

Catholic University Law Review

Volume 53
Issue 3 *Spring 2004*

Article 7

2004

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Recommended Citation

Amy E. Pulliam, *Raising the Bar Too High: Moseley v. V Secret Catalogue, Inc. and Relief Under the Federal Trademark Dilution Act*, 53 Cath. U. L. Rev. 887 (2004).

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NOTES

RAISING THE BAR TOO HIGH: *MOSELEY V. V SECRET CATALOGUE, INC.* AND RELIEF UNDER THE FEDERAL TRADEMARK DILUTION ACT

Amy E. Pulliam⁺

Trademarks are used to identify and differentiate a product from the products of competitors.¹ The distinctiveness and advertising capability of a trademark are invaluable to the usefulness and effectiveness of the mark.² In today's market, companies heavily rely on trademarks to develop brand loyalty, because advertising plays a vital role in consumer decisions.³

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1. Robert N. Klieger, *Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection*, 58 U. PITT. L. REV. 789, 790 (1997). Additionally, in a time when consumers recognize trademarks more than the actual producers of the goods, trademarks are used to indicate a "common (though anonymous) source of ownership such as a product line." ARTHUR R. MILLER & MICHAEL H. DAVIS, *INTELLECTUAL PROPERTY: PATENTS, TRADEMARKS, AND COPYRIGHT IN A NUTSHELL* 179 (1983).

2. MILLER & DAVIS, *supra* note 1, at 179. Trademarks are vital in the field of marketing because "[t]he consumer may prefer a certain product not because the trademark has identified a source whom the consumer values, but because the trademark itself has a certain value." *Id.* Protecting trademarks from dilution is sensible because

A [famous] trademark seeks to economize on information costs by providing a compact, memorable, and unambiguous identifier of a product or service. The economy is less when, because the trademark has other associations, a person seeing it must think for a moment before recognizing it as the mark of the product or service.

Richard A. Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 75 (1992).

3. Klieger, *supra* note 1, at 790-91. Klieger emphasizes trademark value, stating, "a trademark is that which makes tomorrow's business something more than an accident." *Id.* at 791 (citing UNITED STATES TRADEMARK ASSOCIATION, *TRADEMARKS IN ADVERTISING AND SELLING* 1 (1966)). The owner of a trademark should have the authority to protect the advertising value of its mark, as consumers associate the mark with the product being advertised. John F. Hacking, *Trademark Dilution: Setting the Dilution Standard Under the Federal Trademark Dilution Act*, 5 TUL. J. TECH. & INTELL. PROP. 115, 117 (2003) (citing 1 J. THOMAS MCCARTHY, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITIONS* 2:1 (4th ed. 2000)). The *Restatement of Unfair Competition* explains that the commercial value of a highly distinctive and unique trademark is due to its strong association to the goods, services, or business that it identifies. RESTATEMENT

Because the success of a company's product may hinge on consumer recognition of its trademark, it is important to prevent competitors from trying to create similar looking marks to ride on the original's coattails. In a 1927 groundbreaking article, Frank Schechter emphasized the necessity of anti-dilution laws and their role in safeguarding the uniqueness of trademarks.⁴ Prior to the enactment of the Federal Trademark Dilution Act (FTDA), trademark laws protected consumers from confusing similar trademarks through traditional claims of trademark infringement and unfair competition.⁵ In 1995, Schechter's vision materialized when Congress enacted dilution laws to provide the owners of famous trademarks with remedies in situations other than traditional trademark infringement.⁶

(THIRD) OF UNFAIR COMPETITION § 25 (1995). In a 1942 opinion, Justice Frankfurter further emphasized the power of a trademark by stating:

If it is true that we live by symbols, it is no less true that we purchase goods by them. A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits the human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol.

Patrick M. Bible, Comment, *Defining and Quantifying Dilution Under the Federal Trademark Dilution Act of 1995: Using Survey Evidence to Show Actual Dilution*, 70 U. COLO. L. REV. 295, 299 (1999) (quoting *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942)).

4. Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 831-32 (1927). Professor Schechter attempted, but failed, to create a federal act which would include dilution as a cause of action. Julie Arthur Garcia, *Trademark Dilution: Eliminating Confusion*, 85 TRADEMARK REP. 489, 491 (1995). The next change to the 1905 Trademark Act did not occur until the 1946 Lanham Act, which did not provide a remedy for dilution. *Id.* at 491-92. In fact, the Trademark Act would be amended once more, in 1988, again without any provision for dilution. Bible, *supra* note 3, at 301-02.

5. 2 TRADEMARK PROTECTION AND PRACTICE § 5A.01 [1] (Matthew Bender & Company, Inc. 2003) [hereinafter TRADEMARK PROTECTION AND PRACTICE] (discussing the distinction between trademark infringement laws, which protect the public from "confusion, deception and mistake," as compared to anti-dilution laws, which serve a very distinct purpose of only protecting the private right of the famous trademark owner to maintain the uniqueness of its mark). In addition to the anti-dilution laws protecting a private interest, as opposed to the public interest, they protect only a narrow group of the private sector, leaving the "more numerous journeyman trademarks that dot the landscape to the more traditional infringement remedies, at least until they become 'famous.'" *Id.* Prior to the enactment of the FTDA, some courts reluctantly relied on state anti-dilution statutes, finding no recourse under federal law. RESTATEMENT (THIRD) OF UNFAIR COMPETITION cmt. b (1995).

6. Hacking, *supra* note 3, at 115; TRADEMARK PROTECTION AND PRACTICE *supra* note 5, § 5A.01 [4][a]. The United States Trademark Association stated, "[f]amous marks are most likely to be harmed by reduced distinctiveness. They are enormously valuable but fragile assets, susceptible to irreversible injury from promiscuous use." *Id.* (quoting *The United States Trademark Association Trademark Review Commission Report and Recommendations*, 77 T.M.R. 375 (1987)).

Trademark dilution occurs when a third party uses the identical mark or a similar mark, thereby taking away from the distinctiveness of the original mark.⁷ Dilution may impair the selling power of the original trademark by blurring or tarnishing the mark.⁸ Blurring occurs with a mark's use on numerous products, diminishing the mark's ability to identify its owner's product.⁹ Tarnishing occurs when consumers associate a mark with an unsavory or lower quality product.¹⁰

7. Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (1996) (stating that “[t]he term ‘dilution’ means the lessening of the capacity of a famous mark to identify and distinguish goods or services”). *Id.* The American Heritage Dictionary of the English Language defines dilution as “[t]he process of making weaker or less concentrated.” AMERICAN HERITAGE DICTIONARY (4th ed. 2000), available at <http://www.bartleby.com/61/60/D0226000.html>. As an example of a highly distinctive trademark and a non-distinctive mark, or descriptive trademark, compare Kodak as a mark for cameras with Ivory as a mark for products made from elephant tusks. Shannon M. Sidie, Note, *The Federal Trademark Dilution Act—Infringing on Infringement Law?*, 36 SUFFOLK L. REV. 451, 454 (2003). Kodak is a coined or fanciful word, which has no meaning other than as a trademark, and is therefore automatically granted trademark status. *Id.* On the contrary, Ivory directly describes the product it is identifying, as the products are made from the ivory tusks of an elephant. *Id.* Descriptive terms, such as Ivory, are never distinctive, and therefore do not enjoy trademark protection until they have acquired distinctiveness. *Id.* at 454-55. Otherwise non-distinctive trademarks can acquire distinctiveness through advertising, “whereby the public recognizes the mark as an indication of its source.” Laurinda L. Hicks & James L. Holbein, *Convergence of National Intellectual Property Norms in International Trading Agreements*, 12 AM. U. J. INT’L L. & POL’Y 769, 776 (1997). A mark which is originally weak and descriptive (such as Ivory) can “become a celebrated and famous mark that the public associates with the [product or service].” *Ringling Bros. Barnum & Bailey Combined Shows, Inc. v. Celozzi-Ettelson Chevrolet, Inc.*, 855 F.2d 480, 481 (7th Cir. 1988). In this case, the district court acknowledged that although Ringling Brothers’ slogan, “The Greatest Show on Earth,” was originally a weak and descriptive term, thereby not entitled to trademark protection, it eventually became famous through its sustained use in the market. *Id.*

8. *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456, 466 (7th Cir. 2000), *overruled in part by Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003). The FTDA aims to “prevent . . . forms of dilution by ‘protect[ing] the trademark owner from the erosion of the distinctiveness and prestige of a trademark caused by . . . a proliferation of borrowings, that while not degrading the original seller’s mark, are so numerous as to deprive the mark of its distinctiveness and hence impact.’” *Id.* (alteration in original) (citing *Ill. High School Ass’n v. GTE Vantage Inc.*, 99 F.3d 244, 247 (7th Cir. 1996)). The *Restatement* recognizes that trademarks are “the law’s recognition of the psychological function of symbols.” RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 25 (1995). Much of the importance of trademarks, particularly with respect to famous marks, is the effect they have on consumers purchasing products. *Id.* § 25, cmt. a.

9. *Eli Lilly*, 233 F.3d at 466, (citing *Hormel Foods Corp. v. Jim Hensen Prod., Inc.*, 73 F.3d 497, 506 (2d Cir. 1996)). Blurring is further described as a loss of distinctiveness due to the mark’s association with other companies’ or owners’ products. Edward Vassallo & Tila Duhaime, *Supreme Court Tightens Trade Mark Law*, MANAGING INTELLECTUAL PROPERTY (May 2003). Blurring is more likely to harm products that “through their high degree of distinctiveness or through their owner’s extensive advertising, create a ‘positive response that is associated exclusively with the goods or

The FTDA amended the Trademark Act of 1946¹¹ in an effort to focus attention on the protection of famous trademarks.¹² In interpreting the express language of this amendment, a split in the circuit courts developed.¹³ The specific phrase “causes dilution of the distinctive quality of the mark” challenged the courts to decide whether the statute required a showing of actual dilution.¹⁴ The Second, Sixth, and Seventh Circuits’ interpretations of the statute determined that no actual harm must occur to gain relief under the FTDA.¹⁵ In contrast, the Fourth and Fifth Circuits interpreted the statute rigidly to require a showing of actual dilution.¹⁶

The Supreme Court granted certiorari in *Moseley v. V Secret Catalogue, Inc.*¹⁷ to resolve the growing disagreement among the courts

services of the trademark owner.” Bible, *supra* note 3, at 305 (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 25 cmt. c (1995)).

10. *Eli Lilly*, 233 F.3d at 466 (citing *Panavision Int’l L.P. v. Toepfen*, 141 F.3d 1316, 1326 n.7 (9th Cir. 1998)). Tarnishing can be further defined as a mark’s loss of uniqueness due to its connection with “lewd or unsavoury goods or services.” Vassallo & Duhaime, *supra* note 9. A landmark example of tarnishing occurred in *Coca-Cola Co. v. Gemini Rising, Inc.*, when the defendant created a poster employing the phrase “Enjoy Cocaine,” in a manner which looked nearly identical to the super-famous Coca-Cola trademark. 346 F. Supp. 1183 (E.D.N.Y. 1972). The court stated that “[Coca-Cola’s] good will and business reputation are likely to suffer in the eyes of those who, believing it responsible for defendant’s poster, will refuse to deal with a company which would seek commercial advantage by treating a dangerous drug in such jocular fashion.” *Id.* at 1191.

11. 15 U.S.C. § 1125 (2000).

12. Federal Trademark Dilution Act of 1995, Pub. L. No., 104-98, §3(a) 109 Stat. 985 (1996). The FTDA added the following language, in part, to the Trademark Act:

The owner of a famous mark shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to an injunction against another person’s commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark, and to obtain such relief as is provided in this subsection.

Id. (presenting an amendment to section 43 of the Trademark Act of 1946, 15 U.S.C. § 1125).

13. *See infra* parts I.A–I.B.

14. *See Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208 (2d Cir. 1999), *overruled in part by Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003). The federal statute, unlike its state predecessors, requires a showing of actual injury to gain relief. Federal Trademark Dilution Act of 1995, Pub. L. No., 104-98 § 3(c)(1), 109 Stat. 985 (1996). *See also infra* notes 15-16 and accompanying text.

15. *Nabisco*, 191 F.3d at 228; *V Secret Catalogue Inc. v. Moseley*, 259 F.3d 464, 471-76 (6th Cir. 2001), *rev’d* 537 U.S. 418 (2003); *Eli Lilly*, 233 F.3d at 468.

16. *See Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 170 F.3d 449, 464 (4th Cir. 1999), *overruled in part by Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003); *Westchester Media v. PRL USA Holdings, Inc.*, 214 F.3d 658, 670 (5th Cir. 2000).

17. *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003).

of appeals.¹⁸ The particular controversy in *Moseley* arose when a married couple in Elizabethtown, Kentucky opened a women's lingerie and adult novelty store named Victor's Secret.¹⁹ After learning of the store and attempting to settle the matter outside of court, the well-known lingerie chain Victoria's Secret brought suit attempting to enjoin the couple's use of the strikingly similar trademark.²⁰ The Supreme Court ultimately sided with the Court of Appeals for the Fourth Circuit, interpreting the language of the FTDA to require a showing of actual dilution rather than the mere likelihood of dilution.²¹

This Note examines the doctrine of trademark dilution in light of the Supreme Court's decision in *Moseley v. V Secret Catalogue, Inc.* This Note first discusses the relevant background of the Federal Trademark Dilution Act and the purpose and substance of the trademark anti-dilution laws. Next, this Note analyzes relevant portions of the Supreme Court case, as well as the lower courts' decisions that ultimately brought the controversy before the High Court. This Note then examines the reasoning of the courts of appeals involved in the circuit split, one side interpreting the FTDA to require a showing of actual dilution, and the other finding no necessity for such a rigid interpretation of the Act. This Note then analyzes, in detail, the Supreme Court's ruling in *Moseley* and focuses on the Court's strict and literal reading of the express language of the statute. This Note also explores the Court's review of state and federal anti-dilution statutes in an attempt to determine Congress' intent in writing the FTDA. Next, this Note discusses the likelihood that the statute is more rigid than intended by Congress, but that the Supreme Court interpreted the statute based on its express language. This Note then projects the implications of the *Moseley* decision, which set the bar very high for an owner of a senior trademark to gain relief under the Act, and fails to specify the level of evidence required to show actual dilution. This Note predicts that the rigid statute will make it nearly impossible for owners of famous trademarks to gain relief. Finally, this Note asserts that the statute should be amended to more clearly establish a standard

18. *Id.* at 421-22, 425-26.

19. *Id.* at 422-23. Upon first receiving Victoria's Secret's notice, the Moseleys changed the name of their store from Victor's Secret to Victor's Little Secret. This, however, was not satisfactory to the famous chain. *Id.* In fact, Victor and Cathy Moseley have been running their store under the name Cathy's Little Secret since the district court enjoined them from using Victor's Little Secret. *Moseley*, 259 F.3d at 467-68. However, the Moseleys proceeded with the appellate process in an effort to regain permission to use their original store name. *See id.*

20. *Moseley*, 537 U.S. at 423-24.

21. *Id.* at 433 ("This text unambiguously requires a showing of actual dilution, rather than a likelihood of dilution.").

for dilution, drawing a distinction between identical and similar marks regarding the burden of proof.

I. A HIGHER LEVEL OF PROTECTION FOR FAMOUS TRADEMARKS

The Federal Trademark Dilution Act was passed in 1995 as an amendment to the 1946 Trademark Act.²² The focus of the amendment is protecting owners of famous trademarks by allowing injunctive relief for “dilution of the distinctive quality of the [famous] mark.”²³ The FTDA also set forth specific factors to consider when classifying a trademark as distinctive or famous.²⁴

A. *Strict Interpretation of the FTDA: Requiring a Showing of Actual Harm*

Is Ringling Brothers-Barnum and Bailey Circus’ famed phrase the “GREATEST SHOW ON EARTH” tarnished or diluted by the Utah Division of Travel Development’s slogan “THE GREATEST SNOW ON EARTH?”²⁵ This precise question appeared before the Court of Appeals for the Fourth Circuit in 1999.²⁶ Ringling Brothers began using the catchy phrase when the circus originated, as far back as 1872,

22. Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (1996).

23. § 3, 109 Stat. at 985. The Court in *Moseley* stated that a main purpose of the Act was “to protect famous trademarks from subsequent uses that blur the distinctiveness of the mark or tarnish or disparage it, even in the absence of a likelihood of confusion.” *Moseley*, 537 U.S. at 431 (quoting H.R. REP. NO. 104-374, at 2 (1995)). Congress further expressed its concern over the harm dilution can cause by stating that “[c]onfusion leads to immediate injury, while dilution is an infection, which if allowed to spread, will inevitably destroy the advertising value of the mark.” *Moseley*, 537 U.S. at 427 (quoting H.R. REP. NO. 104-374, at 3 (1995)).

24. Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, § 3(a), 109 Stat. 985 (1996). Factors to consider in determining whether a mark is famous include:

(A) the degree of inherent or acquired distinctiveness of the mark; (B) the duration and extent of use of the mark in connection with the goods or services with which the mark is used; (C) the duration and extent of advertising and publicity of the mark; (D) the geographical extent of the trading area in which the mark is used; (E) the channels of trade for the goods or services with which the mark is used; (F) the degree of recognition of the mark in the trading areas and channels of trade used by the marks’ owner and the person against whom the injunction is sought; (G) the nature and extent of use of the same or similar marks by third parties; and (H) whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

Id.

25. *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 170 F.3d 449 (4th Cir. 1999), *overruled in part by Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003).

26. *Id.*

although the circus did not seek or obtain federal registration until 1961.²⁷ Although the Utah Division of Travel Development (Utah) began using the slogan “GREATEST SNOW ON EARTH” as early as 1962, this suit did not arise until 1996, after the circus learned that Utah was applying for trademark registration from the United States Patent and Trademark Office.²⁸ The district court, after denying the circus’ motion for a jury trial, found for Utah.²⁹

The particular question before the Fourth Circuit Court of Appeals was whether the district court erred in finding that Utah’s slogan did not violate the FTDA.³⁰ After delving into a historical perspective of trademark and dilution law, the court compared state and federal trademark laws to highlight the contrast between the statutes’ express language.³¹ The subtle differences in the express language of the state and federal anti-dilution statutes provided guidance to the court when it determined whether the federal statute was intended to have the same burden of proof as the parallel state statute.³² Based upon those semantic differences, the court concluded that the state statutes sought to protect marks of distinctive quality against the *likelihood* of dilution, rather than the more stringent standard of actual dilution required under the federal

27. *Id.* Ringling Brothers attracts more than twelve million people a year to see its show, and including these viewers, more than seventy million people a year see the slogan “GREATEST SHOW ON EARTH” in connection with the circus it represents. *Id.*

28. *Id.* at 451-52.

29. Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev., 955 F. Supp. 605 (E.D. Va. 1997). Ringling Brothers presented survey evidence that twenty-five percent of those surveyed in Utah, weighed against forty-one percent of those surveyed nationwide, linked the incomplete statement “THE GREATEST ___ ON EARTH” solely with Ringling Brothers. *Id.* at 612-13. Ringling Brothers asserted that this evidence showed that Utah Division of Travel Development’s use of the slogan “GREATEST SNOW ON EARTH” caused people to link Ringling Brothers’ famous slogan with Utah Division of Travel Development’s slogan, causing dilution. *Id.* at 616. The district court found this evidence unpersuasive because Ringling Brothers did not demonstrate that “GREATEST SNOW ON EARTH” diminished the ability for “GREATEST SHOW ON EARTH” to advertise for the circus. *Id.* at 617. The court suggested that the evidence might have been more persuasive had it shown that those questioned “fill[ed] in the blank with SHOW and associate[d] the result with Utah skiing.” *Id.* Furthermore, the Court stated that more people within Utah (forty-six percent) than outside Utah (forty-one percent) associated “GREATEST SHOW ON EARTH” with Ringling Brothers. *Id.* Ultimately, the court found the survey evidence more persuasive for Utah Division of Travel Development than for Ringling Brothers. *Id.*

30. *Ringling Bros.*, 170 F.3d at 452.

31. *Id.* at 458 (stating that “the federal Act proscribes and provides remedy only for actual, consummated dilution and not for the mere ‘likelihood of dilution’ proscribed by the state statutes”).

32. *Id.*

statute.³³ State laws also focused more on the loss of the trademark's distinctive nature rather than on the mere economic loss that might result.³⁴ In contrast, a main concern of the federal statute was the protection of the trademark's ability to advertise and sell a product or service.³⁵ The court held that this difference in the express language of the federal and state statutes was a clear indicator for a rigid interpretation of the federal statute.³⁶ Ultimately, Utah prevailed because Ringling Brothers had not satisfied the high burden of proof necessary to warrant relief under the FTDA.³⁷ Specifically, the court required not only a showing that consumers mentally associated "GREATEST SHOW ON EARTH" and "GREATEST SNOW ON EARTH," but also proof that the junior mark economically injured the more famous mark by decreasing its advertising value—a burden Ringling Brothers failed to meet.³⁸

33. *Id.* The courts have not had to address what constitutes actual harm in state cases because the state allows for relief in situations involving a likelihood of harm. *Id.* Courts, up to this point, have done one of two things:

- (1) assumed that its essential elements—mental association, causation, harm—could be found (or rejected) as fact by inference from a balancing of the 'Mead factors,' or (2) assumed that all those elements could be conclusively presumed . . . simply from proof of the identity or near identity of the two marks.

Id. The *Mead* factors referred to in the *Ringling Brothers* case are found in Judge Sweet's concurrence in the *Mead Data* case. *Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 875 F.2d 1026, 1035 (2d Cir. 1989) (Sweet, J., concurring). The factors Judge Sweet found to be vital in evaluating the likelihood of dilution were: "(1) similarity of the marks (2) similarity of the products covered by the marks (3) sophistication of consumers (4) predatory intent (5) renown of the senior mark [and] (6) renown of the junior mark." *Id.*

34. *Ringling Bros.*, 170 F.3d at 458.

35. *Id.* (stating that "the federal Act makes plain what the state statutes arguably may not: that the end harm at which it is aimed is a mark's selling power, not its 'distinctiveness' as such").

36. *Id.* at 458-59. The court admitted that its interpretation was rigid, particularly in comparison to the pre-existing state statutes, but found such an interpretation necessary based on the essential differences between the languages of the state and federal statutes. *Id.*

37. *Id.* at 463.

38. *Id.* at 461. The court agreed with the district court that a claim under the FTDA required three aspects: (1) enough similarity between the marks to create a mental association among consumers; (2) an actual showing of harm; (3) economic harm to the more famous mark and its effect on distinguishing, identifying and selling its product. *Id.* at 453. Compare *Ringling Bros.*, 170 F.3d at 451 (finding that the federal statute required proof of economic harm, which Ringling Brothers did not satisfy, resulting in summary judgment in favor of Utah Division of Travel), with *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Celozzi-Ettelson Chevrolet, Inc.*, 855 F.2d 480 (7th Cir. 1988) (finding dilution under the lower burden of proof required by the Illinois state anti-dilution statute). In *Chevrolet*, a car dealership in Elmhurst, Illinois, began using the slogan "Greatest Used Car Show on Earth" in both showroom advertisements and television advertisements. 855 F.2d at 481. Upon learning of Celozzi-Ettelson's slogan,

Just over a year later, the Fifth Circuit agreed with the *Ringling Brothers* court, and required a showing of actual harm for relief under the FTDA.³⁹ The case arose from a dispute between a magazine publisher, Westchester Media Company, and Ralph Lauren's fashion business, Polo Ralph Lauren (PRL).⁴⁰ In 1997, Westchester bought POLO magazine, which historically maintained a good rapport with PRL.⁴¹ After purchasing the magazine, Westchester instituted major changes, including enlisting a new target audience similar to that of PRL and hiring cover models formerly associated with PRL.⁴²

After failed attempts to maintain the previously established relationship between PRL and POLO magazine,⁴³ Westchester filed suit, seeking a declaratory judgment that the use of the magazine title POLO did not infringe on the well known Polo trademark of Ralph Lauren and PRL.⁴⁴ PRL counterclaimed for trademark infringement, dilution, and unfair competition.⁴⁵ Initially, the magistrate judge entered a preliminary injunction against Westchester.⁴⁶ After the trial, the judge made the injunction permanent, finding that Westchester had infringed upon

Ringling Brothers demanded that the dealership cease use of it. *Id.* at 482. After the dealership refused, Ringling Brothers filed for, and was granted, a preliminary injunction under Illinois state anti-dilution laws. *Id.* at 481-82. On appeal, Ringling Brothers prevailed, with the Seventh Circuit finding that the dealership's use of the slogan "Greatest Used Car Show on Earth" blurred Ringling Brothers' famous mark. *Id.* at 485. Ringling Brothers prevailed in the action against the car dealership, but not in the action against Utah Division of Travel Development, because *Chevrolet* was brought under Illinois state anti-dilution laws, as the federal Act did not yet exist. *See id.* at 482. The standard under Illinois state law is lower than the standard under the newer federal statute, allowing a senior user to prevail "if there exists a likelihood . . . of dilution of the distinctive quality of the mark." *Id.* (quoting ILL. REV. STAT. Ch. 140, § 22).

39. Westchester Media v. PRL USA Holdings, Inc., 214 F.3d 658, 670 (5th Cir. 2000).

40. *Id.* at 661.

41. *Id.* at 661-62. POLO often included PRL advertisements in the magazine, and included an interview with Ralph Lauren soon after the magazine's launch. *Id.*

42. *Id.* at 662. Westchester admitted to buying a customer list from Neiman Marcus, one of PRL's most valuable customers, as well as hiring Claudia Schiffer, who had been featured extensively in Ralph Lauren ads, to grace the cover of the launch issue. *Id.*

43. *Id.* at 663. There was discussion over a controversy between Westchester and PRL, as to whether representatives of PRL objected to the new magazine's title prior to filing suit. *Id.* Westchester asserted that a representative of PRL gave an encouraging reaction to a presentation given by the magazine. *Id.*

44. *Id.*

45. *Id.* at 663.

46. *Id.* The judge required Westchester to issue a public disclaimer pronouncing that the magazine was not affiliated with Ralph Lauren or PRL. As part of the preliminary injunction, the judge also required Westchester to inform all subscription holders and advertisers that it was not associated with Ralph Lauren. *Id.*

PRL's trademark.⁴⁷ Westchester appealed several of the magistrate judge's findings, including trademark infringement and those relating to PRL's anti-dilution counterclaim.⁴⁸

On appeal, the Fifth Circuit, like the Fourth Circuit, found the statutory language of the FTDA to require a showing of actual harm.⁴⁹ Under this rule, the court found that PRL had not satisfied the burden of proof and affirmed the magistrate's ruling against PRL on the dilution claim.⁵⁰

B. Lenient Interpretation of the FTDA: Showing Actual Harm Is Unnecessary

Shortly after the ruling in *Ringling Brothers*, the Court of Appeals for the Second Circuit had an opportunity to interpret the FTDA.⁵¹ In crafting a snack cracker to promote one of its upcoming cartoon programs, Nickelodeon Television Network inadvertently created an issue under the FTDA.⁵² The network contacted Nabisco about producing a cheese cracker in the shapes of characters from the television program.⁵³ The controversy arose because of the similarities in the fish cracker created by Nabisco and the well-known Pepperidge Farm Goldfish snack.⁵⁴ After a failed cease-and-desist order from Pepperidge Farm to Nabisco, Nabisco filed a complaint seeking a declaratory judgment that it was not in violation of trademark laws.⁵⁵ The district court found in favor of Pepperidge Farm, granting a preliminary injunction against Nabisco under anti-dilution laws.⁵⁶

47. *Id.* As a result of the permanent injunction, the judge required Westchester to "cease and desist" use of the magazine name. *Id.*

48. *Id.*

49. *Id.* at 670 (concurring with the Fourth Circuit's interpretation of the express language of the federal statute); see *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 170 F.3d 449, 461 (4th Cir. 1999), *overruled in part by Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003).

50. *Id.* at 671.

51. *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208 (2d Cir. 1999), *overruled in part by Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003) (holding that the FTDA requires actual dilution).

52. *Id.* at 213.

53. *Id.* The resulting product was a cheese cracker snack, which came in three different shapes: a bone, a cat-dog mix, and a fish. *Id.*

54. *Id.* The court stated that "[a]lthough we recognize that Nabisco's fish is not identical to Pepperidge Farm's, the similarity is sufficient to lessen the distinctive aspect of the Pepperidge Farm Goldfish in the eyes of consumers." *Id.* at 218.

55. *Id.* at 213.

56. *Id.* The court relied upon Judge Sweet's factors from the *Mead Data* case, and found that the combination of factors favored a finding of dilution. *Id.* at 214. See *supra* note 33.

On appeal, the Second Circuit starkly disagreed with the Fourth Circuit's interpretation of the FTDA.⁵⁷ The court focused much of its discussion on the meaning of the term "distinctiveness."⁵⁸ In the end, the court concluded that a mark is distinctive if the meaning of the mark is not automatically connected to the object or thing being described.⁵⁹ The court declared the Goldfish mark distinctive enough to merit protection under the anti-dilution statutes⁶⁰ because a cheese cracker and the shape of a goldfish have no logical connection to one another.⁶¹ Having determined the distinctiveness of Pepperidge Farm's Goldfish, the court then examined whether there was "dilution of the distinctive quality of the mark."⁶² The Second Circuit, ultimately ruling for Pepperidge Farm, reasoned that the Nabisco cracker diluted the distinctiveness of the Goldfish cracker because the products were similar enough to negatively affect the uniqueness of the Goldfish.⁶³

The court further discussed why it strongly disagreed with the Fourth Circuit's reasoning, particularly focusing on the difficulties presented to the owners of more famous marks in satisfying the burden of proof to gain relief under the Act.⁶⁴ The court highlighted the difficulty of proving actual economic loss by many owners of famous trademarks, particularly in profitable times.⁶⁵ Furthermore, the court speculated that

57. *Compare* Nabisco, Inc. v. PF Brands, Inc., 191 F.3d 208 (2d Cir. 1999), *overruled in part* by *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003) (not requiring a showing of actual harm) *with* Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev., 170 F.3d 449 (4th Cir. 1999), *overruled in part* by *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003) (requiring a strict showing of actual economic harm). The *Nabisco* court construed the FTDA as setting forth five elements to make a showing of dilution: "(1) the senior mark must be famous; (2) it must be distinctive; (3) the junior use must be a commercial use in commerce; (4) it must begin after the senior mark has become famous; and (5) it must cause dilution of the distinctive quality of the senior mark." *Nabisco*, 191 F.3d at 215.

58. *Nabisco*, 191 F.3d at 215-16 (comparing "generic" words, such as those that name the thing defined, to "descriptive" words or marks, those that describe the characteristics of a product rather than the product itself, and further comparing these to inherently distinctive words, or words which are "'arbitrary' or 'fanciful'" and have no coherent connection to the goods or services) (*citing* *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9-11 (2d Cir. 1976)).

59. *Nabisco*, 191 F.3d at 216.

60. *Id.* (explaining the importance of the mark's distinctiveness in recovering under the FTDA).

61. *Id.* at 217.

62. *Id.* at 216.

63. *Id.* at 217. The court concluded that, "[a]lthough we recognize that Nabisco's fish is not identical to Pepperidge Farm's, the similarity is sufficient to lessen the distinctive aspect of the Pepperidge Farm Goldfish in the eyes of consumers." *Id.* at 218.

64. *Id.* at 223-24.

65. *See id.* Regardless of how conspicuous the dilution by the junior user was, if business for the owner of the famous mark was particularly lucrative at the time of the

even in situations where proof of decreased profits exists, it may be nearly impossible to prove that these changes were due to the use of a similar trademark.⁶⁶

In addition to the difficulties the famous owner would face, the court also examined the hardship the junior user would encounter.⁶⁷ Most junior users would prefer to know in advance whether they were violating the FTDA, rather than learning of the violation after introducing a new product and mark.⁶⁸ However, the junior user must clearly establish its work in the commercial field before the famous owner will ever bring a claim under the FTDA against the junior user.⁶⁹ Essentially, the Second Circuit said that harming the advertising value and the distinctiveness of a trademark were the reasons the anti-dilution laws and the FTDA were created.⁷⁰ Therefore, the court disagreed with the Fourth Circuit and held that relief under the FTDA did not require a showing of actual economic harm or dilution.⁷¹

The Seventh Circuit interpreted the statutory language of the FTDA in a suit between Natural Answers, an Internet herbal medicine company, and Eli Lilly, a pharmaceutical powerhouse.⁷² Natural Answers began advertising Herbrozac, a mood altering drug, as part of its Herbscriptions line.⁷³ Eli Lilly immediately protested the use of the mark, stating that it

alleged dilution, it may be impossible to show a decrease in profits and earnings. *Id.* The court asserted that “requir[ing] proof of actual loss of revenue seems inappropriate. If the famous senior mark were being exploited with continually growing success, the senior user might never be able to show diminished revenues, no matter how obvious it was that the junior use diluted the distinctiveness of the senior.” *Id.*

66. *Id.* at 224.

67. *Id.* (asserting that most junior and new users would prefer to know whether their new name or mark violated the FTDA prior to launching a business or product).

68. *Id.*

69. *Id.* This is detrimental because the junior owner will have to proceed through the marketplace as if it is not in violation of any trademark law, only to possibly be informed later that, in fact, it is in violation. *See id.*

70. *Id.* at 223-25.

71. *Id.* (rejecting the *Mead Data* factors, finding them deficient when applied to the federal anti-dilution statute). *See also supra* note 33. Instead, the court laid out a case-by-case analysis, whereby factors would be determined after looking to the particulars of each case. *Nabisco*, 191 F.3d at 227.

72. *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456 (7th Cir. 2000), *overruled in part by Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003).

73. *Id.* at 459. HerbenolPM, Herbalium, Herbaspirin, and Herbadryl are also part of the Herbscriptions line. *Id.* at 460. The founder of Natural Answers, Brian Feinstein, reluctantly admitted that the names he chose for his herbal medicines were meant to remind the consumer of famous drugs used for the same purpose. *Id.* During his cross-examination, Mr. Feinstein acknowledged that he chose the name Zonk Out for one of his products because “[he] did not believe that there was a sleeping preparation out there that was so widely known with a suffix that would call to mind a certain function so as to help the consumer know that melatonin combined with passion flower and calcium magnesium

was so similar to the mark of its famous antidepressant, Prozac (commonly known as Prozac), and filed suit alleging dilution.⁷⁴ The district court granted a preliminary injunction to Eli Lilly and ordered Natural Answers to remove all comments regarding Prozac from its website.⁷⁵ The appellate court discussed the differing opinions found in the other circuit courts and ultimately endorsed the reasoning of the Second Circuit.⁷⁶ The court discussed the hardship imposed on the owner of a famous mark in trying to satisfy the high burden of proof suggested by the Fourth Circuit.⁷⁷ Specifically, the court found it difficult to accept that the legislature would enact a statute allowing a particular cause of action while simultaneously making this cause of action so difficult to prove.⁷⁸ Eli Lilly prevailed, with the appellate court affirming the district court's grant of the injunction.⁷⁹

II. THE SUPREME COURT RESOLVES THE CIRCUIT SPLIT

A. *The Establishment of "Victor's Little Secret"*

The Supreme Court granted certiorari in *Moseley v. V Secret Catalogue, Inc.* to resolve the split among the federal appellate courts.⁸⁰ In February 1998, Victor and Cathy Moseley opened a store named Victor's Secret in Elizabethtown, Kentucky.⁸¹ An advertisement described the store as selling lingerie, adult novelties, mood lighting, pagers, and more.⁸² After learning of the new store, the well-known chain Victoria's Secret immediately contacted the Moseleys, requesting

would help them sleep." *Eli Lilly & Co. v. Natural Answers, Inc.*, 86 F. Supp. 2d 834, 838-39 (S.D. Ind. 2000) (citations omitted).

74. *Eli Lilly*, 233 F.3d at 460-61. As evidence of the famousness of Prozac, Eli Lilly presented an article from the *Baltimore Sun*, which stated:

Prozac entered the popular lexicon almost immediately after its introduction six years ago. It's been on the cover of Newsweek and shared the stage with Phil and Gerald; it continues to turn up in the monologues of comedians and the cultural references of the ironic. It's a designer label, a buzzword, a brand name familiar to not only the 4.5 million Americans who have taken it, but also those who wonder if they, too, might find a cure for whatever ails them in the little green-and-off-white capsule.

Eli Lilly, 86 F. Supp. 2d at 837. Eli Lilly also presented evidence of substantial numbers of hits resulting from computer database searches for "Prozac." *Id.*

75. *Eli Lilly*, 233 F.3d at 461.

76. *Id.* at 467-68.

77. *Id.* at 468.

78. *Id.*

79. *Id.* at 468-69.

80. 537 U.S. 418, 422 (2003).

81. *Id.* at 423.

82. *Id.*

that they terminate use of the name Victor's Secret, as it was likely to be confused with the mark associated with the well-known store.⁸³ The Moseleys responded by changing the name to Victor's Little Secret.⁸⁴ The famous chain, however, did not find this change adequate to differentiate the two names, and Victoria's Secret filed suit against the Moseleys in federal court.⁸⁵

The district court found the two trademarks similar enough to cause dilution under the FTDA.⁸⁶ Although finding no blurring of Victoria's Secret's trademark, the court found that the Moseleys' store name tarnished the more famous mark and therefore diluted the mark's distinctive quality.⁸⁷ The court granted an injunction, prohibiting the Moseleys from using their store name.⁸⁸

On appeal, the Sixth Circuit affirmed the ruling of the district court.⁸⁹ The court discussed two specific issues: (1) whether Victoria's Secret's mark was distinctive; and (2) whether Victoria's Secret was entitled to relief, even before dilution occurred.⁹⁰ In answering the first question, the court classified the famous mark as "arbitrary and fanciful," and therefore distinctive, under the terms of the FTDA.⁹¹ The court looked to the legislative history and congressional intent behind the FTDA in addressing the second inquiry.⁹² Specifically, in rejecting the holding of

83. *Id.* Victoria's Secret learned of the new store from an army officer who read the advertisement and thought the Moseleys were "us[ing] a reputable company's trademark to promote the sale of 'unwholesome, tawdry merchandise.'" *Id.*

84. *Id.*

85. *Id.* at 423-25. Victoria's Secret filed several claims, including trademark infringement, unfair competition, federal dilution, and state dilution. *Id.* The district court granted summary judgment, dismissing the infringement and unfair competition claims. *Id.* at 425.

86. *Id.* 423-25.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 425-26.

91. *Id.* at 426 (citing *V Secret Catalogue, Inc. v. Moseley*, 259 F.3d 464, 470 (6th Cir. 2001)). The Sixth Circuit stated:

[A]lthough the word 'secret' may provoke some intrinsic association with prurient interests, it is not automatically linked in the ordinary human experience with lingerie. 'Secret' is not particularly descriptive of bras and hosiery. Nor is there anything about the combination of 'Victoria's' and 'secret' that automatically conjures thoughts of women's underwear—except, of course, in the context of plaintiff's line of products [It] is therefore deserving of a high level of trademark protection.

Id. at 426 n.7.

92. *Id.* at 427. The Court quoted the House Report: "Confusion leads to immediate injury, while dilution is an infection, which if allowed to spread, will inevitably destroy the advertising value of the mark." *Id.* (quoting H.R. REP. NO. 104-374, at 3 (1995)).

the Fourth Circuit, the Sixth Circuit held that a showing of actual economic harm was not required.⁹³ The court found for Victoria's Secret, stating that the Moseleys' store name diluted the famous trademark by both tarnishing and blurring it.⁹⁴

B. The Supreme Court's Rigid Interpretation of FTDA

In light of the growing split between the Fourth and Fifth Circuits, and the Second, Sixth, and Seventh Circuits, the Supreme Court granted certiorari in *Moseley* to resolve the question of whether actual harm was required to show dilution under the FTDA.⁹⁵ Following a path similar to that taken by the Fourth Circuit in *Ringling Brothers*, the Court began with a historical perspective of trademark law, followed by a comparison of state and federal dilution statutes.⁹⁶ The consideration of state and federal dilution statutes allowed the Court to compare the language used in each to explore the legislature's intent in drafting the statute.⁹⁷ State anti-dilution statutes allow recovery for a "likelihood" of harm, as do some of the provisions of the Lanham Act.⁹⁸ On the contrary, the FTDA entitles the owner of a famous mark to an injunction if another's use of a mark or trade-name "causes dilution of the distinctive quality of the mark."⁹⁹ The Court emphasized the difference in word choice between the two statutes and held that, unlike the parallel state statutes, the word choice in the federal statute requires a showing of actual dilution.¹⁰⁰

The express language of the FTDA defines dilution as "the lessening of the capacity of a famous mark to identify and distinguish goods or

93. *Id.*

94. *Id.* The Sixth Circuit reasoned:

While no consumer is likely to go to the Moseleys' store expecting to find Victoria's Secret's famed Miracle Bra, consumers who hear the name 'Victor's Little Secret' are likely automatically to think of the more famous store and link it to the Moseleys' adult-toy, gag gift, and lingerie shop. This, then, is a classic instance of dilution by tarnishing (associating the Victoria's Secret name with sex toys and lewd coffee mugs) and by blurring (linking the chain with a single, unauthorized establishment).

V Secret Catalogue, Inc. v. Moseley, 259 F.3d 464, 477 (6th Cir. 2001).

95. *Moseley*, 537 U.S. at 428.

96. *Id.* at 428-34; see *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 170 F.3d 449 (4th Cir. 1999).

97. *Moseley*, 537 U.S. at 432-35.

98. *Id.* at 432.

99. 15 U.S.C. § 1125(c)(1) (emphasis added).

100. *Moseley*, 537 U.S. at 433. The Court also looked to other places within the text of the FTDA where Congress used the phrase "likelihood of confusion," to contrast the absence of similar language when referring to dilution. *Id.*

services.”¹⁰¹ Applying this definition to the facts before it, the Court found no evidence that the Moseleys’ store name lessened the capacity of the famous trademark to identify the products of Victoria’s Secret.¹⁰² The Supreme Court found in favor of the Moseleys, agreeing with the Fourth and Fifth Circuits’ interpretation of the FTDA, and requiring actual harm to gain relief under the Act.¹⁰³

Although it did not set forth a clear standard to apply in proving actual dilution, the Court briefly discussed the sufficiency of different types of evidence.¹⁰⁴ On one hand, the Court expressly rejected the additional requirement of a showing of actual *economic* harm.¹⁰⁵ On the other hand, the Court stated that in cases involving non-identical marks, a mental association made by consumers would not suffice to establish actual harm.¹⁰⁶ Conversely, the Court suggested that additional evidence may not be necessary in cases involving identical famous and junior marks.¹⁰⁷ In addition, the Court set forth the beginnings of a sliding scale for proof of dilution, pointing out a distinction between identical marks and merely similar marks.¹⁰⁸ This distinction, however, was the extent of the Court’s

101. Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, § 4, 109 Stat. 985 (1996).

102. *Moseley*, 537 U.S. at 434. Specifically referring to the officer who brought the matter to Victoria’s Secret’s attention, the Court stated that although he was offended by the advertisement for the Moseleys’ store, it did not change his perception of the image of Victoria’s Secret. *Id.*

103. *Id.*

104. *Id.* at 433-34.

105. *Id.* at 433. In so stating, the Court limited the decision of the Fourth Circuit in *Ringling Brothers*, because the *Ringling Brothers* case suggests the need for a showing of actual economic harm in all cases, regardless of whether the marks are identical or similar. See *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 170 F.3d 449, 460-65 (4th Cir. 1999).

106. *Moseley*, 537 U.S. at 433; see also TRADEMARK PROTECTION AND PRACTICE, *supra* note 5, § 5A.01 [5][A] (explaining that the consumer must make such a connection between the famous and the less-famous mark that the actual value of the famous mark is reduced, or the uniqueness of the famous mark is lessened).

107. *Moseley*, 537 U.S. at 434. The Court implied:

[P]roof of dilution requires either that a defendant’s use *by its very nature* reduces the singularity of the famous mark (as when the defendant uses an identical mark) or that a defendant’s use actually reduces the singularity of the famous mark (by, for example, reducing its selling power, as proven through surveys or direct financial evidence).

Stacey L. Dogan, *An Exclusive Right to Evoke*, 44 B.C. L. REV. 291, 315-16 (2003). See also *Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 875 F.2d 1026, 1035 (2d Cir. 1989). The court asserted that in some situations, a “lack of similarity alone may be enough to defeat a dilution claim.” *Id.* (citing *Universal City Studios, Inc. v. Nintendo Co.*, 746 F.2d 112 (2d Cir. 1984), which held that the name “King Kong” and “Donkey Kong” were not similar enough to support a dilution claim).

108. *Moseley*, 537 U.S. at 433-34.

guidance on how future plaintiffs should establish proof of actual harm.¹⁰⁹ Although recognizing that the burden of proof for gaining relief under the FTDA had been raised, the Court defended its ruling on the basis that increased burdens of proof do not provide appropriate grounds for ignoring express statutory language.¹¹⁰

III. THE IMPLICATIONS OF A RIGIDLY WRITTEN STATUTE

A. *Did Congress Set a Higher Bar Than Intended for Gaining Relief Under the FTDA?*

The circuit courts presented several varying, yet persuasive arguments defending their interpretations of the express language of the FTDA.¹¹¹ The Fourth and Fifth Circuits strictly interpreted the statute and compared the state and federal anti-dilution statutes and the language used therein.¹¹² State statutes, as well as other provisions within the FTDA, include statements relating to the likelihood of dilution or harm.¹¹³ In contrast, the term “likelihood” is conspicuously absent from

109. *Id.* at 434. In support of its opinion that a showing of actual harm should not be required, *Victoria's Secret* and its *amici* argue that consumer surveys are generally untrustworthy. *Id.* *But see* Bible, *supra* note 3, at 295. Bible supports the use of survey evidence to show actual dilution, stating that such evidence would be “highly probative of such harm,” and therefore useful in federal dilution litigation. *Id.* at 295-96. Bible asserts that “a survey that clearly demonstrates actual dilution may be a plaintiff’s strongest and most persuasive evidence.” *Id.* at 314. Realizing the courts’ hesitancy in relying on survey evidence, Bible does caution that surveys must be carefully conducted. *See id.* at 318-19. In a case involving the use of survey evidence in trademark litigation, Judge Posner has stated, “many experts are willing for a generous (and sometimes for a modest) fee to bend their science in the direction from which their fee is coming.” *Id.* at 318. Furthermore, Judge Posner emphasized that the courts are often not able to respond accordingly to false expert testimony and survey information due to the judges’ lack of expertise in the particular area before the Court. *Id.* (quoting *Indianapolis Colts, Inc. v. Metro. Baltimore Football*, 34 F.3d 410 (7th Cir. 1994)). As a result of possible distortions and falsities, courts are suspicious of survey evidence. *Id.* Bible guides the practitioner, stating that the court will likely question the survey evidence in the following manner, considering: (1) was the population carefully selected and defined; (2) does the sample relied upon accurately represent the population; (3) was the data accurately acquired and reported; (4) was the data analyzed using accepted statistical analysis; (5) were the questions asked clearly; (6) was the survey conducted by qualified personnel; and (7) was objectivity carefully protected while conducting the survey. *Id.* at 318-19 (citing *MANUAL FOR COMPLEX LITIGATION* 21:493, 102 (3d ed. 1995)). *See also supra* note 29.

110. *Moseley*, 537 U.S. at 434.

111. *See infra* parts I.A and I.B.

112. *See* *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel*, 170 F.3d 449, 459 (4th Cir. 1999), *overruled in part by* 537 U.S. 418 (2003); *Westchester Media v. PRL USA Holdings, Inc.*, 219 F.3d 658 (5th Cir. 2000).

113. *Moseley*, 537 U.S. at 433-34 (discussing that the Lanham Act uses the term “likelihood” when referring to confusion, mistake, or deception, but not when referring to dilution of the quality of the famous trademark).

the federal statute when referring to dilution.¹¹⁴ The Supreme Court found this distinction compelling in determining congressional intent.¹¹⁵ The Court ruled that this slight difference in the express language of the statutes clearly demonstrated that the federal statute required an actual showing of dilution or harm.¹¹⁶ The Court reasoned that if Congress intended the statute to cover a likelihood of dilution, it would have used the word "likelihood," as it did in other portions of the very same Act.¹¹⁷

However, looking back to some of the discussions by Congress during the drafting of the FTDA, it is unlikely that Congress intended such a rigid rule.¹¹⁸ Specifically, a House Report stated, "Confusion leads to immediate injury, while dilution is an infection, which if allowed to spread, will inevitably destroy the advertising value of the mark."¹¹⁹ This passage demonstrates that Congress understood the great difference in impact that confusion and dilution may have on a trademark.¹²⁰ Furthermore, it reveals that Congress was concerned with the severe implications that might result if dilution occurred and was allowed to continue.¹²¹ Based on Congress' discussions regarding dilution and the difficulty famous mark owners have had thus far in recovering under the Act, Congress did not likely intend for the bar to be so high to prevail under the FTDA.¹²²

114. *Id.* at 433.

115. *Id.* at 432-33.

116. *Id.* at 433.

117. *See id.* (suggesting that Congress' use of "likelihood" when referring to confusion, but not when referring to dilution, implies its intent to require actual harm).

118. *Id.* at 427 (citing H.R. REP. NO. 104-374, at 3 (1995)).

119. *Id.* at 427 (citing H.R. REP. NO. 104-374, at 3 (1995)). The report also stated that "[d]ilution is an injury that differs materially from that arising out of the orthodox confusion. Even in the absence of confusion, the potency of a mark may be debilitated by another's use. This is the essence of dilution." Brief of Amicus Curiae, The International Trademark Association, in support of Respondents, *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003) (citing H.R. REP. NO. 104-374 (1995)). This portion of the legislative history is consistent with the express language of the statute. *Id.* Section Four of the FTDA clearly states, "[t]he term 'dilution' means the lessening of the capacity of a famous mark to identify and distinguish goods or services, *regardless of the presence or absence of . . . likelihood of confusion, mistake, or deception.*" Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, § 4, 109 Stat. 985 (1996) (emphasis added).

120. *See Moseley*, 537 U.S. at 427 (citing H.R. REP. NO. 104-374, at 3 (1995)).

121. *See id.* (citing H.R. REP. NO. 104-374 (1995)).

122. In the cases before both the Fourth and Fifth Circuits, which followed the strict interpretation requiring a showing of actual harm, the owner of the famous mark lost because he could not meet such a high standard of proof. *See Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 170 F.3d 449, 463 (4th Cir. 1999), *overruled in part by* 537 U.S. 418 (2003); *PRL USA Holdings, Inc.*, 214 F.3d at 671. In the three cases that reached the Second, Sixth, and Seventh Circuits, which interpreted the statute more leniently, the owners of the famous marks prevailed, although temporarily, as each has now been overturned by *Moseley*. *Nabisco, Inc. v. PF Brands*,

B. The Supreme Court Is Forced Into a Rigid Interpretation of the FTDA

The Court recognized that in interpreting the statute literally, it raised the bar and increased the burden of proof necessary for owners of famous marks to recover under the Act.¹²³ However, the Court refused to allow an increase in the burden of proof to sway its interpretation of clear statutory language.¹²⁴ Under the newly pronounced and narrow reading of the FTDA, owners of famous trademarks face a more difficult challenge in gaining relief for trademark dilution for non-identical marks.¹²⁵ The Supreme Court did not set forth any specific guidelines for the lower courts to determine a sufficient showing of actual harm.¹²⁶ However, the Court set boundaries, stating that proof of actual economic loss was not necessary,¹²⁷ but that a mere mental association of the two marks by a consumer would not suffice as proof of dilution between non-identical marks.¹²⁸ Absent express guidelines, the burden shifts to the lower courts to establish a test for a sufficient showing of actual dilution.¹²⁹ Under this newly raised burden of proof, it is difficult to conceive how an owner of a famous mark will recover against a non-identical mark. Although the Court deemed it unnecessary, one obvious

Inc., 191 F.3d 208, 228-29 (2d Cir. 1999), *overruled in part by* 537 U.S. 418 (2003); V Secret Catalogue, Inc. v. Moseley, 259 F.3d 464, 472-77 (6th Cir. 2001), *rev'd*, 537 U.S. 418 (2003); Eli Lilly & Co. v. Natural Answers, Inc., 233 F.3d 456, 469 (7th Cir. 2000), *overruled in part by* 537 U.S. 418 (2003).

123. *Moseley*, 537 U.S. at 434.

124. *Id.* (“Whatever difficulties of proof may be entailed, they are not an acceptable reason for dispensing with proof of an essential element of a statutory violation.”).

125. See *Nabisco*, 191 F.3d at 223-24 (asserting that the Fourth Circuit’s interpretation of the statute would create “uncompensable injury” for the senior user); *Moseley*, 259 F.3d at 473 (discussing the Fourth Circuit’s own admission that its interpretation in *Ringling Brothers* had been exceptionally rigid); *Eli Lilly*, 233 F.3d at 468 (stating that the Fourth Circuit’s strict interpretation of the FTDA creates an “impossible level of proof” for plaintiffs).

126. See *Moseley*, 537 U.S. at 434. Instead, the Court vaguely discussed the possible use of circumstantial evidence, rather than direct. *Id.* Again, the Court asserted that the most obvious form of reliable circumstantial evidence is when the senior and junior marks are identical, suggesting that identical marks should be held to a lower standard of proof than non-identical marks. *Id.*

127. *Id.* at 433.

128. *Id.* (stating that “[s]uch mental association will not necessarily reduce the capacity of the famous mark to identify the goods of its owner”).

129. Many courts, when dealing with both the state and federal anti-dilution laws, rely upon a series of factors when weighing and determining whether dilution occurred. See *Mead Data Cent., Inc. v. Toyota Motor Corp.*, 875 F.2d 1026, 1035 (2d Cir. 1989) (Sweet, J., concurring); see also *Nabisco*, 191 F.3d at 223-24; *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 170 F.3d 449, 463 (4th Cir. 1999), *overruled in part by* 537 U.S. 418 (2003) (all applying the “Sweet factors” found in Judge Sweet’s concurrence in the *Mead Data* case).

way to show actual harm is through economic harm.¹³⁰ However, as pointed out by the Second Circuit, it may be impossible to prove that any loss in profits was the result of a diluting, junior mark.¹³¹ It is unlikely that the powerhouse of Victoria's Secret could prove that a small store in Kentucky negatively impacted the selling power of its mark. However, it is probable that some of Victor's Little Secret's customers are shopping in their store as a result of the similarity in name to the larger and more well-known chain.¹³² Although the Moseleys deny ever hearing of Victoria's Secret prior to selecting the name for their store,¹³³ there are examples, such as the junior user in the *Eli Lilly* case, where a name is selected solely based on its similarity to a more famous mark.¹³⁴ This alone shows that companies realize the effects of trademarks on consumers, and that consumers will more likely choose a product if it sounds familiar.¹³⁵ This also begs the question of whether the Supreme Court would have decided the case differently had the Moseleys been planning to open stores nationwide, or advertise nationally.¹³⁶ It seems unfair for a smaller store or company, no matter how undersized its consumer market, to piggyback off of the success of a huge empire that the FTDA was created to protect. If the Moseleys' store negatively

130. *Moseley*, 537 U.S. at 433. There is a theory that the Supreme Court landed on a middle ground when settling the disagreement regarding the necessary level of proof. This theory is based on the idea that "if a plaintiff need not introduce evidence that a famous mark has suffered an actual loss of distinctiveness in consumers' minds, or a loss of value associated with such loss of distinctiveness, then the plaintiff can prevail in a FTDA claim without direct proof of actual dilution." Dogan, *supra* note 107, at 315.

131. *Nabisco*, 191 F.3d at 223-24. See also *supra* note 65 and accompanying text.

132. *V Secret Catalogue, Inc. v. Moseley*, 259 F.3d 464, 477 (6th Cir. 2001), *rev'd* 537 U.S. 418 (2003).

133. *Id.* at 477. The Moseleys claim to have chosen the name because the store was being kept a secret from Victor's (Mr. Moseley's) former boss. Peter Katz, *At Issue Lingerie Litigation Court Ruling Leaves Large Companies Exposed*, THE BOSTON GLOBE, Mar. 23, 2003, at C4.

134. *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456, 460 (7th Cir. 2000) (discussing how the owner of the junior mark admitted he had chosen the name for his product, Herbrozac, specifically to allow the consumer to relate it to the famous drug, Prozac, which performs the same function).

135. *Id.* Judge Learned Hand discussed the importance of trademarks in a 1928 Second Circuit decision, stating:

[A merchant's] mark is his authentic seal; by it he couches for the goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owner's reputation, whose quality no longer lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask.

Bible, *supra* note 3, at 298 (quoting *Yale Elec. Corp. v. Robertson*, 26 F.2d 972, 974 (2d Cir. 1928) (alteration in original) (emphasis in original)).

136. Katz, *supra* note 133.

impacts just one customer's impression of Victoria's Secret, then in turn, the Moseleys also negatively impact the uniqueness of the mark—precisely the harm anti-dilution laws were intended to prevent.¹³⁷ Although remanded, Victoria's Secret now has an opportunity to meet the newly established burden of proof, although its success remains unlikely.¹³⁸

Congress enacted the FTDA to protect owners of very famous and valuable trademarks.¹³⁹ It is highly improbable that these owners will be substantially affected by a much smaller store or company, such as the Moseleys' store in Elizabethtown, Kentucky. However, allowing one of these stores or companies to proceed with such a similar trademark will likely result in many companies following suit, using names similar to well known names to gain the benefit of familiarity.¹⁴⁰ As stated long ago

137. *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 170 F.3d 449, 454 (4th Cir. 1999), *overruled in part by Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003) (discussing Frank Schechter's theory that protecting trademarks from dilution of their "hard-earned advertising value and selling power" is a main purpose of anti-dilution laws). In *Deere & Co. v. MTD Prods., Inc.*, the court recognized the importance in protecting not only a trademark's relationship to the product or service it represents, but also protecting the mark itself. 860 F. Supp. 113, 120 (S.D.N.Y. 1994). In *Deere*, a competing lawn tractor company, MTD, used an altered and animated version of John Deere's famed trademark in a commercial. *Id.* The *Deere* court stated that "[t]rademarks are symbols—symbols of products and their origins. When a trademark is successfully employed, favorable associations accrue not only to its referent—the product or source for which the trademark stands—but also to the trademark itself." *Id.* Although this case involved a cause of action for dilution under New York state law, rather than federal law, it nonetheless demonstrates that trademarks are a valuable asset for companies, not only in their ability to advertise a good or service, but also in the value of the mark itself. *See id.* Companies invest a great deal into their marks and logos, and aside from preventing blurring and tarnishing of the mark, trademark owners want to prevent others from altering the mark in any way. *See id.* As stated by the *Deere* court, the holder of a trademark retains the right to prevent others from altering its mark. *Id.* at n.14.

138. *Moseley*, 537 U.S. at 434. In fact, the lack of guidance offered as to what constitutes the required burden of proof "has left large companies wondering what criteria must be met before the federal law will provide them protection." Katz, *supra* note 133.

139. TRADEMARK PROTECTION AND PRACTICE, *supra* note 5, § 5.01[2][c].

140. The District Court for the Northern District of Illinois stated that dilution is: [L]ike the pollution of a lake. If everyone who pollutes Lake Michigan were allowed to say its discharge is an insignificant contribution . . . and that no one is really hurt by it, then no polluter could ever be restrained and it is only on the theory that each pollution, when considered as part of the total population that is discharged into the lake, is a restrainable act that the whole concept of protection of the environment through injunctive relief makes any sense.

Brief of Amicus Curiae, The International Trademark Association, in Support of Respondents at 17-18, *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003) (No. 01-1015) (quoting *McDonald's Corp. v. Gunville*, 1979 U.S. Dist. LEXIS 11106, at *8-9 (N.D. Ill. 1979)).

by Frank Schechter, the “father” of anti-dilution laws, the purpose of such laws is to protect the uniqueness of a mark, therefore preserving its selling power.¹⁴¹ As more and more stores and companies begin using marks similar to those owned and relied upon by famous companies, the selling power and uniqueness of their famous marks will likely decline.¹⁴² Allowing this domino effect to occur contradicts the purpose and intent of anti-dilution laws.¹⁴³

C. *The Need For a Clearer, Fairer, and More Effective Statute*

The Supreme Court stated that the increased burden of proof and the unlikelihood of gaining relief do not change the Court’s responsibility to interpret a statute as written by the legislature.¹⁴⁴ Congress tied the hands of the High Court in drafting such a rigid statute. As such, Congress should amend the statute to create a clearer, fairer, and more effective law.¹⁴⁵ First, as discussed by the Court in *Moseley*, Congress should establish a distinction between identical marks and merely similar marks.¹⁴⁶ Dilution may occur with similar marks; however, a higher

141. Schechter, *supra* note 4, at 830-31.

142. See *supra* note 135 and accompanying text. In a hearing before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary, Chairman Howard Choble expressed concern that there are people and companies who might take advantage of the fame and status of another’s trademark for their own purposes, to the detriment of the rightful trademark owner. *Fed. Trademark Dilution Act: Hearing Before the Subcomm. on Courts, The Internet, and Intellectual Prop. of the Comm. on the Judiciary*, 107th Cong. 53 at 1 (2002) [hereinafter *FTDA Hearing*].

143. H.R. REP. NO. 104-374, at 3-4 (1995) (describing Congress’ concern with the ability of a phenomenon such as dilution to spread).

144. *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 434 (2003).

145. *FTDA Hearing, supra* note 143, at 5, 8-9, 19. Four experts in the trademark field testified at this hearing. Kathryn Barrett Park, the executive vice president for the International Trademark Association, testified that the INTA supports amendments to the FTDA which would create a clear “likelihood of dilution” standard to gain relief under the Act. *Id.* at 5. This position was further supported by Michael Kirk, executive director of the American Intellectual Property Law Association, Sherry L. Jetter, vice president of intellectual property of the Polo Ralph Lauren Corporation, and Ethan Horwitz, a partner at the law firm of Darby and Darby. *Id.* at 9, 13, 26.

146. *Moseley*, 537 U.S. at 433-34 (noting that customers making a mental association between two non-identical marks is not sufficient for a showing of dilution, but further evidence may not be necessary in cases involving identical marks, as this alone may be sufficient evidence). Congress should also consider the significance of the junior and senior mark in competing markets. See *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 222 (2d Cir. 1999), *overruled in part by* 537 U.S. 418 (2003). Does it matter if the senior and junior mark are in competing or non-competing markets? Nabisco argued that dilution should not be applied to competing marks, as the infringement cause of action is meant to cover marks in competing markets. *Id.* at 214. The *Nabisco* court disagreed, although the Supreme Court never discussed this distinction. *Id.* at 222. The Second Circuit argued that dilution should apply, even when the marks are in competing markets. *Id.* at 222-23.

burden of proof, such as that suggested by the *Moseley* Court, should be required.¹⁴⁷ Dilution becomes more probable with identical marks, thus necessitating a lower standard.¹⁴⁸ An appropriate standard here would include the “likelihood of harm” standard, found in many state dilution statutes. This ensures that the burden is not set too low as to bar other companies from creating similar trademarks which are not dilutive. For example, this prevents a situation where a famous mark can prevail against anyone who has a mark that is only similar, rather than identical to the famous mark, without some further requirement of proof.¹⁴⁹ An appropriate amendment would also vary the burden of proof, making it not only based solely on the distinction between identical or similar junior and senior marks, but also slightly based upon the inherent and

First, the closer the markets, the more likely dilution and confusion will occur. *Id.* at 222. Second, even if this situation would be covered by infringement, the senior user should have the right to bring any applicable causes of action forward. *Id.* Claims are not inapplicable merely because there is another cause of action that would cover the situation. *Id.* at 223. Finally, the *Nabisco* court found that eliminating competing products from the reaches of the anti-dilution laws might create a “gap in coverage.” *Id.* In other words, “products might be found too far apart to support a finding of likelihood of confusion . . . yet too close together to permit a finding of dilution.” *Id.* The International Trademark Association (INTA) agreed with the *Nabisco* court that use of a similar mark, even in non-competing markets, should be actionable under federal anti-dilution laws. Brief of Amicus Curiae, The International Trademark Association, in Support of Respondents, at 11, *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003) (No. 01-1015). Specifically, the INTA discusses that if Kodak pianos and Buick aspirin were used as identifiers, it would be realistic that some consumers would relate Kodak to both film and pianos, or Buick to both cars and aspirin. *Id.* at 11-12, 14-15. This association alone decreases the marks’ ability to act as “exclusive identifiers” of their original products. *Id.* at 15. Frank Schechter stated that “[t]he history of important trademark litigation within recent years shows that the use of similar marks on *non-competing* goods is perhaps the *normal* rather than the exceptional case of infringement.” Schechter, *supra* note 4, at 825. Schechter discusses several famous examples, including Kodak cameras and bicycles, Aunt Jemima’s pancake flour and syrup, Rolls-Royce automobiles and radio parts, and Beech-Nut food products and cigarettes. *Id.* (citing *Aunt Jemima Mills v. Rigney & Co.*, 247 Fed. 407 (C.C.A. 2d 1917); *Beech-Nut Packing Co. v. P. Lorillard Co.*, 7 F.2d 967 (C.C.A. 3d 1925); *Wall v. Rolls-Royce of America*, 4 F.2d 333 (C.C.A. 3d 1925); *Eastman Kodak Co. v. Kodak Cycle Co.*, 15 Rep. Pat. Cas. 105 (1898)).

147. *Moseley*, 537 U.S. at 433-34.

148. *Id.* at 434. The *Moseley* Court stated, “It may well be, however, that direct evidence of dilution such as consumer surveys will not be necessary if actual dilution can reliably be proved through circumstantial evidence—the obvious case is one where the junior and senior marks are identical.” *Id.*

149. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 25 Reporters’ Note cmt. B. at 2 (1995), citing *Coffee Don’s, Inc. v. Coffee Dan’s Charcoal Broiler*, 305 F. Supp. 1210 (N.D. Cal. 1969) (warning that limits should be placed on the application of anti-dilution protection, “lest it swallow up all competition in the claim of protection against trade name infringement”).

acquired distinctiveness of the senior trademark.¹⁵⁰ If a mark is coined or arbitrary, the “likelihood of harm” standard should apply, allowing for a slightly lower burden for inherently distinctive marks.¹⁵¹ Conversely, the standard should be slightly more difficult for descriptive marks which have acquired distinctiveness through use or advertising.¹⁵² Ultimately, Congress should amend the statute to allow for relief in some cases of a likelihood of dilution, particularly in situations of identical senior and junior marks.¹⁵³ This amendment would prevent the spread of dilution discussed by Congress in the committee meetings leading up to the enactment of the FTDA.¹⁵⁴

IV. CONCLUSION

In *Moseley v. V Secret Catalogue, Inc.*,¹⁵⁵ the Supreme Court had the task of interpreting a relatively new statute and resolving a split among the federal circuit courts.¹⁵⁶ Congress wrote a rigid statute, which seems contradictory to its intent gleaned from the legislative history.¹⁵⁷ In interpreting the Act, the Court was forced to read the language of the statute literally, and found that the language required a high burden of proof for plaintiffs seeking relief under the Act.¹⁵⁸ Based on the analysis used by the Court, such as the comparison of the federal and state statutes, it is evident that the Court’s hands were tied, and it was required to interpret the express language of the statute in the manner it did.¹⁵⁹ However, this unfortunate interpretation will likely make it impossible for the Act to serve its fundamental purpose, which is to allow the

150. Hacking, *supra* note 3, at 116. Cases have discussed the difference between descriptive marks, with a low amount of distinctiveness, compared to “arbitrary” or “fanciful” marks, with a high amount of distinctiveness. *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 215-16 (2d Cir. 1999). The purpose of the FTDA is to protect owners of famous marks, whose mark may be greatly harmed by loss of uniqueness or loss of distinctiveness. Schechter, *supra* note 4, at 830-31. It is appropriate, then, for the standard to vary based upon the level of distinctiveness of the mark. Marks that are deemed more arbitrary and distinctive should be entitled to the “likelihood of dilution” standard, while less distinctive marks should have a more difficult burden of proof. Hacking, *supra* note 3, at 116.

151. *See supra* note 146.

152. *See supra* note 7.

153. *See supra* note 145.

154. *See supra* note 143 and accompanying text.

155. *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003).

156. *Id.* at 428.

157. *See supra* Part III.A.

158. *Moseley*, 537 U.S. at 434.

159. *Id.* at 432-33.

owners of famous trademarks recourse for dilution of their mark.¹⁶⁰ Based upon statements made by Congress during the drafting of the Act, this strict result was not its intention, and therefore, the statute should be amended to reflect congressional intent.¹⁶¹ In amending the statute, Congress should set forth exactly what is necessary to allow recovery for dilution, drawing a distinction between identical and similar marks, as well as inherent or acquired distinctiveness.¹⁶² However, until the enactment of an amendment, the owners of famous marks have a difficult task ahead when attempting to prevail against junior users who may be diluting the advertising value of the famous mark.

160. Hacking, *supra* note 3, at 115. Interpreting the Act to require evidence of actual dilution would cause the act to be “unnecessarily blunted.” *Id.* at 116. Further, “[a] likelihood of dilution standard more properly sharpens the statute into an instrument of protection” *Id.*

161. *See supra* Part III.A.

162. *See supra* Part III.C.

