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Measuring Trademark Dilution by Tarnishment


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Measuring Trademark Dilution by Tarnishment

SUNEAL BEDI* AND DAVID REIBSTEIN**

The law of trademark tarnishment—a type of trademark dilution—is in disarray. The basic definition is deceptively simple. Trademark tarnishment occurs when a junior mark harms the reputation of a substantially similar existing senior trademark by associating itself with something perverse or deviant. However, it turns out that Congress and the courts disagree over the prima facie evidence necessary to prove its existence. The problem is that federal law and related legal principles are simply ill-equipped to adequately analyze this unique market-driven doctrine. To make matters worse, legal scholars cannot even agree on whether trademark tarnishment can empirically exist in the marketplace. Part of the issue is that there has never been any real attempt to define the phrase “harm to reputation” in the trademark context.

Drawing on marketing scholarship and social science methods, this Article provides the first workable framework that courts can use to hear and accurately analyze these cases. It relies on experimental survey methodology to empirically show that tarnishment can exist under certain conditions; the key is increasing the number of exposures to the harmful mark. The Article also introduces extant branding theory as a way to define harm to reputation in the marketplace. This interdisciplinary approach ultimately gives courts a mechanism by which to measure harm to reputation and the tangible impact of tarnishment. In the process, this theory provides litigants with an empirical-based strategy to prove their dilution claims and contributes to the doctrinal justification for trademark dilution laws.

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INTRODUCTION

Does having your trademark associated with sex harm your brand? What about disgust? Or low-quality products? The answer to these questions is at the core of trademark tarnishment. Trademark tarnishment, a form of trademark dilution, is a hotly debated federal and state cause of action in intellectual property law.¹ The basic

1. See, e.g., Barton Beebe, Roy Germano, Christopher Jon Sprigman & Joel H. Steckel, *Testing for Trademark Dilution in the Court and the Lab*, 86 U. CHI. L. REV. 611 (2019) (arguing that previous measurements of dilution were misguided because they did not take into consideration contextual decision making and effects on consumers of unexpected trademark names); Shari Seidman Diamond & David J. Franklyn, *Trademark Surveys: An Undulating Path*, 92 TEX. L. REV. 2029 (2014) (providing a deep background on how surveys are used in trademark cases by plaintiffs); Jacob Jacoby, *Considering the Who, What, When, Where and How of Measuring Dilution*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 601 (2008) (arguing that dilution can be measured with survey methodology); Thomas R. Lee, *Demystifying Dilution*, 84 B.U. L. REV. 859 (2004) (laying out various theories of when dilution should count as legally actionable); Rebecca Tushnet, *Gone in Sixty Milliseconds:*

definition is deceptively simple. Trademark tarnishment occurs when a junior mark harms the reputation of a substantially similar existing senior trademark by associating itself with something perverse or deviant, even if consumers know that the two marks come from different sources.²

For example, assume an adult store is going to name itself “Chicks Fill A.” This store is associated with sex, adult products, pornographic materials, perversion, anticonservative values, and even disgust. Chick-fil-A, the restaurant, then sues Chicks Fill A for trademark tarnishment, asking for an injunction on the use of the name—its theory being that Chick-fil-A prides itself on its conservative and Christian values and tasty food. And even though consumers know that Chicks Fill A and Chick-fil-A are not owned by the same company, the perversion and sex associated with Chicks Fill A will harm the reputation of Chick-fil-A. Currently, federal law and related legal principles are simply ill-equipped to adequately analyze such trademark tarnishment cases.

Legal and empirical scholars disagree as to when and whether trademark tarnishment even exists.³ Moreover, Congress and courts disagree as to the prima facie evidence necessary to prove its existence.⁴ This is all compounded by the fact

Trademark Law and Cognitive Science, 86 TEX. L. REV. 507 (2008) (arguing that current marketing scholarship on dilution is misguided because it does not take into consideration contextual decision making).

2. 15 U.S.C. § 1125(c)(1) and (c)(2)(C) provide that “regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury . . . ‘dilution by tarnishment’ is association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.” 15 U.S.C. § 1125(c)(1), (2)(C). Note that the statute has several exceptions that implicate First Amendment concerns such as parody, news reporting and competitive advertising. *Id.* § 1125(c)(3). We make sure to steer clear of any tarnishing marks that would potentially raise First Amendment concerns.

3. Some argue that dilution by tarnishment can be measured and does likely exist. *See* Jacoby, *supra* note 1. These scholars advocate for empirical studies to help tease out when and why trademark tarnishment exists, while others have been adamant in arguing that both empirical studies measuring tarnishment are flawed and that tarnishment does not actually exist. *See* Christine Haight Farley, *Why We Are Confused About the Trademark Dilution Law*, 16 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 1175, 1184 (2006) (arguing that tarnishment does not exist in the marketplace and there is no evidence to show that tarnishment would exist); Tushnet, *supra* note 1, 522–24. These scholars mainly criticize the methodology of empirical scholars but also argue that the realities of trademark tarnishment cannot be studied as they are too complex. *See* Christopher Buccafusco, Paul J. Heald & Wen Bu, *Testing Tarnishment in Trademark and Copyright Law: The Effect of Pornographic Versions of Protected Marks and Works*, 94 WASH. U. L. REV. 341, 372–88 (2016) (finding no statistically significant empirical proof of trademark tarnishment); *see also* Beebe et al., *supra* note 1, at 32–33 (arguing that dilution by blurring studies are flawed and hence do not adequately show dilution).

4. The Supreme Court advocates for a showing of actual harm, which would entail Chick-fil-A having to wait until Chicks Fill A launched its store. *See* *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003). Federal law advocates for a likelihood of harm but provides no guidance on how Chick-fil-A would utilize such a standard, Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, § 2, 120 Stat. 1730 (codified as amended at 15 U.S.C. § 1125 (2012)), and subsequent interpretation of federal law advocates for a presumptive harm, which would mean Chick-fil-A need not produce any evidence of

that there has been no real attempt to define what “harm to reputation” means in the trademark dilution context.

Drawing on marketing scholarship and social science methods, we provide the first workable framework that courts can use to hear and accurately analyze cases like the Chick-fil-A example above. We rely on experimental survey methodology to empirically show that tarnishment can exist under certain conditions; the key here is showing how increased exposures to the harmful mark seem to make tarnishing more likely. Our interdisciplinary approach ultimately leads to the conclusion that courts should require litigants to introduce evidence that shows a junior mark is likely to harm the reputation of a senior mark.

We are the first to define exactly what a trademark’s reputation is and how to measure harm. Drawing upon extant brand equity theory, we argue that the reputation of a trademark should be best understood and measured as the reputation of the brand the trademark represents. This includes brand associations and brand attitudes. Brand associations and brand attitudes are measurable concepts that focus on consumer perceptions of the relevant trademarks and brands. Marketing scholars have long understood and worked with these measures of reputation and we transplant them from the marketing discipline to assist in the analysis of trademark dilution claims.⁵

Using this exact definition of reputation and drawing upon empirical social science methodology,⁶ we are the first to show that tarnishing does exist in the marketplace. To do this we use an experimental survey framework.⁷ We measure a

purported or potential harm to succeed in getting an injunction. *See* V Secret Catalogue, Inc. v. Moseley, 605 F.3d 382 (6th Cir. 2010).

5. *See, e.g.*, Kevin Lane Keller, *Conceptualizing, Measuring, and Managing Customer-Based Brand Equity*, 57 J. MARKETING 1 (1993) (arguing for the importance of measuring and quantifying consumer brand associations).

6. For why dilution is a distinctively empirical issue, see Robert A. Peterson, Karen H. Smith & Philip C. Zerrillo, *Trademark Dilution and the Practice of Marketing*, 27 J. ACAD. MARKETING SCI. 255, 265 (1999). For a general discussion of why trademark law writ large requires empirical work, see 6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:158 (5th ed. 2017–2019) (“To an extent not true in other fields of law, in trademark and false advertising disputes the perceptions of large groups of ordinary people are key factual issues.”); Robert C. Bird & Joel H. Steckel, *The Role of Consumer Surveys in Trademark Infringement: Empirical Evidence from the Federal Courts*, 14 U. PA. J. BUS. L. 1013, 1017 (2012); Jacob Jacoby, *The Psychological Foundations of Trademark Law: Secondary Meaning, Genericism, Fame, Confusion and Dilution*, 91 TRADEMARK REP. 1013 (2001); Jacob Jacoby, *The Psychological Foundations of Trademark Law: Secondary Meaning, Acquired Distinctiveness, Genericism, Fame, Confusion and Dilution* (N.Y. Univ. Ctr. for Law & Bus., Working Paper No. CLB-00-003, 2000), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=229325 [<https://perma.cc/LF4Y-FYF5>].

7. Using surveys is quite commonplace in trademark lawsuits. *See, e.g.*, Bird & Steckel, *supra* note 6; Reginald E. Caughey, *The Use of Public Polls, Surveys and Sampling as Evidence in Litigation, and Particularly Trademark and Unfair Competition Cases*, 44 CALIF. L. REV. 539 (1956); Diamond & Franklyn, *supra* note 1; Jacob Jacoby & Amy H. Handlin, *Non-Probability Sampling Designs for Litigation Surveys*, 81 TRADEMARK REP. 169 (1991). Surveys are routinely used in trademark infringement cases to determine whether confusion existed and how famous a mark is. However, to our knowledge, little use of surveys appears in trademark tarnishment cases, specifically surveys drawing upon marketing

trademark's reputation before and then after consumers have viewed advertisements with tarnishing trademarks. We use both real tarnishing cases as well as fictional ones. Our studies using potential fictional tarnishing marks show that companies can prove that certain junior marks have a likelihood of harming their reputation without having to wait for signs of actual harm. This is exactly the standard that federal law purports to adopt but does not fully explicate. We innovate on previous empirical work by using multiple exposures of potential tarnishing marks, increasing the external applications of our methods, and introducing tarnishing in different forms.⁸

This Article is in five parts. Part I provides a brief background on the current state of trademark dilution—specifically, trademark tarnishment. We focus on the passing of the Trademark Dilution Revision Act of 2006 (TDRA) and its subsequent interpretation in the Sixth Circuit. Part II defines what exactly a trademark's reputation is and how it can and should be measured, something both Congress and courts have neglected to detail. Here we draw from the marketing literature around brand reputation. Part III details our experimental studies in which we show tarnishment does exist but is more likely to occur under certain conditions including multiple exposures. We use various measures of brand reputation as dependent variables, including brand associations, brand attitudes, and rankings of a brand against its competitors. We also introduce tarnishment in various forms, including sex tarnishment, disgust tarnishment, and low-quality tarnishment. In Part IV, we respond to criticisms that empirical proof in trademark tarnishment cases is both expensive and unreliable. The studies proposed in this Article would only account for a small percentage of litigation costs and, moreover, companies routinely collect the information necessary for experimental survey dilution studies. In Part V, we provide guidance to courts and litigants on how to effectively execute our survey methodology.

I. A BRIEF HISTORY OF TRADEMARK TARNISHMENT

Trademark dilution has been a long-standing common law cause of action.⁹ Up until 1995, most trademark dilution claims were brought under state statutes.¹⁰ In

branding theory as we do here. Diamond and Franklyn show that only a small percentage of surveys tackles questions of dilution and an even smaller portion tackles tarnishment. *See* Diamond & Franklyn, *supra* note 1, at 2057 tbl.2.

8. We focus on sex tarnishment, exemplified by the Chick-fil-A example above, because that is the subject of most recent controversial trademark tarnishment cases. *See* *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003) (contemplating sex tarnishing to the Victoria's Secret brand); *Mattel, Inc. v. Internet Dimensions Inc.*, No. 99 Civ. 10066(HB), 2000 WL 973745 (S.D.N.Y. July 13, 2000) (contemplating sex tarnishing to the Barbie brand).

9. An exhaustive list of trademark dilution by tarnishment cases is beyond the scope of this paper. The following is a short representative list: *Jordache Enters. v. Hogg Wyld, Ltd.*, 625 F. Supp. 48 (D.N.M. 1985) (applying N.M. Stat. Ann. § 57-3-10); *Pillsbury Co. v. Milky Way Prods., Inc.*, No. C78-679A, 1981 U.S. Dist. Lexis 17722 (N.D. Ga. Dec. 24, 1981) (applying Ga. Code Ann. § 106-115); *Dallas Cowboy Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 467 F. Supp. 366 (S.D.N.Y. 1979) (applying New York General Business Law § 368-d).

10. *See supra* note 9. Trademark dilution's originations started with Frank Schechter's 1927 law review article, where he argued that "the preservation of the uniqueness of a trademark should constitute the only rational basis for its protection." Frank I. Schechter, *The*

1995, Congress passed the Federal Trademark Dilution Act which defined more clearly trademark dilution. This Act defined trademark dilution as the “lessening of the capacity of a famous mark to identify or distinguish goods or services, regardless of the presence or absence of (1) competition between the owner of the famous mark and other parties, or (2) likelihood of confusion, mistake, or deception.”¹¹ Although this federal law did not distinguish among types of trademark dilution, subsequent case law articulated two ways that dilution could occur.

The first is dilution by blurring, which focuses solely on the lessening of a distinctiveness of a mark even when consumers are not confused as to the source of the mark.¹² The classic example courts have employed is Kodak pianos.¹³ If a piano company created a brand called “Kodak Pianos,” the new brand would likely dilute the brand of Kodak film. The theory being that over time the mark Kodak has created an image of photography. However, that image is lessened by the existence of Kodak pianos.¹⁴ Dilution by blurring does not require a harming of the reputation of a mark due to some unseemly association. That is reserved for dilution by tarnishment. This paper is not focused on dilution by blurring; as such, the remainder of this part will only focus on dilution by tarnishment.

Dilution by tarnishment occurs when a junior mark, that is similar¹⁵ to a senior mark is introduced into the marketplace and this junior mark harms the reputation of the senior mark, even if consumers are not confused as to the source of the goods.¹⁶

Rational Basis of Trademark Protection, 40 HARV. L. REV. 813, 831 (1927). Twenty years later, Massachusetts was the first state that passed a trademark dilution statute: “Likelihood of injury to business reputation or of dilution of the distinctive quality of a trade name or trademark shall be a ground for injunctive relief . . .” Act of May 2, 1947, ch. 307, 1947 Mass. Acts 300. Several states then followed and passed their own trademark dilution laws before the FDTA was enacted in 1995. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 25 cmt. b (AM. LAW INST. 1995).

11. Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, § 4, 109 Stat. 985 (codified as amended at 15 U.S.C. § 1127 (2012)).

12. For subsequent cases that distinguished between blurring and tarnishing, see *Starbucks Corp. v. Wolfe’s Borough Coffee, Inc.*, 588 F.3d 97, 105 (2d Cir. 2009); *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 219 (2d Cir. 1999), *abrogated by* *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003); and *Columbia Univ. v. Columbia/HCA Healthcare Corp.*, 964 F. Supp. 733, 750 (S.D.N.Y. 1997). Confusion as to the source of mark is trademark infringement, and a separate cause of action with separate prima facie case and standards of proof. We are only focused here on trademark dilution as distinct from trademark infringement.

13. *Starbucks Corp. v. Wolfe’s Borough Coffee, Inc.*, 588 F.3d 97, 105 (2d Cir. 2009) (“Some classic examples of blurring include ‘hypothetical anomalies as . . . Kodak pianos.’” (quoting *Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 875 F.2d 1026, 1031 (2d Cir. 1989))).

14. See *infra* Part III, for empirical studies on trademark blurring.

15. Note that the marks need not be identical but simply similar enough. For trademark dilution by tarnishment to exist there must be “similarity between a mark or trade name and a famous mark.” *V Secret Catalogue, Inc. v. Moseley*, 605 F.3d 382, 391 (6th Cir. 2010). In our empirical strategy below, we use the exact same mark so as to not confound our results with any disagreement of similarity.

16. “[D]ilution by tarnishment’ is [an] association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.” This

This occurs when the junior mark is associated with something perverse. Courts before and after the 1995 Federal Trademark Dilution Act routinely heard dilution by tarnishment cases.¹⁷ These cases have generally fallen into four categories: unwholesome tarnishing, low-quality tarnishing, disgust tarnishing, and sex tarnishing.

Unwholesome tarnishing occurs when a junior mark launches a product associated with unwholesome ideas or thoughts which then harm the reputation of an existing senior mark.¹⁸ Take, for example, *Jordache Enterprises, Inc. v. Hogg Wyld, Ltd.*¹⁹ In that case Jordache jeans sued a company that made jeans using the mark “Lardashe.” Jordache argued that the term “Lardashe” was not only very similar to Jordache but also created unwholesome associations. The court however disagreed saying that even though Lardashe “might be considered to be in poor taste by some consumers [I]t is not likely to create in the mind of consumers a particularly unwholesome, unsavory, or degrading association with plaintiff’s name and marks.”²⁰ However, the court relied upon no empirical evidence regarding the tarnishment claims. Several other cases have contemplated unwholesome tarnishment.²¹

Low-quality tarnishing occurs when a junior mark launches a product associated with low quality and this harms the reputation of an existing senior mark. The most famous case on this point concerns the luxury retailer Louis Vuitton. Louis Vuitton sued a dog toy company that made a dog toy called “Chewy Vuitton.”²² Louis Vuitton argued that since the dog toy was low quality (it was meant for a dog to chew on and rip) that these associations would pass onto its own brand and harm the reputation of Louis Vuitton as a luxury bag retailer.²³ There, the court, without requesting or conferring with empirical evidence, held that “Chewy Vuitton” has no tarnishing or harmful effect on Louis Vuitton’s brand.²⁴

Disgust tarnishing occurs when a junior mark launches a product that is associated with bodily disgust and this harms the reputation of an existing senior mark.²⁵ Take,

can occur “regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.” Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, § 4, 109 Stat. 985 (codified as amended at 15 U.S.C. § 1127(c)(1), (2)(C) (2012)).

17. *See, e.g.*, *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007); *Girl Scouts of the U.S. v. Personality Posters Mfg. Co.*, 304 F. Supp. 1228 (S.D.N.Y. 1969).

18. *Girl Scouts of the U.S. v. Personality Posters Mfg. Co.*, 304 F. Supp. 1228, 1235 (S.D.N.Y. 1969) (noting that the Girl Scouts argued that a poster made by Personality Posters that contained an image of a Girl Scout who was pregnant and the caption “BE PREPARED” painted their brand in an unwholesome light).

19. 625 F. Supp. 48 (D.N.M. 1985).

20. *See id.* at 57.

21. *See Steinway & Sons v. Robert Demars & Friends*, 210 U.S.P.Q. (BNA) 954 (C.D. Cal 1981) (noting Steinway’s claim that a logo very similar to its being used on a beer holder tarnished it mark, as it created an association with alcohol); *Girl Scouts*, 304 F. Supp. at 1235.

22. *Louis Vuitton Malletier v. Haute Diggity Dog, LLC*, 507 F.3d 252, 256 (4th Cir. 2007).

23. *See id.* at 264, 268–69.

24. *See id.* at 269.

25. We use the following definition of disgust from psychology literature as this maps

for example, *Chemical Corporation of America v. Anheuser-Busch, Inc.*²⁶ The beer company's slogan was "Where there's life . . . there's Bud," alluding to the Budweiser brand that the company makes. Chemical Corporation, a company in the extermination business, came up with a slogan for a special type of floor cleaner: "Where there's life . . . there's bugs."²⁷ Anheuser-Busch argued that the association of the slogan with bugs would harm its brand, as people would begin to associate its beer with insects, something that would clearly be disgusting.²⁸ Anheuser-Busch won that case on a finding that the two slogans would confuse consumers. In holding this, the court did acknowledge, without conferring with or relying upon empirical evidence of tarnishment, that the Chemical Corporation's slogan would harm Budweiser's reputation.²⁹ Several other cases have contemplated disgust tarnishing.³⁰

Finally, the most prevalent and often-argued form of tarnishment is sex tarnishment.³¹ This occurs when a junior mark launches a product that has

well onto the use of disgust in tarnishing cases: "[A] revulsion at the prospect of (oral) incorporation of an offensive substance.' This is not to say that people experience disgust only toward ingestible objects, but rather it emphasizes the strong link between objects having some form of physical contact with their bodies and feelings of disgust. Thinking about touching or even being near certain objects is often enough to evoke disgust." Andrea C. Morales & Gavan J. Fitzsimons, *Product Contagion: Changing Consumer Evaluations Through Physical Contact with "Disgusting" Products*, 44 J. MARKETING RES. 272, 273 (2007) (citations omitted) (quoting Paul Rozin & April E. Fallon, *A Perspective on Disgust*, 94 PSYCHOL. REV. 23, 23 (1987)); see also A. Angyal, *Disgust and Related Aversions*, 36 J. ABNORMAL & SOC. PSYCHOL. 393, 393 (1941).

26. 306 F.2d 433 (5th Cir. 1962).

27. *Id.* at 434–35 ("At the time that the idea to use 'Where there's life . . . there's Bugs' arose, defendant knew that plaintiff was using the slogans 'Where there's life . . . there's Bud' and 'Where there's life . . . there's Budweiser.'").

28. *Id.* at 436.

29. See *id.* at 437.

30. See *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97 (2d Cir. 2009) (ruling that "Charbucks" did not have associations of low-quality or disgusting coffee, even though Starbucks argued that "Charbucks" would harm its reputation as a high-quality coffee because the word "char" connoted burnt coffee); *Hormel Foods Corp. v. Jim Henson Prods.*, 73 F.3d 497 (2d Cir. 1996) (considering and rejecting Hormel's argument that Jim Henson's use of the name "Spa'am" for an obese character in a Muppets movie would harm the reputation of the food product "SPAM"); *Kraft Foods Holdings, Inc. v. Helm*, 205 F. Supp. 2d 942 (N.D. Ill. 2002) ("finding that a website's use of a sexual comic named 'King VelVeeda' tarnished the 'Velveeta' mark because of its associations with sex and offensive material"); *Grey v. Campbell Soup Co.*, 650 F. Supp. 1166 (C.D. Cal. 1986) (finding that the dog food name "Dogiva" harmed the reputation of "Godiva" because of associations made between animal treats and the premium food products intended for human consumption).

31. Historically, many of the cases surrounding tarnishment focused on sex associations. See *Mattel, Inc. v. Internet Dimensions Inc.*, No. 99 Civ. 10066(HB), 2000 WL 973745 (S.D.N.Y. July 13, 2000) (finding that the website "barbiesplaypen.com," which portrayed Barbie dolls engaging in lewd sex acts, tarnished the Barbie brand); *Pillsbury Co. v. Milky Way Prods., Inc.*, No. C78-679A, 1981 WL 1402 (N.D. Ga. Dec. 24, 1981) (granting injunctive relief to Pillsbury, which sued Milky Way Productions for publishing a picture of figures resembling their trade characters "Poppin' Fresh" and "Poppie Fresh" engaging in

associations with sex or obscenity and these associations harm an existing senior mark.³² Although several cases exist on sex tarnishing,³³ we focus here on the most infamous, the 2003 installment, and its aftermath, *Moseley v. V Secret Catalogue, Inc.*³⁴

A. *The Victoria's Secret Case and Subsequent Developments*

In 2003, Victoria's Secret sued an adult sex shop called "Victor's Little Secret" for trademark dilution, arguing that since the sex shop was selling unseemly products, consumers would begin to associate the famous Victoria's Secret fashion mark with taboo sex toys. These transferred associations were purported to happen even though it was agreed by both parties that consumers would not confuse products of Victor's Little Secret and Victoria's Secret as coming from the same company.³⁵ "Moreover, the disposition . . . also [made] it appropriate to decide . . . that there was no significant competition between the adversaries"³⁶ Stevens, writing for the majority, held that Victoria's Secret could not win the lawsuit in its current form because there was no confusion between the marks, and the company had not introduced any empirical evidence that Victor's Little Secret had any effect on the reputation of Victoria's Secret.³⁷ Simple, mental associations between the marks were not proof enough to make out a successful tarnishment case.³⁸ The Court held that to show trademark dilution (in this case trademark tarnishment) under the FTDA, a plaintiff must show either direct evidence demonstrating that the junior mark had the purported effect on the reputation of the famous mark or actual dilution through circumstantial evidence.³⁹ The Court held that "actual dilution" rather than merely a likelihood be shown by Victoria's Secret in order to prevail.⁴⁰

sexual acts); *Dallas Cowboy Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 467 F. Supp. 366, 371–72 (S.D.N.Y. 1979) (finding that the pornographic film "Debbie Does Dallas," in which the characters closely resembled Dallas Cowboy Cheerleaders, harmed the reputation of the football team's cheerleaders).

32. "[C]ourts have concluded that a finding of tarnishment is likely when a mark's 'likeness is placed in the context of sexual activity, obscenity, or illegal activity" *V Secret Catalogue, Inc. v. Moseley*, 605 F.3d 382, 394 (6th Cir. 2010) (citing *Hormel Foods Corp. v. Jim Henson Prods., Inc.*, 73 F.3d 497, 507 (2nd Cir. 1996)).

33. *See supra* note 31.

34. 537 U.S. 418 (2003).

35. *See id.* at 429 ("[W]e decide the case on the assumption that the Moseleys' use of the name 'Victor's Little Secret' neither confused any consumers or potential consumers, nor was likely to do so.").

36. *Id.* at 429.

37. *Id.* at 433 ("[W]here the marks at issue are not identical, the mere fact that consumers mentally associate the junior user's mark with a famous mark is not sufficient to establish actionable dilution.").

38. *Id.*

39. *Id.* at 434.

40. *Id.* at 433 (confirming "the conclusion that actual dilution must be established"). For a more extensive discussion of *Moseley* and the Court's interpretation of the FTDA, see Sue Mota, *Victor's Little Secret Prevails (for Now) over Victoria's Secret: The Supreme Court Requires Proof of Actual Dilution under the FTDA*, 19 SANTA CLARA HIGH TECH.

This was the start of some clarity in the trademark tarnishment saga. The Court had spoken, and mere rhetoric and intuition were not enough to prove or win a trademark tarnishment lawsuit.⁴¹ But although the Court took a clear stance on requiring actual dilution, it did not go so far as to decide what kind of proof is necessary, however, for a showing of actual dilution.⁴² This, of course, left practitioners and scholars alike unsure about what form of evidence should be introduced.⁴³

The Court's ruling in *Moseley* was, however, short lived. Congress, in passing the TDRA, overturned *Moseley* and provided for a new set of rules for proving dilution.⁴⁴ The TDRA broke up dilution into two forms: blurring and tarnishment. Blurring is the lessening of the distinctiveness of a famous mark using a similar competing mark, while tarnishing is the reputation harm suffered by a famous mark with the use of a similar competing mark.⁴⁵ The statute provides details on how both types of dilution are to be proven in a court.⁴⁶

First, a plaintiff must show that their mark is famous and has been used in the marketplace.⁴⁷ Second, a plaintiff must show that the rival mark is similar enough to the famous mark, though it need not be confusing to consumers as to the source of a good.⁴⁸ Finally, and most importantly for this Article, a plaintiff need only show that

L.J. 541 (2003).

41. *Moseley*, 537 U.S. at 434 (“The evidence in the present record is not sufficient to support the summary judgment on the dilution count.”). The Court noted that even the one witness who tipped off Victoria's Secret showed no evidence of changing his viewpoint of Victoria's Secret, only that he was reminded of Victoria's Secret when seeing Victor's Secret. *Id.*

42. Nowhere in the Court's opinion did it lay out what exactly would be sufficient to show dilution had taken place. The Court even acknowledged that “consumer surveys and other means of demonstrating actual dilution are expensive and often unreliable.” *Id.* Yet, the Court still held that “[w]hatever difficulties of proof may be entailed, they are not an acceptable reason for dispensing with proof of an essential element of a statutory violation.” *Id.*

43. See, e.g., Matthew D. Bunker, James G. Stovall & Patrick R. Cotter, *Proving Dilution: Survey Evidence in Trademark Dilution Actions*, 13 U. BALT. INTELL. PROP. L.J. 37 (2004) (providing suggestions on how consumers surveys could be used to measure dilution); Julie Manning Magid, Anthony D. Cox & Dena S. Cox, *Quantifying Brand Image: Empirical Evidence of Trademark Dilution*, 43 AM. BUS. L.J., 1 (2006) (laying out potential experimental designs for proving trademark dilution). We draw upon the advertising exposure aspect of Magrid et al. in our studies below. See *id.* at 24–38.

44. Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, § 2, 120 Stat. 1730 (codified as amended at 15 U.S.C. § 1125 (2012)).

45. 15 U.S.C. § 1125(c)(2)(B), (C) (2012) (“[D]ilution by blurring’ is association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark . . . ‘dilution by tarnishment’ is association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.”).

46. *Id.* § 1125(c)(2), (4).

47. See *id.* § 1125(c)(1)–(2)(A).

48. See *id.* “[D]ilution by tarnishment’ is [an] association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.” This can occur “regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.” *Id.*

the rival mark has a “likelihood” of harming the famous mark.⁴⁹ The House Judiciary Committee Report rejected the *Moseley* standard arguing that it “creat[ed] an undue burden for trademark holders who contest diluting uses and should be reversed.”⁵⁰ Thus “the new language [provides] . . . specifically that the standard for proving a dilution claim is ‘likelihood of dilution,’” not actual dilution.⁵¹

But the question of what constitutes “likelihood of dilution”⁵² was still unclear. *Moseley* required evidence with its “actual dilution” standard, and though Congress rejected that standard, its laxer standard of “likelihood” could have been interpreted to still require empirical evidence. Congress might have meant that a senior mark need not wait until a junior mark has actually caused harm before it brings a lawsuit. Instead, a “likelihood” determination could mean that the holder of the senior mark needs to introduce empirical evidence that shows *if* the junior mark’s existence were to continue, it would tarnish the senior mark.

However, the first case to interpret this new likelihood standard held that no empirical proof whatsoever was necessary to prove “likelihood of dilution.”⁵³ In 2010, Victoria’s Secret once again brought its suit against Victor’s Little Secret.⁵⁴ In this subsequent proceeding, the Sixth Circuit held that the “likelihood of dilution” standard should be “interpreted . . . to create a kind of rebuttable presumption, or at least a very strong inference, that a new mark used to sell sex-related products is likely to tarnish a famous mark if there is a clear semantic association between the two.”⁵⁵

In a more recent case, which seemed to implicate disgust tarnishing, the court granted a permanent injunction against a junior tarnishing mark while explicitly ignoring contrary empirical evidence and ruling based solely on theoretical arguments.⁵⁶

In effect, what started as a requirement to show empirical proof of actual harm has become no requirement to show any empirical proof of harm. What we are left

49. 15 U.S.C. § 1125(c)(1).

50. *V Secret Catalogue, Inc. v. Moseley*, 605 F.3d 382, 387 (quoting H.R. REP. NO. 109-23, at 5 (2006), *as reprinted in* 2006 U.S.C.A.A.N. 1091, 1094).

51. *Moseley*, 605 F.3d at 387 (quoting H.R. REP. NO. 109-23, at 9).

52. We view this standard like the statutory standard in trademark infringement of “likelihood of confusion.” Courts have developed a multi-factor test that can be used to prove likelihood of confusion. Included in this multi-factor test is empirical evidence on whether consumers are likely to be confused. This empirical evidence can take the form of survey evidence. See *infra* Part IV, for further discussion. See also *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961) (employing an eight-factor test that considers the following factors: “the strength of his mark, the degree of similarity between the two marks, the proximity of the products, the likelihood that the prior owner will bridge the gap, actual confusion, and the reciprocal of defendant’s good faith in adopting its own mark, the quality of defendant’s product, and the sophistication of the buyers”); *Diamond & Franklyn*, *supra* note 1.

53. *V Secret Catalogue*, 605 F.3d at 389.

54. *Id.* at 384.

55. *Id.* at 388. The court further acknowledged that “the phrase ‘likely to cause dilution’ used in the new statute significantly changes the meaning of the law from ‘causes actual harm’ under the preexisting law. The word ‘likely’ or ‘likelihood’ means ‘probably’” *Id.* at 388.

56. *VIP Prods., LLC v. Jack Daniel’s Prods., Inc.*, 291 F. Supp. 3d 891 (D. Ariz. 2018).

with is a shifting of the burden to the defendant to prove a lack of dilution.⁵⁷ VIP Products had produced a dog toy that looked similar to a Jack Daniel's whiskey bottle. Instead of displaying the nutrition facts of whiskey however, the dog toy contained language such as "Bad Spaniels," "43% POO BY VOL.," and "100% SMELLY."⁵⁸ Jack Daniel's brought a Stanford marketing professor to opine on the potential tarnishing effect of Bad Spaniels.⁵⁹ While that expert there cited the theories we draw upon here,⁶⁰ there were still no empirical studies introduced that evidenced any dilution, and instead the court simply relied upon the theory of the expert to conclude that Bad Spaniels would harm the reputation of Jack Daniel's.⁶¹

Given the findings of our empirical strategy below, we argue that the Supreme Court's standard of actual harm is too narrow and too strict. Requiring companies to wait until there has been a harm is problematic, as we describe further in Part III.⁶² However, we also note that the Sixth Circuit's interpretation of the federal law is too lenient. Tarnishment only occurs in a narrow set of circumstances and is idiosyncratic.⁶³ The federal standard of a "likelihood of harm" is the appropriate standard, but Congress's lack of detail in how companies are to show this likelihood of harm is problematic. We argue that courts should require plaintiffs to introduce empirical evidence, as we detail below, to assist in litigation of trademark tarnishment. At its core, trademark dilution is an empirical cause of action.⁶⁴ It is unclear simply based upon a semantic relationship between two marks if one will tarnish another. Clear empirical proof of harm using experimental methodology is the only way to prove if there is a likelihood of trademark dilution.⁶⁵ We argue that our experimental survey method below should be utilized and required by courts in trademark tarnishment litigation. Evidentiary standards should be clear and empirical evidence should be required to prove a "likelihood" of trademark tarnishment.

57. Note that this presumption seems to only hold for sex tarnishing marks, as the court only discussed sex in its opinion. It is still unclear what the new "likelihood" standard would mean for other forms of dilution.

58. *Id.* at 898.

59. *Id.* at 902.

60. The expert in that case used associative network theory to explain why it is the case that a tarnishing mark can harm an existing mark. *Id.* at 903. We discuss it briefly later. *See infra* note 74. The defense did actually introduce evidence of no tarnishing at trial, but this was seen as unreliable by the court and hence ignored. *VIP Products*, 291 F. Supp. 3d at 903–04.

61. *VIP Products*, 291 F. Supp. 3d at 904–05.

62. *See, e.g., Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 875 F.2d 1026 (2d Cir. 1989) (ruling on suit brought by LexisNexis against Toyota before the latter introduced the "Lexus" car model and the former argued that waiting until the car launched would cause irreparable damage to the Lexis brand).

63. We discuss the condition and idiosyncrasies further below.

64. For detailed discussions of why trademark tarnishment is an empirical cause of action see Buccafusco et al., *supra* note 3, and Jacoby, *supra* note 1.

65. Note that one could use more quantitative models to show actual harm of a diluting trademark. We speak of this strategy in detail in other papers.

II. MEASURING A MARK'S REPUTATION

Federal law defines tarnishment as a harming of the reputation of a famous mark.⁶⁶ But scholars, courts, and Congress alike have provided no guidance to litigants on what exactly “reputation of a mark” is and what it means to “harm” that reputation. In this part, we draw upon marketing literature to help bring clarity and concreteness to the concept of a mark’s reputation.

For all intents and purposes, the reputation of a famous mark is synonymous with the reputation of the brand. This flows nicely from the purpose of having a trademark in the first instance. A trademark tells the consumer what the source of a product is. But over time, consumers viewing a mark use that mark not only as shortcuts for source identification, but also for association identification. The mark comes to represent what attributes of the product the customer expects to get.⁶⁷ Many marketers refer to a trademark or a brand as a “promise,” that is, a promise of what the consumer can expect to get.⁶⁸ The trademark “Nike” signals that the company Nike makes a given product. But it also signals that the product is likely high quality, well designed, stylish for an athlete, popular in certain circles, etc. These associations are the reputation that the trademark commands in the marketplace. *This reputation is exactly the reputation of the brand.* Nike’s reputation as a brand is one of high quality and well-designed athletic wear. Therefore, to better understand how to measure a mark’s reputation, we focus on how to measure brand reputation. Going forward, we use brand reputation and trademark reputation synonymously.

Brand reputation has been a long-standing interest of marketing scholars. These scholars have cultivated strategies for not only measuring the value and associations people place on marks and brands, but also for managing brands to leverage these exact associations.⁶⁹

Brand and trademark reputation serves many purposes, including to help consumers make purchasing decisions quickly and accurately,⁷⁰ to create positive attitudes and perceptions of the brand as a whole,⁷¹ and even to help a company extend its products to neighboring categories (so-called brand extensions).⁷²

66. 15 U.S.C. § 1125(c)(2)(C) (2012).

67. DAVID A. AAKER, *MANAGING BRAND EQUITY* 15–16 (1991) (“Brand [reputation] is a set of brand assets and liabilities linked to a brand its name and symbol, that add to or subtract from the value provided by a product or service to a firm and/or that firm’s customers.”).

68. “Consistent with prior authors, we suggest that a *brand* represents a promise of benefits to a customer or consumer (business or individual).” Randle D. Raggio & Robert Leone, *The Theoretical Separation of Brand Equity and Brand Value: Managerial Implications for Strategic Planning*, 14 J. BRAND MGMT. 380, 382 (2007) (emphasis in original); see also RITA CLIFTON ET AL., *BRANDS AND BRANDING* 18 (1st ed. 2004).

69. See AAKER, *supra* note 67, at 109–10. Aaker argues that brand associations, in addition to perceived quality, are one of five aspects of brand reputation.

70. See *id.* at 111 (“Associations can serve to summarize a set of facts and specifications that otherwise would be difficult for the customer to process and access, and expensive for the firm to communicate.”).

71. *Id.* at 112–13 (“Some associations are liked and stimulate positive feelings that get transferred to the brand Some associations create positive feelings during the use experience, serving to transform it into something different than it would otherwise be.”).

72. *Id.* at 113 (“An association can provide the basis for an extension by creating a sense

Ultimately, however, reputation matters because it influences whether consumers will purchase one's products or consume the services of one's brand and even what they will be willing to pay. Owning a trademark with a good reputation in the market will likely make consumers more willing and likely to purchase from that company over others.⁷³

Brands and brand reputation are incredibly important to protect. Strong brands have been linked to strong sales⁷⁴ and strong customer loyalty.⁷⁵ Finance scholars even treat a brand as a financial asset. Mary W. Sullivan and Carol J. Simon show that industries and companies that rely upon strong brands (consumer products and generally business to consumer companies) are reflected with positive values on the balance sheets.⁷⁶

Several different metrics have been used in marketing literature to measure brand reputation. We describe these metrics, how to measure these metrics, and how to evaluate harm to these metrics below. We then use these measures of brand reputation as a definition of trademark reputation in our empirical studies below.⁷⁷

of fit between the brand name and a new product, or by providing a reason to buy the extension.”).

73. See Keller, *supra* note 5; Shuba Srinivasan, Marc Vanhuele & Koen Pauwels, *Mind-Set Metrics in Market Response Models: An Integrative Approach*, 47 J. MARKETING RES. 672 (2010) (empirically showing that changes in brand associations have independent effects on sales); see also TIM AMBLER, *MARKETING AND THE BOTTOM LINE: THE MARKETING METRICS TO PUMP UP CASH FLOW* (2d ed. 2003); PATRICK LAPOINTE, *MARKETING BY THE DASHBOARD LIGHT: HOW TO GET MORE INSIGHT, FORESIGHT, AND ACCOUNTABILITY FROM YOUR MARKETING INVESTMENTS* (2005); DONALD R. LEHMANN & DAVID J. REIBSTEIN, *MARKETING METRICS AND FINANCIAL PERFORMANCE* (2006).

74. See, e.g., Kusum L. Ailawadi, Donald R. Lehmann & Scott A. Neslin, *Revenue Premium as an Outcome Measure of Brand Equity*, 67 J. MARKETING 1 (2003) (concluding that companies with strong brands show higher revenues—brand revenue premiums—in comparison to companies that are not branded). Ailawadi et al. compared revenues of famous consumer-packaged goods brands with those that are “generic” (*i.e.*, not famously branded), and found a significant difference between the two types of goods. *Id.*

75. See Arjun Chaudhuri & Morris B. Holbrook, *The Chain of Effects from Brand Trust and Brand Affect to Brand Performance: The Role of Brand Loyalty*, 65 J. MARKETING 81 (2001) (showing that the strong brands create strong brand trust and brand attitude which in turn influence purchase loyalty and attitudinal loyalty).

76. See Carol J. Simon & Mary W. Sullivan, *The Measurement and Determinants of Brand Equity: A Financial Approach*, 12 MARKETING SCI. 28 (1993) (using publicly available balance sheets for several companies in various industries and deconstructing a company's assets to arrive at a value of the company's brand to confirm the intuition that industries and companies that rely upon their brand to make a profit show higher values of brand equity than those that focus more on business to business or non-consumer facing endeavors). Even trademarks that are closely tied to brand reputation have been shown to have high balance sheet values for companies that rely heavily on the associations those trademarks have in the marketplace. See Alexander Krasnikov, Saurabh Mishra & David Orozco, *Evaluating the Financial Impact of Branding Using Trademarks: A Framework and Empirical Evidence*, 73 J. MARKETING 154 (2009).

77. We do not spend time here discussing the process by which brands become associated in long-term memory with certain perceptions. Psychology research has described this process as the associative network theory. According to associative network theory, brand knowledge

A. Brand Associations

Brand associations, most generally, are anything “‘linked’ in memory to a brand.”⁷⁸ These associations derive from how products are marketed and, over time, how consumers interact with the products themselves.⁷⁹ For Nike this could be “athletes,” “high quality,” “sweat wicking,” etc. These associations are idiosyncratic in many ways. First, brands have not only associations but also levels of strength. The links in memory to a brand will be stronger when that brand is more pervasive for an individual consumer (e.g., well-known) and when the consumer has had several interactions with the brand.⁸⁰ This means that brand associations are likely strongest for those consumers who have brand loyalty and consistently choose the brand over other competing brands.⁸¹ Second, different brands have different target customers. Understanding which customers hold which associations is an important task for the marketing manager.⁸² Moreover, it could be the case that certain brands, although having small market share, have very strong loyalty and create strong associations with the target consumers.⁸³ This is particularly true for luxury goods.

is encoded in memory as a pattern of linkages between concept nodes. A trademark or a brand has several nodes attached to it that represent the three forms of brand knowledge (product categories, brand attributes, and brand attitudes). These nodes are encoded over time as consumers interact with a mark and its products. Companies benefit by having a trademark with strong connecting nodes. When consumers see a mark, they retrieve from memory the various nodes associated with the mark. Tarnishing marks that are similar to an existing mark are likely encoded close to the senior existing mark in the shared associative network. Therefore, when consumers interact with an existing brand, it is possible that the perception nodes linked to the tarnishing brand will also be triggered. This is the theorized process by which a tarnishing mark can harm the reputation of an existing mark. For detailed analysis of associative network theory see John R. Anderson, *A Spreading Activation Theory of Memory*, 22 J. VERBAL LEARNING & VERBAL BEHAV. 261 (1983); Chris Pullig, Carolyn J. Simmons & Richard G. Netemeyer, *Brand Dilution: When Do New Brands Hurt Existing Brands?* 70 J. MARKETING 52 (2006). We do not detail this theory in this paper but have another paper focused on the psychology theories that predict tarnishing. Please email one of the authors for a draft of that paper.

78. AAKER, *supra* note 67, at 109.

79. *See id.* (“A link to a brand will be stronger when it is based on many experiences or exposures to communications, rather than few.”).

80. *Id.*

81. These consumers would likely be the ones who have the most exposure to the product given that they utilize it. *See* B. Ramaseshan & Alisha Stein, *Connecting the Dots Between Brand Experience and Brand Loyalty: The Mediating Role of Brand Personality and Brand Relationships*, 21 J. BRAND MGMT. 664 (2014).

82. We show below that certain consumers (conservatives) have more positive associations with a publicly conservative brand.

83. Take, for example, Rolls Royce or Prada. They have very strong brand associations with those consumers who are their target market. It’s worth noting, however, there is a tension here because dilution protection is only available for those marks that are famous among the general consuming public, i.e., the entire U.S. population—niche fame is not enough under TDRA. *See* Alexandra J. Roberts, *New-School Trademark Dilution: Famous among the Juvenile Consuming Public*, 49 IDEA 579 (2009).

We leverage this idiosyncrasy in brand loyalty and associations in our experimental section below.⁸⁴

Trademark tarnishing is purported to change these brand/trademark associations. Specifically, the cause of action is thought to ruin or pervert prevailing positive mark associations with sex, disgust, or low quality, thus harming a company's brand reputation.⁸⁵

Marketers extensively research how associations of brands come about. Sometimes, they come about via conscious promotion⁸⁶ and advertising,⁸⁷ and other times they are almost accidental in nature. When determining the brand associations for trademark tarnishment, we take as given the strength and content of the brand associations. As such, in our empirical strategy below, we draw upon companies that have cultivated clear associations over time.

Measuring associations is generally a straightforward task. Most previous work that attempted to measure brand reputation via associations used customer surveys

84. We use brands that are in the same space but have differing brand loyalty and market shares to show that tarnishing might affect different brands differently even though they produce the same goods.

85. Note that under a more robust definition of tarnishing, *any* change in association that a brand does not want would cause harm to the trademark. A brand builds a particular reputation to a specific customer segment, not just a positive one. A brand must protect its exact brand reputation to leverage all that comes with having a clear and well understood brand, most importantly brand extensions. Take Under Armour, for example. Under Armour's original brand was focused on the aggressive football athlete. *See* Terry Lefton, 'Protect This House' Fired Up UA's Marketing, *SPORTS BUS. J.* (June 20, 2016), <https://www.sportsbusinessdaily.com/Journal/Issues/2016/06/20/In-Depth/Protect.aspx> [<https://perma.cc/X25Z-G8KA>]. Imagine a company that creates an athletic brand called "Under the Armour" and is geared towards polo players. Furthermore, assume that "Under the Armour" sponsors the best polo players in the world. We might be hard pressed to think that "Under the Armour" has tarnished Under Armour, because both brands are associated with the pinnacle of their sports. However, "Under the Armour" might have changed the particular association of Under Armour from aggressive athletes to more "chic" athletes. Although seemingly a positive association, being associated with "chic" athletes would be harmful to Under Armour. Under Armour would have a hard time marketing towards aggressive sports like football, basketball, rugby, wrestling, or boxing. Brand extensions of the original company would be closed off after the introduction of "Under the Armour." In many ways, this broad conception of tarnishing, as not just negative brand associations but any change in brand associations, is in line with viewing trademarks as property rights. If one owns a trademark, that person should have sole power to shape it into whatever they like. Any use of the trademark or a similar variant would be considered a trespass on the trademark property right. As such, a trespass, even if it does not have a negative connotation that changes reputation in any way (even positively), should be considered dilution. For a more detailed discussion on how trademark dilution moves toward a property-like right see Robert N. Klieger, *Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection*, 58 U. PITT. L. REV. 789 (1997) and Beverly W. Pattishall, *The Dilution Rationale for Trademark—Trade Identity Protection, Its Progress and Prospects*, 67 TRADEMARK REP. 607 (1977).

86. *See* AAKER, *supra* note 67, at 167 (arguing that promotions increase the awareness of your product but can also cheapen it and hence can tarnish brand equity).

87. *Id.* at 163 ("Advertising which creates brand associations that change the use experience is termed 'transformational advertising.'").

to better understand what mental image consumers had of the products.⁸⁸ This takes the form of asking consumers open-ended questions on what they think about when they see or hear a particular trademark. In our experiments below, we simply ask respondents to rate how much they agree with prevailing associations of a famous trademark in the marketplace. By doing this, we are not only exploring or discovering the types of associations consumers have but also to what extent various consumers hold each of the prevailing associations.

Hence, our first dependent variable in measuring mark/brand reputation is to what extent consumers agree with or hold prevailing associations of a famous brand. For example, we measure to what extent a consumer agrees that Nike products are “high quality,” “made for athletes,” and are “very stylish.”

B. Brand Attitudes

A brand/mark’s reputation also incorporates how consumers feel about the given brand/mark. This feeling towards the brand is called brand attitude.⁸⁹ Common brand attitudes questions are: “Do I like the brand?”; “Do I feel like the brand reflects my identity?”; and “Do I want to approach the brand’s products?” Brand attitudes are an important part of what predicts if consumers will purchase from a given brand,⁹⁰ whether brand extensions will be successful,⁹¹ and whether a given advertisement will be persuasive.⁹² We measure brand/mark attitudes using a Likert scale focused on how much a consumer “likes” the target brand.⁹³

Given that we use tarnishing advertisements, we expect that brand/mark attitudes, after people view these advertisements, might change for the worse. If this happens

88. Customer surveys are the mainstay in consumer behavioral research. See Janet Ilieva, Steve Baron & Nigel M. Healey, *Online Surveys in Marketing Research: Pros and Cons*, 44 INT’L J. MKT. RES. 361 (2002). Surveys are also the mainstay in expert testimony for trademark disputes. See Robert Bonyng, *Trademark Surveys and Techniques and Their Use in Litigation*, 48 A.B.A. J. 329 (1962); Larry C. Jones, *Developing and Using Survey Evidence in Trademark Litigation*, 19 MEM. ST. U. L. REV. 471 (1989).

89. “[A] person’s attitude represents his evaluation of the entity in question.” An attitude is specific to a person, context, time and the target the attitude is directed against. Icek Ajzen & Martin Fishbein, *Attitude-Behavior Relations: A Theoretical Analysis and Review of Empirical Research*, 84 PSYCHOL. BULL. 888, 889 (2002).

90. See Nancy Spears & Surendra Singh, *Measuring Attitude Toward the Brand and Purchase Intentions*, 26 J. CURRENT ISSUES & RES. ADVERT. 53 (2004) (showing how the two constructs of brand attitude and purchase intentions are related).

91. See David A. Aaker & Kevin Lane Keller, *Consumer Evaluations of Brand Extensions*, 54 J. MARKETING 27 (1990). For a similar analysis but focused on brand alliances rather than extensions, see Bernard L. Simonin & Julie A. Ruth, *Is a Company Known by the Company It Keeps? Assessing the Spillover Effects of Brand Alliances on Consumer Brand Attitudes*, 35 J. MARKETING RES. 30 (1998).

92. See generally RICHARD E. PETTY & JOHN T. CACIOPPO, *COMMUNICATION AND PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE CHANGE* (1986).

93. See Rensis Likert, *A Technique for the Measurement of Attitudes*, 22 ARCHIVES PSYCHOL. 5 (1932) Likert scales are very common scale measurements used in consumer behavior research. For details on which brand attitudes scales predict purchase intention most readily, see Spears & Singh, *supra* note 90.

to be the case, this is evidence that consumers are less likely to purchase from the brand going forward. How and when brand attitudes change in response to advertisements has been intensely written about in the marketing and psychology literature. Attitude change is explained by the Elaboration Likelihood Model (ELM).⁹⁴ The ELM predicts that attitudes change via one of two paths, a central route and a peripheral route. In the central route, attitude change occurs because an individual will pay close attention to advertising and will thoughtfully, cognitively, and rationally evaluate the message of the advertisement.⁹⁵ In the peripheral route, attitude change occurs because an individual uses negative or positive cues in the advertisement to make simple and often crude inferences about the brand being advertised.⁹⁶

The ELM predicts that a consumer's available cognitive resources at the time of the advertisement is one factor in predicting which route the consumer will take.⁹⁷ When consumers are under stress and have little cognitive availability to process an advertisement, they will follow the peripheral route. They will follow the central route when resources are readily available.⁹⁸ Previously, however, attitude persuasion has been focused on the target brand's own advertisements. We, however, expand this model to include how tarnishing ads might change brand attitudes of the target brand.

The ELM has implications for our studies below. We argue, if tarnishing advertisements are presented in contexts in which consumers have ample cognitive processing capability available, they are less likely to change brand/mark attitudes. This is because consumers will clearly internalize that the tarnishing mark and the target mark come from different entities, and tarnishing ads should not affect perceptions of a different entity. However, when tarnishing ads are presented in contexts in which consumers have little cognitive processing capability available, we expect tarnishing ads to have a larger effect on trademark attitudes. This is because consumers will not clearly internalize that the two marks are different entities. We expand on this below in the discussion sessions of our various studies.

C. Competitive Rank

Legal scholars have criticized previous trademark dilution studies because they do not take into consideration contextual decision making. When respondents are

94. See Richard E. Petty & John T. Cacioppo, *The Elaboration Likelihood Model of Persuasion*, in 19 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 123 (Leonard Berkowitz ed., 1986).

95. Richard E. Petty, John T. Cacioppo & David Schumann, *Central and Peripheral Routes to Advertising Effectiveness: The Moderating Role of Involvement*, 10 J. CONSUMER RES. 135, 135 (1983).

96. *Id.*

97. See Richard E. Petty & John T. Cacioppo, *Source Factors and the Elaboration Likelihood Model of Persuasion*, 11 ADVANCES CONSUMER RES. 668 (1984). Note that the model also predicts that involvement will influence the route used. When consumers are more involved (generally defined as a motivation) in the process of viewing and evaluating the advertisements, they are more likely to follow the central route of processing. *Id.*

98. *Id.* at 669.

asked about brands in isolation, dilution may exist, but this dilution could go away if the decisions are put in a realistic shopping context.⁹⁹

Context is important for another reason. Just because brand reputation decreases for some consumers, this alone is not sufficient evidence to conclude that purchase likelihood will decrease. It could be the case that even though associations have changed for a given mark, that mark is so preferred to other competitor brands that the market share of the target does not change. If this is the case, it makes trademark tarnishing and dilution in general less problematic. Therefore, it is important to measure the market share of the tarnished brand against the market share of its competitors.¹⁰⁰

To do this, we measure the preferred rank of the target brand in comparison to other similar competitive brands. By looking at how the rank of competitive brands changes with tarnishing marks, we might find that even though associations show little change, a tarnished brand loses significant market share. And vice versa: brand associations might change a lot, but the tarnished brand loses little to no market share.

D. Other Measures of Brand Reputation

While brand/mark associations are a satisfactory way to measure how good a mark's reputation is, the ultimate reason to cultivate a strong trademark reputation is to make sales. A brand that has a good reputation has strong positive associations, and these associations then lead consumers to consistently choose the brand's products in the marketplace.¹⁰¹

However, the link between associations and purchase likelihood is often hard to measure.¹⁰² This is because several other brand characteristics influence purchase likelihood, including marketing expenditures and competitor expenditures. Recent scholarship has attempted to more clearly connect brand associations with purchase likelihood.¹⁰³ In doing this, marketers have realized that brand associations do have an independent effect on purchase likelihood.¹⁰⁴

Although purchase likelihood is an important part of what makes a brand, and hence a trademark, valuable, we do not define tarnishing as necessarily influencing purchase likelihood. It could be the case that purchase likelihood goes up after seeing tarnishing marks. This could happen in at least two ways. First, brand awareness

99. See Declaration of David Reibstein at 57, In re POM Wonderful LLC Mktg. & Sales Practices Litig., No. MDL 2199, 2012 WL 4490860 (C.D. Cal. Sept. 28, 2012) (arguing that certain methodologies used in surveys are not reliable because they attempt to measure an effect in isolation and are not connected to what consumers "would . . . do in the real world"); see also Beebe et al., *supra* note 1; Tushnet, *supra* note 1.

100. Beebe et al., *supra* note 1 (using car brands that had high and low awareness).

101. See AAKER, *supra* note 67, at 112 ("Many brand associations . . . represent a basis for purchase decisions and brand loyalty."). Note that this connection between positive brand associations and purchase intention is codified in the purchase funnel framework. For a detailed explanation of the purchase funnel, see EDWARD K. STRONG, JR., *THE PSYCHOLOGY OF SELLING AND ADVERTISING* 9, 349 (1st ed. 1925).

102. See Srinivasan et al., *supra* note 73, at 674.

103. See Srinivasan et al., *supra* note 73.

104. *Id.*

(how consumers readily recall a brand) may go up after seeing tarnishing ads.¹⁰⁵ After seeing a copycat mark or a mark that mimics an existing mark, the famous existing mark is more readily retrieved in memory, which increases its brand awareness. This has been demonstrated in marketing literature focusing on luxury goods. Previous empirical work has found that copycat luxury brands make it more likely that the original luxury brand is included in a purchase set.¹⁰⁶ This happens both because the awareness of the brand increases, and because people may like the brand more after knowing that others are attempting to copy it.¹⁰⁷

In addition, certain brand perceptions may change and cause new consumers to like the brand more, and hence, increase purchase likelihood and sales. For example, one could argue Victor's Secret would make perceptions of Victoria's Secret more sexual than they currently are. This could make the brand more appealing to some consumers and cause sales to go up.

We specifically do not define tarnishing as changes in purchase likelihood, brand awareness, or sales. Instead, we focus solely on changes in brand perceptions, attitudes, and rank.¹⁰⁸ We do this because this most clearly connects to the statutory language of "harm to reputation." We also think that brand perceptions and brand attitudes are important to brands independent of sales. Marketing literature has historically been sensitive to a company's brand perceptions independent of the effect on sales. But the law clearly is moving further towards protecting a brand as speech, something that a company cares about independent of sales.¹⁰⁹ In that regard, we think our measures of tarnishing are the correct ones that courts should be focusing on.

105. AAKER, *supra* note 67, at 56–57.

106. See Arghavan Nia & Judith Lynne Zaichkowsky, *Do Counterfeits Devalue the Ownership of Luxury Brands?*, 9 J. PRODUCT & BRAND MGMT. 485 (2000) (showing that counterfeit luxury goods do not decrease the liking of authentic luxury goods and increase the brand awareness of authentic luxury brands).

107. See Sophie Hieke, *Effects of Counterfeits on the Image of Luxury Brands: An Empirical Study From the Customer Perspective*, 18 J. BRAND MGMT. 159 (2010) (empirically showing that counterfeits brands do not change prevailing brand perceptions of authentic luxury goods).

108. Note that we do attempt to show that tarnishing does have effects on sales, but the point here is that tarnishing should still be recognized even if there is no effect on sales.

109. Much discussion in the literature on corporations as people has focused on the speech implications of giving brands First Amendment rights. See, e.g., Frederick M. Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51 (2014) (arguing that ruling in favor of Hobby Lobby would create a regime where significant costs of health care are going to be borne by female employees); Alan J. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations are RFRA Persons*, 127 HARV. L. REV. F. 273 (2014) (arguing that the holding in Hobby Lobby is consistent with the corporate theory of the firm); Mark Tushnet, *Do For-Profit Corporations Have Rights of Religious Conscience?*, 99 CORNELL L. REV. ONLINE 70 (2013) (arguing that there are several relevant and important factors in determining whether or not for-profit corporations have religious conscience).

III. MEASURING TRADEMARK TARNISHMENT

Above, we identified how to use brand reputation to measure a trademark's reputation and how to measure harm to that reputation. In the following part, we use those measures to present three sets of studies that show conditions under which tarnishment (harm to a trademark's reputation) is likely to exist. We conclude that when consumers are exposed to several tarnishing marks, they are more passively engaged in viewing those exposures, and when they are the ideal customer segment, tarnishing is likely to occur. We show how our studies differ from previous dilution studies and provide a brief overview of our studies here before proceeding into further detail below. Ultimately, we show a viable empirical strategy to measure the "likelihood of harm," per the federal statute, that courts should begin to adopt. Our strategy applies to the "likelihood of harm" standard because we mostly use fictitious marks in the studies below.

A. Previous Dilution Studies Versus This Article

Although not terribly prevalent in dilution scholarship, some previous empirical work on dilution (both blurring and tarnishing) has been performed. We detail that work briefly here and show how our work builds on previous studies.

Previous studies can be categorized into which type of dilution they studied. Dilution by blurring (a lessening of distinctiveness) has received the most empirical attention. Both peer reviewed marketing scholarship¹¹⁰ and law review scholarship¹¹¹ have attempted to find ways to measure dilution by blurring. Given that this paper is focused on dilution by tarnishment, we will not spend much time going through those studies. We only say here that those studies focused on measuring how quickly consumers could match a trademark with its products. Those studies attempted neither to measure reputational harms nor to measure how reputational harms affected purchasing behavior.

Only one study has looked at dilution by tarnishment. Christopher Buccafusco, Paul Head, and Ben Wu used sexualized versions of movie posters to measure tarnishing. They found no statistically significant effect of the sexualized movie posters on desire to watch the original movie.¹¹² In that study, Buccafusco et al. showed movie posters to respondents and then asked them their desire to watch the original movie. This dependent variable measurement is akin to measuring purchase likelihood.

Our studies below differ from previous dilution studies in several ways. First, while other studies only looked at response times¹¹³ and choice likelihood,¹¹⁴ we focus here on measuring reputational harm. We measure the construct of trademark

110. See Beebe et al., *supra* note 1; Maureen Morrin & Jacob Jacoby, *Trademark Dilution: Empirical Measures for an Elusive Concept*, 19 J. PUB. POL'Y & MARKETING 265, 268–70 (2000); Pullig et al., *supra* note 77, at 54.

111. See Tushnet, *supra* note 1.

112. See Buccafusco et al., *supra* note 3.

113. See Beebe et al., *supra* note 1; Morrin & Jacoby, *supra* note 110; Pullig et al., *supra* note 77.

114. See Buccafusco et al., *supra* note 3.

reputation through brand association and brand attitudes. As we discuss above, focusing on these aspects of brand reputation most clearly tracks tarnishing as harm to the reputation of a brand. We specifically do not use purchase likelihood and sales as measures because these measures of financial health of a brand may go up in the face of tarnishing marks, yet tarnishing may still negatively affect the message a company wants to communicate.

Second, previous studies have focused on using only catalogue ads (a one-page ad that explains the diluting brand to the respondent). We vary the medium in which we present diluting ads using catalogue ads, website ads, and banner ads. This not only maps onto real tarnishing cases nicely but also gives our studies external validity.¹¹⁵ Moreover, these studies have used only single ad exposures.

Lastly, and most importantly, previous dilution studies showed only one exposure to respondents and measured subsequent outcomes. Dilution, however, is most likely to occur when respondents are confronted with the diluting trademark over several exposures. This is because the perceptions of the senior mark have been engrained in consumer memory for quite some time. One exposure will not be enough to change these perceptions. In our studies, we use multiple exposures and show that under multiple exposures, tarnishing is more likely. Further, it is more likely that consumers would receive multiple exposures of the tarnishing ad in the real world. As such, we vary the number of exposures in our studies.

The importance of our use of brand associations and attitudes to operationalize trademark reputation deserves further explanation. If we are to find significant effects of tarnishing on senior marks for purposes of proving that tarnishing exists, we must study marks that are most susceptible to tarnishing. Note that is not the legal requirement. Any trademark can bring a lawsuit of tarnishment.¹¹⁶ We only argue that certain marks (those that have associations that are at odds with sex, disgust, or low quality) are more likely to be actually tarnished.

The notion of inconsistent perceptions arises nicely from the work in brand extension dilution. Previous work has looked at what happens when a brand extends its own brand into a new category. The lack of fit and typicality of a brand extension with a senior brand is a key indicator of the likelihood of dilution. When a brand extension has attributes that are inconsistent with the current residing brand associations, those existing associations become diluted.¹¹⁷ For example, Neutrogena soap has “gentle” brand attribute associations. If the brand were to introduce a new

115. External validity is a common concern in social science literature, particularly in work done through experimental studies in a lab. The concern with many empirical studies is the lack of applicability to the real world. Real world dynamics do not necessarily mimic the lab. As such, many studies run in the lab do not translate to results in the real world. We focus on using advertisements that tend to exist in the real world (websites and banner ads); that way, our results have more external validity than other previous dilution studies.

116. 15 U.S.C. § 1127 (2012).

117. See Kevin Lane Keller & David A. Aaker, *The Effects of Sequential Introduction of Brand Extensions*, 29 J. MARKETING RES. 35 (1992) (showing that brand extensions that have inconsistent or incompatible new perceptions fail to be successful); Barbara Loken & Deborah Roedder John, *Diluting Brand Beliefs: When Do Brand Extensions Have a Negative Impact?*, 57 J. MARKETING 71 (1993) (showing that Neutrogena soap is harmed by introducing an extension that is perceived as harsh).

extension that has a “harsh” brand attribute association, consumers might view Neutrogena soap as less “gentle.” In this same way, when a tarnishing mark has associations that are inconsistent or at odds with the associations of the senior famous mark, there is a higher likelihood of dilution by tarnishment.

Trivially, if a pornographic movie’s name is used in another sex-oriented way, we would find little empirical evidence that the pornographic movie has been tarnished. After all, the associations would not have undergone any substantive change. Likewise, if a mark has associations that are consistent with or orthogonal to sex, we would also find it weird to presume sex tarnishing. In this way, Buccafusco et al. do not use the most appropriate marks/movies in their sex tarnishing studies if the purpose to demonstrate the existence of tarnishing. They use movie names/posters that have associations that are orthogonal to sex associations. For example, in attempting to see if “Jack Reach Around” tarnishes “Jack Reacher,” they find no tarnishing, but that shouldn’t be surprising to us. Jack Reacher likely has no underlying mark association that would be harmed by also being associated with sex. Instead, a better test of tarnishing would be to tarnish a mark that has some known associations that are counter to sex in some way. The only movies that intuitively satisfy this in the Buccafusco et al. study are “Harry Potter and the Sorcerer’s Stone” and “Wreck-It-Ralph.” One could reasonably assume that those movies are associated with children and families—associations that are susceptible to sex tarnishing. In our studies, whether we study sex, low quality, or disgust tarnishing, we use target marks that have known associations that are directly in contrast to sex.¹¹⁸

Buccafusco et al. do, however, appropriately use the trademarks that legally fall under the tarnishing doctrine. Our point here is as an empirical strategy; it is more apt to use marks that are highly likely to be tarnished. In this way, we do stack the deck to some degree. By choosing brands that we hypothesize should suffer reputational harm in the face of tarnishing advertisements, we focus on isolating the marketplace effect of tarnishment. If our marks and our studies do not show tarnishing, then that is very good evidence that tarnishing likely does not exist.

B. Overview of Our Studies

In each of the studies, we focus on looking for harm to the reputation of a mark/brand. From the marketing literature described above, we operationalize trademark reputation as the following: brand associations (including how much a consumer likes a given brand)—taken from the prevailing associations of the brands we use, brand attitudes, competitive rank or market share, and purchase likelihood. In each study, we measure on a seven-point Likert scale¹¹⁹ how much consumers agree that prevailing associations accurately describe the brand. We also have them

118. We establish these associations through several pretests. Sex contrasting “Chick-fil-A=wholesome”; Disgust contrasting “Dove=clean”; Low Quality contrasting “Louis Vuitton=high quality.”

119. A Likert scale is a scale named after Dr. Rensis Likert, and it is a psychometric scale that is used to generally elicit response of whether or not respondents agree with an underlying statement. Ankur Joshi, Saket Kale, Satish Chandel & D. K. Pal, *Likert Scale: Explored and Explained*, 7 BRITISH J. APPLIED SCI. & TECH. 396, 397 (2015).

rank the target mark against its competitors. Although we think that purchase likelihood is not a good measure of tarnishment, we include it here because previous work has attempted to measure it. As we show, focusing on purchase intent or actual sales can actually be counterproductive to understanding tarnishing.

Each study followed a similar pattern. We first showed consumers what we considered trademark tarnishing advertisements. Some of the tarnishing marks were taken from court cases and others were fictional.¹²⁰ After showing consumers these ads, we gave them filler questions and tasks before asking them about the associations they have of the target brand. We were interested to see if there was a decrease in positive associations, a decrease in likelihood of purchase, and a decrease in rank after consumers had seen the tarnishing ads.

In our first two sets of experiments, we found limited evidence of trademark tarnishment. Showing consumers one advertisement or one website of a tarnishing brand representation had marginal effects on mark associations, likelihood of purchase, and rank. In many cases, however, there was no effect on any of our dependent variables. In our last experiment, we varied the number of advertisements and found that as the number of tarnishing advertisements (exposures) increases, the likelihood of tarnishment increases. This leads us to conclude that tarnishment is not resulting from a one-time exposure. Rather, it takes several exposures to have a significant effect on the target trademark/brand. As noted earlier, most junior brands would most likely be exposing their ads repeatedly, given that is the practice for all advertising.

We also note that certain consumers are affected more than others. How fluent a consumer is with a given brand, how strong they feel about the brand, and even their personal demographics play significant roles in whether tarnishing marks have their anticipated effects. We describe these takeaways in more detail in Part Four below.

C. Study 1: Single Advertisements

Our first set of studies used single advertisements. We did this with the intention of mimicking previous studies on trademark dilution. In those studies, only one advertisement was used and dilution was measured.

1. Study 1A: Disgust and Low-Quality Tarnishing

Stimuli: Although *Moseley* only concerned tarnishment via associations of sex, several cases have drawn out other categories of tarnishment. Tarnishment via associations of disgust and low quality have been extensively litigated.¹²¹ Therefore,

120. In creating these marks/brands, we attempted to have the mark as similar as possible to the target brand without creating any consumer confusion.

121. See *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97 (2d Cir. 2009); *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, L.L.C.*, 507 F.3d 252 (4th Cir. 2007); *Chem. Co. of Am. v. Anheiser Busch, Inc.*, 306 F.2d 433 (5th Cir. 1962); *Grey v. Campbell Soup Co.*, 650 F. Supp. 1166 (C.D. Cal. 1986), *aff'd*, 830 F.2d 197 (9th Cir. 1987); *Jordache Enters., Inc. v. Hogg Wyld, Ltd.*, 625 F. Supp. 48 (D.N.M. 1985), *aff'd*, 828 F.2d 1482 (10th Cir. 1987).

in this first study, we attempted to include one tarnishing stimuli for both disgust and low quality.

We also decided to use a mix of real tarnishing marks/brands taken from famous cases and fabricated marks. We used two real trademarks: First, “Chewy Vuitton,” a company that makes dog toys in the shapes of Louis Vuitton bags and “Dogiva,” a company that made dog treats. Chewy Vuitton was sued by Louis Vuitton (LV), where LV claimed that the low-quality dog toys made by Chewy Vuitton would tarnish the LV mark and consumers would begin to associate low-quality goods with LV.¹²² Second, Godiva, a company that makes luxurious chocolates, sued Dogiva, claiming that consumers would start to associate Godiva with disgust, as dog treats were not appetizing to human consumers. We then also used a fabricated brand: Dove Manure. We did this with the intention to create a brand that was clearly in a different category as the target brand (Dove Soap)¹²³ and had associations that were the opposite of the target brand—manure is dirty and does not smell pleasant.

The form of our stimuli was modeled after previous scholarship studying trademark blurring.¹²⁴ Each advertisement clearly indicated the name of the tarnishing mark, had a picture of the product being sold, and contained reviews from consumers that articulated the potential tarnishing associations. For example, for Dogiva, one of the reviews read: “My dog loves these treats, but I tried them once and they were pretty gross.” A sample advertisement is copied below in Appendix 1.

Procedure: We used a 4X1 between subject’s design where each subject saw one of four advertisements (Chewy Vuitton, Dogiva, Dove Manure, and a control).¹²⁵ We used Amazon Mechanical Turk to recruit subjects to take our survey (N=190).¹²⁶

Respondents first read each of the ads. They then answered some filler questions before answering questions about the ads. We asked each respondent to replicate the name of the brand (tarnishing mark) advertised and to describe the product being sold. We used these questions as manipulation checks. Those respondents that did

122. See *Louis Vuitton*, 507 F.3d.

123. We also specified in our ad that “DOVE MANURE was NOT associated with DOVE SOAP,” following the lead of Pullig et al. See Pullig et al., *supra* note 77. There, each advertisement came with disclosures that the diluting brand was not associated with target brand. *Id.*

124. See Pullig et al., *supra* note 77, for similar advertisement forms.

125. We also included two other control advertisements that stayed the same for all respondents.

126. Amazon Mechanical Turk is an internet marketplace that allows businesses (and individuals) to coordinate with humans to perform tasks that computers are currently unable to do. It is a simple and cost-effective way for social scientists to get consumer data on various topics. Marketing, psychology, management, and legal scholars have routinely used Amazon Mechanical Turk to recruit respondents for surveys and other empirical studies. For more background on the marketplace, including its reliability and demographics, see Michael Buhrmester, Tracy Kwang & Samuel D. Gosling, *Amazon’s Mechanical Turk: A New Source of Inexpensive, Yet High-Quality, Data?*, 6 PERSP. ON PSYCHOL. SCI. 1, 3–5 (2011) (arguing that Amazon Mechanical Turk respondents are more diverse and the data obtained is just as reliable as more traditional methods); Frank R. Bentley, Nediya Daskalova & Brooke White, *Comparing the Reliability of Amazon Mechanical Turk and Survey Monkey to Traditional Market Research Surveys*, CHI EXTENDED ABSTRACTS (2017) (discussing the reliability of traditional marketplace consumer research versus Amazon Mechanical Turk).

not correctly replicate the names of the tarnishing marks were not included in the analysis of the data. The control group saw no tarnishing advertisements, but instead saw an unrelated one-page advertisement.

Afterwards, respondents answered our dependent variable questions on a Likert seven-point scale. We asked each respondent how much they agreed with the statement that each mark's products were associated with various attributes. For example, we asked respondents how much they agreed with the statement that "Louis Vuitton bags are high quality."¹²⁷ Table 1 shows each brand and the respective attribute we measured.

Table 1: Measured Associations for Each Brand

| Brand | Measured Association |
|---------------|--|
| Louis Vuitton | "How high quality are the products from Louis Vuitton?" "How likely are you to purchase products from Louis Vuitton?" |
| Godiva | "How tasty are the products from Godiva?" "How likely are you to purchase products from Godiva?" |
| Dove | "How clean are the products from Dove?" "How likely are you to purchase products from Dove?" |

We then measured the same dependent variables for the control group. We used the control group responses as baseline measurements that represent beliefs about our various brands/marks before seeing a tarnishing ad. We then compared these "pre-tarnishing/control" measurements to the post-tarnishing measurements to see if the tarnishing advertisements had any effect on brand reputation.¹²⁸

Results: We analyzed the results using separate Analysis of Variance (ANOVAs) and did not find any significant differences on any of the dependent variables measured.¹²⁹ However, there was a marginally significant difference in the Louis Vuitton purchase condition. Table 2 details the omnibus ANOVA results.

127. To get these associations we pretested what associations consumers had with each brand with a different set of respondents. We then took the most common attributes and used them in our study.

128. Note that ideally, we would run a within subjects design experiment (an experiment where respondents are shown all conditions in the design) where we would have measured perceptions of the brands before showing tarnishing advertisements, and then measured them again with the same respondents after showing tarnishing advertisements. However, given that respondents are quick to discover the purpose of within subjects studies like ours, we decided to include a randomly assigned control condition that would act as a pre-tarnishing measure in order to avoid any possible demand effects.

129. An analysis of variance test is used to compare the average response rate of two groups. The means of each response are compared using the variance of each sample to determine whether the two samples have means that are statistically different from each other. A statistically significant result indicates that the means of the two groups are highly likely to be different from each other. In social science methodology, the level of significance that is deemed to be statistically significant is five percent or one percent (which means that there is a five percent/one percent likelihood of seeing a difference in means between two groups, when in reality the means of the two groups are the same). A ten percent significance is deemed

Table 2: Omnibus ANOVA Results

| Dependent Variable | F (3186) = | Significance (p value) = |
|-----------------------------------|------------|--------------------------|
| Louis Vuitton—High Quality | .244 | .866 |
| Louis Vuitton—Purchase Likelihood | 2.050 | .108 |
| Godiva—Tasty | .535 | .665 |
| Godiva—Purchase Likelihood | 2.041 | .110 |
| Dove—Clean | .373 | .773 |
| Dove—Purchase Likelihood | .806 | .492 |

We were interested in whether the specific tarnishing ads had a negative effect on the associations of the target brand (e.g., did seeing Chewy Vuitton make consumers less likely to purchase Louis Vuitton in comparison to those who only saw a control advertisement). If tarnishing did exist, the associations consumers have for a given brand would be lower in the tarnishing ad condition than in the control condition. Therefore, we ran Tukey contrasts between the specific tarnishing brand (Chewy Vuitton, Dogiva, Dove Manure) and the control advertisement to determine if a single advertisement did harm the reputation of a brand.

We found that none of the tarnishing advertisements had significant negative effects on the target brands. One tarnishing ad however (Chewy Vuitton) had a marginal positive effect on how much consumers liked the target brand (Louis Vuitton). The mean difference in purchase likelihood between the Chewy Vuitton tarnishing condition and the control condition was .951 ($p=.074$) meaning that those in the tarnishing condition rated their likelihood to purchase one point higher on average on a seven-point scale in comparison to those in the control condition. We found this to be an interesting result. It seems that Chewy Vuitton increased how much respondents wanted to buy Louis Vuitton.¹³⁰ If we only defined tarnishing as changes in purchase likelihood, we would not find any tarnishing effects for cases like Chewy Vuitton. Although perceptions of Louis Vuitton did not change and so tarnishing is not likely happening, it is not enough to simply show that purchase likelihood does not change. Instead, purchase likelihood should be distinct from harm to the reputation as contemplated by trademark tarnishment.

Discussion: Study 1A showed no evidence of tarnishment. While respondents did view single tarnishing ads, the ads did not seem to influence the associations that respondents had towards the target marks. Two obvious reasons come to mind about why the tarnishing ads had little to no significant effect.¹³¹ First, one exposure is just

“marginally significant.” We indicate the level of significance of each of our tests with the designation “p.”

130. Note that this is consistent with empirical work on how copycat luxury goods increase purchase likelihood of authentic luxury goods. We term this effect “garnishing.” We hope to further think about this effect going forward in empirical work. Note that Buccafusco et al., *supra* note 3, found a similar effect with sex tarnishing.

131. A potential third reason is due to our small sample size. It is generally more difficult to find significant effects of mean responses when sample size is small because the standard deviation of the sample is large. In this case, even though our sample size was about fifty for each condition (larger than previous studies on brand dilution), we found no directional effects

not enough to move consumers. We address this concern in Study 2 and Study 3. Second, consumers might have strongly held beliefs about the target marks, thereby making it very difficult to influence consumers with one ad. In Study 1B we address this concern by using two brands/marks in the same category, one with a widely held reputation and one with a lesser known reputation.

2. Study 1B: Disgust and Strong Versus Weak Brands

Stimuli: The stimuli for Study 1B were similar to Study 1A. We focused on two toothpaste brands: Crest and Tom's.¹³² Crest has a large market share and is widely known as a nationwide brand. Tom's, however, has a drastically lower market share and is not as widely known.¹³³

Our tarnishing marks were Crest Hot Sauce and Tom's Hot Sauce. This is a type of disgust tarnishing. We expected that when associated with something like hot sauce, the toothpaste marks would be perceived as less fresh and less tasty. A sample of the advertisements is copied below in Appendix 2.

Procedure: The procedure for Study 1B was the same as Study 1A. We used a 3x1 between subject design where each respondent saw one of three ads (Crest's Hot Sauce, Tom's Hot Sauce, or Control Ad). They were then asked how much they agreed with the statement that Crest Toothpaste (or Tom's Toothpaste) was fresh and tasty on a seven-point Likert scale. They also ranked their preference for Crest, Colgate, Tom's and Sensodyne toothpastes. Again, we used the control group as a pre-tarnishing measurement of brand associations.¹³⁴

We again recruited respondents via Amazon Mechanical Turk (N=178).

Results: We analyzed the results using an ANOVA and did not find any significant differences on any of the dependent variables measured. The tarnishing marks had no effect on the target marks Crest and Tom's toothpaste. The omnibus ANOVA showed no difference among the Crest, Tom's, and control groups.¹³⁵

Discussion: Study 1B showed no evidence of tarnishing of either the Crest or Tom's marks. Even though Crest and Tom's have different reputations in the toothpaste space, we did not find that these differing reputations had any effect on

even marginally in favor of tarnishing. In that way, we think that sample size did not account for the lack of effects we found. See Loken & Roedder John, *supra* note 117 (using approximately eighteen respondents per condition); Pullig et al., *supra* note 77 (using approximately sixteen respondents per condition per study).

132. The actual toothpaste trademark is Tom's of Maine. We shorten it to "Tom's" because that is colloquially how consumer's use it in the marketplace.

133. For a discussion of Crest v. Tom's of Maine market share, see Amy Feldman, *Taking on the Toothpaste Giants: How One Entrepreneur Built a Fresh \$20 Million Brand*, FORBES (Mar. 29, 2018), <https://www.forbes.com/sites/amyfeldman/2018/03/29/taking-on-the-tooth-paste-giants-how-one-entrepreneur-built-a-fresh-20-million-brand/#289350d24019> [<https://perma.cc/YQ9D-JH7Q>].

134. See *supra* note 128 for why a between subjects design with a control group was used rather than a within subjects design.

135. Tom's cleanliness— $F(2175)=.264$, $p=.769$; Crest cleanliness— $F(2175)=.306$, $p=.737$; Tom's tastiness— $F(2175)=.165$, $p=.848$; Crest tastiness— $F(2175)=.251$, $p=.595$; Tom's rank— $F(2175)=1.111$, $p=.331$; Crest rank— $F(2175)=.452$, $p=.605$.

the likelihood of tarnishing occurring. We now turn to the other reason that Study 1A might have not had an effect—that one exposure is likely not enough to produce tarnishment. Therefore, in Studies 2 and 3 we increased tarnishing exposure.

D. Study 2: Websites and Sex Tarnishing

Study 1 results used one tarnishing exposure and found no tarnishing. However, multiple exposures could have a greater chance of showing tarnishing.

In Study 2 we utilized a common, real-life tarnishing situation: a website. Several cases have arisen because a website was created that used a domain name similar to a famous existing mark.¹³⁶ These cases have mainly arisen in the context of sex tarnishing. The most visible case concerned Barbie. “Barbiesplaypen.com” posted videos and photos of Barbie dolls taking part in lewd sexual acts. As such, in this study we focus on sex tarnishing that occurs when a website URL and webpage harm the reputation of a protected mark/brand.

Stimuli: We created screenshots of a fabricated website titled “ChicksFillA.com.” In our study, Chicks Fill A was an adult store that had a website containing several photos of scantily clothed women/men and adult products, including pornographic magazines. We created Chicks Fill A with the intent that it would tarnish the brand Chick-fil-A, a popular fast food chain that serves only chicken products. We predicted that being associated with sex would make people less likely to want to consume food from Chick-fil-A. Sex should have a unique tarnishing effect on Chick-fil-A. Over the course of several years, Chick-fil-A has branded itself as a company that is focused on wholesome, religious, and family values. We thought that being associated with sex and adult products would certainly harm the Chick-fil-A mark.

We used a home page, an about page, and a reviews page to provide ample exposure to the tarnishing mark. A website constitutes several exposures because we allow respondents to look through the different pages of the website which display the tarnishing mark several times.

Procedure: We used a 2x1 between subjects design where consumers either saw the Chicks Fill A website or a control website.¹³⁷ They were asked to click through the websites, explore the pages, and then answer some filler questions.¹³⁸ Finally, respondents indicated how wholesome and tasty they found Chick-fil-A.¹³⁹ They also rated how much they liked products from Chick-fil-A and ranked their preferences

136. *E.g.*, *Mattel, Inc. v. Internet Dimensions Inc.*, No. 99 Civ. 10066(HB), 2000 U.S. Dist. LEXIS 9747 (S.D.N.Y. July 13, 2000) (considering Mattel’s argument that the website “barbiesplaypen.com” that portrayed Barbie dolls in lewd sex acts tarnished the Barbie brand); *Williams Sonoma v. Friendfinder Inc.*, 2007 U.S. Dist. LEXIS 31299 (N.D. Cal. April 17, 2007) (considering Williams Sonoma’s argument that Friendfinder was using the mark “Pottery Barn” to direct internet users to sex oriented websites).

137. We also included a second control website that stayed the same across all respondents.

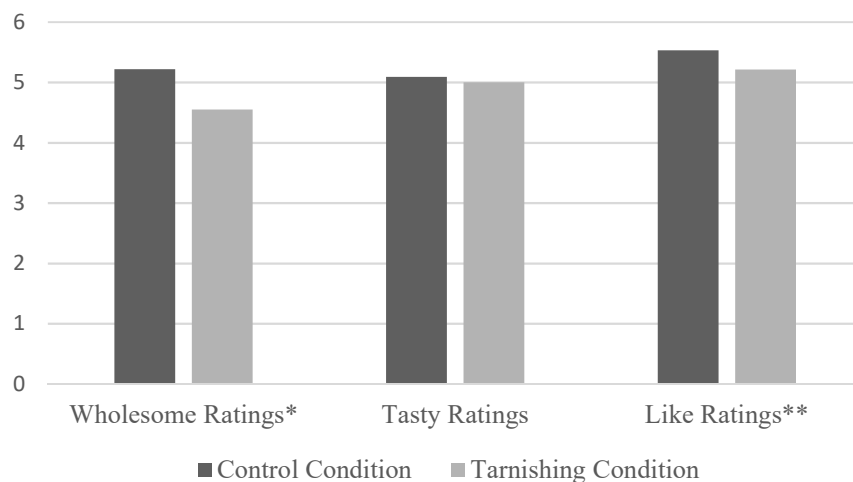
138. These filler questions were included to make sure that the consumers had some time before being asked to rate their brand associations and attitudes towards Chick-fil-A. Filler tasks were unrelated to the study.

139. Specifically, respondents were asked how wholesome the company is, how tasty the food is, and how much they like the company Chick-fil-A.

among Chick-fil-A, Chipotle, Qdoba, and McDonald's. We then asked some demographic questions about gender, political leaning, and previous adult store experience.¹⁴⁰ We treated the control condition as pre-tarnishing just as we did in our previous studies. We again recruited respondents via Amazon Mechanical Turk (N=154).

Results: We ran separate ANOVAs on the various dependent variables and found a negative effect of the tarnishing ad on wholesome associations and liking of Chick-fil-A. Figure 1 below shows the ratings of Chick-fil-A in the tarnishing condition versus the control condition.

Figure 1: Results of Chick-fil-A Sex Tarnishing Website on Brand Associations



* $F(1152) = 6.107, p = .015$

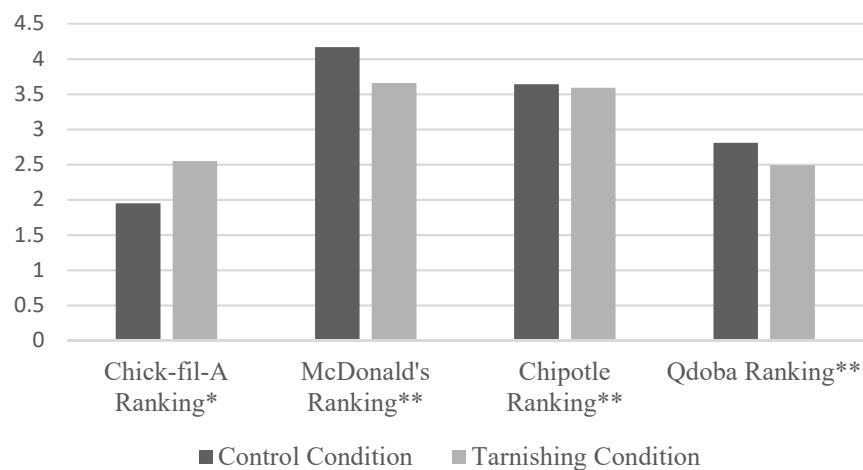
** $F(1152) = 2.813, p = .09$

Wholesome ratings went down significantly after respondents saw the tarnishing website. In addition, those in the tarnishing condition liked Chick-fil-A less (marginally significant). Tasting ratings did go down (directionally) but we did not see statistically significant effects of tarnishing. Importantly, these decreases of Chick-fil-A perceptions after viewing the tarnishing website did not hold for the other fast food chains. The tarnishing website had no effect on how respondents viewed the other fast food chains. This lends us to conclude that the effect of tarnishing is unique to the similar senior trademark (i.e., seeing sex does not put respondents in negative moods or harm the reputation of any trademark, just the reputation of the trademark at issue).

140. Our intention behind these questions was to control for various factors that could influence existing perceptions of Chick-Fil-A. Chick-fil-A has branded itself as a religious company. Given its public political leaning, we anticipated that conservatives would be more likely to have positive associations of the brand. We also thought that women may be more offended by the Chicks Fill A manipulation than men and wanted to be able to account for it.

We also found a marginally significant negative effect of the tarnishing mark's website on the rank of Chick-fil-A against its competitors. Figure 2 shows this result. Both Chipotle and Qdoba saw marginally significant results as well but in the opposite direction (those in the tarnishing condition like those brands more). This makes sense because, given that we restricted respondent choice to the four brands, the consumers who moved from Chick-fil-A seemed to have moved to Chipotle and Qdoba. While the figure shows an even greater improvement in the McDonald's ranking, there was considerably more variance in the responses making the shift not statistically significant.

Figure 2: Results of Chick-fil-A Sex Tarnishing Website on Rank¹⁴¹



*Chick-fil-A $F(1152)=3.286$, $p=.09$
 **McDonald's $F(1152)=1.852$, $p=.176$; Chipotle $F(1152)=3.422$, $p=.07$; Qdoba $F(1152)=2.484$, $p=.09$.

We then ran a two-way ANOVA¹⁴² treating the ad condition and political leaning as fixed factors.¹⁴³ We expected that those who were more conservative would like Chick-fil-A more at the start, and hence, would show more evidence of tarnishing. The two-way ANOVA showed no significant interaction term for any of the dependent variables but did show a main effect of political leaning on wholesome ratings,¹⁴⁴ leading us to believe that political leaning did not influence how the tarnishing ad effected mark associations.

141. It should be noted, that for rankings, a higher number is a worse ranking.

142. An ANOVA is an analysis of variance test. It is commonly used test to determine whether means of two samples are different from each other.

143. Political leaning was measured on a seven-point scale with seven being extremely conservative and one being extremely liberal. We then created a dummy variable where conservative was defined as a rating five or above and liberal was defined as four or below.

144. The main effect of political leaning for wholesome was significant: $F(1152)=2.740$, $p=.011$. The interaction term of political leaning and tarnishing ad for wholesome was not significant: $F(1152)=.393$, $p=.905$.

Discussion: In Study 2 we explored whether increases in ad exposure had corresponding increases in tarnishing and we found mixed evidence of sex tarnishing. While being in a tarnished condition did have some negative effect on the brand reputation of Chick-fil-A, it did not have a significantly large effect across all dependent variables. We also note that gender and political leaning did not significantly affect our results.

E. Study 3: Sex Tarnishing and Banner Ads

Our previous studies looked at various forms of tarnishing and slightly increased exposures of tarnishing brands. This study attempts to dive more deeply into the exposure hypothesis and to test a more realistic form of advertisements.

Study 3 utilized banner ads (ads that appear on a webpage that are sponsored by the advertising party) on online news articles. This is an increasingly common occurrence in everyday online browsing and represents the most realistic form of advertising exposure that we studied.

Stimuli: We continued to use ChicksFillA.com in this study. We chose four different online news articles and placed a number of advertisements on these articles. A sample article with sponsored ChicksFillA.com ads is shown below in Appendix 3.

Procedure: We used a 4x1 between subject's design where each subject saw one of four levels of ad exposure (zero tarnishing ads, one tarnishing ad, four tarnishing ads, and eight tarnishing ads). We spaced out the tarnishing ads across the four online news articles. Respondents first read the articles, then answered some filler questions before answering questions about the articles.¹⁴⁵ We then asked respondents to rate how wholesome and tasty they found Chick-fil-A. They also rated how much they liked Chick-fil-A products and ranked their preferences between Chick-fil-A, Chipotle, Qdoba, and McDonald's. Finally, respondents answered some demographic questions about gender and political leaning.

We again recruited respondents via Amazon Mechanical Turk (N=171).

Analysis: We ran separate ANOVAs on the various dependent variables and found significant negative effects of ad exposure on wholesome ratings and liking ratings of Chick-fil-A. We found only marginally negative effects on tastiness ratings.¹⁴⁶ Figures 3 through 5 below show how increasing ad exposure decreases the tastiness, liking, and wholesome ratings of Chick-fil-A.

Running Tukey contrasts showed that the zero-ad and four-ad conditions for tastiness ratings were marginally significant, with a mean difference of .777 and p-value of .106. Our results show a direct relationship between tarnishing and ad exposure, with increased ad exposure leading to increased tarnishing.

145. We used these questions as manipulation checks. Those that did not correctly answer simple questions about the news articles were not included in the analysis, as it is unlikely they were paying attention to the survey.

146. Wholesome Ratings $F(3167)=2.537$, $p=.058$; Liking Ratings $F(3167)=3.738$, $p=.012$; Tasty Ratings $F(3167)=1.988$, $p=.118$. Ranking was not significant $F(3167)=1.308$, $p=.217$.

Figure 3: Tastiness Ratings for Chick Fil A by Condition

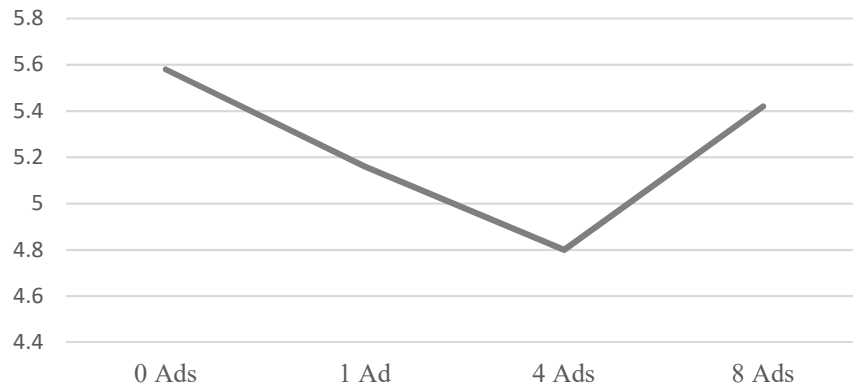


Figure 4: Liking Ratings for Chick Fil A by Condition

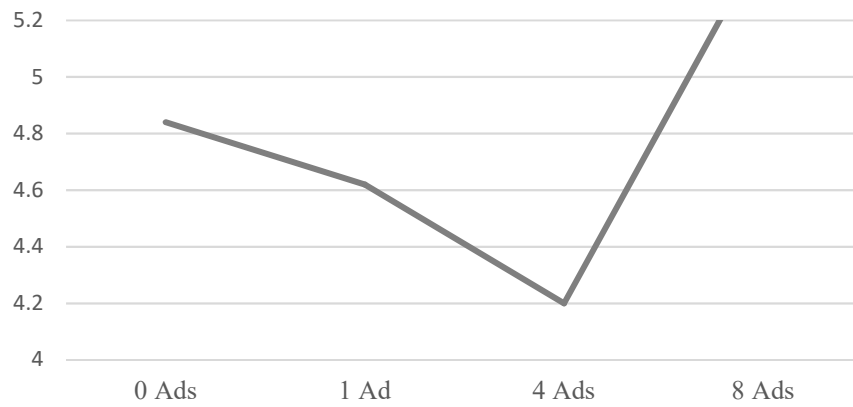
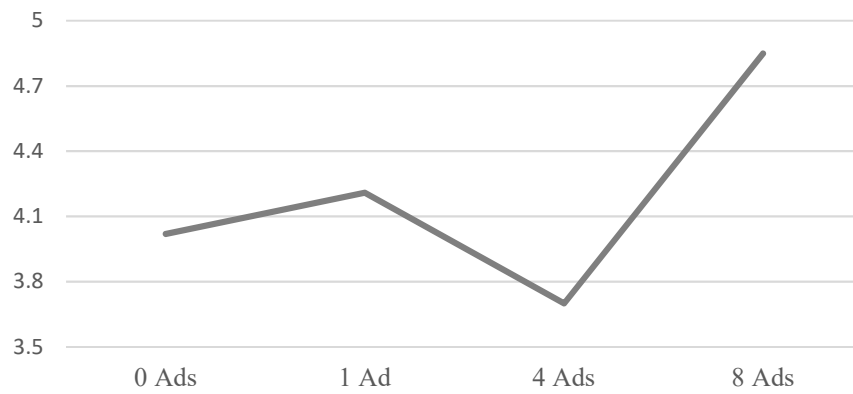


Figure 5: Wholesome Ratings for Chick Fil A by Condition



The eight-ad condition showed a large spike in ratings. Those in the eight-ad condition were not only immune to the tarnishing advertisements but consistently rated Chick-fil-A higher on all accounts in comparison to the other conditions. We think this was due to a potential demand effect. Respondents in the eight-ad condition likely discovered what we were looking for and thought we wanted a more positive evaluation of Chick-fil-A. Eight ads within four newspaper articles provided an obvious manipulation and this could have affected the results. We expect that if we had distributed the eight ads over more than four articles, we would find results consistent with those in the one-ad and four-ad conditions, as well as results consistent with those brand attitude changes in Study 2 above.¹⁴⁷

We also ran a two-way ANOVA treating ad exposure and political leaning as fixed factors.¹⁴⁸ For wholesome ratings, the interaction term was significant.¹⁴⁹ Conservatives were more negatively affected by tarnishing ads than liberals. Even though interaction terms were not significant in our other two-way ANOVAs,¹⁵⁰ we did find that conservatives showed the hypothesized effect more than liberals. Looking at Figures 6 through 9 below we see that the trend for conservatives on all measured metrics of brand reputation show the existence of sex tarnishing when ad exposure is increased.¹⁵¹

147. Another explanation could be due to a perceived identity threat by conservative customers. As we look below on the two-factor ANOVA, we find that the uptick in the eight condition is driven by the responses of conservative consumers. In our study, conservative consumers like Chick-fil-A more than liberals do. This is likely because Chick-fil-A espouses conservative principles and hence lines up with the social identity matrix of conservatives. When seeing an ad for a Chicks Fill A adult store, there is a type of cognitive dissonance or social identity threat for the conservative consumer—more likely in the eight-ad condition, because the Chicks Fill A brand was incredibly obvious and apparent. Psychology literature suggests that, when faced with such social identity threat, consumers respond by elevating their perceptions of brands that are closely tied to their social identity in order to combat the threat. The increase in brand associations in the eight condition could be a social identity threat response by conservative consumers. For a detailed discussion of responses to social identity threat, see Amy N. Dalton & Li Huang, *Motivated Forgetting in Response to Social Identity Threat*, 40 J. OF CONSUMER RES. 1017, 1017 (2014).

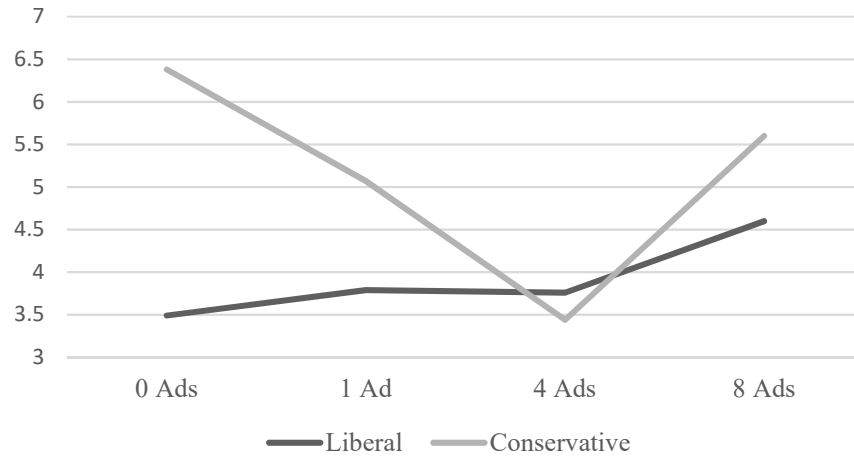
148. We dummy coded the political leaning scale just as in previous studies.

149. $F(3163)=3.343$, $p=.021$.

150. Tasty Ratings $F(3163)=1.431$, $p=.236$; Rank $F(3163)=1.910$, $p=.130$; Liking $F(3163)=1.652$, $p=.180$.

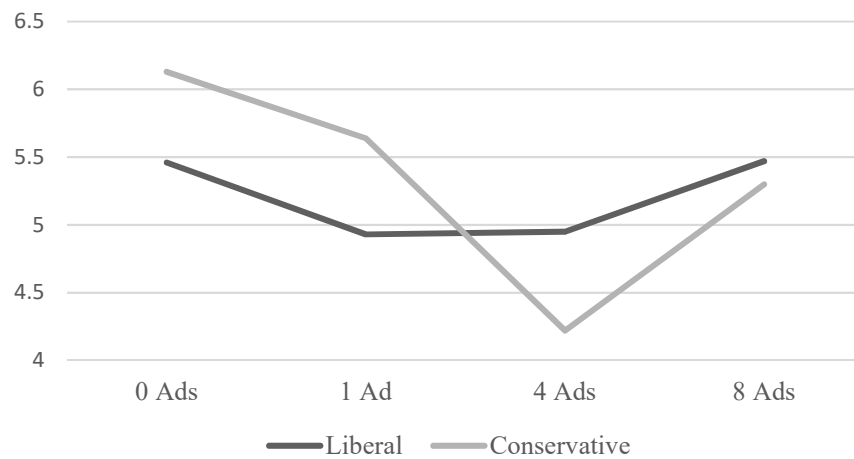
151. Note that the eight-ad condition is still an outlier and an anomaly even when controlling for political leaning.

Figure 6: Wholesome Ratings of Chick-fil-A Condition x Political Leaning



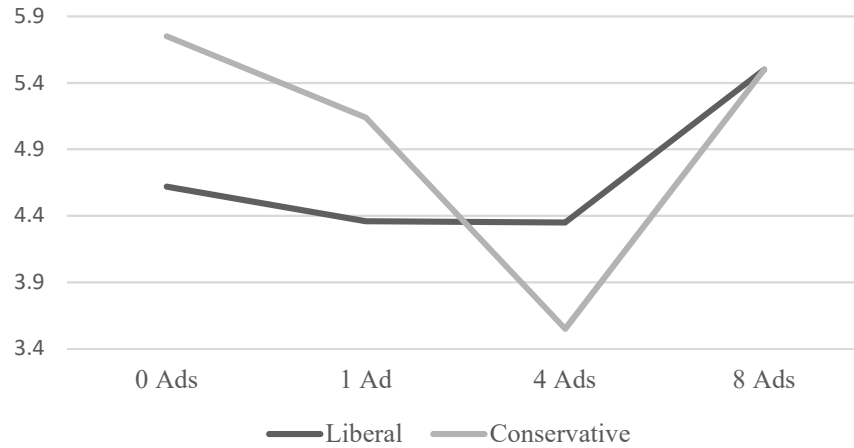
Contrasts indicate that the zero-ad and four-ad conditions for conservatives were significantly different (mean difference=2.931, $p=.003$).

Figure 7: Tasty Ratings of Chick-fil-A Condition x Political Leaning



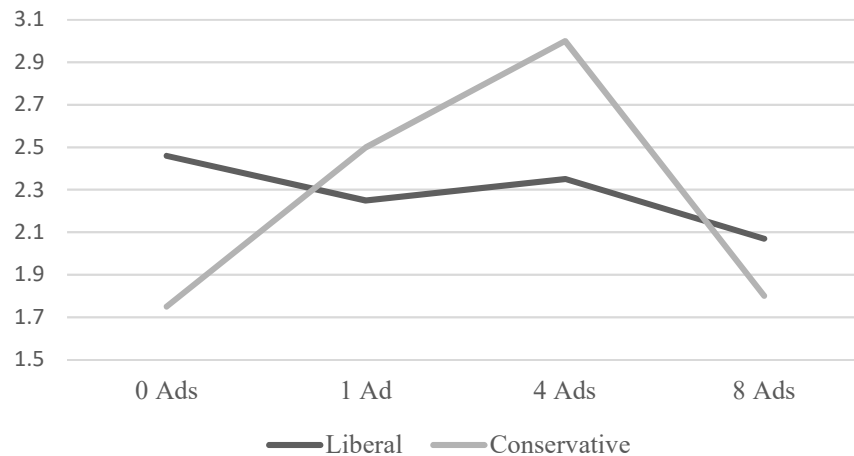
Contrasts indicate that the zero-ad and four-ad conditions for conservatives were marginally significantly different (mean difference=1.903, $p=.079$).

Figure 8: Liking Ratings of Chick-fil-A Condition x Political Leaning



Contrasts indicate that the zero-ad and four-ad conditions for conservatives were significantly different (mean difference=2.194, $p=.031$).

Figure 9: Ranking of Chick-fil-A against competitors Condition x Political Leaning



Note that a higher ranking means a lower rating in terms of liking. Contrasts indicate that the zero-ad and four-ad conditions for conservatives were marginally significantly different (mean difference=1.250, $p=.095$).

Discussion: In this study, we directly manipulated the exposure of sex tarnishing ads. We used banner ads on online news articles. We found that as we increased the level of ads from zero to eight, we found larger effects of tarnishing. The tipping point seemed to be four ads. Four tarnishing ads seemed to have consistently caused significant tarnishing effects for those respondents who were conservative leaning. When seen in context with Studies 1A and 1B this finding makes sense. One-off

advertisements and a small number of tarnishing exposures has little to no effect on mark reputation. But when exposure is increased, we see sex tarnishment become a reality.

We also note that all our studies are consistent with the classic Elaboration Likelihood Model as described above in Part II. The model predicts that when cognitive capacity is available, the central route to attitude persuasion will be used. This could explain why catalogue and website tarnishing advertisements did not have large effects on brand associations and brand attitudes. For those ads, we directed consumers to focus on the advertisements themselves and to read and evaluate the marks. This likely triggered the use of the central route. The central route is characterized by reasoned, rational cognition. In this type of processing, it is likely that consumers were extremely, readily cognizant that the two brands (tarnishing brand and the target brand) were from two different sources. As such, they were less likely to allow the tarnishing brand to dilute the target brand. However, in our last study, we did not direct any attention towards the advertisements themselves. Instead, we told consumers to focus on the newspaper articles. The tarnishing advertisements were only background noise. Therefore, when seeing the advertisements, consumers were under cognitive load and stress because they were focused on the articles. In this case, we would predict the peripheral route of processing to manifest. Given that the peripheral route is more emotionally driven and focused on using crude cues rather than reasoned evaluation, it is likely that consumers were less readily cognizant that the two brands were distinct (although, it was clear nobody was confused as to the source). Therefore, they were more likely to allow the tarnishing brand to dilute the target brand.

The interaction of political leaning and tarnishing is also an interesting take-away. We found that conservatives were more likely to have positive association and attitudes towards Chick-fil-A as a baseline (a main effect of conservative leaning). This is likely because Chick-fil-A espouses conservative ideals and so is more appealing to conservative consumers. It also is the case that tarnishing ads had a larger effect on conservatives than they did on left-leaning consumers. This makes sense as an adult store is likely to be extremely unappealing to a conservative (at least more so than a left-leaning consumer). Given both the unappealing nature of the tarnishing ad and the higher baseline liking of Chick-fil-A by conservatives, we think it is consistent with theory that conservatives would show larger effects of tarnishing than liberals.

F. Replication of Study 3

Our study above implies that as the number of ads goes up, the potential for a tarnishing effect also goes up. It is important in any experimental survey methodology to replicate effects to make sure that the initial results manifest for different groups of consumers. To replicate our banner ad study above, we used a new sample of 191 consumers.¹⁵² Since it seemed that four tarnishing ads were the

152. In finding new consumers to test, we made sure that on Amazon Mechanical Turk we had indicators for those respondents who had taken Study 2 and Study 3, above. We did not want any consumers to have already seen the Chicks Fill A website or banner advertisements.

sweet spot of reputational harm, we only compared mark associations and attitudes for two conditions (zero tarnishing ads versus four tarnishing ads). The study proceeded in the exact same way as above except we asked two new questions to get at consumption habits of respondents. We asked respondents how often in the past two months they have consumed Chick-fil-A products and on average how much they spend per visit to Chick-fil-A. We did this to help us estimate the revenue effect of the four tarnishing ads.

We successfully replicated our previous results and found statistically significant effects of four tarnishing ads on brand associations and attitudes. Those that saw the four tarnishing ads rated Chick-fil-A as less tasty, preferred it less compared to competitors, and liked it less: Tasty Ratings $F(1189)=12.02$, $p=.048$; Rank $F(1189)=4.355$, $p=.059$; Liking $F(1189)=18.395$, $p=.015$. Again, we see that brand attitude shows the largest statistical effect (one-percent significance level) and the largest absolute effect. The ratings of liking went from 5.40 to 4.78, a decrease of .62 on the Likert Scale. This comports nicely with the Elaboration Likelihood Model's predictions as described above.

These results held both for conservative and non-conservative consumers. The robustness of our results make us confident that increasing sex-tarnishing ad exposure does increase the likelihood of harm to the reputation of the existing senior brand.

We also note that the decrease in liking ratings (among others) might not seem at first to have serious revenue effects tied to purchase likelihood—after all it was only a decrease of .62 on a scale of one to seven. However, we can provide an estimate of the revenue effect of only a .62 decrease in liking ratings given that we asked consumers how often they consumed Chick-fil-A and how much money they spent when they visited the store previously. Doing this, we estimate that the revenue effect of four tarnishing ads is a decrease of \$1804.50 for our sample. The pre-tarnishing estimated revenue for our sample was \$7,650, and the post-tarnishing estimated revenue for our sample was \$5854.50.¹⁵³ This shows that even small changes in mark

153. To get the estimated revenue for the pre-tarnishing sample, we first calculated the number of people who answered each interval on the one to seven scale (e.g., ten people answered a one, eight answered a two, etc.). We then divide these numbers by the total population of the pre-tarnishing sample to get the percentage of people who gave a rating "n" to their liking of Chick-fil-A. We call this percentage P_n^Z where P represents the percentage of people in the non-tarnishing sample, "Z," who gave Chick-fil-A a liking rating of "n" where $n=1-7$. We then define P_n^T where P represents the percentage of people in the non-tarnishing sample, "T," who gave Chick-fil-A a liking rating of "n" where $n=1-7$. We then used consumers' liking rating (between one and seven) to calculate how often they patron Chick-fil-A. This was easy to calculate as it was one of the added questions we asked in our replication study. We asked this question on a two-month specification, so we multiplied the answers by twelve. We then averaged the number of visits across each rating. We define the number of yearly visits for any given rating as V_n where "n" represents each rating of one to seven. Note that this number is the same across the pre-tarnishing and post-tarnishing samples, meaning we only estimate how the movement along the Likert scale affects revenue. We also asked our respondents their average dollar expenditure for each visit to Chick-fil-A. We averaged these to get nine dollars, which after looking at the Chick-fil-A menu, does seem like the reasonable price for one meal. With these numbers, we can calculate the pre-tarnishing estimated revenue and the post-tarnishing estimated revenue by taking the number of

attitudes and mark associations that harm the reputation of the brand can have drastic effects on revenue. Our analysis above shows that showing four tarnishing ads created a twenty-five percent decrease in revenue for our sample. However, we do not argue that this is a necessary or even sufficient measure to prove tarnishment. Trademark tarnishment should be recognized even in the absence of a decrease in revenue. We only take on this exercise to show that tarnishing can have serious negative consequences on the financial health of a company.

Note that this is an effect measured directly after viewing the tarnishing advertisements. We acknowledge, as is the case with any advertisements, that there is a decay of the total effect on brand attitudes in the same way that viewing an advertisement for a product creates a spike in awareness and association that decreases over time. We expect that the tarnishing effect of an ad is not everlasting. The effect spikes and then likely decreases over time. However, if our respondents were then shown these ads again as the tarnishing effect began to decay, we think that this would cause the effect to permeate throughout time.¹⁵⁴

IV. SURVEY METHODOLOGY IN TRADEMARK TARNISHMENT CASES

In this part, we briefly show why using experimental survey methodology is a workable requirement for plaintiffs in trademark dilution by tarnishment cases. We ultimately argue that our methods above should be the type of proof that is required in subsequent court proceedings. In Part V below, we focus on what aspects make a good survey for trademark dilution cases and what aspects courts and litigants should focus on.

A. Surveys and Trademark Litigation

Surveys are routinely used in intellectual property cases including patents and trademarks.¹⁵⁵ In patent litigation, conjoint analysis (a form of survey methodology) is routinely used to show which attributes of a product consumers prefer and how

consumers who gave a specific rating to Chick-fil-A multiplying it by the number of yearly visits of consumers by specific rating, and finally multiplying by the average expenditure of \$9 per visit. We then simply take the difference between the two revenues. This difference in revenue can be represented by the following expression:¹⁵⁴ $\sum_{i=1}^n p_i^a v_i - \sum_{i=1}^n p_i^b v_i$.

154. Much has been written about the decay effect of advertisements and the frequency at which advertising needs to be shown to be effective. The following is a non-exhaustive representative list: HERMANN EBBINGHAUS, *MEMORY* (Henry A. Ruger & Clara E. Bussenius trans., 1913) (showing that consumers forget advertising as distance from exposure increases); Vijay Mahajan & Eitan Muller, *Advertising Pulsing Policies for Generating Awareness for New Products*, 5 *MARKETING SCI.* 2, 89 (1986) (building an analytical model that evaluates whether pulsing or an even policy of advertising is more effective); Julian L. Simon, *What Do Zielske's Real Data Show About Pulsing?*, 19 *J. MARKETING RES.* 415, 415–20 (1979) (finding that advertising is most effective when it is pulsed in non-uniform increments rather than a large one-time burst and more effective than uniform pulsing).

155. See, e.g., *TRADEMARK AND DECEPTIVE ADVERTISING SURVEYS: LAW, SCIENCE, AND DESIGN 3–7* (Shari Seidman Diamond & Jerre B. Swann eds., 2012); Bird & Steckel, *supra* note 6, at 1017; Diamond & Franklyn, *supra* note 1.

much they value those attributes.¹⁵⁶ This is helpful for damages in patent infringement cases.

Surveys have a strong historical role in trademark analysis.¹⁵⁷ They have been used traditionally to help courts and litigants understand whether a mark is famous in this first instance,¹⁵⁸ whether two marks are similar enough, and whether a junior mark is likely to confuse consumers as to the source of a good.¹⁵⁹ In a sample of ninety-six cases, Diamond and Franklyn found that eighty-one percent of surveys used in trademark litigation cases were used to determine a likelihood of confusion, thirty-three percent were used to establish secondary meaning, and twenty percent were used for deceptive meaning.¹⁶⁰

The likelihood of confusion standard¹⁶¹ is satisfied using either survey evidence of proposed confusion (like we do above), actual confusion (bringing in consumers and experts who testify that consumers were actually confused), and “argument by inference.”¹⁶² In a likelihood of confusion survey, consumers are generally shown both marks at issue and asked where each comes from. If the majority of consumers

156. Suneal Bedi & Dave Reibstein, *Damaged Damages: Errors in Patent and False Advertising Litigation* (Kelley Sch. of Bus. Working Paper No. 19-41, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3440817 [<https://perma.cc/XB8S-4BBX>].

157. Although initially surveys were not widely used, over the course of the past fifty years, survey use has rapidly increased:

According to one account, only 18 surveys were offered in reported cases in the fifteen years between 1946 and 1960, growing to 86 surveys between 1961 and 1975 (approximately 6 per year). Between 1976 to 1990, 442 surveys were presented in reported cases (29 per year); between 1991 and 2005, 742 surveys were offered (approximately 49 per year on average); and in the seven years between 2006 and 2012, about 315 surveys appeared in reported cases (approximately 45 per year).

See Diamond & Franklyn, *supra* note 1, at 2040.

158. This is a multifaceted requirement in trademark litigation. One prong of satisfying this is establishing secondary meaning. Secondary meaning is important because one cannot trademark a term that does not have a special meaning:

The question of whether a descriptive mark has achieved secondary meaning is important both in the bulk of litigation that takes place before the Trademark Trial and Appeal Board (TTAB) in office actions to determine whether a descriptive mark qualifies for trademark protection through registration on the Principal Register and in trademark infringement litigation in federal court. Although circumstantial measures are often used to support a claim of secondary meaning (e.g., ‘amount and manner of advertising’ and ‘volume of sales’), surveys provide direct evidence on the relevant legal question: whether the relevant consuming public has come to identify the mark as denoting source.

See Diamond, *supra* note 1, at 2034.

159. See Diamond & Franklyn, *supra* note 1.

160. *Id.* at 2057.

161. In a trademark infringement action, a senior mark must simply show that the junior mark “is likely to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1114(1)(a) (2012).

162. See Diamond & Franklyn, *supra* note 1, at 2036 (citing THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:158 (4th ed. 2014)).

think both marks come from the same source, this is good evidence of a likelihood of confusion.

Surveys have also been recently used to show dilution.¹⁶³ But most survey empirical work, whether in law reviews or court proceedings, has focused on dilution by blurring.¹⁶⁴ These surveys focus on measuring whether junior marks harm the distinctiveness of a relevant senior mark. However, little survey work has been introduced in dilution by tarnishing cases.¹⁶⁵ This is partly because, as described above, the standard of proof has been puzzling to legal scholars and courts. But it is also due in part to a lack of a good framework for measuring the likelihood of reputational harm. We have provided such a framework in this Article and below argue why it is a workable standard.

B. Surveys in Trademark Tarnishment Cases

Surveys are a fruitful way to measure the reputation of harm to a senior trademark. The crux of the problem for using surveys for trademark tarnishment has been the lack of a good definition of trademark reputation. It is here where marketing scholarship is useful because marketing scholars have consistently measured and studied brand reputation.¹⁶⁶ To better understand trademark and brand reputation, marketing scholarship routinely uses survey methodology.¹⁶⁷ Moreover, these surveys routinely use fictional brands and stories to manipulate brand associations and brand attitudes.¹⁶⁸ This is exactly the correct way to measure a likelihood of

163. Diamond & Franklyn, *supra* note 1, at 2039.

164. See Jerre B. Swann, *Swann's Rebuttal to Diamond*, in TRADEMARK AND DECEPTIVE ADVERTISING SURVEYS 163, 163–65 (arguing against Diamond that impaired distinctiveness can be established empirically); Beebe, *supra* note 1; Morrin & Jacoby, *supra* note 110; Pullig et al., *supra* note 77. Cases are also seeing more use of dilution surveys. See, e.g., Nike, Inc. v. Nikepal Int'l, Inc., 84 U.S.P.Q. 2d (BNA) 1820 (E.D. Cal. 2007).

165. We found one case concerning trademark tarnishing that did use empirical survey evidence. *Smith v. Wal-Mart Stores, Inc.*, 537 F. Supp. 2d 1302 (N.D. Ga. 2008) (Wal-Mart sued Charles Smith for making t-shirts with the slogan “Wal-Qaeda” with the intent to make political statement against Wal-Mart. The court there heard testimony from Jacob Jacoby on a survey he commissioned to find out if the t-shirts harmed the reputation of Wal-Mart’s trademark. The case was ultimately dismissed because the t-shirts were political speech and protected under the First Amendment).

166. See *supra* Part II for further discussion on marketing scholarship on brand dilution.

167. An exhaustive list of marketing scholarship that uses surveys to measure brands would be incredibly long. For an overview of surveys in the field, see George Gallup, Jr., *Survey Research: Current Problems and Future Opportunities*, 5 J. CONSUMER MARKETING 27, 27–30 (1988).

168. The following is a non-exhaustive list of marketing scholarship using fictional brands in studying brand dilution: Kong Cheen Lau & Ian Phau, *Extending Symbolic Brands Using Their Personality: Examining Antecedents and Implications Towards Brand Image Fit and Brand Dilution*, 24 PSYCHOL. & MARKETING 421, 421–44 (2007) (using fictional brands to study how various factors of a brand speak to consumers); Sanjay Sood & Kevin Lane Keller, *The Effects of Brand Name Structure on Brand Extension Evaluations and Parent Brand Dilution*, 49 J. MARKETING RES. 373, 373–82 (2012) (using fictional brands to study how brand extensions harm the underlying brands); Vanitha Swaminathan, Richard J. Fox & Srinivas K.

reputational harm to a trademark. Long-standing marketing scholarship methods provide rigor and precedent for courts to require sophisticated survey evidence.

It is important to note that there are alternatives to surveys to measure dilution. Regression analysis using real-life data is in many ways an *ideal* way to measure harm to the reputation of a mark. With regression analysis, large amounts of data would be needed to attempt to show the point at which mark association and mark attitudes change.¹⁶⁹ Ideally, to do this a litigant would have an abundance of real-life market measures of mark attitudes, mark associations, and purchase data for two periods of time. First, data would need to be collected for a set time period before a tarnishing mark was introduced, and then an equal time period after a tarnishing mark was introduced. With this robust data, a regression could be run to determine whether the introduction of a tarnishing mark had a negative effect on the measured mark associations, mark attitudes, and purchasing behavior.

There are several advantages of using regression analysis to measure reputational harm. Surveys are not quite the “real world”—their external validity can be questioned. In our surveys above, no consumers made actual decisions in a store. Using real-world data and regression analysis makes the external validity of the result drastically higher than for a survey. This is where the advantages stop and the severe difficulties begin.

First, to use real world data on mark associations, mark attitudes, and purchase behavior, a litigant needs this data. Collecting data on brand perceptions by consumers is not that difficult; one simply needs to ask consumers who patron the store. This data needs to be collected at equal time periods. For example, one cannot collect data every day for a month and then skip a few days and continue collecting data. For regression analysis to be specified correctly, data must be collected in equal installments. This is very difficult to do over a long period of time.

Second, to isolate the causal effect of a tarnishing mark, we must control for every other potential variable that can affect mark reputation and sales. This is practically impossible. Marketing of a competitor brand, marketing of the litigant’s brand, the interest rate, political elections, monetary policy, the stock market, weather and several other factors can influence how people make decisions and what perceptions they have of a brand.¹⁷⁰ To truly isolate the effect of a tarnishing mark, a regression needs to hold constant all other metrics that might influence a mark’s reputation. As such, drawing causal influences from real-world data is incredibly difficult.¹⁷¹

Reddy, *The Impact of Brand Extension Introduction on Choice*, 65 J. MARKETING 1, 1–15 (2001) (using fictional brands to study brand extension effects).

169. One potential application of regression analysis would be to use VAR models to delineate dilution of associations and attitudes. See Srinivasan et al., *supra* note 73.

170. At least one article in the marketing arena has attempted to use brand perceptions across many consumers and create causal inferences. See Srinivasan et al., *supra* note 73 (using vector autoregressive models to isolate effects of brand perceptions on sales).

171. See, e.g., Douglas A. Hibbs, Jr., *Problems of Statistical Estimation and Causal Inference in Time-Series Regression Models*, 5 SOC. METHODOLOGY 252, 253–308 (1973) (detailing the difficulties of using regression data over time to make causal inferences); Christopher Winship & Stephen L. Morgan, *The Estimation of Causal Effects from Observational Data*, 25 ANN. REV. SOC. 659, 659–706 (2009) (discussing several designs and data analysis models available to strengthen causal inference from non-experimental data).

Survey methodology using the type of randomization that we used above allows us to easily draw causal connections. Given that our study is done on Amazon Mechanical Turk and given that we have only varied the relevant trademark between our conditions, we can safely say that the result we find is causally connected to the tarnishing mark.¹⁷²

Lastly, to use real data, litigants must wait for a tarnishing mark to be introduced into the market and then wait for it to have an effect before they can analyze whether the mark caused reputational harm. This means that regression analysis cannot handle the Chick-fil-A case in the introduction. It can only handle non-fictional tarnishing marks. Regression analysis can potentially measure “actual harm.” Given the federal standard—a “likelihood” standard—courts and litigants must employ a method that can handle fictional brands and preemptive tarnishing lawsuits. Surveys do exactly this. Above we created a fictional brand (Chicks Fill A) and showed how it affected the brand reputation of Chick-fil-A. Only with surveys using randomization can this be achieved.¹⁷³

C. Reliability and Cost of Surveys in Trademark Tarnishing Cases

Legal scholars have been critical of survey and empirical work in litigation arguing that it is unreliable and costly.¹⁷⁴ We respond to those criticisms here briefly.

Survey methodology has been a staple of consumer behavior research for decades.¹⁷⁵ Consumer behavior research generally is considered the study of how consumers in the marketplace make decisions and behave.¹⁷⁶ Trademark dilution is

This difficulty of causal analysis with real world data is tied to the problem of endogeneity as well. For discussions of endogeneity in regression analysis, see Rubin, Donald B. For objective causal inference, design trumps analysis. *Ann. Appl. Stat.* 2 (2008), no. 3 (emphasizing that endogeneity problems should be analyzed before data is collected).

172. See, e.g., HANDBOOK OF STATISTICAL MODELING FOR THE SOCIAL AND BEHAVIORAL SCIENCES 1–32 (Gerhard Arminger, Clifford C. Clogg & Michael E. Sobel eds., 1995) (detailing the methods in social science that produce the best causal inferences); Steven J. Spencer, Mark P. Zanna & Geoffrey T. Fong, *Establishing a Causal Chain: Why Experiments are Often More Effective Than Mediation Analyses in Examining Psychological Processes*, 89 *J. PERSONALITY & SOC. PSYCHOL.* 845 (2005) (discussing why randomization and surveys can isolate causality better than real-world regression analysis).

173. See *supra* Part II on why companies would not want to wait for a tarnishing mark to be introduced before seeking an injunction.

174. See Tushnet, *supra* note 1 (criticizing surveys because they do not mimic real world purchasing decisions and hence are unreliable); see also Beebe et al., *supra* note 1 (showing that when dilution by blurring measurements are put in a realistic context, dilution effects go away).

175. Marketing scholarship routinely uses survey methodology, and companies themselves also use the strategy to gain insights into consumer behaviors. For discussion of reliability of consumer behavior research, see J. Paul Peter, *Reliability: A Review of Psychometric Basics and Recent Marketing Practices*, 16 *J. MARKETING RES.* 6 (1979) (discussing which marketing methods prove to be more reliable and offering guidance to scholars on increasing reliability).

176. James G. Helgeson, E. Alan Kluge, John Mager & Cheri Taylor, *Trends in Consumer Behavior Literature: A Content Analysis*, 10 *J. CONSUMER RES.* 449 (1984) (consumer behavior is the “acts of individuals directly involved in obtaining and using economic goods

exactly focused on how consumers make decisions and which things affect consumers in the marketplace.¹⁷⁷ As such, in order to better understand consumers, surveys are exactly the right type of evidence needed in trademark litigation.¹⁷⁸ Although surveys do not exactly represent the real world, as described above, they do approximate the real world. Over the course of the past several years, marketing scholars have continued to not only refine their survey methods to make them more reliable, but also have continued to replicate their results.¹⁷⁹ In our empirical strategy above, we replicated our final results of four ads having a significant tarnishing effect. Surveys allow mass reproduction of results which should give courts and litigants confidence in the product of survey methodology.

This is not to say that every survey is a reliable approximation of what will happen if a tarnishing mark is introduced. Quite the contrary. It is important to craft a well-designed and well-analyzed survey. We discuss the dynamics and requirements for a reliable dilution survey study below in Part IV.

One might also argue that surveys are expensive and cumbersome to use in tarnishing litigation. Even though they are used in trademark infringement litigation routinely, collecting data on mark associations, attitudes and purchase likelihood, especially with fictional marks, might seem difficult. First, on a cost account, surveys would be a very small percentage of total litigation costs. The studies we presented in this Article only cost a few thousand dollars, and similar work would cost even less given that companies have a better sense of their own mark's associations and accompanying attitudes.¹⁸⁰

Companies have a huge cost advantage in producing the dilution studies we advocate for here. Large companies are constantly managing their brands and this includes managing the associations and attitudes consumers have towards their trademarks.¹⁸¹ At any given point, a good brand manager will be collecting data on consumer behavior. She will be making sure she understands how consumers view the brand, how they relate to the brand, whether they like the brand, and how likely they are to buy from the brand. These are the same data points we, as non-company

and services, including the decision processes that precede and determine these acts”).

177. See Jacoby, *supra* note 1 (arguing that trademarks are distinctly linked to consumer behavior).

178. Court cases have said as much. See, e.g., Schering Corp. v. Pfizer, Inc., 189 F.3d 218, 225 (2d Cir. 1999) (“Surveys are, for example, routinely admitted in trademark and false advertising cases to show actual confusion, genericness of a name or secondary meaning.”); Kate Spade LLC v. Saturdays Surf LLC, 950 F. Supp. 2d 639, 647 (S.D.N.Y. 2013) (“[I]t has become routine in Lanham Act cases to submit [confusion] surveys.”).

179. For examples of replications see the Reproducibility Project started in 2011 by Brian Nosek. The project has attempted to replicate several findings in the top psychology journals and has broadened its scope to consumer behavior research. For example, see Robert A. Peterson & Dwight R. Merunka, *Convenience Samples of College Students and Research Reproducibility*, 67 J. BUS. RES. 5 (2014).

180. We needed to extensively pretest brand attitudes, perceptions, and purchase likelihood before measuring potential tarnishing effects.

181. Companies sometimes collect such good, granular, weekly data that scholars can use this data in their empirical studies. See Srinivasan et al., *supra* note 73 (using data from brands on brand perceptions, attitudes, associations, and purchase likelihood measured across hundreds of consumers on a weekly basis).

insiders, have to initially collect, adding to the cost of our study. The brand and trademark manager need not spend money collecting data in the first instance. Expert witnesses and litigants can use the existing data that brands collect to substantially lower the cost of dilution surveys and increase the reliability of those surveys. By using data of actual daily consumers, the results of a dilution study using a brand's real-life data come closer to mimicking reality, increasing external validity of the study.

V. GUIDANCE FOR COURTS AND CONGRESS

We think that courts and legal scholars have yet to fully integrate marketing scholarship and methodology to measure trademark tarnishment. Above we showed that, using brand theory and surveys, it is possible to empirically show that a junior mark has a "likelihood of harm." Ultimately, we hope that our theory and methods will guide courts and Congress to clearly lay out what types of empirical evidence should be necessary to prove trademark tarnishment. As mentioned above, the Supreme Court's actual harm standard is too strict, as companies lose market share if they must wait until tarnishing marks are introduced into the market before bringing a lawsuit. The presumptive Sixth Circuit standard, however, is too liberal because, as our studies show, tarnishing (even sex tarnishing) does not occur in all circumstances and even when it does, the effects do not seem to be drastically large.¹⁸² The impact will obviously be idiosyncratic.

Four distinct determinations likely need to be made before tarnishing is likely to play a large part in harming a mark's reputation: (1) the extent to which consumers know about and like a given brand; (2) the extent to which consumers are exposed to the tarnishing mark; (3) idiosyncrasies in the demographics of the relevant consumers; and (4) context in which marks are encountered. Courts and litigants that intend to require, introduce, or argue against surveys to show trademark tarnishing would be wise to craft surveys that touch on these important considerations. We discuss each of these below and how they should be used to craft reliable surveys and provide guidance to courts on how to interpret these surveys.

A. Consumer Knowledge and Liking

Trademark reputation cannot be harmed if it is not known. Specifically, it must be the case that the brand associations that a company is claiming could be tarnished must be widely known to the public.

It is important for plaintiffs to understand which associations consumers hold and which ones are widely held when constructing surveys to explore trademark

182. We note that the Cohen's D for many of our effects were around .3-.4 These are small to medium effect sizes. Although no area of the law specifies how large a statistically significant effect needs to be, we note that reporting effect size is an important step in understanding how harmful tarnishing marks actually are. Effect size calculations are ways to express how large an effect is. Just saying the effect is statistically significant is often not enough, and so Cohen's D is a measure of the size of the effect. For more details on why effect sizes are important in psychology research see Christopher J. Ferguson, *An Effect Size Primer: A Guide for Clinicians and Researchers*, 40 PROF. PSYCHOL.: RES. & PRAC. 532 (2009).

tarnishment. Significant pre-testing on a mark's associations is an important step in making sure plaintiffs are isolating those relevant associations. Often, a brand might think it has a certain reputation in the marketplace, but consumers are not convinced of it or are not cognizant of it. If this is the case, survey methodology will not show any negative effects of a tarnishing mark.

On the other hand, plaintiffs should be wary of consumers who hold very strong positive associations of their mark. It was possible in our last study that those in the eight-ad condition had very strong feelings on Chick-fil-A. So much so that it is possible that no level of ad exposure would have swayed them in any way.

Plaintiffs need to be cognizant of the varying brand associations and relative strength of associations that consumers have. To create a realistic measurement of tarnishing, courts should require plaintiffs to use the brand's target segment in their surveys.¹⁸³ It is likely not consequential enough that tarnishing occurs with some consumers, so it must occur for the plaintiff's actual consumers for the revenue effect to be sufficiently large. By arguing that a strong brand reputation allows for more efficient and profitable brand extensions, plaintiffs can and should incorporate future and prospective target segments into their surveys. When plaintiffs choose their sample wisely and appropriately, even small tarnishing effects could have a large impact on a brand's bottom line.

Defendants, of course should be wary of the samples that plaintiffs choose. Defining a target segment too narrowly or too broadly could have the potential to create fabricated tarnishing results.

B. Advertisement Exposure

Our studies show that exposure has a large effect on the existence of tarnishment. This makes intuitive sense. Just as normal advertising exposure increases awareness of brands, tarnishing exposure increases the potential for reputational harm. In our first set of studies we found very little tarnishing of one-off ads. However, in our last study when we varied significantly the number of advertisements, we saw that tarnishing began to rear its ugly head.

Marketing theory reinforces our finding here. When exploring the relationship between advertising exposure and effectiveness, marketers have discovered a type of S-curve. This S-curve shows that at low exposures of advertising, effectiveness does not increase. However, after a certain point, the effectiveness of the marginal advertisement is incredibly high. It then flattens out at high levels of ad exposure.

183. This is often a point of contention in expert testimony. *See* Rebuttal Expert Report of David Reibstein at 46, *Hankinson v. R.T.G. Furniture Corp.*, No. 15-81139-CIV-COHN/SELTZER, 2016 WL 1182768 (S.D. Fla. Mar. 28, 2016) (arguing that the Gaskin survey did not attempt to use the correct customer segment of Rooms to Go; by just using customers who previously purchased a Rooms to Go product, the survey did not adequately "ensure[] that respondents taking his survey have ever or would be willing to purchase this type of protectant and stain warranty plan" at issue in the litigation); *see also* Declaration of David Reibstein at 50, *In re POM Wonderful LLC Mktg. & Sales Practices Litig.*, No. MDL 2199, 2012 WL 4490860 (C.D. Cal. Sept. 28, 2012) (arguing that the respondents used in the Maronick survey were not representative of the population writ large who were the subjects of the litigation).

This makes sense if we think about tarnishing as combative advertising. For the tarnishing mark to have a large effect on the existing senior mark, its own advertising or communications needs to be effective. If consumers do not perceive “sex” or “disgust” from the tarnishing mark, their perceptions of the senior will not be affected. Therefore, we must look to how effective the tarnishing ad is to really understand how the existing senior mark is affected. In this case, high exposure rates reinforced the sex nature of our tarnishing mark, and therefore, significantly affected perceptions of the senior mark.

This has implications for litigation. Take, for example, *Moseley*. Victor’s Little Secret was by no means a national brand. It had only one store in a small strip mall in a small town. It mainly advertised in local newspapers and local television. The distribution and exposure levels of Victor’s Little Secret were quite low. The chances of a consumer ever seeing Victor’s Little Secret was low and even if a consumer did see, the chances of seeing it several times was even lower (although those who lived in the town or commuted by the store sign would have had multiple exposures). Therefore, for the consumer writ large we would expect that Victor’s Little Secret probably had little to no tarnishing effect on Victoria’s Secret. This is particularly important, given that the Sixth Circuit held that Victor’s Little Secret presumptively tarnished Victoria’s Secret.

When using surveys to show potential tarnishing effects, plaintiffs should be careful to realistically portray the exposure levels of the tarnishing mark. Moreover, courts and defendants should act as gatekeepers to make sure that plaintiffs do not introduce evidence that drastically overestimates the number of ad exposures that consumers will receive in the marketplace.

C. Consumer Demographics

Consumers are unique. They have unique identities and unique connections with a brand. Some consumers think that Chick-fil-A is the best thing ever because it is super tasty and has the best sweet tea around. Others think that Chick-fil-A is the best thing ever because of the religious and family oriented wholesome values it espouses. Still others are increasingly critical of Chick-fil-A specifically because it infuses its religious agenda in its marketing and political contributions.¹⁸⁴

We measured political leaning because we thought that certain types of consumers would have different perceptions of the Chick-fil-A trademark. We did find that conservatives found the brand more wholesome overall than liberals found it. This is an important metric in survey methodology. Understanding and measuring how consumer idiosyncrasies affect tarnishing is important for courts and litigants to keep in mind. Plaintiffs should be measuring these demographic characteristics and using them in their analysis.

It is not just demographics that effect brand liking. Demographics can also affect how consumers respond to a tarnishing advertisement. For example, we found that

184. For a clear discussion of the connection of Chick-fil-A to religion and the criticisms it has faced, see Emma Green, *Chick-fil-A: Selling Chicken with a Side of God*, ATLANTIC (Sept. 8, 2014), <https://www.theatlantic.com/business/archive/2014/09/chick-fil-a-selling-chicken-with-a-side-of-god/379776/> [<https://perma.cc/N9RC-E8C5>].

conservatives generally disliked our Chicks Fill A adult store ad more than liberals dislike it. We also found that women disliked the Chicks Fill A ads more than men disliked the ads. Respondents who had never been to an adult store disliked the ads more than those that had. This only reinforces the fact that understanding what consumers constitute your target segment and where they come from in terms of geography, gender, political leaning, etc. will allow plaintiffs to better craft surveys that more realistically assess the existence of tarnishment.

D. Context

Our studies show that the Elaboration Likelihood Model accurately predicts when tarnishing will likely affect a senior brand. We showed that under cognitive load, sex tarnishing is more likely to occur. This is because consumers use surrounding cues of an advertisement when they are under cognitive load, rather than rationally analyzing the merits of an advertisement.

Cognitive load is more effective because it makes the sex aspect of the tarnishing mark more salient for consumers. Moreover, when seeing a similar mark associated with sex under cognitive load, consumers spend less time distinguishing Chicks Fil A from Chik-fil-A (although consumers were not confused as to the source of the mark). These two factors (high effectiveness and less dissociation between the marks) creates a larger tarnishing effect. When little attention is paid to the tarnishing mark, it likely is encoded in a consumer's memory closer to the original mark. This increases the likelihood that the tarnishing mark's perceptions will be recalled when a consumer interacts with the original mark.¹⁸⁵

Courts and litigants should recognize the context in which tarnishing ads are perceived. In some cases, tarnishing ads are in magazines or retail environments where consumers generally spend time focusing and evaluating the merits of an ad. However, when tarnishing ads are placed in locations where consumers might be under cognitive load (banner ads, billboards), tarnishing marks do not receive high levels of analysis, and hence, can cause reputational harm more easily.

CONCLUSION

In this Article, we have provided a workable framework for analyzing trademark tarnishment cases. We showed that reputational harm can be defined using extant marketing scholarship. Our empirical studies show that tarnishing does exist, but under certain conditions. We showed using three experimental studies that certain types of junior marks can harm the reputation of senior marks. However, our studies showed mixed results. This only reinforces the realities of trademark tarnishment (i.e., it should not be a presumptive reality). As such, the current state of legal doctrine and court precedent is insufficient to adequately hear trademark tarnishment cases. The federal likelihood of harm standard that some courts have employed,

185. This is supported by associate network theory. See AAKER, *supra* note 67, at 111 (“Associations can serve to summarize a set of facts and specifications that otherwise would be difficult for the customer to process and access, and expensive for the firm to communicate.”).

devoid of any empirical proof, is an unworkable standard. Courts should require plaintiffs to show empirically that the junior mark in question will harm or has harmed the plaintiff's mark in the same way we have done here.

We also note that more research on the dynamics of tarnishing and trademark dilution are necessary and ripe for studying. We only focused on sex tarnishing in our latter studies. Tarnishing takes many forms and the psychology literature shows robust effects of disgust aversion. Disgust is an important form of tarnishing that deserves further study. Social identity tarnishing is also an unexplored form of reputational harm. Many consumers make personal connections with brands, because they view the brand as a part of their social identity. What happens when a junior mark puts that personal connection in question? For example, Lululemon appeals to those who embody a certain type of identity (focused on relaxation, lean body types, women, etc.). What would happen if a company focused on heavy lifting, aggressive grunting in the gym, and that was male dominant, introduced a clothing brand called "Liftinglemon"? Liftinglemon might harm Lululemon's connection to the lean body female social identity if Lululemon becomes associated with more masculine heavy lifting.¹⁸⁶

186. We thank a participant at the 2016 Boston University Intellectual Property Working Paper Conference for suggesting social identity tarnishing.

APPENDIX 1: SAMPLE ADVERTISEMENT FOR STUDY 1A

Dog Boutique > Toys > Designer Inspired Toys >

CHECKER CHEWY VUITON HANDBAG PLUSH TOY- LARGE



Product Price: \$17.00
Sale Price: \$15.00
You save \$2.00!



Availability: Usually Ships in 3 to 5 Business Days
Product Code: HD-CVB-CHKR-L-I

Qty:

ADD TO CART

ADD TO WISHLIST

LARGER PHOTO

EMAIL A FRIEND



Alternative Views:



APPENDIX 2: SAMPLE ADVERTISEMENTS FOR STUDY 1B



Jason Crest is the most knowledgeable man when it comes to hot sauce. His **Crest Hot Sauce** is the single hottest yet tastiest sauce you will ever try. It is made from the hottest peppers in the world (the Naga Viper Pepper)!

Every naga pepper that goes into **Crest Hot Sauce** is carefully selected to be just ripe enough to be a fire cracker but not so ripe that it loses the smoky, savory flavor that we all want when it comes to hot sauce.

Crest Hot Sauce has been gaining lots of popularity and you can find it at various mom and pop grocery stores around the country. **Crest Hot Sauce** is made with the care and attention you want from the people who understand hot sauce the best. You can use **Crest Hot Sauce** on basically anything: Pizza, Wings, Eggs and even Salads!



Check out what people are saying about us:

"**Crest Hot Sauce** is the hottest sauce I've ever had. It burned my mouth and my tongue...which I loved."

—Suzy V.

"I consider myself a hot sauce connoisseur, and **Crest Hot Sauce** is probably one of the top 3 hot sauces I've ever had in my life."—Neal B.

"You think Tabasco is hot??, try **Crest**, it's like lighting a fire in your mouth!"

APPENDIX 3: SAMPLE NEWS ARTICLE WITH BANNER ADS FOR STUDY 3

What You Need to Know about your Pets

While a lot of people may think chubby cats and dogs look adorable, obesity is a real health problem for many pets in the United States. On Tuesday, veterinary clinic chain Banfield Pet Hospital released their annual report on the "state of pet health," based on data from the



2.5 million dogs and 505,000 cats treated by the chain of more than 950 clinics. This year's report includes a special focus on overweight pets, and the company compiled a list of the states with the highest percentages of obese and overweight pets.

Overweight animals can be at risk for severe heart disease and respiratory conditions.

Minnesota topped the list for heaviest pets.

