TRADEMASKS*

MATTHEW SIPE**

The accepted purpose of trademark law is to help consumers locate and verify what they want to buy, a task accomplished by linking producers to reputations through marks. Nevertheless, trademark law fully permits the strategic use and non-use of marks by their owners to conceal information rather than reveal it—strategies herein termed masking. Masking encompasses a range of widespread and well-accepted market practices, including rebranding to escape a negative reputation, maintaining an old trademark despite significant product changes or degradation, and using white labels or private labels to obscure origin outright.

Despite doctrines that purport to stop confusion and deception, trademark law has no internal prohibitions on masking. As a result, trademarks allow producers to raise search costs (not just lower them) and liquidate or abandon their reputation (not just preserve it). The orthodox story of trademark law is therefore incomplete, and longstanding debates—like the propriety of post-sale confusion and dilution as actionable conduct—are proceeding on fundamentally mistaken terms. Efficient uses of masking suggest instead that a property theory of trademark law is much more compelling and coherent than the literature has recognized to date.

Even some welfare-reducing masking strategies are apt to be self-correcting in a competitive market in the long run, but not all of them. In particular, self-correction is especially unlikely when information costs for consumers are high. Where firms are able to manipulate perception via marks without consequences, state and federal consumer deception law can therefore play a complementary, information-forcing role.

** Associate Professor, University of Baltimore School of Law; Thomas Edison Fellow, George Mason University Center for Intellectual Property & Innovation Policy; Chair, Association of American Law Schools, Section on Intellectual Property. With sincere gratitude to all commenters and participants at the Cardozo School of Law, the University of Maryland, the 24th Annual Intellectual Property Scholars Conference, and the 2024 Works in Progress for Intellectual Property Scholars workshop. Special thanks to Professors Barton Beebe, Michael Burstein, Michael Carrier, Eric Claeys, John Duffy, Jeanne Fromer, Jim Gibson, Camilla Hrdy, Mark Lemley, Erika Lietzan, Mark McKenna, Jacob Noti-Victor, Mark Schultz, Ted Sichelman, Rebecca Tushnet, Saurabh Vishnubhakat, Ryan Watzel, and Felix Wu.

INTRODUCTION

"A trademark . . . helps consumers identify goods and services that they wish to purchase, *as well as those they want to avoid.*"[1]

In 1996, a ValuJet flight crashed in the Florida Everglades, killing 110 people; ValuJet thereafter acquired rival AirTran and began exclusively using the latter's trademark in order to escape the bad press.[2] Private security firm Blackwater similarly changed its mark to Xe Services after an incident resulting in the deaths of Iraqi civilians and then changed it *again* to Academi after an incident resulting in the deaths of Afghan civilians.[3] And to keep the mounting

1. Matal v. Tam, 582 U.S. 218, 218 (2017) (emphasis added).

2. *See* Randolph E. Schmid, *FAA Prepares Rule To Require Fire Detectors in Cargo Holds*, WASH. POST, Nov. 15, 1996, at C11 (noting that blame for the ValuJet crash had focused on oxygen generators stored in the plane's cargo hold); Anthony Faiola, *ValuJet Resumes Service on a Wing and a Fare*, WASH. POST, Oct. 1, 1996, at C1 (describing ValuJet's struggle to "convince the flying public that they offer a safe, though budget-priced, alternative to the big carriers"); Doug Aamoth, *Top 10 Worst Corporate Name Changes*, TIME (Feb. 8, 2010), https://content.time.com/time/specials/packages/article/0,28804,1914815_1914808_1914788,00.html [https://perma.cc/U7UY-CMZH] ("By the end of the next year, though, passengers were again flying ValuJet—even if they didn't realize it. In a corporate disappearing act, the troubled airline bought a smaller rival and adopted its name, becoming AirTran Airways. Overnight, ValuJet shed its sketchy reputation and vaguely unsettling name . . . .").

3. *See* Jason Ukman, *Ex-Blackwater Firm Gets a Name Change, Again*, WASH. POST (Dec. 12, 2011), https://www.washingtonpost.com/blogs/checkpoint-washington/post/ex-blackwater-firm-gets-a-name-change-again/2011/12/12/gIQAXf4YpO_blog.html [https://perma.cc/B2DG-YEYY (staff-uploaded, dark archive)] ("On Monday, Xe announced that it was changing its name to Academi, part of a years-long effort by the company to shed a troubled legacy that critics said made the firm a symbol

public backlash against Big Tobacco from affecting its other consumer-products acquisitions—from Kraft Foods to Miller Brewing—Philip Morris rebranded under the name Altria.[4] These are only a few high-profile examples of a common business tactic: firms swap out old trademarks for new ones in an attempt to mask their negative reputation from consumers.

The reverse tactic is also common: firms keep the same trademark despite significant underlying changes to the product and are able to capitalize on a positive reputation even if it is no longer warranted. From Levi's[5] to Dr. Martens[6] to, most recently, Boeing,[7] it is easy to find examples of consumer shock over shoddy modern products from brands with historic reputations for high quality. Indeed, a variety of common, accepted trademark practices fall somewhere between these two paradigms. White labeling, for example, allows actual producers to hide behind relabeling sellers; a consumer is thus led to believe they are taking a course from a well-established university, when it is in fact wholly designed and taught by a third-party startup.[8] Private labels and

for mercenaries and impunity in Iraq and elsewhere."); Dina Temple-Raston, *Blackwater Rebrands, But Some Are Still Skeptical*, NPR (Apr. 23, 2009, at 10:25 ET), https://www.npr.org/templates/story/story.php?storyId=103108471 [https://perma.cc/2R6P-B5KK] ("Two years ago, Blackwater Worldwide became a symbol for all that was going wrong with military contractors in Iraq when a group of its guards were involved in a shootout that resulted in the deaths of 17 Iraqis. . . . The publicity got so bad that Blackwater went for an extreme makeover. It dropped its tarnished brand name and giant bear paw logo and renamed itself Xe—pronounced Zee.").

4. *See* John Schwartz, *Philip Morris To Change Name to Altria*, N.Y. TIMES (Nov. 16, 2001), https://www.nytimes.com/2001/11/16/business/philip-morris-to-change-name-to-altria.html [https://perma.cc/A2Q7-PM4C (staff-uploaded, dark archive)] ("The company has taken this action, its executives say, to reduce the drag on the company's reputation that association with the world's most famous cigarette maker has caused."); Aamoth, *supra* note 2 ("To distance itself from a number of publicity nightmares—like then company president William Campbell's 1994 sworn oath to Congress that 'I believe nicotine is not addictive'—Philip Morris Co. Inc., makers of cigarette brands like Marlboro and Chesterfield, changed its name to the anodyne Altria Group.").

5. *See* Grant Brissey, *Dear Levi's, Your Jeans Are Garbage These Days*, STRANGER (Oct. 3, 2012, at 14:24 ET), https://www.thestranger.com/blogs/2012/10/03/14921813/dear-levis-your-jeans-are-garbage-these-days [https://perma.cc/9RKH-BHRV] ("Used to be you could buy a pair of Levi's and you knew they were going to last through the years. That is evidently not the case anymore.").

6. *See* Patrick Collinson & Rebecca Smithers, *Dr Martens: Are Things Going Wrong with the UK's Beloved Brand?*, GUARDIAN (Nov. 30, 2019, at 14:00 ET), https://www.theguardian.com/money/2019/nov/30/are-things-going-wrong-with-the-uk-beloved-dr-martens-brand [https://perma.cc/GM2K-EMDG] ("[R]eaders accus[e] the bootmaker of sacrificing quality, offshoring production and chasing profits under the ownership of a London-based private equity company a long way from its roots in Northamptonshire. . . . The company's shift to China, factory closures in Northamptonshire, Leicestershire and Somerset, and a takeover by private equity, seem symbolic of what has happened to the British economy since then.").

7. *See* Chris Isidore, *Boeing Was Once Known for Safety and Engineering, but Critics Say an Emphasis on Profits Changed That*, CNN (Feb. 5, 2024, at 15:15 ET), https://www.cnn.com/2024/01/30/business/boeing-history-of-problems [https://perma.cc/Y43D-UW7W (staff-uploaded, dark archive)].

8. *See, e.g.*, Matt Reed, *'White Labeling*,' INSIDE HIGHER ED. (July 15, 2019), https://www.insidehighered.com/blogs/confessions-community-college-dean/white-labeling [https://perma.cc/QU4H-PD3E (staff-uploaded, dark archive)] ("The students pay university-level tuition for a rebranded generic class.").

ghost kitchens allow identical products to masquerade as distinct ones—like Chili's selling its usual food under the virtual storefront "It's Just Wings" on Uber Eats and DoorDash—to customers' disappointment and surprise.[9] Outlet stores, meanwhile, frequently feature products of inferior make and quality masquerading as identical to the rest of the brand.[10] And across a variety of markets, the full extent of outsourcing and concentration has been greatly concealed by the careful, selective use of marks.[11]

Nothing internal to trademark law prevents this *masking*: the strategic use and non-use of marks by their owners and licensees to conceal information rather than reveal it. Nominally, trademark law prevents confusion, deception, and dilution—and masking would seem to confuse and deceive consumers and dilute the significance of marks to consumers in the ordinary sense of those terms.[12] But trademark law's version of confusion is surprisingly shallow, only reaching consumer confusion over the seller's legal entitlement to use the mark in the first place; it does not reach confusion over any substantive attributes of the product, process, or producer.[13] Trademark law's version of deception goes somewhat deeper, asking whether the meaning of a mark misdescribes its actual qualities, but it exclusively looks at the literal meaning of a mark (for example,

9. Io Dodds, *'It's a Bait and Switch': Behind the 'Fake' Uber Eats and DoorDash Restaurants that Are Making Customers Furious*, INDEPENDENT (Nov. 3, 2022, at 15:52 GMT), https://www.independent.co.uk/news/world/americas/doordash-uber-eats-ghost-kitchens-virtual-restaurants-b2215680.html [https://perma.cc/825A-ADZV] ("What Stamps didn't know when he ordered was that It's Just Wings is a 'virtual restaurant,' not only owned by the same company as Chili's but actually cooking its food in the same kitchens. According to Stamps, the food was exactly the same. 'I hate Chili's. I know Chili's wings are awful. I would never knowingly order from Chili's.'").

10. *See* Press Release, Sheldon Whitehouse, Sens. & Rep. to FTC: Outlet Stores May Be Misleading Consumers (Jan. 30, 2014) [hereinafter Press Release], https://www.whitehouse.senate.gov/news/release/sens-and-rep-to-ftc-outlet-stores-may-be-misleading-consumers/ [https://perma.cc/SQ3R-FZ9A] ("Historically, outlets offered excess inventory and slightly damaged goods that retailers were unable to sell at regular retail stores. . . . Today, however, some analysts estimate that upwards of 85% of the merchandise sold in outlet stores was manufactured exclusively for these stores. Outlet-specific merchandise is often of lower quality than goods sold at non-outlet retail locations. While some retailers use different brand names and labels to distinguish merchandise produced exclusively for outlets, others do not. . . . [O]utlet store consumers are being misled . . . .").

11. *See* AMY KLOBUCHAR, ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE 186 (2021) ("In walking through supermarket and retail store aisles, . . . what looks like a lot of choice is, in reality, just more evidence of extensive corporate consolidation. . . . What may appear . . . as competing brands or competing stores are actually all owned by the exact same company.").

12. *See infra* Section I.B (explaining the narrow scope of trademark law's prohibitions on confusion, deception, and dilution).

13. *See, e.g.*, Deven R. Desai, *From Trademarks to Brands*, 64 FLA. L. REV. 981, 1011 (2012) [hereinafter Desai, *From Trademarks to Brands*] ("[A] trademark must represent a single source, but consumers do not have to know the precise origin of a good."); Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 814 (1927) ("[T]he source or origin of the goods bearing a well known trademark is seldom known to the consumer.").

whether SUPERSILK-brand fabric is truly silk or not[14]) and not any further consumer associations.[15] Dilution prevents additional, potentially unsavory associations from becoming attached to a mark but by definition operates in the absence of any actual mistakes on the part of consumers.[16] The rules against naked licensing and assignments in gross could have prevented masking under limited circumstances (those relating to transfers of rights and ownership) but are largely inoperative today in any case.[17] Overall, trademark law permits masking absolutely.[18]

Trademark law's tolerance of masking, however, conflicts directly with some of its most well-accepted, bedrock principles. The orthodox story is that trademarks support consumer and producer interests alike without tension. By creating exclusive use rights in a particular sign, trademark law turns the sign into a reliable indicator of authenticity—both supporting consumer decision-making and preventing the loss of investments in goodwill for producers. This leads to the typical functionalist description of trademarks: they reduce search costs for consumers and incentivize producers to maintain their reputations.[19] But masking plainly undermines both of these functions. It increases search costs, rather than reducing them, when a firm adopts a new mark to hide its bad reputation or keeps an old mark despite substantial change. A consumer that wants to avoid brands that have dropped their standards, outsourced, or become more harmful to society must perform new research with every single purchase

14. *In re* Phillips-Van Heusen Corp., 63 U.S.P.Q.2d 1047, 1052 (T.T.A.B. 2002).

15. *See infra* Subsection I.B.2.

16. 15 U.S.C. § 1125(c)(1) (protecting "the owner of a famous mark" from unauthorized use "that is likely to cause . . . blurring or . . . tarnishment . . . , regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury").

17. *See* Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1710 (1999) ("[T]he trend in trademark law clearly seems to be toward permitting assignments in gross and 'naked,' or unsupervised, trademark licenses. . . . While U.S. courts have not abandoned the rule against assignments in gross, they are more willing than ever before to permit transfers with minimal associated goodwill, particularly in the context of allowing financiers to take a security interest in trademarks.").

18. *See* Aaron Perzanowski, *Unbranding, Confusion, & Deception*, 24 HARV. J.L. & TECH. 1, 17 (2010) ("The dominant theoretical justifications for trademark law support efforts to control unbranding and prevent the consumer confusion that it creates. But the few courts to analyze unbranding through the lens of trademark law have demonstrated striking insensitivity to the potential harms unbranding strategies impose on consumers, competitors, and the market broadly.").

19. *See, e.g.*, William M. Landes & Richard A. Posner, *The Economics of Trademark Law*, 78 TRADEMARK REP. 267, 277 (1988) ("[T]rademarks lower search costs and foster quality control."); Stacey Dogan & Mark Lemley, *A Search-Costs Theory of Limiting Doctrines in Trademark Law*, 97 TRADEMARK REP. 1223, 1226 (2007) [hereinafter Dogan & Lemley, *A Search-Costs Theory*] ("By protecting established trademarks . . . [b]oth sellers and buyers benefit . . . . Sellers benefit because they can invest in goodwill with the knowledge that others will not appropriate it. Consumers benefit because they do not have to do exhaustive research or even spend extra time looking at labels before making a purchase; they can know, based on a brand name, that a product has the features they are seeking.").

rather than relying on marks to communicate product qualities. Likewise, it reduces the incentive for firms to cultivate or maintain a positive reputation when they can easily acquire someone else's (whether the transfer of goodwill is deserved or not) or cash out on a legacy via unwary consumers. Naturally, it also weakens the incentive to avoid creating a negative reputation when any firm is free to abandon its old mark and start afresh with a new one.

The acceptability of masking thus reveals a more accurate functionalist description of trademark law: trademarks allow producers to *control* search costs for consumers (not just lowering them, but raising them at times), and trademarks allow producers to prevent *interference and free riding* by others on their investments in reputation (while leaving incentives in place to deplete it or bail it out at times). When the tolerance of masking is considered alongside the actual prohibitions against confusion, deception, and dilution, these functions become even more clear. That is, trademarks solve certain rivalry problems with respect to reputation by creating exclusive rights,[20] but trademarks do not solve unilateral problems with respect to reputation by creating owner obligations. This drastically changes the terms of one of trademark law's most longstanding and contentious debates: whether doctrines like post-sale confusion and dilution are aberrational, producer-focused outgrowths of a body of law otherwise devoted to the interests of consumers first and foremost.[21] Trademark law's acceptance of masking reveals that a key premise of this argument is mistaken; even the heartland of trademark law appears to serve producers—mark owners—first and consumers second. Mark owners are permitted to frustrate consumer decision-making in the very ways

20. This author has previously demonstrated that functionality doctrine, which has long proved difficult to adequately describe, proceeds on essentially the same grounds. That is, product features that provide nonrivalrous benefits are deemed functional, whereas features that provide rivalrous benefits are not. Matthew Sipe, *A Fragility Theory of Trademark Functionality*, 169 PA. L. REV. 1825, 1825, 1831–32 (2021). This Article shows that the same observation can be extended to trademark law as a whole.

21. *See* Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1733 (1999). *See generally* Mark Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413 (2010) (critiquing trademark law's expansion, particularly regarding confusion); Glynn S. Lunney Jr., *Trademark Monopolies*, 48 EMORY L.J. 367 (1999) (same); Robert C. Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158 (discussing "the possibility of genuine conflict between trademark law and the First Amendment"); Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 CARDOZO L. REV. 105 (2005) (analyzing the confusion doctrine in relation to the Internet) [hereinafter Rothman, *Initial Interest Confusion*]; Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621 (2004) (proposing viewing trademark law through a lens of semiotics) [hereinafter Beebe, *The Semiotic Analysis*]; Deven R. Desai, *The Chicago School Trap in Trademark: The Co-Evolution of Corporate, Antitrust, and Trademark Law*, 37 CARDOZO L. REV. 551 (2015) [hereinafter Desai, *The Chicago School Trap*] ("offer[ing] a diagnosis of trademark law that explains how trademark law works and its current foundation").

that trademark law purports to solve at its core by obfuscating who is behind a product and what the product is.

This description suggests that the property law account of trademarks is undertheorized and unfairly marginalized in the literature to date. Few commentators have taken this position seriously (doing so as a matter of history and philosophy[22]), but the following analysis lends functionalist support. That is, by creating ownership rights, both trademark and property law avoid wealth dissipation that would otherwise occur from counterproductive rivalry. Trademark law thus solves a class of common problems with respect to reputation—but does not go further and take the form of public regulation via government benefit. Instead, trademark law's treatment of masking reveals a distinctly property-like bundle of rights in exclusion, use, destruction, and transfer. And like property, it does not internally occupy itself with distributional concerns; indeed, because of the complete absence of consumer standing under the Lanham Act,[23] only the "self-interest of . . . plaintiff trademark holders determines the range of cases pursued."[24] In that sense, trademark law tends to promote overall efficiency, but it generally prioritizes the welfare of producer-owners even at the occasional expense of consumers.

Some, perhaps most, masking behavior is likely to be self-correcting, even if it harms a subset of consumers in the short run. Consumers update their associations with a mark over time as they have more experiences; so, for example, if a firm dumps its badwill by hiding behind a new mark, consumers will simply develop new badwill unless the firm improves the product. Likewise, if a firm suddenly drops the quality of its product but continues to use the same mark, consumers will eventually change their purchasing behavior when their high expectations are continually unmet. Recognizing these kinds of long-term outcomes, most firms will be wary of trying to capitalize on a purely short-term grift. On the other hand, masking behavior may not be self-correcting when a firm has market power, information costs are particularly high, or rebranding costs are particularly low.[25]

22. *See, e.g.*, Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1847 (2007) (recognizing the elements of both "confusion-based protection" and a "property-based regime" that can be found in modern trademark law, and finding the latter to dominate the historical record); Adam Mossoff, *Trademark as a Property Right*, 107 KY. L.J. 1, 3 (2018) (recognizing—but dissenting from—the consensus view among "[m]ost commentators," that trademarks are "primarily a regulatory entitlement" and not property, using Lockean labor theory). *See generally* Jennifer Rothman, *Navigating the Identity Thicket: Trademark Law's Lost Theory of Personality, the Right of Publicity, and Preemption*, 135 HARV. L. REV. 1271 (2022) [hereinafter Rothman, *Navigating the Identity Thicket*] (applying theories of personhood to trademark interests and rights).

23. Pub. L. No. 87-772, sec. 17, §§ 32–45, 76 Stat. 769, 773–75 (1962) (codified as amended at 15 U.S.C. §§ 1114–27).

24. Michael Grynberg, *Trademark Litigation as Consumer Conflict*, 83 N.Y.U. L. REV. 60, 72 (2008).

25. *See infra* Part III.

Given this information-cost issue and the lack of a solution internal to trademark law, it is worth examining at least some instances of masking through the lens of consumer protection law. State and federal laws regarding deceptive practices against consumers are, in effect, an information-forcing regime, and the elements of such a claim would seem to be met by masking behavior that harms consumers. There is no precedent, however, finding the use or nonuse of a trademark to itself constitute a deceptive act. One recent, high-profile case that reached the New Mexico Supreme Court offers a preview into how such claims might proceed, yet has no precedential value.[26] For future cases, the analysis herein shows that the Lanham Act should not be held to stand in the way, contrary to what the defendants in that case argued. Rather, consumer protection law would fill a complementary, regulatory role to trademark law's internally coherent—but susceptible to abuse—regime of property rights.

This Article will proceed in three parts. Part I examines the ways that trademark law allows mark owners to mask—strategically using and not using marks in ways that frustrate consumer decision making—as contrasted against the kinds of confusion, deception, and dilution that trademark law prohibits. In Part II, the contrast between these two categories prompts a critical reexamination of the typically stated purposes and functions of trademark law. The orthodox story of search costs and quality incentives cannot stand as is, whereas the more heterodox, property-law story warrants much greater attention. Part III then offers a potential intervention for masking behavior that is unlikely to be self-correcting due to high information costs: state and federal consumer protection law.

I. MASKING VERSUS CONFUSION, DECEPTION, AND DILUTION

A. *Masking—What Trademark Law Permits*

Trademarks can function as masks in essentially two ways. First, a firm may cease using an old mark and choose to adopt a new one—masquerading as something different than what consumers already know. If there actually is some relevant similarity for consumers, the new mark will thus act to conceal it. Second, a firm may continue using an old mark and decline to adopt a new one—masquerading as the same thing that consumers already know. If there actually is some relevant difference for consumers, the old mark will thus act to conceal it. In either case, insofar as consumers rely on marks to help them avoid or locate certain firms, products, and characteristics, masking makes their task more difficult.

26. *See* Puma v. Wal-Mart Stores E., LP, No. S-1-SC-39540, 2024 WL 5166686, at *1 (N.M. Sup. Ct. Dec. 19, 2024).

One reason why a firm might drop an old mark and take up a new one is to hide some kind of negative reputation.[27] ValuJet was associated with a horrific, fatal plane crash; AirTran was not.[28] Blackwater and Xe Services were associated with the killing of Iraqi and Afghan civilians; Academi was not.[29] Philip Morris was associated with countless tobacco-related deaths; Altria and its subsidiaries like Kraft Foods were not.[30] As a result of this kind of masking, a consumer that wants to avoid, say, flying with an airline with a poor reputation for safety or lining the pockets of a firm whose behavior they find immoral, would have a more difficult time doing so. "ValuJet," "Blackwater," and "Philip Morris" may have negative reputations, but "AirTran," "Academi," and "Altria" get to start afresh.

Brazen dumping of badwill may be the most extreme example of new-mark masking, but it is far from alone. Consider the widespread practice of white labeling, whereby one firm sells a product or service to another firm, who then labels it with their own branding—*only* their own branding—before selling it to the end consumer.[31] The two firms are both fully aware of the arrangement, but

27. *See* Note, *Badwill*, 116 HARV. L. REV. 1845, 1845 (2003) ("[T]rademark law . . . provides producers with an escape hatch. When a product or service is of such poor quality that significant badwill accrues to its associated mark, the producer can simply change the mark."); *see, e.g.*, Stephen Chernin, *AIG Starts Makeover, Changes Sign at N.Y. Office*, NBC NEWS (Mar. 23, 2009, at 07:46 ET), https://www.nbcnews.com/id/wbna29834658 [https://perma.cc/2F3X-D4YA] ("A spokesman said the company had decided to replace the large AIG sign—outside the entrance to its property-casualty offices—as part of its plan to change that operation's name to AIU Holdings Ltd. . . . The AIG name, once the proud moniker of the world's largest insurer, has become tainted since large losses on mortgage bets necessitated a government bailout of $85 billion last September. Twice since more aid has been given to AIG, with the rescue now costing U.S. taxpayers up to $180 billion."); Yinka Adegoke, *Comcast Seeks Reputation Change with Xfinity Brand*, REUTERS (Feb. 9, 2010, at 13:08 ET), https://www.reuters.com/article/idUSN05153286/ [https://perma.cc/N5CD-ZYKH] ("If you search for 'Comcast' on YouTube, the top clip is one of a cable technician fast asleep on a customer's sofa while waiting on the phone for a reply from the cable company's head office. Such clips, plus numerous blog posts and Twitter messages that berate Comcast's customer service, are the reasons behind a major marketing campaign to rebrand the No. 1 U.S. cable TV service under a new name, Xfinity."); Jonathan D. Rockoff, *Valeant Pharmaceuticals To Change Its Name to Bausch Health: Another Move in Its Attempt for Some Distance from Its Past*, WALL ST. J. (May 8, 2018, at 12:14 ET), https://www.wsj.com/articles/valeant-pharmaceuticals-to-change-its-name-to-bausch-health-1525752878 [https://perma.cc/VX7N-PP83 (staff-uploaded, dark archive)] ("Valeant Pharmaceuticals International Inc. plans to change its name to Bausch Health Cos., as management takes another step toward remaking the company and distancing it from past controversies . . . over its accounting and business practices, such as buying drugs and then increasing their prices.").

28. *See supra* note 2 and accompanying text.

29. *See supra* note 3 and accompanying text.

30. *See supra* note 4 and accompanying text.

31. *See generally* Garry A. Gabison, *White Label: The Technological Illusion of Competition*, 67 ANTITRUST BULL. 642 (2022) (exploring various forms of a "white label" business model in financial services markets); Braeden Hodges, *Banking-as-a-Service: Fintechs Walking the Regulatory Perimeter*, 17 BROOK. J. OF CORP., FIN., & COMM. L. 127, 134 (2023) ("To summarize [white labeling], a product or service is produced by one company, 'Company A,' and sold to another company, 'Company B,'

the consumer likely is not.[32] The result is that a consumer might believe they are taking a course from a well-established university when it is in fact wholly designed and taught by a third-party startup.[33] Or a consumer might think they are receiving financial services from a new innovator or a local bank when those services are in fact performed by an incumbent, national firm.[34] And in the world of cosmetics, a consumer might expect that the company from whom they made their latest purchase had a bit more to do with the product than "branding and marketing" alone.[35] But as a result of masking—specifically, the non-use of the actual producer's mark and prominent use of the seller's mark—these consumers may be highly surprised by the truth.

A single firm might also adopt a new mark in one context but continue using its old mark in another. Ghost kitchens are a particularly timely example of this kind of masking: "[v]irtual restaurant brands based in other

which will rebrand the good and market it to consumers as though Company B was its original manufacturer.").

32. *See* Gabison, *supra* note 31, at 643 ("White labeling is a form of outsourcing or subcontracting. With this form of subcontracting, the consumers do not know the identity of the producer and suffer from information asymmetries."); Hodges, *supra* note 31, at 134 ("[T]he end-user might never discover the bank's behind-the-scenes involvement."); Jason Gordon, *White Label Product–Explained*, BUS. PROFESSOR (Feb. 23, 2025), https://thebusinessprofessor.com/white-label-product-explained/ [https://perma.cc/3DHV-UTDF] ("[Thus], the end result or the product seems to be one manufactured by the buyer[] itself."); Michelle Richardson, *Ethics and Transparency in White Labeling*, MEDIUM (Jan. 2, 2024), https://medium.com/@michellerichardson_11188/ethics-and-transparency-in-white-labelling-e7068a12aeda [https://perma.cc/QG8D-NFDH] ("If the reseller openly discloses that the product is white labeled and provides information about the original manufacturer, consumers can make informed decisions. Lack of transparency can be perceived as deceptive, potentially leading to distrust among customers.").

33. *See, e.g.*, Reed, *supra* note 8 ("In the context of higher education . . . putting the university's name on those classes . . . offers legitimacy. Companies like Trilogy have built a business model on teaching courses under the names of established universities.").

34. *See, e.g.*, Hodges, *supra* note 31, at 134–36 (describing Apple's white-label arrangement with Goldman Sachs to create the Apple Card); Jelle Van Schaick, *What the Hell Is White Label Banking? And What Is It Not?*, FINEXTRA (Oct. 1, 2024), https://www.finextra.com/blogposting/26920/what-the-hell-is-white-label-banking-and-what-is-it-not [https://perma.cc/GW2M-5KV4] (describing fintech giant Revolut's white-label arrangement with Lloyds Bank and Barclays); Carla Tardi, *What Is a White Label Product, and How Does It Work?*, INVESTOPEDIA, https://www.investopedia.com/terms/w/white-label-product.asp [https://perma.cc/HYZ8-JL6L] (last updated Apr. 23, 2025).

35. *How To Start a Skincare Brand with Selfnamed?*, SELFNAMED, https://www.selfnamed.com/en/how-it-works [https://perma.cc/R96F-R5KV] (offering white-label cosmetics to businesses, suggesting that they "[f]ocus on branding and marketing, while we handle the product creation, packaging and shipping"); *see, e.g.*, Victoria Stokes, *Is Kylie Jenner's $30 Lip Kit Just a Rebrand of a Much Cheaper Product? We Take a Look at White Labeling to Find Out*, STELLAR (Dec. 2, 2015), https://stellar.ie/beauty-fashion/is-kylie-jenners-30-lip-kit-just-a-rebrand-of-a-much-cheaper-product-we-take-a-look-at-white-labelling-to-find-out/20804 [https://perma.cc/4LP8-LKMP]; Maria Freeman, *Kylie Jenner Sells Majority Share of Cosmetics Line for $600 Million*, L.A. BUS. J. (Nov. 22, 2019), https://labusinessjournal.com/retail/kylie-jenner-sells-majority-share-cosmetics-line/ [https://perma.cc/AL75-57L4] (describing "an extensive beauty products infrastructure" in Los Angeles, including "a string of white-label companies that can quickly manufacture and bring makeup to market" on behalf of celebrities and influencers).

establishments' kitchens," with "no public seating or frontage," exclusively fulfilling delivery orders through platforms like Uber Eats or DoorDash.[36] Incumbent restaurant chains create new virtual personas, masquerading as something new, local, or small, with consumers finding themselves misled and frustrated as a result. For example:

> Daniel Stamps thought he would be trying out something new when he logged onto UberEats this June and ordered delivery from an unfamiliar restaurant called "It's Just Wings." When the food arrived, Stamps says it was "by far the worst wings I've ever seen—soggy and cold, like they'd been sitting in water for two hours." . . . What Stamps didn't know when he ordered was that It's Just Wings is a "virtual restaurant," not only owned by the same company as Chili's but actually cooking its food in the same kitchens. According to Stamps, the food was exactly the same. "I hate Chili's. I know Chili's wings are awful. I would never knowingly order from Chili's."[37]

In a similar fashion, IHOP becomes "Thrilled Cheese," Applebee's becomes "Cosmic Wings," Chuck E. Cheese becomes "Pasqually's Pizza," and Denny's becomes "The Burger Den."[38] Even if these longstanding restaurants have negative reputations amongst the segment of consumers who order food delivery online, the restaurants are nevertheless able to use masking to prevent those consumers from incorporating it into their decision-making. At the same time, these restaurants still use their old marks in the context of brick-and-mortar dining establishments, allowing them to continue reaping the benefits

36. Dodds, *supra* note 9.

37. *Id.*; *see also* Julie Creswell, *Ghost Kitchens Are Disappearing, Squeezed by Demand and Complaints*, N.Y. TIMES (Apr. 12, 2024), https://www.nytimes.com/2024/04/12/business/ghost-kitchens-restaurants-pandemic.html [https://perma.cc/8CZP-KVJC (staff-uploaded, dark archive)] ("Customers using delivery apps like Uber Eats and DoorDash find themselves sometimes wondering where the food is being made as well as dealing with long wait times as drivers have to deliver multiple orders at a time. This leads to food quality issues. Uber Eats removed 8,000 'storefronts' from its listings last year over complaints of poor quality, inaccurate orders or duplication, meaning multiple, nearly identical restaurants were operating out of the same location.").

38. Dodds, *supra* note 9; *see also* Nahid Hassan, *Ghost Kitchens? The System of Fake Restaurants on GrubHub*, CORN. REV. (Mar. 16, 2023), https://www.thecornellreview.org/ghost-kitchens-the-system-of-fake-restaurants-on-grubhub/ [https://perma.cc/PR4U-9VHY] ("Unfortunately, a small number of Ithaca restaurants have made multiple fake ghost kitchens on GrubHub, deceiving customers into thinking they're ordering from a new restaurant each time they order. These fake ghost kitchens offer the same food as the proprietor restaurant, and operate from the same location, but with different names on their listings. If a certain fake restaurant does poorly, the mother restaurant can simply remove the listed restaurant and create a new listing."); *Disguised on DoorDash? Several Chain Restaurants Marketing Food Under Different Names*, CBS NEWS SACRAMENTO (Mar. 4, 2021, at 08:35 PT), https://www.cbsnews.com/sacramento/news/doordash-chain-restaurant-virtual-brand/ [https://perma.cc/6BCM-E78T]; Braden Bjella, *'Ghost Kitchens Are Getting Out of Control': Customer Calls Out 'Fake Restaurants' that Have Same Address as IHOP on DoorDash*, DAILY DOT, https://www.dailydot.com/irl/ihop-doordash-ghost-kitchens/ [https://perma.cc/Q6XK-7F26] (last updated Jan. 14, 2023, at 08:45 CT).

of whatever positive reputations exist amongst the dine-in segment of consumers.

Auto makers and retail stores provide similar examples of this kind of masking, where multiple marks allow for multiple—potentially inconsistent—reputations on otherwise identical firms or products. In the automobile industry, "badge engineering" refers to the common practice of selling vehicles with "little or no actual engineering differences" under multiple brand names and logos.[39] This can lead to astonishing price differences between otherwise identical vehicles, with consumers none the wiser:

> Take, for instance, the tiny European city runabout known as the Aston Martin Cygnet. In its most basic version it sells at more than $45,000. The car is actually made by Toyota and a Toyota version (identical except for some interior accoutrements) can be had for less than $17,000. On an apples-to-apples comparison . . . the average price discrepancy is more than $31,000. Thus those who [buy under] Aston Martin's badge pay an outrageous three times more for exactly the same Toyota engineering![40]

The private labels—more colloquially, store brands—used by retail stores can lead to a similar phenomenon.[41] Costco stores, for example, carry a variety

39. Scott McLachlan, Martin Neil, Kudakwashe Dube, Ronny Bogani, Normal Fenton & Burkhard Schaffer, *Smart Automotive Technology Adherence to the Law*, 29 INT'L J.L. & INFO. TECH. 255, 270 n.30 (2021); *see, e.g.*, Subaru Dist. Corp. v. Subaru of Am., 425 F.3d 119, 121 (2d Cir. 2005) ("Subaru . . . brought the suit to prevent the defendants from selling 'rebadged' cars, that is, cars manufactured from designs also used for Subaru models, but which defendants allegedly propose to sell under the Saab trademark."); Amy Wilson, *Can't Tell the Pontiacs from the Buicks? That's a Problem*, AUTO. NEWS (Sep. 14, 2008, at 01:00 ET), https://www.autonews.com/article/20080914/OEM02/309149940/can-t-tell-the-pontiacs-from-the-buicks-that-s-a-problem/ [https://perma.cc/PF2B-7CLR].

40. Eamonn Fingleton, *Same Car, Different Brand, Hugely Higher Price: Why Pay an Extra $30,000 for Fake Prestige?*, FORBES, https://www.forbes.com/sites/eamonnfingleton/2013/07/04/same-car-different-brand-hugely-higher-price-why-pay-an-extra-30000-for-fake-prestige/ [https://perma.cc/6VFL-F97B] (last updated July 7, 2013, at 21:40 ET); *see also, e.g.*, Andrei Nedelea, *DriveMag Looks at Badge Engineering: 2012-2015 Chrysler Ypsilon*, DRIVE MAG. (Apr. 18, 2017), https://drivemag.com/news/drivemag-looks-at-badge-engineering-2012-2015-chrysler-ypsilon/ [https://perma.cc/SP6G-UH7Z] ("Back in 2011, when [Chrysler's rebadged Lancia Ypsilon] debuted in the UK, the press blurb said it is 'equipped with all the features you would expect from a large Chrysler, integrated with stylish European designed interiors.' Now while that may have been true for the most part, the blurb presented it as a new model made by Chrysler to reflect Chrysler values, and it was kind of deceiving to the buyer . . . ."); Andrei Nedelea, *DriveMag Looks at Badge Engineering: 2005-2006 Saab 9-2X*, DRIVE MAG. (Jan. 12, 2017), https://drivemag.com/news/drivemag-looks-at-badge-engineering-2005-2006-saab-9-2x/ [https://perma.cc/PAR6-M2K2] ("If you're still wondering what the heck we're talking about here, we'll tell you the 9-2X's secret: it's actually a 2004 Impreza wagon with Saab badges replacing the Subaru ones. There is literally no Saab in it whatsoever; even the interior is all Subaru, and that's never been something to brag about . . . .").

41. *See generally Store Brand Facts*, PRIV. LABEL MFRS. ASS'N, https://www.plma.com/about_

of national brands (like Coca-Cola soda or General Mills cereal), but they also carry Costco's own private label (Kirkland Signature) covering sodas, cereals, and a seemingly endless array of other goods.[42] But many Kirkland Signature goods are, in fact, merely repackaged products of national brands: the batteries are Duracell, the tuna is Bumble Bee, the diapers are Huggies, the coffee beans are Starbucks, the aluminum foil is Reynolds Wrap, and the list goes on.[43] Put differently, otherwise identical goods with different labels may appear side-by-side on store shelves—and, given the secrecy surrounding this practice, consumers may wind up unknowingly paying a premium for the label alone.[44] A single manufacturer can thus simultaneously capitalize on two completely different identities (and price points), with the help of masking.

The examples thus far illustrate how using a new or different mark might conceal information from consumers. But continuing to use an old mark despite changes in the product, process, or producer can do much the same. When a firm uses a mark with a longstanding, storied reputation for excellence—but the firm now produces a shoddy, inferior product—unsavvy consumers suffer the difference. ValuJet changed its mark to escape a bad reputation, but Boeing kept its mark and thereby hid behind a good one:

> It wasn't that long ago that Boeing's reputation was that of a staid industrial giant, known for building the safest, most advanced planes in

industry/store_brand_facts [https://perma.cc/S7C3-RGZE] ("Simply stated, store brands are the products that carry the retailer's name or private brands. . . . They often carry the chain's own proper name, or a variety of brand names created exclusively by the retailer for its stores . . . such as Costco's Kirkland Signature, Wal-Mart's Great Value, Whole Foods' 365 Everyday Value, or Meijer Gold."); United States v. Topco Assocs., Inc., 405 U.S. 596, 599 n.3 (1972) ("Private-label products differ from other brand-name products in that they are sold at a limited number of easily ascertainable stores. A&P, for example, was a pioneer in developing a series of products that were sold under an A&P label and that were only available in A&P stores.").

42. *See Kirkland Signature*, COSTCO, https://www.costco.com/kirkland-signature.html [https://perma.cc/A5NW-2R7U (staff-uploaded archive)]; Nathaniel Meyersohn, *Why Every Costco Product Is Called 'Kirkland Signature*,' CNN BUS. (Feb. 5, 2022, at 16:44 ET), https://www.cnn.com/2022/02/05/business/costco-kirkland-signature/index.html [https://perma.cc/3NV3-RRT6 (staff-uploaded archive)] ("Costco's Kirkland Signature brand is perhaps America's weirdest private label. You can put Kirkland Signature AA batteries alongside Kirkland Signature cashews in your shopping cart.").

43. *See* Serah Louis, *Here Are the Big Brands Hidden Behind Costco's Kirkland Products*, YAHOO! FIN. (Dec. 20, 2020), https://finance.yahoo.com/news/big-brands-actually-costcos-kirkland-000800481.html [https://perma.cc/Y9JE-BQRC (staff-uploaded archive)]; Nathaniel Meyersohn, *The Hidden Makers of Costco's Kirkland Signature and Trader Joe's O's*, CNN BUS. (Aug. 6, 2022), https://www.cnn.com/2022/08/06/business/costco-kirkland-signature-trader-joes-store-brands/index.html [https://perma.cc/EJA8-B7VG (staff-uploaded archive)].

44. *See, e.g.*, Louis, *supra* note 43 (noting that some "names behind Kirkland Signature products are public knowledge," but "others remain a closely guarded secret"); Meyersohn, *supra* note 43 ("[T]he origins of store brands remain largely secretive. Retailers aren't typically forthcoming about the companies that make their brands. And manufacturers, likewise, have little incentive to reveal that they're creating similar products to their name brands under a different label sold on the cheap.").

> the sky . . . . While Boeing denies there has been . . . a shift away from safety and excellence, what is indisputable is that its engineering and manufacturing problems have contributed to a series of shocking incidents, two of which resulted in the deaths more [sic] than 300 people combined.[45]

Again, it is not difficult to find instances of frustrated consumers discovering (*after* a purchase) that a firm has drastically dropped its standards.[46] For a more quotidian example, consider the Nature Valley Peanut Butter Biscuit Sandwich.[47] Endless consumer reviews over the last year bemoan a wholly unannounced change in production that changed the product from many consumers' "favorite snack" to something tasting like "burned cardboard."[48] Because of the mark and its associations, consumers had certain (unmet) expectations in the product and were out the purchase price as a result.

These are instances where a mark acts to conceal changes in quality over time, but masking can also occur across space: the same branding being used in multiple places despite radical differences in quality. Outlet stores may be the quintessential example here. Consumers see the same fashion labels they know and "assume outlet malls stock their shelves" with things like "excess inventory, end-of-season or slightly flawed factory seconds (think: a seam with a few errant stitches)."[49] In reality, "[t]he little-known truth about outlet stores is that most of their merchandise was actually made to sell only at outlets"[50] as deliberately

45. *See* Isidore, *supra* note 7.

46. *See, e.g.*, Brissey, *supra* note 5; Collinson & Smithers, *supra* note 6.

47. *See Peanut Butter Biscuit Sandwiches*, NATURE VALLEY, https://www.naturevalley.com/products/peanut-butter-biscuit-sandwiches [https://perma.cc/99MP-KWUK (staff-uploaded archive)].

48. Comment, AllieLou1212 (2025), *on Peanut Butter Biscuit Sandwiches*, *supra* note 47 ("WHY??!!! I loved these like possibly obsessed, then you changed them! They are HORRIBLE NOW I AM DISGUSTED! . . . I will never buy another box ever. I actually threw the last box out that I bought.").

49. Veronica Matthews, *Spoiler Alert: Outlet Malls Actually Aren't a Great Deal—Here's Why*, PENNY HOARDER (Oct. 11, 2023), https://www.thepennyhoarder.com/save-money/truth-about-outlet-stores/ [https://perma.cc/9RQG-F265]; *see also* Mark Reback, *Outlet Malls Aren't What They Used To Be*, CONSUMER WATCHDOG (Dec. 8, 2013), https://consumerwatchdog.org/uncategorized/outlet-malls-arent-what-they-used-be/ [https://perma.cc/V6KV-2SCU] ("When outlet malls first appeared nearly 40 years ago, they didn't make much money, serving mostly as a channel to get rid of goods no one wanted."); *Outlet Stores and "Compare At" Pricing*, OFF. OF THE ATT'Y GEN., STATE OF CAL., https://oag.ca.gov/consumers/general/outlet-stores [https://perma.cc/VRN8-BPWK] [hereinafter *Outlet Stores*] ("[O]utlet stores used to sell overstock or past-season items at discount prices . . . ."); Gina Barton, *Why Outlet Stores Aren't as Good a Deal as You Think*, VOX (Dec. 4, 2015), https://www.vox.com/2015/12/4/9792764/outlet-stores [https://perma.cc/LU3F-JXRZ (dark archive)] ("Excess designer clothes from last season at a good price—that's what you find at outlet clothing stores, right? Wrong.").

50. Barton, *supra* note 49.

low-quality versions of what the firm sells through its ordinary channels.[51] By using the same mark in these two distinct streams of commerce, firms are able to mask the discrepancy and profit off of consumers' erroneous beliefs.[52]

Where there are changes to the inherent, consumptive qualities of a product, consumers may at least catch on relatively quickly. But continuing to use an old mark can mask much subtler changes—changes that may still matter to consumers but would not be automatically detectable through consumption over time. This kind of masking, for example, can capitalize on a reputation for good labor relations that is no longer fully true; consider Whole Foods post-acquisition by Amazon.[53] It can capitalize on a reputation for positive environmental practices that is now more complex; consider The Body Shop post-acquisition by L'Oréal.[54] In the same way, holding on to old marks can conceal the complete outsourcing (like Rawlings baseballs[55] and L.L. Bean[56]

51. *See, e.g.*, *Outlet Stores*, *supra* note 49 ("[M]odern-day outlet stores primarily sell different, lower-quality products than the regular retail stores, made specifically for the outlet to be sold at lower prices . . . . For example, clothes may be made of less-expensive material, manufactured in different countries with less-expensive labor costs, and have lower quality buttons or zippers, to bring the manufacturing cost down."); Reback, *supra* note 49 ("[M]ost brands now sell lesser-quality merchandise made just for their outlets . . . . 'It's an abuse of the brand. Most consumers don't realize what they're getting,' said Jamie Court, president of Consumer Watchdog.").

52. *See* Press Release, *supra* note 10.

53. *See* Michael Blanding, *Amazon vs. Whole Foods: When Cultures Collide*, HARV. BUS. SCH.: WORKING KNOWLEDGE (May 14, 2018), https://hbswk.hbs.edu/item/amazon-vs-whole-foods-when-cultures-collide [https://perma.cc/6PNB-G9XM] ("Employees struggled, however[, after the acquisition]. They were frustrated about having to do paperwork instead of helping customers, and stressed over new performance metrics with demerits if they failed to meet them. Last year, the company dropped from Fortune's best companies to work for list for the first time in two decades."); Claire Kelloway, *The Amazonification of Whole Foods Goes Beyond Store Tech*, FOOD & POWER (Apr. 28, 2022), https://www.foodandpower.net/latest/whole-foods-amazon-purchasing-changes-labor-cuts-2022 [https://perma.cc/5TRT-BUT4] ("Amazon's acquisition . . . ushered in more cost cutting, especially on the backs of workers. While Whole Foods still talks a big game about supporting local businesses and their workers, both groups have been shunted as the chain seeks to compete with dominant retailers.").

54. *See* Kate Hardcastle, *The Body Shop Owners To Call in Administrators: What Now for Beloved Beauty Brand?*, FORBES (Feb. 10, 2024, at 16:07 ET), https://www.forbes.com/sites/katehardcastle/2024/02/10/the-body-shop-owners-to-call-in-administrators-what-now-for-beloved-beauty-brand/ [https://perma.cc/39TD-VJHX] ("The Body Shop emerged in stark contrast to the prevailing beauty norms, introducing breakthrough products that were not only natural but also ethically sourced. . . . The narrative took a significant turn in 2006 when Roddick sold The Body Shop to L'Oréal, a move that sparked debate among loyal customers and critics alike. The sale was seen by some as a betrayal of the brand's core values, given L'Oréal's history with animal testing.").

55. *See* Leslie Josephs, *Made in Costa Rica: U.S. Major League Baseballs*, REUTERS, https://www.reuters.com/article/us-costarica-baseballs-idUSTRE62831Z20100309/ [https://perma.cc/C5FP-F3AX] (last updated Mar. 10, 2010).

56. *See* Mike Yon, *Where Is LL Bean Made?*, ALLAMERICAN (Feb. 7, 2025), https://allamerican.org/investigation/ll-bean/ [https://perma.cc/MZB5-DGBR] ("LL Bean still manufactures 425 products in the USA that are available in its online store. However, 425 is . . . less than 10% of its overall portfolio."); *Does L.L. Bean Keep It Made in America?*, ALL. FOR AM. MFG. (June

manufacturing) or foreign acquisition (like General Electric Appliances, now owned by the Chinese company Haier[57]) of famously American-made and American-owned brands. Today's consumers are highly interested in qualities that go beyond the physical item on the shelf in front of them: they care about where[58] their products are made and how,[59] they care about supporting small and independent firms,[60] and they care about what causes the firm or its leaders endorse.[61] These qualities are not easily confirmed through direct consumptive experience or product reviews,[62] so until a consumer performs new research, they will not discover these kinds of changes. Masking cashes in on that reality.

23, 2011), https://www.americanmanufacturing.org/blog/does-l-l-bean-keep-it-made-in-america/ [https://perma.cc/72L4-M5UU].

57. McKenzie Sadeghi, *Fact Check: China's Haier Purchased GE's Appliance Business in 2016*, USA TODAY (Jan. 7, 2021, at 08:49 ET), https://www.usatoday.com/story/news/factcheck/2021/01/07/fact-check-chinas-haier-purchased-ge-appliance-unit-2016/4119523001/ [https://perma.cc/HF2H-YF98] ("GE sold its appliance business . . . to Haier for $5.4 billion in 2016 . . . .").

58. *See, e.g.*, *Survey Says: Americans Prefer "Made in USA*," RESHORING INST., https://reshoringinstitute.org/wp-content/uploads/2020/09/made-in-usa-survey.pdf [https://perma.cc/WMZ8-ZGZ4] ("Nearly 70% of the respondents said they prefer American-made products. Slightly more than 83% said they would pay up to 20% more for products made domestically."); *"Made in the USA" Resonates in China*, BOS. CONSULTING GRP. (Mar. 19, 2013), https://www.bcg.com/publications/2013/lean-manufacturing-pricing-made-in-usa-resonates-china [https://perma.cc/94EK-447Z (staff-uploaded archive)] ("More than 80 percent of U.S. consumers are willing to pay more for products labeled 'Made in USA' than for those labeled 'Made in China.' . . . Quality is a factor, but respondents also buy American to keep jobs from going overseas.").

59. *See, e.g.*, Greg Petro, *Consumers Demand Sustainable Products and Shopping Formats*, FORBES (Mar. 11, 2022, at 13:01 ET), https://www.forbes.com/sites/gregpetro/2022/03/11/consumers-demand-sustainable-products-and-shopping-formats/ [https://perma.cc/5DCM-V9JN] ("[C]onsumers across all generations—from Baby Boomers to Gen Z—are now willing to spend more for sustainable products."); Sherry Frey, Jordan Bar Am, Vinit Doshi, Anandi Malik & Steve Noble, *Consumers Care About Sustainability—and Back It Up with Their Wallets*, MCKINSEY & CO. (Feb. 6, 2023), https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/consumers-care-about-sustainability-and-back-it-up-with-their-wallets [https://perma.cc/MXG2-VARR].

60. VISTAPRINT, 2024 SMALL BUSINESS MARKETING REPORT 12, https://www.vistaprint.com/hub/small-business-marketing-report [https://perma.cc/B2R8-UF8V (staff-uploaded archive)] ("78% [of surveyed consumers] say it's important for them to shop small[, and] 41% say one of the reasons they would shop small over big is to support a local business.").

61. *See, e.g.*, Amanda Holpuch, *Behind the Backlash Against Bud Light*, N.Y. TIMES (Nov. 21, 2023), https://www.nytimes.com/article/bud-light-boycott.html [https://perma.cc/4C78-6TP2 (staff-uploaded archive)] ("After Dylan Mulvaney, the transgender influencer, promoted the beer on Instagram, conservatives called for a boycott. The fallout grew to include the retailer Target and the country singer Garth Brooks. Months after . . . the beer company is still dealing with the strong response to its campaign."); Gaby Del Valle, *Chick-fil-A's Many Controversies, Explained*, VOX (Nov. 19, 2019), https://www.vox.com/the-goods/2019/5/29/18644354/chick-fil-a-anti-gay-donations-homophobia-dan-cathy [https://perma.cc/2V22-FV69 (dark archive)] (describing the various "boycotts and negative press" that ensued as a result of Chick-fil-A's donations to anti-LGBTQ charities and comments made by the CEO).

62. *See In re* Nat'l Distillers & Chem. Corp., 49 C.C.P.A. 854, 863 (1962) (Rich, J., concurring) ("The purchasing public knows no more about trademark registrations than a man walking down the street in a strange city knows about legal title to the land and buildings he passes." (emphasis omitted)).

In general, changes in ownership and structure are particularly easy to mask by keeping the branding otherwise the same. To take a particularly extreme example, consider Anheuser-Busch InBev: as it acquires an endless number of craft breweries, from Devil's Backbone to Four Peaks to Goose Island, it continues to use their marks.[63]

Figure 1: Brands Owned by Anheuser-Busch InBev[64]

Luxottica does the same with eyewear: LensCrafters, Sunglass Hut, Ray-Ban, Oakley, Chanel, Burberry, Polo, Ralph Lauren, DKNY, Armani, Versace, and many other brands are all, in fact, within this one company's portfolio.[65] As a

63. *America's Concentration Crisis*, OPEN MKTS. INST., https://concentrationcrisis.openmarketsinstitute.org/industry/beer [https://perma.cc/L6E8-TE7G] (providing a complete list of the brands owned by Anheuser-Busch InBev and the next two largest firms).

64. Andrew Pierce, *Everything Owned by Anheuser-Busch InBev*, WYO. LLC ATT'Y, https://wyomingllcattorney.com/Blog/Everything-Owned-by-Anheuser-Busch-InBev [https://perma.cc/KCC9-H7MD]; *see Our Beers*, ANHEUSER-BUSCH, https://www.anheuser-busch.com/brands [https://perma.cc/JT8K-KC5R] (noting ownership of "more than 100 brands" and providing a partial list).

65. *See Eyewear*, ESSILORLUXOTTICA, https://www.essilorluxottica.com/en/brands/ [https://perma.cc/34BV-6LBX]; David Trites, *Want To Know Who Makes Your Designer Eyewear?*,

result, these firms mask some of the most highly concentrated markets in the United States, presenting as many small and independent brands in competition. This has significant political implications; as a result of masking, consumers qua *voters* may be unaware of just how extreme monopolization has become across numerous industries.[66] Indeed, "while it may appear as though there are endless brands to choose from online and on the shelf," it frequently turns out that "the array of labels [is] a mere façade creating the illusion of abundant options."[67]

B. *Confusion, Deception, and Dilution—What Trademark Law Prohibits*

Nominally, trademark law prohibits "confusion,"[68] "decepti[on],"[69] and "dilution"[70] relating to marks. The masking described in the previous section seems to confuse consumers, deceive consumers, and dilute the significance of marks to consumers—at least in the ordinary, plain sense of those terms, and at least in some cases. Nevertheless, trademark law permits the conduct described thus far without reservation or exception. Accordingly, it is worth examining the actual, surprisingly narrow meaning of these prohibitions for the sake of context and contrast.

1. Prohibited Confusion

Starting with confusion, the "primary mission" of trademark law is to enable marks to function as "source identifiers"; as such, the "cardinal sin" of trademark law is "to confuse consumers about source—to make . . . them think that one producer's products are another's."[71] But trademark law's actual

FORBES, https://www.forbes.com/sites/sap/2014/03/28/want-to-know-who-makes-your-designer-eyewear/ [https://perma.cc/V3D2-KT8R] (last updated Mar. 28, 2014, at 13:42 ET).

66. *See* Emily Stewart, *America's Monopoly Problem, in One Chart*, VOX (Nov. 26, 2018), https://www.vox.com/2018/11/26/18112651/monopoly-open-markets-institute-report-concentration [https://perma.cc/JF2R-79EA (dark archive)] ("'This is an effort to really introduce the fact that you go to the store, you see all of these brands, but guess what? They're all being operated by the same companies,' Sarah Miller, deputy director of the Open Markets Institute, told me. She called the system a 'scam economy' where 'competition is an illusion, and choice is an illusion.'").

67. *America's Concentration Crisis*, *supra* note 63 (detailing concentration across fifty-four industries); *see also* KLOBUCHAR, *supra* note 11, at 186.

68. 15 U.S.C. § 1125(a)(1)(A) (prohibiting the use of "any word, term, name, symbol, or device" that is "likely to cause confusion . . . as to the affiliation, connection, or association . . . or as to the origin, sponsorship, or approval" of goods or services); *id.* § 1114(1)(a) (prohibiting the use of "a registered mark" or imitation thereof that is "likely to cause confusion").

69. *Id.* § 1052(a) (prohibiting the registration of any mark that "[c]onsists of . . . deceptive . . . matter" or "falsely suggest[s] a connection with persons, . . . institutions, beliefs, or national symbols"); *id.* § 1052(e) (prohibiting the registration of any mark that is "deceptively misdescriptive" or "primarily geographically deceptively misdescriptive").

70. *Id.* § 1125(c)(1) (entitling the owners of "famous" marks to injunctive relief against the use of any other mark that is "likely to cause dilution by blurring or dilution by tarnishment of the famous mark").

71. Jack Daniel's Props., Inc. v. VIP Prods. LLC, 143 S. Ct. 1578, 1589 (2023).

conception of source is so thin that it is practically "a legal fiction."[72] It does not mean the true "origin" of a good or service in terms of space and time,[73] it does not mean the "particular substances" that physically compose a product,[74] and it does not even mean the mark's genuine owner in a legal sense.[75] In short, trademarks just do not signify "that the article in question comes from a definite or particular source, the characteristics of which or the personalities connected with which are specifically known to the consumer."[76] Strictly speaking, a trademark directly signifies only one thing: that the entity using it is (or has permission from) the owner of the mark. Thus, the consumer confusion that trademark law actually prohibits is confusion over only one thing: whether the user has the legal right to use the mark.

Accordingly, trademark law has no qualms about masking, despite the "confusion" it may cause consumers. It freely allows firms to drop an old mark and adopt a new one in order to dump their bad will and start fresh.[77] It freely allows firms to use marks to conceal the true owner of a brand or the existence of monopoly power.[78] And it freely allows firms to drop certain qualities or attributes of their products, even if doing so upsets consumers' expectations.[79]

72. Beebe, *The Semiotic Analysis*, *supra* note 21, at 680.

73. Desai, *From Trademarks to Brands*, *supra* note 13, at 1011; Schechter, *supra* note 13, at 814; Beebe, *The Semiotic Analysis*, *supra* note 21, at 678 ("Trademark doctrine . . . no longer assume[s] that consumers of mass-produced brand name goods kn[ow] or care[] to know the actual source of the brand they [a]re buying.").

74. *See, e.g.*, Coca-Cola Co. v. Koke Co. of Am., 254 U.S. 143, 146 (1920) ("The name [Coca-Cola] now characterizes a beverage to be had at almost any soda fountain. It means a single thing coming from a single source, and well known to the community . . . . In other words Coca-Cola probably means to most persons the plaintiff's familiar product to be had everywhere rather than a compound of particular substances.").

75. *See, e.g.*, Walter Baker & Co. v. Slack, 130 F. 514, 518 (7th Cir. 1904) ("We may safely take it for granted that not one in a thousand knowing of or desiring to purchase 'Baker's Cocoa' or 'Baker's Chocolate' know of Walter Baker & Co., Limited."); Manhattan Shirt Co. v. Sarnoff-Irving Hat Stores, 164 A. 246, 250 (Del. Ch. 1933) ("When the courts speak of the public's identifying the source of origin, they do not mean thereby that the purchasing public can identify the maker by his specific name or the place of manufacture by precise location.").

76. Schechter, *supra* note 13, at 816.

77. *See Badwill*, *supra* note 27, at 1845 ("Existing trademark law fails to account for consumer badwill. Instead, it provides producers with an escape hatch.").

78. *See* Laura A. Heymann, *Naming, Identity, and Trademark Law*, 86 IND. L.J. 381, 441 (2011) ("Name or trademark changes that make it more difficult for others to retrieve information about the person or entity are not legally prohibited, even though such changes can result in increased search costs, and even though others may have been induced to act in a way in which they would not have acted if they had known about the person's or the company's history."); Ann Bartow, *Likelihood of Confusion*, 41 S.D. L. REV. 721, 732 (2004) (asserting that use of multiple brands by one company is permitted, even though it could be "intended to confuse consumers, rather than protect or inform them").

79. *See* 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 17:24 (Thomson Reuters 4th ed. 2017) ("For example, the marks CADILLAC or FORD stand for a certain quality level, even though the automotive product sold today under those marks differs radically

In each of these scenarios, nobody is using a mark without ownership or permission from its owner, so there is no confusion that trademark law recognizes as problematic.

It is worth noting that the idea of confusion under trademark law has become *wider* over time but not any *deeper* than confusion over the right to use. Actionable confusion includes not only confusion over source but also "sponsorship" or "affiliation" confusion,[80] "initial interest" confusion,[81] and "reverse" confusion.[82] But in all cases, it remains confusion over the legal entitlement to use a mark—at times, to the point of outright circularity:

> If consumers think that most uses of a trademark require authorization, then in fact they will require authorization because the owner can enjoin consumer confusion caused by unpermitted uses or charge for licenses. And if owners can sue to stop unauthorized uses, then only authorized uses will be seen by consumers, creating or reinforcing their perception

from that sold under the same mark in the 1930s. Thus normal product changes do not disturb the priority of a trademark owner."); *see, e.g.*, Beech-Nut Packing Co. v. P. Lorillard Co., 299 F. 834, 849 (D.N.J. 1924) ("Tobacco is tobacco; but there are many, many blends, mixtures, etc. Adopting a new formula, therefore, did not, in the opinion of the court, work an abandonment."); E.I. Du Pont De Nemours & Co. v. G.C. Murphy Co., 199 U.S.P.Q. 807, 812–13 (T.T.A.B. 1978) (finding that a change from premium-priced paint to budget-priced paint with different formulation was not abandonment); Royal Milling Co. v. J.F. Imbs Milling Co., 44 App. D.C. 207, 208 (1915) ("[W]hile the flour made from hard wheat may be different from that made from soft wheat . . . the trademark is not to be vitiated by a change in the species of wheat used, any more than it would be vitiated by an important change of process in the making of flour."); Rick v. Buchansky, 609 F. Supp. 1522, 1539–41 (S.D.N.Y. 1985) (finding that changes in the performers and the nature of a musical group did not constitute abandonment of the group's mark); Menendez v. Saks & Co., 485 F.2d 1355, 1377 (2d Cir. 1973) (finding that a change from genuine Cuban cigars to non-Cuban cigars did not constitute abandonment); Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 878 (9th Cir. 2009) (finding that a change in the active ingredients of a dietary supplement was not an abandonment of the mark); El Greco Leather Prods. Co. v. Shoe World, Inc., 806 F.2d 392, 395 (2d Cir. 1986) ("One of the most valuable and important protections afforded by the Lanham Act is the right to control the quality of the goods manufactured and sold under the holder's trademark. . . . For this purpose the *actual* quality of the goods is irrelevant; it is the *control* of quality that a trademark holder is entitled to maintain." (emphases added)).

80. *See, e.g.*, Int'l Info. Sys. Sec. Certification Consortium, Inc. v. Sec. Univ., LLC, 823 F.3d 153, 161 (2d Cir. 2016) ("The modern test of infringement is whether the defendant's use [is] likely to cause confusion not just as to source, but also as to sponsorship, affiliation or connection." (quoting MCCARTHY, *supra* note 79, § 23:76)).

81. *See, e.g.*, Promatek Indus., Ltd. v. Equitrac Corp., 300 F.3d 808, 812 (7th Cir. 2002) ("Initial interest confusion, which is actionable under the Lanham Act, occurs when a customer is lured to a product by the similarity of the mark, even if the customer realizes the true source of the goods before the sale is consummated.").

82. *See, e.g.*, Wreal, LLC v. Amazon.com, Inc., 38 F.4th 114, 121 (11th Cir. 2022) ("Reverse confusion is . . . a theory of how trademark infringement can occur. In reverse-confusion cases, the plaintiff is usually a commercially smaller, but more senior, user of the mark at issue. The defendant tends to be a commercially larger, but more junior, user of the mark. The plaintiff thus does not argue that the defendant is using the mark to profit off plaintiff's goodwill; instead, the plaintiff brings suit because of the fear that consumers are associating the plaintiff's mark with the defendant's corporate identity.").

> that authorization is necessary. This is a "chicken and the egg" conundrum. Which comes first? The trademark right on far-flung items or the license? Licensing itself may affect consumer perception if consumers see a plethora of items with the mark perhaps accompanied by an "authorized by" label.[83]

This circularity manifests precisely because trademark law's conception of confusion does not reach any substantive quality of the producer or product; it goes no deeper than the legal right itself.[84]

The closest that trademark law comes to something deeper is the rules against assignment in gross and naked licensing, but even these do little against masking in practice. Assignment in gross refers to transferring ownership of a mark "without some attached goodwill,"[85] whereas naked licensing refers to granting permission to use a mark "without quality control by the licensor."[86] In theory, the two rules are meant to prevent a firm from accumulating goodwill by selling a quality product, then fooling consumers into purchasing garbage from a second firm that acquired the mark or an unsupervised licensee that paid for permission.[87] For trademark assignments, this once meant an expectation of

83. MCCARTHY, *supra* note 79, § 24:9; *see also* BARTON BEEBE, TRADEMARK LAW: AN OPEN-ACCESS CASEBOOK 384 (10th ed. 2023) [hereinafter BEEBE, TRADEMARK LAW] ("Trademark commentators have long identified a fundamental problem with basing the subject matter and scope of trademark rights on consumer perception. The problem is that consumer perception is itself based at least in part on what the law allows to occur in the marketplace—and even more problematically, on what consumers *think* the law allows to occur in the marketplace."); Lemley, *supra* note 17, at 1708 ("Ironically, having accepted the merchandising rationale for certain sorts of trademarks, we may find it hard to undo. It is possible that consumers have come to expect that 'Dallas Cowboys' caps are licensed by the Cowboys, not because they serve a trademark function, but simply because the law has recently required such a relationship.").

84. *See generally* James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 907 (2007) ("[T]rademark's growth is not just the result of formal changes in the positive law. Instead, trademark licensing practices inform trademark law, resulting in an expansive feedback loop . . . . [I]f consumers think that a given use of a mark requires a license from the mark owner, then engaging in that use without a license presents a real risk of liability.").

85. 4 LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 20:38 (Thomas Reuters 4th ed. 2023).

86. *Id.* § 20:55.

87. *See* Taco Cabana Int'l, Inc. v. Two Pesos, Inc., 932 F.2d 1113, 1121 (5th Cir. 1991) ("The purpose of the quality-control requirement is to prevent the public deception that would ensue from variant quality standards under the same mark."); Eva's Bridal Ltd. v. Halanick Enters., Inc., 639 F.3d 788, 790 (7th Cir. 2011) ("The sort of supervision required for a trademark license is the sort that produces *consistent* quality."); Visa, U.S.A., Inc. v. Birm. Tr. Nat'l Bank, 696 F.2d 1371, 1375 (Fed. Cir. 1982) ("[I]f consumers are not to be misled from established associations with the mark, [it must] continue to be associated with the same or similar products after the assignment." (quoting Raufast S.A. v. Kicker's Pizzazz, Ltd., 208 U.S.P.Q. 699, 702 (E.D.N.Y. 1980))); Marshak v. Green, 746 F.2d 927, 929 (2d Cir. 1984) ("Use of the mark by the assignee in connection with a different goodwill and different product would result in a fraud on the purchasing public who reasonably assume that the mark signifies the same thing, whether used by one person or another.").

actual product continuity,[88] but courts gradually relaxed that into a bare, formalist requirement for minimal asset transfer.[89] For licensing, courts likewise "progressively relaxed the interpretation of the control that licensors must exercise," from "adequate" to "sufficient," and ultimately "minimal."[90] As a result, the consensus view is that the rules against assignment in gross and naked licensing have largely become defunct—that today, "the requirement[s are] empty and sterile."[91] Either way, observe that these rules only become operative when *licensing or assignment* is involved; they would do nothing in any event to prevent masking that occurs during a firm's own use of its mark (let alone non-use).

One species of actionable confusion under trademark law—post-sale confusion[92]—is worth discussing separately, though it too does not prevent masking. Specifically, post-sale confusion refers to claims of trademark infringement "based on confusion of consumers other than direct purchasers," such as "observers of those wearing an accused article."[93] In certain contexts, the actual purchaser of an infringing article could not plausibly be confused as to whether the seller is operating legitimately; "no one would ever expect to purchase, nor intend to purchase a genuine Rolex watch for $25 at a flea

88. *See, e.g.*, PepsiCo, Inc. v. Grapette Co., 416 F.2d 285, 288 (8th Cir. 1969) ("[A]ny assignment of a trademark . . . requires the mark itself be used by the assignee on a product having substantially the same characteristics."); Vittoria N. Am., LLC v. Euro-Asia Imps., Inc., 278 F.3d 1076, 1083 (10th Cir. 2001) ("The courts have upheld such assignments if they find that the assignee is producing a product or performing a service substantially similar to that of the assignor and that the consumers would not be deceived or harmed.").

89. *See* Irene Calboli, *Trademark Assignment "With Goodwill": A Concept Whose Time Has Gone*, 57 FLA. L. REV. 771, 774 (2005) [hereinafter Calboli, *Goodwill*] ("In the past decades, however, this pragmatic approach has increasingly tolerated assignments de facto without goodwill . . . . Specifically, an analysis of the case law on trademark assignment indicates how the courts have provided trademark owners with a growing flexibility to transfer their marks by gradually relaxing the interpretation of what represents goodwill, a concept per se ambiguous and thus susceptible to inconsistent interpretations."); Irene Calboli, *What If, After All, Trademarks Were "Traded in Gross"?*, 2008 MICH. STATE L. REV. 345, 352–58 (2008) [hereinafter Calboli, *What If*] (further collecting and summarizing cases).

90. Irene Calboli, *The Sunset of "Quality Control" in Modern Trademark Licensing*, 57 AM. U. L. REV. 341, 346 (2007) [hereinafter Calboli, *Quality Control*].

91. Calboli, *What If*, *supra* note 89, at 356; *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 33 cmt. c (AM. L. INST. 1993) (collecting cases and stating that "[t]he degree of control necessary to protect the validity of a mark is often described as 'minimal'"); MCCARTHY, *supra* note 79, § 18:10 ("The situation sought to be avoided is customer deception resulting from abrupt and radical changes in the nature and quality of the goods or services after assignment of the mark. But this can still occur even if the rule is observed and good will and tangible assets are transferred, for the assignee need not use them to produce the goods or services."); Lemley, *supra* note 17, at 1710.

92. *See, e.g.*, Esercizio v. Roberts, 944 F.2d 1235, 1245 (6th Cir. 1991) ("Since Congress intended to protect the reputation of the manufacturer as well as to protect purchasers, the Act's protection is not limited to confusion at the point of sale. Because Ferrari's reputation in the field could be damaged by the marketing of Roberts' replicas, the district court did not err in permitting recovery despite the absence of point of sale confusion.").

93. Payless Shoesource, Inc. v. Reebok Int'l Ltd., 998 F.2d 985, 989 (Fed. Cir. 1993).

market."[94] Any would-be customer is clearly in on the ruse and happily buying an imitation. But once these "Rolexes" have been purchased and are worn in public, subsequent observers—"believing them to be genuine Rolex watches"—"might find themselves unimpressed with the quality . . . and consequently be inhibited from purchasing the real time piece."[95] Though high fashion items are prototypical cases,[96] successful cases of post-sale confusion have involved all manner of products, ranging from writing pens[97] to auto body kits[98] to hockey merchandise.[99] The text of the Lanham Act does not explicitly discuss post-sale confusion as an actionable theory of trademark infringement, but its textual breadth seems to readily permit such claims.[100] Likewise, though the precise doctrinal contours vary, only one federal circuit court (the D.C. Circuit) has yet to explicitly recognize post-sale confusion as a species of infringement.[101]

On the one hand, post-sale confusion seems to go deeper than other theories of confusion, insofar as it is directly interested in gaps between the *perceived* and *actual* qualities of products. Imagine a consumer who is considering buying a Gucci belt, but one day they see a stranger walk by with one that looks shoddy. The belt is actually a fake, but the consumer thinks it is real; with this new (but false) information, the consumer is dissuaded from making their purchase. The consumer's autonomy has been undermined because they were misled—it turns out, they would have thoroughly enjoyed

94. Rolex Watch U.S.A., Inc. v. Canner, 645 F. Supp. 484, 492 (S.D. Fla. 1986).

95. *Id.* at 495.

96. *See, e.g.*, Hermès Int'l v. Lederer de Paris Fifth Ave., Inc., 219 F.3d 104, 106, 108 (2d Cir. 2000); Polo Fashions, Inc. v. Craftex, Inc., 816 F.2d 145, 147 (4th Cir. 1987).

97. *See, e.g.*, A.T. Cross Co. v. Jonathan Bradley Pens, Inc., 470 F.2d 689, 690 (2d Cir. 1972); T & T Mfg. Co. v. A.T. Cross Co., 587 F.2d 533, 535–36 (1st Cir. 1978).

98. *See, e.g.*, Esercizio v. Roberts, 944 F.2d 1235, 1238 (6th Cir. 1991); Rolls-Royce Motors, Ltd. v. A & A Fiberglass, Inc., 428 F. Supp. 689, 694 (N.D. Ga. 1976).

99. *See, e.g.*, Bos. Pro. Hockey Ass'n v. Dall. Cap & Emblem Mfg., Inc., 510 F.2d 1004, 1012 (5th Cir. 1975).

100. Lanham Act, Pub. L. No. 87-772, sec. 17, § 32(1), 76 Stat. 769, 773–74 (1962) (codified as amended at 15 U.S.C. § 1114(1)) (eliminating language that required confusion specifically on the part of "purchasers . . . of such goods and services"); *see, e.g.*, Marathon Mfg. Co. v. Enerlite Prods. Corp., 767 F.2d 214, 221 (5th Cir. 1985) ("Contrary to Enerlite's insistence, Marathon need not prove confusion on the part of actual customers. Prior to 1962, § 32(1)(a) of the Lanham Act . . . required confusion, mistake or deception by 'purchasers as to the source or origin of such goods or services.' In 1962, the quoted words were deleted . . . specifically to allow any kind of confusion in support of a trademark infringement action.").

101. *See, e.g.*, Payless Shoesource, Inc. v. Reebok Int'l Ltd., 998 F.2d 985, 989 (Fed. Cir. 1993); I.P. Lund Trading ApS v. Kohler Co., 163 F.3d 27, 44 (1st Cir. 1998); Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 799 F.2d 867, 872–73 (2d Cir. 1986); Am. Home Prods. Corp. v. Barr Lab'ys, Inc., 834 F.2d 368, 371 (3d Cir. 1987); Polo Fashions, Inc. v. Craftex, Inc., 816 F.2d 145, 148 (4th Cir. 1987); United States v. Yamin, 868 F.2d 130, 132–33 (5th Cir. 1989); *Esercizio*, 944 F.2d at 1245; Dorr-Oliver, Inc. v. Fluid-Quip, Inc., 94 F.3d 376, 383 (7th Cir. 1996); Insty*Bit v. Poly-Tech Indus., 95 F.3d 663, 669–72 (8th Cir. 1996); Levi Strauss & Co. v. Blue Bell, Inc., 632 F.2d 817, 822 (9th Cir. 1980); Gen. Motors Corp. v. Urban Gorilla, LLC, 500 F.3d 1222, 1227–28 (10th Cir. 2007); United States v. Torkington, 812 F.2d 1347, 1352–53 (11th Cir. 1987).

the quality of a real Gucci belt. Likewise, Gucci has been harmed through the lost sale, and its incentives to invest in quality are reduced as more potential customers conflate the knock-off quality level with that of the genuine article.[102] On the other hand, this theoretical story is unlikely to occur with much frequency, even without post-sale confusion doctrine. Principally, this is because the hypothetical consumer described above requires a very precise level of sophistication in order to be harmed: they must have enough knowledge and acuity to recognize the purported brand of the item and perceive its shoddy quality on sight but not so much that they successfully identify it as a fake.[103] For the high-end items that comprise typical post-sale confusion claims, this hypothetical consumer is particularly unlikely to exist in the first place[104]—and even where such confusion exists, it would only affect an actual purchase decision in the most marginal of circumstances. Tellingly, this theory of post-sale confusion harm is "often assumed by courts speculating" on the facts, rather than truly "proven by . . . plaintiffs."[105]

Perhaps unsurprisingly then, a different justification for preventing post-sale confusion features more prominently in the case law and literature: protecting the *status* of certain goods.[106] To return to the twenty-five-dollar-fake-Rolex example, those "who see . . . the Rolex trademarks on so many wrists might find themselves discouraged from acquiring a genuine because the items have become too commonplace and no longer possess the prestige once associated with them."[107] Or, to take another court's formulation: "[T]he purchaser of an original is harmed by the widespread existence of knockoffs because the high value of originals, which derives in part from their scarcity, is

102. *See generally* MCCARTHY, *supra* note 79, § 23:7 ("Even though the knowledgeable buyer knew that it was getting an imitation, viewers would be confused. Thus, the senior user suffers a loss of sales diverted to the junior user, the same as if the actual buyer were confused. In addition, downstream confusion can damage the trademark owner's reputation for quality if viewers, repurchasers or gift recipients attribute inferior attributes of the imitation to the trademark owner.").

103. *See* Kal Raustiala & Christopher Jon Sprigman, *Rethinking Post-Sale Confusion*, 108 TRADEMARK REP. 881, 888–89 (2018) ("The observer must know the attributes of Brand well enough to see them in the purchaser's Not Brand good. But she must not be so sophisticated that she can see any differences in the goods' appearance that may otherwise point out to her that Not Brand is really just a look-alike. Too little sophistication on the part of the observer, and she misses the source-identifying features. Too much, and she spots the knockoff.").

104. *See* Connie Davis Powell, *We All Know It's a Knock-Off! Re-Evaluating the Need for the Post-Sale Confusion Doctrine in Trademark Law*, 14 N.C. J.L. & TECH. 1, 4 (2012) ("Purchasers of high-end goods are less likely to be confused in the post-sale context because of their keen awareness of their preferred brands and their knowledge of the existence and prevalence of counterfeit luxury goods in the marketplace.").

105. Jeremy N. Sheff, *Veblen Brands*, 96 MINN. L. REV. 769, 783 (2012).

106. *Id.* at 774 ("Status confusion is the legal theory that most often serves to justify liability against the manufacturers of knockoff luxury branded goods, even though the purchasers of those goods know full well what they are buying.").

107. Rolex Watch U.S.A., Inc. v. Canner, 645 F. Supp. 484, 495 (S.D. Fla. 1986).

lessened."[108] This is "different in kind" than a search-cost or reputation-incentive theory of harm: "Put simply, these cases presume that purchasers of such goods are not purchasing a level of product quality associated with the brand, but are rather purchasing the social status that is accorded to those who possess products bearing the brand."[109] Either way, observe that both the observer-confusion and status-loss theories alike only govern the behavior of unlicensed, third-party uses; they still do not prevent trademark owners from engaging in masking behavior. Tomorrow, Gucci could—if it so chooses—begin selling shoddier belts under its mark at the same price or flood the market with cheap ones and thereby destroy the mark's cachet (to the harm of incumbent owners).[110] Altogether then, trademark law's main vision of prohibited confusion is remarkably thin—even if post-sale confusion goes somewhat further—and it certainly does not encompass the kinds of masking described in the previous section.

2. Prohibited Deception

With respect to deception, it turns out that trademark law has a more robust vision, but one that ultimately still falls short. Specifically, a trademark will be refused registration (or cancelled) as "deceptive" if:

> (1) [it is] misdescriptive of the character, quality, function, composition or use of the goods[;]
>
> (2) . . . prospective purchasers [are] likely to believe that the misdescription actually describes the goods[; and]

108. Hermes Int'l v. Lederer de Paris Fifth Avenue, Inc., 219 F.3d 104, 108 (2d Cir. 2000); *see, e.g.*, Empresa Cubana del Tabaco v. Culbro Corp., 70 U.S.P.Q.2d 1650, 1689 (S.D.N.Y. 2004) ("[T]he consumer may acquire the prestige of smoking a Cuban [cigar] without actually purchasing one."); Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-LeCoultre Watches, Inc., 221 F.2d 464, 466 (2d Cir. 1955) ("This goes to show at least that some customers would buy plaintiff's cheaper clock for the purpose of acquiring the prestige gained by displaying what many visitors at the customers' homes would regard as a prestigious article."); Acad. of Motion Picture Arts & Scis. v. Creative House Promotions, Inc., 944 F.2d 1446, 1457 (9th Cir. 1991) ("[T]he Oscar's distinctive quality as a coveted symbol of excellence, which cannot be purchased from the Academy at any price, is threatened.").

109. Sheff, *supra* note 105, at 792; *see also* Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 855 (2010) ("To the extent that these theories make little effort to ground themselves in any notion of search costs, they represent the clearest expression of courts' essentially normative commitment to policing the sumptuary code . . . . In a surprisingly persistent line of cases, . . . [courts] hold that it is simply not fair for a person to acquire the prestige associated with a good . . . without paying the customary price.").

110. *Cf. In re* Gen. Motors LLC Ignition Switch Litig., No. 14-MC-2543, 2016 WL 3920353, at *2 (S.D.N.Y. July 15, 2016) ("By their own admission, Plaintiffs pursue an unprecedented theory of damages, one that turns not on whether the vehicles at issue were sold with known, latent defects (many of the class members' cars were concededly not defective when sold), but rather on the alleged reduction in resale value of the vehicles due to damage to New GM's reputation and brand. For the reasons discussed below, the Court finds that novel theory of damages is unsound.").

> (3) . . . the misdescription [is] likely to affect a significant portion of the relevant consumers' decision to purchase.[111]

The "misdescriptive" element, however, only checks for a facial mismatch, based on the semantic contents of the mark; that is, it checks for a disconnect between the *literal* meaning of a mark versus the truth of what it is affixed to. Thus, SUPER SILK is prohibited for a fabric that is not actually silk;[112] WHITE JASMINE is prohibited for a tea that is not actually white tea;[113] REAL RUSSIAN is prohibited for a vodka that is not actually Russian;[114] and OLD HAVANA is prohibited for a rum that is not actually Cuban.[115] Trademark law's other main anti-deception provision specifically prohibits marks "falsely suggest[ing] a connection with persons,"[116] but this too is examined on the face of the mark alone. Thus, ROYAL KATE is prohibited for cosmetics and jewelry when the company has no genuine association with Kate Middleton.[117]

In this way, the idea of deception under trademark law does include examining the actual product, process, and producer—something much more substantive than its idea of confusion. At the same time, it goes no further than comparing that substance to the meaning of the mark in a vacuum, as if encountered for the first time; it does not recognize any meanings that the mark may have developed through use over time. In other words, it is no problem under trademark law to create a mark without relevant semantic content (say, PLUNK for cereal), create certain consumer associations through consistent use (say, only using organic ingredients), and then suddenly violate those expectations (say, by continuing to sell PLUNK cereal despite switching to nonorganic ingredients). From the consumer's perspective, there may be little difference between these kinds of deception. One sees ORGANIK and expects organic because of the word itself;[118] one sees PLUNK and expects organic because of reputation and experience. Nevertheless, trademark law's prohibition

111. TMEP § 1203.02(b) (Nov. 2025); *see also* TMEP § 1210.05(b) (Nov. 2025) (discussing geographically related deception in particular and adding a fourth element: "[t]he primary significance of the mark is a generally known geographic location"). *See generally* 15 U.S.C. § 1052(a) (prohibiting the registration of any mark that "[c]onsists of . . . deceptive . . . matter" or "falsely suggest[s] a connection with persons, . . . institutions, beliefs, or national symbols"); *id.* § 1052(e) (prohibiting the registration of any mark that is "deceptively misdescriptive" or "primarily geographically deceptively misdescriptive").

112. *In re* Phillips-Van Heusen Corp., 63 U.S.P.Q.2d 1047, 1052–53 (T.T.A.B. 2002).

113. *In re* White Jasmine LLC, 106 U.S.P.Q.2d 1385, 1394 (T.T.A.B. 2013).

114. *In re* Premiere Distillery, LLC, 103 U.S.P.Q.2d 1483, 1487 (T.T.A.B. 2012).

115. *In re* Compania de Licores Internacionales S.A., 102 U.S.P.Q.2d 1841, 1844 (T.T.A.B. 2012).

116. 15 U.S.C. § 1052(a); *see also id.* § 1052(c) (prohibiting marks that "[c]onsist[] of or comprise[] a name, portrait, or signature identifying a particular living individual except by his [or her] written consent").

117. *In re* Nieves & Nieves LLC, 113 U.S.P.Q.2d 1629, 1639 (T.T.A.B. 2015).

118. *In re* Organik Tech., Inc., 41 U.S.P.Q.2d 1690, 1694 (T.T.A.B. 1997).

on deception only reaches the former.[119] As a result, it too does nothing to counteract masking.

3. Prohibited Dilution

Finally, trademark law prevents dilution, a concept even further removed from anything resembling masking. As codified by the Federal Trademark Dilution Act[120] and the Trademark Dilution Revision Act,[121] anti-dilution rights protect "the owner of a famous mark" from unauthorized use "that is likely to cause . . . blurring or . . . tarnishment . . . , regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury."[122] In brief, dilution refers to a junior user adopting a famous mark for use on *unrelated* goods or services (blurring) or on *unsavory* goods or services (tarnishment).[123] As the statutory language indicates, neither type of offense looks for any harm to consumers—and indeed, it is difficult to imagine consumer mistakes happening at all in most dilution cases. No one is apt to be confused or deceived by BUICK-branded aspirin,[124] BLOCKBUSTER-branded fireworks,[125] or CHANEL-branded real estate services,[126] but the owners of these famous marks still have the power to exclude those second comers as a matter of blurring. Likewise, nobody would believe that a pornographic website named "Barbie's Playpen" is legitimately associated with the BARBIE line of children's toys[127] or that a poster series inviting the viewer to "Enjoy Cocaine" in the same color

119. In fact, trademark law's understanding of deception is so thin that it currently fails to distinguish between largely harmless semantic mismatches and those that genuinely create a risk of physical harm. *See* David A. Simon, *Trademark Law & Consumer Safety*, 72 FLA. L. REV. 673, 673 (2020) ("The test for determining whether a mark is deceptive, however, is too rigid . . . . Sometimes the risk of harm is only economic or has only economic effects. A customer who receives SPUNOUT ICE CREAM may erroneously think that the ice cream was produced by a special spinning process, and she may buy it for that reason. In other cases, however, the risk of harm may implicate more serious considerations, such as physical safety. A consumer who buys the dietary supplement BRAINSTRONG because it suggests, without evidence, that it will improve brain function faces a variety of potential physical effects—effects not experienced by the patron of ice cream.").

120. Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (codified in scattered sections of 15 U.S.C.).

121. Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. 1730 (codified in scattered sections of 15 U.S.C.).

122. 15 U.S.C. § 1125(c)(1).

123. *Id.* § 1125(c)(2)(B)–(C) (emphasis added).

124. *See* H.R. Rep. No. 104-374, at 3 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 1029, 1030 (providing background for new trademark legislation suggesting that dilution, unlike trademark infringement, does not rely upon the likelihood of confusion).

125. *See* Viacom Inc. v. Ingram Enters., Inc., 141 F.3d 886, 887–88 (8th Cir. 1998).

126. *See* Chanel, Inc. v. Makarczyk, 110 U.S.P.Q.2d 2013, 2017–18 (T.T.A.B. 2014).

127. Mattel, Inc. v. Internet Dimensions, Inc., No. 99 Civ. 10066, 2000 WL 973745, at *5–7 (S.D.N.Y. July 13, 2000); *see also* V Secret Catalogue, Inc. v. Moseley, 558 F. Supp. 2d 734, 737, 750 (W.D. Ky. 2008) (finding "Victor's Secret," a store for "adult videos as well as sex toys," to tarnish the reputation of "Victoria's Secret" as a "well-respected retailer of high-quality women's lingerie").

and typeface as COCA-COLA is one of the beverage giant's legitimate products,[128] but those second comers are still prohibited as a matter of tarnishment.

The anti-dilution branch of trademark law thus exists to prevent additional associations from becoming attached to a mark in the minds of consumers, even those that do not create actual confusion or deception. For dilution by blurring, a brand with meaning "in the abstract" (like NINTENDO[129] unambiguously conjuring video games and toys) becomes a brand with meaning "only in context" because of the additional associations (like DOVE, where either soap[130] or chocolate[131] may be brought to mind).[132] For dilution by tarnishment, a brand with wholesome meaning becomes a brand with mixed meaning—due to "subconscious pollution"[133]:

> [S]uppose that [a] "restaurant" that adopts the name "Tiffany" is . . . a striptease joint . . . . [C]onsumers will not think the striptease joint under common ownership with the jewelry store. But because of the inveterate tendency of the human mind to proceed by association, every time they think of the word "Tiffany" their image of the fancy jewelry store will be tarnished by the association of the word with the strip joint.[134]

The status of dilution under trademark law is thus a curious mirror image of the status of masking under trademark law. Dilution does not require that any consumers are actually tricked or misled—so it is possible that no consumers are making purchases based on false beliefs that they come to regret. Nevertheless, trademark law aggressively prohibits this. When masking happens, some consumers are indeed tricked or misled—and so make purchasing decisions they would not otherwise have made. Nevertheless, trademark law freely permits this.

The special category of certification marks provides a final, parallel example of trademark law's surprising tolerance of consumer deception and confusion. Certification marks are those specifically intended to "certify

128. Coca-Cola Co. v. Gemini Rising, Inc., 346 F. Supp. 1183, 1189 (E.D.N.Y. 1972).

129. NINTENDO, Registration No. 1,628,966.

130. DOVE, Registration No. 2,052,770.

131. DOVE, Registration No. 2,012,056.

132. Jerre B. Swann, Sr., *Dilution Redefined for the Year 2000*, 37 HOUS. L. REV. 729, 759 (2000); *see also* Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1198 (2006) ("Blurring takes a formerly unique mark (say, Exxon), which consumers can associate with the mark owner without any necessary context, and applies it to unrelated products—say, Exxon pianos or Exxon carpets.").

133. Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or* Fait Accompli*?*, 54 EMORY L.J. 461, 494 (2005) [hereinafter Dogan & Lemley, *The Merchandising Right*]; Sandra L. Rierson, *The Myth and Reality of Dilution*, 11 DUKE L. & TECH. REV. 212, 246 (2012) ("The tarnishment claim arises from the fear that the famous trademark holder will suffer guilt by (admittedly indirect) association.").

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

regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics" to the consumer.[135] In other words, "a certification mark . . . inform[s] purchasers that the goods or services . . . possess certain characteristics or meet certain qualifications . . . [but] does not indicate origin in a single commercial or proprietary source the way a trademark or service mark does."[136] Familiar examples include marks that indicate compliance with religious restrictions,[137] marks that indicate labor from a union was used,[138] or marks that indicate origin from a special geographic region.[139] Rather than conveying product attributes indirectly by indicating a particular seller (and thus calling that seller's reputational associations to mind), certification marks like these are supposed to convey product attributes directly—they are explicitly supposed to go deeper. In reality, however, even certification marks often stand for nothing more than proof of the owner's permission to use them. Once a certification mark is successfully registered, "neither the [United States Patent and Trademark Office ('USPTO')] nor any other public agency . . . monitors whether the stated standards continue to be accurate; it is entirely up to a certification holder (or its licensees) to control the quality of these standards."[140] Indeed, a combination of flexible standards, opaque decision making, and market power means that certification marks are frequently susceptible to abuse at the direct expense of consumers.[141] Certification marks may therefore be the most surprising failure in this regard, but the orthodox story of trademark law's purpose and function is in direct conflict with the entire landscape described thus far.

II. REEXAMINING THE PURPOSE AND FUNCTION OF TRADEMARK LAW

A. *Orthodox Trademark Law*

Trademark law is typically described as having two simultaneous goals: protecting consumers against deception and confusion in the marketplace and

135. 15 U.S.C. § 1127; *see also* TMEP § 1306.01 (Nov. 2025).

136. TMEP § 1306.01(b) (Nov. 2025).

137. *See, e.g.*, U, Registration No. 636,593 (U-in-a-circle symbol, indicating kosher food).

138. *See, e.g.*, INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES UNION LABEL, Registration No. 2,749,294.

139. *See, e.g.*, SCOTCH WHISKY, Registration No. 6,763,223.

140. Margaret Chon, *Certification and Collective Marks in the United States*, *in* CAMBRIDGE HANDBOOK ON INTERNATIONAL AND COMPARATIVE TRADEMARK LAW 313 (Jane Ginsburg & Irene Calboli eds., 2020).

141. *See id.*; *see also* Jeanne C. Fromer, *The Unregulated Certification Mark(et)*, 69 STAN. L. REV. 121, 166 (2017) ("When certifiers then deploy the standard in ways inconsistent with consumer perceptions, which is possible due to the standard's flexibility, . . . the values of consumer protection and promotion of competition . . . are both undermined . . . . [C]ertification standards, both as depicted in certification mark registrations and as deployed in practice, are frequently kept flexible, vague, or incomprehensive.").

protecting producers' investments in their reputations and goodwill. The legislative history of the Lanham Act,[142] landmark cases,[143] and leading treatises[144] alike highlight both of these goals. In short, by creating exclusive use rights in a particular sign, trademark law prohibits interference with and free riding on that sign by others, which in turn protects consumers (for example, by helping them avoid imitators) and producers (for example, by helping them avoid unwarranted losses of goodwill). Granted, many academics offer normative critiques of trademark law's producer-oriented goal[145] or dispute the extent of its historical pedigree,[146] but none seriously dispute its existence alongside the consumer-oriented goal today.

In the heartland of trademark law—preventing one firm from attempting to pass off its products as those of another—these two goals are perfectly aligned. Think of a hypothetical consumer who wants to buy a pair of genuine NIKE[147] shoes, but some other upstart firm has started writing "NIKE" on its shoes as well, so the consumer buys a pair of those instead by mistake. The

142. S. REP. NO. 79-1333, at 3 (1946) ("The purpose underlying any trade-mark statute is twofold. One is to protect the public so it may be confident that . . . it will get the product which it asks for and wants to get. Secondly, where the owner of a trade-mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment . . . . This is the well-established rule of law protecting both the public and the trade-mark owner.").

143. *See, e.g.*, Jack Daniel's Props., Inc. v. VIP Prods. LLC, 143 S. Ct. 1578, 1583 (2023) ("[T]rademarks benefit consumers and producers alike. A source-identifying mark enables customers to select 'the goods and services that they wish to purchase, as well as those they want to avoid.' . . . And because that is so, the producer of a quality product may derive significant value from its marks. They ensure that the producer itself—and not some 'imitating competitor'—will reap the financial rewards associated with the product's good reputation."); Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163–64 (1995) ("In principle, trademark law, . . . 'reduce[s] the customer's costs of shopping and making purchasing decisions,' . . . . At the same time, the law helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product.").

144. *See* MCCARTHY, *supra* note 79, § 2:2 ("Trademark law serves to protect consumers from deception and confusion over trademarks as well as to protect the plaintiff's infringed trademark as property."); ALTMAN & POLLACK, *supra* note 85, § 17:9 (recognizing "theor[ies] of fraud" as well as the "protection of . . . property interest[s]" in marks as the animating goals of trademark protection).

145. *See, e.g.*, Lemley, *supra* note 17, at 1688, 1696; Rothman, *Initial Interest Confusion*, *supra* note 21, at 108; Lunney, *supra* note 21, at 417; Beebe, *The Semiotic Analysis*, *supra* note 21, at 622 ("While the economic account continues to profess that trademarks do little more than minimize consumer search costs, much of modern trademark law is now directed towards the commodification of semiotic 'sign value.'"). *But see* Mossoff, *supra* note 22, at 4.

146. *See* Rothman, *Navigating the Identity Thicket*, *supra* note 22, at 1275 ("I briefly set forth the widely recognized objectives of trademark law. Courts and scholars who rely solely on these conventional trademark objectives, rooted primarily in the economic interests of markholders and to a lesser extent in protecting consumers, overlook the personality-based objectives of trademark law."). *Compare* McKenna, *supra* note 22, at 1840–41, *with* Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 561 n.59 (2006) ("The problem with a project like Professor McKenna's is similar to interpreting an Escher print. Everything depends on what one sees as the foreground (protecting consumers or protecting sellers) and what one sees as the background—and both perspectives are necessary to fully appreciate the whole.").

147. NIKE, Registration No. 978,952.

consumer has been harmed insofar as they were duped into making a purchase that they did not really intend to make; there may be additional consumer harms beyond violated autonomy as well, for example, if the knockoff is of inferior quality. The producer, Nike, has also been harmed, insofar as it lost a sale to the upstart firm; there may be additional producer harms as well, for example, if the consumer or other observers wrongly attribute the shoddier shoes to Nike. Both sides thus have an interest in preventing upstarts from using the word "NIKE" on shoes. In other words, preventing this kind of passing off simultaneously supports the autonomous decision-making of consumers and the investment-backed interests of producers.

This leads to the typical functionalist description of trademarks, which is also twofold: trademarks reduce search costs for consumers and incentivize producers to maintain their reputations.[148] Search costs are reduced, the story goes, because consumers can rely on a mere word (NIKE)[149], color (Tiffany Blue)[150], or shape (Coca-Cola's curved bottles)[151] to ensure that the product has certain attributes—a much easier task than performing research on provenance or composition with every single purchase. Producers are likewise incentivized to maintain their reputations because consumers can reliably distinguish between authentic items and imitations, preventing other firms from free riding on or destroying the reputation of the former. In the context of passing off, this account of what trademarks do is essentially accurate and complete.

As a result, the typical critiques of contemporary trademark law go something like this: the passing-off heartland of trademark law reflects its true core (serving and protecting consumers, with ancillary benefits to producers), whereas doctrines like post-sale confusion or dilution represent aberrations (serving and protecting producers, with dubious benefits to consumers).[152] If

148. *See, e.g.*, BEEBE, TRADEMARK LAW, *supra* note 83, at 14 ("The current orthodox view of trademarks, then, is that they (1) minimize consumer search costs, and (2) provide incentives to producers to produce consistent levels of product quality."); MCCARTHY, *supra* note 79, § 2:3 ("Microeconomic theory teaches that trademarks perform at least two important market functions: (1) they encourage the production of quality products; and (2) they reduce the customer's costs of shopping and making purchasing decisions."); Landes & Posner, *supra* note 19, at 276–77; Dogan & Lemley, *A Search-Costs Theory*, *supra* note 19, at 1226.

149. NIKE, Registration No. 978,952.

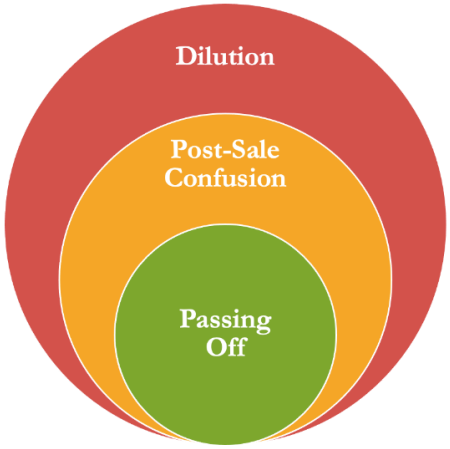
150. "The mark consists of a shade of blue often referred to as robin's-egg blue which is used on boxes. The matter shown in broken lines represents boxes of various sizes and serves to show positioning of the mark. No claim is made to shape of the boxes." Registration No. 2,359,351.

151. COCA-COLA, Registration No. 696,147.

152. *See* Dogan & Lemley, *The Merchandising Right*, *supra* note 133, at 465; Rierson, *supra* note 133, at 213; *see also* Lunney, *supra* note 21, at 407 ("[Post-sale] confusion comes very near the focus of deception-based trademark because it concerns incorrect information that may influence consumer-buying decisions. But courts have typically offered only the barest possibility of such confusion, and it is difficult to believe that such confusion would actually prove very widespread, particularly as consumers became aware of the need to separate more precisely imitators from the original."); Lemley

one could only cleave off these outgrowths, the argument goes, *real* trademark law would be laid bare at last.

Figure 2: The Typical Conceptualization of Trademark Causes of Action



Trademark law's tolerance of masking defeats this narrative because it reveals the tension between consumer and producer interests even at the heartland: *Who made this product, and what is it?* Put differently, when producers engage in masking, the orthodox goals and functions of trademark law are upended—whether these other trademark causes of action continue to exist or not.

To start, masking renders the typically described consumer-oriented goal subordinate to the producer-oriented goal. Consumers' expected reliance on trademarks can cause confusion: they may mistakenly believe themselves to be purchasing from a certain source (a craft brewery, an airline with a clean safety record, a firm without ties to Big Tobacco) instead of another (Anheuser-Busch InBev, ValuJet, Philip Morris)[153]. Precisely because they are relying on prior reputation and goodwill instead of performing original research with every purchase, consumers are vulnerable to deception: they may expect to obtain a product with certain attributes (durable, American-made, socially responsible) and instead receive one with others (shoddy quality, outsourced production,

& McKenna, *supra* note 21, at 445 n.125 ("We think . . . post-sale confusion can be criticized on similar grounds: one may reasonably doubt whether [post-sale confusion], to the extent it even exists, actually affects purchasing decisions."); Denicola, *supra* note 21, at 183 ("The lack of a compelling consumer interest requires the dilution doctrine to rest entirely upon the sense of inequity aroused by specific takings, leaving it vulnerable to attacks premised on an overriding public interest in unrestrained competition."); Litman, *supra* note 21, at 1718 (explaining how doctrines like dilution "yield no benefits to consumers and . . . disserve the public interest by shielding firms from healthy competition").

153. *See supra* notes 27–30 and accompanying text.

poor labor and environmental practices). This consumer harm translates to producer gain. Investments in goodwill effectively have additional dimensions of protection because producers have additional strategies: they are free to cash out on their accrued goodwill or start over without badwill at any time. Trademark law's tolerance of masking thus suggests a singular, producer-oriented goal, with consumer benefits as a mere side effect in the subset of circumstances where interests happen to align.

Masking also complicates the descriptive account by undermining the search-cost and reputation-incentive functions of marks. Search costs are increased, for example, when consumers must perform independent research on corporate ownership structure to avoid purchasing from firms that hide behind other marks. Likewise, search costs go up if consumers cannot rely on the past reputation associated with a mark as a meaningful indicator of present or future quality. The incentives to build a positive reputation are reduced, for example, when firms can buy goodwill outright—whether that reputation accurately represents their products or not—by acquiring another firm's mark. Along similar lines, firms have less of an incentive to avoid acquiring a negative reputation when they have the option of dumping badwill by hiding under a new mark. Perhaps a better functionalist description, then, is that: (1) trademarks allow producers to *control* search costs for consumers (not just lowering them, but raising them at times); and (2) trademarks allow producers to prevent *interference and free riding* by others on their investments in reputation (while leaving themselves free to deplete or abandon it at any moment).

When the tolerance of masking is considered alongside the actual prohibitions against confusion, deception, and dilution, these search-cost-control and anti-interference functions become even clearer. That is, trademarks solve certain *rivalry* problems with respect to reputation by creating exclusive rights, but trademarks do not solve *unilateral* problems with respect to reputation by regulating owners' conduct. The core prohibition against confusion prevents firms other than the mark owner and its licensees from using the mark—as a result, these other firms cannot free ride on the existing goodwill or cause harm to it. Along similar lines, the prohibitions against dilution and post-sale confusion prevent other firms from reducing the distinctiveness and status value of a mark through additional associations and copies. But the owner and its licensees are themselves free to harm the existing goodwill by producing shoddier goods under the mark going forward. The owner and its licensees are likewise free to diminish the existing distinctiveness and status value by applying the mark to unrelated, unsavory, or low-status goods. Rivalry problems are solved, but unilateral conduct is not directly constrained. Market forces, not trademark doctrine, are left to police owners' conduct.

Even the prohibition on deception may be better thought of as solving a rivalry problem rather than unilateral misbehavior by mark owners. When a

firm uses a mark that literally, but falsely, invokes a certain attribute—like a geographic region or ingredient—it is effectively trading on a reputation. The reputation is not individualized (like the reputation of the particular firm, Nike) but instead shared by any firm that incorporates the attribute (like the reputation of all Wisconsin cheese). This gives rise to identical free-riding and interference concerns, precisely because deception doctrine is limited to the literal meaning of the mark (which is portable to other firms) rather than consumers' developed associations with it (which are not). When a firm's mark misdescribes the product's attributes (this synthetic fabric is SILK; this cheap cigar is CUBAN), consumers may draw false inferences about the actual attribute (silk is surprisingly rough and scratchy; Cuban cigars are surprisingly harsh and acrid). Those consumers would then be less inclined to purchase any product that appears to incorporate the attribute in the future. This reputational harm is even more straightforward, of course, for marks that are deceptive regarding connections to specific persons (for example, ROYAL KATE and Kate Middleton). Left unchecked, deceptive firms would get to free ride on the reputation of various attributes and persons, harm the goodwill therein, and destroy the incentive for any firm to invest in those presumably desirable attributes (or maintain the quality of their personal brand) in the first place. A broader vision of deception would do more to prevent masking-related harms to consumers from mark owners, but it need not be any broader to prevent *rivalry* problems with respect to reputation. Again, it is exclusively up to market forces to constrain masking behavior.

All of this is a far cry from the orthodox account of trademark law. Thus, in addition to the heterodox version of a search-cost and reputation-incentive theory provided above, greater attention is warranted toward alternative accounts of trademark law. In particular, the preceding analysis has implications for a property-law theory of trademark law—which is revealed to be somewhat undertheorized and unfairly marginalized.

B. *Trademarks as Property Law*

The consensus view of trademark commentators is that trademarks should not be conceived of as property.[154] Granted, courts will label them as such from

154. *See, e.g.*, E.I. Du Pont de Nemours Powder Co. v. Masland, 244 U.S. 100, 102 (1917) ("The word 'property' as applied to trade-marks and trade secrets is an unanalyzed expression."); Libman Co. v. Vining Indus., 69 F.3d 1360, 1361 (7th Cir. 1995) ("A trademark is not a property right."); Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev., 170 F.3d 449, 459 (4th Cir. 1999) ("[W]e simply cannot believe that, as a general proposition, Congress could have intended, without making its intention to do so perfectly clear, to create property rights in gross, unlimited in time (via injunction), even in 'famous' trademarks."); Mossoff, *supra* note 22, at 3; Lemley, *supra* note 17, at 1695 ("Even if one accepts [a property view of patents and copyrights], it does not carry over to trademarks. The justifications for trademark law are different from those for other forms of intellectual property.").

time to time, but less often in recent years and without serious attention as to what that may entail or imply.[155] Indeed, one of the most typical critiques applied to doctrines like post-sale confusion or dilution is that they represent a propertization of trademark law—and are therefore aberrational.[156] Vanishingly few modern scholars have attempted to rehabilitate the property law conception of trademarks, with the most notable attempts proceeding on historical[157] and philosophical (specifically, labor-theoretic)[158] grounds. The majority view instead sees property rights in trademarks as lacking apparent justification[159] and harmfully maximalist.[160] Trademark law's tolerance of masking, however, complicates this debate by completing a functionalist model of trademarks as property. That is, masking comports with a broadly efficiency-promoting regime centered on ownership, doing so by completing a bundled set of rights in exclusion, use, destruction, and alienation. It also does not necessarily exclude regulations that provide constraints, as addressed in Part III.

155. *See, e.g.*, Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 259 (1916) ("The right to use a trade-mark is recognized as a kind of property, of which the owner is entitled to the exclusive enjoyment to the extent that it has been actually used."); Beech-Nut Packing Co. v. P. Lorillard Co., 273 U.S. 629, 632 (1927) ("[I]n a qualified sense the mark is property, protected and alienable . . . ."); Int'l Ord. of Job's Daughters v. Lindeburg & Co., 633 F.2d 912, 919 (9th Cir. 1980) ("A trademark is, of course, a form of business property."); PaperCutter Inc. v. Fay's Drug Co., 900 F.2d 558, 561 (2d Cir. 1990) ("[T]rademarks are often referred to as a form of property, or more specifically as 'intellectual property' . . . ."). *See generally* MCCARTHY, *supra* note 79, § 2:10 ("Because a trademark is undoubtedly a 'right to exclude,' a trademark is a form of 'property.'").

156. *See, e.g.*, McKenna, *supra* note 22, at 1840 ("Doctrinal innovations like dilution . . . are illegitimate, many commentators suggest, because they reflect a property-based conception of trademarks that is inconsistent with trademark law's core policies . . . ."); Desai, *The Chicago School Trap*, *supra* note 21, at 553 ("Dissatisfaction with trademark law has only grown . . . with critics arguing that trademark rights have expanded too far in protecting right holders' interests, have become property rights, and that trademark law does not regulate competition well."); Calboli, *Goodwill*, *supra* note 89, at 778 ("[Courts] increasingly protect[] trademarks beyond consumer welfare . . . adopt[ing] an approach based on property rights."); Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 405–11 (1990); Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 20–23 (2004).

157. *See* McKenna, *supra* note 22, at 1841.

158. *See* Mossoff, *supra* note 22, at 4.

159. *See, e.g.*, Lemley, *supra* note 17, at 1695 ("We give protection to trademarks for one basic reason: to enable the public to identify easily a particular product from a particular source . . . . There is no reason to believe that treating trademarks as property is particularly likely to further this goal."); McKenna, *supra* note 22, at 1840 ("Doctrinal innovations like dilution and initial interest confusion are illegitimate, many commentators suggest, because they reflect a property-based conception of trademarks that is inconsistent with trademark law's core policies of protecting consumers and improving the quality of information in the marketplace.").

160. *See, e.g.*, Rothman, *Initial Interest Confusion*, *supra* note 21, at 190 ("The shift towards treating the value of trademarks as something separate and apart from any indication of origin, or even of a particular product, greatly broadens the conduct that can be blocked by infringement actions. As such, trademarks are rapidly approaching property rights in gross."); Beebe, *The Semiotic Analysis*, *supra* note 21, at 651 ("Nevertheless, to expand the scope of their property rights, trademark owners have sought to define their property right as an exclusive right to the signifier in itself.").

1. Masking's Efficiency Valence

As an initial step, consider the likely effects of masking behavior as a matter of overall efficiency. Many instances of masking will be, in fact, efficient. First, avoiding an old mark allows a firm to debias consumers, potentially rationalizing their purchasing decisions.[161] After the ValuJet crash, the renamed AirTran genuinely overhauled its leadership and business model[162] and was found by the FAA to have "no significant safety problems" remaining.[163] The brand went on to become the *safest* U.S. airline several years in a row.[164] Later, AirTran was folded into Southwest, an airline recognized for its sterling safety record in the ensuing decades.[165] When consumers unduly focus on the ValuJet accident—to the exclusion of these more recent, representative, and comprehensive facts—then it genuinely improves consumer decision-making to allow for masking; it allows AirTran and Southwest to be judged on their merits.

161. *See* Perzanowski, *supra* note 18, at 16 ("In some cases, unbranding could actually improve consumer decision-making by reducing confusion as to the source and quality of goods and services. If a brand triggers factually inaccurate negative associations in the minds of consumers, unbranding can refocus consumer attention on other, more relevant characteristics.").

162. *See* Steve Huettel, *10 Years After Tragedy, AirTran Flies On*, TAMPA BAY TIMES (May 11, 2006), https://www.tampabay.com/archive/2006/05/11/10-years-after-tragedy-airtran-flies-on/ [https://perma.cc/T7WW-7HFP (staff-uploaded, dark archive)] ("Joe Leonard, an industry veteran who worked as chief operating officer of defunct Eastern Airlines, took over as AirTran's chief executive in 1999. He sped up deliveries of new jets, and built a new management team. Only one of the 16 executives on AirTran's leadership team ever worked for ValuJet.").

163. Eleena de Lisser, *AirTran, Formerly ValuJet, Passes FAA Inspections*, WALL ST. J. (Mar. 2, 1998, at 00:01 ET), https://www.wsj.com/articles/SB888794343304550000 [https://perma.cc/JTP3-CSUF (staff-uploaded, dark archive)].

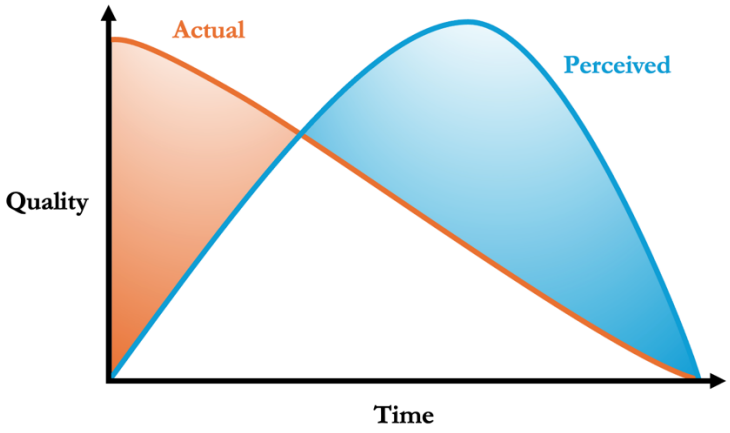
164. *See* Hamooda Shami, *America's Safest Airlines*, ORLANDO BUS. J. (Jan. 27, 2011), https://www.bizjournals.com/orlando/news/2011/01/27/airtran-named-safest-airline-in-2010.html [https://perma.cc/YHB5-GFWP (staff-uploaded, dark archive)]; 7 *Safest U.S. Airlines, But Who's Counting?*, ABC NEWS (Apr. 11, 2011, at 10:06 ET), https://abcnews.go.com/Business/safest-us-airlines-airtran-airways-safest-fewest-incidents/story?id=13347280 [https://perma.cc/NRP2-GH5X (staff-uploaded, dark archive)] (noting that, "[o]n an incidents-per-flight basis," AirTran was the single safest U.S. airline in 2011).

165. *See* Elizabeth Weise, *Airlines, Including Southwest, Are So Safe It's Hard to Rank Them by Safety*, USA TODAY, https://www.usatoday.com/story/tech/2018/04/19/airlines-including-southwest-so-safe-its-hard-rank-them-safety/533166002/ [https://perma.cc/QY5U-ZWH4 (staff-uploaded archive)] (last updated Apr. 20, 2018, at 09:53 ET) ("American air carriers in general are so safe that ranking them in terms of safety is difficult. Tuesday's accident was the first fatality Southwest Airlines had experienced in its 47 years of operation. It was the first death on a U.S.-registered carrier in nine years."); Simon Calder, *Why Southwest Airlines Should Still Celebrate Its Air Safety Success*, INDEPENDENT (Apr. 21, 2018, at 09:34 ET), https://www.the-independent.com/travel/news-and-advice/southwest-airlines-latest-safety-record-passenger-died-ryanair-easyjet-qantas-a8313751.html [https://perma.cc/EPT2-B78C (staff-uploaded archive)] ("Until 17 April 2018, Southwest was unrivalled as the safest airline in the world, at least on the measure I believe is the most significant: the number of people flown without a single passenger fatality. Since its first flight in Texas in 1971, the Dallas-based airline had flown 1.8 billion travelers safely.").

The same is broadly true for using separate marks simultaneously, to thereby avoid reputation conflicts across genuinely distinct businesses. For example, a restaurant like Denny's may have certain associations among consumers, like selling low-cost or low-quality food. If it wants to repurpose some of its capacity to separately sell higher-cost, higher-quality food instead, it will face an uphill battle due to its preexisting reputation—even if that reputation is inaccurate for the new venture. Put differently, if "The Burger Den" is geared towards a different business model selling excellent, upscale burgers, then the Denny's name might itself be misleading to consumers. Along the same lines, if Anheuser-Busch InBev changes nothing about a small brewery it acquires (acting as a source of capital and nothing more), then using the Anheuser-Busch name may cause consumers to infer changes to the actual beer that are nonexistent. A consumer's thoughts about the taste and profile of, say, Bud Light would come to influence their decision on whether or not to buy one of Elysian Brewing's beers, even if the two have nothing in common but raw financial backing. Whenever the preexisting reputation of a mark would *not* actually improve consumer decision-making—in particular, when consumers will give it undue weight—then masking under a different mark should promote more efficient outcomes.

Second, masking allows goodwill a greater degree of marketability through liquidation. Reputation lags reality, so a firm's initial investments into quality will act as net transfers towards consumers—represented by the orange area in the diagram below. That is, until reputation catches up with reality, consumers get more than they expected (and, presumably, more than they paid for at the prevailing market price). When a firm decreases its quality but keeps using the same mark, the net transfer is away from consumers—represented by the blue area in the diagram below. That is, until reputation catches up, they get less than they expected (and, presumably, less than they paid for at the prevailing market price). This effectively allows a firm to liquidate its reputational investments—reversing the previous transfer of producer welfare to consumer welfare—and thereby turns goodwill into a more freely alienable asset than it would otherwise be.

Figure 3: Investing in and Liquidating Goodwill



To the extent that investments in reputation are otherwise irrecoverable, it naturally diminishes the incentives for firms to make them in the first place. And to go one step further, if a firm could be *punished* for decreasing its quality while keeping the same marks, then investing in reputation would create affirmative liability risk—further reducing the incentive to do so. All else being equal, the tolerance of masking thus lowers the cost of investing in quality, allowing firms the freedom to experiment and take risks on improving their products.

Third, masking allows for products and markets that would otherwise just not be possible. Returning to the example of private labels, if Duracell and Kirkland were forced into absolute transparency—loudly indicating that the batteries are identical—then the former would no longer be able to command any price premium over the latter. Faced with that outcome, it might be more profitable to just stop selling to Kirkland altogether. A cheap, but high-quality option for budget-conscious and deal-savvy consumers would disappear. Returning to the examples of rebadging and outlet malls, there may be consumers who are perfectly happy to obtain a car or sweatshirt with a prestige label for a discount, even if it means inferior construction under the hood. Prohibiting masking (in the sense of mandating truly uniform product quality under a single mark) would tend to eliminate those tiered opportunities to access high-status brands.

At the same time, by tolerating masking in all cases, trademark law makes no attempt to distinguish between behavior that promotes efficiency and behavior that does not. Masking can conceal relevant information from consumers and undermine their autonomy, just as much as it can debias them. Liquidating goodwill can potentially extract more value from consumers than the producer initially invested. And the creation of new markets may only be a

wealth transfer through price discrimination. The orthodox story of trademark law—reducing search costs and providing an incentive to invest in quality—matches an efficiency paradigm outright, insofar as it lowers transaction costs and overcomes free-riding problems. But trademark law's treatment of masking (alongside dilution and post-sale confusion)[166] allows even those baseline efficiency gains to be diminished whenever a mark owner believes it is in its self-interest to mask.

That said, from a decision-theoretic perspective, trademark law's blanket tolerance of masking may be efficient even if masking itself is not always so. Antitrust law relies on per se prohibitions (against, for example, horizontal price fixing) that are highly unlikely to ever be efficiency-promoting, precisely to avoid undertaking costly and error-prone analysis on a case-by-case basis.[167] The analysis required to evaluate masking claims on their merits would likely be challenging as well. Examining heterogeneous consumer beliefs, historical market patterns, materiality to purchasing decisions, producer intent, and subjective product quality could all conceivably be part of a court's task. The costs of such litigation—magnified by the risk of potential errors—would doubtless create their own inefficiencies and market distortions. Indeed, trademark law arguably uses a per se mode of analysis when it comes to infringement doctrine as well: confusion and dilution are prohibited, full stop, without any need to show actual harm to competition.[168]

2. Trademark's Bundle of Rights

To summarize, then, trademark law creates a right: defined by exclusivity (infringement *is* the only harm that needs to be shown); readily explained as a matter of efficiency (broadly speaking, but not assessed on a case-by-case basis); and without seriously regulating how individual owners exercise those rights (such as masking behavior that harms consumers). This is, essentially, the

166. *See, e.g.*, Lunney, *supra* note 21, at 436 ("[E]xpanded trademark protection is likely to generate only small marginal increases in the information-based efficiencies associated with protection when compared to a minimally-protective regime.").

167. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007) (observing that per se rules treat certain "categories of restraints [of trade] as necessarily illegal," thereby "eliminat[ing] the need to study the reasonableness of an individual restraint in light of the real market forces at work" (citing Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988))); United States v. Topco Assocs., Inc., 405 U.S. 596, 609 n.10 (1972) ("Without the per se rules, businessmen [are] left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act."). *See generally* C. Frederick Beckner, III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41 (1999) (discussing "decision theory"); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) (discussing how per se rules are limited in addressing anticompetitive practices).

168. *See* Daniel M. Lifton, *Towards a Trademark Rule of Reason*, N.Y.U. J. INTELL. PROP. & ENTER. L. 222, 228 (2020) ("If the plaintiff succeeds in establishing a likelihood of confusion, the court will hold the defendant liable for infringement, implicitly presuming that the confusion causes harm to the consumer, the mark owner, and the market.").

traditional functionalist description of property rights as distinct from other species of law. In legal and economic terms, property rights exist to solve problems of wealth dissipation through unchecked rivalry. Consider the classic tragedy of the commons:

> Suppose that land is communally owned. Every person has the right to hunt, till, or mine the land. This form of ownership fails to concentrate the cost associated with any person's exercise of his communal right on that person. If a person seeks to maximize the value of his communal rights, he will tend to overhunt and overwork the land because some of the costs of his doing so are borne by others. The stock of game and the richness of the soil will be diminished too quickly . . . . [Whereas, if] a single person owns land, he will attempt to maximize its present value by taking into account alternative future time streams of benefits and costs and selecting that one which he believes will maximize the present value of his privately-owned land rights.[169]

Thus, at the highest level of simplicity—and naturally subject to many exceptions—economic reasoning suggests that rivalrous things ought to be subject to ownership as private property, whereas nonrivalrous things can remain public for the benefit and use of all.[170] Put differently, subjecting something to the property paradigm (as distinct from contract and tort alone) "allow[s] owners to extract utility that is otherwise unavailable."[171] So, too, with trademark law: unchecked, common use of a symbol destroys its signaling function, its prestige or cachet, and the incentives for long-term investments in its reputation for quality. By creating a property right, these particular rivalry

169. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 354–55 (1967); *see also* DEAN LUECK & THOMAS MICELI, *Property Law*, *in* 1 HANDBOOK OF LAW AND ECONOMICS 183, 192 (A. Mitchell Polinsky & Steven Shavell eds., 2007) ("Private ownership . . . is the straightforward solution to the open access problem . . . . Not only does private ownership create incentives for optimal resource use, it also creates incentives for optimal asset maintenance and investment."). *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968) (discussing the tragedy of the commons and how privatization is a flawed solution to the overuse of common resources).

170. *See, e.g.*, ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 102–03 (6th ed. 2012) ("[E]fficiency requires that rivalrous and excludable goods should be controlled by individuals or small groups of people, whereas nonrivalrous and nonexcludable goods should be controlled by a large group of people such as the state.").

171. Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORN. L. REV. 531, 538 (2005) ("The account in this Article is predicated on the insight that property law as a legal institution is organized around creating and defending the value inherent in stable ownership. Property law both recognizes and helps create stable relationships between persons and assets . . . ."); *see also* Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1327 (1993) ("In essence, the parcelization of land is a relatively low-transaction-cost method of inducing people to 'do the right thing' with the earth's surface, the vernacular for avoiding deadweight losses. Compared to group ownership, not to mention an open-access regime, private property tends best to equate the personal product of an individual's small actions with the social product of those actions.").

problems are solved, and the owners are thereby able to create value that would otherwise not be possible.

The right to exclude is thus "fundamental to the concept of property"[172] and may broadly promote efficiency overall—but importantly, it need not be efficiently exercised on a case-by-case basis. Contract law does not prohibit breaches absolutely; it largely tolerates efficient breaches through the typical remedy of expectation damages.[173] Along similar lines, tort law does not prohibit accidents absolutely; it largely tolerates accidents that arise despite an efficient level of care.[174] There are exceptions to both of these bedrock principles, but property law's conception of trespass has no equivalent: "[T]here is no full-throated tolerance of intentional property violations that, on balance, promote higher-valued use."[175] Take adverse possession, for example: it does not excuse trespass directly; it creates a new claim of ownership (and even then, it does not directly inquire into the efficiency of the transfer).[176] As a consequence, property owners need only be diligent, not necessarily use their property in a wealth-maximizing fashion—because their right to exclude remains secure either way.[177] Conflicts between property owners' uses are, at times, resolved on an efficiency basis (the doctrine of nuisance can be viewed through such a lens[178]), but property law does not typically engage in such balancing between owners and the public writ large. To reiterate, this account entirely matches trademark law. The tolerance of masking reveals that there is no systematic,

172. Thomas W. Merrill, *Property and the Right To Exclude*, 77 NEB. L. REV. 730, 731 (1998); *see also* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) ("[O]ne of the most essential sticks in the bundle of rights that are commonly characterized as property [is] the right to exclude others.").

173. *See* Steven Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466, 466 (1980); RICHARD A. POSNER, THE ECONOMIC ANALYSIS OF LAW 56–57 (1972); Barry E. Adler, *Efficient Breach Theory Through the Looking Glass*, N.Y.U. L. REV. 1679, 1688–94 (2008).

174. John Prather Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323, 328 (1973); William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 873–74 (1981). *See generally* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970) (prioritizing cost-reduction in his theoretical framework for evaluating accident law).

175. Matthew G. Sipe, *Patent Law's Philosophical Fault Line*, 2019 WIS. L. REV. 1033, 1094 [hereinafter Sipe, *Philosophical Fault Line*]; *see also* Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW. U. L. REV. 1037, 1038 (2006).

176. Sipe, *Philosophical Fault Line*, *supra* note 175, at 1094–95; *see* Fennell, *supra* note 175, at 1038 (arguing that the bad-faith standard for adverse possession, now almost entirely extinct, is the only one that could truly be considered an "efficient trespass" doctrine).

177. *See* COOTER & ULEN, *supra* note 170, at 105 ("Legislation imposes many restrictions on what a person may do with his or her property. But at common law there are relatively few restrictions, with the general rule being that any use is allowed that does not interfere with other peoples' property or other rights.").

178. *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960); Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13, 14 (1985); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1118–21 (1972).

case-by-case attempt at achieving efficiency through the use of marks or any balancing between owners and the consuming public—even if some doctrines (genericness and functionality) are decided on the basis of efficiency when different *producers*' uses conflict.

The right to destroy offers another example of this functional symmetry between property and trademark. Just as a property owner may generally choose to use or exclude from their property in an inefficient manner, they are often free to destroy their property outright—even if it holds value.[179] To some degree, this should be unsurprising; destruction can merely be thought of as an extreme use (to use up entirely) or exclusion (to exclude all others forever) to begin with. It is thus a particularly stark, but also intuitive, feature of property as compared to other legal frameworks. Tellingly then, trademark law embodies this very same right to destroy. This can be found in masking, certainly: firms are free to degrade quality over time or across markets while using the same mark, eventually destroying their reputation if they so desire. But the right to destroy can also be found in dilution and post-sale confusion doctrine. That is, the *owner* of a mark is perfectly free to dilute its distinctiveness by extending their branding into new markets, on unrelated and unsavory goods. The *owner* of a mark is perfectly free to undermine its accumulated prestige by selling more items at a lower price (think Coach handbags)[180] or drastically change its social meaning through public messaging (think Tesla cars).[181] In this way, trademark

179. JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 1–2 (2001) (critiquing American property law for its strong vision of the right to destroy, including culturally significant items); Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 803 (2005) ("It turns out that burial practices are not the only context in which American traditions permit the destruction of valuable property. Indeed, there are contexts in which both the law and prevalent social norms encourage the destruction of especially valuable societal resources.").

180. *See, e.g.*, Carey Dunne, *How Coach Lost Its Luxury Cachet*, FAST CO. (Aug. 8, 2014), https://www.fastcompany.com/3034131/how-coach-lost-its-luxury-cachet [https://perma.cc/EX6E-VUGU] ("Analysts say the declines [in Coach sales] are the result of opening outlet stores all over the U.S. and filling them with cheaper, CC logo-plastered bags—a move that diminished the brand's luxury cachet and pricing power. Essentially, now that the brand has become more accessible to the masses, wealthier customers aren't as interested . . . ."); Phil Wahba, *Coach Thinks Outside the Bag*, FORTUNE (May 24, 2017, at 06:30 ET), https://fortune.com/2017/05/24/coach-victor-luis-stuart-vevers/ [https://perma.cc/XT5L-3ZDB (staff-uploaded archive)] (observing that Coach's "aggressive expansion" caused the brand to lose its "focus and prestige").

181. *See, e.g.*, Natalie Sherman & Samira Hussain, *'Elon Musk Has Made Me Embarrassed To Drive My Tesla Now,'* BBC NEWS (Jan. 28, 2023), https://www.bbc.com/news/business-64376727 [https://perma.cc/72LX-6CUU (staff-uploaded archive)] ("When Anne Marie Squeo received her fiery red Tesla sports utility vehicle in 2020, the 55-year-old marketing and communications professional felt like she had joined a special 'club' of people who were doing something to help the environment, while still driving with style. But last year, as Tesla boss Elon Musk shared right-wing conspiracy theories on Twitter . . . Anne Marie's satisfaction gave way to shame."); Tim Higgins, *Elon Musk Lost Democrats on Tesla When He Needed Them Most*, WALL ST. J. (Apr. 20, 2024, at 05:30 ET), https://www.wsj.com/business/autos/elon-musk-turned-democrats-off-tesla-when-he-needed-them-

law enables the creation of value—reputation, distinctiveness, cachet—by allowing owners to exclude others from use, but it takes no issue with owners destroying that very same value at will (even to the shock and dismay of incumbent consumers).

A similar argument applies with respect to the right to transfer, in particular the general preference of property law towards alienability.[182] There is, of course, the baseline principle that absolute restraints on alienability are typically void.[183] But a rather long list of property concepts are also justified as a matter of promoting alienability—the Rule Against Perpetuities,[184] *numerus clausus*,[185] and adverse possession,[186] to name a few. Yes, restrictions exist and some property interests in particular are appurtenant (bundled together in ways that frustrate piecemeal alienability),[187] but the broad trend is certainly toward alienability. And trademark law follows suit. As noted earlier, the rules against naked licensing and transfers in gross effectively treat trademarks as less than fully alienable—as inextricably bound to actual reputation or physical capital.[188] But again, those rules have consistently weakened over time to the point of

most-176023af [https://perma.cc/KCS7-9238 (staff-uploaded, dark archive)] ("For years, the biggest cohort of Tesla buyers, politically speaking, has been Democrats . . . . [But the] proportion of Democrats buying Tesla vehicles fell by more than 60%, . . . coincid[ing] with Musk's being increasingly vocal about illegal immigration, amplifying a tweet promoting antisemitic vitriol, and publicly attacking Disney over his contention that the entertainment company had become too woke.").

182. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1854 (1987) ("Market-inalienability negates a central element of traditional property rights, which are conceived of as fully alienable."); JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH 303 (5th ed. 2021) ("One of the core policies of our property law system is freedom of alienation."). *See generally* Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970 (1985) (explaining that restraints on alienation of property exist to "control problems of external harm and the common pool").

183. Richard E. Manning, *The Development of Restraints on Alienation Since Gray*, 48 HARV. L. REV. 373, 401–05 (1935); 1 RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 4.1 cmt. a (AM. L. INST. 1983) ("All restraints on alienation run counter to the policy of freedom of alienation, so that to be upheld they must in some way be justified.").

184. George L. Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19, 20 (1977) ("It is, after all, a rule *against* perpetuities and thus is generally considered to be one of the law's weapons against restraints on the alienation of property. Indeed this has always been the accepted explanation . . . .").

185. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 4–6, 61–66 (2000).

186. *See* Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1129–30 (1985).

187. Mossoff, *supra* note 22, at 18–19 ("Property lawyers are well aware of many use-right property doctrines that are necessarily derived from or attached to an accompanying property right, such as riparian rights and easements appurtenant.").

188. *Id.* at 20 ("The conceptual similarities between a trademark and an easement appurtenant are striking, especially given the conventional wisdom today that trademarks are not property rights."); Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 414 (1915) (describing trademarks as "property right[s] . . . appurtenant to an established business or trade . . . .").

nearly becoming dead letter.[189] Other scholars have explicitly critiqued that shift for relying (inappropriately, in their view) on a "property rights" vision of trademark law,[190] because it potentially permits more species of masking and weakens the traditional justifications for trademarks in the first place.[191] Put differently, property law's strong preference for alienability can also be found in trademark law, to the point of undermining its supposed search-cost and reputation-incentive rationales.

Altogether then, if one thinks of property functionally as a bundle of four core rights—exclusion, use, destruction, and alienation[192]—then trademark law (and its tolerance of masking) mimics the same general shape. There is a final point worth emphasizing, moreover, on distribution. That is, property law generally does not concern itself with questions of distributive justice.[193] In some ways, this is a natural consequence of robust rights in exclusion, use, destruction, and transfer—none of which are explicitly limited by distributional concerns. Indeed, foundational texts on distributive justice tellingly offer much more limited visions of property rights than exist in reality.[194] Trademark law

189. *See supra* notes 87–91 and accompanying text.

190. *See, e.g.*, Calboli, *Goodwill*, *supra* note 89, at 778–79 ("[C]ourts . . . have increasingly protected trademarks beyond consumer welfare and adopted an approach based on property rights . . . . [T]his trend has invariably affected all areas of trademark law, including the rule on trademark assignment."); Calboli, *Quality Control*, *supra* note 90, at 354 ("[T]his trend has influenced the traditional interpretation of trademark licensing and, accordingly, has profoundly undermined the sustainability of the quality control requirement."); Lemley, *supra* note 17, at 1709 ("[One] way in which trademarks are increasingly being treated as property involves the sale and licensing of trademarks without the accompanying business or goodwill of the company that developed them . . . . If anything, assignments in gross are vehicles for *adding* to consumer confusion, not reducing it.").

191. Calboli, *Goodwill*, *supra* note 89, at 773 (describing the prohibition against transfers in gross as "based on the assumption that such changes could result in consumer confusion because of the breach in the continuity of the product quality or kind they are likely to create . . . ."); Calboli, *Quality Control*, *supra* note 90, at 345 (describing the prohibition against naked licensing as "based on the assumption that without this control, licensors could not guarantee consistent product quality, and this would result in consumer deception"); *see* Nathan Isaacs, *Traffic in Trade-Symbols*, 44 HARV. L. REV. 1210, 1220 (1931) (describing traditional justifications for the trademark).

192. SPRANKLING & COLETTA, *supra* note 182, at 24; *see also* United States v. Craft, 535 U.S. 274, 280 (2002); Strahilevitz, *supra* note 179, at 794–96. *But see* J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 742–44 (1996) (critiquing the prevailing legal philosophy of the bundle of property rights).

193. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1849 (2007) (observing that property law is typically addressed "from a utilitarian perspective" and as such is "largely indifferent to questions of . . . distributive justice"); *see* LAURA UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 40 (2003) (describing property rights specifically as protecting individual interests against collective ones).

194. JOHN RAWLS, A THEORY OF JUSTICE 65–66, 101–02 (1971) (finding inherent justification only for "personal property" like toothbrushes and clothing, not for "productive property" like land and machinery); *see also* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 114–15, 177 (Erin Kelly ed., 2001) (contrasting private personal property and the right of private property in productive assets); George G. Brenkert, *Freedom and Private Property in Marx*, 8 PHIL. & PUB. AFFS. 122, 122

exhibits the very same dynamic. As observed earlier and demonstrated in part through masking, trademark law is not directly concerned with supporting consumer welfare, as a distributive justice regime would be.

Indeed, one should be highly skeptical of trademark law's distributional valence, because consumers have no voice in it at all; there is absolutely zero consumer standing available.[195] For better or for worse, courts have left producers to police the boundaries of marks amongst themselves. This works reasonably well for the other principal areas where trademark law risks harming competition more than helping it, like genericness or functionality. If one firm wants to trademark a purely generic term or functional feature of the product, their competitors have a strong incentive to intervene and kill the mark; they will be at a significant competitive disadvantage otherwise, so their interests broadly align with that of the consuming public. But masking harms may not affect competitors at all or only in an indirect way that is unlikely to give rise to Article III standing, an incentive to litigate, or adequate deterrent damages (since the full extent of harm to consumers will not be internalized). Thus, any masking that acts as a pure wealth transfer from consumers to producers (rather than *between* producers) is highly unlikely to be corrected by trademark law itself. Moreover, even as between producers, trademark law explicitly promotes the rich getting richer. The more powerful doctrine of dilution only applies to "famous" (read: especially valuable) marks,[196] and even the scope of ordinary confusion-based claims scales with brand value.[197] That is, marks that are worth more receive stronger protection—potentially in perpetuity.

The orthodox story of trademark law purports that marks protect consumers against deception and confusion, but marks do so only in a very limited way. In reality, marks themselves have the potential to deceive and confuse consumers through masking. The typical functionalist description of trademark law, in turn, characterizes marks as reducing search costs and incentivizing investments in reputation, but that too is an incomplete story. Through strategically using (and not using) trademarks, firms have real power to raise search costs and liquidate (or escape) reputations. The most coherent

(1979) ("[Karl] Marx's opposition to private property is well known. He was . . . quite explicit: 'the theory of the Communists may be summed up in the single sentence: Abolition of private property.'" (quoting Karl Marx & Friedrich Engels, *Manifesto of the Communist Party*, *in* 6 KARL MARX AND FRIEDRICH ENGELS: COLLECTED WORKS 477, 498 (1976))).

195. *See* Made in the USA Found. v. Phillips Foods, Inc. 365 F.3d 278, 281 (4th Cir. 2004) (observing that "the several circuits that have dealt with the question are uniform in their categorical denial of Lanham Act standing to consumers"). *See generally* Grynberg, *supra* note 24, at 72 ("On the most basic level, trademark holders file the lawsuits. Whatever the centrality of consumer protection to trademark law, vindicating this interest is out of consumer hands.").

196. 15 U.S.C. § 1125(c)(1).

197. ALTMAK & POLLACK, *supra* note 85, § 21:10 (observing that "slight differences exist" between circuits, but the "tests are quite similar in practice," and each include some kind of factor addressing "[t]he fame of the prior mark"—including dollars obtained in sales and spent in advertising).

vision of modern trademark law may therefore be as a form of property law after all—not merely as a result of modern expansions like post-sale confusion and dilution, but all the way down to its heart. Trademark law broadly prevents wealth dissipation through rivalry problems but is not occupied with micromanaging owners' use (or misuse) of rights. Rather, it focuses on safeguarding the rights of exclusion, use, destruction, and alienation in a thing—a marketplace symbol. When trademark law is viewed in this heretofore heterodox way, the tolerance of masking is no longer surprising or paradoxical at all, but instead perfectly consistent and typical.

III. ADDRESSING MASKING HARMS

The preceding discussion has necessarily taken a high-level view of property rights—focusing on the general functions that make it a coherent category to begin with—in order to show that trademark law exhibits all of the same. But property rights are not as absolute as such a view may suggest. From securities to copyrights to government benefits, extensive regulation is the norm rather than the exception. Even real property rights, the law's conceptual bedrock, are curtailed through myriad zoning and environmental regulations. Therefore, categorizing trademarks as a form of property does not imply they should be left unrestrained when they generate harms. On the contrary, this categorization *emphasizes* the room for intervention when such harms manifest.

Some masking that harms consumers—perhaps most—will be self-correcting through market forces. In particular, consumers will update their associations with a mark over time as they have more experiences. If a firm drops the quality of a good, consumers will eventually change their behavior when their higher expectations are continually unmet. Likewise, if a firm uses different marks for the same good, consumers are likely to catch on when they notice the similarities (like the unfortunate patron of It's Just Wings).[198] And if a firm dumps its badwill by hiding behind a new mark, consumers will simply develop new badwill unless the firm improves the product. In any event, the consumers will eventually stop buying the product and take their business elsewhere, with the marks' reputations ruined. Recognizing that long-term outcome and working backwards, most firms will be properly disincentivized from trying to capitalize on a purely short-term grift.

In general, there are three main factors that will determine when masking behavior is likely to be self-correcting or not: market power, rebranding costs, and information costs. In terms of market power, where the market is already uncompetitive for some reason—say, a fully monopolized industry—consumers have limited choice by definition. Lacking alternative options, consumers cannot enforce reputation through their purchasing behavior in the first place,

198. *See supra* text accompanying notes 36–37.

so there is no means of disciplining firms that engage in masking. At the same time, masking should not cause any additional harm beyond the uncompetitive market itself; a monopolist can degrade quality and charge supracompetitive prices with or without the assistance of marks. Moreover, antitrust law exists to squarely address the presence and abuse of market power, so the extent to which it fails or succeeds in that task is left as an antitrust problem, not really a trademark one.

More significant, then, are the remaining two factors. When rebranding is cheap to perform—that is, when it is easy for firms to create new marks and drop old ones—self-correction is also less likely to occur. If a firm can repeatedly rebrand for little cost, there may be a viable business model in selling facially attractive garbage and repeatedly changing marks whenever enough badwill accrues. This is particularly easy in digital spaces, as seen in the proliferation of "nonsense marks" and evasive rebranding on platforms like Amazon.[199] Along similar lines, if rebranding is cheap, then firms can more easily deploy additional marks across different markets. As consumers learn that "Thrilled Cheese" is IHOP or "Kirkland Signature" tuna is Bumble Bee,[200] the ruse can continue so long as the firm is able to create a new mask. Naturally, if there are low *opportunity* costs in rebranding as well (in the sense that any accrued positive reputation tends to not carry much value), then self-correction again may not be possible—a positive reputation is not worth preserving.

When information about product attributes is costly to obtain—that is, when it is hard for consumers to independently discover the truth—self-correction will be least likely to occur. Some product attributes are discoverable immediately upon consumption (think of a change in the taste of a soda); some, over a lengthier period of consumption (think of a change in the durability of a car tire); and some, perhaps never through consumption alone (think of a change in the environmental impact of a lip gloss). Investigative reporting or public awareness campaigns may be the only way some consumers learn of masking in the latter two categories. Granted, modern technology makes it theoretically easier for consumers to obtain all kinds of product information. Almost anyone can pull out their phone and perform a little internet research, even in the middle of a grocery aisle. That being said, consumers are unlikely to actually do so for the inexpensive and routine purchases that define their day-

199. Jeanne C. Fromer & Mark P. McKenna, *Amazon's Quiet Overhaul of the Trademark System*, 113 CALIF. L. REV. 1169, 1213 (2025) ("Indeed, the forgettability of nonsense marks might be precisely their point. Owners of nonsense marks can collect product reviews on their listings. If they are positive, they can rely on the search algorithm to deliver them more customers. If the reviews are negative, they can easily relaunch under another forgettable nonsense mark and avoid the reputational consequences of those reviews. In this way, nonsense marks undermine the very function of trademarks—to allow consumers an easy way to attach reputation to the right party.").

200. *See supra* text accompanying notes 37, 42.

to-day consumption.[201] The proliferation of choices available to modern consumers, moreover, tends to create decision-making fatigue and encourage default to heuristics like marks rather than promote engagement and rational choice.[202] Moreover, dismissing masking concerns on the basis of modern communications technology would seem to prove too much; if information is indeed so freely accessible, then the orthodox search-cost and reputation-incentive justifications for trademark law themselves disappear.[203]

The challenge in curing these remaining harms, then, lies in finding a suitable legal structure without warping trademark law to create one. Its current two-pillared structure, focusing on the binary issues of validity and infringement, is ill-equipped to handle all the aforementioned nuances of masking. Like real property law's equivalent of ownership and trespass, those issues alone are too crude to regulate complex, long-run conduct and welfare tradeoffs. Treating masking as a form of prohibited deception, for example, would only lead to the outright invalidation of many marks, creating chaos and confusion in the marketplace rather than resolving it. Moreover, the actual regulatory body of trademark law, the USPTO, is not well-suited to the task of constant, ongoing supervision and micromanagement that policing masking would require. Its track record in overseeing certification marks speaks for itself.

But property law does not attempt to solve all of its externality problems itself; it relies on appurtenant legal structures. Given trademark law's limitations, it must do the same, and consumer protection law readily offers support. Consumer protection laws—specifically, Section 5 of the Federal

201. *See* ANDREA NIOSI, INTRODUCTION TO CONSUMER BEHAVIOR 103 (2021) ("Low-involvement decisions are . . . typically products that are relatively inexpensive and pose a low risk to the buyer if a mistake is made in purchasing them. Consumers often engage in routine response behaviour when they make low-involvement decisions—that is, they make automatic purchase decisions based on limited information or information they have gathered in the past."); Joel W. Reese, *Defining the Elements of Trade Dress Infringement Under Section 43(a) of the Lanham Act*, 2 TEX. INTELL. PROP. L.J. 103, 129 (1994) ("For example, the purchase of an over-the-counter pain reliever, a relatively 'low involvement' purchase, involves a greater probability of consumer confusion than the purchase of multi-million dollar construction services, a relatively 'high involvement' purchase.").

202. *See* Graeme B. Dinwoodie & Mark D. Janis, *Confusion Over Use: Contextualism in Trademark Law*, 92 IOWA L. REV. 1597, 1630–31 (2007) ("But, especially in the context of online information supply, search costs for consumers may be increased as a result of information overload; not all information reduces search costs."); Stacey Colino, *Decision Fatigue: Why It's So Hard To Make up Your Mind These Days, and How To Make It Easier*, WASH. POST (Sep. 22, 2021), https://www.washingtonpost.com/lifestyle/wellness/too-many-choices-decision-fatigue/2021/09/21/2dffce74-1b22-11ec-bcb8-0cb135811007_story.html [https://perma.cc/2L7B-63Q5]. *See generally* RICHARD LANHAM, THE ECONOMICS OF ATTENTION (2006) (arguing that consumers gravitate toward attention-grabbing stylistic choices over product information); BARRY SCHWARTZ, THE PARADOX OF CHOICE (2004) (highlighting that consumers can be harmed when confronted with too many choices).

203. *See* Christine Haight Farley, *Trademarks in an Algorithmic World*, 98 WASH. L. REV. 1123, 1137–54 (2023).

Trade Commission ("FTC") Act[204] and parallel state statutes prohibiting Unfair or Deceptive Acts or Practices ("UDAP statutes")—explicitly target "deceptive acts" in commerce,[205] and appear well suited to the task of addressing masking harms that are resistant to market correction. A consumer deception claim has essentially three elements: "[1] a representation, omission, or practice, that [2] is likely to mislead consumers acting reasonably under the circumstances, and [3] . . . is material."[206] Immediately, one can observe the striking structural parallel between trademark deception doctrine and this test. These laws, however, are enforced by institutions like the FTC that are purpose-built for ongoing supervision and regulatory enforcement. Allowing these true regulatory bodies to exercise authority over masking would thus be the functional equivalent of equipping the USPTO with the capacity to handle these complex issues itself, without requiring such a radical doctrinal and institutional overhaul.

Moreover, the FTC Act and state UDAPs carry particular advantages in this context. First, not only are affirmative representations actionable, but "omission[s]" are as well.[207] Second, rather than relying solely on the "literal" meaning of a given representation, courts look to the net "impression" that it is likely to make in full context.[208] Finally, the case law recognizes that separate disclosures or disclaimers are not necessarily effective in curing what would otherwise be a deceptive act.[209] Structurally, consumer protection law also has

204. An Act to Create a Federal Trade Commission, Pub. L. No. 63-203, ch. 311, sec. 5, 38 Stat. 717, 719–21 (1914) (codified as amended at 15 U.S.C. § 45).

205. 15 U.S.C. § 45(a)(1); *see* PRACTICE NOTE: KEY ELEMENTS OF STATE UNFAIR AND DECEPTIVE PRACTICES (UDAP) ACTS, Westlaw w-028-1412 (database updated Feb. 2026) ("[State] UDAP statutes are often called 'Little FTC Acts' because UDAP statutes include substantive consumer protections that are similar to the prohibition against unfair and deceptive acts and practices set out in the Federal Trade Commission Act (FTC Act) (15 U.S.C. § 45(a)(1)).").

206. FTC v. Verity Int'l, Ltd., 443 F.3d 48, 63 (2d Cir. 2006).

207. FTC v. Bay Area Bus. Council, Inc., 423 F.3d 627, 635 (7th Cir. 2005) ("Additionally, the omission of a material fact, without an affirmative misrepresentation, may give rise to an FTC Act violation."); *see also* FTC v. LeadClick Media, LLC, 838 F.3d 158, 170 (2d Cir. 2016) ("This is consistent with the FTC's longstanding policy that an omission in certain circumstances may constitute a deceptive or unfair practice.").

208. Removatron Int'l Corp. v. FTC, 884 F.2d 1489, 1496 (1st Cir. 1989) (quoting Am. Home Prods. Corp. v. FTC, 695 F.2d 681, 687 (3d Cir. 1982)); *see also* Letter from James C. Miller, Chairman, Fed. Trade Comm'n, to Hon. John D. Dingell, Chairman, U.S. House Comm. on Energy and Com. 2—3 (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [https://perma.cc/J4NK-HAG6] ("When representations or sales practices are targeted to a specific audience, the Commission determines the effect of the practice on a reasonable member of that group. In evaluating a particular practice, the Commission considers the totality of the practice in determining how reasonable consumers are likely to respond.").

209. *See, e.g.*, FTC v. Cyberspace.com LLC, 453 F.3d 1196, 1200–01 (9th Cir. 2006) (finding deceptive conduct in totality despite the inclusion of truthful fine-print disclosures); FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 42–43 (D.C. Cir. 1985) (same); Indep. Directory Corp. v. FTC, 188 F.2d 468, 469–70 (2d Cir. 1951) (same).

two key edges over trademark law when it comes to masking: consumer standing and public enforcement. Again, there is no consumer standing at all under the Lanham Act, despite its purported focus in serving consumer interests.[210] State UDAP laws, however, provide standing to individual consumers (Iowa being the sole exception),[211] and most include access-to-justice measures beyond that, like attorney's fees (forty-five states and the District of Columbia), aggregation of claims through class actions (forty-one states and the District of Columbia), and enhanced damages for plaintiffs (twenty-five states and the District of Columbia).[212] In addition, all state and federal consumer protection law features public enforcement; state UDAP statutes are typically enforced by state attorneys general,[213] and the FTC Act is enforced by the FTC itself.[214] By dedicating public resources to the enforcement of these laws, the states and the federal government are able to reach conduct that might otherwise evade scrutiny (say, due to uncertainty in outcome, small individual damages per consumer, or high litigation costs). In short, then, consumer protection law gives consumers—rather than just producers—an active voice in enforcement, buoyed by affirmative access mechanisms, and bolstered by public enforcement.

With this background in mind, it is straightforward that at least some masking behavior falls within the text of consumer protection law. Using a trademark is a representation; not using a trademark is an omission. Given how consumers rely on trademarks in the marketplace, use or non-use may be misleading as to certain facts (regarding the product, process, and producer) depending on the reputational context and availability of other information. If those facts are important to a substantial number of consumers—to the point where their actual purchasing behavior is affected—then the presence or

210. *See supra* note 190 and accompanying text.

211. CAROLYN L. CARTER, NAT'L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 19 (2009), https://www.nclc.org/wp-content/uploads/2022/08/report_50_states.pdf [https://perma.cc/8Q76-D7U6] ("All state UDAP statutes except Iowa's allow consumers to seek at least the dollar amount of their losses."). *See generally* Staci Zaretsky, Note, *Trademark Law and Consumer Protection Law—Deception Is a Cruel Act: "Uniform" State Deceptive Trade Practices Acts and Their Deceptive Effects on the Trademark Claims of Corporate Competitors*, 32 W. NEW ENG. L. REV. 549, 550 (2010) ("When the [UDAPs] were first adopted by the states, many of these statutes dictated that only the State Attorney General could bring suit on behalf of private individuals. But with the passing of time, private rights of action were recognized . . . .").

212. *See* CARTER, *supra* note 211, at 18–23.

213. *Id.* at 16 ("Every state designates a state agency—usually the Attorney General's office—to enforce its UDAP statute.").

214. *See generally A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N (July 2025), https://www.ftc.gov/about-ftc/mission/enforcement-authority [https://perma.cc/JVK5-P8LU] (outlining FTC's enforcement authority).

absence of the mark is necessarily material.[215] So, when a firm ceases using a trademark to successfully conceal a negative reputation that matters greatly to its consumers or a firm continues to use a trademark despite substantial changes to the product that would be difficult to otherwise detect by ordinary consumers, these elements are at least hypothetically met. Granted, eleven state UDAP statutes have language stating that source confusion caused by the otherwise lawful use of trademarks would not give rise to liability.[216] But these exemptions all require good faith in use, which arguably is not present with certain instances of masking; they do not, by their own terms, address the *non*-use of trademarks; and they do not appear at all in most other states' UDAP statutes or federal law.

Despite the potential of consumer protection law, there appears to be a near-total absence of cases in which the use or non-use of a trademark itself was found to constitute a deceptive practice. The sole exception is quite recent, however, and tees up the issue perfectly.[217] In short, Black & Decker ("a well-known company that has a reputation for producing well-built products for good value") licensed their trademark to Applica Consumer Products (who in turn contracted with a Chinese manufacturer), all under a particularly loose arrangement.[218] One product sold under that arrangement was a coffeemaker; despite prominently bearing the BLACK & DECKER mark, Black & Decker "did not design, manufacture, distribute, or warrant the [c]offeemaker" at all.[219] A class of consumers who purchased the coffeemaker claimed injury under New Mexico's UDAP statute—arguing that they believed they were getting one thing when they bought the product, but wound up with another entirely:

> Black & Decker and Applica coordinated the manner in which the Black & Decker name was presented on their respective products such that a consumer would be unable to tell the difference between products produced by Applica and products produced by Black & Decker. One

215. *See, e.g.*, Novartis Corp. v. FTC, 223 F.3d 783, 786 (D.C. Cir. 2000) (stating that "material" means "important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product"); *In re* Rambus, Inc., 142 F.T.C. 617, 657 (2006) (same).

216. *See, e.g.*, COLO. REV. STAT. § 6-1-106(2) ("This article shall not be interpreted to apply to the use by a person of any service mark, trademark, certification mark, collective mark, trade name, or other trade identification which was used and not abandoned prior to July 1, 1969, if the use was in good faith and is otherwise lawful except for the provisions of this article."). The other ten examples all use near-identical language. *See, e.g.*, GA. CODE ANN. § 10-1-374(b); NEV. REV. STAT. 598.0955(2); 815 ILL. COMP. STAT. 510/4; ME. STAT. tit. 10, § 1214(2); OKLA. STAT. tit. 78, § 55B; MINN. STAT. § 325D.46; HAW. REV. STAT. § 481A-5(b); DEL. CODE ANN. tit. 6, § 2534(b); NEB. REV. STAT. § 87-304; OHIO REV. CODE ANN. § 4165.04(B).

217. Puma v. Wal-Mart Stores E., LP, 523 P.3d 589 (N.M. Ct. App. 2022), *vacated in part*, No. S-1-SC-39540, 2024 WL 5166686 (N.M. Dec. 19, 2024).

218. *Id.* at 593.

219. *Id.*; Plaintiffs-Respondents' Answer Brief at 6–7, *Puma*, 2024 WL 5166686 (collecting deposition testimony and interrogatory responses).

> consequence of this confusion is that consumers will pay a higher price for a name brand Black & Decker coffeemaker than they would pay for a generic Applica coffeemaker of equal quality.[220]

In other words, their claim was that the BLACK & DECKER mark had been used as a mask, intentionally, to command an unwarranted price premium on the product.

The trial court agreed, finding a UDAP violation and awarding minimal ($300) statutory damages, but holding that "the class could not establish actual damages" beyond that.[221] On appeal, Black & Decker argued that the Lanham Act should control the analysis of any mark-related UDAP claim: "[i]n essence, . . . if the Lanham Act allows Applica to market the Coffeemaker, the arrangement cannot constitute a violation of the [UDAP statute]."[222] The court of appeals disagreed, finding that the state's UDAP law was not intended to incorporate Lanham Act precedent or otherwise be so limited, briefly noting key differences between the two regimes: the UDAP statute's recognition of confusion claims based purely on quality, even without confusion over source; the Lanham Act's complete lack of consumer standing; and a general presumption that UDAP scope is to be interpreted liberally, as a catchall mechanism for what other regimes fail to reach.[223] Finding Black & Decker's other arguments equally unmeritorious, the court of appeals ultimately affirmed the decision below.

Black & Decker filed a cert petition with the New Mexico Supreme Court, which was granted, raising substantially the same Lanham Act argument as before:

> This common practice is regulated by the Trademark Act of 1946, also known as the Lanham Act. The product licensing industry has thrived by benefitting brand owners, licensees, and consumers. Brand owners can enter or remain in markets under economically viable conditions. Brand licensees can enter markets under the oversight and goodwill of familiar brand owners . . . . Congress, through the Lanham Act, has created a legal framework regulating and sanctioning the practice.[224]

In December 2024, the nonprecedential opinion was released, wherein the court punted on the relevant issue: "Petitioners waived any Lanham Act defense by

220. Plaintiffs-Respondents' Answer Brief, *supra* note 219, at 5; *see also id.* at 8 ("It defies reality to claim that Black & Decker was the party . . . responsible for production of the coffeemakers in the face of evidence that Black & Decker had . . . no involvement whatsoever in the design, production, manufacture, distribution or warranty of the coffeemakers . . . .").

221. *Puma*, 523 P.3d at 593.

222. *Id.* at 594.

223. *Id.* at 595–97.

224. Brief in Chief of Petitioners Wal-Mart Stores E., LP, Applica Consumer Prods., Inc., & the Black & Decker Corp. at 1–2, *Puma*, 2024 WL 5166686 (citations omitted).

failing to raise the issue at any point before or during the six-day district court bench trial."[225] Accordingly, it vacated all of the court of appeals' decision with respect to the Lanham Act. The viability of Black & Decker's defense remains unsettled in New Mexico—and nationwide.

As noted earlier, there may be prudential reasons against opening up firms to UDAP or FTC Act liability for masking behavior. Overly aggressive prohibitions on masking could chill investment and experimentation, for example. Moreover, given the costs of litigation and enforcement, self-evident abuses are probably best dealt with by market forces. And there are limits to what consumer protection law could do in practice, as this case reveals. In particular, it can be quite difficult to prove actual damages; here, the counterfactual exercise requires finding the difference between the coffeemaker's actual price and how much a consumer would have been willing to pay for the transparently branded Applica one. This is not easily done, as the New Mexico courts found.

Nevertheless, the *Puma* case is a good example of how consumer protection law could play a modest—yet helpful—role where masking is not likely to be self-correcting. Outsourcing arrangements are a perfect example; unlike the taste of a food product or feel of a sweater, consumers are not apt to automatically discover a product's specific upstream stages in commerce. Even if there is an associated difference in some long-term quality (like durability), it can be difficult for a consumer to distinguish between bad luck or misuse and a genuine degradation in manufacturing or design. Firms, meanwhile, are generally well-positioned to know what is and is not material to their consumers—this is exactly what competitive market forces encourage them to know. Indeed, Black & Decker is well aware that its name carries a particular reputation for quality and craftsmanship, upon which consumers depend. Where—as in *Puma*—a mark is used (or not used) that creates a materially false impression, corrective information is costly for consumers to obtain and cheap for the producer to provide. Consumer protection liability thus creates better incentives for transparency, as an information-forcing mechanism aimed at the lower-cost provider.

Either way, Black & Decker's particular argument (that consumer protection liability should not attach because trademark law already regulates this conduct) is simply untrue, as the foregoing analysis has repeatedly demonstrated. At the same time, it *is* true that trademark law's conceptual coherence—as a species of property rights—is predicated on its ability to generate efficiency gains, and much of those gains are realized through the improvement of information in the marketplace. This is emblematic of property rights in general and real property rights in particular; with their emphasis on

225. *Puma*, 2024 WL 5166686, at *1.

clear boundaries, recording systems, and notice requirements, they drastically reduce friction and ambiguity in the marketplace. The clarity and certainty provided by well-defined property rights minimize disputes and enable transactions in turn.

If anything, then, consumer protection law is a natural and necessary complement to trademark law's property-rights model. If the property characteristics of marks are rooted in their efficiency-promoting capacity to provide clarity and reduce information asymmetry, then consumer protection's focus on disclosure and transparency is a direct and logical extension of this core principle. When the owner of a mark engages in masking that is unlikely to be self-correcting for reasons relating to information costs, they are violating one of the fundamental justifications of trademark's property-rights model. In such cases, consumer protection law would serve as a crucial regulatory backstop, ensuring that the property rights granted to trademark owners are not abused in a way that subverts their very purpose. It is at this precise nexus—that of property and consumer protection—that trademark law, in fact, finds its most coherent and robust theoretical footing.

CONCLUSION

Trademark law, which supposedly exists to aid authentic consumer choice and bind producers to their reputations, nonetheless enables a wide array of behaviors that mislead, misdirect, and obfuscate. By strategically using trademarks as *masks*, producers are able raise search costs as easily as lowering them and liquidate or abandon a reputation as easily as investing in it. Trademark law's tolerance of masking reveals the limitations of orthodox descriptions of the field and suggests that a more heterodox theory—viewing it as a true subspecies of property law—may offer more coherent explanations for its function and its limitations. With no internal solution, then, consumer protection law may need to step in when masking harms are unlikely to be self-correcting through market forces.