, the consumer's identity has little to nothing to do with the brand message. Low-type consumers have an attitude towards rock climbing or deep-sea fishing that is just north of "meh". When θ is high, and it nears 1, the consumer's identity is on all fours with the brand message. High-type consumers live and die for rock climbing, deep-sea fishing, or adrenaline-fueled activities in general. To make matters simple, we assume that θ is uniformly distributed over the 0 to 1 interval. In practice, this means that each identity value is equally likely.

In addition to conveying brand messages, we also assume that trademarks signal the intensity with which consumers embrace brand messages. A trademark could convey that the wearer has a lower-value identity type of 0.6 (a moderate devotion to the brand message), or it could convey that the wearer has a high-value identity type of 0.9 (a strong devotion to the brand message). Finally, we posit that trademark clarity

72 (2021) ("Lifestyle brands typically refer to companies that attempt to position themselves in their respective markets as unique by focusing on an idealized lifestyle of their customers and an imagined community made of these customers.").

measures the extent to which the trademark accurately conveys the identity-value of the wearer. A trademark could convey that the wearer’s identity type falls somewhere within a range of 0.4 to 1 (a relatively fuzzy signal), or it could convey that the wearer has an identity type between 0.8 and 1 (a relatively clear signal).

Furthermore, we assume the characteristics of reference group members determine both the intensity and the clarity with which a trademark conveys its brand message. More formally, to measure intensity and clarity, we partition the one-dimensional space of consumer types into two groups as illustrated in Figure 1: first, those in the blue box that display the mark—that is, the reference group—and, second, those that do not. We assume that the consumers with the highest θ ’s will display the trademark and be part of the reference group, and that, as θ decreases, consumers will at some point stop displaying the trademark. We denote that point as x .

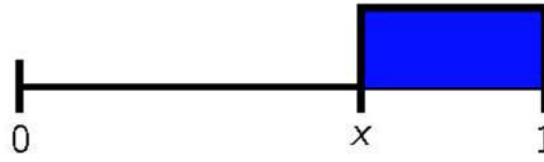


Figure 1: Consumer Partition

The intensity of a trademark’s brand message is the average of the θ ’s of the consumers in the reference group. This is the mid-point of the blue box, or $\frac{1+x}{2}$. The clarity of the trademark’s brand message depends on the size of the interval of the consumer types who display the mark. This size is $1 - x$ or the width of the blue box in Figure 1. The larger the blue box, the fuzzier the signal the trademark conveys. Thus, x measures clarity, where the clarity of the trademark’s signal increases as x grows larger and the box grows smaller.

For example, if everyone displays a trademark ($x = 0$), the blue box is large. The reference group has maximum variation in consumer types and the trademark has minimum clarity. The intensity of the trademark’s brand message is 0.5, but observers have little confidence that any particular wearer has an identity type that is close to 0.5. If x approaches 1 and only the most passionate consumers display the trademark, the reference group has minimum variation, and the trademark has maximum clarity. Everyone wearing the mark will have an identity-type that is close to 1.

In line with these assumptions, we model the consumer’s benefit from display of the trademark as having two parts. The first term is the consumer’s identity type. The larger the value of θ , the greater the consumer utility from display. A true devotee of rock climbing derives more benefit from displaying a trademark that conveys an “I like

rock climbing” brand message than a casual rock climber does. This benefit is independent of the size of reference group.¹³⁵

The second term is the *clarity boost*. It reflects that the consumer benefits from greater precision in the trademark’s brand message. Formally, we operationalize the clarity boost as $x\theta\alpha$. The x variable tracks the variation of the identity types of the members of the reference group. The larger x is, the less variation and the clearer the signal sent by the reference group. The presence of θ means consumers with more passion for the brand message—those with a higher type—reap larger gains from greater clarity.¹³⁶ Someone who is passionate about rock climbing derives more utility from announcing the full intensity of the rock-climbing facet of their identity and interacting with other intense rock climbers than a consumer who has a “meh” attitude toward rock climbing does. Finally, α is a parameter that varies from mark to mark and that captures the extent to which consumers value clarity in a mark’s ability to convey information about their intensity types. For some brand messages, α is high, and consumers derive significant utility from being able to accurately signal their identity types. For other brands, however, α is low, and clarity matters less.

Putting all of this together, a consumer of type θ obtains the following utility from displaying an identity-relevant trademark, where p is the price paid for the product:

$$U(\theta) = \theta + x\alpha\theta - p$$

Based on the price, each consumer decides whether to purchase or not. Without legal rules protecting a trademark owner’s rights, competition drives the price down to the marginal cost of production, which we normalize to be zero. With protection, the mark-holder acts as a monopolist in setting the price.

We explore the model’s implications under two conditions. First, we present a benchmark in which consumers do not care about trademark clarity. The story here is the story that scholars already tell: trademark protection imposes access costs on consumers who seek to use trademarks to construct their self-identities, without any off-setting benefits. Second, we assume that consumers do value trademark clarity. Here granting exclusive rights to trademark owners generates the clarity boost and improves welfare, but only when consumers place a high value on trademark clarity.

a. Clarity Does Not Matter

¹³⁵ In other words, we assume that low θ consumers value publicly affiliating themselves with a brand message less than high θ consumers do. An alternative model, which we think is not as realistic, is that consumers of all identity-types value publicly affiliating themselves with a brand message equally, so long as they can also convey their identity type. Under this model, producers would introduce differentiated lines of trademarks for any given personality attribute. They would market a trademark that means “I enjoy, but am almost indifferent to, surfing” to low intensity-type consumers, a trademark that means “I like surfing, but it doesn’t rule my world” to mid intensity-type consumers, and a trademark that means “I think surfing rocks” to high intensity-type consumers.

¹³⁶ Known as the single crossing property, this is a common assumption in economic models. DREW FUDENBERG & JEAN TIROLE, *GAME THEORY* 259 (1991).

Suppose that consumers do not value the clarity in communication. That is, assume that $\alpha = 0$. In that case, the second term of the consumer's utility is zeroed out, and the consumer's gross benefit from purchasing the product is their type less the price paid:

$$U(\theta, p) = \theta - p$$

The consumer will buy and display the trademark if their type-dependent valuation of using the trademark for identity construction exceeds the price. Welfare for an individual of type θ is defined as the sum of the consumer surplus and the producer's profit. Normalizing the cost of production to 0, the producer obtains a profit of p from the sale. The welfare from an individual's purchase of a good is thus $\theta - p + p$, or θ —the consumer's gross benefit from displaying the mark.¹³⁷

Figure 2 plots welfare for each consumer type θ . Welfare is higher for consumers with higher identity types. To calculate total welfare, we add up the welfare of all consumers displaying the brand. Since, in this benchmark, consumers do not care about the contours of the reference group, welfare is highest when everyone uses the mark. Moreover, if the law denies trademark protection, competition drives the price to marginal cost (normalized to zero) yielding the efficient outcome. Graphically, the green area represents the welfare associated with the denial of trademark protection.

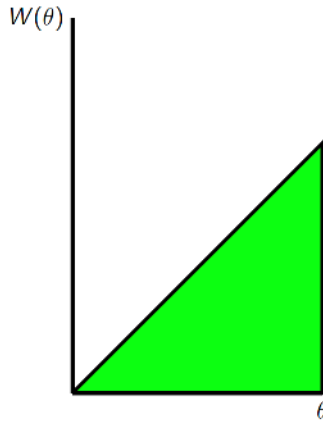


Figure 2: *Welfare Maximizing Market Coverage* ($\alpha = 0$)

¹³⁷ Not much changes if the cost of production is greater than 0. Let c be the cost of producing a unit. Profit from a sale of one unit is then $p - c$. The welfare associated with a sale sums profit and consumer utility. It is $\theta - p + p - c = \theta - c$. To maximize welfare, consumers should buy when their valuation exceeds the cost of production.

In contrast, if granted exclusive rights, the trademark owner picks the price to maximize profit. As illustrated in Figure 3, simple math reveals that the profit maximizing price results in a market restriction of $\frac{1}{2}$.¹³⁸ The monopolist prices any consumer type less than $\frac{1}{2}$ out of the market. Intuitively, some low identity-type consumers who want to use a trademark elect not to do so, even though they would have used the trademark in a competitive market in which price equaled the marginal cost of production. From an efficiency standpoint, this denial of access results in a loss—namely the dotted area in Figure 3—without any offsetting benefit.

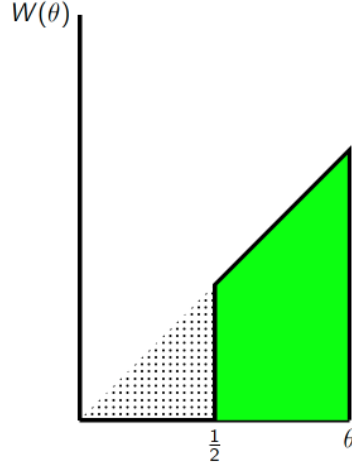


Figure 3: Welfare Under Monopoly ($\alpha = 0$)

b. Clarity Does Matter

Consider now a market where consumers value clarity. That is, in the terms of the model, take a market in which α is greater than zero. Initially, take a world without property rights. Competition drives the price to 0—our normalized cost of production. Everyone with a θ greater than 0 elects to display the mark. This means that $x = 0$, and the mark lacks clarity, regardless of how much consumers value it. This again knocks out the second term of the consumer utility function, reducing the utility to

¹³⁸ For any price p , a consumer buys if $\theta > p$. Like in the undergraduate monopoly analysis, we might think of the monopolist selecting the size of the market, the quantity, to maximize profits, knowing that any quantity decision necessarily involves charging a particular price.

Let x^m be the smallest type that buys the product. Given the uniform distribution of types, the resulting market size is $1 - x^m$. To induce indifference by consumer type x^m demands that the monopolist set a price so that $x^m - p(x^m) = 0$. Given there is no cost of production, monopoly profits are price times quantity:

$$p(x^m)(1 - x^m)$$

Substituting $p(x^m) = x^m$, profits become

$$x^m(1 - x^m)$$

This function is maximized by setting $x^m = \frac{1}{2}$, and, accordingly, $p(x^m) = \frac{1}{2}$. To see why, note that the first order condition for this problem is $1 - 2x^m = 0$. Solving yields the profit-maximizing market size.

$$U(\theta, p) = \theta - p.$$

Accordingly, Figure 2 remains the plot of the welfare for each consumer type θ displaying the mark.

Pivoting to exclusive rights, the fact that clarity matters alters the welfare consequences of the trademark owner's decisions. As above, the trademark owner still acts as a monopolist with control over the price and uses that power to extract value from consumers. Some people who want to use a trademark to craft their identities are priced out of the market.

Our core insight is that now the trademark owner charging a price, however, does more than only generate a social loss. It also generates a benefit for consumers not priced out of the market—the clarity boost—because both α and x are greater than zero. Critically, the clarity boost enjoyed by any individual consumer increases in magnitude for two reasons. First, it increases as α increases, as expected given that α measures the extent to which consumers value clarity in any given trademark. Second, for any given α , it increases as x , and thus p , increases and, inversely, as the segment of the market that sports the trademark decreases. Figure 4 illustrates this dynamic using the arbitrary assumptions that $\alpha = 1$ and that the trademark owner sets the price so that the market restriction, x , equals either $\frac{1}{4}$ and $\frac{1}{2}$. The truncated green triangles represent the benefit of consumer expression that is independent of the reference group. The truncated blue wedges on top of the green areas indicate the reference-group-dependent clarity boost.

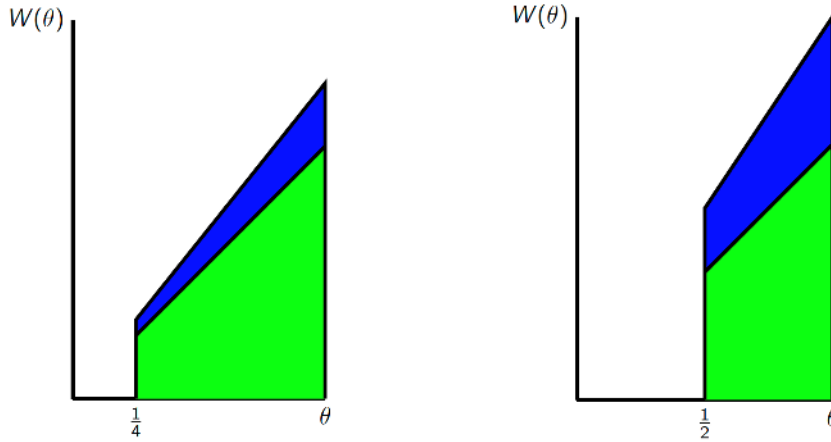


Figure 4: Clarity Boost, $x = \frac{1}{4}$ and $x = \frac{1}{2}$

In sum, when clarity matters to consumers, the model captures a tradeoff in between clarity and access. On the access side, the larger the set of consumers priced out of the market, the larger the access costs on consumers. On the clarity side, the larger the set of consumers priced out of the market, the larger the clarity boost enjoyed by those consumers who are not priced out. Exclusive rights to trademarks, even in the absence of core confusion, benefit society if the trademark owner's market restriction

results in a clarity boost that is larger than the access costs of pricing consumers out of the market.

2. *Trademark Owners as Private Attorneys General*

In an ideal world, a social planner could set the price of a trademark that bears an identity-relevant message to maximize consumer benefit. However, when the plan is to restrict access by setting up the trademark owner as a monopolist and presuming that they will maximize their own self-interest, the clarity/access tradeoff will not be resolved in such a clean manner. Monopolists will not set the market restriction at the social optimum.

As an example, suppose α equals 1. A planner at the helm would use her exclusive rights to choose the p that perfectly balances the marginal gains in clarity against the marginal loss in access, which turns out to lead to x equaling $\frac{1}{3}$ (or 0.33).¹³⁹ In contrast, with a trademark owner at the helm, it is self-interest and profit maximization that steers the boat, and the monopolist selects a market restriction of $\frac{1}{\sqrt{3}}$ (or 0.57).¹⁴⁰ The monopolist thus overshoots, restricting output more than is ideal to maximize welfare.

¹³⁹ Formally, welfare is

$$(1 + \alpha x) \int_x^1 \theta d\theta$$

This expression represents the area under the $W(\theta)$ graph for any market restriction choice x . To maximize welfare, we restrict access until the cost of leaving one more consumer out of the market equals the benefit from a one-unit increase in the clarity benefit for the remaining consumers. The first order condition for maximizing welfare reflects these offsetting concerns. It is

$$\underbrace{\alpha \int_x^1 \theta d\theta}_{\text{Marginal Benefit}} = \underbrace{(1 - \alpha x)x}_{\text{Marginal Cost}}$$

The left-hand side is the marginal benefit obtained by the infra-marginal consumers from better clarity of consumer communication---this is the rotation in the slope of the benefit line. The right-hand side is the marginal cost of kicking another consumer out of the market---the price paid for that communication benefit.

Solving the above expression yields the optimal market size:

$$x^* = \frac{\sqrt{1 + 3\alpha^2}}{3\alpha} - \frac{1}{3\alpha}$$

Note that when $\alpha = 1$, we have $x^* = \frac{1}{3}$.

¹⁴⁰ At a price p , the consumer buys if $(1 + \alpha x)\theta > p$. Suppose the monopolist decides on the size of the market restriction and sets the price to achieve the desired restriction. Given that consumer type x must be indifferent, the price charged as a function of the market restriction is

$$p(x) = x(1 + \alpha x)$$

The probability of a sale is the probability a consumer type lies above x , that is, $1 - x$. Profits are thus

$$p(x)(1 - x) = x(1 + \alpha x)(1 - x)$$

The monopolist selects a market restriction, x , between 0 and 1 to maximize profits. Solving this problem yields a market restriction of

Because the availability of exclusive rights is a binary choice—either the trademark owner has them or she does not—the clarity/access tradeoff presents take-it-or-leave-it choice between two suboptimal alternatives. Society must choose between granting exclusive rights, leading to too much clarity and too little access, and not granting exclusive rights, producing too much access and no clarity at all.

What to do? Which of the imperfect choices brings us closer to the social optimum? When is the trademark owner an effective private attorney general? The answer turns on how much consumers value greater clarity in their own speech. That is, it turns on the value of α . The more utility consumers derive from clarity, the more likely granting a monopoly and unleashing a self-interested profit motive serves the public interest.¹⁴¹

Figures 6 to 8 illustrate this general result. The blue curve represents on the y axis total welfare measured in money as a function of the market restriction x . The market restriction that maximizes welfare occurs where the blue curve takes on its largest value on the y axis. The red curve represents the monopoly profit as a function of the market restriction chosen by the monopolist. To maximize profit, the monopolist sets the price so that it induces a market restriction where the red curve takes on its largest value. This value occurs at x^m . To assess the welfare implications of the monopolist charging this price, read up from x^m to the blue curve. If the value of the blue curve at this point is less than the value of the blue curve at zero, society prefers to deny the mark legal protection.

Figure 5 shows that when α is low ($\alpha = \frac{1}{2}$), society is better off if consumers give up on their aspirations for more clarity. Granting exclusive rights to the trademark owner and allowing her to act as a monopolist decreases welfare. The height of the

$$x^m = \frac{1}{3} - \frac{1}{3\alpha} + \frac{\sqrt{1 + \alpha + \alpha^2}}{3\alpha}$$

Note that when $\alpha = 1$, we have $x^m = \frac{1}{\sqrt{3}}$.

¹⁴¹ Formally, without protection, welfare is

$$W = \int_0^1 \theta d\theta = \frac{1}{2}.$$

With protection, welfare is

$$W = (1 + \alpha x^m) \int_{x^m}^1 \theta d\theta$$

Suppose that $\alpha = 1$. In that case, $x^m = \frac{\sqrt{3}}{3}$ and welfare with protection is

$$W = \frac{\left(1 + \frac{\sqrt{3}}{3}\right) \left(1 - \left(\frac{\sqrt{3}}{3}\right)^2\right)}{2} = .52$$

which exceeds the welfare without protection.

Suppose, in the alternative, that $\alpha = 0$. In that case, $x^m = \frac{1}{2}$ and welfare with protection is

$$W = \int_{\frac{1}{2}}^1 \theta d\theta = \frac{1}{4}$$

which is less than welfare without protection.

blue line at x^m that maximizes the monopolist's profit to the blue curve is lower than the blue curve at $x = 0$, which is welfare in the absence of exclusive rights. In contrast, Figure 6 shows that when $\alpha = 1.5$, granting property rights makes a notable improvement in welfare. Although the monopolist restricts market access too much, the deadweight loss is still smaller than the value that consumers derive from greater clarity. Figure 7 shows that when α takes on a middling value ($\alpha = 1$), the choice between property rights and no property rights is close to a draw.

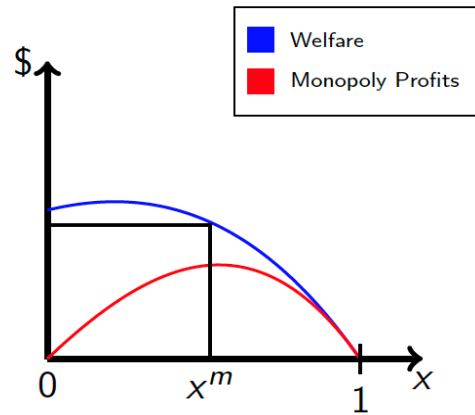


Figure 5: *Welfare Implications of Trademark Rights* $\alpha = \frac{1}{2}$

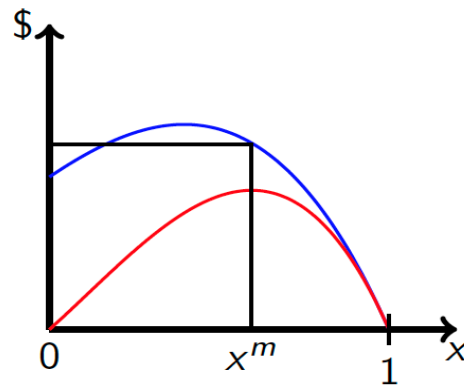


Figure 6: *Welfare Implications of Trademark Rights* $\alpha = 1.5$

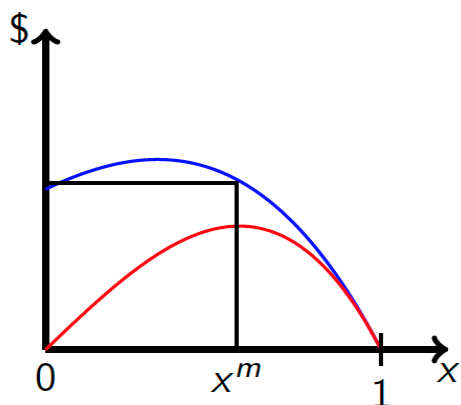


Figure 7: *Welfare Implications of Trademark Rights $\alpha = 1$*

The basic message extends to any value of α . Where the value consumers attach to clarity is small, the costs from the monopolist's overly aggressive restriction in market access outweigh any gains in clarity. Thus, the law should deny trademark owners exclusive rights and tolerate the resulting lack of clarity in consumer speech. As the value attached to clarity increases, eventually the gains from the clarity boost are sufficient to justify the costs associated with a monopolist unduly restricting market access. In other words, the clarity/access tradeoff tilts in favor of clarity over access.

C. *Divergence from Prior Scholarship*

Our elaboration of the clarity boost builds on, yet also departs from the reasoning in, two threads in prior trademark scholarship addressing consumer speech interests. Section II.C.1 considers scholarship that has already looked to the consumer-identity theory of brands for lessons about the desired scope of trademark protection. Section II.C.2 considers two threads of yet more closely related scholarship positing that expressive consumers are not atomistic, that the meaning of a trademark hinges on the number consumers who display the trademark, and that some consumers benefit from trademark owners exercising exclusive rights.

1. *Active Trademark Modification and Fair Use*

A number of trademark scholars have considered the import of the reality revealed in the consumer-identity theory of brands that consumers use trademarks to express themselves in sculpting trademark scope.¹⁴² They have done so, however, largely in so-

¹⁴² Some scholars explicitly discuss the consumer-identity theory of branding. Graeme W. Austin, *Trademarks and the Burdened Imagination*, 69 BROOKLYN L. REV. 827, 849 (2004); Desai, *supra* note 70, at 997–98; Gerhardt, *supra* note 70, at 259–60; Malla Pollack, *Your Image Is My Image: When Advertising Dedicates Trademarks to the Public Domain—with an Example from the Trademark Counterfeiting Act of 1984*, 14 CARDOZO L. REV. 1391, 1398–412 (1992). More commonly, however, scholars discuss consumer speech interests without directly discussing that theory. For a sampling of such work, see Dreyfuss, *supra* note 115, at 142; Dreyfuss, *supra* note 30, at 412–24; Christine Haight

called “expressive use” cases.¹⁴³ In expressive use cases, consumers with rebellious streaks wind up as defendants in trademark infringement suits when they use trademarks as raw materials in creative works that comment on or subvert the brand messages that the trademark owners seek to establish. Barbie dolls and their connotations of idealized domesticity land in blenders;¹⁴⁴ trademark parodists humorously mix the high and the low by selling Chewy Vuiton dog toys.¹⁴⁵ In discussing these cases, scholars highlight the alleged infringers’ speech interests, and they advocate for limiting trademark owners’ rights to protect those interests, often through an expansive interpretation of trademark fair use.¹⁴⁶

This literature unquestionably makes valid points.¹⁴⁷ However, we take a different tack on the consumer-identity theory of brands and draw a different lesson from it.

We look to a different, and larger, set of consumers who also count as speakers. We study more run-of-the-mill consumer expression where the consumer displays unaltered trademarks to affiliate themselves with the brand message, not to subvert or comment on it. These consumers may be more passive than the consumers in traditional “expressive use” cases, but they are using trademarks to express themselves, and their interests merit consideration nonetheless. Furthermore, they outnumber the speakers in conventional “expressive use” cases, and their speech is more prevalent in our everyday commercialized culture. We take our cue from marketing scholars who “assert a place for the average and ordinary consumer” in branding theory and “mitigate the tendency to conflate fanatical status with social action.”¹⁴⁸ We leave aside consumers who band together in consumer communities and “actively ‘bargain’ for ... what the brand means and for whom,”¹⁴⁹ and who engage in brand “hijacks” or “appropriations” that spin a brand’s marketer-preferred meaning around 180 degrees into something altogether different.¹⁵⁰ We thus avoid a

Farley & Lisa P. Ramsey, *Raising the Threshold for Trademark Infringement to Protect Free Expression*, 72 AM. U. L. REV. 1225 (2023); Kozinski, *supra* note 82, at 975; Lemley, *supra* note 29, at 1694; Litman, *supra* note 82, at 1730–31.

¹⁴³ Trademark casebooks commonly employ the “expressive use” label to refer to a set of cases implicating speech-related limitations on, and affirmative defenses to, *prima facie* trademark infringement. See, e.g., BEEBE, *supra* note 34, at 749–809. But cf. *infra* note 148 and accompanying text (arguing that a large set of cases, extending well beyond the cases conventionally labeled as “expressive use” cases, implicate consumer speech).

¹⁴⁴ *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003).

¹⁴⁵ *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007).

¹⁴⁶ See *supra* note 142 (compiling sources).

¹⁴⁷ Although we demonstrate that expansive trademark rights sometimes enhance consumer speech, we recognize that consumers’ speech interests counsel in favor of granting trademark owners more limited rights in conventional “expressive use” cases, like those that arise from trademark parodies. See *supra* note 117.

¹⁴⁸ Muniz & O’Guinn, *supra* note 68, at 190.

¹⁴⁹ O’Guinn & Muñoz, Jr., *supra* note 15, at 182.

¹⁵⁰ *Id.* at 182, 187–88.

“tendency to conflate fanatical status with social action” and make a “place for the average and ordinary consumer” in shaping brand messages.¹⁵¹

In addition, we diverge from other trademark scholars who employ the consumer-identity theory of brands not only by examining the interests of a different set of communicative consumers, but also by reaching a different conclusion about how favoring consumer speech interests impacts optimal trademark scope. The literature on “expressive uses” highlights the plight of consumers who use trademarks to speak to counsel in favor of narrower trademark scope. We, in contrast, marshal expressive consumers’ interests in clarity to support more expansive trademark scope.

2. *Veblen Goods and Meaningless Difference*

One of the principal assumptions in our model is that the meaning of a trademark—namely the clarity with which the mark can communicate the degree to which a consumer is invested in the trademark’s brand message—is contingent on the characteristics of other consumers who also sport the trademark. Similar assumptions animate two concepts of trademark meaning in prior scholarship addressing consumers who use trademarks to express themselves: the theory underpinning status-signaling Veblen goods and a Baudrillard-inspired theory, employed by Barton Beebe, that frames trademarks as markers of pure, meaningless difference. However, because we adopt the consumer-identity theory of brands—a theory that assumes that trademarks have specific semantic meaning in the form of brand messages—the clarity boost takes the principle of nonatomicity in a different direction.

Writing in the late 1800s, Thorstein Veblen made the point that purchasing and conspicuously displaying expensive items of little to no functional utility signaled wealth.¹⁵² That is, consumers purchase Veblen goods because the goods allow them to “say” something specific to other consumers, namely that they have status because they are wealthy enough to purchase the good.¹⁵³ As a result, the value of Veblen goods to consumers increases as the goods’ price increases.

Trademark scholars have long recognized that protecting trademarks-as-goods, and especially when protecting trademarks-as-goods even when there is no likelihood of confusion in post-sale confusion and counterfeiting cases, can transform trademarks into Veblen goods.¹⁵⁴ Perhaps the trademark at issue is the print and shape of a designer handbag; perhaps it is a conspicuously displayed token of a word or symbol

¹⁵¹ *Id.* at 190

¹⁵² THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* 71 (1912) (defining “accredited canons of conspicuous consumption, the effect of which is to hold the consumer up to a standard of expensiveness and wastefulness in his consumption of goods and his employment of time and effort”); *see also* Laurie Simon Bagwell & B. Douglas Bernheim, *Veblen Effects in a Theory of Conspicuous Consumption*, 86 AM. ECON. REV. 349 (1996).

¹⁵³ Economists have identified the conditions under which such signaling is effective. Often, it might make sense to buy a wider variety of different luxury brands (a suit and a watch) rather than overpay for a single item like a suit. Bagwell & Bernheim, *supra* note 152, at 357-58.

¹⁵⁴ Jeffrey L. Harrison, *Trademark Law and Status Signaling: Tattoos for the Privileged Essay*, 59 FLA. L. REV. 195 (2007); Jeremy N. Sheff, *Veblen Brands*, 96 MINN. L. REV. 769 (2011).

mark. Either way, trademark owners can use their exclusive rights to generate the artificial scarcity and maintain the high price that enable their trademarks to signal wealth and status.¹⁵⁵

The role of trademark law in the generation of Veblen goods has three features in common with the role that we posit trademark law can play in generating the clarity boost. First, and most basically, both focus on the value that consumers derive from using trademarks to speak about themselves in consumer-to-consumer communication. Second, both illustrate how granting exclusive rights to producers can redound to the benefit of consumers—or, at least, those consumers who are not priced out of the market. Granting exclusive rights to trademark owners allows (some) consumers to say things that they could not otherwise use trademarks to say. Third, both highlight that trademark-enabled consumer speech can have negative externalities. The display of a trademark by a person without wealth chips away at the status the trademark can signal when the wealthy display it, just as the display of a trademark by a “meh” adopter (i.e., a consumer with a low θ) of a brand message detracts from the clarity of the signal sent when a passionate adopter displays it.

Yet, trademarks that enjoy a clarity boost also differ from trademarks that function as Veblen goods in two fundamental ways. First, we posit that trademarks convey a different type of meaning than Veblen goods do. Veblen goods are about vertical differentiation on a unidimensional scale of status—who has more money than whom. In contrast, according to the consumer-identity theory of brands, our consumers display trademarks to sort themselves horizontally among a diverse array of brand messages offered in the marketplace, where one brand message is not necessarily any more desirable than another. A Taylor Swift t-shirt conveys a different signal from a Led Zeppelin t-shirt which conveys a different signal than a Salt Life bumper sticker. Yet each one exists in the marketplace. This is a natural consequence of building on the consumer-identity theory of brands and its focus on differentiation among consumers along the lines of tastes, preferences, or identity, rather than wealth. As McCracken notes, “the cultural meaning carried by consumer goods is enormously more vari-

¹⁵⁵ *Hermes Int'l v. Lederer de Paris Fifth Ave., Inc.*, 219 F.3d 104, 108 (2d Cir. 2000) (“We have previously held that post-sale confusion can occur when a manufacturer of knockoff goods offers consumers a cheap knockoff copy of the original manufacturer's more expensive product, thus allowing a buyer to acquire the prestige of owning what appears to be the more expensive product.”); Harrison, *supra* note 154, at 204–07 (exploring Veblen effects).

ous and complex than the Veblenian instance on status was capable of recognizing.”¹⁵⁶ Wealth, of course, might be one part of a brand message.¹⁵⁷ But, it is not the entirety of the message, and it is not the focus of our analysis.

Second, and relatedly, exclusive rights may generate a clarity boost for many trademarks that are not signals of wealth. T-shirts with logos, baseball caps with team insignias, and bumper stickers are all examples of trademarks used for communication, where clarity might help. Yet, they are difficult to classify as Veblen-type luxury goods that reveal the wearer as uber-wealthy.

Barton Beebe has offered a different theory about what trademarks “say” in consumer-to-consumer communication. Following Jean Baudrillard, Beebe assumes that trademarks are empty signifiers that lack signifieds, and that their only function is to mark the wearer as different from others.¹⁵⁸ Trademarks are thus able to play a role in consumer-to-consumer communication because they help consumers to affirm their individuality and mark distinction or distance from the crowd. Following this theory, each additional consumer who displays a mark generates negative externalities for those who are already displaying the mark, as each additional displayer decreases the mark’s distinctiveness signal for those who are already displaying it.¹⁵⁹

¹⁵⁶ McCracken, *supra* note 45, at 80–81. Other marketing scholars also emphasize the distinction between Veblen goods and trademarks with identity-relevant brand messages:

For some consumers, [identity-relevant] brands are linked with status, success, and achievement – as would be the case for brands like Rolex and Hummer. However, other ideal future selves pave the way for self-enrichment through different brand meanings. One’s ideal future self as someone who is healthy (e.g., Atkins), athletic (Nike), famous (e.g., American Idol), or a good parent (e.g., Parents Magazine) involve other brands whose linkage to an ideal future self enriches the self.

C. Whan Park, Deborah J. Macinnis & Joseph Priester, *Beyond Attitudes: Attachment and Consumer Behavior*, 12 SEOUL JOURNAL OF BUSINESS 3, 14 (2006); see also EDWARDS & DAY, *supra* note 45, at 51 (discussing “the shift in the social role of brands from that of signaling status to that of signaling affinity”).

¹⁵⁷ Many different items might serve as Veblen goods, and it unclear why someone buys, say, an expensive watch rather than posting their W-2s or audited asset valuation online for all to see. Bagwell & Bernheim, *supra* note 152, at 367 (“[I]t is[] difficult to understand why consumers remove price tags from their conspicuous possessions. Obviously, there are other important considerations that influence the choice of a signal; completely transparent exhibitions of wealth seem socially unacceptable.”). Transparent displays of wealth would be clearer and cheaper than acquiring and displaying Veblen goods. In our model, by contrast, broadcasting a personal attribute or passion through a mark is likely easier than broadcasting through a different vehicle given that the trademark owner has already infused the trademark with a brand message.

¹⁵⁸ Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809 (2009); Beebe, *supra* note 65, at 667–69 (discussing difference without meaning or, at least, with meaning that is only difference).

¹⁵⁹ Adopting a similar premise that distinctiveness has value to consumers, other trademark scholars have also highlighted negative externalities from trademark-enabled consumer speech. See, e.g., Denicola, *supra* note 90, at 637–41 (“[T]he sheer volume of ornamental use may affect the value

The clarity boost, again, adopts a different semiotic model of a trademark. In our model, trademarks are not empty signifiers that mark only difference. They convey brand messages; they are signs with meaningful semantic content; they something substantive about those who display them, such as “I like the beach” or “I’m a Michigan fan.” This shift from absent to present signifieds has important implications for the stability of trademark meaning in consumer-to-consumer communication. Because trademarks only denote difference, Beebe views the horizontal differentiation among consumers enabled by trademarks as an inherently unstable edifice that is destined to come crashing down as consumers who glom onto fashion trends transform trademarks that were once sought-after indicators of uniqueness into scarlet letters of conformity.¹⁶⁰ In contrast, the clarity boost presumes that a trademark’s substantive brand message does not erode with widespread adoption. It is only the clarity of the intensity with which a trademark conveys that brand message that decreases as the number of adherents increases. Our model therefore reflects a more stable, trademark-enabled social system for constructing and announcing consumer identities.

III. DOCTRINAL IMPLICATIONS

The clarity boost and the clarity/access tradeoff have direct implications for the justified scope of trademark protection under the Lanham Act.¹⁶¹ Section III.A addresses the modifications that they suggest for the doctrine of trademark infringement. More specifically, it considers the showings that should be necessary for a trademark owner’s exclusive rights to extend beyond situations in which there is a likelihood of core consumer confusion in cases involving merchandizing, post-sale confusion, and counterfeiting. Section III.B briefly considers the implications of the clarity boost for dilution by blurring.

A. *Merchandizing, Post-Sale Confusion, and Counterfeiting Cases*

In principle, the clarity boost, and the clarity/access tradeoff to which it contributes, are general phenomena. That is, they identify an overlooked gross benefit of any

of the symbol as the market becomes saturated with merchandise bearing the mark.); *id.* (“The public may simply grow bored with [merchandizing] use of a mark if they encounter it too frequently.”).

¹⁶⁰ Beebe, *supra* note 158, at 880–884.

¹⁶¹ Whether courts determining actionable infringement have any authority under the Lanham Act to consider arguments that reach beyond the producer-communication theory, and that sound instead in an upstart consumer-communication theory instead, is an open question. Perhaps the benefits that expressive consumers glean from using trademarks in consumer-to-consumer communication should not be considered when sculpting the scope of statutory trademark protection. *Cf.* Bone, *supra* note 3, at 618–21 (arguing that, if trademark law were to evolve to in the manner needed to grant exclusive rights to sell signs, legislative action would be the best way to achieve that evolution). However, if the normative calculus of trademark scope is to include the access costs that exclusive rights impose on expressive consumers, *see supra* notes ___ and accompanying text, then it is only reasonable to consider the clarity benefits that exclusive rights bestow upon those same expressive consumers.

increment of exclusive rights to all trademarks that signify identity-relevant brand messages and in which expressive consumers value clarity. However, the way in which they modify the justified scope of trademark doctrine at the margin is most likely to be felt only in a subset of trademark infringement cases. If the conventional producer-to-consumer framework that does not consider the clarity boost counsels in favor of labeling a defendant's conduct as infringement, then the clarity boost is irrelevant. It simply bolsters the normative support for the already justified doctrinal result. But, if the traditional framework does not support treating a defendant's conduct as infringement, then recognizing that exclusive rights generate a clarity/access tradeoff for consumer expression, not simply access costs, may alter the desired outcome. The clarity boost can add an entry on the benefit side of the benefit/cost ledger that tips the welfare scales in favor of a doctrinal finding of infringement. When the clarity boost that expressive consumers enjoy is larger than the access costs that they bear, the clarity/access tradeoff counsels in favor of finding infringement, despite the absence of a likelihood of consumer confusion.

Given this limiting principle, the clarity boost is likely to have its biggest impact on trademark doctrine in the controversial merchandizing, post-sale confusion, and counterfeiting cases discussed above.¹⁶² These are all cases involving defendants who value trademarks not merely for the reliability that they create in producer-to-consumer communication, but also as expressive vehicles for consumer-to-consumer communication. In addition, these are also cases in which courts regularly find infringement in the absence of core consumer confusion.¹⁶³ The clarity boost may provide a reason other than the specious “if value, then right” argument to support some—but not all—of the expansiveness of existing case law and justify infringement in the absence of consumer confusion.¹⁶⁴

The doctrinal challenge is to identify the fraction of the merchandizing, post-sale confusion, and counterfeiting cases in which granting trademark owners exclusive rights that extend beyond core consumer confusion generates a significant clarity benefit for consumers. (Note that, while it does support infringement holdings in some situations in which there is no likelihood of core consumer confusion, trademark doctrine that is tailored to the justification provided by the clarity boost would actually narrow the protection available vis-à-vis the protection that the courts currently grant.) We identify a series of three questions that courts can ask to help draw the needed line.

First, does a trademark carry an identity-relevant brand message? If a mark does not carry an identity-relevant brand message, consumers cannot use the mark in consumer-to-consumer communication, and protection of the trade in the absence of

¹⁶² See *supra* notes 88–112 and accompanying text.

¹⁶³ See *supra* notes 36–40 and accompanying text (defining core confusion).

¹⁶⁴ We take no position on a causal link between the clarity boost and the expansiveness of contemporary trademark law. Our claim is not that an inchoate conception of the clarity boost led judges to grant expansive trademark in merchandizing, post-sale confusion, and counterfeiting cases. As other scholars have suggested, judges may have been motivated by a moral intuition about just deserts. See *supra* note 115 and accompanying text.

consumer confusion obviously cannot generate a clarity boost. For example, the configuration of an engine may serve as a valuable, distinctive mark that conveys information from producers to consumers in sophisticated, business-to-business transactions¹⁶⁵, but the configuration may not have any brand meaning when one consumer displays it to another. Or, to take another example, the mark TICONDEROGA may convey information from producers to consumers about the origin and quality of the pencils to which it is attached, but it may not carry a lifestyle brand message that can be transferred to a personality attribute of a consumer who purchases and displays the TICONDEROGA mark.

If plaintiffs want exclusive rights that extend beyond situations in which there is consumer confusion, they must show that their trademarks carry brand messages. They may do so directly through survey evidence or indirectly through documentation of either producer-funded advertising campaigns or cultural accretion.¹⁶⁶ If producer-funded advertising underpins the argument, the advertising must be a species of “non-informative” or “persuasive” advertising—advertising in which the producer says “you are something” if you consume the brand, rather than “our products are something.”¹⁶⁷

This requirement to show an identity-relevant brand message as a condition of obtaining exclusive rights may not be as limiting in merchandizing, post-sale confusion, and counterfeiting cases as one might initially imagine. The subset of trademarks at issue in these litigated cases is already largely restricted to the trademarks that bear identity-relevant brand messages. Why do consumers want t-shirts or hats with trademarks emblazoned on them if the trademarks are not indicating source? Why do they want goods that they know come from a second producer when those goods display a word or symbol that strongly resembles the trademark of a first producer? The reason is, often, that consumers want inexpensive versions of trademarks that they can use to communicate something about themselves to others.¹⁶⁸ If a trademark lacks an

¹⁶⁵ See, e.g., *Kohler Co. v. Honda Giken Kogyo K.K.*, 125 USPQ2d 1468 (TTAB 2017).

¹⁶⁶ It is possible that a trademark may acquire a brand message not through the top-down, producer-driven process that McCracken describes, see *supra* note __ and accompanying text, but rather through a decentralized, cultural process of meaning bubbling up from consumers or non-consumer individuals. It is true that trademark owners do not need to expend resources to weld a brand message to a trademark if the meaning develops through such a process of cultural accretion, but the distinction between producer- and culture-created brand messages is not relevant here. Expressive consumers may benefit from clarity regardless of the origin of the brand message that a trademark bears. See *supra* note __ and accompanying text.

¹⁶⁷ See generally Brown, *supra* note 24, at 1168–1170 (distinguishing informative and persuasive advertising. Persuasive advertising is often characterized as advertising that creates “artificial” distinctions and misleads consumers into thinking they want something that they do not. See, e.g., Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 113–22 (2012) (arguing that there is little, if any, value in persuasive advertising). The subset of persuasive advertising that can satisfy the plaintiff’s burden, in contrast, welds an identity-relevant brand message to a trademark and thus creates a “real” (if psychic) distinction in relation to other trademarks.

¹⁶⁸ More broadly, competitors may want inexpensive versions of any trademarks that have become trademarks-as-goods. See *supra* note 84 and accompanying text (noting that trademarks with value as vehicles for consumer-to-consumer communication are one of several types of trademarks-as-goods).

identity-relevant brand message, competitors may still have incentives to engage in infringing conduct that garbles producer-to-consumer communication, but they have little incentive to infringe through sales of merchandizing goods in which there is no likelihood of core consumer confusion, or sales with disclaimers that eliminate point-of-sale confusion.

Second, does a consumer's use of a branded good involve a public display of the mark? Even if a producer has successfully bonded an identity-relevant brand message onto a trademark, the clarity boost only provides a benefit when consumers display the trademarks to other consumers and, more broadly, the world at large. Reference groups are key components of the mechanism through which exclusive rights generate clarity boosts¹⁶⁹, and the consumers of a trademark cannot perceive the reference group for a trademarked good that is consumed entirely in private. A consumer might buy a certain brand of soap, shampoo, or razor because it comports with how they see themselves, but with no intention of displaying the product's container to others.¹⁷⁰

Marketing scholars draw a relevant distinction here. Trademarks bearing brand messages contribute to how a person views themselves on two interconnected levels: self-symbolism and social-symbolism.¹⁷¹ Self-symbolism resonates on the individual level with consumers who seek to create and maintain their concepts of self. Here, the purchase of a branded good and the consumer's use thereof may be enough to trigger self-identity benefits, even if they occur in private. Self-symbolism means that even “everyday brands in everyday categories, the kinds of brands that get tucked away inside cupboards in bathrooms and kitchens and garages,” can provide consumers with identity-construction resources.¹⁷² Trademarks that help consumers to construct identities through self-symbolism do not form reference groups, and exclusive rights therefore do not provide consumers with clarity boosts. In contrast, where self-symbolism is a question of “What does this brand say about me—to me?”, social-symbolism raises the question of “What does this brand say about me to others?”¹⁷³ Here, brands are chosen and consumed due to their ability to spark inter-consumer communication, so public display of the trademark is essential.¹⁷⁴ Consumers seek to project the identities

¹⁶⁹ See *supra* notes ___ and accompanying text (discussing reference groups).

¹⁷⁰ Trademark owners do expend resources to weld brand messages to consumer goods consumed in private. Dove soap's motto is “real beauty, real confidence.” The brand message is about inclusion: that beauty comes in many forms. *The Dove Real Beauty Pledge*, DOVE, <http://www.dove.com/us/en/campaigns/purpose/real-beauty-pledge.html>. By contrast, the beauty brand Aussie's message revolves around fun. *Social Media Case Study: Aussie Hair*, DIGITAL TRAINING ACADEMY, <http://www.digitaltrainingacademy.com/casestudies/2017/04/social-media-case-study-aussie-hair-puts-user-generated-images-into-marketing-campaign.php>.

¹⁷¹ Elliott & Wattanasuwan, *supra* note 48, at 132. Self-symbolism and social-symbolism are tightly interconnected. *Id.* at 133 (arguing that “self-identity must be validated through social interaction and that the self is embedded in social practices”).

¹⁷² EDWARDS & DAY, *supra* note 45, at 52–53.

¹⁷³ *Id.*

¹⁷⁴ GABRIEL & LANG, *supra* note 1, at 95 (“Western consumers [use] the goods they consume . . . in opportunistic but highly visible ways, being very conscious of the inferences that others will draw from them and by the ways their image will be affected by them.”).

that they have adopted, or that they are still playing with, into the world. Because trademarks that operate on the level of social-symbolism are consumed or displayed in public, reference groups exist, and as can the clarity boost.

Third, assuming an identity-relevant trademark is used or displayed in public by expressive consumers, do passionate consumers value clarity in the trademark's message about the intensity with which adopters subscribe to the brand message? For some trademarks, the answer is likely to be "no" because consumers value a contradictory goal even more—something we call a *belonging boost*. Being part of a dominant tribe that has many members can be a psychic hit if a consumer's goal is clarity or standing out from the crowd¹⁷⁵, but it can also be ego-reinforcing if their goal is comfort from being a member of a dominant tribe. In the latter case, I may glean more value from announcing that a trademark's brand message is part of my identity when there is a larger group of consumers who also announce that the same trademark's brand message is part of their identities. In addition, a larger reference group increases the potential to interact with people who share some aspect of their identities, even if the interaction is less likely to lead to deeper bonding because it involves consumers with different identity types. Merchandizing goods for sports teams and universities are perhaps good examples. The shrunken reference group that is necessary to achieve greater clarity may undermine the consumer's sense of belonging. In contrast to the clarity analysis, getting the consumer with a "meh" attitude to sport the trademark may produce a positive externality for others in the reference group when belonging is paramount. For trademarks that are amenable to belonging boosts, α may even be negative, and restricting market coverage may *decrease* welfare. In sum, defendants should be free to present evidence, perhaps in the form of consumer surveys, that consumers do not value the clarity provided by clarity boosts.

If the answers to all three questions are in the affirmative, then granting exclusive rights to trademark owners in merchandizing, post-sale confusion, and counterfeiting cases, even in the absence of core consumer confusion, would produce a clarity boost that redounds to the benefit of expressive consumers. The final issue, then, involves the tradeoff between the benefits that the more gung-ho consumers enjoy due to greater clarity and the costs that the more tepid consumers must bear from reduced access. This is clearly a tradeoff that is difficult to measure with precision, just as the incentives/access tradeoff at issue in copyright and patent is difficult to measure with precision. What can be said, however, is that the case for exclusive rights grows stronger as the value that consumers place on clarity grows larger. Trademarks that convey messages for devotees of niche activities or pastimes are perhaps some of the trademarks that are most likely to provide consumers with significant clarity boosts.

B. *Dilution by Blurring*

The previous section suggested that the clarity boost provides a normative justification for trademark infringement in some fraction of the cases in which the courts have extended protection beyond situations in which the defendant's conduct is likely to cause core consumer confusion. This conclusion might naturally lead one to infer

¹⁷⁵ See *supra* notes 158–160 and accompanying text.

that the clarity boost can also provide an additional normative justification for liability under the anti-dilution laws that protect against blurring.¹⁷⁶ After all, these laws mirror the caselaw discussed in the previous section in that they, too, stretch liability beyond situations in which there is a likelihood of core consumer confusion. (The difference is that judges did the stretching in the cases discussed in the previous section, whereas Congress did the stretching in the anti-blurring dilution laws.) In addition, paralleling the merchandizing, post-sale confusion, and counterfeiting cases discussed in the previous section, there is some skepticism among trademark scholars about whether anti-dilution laws that protect against blurring in the absence of core consumer confusion have a solid utilitarian justification under the conventional trademark framework that examines producer-to-consumer communication.¹⁷⁷

Upon closer inspection, however, the clarity boost is only likely to provide support for a small slice of cases that find liability due to blurring. The key issue is whether the consuming public will perceive the defendant's mark as an instance of the plaintiff's mark, as it must for the defendant's mark to undermine the clarity of the plaintiff's mark. The classic examples of dilution involve a junior user who adopts a mark similar or identical to a senior user's mark, but who uses it on goods that are so far removed from the goods of the senior user that consumers are not likely to believe that the senior user produced or sponsored the goods. KODAK pianos and DUPONT shoes are classic examples.¹⁷⁸ When this distance exists between the product markets of the plaintiff and defendant, however, the lack of consumer confusion may well lead consumers to understand that the same word—KODAK or DUPONT—means different things in the different markets. Kodak (the film company) might invest its trademark with a brand message, but consumers might understand that that word “Kodak” on pianos does not convey that brand message; Dupont (the chemical company) might invest its trademark with a brand message, but consumers might understand that “DuPont” on shoes does not convey that brand message. Just as a speaker of English understands that the word “bank” means one thing when used in discussions of about rivers and something altogether different when used in discussions about mortgages, a consumer might understand the same set of letters means different things when used in markets for different goods. If this is true, then the defendant's conduct does not

¹⁷⁶ 15 U.S.C. § 1125(c). Dilution by blurring is an “association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark.” *Id.* at (c)(2)(B). Anti-dilution laws that protect against tarnishment have a more fraught relationship with the clarity boost. Our model of the clarity boost assumes that the contents of a brand message remain stable, or at least relatively stable, over time. *See supra* note 117 and accompanying text. In contrast, the alleged harm in tarnishment cases is precisely that a defendant's conduct alters the content of a trademark's brand message by debasing it. For example, plaintiffs may own trademarks with family friendly brand messages, and defendants may use similar trademarks in sexual or violent contexts. *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003).

¹⁷⁷ *See, e.g.*, Barton Beebe, *Testing for Trademark Dilution in Court and in the Lab*, 86 U. CHI. L. REV. 611 (2019); Sonia K Katyal, *Semiotic Disobedience*, 84 WASH. U.L. REV. 489 (2006); Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507 (2008).

¹⁷⁸ *See* Federal Trademark Dilution Act of 1955, H.R. REP. NO. 104-374, at 3 (1996), reprinted in 1995 U.S.C.C.A.N. 1029, 1030.

undermine the clarity of the plaintiff's trademark, even if it does diminish the distinctiveness of the plaintiff's trademark. The defendant is not flooding the market with symbols that the consumer interprets as the plaintiff's trademark, so it does not matter whether the consumers of the defendant's products have a "meh" attitude toward the plaintiff's brand message.

To be sure, there may be occasional cases in which anti-dilution laws help to prevent low-intensity types from flooding the market and undermining a trademark's clarity. In such cases, the benefit that the clarity boost bestows on expressive consumers could provide a justification for anti-blurring dilution protection that some commentators find lacking. The key to these cases is perhaps that the owner of the defendant's allegedly diluting mark welds a brand message to its mark that the public perceives as part of, or at least related to, the brand message borne by the plaintiff's allegedly diluted mark.¹⁷⁹ This similarity of brand messages means that consumers may not distinguish the two marks and that, if it is sold at a low price, the defendant's diluting mark may be widely used by low-intensity types. In turn, the plaintiff's diluted mark will lack clarity.

For example, consider the facts at issue in *Patagonia, Inc. v. Anheuser-Busch LLC*.¹⁸⁰ The parties are well-known US companies. Patagonia Inc., the plaintiff, manufactures outdoor apparel, among other outdoorsy apparel, and part of its brand message is that its adopters are concerned about taking care of the environment. Anheuser-Busch LLC, the defendant, brews beer and sells alcoholic drinks. Anheuser-Busch began to sell beer under a PATAGONIA trademark. Patagonia alleged that Anheuser-Busch "has surrounded its promotion of the beer products with . . . a plant-a-tree initiative in an attempt to draw upon the same associations that consumers have with Patagonia's PATAGONIA brand," using the slogan "you buy a case, we plant a tree."¹⁸¹ It is possible that a court would find core consumer confusion in the facts of *Patagonia*, mooting the dilution issue.¹⁸² But, it is plausible that the distance between the plaintiff's and the defendant's products (outdoorsy apparel and alcoholic beverages) could negate a likelihood of consumer confusion. In this instance, the clarity boost would provide an additional justification for granting exclusive rights to Patagonia Inc., which would have practical significance if one were skeptical of the conventional justification

¹⁷⁹ In addition, the three questions asked in the previous section must support the existence of a clarity boost. See *supra* notes 165–175 and accompanying text. The doctrinal requirement that the allegedly diluted mark be famous may make it easier to satisfy some of these criteria. For example, famous marks may be more likely to convey identity-relevant brand messages.

¹⁸⁰ *Patagonia, Inc. v. Anheuser-Busch, LLC*, No. 2:19-cv-02702-VAP (JEMx) (C.D. Cal. Sep. 3, 2019).

¹⁸¹ Second Amended Complaint, *Patagonia, Inc. v. Anheuser-Busch, LLC*, No. 2:19-cv-02702-VAP (JEMx) (C.D. Cal. Sep. 20, 2019), at paras. 47, 48; see also *id.* at para. 52 (alleging that Anheuser-Busch promoted its beer by announcing "Patagonia's 'tree positive' mission").

¹⁸² The case settled before the court reached a verdict on the merits. If Anheuser-Busch's conduct were to lead to core consumer confusion, the clarity-boost rationale for exclusive rights would be superfluous, given the already strong justification for preventing behavior that interferes with producer-to-consumer communication.

of anti-blurring dilution laws.¹⁸³ The similarity of brand messages might lead consumers to elide PATAGONIA as used on apparel and PATAGONIA as used on beer. If the beer is available at a low price, lower-intensity types—consumers who are not *that* dedicated to the environment—may pollute the reference group for PATAGONIA apparel and detract from the clarity that the trademark has for true environmentalists.

CONCLUSION

We started this article with a simple observation: Consumers use trademarks to express themselves. To recognize this reality and consider its consequences, trademark theory needs a refresher. Today, courts routinely extend trademark protection in spite of weak evidence of consumer confusion about source. Under the conventional logic of trademark law, that move seems like a give-away to trademark owners who leverage more muscular trademark rights to stifle competition and charge higher prices. Yet, once trademark law is updated to account for the value that exclusive rights generate for trademark-enabled consumer speech, the “give-away” story may no longer always ring true.

When trademark owners restrict access to the trademarks that signify lifestyle brands—and, more broadly, any trademarks that consumers use in inter-consumer communication—they do something individuals cannot do on their own, namely generate a clarity boost that, as its name suggests, improves the clarity of consumer speech. When they display trademarks, consumers who have less intense attachments to brand messages impose negative externalities on more passionate trademark adopters. Trademark owners price the less-passionate out of the market, cleaning up the message sent by the more passionate consumers that remain. Trademark owners can act as private attorneys general: they can augment the welfare of expressive consumers by following their own self-interest and maximizing profits.

The doctrinal implications of the clarity boost are easiest to see in a series of cases involving merchandizing, post-sale confusion, and counterfeiting in which courts regularly find infringement despite the absence of the likelihood of core consumer confusion. Trademark scholars have, to date, largely agreed that it is difficult to find firm normative ground to justify this expansive interpretation of trademark protection. They correctly note that it does not make producer-to-consumer communication more reliable, and that it imposes access costs on expressive consumers who seek to use trademarks in consumer-to-consumer communication. We agree with both of these points, but we suggest that the story is nonetheless more complicated and less definitive. The clarity boost reveals that granting producers exclusive rights that extend beyond core confusion can, on occasion, make expressive consumers better off and improve welfare in these cases. Whether it does, or whether it doesn’t, hinges on a clarity/access tradeoff: Are the benefits in the form of greater clarity for passionate expressive consumers larger than the costs of reduced access by closer-to-indifferent expressive consumers? It is an important feature of the trademark system, not a bug therein, that consumers adopt marks to tell their own stories and connect with others

¹⁸³ See *supra* note 177 and accompanying text.

who share similar tastes and interests. The calculus of trademark rights, we submit, should be attentive to this facet of contemporary consumer life.