

# The Trademark Reporter®



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An Empirical Assessment of the Eveready Survey's Ability to Detect Significant Confusion in Cases of Senior Marks That Are Not Top-of-Mind

*Hal Poret*

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## COMMENTARY

THE SCIENCE OF PROVING  
TRADEMARK DILUTION\*

By Barton Beebe,\*\* Roy Germano,\*\* Christopher Jon Sprigman,\*\*\*\* and Joel H. Steckel\*\*\*\*\*

## I. INTRODUCTION

In this short commentary, we discuss our recent empirical scholarship on the vexing question of how to prove claims that a trademark has been diluted by “blurring.”<sup>1</sup> We first discuss the current confusion in the federal courts over what qualifies as proof of dilution. We then report the results of two experiments that test different ways that plaintiffs may seek to prove these claims.

Our bottom line is clear: the test that has been employed by most federal courts—what we refer to here as the “mere association test”—is an invalid measure of trademark dilution. The important question, which we take up later in this commentary, is how to improve upon that failed approach.

We offer a new “association strength test” that can be used to prove—or, to disprove—dilution by blurring. This test offers a valid construct for measuring trademark dilution. Those who are interested in the full details of our research should consult the longer article, *Testing for Trademark Dilution in Court and the Lab*, from which this commentary is drawn.<sup>2</sup>

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\* This commentary is based on an article published by the authors in the *University of Chicago Law Review*. Barton Beebe, Roy Germano, Christopher Jon Sprigman & Joel H. Steckel, *Testing for Trademark Dilution in Court and the Lab*, 86 U. Chi. L. Rev. 611 (2019), available at <https://lawreview.uchicago.edu/publication/testing-trademark-dilution-court-and-lab>. © 2019 Barton Beebe, Roy Germano, Christopher Jon Sprigman & Joel H. Steckel.

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<sup>1</sup> See Barton Beebe, Roy Germano, Christopher Jon Sprigman & Joel H. Steckel, *Testing for Trademark Dilution in Court and the Lab*, 86 U. Chi. L. Rev. 611 (2019), available at <https://lawreview.uchicago.edu/publication/testing-trademark-dilution-court-and-lab>.

<sup>2</sup> *Id.*

## II. COURTS' CONFUSION ABOUT TRADEMARK DILUTION

The difficulty in understanding how best to prove claims of trademark dilution is likely rooted in the difficulty of articulating what, precisely, the claim is.<sup>3</sup> In theory, dilution occurs when two companies use very similar or even identical trademarks in a manner that does *not* confuse consumers as to source. The problem that trademark dilution hypothesizes is not confusion; instead, the problem is a form of cognitive obstruction—that is, that these consumers must “think for a moment”<sup>4</sup> whenever they see one of the marks to determine to which company the mark refers. This delay in recognition is thought to represent a harm to the prior, “senior” user of the mark.

Here’s an example: Imagine that a Brooklynite opens a microbar called “Apple” in her neighborhood. Suppose further that there is no likelihood of consumer confusion about source—that it is highly unlikely that patrons will be confused into believing that the global high technology brand owns the bar and is leveraging its brand into the sale of artisanal cocktails. The concept of dilution asserts that the existence of the bar may nevertheless harm the famous global brand. When Brooklynites hear the term “Apple,” they will associate it with two different entities: Is it the high tech company (the senior user of the trademark) or the bar (the junior user)? As the legal theory goes, this dual association causes a “blurring” of the link between “Apple” and the Cupertino company. This “dilution by blurring” is alleged to damage the famous brand name by

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<sup>3</sup> See J. Thomas McCarthy, *Dilution of a Trademark: European and United States Law Compared*, 94 TMR 1163, 1163 (2004) (“No part of trademark law that I have encountered in my forty years of teaching and practicing IP law has created so much doctrinal puzzlement and judicial incomprehension as the concept of ‘dilution’ as a form of intrusion on a trademark.”).

<sup>4</sup> Richard A. Posner, *When Is Parody Fair Use?*, 21 J. Legal Stud. 67, 75 (1992) (explaining antidilution law on the basis that “[a] trademark seeks to economize on information costs by providing a compact, memorable, and unambiguous identifier of a product or service. The economy is less when, because the trademark has other associations, a person seeing it must think for a moment before recognizing it as the mark of the product or service.”). On the bench, Judge Richard Posner reasoned similarly in explaining the rationale for protection specifically against dilution by blurring:

[T]here is concern that consumer search costs will rise if a trademark becomes associated with a variety of unrelated products. Suppose an upscale restaurant calls itself “Tiffany.” There is little danger that the consuming public will think it’s dealing with a branch of the Tiffany jewelry store if it patronizes this restaurant. But when consumers next see the name “Tiffany” they may think about both the restaurant and the jewelry store, and if so the efficacy of the name as an identifier of the store will be diminished. Consumers will have to think harder—incur as it were a higher imagination cost—to recognize the name as the name of the store. . . . So “blurring” is one form of dilution.

*Ty Inc. v. Perryman*, 306 F.3d 509, 511 (7th Cir. 2002).

diminishing the immediacy with which consumers identify the brand name with its source and other preexisting associations.

This framework for understanding trademark dilution is as controversial as it is vague. Trademark scholars are overwhelmingly critical of antidilution protection,<sup>5</sup> not least because in real-world purchasing contexts, consumers are likely to use a variety of environmental cues to disambiguate the meaning of terms.<sup>6</sup> For example, at an airport, when someone refers to “American” or “Delta,” no one must “think for a moment” to know that the references are to airlines and not to the broadcasting company or the faucet maker. Even in a setting such as online search, in which there is less context, consumers are often able to disambiguate various uses of a mark using the information that accompanies search results.

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Pictured above, for example, are results from a Google search for “Delta.” Using the search test, one can clearly differentiate the airline from the faucet maker below.

<sup>5</sup> See, e.g., Christine Haight Farley, *Why We Are Confused about the Trademark Dilution Law*, 16 *Fordham Intell. Prop. Media & Enter. L. J.* 1175, 1184–85 (2006) (arguing that little harm results from most cases of dilution); David S. Welkowitz, *Reexamining Trademark Dilution*, 44 *Vand. L. Rev.* 531, 548–49, 557–58, (1991) (arguing that the tenuous benefits that antidilution doctrine may provide beyond those of other areas of trademark law are not enough to justify it).

<sup>6</sup> See Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 *Tex. L. Rev.* 507, 529–32 (2008).

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Blurring, in other words, is plausible in theory but may actually be rare in practice because of the disambiguating effect of purchasing context.

In the shadow of this uncertainty over the *bona fides* of the dilution claim, federal courts are currently split on what the plaintiff must show to establish that the defendant's conduct constitutes blurring. Even within particular districts, such as the Southern District of New York, courts have adopted different standards.<sup>7</sup> Federal trademark law states that “dilution by blurring’ is association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark.”<sup>8</sup> In construing this language, a majority of courts have held that to establish blurring, a plaintiff need show only that consumers associate the defendant's mark with the plaintiff's famous mark.<sup>9</sup> In other words, to win an injunction, Apple of Cupertino would need show only that patrons of the Brooklyn “Apple” bar associate its name with the Cupertino company (even if there is no source confusion). These courts appear to assume that to the extent there is association between the defendant's and plaintiff's marks, this association alone will impair the distinctiveness of the senior mark's source and its other preexisting associations.<sup>10</sup> We refer to this in what follows as the “mere

<sup>7</sup> Compare *Louis Vuitton Malletier, S.A. v. Hyundai Motor Am.*, No. 10 Civ. 1611(PKC), 2012 WL 1022247, \*11, 13 (S.D.N.Y. Jan. 6, 2016) (finding proof of association conclusive evidence of dilution), with *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425, 436 n.4 (S.D.N.Y. 2016) (rejecting the reasoning in *Hyundai* because “association is a necessary, but not sufficient, condition for a finding of dilution by blurring”), *aff'd*, 674 Fed. App'x 16 (2d Cir. 2016).

<sup>8</sup> 15 U.S.C. § 1125(c)(2)(B) (2018). An alternative form of dilution, which we do not discuss in this article, is “dilution by tarnishment.” Federal trademark law defines “dilution by tarnishment” as “association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.” 15 U.S.C. § 1125(c)(2)(C) (2018). Tarnishment “generally arises when the plaintiff's trademark is linked to products of shoddy quality, or is portrayed in an unwholesome or unsavory context likely to evoke unflattering thoughts about the owner's product.” *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 111 (2d Cir. 2010), quoting *Deere & Co. v. MTD Prods., Inc.*, 41 F.3d 39, 43 (2d Cir. 1994).

<sup>9</sup> See, e.g., *Wrenn v. Boy Scouts of Am.*, No. C 03-04057 JSW, 2008 WL 4792683, \*7 (N.D. Cal. Oct. 28, 2008); *Hershey Co v. Art Van Furniture, Inc.*, No. 08-14463, 2008 WL 4724756, \*14-15 (E.D. Mich. Oct. 28, 2008); *New York Yankees P'ship v. IET Prods. & Servs., Inc.*, 114 U.S.P.Q.2d 1497, 1506 (T.T.A.B. 2015).

<sup>10</sup> See, e.g., *Visa Int'l Serv. Ass'n v. JSL Corp.*, 610 F.3d 1088, 1090-91 (9th Cir. 2010) (affirming summary judgment for likely dilution of Visa's trademark through a mere

association” standard. A minority of courts have held that the plaintiff must show *both* consumer association *and* that this consumer association impairs the distinctiveness of the senior mark’s preexisting associations.<sup>11</sup> Here, Apple of Cupertino would need to show that the bar calls to mind the global brand and that this calling to mind somehow impairs the global brand’s distinctiveness. We refer to this as the “association plus impairment” standard.

The split among courts is surprising, and not just because the statutory language appears clearly to call for the *association plus impairment* approach. In the 2003 case *Moseley v. V Secret Catalogue, Inc.*,<sup>12</sup> the Supreme Court explicitly stated, albeit in dicta, that “[b]lurring’ is not a necessary consequence of mental association.”<sup>13</sup> The Court could not have been clearer: the mere fact that consumers associate the defendant’s mark with the plaintiff’s cannot, without more, establish blurring. The Court recognized that there are two different associative links at issue: the link between the defendant’s mark and the plaintiff’s mark, and the link between the plaintiff’s mark and its source and other preexisting attributes. The emergence of the former link does not necessarily impact the strength of the latter. And yet a majority of courts continue to accept evidence establishing mere association as sufficient evidence of blurring.

In the remainder of this commentary, we summarize two of the primary contributions that our empirical research has made to the current debate over the nature of dilution by blurring and what must be shown to establish it in court.

First, we report findings from a new set of experiments that confirm that the majority *mere association* approach is fundamentally deficient. These experiments demonstrate that even when consumers associate a junior mark with a famous senior mark, this association does not necessarily result in any impairment of the ability of the senior mark to identify and distinguish its source and other associations. The practical significance of our experimental results is clear: courts should not base dilution liability on mere association. Rather, they should require the plaintiff to show that the association between the defendant’s and plaintiff’s mark impairs the latter’s distinctiveness of source and other attributes.

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association standard). *See also* J. Thomas McCarthy, McCarthy on Trademarks § 24:120 at 432–33 (5th ed. 2017) (criticizing the *Visa* court’s reasoning).

<sup>11</sup> *See, e.g.*, *Huginin v. Land O’ Lakes Tackle Co.*, 815 F.3d 1064, 1067–68 (7th Cir. 2016) (dismissing dilution claim for absence of harm showing); *Gap Inc. v. G.A.P. Adventures Inc.*, 100 U.S.P.Q.2d 1417, 1431 (S.D.N.Y. 2011) (likelihood of association absent proof of impairment did not make out dilution claim).

<sup>12</sup> 537 U.S. 418 (2003).

<sup>13</sup> *Id.* at 434 (addressing a prior antidilution statute).

Second, we propose a new, more empirically grounded, “association strength test” for dilution. We suggest that courts should demand evidence that exposing consumers to the junior mark is likely to affect the *strength of preexisting associations* between the senior mark and the qualities or attributes to which it is linked. Those preexisting associations must first be identified. The plaintiff must then establish that exposure to the junior mark weakens the link between the senior mark and those preexisting associations. Our experiments model a methodology that can be used in litigation for assessing whether potentially diluting uses of marks actually reduce association strength and harm the distinctiveness of the senior mark.

### III. MERE ASSOCIATION AND BLURRING

As we mention briefly above, a majority of courts that have considered an antidilution claim have adopted the mere association standard for establishing blurring. That is, they have accepted survey evidence that consumers merely associate the plaintiff’s and defendant’s marks as sufficient evidence to show that the defendant’s mark “impairs the distinctiveness” of the plaintiff’s mark. And in certain leading cases, courts have based their finding of blurring on survey evidence showing a likelihood of consumer confusion as to source.

Those courts that apply the mere association standard generally rely on two forms of survey evidence as proof of blurring. We review them in turn.

#### A. *The Nikepal Survey Approach*

The first and most prominent form of survey evidence that mere association courts have accepted consists of variations on the survey method used by the plaintiff in *Nike Inc. v. Nikepal International Inc.*<sup>14</sup> In *Nikepal*, the defendant used the mark NIKEPAL as the name of its business, which distributes glass syringes and other laboratory products.<sup>15</sup> Nike conducted a telephone survey of the defendant’s current and prospective customers in which it asked them about “their perception of a website called nikepal.com.”<sup>16</sup> Specifically, the survey asked: “What, if anything, came to your mind when I first said the word ‘Nikepal?’” Unsurprisingly, 87 percent of respondents stated that they thought of the plaintiff or its products. The survey expert and the *Nikepal* court took this as

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<sup>14</sup> 84 U.S.P.Q.2d 1820, 1824–25 (E.D. Cal. 2007).

<sup>15</sup> *Id.* at 1822.

<sup>16</sup> *Id.* at 1824.

evidence of blurring.<sup>17</sup> Other courts have accepted the results of similar surveys as evidence of blurring.<sup>18</sup>

The *Nikepal* court did not explain how *mere association* translates into evidence that use of NIKEPAL impairs the distinctiveness of the NIKE mark. Numerous trademark commentators have criticized the *Nikepal* survey method as failing to present persuasive evidence of dilution,<sup>19</sup> and we believe these criticisms are valid. NIKE is one of the world's best-known brand names. The fact that a consumer thinks of a famous mark when she sees a word containing that mark may not mean that the distinctiveness of the famous mark is "blurred" or harmed in any way. Indeed, because the association calls the famous mark to mind, its strength and salience may conceivably be reinforced.<sup>20</sup> The measure used in the *Nikepal* case cannot tell us which of the outcomes is more likely and, for that reason, lacks construct validity; that is, it cannot be taken as a valid measure of harm.

The marketing literature is very clear on how a brand suffers harm. Marketers would describe harm to a brand (or trademark) as a diminution of (customer-based) brand equity.<sup>21</sup> Professor Kevin Lane Keller characterizes brand awareness and brand image as the components of customer-based brand equity.<sup>22</sup> Brand image, in turn, is built from strong, favorable, and unique brand associations. Damage caused by blurring conceptually fits into this framework as

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<sup>17</sup> *Id.* at 1825, 1828.

<sup>18</sup> See, e.g., *Perfumbay.com Inc. v. eBay Inc.*, 506 F.3d 1165, 1172 (9th Cir. 2007) (discussing a similar telephone survey asking respondents what website or company they would think of if they encountered the term "bay" used by a web site); *Deere & Co. v. FIMCO Inc.*, 302 F. Supp. 3d 837, 873 (W.D. Ky. 2017) (discussing an online blurring survey asking respondents to identify which, if any, companies came to mind upon seeing photographs of certain agricultural equipment); *id.* at 900 (crediting the survey and finding blurring). See also Krista F. Holt and Scot A. Duvall, *Chasing Moseley's Ghost: Dilution Surveys Under the Trademark Dilution Revision Act*, 98 TMR 1311, 1324–29 (2008) (reviewing survey evidence of dilution considered by the federal courts in *Nikepal* and *Perfumbay.com*). But see *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 736 F.3d 198, 210–11 (2d Cir. 2013) (finding a 3.1 percent response rate insufficient to prove actual association).

<sup>19</sup> See, e.g., Matthew D. Bunker & Kim Bissell, *Lost in the Semiotic Maze: Empirical Approaches to Proof of Blurring in Trademark Dilution Law*, 18 Comm L. & Pol. 375, 384 (2013) ("Aside from the problem of conflating association with dilution, the [Nike] survey certainly provides no evidence of dilutive harm since there is no baseline measurement of the strength of Nike's brand prior to Nikepal's entry into the marketplace.").

<sup>20</sup> See *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 267 (4th Cir. 2007) ("[B]y making the famous mark an object of the parody, a successful parody might actually enhance the famous mark's distinctiveness by making it an icon. The brunt of the joke becomes yet more famous.").

<sup>21</sup> See, e.g., Kevin Lane Keller, *Conceptualizing, Measuring, and Managing Customer-Based Brand Equity*, 57 J. Marketing 1, 8 (1993).

<sup>22</sup> Kevin Lane Keller, *Strategic Brand Management: Building, Measuring, and Managing Brand Equity* 45–51 (2013).

a weakening of brand associations, a compromise of the uniqueness of the associations, or a reduction in the favorability of the associations the trademark owner has worked hard to cultivate.<sup>23</sup> The *Nikepal* approach cannot indicate that an association is tied to brand weakening and as such is not probative of blurring.

### ***B. Association and Confusion Survey Results***

Courts have also relied on likelihood of confusion surveys as evidence of dilution by blurring. For example, in *Jada Toys, Inc. v. Mattel, Inc.*,<sup>24</sup> Mattel, which manufactured toy automobiles under the HOT WHEELS mark, argued that Jada Toys's sale of toy automobiles under the HOT RIGZ mark would both confuse consumers and blur Mattel's mark.<sup>25</sup> Mattel proffered two confusion surveys.<sup>26</sup> The first exposed respondents to the HOT RIGZ mark and then asked a series of questions designed to determine who the respondents believed "puts out or makes" toy vehicles with that name.<sup>27</sup> The second survey exposed respondents to a HOT RIGZ package and asked similar questions.<sup>28</sup> In reversing the district court's partial grant of summary judgment to Jada Toys, the Ninth Circuit Court of Appeals pointed to both surveys as "significant evidence of actual association between the alleged diluting mark and the famous mark"<sup>29</sup> and found that a "reasonable trier of fact could conclude that this evidence was sufficient to establish the existence of a likelihood of dilution."<sup>30</sup> The Second Circuit Court of

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<sup>23</sup> This view follows the associative network theory of memory in psychology. See Allan M. Collins and Elizabeth F. Loftus, *A Spreading-Activation Theory of Semantic Processing*, 82 *Psychol. Rev.* 407, 408–09, 411–15 (1975). That theory models information in (long-term) memory as networks of nodes connected by links. For an example of associative network theory applied in the trademark context, see Jacob Jacoby, *The Psychological Foundations of Trademark Law: Secondary Meaning, Genericism, Fame, Confusion and Dilution*, 91 TMR 1013, 1018–24, 1046–50 (2001). Here, the nodes consist of trademarks and concepts linked to or associated with those marks. These concepts include product categories and attributes possessed. When exposed to a trademark, the network containing that trademark is activated and the activation signal spreads outward to the concepts linked to that node. Blurring presumes that that signal activates the node of the desired association more slowly, if at all. See *id.* at 1046–50.

<sup>24</sup> 518 F.3d 628 (9th Cir. 2008).

<sup>25</sup> *Id.* at 631–32.

<sup>26</sup> *Id.* at 636. See also Krista F. Holt and Scot A. Duvall, *Chasing Moseley's Ghost: Dilution Surveys Under the Trademark Dilution Revision Act*, 98 TMR 1311, 1332–35 (2008) (discussing the *Jada Toys* surveys in detail).

<sup>27</sup> *Jada Toys*, 518 F.3d at 636. The first survey took the form of an "Eveready" survey. See also J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 32:174 at 468–71 (5th ed 2017) (describing the survey design used in *Union Carbide Corp v. Ever-Ready Inc.*, 531 F.2d 366 (7th Cir. 1976) as "a standard and widely accepted survey format for testing to see if confusion is likely or not").

<sup>28</sup> *Jada Toys*, 518 F.3d at 636.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

Appeals has more recently written approvingly of the *Jada Toys* court's reasoning and reliance on confusion survey evidence as potential evidence of dilution, stating that "[s]ource confusion may be probative of association."<sup>31</sup>

As with the *Nikepal* survey format, consumer confusion surveys show consumer association, but they do not show blurring. Indeed, confusion surveys arguably show the *opposite* of blurring. Recall that blurring describes situations in which, because of the similarity of the plaintiff's and the defendant's marks, consumers see the plaintiff's mark and must think for a moment to determine whether the mark is referring to the plaintiff or the defendant. In this scenario, consumers are not confused as to source. By contrast, consumer confusion surveys expose situations in which consumers believe that both marks, because of their close similarity, refer only to the plaintiff. In this sense, the defendant's mark reminds consumers of and reinforces the link between the plaintiff's mark and the plaintiff.

In other words, in the case of consumer confusion, on encountering the defendant's mark, the confused consumer associates it with the plaintiff's mark and believes that it originates in the plaintiff. By contrast, in the case of blurring, on encountering the defendant's mark, the blurred consumer associates it with the plaintiff's mark but knows that it originates in the *defendant*. Evidence of consumer association that leads to consumer confusion is evidence that consumers think there is only one company rather than two; those confused consumers cannot experience blurring because they associate both marks with the *same* company.

### ***C. Survey Evidence of Mere Association Is Not Evidence of Impairment***

We present experimental evidence confirming that even when consumers associate a junior mark with a senior famous mark, this does not necessarily result in weakening the association of the famous mark with its source or other associations. Furthermore, such consumer association does not necessarily result in any material change to consumers' purchasing preferences. In sum, mere association on its own does not necessarily harm the senior mark.

#### **1. Brand Selection Pretest**

Because we intended in these experiments to study blurring in the form of changes in brand associations, we sought out brands with strong, relatively well-defined associations. We chose automobiles as a product category and collected data from five

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<sup>31</sup> Starbucks Corp. v. Wolfe's Borough Coffee, Inc., 736 F.3d 198, 211 n.14 (2d Cir. 2013).

hundred people to identify brands and associations that could potentially be blurred. The research began by showing respondents the names of up to twenty popular car brands. The brand names were shown one by one in random order. For each brand name, respondents were asked whether they were familiar with the brand. For each brand they identified as familiar, respondents were asked to name the top five things that came to mind when they thought of that brand; that is, the top five associations for each brand. We hypothesized that very strong brands would bring to mind a relatively concentrated set of associations, most of which would be positive. Conversely, weaker brands would bring to mind a larger set of more diffuse, and sometimes negative, associations.

To determine how concentrated a brand's associations were, we collected all of the associations that respondents provided for each brand. We then grouped equivalent associations and calculated the percentage of subjects identifying each group. We then added up the percentages for the five most common association groups mentioned for each brand. This gave us a concentration score. Based on this analysis, we identified MERCEDES, BMW, and INFINITI as our three strongest brands. In all three cases, the most common associations named were characteristics like "luxury," "expensive," as well as words that connote wealth and high socioeconomic status.

We selected MERCEDES and INFINITI as our test brands. We selected MERCEDES because it had the highest concentration score. We also selected INFINITI because, although it had a relatively high concentration of positive associations, it was among the least familiar brands in our sample. As such, although INFINITI has relatively clear associations among those who are familiar with it, it may be more easily diluted because its associations are not as widely held.

## 2. Study 1: Examining Brand Association Strength

Study 1 tested whether blurring advertisements affected the strength of the association between the MERCEDES and INFINITI brands and both their product category (cars) and the top associations (wealth, luxury) previously found for each brand in our initial brand selection pretest. A total of 2,012 subjects participated in the experiment. Each subject was randomly assigned to a brand (MERCEDES or INFINITI), then randomly assigned to a treatment or control group. Subjects in the INFINITI and MERCEDES control groups saw three "filler" text-only "tombstone" advertisements for well-known brands that contained true representations of each brand's product category and attributes.<sup>32</sup> Subjects in our two

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<sup>32</sup> A tombstone advertisement presents information via "black and white text only, with no use of human or animal images or cartoon characters." Lawrence O. Gostin, *Corporate*

treatment groups saw the three filler ads plus an ad for a fictitious diluting brand. Subjects assigned to the MERCEDES treatment group saw an ad for a diluting brand called “MERCEDES toothpaste” and subjects assigned to the INFINITI treatment group saw an ad for a diluting brand called “INFINITI toothpaste.”

All subjects were then shown twenty-three brand-word pairs. For each pair, subjects were asked to state the degree to which they associate the brand and the word using a five-point scale that ranged from “a great deal” to “not at all.” Eighteen of these pairs were filler pairs for brands unrelated to cars. Randomly mixed in with the eighteen filler pairs were five brand-word pairs for one of our target marks. The pairs for our target marks included the product category “cars” and two words that capture the high-status qualities that respondents in our brand selection survey tended to associate with both marks: “luxury” and “wealth.” Finally, we included two words that are not associated with the MERCEDES and INFINITI car brands—at least not uniquely so: the product category “toothpaste” and the attribute “cheap.”

If the MERCEDES and INFINITI toothpaste ads were causing dilution by blurring, we would expect that subjects in the treatment groups exposed to such ads would less strongly associate the car brands with the product category “cars.” They may also become less likely to associate these marks with words that our pretests indicated to be strongly associated with MERCEDES and INFINITI, such as “luxury” and “wealth,” and more likely to associate these brands with the word “cheap,” which better describes an ordinary, low-cost product like toothpaste than an expensive luxury automobile. Weakening associations between the brand and “luxury” or “wealth” would indicate that distinctiveness has been impaired. The possible addition of an association between the brand and the attribute “cheap” would be an example of tarnishment, not blurring, which is the subject of this paper. Nevertheless, we felt it interesting to study.

We did not find these effects. Our results show that for a significant number of subjects our blurring stimulus produced a new association—that is, an association between MERCEDES, or INFINITI, and toothpaste. We found little, if any, compelling evidence that the new association between the test brands and the toothpaste product category is accompanied by a weakening of the association between the test brands and their true product category or their principal product attributes.

First, it is clear from our data that the toothpaste ads created a new association between the car brands and the toothpaste product category. About 95 percent of subjects who did not see the toothpaste

ad said they do “not at all” associate the INFINITI or MERCEDES brand with the word “toothpaste.” The result was different for subjects in the treatment groups. In the INFINITI treatment group, 54.8 percent of subjects said they do “not at all” associate INFINITI with the word “toothpaste,” whereas 23.5 percent said they associate these words “a little,” 9.2 percent “a moderate amount,” 6.2 percent “a lot,” and 6.2 percent “a great deal” with the word “toothpaste.” In the MERCEDES treatment group, 73.3 percent of subjects said they do “not at all” associate MERCEDES with “toothpaste,” whereas 15.8 percent associate them “a little,” 5.0 percent “a moderate amount,” 2.8 percent “a lot,” and 3.2 percent “a great deal.” These results should surprise no one. Such differences should be expected after treatment group subjects saw, moments earlier, an ad establishing an association between these brands and the toothpaste product category.<sup>33</sup>

To the question of whether the toothpaste ad weakened existing car-related associations, we find that subjects who saw the toothpaste ads were no less likely on average than those who did not see it to associate the MERCEDES or INFINITI marks with the product category “cars” or attributes like “luxury” and “wealth.” In short, a comparison of average responses reveals no evidence of distinctiveness having been impaired.<sup>34</sup>

Of course, looking only at averages can obscure changes in the distribution of responses to each of the brand-word pairs. On occasion, these distributions may possibly tell a more nuanced story. Specifically, in the case of INFINITI, the lesser known of our two brands, we see some evidence that the toothpaste ad might possibly have caused a weakening of the association between the INFINITI brand and the product category “cars.”<sup>35</sup>

However, in most cases, a weakening of a brand-product category association could not be considered impairing. Brand-product category associations generally do not differentiate the brand within a product category. On the other hand, if there was a weakening of the brand associations of “luxury” or “wealth,” that would be more serious, as those are properties with which not all cars are endowed. When comparing the distributions for product

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<sup>33</sup> A summary of the distribution of responses is set out in Figures 1 and 2 of our full article in the *University of Chicago Law Review*, *supra*, note 1, at 630-31.

<sup>34</sup> A summary of average distribution results is set out in Table 1 of our full article in the *University of Chicago Law Review*, *supra* note 1, at 628.

<sup>35</sup> Among control group subjects, 58.65 percent said they associate INFINITI with the word “cars” “a great deal,” and 18.09 percent said they associate INFINITI with cars “a lot.” Among treatment group subjects, the percentage who said they associate INFINITI with cars “a great deal” was lower at 51.81 percent, while the percentage who said they associate INFINITI with cars “a lot” was higher at 25.1 percent. Both groups strongly associate INFINITI with the word “cars”; however, the group that saw the INFINITI toothpaste ad was somewhat less enthusiastic in making that connection. A chi-square test indicates that this difference is statistically significant ( $p = 0.002$ ).

attributes like “luxury,” and “wealth,” however, we found no significant evidence of any meaningful impairment, either in averages or distributional shifts.

We also compared the distribution of responses for subjects in the MERCEDES groups. We found no evidence that the toothpaste ad caused a weakening of the association between MERCEDES and the product category “cars” or the attributes of “luxury” and “wealth.”

In sum, it is clear from our experiments that the MERCEDES and INFINITI toothpaste ads caused subjects to form a new association between toothpaste and our two car brands. Evidence of this was straightforward both when we compared group averages and when we compared how subjects’ responses were distributed. While we observed the formation of a new association among subjects in the treatment groups, we found no evidence that the creation of this new association was accompanied by the blurring or weakening of preexisting within-category differentiating associations. Comparing average responses, there were no statistically significant differences between the treatment and control groups. A closer look at the distribution of responses indicates that the diluting ad may have caused a slight weakening of the association between INFINITI and cars. The data here are far from definitive—especially given the results of Study 2, which we discuss directly below. But our results point toward a method, which we term the “association strength test,” that courts can use to determine whether association is likely to lead, in a particular case, to dilution.

### 3. Study 2: Dilution and Brand Ranking

Study 1 shows that new associations may or may not lead to the weakening of other associations, but the ultimate question as to whether distinctiveness is impaired is whether these new associations have some effect on the “selling power” of the famous brand. Study 2 engaged this issue. It tested whether ostensibly blurring advertisements and the new associations they produce affect consumer preferences and consumers’ intent to purchase the targeted brand.<sup>36</sup>

Study 2 consisted of a preference-ordering protocol in which 1,009 subjects were first shown up to twenty car brands in random order and asked to state whether the brand was familiar. When five familiar brands were selected, respondents moved to the next stage of the experiment. Half of the subjects who said they were familiar with either MERCEDES or INFINITI were shown a diluting MERCEDES toothpaste or INFINITI toothpaste ad in addition to

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<sup>36</sup> A summary of Study 2’s preference ranking results is set out in Table 2 of our full article in the *University of Chicago Law Review*, *supra* note 1, at 633.

three filler ads (treatment group). The other half were shown a NIKE toothpaste ad in addition to the three filler ads (control group).<sup>37</sup>

After viewing the ads, subjects were asked to rank the five brands they had identified as familiar in order of preference, from 1 (favorite) to 5 (least favorite). Overall, the mean rank for MERCEDES was 2.32, and the mean rank for INFINITI was 2.84.

We calculated the differences between the mean preference ranking for treatment and control group subjects for each brand. In both cases, the differences are not statistically different from zero. We were unable to find any evidence from this protocol that the diluting ad caused subjects to rank MERCEDES or INFINITI lower.

#### IV. MOVING FORWARD: WHAT COURTS SHOULD REQUIRE DILUTION PLAINTIFFS TO PROVE

To recall, federal trademark law states that “dilution by blurring’ is association arising from the similarity between a mark or trade name and a famous mark that *impairs the distinctiveness* of the famous mark.”<sup>38</sup> This statutory language implies that some associations do not impair the distinctiveness of the plaintiff’s mark. Otherwise, if all association resulted in impairment, there would be no need to add the limiting phrase “that impairs the distinctiveness of the famous mark.” The statutory scheme assumes an underlying fact: association does not *necessarily* lead to impairment.

Our experiments provide methodologically valid and judicially administrable techniques for assessing the likelihood of blurring.<sup>39</sup> Litigants can design studies to mimic our Studies 1 and 2. Taken together, these studies suggest that courts that equate mere association with impairment are proceeding in error. We exposed subjects to diluting stimuli that created new associations among the targeted brands and new products and brand characteristics in these subjects’ shared associative memory networks.<sup>40</sup> But despite the new associations, we found no evidence of blurring measured

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<sup>37</sup> For reasons we explain more fully in the next Part, the control group was shown a toothpaste ad for a famous brand other than MERCEDES or INFINITI to ensure that control subjects were exposed to some ostensibly diluting advertisement, though one not directed at the targeted brands.

<sup>38</sup> 15 U.S.C. § 1125(c)(2)(B) (2018) (emphasis added).

<sup>39</sup> Note that our experiments do not measure *actual* dilution, but rather the *likelihood* of dilution occurring within the context of our experimental setting. Laboratory experiments inherently involve the simplification of reality. Our experiments, for example, do not contain any of the market context that may affect consumers’ perception and understanding of trademarks. Of course, this is equally true of virtually all dilution surveys employed in trademark litigation. Such studies—like this experiment—should be evaluated for their usefulness as evidence of the likelihood of dilution. They should not be taken as an indication of actual dilution of any particular mark in the real world.

<sup>40</sup> See generally Allan M. Collins & Elizabeth F. Loftus, *A Spreading-Activation Theory of Semantic Processing*, 82 Psychol. Rev. 407 (1975).

either by average treatment effects or by effects on purchase intention.

On average, subjects showed no weakening of the association between the targeted brands and their traditional products and characteristics, nor did these subjects reveal any change in purchasing preferences. When we disaggregated average treatment effects and examined the distribution of responses on our five-point scale, we saw some results that suggest the *potential* for dilution with regard to the INFINITI brand with respect to its association with the automobile product category. But we did not see the same sort of significant shift in the distribution of responses for MERCEDES.

Our results suggest that courts should not treat mere association as tantamount to proof of trademark dilution through blurring. Plaintiffs must present something more than evidence of association between the defendant's and plaintiff's marks to establish the likelihood that the plaintiff's mark will suffer dilution via blurring. Importantly, we believe that our results help to mark the correct path. Courts should require plaintiffs to produce evidence showing that a weakening of the associations between the plaintiff's mark and its source or other preexisting attributes is likely. Plaintiffs may seek to do so by using our Study 1 and Study 2 methodologies. Study 1 is a direct measure of any such impairment. Data from this type of study should be analyzed to see both whether exposure creates weaker associations on average and also whether it changes the distribution of responses in a way that suggests impairment. As a supplement, Study 2 indirectly measures association strength. It does so by inquiring whether the association of a defendant's junior mark with the plaintiff's senior mark "cashes out" in the form of reduced consumer intention to purchase the plaintiff's goods. In the end, this is the form of harm that brand owners typically care about most because it hits their bottom line. Though the results of one test may sometimes be sufficient to show impairment, courts would be best advised to rely on a combination of these tests and to be wary of enjoining defendants based on weak and conflicting evidence of dilution—such as when (as in our studies) the data reveal no impairment on average or diminution in purchase intention but rather only small shifts in the distribution of responses. Ultimately, the plaintiff should be required to demonstrate that any weakening of association between the plaintiff's mark and its source or preexisting attributes (or any reduction in purchase intention) is not just statistically significant but also *substantively* significant.<sup>41</sup> Evidence that the defendant's

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<sup>41</sup> In our full article in the *University of Chicago Law Review* we also assess the construct validity of tests for blurring based on response time measurements. Response time tests purportedly show disassociation in that subjects exposed to ostensibly diluting stimuli appear to take longer than control subjects to link targeted marks with their traditional

mark only slightly impairs the distinctiveness of the plaintiff's mark cannot justify the kind of broad injunctive relief that antidilution protection entails.

In sum, we have identified empirical tests for dilution that have construct validity. And yet nothing we have done relieves courts of their central responsibility in assessing this sort of social scientific evidence—a court must always take care to assess the strength of the evidence produced by the tests and not simply rely blindly on a positive and statistically significant result.

All that said, we must confess that, though we have made a contribution by offering methods that both are administrable and possess construct validity, in a deeper sense we remain at sea. Our experiments do not settle the question of the existence of trademark blurring. It is, of course, possible that future surveys used in litigation or academic empirical studies may be able to reliably detect “association” between two similar marks that “impairs the distinctiveness” of one of them. But at present, we have only very weak evidence that this form of dilution ever actually occurs. We have little more than “just so” stories that attempt to explain how dilution by blurring might operate.

So where does that leave us? Given the absence of proof that dilution by blurring actually occurs, we are left to speculate that the problem may ultimately be not with our experiments or the surveys or experiments of others but with the concept of blurring itself. The notion of dilution originally emerged out of the 1924 German *Odol* case,<sup>42</sup> which was essentially a case about misappropriation, one that happened to involve a trademark.<sup>43</sup> But when Professor Frank Schechter introduced the concept of dilution to American law in his still widely cited 1927 article “The Rational Basis of Trademark Protection,”<sup>44</sup> he downplayed the fact that dilution was a misappropriation doctrine and went so far as to expurgate from his translation of the *Odol* opinion the court's core finding that the respondent had “appropriate[d] thus the fruit of another's labor.”<sup>45</sup> Heavily influenced by law and economics thinking on trademark

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product categories and product attributes and characteristics. In the article, however, we show that previous versions of these tests used an improper control and therefore lacked construct validity. When response time tests use the proper control, no evidence of dilution is found. *See supra* note 1, at 628.

<sup>42</sup> *See Odol*, 25 *Juristische Wochenschrift* 502 (1924). *See also* Barton Beebe, *The Suppressed Misappropriation Origins of Trademark Antidilution Law: The Landgericht Elberfeld's Odol Opinion and Frank Schechter's "The Rational Basis of Trademark Protection,"* in *Intellectual Property at the Edge: The Contested Contours of IP* 59, 64–70 (Rochelle Cooper Dreyfus and Jane C. Ginsburg, eds. 2014).

<sup>43</sup> The *Odol* court asserted that the damage to the mark was to its “selling power.” *See Beebe, supra* note 42, at 60.

<sup>44</sup> Frank I. Schechter, *The Rational Basis of Trademark Protection* 40 *Harv. L. Rev.* 813, 830–33 (1927).

<sup>45</sup> Beebe, *supra* note 42 at 72.

law, with its focus on consumer search costs, the American concept of dilution evolved into the concept of “blurring” and the idea that, when two firms use the same mark, consumers must “think for a moment,” which increases their search costs.<sup>46</sup> We have struggled ever since to develop empirical proof that any appreciable increase in search costs actually occurs.

Yet courts continue to rule in favor of plaintiffs on antidilution causes of action. We suggest, as others have,<sup>47</sup> that they do so primarily for reasons sounding in misappropriation, but never articulated as such. The concept of “blurring” acts as an alibi for courts that want to reach what they deem to be the right result in cases like *Nikepal*, in which a defendant uses another’s famous mark on unrelated goods. The defendant is not causing consumer confusion, but it is reaping where it has not sown by appropriating some of the notoriety of the famous mark. Courts are motivated to accept *mere association* survey evidence as full-blown evidence of impairment to justify enjoining conduct they deem to be unfair misappropriation.<sup>48</sup>

This is problematic for at least two reasons. First, we continue to twist ourselves into contortions to develop evidence of blurring when courts’ underlying focus is on fairness and misappropriation. The result is that the concept of dilution grows increasingly vague and outcomes grow increasingly unpredictable. Second, unlike its European counterparts,<sup>49</sup> the American antidilution statute contains no misappropriation provision. Congress has twice had the opportunity to include such a provision, and twice it has declined to do so.<sup>50</sup> To the extent that courts are ruling on unstated

<sup>46</sup> See Richard A. Posner, *When Is Parody Fair Use?*, 21 J. Legal Stud. 67, 75 (1992).

<sup>47</sup> See, e.g., Apostolos Chronopoulos, *Goodwill Appropriation as a Distinct Theory of Trademark Liability: A Study on the Misappropriation Rationale in Trademark and Unfair Competition Law*, 22 Tex. Intell. Prop. L. J. 253, 296–97 (2014); David J. Franklyn, *Debunking Dilution Doctrine: Toward a Coherent Theory of the Anti-free-rider Principle in American Trademark Law*, 56 Hastings L. J. 117, 131–33 (2004); Richard A. Posner, *Misappropriation: A Dirge*, 40 Houston L. Rev. 621, 623 (2003); David S. Welkowitz, *Reexamining Trademark Dilution*, 44 Vand. L. Rev. 531, 545–46 (1991).

<sup>48</sup> See *Nike Inc. v. Nikepal Int’l Inc.*, 84 U.S.P.Q.2d 1828 (E.D. Cal. 2007) (finding dilution based on a survey in which over 87 percent of participants responded that the word NIKEPAL brought to mind the NIKE brand).

<sup>49</sup> See Articles 5(3)(a) and 10(2)(c) of Directive 2015/2436 of the European Parliament and of the Council of 16 December 2015 to Approximate the Laws of the Member States Relating to Trade Marks, 2015 OJ L336 1, 9 (Dec. 23, 2015), Articles 8(5) and 9(2)(c) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (prohibiting the unauthorized registration or use of a qualifying mark that “without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark”).

<sup>50</sup> See Federal Trademark Dilution Act of 1995, Pub. L. 104–98, 109 Stat 985 (1996); Trademark Dilution Revision Act of 2006, Pub. L. 109–312, 120 Stat 1730 (2006) (replacing the Federal Trademark Dilution Act).

misappropriation grounds, they are acting outside of the federal statutory framework.

In the end, we are left both better off and worse off than before. We believe that we have produced, at last, methodologically sound tests for measuring the likelihood of dilution. As applied to our test brands, however, none of the measures provided strong evidence that dilution actually occurs. This is not to deny the possibility that our methods might yield evidence of dilution if applied to other target brands with other ostensibly diluting stimuli. More significantly, our methods might show a likelihood of dilution if respondents were repeatedly exposed to the stimuli longitudinally over time.<sup>51</sup> Indeed, Schechter himself spoke of the “gradual whittling away”<sup>52</sup> of the distinctiveness of the brand through the long-term accumulation of otherwise de minimis harms—though the one empirical study that exists of long-term third-party uses of famous marks found no evidence of damage to the marks.<sup>53</sup>

But even if we applied our methods to other brands over time and measured significant reductions in association strength or response delays indicating the possibility of dilution, additional questions would arise. We would need to test the possible mitigating effect of market context. And most importantly, we would still need to test whether laboratory protocols to measure dilution by blurring that showed small average association-strength treatment effects, or small shifts in the distribution of assessments of association strength, were likely to translate into real-world attribute association, preference, or purchase implications.

These are questions that remain open. But we have an intuition about where the evidence will lead. We suspect that the concept of dilution by blurring is a chimera—that is, an imaginary thing that

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<sup>51</sup> Though difficult to mount, particularly in the litigation context, a longitudinal study might show that repeated exposure to diluting stimuli would at some point generate evidence of blurring. We know of one cleverly designed small-scale pilot study that exposed thirteen undergraduate students weekly over the course of a month to a diluting stimulus in the form of a box of baked goods bearing the trademark CHEVROLET BAKERY. Results from a computer task showed no statistically significant treatment effect. See Dan Svirsky, *Measuring Dilution: Is There an Effective Screening Device for Early Detection of Trademark Infections?* \*31–32 (working paper, 2012) (on file with authors). By contrast, our goal in this article has been to examine and rectify existing studies designed to detect dilution by blurring, all of which involve single-exposure protocols.

<sup>52</sup> See Schechter, *supra* note 44, at 825. See also Hearings Before the House Comm. on Patents, 72d Cong. 15 (1932) (testimony of Frank I. Schechter) (“[I]f you allow Rolls Royce restaurants and Rolls Royce cafeterias, and Rolls Royce pants, and Rolls Royce candy, in 10 years you will not have the Rolls Royce mark any more.”).

<sup>53</sup> See Paul J. Heald & Robert Brauneis, *The Myth of Buick Aspirin: An Empirical Study of Trademark Dilution by Product and Trade Names*, 32 *Cardozo L. Rev.* 2533, 2537 (2011) (finding that “[t]he vast number of unauthorized uses of some of the most iconic American trademarks suggests that consumers have a well-developed ability to cabin information in ways that maintain the associational values of even the most overused marks.”).

we insist upon only because it is valuable to us as a proxy for attacking unauthorized uses of senior marks that our intuition tells us are unfair. It is true that, in at least some dilution cases, defendants are engaged in some form of free riding on the fame and goodwill enjoyed by the plaintiff's mark. Free riding is, admittedly, not a simple thing to judge. Whether it is fair or unfair, productive or destructive, often depends on subtle differences in context. But courts are better at judging these sorts of contextual questions than they are at running a social science inquiry into the hypothesized, but unproven, cognitive concept of "blurring." It is better, we think, to reframe the dilution cause of action away from cognitive science and toward the broader and more tractable questions of fairness and harm that the courts have become accustomed to dealing with in misappropriation cases.

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