TRADEMARK LAW AND INDUSTRY MYTHS

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In false advertising suits, plaintiffs face the challenge of overcoming a powerful affirmative defense—the puffery doctrine, which renders the advertisement in dispute non-actionable if it constitutes an exaggerated, boasting statement or a mere expression of opinion rather than of fact. The assumption in false advertising law is that puffing does not harm anyone; when a brand employs exaggerated statements in its advertising, it is not providing literally false statements, just exaggerated ones that everyone knows are exaggerated. But I argue in this Essay that courts as well as commentators have ignored one crucial and harmful dimension of puffery in today’s marketplace: It is not just a tactic employed by individual brands. Rather, different players in the market will compete with each other for brand recognition (e.g. Camel versus Marlboro) while reproducing the same boasting statements about a product type (e.g. the superiority of a new line of “safe” cigarettes with low tar content). The blossoming of this latter genre of advertising—what I call industry myths—reveals a structural deficiency of false advertising law: even if we made it easier for plaintiffs to proceed with litigation, there still exists a whole category of exaggerated and boastful statements that competitors simply would not sue each other over. Claims about the superiority of a product type keep them all in business, so no one would be rushing to the courthouse. I will argue that this structural defect in false advertising law could be addressed through looking to trademark law because the two are intricately linked, and problems that occur in one arena easily impacts the other; in the case of industry myths, I will show that the impera-

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tive of developing counter-mythical knowledge to help the consumer requires us to look beyond false advertising law and reappraise some doctrines in trademark law, such as tarnishment and post-sale confusion, that work to protect industry myths.

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Introduction
The rise of modern advertising has stoked wide ranging scholarly debate about its effect on consumer behavior and its implications for advertising and trademark law. Frank Schecter famously argued that trademark law should protect the use of a product’s mark to signal its uniqueness even when such use does not have anything to do with the identification of the source of the product.1 This idea was later challenged by advertising skeptics who believed that such protection against the dilution of a mark's distinctiveness ended up generating social wastefulness

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1 See Frank I. Schecter, The Rational Basis of Trademark Protection, 40 Harv. L. Rev. 813, 814, 830-31 (1927).
and distorting consumer choices in the marketplace.² Law and economics scholars then retorted that choices based on reasons other than product function and price nevertheless improve consumer welfare if consumers derive utility from them,³ and in any case the law must make available remedies against new brands who free-ride on established brands when the latter have worked to build their reputations into values in the marketplace.⁴

This essay considers one issue to which theorists have not paid attention: I argue that advertising not only generates brand loyalty but also cultivates identification with a type of product, a type that might encompass multiple brands within an industry. I do so through the lens of puffery, which is usually known in


trademark law as a defense in false advertising suits, that renders the advertisement in dispute non-actionable when it constitutes "(1) an exaggerated, blustering, and boasting statement upon which no reasonable buyer would be justified in relying; or (2) a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion."

Although invoked often by defendants in such cases as a defense, puffery as a phenomenon in the real world does not receive much attention as a subject of study. It languishes in a state of relative neglect in scholarly discourse on advertising and trademarks. The reluctance stems perhaps from a preoccupation with some of the expansive developments in trademark and unfair competition law, such as rights of publicity, sponsorship or affiliation confusion, initial interest confusion, post-sale confusion, and so on. puffery is so vague that it can be understood as nothing more than a mere advertising.


6 Pizza Hut, Inc. v. Papa John’s Int’l., Inc., 227 F.3d 489, 497 (5th Cir. 2000).

sion, and misappropriation. But whatever the reason, we ignore puffery at our peril. The implicit assumption in false advertising law is that puffing does not harm anyone; when a brand employs exaggerated statements in its advertising, it is not providing literally false statements, just exaggerated ones that everyone knows are exaggerated. As I will argue in the rest of this Essay, however, a careful examination of puffery as it is practiced by actors in the marketplace would make us realize that it is much more complex than we think it is, that there are blustering and boasting statements that reasonable consumers would be justified in relying upon, and that they rely upon them to their peril such that there are real harms generated by puffery. My examination reveals a structural deficiency of false advertising law: even if we started reforming the puffery defense by weakening it and making it theoretically easier for plaintiffs to proceed with litigation, there still exists a whole category of exaggerated and boastful statements that competitors simply would not sue each other over.

Puffery, I will argue, flows from the mouths of individual brand owners, but also flourishes at the level of entire industries. This industrial dimension of puffery has gone unaddressed in the literature because of a basic flaw in our conception of puffery as a tactic employed by individual brands only. In the real world, multiple sellers might simultaneously employ the same genre of persuasive advertising and radically alter the nature of the dyadic relationship with the consumer stylized in contemporary trademark theory. Although puffery doctrine emphasizes the difference between statements of fact and statements of opinion, I argue that repeated and reproduced exaggerations by players in the same industry -- what I will call industry myths -- end up blurring the line between the two, certainly in the minds of consumers. Some industries, indeed, create and thrive off of industry myths that aid and abet their individual advertising tactics.

I will argue that this structural defect in false advertising law could be addressed through looking to trademark law be-
cause the two are intricately linked, and problems that occur in one arena easily impacts the other; in the case of industry myths,

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8 See Rebecca Tushnet, Looking at the Lanham Act: Images in Trademark and Advertising Law, 48 Hous. L. Rev. 861, 864-65 (2011). As Rebecca Tushnet has written, although courts treat doctrines in the two arenas as separate and the literature also tends to address them as separate topics, trademark law and false advertising law are very much tied together:

The Lanham Act recognizes this basic connection in the core language of section 1125, which bars the use of “any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact,” which either “is likely to cause confusion . . . as to the affiliation, connection, or association of [the defendant] with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities” (trademark) or “misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities” (false advertising generally). State unfair competition statutes generally have similar scope. Thus, to understand trademark, it’s useful to pay attention to the rest of false advertising law, and vice versa. Unfortunately, much of the relevant literature treats “intellectual property” as a separate topic instead of looking at the Lanham Act as a whole. This property frame distracts legal analysis from the actual language of the governing statute and from the history of trademark infringement as a wrong done by one competitor to another. The legal congruence between trademark and other forms of advertising law has its basis in nonlegal reality: trademarks identify and promote products and services. Trademarks are, like other kinds of marketing, ultimately a way of getting consumers to buy things. Dilution law, which is supposed to protect the “selling power” of a mark, is the most naked legal recognition of this marketing function, but ordinary protection and infringement rulings are ultimately about the ways in which trademark owners, and other people, will be allowed to sell their products. Lawyers may treat trademark as a unique category of marketing communications (at the same time as they assert that trademark protection applies to every possible form of such marketing), but marketers don’t, nor should they rationally do so if the goal is, as they tell us, to improve sales and “brand value.”

Id. at 864-65.
I will show that the imperative of developing counter-mythical knowledge to help the consumer requires us to look beyond false advertising law and reappraise long held assumptions in trademark law. That is because at the same time that industry myths blossom and take on a life of their own with the aid of a globalized and increasingly networked business and advertising environment, trademark law has expanded its scope to protect them. For example, mark owners have a statutory right of action against uses that “tarnish” the mark. Courts have historically found tarnishment where the plaintiff showed that its mark is “linked to products of shoddy quality, or is portrayed in an unwholesome or unsavory context,” so that “the public will associate the lack of quality or lack of prestige in the defendant’s goods with the plaintiff's unrelated goods . . . .”\(^9\) Furthermore, section 43(a)(1)(A) of the Lanham Act gives a private right of action against any person who uses in commerce “any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion . . . .”\(^10\) Courts have developed many interpretations of “confusion,”\(^11\) including the capacious concept that even if the buyer and seller of a good proceeded with their transaction with no confusion as to source or affiliation, a good could cause confusion in the minds of the general public (i.e. people in general who did not yet buy the good).\(^12\) I will show that these caus-

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9 Deere & Co. v. MTD Products, Inc., 41 F.3d 39, 43 (2d Cir. 1994).
12 See Hermes Int’l v. Lederer de Paris Fifth Ave., Inc., 219 F.3d 104, 108-09 (2d Cir. 2000) (noting the general public is harmed more than high-end consumers by knockoff items in the marketplace); see also Landscape Forms, Inc. v. Columbia Cascade Co., 113 F.3d 373, 382 (2d Cir. 1997) (explaining that the likelihood of confusion is important to the general public and not only purchasers of the goods); Ferrari S.P.A. v. Roberts, 944 F.2d 1235, 1243 (6th
es of action are tied to the phenomenon of industry myths because at bottom, they are attempts by mark owners to block "uses that might change the way people feel about their mark"---effectively blocking competition about the meaning of a mark rather than actual competition on price and quality within a given market.

This Essay proceeds in six Parts. In Part I, I lay out the landscape of trademark theory fully to contextualize puffery, followed by a longer exploration of puffery as both a phenomenon and doctrine. In Part II, I provide a case study to illustrate the industrial dimension of advertising that operates in tandem, rather than in tension, with individual brand marketing. I choose luxury fashion as a case study not only because it provides a window into the power of puffery to help brands and industries command high profit margins, but also because this particular industry has in recent years quite vociferously articulated its need for vigorous intellectual property protection.

In Part III, I describe the dramatic expansion of trademark law that has affected the market’s ability to provide counter-mythical knowledge. I then propose in Part IV that the best solution to the problem I identify in this Essay is to unleash the power of the market and allow for new uses of a mark that deliberately destabilize its cultural significance. I argue for the abandonment of doctrines that protect mark owners against uses that do not compete with the owner but merely affect the mark’s meaning.

Finally, I revisit the world of luxury fashion in Part V to provide a casual illustration of the implications of my argument. I consider, with the help of theorists of fashion, how the prestige

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Cir. 1991) (discussing purchaser confusion at point-of-sale and not the confusion of nonpurchasing or casual observers); Au-Tomotive Gold Inc. v. Volkswagen of Am., Inc., 603 F.3d 1133, 1138 (9th Cir. 2010) (describing a “free-rid[ing]” producer as a producer profiting from a trademark because of “post-purchase confusion about the product’s origin”).

13 McKenna, A Consumer Decision-Making Theory of Trademark Law, supra note 11, at 134 (describing tarnishment as a cause of action).
of luxury products circulates as a currency in the game of the competition for meaning and, by extension, for power. Hence, the subversive potential of uses of a mark that deliberately thwart the original owner’s purpose.

I. A Structural Problem of False Advertising Law

Traditional trademark theory assumed that trademarks serve as valuable informational tools, and a large body of literature has propounded the view that trademarks communicate information to consumers to reduce their “search costs” in distinguishing one company’s product from another’s. Buttressing this conception of trademark-as-information, false advertising law ensures that the seller communicates accurately, by giving a

14 See Brown, supra note 2, at 1185-87 (illustrating that trade symbols are traditionally used to identify a source); Stacey L. Dogan, What is Dilution, Anyway?, 105 MICH. L. REV. 101, 106 (2006) (highlighting that trademarks preserve informational clarity in the marketplace); Kratzke, supra note 2, at 216-17 (explaining the use of trademarks is cost-effective); Lunney, supra note 2, at 431-32 (stating trademarks allow consumers to connect information to a product more efficiently).


The purpose is to reduce the cost of information to consumers by making it easy for them to identify the products or producers with which they have had either good experiences, so that they want to keep buying the product (or buying from the producer), or bad experiences, so that they want to avoid the product or the producer in the future. 778 F.2d 334, 338 (7th Cir. 1985). See also Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163-64 (1995) (discussing items’ marks as distinguishing products and giving example). For a critique of the search cost model, see McKenna, A Consumer Decision-Making Theory of Trademark Law, supra note 11, at 81-86.
right of action against any party that “misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities.”

This framework depends not only on the enforcement power of the Federal Trade Commission, but also on competing mark owners to generate litigation over false advertising. False advertising law, however, occupies a much more limited field than the law on trademark infringement. For example, courts impose a materiality requirement on false advertising cases even though the statutory language does not contain it. Courts also consider prudential standing for false advertising claims where no such consideration obtains in trademark infringement cases.

To succeed on a false advertising claim, a plaintiff can make one of two showings: that the advertisement was literally

16 Lanham Act § 43(a)(1)(B)
18 See David A. Hoffman, The Best Puffery Article Ever, 91 IOWA L. REV. 1395, 1401 (2006) (discussing “puffery” as a defense in numerous cause of action); Dilbary, supra note 4, at 629 n.109 (summarizing boundaries of litigation for trademark infringement). Only competitors (not consumers) have the right to sue under the Lanham Act for false advertising. See Made in the USA Found. v. Phillips Foods, Inc., 365 F.3d 278, 281 (4th Cir. 2004) (“[T]he Lanham Act is ... 'a private remedy [for a] commercial plaintiff who meets the burden of proving that its commercial interests have been harmed by a competitor's false advertising'”).
19 See Made in the USA Found., 365 F.3d at 280 (explaining Congress’ purpose in limiting consumer remedies through the Lanham Act).
false or that it was ambiguous but likely to mislead consumers.\footnote{See Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997); Castrol, Inc. v. Pennzoil Co., 987 F.2d 939, 943 (3d Cir. 1993); Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6, 13 (7th Cir. 1992); United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1180 (8th Cir. 1998) (noting the two theories of recovery).} In the latter case, the burden is on the plaintiff to show actual consumer reaction to the advertisement.\footnote{See Clorox Co. P.R. v. Proctor & Gamble Commercial Co., 228 F.3d 24, 33 (1st Cir. 2000) (explaining plaintiff’s burden to prove actual consumer reaction and not how consumers could have reacted to an explicitly true advertisement with a misleading message).} Furthermore, the plaintiff faces the challenge of overcoming a powerful affirmative defense: puffery, which renders the advertisement in dispute non-actionable if it constitutes "(1) an exaggerated, blustering, and boasting statement upon which no reasonable buyer would be justified in relying; or (2) a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion."\footnote{See Pizza Hut, 227 F.3d at 496-97.}

Puffery has an illustrious past. As a doctrine, it comes from the age old notion, “let the buyer beware”:

A concept that became a basis of the puffery exclusion predates 1534, when a compiler of English law gave the following example about the potential sale of a horse. "If he be tame and have been rydden upon [by the potential buyer], then caveat emptor [let the buyer beware]." The strange legal terms "puffer" and "puffery" apparently became associated with commercial activities in the mid- to late-18th Century. A "puffer" was a person secretly hired by a seller to bid up auction prices ("puffing"), thereby creating a deliberate and material deception that was outlawed by statute in many jurisdictions. By the 19th Century, the term "puffery" (sometimes called "sales talk" or "dealer’s talk") had transmogrified into a contrary connotation as a
legal defense for vindicating salespeople accused of common law fraud and deceit.\textsuperscript{25}

In the context of false advertising, modern American courts tend to recognize puffery as claims in advertising that come in one of two non-actionable forms: “(1) an exaggerated, blustering, and boasting statement upon which no reasonable buyer would be justified in relying; or (2) a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion.”\textsuperscript{26} Here are just a few examples of what would be considered puffery:\textsuperscript{27}

“The very best chocolate (Nestle’s);”\textsuperscript{28}

“Nothing soothes away heartburn faster than Mylanta;”\textsuperscript{29}

“For my tough headaches, Advil just works better.”\textsuperscript{30}

The line between non-actionable puffery and actionable deception seems to hinge on whether or not the speech constitutes fact or opinion. As the FTC explained in its Statement on Deception, “expression of opinion not made as a representation of fact” constitutes puffery.\textsuperscript{31} Courts have only reinforced the sa-

\textsuperscript{25} Leighton, supra note 20, at 616-17 (quoting Anthony Fitzherbert, Boke of Husbandrie § 118 (1534)) (alteration in original). \textit{See also} IVAN L. PRESTON, GREAT AMERICAN BLOW-UP: PUFFERY IN ADVERTISING AND SELLING 29 (2nd ed. 1996) (reviewing the history of the puffery).

\textsuperscript{26} \textit{Pizza Hut}, 227 F.3d at 497.

\textsuperscript{27} \textit{See} PRESTON, supra note 25, at 14-20 (listing examples of puffery).

\textsuperscript{28} PRESTON, supra note 25, at 14.

\textsuperscript{29} PRESTON, supra note 25, at 16.

\textsuperscript{30} PRESTON, supra note 25, at 17.

\textsuperscript{31} \textit{See} James C. Miller, III, FTC POLICY STATEMENT ON DECEPTION, n.42, Oct. 14, 1983, archived at www.webcitation.org/6AltMqo4C (citing Wilmington Chemical, 69 F.T.C. 828, 865 (1966)). As I will soon discuss, this line between fact and opinion has a long history, with roots in 17th century English common law. \textit{See also} PRESTON, supra note 25, at 68.
lience of this boundary. And as the Eighth Circuit stated in *American Italian Pasta Co. v. New World Pasta Co.*,\(^{32}\)

Puffery and statements of fact are mutually exclusive. If a statement is a specific, measurable claim or can be reasonably interpreted as being a factual claim, i.e., one capable of verification, the statement is one of fact. Conversely, if the statement is not specific and measurable, and cannot be reasonably interpreted as providing a benchmark by which the veracity of the statement can be ascertained, the statement constitutes puffery.\(^{33}\)

Similarly, the Fifth Circuit expressed in *Pizza Hut* that “[t]he law recognizes that a vendor is allowed some latitude in claiming merits of his wares by way of an opinion rather than an absolute guarantee, so long as he hews to the line of rectitude in matters of fact.”\(^{34}\)

Commentary on puffery in advertising has largely focused on comparing courts’ application of the and how FTC interprets the doctrine.\(^{35}\) Scholars seem to have little interest in following

\(^{32}\) 371 F.3d 387 (8th Cir. 2004).
\(^{33}\) Id. at 391.
\(^{34}\) *Pizza Hut, Inc.*, 227 F.3d at 499 (quoting Presidio Enter. v. Warner Bros. Distrib., Corp., 784 F.2d 674, 685 (5th Cir. 1986)).
the footsteps of Ivan Preston, who paved the path toward examining the phenomenon of puffery and seeing what that says about the state of false advertising law. Specifically, Preston argued that the fact/non-fact distinction was unsustainable because puffed opinion statements often implied facts, and survey evidence suggested that many consumers believed those implied facts.

One notable exception to the inattention is David Hoffman. In an ambitious overview of the permutations of puffery doctrine across several different areas of law, Hoffman took care to point out that in practice, courts come up with conflicting conclusions with respect to the line between fact and opinion in advertising.

To be sure there is a vast literature on false advertising, but articles focusing on advertising puffery are few and far between. For example, two of the most influential articles in on false advertising mention puffery only in passing. See Robert Pitofsky, Beyond Nader: Consumer Protection and the Regulation of Advertising, 90 HARV. L. REV. 661, 677-81 (1977) (finding that the FTC has taken several “major” steps to regulating advertisements); Richard Craswell, Interpreting Deceptive Advertising, 65 B.U. L. REV. 657, 660 (1985) (advocating courts should adopt a method that balances the deception of ads to the potential dangers the product may bring).

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36 See PRESTON, supra note 25, 176-77 (setting forth Preston’s vision of puffery regulation); IVAN L. PRESTON, Researchers at the Federal Trade Commission—Peril and Promise, in COMMUNICATION RESEARCHERS AND POLICY-MAKING 511, 524-25 (Sandra Braman ed., 2003) (arguing the FTC merely evaluates whether a claim is reasonably believable); IVAN L. Preston, Puffery and Other “Loophole” Claims: How the Law’s “Don’t Ask, Don’t Tell” Policy Condones Fraudulent Falsity in Advertising, 18 J.L. & COM. 49, 78-103 (1998) (arguing that puffing claims by advertisers have real meaning in the minds of consumers and engenders real harms); IVAN L. Preston, Regulatory Positions Toward Advertising Puffery of the Uniform Commercial Code and the Federal Trade Commission, 16 PUB. POL’Y & MARKETING 336, 337-38 (1997) (discussing how the FTC is attempting to define puffery); IVAN L. PRESTON, THE TANGLED WEB THEY WEAVE 9-10 (1994) (establishing that puffery is an important principle that must be examined by the FTC).

37 See PRESTON, Researchers at the Federal Trade Commission—Peril and Promise, supra note 36, at 524; PRESTON, supra note 25, at 180-84 (commenting on the fact/non-fact distinction).

38 See Hoffman, supra note 18, at 1404 (illustrating the ways in which judges’ opinions vary on what constitutes puffery).
He suggests that applications of the puffery doctrine could benefit from some grounding in empirical research, of which no court currently takes into account.\textsuperscript{39} Plowing the marketing and communications literature, Hoffman identifies a few empirical findings useful for a project at revising puffery doctrine: In line with Preston’s writings on the subject decades ago, he points out that recent studies have shown that a sizable minority of consumers do believe seller’s opinions in advertising,\textsuperscript{40} as well as the implied facts therein.\textsuperscript{41} Consumers’ likelihood of belief increases with the level of familiarity with the brand; “[m]oreover, repeated experiences with products appear to increase the distorting effects of puffing speech, making it difficult for consumers to learn and correct for falsehoods.”\textsuperscript{42} In view of the foregoing evidence, which he considers worrying, Hoffman prescribes a new version of the puffery doctrine by which courts presume that exaggerated statements imply false factual claims relied upon by the consumer; in turn, the seller could rebut the presumption by making one of three showings – “(1) they did not intend to mislead consumers; (2) there was no reliance by most of the audience; or (3) the speech implied no false facts.”\textsuperscript{43} In doing so, he hopes to dramatically alter the process of drawing the fact/opinion dichotomy discussed earlier.\textsuperscript{44}

\textsuperscript{39} See Hoffman, supra note 18, at 1444-47 (advocating for empirical studies of puffery). For a thorough overview of the empirical literature not only in marketing but also psychology, see also Laura R. Bradford, 	extit{Emotion, Dilution, and the Trademark Consumer}, 23 Berkeley Tech. L.J. 1227, 1260 (2008).

\textsuperscript{40} See Hoffman, supra note 18, at 1436 (demonstrating that buyers will base purchases off of seller’s claims).

\textsuperscript{41} See Hoffman, supra note 18, at 1437 (contrasting that consumers will believe explicit puffing more easily than implicit puffing).

\textsuperscript{42} See Hoffman, supra note 18, at 1438.

\textsuperscript{43} See Hoffman, supra note 18, at 1444. Contra Sarah Samuelson, 	extit{True or False: The Expanding “False by Necessary Implication” Doctrine in Lanham Act False Advertising, and How a Revitalized Puffery Defense Can Solve This Problem}, 30 Cardozo L. Rev. 317, 343-44 (2008) (proposing to dramatically expand the puffery defense as a way to curb the expansion of the “false by necessary implication” doctrine in false advertising law).

\textsuperscript{44} See Hoffman, supra note 18, at 1499 (offering an alternative model of the relationship between puffing speech and consumption).
I concur with Hoffman’s approach, but my project actually begins where his leaves off. Whereas courts currently make the determination in an ad hoc fashion, his presumed liability approach imposes a strict structure in favor of the consumer. I think this would bring a lot of positive changes. But this model also depends ultimately on a central assumption in false advertising law spelt out at the beginning of the paper: that enforcement comes from competitors in the market for similar goods. I will suggest here that this is a structural defect of false advertising law: even if we lived in a world of Hoffman’s presumed liability, where the puffery defense as it exists now is dramatically whittled down, there still exists a whole category of exaggerated and boastful statements that competitors simply would not sue each other over. Puffery, I will argue, flow from the mouths of individual brand owners, but also flourishes at the level of entire industries. This industrial dimension of puffery has gone unaddressed in the literature because of a basic flaw in our conception of puffery as a tactic employed by individual brands.

The common imagination of puffery conjures the image of one seller interacting directly with one buyer, and does not see a problem if the buyer encounters the seller’s exaggerated opinions.\textsuperscript{45} Furthermore, courts assume, as early English common law once did, that the buyer would not rely solely on the seller’s opinion anyway.\textsuperscript{46} This popular framework, however, understands puffery as a rhetorical device in a dyadic relationship only. It sees the relevance of puffery only in terms of building the loyalty of the customer to the brand. But it unfortunately elides all exploration into the ways in which multiple sellers might simultaneously employ the same genre of puffery and radically alter the nature of the dyadic relationship with the buyer. For example, if you lived in 16th century England and there exists only one stationery store in your village, you might have a conversation with the store owner and choose to brush aside his comment that one

\textsuperscript{45} See PRESTON, Puffery and Other ”Loophole” Claims, supra note 36.
\textsuperscript{46} See Pitofsky, supra note 35, at 677 (1977) (noting that most customers do not believe puffing).
type of expensive stationery is the best parchment paper in all of His Majesty’s Kingdom, a claim that has no basis in fact. But if you live in modern-day Manhattan where ten different store owners all proclaim that one type of stationery paper – let’s say a type made out of hempseed instead of wood – is the best, and so do other online stores (you have been catapulted into the Internet Age), you might be much more inclined to believe them. You might just buy hempseed paper, having absorbed the implied claim that this type is better than other types of stationery available at the ten different stores. In any case you don’t have an easy way of checking because the media does not often cover stories on the papermaking industry and you do not have much time to research the intricacies of papermaking to verify the quality of the product. Academic books and journal articles on the matter are not only incomprehensible to you, but also inaccessible physically. In this way, repeated and reproduced puffery by market actors across an industry has a way of coalescing into something more durable and impervious to attack than the sum of its parts. It begins to acquire the status of myth.

In the hyper-commercialized and connected society of today, a seller does not “puff” alone. Rather, a constant stream of messages from multiple sellers of the same type of product often confronts the buyer, and some industries create and thrive off of myths that reinforce their individual tactics. They might contain strains of critique of each other’s products, but also often leave some exaggerations uncontested. Different companies can reproduce the same puffery about a type of product even as they attempt to out-compete each other over their particular brand of a product. In this way, the modern economy and modern advertising has severely compromised the idealized information model of dyadic exchange: the traffic in merchandise and in information about the merchandise no longer inheres in a one-to-one relationship; many sellers speak at once, and in their seemingly conflicting narratives they can remain silent about certain core claims. In the wake of this silence, exaggerated and boasting statements may flourish at the level of the product type – I will now call these industry myths as a shorthand – even as they struggle for a living at the level of the brand.
Two brief examples might help to pave the way for a longer discussion in this essay. I first draw a quick story from the cosmetics industry. The spa treatments market has for the past few years seen growing sales for dry brushes, which women could supposedly use to brush their own skin abrasively to get rid of dead skin cells, increase circulation, decrease bloating, as well as improve the look of cellulite.\footnote{See Catherine Saint Louis, \textit{Wildly Abrasive}, N.Y. TIMES, Dec. 15, 2010, archived at www.webcitation.org/6AmA9mqSe (discussing the various uses for abrasive skin brushes).} Such boasting might not reach the level of actionable false advertising that the FTC could pursue because of the difficulty of proving misrepresentation of fact: the dry brush may very well produce the advertised effects of sloughing off dead skin cells, increasing circulation, and decreasing bloating,\footnote{See id. (stating that abrasive skin brushes can be used to remove dead skin cells, increase circulation, and decrease bloating).} so at least those three claims can seem like solid facts, making futile a false advertising claim. Yet, one concern should still elevate the claims into the zone of puffery: companies advertise aggressively through spa centers and media outlets – not least through the use of celebrities – generating a craze over brushes that cost over $30 a piece because they seemingly deliver these special benefits, even though doctors might say that other very easy activities (such as taking a brisk walk) actually produce some of the same results as rubbing oneself with bristles.\footnote{See id. (noting that at least one Doctor doubts whether brushes can effectively eliminate waste from the human body).} By contrast, dry brushing actually induces pain.\footnote{See id. (describing some dry brush treatments as “agonizing”).}

The second example also has potential consequences for consumers’ health. For decades the tobacco industry obscured the harms to health that stemmed from smoking, but was eventually subject to a wave of litigation over the carcinogenic properties in tobacco products.\footnote{See \textit{Allan Brandt}, \textit{The Cigarette Century: The Rise, Fall, and Deadly Persistence of the Product That Defined America} 318-22 (2007) (discussing...
try has embarked on an image makeover campaign bent on claiming that it has come up with modified products with reduced toxin exposure that constitute a safer cigarette. For example, RJ Reynolds introduced a smokeless cigarette that heated rather than burned tobacco and claimed that it presented less of a risk of cancer and other diseases. Yet, as public health experts have cautioned, "there is inconclusive evidence about which ingredients in tobacco products are linked to particular morbidities and mortalities and at what level. The link between reduced toxin exposure and ingredient control and health outcomes remains extremely complex and poorly understood . . . ." Are claims of a safe cigarette literally false? It would seem hard to prove. So we are made to live with puffery about a "safe" cigarette, and none of the competing tobacco companies would challenge each other on such an understanding because they obviously all benefit from consumers’ acceptance of the new breed of cigarettes. Yet this is deeply disconcerting on many levels. As one commentator has noted, there is really no such a thing as a safe cigarette.

Boasting about a type of product, therefore, has a way of reproducing and compounding itself because the market partici-

puffery as an assumption-of-risk defense and its vulnerability in landmark litigation in the tobacco industry).

52 See Peter Benson, Safe Cigarettes, 34 DIALECTICAL ANTHROPOLOGY 49, 50, 53 (2010) (explaining how waves of product design modification and new advertisements in the tobacco industry have generated the popular concept of a safer cigarette).


54 Benson, supra note 52, at 53 (internal citation omitted); see also Michael Givel, FDA legislation, 16 TOBACCO CONTROL 217, 217–18 (2007) (discussing the difficulties in passing a bill that allows tobacco companies to advertise cigarettes as safer because of a lack of conclusive evidence on what ingredients are more dangerous than others).

55 See Peter Benson & Stuart Kirsch, Corporate Oxymorons, 34 DIALECTICAL ANTHROPOLOGY 45, 45-48 (2010) (expressing the opinion of noted anthropologist Peter Benson, that the safe cigarette is a “corporate oxymoron”).
pants all benefit from the perception of quality or superiority of a
product type even as they battle each other for brand recognition.
This industry-level dimension of advertising operates in tandem,
rather than in tension, with individual brand marketing. I hope
that a longer, more detailed case study sketched out below might
develop my theory more colorfully. I choose luxury fashion as a
case study not only because it provides a window into the power
of puffery to help brands and industries command high profit
margins, but also because this particular industry has in recent
years quite vociferously articulated its need for vigorous intellec-
tual property protection. The urgency with which the industry
appeals to the law lends it fresh salience with respect to scholarly
inquiry.

II. The Myths of Luxury Fashion

Students of the law have historically paid little attention to
the fashion industry.56 Prior to 2006, rigorous analysis of intel-
lectual property issues with regards to fashion was extremely
sparse and sporadic.57 The first few articles directly focusing on
the fashion industry were published decades apart from each
other.58 But all of the sudden, law professors have now taken an

56 See SUSAN SCAFIDI, WHO OWNS CULTURE?: APPROPRIATION AND AUTHENTICITY IN
AMERICAN LAW 11-12 (2005) (noting the lack of attention that intellectual
property has historically paid to cultural products, including fashion).
57 See id. at 38-51 (discussing fashion as it relates to culture).
58 See Anne T. Briggs, Hung Out to Dry: Clothing Design Protection Pitfalls in
intellectual property protection for fashion); Leslie J. Hagin, A COMPARATIVE
ANALYSIS OF COPYRIGHT LAWS APPLIED TO FASHION WORKS: RENEWING THE PROPOSAL FOR
FOLDING FASHION WORKS INTO THE UNITED STATES COPYRIGHT REGIME, 26 TEX. INT’L L.J.
341, 342-45 (1991) (reviewing copyright protection concerning fashion); Safia
Nurhain, Style Piracy Revisited, 10 J.L. & POL’Y 489, 490-92 (2002) (focusing on
fashion piracy issues); Rocky Schmidt, Designer Law: Fashioning a Remedy for
Design Piracy, 30 UCLA L. REV. 861, 863 (1983) (analyzing the problem of de-
sign piracy). After 2002, some short comments and student notes started to
appear to address the question of protection for the industry. See, e.g.,
Meaghan E. Goodwin, Pricey Purchases and Classy Customers: Why Sophisticated
Consumers Do Not Need the Protection of Trademark Laws, 12 J. INTELL. PROP.
L. 255, 255-56 (2004) (summarizing the issues of enforcement against coun-
terfeit fashion products); Julie P. Tsai, Note, Fashioning Protection: A Note on
interest in fashion. Spurred by the industry’s calls to curb counterfeiting, literature on the subject has blossomed in the last five years. It has taken legal academia surprisingly long to become fascinated with fashion, given the fact that everyone else in the world has long lived under the enchantment of its empire. The world of fashion is easily a $600 billion industry, consisting of sub-industries like apparel, handbag, purse, wallet and accessories, and footwear. Although this figure does not represent the smaller sub-sector of luxury fashion, it gives some context for the present discussion.

Scholars have given serious consideration to the question of whether the fashion industry needs further intellectual property protection through vigorous prosecution of infringement and expansion of current law, but this Essay asks a different

\textit{the Protection of Fashion Designs in the United States}, 9 \textsc{Lewis & Clark L. Rev.} 447, 447-49 (2005) (stressing the need for protection of fashion intellectual property). However, there was no sustained dialogue until much more recently.


60 \textit{See id.} (describing the structure of trademark law as ill-suited to design protection).

61 \textit{See} Alessandro Brun and Cecilia Castelli, \textit{Supply Chain Strategy in the Fashion Industry: Developing a Portfolio Model Depending on Product, retail Channel and Brand}, 116 \textsc{Int. J. Prod. Econ.} 169, 170 (noting that fashion is a “cross-sector concept” which is applicable to the clothing industry, as well as to leather goods, shoes, accessories, and jewelry). The global fashion industry segments have combined revenues in excess of $600 billion. \textit{See} IBISWorld, C1311-GL Global Apparel Manufacturing—Global Industry Report, July 2010, \textsc{archived at} http://www.webcitation.org/6CnSpA15C (disclosing approximately $558 billion revenue in apparel manufacturing); IBISWorld, C1312-GL Global Handbag, Purse, Wallet and Accessories Manufacturing—Global Industry Report, Nov. 2012, \textsc{archived at} http://www.webcitation.org/6CnT9EsKQ (providing an estimate of $94 billion in global purse and handbag manufacturing revenues); IBISWorld, C1321-GL Global Footwear Manufacturing—Global Industry Report, Nov. 2012, \textsc{archived at} http://www.webcitation.org/6CnTWiuKm (disclosing approximately $123 billion revenue in global footwear manufacturing).

62 \textit{See} Bartow, supra note 60, at 711-12 (characterizing the need for increased prosecution and protection of fashion intellectual property); Jonathan M.
question. The subsector of luxury fashion, I contend, gives us purchase on the problem of industry myths I already identified. The exorbitant prices paid for luxury fashion items gives us a fascinating glimpse at how advertising relates to product value, and how market participants can simultaneously compete viciously with each other and, at the same time, collude to construct common myths.\textsuperscript{63}

The consumer of high-end fashion cares deeply about the brand since it confers status.\textsuperscript{64} The empirical literature shows some evidence that some customers are willing to pay exorbitant prices for a luxury brand item even though another one (of a lesser known brand) potentially provides the same durability, comfort, and aesthetic quality.\textsuperscript{65} But why are many luxury fash-


\textsuperscript{63} See Harrison, supra note 62, at 210-12 (discussing fashion’s role in the relationship between price and status); Hemphill, supra note 62, at 1151-52 (arguing how fashion impacts economic perceptions of individuals).

\textsuperscript{64} See Harrison, supra note 62, at 210-12 (noting that fashion is an indicator of status).

\textsuperscript{65} See Laurie Simon Bagwell & B. Douglas Bernheim, \textit{Veblen Effects in a Theory of Conspicuous Consumption}, 86 AM. ECON. REV. 349, 349 (1996) archived at www.webcitation.org/6Br7zjDDV (explaining that the “Veblen effect” exists when the consumer pays more for status goods than a functionally equivalent good); Marina Bianchi, \textit{Novelty, Preferences, and Fashion: When Goods are Unsettling}, 47 J. ECON. BEHAVIOR & ORG. 1, 15 (2002) (illustrating that variability and connections with other goods is more important than utility); Giacomo Corneo & Oliver Jeanne, \textit{Segmented Communication and Fashionable Behavior},
ion items prestigious to own and how did consumers think of brands as status signaling? The brand creates value through advertising such that the production of an item of fashion is actually the bare beginning of an avalanche of the active creation of value: For example, when Reed Krakoff launched his eponymous brand three years ago, every detail of how his stores would look was meticulously thought over---the clothes hanger, the lacquer on the walls, the floorboards from France---in terms of how to create a status symbol out of the products within the space. Fashion modeling---another example---sets up one of the nodal points in the mediation of value and the interpellation of desire. Through the promulgation of images that are meticulously managed to glamorize an imaginative lifestyle, modeling as a set of practices feeds into the reproducible package that is sold to the

39 J. Econ. Behavior & Org. 371, 373 (1999) (suggesting that segmented socialization induces imitative purchases); Paul Frijters, A Model of Fashion and Status, 15 Econ. Modeling 501, 502 (1998) (noting that the status value of a good is determined by the status of the consumer who purchases it); David Hirshleifer, Sushil Bikhchandani & Ivo Welch, A Theory of Fads, Fashion Custom, and Cultural Change as Information Cascades, 100 J. Pol. Econ. 992, 994 (1992) (observing that consumers are inclined to purchase an object because others have purchased it before them); see also Peter M. Kort, Jonathan P. Caulkins, Richard F. Hartl, & Gustav Feichtinger, Brand Image and Brand Dilution in the Fashion Industry, 42 Automatica 1363, 1363 (2006) (discussing the profitability of strong branding). Per the authors,

Physically attaching a brand-name to a product costs little, so the brand’s capacity to command higher prices translates into substantial profit opportunities. This capacity is namespecific; merely sewing the name “Joe Smith” on a sweater won’t increase its value to anyone, except perhaps Mr. Smith. Likewise, the price-raising capacity of any given name can vary over time.

Id.

66 See Ariel Levy, Brand-New Bag, The New Yorker, Apr. 25, 2011, archived at www.webcitation.org/6Cgyqd4QD (discussing how Krakoff focused on the little details in his stores to create a unified image).

67 See Ashley Mears, Pricing Beauty: The Production of Value in Fashion Modeling Markets, ProQuest Dissertations and Theses, 4 (2009), archived at www.webcitation.org/6BtC51aMg (describing the potential for fashion models and designers to succeed upon creating a marketable “look”).
The consumer is therefore not just buying the tangible commodity: he or she purchases the idea, an imaginative claim over a particular lifestyle supported by the representations made through advertising.

Prestige, in other words, does not spring out of thin air. It must be built and maintained. It has a history. To understand this process we must historicize the phenomenon that we call fashion. We must account for the complex history of the industrial production of fashion, and its subsequent globalization.

From the beginning of couture in France, the prestige of couture was associated with the myth of the one-off dress designed for each customer. In reality, however, the couturier’s enterprise revolved around employing skilled workers in their ateliers to copy their original designs for customers. Similarly, Italian entrepreneurs of today not only cultivate the myth of the designer as artist, but also unabashedly market a vision of cultural identity as wedded to the fabric (literally and figuratively) of their trade; namely, that their ability to command and even dictate global fashion trends naturally extends out of the “essence” of Italianness (italianità), that timeless fountain of cultural capital. It is a marketing trend that seeks to re-establish a link be-

69 See Webster’s II New Riverside Dictionary 250 (Revised ed. 1996) (defining fashion as “the current style and custom”).
71 See NANCY TROY, COUTURE CULTURE 24-25 (2003) (discussing the nature of couture culture as one in which copies were frequent and necessary for commercial success).
72 See Essence of Italy, FONDAZIONE ALTAGAMMA, Sept. 20, 2012, archived at www.webcitation.org/6CgzXaOKO (providing videos of corporate executives expounding on the importance of Italy to fashion development); see also SYLVIA J. YANAGISAKO, Transnational Family Capitalism: Producing ‘Made in Italy’ in China, VITAL RELATIONS: MODERNITY AND THE PERSISTENT LIFE OF KINSHIP, 63, 63-84 (Susan McKinnon and Fenella Cannell eds., 2013) (publication forthcoming); Simona Segre Reinach, “If you Speak Fashion you speak Italian”: Notes on
BETWEEN LUXURY ITALIAN FASHION WITH ITS PRESUMED CULTURAL ROOTS THAT EMPHASIZES “AN IDENTIFICATION WITH THE RENAISSANCE, ARTISAN SKILLS, AND ENTREPRENEURSHIP . . .”

But history shows that if there ever existed such predestination for fashion, Italians did not put it to use until several decades ago. Although Mussolini had sought to construct a “fashion industry” coordinated by his Ente nazione della moda, Italy in fact had for a long time exported its textiles straight to the haute couture workshops of Paris and there was no real fashion industry to

Present Day Italian Fashion Identity, 1 CRITICAL STUDIES ON FASHION AND BEAUTY 203-04, 212-13 (2010); Simona Segre Reinach, Fashion and National Identity, 7 BUS. & ECON. HIST. ON-LINE 1, 5 (2009), archived at www.webcitation.org/6ByT6qy4D [noting that many, particularly Italians working in the Chinese fashion industry, believe that there is an “Italian superiority” with respect to style]. 73 See Reinach, Fashion and National Identity, supra note 72, at 2 (discussing the movement within Italian fashion to reestablish and celebrate its cultural roots); see also Andrew Ross, Made in Italy: The Trouble with Craft Capitalism, 36 ANTIPODE 209, 210-11 (2004) (noting that many refer to Italian manufacturing as the, “savior of craft,” despite being quite different than the “pre-industrial” craft workshop). Per Mr. Ross,

“Craft” is a key term in the promotional rhetoric of virtually every Italian manufacturer, and it is supposed to evoke an unbroken tradition of making things by hand in artisanal workshops as old as the Renaissance. The knowledge passed down in these workshops is somehow responsible for the elusive style of the Italian product. Some part of this reputation is sheer necromancy, conjured up to breathe value into the product’s price. Traditionally, this mystique was rooted in the survivalist need for practitioners to protect their knowledge of techniques and rules of the trade, inducting apprentices only under closely controlled conditions. The legacy is strong enough that, even today, the perception of craft skills is still colored by the obscurantism tied to this mystique. Yet the modernized craft units of production that support Made in Italy bear little resemblance to the pre-industrial workshop.

speak of.\textsuperscript{75} In fact, it was the styles created by French couturiers that preoccupied Italian fashion magazines in the prewar period.\textsuperscript{76} The industrial production of fashion did not begin until the 1950s, when the American market opened its arms to Italian fashion; and by the mid-1970s, Milan had finally solidified its position as a hub for export from Europe.\textsuperscript{77} But even then, celebrated brands such as Gucci, Giorgio Armani, and Prada simply did not have any global prominence until their astounding ascendance in the 1990s.\textsuperscript{78}

If the claim of an inherent cultural connection to fashion lacks a solid foundation, so does the claim of a connection to Italy, the place itself.\textsuperscript{79} As a matter of fact, the clothing is not necessarily made in Italy.\textsuperscript{80} The manufacturing of clothing and other fashion items went through a fundamental shift with the rapid off-shoring of production in the past twenty years.\textsuperscript{81} The consumer

\textsuperscript{75} See Nicola White, \textit{Reconstructing Italian Fashion: America and the Development of the Italian Fashion Industry} 28 (2000) (describing the tension between the fashion industry and textile producers). This is not to say that there was no “fashion industry” before that took advantage of Italian textiles. Indeed, that is what Mussolini’s \textit{Ente nazione della moda} sought to coordinate. See Paulicelli, supra note 74, at 20-21.


\textsuperscript{80} See id. at 294, 299-300, 307 (noting outsourcing and explaining that at times, companies will drop “Made in Italy” label for lower production price).

\textsuperscript{81} See id. at 298 (describing recent outsourcing and its effects).
now would have a hard time finding out that almost all of the production process occurs outside of Europe;\textsuperscript{82} as long as the fashion house can attach the correct label, it can comfortably obscure everything that goes into the making of the product.\textsuperscript{83}

In other words, from the very beginning of the modern business of luxury fashion, dubious claims undergirded the peddling of highly valued designs and products.\textsuperscript{84} The market participants do not accuse each other of puffery because they all benefit from each other’s mythmaking.\textsuperscript{85} Another, more comprehensive study might ascertain the pervasiveness of the practice across sectors of the economy, but for this paper, I have limited my discussion to providing an opening window into the problem.

\textsuperscript{82} See Alexandra A. Seno, A New Luxe Take on “Made in China,” N.Y. TIMES, Oct. 1, 2007, archived at www.webcitation.org/6AvWwcaEp (stating that it is difficult to get luxury companies to reveal any details about their supply chains). Yet there is clear evidence of a move in production out of Europe; for example, “Made in Italy” companies in Italy relocated significant portions of their production chain throughout the 1990s and 2000s. See Giuliano Conti & Stefano Menghinello, Modelli di impresa e di industria nei contesti di competizione globale: l’internazionalizzazione produttiva dei sistemi locali del made in Italy, 2 L’INDUSTRIA: RIVISTA DI ECONOMIA E POLITICA INDUSTRIALE 315, 315 (1998); Maria Savona & Roberto Schiattarella, International Relocation of Production and the Growth of Services: the Case of the “Made in Italy” Industries, 13 TRANSNAT’L CORPS. 57, 58 (2004) (addressing the relationship between the international relocation of production and the “Made in Italy” production industry); YANAGISAKO, supra note 72; Crane, supra note 76, at 329 (noting “[i]t is also pertinent that several of its most prestigious brands that are supposedly ‘made in Italy’ are actually made in China”).

\textsuperscript{83} See Lanham Act § 43(a)(1)(B) (explaining the prohibition on misrepresentations of origin). This would not make for a showing of literal falsity by a plaintiff in a false advertising suit, however, because EU rules of origin allow a country to be indicated as the country of origin as long as the last substantial transformation of the product occurred in that country. See Council Regulation 2913/92, art. 24, 1992 O.J. (L 302) 1, 17 (EC) (describing how origin is determined when production occurs in more than one country).

\textsuperscript{84} See Djelic, supra note 78, at 631-32 (discussing the evolution of Italian fashion companies); Likosky, supra note 79, at 306-10 (considering the effect of outsourcing on “Made in Italy” label).

\textsuperscript{85} See PRESTON, supra note 25, at 25-26 (examining industry comments with respect to the benefits of using puffery in advertising).
III. Trademark Law and Industry Myths

As the foregoing discussion shows, in at least one industry --- and I think in many others as well --- industry myths maintain and fortify the prestige value of products, which is different from the value of the physical product. Such a conclusion is broadly in line with the trademark theory literature, which has long held that the rise of modern advertising has augmented the value of a vast array of trademarks beyond — as I articulated at the beginning of this Essay -- the value of conveying information about the product.\footnote{See, e.g., Dogan, supra note 14, at 1671-72 (discussing the influence that advertising has had on consumers); Landes, supra note 15, at 167 (noting the value in product identification through the use of trademarked names).} In 1927, at a time in American history when advertising practices had already begun to move towards the attempted cultivation of new consumer desires,\footnote{See Bone, supra note 2, at 580 (reviewing the logic and value of psychological advertising).} Frank Schecter argued that trademark protection should come out of a recognition that the mark is “often the most effective agent for the creation of good will, imprinting upon the public mind an anonymous and impersonal guaranty of satisfaction, creating a desire for further satisfactions. The mark actually sells the goods. And, self-evidently, the more distinctive the mark, the more effective is its selling power.”\footnote{Schecter, supra note 1, at 819.}

He proposed that trademark law should protect against uses of a mark that dilute its uniqueness.\footnote{See Schecter, supra note 1, at 830-31:  
[T]he following principles necessarily emerge: (1) that the value of the modern trademark lies in its selling power; (2) that this selling power depends for its psychological hold upon the public, not merely upon the merit of the goods upon which it is used, but equally upon its own uniqueness and singularity; (3) that such uniqueness or singularity is vitiated or impaired by its use upon either related or non-related goods; and (4) that the degree of its protection depends in turn upon the extent to which, through the efforts or ingenuity of its owner, it is actually unique and different from other marks.} According to this
simple yet radical view, "[t]he judge need only consider the identity or close similarity of the parties’ marks. If they were identical or closely-similar, then the loss of uniqueness could be presumed." The impulse was challenged later by Ralph Brown in a prominent article in 1948, by which time there was already forms of antidilution protection on the books in state law. Lamenting that the persuasive – as opposed to informational – advertising of his time thrived off of exploiting consumer emotion, Brown wished to strip legal protection for uses of a mark that merely captured their persuasive value because they wasted resources by distorting consumer choices. Echoing this attack on the persuasive aspect of advertising, many contemporary commentators have articulated concerns about social wastefulness and even the stifling of competition. Others have then retorted that choices based on reasons other than product function and price nevertheless improves consumer welfare if consumers de-

91 See Brown, supra note 2, at 1205-06 (emphasizing the dangers of persuasive advertising, as well as acknowledging its duty to inform consumers).
92 See Brown, supra note 2 at 1182: The classical economists who enthroned the consumer never dreamed that he would make his decisions under a bombardment of stupefying symbols. He should be informed, and willing to pay the necessary price for information. But the most charitable tabulations reveal relatively little information in advertising directed to consumers outside the classified columns and local announcements. National advertising is dominated by appeals to sex, fear, emulation, and patriotism, regardless of the relevance of those drives to the transaction at hand. The purchase of many advertised articles, then, has a raw emotional origin.
93 See Bone, supra note 2, at 620 (highlighting how trademarks distort consumer views by targeting their emotions); Klieger, supra note 2, at 856-63 (discussing effects of persuasive advertising on brand appeal); Kratzke, supra note 2, at 222 (discussing the implications of a consumer paying a premium for a trademarked product); Litman, supra note 2, at 1730 (evaluating effects of intellectual property protection on consumers); Lunney, supra note 2, at 437-39 (reviewing trademark protection on consumers).
rive utility from them.94 Contrary to claims of anticompetitive effects, some would argue that the law is merely brands to capture the new kind of value that they created themselves through persuasive advertising.95

This certainly seems to be the view of the fashion industry.96 As mentioned earlier, the fashion industry has been worried about counterfeiting.97 It is worried because a particular type of counterfeiting -- what I will call brand imitation -- has the potential to severely compromise the prestige value that stem from persuasive advertising. By brand imitation I point to a specific type of counterfeiting that causes the most consternation for brand owners. It exists along a spectrum of counterfeiting that occurs in the real world: on one end, there are fake items sold as real ones, commanding the normal, exorbitant prices; on the other end, there are look-alikes that do not resemble the real, with shabby construction and misspellings in the fake trademark; and then, in between the two extremes, there are fakes that consumers know as fakes, that earnestly imitate the real, that attempt to copy the original design and mark so as to evoke the feeling of luxury.98 These ambiguous counterfeits do the work of what I call brand imitation.

94 See Nelson, supra note 3, at 213 (noting different theories on how consumers determine utility of a brand).
96 See Merlo, supra note 77, at 424 (discussing the influence of Italian fashion).
97 See Taylor, supra note 70 at 55 (noting that copying of designs has long been part of couture fashion world); Bartow, supra note 62, at 711-12 (discussing the need for further prosecution of imitation brands).
The fraud that inheres in the first type of use, the kind that confuses the actual consumer, makes it universally condemnable. But it is also not very likely that a fake would show up on the shelves of a luxury goods store. The second type of use would not concern the mark owners because the public probably does not associate the look-alikes with the luxury fashion company. The fluid and indeterminate gray zone in between the two (the third type), however, causes great unease for mark owners because it opens up endless possibilities for damaging the prestige of their products.

Luckily for mark owners, current trademark law allows them to take action in several ways, through statutory rights and judicial doctrines that essentially defend prestige values. For example, mark owners have a statutory right of action against uses that “tarnish” the mark. Courts have embraced the concept as a dilution concept, and historically found tarnishment where the plaintiff showed that its mark is “linked to products of shoddy quality, or is portrayed in an unwholesome or unsavory context . . .” so that “the public will associate the lack of quality or lack of prestige in the defendant’s goods with the plaintiff’s unrelated goods . . .”

Antidilution protection does not merely exist in statutory rights. Section 43(a)(1)(A) of the Lanham Act also gives a private right of action against any person who uses in commerce “any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion . . .” Courts have developed many in-

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100 See Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 434 (2003) (discussing how demonstrating dilution of a mark is done by showing a lessening of the capacity of a brand to identify and distinguish goods).

101 Deere, 41 F.3d at 43.

102 Lanham Act §43(a)(1)(A).
interpretations of “confusion,” including the capacious concept that even if the buyer and seller of a good proceeded with their transaction with no confusion as to source or affiliation, a good could cause confusion in the minds of the general public (i.e. people in general who did not yet buy the good).

These examples require much more elaboration, which I will provide in the next Part. They partake in a much broader trend that many trademark scholars have written about --- the dramatic expansion of trademark law in the form of rights of publicity, sponsorship or affiliation confusion, and initial-interest confusion. Numerous commentators have worried that these trends amount to a move towards making trademarks property, including the capacious concept that even if the buyer and seller of a good proceeded with their transaction with no confusion as to source or affiliation, a good could cause confusion in the minds of the general public (i.e. people in general who did not yet buy the good).

103 See Allen supra note 11, at 345 (focusing on post-purchase instead of pre-sale confusion as a strain of non-purchaser confusion); Lemley, supra note 11, at 422-26 (providing examples of how consumers can become confused by companies using other companies’ trademarks); McKenna, A Consumer Decision-Making Theory of Trademark Law, supra note 11, at 95-99 (discussing how courts have interpreted the doctrinal requirement of “source” confusion more broadly).

104 See, e.g., Au-Tomotive Gold Inc., 603 F.3d at 1138 (concluding that consumers purchase products that have been trademarked rather than actually purchasing the trademark); Hermes Int’l, 219 F.3d at 109 (illustrating how high-end consumers may confuse the general public by passing off a knockoff as the genuine article); Landscape Forms, 113 F.3d at 382 (signifying the importance of the confusion test to the general public, as well as to potential purchasers); Ferrari S.P.A., 944 F.2d at 1243 (stating that similarity of products is actionable when the similarity leads to confusion as to the source of the product is significant to the public).

in the sense of giving exclusive rights in gross.  As Rochelle Dreyfuss long ago cautioned, trademarks do not exist just as consumed objects, the audience (the public) also receives them by using them in the language of everyday life through what Dreyfuss calls expressive use of the mark. But mark owners have tried to occupy this “linguistic marketplace” by restricting the ability of the public to use the mark in a fashion other than what the owner intended, through the doctrines such as the ones explained above. In a 2006 article Dreyfuss observes how this development increasingly pits trademark law against the natural ways in which marks change in meaning in the social world that they enter:

Images and trade symbols are increasing in cultural significance at exactly the time when protection is expanding. The exigencies of a global, on-line marketplace make stronger protection for trademarks necessary just when technology makes their widespread expressive use more feasible. Internet shopping requires both exclusivity and unrestricted availability—the former, to keep search costs

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106 See Mark A. Lemley, The Modern Lanham Act and the Death of Common Sense, 108 YALE L.J. 1687, 1696 (1999) (providing examples of trademark propertization); see also Robert C. Denicola, Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols, 1982 WIS. L. REV. 158, 195-96 (1982) (stating that “[f]amous trademarks offer a particularly powerful means of conjuring up the image of their owners, and thus become an important, perhaps at times indispensable, part of the public vocabulary. Rules restricting the use of well-known trademarks may therefore restrict the communication of ideas”).


108 DREYFUSS, supra note 105, at 7.

109 See DREYFUSS, supra note 105, at 7 (delving into the complications of the linguistic marketplace).
down by ensuring that consumers find the right site; the latter to allow markets to work efficiently by ensuring that consumers receive information about comparable products. As the commercial/expressive duality of marks’ meanings become salient, so too does the expressive/commercial duality of their use: many of those tee shirts, mugs, posters, and art works [not sponsored by the trademark owner] are sources of profits—profits that derive from the trademark but which are channeled back into efforts to destabilize its meaning.\textsuperscript{110}

After reviewing the ways that courts have dealt with this tension, Dreyfuss calls for trademark law to draw lessons from cognitive science research on consumer psychology and behavior.\textsuperscript{111} By coming up with a better picture of the reasonable consumer, we can begin finding ways to protect mark owners while also better protecting speech interests.\textsuperscript{112}

Dreyfuss’ normative concerns about the linguistic marketplace ground the proposal that I am about to give to deal with the problem of industry myths, but I first want to emphasize that my view of the problem comes from a different angle. For me, the attempted monopolization of the meaning of the mark not only collides with speech interests, but also facilitates industry myth-making. If the law allows no one to appropriate trade symbols in creative (though non-confusing to the buyer) ways to criticize the original mark owner, we leave the task of myth-busting to non-commercial speech avenues only, and constrict our possibilities for revelation. Through doctrines such as post-sale confusion, trademark law has structurally adjusted to become unwilling to help the consumer read industry myths with a critical eye. A spiral of silence encapsulates counter-mythical knowledge, frustrat-

\textsuperscript{110} Dreyfuss, supra note 105, at 5.
\textsuperscript{111} See Dreyfuss, supra note 105, at 21-22 (analyzing prevailing theories of cognitive research).
\textsuperscript{112} See Dreyfuss, supra note 105, at 24-26 (discussing consumer confusion).
ing the goals of trademark law as a vehicle for information in the marketplace.

IV. A Proposal

In light of these circumstances, several proposals might help to open up channels to attack industry myths, and I weigh them in turn. First, news reporting and other noncommercial speech provide crucial information to the public. The public relies on the media to investigate corporate malfeasance, but the media could not possibly do systematic research into every industry to detect the subterranean webs of half-truths that no one else outside the particular trade sees. Each story requires a commitment of resources for forensic journalism.

Aside from the media, the government could step in with a strong hand. The Federal Trade Commission has long had the authority to prohibit “unfair or deceptive acts or practices in or affecting commerce . . .,” as well as false advertising. The FTC could play a more vigorous investigative role in unveiling industry myths, especially if we lived in a world of a weakened puffery doctrine --- as proposed by Hoffman --- in which more statements would be considered illegal false advertising and fewer statements would be nonactionable puffery. However, even if the puffery doctrine were weakened, it seems fair to predict that FTC investigations and reports would have limited effect on powerful industries whose common myths figure prominently in the business model of individual firms. The Commission’s investigations take time, and the reactionary and retrospective nature of these actions gives these industries free rein to reap the profits from their masquerade while the agency conducts research. And be-

\hspace{1cm}^{113} 15 \text{ U.S.C. § 45(a)(2)} (2006).
\hspace{1cm}^{114} \textit{See id. at §§ 52-54} (establishing Federal Trade Commission’s authority to regulate false advertising as an unfair method of competition).
\hspace{1cm}^{115} \textit{See Hoffman, supra note 18, at 1445} (articulating the need for the puffing doctrine to focus more on manipulation).
\hspace{1cm}^{116} \textit{See J. Shahar Dilibary, Trademarks as a Media for False Advertising, 31 Cardozo L. Rev. 327, 340} (2009) (arguing that agencies such as Federal Trade
sides, there does not yet exist a clear path to coming up with a new regulatory regime because advertising constantly reinvents and reinvigorates brands but also its own methodology and means. As Mark McKenna aptly cautioned,

[a]ttempting to police the persuasive messages of advertising and to restrict advertisers’ ability to convey those persuasive messages promises to be messy, as brand messages are conveyed in a multitude of ways beyond conventional advertising. Marketers engage in product placement, commission branded content, and use a variety of other “stealth marketing” . . . [and] [r]egulating these practices would raise enormous practical difficulties. Even focusing just on traditional . . . advertising, it is difficult to imagine a regulatory regime that could regulate persuasive messaging without undermining the value of the informational messages.\textsuperscript{117}

In sum, agency intervention and news reporting serve important functions, but I have endeavored to show in this Essay that industry myths are complex phenomena. These two avenues alone are not enough. For example, for something like luxury Italian handbags, I don’t think it’s realistic to expect any news agency to spend considerable resources investigating the puffing that goes into them.

Instead of pinning all hope onto the government and the media, I look to the dynamism of the market. Breaking up the implicit collusion in the construction of industry myths requires looking beyond false advertising law and a radical departure from the current scheme of trademark law generally, in which our doctrines too forcefully protect existing trademark owners’

\textsuperscript{117} McKenna, \textit{A Consumer Decision-Making Theory of Trademark Law}, supra note 11, at 117-118.
ability to monopolize the meaning of their marks. We ought to unleash the power of the market and allow for new uses of a mark that deliberately destabilize its cultural significance. The commercial use of the mark in a way least intended by the mark owner might have exactly the kind of critical stance that we need against established brands. Allowing such new players in the marketplace spurs the process of breaking down falsehoods that too easily thrive in the current regime.

Carving out this battlefield for meaning requires rethinking many doctrines in trademark law. As I stated at the outset of this Essay, trademark and false advertising law are intricately linked, and problems that occur in one arena easily impacts the other; in the case of industry myths, the imperative of opening up the linguistic marketplace requires us to look beyond false advertising law and reappraise long held assumptions in trademark law.\textsuperscript{118} Although I do not pretend here to explain every possible implication of my proposal, I will revisit two doctrines briefly mentioned earlier to illustrate how to begin this exercise in reform.

\textit{A. Tarnishment}

Courts have historically found tarnishment where the plaintiff showed that its mark has been “linked to products of shoddy quality, or is portrayed in an unwholesome or unsavory context,” so that “the public will associate the lack of quality or lack of prestige in the defendant’s goods with the plaintiff’s unrelated goods . . . .”\textsuperscript{119} Unwholesome or unsavory contexts might include sexual activity, obscenity, or illegal activity.\textsuperscript{120} In an in-
fluential opinion, Judge Posner illustrated the concept of tarnishment through an example of a striptease joint that adopts the name Tiffany.121 Even though consumers will not think that the famous jewelry store owns the striptease joint, tarnishment doctrine would hold that “because of the inveterate tendency of the human mind to proceed by association, every time they think of the word 'Tiffany' their image of the fancy jewelry store will be tarnished by the association of the word with the strip joint.”122 Courts have found tarnishment in associations that are much less dramatic. For example, in *New York Stock Exchange, Inc. v. New York, New York Hotel LLC*,123 the NYSE sued the New York, New York Hotel & Casino (“Casino”) in Las Vegas over the latter’s use of the slogan “New York $lot Exchange” on its slot machines.124 The Second Circuit reversed a grant of summary judgment on a claim of tarnishment; it reasoned that “[a] reasonable trier of fact might . . . find that the Casino's humorous analogy to its activities—deemed by many to involve odds stacked heavily in favor of the house—would injure NYSE's reputation.”125 And in *Chemical Corp. of America v. Anheuser-Busch, Inc.*,126 the Fifth Circuit held that Budweiser, which owned the slogan “Where there's life . . . there's Bud” was entitled to a decree enjoining an insecticide manufacturer from using the slogan “Where there's life . . . there's bugs.”127 The court reasoned that the latter would bring bad reputation to Budweiser.128 Similarly, in *Coca-Cola Co. v. Alma-Leo (S.D.N.Y. 1979), aff’d, 604 F.2d 200 (2d Cir. 1979) (explaining how sexual behavior and illegal use of trademark tarnish the reputation); Pillsbury Co. v. Milky Way Prods., Inc., 215 USPQ 124, 132 (N.D. Ga. 1981) (demonstrating the use of trademark obscenely is not in fair use).

121 *Ty Inc. v. Perryman, 306 F.3d 509, 511 (7th Cir. 2002) (describing “tarnishment” as a form of dilution).*

122 *Id.*

123 293 F.3d 550 (2d Cir. 2002).

124 *Id.* at 553-54 (noting the casino’s continued use of NYSE trademarks as the basis for appeal).

125 *Id.* at 558.

126 306 F.2d 433 (5th Cir. 1962).

127 *See id.* at 436, 439 (finding slogans to be deceptively similar as grounds for temporary injunction).

128 *See id.* at 438 (noting that a party’s interest in a trademark can be protected from related and unrelated competitors).
U.S.A., Inc., a trial court granted a temporary restraining order enjoining a bubble gum maker from selling its products in the form of a white powder inside a plastic container. Regardless of whether there was confusion in the mind of the consumer, the court thought that the association with Coca-Cola through the shape of the bottle would likely injure Coca-Cola’s reputation.

Courts have folded tarnishment into the above-mentioned concept of dilution. And the most recent iteration of the statutory protection, in the form of the Trademark Dilution Revision Act of 2006 (TDRA), seems to do the same. Specifically, it provides protection against two types of phenomena: The first is blurring, which is defined as an “association arising from the similarity between a [designation of source] and a famous mark that impairs the distinctiveness of the famous mark.” For example, as two commentators have helpfully illustrated, Exxon pianos or Exxon carpets would adversely affect the distinctiveness of Exxon. The rationale behind the theory of blurring is that having many types of Exxon-marked products on the market “may make it more difficult for consumers to figure out which company is responsible for any particular product.”

The second phenomenon that TDRA protects against is tarnishment, which is now defined as “association arising from

\[\text{\textsuperscript{129}} 719 \text{ F. Supp. 725, 726 (N.D. Ill. 1989)} \text{ (precluding distribution of a bubble gum product in a container resembling a Coca-Cola bottle).} \]
\[\text{\textsuperscript{130}} \text{See id. at 728 (explaining that the use of a bottle of similar shape would “likely” harm Coca-Cola’s reputation).} \]
\[\text{\textsuperscript{131}} \text{See \textit{Ty}, 306 F.3d at 511 (suggesting that tarnishment reduces the distinctiveness of a trademark).} \]
\[\text{\textsuperscript{132}} \text{See Lanham Act \S 43(c)(2)(C) (defining dilution by tarnishment).} \]
\[\text{\textsuperscript{133}} \text{Id.} \]
\[\text{\textsuperscript{134}} \text{See Stacey L. Dogan & Mark A. Lemley, \textit{What the Right of Publicity Can Learn from Trademark Law}, 58 Stan. L. Rev. 1161, 1198 (2006) (describing the potential for consumer confusion when using a name like Exxon for multiple products).} \]
\[\text{\textsuperscript{135}} \text{See \textit{id.} (describing how consumers associate even unrelated products with blurred marks).} \]
the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.”

A “plaintiff must show . . . that the defendant [has] tarnish[ed] the plaintiff’s mark” through what “consumers [would] perceive as a designation of source of the defendant’s goods . . . .” This means that references that the defendant made to a plaintiff’s mark, even if they might harm the reputation of the mark, are not considered tarnishing if consumers do not consider them to be designations of source of the defendant’s products. Additionally, the statute establishes an affirmative defense for fair use of a famous mark “by another person other than as a designation of source for the person’s own goods or services . . . .”

The rationale behind tarnishment seems to be that just like blurring, it diminishes the distinctiveness of the mark; it is

136 Lanham Act § 43(c)(2)(C).
137 Beebe, supra note 90, at 1172.
138 See Beebe, supra note 90, at 1172-74 (indicating that in order for there to be harm there must be misrepresentation that creates consumer confusion). As Barton Beebe explains: “Consider a t-shirt or bumper sticker that states ‘Wal-Mart is Evil.’ This conduct, though certainly tarnishing, is not prohibited under the Act. The reason is that in neither of these cases will consumers perceive these signs as designations of the source of the defendants’ goods.” Beebe, supra note 90, at 1172.
139 Lanham Act § 43(c)(3). The full section provides that no cause of action exists for:

- (A) Any fair use, including a nominative or descriptive fair use, or facilitation of such fair use, of a famous mark by another person other than as a designation of source for the person’s own goods or services, including use in connection with—
  - (i) advertising or promotion that permits consumers to compare goods or services; or
  - (ii) identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner.
- (B) All forms of news reporting and news commentary.
- (C) Any noncommercial use of a mark.

Id.
therefore a cause of action under dilution law.\textsuperscript{140} But the concept of tarnishment does not in fact have much in common with blurring.\textsuperscript{141} The latter, as I explained above, is about the difficulty that consumers would have in figuring out who produces what goods if products in different markets had the same mark.\textsuperscript{142} This “blurring” of the mark makes it less distinctive.\textsuperscript{143} But tarnishment does not seem to touch on such concerns at all.\textsuperscript{144} Instead it seems to reflect concerns about the loss of reputation, prestige, or, in the terminology of the trademark theory literature, persuasive values.\textsuperscript{145} As Professor Shahar Dilbary explains in his defense of the doctrine, the consumer of a famous mark received what he calls an “intangible product” --- characterized by positive emotional associations with the famous mark --- along with the tangible product of the good itself and information about the good, and tarnishing conduct by other marks threatens to erode this intangible product: \textsuperscript{146}

The buyer receives the right to use or enjoy the intangible psychological effect attached to the

\textsuperscript{140} See, e.g., \textit{Ty}, 306 F.3d at 511 (describing the similarities between tarnishment and dilution and how these concepts reduce the distinctive nature of the trademark).

\textsuperscript{141} See Gerard N. Magliocca, \textit{One and Inseparable: Dilution and Infringement in Trademark Law}, 85 Minn. L. Rev. 949, 983 (2001) (arguing Schecter’s concept of dilution had nothing to say about tarnishment in fact because it had little to do with how he conceived of dilution); \textit{see also} Beebe, \textit{supra} note 90, at 1174 (stating much confusion could be avoided by refraining from using the term dilution).

\textsuperscript{142} See Dogan & Lemley, \textit{supra} note 134, at 1198 (asserting that blurring makes it difficult for consumers to know which company is responsible for creating products).

\textsuperscript{143} See \textit{Ty}, 306 F.3d at 511 (describing tarnishment as a subset of blurring, since it reduces the distinctiveness of the trademark).

\textsuperscript{144} See Dogan & Lemley, \textit{supra} note 134, at 1198 (clarifying that tarnishment does not result in a loss of distinctiveness but rather affects the reputation of the producer).

\textsuperscript{145} See Dogan & Lemley, \textit{supra} note 134, at 1198 (articulating the concept that use of a similar mark on an unrelated good or service of poor quality may result in a negative association with the original mark).

\textsuperscript{146} See Dilbary, \textit{supra} note 4, at 634-35 (reviewing tangible and intangible benefits of famous mark).
product (conveyed by the famous mark), but the mark can be eroded, or diluted, if, for example, the public learns to associate the mark with an unsavory image. If the public learns to associate “Coca-Cola” with drug consumption, or “Bud” beers with bugs, then instead of conveying a hedonistic lifestyle, a sense of freedom, or just a pleasing association, the intangible product will subject a consumer who purchased these goods to ridicule or disgust. Contamination of the mark destroys the value to the consumer. The product’s physical value will remain the same, but such tarnishing diminishes the emotional experience and the image that accompany it.

Contamination or, to use the trademark lingo, dilution, divests an article from its psychological freight (or even worse, replaces a positive psychological association with a negative one) and renders that freight worthless. The third party that destroys the aura of the famous mark inflicts an externality on both consumers and the producer. He appropriates the positive image of feeling associated with the mark to his own benefit without internalizing the costs of such appropriation. Using the slogan “Never Leave Home Without It” in connection with the sale of condoms as a spoof of American Express’s “Don’t Leave Home Without It” campaign could damage the image of decency and respect that the credit card company has created. It will also decrease consumers’ utility from showing a prestigious card and may lead to a decrease in consumption.147

147 Dilbary, supra note 4, at 634-35.
But this justification for tarnishment doctrine makes two assumptions that this Essay shows to be unsustainable. It assumes that persuasive advertising could not be harmful, and that persuasive branding happens only in a dyadic relationship between the brand and the consumer. But as I have demonstrated through examples like cigarettes and fashion, the making of reputation is intimately entwined with industry mythmaking, which can be very harmful and also transcends the dyadic relationship. Market participants could compete fiercely with each other while at the same time remain complicit in the construction of a common myth that enhances the collective value of products across the entire industry. Industry myths do not enter into the spotlight because competitors do not have any incentive to counter some of their competitors’ claims about the competitors’ own products in situations where they themselves benefit from such claims by dint of coexisting in the same industry and producing the same type of products. They puff together, they inhale the profits together.

In light of these circumstances, tarnishment, as a statutory cause of action protecting a mark’s reputation, becomes a crucial weapon in the suppression of countermythical knowledge. The consumer fails to receive such information in the marketplace because, absent government or news commentary, effective critique in the form of commercial activity would be actionable. In my view, we would be better off eliminating tarnishment as a cause of action altogether.

148 See Dilbary, supra note 4, at 634-35 (discussing psychological interaction between consumer and brand).
149 See Dilbary, supra note 4, at 647 (stating “[d]ilution, persuasive branding, and price-discrimination are all intra-brand phenomena”). This assumption is in fact quite explicit. See also Dilbary, supra note 4, at 656 (referring to the effect of persuasive branding in the intra-brand setting).
150 See supra Part I (discussing cigarette brands), Part II (demonstrating mythmaking via the fashion industry).
151 See Tushnet, supra note 8, at 864-65 (harmonizing trademark law and false advertising law).
152 But see Lanham Act § 43(c)(3)(C) (stating that news commentary and noncommercial work constitute fair use and are not actionable).
Absent statutory repeal, I would propose that courts make the above-mentioned affirmative defenses more robust. As Rebecca Tushnet has pointed out, courts have historically shown a disturbing willingness to characterize the use of a mark as a designation of source for the defendant’s goods (in which case the statutory defenses would not apply) even when the use could be validly seen as a parody. In light of the evidence I’ve presented in this Essay, I would urge future courts to be more liberal with the application of the defenses.

B. Post-Sale Confusion

As I explained above, the TDRA covers only blurring and tarnishment. But dilution is contemplated in trademark law in other ways as well, most notably through the doctrine of post-sale confusion. Section 43(a)(1)(A) of the Lanham Act gives a private right of action against any person who uses in commerce “any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion . . . .” Courts have developed many interpretations of “confusion,” including the capa-

154 See Beebe, supra note 90, at 1145 (noting “the TDRA seeks to prevent only dilution by blurring and dilution by tarnishment. The language of the Act does not address and does not seek to prevent the dilution of a mark’s uniqueness”).
155 See, e.g., Beebe, supra note 90, at 1146 (discussing how protection from dilution is necessary based on consumer confusion as to source).
156 Lanham Act § 43 (a)(1)(A).
157 See Allen, supra note 11, at 345 (acknowledging post-purchase confusion in discussions of jeans’ back-pocket branding); Lemley, supra note 11, 416-18 (examining advertising wherein trademark owner may mistakenly be associated with defendant); McKenna, A Consumer Decision-Making Theory of Trademark Law, supra note 11, at 92-94 (commenting on the added costs caused by confusion); Robert G. Bone, Enforcement Costs and Trademark Puzzles, 90 VA. L. REV. 2009, 2120-22 (2009) (creating cost-benefit analysis
cious concept that even if the buyer and seller of a good proceeded with their transaction with no confusion as to source or affiliation, a good could cause confusion in the minds of the general public. Indeed, the majority of circuits have adopted this formulation of post-sale confusion. But some of the justifications given for the doctrine seem to veer away from an understanding of confusion; instead, some courts started to ground their definition of post-sale confusion in the general sense that somehow “rarity and distinction should be promoted and preserved in light of the social functions that they play.” In the words of the Second Circuit in Lois Sportswear, Inc. v. Levi Strauss & Co., confusion can come about, for example, as a result of one clothing company’s copying of Levi’s rear-pocket stitching because buyers will start realizing that Levi Strauss no longer commands an exclusive pattern.

Since courts, not Congress, ushered in post-sale confusion, the courts could also contain it. Notably, the Seventh Circuit may have already started down this path. In Nike, Inc. v. Just Did It Enterprises, the court held that a trademark infringement which justifies a conclusive presumption of secondary meaning for inherently distinctive marks establishes a state of confusion with directly competing products.

158 See Hermes, 219 F.3d at 108-09 (asserting post-sale confusion often created in general public by knockoffs); Landscape, 113 F.3d at 382 (asserting same). 159 See, e.g., Insty*Bit, Inc. v. Poly-Tech Indus., Inc., 95 F.3d 663, 671-72 (8th Cir. 1996), cert denied, Poly-Tech Indus., Inc. v. Insty*Bit, Inc., 519 U.S. 1151 (1997) (describing a 1962 amendment to the Lanham Act as “includ[ing] confusion of nonpurchasers as well as direct purchasers ...”); Ferrari, 944 F.2d at 1239-40, 1243-44 (discussing when similarity leads to public confusion); Payless Shoesource, Inc. v. Reebok Int’l Ltd., 998 F.2d 985, 989 (Fed. Cir. 1993) (noting that post-sale confusion may damage a company’s reputation and image).

160 Beebe, supra note 105, at 852.
161 799 F.2d 867 (2d Cir. 1986).
162 See id. at 875-76 (describing consumers’ perception of exclusiveness of back-pocket stitching).
163 See Nike, Inc. v. Just Did It Enter., 6 F.3d 1225, 1229 (7th Cir. 1993) (differentiating customer confusion from public confusion).
164 See id. (differentiating types of confusion).
action deals with customer confusion, not public confusion when viewing the goods in question from afar.\textsuperscript{165} In \textit{Dorr-Oliver, Inc. v. Fluid-Quip, Inc.},\textsuperscript{166} the district court had found a likelihood of confusion in a situation where people touring clamshell plants "would be unable to distinguish Fluid-Quip's clamshells from Dorr-Oliver's when viewing a starch washing line," but the Seventh Circuit held that the Lanham Act does not protect against confusion among people touring the plants; rather, it protects against confusion among consumers in the market for clamshells.\textsuperscript{167}

The theory put forth in this paper supports the idea of eliminating post-sale confusion altogether. Right now, the post-sale confusion doctrine poses a formidable obstacle against liberating the linguistic marketplace, which necessitates breaking open new channels for dialogue between new market entrants and the public.\textsuperscript{168}

\textbf{V. Conclusion}

By way of conclusion I would like to consider briefly, again, the example of luxury fashion to take a glimpse – however fleeting – at a world without doctrines that protect the mark’s reputation. Recall the typology I outlined earlier: First, a fake item sold as a real one, which would be fraud; second, look-alikes that do not resemble the real, which mark owners would not be so concerned with; and third, fakes that consumers know as fakes, that earnestly imitate the real, that causes great consternation for mark owners because it confuses the public (though not the consumer).

\textsuperscript{165} See id at 1233 (limiting use of post-sale confusion in the case).
\textsuperscript{166} 94 F.3d 376 (7th Cir. 1996).
\textsuperscript{167} See id. at 382 (reversing Dorr-Oliver, Inc. v. Fluid-Quip, Inc. 894 F. Supp. 1190, 1200 (N.D. Ill. 1995)).
\textsuperscript{168} My critique of postsale confusion comes from the vantage point of false advertising. See also, Jeremy N. Sheff, \textit{Vehlen Brands}, 96 Minn. L. Rev. 769, 772-73 (2012) (critiquing post-sale confusion from an angle other than false advertising).
Yet, this work of earnest imitation embodies the counter-mythical potential of a freer linguistic marketplace, in which conspicuous consumption constitutes a subset of practices that perfectly illustrate the simultaneous salience of brand competition in the market and second-order competition in meaning. Thorstein Veblen first theorized that the emergence of a split between productive labor and honorific pursuits undergirded the rise of capitalism in Europe and the practice of status-conferring consumption.\textsuperscript{169} Since then, the disputed relationship between the latter and the former continues to pique scholarly interest, especially after the canonical work of Pierre Bourdieu. In Distinction: A Social Critique of the Judgment of Taste, Bourdieu rebukes Marxist theorists for their oversimplified account of the erection of class structures.\textsuperscript{170} The ownership of capital does not predetermine social life and hierarchies, Bourdieu cautions.\textsuperscript{171} Rather, consumptive practices structure the contours of class, a system by which elites create and maintain signs of distinction to lend cultural and moral legitimacy to their position in the social hierarchy.

Prestige, in other words, circulates as a currency in the game of second-order competition. The material world of the consumer, therefore, does not simply traffic in the trading of goods made to out-dazzle one another. It also abounds in symbols, the deployment of which becomes another battleground on which some consumers have more power than others. Hence, the subversive potential of uses of a mark that deliberately confuse the public (though not the buyer) and tarnish reputation. In a relatively uninhibited linguistic marketplace, such uses give each consumer the power to destabilize the meaning of the mark (Could a Gucci bag really be Italian made if everyone on the sub-

\textsuperscript{169} See Thorstein Veblen, The Theory of the Leisure Class: An Economic Study of Institutions 68-101 (1899) (theorizing that the emergence of a split between productive labor and honorific pursuits undergirded the rise of capitalism in Europe).


\textsuperscript{171} See id.
way seemed to carried something of similar design? Or, asked another way, could it really be that special as to warrant the price?). They render usurpable the hierarchies of distinction occupying a symbolic world that is at once vapid and meaningful.