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# What's the Harm of Trademark Infringement?

Rebecca Tushnet

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## WHAT'S THE HARM OF TRADEMARK INFRINGEMENT?

*Rebecca Tushnet\**

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### I. INTRODUCTION

For decades, the concept of actionable trademark infringement has been expanding. Source confusion, reverse confusion, approval/affiliation confusion, initial interest confusion, post-sale confusion, endorsement confusion, and so on, all have won cases for plaintiffs. Whether or not the confusion cost the plaintiff any sales, or was in any way material to consumers, our concept of trademark infringement now encompasses it. These expansions occurred for reasons that seemed sufficient to courts at the time, when advocates offered theories about how all these kinds of confusion could cause harm to the trademark owner. Primarily, courts feared that non-competing uses would preclude trademark owners from expanding into natural markets or tarnish its reputation among its existing consumers.

But tensions have been growing: courts deciding whether confusion is likely still rarely question the empirical bases of the different harm stories involved in different kinds of likely confusion. However, they increasingly ask whether those harm stories apply to the particular facts before them in assessing whether or not to grant injunctive relief. This particularization stems from the application of *eBay v. MercExchange*

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\* Professor, Georgetown University Law Center. Thanks to Mark McKenna for comments.

and *Winter v. Natural Resources Defense Council*, Supreme Court cases holding that courts must, in each case, engage in an equitable balancing before granting injunctive relief rather than presuming irreparable harm from the mere violation of a statute.<sup>1</sup> This development has broken many courts' habit of equating likely confusion with harm.<sup>2</sup> While it's probably not the best idea to examine theories that are the basis of liability solely from the perspective of whether or not to grant a remedy, courts are now asking what the harm of trademark infringement really is when it's not sales lost to the plaintiff in favor of the defendant's confusingly similar, competing product.

This Article explores the classic harm theories not involving sales substitution and argues that courts should recognize their empirical weakness. Part II considers the scholarly criticisms of the harm theories on empirical and normative grounds. Part III examines how the debate over harm is now resuming in court at the remedy stage. Part IV concludes that the changes in the law of remedies are positive developments, especially if they make courts rethink overly expansive models of trademark confusion.

## II. TM TROPES: TRADITIONAL STORIES ABOUT HARM FROM INFRINGEMENT

Before *eBay*, courts routinely found that “once the likelihood of confusion caused by trademark infringement has been established, the inescapable conclusion is that there was also irreparable injury.”<sup>3</sup> As one defender of the presumption of irreparable harm pithily summarized:

The basis for the presumption of irreparable harm in trademark law is the known or proven fact that monetary relief from trademark infringement is “inherently ‘inadequate’ and injury is ‘irreparable.’” Accordingly, the trademark presumption is merely an efficient, commonsense approach of recognizing the inherently irreparable nature of trademark infringement; it is not the type of categorical rule forbidden

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1. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 9 (2008); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006).

2. Mark P. McKenna, *Testing Modern Trademark Law's Theory of Harm*, 95 IOWA L. REV. 63, 67 (2009) (“[B]ecause courts have simply equated confusion with harm, they have lacked the tools to resist novel confusion claims.”).

3. *Pappan Enters. v. Hardee's Food Sys.*, 143 F.3d 800, 805 (3d Cir. 1998); *see also, e.g., McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1314 (11th Cir. 1998) (holding damage to reputation and loss of customers caused by unauthorized distribution of inferior products presents incalculable damages and thus irreparable harm).

by *eBay*.<sup>4</sup>

But the simplicity of this claim hides much: by whom is it “known or proven” that infringement causes irreparable harm? With what evidence was this fact proven? If it was proven in the early decades of the twentieth century when the theories were first embraced, is it still true?

#### A. *What Harms Might Be Irreparable?*

Lost sales are classic harm reparable with money damages. Therefore, they are not helpful in getting a preliminary injunction unless the magnitude of such lost sales is highly uncertain, which it is less likely to be if the defendant’s confusing products compete and thus substitute for purchases of the plaintiff’s. Lost sales are also most likely when the plaintiff’s goods compete with the defendant’s: a purchase of one can substitute for a purchase of the other, making the account of harm to the plaintiff highly plausible. But trademark law expanded over the course of the twentieth century to cover non-competing goods, which generally don’t cause lost sales in any direct fashion.<sup>5</sup>

The absence of a materiality requirement in trademark also affected how courts thought, or rather failed to think, about harm. Since courts don’t generally require plaintiffs to show that consumers *care* about the confusion at issue—particularly who sponsored or endorsed a product or service, rather than who made it or provided it—consumer harm from confusion isn’t required. Yet without consumer harm, there may be no harm to the trademark owner. Recent research suggests that materiality varies across different products. While consumers do often increase their willingness to pay or say that sponsorship is material to them for sports memorabilia, they care a lot less about other products, such as those that incidentally use a trademark owner’s name.<sup>6</sup> This result indicates that the true harm to the trademark owner from confusion in many cases is a mere loss of licensing revenue, which should be reparable with money damages just as copyright and patent losses are.

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4. Jeffrey M. Sanchez, *The Irreparably Harmed Presumption? Why the Presumption of Irreparable Harm in Trademark Law Will Survive eBay and Winter*, 2011 B.Y.U. L. REV. 535, 556 (2011) (footnotes omitted); *see also* Brief of the Int’l Trademark Ass’n as Amicus Curiae in Support of Petitioner at 3-4, *Herb Reed Enters., LLC v. Florida Entm’t Mgmt., Inc.*, 135 S. Ct. 57 (2014), (No. 13-1271).

5. McKenna, *supra* note 2, at 67-68 (identifying common arguments about the harm from confusion over non-competing goods, “which sound in empirical terms but which have never been empirically supported”).

6. Matthew B. Kugler, *Measuring Sponsorship Materiality* 3 (2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2628522](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2628522).

The theories of harm in cases of non-competing goods were more complicated than loss of licensing revenue. Some arguments appealed to the idea that poor-quality goods produced by the defendant could harm the plaintiff's reputation, leading people to evaluate the plaintiff's goods less favorably. Relatedly but more expansively, trademark lawyers argued that the plaintiff's loss of control over its own reputation was harmful, regardless of the present quality of the defendant's products.<sup>7</sup> As Professor Mark McKenna points out, these are far from immediate harms—they are risks, sometimes distant risks.<sup>8</sup> If the plaintiff's products are of good quality now, no immediate action should be required.<sup>9</sup>

Nonetheless, and without citation to actual evidence about consumers, the standard account offers an intuitively plausible claim about harm from inferior, confusing goods:

[C]onsumers' negative experiences with products sold under a particular trademark are never completely expunged from their memories. These consumers will justifiably view goods or services offered under the trademark with increased skepticism and hesitancy, having been put on notice that there has been imperfect control over the quality and consistency of such goods in the past. The more widespread and long-lasting the trademark infringement becomes, the more customers will have been exposed to these negative experiences that can never be fully erased.<sup>10</sup>

This account of consumer psychology bears similarities to the rational economic person models that assume that people can and do perfectly calibrate the amount of skepticism with which they approach advertising

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7. McKenna, *supra* note 2, at 83; see David H. Bernstein & Andrew Gilden, *No Trolls Barred: Trademark Injunctions After eBay*, 99 TRADEMARK REP. 1037, 1053 (2009) (making the standard argument that lower quality will harm the trademark owner's reputation for its own goods).

8. McKenna, *supra* note 2, at 83 ("These are not arguments about imminent economic loss to a mark owner. They are instead arguments about the ways third-party uses interfere with the meaning of a brand, and how that interference might ultimately cause economic harm by depressing demand for the mark owner's products or services.").

9. Jeremy N. Sheff, *Marks, Morals, and Markets*, 65 STAN. L. REV. 761, 799-80 (2013) (footnotes omitted) (noting that the rationale that even current good quality is no guarantee of continued quality "seems to allow a plaintiff who suffered no injury to obtain a judgment against a defendant who may (or may not) injure him someday, ignoring standing and ripeness doctrines that would seem to be directly applicable").

10. Bernstein & Gilden, *supra* note 7, at 1054; see also J. Thomas McCarthy, *Are Preliminary Injunctions Against Trademark Infringement Getting Harder to Achieve?*, 14 INTELL. PROP. L. BULL. 1, 1 (2009) (defending the presumption of irreparable harm); J. THOMAS MCCARTHY, 5 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 30:47 (4th ed. 2010) (same).

claims. To understate the matter, this idea of constantly updated preferences and evaluations is not borne out by the evidence. Indeed, as McKenna's survey of the evidence shows, consistent with my own work on dilution, it is rare for a brand to be harmed by the low quality or failure of a brand extension. That is, even when consumers correctly understand that a trademark owner is responsible for a bad product in a new market, they are unlikely to change their good opinion of the older, established product sold under the familiar trademark.<sup>11</sup> The risk of harm from confusion about mere affiliation with or sponsorship of an unworthy product is even lower, according to the evidence.<sup>12</sup> And all that is true even without further reinforcement by the trademark owner, who is unlikely to stop advertising its good qualities.

Strong brands in particular are very resilient.<sup>13</sup> Consider the Fifth Circuit's claim: "If a trademark owner allows licensees to depart from its quality standards, the public will be misled, and the trademark will cease to have utility as an informational device."<sup>14</sup> That's a wild overstatement. Even if there's some confusion, the trademark will

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11. McKenna, *supra* note 2, at 102-03 & accompanying notes ("Thus, the only apparent risk to a core brand from failed extension is that consumers will evaluate future extensions more negatively than they otherwise might have . . . [N]egative information about an extension did not affect the parent brand's image in the context of the goods the parent previously offered . . . Thus, the most that can be said regarding the impact of extensions on global brand assessments is that the extension may have feedback effects that are small in magnitude in a few cases in which the extension product is very closely related to the brand owner's pre-extension product offerings."); Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507 (2008); cf. Kugler, *supra* note 6, at 30 ("Only about 26.0% of those rating the six souvenir products would have blamed the sponsor for a bad experience. More than twice as many (57.4%) would have had an unchanged opinion. The difference was similar for the two automotive products (34.7% vs. 54.2%), if slightly less stark."). *But see* Robert G. Bone, *Taking the Confusion out of "Likelihood of Confusion": Toward a More Sensible Approach to Trademark Infringement*, 106 NW. U. L. REV. 1307, 1367-68 (2012) (commenting that these results just don't seem plausible to him and might not hold where consumers lack prior experience with the trademark owner).

12. McKenna, *supra* note 2, at 114 (citing Nicole L. Votolato & H. Rao Unnava, *Spillover of Negative Information on Brand Alliances*, 16 J. CONSUMER PSYCHOL. 196 (2006)) (discussing research about negative associations caused by brand alliances or celebrity endorsements); Votolato & Unnava, at 196, 198, 201 ("[A] host brand may generally be quite impervious to negative publicity surrounding its partner brand; the host brand [in the study] was only affected when participants were led to believe that the host knew of and condoned the partner's behavior. Spillover from the partner brand to the host brand did not occur unless this condition was present"; "consumers do not routinely blame a host brand for its partner's mistakes.").

13. Tushnet, *supra* note 11, at 543-44; *see also* Christo Boshoff, *The Lady Doth Protest Too Much: a Neurophysiological Perspective On Brand Tarnishment*, 25 J. PRODUCT & BRAND MANAGEMENT 196 (2016) (finding no support for the claim that tarnishing ads harm the reputation of moderately strong brands).

14. *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 387 (5th Cir. 1977).

almost certainly continue to have plenty of utility as an informational device. Courts recognize this in other contexts, as when a trademark claimant is fighting an argument that it abandoned its mark by failing to police unauthorized uses; courts are highly forgiving in such cases.<sup>15</sup> For example, courts and the Trademark Trial and Appeal Board have found that university mascots and names have retained trademark significance despite uncontrolled use by others for decades and, in one case, for nearly two centuries.<sup>16</sup>

Pre-*eBay* legal concepts of harm are even more detached from reality because of how consumers reason in “non-confusing” situations, where their prior experiences may lead them to self-reinforce their own expectations about strong brands. When over a thousand people interested in the Euro 2016 soccer tournament were asked to list the five brands they most closely associated with the tournament, more than half of their choices weren’t actual sponsors, including six out of the top ten choices.<sup>17</sup> Non-sponsor Nike, mentioned by nine percent of respondents, was only barely behind actual sponsors Coca-Cola and Adidas, mentioned by twelve and eleven percent respectively.<sup>18</sup> Meanwhile, actual official sponsors Orange, Hisense, and Hyundai failed to get even one percent of responses.<sup>19</sup>

This phenomenon is not unique to soccer. In surveys, five to ten percent of respondents will say that a famous brand is associated with a control product “just because they have heard of it.”<sup>20</sup> One survey expert reported that over *forty* percent of consumers would name a dominant

15. See, e.g., *Warner Bros., Inc. v. Gay Toys, Inc.*, 724 F.2d 327, 334 (2d Cir. 1983) (imposing “high burden of proof” on defendant claiming plaintiff abandoned its mark); *McCarthy*, *supra* note 10, § 17:17 (collecting cases to show that failure to police may, but need not, constitute abandonment; “The issue is hardly ever ‘abandonment,’ because that requires proof that the mark has lost all significance as an indication of origin.”); cf. *Carter-Wallace, Inc. v. Procter & Gamble Co.*, 434 F.2d 794, 802 (9th Cir. 1970) (noting even a single good faith use prevents abandonment).

16. See, e.g., *Bd. of Governors of the Univ. of North Carolina v. Helpingstine*, 714 F. Supp. 167, 171 (M.D.N.C. 1989) (noting marks didn’t lose significance as indications of origin despite substantial uncontrolled use of marks by third parties from 1795 until 1982); *Univ. Book Store v. Univ. of Wisconsin Bd. of Regents*, 33 U.S.P.Q.2d 1385 (T.T.A.B. 1994) (noting a similar finding with uncontrolled use from the 1940s until the 1990s).

17. Will Heilpern, *More than Half of the Brands People Associate With Euro 2016 Are Not Even Sponsoring the Tournament*, BUSINESSINSIDER (May 18, 2016), <http://www.businessinsider.com/euro-2016-brand-sponsors-2016-5>.

18. *Id.*

19. *Id.*

20. Eugene P. Ericksen & Melissa A. Pittaoulis, *Control Groups in Lanham Act Surveys*, 104 TRADEMARK REPORTER 744, 752 (2014) (“For example, in a pilot survey in which the control product was a local pizza brand from a different state, none of the respondents identified it correctly, but 7, 9, and 11 percent of them said it was Domino’s, Papa John’s, and Pizza Hut, respectively.”).

brand without even seeing any stimulus to trigger that response.<sup>21</sup> Thus, the prominence of strong brands itself leads to misattribution of truthful sponsorship relationships: when consumers are presented with prominent brands as alternatives, they often fail to identify the true sponsor of an event. This is especially true when the genuine sponsor isn't prominent in the field—in such circumstances, correct sponsor identification occurs at levels near chance.<sup>22</sup> Consumers aren't actually relying on their memories to determine who they think sponsors an event. They use their judgment, which is influenced by the prominence of the brand at issue. This process systematically favors well-known brands, especially when consumers are uncertain or when the information environment is unclear.<sup>23</sup> The research suggests that this phenomenon extends beyond event sponsorship to other common scenarios such as retail advertising.<sup>24</sup> And it happens whether or not consumers are cued with the name of the prominent brand.<sup>25</sup>

The implications of consumer misattribution for trademark law are twofold, bearing on both liability in the first instance as well as on harm. As for liability, when there isn't a real relationship between the trademark owner and the defendant, the information environment is

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21. Jerre B. Swann, *Likelihood of Confusion*, 53, 62, in *TRADEMARK AND DECEPTIVE ADVERTISING SURVEYS: LAW, SCIENCE, AND DESIGN* (Shari Seidman Diamond & Jerre B. Swann eds., 2012).

22. Gita Venkataramani Johar & Michel Tuan Pham, *Relatedness, Prominence, and Constructive Sponsor Identification*, 36 *J. MARKETING RES.* 299, 302-03 (1999); *see also id.* at 305-06 (noting sponsorship inferences and mistakes also depend on the relatedness of the supposed sponsor to the sponsored event, independent of whether the actual sponsor was related or prominent); Gita Venkataramani Johar et al., *How Event Sponsors Are Really Identified: A (Baseball) Field Analysis*, 46 *J. ADVERTISING RES.* 183, 183 (2006) (“Event sponsors often do not receive proper credit for their efforts. This issue was examined in a field study involving over 300 baseball fans . . . [E]ven among such sports fans, the ability to correctly discriminate actual official sponsors of the home team from matched foils, although above chance, was rather poor. Consistent with recent laboratory findings, sponsor identification responses were further found to be heavily influenced by the mere plausibility of the brand as a potential sponsor.”); *id.* at 188 (table 1), 189 (Baseball fans had a false alarm rate of 40% identifying sponsors of their teams, and missed 43% of the actual sponsors, and this was only the diligent survey respondents who answered at least 70 of 90 questions; for the whole sample, accuracy was at chance: 56.9% of sponsors produced true positives and 57.9% of non-sponsors produced false positives.).

23. Johar et al., *supra* note 23, at 196; Michel Tuan Pham and Gita Venkataramani Johar, *Market Prominence Biases in Sponsor Identification: Processes and Consequentiality*, 18 *PSYCH. & MARKETING* 123, 123 (2001) (“All things equal, consumers are more likely to attribute sponsorship to brands that they perceive to be more prominent in the marketplace, such as large-share brands . . . [T]his bias arises only when consumers are unable to retrieve the name of the sponsor directly from memory . . . The prominence bias is therefore more likely to occur in cluttered media environments where learning the event-sponsor associations is difficult.”).

24. Pham & Johar, *supra* note 22, at 124.

25. *Id.* at 125.



likely to be at least unclear—biasing surveys in favor of showing likely confusion when the plaintiff is well known. As a result, a consumer survey, though often lauded by courts as the soundest way of showing actual confusion, will not be reliable in many situations involving prominent brands.<sup>26</sup> Making matters worse, even if people identify similarity in trademarks as the reason they think two things are related or are from the same source, they may be engaging in “post hoc rationalization,” choosing similarity as the reason merely because of heuristics.<sup>27</sup> In one case involving a survey, for example, the test group saw the allegedly confusingly similar use and the control group saw a supposedly non-confusing use. Both groups reported an eighty percent belief that there was some source, affiliation, or sponsorship connection between the stimulus and the trademark owner. At the same time, 17.7% gave the similarity of names as the reason why they believed this in the test cell, but only 2.2% did in the control group.<sup>28</sup> On its own, that looks like 15.5% net confusion based on similarity, which would often be enough to justify a finding of likely confusion. However the groups’ overall reported belief in a connection between the trademark owner and the stimulus, which is supposedly the ultimate question in a confusion

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26. *Id.* at 139 (“Overall, our results suggest greater caution when interpreting sponsor identification data. For instance, market-research data that could be interpreted as successful sponsorship by a prominent brand (e.g., high percentage of respondents associating Nike with Olympics) may reflect little more than respondents’ educated guesses . . . . [S]urveys that assess identification in a recognition format are likely to be biased whenever the various response options are not of comparable prominence.”).

27. Swann, *supra* note 21, at 68-69; *see also* Shari Seidman Diamond, *Control Foundations: Rationales and Approaches*, in *TRADEMARK AND DECEPTIVE ADVERTISING SURVEYS: LAW, SCIENCE, AND DESIGN* 201, 211 (Shari Seidman Diamond & Jerre B. Swann eds., 2012) (explaining that “why” answers are unreliable—respondents just don’t know; some give reasons that don’t actually describe the stimulus or otherwise don’t make sense).

28. *Kargo Global, Inc. v. Advance Magazine Publishers, Inc.*, No. 06 Civ. 550 (JFK.), 2007 WL 2258688, at \*16-17 (S.D.N.Y. Aug. 6, 2007); *see also* Itmar Simonson & Ran Kivetz, *Demand Effects in Likelihood of Confusion Surveys: The Importance of Marketplace Conditions*, in *TRADEMARK AND DECEPTIVE ADVERTISING SURVEYS: LAW, SCIENCE, AND DESIGN* 243, 250-55 (Shari Seidman Diamond & Jerre B. Swann eds., 2012). As Simonson & Kivetz summarize:

[S]ome (or many) respondents may suspect, for example, that the survey designer knows something about the true relations between the two brands that the respondents do not know. Once they form such a (demand-based) hypothesis, survey respondents may seek clues (e.g., a similarity on a certain dimension or some other justification) that support the guess that the presented brands are related in some manner. The respondent-provided explanations will often not be very informative in such cases, because they will tend to refer to the available clues and may thus falsely appear to confirm the alleged cause of confusion. Furthermore, while such demand effects may (or may not) be reflected in an unusually high level of “confusion” in the control group, by design, the difference between the test and control stimuli may elicit different explanations.

*Id.* at 251 (footnote omitted).

case, was exactly the same.

Even if we were confident about surveys, this same research casts doubt on the standard harm story. It indicates that sponsorship confusion is inherently widespread and that real control over a brand's associations is inherently lacking for the very brands we think of as strongest—*because* they're strong. Consumers have images of brands that they use to make attributions, and they resist contrary evidence (including explicit identification of different brands as sponsors). If strong brands do well despite pervasive confusion about their sponsorship of other entities, then the lost-control theory of harm loses even more force.

### *B. Mostly Unpersuasive Defenses of the Presumption*

Professor Robert Bone has argued that proving a quality difference is likely to be difficult, so the risk of harm justifies relieving trademark owners of the burden of proof.<sup>29</sup> However, McKenna's point is that even if we assumed that there was a quality difference in each case, the risk of harm to any particular trademark owner would still be low.<sup>30</sup> When we wait for evidence of such harm it may fail to appear.<sup>31</sup> At most, a poor quality brand extension makes consumers less likely to be interested in a different, related brand extension in the future.<sup>32</sup> This is a market preclusion argument, not an argument for ongoing harm, and it's particularly unlikely to reflect an *immediate* risk to a trademark plaintiff.

The empirical evidence now available suggests that one pathway around *eBay* should not be taken. In *eBay*'s concurrences, seven Justices suggested that traditional practices could serve as persuasive evidence in themselves that irreparable harm was likely in analogous cases.<sup>33</sup> But where the traditional practices of presuming irreparable harm were based on nothing more than speculation, and when the psychological and

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29. Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099, 2155 (2004) (arguing that “the social costs of a false negative (that is, an erroneous failure to find infringement) greatly exceed the social costs of a false positive (that is, an erroneous infringement finding)”).

30. McKenna, *supra* note 2, at 115.

31. *Pom Wonderful LLC v. Pur Beverages LLC*, No. CV 13-06917 MMM (CWx), 2015 WL 10433693, at \*6 (C.D. Cal. Aug. 6, 2015) (Though defendant's products and advertising were of lower quality than plaintiff's, there was no evidence of harm to plaintiff's goodwill from two years on the market—mere possibility of harm wasn't likelihood.).

32. McKenna, *supra* note 2, at 115-16.

33. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 396 (2006) (Kennedy, J., concurring, joined by Stevens, Souter, and Breyer, JJ.) (noting district courts may continue to apply “lesson[s] of . . . historical practice” to inform their equitable discretion “when the circumstances of a case bear substantial parallels to litigation the courts have confronted before”); *see also id.* at 394-95 (Roberts, C.J., concurring, joined by Scalia and Ginsburg, JJ.).

marketing evidence suggests otherwise, there is no reason to accord any weight to older courts' *factual* assumptions about harm, rather than the legal principles they applied.

Defenders of the old rule argue that a presumption of irreparable harm to the plaintiff is justified by the difference between patent and copyright law's property-based regimes and trademark's consumer protection aims; preventing confusion, they argue, is always in the public interest and thus weighs in favor of an injunction.<sup>34</sup> There are several problems with this analysis. First, as several courts of appeal have noted, the Supreme Court said that it was setting forth a general equitable rule for statutes that didn't provide otherwise in terms of entitlement to injunctions.<sup>35</sup> Second, and relatedly, "property" rights are the poster children for injunctive relief because they are protected by "property" rules, not "liability" rules allowing the defendant to simply pay for the harm it causes. If "property" rights aren't entitled to a presumption of irreparable harm, a non-property right shouldn't be either. Third, the public interest is, formally, a separate factor in the injunctive relief calculus to be considered only when irreparable harm has been shown. If consumers are in fact being harmed, the injury to them is separate from the injury to the trademark owner. They may bring their own claims, especially because the trademark owner may not be a very good representative of consumers' interests.<sup>36</sup>

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34. Brief in Support of Petitioner, *supra* note 4, at 13-14 ("Unlike the Patent Act and Copyright Act, the Lanham Act is, at its heart, a consumer protection law rather than a law designed to protect private property rights. In patent and copyright cases, the principal reason the law grants protection is to encourage the development of the arts and sciences; the public interest may therefore tolerate continued sales of infringing items under certain circumstances, such as under a compulsory license when damages from the infringement are quantifiable. On the other hand, the Lanham Act's goal of protecting consumers is always in the public interest and the harm to goodwill and reputation cannot be quantified with any reasonable degree of accuracy.").

35. See, e.g., *Ferring Pharmaceuticals, Inc. v. Watson Pharmaceuticals, Inc.*, 765 F.3d 205, 216-17 (3d Cir. Aug. 26, 2014) (The Supreme Court set out a general rule that the principles of equity must always be considered unless Congress indicated an intent to depart from those principles; "[i]t follows that a court is not free to depart from traditional principles of equity merely because it believes such a departure would further a statute's policy goals, such as, in the case of Lanham Act claims, compensating plaintiffs for harms that may be difficult to quantify"; "[a] presumption of irreparable harm that functions as an automatic or general grant of an injunction is inconsistent with [traditional] principles of equity.").

36. Michael Grynberg, *Trademark Litigation as Consumer Conflict*, 83 N.Y.U. L. REV. 60, 77 (2008). (Some consumers may have interests that differ substantially from the trademark owner. For example, some non-confused consumers may actually benefit from the defendant's conduct. In such cases, the trademark owner is not a good representative of this group of consumers.); "Non-confused consumers who benefit from the defendant's behavior are usually missing from the analysis. The public interest at issue is that of avoiding consumer confusion, which is the charge of trademark plaintiffs." *Id.*

These empirical, and empirically dubious, claims about the harm to a trademark owner's reputation from infringement are of course not the only possible harms. One could identify the defendant's free riding as objectionable in itself, or at least deliberate trademark infringement as morally wrongful.<sup>37</sup> Perhaps moral harm is more like First Amendment harm, where intrusion on First Amendment rights is considered irreparable by its nature.<sup>38</sup> But inability to speak isn't the same thing as having someone else's confusing use out in the world, especially when the context is commercial speech (using a trademark to sell goods or services), and a private infringer is unlike a government threatening to penalize a speaker for noncompliance in terms of its affront to the autonomy of the plaintiff.

The irreparable harm argument is most persuasive when the defendant lacks the resources to pay any significant monetary damages. Could we return to money as a justification more generally, whether based on lost sales or lost licensing revenue? As a runner-up, irreparable harm may be found when damages exist but are extremely hard to quantify. Because the federal trademark statute requires that damages be awarded as compensation and not as a penalty, an inability to prove the magnitude of harm may justify calling the harm irreparable, once we're convinced it exists.<sup>39</sup> Many trademark authorities assert that damages from trademark infringement are usually hard to quantify, making them irreparable even if the defendant could pay a judgment.<sup>40</sup> The Second Circuit stated in 1971 that when confusion is likely,

[I]njury irreparable in the sense that it may not be fully compensable in damages almost inevitably follows. While an injured plaintiff would be entitled to recover the profits on the infringing items, this is often difficult to determine; moreover, a defendant may have failed to earn profits because of the poor quality of its product or its own inefficiency. Indeed, confusion may cause purchasers to refrain from buying either

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37. See Sheff, *supra* note 9, at 764, 801. Matthew Kugler suggests that consumers, too, generally care about sponsorship or affiliation more as a matter of fairness or morality than quality—they think it's fair to compensate a sports team when they buy a branded jersey. Kugler, *supra* note 6, at 3. This finding reinforces the idea that the harm of confusion is usually moral, not material.

38. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (Deprivation of First Amendment rights for any amount of time is irreparable harm.).

39. See, e.g., *Southwest Stainless, LP v. Sappington*, 582 F.3d 1176, 1191 (10th Cir. 2009) (noting irreparable harm may be shown where the evidence suggests that it is impossible to precisely calculate the amount of damages a plaintiff will suffer).

40. Damage to business “reputation and goodwill is difficult, if not impossible, to quantify in terms of dollars.” *Medicine Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 805 (8th Cir. 2003).

product and to turn to those of other competitors. Yet to prove the loss of sales due to infringement is also notoriously difficult.<sup>41</sup>

But there is a significant, if often forgotten, difference between “it’s not clear what the damages are, though we’re confident there are some” and “it’s not clear that there are any damages; there might or might not be.” Moreover, there are often ways of measuring “goodwill” or “brand equity,” the labels to which trademark owners appeal to identify the things infringement harms. If those measures are unlikely to change after an episode of consumer confusion, that fact indicates that monetary harm from trademark infringement just isn’t that common.<sup>42</sup>

As McKenna explains:

The marketing literature paints a complex and sometimes contradictory picture of consumer evaluation of brand uses. On the whole, however, one thing is clear: no presumption of harm from uses of a mark for non-competing goods is warranted. Indeed the only sense in which one could confidently conclude that mark owners are likely to be “harmed” by uses for non-competing goods is that the later uses may interfere with the mark owner’s ability to expand into new markets.<sup>43</sup>

Treating foreclosed expansion, if such expansion is even likely, as harm requires us to conclude in advance that the trademark owner is *entitled* to expand into new markets under its existing mark. This is a fundamentally normative argument, not an empirical one subject to case-specific proof.

Indeed, confusion harm—especially in cases of affiliation or endorsement confusion, rather than classic point of sale confusion—is in large measure a normative belief, not an empirical concept. Having conceived of confusion and dilution as wrongs, trademark owners insist that harm must exist in the real world as a thing that has effects on the

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41. *Omega Importing Corp. v. Petri-Kine Camera Co.*, 451 F.2d 1190, 1195 (2d Cir. 1971) (internal citations omitted); *see also Re/Max N. Cent., Inc. v. Cook*, 272 F.3d 424, 432 (7th Cir. 2001) (internal citation omitted) (“The most corrosive and irreparable harm attributable to trademark infringement is the inability of the victim to control the nature and quality of the defendant’s goods. Even if the infringer’s products are of high quality, the plaintiff can properly insist that its reputation should not be imperiled by the acts of another.”).

42. *See Sandra L. Rierson, IP Remedies After eBay: Assessing the Impact on Trademark Law*, 2 AKRON INTELL. PROP. L. J. 163, 174 (2008) (“[C]ourts should not accept without question the notion that the trademark holder’s goodwill is so ethereal and intangible that damage done to it via infringement is simply incalculable”; “goodwill” or “brand equity” has a standard definition of “the price premium the brand commands times the extra volume it moves over an average brand”; valuing decreased goodwill can be difficult, but that doesn’t make harm irreparable).

43. McKenna, *supra* note 2, at 70.

trademark owner and not just as a category of actionable behavior.<sup>44</sup>

### III. THE NEW CASES: ASKING WHETHER THE STORIES ARE SPECIFIC ENOUGH

The tropes of trademark infringement taught that confusion of any kind always harmed trademark owners irreparably. Then the Supreme Court instructed courts to reconsider blanket presumptions in favor of injunctive relief, and they have begun to look for evidence of the threatened harms in any given case. Sometimes, they look in vain. This Part reviews some representative cases looking beneath the surface of trademark's general stories. The question is far from settled, but this time of ferment and reexamination offers opportunities for improving trademark law substantially.

*Wells Fargo & Co. v. ABD Insurance & Financial Services* provides a good example of the new judicial approach.<sup>45</sup> Wells Fargo bought the old ABD and absorbed all of its business. A few refugees, who fled old ABD when or soon after Wells Fargo bought it, started the defendant company. Because of an earlier appellate ruling, the district court was constrained to find that Wells Fargo had shown likely confusion between new ABD and Wells Fargo's rump operations of old ABD. Despite evidence of actual confusion, which included misdirected payments, the district court declined to find irreparable harm.<sup>46</sup> As the court pointed out, while post-*eBay* Ninth Circuit precedent held that "evidence of loss of control over business reputation and damage to goodwill could constitute irreparable harm," the Ninth Circuit also held that "unsupported and conclusory statements regarding harm" will not do.<sup>47</sup>

But what can lost control mean as an independent type of harm? If damage hasn't yet materialized from the lost control—perhaps because the quality of the defendant's product is good—then there seems to be nothing irreparable about the harm; restore the control, and the period of lost control will be irrelevant. Like the speeder who doesn't get into an auto accident, the defendant might have caused a risk of harm, but the risk didn't materialize. Such a person might be criminally liable, but she

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44. See Bernstein & Gilden, *supra* note 7, at 1040 ("[I]f dilution is a theory that is to have any conceptual rigor, it is incompatible with anything but a presumptive, if not a categorical, availability of injunctive relief.")

45. *Wells Fargo and Co. v. ABD Ins. and Fin. Serv., Inc.*, No. C 12-3856 PJH, 2014 WL 4312021, at \*3 (N.D. Cal. Aug. 28, 2014).

46. *Id.* at \*9-10.

47. *Id.*

hasn't committed a tort against any private party whose risks were raised by her misconduct. Post-*eBay*, the district court concluded that plaintiffs needed to show more than lost control; it demanded "evidence that the loss of control is likely to cause harm to the trademark holder."<sup>48</sup>

In *Wells Fargo*, the only evidence Wells Fargo could provide was a declaration from an employee who made statements such as "it would be difficult to fully capture the amount of economic damages caused by the defendants in this case," and "[b]y attempting to subvert the ABD brand for its own purposes, the defendants are diminishing the value that this brand conveys to Wells Fargo."<sup>49</sup> Although the witness repeated these unsupported conclusions in several different ways, there was no factual support for them.<sup>50</sup> Accepting the assertion that likely confusion causes irreparable harm to the value of a mark would have the "practical effect" of resurrecting the discarded presumption of irreparable harm,<sup>51</sup> especially given that Wells Fargo's counsel couldn't explain why its arguments wouldn't always apply any time a plaintiff established likely confusion.<sup>52</sup> The court concluded that irreparable harm might be hard to show, but that didn't relieve Wells Fargo entirely of its burden to do so.<sup>53</sup>

Similarly, another case, *Purdum v. Wolfe*,<sup>54</sup> specifically addressed the theory that shoddy goods would hurt the trademark owner's reputation. The court pointed out that, while harm to the owner was possible, the plaintiff had offered no evidence that the defendant's goods were in any way unsatisfactory.<sup>55</sup> Where the twentieth century's expansive infringement doctrine converted possible scenarios into unquestioned trademark harm, courts unpacking these theories now have

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48. See also *San Miguel Pure Foods Co., Inc. v. Ramar Int'l Corp.*, 625 F. App'x 322, 327 (9th Cir. 2015) (noting allegations that a company "would effectively lose control" over its brand did not demonstrate it had lost control over its brand).

49. *Wells Fargo*, 2014 WL 4312021, at \*9.

50. *Id.* at \*10.

51. *Id.*

52. See also *Pom Wonderful LLC v. Pur Beverages LLC*, No. CV 13-06917 MMM (CWx), 2015 WL 10433693, at \*5-6 (C.D. Cal. Aug. 6, 2015) (noting claims of lost distinctiveness, lost return on investment, and harm to reputation and goodwill were mere assertions not tied to specific evidence even though expert cited economic theory; experts' conclusions "would apply in any trademark infringement case where the plaintiff owns a distinctive trademark").

53. *Wells Fargo*, 2014 WL 4312021, at \*12; Wells Fargo also argued that it had lost "scores of customers representing millions of dollars in lost revenue" but didn't show any connection between that lost business and defendants' use of the ABD name. In any event, expert testimony could quantify money damages, making them reparable. *Id.* at \*11.

54. No. C-13-04816 DMR, 2014 WL 171546, at \*9 (N.D. Cal. Jan. 15, 2014).

55. Cf. *Pom Wonderful*, 2015 WL 10433693, at \*9 (noting events that might occur in the future were merely speculative, rather than likely).

reason to demand evidence that poor-quality goods or a plaintiff's blocked expansion into other fields are actually *likely* in the cases before them.

On the other hand, some courts are still accepting extremely tenuous assertions of harm from lost control.<sup>56</sup> In *U.S. Polo Ass'n v. PRL USA Holdings*,<sup>57</sup> the Second Circuit declined to decide whether the presumption of irreparable harm applied in light of *eBay*. It did find irreparable harm, however, because it decided that the district court made a specific factual finding that the plaintiff would be irreparably harmed by ceding control over its reputation and goodwill to the defendant. The court remarked that a similar finding might be made in many infringement cases but that "it is a factual finding nonetheless, and not simply the product of a legal presumption."<sup>58</sup> Yet that reasoning seems vulnerable to the objection raised by the *Wells Fargo* court—a claim applicable in any trademark case isn't proof of anything specific—as well as the analysis in *Purdum* requiring the harm from lost control to be likely, rather than simply possible.

Another disappointing example is *E. & J. Gallo Winery v. Grenade Beverage LLC*.<sup>59</sup> In this district court case, Gallo argued that any confusion between El Gallo energy drinks and Gallo wines could hurt Gallo's reputation because, as its director of marketing testified, "it believes that mixing energy drinks with alcoholic beverages promotes irresponsible drinking behavior, which is directly contrary to Gallo's philosophy."<sup>60</sup> Thus, consumer confusion would harm Gallo's reputation. "And because there have been some reports that drinking excessive amounts of alcoholic beverages mixed with energy drinks could cause physical harm, the harm to Plaintiff's reputation could be

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56. *Adidas Am., Inc. v. Skechers USA, Inc.*, No. 3:15-cv-01741-HZ, 2016 WL 591760, at \*17 (D. Or. Feb. 12, 2016) ("Skechers' attempts to 'piggy back' off of adidas's efforts by copying or closely imitating adidas's marks means adidas loses control over its trademarks, reputation, and goodwill—a quintessentially irreparable injury," specifically given adidas' efforts to be perceived as a "premium" brand versus Skechers' image as a "lower end value brand" and adidas' deliberate efforts to create scarcity of the infringed design in order to increase demand; the decreased perception of scarcity would create "another type of irreparable harm."); *Toyo Tire and Rubber Co. v. Kabusikiki Kaisha Tokyo Nihoon Rubber Corp.*, No. 2:14-cv-01847-JAD-VCF, 2015 WL 6501228, at \*3-4 (D. Nev. Oct. 26, 2015) (finding irreparable harm where the plaintiff proffered evidence of its "considerable time and effort building its reputation" and the defendant's profiting from such efforts).

57. 511 F. App'x 81, 85 (2d Cir. 2013).

58. *Id.*

59. No. 1:13-cv-00770-AWI-SAB, 2014 WL 4073241, at \*14, (E.D. Cal. Aug. 15, 2014).

60. *Id.* at \*13.



devastating.”<sup>61</sup>

There are several missing steps here including, most notably, any connection between Gallo’s objection to energy drinks and *Gallo’s customers’* potential objections.<sup>62</sup> Gallo provided a scenario that could happen if a number of other things happened—mixing El Gallo energy drinks and alcohol harmed someone, and Gallo was blamed for it—but didn’t do anything to show that this harm was likely. Indeed, the court specifically noted that Gallo’s witness wasn’t qualified to testify about the risks of mixing energy drinks and alcohol, but it accepted her testimony on irreparable harm because she was qualified to testify that Gallo *believed* that an association with energy drinks would be harmful to its reputation. “[I]t is enough that Plaintiff has introduced evidence of loss of control over [its] own business reputation.”<sup>63</sup> The language of “potential” harm was still sufficient.

Somewhere in between the *Wells Fargo* and *Gallo* courts is the district court’s reasoning in *Uber Promotions, Inc. v. Uber Technologies, Inc.*<sup>64</sup> In this case, the well-known national brand Uber Technologies was found to have caused actual confusion with the transportation business of local senior user Uber Promotions in Gainesville, Florida. In finding irreparable harm to Uber Promotions, the

61. *Id.*

62. *See Titaness Light Shop, LLC v. Sunlight Supply, Inc.*, 585 F. App’x 390, 391 (9th Cir. 2014) (The fact that defendant’s product was sold on “a website that supposedly catered to marijuana growers” didn’t show irreparable harm; “assertions by a representative of the plaintiff that its goodwill and reputation would be harmed if consumers associated its product with an item that did not fit the plaintiff’s brand image” were insufficient when the plaintiff did not show that its “customers [were] aware of the website, [that they] would associate the products on the site with marijuana, or [that they] would stop purchasing Sunlight products if they mistakenly believed that Sunlight was marketing to marijuana growers.”); *Pom Wonderful LLC v. Pur Beverages LLC*, No. CV 13-06917 MMM (CWx), 2015 WL 10433693, at \*13 (C.D. Cal. Aug. 6, 2015) (disagreeing with *Gallo* and pointing out that association between some energy drinks and adverse events reported to the FDA didn’t show that defendant’s energy drink was disreputable or that plaintiff’s customers saw energy drinks as disreputable).

63. *E. & J. Gallo*, 2014 WL 4073241, at \*14; *see also E. & J. Gallo Winery v. Grenade Beverage LLC*, No. 1:13-cv-00770-AWI-SAB, 2014 WL 5489076, at \*5 (E.D. Cal. Sept. 8, 2014) (“Plaintiff has demonstrated that Plaintiff suffered irreparable injury because Defendant’s action deprived Plaintiff of its legal right to control its mark and its reputation. Whether or not mixing energy drinks with alcohol leads to irresponsible drinking is irrelevant. The relevant inquiry is whether Defendant’s actions interfered with Plaintiff’s desired business strategy of not associating its Gallo brand with energy drinks.”). Nor were money damages adequate, according to the court. Gallo’s other licensing agreements for use of the mark didn’t show that damages in this case would be readily calculable or adequate. And Gallo abandoned its claim for money damages, which “suggests that monetary damages are inadequate because they are too difficult to calculate and prove.” *E. & J. Gallo*, 2014 WL 4073241, at \*15.

64. *Uber Promotions, Inc. v. Uber Techs., Inc.*, No. 1:15CV206-MW/GRJ, 2016 WL 617450, at \*20 (N.D. Fla. Feb. 16, 2016).

court noted Uber Technologies' extremely controversial and often downright bad reputation. For example, the court pointed out that, as of the time it wrote its opinion, top news stories for "uber florida" included numerous stories about Uber Technologies' exposure of a driver's personal information, including her social security number.<sup>65</sup> "With all due respect to Tech, Promotions has every reason not to want potential customers and other members of the public to associate it with a company that has inspired protests in cities around the world."<sup>66</sup> Bad product extensions are one thing; the evidence discussed in Part I indicates that confusion about an association with poorly performing products isn't likely to be harmful. Confusion with a brand that triggers riots and boycotts could reasonably be predicted to be substantially more harmful. For example, there is evidence that Donald Trump's rise as a proto-fascist has harmed the value of Trump-branded properties with a substantial segment of his target consumers.<sup>67</sup>

#### IV. STEPS FORWARD

Greater attention to the realistic threats of harm from infringement is justified, both by precedent and by the evidence specific to trademark law, which counsels skepticism about broad harm claims.

Materiality offers a useful way of thinking about proving a sufficient likelihood of irreparable harm. In one case involving energy drinks, for example, the court rejected *Gallo's* pure possibility standard even though the court agreed that evidence that customers have a negative perception of energy drinks in general or of the defendant's product in particular would probably have sufficed to show irreparable harm.<sup>68</sup> Analogously, in false advertising cases, courts do not necessarily require a showing that the exact words of the defendant's ad are material

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65. *Id.* at \*15.

66. *See also* OTR Wheel Eng'g, Inc. v. West Worldwide Servs., Inc., 602 F. App'x. 669, 672 (9th Cir. 2015) (finding evidence of irreparable harm where the infringing product was sold to the plaintiff's major customer, which led to a dispute between the plaintiff and its customer—"a nonquantifiable injury to the goodwill it had created with its customer"); Life Alert Emergency Response, Inc. v. LifeWatch, Inc., 601 F. App'x. 469, 474 (9th Cir. 2015) (finding harm based on a declaration "reporting numerous and persistent complaints from would-be customers who received robo-calls for what they believed were Life Alert products" as well as emails and social media posts substantiating the threat to Life Alert's reputation and goodwill).

67. Will Johnson & Michael D'Antonio, *Trump's Campaign Is Damaging His Brand*, POLITICO (Jan. 11, 2016), <http://www.politico.com/magazine/story/2016/01/donald-trump-2016-brand-business-213515>.

68. Pom Wonderful LLC v. Pur Beverages LLC, No. CV 13-06917 MMM (CWx), 2015 WL 10433693, at \*15 (C.D. Cal. Aug. 6, 2015).

to consumers, but they require the plaintiff to show that the false claim concerns *the kind of thing* that consumers care about when making purchasing decisions.<sup>69</sup>

One way to understand these doctrinal developments is that, at long last and at the remedy stage, irreparable harm is being used to reintroduce a materiality standard to trademark. But materiality shouldn't be so confined—it deserves consideration at the liability stage as well. This wouldn't mark the end of all trademark liability, since consumers sometimes do care about source or sponsorship even outside of their beliefs about the entity responsible for producing a product, but it would deal with many of the most troubling situations of expansion. If we reintroduced materiality, moreover, likely confusion would represent likely harm to the public—interference with consumers' autonomous decision making—supporting a public interest in injunctive relief. Under *eBay*, plaintiffs must still show irreparable harm as well as that the public interest favors injunctive relief, but if we were sure that confusion was materially affecting decisions, then at least we would be relatively sure that the plaintiff was suffering damage or that the defendant was accruing profits from the infringement, and we could reason from there. At that point, the difficulty of ascertaining the amount of damages/profits with a reasonable degree of certainty might provide reason to find irreparable harm in a large percentage of cases. Or, in situations in which consumers were confused and mainly wanted the trademark owner to get paid for moral reasons—essentially, t-shirt and similar licensing cases—a reasonable royalty would be justified.

The International Trademark Association has urged that damages are regularly inappropriate in infringement cases because of the special nature of trademark harm.<sup>70</sup> But if the marketing studies are any guide, as I have argued they are, the purported harms of infringement are more often likely to be similar to the harms of copyright and patent infringement. Courts regularly remedy infringements of those rights with a reasonable license fee (though of course that fee may pose difficult

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69. See, e.g., *IDT Telecom, Inc. v. CVT Prepaid Sols., Inc.*, No. 07-1076 (GED), 2009 WL 5205968, at \*9 (D. N.J. Dec. 28, 2009) (Despite survey evidence indicating that consumers didn't pay attention to how many minutes of talk time were promised by telephone card ads, “[b]ecause the advertisements go so clearly to the purpose of the product—the amount of minutes of talk time that they deliver—the statements are material as a matter of law.”); *Rexall Sundown, Inc. v. Perrigo Co.*, 651 F. Supp. 2d 9, 39 (E.D.N.Y. 2009) (“Unlike on the issue of consumer confusion, materiality need not be proven by extrinsic evidence such as consumer surveys. Moreover, . . . materiality may be proven by showing that the misrepresentation related to an inherent characteristic of the product . . .”).

70. Brief in Support of Petitioner, *supra* note 4.

problems of calculation). The key, then, is to determine the appropriate cases in which a license *should* be required, despite the absence of any other harm. To the extent that trademark's justifications are consumer-oriented and the scope of trademark rights is determined by consumer understanding, the mere fact that a trademark owner would like to be paid for a use is no reason to conclude that payment should be required.

David Bernstein and Andrew Gilden offer a structural reason for concern in this regard. They argue that having fewer available remedies may make courts more willing to find confusion in marginal cases, comfortable with the idea that they won't be enjoining the defendant out of business but only requiring it to pay some amount.<sup>71</sup> This expansion of the idea of confusion is itself harmful and should be addressed at the liability stage, not at the remedy stage. Their concern is significant, but it's not yet clear that courts in circuits that have definitively adopted *eBay* for trademark are more likely to find confusion in the first place.<sup>72</sup> Given how far the concept of actionable confusion expanded before *eBay*, there are fewer obvious places for the underlying doctrine to expand, especially now that dilution is recognized as a separate cause of action.<sup>73</sup>

Indeed, those of us who are concerned that the overall level of liability is too high can take comfort from what has happened since *eBay*: when applied to trademark, the rule against any presumption in favor of injunctive relief triggered a reexamination of expansive harm theories in particular by focusing courts on the issue of irreparable harm, which has allowed them to make a good start on the problem. Similar reexamination of harm theories was part of the antitrust revolution that substantially changed the shape of antitrust law, offering a possible model for a truly consequential reconfiguration of the law.<sup>74</sup>

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71. Bernstein & Gilden, *supra* note 7, at 1069-70.

72. Equally, it doesn't seem that substantive patent and copyright rights are expanding in scope, despite the clear applicability of *eBay* to those rights. There are numerous confounding variables, but, if anything, fair use in copyright and invalidity in patent seem to be robust if not growing doctrines. *Id.*

73. Bernstein and Gilden also point out that dilution itself only makes sense as an immeasurable harm, and argue that it therefore has to give rise to a presumption of irreparable harm even if it isn't an empirical concept. *Id.* at 1071. I think this is really an argument that dilution is a moral injury. If dilution is death by a thousand bee stings, and each sting doesn't cause harm on its own, then there is still no need to enjoin the initial stings. *Cf. Pom Wonderful*, 2015 WL 10433693, at \*6 (Evidence that consumers' association of the POM mark with Pom Wonderful had weakened since *pūr pōm* entered the market or evidence that other companies had attempted to market pomegranate beverages under "pom" "might make irreparable harm likely, as opposed to just merely possible," but assumptions about future uses by third parties weren't sufficient.).

74. See Timothy K. Armstrong, *Dueling Monologues on the Public Domain: What Digital*

Almost by accident, and despite trademark owners' resistance, changes in the law of remedies have led some courts to revisit the assumptions of a century ago. Stories that those earlier courts found plausible now seem less persuasive when examined in the light of current knowledge and the facts of specific cases. This is a positive development, especially if it encourages greater attention to the mechanics of consumer confusion generally. As long as trademark purports to be guided by consumer reactions, it can only benefit from a better understanding of those reactions.

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*Copyright Can Learn from Antitrust*, 1 U. CIN. INTELL. PROP. & COMPUTER L.J. 1, 54 (2016).