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## Placebo Marks

Jake Linford

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# Placebo Marks

Jake Linford\*

## *Abstract*

*Scholars often complain that sellers use trademarks to manipulate consumer perception. This manipulation ostensibly harms consumers by limiting their ability to make informed choices. For example, holding other things constant, consumers spend more money on goods with a high-performance reputation. Critics characterize that result as wasteful, if not anticompetitive. But recent marketing research shows that trademarks with a high-performance reputation may sometimes influence perception to the benefit of the consumer.*

*A trademark with a high-performance reputation can deliver a performance-enhancing placebo effect. Research subjects perform better at physical and mental tasks when they prepare or play with a product bearing a high-performance mark. For example, subjects using a putter with a Nike label can sink a putt in 20% fewer strokes than subjects using the same putter with a different label.*

*This performance-amplifying effect stems from shaping consumer perception, but the effect does not limit consumer autonomy. Indeed, the benefits of shaping consumer perception may outweigh the costs. Moreover, understanding this performance-enhancing placebo effect provides additional insights. The effect is price sensitive. Maximizing price competition in a market for branded goods*

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\* Loula Fuller & Dan Myers Professor of Law, Florida State University. Thanks to Mark Bartholomew, Graeme Dinwoodie, Paul Goldstein, Laura Heymann, Katrina Hull, Ed Lee, Mark Lemley, Ron Lundeen, Irina Manta, Joel Meyer, Michael Morley, Andrew Moshirnia, Jason Rantanen, Alexandra Roberts, Matthew Sag, Franita Tolson, and participants at the Stanford/Yale/Harvard Junior Faculty Forum, the Federalist Society Junior Scholars Colloquium, the Chicago IP Colloquium 2017, the 17th Annual Intellectual Property Scholars Conference, the 2018 J. Reuben Clark Society Professors Workshop, the 9th Annual Trademark Scholarship Symposium at the 140th Annual Meeting of the International Trademark Association, and presentations at Florida State University and the University of Iowa. My gratitude to Alan LaCerra, Lauren Pettine, and Shannon Brophy for excellent research assistance.

*may sometimes reduce positive spillovers that would otherwise flow to consumers who use products with high-performance marks. Additionally, high-prestige marks do not provide a performance-enhancing effect, suggesting that consumers perceive and use high-performance and high-prestige marks differently. The difference might blunt criticisms of trademark mechanisms that safeguard prestige value like post-sale confusion and protection against dilution, at least for that subset of high-prestige marks that are also high-performance marks. Moreover, reforming trademark law to prevent all manipulation of consumer perception, including the creation of a high-performance reputation may have the unintended consequence of unraveling benefits consumers receive from mechanisms like performance-enhancing placebo effects.*

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## I. INTRODUCTION

Under the standard economic account, the law protects a trademark as an exclusive source identifier for a given product because the mark provides important information to consumers.<sup>1</sup> Consumers consequently save search costs—the costs of finding the product they prefer to buy<sup>2</sup>—because they can rely on the mark to convey accurate information about product source and then more easily compare products from different sellers.<sup>3</sup> Consumers can rely on marks because protecting the mark from infringing uses allows the owner to internalize the benefit of maintaining and improving product quality.<sup>4</sup> Trademark protection thus contributes to an efficient market by enabling competition on price and quality.<sup>5</sup>

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1. Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 549 (2006) [hereinafter Bone, *Hunting Goodwill*] (“[T]he ‘information transmission model’ . . . views trademarks as devices for communicating information to the market and sees the goal of trademark law as preventing others from using similar marks to deceive or confuse consumers.”).

2. Gerald E. Smith et al., *Diagnosing the Search Cost Effect: Waiting Time and the Moderating Impact of Prior Category Knowledge*, 20 J. ECON. PSYCHOL. 285, 286 (1999) (“A central thesis of economics of information research is that buyers search for information until the marginal cost of search exceeds the marginal benefit.”).

3. See, e.g., Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1690 (1999) [hereinafter Lemley, *Modern Lanham Act*] (finding trademarks are justified to the extent they “communicate useful information to consumers, and thereby reduce consumer search costs”); *New Kids on the Block v. News Am. Pub., Inc.*, 971 F.2d 302, 305 n.2 (9th Cir. 1992) (citing William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 269 (1987) (“In economic terms, trademarks reduce consumer search costs by informing people that trademarked products come from the same source.”)).

4. *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985) (“National protection of trademarks is desirable, Congress concluded, because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation.”).

5. See *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1430 (7th Cir. 1985) (“If the seller provides an inconsistent level of quality, or reduces quality below what consumers expect from earlier experience, that reduces the value of the trademark.”); *Smith v. Chanel, Inc.*, 402 F.2d 562, 566 (9th Cir. 1968) (“Without some such method of product identification, informed consumer choice, and hence meaningful competition in quality, could not exist.”); Robert N. Klieger, *Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection*, 58 U. PITT. L. REV. 789, 856–60 (1997); Sidney A. Diamond, *The Public Interest and the Trademark System*, 62 J. PAT. OFF. SOC’Y 528, 544 (1980); Joseph M. Livermore, *On Uses of a Competitor’s Trademark*, 59 TRADEMARK REP. 30, 30 (1969) (“In many industries . . . the absence of differentiating trademarks would mean that competition in product quality could not exist.”).

But trademarks can also communicate messages and create customer interest independent of accurate signals about price and quality.<sup>6</sup> Emotional appeals can create attachments that are irrational, or at least not grounded in objective quality.<sup>7</sup> Consumer loyalty based on emotional connection might thus insulate marked goods from price and quality competition.<sup>8</sup> If consumer loyalty is grounded in emotional appeals or otherwise “unreal” information about the mark-bearing good,<sup>9</sup> the trademark may convey accurate signals about source, but mislead consumers about quality.<sup>10</sup> Many scholars argue this mismatch harms consumers and allows mark owners to expand trademark protection beyond its reasonable bounds.<sup>11</sup>

Recent evidence, however, suggests that the ability of trademarks to influence consumer perception provides material, beneficial spillover effects.<sup>12</sup>

6. JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* 155 (1958) (arguing that advertising and marketing cannot be “reconciled with the notion of independently determined desires, for their central function is to create desires—to bring into being wants that previously did not exist”).

7. *Id.*; see also Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2056–57 (2005) [hereinafter Beebe, *Search and Persuasion*] (summarizing scholarship advocating restrictive interpretation of trademark protection based on manipulation of consumers).

8. See *infra* notes 48–59 and accompanying text.

9. See, e.g., Graeme W. Austin, *Trademarks and the Burdened Imagination*, 69 BROOK. L. REV. 827, 856–60 (2004) (examining consumer expectations in context of products liability (citing Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1747 (2003))); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 630 (1999) (noting the influence of unyielding cognitive biases on decision makers as applied to products liability law).

10. Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165, 1187 (1948) (“[A trademark] is a narrow bridge over which all the traffic powered by [product] advertising must pass. . . . With time, the symbol comes to be more than a conduit through which the persuasive power of the advertising is transmitted, and acquires a potency, a ‘commercial magnetism,’ of its own.”); see also *id.* at 1181 (“The buyer of an advertised good buys more than a parcel of food or fabric; he buys the pause that refreshes, the hand that has never lost its skill, the priceless ingredient that is the reputation of its maker.”); Theodore Levitt, *The Morality (?) of Advertising*, HARV. BUS. REV., July/Aug. 1970, at 85 (“In the factory we make cosmetics; in the store we sell hope.” (quoting Charles Revson of Revlon, Inc.) (internal quotation marks omitted)).

11. See Mark Bartholomew, *Neuromarks*, 103 MINN. L. REV. 521, 524 (2018); Stacey L. Dogan & Mark A. Lemley, *Parody as Brand*, 47 U.C. DAVIS L. REV. 473, 493 (2013) (“[A]rtificial product differentiation can lead to higher prices and deadweight loss.” (citing Ann Bartow, *Counterfeits, Copying and Class*, 48 HOUS. L. REV. 707, 707–08 (2011))); Lemley, *Modern Lanham Act*, *supra* note 3, at 1713; Jeremy N. Sheff, *Veblen Brands*, 96 MINN. L. REV. 769, 825 (2012) [hereinafter, Sheff, *Veblen Brands*].

12. A spillover often refers to a cost that the use of a resource might impose on neighbors. See, e.g., Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 161 (1971). A

In particular, several recent studies demonstrate that exposure to or use of a product bearing a trademark with a performance-enhancing reputation—a high-performance mark<sup>13</sup>—will improve the user’s performance on various tasks, compared to a product without a high-performance mark.<sup>14</sup> This effect is independent of actual product quality. For instance, if research subjects believe they are using a Nike putter, they putt better, whether or not Nike actually made the putter.<sup>15</sup> Consumers may gain measurable benefits from the mere perception that the product they are using is performance-enhancing.

In addition, these recent studies suggest that high-performance marks deliver a benefit that high-prestige marks do not. Participants do not putt better using a putter with a Gucci label.<sup>16</sup> The effect is nonetheless price-sensitive: research participants who think they are using a discounted product do not experience the same performance-enhancing effect.

Understanding how this performance-enhancing placebo effect operates provides an opportunity to improve the fit between trademark law and how consumers use and process information.<sup>17</sup> Consumers may derive distinct and

positive spillover is a benefit conferred to neighbors without a corresponding harm to the resource owner. See Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137, 187 (2010).

13. Aaron M. Garvey, Frank Germann & Lisa E. Bolton, *Performance Brand Placebos: How Brands Improve Performance and Consumers Take the Credit*, 42 J. CONSUMER RES. 931, 931 (2016) (“Performance brand offerings [are] branded goods and services expected to enhance personal performance outcomes.”).

14. See *id.* at 944; see also S. Adam Brasel & James Gips, *Red Bull “Gives You Wings” for Better or Worse: A Double-Edged Impact of Brand Exposure on Consumer Performance*, 21 J. CONSUMER PSYCHOL. 57 (2011); Gráinne M. Fitzsimons et al., *Automatic Effects of Brand Exposure on Motivated Behavior: How Apple Makes You “Think Different,”* 35 J. CONSUMER RES. 21 (2008); R. Friedman & A. Elliot, *Exploring the Influence of Sports Drink Exposure on Physical Endurance*, 9 PSYCHOL. SPORT & EXERCISE, 749–59 (2008); Ji Kyung Park & Deborah Roedder John, *I Think I Can, I Think I Can: Brand Use, Self-Efficacy, and Performance*, 51 J. MKTG. RES. 233 (2014); Liane Schmidt et al., *Red Bull Gives You Incentive Motivation: Understanding Placebo Effects of Energy Drinks on Human Cognitive Performance* (pre-print, not yet peer-reviewed) (2017); cf. A. Branthwaite & P. Cooper, *Analgesic Effects of Branding in Treatment of Headaches*, 282 BRIT. MED. J. CLIN. RES. ED. 1576 (1981).

15. See Garvey et al., *supra* note 13.

16. *Id.* at 943.

17. See, e.g., Thomas R. Lee et al., *An Empirical and Consumer Psychology Analysis of Trademark Distinctiveness*, 41 ARIZ. ST. L.J. 1033, 1036–39 (2009) (using consumer psychology models as a means to determine a trademark’s effect); Jake Linford, *Are Trademarks Ever Fanciful?*, 105 GEO. L.J. 731, 731 (2017) [hereinafter Linford, *Are Trademarks Ever Fanciful?*] (using sound symbols in fanciful marks can convey product information, which militates against overprotecting fanciful

different benefits from high-performance and high-prestige marks.<sup>18</sup> This evidence also invites us to revisit whether the market for trademarked products should maximize price competition in every instance. In particular, to the extent the performance-enhancing placebo effect is generalizable, the effect dampens some criticism of protection against post-sale confusion and dilution, at least for high-performance marks. Even if one assumes that protecting prestige value systematically reduces market efficiency, that assumption may not hold for high-prestige marks with a high-performance reputation. Thus, calls to limit trademark protection to cabin consumer manipulation must account for the potential unraveling of benefits to consumers like performance-enhancing placebo effects.

This Article proceeds in three Parts. Part II summarizes the dominant search cost justification for trademark protection, as well as critiques leveled against the manipulation of consumer perception seen as part and parcel of modern branding practices.<sup>19</sup> Part III describes recent research that shows a performance-enhancing placebo effect for subjects who use a product bearing a high-performance mark.<sup>20</sup> Part IV considers whether and how society might benefit from reframing trademark law's normative bases or adjusting trademark doctrines in light of this new research.<sup>21</sup>

## II. THE (MIS)INFORMATION FUNCTION OF TRADEMARKS

A trademark is any word, name, symbol, or device used to distinguish the seller's product and indicate the (anonymous) source of that product.<sup>22</sup> The law secures the right to use a trademark as an exclusive source designator for a given product on the assumption that the trademark provides important information to consumers.<sup>23</sup> If a consumer can expect to have a similar experience every time she eats at a McDonald's restaurant, or drinks a Coke-branded

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marks).

18. Garvey et al., *supra* note 13, at 943.

19. *See infra* Part II.

20. *See infra* Part III.

21. *See infra* Part IV.

22. 15 U.S.C. § 1127 defines "trademark." In this Article, "product" indicates goods, services, or both.

23. Bone, *Hunting Goodwill*, *supra* note 1, at 549 ("[T]he 'information transmission model' . . . views trademarks as devices for communicating information to the market and sees the



cola, the trademark communicates useful information that reduces the cost of searching for a desired product.<sup>24</sup>

But if a competitor can use the same or a similar mark on the same or similar products, consumers will more likely be confused about the source of the competing products.<sup>25</sup> That confusion may well impair consumers' ability to use the mark to help them select the product they prefer, thus increasing search costs.<sup>26</sup> To help consumers economize on search costs, a trademark is protected as an exclusive signifier of a particular product from a particular source, empowering consumers to rely on the information the mark conveys.<sup>27</sup>

To the extent that the law protects the source significance of a trademark, it also incentivizes the mark owner to maintain consistent product quality. Trademark law allows the mark owner to internalize consumer goodwill (i.e. repeat custom)<sup>28</sup> as the reward for truthfully signaling consistent product

goal of trademark law as preventing others from using similar marks to deceive or confuse consumers.”); Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099, 2116 (2004) [hereinafter Bone, *Enforcement Costs*] (“[R]educing consumer search costs, maintaining and improving product quality, and remedying intentional deception—all relate to the quality of the product information available to consumers. Even the [quality] incentive . . . is linked to safeguarding the information transmission function of marks.”); Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 824 (1927) (“[T]he consumer now projects his shopping far from home and comes to rely more and more upon trademarks and tradenames as symbols of quality and guaranties of satisfaction.”).

24. Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1840 (2007) (“[T]rademark law’s core policies [are] protecting consumers and improving the quality of information in the marketplace.”).

25. See William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 268–69 (1987).

26. *Id.*

27. See, e.g., Lemley, *Modern Lanham Act*, *supra* note 3, at 1690 (finding trademarks are justified to the extent they “communicate useful information to consumers, and thereby reduce consumer search costs”).

28. See Elizabeth Cutter Bannon, *Revisiting “The Rational Basis of Trademark Protection”: Control of Quality and Dilution—Estranged Bedfellows?*, 24 J. MARSHALL L. REV. 65, 73–74 (1990) (“[Goodwill] exists in the minds of the buying public, where buyers trust the constancy of quality emanating from a particular producer. ‘Goodwill’ thus becomes ‘a business value that reflects the basic human propensity to continue doing business with a seller whose goods and services . . . the customer likes and has found adequate to fulfill his needs.’” (quoting J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 2.8(a) (2d ed. 1984))); Jake Linford, *Valuing Residual Goodwill After Trademark Forfeiture*, 93 NOTRE DAME L. REV. 811, 815 n.24 (2017) (describing goodwill as “value that represents confidence on the part of consumers that ‘their experience in the future will be as satisfactory as it has been in the past,’ earned by the mark owner through long years of ‘scrupulous’ attention to detail and care in maintaining ‘the standard of the goods dealt in’” (citing Washburn v.

quality.<sup>29</sup> Without trademark protection, firms might hesitate to create brands with costly, high-quality characteristics, because the benefits of such efforts could be appropriated by new entrants using the owner's mark on similar goods.<sup>30</sup> Correctly calibrated trademark protection thus encourages the mark owner to expend effort on costly signaling, which enables the mark to communicate information to consumers about the source, and therefore quality, of the marked product.<sup>31</sup> New entrants may compete on quality and price, but are discouraged from free riding on the mark's source significance or otherwise impeding the information transmission function of the mark.<sup>32</sup> Under the standard economic account, trademark protection thus contributes to a well-functioning market by ensuring that consumers can rely on the mark as a source signifier, which enables competition between sellers on price and quality.<sup>33</sup>

This standard economic account does not fully reflect the reality of modern branding practices.<sup>34</sup> Trademark-related advertising creates demand that

Nat'l Wall-Paper Co., 81 F. 17, 20 (2d Cir. 1897))).

29. Nicholas S. Economides, *The Economics of Trademarks*, 78 TRADEMARK REP. 523, 525–27 (1988) (suggesting that trademarks primarily exist to enhance consumer decisions and to create incentives for firms to produce desirable products).

30. Bone, *Enforcement Costs*, *supra* note 23, at 2108 (“[I]f consumers lacked the ability to distinguish one brand from another, firms would have no reason to create brands with more costly but higher quality characteristics.”); A.R. Rao & K.B. Monroe, *The Effect of Price, Brand Name, and Store Name on Buyers' Perceptions of Product Quality: An Integrative Review*, 26 J. MKTG. RES. 351 (1989) (demonstrating impact of brand name on perceptions of quality).

31. Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1744 (2007) (arguing that intellectual property regimes “reflect a concern that, in their absence, people will have too little incentive to engage in certain activities with respect to information, whether discovering it, commercializing it, or using it to lower consumer search costs”).

32. Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 778, 819 (2004) (arguing that the historical normative goal of trademark law is to foster the flow of information in markets, thereby reducing consumer search costs).

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

34. The research on placebo effects and trademark usage is replete with references to brands as opposed to trademarks. This Article does not draw a sharp distinction between the two, but other scholars have highlighted differences between a trademark and a brand. See, for example, Deven R. Desai & Spencer Waller, *Brands, Competition, and the Law*, 2010 B.Y.U. L. REV. 1425, 1425 (2010), for an explanation that:

Contrary to the law's conception of trademarks, brands are used to indicate far more than source and/or quality. Indeed, those functions are far down on the list of what most businesses want for their brands. Brands allow businesses to reach consumers directly with messages regarding emotion, identity, and self-worth, such that consumers are no longer

may not otherwise exist.<sup>35</sup> No merchant would pay for advertising that didn't generate sales. Indeed, effective advertising often trades on emotional appeals,<sup>36</sup> rather than informative content.<sup>37</sup> As Justice Frankfurter noted in one well-known Supreme Court decision, the “commercial magnetism” or drawing power of a trademark stems in part from the ability of the mark to create consumer desire,<sup>38</sup> instead of meeting or satisfying existing desire.<sup>39</sup> Thus, in many cases, the magnetism of a trademark may have little to do with the quality of the product sold under the mark and may depend instead on a “condi-

buying a product but buying a brand.

35. See GALBRAITH, *supra* note 6.

36. Indeed, trademark owners encourage consumers to connect with marks and brands on an emotional level. Deven R. Desai, *From Trademarks to Brands*, 64 FLA. L. REV. 981, 990–91 (2012) [hereinafter Desai, *From Trademarks to Brands*] (“Many companies encourage consumers to see a brand as having a personality and to accept the idea that owning a branded good connects the consumer to the brand in some deep, personal way. Buying branded goods, authorized or not, is one way in which consumers build that connection.” (footnote omitted)); B.B. Gardner & S.J. Levy, *The Product and the Brand*, HARV. BUS. REV. 33–39 (Mar.–Apr. 1955) (discussing symbolic values of brand names).

37. Klieger, *supra* note 5, at 858 (“[W]here product differentiation ‘is built primarily on a non-rational or emotional basis, through the efforts of the ad-man,’ consumer willingness to pay the premium proves economically inefficient.” footnote omitted); Hannibal Travis, *The Battle for Mindshare: The Emerging Consensus That the First Amendment Protects Corporate Criticism and Parody on the Internet*, 10 VA. J.L. & TECH. 3, ¶ 124 (2005) (citing Jacob Jacoby & Maureen Morrin, “Not Manufactured or Authorized by . . .”: *Recent Federal Cases Involving Trademark Disclaimers*, 17 J. PUB. POL’Y & MKT. 97 (Apr. 1998) (quoting Allan M. Collins, & Elizabeth F. Loftus, *A Spreading Activation Theory of Semantic Processing*, 82 PSYCHOL. REV. 407, 407–28 (1975))); Carl Obermiller, Eric Spangenberg & Douglas L. MacLachlan, *Ad Skepticism: The Consequences of Disbelief*, 34 J. ADVERT. 7, 15 (Fall 2005) (explaining that consumers may still be drawn to emotional appeals, even if they are skeptical of informational claims).

38. See also Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 114–15 (2012) [hereinafter McKenna, *Consumer Decision-Making*] (“Marketing is designed not merely to give information about products consumers already know they want but to ‘make people want many other things.’”).

39. *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942) (“The protection of trade-marks is the law’s recognition of the psychological function of symbols. . . . A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants.”); see also Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 973 (1993) (expressing concern about the impact of trademark protection on public discourse, given the “communicative freight” carried by trademarks, and the manner in which trademarks are “injected into the stream of communication with the pressure of a firehose by means of mass media campaigns”).

tioned reflex developed in the buyer by imaginative or often purely monotonous selling of the mark itself.”<sup>40</sup> Emotional appeal is one way to build brand loyalty.<sup>41</sup> Monotonous repetition is another.<sup>42</sup> Neither is necessarily informative.<sup>43</sup>

To the extent that a trademark’s appeal is independent of quality or price, it may drive economically irrational consumer choices.<sup>44</sup> Trademark law presumes that misappropriating the goodwill in the mark is actionable, but there is some danger that many such actions merely “reward[] advertising expenditures with little accompanying societal benefit.”<sup>45</sup> Robert Bone has warned

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40. Thomas P. Derring, *Trade-Marks on Noncompetitive Products*, 36 OR. L. REV. 1, 2 (1956). Indeed, one criticism against the protection of a merchandising right, the right of a firm to control the sales of clothing or other items bearing its mark as a decoration rather than a source signifier, focuses on how consumers are unlikely to connect the quality of the merchandise purchased with the mark owner. See, e.g., Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 EMORY L.J. 461, 481 (2005) (“If consumers are not duped into believing that a trademark-bearing product was either sponsored or made by the trademark holder, then the quality of product-related information in the marketplace has not suffered from the use.” (footnote omitted)).

41. Katya Assaf, *Brand Fetishism*, 43 CONN. L. REV. 83, 93 (2010) (“Customers are much more loyal to a brand when their loyalty is based not on rational reasoning, but on emotional preference.”).

42. Brown, *supra* note 10, at 1187 (“One of the oldest of advertising techniques, the simple reiteration of the brand name, contributes to [the persuasive power of symbols].”).

43. See, e.g., Deven R. Desai, *Response: An Information Approach to Trademarks*, 100 GEO. L.J. 2119, 2123 (2012) (arguing that in its focus on protecting a static, owner-created message about the branded product, “trademark law erects barriers to information in the name of fostering information in the marketplace.”); see also Desai, *From Trademarks to Brands*, *supra* note 36, at 987 (arguing for a brand theory of trademarks which would embrace “a more open, democratic understanding of brands” which “creates room for individuals and communities to use brands as a locus of personal expression, political debate, and market discussion”).

44. See *supra* note 10 and accompanying text; see also Giovanni B. Ramello & Francesco Silva, *Appropriating Signs and Meaning: The Elusive Economics of Trademark*, 15 INDUS. & CORP. CHANGE 937, 955 (2006) (“[I]n the presence of both objective differentiation between products and semiotic differentiation, the consumer may be led astray in his choices if he allows the semiotic component to prevail when the objective component would point to a different choice.”).

45. Austin, *supra* note 9, at 862; see also Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367, 428 (1999) (suggesting brand loyalty can reach “Pavlovian” levels); Lemley, *Modern Lanham Act*, *supra* note 3, at 1709 (“It is hard to see how the goals of preventing consumer confusion and encouraging investments in product quality would be furthered by allowing a company to sell the rights to a mark to another who will not make the same products.”); Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 398 (1990) (“[A]s trademark owners have begun to capitalize on the salience of these symbols in the culture, the justifications that formerly delineated the scope of the law have lost significance.”); Graeme B. Dinwoodie, *The Rational Limits of Trademark Law*, in UNITED STATES INTELLECTUAL

that the case for encouraging the creation of emotion-laden trademarks may not “justify the enforcement and other costs associated with legal exclusivity.”<sup>46</sup> If so, consumers might not benefit from the generation of information not directly related to the source or quality of the mark.<sup>47</sup>

Consumers could even become overly attached to brands.<sup>48</sup> If consumers make irrational choices and if consumer loyalty depends on emotional connection more than objective measures of price and quality, then the owner of a strong mark may be somewhat insulated from price and quality competition.<sup>49</sup> As A.G. Papandreou notes, at the extreme, “the presence of irrational consumer allegiances may constitute an effective barrier to entry.”<sup>50</sup>

Consumers may also be deceived if they buy a product believing it has a

PROPERTY LAW AND POLICY (Hugh C. Hansen ed., 2002) (attempting to circumscribe trademark protection in light of the purpose of preventing consumer confusion); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717 (1999) [hereinafter Litman, *Batman*]; Stephen L. Carter, *The Trouble with Trademark*, 99 YALE L.J. 759, 794 (1990) (arguing against exclusive rights upon registration and intent-to-use registration).

46. Bone, *Hunting Goodwill*, *supra* note 1, at 620.

47. See Michael Abramowicz & John F. Duffy, *Intellectual Property for Market Experimentation*, 83 N.Y.U. L. REV. 337, 383 (2008) (noting that in the face of evidence that “consumers irrationally overestimated the quality benefits of purchasing from the most familiar brand,” a search cost account would need to “recommend relaxation of trademark rules”).

48. C. Whan Park, Deborah J. MacInnis & Joseph R. Priester, *Beyond Attitudes: Attachment and Consumer Behavior*, 12 SEOUL J. BUS. 3, 18 (2006), available at <http://ssrn.com/abstract=961469>.

[W]hen attachment is high, consumers perceive the brand to be an extension of themselves. They are defensive of attacks or criticisms against their brand and interpret such criticisms as personally threatening. Thus they are willing to engage in behaviors on behalf of the brand, despite the potential self-image-related risks such behaviors may carry. Moreover, since strong brand attachment involves automatic retrieval of brand-self connections, these individuals have less control over brand related defensive behaviors. These consumers are also less cost-benefit oriented in their reactions to their brands.

*Id.*

49. See Assaf, *supra* note 41, at 93 (“A consumer who considers factors such as product quality, when preferring one brand over another, is more likely than the emotionally attached consumer to switch brands when these factors change.”).

50. A.G. Papandreou, *The Economic Effects of Trademarks*, 44 CALIF. L. REV. 503, 508–09 (1956) (“Consumer allegiances built over the years with intensive advertising, trademarks, trade names, copyrights and so forth extend substantial protection to firms already in the market. In some markets this barrier to entry may be insuperable.”). Ralph Brown likewise concluded advertisement “is a potent device to distinguish a product from its competitors, and to create a partial immunity from the chills and fevers of competition. The result of successful differentiation is higher prices than would otherwise prevail.” Brown, *supra* note 10, at 1183.

feature or conveys a benefit that it does not.<sup>51</sup> Consumers think products bearing marks with a reputation for quality provide some advantage.<sup>52</sup> But if that belief is based more on the emotional connection with the mark than objectively measurable features,<sup>53</sup> spending more on premium performance products may be irrational behavior.<sup>54</sup> Indeed, if consumers believe the source significance of the mark guarantees some level of objectively measurable quality that it does not, the use of the trademark itself may deceive consumers.<sup>55</sup> The goodwill protected through the mark may be unrelated to any actual difference in quality, or may even misrepresent that difference.<sup>56</sup> As Jeremy Sheff has observed, “trademarks, supported by marketing activities . . . can give rise to consumer beliefs about objective product qualities that are objectively mistaken, and yet resistant to correction by exposure of the consumer to objective evidence.”<sup>57</sup> To the extent this is true, trademarks may provide strategic advantage to sellers, enticing consumers to make irrational choices

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51. *But see* Shahar J. Dilbary, *Famous Trademarks and the Rational Basis for Protecting “Irrational Beliefs,”* 14 GEO. MASON L. REV. 605, 607–08 (2007) (arguing that consumers who buy a branded product make an economically rational decision to purchase with the physical product “an intangible product such as fame, prestige, peace of mind, or just a pleasant feeling”).

52. Garvey et al., *supra* note 13, at 936.

53. *See supra* notes 9–10 and accompanying text.

54. *See* Bart J. Bronnenberg et al., *Do Pharmacists Buy Bayer? Informed Shoppers and the Brand Premium*, 130 Q.J. ECON. 1669, 1669–70 (2015); Jagdish N. Sheth & Rajendra S. Sisodia, *Raising Marketing’s Aspirations*, 26 J. PUB. POL’Y & MARKETING 141, 141 (2007); Laura R. Bradford, *Emotion, Dilution, and the Trademark Consumer*, 23 BERKELEY TECH. L.J. 1227, 1229 (2008) (“Some have argued that emotional advertising causes consumers irrationally to pay a premium for trademarked products that are not functionally superior to generic substitutes.” (citing, *inter alia*, EDWARD CHAMBERLAIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (5th ed. 1946))).

55. Isaac W. Digges, *Is Your Advertising Destroying Your Trademark?*, 35 TRADEMARK REP. 51, 53 (1945).

When a cigarette manufacturer advises the public in strident tones that the X brand of cigarettes means fine tobacco, he finds many to imitate him. The air waves vibrate with the message of trade-mark owners who aver that the A product means quality, that the B product means a guaranteed life . . . or claims of similar import. Of course, they do not mean any of those things. They mean products originating from a particular source.

*Id.*

56. *See* Austin, *supra* note 9, at 856 (“How can trademarks be neutral vehicles for transmitting information efficiently . . . when trademarks themselves are bundled together with promotional and advertising strategies that manipulate consumer desires?” (footnote omitted)); Litman, *Batman*, *supra* note 45, at 1725–28 (suggesting consumers trick themselves into paying more when the mark they prefer is attached to a high-priced product).

57. Jeremy N. Sheff, *Biasing Brands*, 32 CARDOZO L. REV. 1245, 1253 (2011).

against self-interest.<sup>58</sup> This disconnect between objective product quality and manipulated consumer loyalty may lead a consumer to “make purchase decisions she would not have made.”<sup>59</sup>

Courts have expressed skepticism about the social value of consumer manipulation through advertising. For example, Justice Harlan grouched that persuasive branding may “[u]ndeniably . . . be used to create irrational brand preferences and mislead consumers as to the actual differences between products.”<sup>60</sup> Judge Frank likewise cautioned that expansive trademark protection might enable a firm to “acquire a vested interest in a demand ‘spuriously’ stimulated through ‘the art of advertising’ by ‘the power of reiterated suggestion’ which creates stubborn habits.”<sup>61</sup> Perhaps courts should then eschew “actively lend[ing] their aid to the making of profits derived from the building of such habits,” if and whenever those stubborn habits “so dominate buyers that they pay more for a product than for an equally good competing product.”<sup>62</sup> If consumer interest is based on emotional appeals rather than source identification or accurate information about consistent quality, persuasion might amount to manipulation, impairing consumer autonomy.<sup>63</sup> In such a world, courts might properly refuse to extend trademark protection to marks or product features.<sup>64</sup>

Courts nevertheless often shrug off the concern, extending protection to mark owners on the rationale that “the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by

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58. *See id.* at 1254 (arguing that manipulation of consumers may be mitigated in part by complementary regulation that protects consumers).

59. *Id.* at 1296.

60. *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 603 (1967) (Harlan, J., concurring); *see also* Dilbary, *supra* note 51, at 614 n.38 (quoting *Procter & Gamble*, 386 U.S. at 603).

61. *Triangle Publ'ns, Inc. v. Rohrlich*, 167 F.2d 969, 980 n.13 (2d Cir. 1948) (Frank, J., dissenting).

62. *Id.*

63. *See* Beebe, *Search and Persuasion*, *supra* note 7, at 2057 (“The manipulationist tradition . . . assumes that the consumer is somehow being manipulated if (1) her choice is informed to some degree by emotion or imagination, rather than purely by rational calculation . . . or (2) she is persuaded to buy a product for reasons other than its intrinsic utility . . . .” (footnote omitted)).

64. *See id.* at 2056–57 (arguing against the current standard where “courts assess whether or not consumers are actually confused, not whether or not they *should* be confused”).

ignorance.”<sup>65</sup> This view is not inconsistent with scholars who argue that consumers should be treated as rational and discriminating agents who can tolerate some confusion in the marketplace and make reasoned decisions.<sup>66</sup>

Some scholars have further argued that despite the complaints leveled by courts and other academics, brand-related product differentiation based on features like a reputation for luxury promote social welfare.<sup>67</sup> For example, Irina Manta argues that trademark law should account for the hedonic enjoyment (increased happiness or well-being) consumers receive from consuming branded goods, including positive mental associations and perceived increases in status.<sup>68</sup> Shahar Dilbary likewise contends that consumers derive value from non-physical, brand-related attributes, even if those attributes are desirable only because trademark owners have successfully exploited consumer vulnerabilities.<sup>69</sup> To Dilbary, the willingness of consumers to pay more for branded goods is itself a signal that the creation of psychological effects is not

65. *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 78 (1934).

66. McKenna, *Consumer Decision-Making*, *supra* note 38, at 137–38 (“Courts should err on the side of less protection in close cases, requiring consumers to manage the resulting marketplace, because trademark law should not coddle consumers.”); Austin, *supra* note 9, at 906 (“[C]haracterizing the consumer as rational and discriminating, as an agent in the processes of communication with firms that are mediated by brands, is as plausible as the characteristics that modern trademark law often accords to the ordinarily prudent consumer.”); *see also id.* at 921 (“[R]e-imagining the consumer in this way should lead to a curtailment of the scope of trademark rights, something numerous distinguished commentators have long been urging.”); Alfred C. Yen, *The Constructive Role of Confusion in Trademark*, 93 N.C. L. REV. 77, 128 (2014) (“[C]onfusion actually increases the value of the [trademark] system by helping consumers develop cognitive skills that support the transmission of subtle messages through trademarks.”). Ralph Brown sympathetically summarizes the argument for which he has no sympathy: “The economist, whose dour lexicon defines as irrational any market behavior not dictated by a logical pecuniary calculus, may think it irrational to buy illusions; but there is a degree of that kind of irrationality even in economic man; and consuming man is full of it.” Brown, *supra* note 10, at 1181.

67. Dogan & Lemley, *supra* note 11, at 493 (summarizing scholarly commentary).

68. Irina D. Manta, *Hedonic Trademarks*, 74 OHIO ST. L.J. 241, 244 (2013); *see also id.* at 265 n.117 (defining a hedonic evaluation of well-being as dependent “solely on how a person feels rather than on any other (for example, more objective) consideration or fact,” a value that “can be influenced only by those things that affect a person’s sensory, emotional, or cognitive experience of life” (quoting John Bronsteen et al., *Welfare as Happiness*, 98 GEO. L.J. 1583, 1601–02 (2010))).

69. Dilbary, *supra* note 51, at 606–07; *see also* Lunney, *supra* note 45, at 372 (arguing that property-based trademark protection reduces social welfare). *But see* Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 815–17 (2010) (arguing that the protection of luxury brands through trademark law is an attempt to preserve distinctions between high-class and low-class citizenry by protecting luxury goods from unauthorized copying, and that the attempt is “inconsistent with the progressive project of intellectual property law”).



socially wasteful.<sup>70</sup>

Other scholars are skeptical that prestige associated with the mark merits protection. For example, Jeremy Sheff argues that protecting intangible, advertising-created features like the status of luxury brands using remedies like anti-dilution protection is harmful to consumer interests and inimical to First Amendment and democratic values.<sup>71</sup> Scholars who seek to narrow the protection for status-signaling marks argue that trademark protection should curtail only behavior by a competitor that is likely to “confuse[] the consuming public or destroy[] the trademark owner’s incentives to invest in product quality.”<sup>72</sup> For instance, Mark McKenna has argued that trademark law should only intervene when “use of a trademark threatens to prevent consumers from acting on pre-existing preferences.”<sup>73</sup> McKenna’s argument focuses on cabining controversial forms of confusion that he argues do not deceive consumers or otherwise alter consumer autonomy.<sup>74</sup> But this manipulation of consumer autonomy is often invoked as the cardinal sin, or at least the intended outcome, of emotional advertising appeals.<sup>75</sup> Indeed, some mechanisms deny protection to the owner of a mark likely to deceive consumers.<sup>76</sup>

Ralph Brown similarly concludes that “persuasive values,” as compared to source and quality information conveyed by the brand, are not entitled to protection in trademark cases.<sup>77</sup> Scholars eager to separate source significance and objective information about brands from the manipulative effect of persuasive advertising have argued for various limits on trademark protection.<sup>78</sup>

70. Dilbary, *supra* note 51, at 660.

71. Sheff, *Veblen Brands*, *supra* note 11, at 775.

72. Lemley, *Modern Lanham Act*, *supra* note 3, at 1713.

73. McKenna, *Consumer Decision-Making*, *supra* note 38, at 122.

74. *Id.* at 125–36.

75. See Katya Assaf, *supra* note 41, at 146 (“The commercial mass media is rearranging our neurons, manipulating our emotions, making powerful new connections between deep immaterial needs and material products.” (quoting KALLE LASN, *CULTURE JAM: THE COOLING OF AMERICA* 12 (1999))); see also Bradford, *supra* note 54, at 1253–54 (2008) (discussing the origins of criticism regarding consumer manipulation through emotional advertising).

76. See *infra* Part IV.C.1.

77. Brown, *supra* note 10, at 1201. For Brown, this is a conclusion both descriptive and normative. *Id.*

78. See, e.g., Dinwoodie, *supra* note 45, at 59 (advocating for a more focused scope on trademark protection, with the central purpose being “the classic avoidance of consumer confusion”); Jeremy N. Sheff, *Biasing Brands*, 32 *CARDOZO L. REV.* 1245, 1245 (2011) (“[T]rademark protection can only reliably promote economic efficiency in a legal environment where complementary regulations, such

These scholars express skepticism of protections against initial interest confusion, post-sale confusion, sponsorship confusion, and dilution. Those rights safeguard brand-related persuasion before or after the point of sale, or in circumstances when consumers are unlikely to be deceived by the new entrant's allegedly infringing use.<sup>79</sup>

Scholars likewise propose denying protection to aesthetic features that might otherwise qualify as source-signifying trade dress. For example, Ann Bartow proposes denying protection to aesthetic features of high-end consumer goods on functionality grounds, arguing that protecting those features "illegitimately prevents lower income people from procuring and enjoying goods with aesthetic attributes that are not properly monopolized through trademark law."<sup>80</sup> Others argue that if persuasive advertising and emotional appeals effectively create barriers to entry, then antitrust law correctly applied should make unlawful the use of marks for persuasive, rather than informative, purposes.<sup>81</sup> In nearly every case, narrower protection would allow some free riding on the mark owner's goodwill, broadly defined, but some have argued that such free riding is part and parcel of effective competition.<sup>82</sup>

Much of the disagreement about the legal validity of persuasive trademark

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as those prevalent in food and drug law, mitigate the opportunities for producers to extract rents by manipulating consumer psychology.").

79. See Manta, *supra* note 68, at 255 (summarizing these arguments).

80. Ann Bartow, *Counterfeits, Copying and Class*, 48 HOUS. L. REV. 707, 707–08 (2011); see also Kaitlin Powers, *Saving Soles: The Limited Practical Application of* Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc., 14 N.C. J.L. & TECH. ON. 335, 336–37 (2013) ("[W]hile trademark law supports efforts to distinguish a product and proclaim its source via 'marketing gimmick[s],' such as Louboutin's red soles, it potentially opposes efforts to use a trademark to monopolize color's functional ability to evoke emotions and concepts like prestige, glamour, and even romance." (footnote omitted)); Ramello & Silva, *supra* note 44, at 955 (observing that if counterfeiting does not reduce the value of the imitated mark, counterfeiting may be welfare enhancing (citing G.M. Grossman & C. Shapiro, *Foreign Counterfeiting of Status Goods*, 103 Q.J. ECON. 79 (1988))); cf. A. Samuel Oddi, *Consumer Motivation in Trademark and Unfair Competition Law: On the Importance of Source*, 31 VILL. L. REV. 1, 45–46 (1986) ("Closely related and probably involving an overlap of affective and cognitive aesthetic functionality is the trademark and unfair competition doctrine of 'mere ornamentation,' which denies protection to those product features that are merely ornamental and hence not indicative of source.").

81. Papandreou, *supra* note 50, at 509.

82. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1032 (2005) ("[T]he rhetoric of free riding in intellectual property . . . [is] fundamentally misguided.") [hereinafter Lemley, *Free Riding*]; Lunney, *supra* note 45, at 454 ("[F]ree riding alone does not establish market failure, nor does it suffice to justify government intervention.").

messaging turns on empirical questions. Are consumers' desires for branded goods inherently motivated or externally manipulated? Even if those desires are manipulated, does some objectively measurable benefit flow to consumers from the creation of brand reputation for quality? Recent research hints at better answers to those questions. As the next Part describes, new experimental research offers evidence that exposure to a high-performance trademark, or use of a product bearing a high-performance mark, enhances consumer performance independent of the quality of the product. These enhancements appear susceptible to concrete measurement.

### III. THE PLACEBO EFFECT OF A HIGH-PERFORMANCE REPUTATION

A recent series of experiments have uncovered evidence of a placebo effect when subjects use goods or services identified with a high-performance brand. Subjects perform better when they use a tool bearing a trademark with a strong reputation for performance.<sup>83</sup> For example, research subjects using a putter with the Nike mark can sink a putt in fewer tries than counterparts using the same putter labeled with the Starter or Gucci trademarks, or with no mark at all.<sup>84</sup> Subjects can correctly answer more math questions when they think they are using 3M branded foam earplugs to block distracting noise than peers using exactly the same earplugs with no brand identifier.<sup>85</sup> And subjects who play multiple rounds of a car racing video game drive more aggressively when they drive a car with the Red Bull mark than when they drive a car with another mark or drive an unmarked car.<sup>86</sup> These effects appear to have multiple causes, but the results have interesting implications for the relationship between brand identity and consumer benefit.<sup>87</sup>

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83. Garvey et al., *supra* note 13, at 932.

84. *Id.* at 936 (showing that participants with “strong” Nike brand outperformed those with “weak” Starter brand); *id.* at 943 (showing that those with “performance” Nike brand outperformed those with “prestige” Gucci putters).

85. *Id.* at 938–39.

86. *See infra* notes 164–70 and accompanying text.

87. *See infra* Part IV.

A. *Placebo Effects*

For the purposes of this paper,<sup>88</sup> a placebo effect is a benefit, either self-reported or objectively measured, that correlates with, or is caused by, the consumption or use of a substance or product that is not objectively more therapeutic or more likely to improve test outcomes than a substance or product from a control group.<sup>89</sup> Generally, subjects who experience placebo effects are not conscious of the effect.<sup>90</sup>

Placebo effects are probably multiply determined,<sup>91</sup> but research has disclosed some likely candidates.<sup>92</sup> The recipient of the placebo might have increased ability to allocate effort,<sup>93</sup> or increased motivation.<sup>94</sup> Or placebo effects might instead operate by firing up dopamine pathways.<sup>95</sup> However they

88. Placebo effects have a notoriously contested definition. *See, e.g.*, Daniel E. Moerman & Wayne B. Jonas, *Deconstructing the Placebo Effect and Finding the Meaning Response*, 136 ANNALS INTERNAL MED. 471, 471 (2002) (“[T]he most recent serious attempt to try logically to define the placebo effect failed utterly.”).

89. *See* Garvey et al., *supra* note 13, at 933 (“[A] placebo effect is any measurable difference between a control group and a separate group that receives the exact same treatment (product/service) but believes the treatment to be fundamentally different.”).

90. Brasel & Gips, *supra* note 14, at 62–63; Baba Shiv, Ziv Carmon & Dan Ariely, *Placebo Effects of Marketing Actions: Consumers May Get What They Pay For*, 42 J. MKTG. RES. 383, 383 (2005); Steve Stewart-Williams & John Podd, *The Placebo Effect: Dissolving the Expectancy versus Conditioning Debate*, 130 PSYCHOL. BULL. 324, 324 (2004).

91. Baba Shiv, Ziv Carmon & Dan Ariely, *Ruminating About Placebo Effects of Marketing Actions*, 42 J. MKTG. RES. 410, 413 (2005) (“Given the substantial power and robustness of placebo effects, these effects are most likely multiply determined.”).

92. *Id.* at 412–13.

93. Kent C. Berridge, T.E. Robinson & J.W. Aldridge, *Dissecting Components of Reward: ‘Liking,’ ‘Wanting,’ and Learning*, 9 CURRENT OPINION PHARMACOLOGY 65 (2009); Tor D. Wager & Lauren Y. Atlas, *The Neuroscience of Placebo Effects: Connecting Context, Learning and Health*, 16 NATURE REV. NEUROSCIENCE 403, 406 (2015).

94. *See* Caglar Irmak et al., *The Placebo Effect in Marketing: Sometimes You Just Have to Want It to Work*, 42 J. MKTG. RES. 406, 408 (2005) (pointing to the role of motivation in placebo effects).

95. *See generally* F. Benedetti et al., *Placebo-Responsive Parkinson Patients Show Decreased Activity in Single Neurons of Subthalamic Nucleus*, 7 NATURE NEUROSCIENCE 587 (2004); R. de la Fuente-Fernandez et al., *Expectation and Dopamine Release: Mechanism of the Placebo Effect in Parkinson’s Disease*, 293 SCI. 1164 (2001); Ginger A. Hoffman et al., *Pain and the Placebo: What We Have Learned*, 48 PERSP. BIOLOGY & MED. 262 (2005) (finding some evidence suggests that placebo analgesic responses and analgesic responses caused by morphine or another exogenous opioid are mediated by largely overlapping pain modulating circuits in the brain); S.C. Lidstone et al., *Effects of Expectation on Placebo-Induced Dopamine Release in Parkinson Disease*, 67 ARCH. GEN. PSYCHIATRY 857 (2010); L. Schmidt et al., *Mind Matters: Placebo Enhances Reward Learning in*

work, researchers have measured concrete connections between beneficial placebo effects and trademark usage.

For instance, studies of placebo effects in the pharmaceutical context show that subjects report greater pain relief when the placebo offered bears a trademark associated with the desired effect.<sup>96</sup> To wit, subjects who consume placebos labelled as pain-relieving brands report more pain relief than those taking non-branded placebos.<sup>97</sup> Actual aspirin works better than either placebo, but the reported relief of the branded placebo compared to a non-branded placebo was statistically significant ( $p < .05$ ).<sup>98</sup> Generally, the placebo effect for branded pain relievers improves subjective outcomes, like reported pain relief, but not objectively measurable outcomes like reduced hypertension.<sup>99</sup>

### B. How Brands Change Consumer Behavior

Brand use has also been linked to consumer perceptions of self.<sup>100</sup> Marketing research has demonstrated that consumers identify characteristics of

*Parkinson's Disease*, 17 NAT. NEUROSCIENCE 1793 (2014); Petra Schweinhardt et al., *The Anatomy of the Mesolimbic Reward System: a Link between Personality and the Placebo Analgesic Response*, 29 J. NEUROSCIENCE 4882 (2009); D.J. Scott et al., *Placebo and Nocebo Effects are Defined by Opposite Opioid and Dopaminergic Responses*, 65 ARCHIVES GEN. PSYCHIATRY 220 (2008).

96. See Branthwaite & Cooper, *supra* note 14, at 1576, 1578.

97. *Id.* at 1576; see also Suz Redfearn, *Head Rub*, WASH. POST (Sept. 26, 2006), [https://www.washingtonpost.com/archive/lifestyle/wellness/2006/09/26/head-rub/e621244e-8f15-40fb-ad5e-6b5ed5c3f6ad/?utm\\_term=.a7d0d844644b](https://www.washingtonpost.com/archive/lifestyle/wellness/2006/09/26/head-rub/e621244e-8f15-40fb-ad5e-6b5ed5c3f6ad/?utm_term=.a7d0d844644b) (quoting the director of Diamond Headache Clinic in Chicago who asserted that thirty to forty percent of headache relief is usually attributed to the placebo effect).

98. Branthwaite & Cooper, *supra* note 14, at 1577.

99. Asbjorn Hróbjartsson & Peter C. Gøtzsche, *Placebo Interventions for All Clinical Conditions (Review)*, 1 COCHRANE LIBR. 1, 2 (2010), <http://www.dscience.net/Hrobjartsson-Gotzsche-Cochrane-placebo.pdf> (questioning the extent of reliable research into the placebo effect); see also Kathleen M. Boozang, *The Therapeutic Placebo: The Case for Patient Deception*, 54 FLA. L. REV. 687, 715–16 (2002) (discussing Hróbjartsson and Gøtzsche's earlier work on the existence of reliable research on the placebo effect, and noting that "the authors' research observes [the] placebo effect for subjective but not objective outcomes"); Dilbary, *supra* note 51, at 627–28.

100. See generally Jonah Berger & Chip Heath, *Where Consumers Diverge from Others: Identity Signaling and Product Domains*, 34 J. CONSUMER RES. 121 (2007); Ira J. Dolich, *Congruence Relationships Between Self Images and Product Brands*, 6 J. MARKETING RES. 80 (1969); Jennifer Edson Escalas & James R. Bettman, *Self-Construal, Reference Groups, and Brand Meaning*, 32 J. CONSUMER RES. 378 (2005); Robert E. Kleine, Susan Schultz Kleine & Jerome B. Kernan, *Mundane Consumption and the Self: A Social-Identity Perspective*, 2 J. CONSUMER PSYCHOL. 209 (1993); E.

brands and often adopt those perceived characteristics. For example, consumers purchase brands to help construct their self-concept and bolster self-esteem.<sup>101</sup> Brand-conscious consumers typically consider branded products to be higher quality and more efficacious.<sup>102</sup> Bolstering self-concept and self-esteem can improve consumer-brand connections.<sup>103</sup>

Brand exposure not only shapes consumer perception, but can also change consumer behavior. For example, consumers exposed to the Kellogg's trademark, which has a reputation for healthiness, self-report an increased likelihood they will take the stairs instead of the elevator.<sup>104</sup> Exposure to Disney Channel logos increases the observer's honesty compared to exposure to E! Channel logos, while exposure to the Apple logo increases the observer's creativity compared to exposure to the IBM logo, consistent with expectations about those brands.<sup>105</sup> Consumers exposed to brand names with a reputation for delivering low-price goods, like Walmart, are more likely than other consumers to pick high-value, low cost-products.<sup>106</sup> Exposure to the Nike mark, with its reputation for boldness and risk-taking, can lead research participants to make riskier investment choices than their peers.<sup>107</sup> Likewise, consuming branded goods consistent with one's idealized self-worth has the potential to

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Laird Landon, Jr., *Self Concept, Ideal Self Concept, and Consumer Purchase Intentions*, 1 J. CONSUMER RES. 44 (1974).

101. Martin Reimann & Arthur Aron, *Self-Expansion Motivation and Inclusion of Brands in Self: Toward a Theory of Brand Relationships*, in HANDBOOK OF BRAND RELATIONSHIPS 65 (MacInnis et al. eds., 2009).

102. Elizabeth Kendall Sproles & George B. Sproles, *Consumer Decision-Making Styles as a Function of Individual Learning Styles*, 24 J. CONSUMER AFF. 134, 140 (1990).

103. Escalas & Bettman, *supra* note 100.

104. Pankaj Aggarwal & Ann L. McGill, *When Brands Seem Human, Do Humans Act Like Brands? Automatic Behavioral Priming Effects of Brand Anthropomorphism*, 39 J. CONSUMER RES. 307, 313 (2012).

105. Fitzsimons et. al., *supra* note 14, at 30–31, 33 (explaining how brand primes can cue brand identity-consistent behavior).

106. Tanya L. Chartrand, Joel Huber, Baba Shiv & Rob Tanner, *Nonconscious Goals and Consumer Choice*, 35 J. CONSUMER RES. 189, 196 (2008).

107. Danielle Mantovani & Fábio Henrique Silva Galvão, *Brand Priming Effect on Consumers' Financial Risk Taking Behavior*, 52 REVISTA DE ADMINISTRAÇÃO 15, 19–21 (2016), <http://dx.doi.org/10.1016/j.rausp.2016.09.002>.

reinforce a positive self-view.<sup>108</sup> Exposure to brands thus appears to alter consumer behavior.<sup>109</sup>

### C. Performance-Enhancing Placebo Effects

In light of the ability of brands to shape consumer perception and behavior, it is not unreasonable to think that consuming or using a high-performance brand could make consumers feel better about their ability to perform, and perhaps even help them perform better.<sup>110</sup> Scholars have recently shown this effect in various experiments. Consumption or use of a product bearing a high-performance mark increases the research subjects' performance on a variety of tasks. This effect holds even though the product used or consumed is not actually produced by the mark owner. In fact, in all of the following studies, research subjects in the high-performance and control groups use the very same product.

For example, Aaron Garvey and his co-authors conducted several studies to isolate the effects of high-performance brands on the performance of research subjects.<sup>111</sup> The Garvey experiments showed a statistically significant correlation between use of a high-performance brand and improved performance in golf putting, taking a math test, and answering GMAT practice questions.<sup>112</sup> The Garvey experiments show that subjects perform better when they are told the tool used comes from a brand with a strong reputation for performance, although in each case, the difference between tools associated with the high-performance brand and controls was "illusory."<sup>113</sup> Each research subject

108. Garvey et al., *supra* note 13, at 934.

109. See, e.g., A. Dijksterhuis, T.L. Chartrand & H. Aarts, *Effects of Priming and Perception on Social Behavior and Goal Pursuit*, in *SOCIAL PSYCHOLOGY AND THE UNCONSCIOUS: THE AUTOMATICITY OF HIGHER MENTAL PROCESSES* 51–132 (John A. Bargh ed., 2007); John A. Bargh, *Auto-motives: Preconscious Determinants of Social Interaction*, in *2 HANDBOOK OF MOTIVATION AND COGNITION* 93–130 (Higgins & Sorrentino eds., 1990).

110. Garvey et al., *supra* note 13, at 934 (exploring the relationships that can develop between individuals, their self-identities, and their brand preferences (citing, *inter alia*, Susan Fournier, *Consumers and Their Brands: Developing Relationship Theory in Consumer Research*, 24 *J. CONSUMER RES.* 343, 348–63 (1998))); KEVIN LANE KELLER, *STRATEGIC BRAND MGMT.* 6 (1998) ("[T]he psychological response to a brand can be as important as the physiological response to the product.").

111. Garvey et al., *supra* note 13, at 931.

112. *Id.* at 945.

113. *Id.* at 932.

used the same tool (the same putter; earplugs from the same source, etc.); only the names changed.<sup>114</sup> Other studies corroborate these effects.<sup>115</sup>

In the first Garvey experiment, subjects were invited to sink a putt from distances of two, three and four-and-one-half feet.<sup>116</sup> Each subject used the same putter, but in some cases, the putter was labeled as a Nike putter.<sup>117</sup> In other cases, the putter was labeled as a Starter putter.<sup>118</sup> For the control group, the putter bore no label.<sup>119</sup> Subjects using the Nike putter performed better than other subjects, sinking putts in an average of 1.91 strokes.<sup>120</sup> That was a twenty percent improvement over subjects who used the non-branded control putter (2.49,  $p < .01$ ) or the Starter-branded putter (2.36,  $p < .05$ ).<sup>121</sup>

Garvey and co-authors hypothesized that increases in performance might depend either on the subjects' increased self-esteem or decreased anxiety.<sup>122</sup> Two follow-up experiments support these hypotheses.<sup>123</sup> The second Garvey experiment also invited subjects to sink putts of varying lengths, using either a Nike-branded or non-branded putter.<sup>124</sup> Again, all subjects used the same putter, with either the Nike label or a control label.<sup>125</sup> The performance of those who used the Nike putter (1.71) was twenty percent better than those who used the unlabeled putter (2.14,  $p < .01$ ).<sup>126</sup> In addition, controlling for each subject's actual performance, subjects using the Nike-branded putter reported greater self-esteem on a seven-point scale (5.12) than those using the control-branded putter (4.37,  $p < .05$ ).<sup>127</sup>

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114. *See id.* at 936, 938, 945.

115. *See infra* notes 158–78 and accompanying text.

116. Garvey et al., *supra* note 13, at 936.

117. *Id.*

118. *Id.* In a separate pretest, a different panel of subjects were asked to assess, using a seven-point scale, the likelihood that each of the three putters would improve or harm performance. *Id.* Subjects reported a significantly higher expectation of a strong performance using the Nike putter (5.02) than the Starter (3.99,  $p < .01$ ) or the non-branded putter (4.10,  $p < .01$ ). *Id.*

119. *Id.*

120. *Id.* The average subject's performance was 2.24 strokes. *Id.*

121. *Id.*

122. *Id.* at 934.

123. *Id.* at 937–39.

124. *Id.* at 937.

125. *Id.*

126. *Id.*

127. *Id.*



Also interesting was the subjects' response to questions designed to elicit their perspective about the source of their success.<sup>128</sup> Subjects who used the Nike-branded putter attributed their performance to their own skills (3.96) as opposed to control users (3.26,  $p = .01$ ).<sup>129</sup> But there was no significant difference attributed to the brand (4.47 v. 4.08,  $p > .10$ ).<sup>130</sup> In other words, subjects who used the Nike-brand putter and experienced the improved performance consciously attributed their performance to their own skills, rather than the putter.<sup>131</sup>

A third Garvey experiment shows the placebo effect extends to cognitive tasks.<sup>132</sup> In that experiment, subjects were invited to take a math test.<sup>133</sup> Each subject used the same style of sound-reducing foam earplugs while taking the test.<sup>134</sup> Some participants wore earplugs taken from a 3M container—a brand with a strong performance reputation.<sup>135</sup> Subjects in the control group wore earplugs from a container with no brand identifier.<sup>136</sup> Those subjects who received the 3M earplugs correctly answered more of the five presented math questions than the control group (2.88 v. 2.39,  $p < .05$ ).<sup>137</sup>

After the math test, subjects were asked to rate their motivation, confidence, and anxiety.<sup>138</sup> Like the participants in the second Garvey experiment, those who used the 3M earplugs experienced heightened self-esteem and in turn attributed their performance to themselves at a significantly higher level than the control group, on a seven-point Likert scale (5.07 v. 4.46,  $p < .05$ ).<sup>139</sup>

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128. *Id.* at 938.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 939. In a pretest, a different group of students were asked to assess the likelihood that the 3M or non-branded earplugs would improve concentration on a math test. *Id.* Those subjects expressed a significantly higher expectation that using the 3M earplugs would improve performance compared to the control group, on a seven-point Likert scale (4.83 v. 3.95,  $p < .01$ ). *Id.*

136. *Id.* at 938.

137. *Id.* at 939.

138. *Id.*

139. *Id.*

There was no statistically significant difference between the 3M and control groups regarding attribution of success to the earplugs (2.80 v. 2.49,  $p > .30$ ).<sup>140</sup>

A fourth experiment by Garvey and co-authors invited subjects to prepare for GMAT practice tests with a test prep app.<sup>141</sup> Some subjects were offered a smartphone app ostensibly from Kaplan (a mark with a strong performance reputation), while others used a Laserprep app (a name made up for the study).<sup>142</sup> Subjects pre-reported whether they viewed stress as likely to increase or decrease productivity.<sup>143</sup> Subjects who reported that stress was likely to *decrease* performance and were told they were using a Kaplan app correctly answered one more question than Laserprep users ( $p = .05$ ).<sup>144</sup> But Kaplan subjects who reported that stress could enhance performance did not perform better than the Laserprep group ( $p = .05$ ).<sup>145</sup> In fact, they correctly answered one *fewer* question than Laserprep users.<sup>146</sup> Garvey and co-authors surmise that because using a tool with a high-performance mark reduces stress, those who find stress to enhance performance are likely to have reduced success when they use a high-performance branded tool.<sup>147</sup>

In a fifth study, subjects once again tried to sink putts, and once again, all subjects used the same putter.<sup>148</sup> For this study, in addition to a Nike and non-branded condition, some subjects used a Gucci-branded putter.<sup>149</sup> This experiment was designed to clarify whether subjects were responding to the general

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140. *Id.*

141. *Id.* at 941.

142. *Id.* As with an earlier experiment, a different panel of subjects reported a significantly higher expectation that using Kaplan would improve test results, compared to Laserprep, on a seven-point Likert scale (4.63 v. 3.85,  $p < .01$ ). *Id.*

143. *Id.* at 940–41. A majority of individuals hold the belief that stress reduces performance, but a minority hold the opposite view. *Id.* at 940 (citing Alison Wood Brooks, *Get Excited: Reappraising Pre-Performance Anxiety as Excitement*, 143 J. EXPERIMENTAL PSYCHOL. 1144, 1147 (2013)).

144. Garvey et al., *supra* note 13, at 941–42.

145. *Id.*

146. *Id.*

147. *Id.* at 942.

148. *Id.* at 943.

149. *Id.* at 943. A different panel of subjects assessed performance expectations related to the brand of the putter. *Id.* The subjects reported a higher expectation, on a seven-point scale, that using the Nike putter would improve performance (4.95) compared to the Gucci putter (4.21,  $p < .01$ ) or the control putter (4.06,  $p < .01$ ). *Id.* There was no significant difference of expectations between the Gucci and control putters ( $p > .80$ ). *Id.*

quality and prestige of a brand, or a specific reputation for enhancing performance.<sup>150</sup>

Pre-tests evaluated subjects' confidence about their golfing abilities.<sup>151</sup> As in studies 1 and 2, subjects were invited to sink putts of varying lengths.<sup>152</sup> All subjects took an average of 1.81 strokes to sink a putt.<sup>153</sup> Subjects in the Nike group sunk putts in significantly fewer strokes than subjects in the Gucci group (1.44 v. 2.11,  $p < .01$ ).<sup>154</sup> The performance of the Nike groups was also significantly lower than the control group (1.44 v. 1.91,  $p < .05$ ).<sup>155</sup> However, for subjects who pre-reported a high level of self-efficacy as a golfer, there was not a significant difference in performance between subjects in the Nike group and subjects in other groups ( $p = .31$ ).<sup>156</sup>

Other studies show that brand exposure and/or brand use can improve performance in physical exercise, taking exams, memory tests, and even playing video games.<sup>157</sup> For example, in one study, research participants repeatedly exercised with a hand grip while drinking water either from a Gatorade cup or a cup with a control brand.<sup>158</sup> Participants who viewed their personal qualities as relatively immutable performed better than other participants while drinking from the Gatorade cup.<sup>159</sup> In a similar study by the same researchers, participants who viewed personal qualities as immutable performed better than other participants on a GRE math test when using a pen engraved with the MIT name instead of an unlabeled pen.<sup>160</sup>

Similarly, motivated study participants who consumed a placebo energy drink (presented as New York Minute) outperformed the control group on

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150. *Id.* at 932, 942.

151. *Id.* at 943.

152. *Id.* (“Participants proceeded to sink three putts from predefined locations (same as in studies 1 and 2) and then received compensation for their participation.”).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 944.

157. *See generally* Brasel & Grips, *supra* note 14; Irmak et al., *supra* note 94; Park & John, *supra* note 14; Schmidt et al., *supra* note 14.

158. Park & John, *supra* note 14, at 233.

159. *Id.* at 233, 235. Park & John suggest that some consumers are entity theorists, who “believe that their abilities are fixed and cannot be improved on through their own efforts.” *Id.* at 235.

160. *Id.* at 236–38.

computer tasks to measure physical reflexes and mental alertness.<sup>161</sup> In the New York Minute study, motivated participants who consumed the placebo also responded physically as if they had consumed the energy drink.<sup>162</sup> Those participants experienced elevated blood pressure in addition to increased physical reflexes and enhanced mental alertness.<sup>163</sup>

Likewise, in a study by Adam Brasel and James Gips, subjects played a car racing video game in which the cars were “skinned” or covered with different trademarks or brand logos. Subjects driving the Red Bull car reflected behavior consistent with Red Bull’s brand identity, which suggests speed, power, and risk-taking.<sup>164</sup> There was no statistically significant pattern for the control car, or cars with brands other than Red Bull.<sup>165</sup> But drivers consistently had either their fastest time or their slowest time on the race when they drove the Red Bull car.<sup>166</sup> When the Red Bull car was the fastest car, drivers spent three seconds less off track than the average of their other races.<sup>167</sup> On the other hand, when it was the slowest car, they spent four more seconds off track than their average.<sup>168</sup> This double-edged or U-shaped effect was significantly different from other cars driven ( $p < .05$ ).<sup>169</sup> The authors suggest exposure to the Red Bull mark, with its reputation for risk taking, encouraged subjects to use riskier, more aggressive strategies, which paid off in some races, but not in others.<sup>170</sup>

Brasel and Gips suggest that similar performance effects could be U-shaped, i.e., working both for and against video game players.<sup>171</sup> They posit

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161. Irmak et al., *supra* note 94, at 407–08.

162. *Id.*

163. *Id.*

164. Brasel & Gips, *supra* note 14, at 58–59. Brasel and Gips described Red Bull’s brand identity using pre-test results where participants identified Red Bull as a brand with higher levels of attributes including *fast, powerful, energetic, daring, and aggressive*. *Id.* Subjects did not consume Red Bull, so the drink’s chemical attributes—sugar, caffeine, taurine, and ginseng—could not directly impact driving performance. *Id.* at 57.

165. *Id.* at 59 (explaining the effects of other brands compared to Red Bull).

166. *Id.* at 61–62 fig.4.

167. *Id.*

168. *Id.* at 61.

169. *Id.*

170. *Id.* at 62 (suggesting that subjects adopted Red Bull’s personality associations, which ultimately affected their race results).

171. *Id.* at 63 (“Brand exposure can create double-edged outcomes on consumer performance, with both positive and negative effects arising from a single set of brand identity associations.”).

that brand exposure effects may be particularly powerful in interactive media environments when consumers manipulate the branded object.<sup>172</sup> The Brasel & Gips experiment also indicates that subjects do not consciously recognize the effect of the brand on video game performance.<sup>173</sup> Post-experiment questions revealed that subjects did not perceive the Red Bull car as faster or slower than the other cars.<sup>174</sup>

Finally, in a study by Liane Schmidt and her co-authors, participants consumed what they were told was an energy drink.<sup>175</sup> Those who consumed the beverage labeled as an energy drink experienced improved performance on a Stroop Task,<sup>176</sup> irrespective of whether the subject was drinking an energy drink or something else.<sup>177</sup> But consuming the unbranded energy drink had a null effect.<sup>178</sup>

A different series of recent experiments suggest that this performance enhancing effect might be reduced or eliminated if consumers encounter counterfeit goods imitating high-performance branded goods. A study by Moty Amar and co-authors reports that study participants who use goods perceived as counterfeits perform less well in experiments where they used those “counterfeit” goods to play computer games or perform on writing tests.<sup>179</sup> In a study of 116 college students, participants who used a counterfeit computer mouse to play a game were less successful than the control group in playing

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172. *Id.*

173. *Id.* at 62.

174. *Id.* In addition, many traditional cognitive measures—self-reports of prior game-playing experience, self-reports of real-life speeding and aggressive driving, or measures of how engaging they found the game— had no measurable impact on the results. *Id.*

175. Schmidt et al., *supra* note 14, at 4, 9.

176. J. Ridley Stroop, *Studies of Interference in Serial Verbal Reactions*, 18 J. EXPERIMENTAL PSYCHOL. 643 (1935). The Stroop Task is a famous psychological test that tests automaticity. Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1142 (2004). Participants are typically shown a list of color names where each name is printed in a color different from the name. *Id.* at 1142–43. The task demonstrates how “[r]eading familiar words takes less cognitive effort than naming font effects.” *Id.* at 1143.

177. Liane Schmidt et al., *supra* note 14, at 5.

178. *Id.*

179. See generally Moty Amar et al., *How Counterfeits Infect Genuine Products: The Role of Moral Disgust*, 28 J. CONSUMER PSYCHOL. 329 (2018).

the game.<sup>180</sup> They also reported greater feelings of disgust toward the counterfeit product.<sup>181</sup> The reduction in performance ability appears mediated by an increased mental accessibility of disgust.<sup>182</sup>

Moreover, this disgust is contagious.<sup>183</sup> Study participants exposed to a counterfeit also performed less well with “genuine” branded items in text-copying and game playing tasks.<sup>184</sup> Thus, participants exposed to a “counterfeit” Parker pen in a quality evaluation task made more errors in a subsequent writing accuracy task with a “genuine” Parker pen, compared to a control group not informed of the authenticity of the pen.<sup>185</sup> Likewise, exposure to a “counterfeit” Microsoft mouse in a quality evaluation task correlated with

180. *Id.* at 333–35. In a game measuring length of time of successful play, participants in the control condition played an average of 8.58 seconds, while those in the counterfeit condition played an average of 5.17 seconds ( $p = .009$ ). *Id.*

181. *Id.* (control condition: 1.84 v. counterfeit condition: 2.89;  $p = .001$ ).

182. *Id.* at 335. For research on the power of disgust to overcome or amplify cognitive biases, see Seunghee Han et al., *The Disgust-Promotes-Disposal Effect*, 44 J. RISK & UNCERTAINTY 101, 110 (2012); see also *id.* (finding disgust reverses status quo bias); Yoel Inbar et al., *Disgusting Smells Cause Decreased Liking of Gay Men*, 12 EMOTION 23, 23–25 (2012) (finding disgust increases negative attitudes toward a social group); Jennifer S. Lerner et al., *Heart Strings and Purse Strings Carryover Effects of Emotions on Economic Decisions*, 15 PSYCHOL. SCI. 337, 340 (2004) (finding disgust reverses the endowment effect); Andrea C. Morales et al., *Product Contagion: Changing Consumer Evaluations Through Physical Contact with “Disgusting” Products*, 44 J. MARKETING RES. 272, 281 (2007) [hereinafter Morales et al., *Product Contagion*] (finding disgust enhances compliance with fear appeals).

183. For research on contagion effects, i.e., the belief that positive or negative aspects of one entity can be transferred to another through contagion, see Jennifer J. Argo et al., *Consumer Contamination: How Consumers React to Products Touched by Others*, 70 J. MARKETING 81, 91 (2006); Jennifer J. Argo et al., *Positive Consumer Contagion: Responses to Attractive Others in a Retail Context*, 45 J. MARKETING RES. 690 (2008); Morales et al., *Product Contagion*, *supra* note 182; George E. Newman & Paul Bloom, *Physical Contact Influences How Much People Pay at Celebrity Auctions*, 111 PROC. NAT’L ACAD. SCI. 3705, 3707 (2014); George E. Newman et al., *Celebrity Contagion and the Value of Objects*, 38 J. CONSUMER RES. 215, 225 (2011). For research on transfer of aspects, i.e., psychological contagion, through perceived similarity, see Paul Rozin et al., *Operation of the Laws of Sympathetic Magic in Disgust and Other Domains*, 50 J. PERSONALITY & SOC. PSYCHOL. 703, 704 (1986). For example, study participants are reluctant to drink orange juice with a plastic roach because they perceive the plastic roach to have the “disgusting essence” of a real roach, and thus to infect the juice. *Id.*

184. Amar et al., *supra* note 179, at 334–38.

185. *Id.* at 334, 336–37. In a study of sixty-two college students, participants in the control group made an average of 38.88 errors using the pen, while those in the counterfeit condition made 82.48 errors ( $p = .022$ ). *Id.* at 336. The effect was statistically significant for participants with more stringent moral values, but not for participants with less stringent moral values. *Id.* at 336–37.

poorer performance on a video game task.<sup>186</sup> This research suggests that widespread counterfeiting could unravel otherwise performance-enhancing placebo effects.

#### D. Summary, Takeaways, and Caveats

These placebo effects may have multiple drivers. Some experiments suggest that the effect stems from stress reduction: experiencing stress often reduces performance, while reducing stress often increases performance.<sup>187</sup> Stress reduces physical and cognitive performance in multiple disciplines,<sup>188</sup> including verbal and mathematic test taking,<sup>189</sup> musical performance;<sup>190</sup> dance;<sup>191</sup> acting;<sup>192</sup> public speaking;<sup>193</sup> athletic competition;<sup>194</sup> and even sexual

186. *Id.* at 337–38.

187. Benjamin Algaze, *Cognitive Therapy, Study Counseling, and Systematic Desensitization in the Treatment of Test Anxiety*, in TEST ANXIETY: THEORY ASSESSMENT & TREATMENT 133–52 (Speilberger & Vagg eds., 1995) (demonstrating that a workshop intervention aimed at reducing academic anxiety resulted in improved performance).

188. Garvey, *supra* note 13, at 934; Michael W. Eysenck, ANXIETY: THE COGNITIVE PERSPECTIVE (1992); Steven J. Spencer, Claude M. Steele & Diane M. Quinn, *Stereotype Threat and Women's Math Performance*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 4, 6 (1999); Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 614 (1997); Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 798 (1995); Jeff Stone et al., *Stereotype Threat Effects on Black and White Athletic Performance*, 77 J. PERSONALITY & SOC. PSYCHOL. 1213, 1215 (1999).

189. Nazanin Derakshan & Michael W. Eysenck, *Anxiety, Processing Efficiency, and Cognitive Performance*, 14 EUROPEAN PSYCHOLOGIST 168, 169, 173–74 (2009); Rajagopal Raghunathan & Michel Tuan Pham, *All Negative Moods Are Not Equal: Motivational Influences of Anxiety and Sadness on Decision Making*, 79 ORG. BEHAV. & HUM. DECISION PROCESSES 56, 57–58, 64 (1999).

190. Diana Rhea Deen, *Awareness and Breathing: Keys to the Moderation of Musical Performance Anxiety* (Dec. 10, 1999) (Ph.D. dissertation, University of Kentucky); Charlene A. Ryan, *Gender Differences in Children's Experience of Musical Performance Anxiety*, 32 PSYCHOL. MUSIC 89, 89, 99 (2004).

191. Robert A. Tamborrino, *An Examination of Performance Anxiety Associated with Solo Performance of College-Level Music Majors* (April 2001) (Ph.D. dissertation, Indiana University).

192. GLENN D. WILSON, *PSYCHOL. FOR PERFORMING ARTISTS* (Wiley 2d ed. 2002).

193. Alison Wood Brooks, *Get Excited: Reappraising Pre-Performance Anxiety as Excitement*, 143 J. EXPERIMENTAL PSYCHOL. 1144, 1150, 1153–54 (2013); Lorraine Merritt, Alison Richard & Pamela Davis, *Performance Anxiety: Loss of the Spoken Edge*, 15 J. VOICE 257, 257–58, 264 (2001).

194. Howard K. Hall & Alistair W. Kerr, *Predicting Achievement Anxiety: A Social-Cognitive Perspective*, 20 J. SPORT & EXERCISE PSYCHOL. 98, 98, 108 (1998); Sheldon Hanton, Stephen D. Mellalieu & Ross Hall, *Re-Examining the Competitive Anxiety Trait-State Relationship*, 33 PERSONALITY

performance.<sup>195</sup> Several studies suggest that reducing stress increases self-esteem, and the increase in self-esteem then increases performance.<sup>196</sup> The converse also appears to be true: lower self-efficacy is accompanied by self-doubt,<sup>197</sup> which can distract from performance.<sup>198</sup>

Some of the placebo effect studies described above indicate that the high-performance brand reduces stress as it increases the user's self-esteem. For the subset of subjects who see stress as performance enhancing or exciting

& INDIVIDUAL DIFFERENCES 1125, 1127, 1131 (2002); Damon Burton, *Do Anxious Swimmers Swim Slower? Reexamining the Elusive Anxiety-Performance Relationship*, 10 J. SPORT & EXERCISE PSYCHOL. 45, 52–54 (1988) (observing that swimmers higher in anxiety immediately prior to competition swam more slowly than expected).

195. Marita P. McCabe, *The Role of Performance Anxiety in the Development and Maintenance of Sexual Dysfunction in Men and Women*, 12 INT'L J. STRESS MGMT. 379, 380 (2005).

196. Garvey et al., *supra* note 13, at 934.

197. Lisa Marie Sinden, *Music Performance Anxiety: Contributions of Perfectionism, Coping Style, Self-Efficacy, and Self Esteem* 145 (May 1999) (Ph.D. dissertation, Arizona State University). Lower self-efficacy is related but not identical to lower self-esteem. *Id.* "Self-efficacy reflects the extent to which people believe they can perform behaviors necessary for the successful completion of a task." *Id.* (citing Albert Bandura, *Self-Efficacy Mechanism in Human Agency*, 37 AM. PSYCHOL. 122, 123 (1982)). "Self-esteem is a theoretical construct of personality defined as liking and respecting oneself." *Id.* (citing J.E. Crandall, *Sex Differences in Extreme Response Style: Differences in Frequency of Use of Extreme Positive and Negative Ratings*, 89 J. SOC. PSYCHOL. 281, 291 (1973)). Both are related to self-confidence. *Id.*

198. Steve M. Jex & Paul D. Bliese, *Efficacy Beliefs as a Moderator of the Impact of Work Related Stressors: A Multi-Level Study*, 84 J. APPLIED PSYCHOL. 349, 349, 357 (1999); Alan M. Saks, *Moderating Effects of Self-Efficacy for the Relationship Between Training Method and Anxiety and Stress Reactions of Newcomers*, 15 J. ORG. BEHAV. 639, 639 (1994) (examining the relation of self-efficacy in training methods to stress and anxiety reactions). Increase of self-esteem also tends to increase cognitive blind spots. *See, e.g.*, Bruce Blaine & Jennifer Crocker, *Self-Esteem and Self-Serving Biases in Reactions to Positive and Negative Events: An Integrative Review*, in SELF-ESTEEM: THE PUZZLE OF LOW SELF-REGARD 55, 55–85 (Baumeister ed. 1993) (self-serving biases); C. Randall Colvin, Jack Block & David C. Funder, *Overly-Positive Self-Evaluations and Personality: Negative Implications for Mental Health*, 68 J. PERSONALITY & SOC. PSYCHOL. 1152, 1159–61 (1995) (self-delusions); Christian H. Jordan et al., *Secure and Defensive High Self-Esteem*, 85 J. PERSONALITY & SOC. PSYCHOL. 969, 970–72, 975 (2003) (narcissism). Attributions for positive outcomes tend to be self-serving. Gifford W. Bradley, *Self-Serving Biases in the Attribution Process: A Reexamination of the Fact or Fiction Question*, 36 J. PERSONALITY & SOC. PSYCHOL. 56, 59, 68 (1978); Bertram F. Malle, *The Actor-Observer Asymmetry in Attribution: A (Surprising) Meta-Analysis*, 132 PSYCHOL. BULL. 895, 896, 914 (2006); Dale T. Miller & Michael Ross, *Self-Serving Biases in the Attribution of Causality: Fact or Fiction?*, 82 PSYCHOL. BULL. 213, 222–23 (1975); Gordon Fitch, *Effects of Self-Esteem, Perceived Performance, and Choice on Causal Attributions*, 16 J. PERSONALITY & SOC. PSYCHOL. 311, 314 (1970) (finding subjects attribute significantly more causality to internal sources for success outcomes than for failure outcomes and importantly, this effect strengthened as self-esteem was enhanced).



rather than performance reducing, using the high-performance brand does not increase performance. In fact, subjects who see stress as performance enhancing perform more poorly when they use high-performance equipment.<sup>199</sup> Other experiments suggest that the brand will improve performance when the brand's characteristics are consistent with the subject's goals.<sup>200</sup>

These studies have a handful of potentially interesting implications. First, placebo effects create positive spillovers for consumers, and those benefits appear related to brand reputation rather than objective differences in the product.<sup>201</sup> Pre-screening expectation tests suggest a performance-enhancing effect that is born out when different subjects use the high-performance branded good or service.<sup>202</sup> These results suggest that the creation of brand meaning can have externally measurable positive spillover effects for the consumer of the trademarked product.<sup>203</sup> To the extent this effect is generalizable, criticisms of the creation of brand meaning as consumer harming or consumer deceiving may be somewhat overstated.<sup>204</sup>

Second, prestige brands like Gucci do not seem to convey a performance-enhancing effect.<sup>205</sup> Thus, the use of a Gucci branded putter does not reduce the number of strokes required to sink a putt, even though Gucci is perceived as a strong brand.<sup>206</sup> Unlike high-prestige products, the use of high-perfor-

199. See *supra* notes 142–47 and accompanying text.

200. See, e.g., *supra* notes 161–63 and accompanying text.

201. Garvey et al., *supra* note 13, at 945 (“[B]rand perceptions can make one perform better, even in the absence of material product differences.”).

202. *Id.* at 937 (“Study 1 provides evidence for a positive performance brand placebo on objective outcomes. Gold performance improved . . . when a brand associated with strong athletic performance expectations was used, compared to a weak brand or no brand information.”).

203. *Id.*

204. See generally Garvey et al., *supra* note 13 (demonstrating that brand meaning can have positive, beneficial performance effects on consumers).

205. See *id.* at 944 (“[P]erformance brands, rather than prestige brands, elicit a placebo effect on objective outcomes.”). On prestige brands more generally, see C. Whan Park, Sandra Milberg & Robert Lawson, *Evaluation of Brand Extensions: The Role of Product Feature Similarity and Brand Concept Consistency*, 18 J. CONSUMER RES. 185 (1991). Brand extensions from high-prestige brands are more successful than other brand extensions, even when there is low similarity between existing and new products. *Id.*; see also Keith Wilcox, Hyeong Min Kim & Sankar Sen, *Why Do Consumers Buy Counterfeit Luxury Brands?*, 46 J. MARKETING RES. 247, 248 (2009) (“[S]ocial motivations guide people’s propensity to consumer counterfeit brands.”).

206. Garvey et al., *supra* note 13, at 943; see also *supra* notes 148–56.

mance products conveys an externally measurable, statistically significant effect of notable size. Subjects take twenty percent fewer putts, correctly answer more test questions, etc.<sup>207</sup> This evidence suggests some benefit in protecting the psychological effect to consumers of buying a high-performance branded good, even absent a measurable benefit from high-prestige brands generally.

Some caution is necessary. These studies do not establish that the entire consumer benefit created by using a high-performance branded good is due to the psychological effects of brands.<sup>208</sup> One could imagine that Nike might sell an objectively superior putter to a Starter putter, and to the extent that is the case, purchasers of the Nike putter might benefit both from the psychological and objective superiority of the putter.

In addition, these are early days for studies on performance-enhancing placebo effects.<sup>209</sup> It is possible that future research will falsify this data. Additionally, at least one meta-study of self-reported placebo effects in medical research suggests that the effect may simply be regression to the mean as the body heals itself.<sup>210</sup> Notwithstanding those concerns, studies like the Garvey study differ because they do not primarily measure self-reported effects—they include external measurements that many medical placebo studies do not include.<sup>211</sup> In addition, the effects measured are unlikely to be driven by a regression to the mean,<sup>212</sup> which may be true of medical studies of the placebo

207. *See id.* (“Golf performance improved . . . when a brand associated with strong athletic performance expectations was used, compared to a weak brand or no brand information. These results support our theorizing regarding the performance brand placebo, with objective improvements of over 20% from using a strong performance brand.”).

208. *See id.* at 945 (explaining the limitations on the experiments conducted and where else the benefits might stem from).

209. *See id.* (“[P]rior research on marketing-driven placebos has focused primarily on subjective consumer effects and not objective performance outcomes of the type we examine here.” (citation omitted)).

210. *See generally* Hróbjartsson & Gøtzsche, *supra* note 99, at 4 (explaining that without comparing “patients who have been randomly allocated to a placebo group and to a no-treatment group . . . the effect of a placebo intervention cannot be distinguished from the natural course of the disease, and other factors, for example regression to the mean”).

211. *See generally* Garvey et al., *supra* note 13.

212. *See* Audrey Schnell, *What is Regression to the Mean?*, ANALYSIS FACTOR, <https://www.the-analysisfactor.com/what-is-regression-to-the-mean/> (last visited Sept. 29, 2019). Regression to the mean “is a statistical phenomenon that occurs when unusually large or unusually small measurement values are followed by values that are closer to the population mean.” *Id.* Regression to the mean is

effect.<sup>213</sup> But studies like the Garvey study are also not longitudinal studies.<sup>214</sup> In studies measured over time, the placebo effect could weaken.<sup>215</sup> Moreover, most of these studies report a statistically significant result, but do not report an effect size.<sup>216</sup> Some scholars express skepticism of studies that do not report effect size, as a small but statistically significant effect might reasonably be ignored by policy makers.<sup>217</sup> But many experimental studies will fail to yield a large effect size because, at least when dependent variables are multiply determined, the average size of an effect attributable to a single cause is limited, and variables are related to one another in complex ways.<sup>218</sup>

Furthermore, these effects may not be fully generalizable. For experiments where the stress effect appears important, recall that for a subset of the population, stress is not seen as performance impairing but performance enhancing.<sup>219</sup> Study participants who hold this view experience reduced perfor-

a particular concern in “[p]re-post intervention study designs that target ‘high risk’ groups” and “[t]wo-phase sampling designs where a subset of the first sample based on initial value is chosen for further study.” *Id.* The Garvey study is unlikely to be driven by regression to the mean because it does not fall under either of these two categories; rather, the subjects performed the same task multiple times with objects of various brands. *See* Garvey et al., *supra* note 13, at 936–44.

213. Hróbjartsson & Gøtzsche, *supra* note 99, at 4.

214. *See* Garvey et al., *supra* note 13, at 945 (“[S]tudies were conducted in controlled settings of relatively short duration for both task performance and brand experience . . .”).

215. *Id.* at 946 (questioning whether the “performance brand placebo [could] eventually ‘wear out’ for consumers who repeatedly use performance brands”).

216. *See id.* at 937 (reporting significant statistical outcomes that do not affect size); Irmak et al., *supra* note 94, at 408 (reporting “a significant two-way interaction between drink consumed and motivation,” but not reporting effect size). *But see* Schmidt et al., *supra* note 14, at 6 (reporting distribution of effect sizes within the study; Cohen’s  $d = 2.8$ ); Hanton et al., *supra* note 194, at 1128, 1131 (reporting internal reliabilities and effect sizes for multiple samples).

217. *See, e.g.*, Jeremy A. Blumenthal, *Meta-Analysis: A Primer for Legal Scholars*, 80 TEMP. L. REV. 201, 213 (2007) (“[E]ffect sizes that are statistically significant but are small, can lead to inferences that the effect is unimportant.”). *But see id.* (“[F]inding a small but robust effect across a large body of empirical work can lend credence to claims that policy makers should devote attention to the findings.”); Edward F. Fern & Kent B. Monroe, *Effect-Size Estimates: Issues and Problems in Interpretation*, 23 J. CONSUMER RES. 89, 96 (1996) (“[A]ssessing the importance or alternatively the triviality of a research finding based solely on the magnitude of the effect-size indicator may be misleading and no more diagnostic than significance levels.”).

218. Fern & Monroe, *supra* note 217, at 98; *see also id.* at 103 (“The number of intended and unintended causal factors and the possible combinations of these factors in explaining variance in a single study are so plentiful that comparing effect sizes across studies may be problematic.”).

219. Brooks, *supra* note 193 (indicating that some individuals may reframe anxiety as excitement and thereby enhance performance outcomes).

mance when using the high-performance branded product.<sup>220</sup> In addition, the high-performance placebo effect may be strongest for low-skilled consumers. For participants who report a high skill level, use of the high-performance brand compared to the low-performance or control brand provides no effect at all.<sup>221</sup>

Discounting the perceived price of the product used or consumed may also reduce placebo effects. Some studies suggest a connection between the price of the good and the placebo effect.<sup>222</sup> For example, study participants offered a discount-brand placebo analgesic report experiencing more pain from an electric shock to the wrist than participants who consumed a placebo labelled with a higher cost brand.<sup>223</sup> Likewise, subjects performed poorly on a test when they were charged a discount price for the energy drink they consumed, compared to subjects who paid full price.<sup>224</sup> A similar study showed that research participants performed better on a memory test when given chocolate labeled as a high-equity brand than when given chocolate labeled as a medium- or low-equity brand.<sup>225</sup> The work by Amar and co-authors measur-

220. See Garvey et al., *supra* note 13, at 941 (explaining that “a strong performance brand . . . undermined performance when stress was seen as enhancing”).

221. See *id.* at 944 (finding the effect of performance brand was significant at low levels of self-efficacy, but not at higher levels of self-efficacy).

222. See, e.g., I-Ling Ling et al., *The Higher the Price the Better the Result? The Placebo-Like Effect of Price and Brand on Consumer Judgments*, 2 THEORETICAL ECON. LETTERS 264, 266 (2012) (demonstrating that research participants who consumed regular price chocolate which was purported to improve memory outperformed participants who consumed discounted chocolate on a memory test).

223. Rebecca L. Waber, Baba Shiv, Ziv Carmon & Dan Ariely, *Commercial Features of Placebo and Therapeutic Efficacy*, 299 JAMA 1016, 1017 (2008) (reporting a 35% reduction in reported pain for the high-cost placebo, compared to a 25% reduction in reported pain for the low-cost placebo ( $p = .02$ )).

224. Shiv, Carmon & Ariely, *supra* note 90, at 387 (reporting lower benefits from placebo effects when subjects were told the product was purchased at a discount) (replicated by Scott A. Wright et al., *If It Tastes Bad It Must Be Good: Consumer Naïve Theories and the Marketing Placebo Effect*, 30 INT’L J. RES. MARKETING 197 (2013)). In related research, a wine is perceived as more pleasurable to drink when perceived to be a higher-cost option. Hilke Plassmann et al., *Marketing Actions Can Modulate Neural Representations of Experienced Pleasantness*, 105 PNAS 1050, 1050 (2008). A similar phenomenon can happen with identifiers other than price. See Justin Hughes, *Champagne, Feta, and Bourbon: The Spirited Debate About Geographical Indications*, 58 HASTINGS L.J. 299, 321–23 (2006).

225. Ling et al., *supra* note 222, at 266.

ing contagious disgust about counterfeit goods suggests that widespread counterfeiting could also reduce the efficacy of placebo effects.<sup>226</sup>

It is also not entirely clear that mark owners can internalize all of the benefits from this effect. Subjects who experience a performance boost do not credit the brand. They instead credit their innate ability. This suggests that consumers are not likely to consciously recognize this effect.<sup>227</sup>

The studies summarized in Part III do not show that placebo effects outperform actual differences. And they do not attempt to show the absence of objective differences between actual Nike and Starter putters.<sup>228</sup> But they indicate, in the absence of an actual difference in the products used, that users experience a boost in proficiency when they think they are using a high-performance brand.<sup>229</sup> Part IV identifies possible changes to trademark law that might reasonably follow if these findings are generalizable.<sup>230</sup>

#### IV. IMPLICATIONS

Evidence of a performance-enhancing placebo effect for high-performance brands provides an opportunity to take better account of the cognitive aspects of consumer engagement with, and creation of, trademark meaning.<sup>231</sup>

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226. See *supra* notes 179–86 and accompanying text.

227. Garvey et al., *supra* note 13, at 932 (asserting that consumers “give only partial rather than full credit to the brand for performance outcomes”). But see Park et al., *Brand Attachment and Brand Attitude Strength: Conceptual and Empirical Differentiation of Two Critical Brand Equity Drivers*, 75 J. MARKETING 1, 3 (2010) (asserting that highly brand-attached consumers see branded products as more instrumental to relevant outcomes).

228. See Garvey et al., *supra* note 13, at 936 (showing that it is the “enhancing effect of brands that carry strong, positive performance expectancies,” rather than the actual differences in the putters).

229. *Id.* at 933.

230. See *infra* Part IV.

231. See, e.g., Lee et al., *supra* note 17, at 1037–38 (2009) (using consumer psychology models as a means to determining a trademark’s effect); Jake Linford, *The False Dichotomy Between Suggestive and Descriptive Trademarks*, 76 OHIO ST. L.J. 1367, 1367 (2015) [hereinafter Linford, *The False Dichotomy*]; Linford, *Are Trademarks Ever Fanciful?*, *supra* note 17; Alexandra J. Roberts, *Failure to Function*, 104 IOWA L. REV. 1977 (2019); see also Jerre B. Swann et al., *Trademarks and Marketing*, 91 TRADEMARK REP. 787, 801 (2001) (“When consumers can communicate a favorable self-image through a brand, they receive self-expressive benefits.”); DAVID A. AAKER, *MANAGING BRAND EQUITY: CAPITALIZING ON THE VALUE OF A BRAND NAME* 144 (1991) (“Transformational advertising transforms the use experience making the brand user feel (for example) more elegant, adventuresome, or warm, thereby potentially adding value to the customer.”). But see Katya Assaf, *Magical Thinking*

But this research into consumer-benefitting placebo effects also offers an account for benefits that can be derived from brand-related manipulation of consumer perception. If trademark law already extends protection for the creation of psychological benefits through emotional advertising appeals embraced by consumers, research into performance-enhancing placebo effects may suggest this protection is, at a minimum, not entirely misguided. Indeed, recognizing the placebo effect of high-performance trademarks might provide space for some normative reframing of trademark law.

Scholars have made similar arguments defending the value of high-prestige branded goods.<sup>232</sup> While some have cautioned that consumer spending on products bearing high-status trademarks is irrational,<sup>233</sup> others argue that trademark protection of high-prestige marks provides some value to consumers who buy them and experience elevated self-esteem, and that value can and should be protected by strong rights against passing off and sales of counterfeit goods.<sup>234</sup> As discussed in Part III, above, high-performance marks appear to convey a more objectively measurable benefit to consumers, distinguishable from the hedonic benefit that may come from consuming a product with a high-prestige mark.<sup>235</sup> For instance, high-prestige branded putters don't improve putting efficiency, but high-performance branded putters seem to do so.<sup>236</sup> Moreover, the placebo effect generated by high-performance marks can

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*in Trademark Law*, 37 L. & SOC. INQUIRY 595, 619 (2012) (“Trademark law should stop being concerned with the psychological benefits trademarks might bring; it should stop attempting to grasp what happens in the depths of the consumer’s mind.”). Additionally, Jeremy Sheff has advanced a justification for trademark protection grounded in correcting errors in consumer rationality. Jeremy N. Sheff, *The (Boundedly) Rational Basis of Trademark Liability*, 15 TEX. INTELL. PROP. L.J. 331, 334 (2007) (“[T]rademark liability—whether imposed under the label of infringement or dilution—serves neither to protect property rights of trademark owners, nor to protect them against the unfair trade practices of competitors, but to shape consumer markets in such a way as to conform to the innate cognitive processes of boundedly rational consumers.”).

232. See Dilbary, *supra* note 51, at 608–09 (“Because physically identical articles may carry different intangible freights, the law should allow a producer to charge different prices for physically identical products.”); cf. Manta, *supra* note 68, at 241 (“[A] robust trademark system must account for the possibility that producers serve as providers of hedonic values to consumers.”).

233. Dilbary, *supra* note 51, at 611 (explaining that economists who take the hardline position against branding believe the consumer to be “irrational and gullible”).

234. See *supra* note 232 and accompanying text.

235. See Garvey et al., *supra* note 13, at 944 (“[P]erformance brands, rather than prestige brands, elicit a placebo effect on objective outcomes.”).

236. See *id.* at 943 (explaining that participants in the golf study that used a performance brand succeeded with fewer putts on average than the prestige brand); see also Manta, *supra* note 68, at 276

be depressed if subjects believe they are using a discounted, lower-priced, or counterfeit product. Maximizing price competition in a market for branded goods may thus reduce the positive spillovers consumers would otherwise receive.<sup>237</sup> The same reduction might follow if courts dispose of protection currently extended to high-prestige marks. Post-sale confusion and anti-dilution protection, oft-criticized preservers of prestige value, might be more readily justified for high-performance marks, if the unraveling of reputation would lead consumers to disbelieve in and lose the performance boosts previously described.

One may still wonder whether trademark protection should extend to marks that secure competitive advantage through consumer manipulation. Trademark law has several mechanisms for denying protection to a mark that threatens to deceive consumers or create anticompetitive barriers to entry, but as this Part explains, those mechanisms should not deny protection to these high-performance marks.<sup>238</sup> First, trademark law bars protection to marks likely to deceive consumers, but trademark's anti-deception mechanisms likely would not reach marks solely on the basis that they provide a placebo effect—that is not the kind of deceptiveness trademark law has historically sought to prevent.<sup>239</sup>

Second, recent scholarship has questioned whether the psychological effects on which a high-performance mark capitalizes might be functional features, and therefore ineligible for trademark protection.<sup>240</sup> For example, some fanciful or coined word marks contain sound symbols that might materially contribute to the success of the mark because consumers are subconsciously drawn to those component sounds.<sup>241</sup> If the attractiveness or resonance of a word or sound is so strong that a new entrant will struggle to attract consumers unless it can use the sound in its own mark, the inability to use the word or

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(arguing that there is no actual dichotomy between real qualities and those produced by advertising because “[a]ll that matters is what our brains perceive”).

237. See *infra* Part IV.A.

238. See *infra* notes 239–43 and accompanying text.

239. See *infra* Part IV.B.1.

240. See *infra* notes 241–43 and accompanying text.

241. See Xiyin Tang, *A Phonaesthetic Theory of Trademark Functionality* (2016) (unpublished manuscript at 19–20) (on file with author) (arguing that sound symbols may be aesthetically functional and thus unprotectable elements of trademarks). *But see* Linford, *Are Trademarks Ever Fanciful?*, *supra* note 17, at 764 (arguing that evidence of the effect of sound symbols does not support applying a functionality bar to protecting sound symbols as components of a trademark).

sound might impose a “significant non-reputation-related disadvantage” on a new entrant.<sup>242</sup> This Part explains that the performance-enhancing reputation of a high-performance brand is not preexistent or hardwired into consumer psyches like a sound symbol or some other aesthetically desirable feature, and thus is not properly subject to a functionality bar.<sup>243</sup>

The placebo effect of high-performance marks may instead militate against protection from passing off or counterfeiting with regard to those goods. If a knock-off Nike putter has the same performance-enhancing placebo effect as an authentic putter, there is no low quality against which to protect consumers. Counterfeiting or passing off may thus cause no actionable injury if the psychologically determined performance-enhancing aspects of an authentic and counterfeit good are the same. But as this Part argues, narrowing trademark protection in this way risks both unraveling the placebo effect and simultaneously undermining incentives to invest in actual quality control.<sup>244</sup> Moreover, evidence that disgust towards counterfeits could contaminate and reduce the effectiveness of tasks performed with authentic branded goods cuts in favor of preserving protection against passing off.

#### A. *Positive Externalities from Consumer Manipulation*

Some scholars have argued that spending on premium performance products is wasteful.<sup>245</sup> Marketing is frequently seen as, at best, uneconomical, and, at worst, exploitative or unethical.<sup>246</sup> To wit, informed consumers with expertise have been shown less likely to spend extra on national brands.<sup>247</sup> Nonetheless, the Garvey experiments and similar studies by other researchers suggest that this spending may not be entirely wasteful.<sup>248</sup> Even if the objective difference between the goods is overstated or nonexistent, performance

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242. Tang, *supra* note 241, at 18 (citing *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 169 (1995)).

243. *See infra* Part IV.B.

244. *See* Lemley, *Free Riding*, *supra* note 82, at 1043 n.53.

245. *See supra* note 54 and accompanying text.

246. Sheth & Sisodia, *supra* note 54, at 141.

247. Bronnenberg et al., *supra* note 54.

248. *See* Garvey et al., *supra* note 13, at 932 (summarizing research “findings that performance brands enhance consumer proficiency” and despite any “functional differences, may provide objective benefits that help consumers”).



benefits may still inure to a subset of consumers who believe the branded goods will enhance performance.<sup>249</sup>

Scholars have raised similar arguments about protecting the hedonic benefits provided by consuming prestige goods.<sup>250</sup> Protections against post-sale confusion or dilution are often criticized from a search-cost perspective.<sup>251</sup> According to critics, those privileges against infringement extend protection beyond the level necessary for mark owners to effectively transmit information about quality and source to consumers.<sup>252</sup> But these aspects of trademark protection may provide consumers of prestige goods a hedonic benefit.<sup>253</sup> As advocates argue, if consumers value that hedonic effect, the law should continue to provide protection against post-sale confusion, dilution, and sponsorship or affiliation confusion, because protecting consumers' ability to purchase prestige goods provides consumers with utility in the form of hedonic enjoyment, whether or not those prestige goods are objectively of

249. Garvey, *supra* note 13, at 947 (“In particular, our studies demonstrate that for a brand to impact performance, consumers must believe that the brand is relevant to improving the target outcome.”).

250. See Bradford, *supra* note 54, at 1231 (“The harm protected against, as classically described, is the ‘gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name by its use on non-competing goods.’” (quoting Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 825 (1927))); Manta, *supra* note 68, at 248 (explaining that the social utility of Gucci bags may decrease if consumers see “some critical number of Gucci burgers” in the marketplace).

251. Manta, *supra* note 68, at 249 (“Scholars have criticized dilution doctrine for many years and questioned the existence of harm in dilution cases, and they have eyed other areas of the law such as post-sale confusion with suspicion as well.” (footnotes omitted)).

252. See, e.g., Lemley & McKenna, *supra* note 12, at 188 (criticizing anti-dilution protection from a search-cost perspective); Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 427 (2010) [hereinafter Lemley & McKenna, *Irrelevant Confusion*] (criticizing sponsorship and affiliation confusion and arguing that the law should instead concern itself only with confusion “about who is responsible for the quality of the defendant’s goods or services”); Sheff, *Veblen Brands*, *supra* note 11, at 772–73 (criticizing post-sale confusion as inappropriately targeted at enforcing social hierarchies); Lunney, *supra* note 45, at 467–68 (arguing that lost value from one prestige good is transferred to another, and thus the interest in maintaining prestige value “does not justify expanding trademark protection”). But see WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 199–200 (2003) (arguing that protecting aesthetic features used as marks does not disadvantage other firms so long as such a feature does not become “an attribute of the product”); Kozinski, *supra* note 39, at 970 (“Allowing unrestricted copying of the Rolex trademark will make it less likely that Rolex, Guess, Pierre Cardin, and others will invest in image advertising, denying the image-conscious among us something we hold near and dear.”).

253. Manta, *supra* note 68, at 245 (citing, *inter alia*, John Bronsteen et al., *Welfare as Happiness*, 98 GEO. L.J. 1583 (2010); John Bronsteen et al., *Well-Being Analysis vs. Cost-Benefit Analysis*, 62 DUKE L.J. 1603 (2013)).

higher quality.<sup>254</sup>

The argument for protecting high-performance placebo effects is even stronger than the argument for protecting the positive feelings experienced from consuming prestige goods.<sup>255</sup> The psychological benefits from consuming prestige goods can be hard to quantify. But the high-performance placebo effect provides an objectively measurable benefit (like answering math questions more effectively) that is not conveyed by prestige goods in similar contexts.<sup>256</sup>

One might instead argue that these placebo effects make it more difficult for new entrants to compete on quality. Critics of advertising and marketing worry that trademark protection effectively creates barriers to entry.<sup>257</sup> For instance, consumers may disregard an objectively better product to purchase those offered under a trusted trademark like Nike.<sup>258</sup> Thus, if consumers think a Nike putter is twenty percent better than a comparable “NewCo” putter,<sup>259</sup> NewCo’s putters must be significantly cheaper or significantly better than

254. *Id.* at 255; see also Gregory Klass, *The Law of Deception: A Research Agenda*, 89 U. COLO. L. REV. 101, 130–34 (2018) (considering where and when the law should allow parties to consent to be deceived); cf. Ravi Dhar & Klaus Wertenbroch, *Consumer Choice Between Hedonic and Utilitarian Goods*, 37 J. MARKETING RES. 60 (2000) (finding that consumers value hedonic goods more when faced with a forfeiture choice than with an acquisition choice).

255. See Garvey et al., *supra* note 13, at 945.

256. See *supra* Part III. Note, however, that the Garvey studies show that performance effects benefit lower-skilled entrants, rather than higher-skilled experts. Garvey et al., *supra* note 13, at 944. The performance-enhancing effect provides the most benefit to those most likely priced out if trademark protection conveys something akin to monopoly pricing power. See *id.*; cf. William P. Kratzke, *The Biblical Fool and the Brander: The Law and Economics of Propertization in American Trademark Law*, 34 CARDOZO ARTS & ENT. L.J. 699, 734–35 (2016). While nearly anyone could obtain hedonic benefit if they could just afford the price, it is possible that the advantage from using a high-performance good benefits only the most amateur. Manta, *supra* note 68, at 263. It is unclear whether amateur status has a positive correlation, negative correlation, or no correlation with reduced ability to pay. *Id.*

257. See Bone, *Enforcement Costs*, *supra* note 23, at 2115 (“[S]ome argue that protecting a mark can be harmful to consumers and creates barriers to entry when it generates loyalty to a single consumer brand.”).

258. See *supra* note 54 and accompanying text; Bradford, *supra* note 54, at 1230 (“[T]rademark fame, or familiarity signals information about risk and quality to consumers through quick and efficient innate emotional response mechanisms.”).

259. See Garvey et al., *supra* note 13, at 937 (finding participants who used a Nike putter over a non-branded putter performed twenty percent better).

Nike's to sell as well.<sup>260</sup> (Of course, that pressure incentivizes NewCo to provide cheaper, better putters.<sup>261</sup> Allowing NewCo to free ride on the Nike brand would weaken that incentive.)<sup>262</sup> Perhaps then these studies on performance-enhancing placebo effect suggest that trademarks really could convey a form of market power about which the law should be skeptical.<sup>263</sup>

The dominant competition narrative suggests that price competition always benefits consumers.<sup>264</sup> Under that narrative, cheaper is always better.<sup>265</sup> Courts identify a "strong public interest in lowest possible prices."<sup>266</sup> If the cheaper good is of equivalent quality to the more expensive good, every consumer should prefer it.<sup>267</sup> Indeed, this is one of the stated rationales for trademark's functionality doctrine.<sup>268</sup> Even if the cheaper good is of somewhat lower quality, consumers benefit from the ability to make the decision so long

260. See Carter, *supra* note 45, at 763–64 (describing the impacts of unfair competition on the market). "The [brand] with a strong mark can charge a higher price than competitors because the consumers of the competitors' goods face higher search costs and will therefore not be willing to pay prices as high as when the search costs are lower." *Id.* at 763 n.16.

261. See David M. Jenkins, *Licenses, Trademarks, and Bankruptcy, Oh My!: Trademark Licensing and the Perils of Licensor Bankruptcy*, 25 J. MARSHALL L. REV. 143, 155 (1991) ("Trademarks themselves promote technological advancement through competition and improve the quality of life.").

262. See Bradford, *supra* note 54, at 1235 (noting that trademark dilution regulations work "by ensuring that only the seller responsible for making a brand familiar to consumers can capture the rewards of positive consumer response"). "Free-riders who appropriate the strong brands of others destroy the informational capital built up in the brand." *Id.* n.29 (citing WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* (2003)).

263. See Michael Grynberg, *Trademark Litigation as Consumer Conflict*, 83 N.Y.U. L. REV. 60, 65–67 (2008). Antitrust law similarly attempts to prevent the development of market power with its accompanying reduction in quality and increase in price. *Id.*

264. See *Eastern Wine Corp. v. Winslow-Warren, Ltd.*, 137 F.2d 955, 958 (2d Cir. 1943) ("[T]here is a basic public policy, deep-rooted in our economy and respected by the courts, resting on the assumption that social welfare is best advanced by free competition . . ."); J. THOMAS MCCARTHY, I MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 1:1 (5th ed. 2019) (noting an "assumption that the pressures of competitive rivalry tend to keep prices down to the lowest level at which a seller can enjoy a reasonable profit and still remain viable").

265. See MCCARTHY, *supra* note 264, at § 1:24 n.4 (noting that public interest is served "by promoting competition and price reductions" (citing *Roho, Inc. v. Marquis*, 902 F.2d 356, 360 (5th Cir. 1990))).

266. *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 505 (8th Cir. 1987).

267. *Id.* at 504.

268. *Qualitex Co. v. Jacobson Prod. Co.*, 514 U.S. 159, 165 (1995) (quoting *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 850 n.10 (1982)).

as the offerings from each competitor are clearly identified.<sup>269</sup> Enabling price competition is also the dominant justification for permitting comparative advertising, the use of one seller's mark by another seller to advertise the differences in their respective offerings.<sup>270</sup>

Nevertheless, maximizing price competition at all costs has a downside that can be seen more clearly in light of evidence of performance-enhancing placebo effects. A mark that has acquired source significance may have influence that superficially resembles the market power against which antitrust polices: consumers will pay more for Coke than a private label cola.<sup>271</sup> But stripping all of that "market power" out of trademark law would almost certainly harm consumers, even if prices fell, because stripping out the persuasive function of a mark would take the informative function of the mark with it.<sup>272</sup> In such a circumstance, consumers could no longer rely on the mark as a

269. See *Calvin*, 815 F.2d at 503.

270. See *Furminator, Inc. v. Ontel Prods. Corp.*, 429 F. Supp. 2d 1153, 1178 (E.D. Mo. 2006), *aff'd*, 214 F. App'x 982 (Fed. Cir. 2007) (finding no irreparable harm where lost customer chose a lower price competitor). "[A] customer decision based on price is not a harm cognizable under the Lanham Act." *Id.* (citing *Cellular Sales, Inc. v. Mackay*, 942 F.2d 483, 487 (8th Cir. 1991); *General Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 627 (8th Cir. 1987)); see also *A.J. Canfield Co. v. Honickman*, 808 F.2d 291, 303 n.18 (3d Cir. 1986) (noting that some have suggested using cross-elasticity of demand as a means of determining whether goods belong in the same or different product genus (citing John F. Coverdale, *Trademarks and Generic Words: An Effect-on-Competition Test*, 51 U. CHI. L. REV. 868, 884–85 (1984))).

271. Cf. Samuel M. McClure et al., *Neural Correlates of Behavioral Preference for Culturally Familiar Drinks*, 44 NEURON 379, 384 (2004) (finding consumers who drink Coke or Pepsi with knowledge of the brand express different preferences and their measured brain responses differ from consumers who drink the beverages without knowing which is which). See generally Lunney, *supra* note 45; Lemley & McKenna, *Owning Mark(et)s*, *supra* note 12. But see generally Beverly W. Pattishall, *Trade-Marks and the Monopoly Phobia*, 50 MICH. L. REV. 967, 968–69 (1952) (arguing that unlike monopoly rights, trademarks rights are not a restraint to trade).

272. Lunney, *supra* note 45, at 434 ("[T]he marginal welfare gains that would result from rooting out the last vestiges of market power associated with a minimally-protective trademark regime are far outweighed by the welfare losses entailed in forcing producers and consumers to abandon trademarks altogether as an information source."); see also Brown, *supra* note 10, at 1204–05 (conceding that if informative and persuasive elements are combined in a single symbol, the information will necessarily carry the persuasive elements along with it); Manta, *supra* note 68, at 244 ("[E]xperiencing a good for its 'inherent' qualities is elusive and . . . our perceptions are necessarily subject to outside influences that our brain incorporates into the experience of products."); Dilbary, *supra* note 51, at 609 (assuming branding creates a new intangible good that must piggyback on the physical one, and arguing that consumers of status goods benefit from the production and consumption of the intangible, status conveying good).

source of information.<sup>273</sup> Once information about goods becomes too costly to obtain, consumers will be unwilling to pay higher prices for higher quality products because they cannot distinguish them from lower quality products.<sup>274</sup> In this state, Robert Bone explains “price competition would drive the quality of hidden characteristics down to a bare minimum as firms reduced costs in order to reduce price.”<sup>275</sup> That would leave consumers with fewer options and economic efficiency would suffer.<sup>276</sup>

Perhaps for this reason, courts measure harm to trademark owners by considering a reduction in the mark owner’s revenues (among other inputs). For example, courts have held that a mark owner can show harm from infringing junior use by pointing to sales made at lower prices.<sup>277</sup> Similarly, protection against the importation of gray-market goods—goods authorized for sale in foreign markets but not in the U.S.—is grounded in part on perceived material differences between goods intended for different markets.<sup>278</sup> A significant difference in price can be such a material difference.<sup>279</sup> Moreover, lowering prices to a predatory level can itself be anticompetitive.<sup>280</sup>

The placebo effect of high-performance products may also be price dependent, and its price dependence may suggest an additional reason for caution in maximizing price competition above other concerns. High price, like

273. Lunney, *supra* note 45, at 434.

274. Bone, *Enforcement Costs*, *supra* note 23, at 2017–18.

275. *Id.* at 2107; Gene M. Grossman & Carl Shapiro, *Foreign Counterfeiting of Status Goods*, 103 Q.J. ECON. 79 (1988); George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

276. Bone, *Enforcement Costs*, *supra* note 23, at 2108.

277. *Int’l Star Class Yacht Racing Ass’n v. Tommy Hilfiger, U.S.A., Inc.*, 80 F.3d 749, 753 (2d Cir. 1996) (explaining that “sales at lower prices” are an indication of pecuniary loss).

278. *Societe Des Produits Nestle, S.A. v. Casa Helvetia, Inc.*, 982 F.2d 633, 644 (1st Cir. 1992) (noting that a significant difference in price is a material difference in gray market goods cases).

279. *Id.*

280. *Amarel v. Connell*, 102 F.3d 1494, 1509 (9th Cir. 1996), *as amended* (Jan. 15, 1997) (“An important rationale for condemning predatory pricing is to protect competition from improper destruction.” (internal quotation omitted)); *Developments in the Law Trade-Marks and Unfair Competition*, 68 HARV. L. REV. 814, 906 (1955) (citing *United States v. Corn Products Refining Co.*, 234 Fed. 964, 1010–11, 1013–15 (S.D.N.Y. 1916), *appeal dismissed*, 249 U.S. 621 (1919)); *see* § 3, 49 STAT. 1528 (1936), 15 U.S.C. § 13(a) (1952); *see also* *United States v. Apple, Inc.*, 791 F.3d 290, 349–50 (2d Cir. 2015) (Jacobs, J., dissenting) (recognizing that Amazon’s below-cost pricing of e-books can have anticompetitive and monopolistic effects).

advertising expenditures, can signal quality.<sup>281</sup> Perhaps surprisingly, placebo effects seem likewise to turn in part on price. For example, in one study of placebo effects on pain, subjects given a higher priced placebo experienced more pain reduction than subjects given a lower-priced placebo.<sup>282</sup> Likewise, subjects did not perform as well on a test when they were charged a discount price for the energy drink they consumed, compared to subjects who paid full price.<sup>283</sup> To the extent that consumers benefit from performance-enhancing placebo effects, changes to trademark law focused on maximizing price competition may have unintended negative consequences, at least for those consumers who would otherwise receive that benefit.

The next section considers what performance-enhancing placebo effects might teach us about two peripheral trademark protections—post-sale confusion and dilution—that are often criticized for protecting status of purchasers rather than protecting purchasers from confusion.<sup>284</sup>

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281. Paul Milgrom & John Roberts, *Price and Advertising Signals of Product Quality*, 94 J. POL. ECON. 796 (1986) (modeling how price and advertising can signal product quality to consumers in a market with repeat sales); Sandeep Heda, Stephen Mewborn & Stephen Caine, *How Customers Perceive a Price Is as Important as the Price Itself*, HARV. BUS. REV. (Jan. 3, 2017), <https://hbr.org/2017/01/how-customers-perceive-a-price-is-as-important-as-the-price-itself> (noting that tweaks in presentation can shift consumer perception about price); Devon DelVecchio & Sanjay Puligadda, *The Effects of Lower Prices on Perceptions of Brand Quality: A Choice Task Perspective*, 21 J. PROD. & BRAND MGMT., no.6, at 465, 465–74 (2012), <https://doi.org/10.1108/10610421211264946> (finding that in some experiments, consumers treat lower price positively, when offered as a discount in a choice task). One meta-study from 1988 argues there is only mixed evidence of a price-perceived quality relationship. Valarie A. Zeithaml, *Consumer Perceptions of Price, Quality, and Value: A Means-End Model and Synthesis of Evidence*, 52 J. MARKETING, no.3, at 2, 11 (1988), DOI:10.2307/1251446. Most positive links are found for durable rather than consumable or nondurable goods. *Id.* at 12 (citing Gardner, 46 J. RETAILING 25 (1970); Zarrel V. Lambert, 9 J. MARKETING RES. 35 (1972); Peterson & Wilson, in PERCEIVED QUALITY (Jacoby & Olson eds., (1985))); see also DPS Verma & Soma Sen Gupta, *Does Higher Price Signal Better Quality?*, 29 VIKALPA 67, 75 tbl.12, 76 tbl.13 (June 2004) (reporting a stronger price-quality relationship for televisions (a durable good) and t-shirts (semi-durable) than for toothpaste (non-durable)). But see Lynn A. Stout, *The Unimportance of Being Efficient: An Economic Analysis of Stock Market Pricing and Securities Regulation*, 87 MICH. L. REV. 613, 695 (1988) (critiquing the management-quality signaling argument that suggests consumers can and should use stock prices as evidence of efficient management).

282. Waber et al., *supra* note 223, at 1017 (reporting a 35% reduction in reported pain for the high-cost placebo, compared to a 25% reduction in reported pain for the low-cost placebo ( $p = .02$ )).

283. See *supra* note 224 and accompanying text.

284. See *infra* Part IV.B.

*B. Prestige, Performance, and Peripheral Protections*

High-prestige marks receive protection from a broader menu of potentially infringing uses than weaker marks. For example, well-known and prestige marks receive protection from post-sale confusion, and famous marks receive protection from non-confusing uses that dilute the distinctiveness of the mark by blurring or tarnishing it.<sup>285</sup> Critics of these regimes suggest they primarily protect only prestige value of famous marks<sup>286</sup> and are not calibrated to prevent meaningful consumer confusion.<sup>287</sup> Essentially, those critics often argue that the benefit of protecting mark owner value does not justify the competition costs of policing against post-sale confusion or dilution.<sup>288</sup> But evidence of the high-performance placebo effect suggests a slightly different weighting. There may be a stronger case than previously recognized that consumers have something to lose from reducing the prestige or distinctiveness of the high-performance good compared to a good that merely has high status.

## 1. Post-Sale Confusion and High-Performance Knockoffs

Penalizing behavior that causes post-sale confusion—confusion of bystanders who view an alleged infringer’s goods outside of the purchasing context<sup>289</sup>—protects prestige goods by penalizing uses that would confuse bystanders even if the purchase of the counterfeit luxury good did not confuse the buyer at the point of sale.<sup>290</sup> Consumer harm happens when observers of

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285. See McKenna, *Normative Foundation*, *supra* note 24, at 1915.

286. See, e.g., Bone, *Hunting Goodwill*, *supra* note 1, at 612.

287. Clarissa Long, *Dilution*, 106 COLUM. L. REV. 1029, 1034 (2006) (“[D]ilution law is producer-focused rather than consumer-focused: It seeks to prevent diminution in the value of a famous mark stemming from the use of the mark by someone other than the trademark [h]older.”).

288. See, e.g., Paul J. Heald, *Filling Two Gaps in the Restatement (Third) of Unfair Competition: Mixed-Use Trademarks and the Problem with Vanna*, 47 S.C. L. REV. 783, 791 (1996) (arguing that in light of the public goods nature of ornamental uses of marks, granting exclusive rights to mark owners would impose “certain and measurable costs” on consumers).

289. *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 872–73 (2d Cir. 1986).

290. See Manta, *supra* note 68, at 268–69; see also *supra* note 231 and accompanying text. Shahar Dilbary makes a similar argument for the value of protection against dilution, which protects a consumer’s pre-purchase expectations about the famous product. Dilbary, *supra* note 51, at 634; see also Haochen Sun, *Reforming Anti-Dilution Protection in the Globalization of Luxury Brands*, 45 GEO. J. INT’L L. 783, 786 (2014) (“[A]nti-dilution protection plays an important role in preserving and enhancing the exclusivity and quality reputation of luxury brands.”).

the knock-off are confused and disappointed upon exposure at some point after purchase.<sup>291</sup> Critics of post-sale confusion argue that purchasers know they are buying a knock-off, either because of the price, because of salient disclaimers, or because of purchasing context.<sup>292</sup> To be clear, the purchaser of the knock-off is not harmed. In fact, she may well benefit from a bump in status among those confused, but not dismayed, to see her sporting the knock-off.

Wherein lies the harm? As the argument goes, other potential buyers who are not privy to purchasing context might mistake the knock-off for the original, and if they find its quality wanting, they will blame the mark owner.<sup>293</sup> Thus, in *Ferrari S.P.A. v. Roberts*, the court found that defendant's planned sale of fiberglass kits designed to make a cheaper car look like a Ferrari was likely to create post-sale confusion among those who might see the car on the street but know nothing about the circumstances of its purchase.<sup>294</sup> Another court, in *Hermès International v. Lederer de Paris Fifth Avenue, Inc.*, concluded "a loss occurs when a sophisticated buyer purchases a knockoff and passes it off to the public as the genuine article, thereby confusing the viewing public and achieving the status of owning the genuine article at a knockoff price."<sup>295</sup> As Ann Bartow observes, however, "[p]recisely what the viewing public loses, if anything, goes unstated."<sup>296</sup>

Critics also argue that at best, post-sale confusion happens infrequently, but not as often as courts presume.<sup>297</sup> Chris Sprigman & Kal Raustiala hit on the tension in the chain of assumptions underlying post-sale confusion that tripped up adidas before the Ninth Circuit: "[C]onsumers who have trouble

291. See Manta, *supra* note 68, at 268–69.

292. See Connie Davis Powell, *We All Know It's a Knock-off! Re-evaluating the Need for the Post-Sale Confusion Doctrine in Trademark Law*, 14 N.C. J.L. 1, 28–30 (2012).

293. Powell, *supra* note 292, at 8 ("This approach does not focus on confusion by consumers, but rather seeks to protect the investment of the trademark owner.")

294. 944 F.2d 1235 (6th Cir. 1991).

295. 219 F.3d 104, 109 (2d Cir. 2000).

296. Ann Bartow, *Counterfeits, Copying and Class*, 48 HOUS. L. REV. 707, 734 (2011).

297. Jeremy Sheff, *Misappropriation-Based Trademark Liability in Comparative Perspective* (July 30, 2018) (manuscript at 7) in *CAMBRIDGE HANDBOOK ON COMPARATIVE AND INTERNATIONAL TRADEMARK LAW* (Cambridge University Press, Jane Ginsburg & Irene Calboli eds., forthcoming), <https://ssrn.com/abstract=3222768> [hereinafter Sheff, *Misappropriation-Based Trademark Liability*]; see also Kal Raustiala & Christopher Jon Sprigman, *Rethinking Post-Sale Confusion*, 108 TRADEMARK REP. 881, 883 (2018).



discerning the difference between Skechers and adidas shoes probably also cannot discern (or see well enough) any adverse quality differences that would seriously harm adidas.”<sup>298</sup> Thus, if consumers are generally insensitive to nuances between authentic and knock-off goods, material post-sale confusion of the sort that changes a purchasing decision might occur less frequently than courts presume.<sup>299</sup>

Post-sale confusion may merely protect the status of those who can afford authentic prestige goods.<sup>300</sup> Jeremy Sheff argues that post-sale confusion actually regulates status confusion.<sup>301</sup> Status confusion might harm consumers in two ways: First, status confusion harms purchasers of high-prestige goods because “the high value of the originals, which derives in part from their scarcity, is lessened.”<sup>302</sup> Second, status confusion may harm the public at large: “A loss [to the public] occurs when a sophisticated buyer purchases a knockoff and passes it off to the public as the genuine article, thereby confusing the viewing public and achieving the status of owning the genuine article at a knockoff price.”<sup>303</sup> Sheff argues that courts in status confusion cases primarily regulate “information that trademarks provide about the *people* who consume them.”<sup>304</sup>

Nonetheless, post-sale confusion could arguably reduce the perceived quality of a high-status but frequently counterfeited mark in the eyes of consumers.<sup>305</sup> As Bone has recognized, “[p]restige value is not completely separate from information transmission.”<sup>306</sup> To wit, some marketing and psychology research suggests that high-status consumers distance themselves from

298. Raustiala & Sprigman, *supra* note 297, at 882 n.5 (citing *Adidas Am., Inc. v. Skechers USA, Inc.*, No. 16-35204, U.S. App. LEXIS 12249, at \*\*21–22 (9th Cir., May 10, 2018)).

299. *Id.* at 884 (arguing that courts should thus require a showing that, when post-sale confusion is alleged, the confusion is “material to purchase decisions”).

300. Sheff, *Veblen Brands*, *supra* note 11, at 791.

301. Sheff, *Misappropriation-Based Trademark Liability*, *supra* note 297, at 8 (“[The junior user’s] wrong thus consisted of the fact that such a visitor would be likely to assume that the clock was [genuine]. . . . This theory of injury, which I refer to as ‘status confusion,’ is the historic source of what we know today as post-sale confusion.” (quoting *Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-Le Coultre Watches, Inc.*, 221 F.2d 464, 466 (2d Cir. 1955))).

302. *Id.* at 9 (quoting *Hermès Int’l v. Lederer de Paris Fifth Avenue, Inc.*, 219 F.3d 104, 108).

303. *Id.* (quoting *Hermès*, 219 F.3d at 109).

304. *Id.* at 10 (citing Sheff, *Veblen Brands*, *supra* note 11).

305. See Bone, *Hunting Goodwill*, *supra* note 1, at 608.

306. *Id.* at 612 n.367.

frequently counterfeited brands.<sup>307</sup> Disappointed observers could decide not to purchase a brand that has been counterfeited, thus reducing sales to the mark owner.<sup>308</sup>

Evidence that a high-performance reputation conveys performance-enhancing effects not offered by other high-prestige brands might suggest that other things being equal, courts should be more willing to grant a remedy against post-sale confusion involving high-performance brands. The average consumer has a bit more to lose if they lose actual performance enhancing effects. Thus, protecting high-performance marks against post-sale confusion might create more social benefit than the commensurate protection of high-prestige goods.<sup>309</sup> Moreover, if disappointment leads observers to doubt the ability of the branded good to improve performance, it is possible that current owners of branded goods could become disenchanted as well. A perception of downward shifting quality could, in theory, strip from a high-performance mark its ability to provide a positive placebo effect. If consumers stop perceiving the brand as having sufficient quality to improve performance, then the placebo effect could unravel.<sup>310</sup> For that to be the case, however, perceived lack of quality would need to feed into a perception that the brand no longer was associated with high performance.<sup>311</sup>

Moreover, some of the skepticism of post-sale confusion stems from the belief that price competition should be maximized.<sup>312</sup> But if maintaining a

307. Suraj Commuri, *The Impact of Counterfeiting on Genuine-Item Consumers' Brand Relationships*, 73 J. MARKETING 86, 95 (2009) (counterfeiting drives some consumers to abandon genuine goods subject to widespread counterfeiting). See generally JUDITH LYNNE ZAICHKOWSKY, *DEFENDING YOUR BRAND AGAINST IMITATION: CONSUMER BEHAVIOR, MARKETING STRATEGIES, AND LEGAL ISSUES* (1995) (explaining that counterfeits imperil the equity of genuine items).

308. See Saerom Lee et al., *Did They Earn It? Observing Unearned Luxury Consumption Decreases Brand Attitude When Observers Value Fairness*, 28 J. CONSUMER PSYCHOL. 412, 413 (2018), DOI:10.1002/jcpy.1028 [hereinafter, Lee et al., *Did They Earn It?*] (indicating that fairness-focused consumers make negative inferences about purchasers who consume luxury brands with unearned financial resources, and also make negative inferences about the brand).

309. See Park & John, *supra* note 14, at 233.

310. The likelihood of unraveling depends in part on the stickiness of the placebo effect, which I discuss *infra*, Part IV.D.

311. See Amar et al., *supra* note 179, at 336–38.

312. Grynberg, *supra* note 263, at 107 (“The countervailing consumer interest is that of consumers who want a product with a similar aesthetic appearance to the prestige good at a cheaper price. Recognizing post-sale confusion claims subordinates the interests of these consumers to those wishing to cultivate the status that comes with the purchase of artificially scarce goods.”); Heald, *supra* note 288,

certain level of price helps preserve placebo effects, there is something to lose in maximizing price competition in every instance, as discussed above in Part IV.A.<sup>313</sup>

## 2. Dilution of High-Performance Marks

The owner of a famous mark can acquire relief against dilution even when consumers are unlikely to be confused by the use.<sup>314</sup> The ostensible harm instead is reduction in the distinctiveness of the mark.<sup>315</sup> Non-competitive use of a famous mark triggers liability under the Lanham Act if it is likely to blur the distinctiveness of the mark or tarnish the mark in the eyes of the public.<sup>316</sup> Frank Schechter first argued in favor of imposing liability to protect against blurring, positing that allowing the use of a famous mark like Kodak on a non-competing good like bicycles could reduce the ability of that famous mark to operate as a singular designator of source.<sup>317</sup> But protection against dilution does not prevent consumer confusion. Indeed, the default structure of trademark law is homonymous<sup>318</sup>—we presume that consumers can sort between Delta faucets and Delta airlines. Moreover, we generally conclude that a bit of confusion regarding source between uses of the same mark in disparate categories is tolerable because, as Jessica Litman described it, the rights acquired through trademark use are “limited to the exclusive use of the mark in circumstances in which the public is likely to perceive it as emanating from”

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at 802 (suggesting that properly calibrating rights in promotional goods to reduce the likelihood of post-sale confusion “will result in increased competition in promotional goods, lower prices, and greater variety and accessibility”).

313. See *supra* Part IV.A.

314. 15 U.S.C. § 1125(c)(1); Jacob Jacoby, *The Psychology Foundations of Trademark Law: Secondary Meaning, Genericism, Fame, Confusion and Dilution*, 91 TRADEMARK REP. 1013, 1062 (2001) (identifying Gucci as a famous mark); see also Heald, *supra* note 288, at 801 (arguing that the problem with anti-dilution statutes is that they create liability even in the absence of any likely confusion).

315. See Bannon, *supra* note 28, at 90.

316. See § 1125(c)(1).

317. Schechter, *supra* note 23, at 825 (“The real injury in all such cases can only be gauged in the light of what has been said concerning the function of a trademark. It is the gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name by its use upon non-competing goods.”); see also *id.* at 822 (“[T]he preservation of the uniqueness or individuality of the trademark is of paramount importance to its owner.”).

318. See Linford, *The False Dichotomy*, *supra* note 231, at 1406.

the mark owner, and not every use of the term in any context.<sup>319</sup> Protection from dilution instead reaches uses that in most contexts would not be confusing, because the products offered by the competing mark owners are too dissimilar.<sup>320</sup>

Not every high-prestige mark is necessarily a high-performance mark, but it seems likely that a high-performance mark recognized by the general population as such is sufficiently famous to qualify for protection from dilution.<sup>321</sup> For famous high-performance marks, there is an additional potential harm to consumers that may stem from a reduction in distinctiveness.<sup>322</sup> Some evidence suggests that for the most famous marks, loss of distinctiveness through blurring never happens.<sup>323</sup> But blurring for a weaker, but still famous, subset of high-performance marks might unravel the psychological performance bump, if loss of distinctiveness alters the perception of high performance.<sup>324</sup> Moreover, if loss of distinctiveness reduces investment in quality, as Bone postulates, then loss of distinctiveness may reduce investment in quality independent of the psychological effect.<sup>325</sup>

As defined by statute, “‘dilution by tarnishment’ is association arising from the similarity between a mark or trade name and a famous mark that

319. Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 973 (1990).

320. Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 676 (2004) (“If protection from trademark infringement prohibits synonyms (two different signifiers pointing to the same signified), protection from trademark dilution prohibits homonyms (two closely similar signifiers pointing each to its own signified).”).

321. See, e.g., *Nike Inc. v. Variety Wholesalers, Inc.*, 274 F. Supp. 2d 1352, 1372 (S.D. Ga. 2003) (“The Court has no difficulty in concluding that the Nike trademarks qualify as famous marks . . . .”); *Minn. Mining & Mfg. Co. v. Rauh Rubber, Inc.*, 943 F. Supp. 1117, 1131 (D. Minn. 1996), *aff’d*, 130 F.3d 1305 (8th Cir. 1997) (presuming that 3M was a famous mark); John M. Murphy, *Famous and Well-Known Marks in Mexico: Past, Present, and Future*, 105 TRADEMARK REP. 1060, 1108 (2015) (describing evidence presented to Mexican trademark examiners regarding the fame of the Red Bull mark).

322. See Bone, *Enforcement Costs*, *supra* note 23, at 2118; Garvey et al., *supra* note 13, at 932.

323. Jacob Jacoby & Maureen Morrin, *Trademark Dilution: Empirical Measures for an Elusive Concept*, 19 J. PUB. POL’Y & MARKETING 265, 274 (2000) (“It appears that very strong brands are immune to dilution because their memory connections are so strong that it is difficult for consumers to alter them or *create* new ones with the same brand name.” (emphasis added)).

324. See Bradford, *supra* note 54, at 1243–45 (discussing problems with trademark blurring, including impairment of trademark distinctiveness).

325. Bone, *Enforcement Costs*, *supra* note 23, at 2107–08; see also G.M. Grossman & C. Shapiro, *Counterfeit-Product Trade*, 78 AM. ECON. REV. 59 (1988).

harms the reputation of the famous mark.”<sup>326</sup> As one of the earliest cases applying the first federal anti-dilution statute noted, tarnishment is not limited to “seamy conduct,” but often occurs when “the plaintiff’s mark is used by the defendant in association with unwholesome or shoddy goods or services . . . [or] obscenity, or sexual or illegal activity.”<sup>327</sup> It is likewise possible that tarnishing a high-performance mark might reduce the trademark’s ability to provide an esteem-boosting effect. If the Amar study is generalizable,<sup>328</sup> many consumers may experience feelings of disgust or have other negative reactions to counterfeit goods, and that disgust can be contagious, reaching authentic goods and negating any performance-enhancing effect.<sup>329</sup>

### C. Manipulation, Deception, and the Function of Placebo Effects

Although the previous sections highlight some formerly unrecognized positive spillovers from protections associated with preserving prestige,<sup>330</sup> perhaps the law should nonetheless discourage the psychological manipulation of consumers.<sup>331</sup> For example, the law does not extend protection to a

326. 15 U.S.C. § 1125(c)(2)(C).

327. *Clinique Labs., Inc. v. Dep Corp.*, 945 F. Supp. 547, 562 (S.D.N.Y. 1996); *see also Ford Motor Co. v. Lapertosa*, 126 F. Supp. 2d 463, 466–67 (E.D. Mich. 2000) (finding defendant’s use of plaintiff’s trademark on website offering pornography “tarnishes the goodwill developed . . . by causing [the mark] to become associated with pornographic material that is fundamentally inconsistent with the otherwise wholesome and commercial nature of the mark”).

The selling power of a trademark also can be undermined by a use of the mark with goods or services such as illicit drugs or pornography that “tarnish” the mark’s image through inherently negative or unsavory associations, or with goods or services that produce a negative response when linked in the minds of prospective purchasers with the goods or services of the prior user, such as the use on insecticide of a trademark similar to one previously used by another on food products.

RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 25(c) (1995). *But see Lucasfilm Ltd. v. Media Mkt. Grp., Ltd.*, 182 F. Supp. 2d 897, 900–01 (N.D. Cal. 2002) (denying plaintiff’s motion for preliminary injunction against porn parody film because a parody is a “noncommercial use of a mark” and thus excepted from the federal dilution statute).

328. *See Amar et al.*, *supra* note 179.

329. *Id.*

330. *See discussion supra* Parts IV.A, IV.B.

331. *See* Laura A. Heymann, *The Public’s Domain in Trademark Law: A First Amendment Theory of the Consumer*, 43 GA. L. REV. 651, 697 (2009). To the extent that is true, perhaps trademark law “should encourage the . . . construction of self-image through choice by exhibiting greater skepticism of aspects of trademark law that interfere with [consumer] autonomy.” *Id.* Heymann suggests that modern marketing scholarship recognizes the importance of consumer autonomy, even if marketers

mark that would deceive consumers or, if protected, would harm competition.<sup>332</sup> The next subsection argues that the mental operations that drive these placebo effects do not interfere with consumer autonomy in a manner that should bar trademark validity.<sup>333</sup> The subsequent subsection explains that protecting a mark that provides a performance-enhancing placebo effect doesn't provide the mark owner with protection of functional elements that would hamper competition or impose non-reputation related harms on new entrants.<sup>334</sup> Finally, the third subsection explains that while courts have been unsympathetic to false advertisers that have tried to justify their deception by arguing some consumers experience a placebo effect from their non-therapeutic products, the performance-enhancing placebo effect is different in kind.<sup>335</sup>

### 1. Trademark Validity and Consumer Deception

Trademark law penalizes a new entrant who adopts a mark confusingly similar to a mark already in use for the same or proximate goods.<sup>336</sup> The law also denies protection to trademarks that may deceive consumers.<sup>337</sup> For instance, a mark owner cannot secure protection of a mark that falsely indicates the goods come from a particular geographic region, if the location would be material to consumer purchasing decisions.<sup>338</sup> Thus, registration was denied to applicant's HAVANA CLUB mark for cigars made from non-Cuban tobacco on grounds of deceptive geographic misdescriptiveness.<sup>339</sup> Likewise, a

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are not maximizing consumer autonomy. *Id.* at 700 (citing Ruby Roy Dholakia & Brian Sternthal, *Highly Credible Sources: Persuasive Facilitators or Persuasive Liabilities?*, 3 J. CONSUMER RES. 223, 224 (1977); Marian Friestad & Peter Wright, *The Persuasion Knowledge Model: How People Cope with Persuasion Attempts*, 21 J. CONSUMER RES. 1, 3 (1994)).

332. See Heymann, *supra* note 331, at 702.

333. See discussion *infra* Part IV.C.1.

334. See discussion *infra* Part IV.C.2.

335. See discussion *infra* Part IV.C.3.

336. See 15 U.S.C. § 1125 (2012).

337. *Id.*

338. See *Corporacion Habanos, S.A. v. Anncas, Inc.*, 88 U.S.P.Q.2d 1785, 2008 WL 4409768 (T.T.A.B. 2008); 15 U.S.C. § 1052(e)(3) (2013) (“No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . . [c]onsists of a mark which, . . . when used on or in connection with the goods of the applicant is primarily geographically deceptively misdescriptive of them . . .”).

339. *Corporacion Habanos*, 2008 WL 4409768, at \*8. The TTAB granted opposition even though the tobacco in question was grown from Cuban tobacco seeds because “the record in this case shows

mark will be denied registration if it falsely suggests an association with a celebrity who is not affiliated with the brand.<sup>340</sup> For example, registration was denied to applicant's ROYAL KATE mark for cosmetics and apparel, among other goods, because the mark falsely suggested a connection with Kate Middleton, the Duchess of Cambridge.<sup>341</sup>

While the law regulates potentially deceptive types of trademark use, false affiliation and geographical misdescriptiveness are quite dissimilar to a placebo effect.<sup>342</sup> Whether the effect is psychological or scientific, the claimed benefit of a Nike product comes from Nike, Inc. as its source (unless we think the law should treat the Greek goddess Nike as an entity with whom one can falsely claim to associate), and the Nike mark offers no geographic indication (unless every trademark inspired by an ancient Greek deity conveys something Grecian about the source of the product offered).<sup>343</sup>

Another prohibition, the bar against protecting deceptive trademarks, is close enough to the placebo effect to merit some discussion.<sup>344</sup> This bar against deceptive marks prevents registration of a mark that falsely suggests the mark-bearing product has features that are material to the consumer's purchasing decision.<sup>345</sup> For example, a mark owner cannot secure protection in a mark, like LOVEE LAMB for automobile seat covers that are not in fact made of lambskin, if the purported presence of that feature is likely to influence the

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that cigars from Cuban seed tobacco share few, if any, qualities or characteristics of genuine or 100% Cuban cigars." *Id.*

340. *See* Nieves & Nieves LLC, 113 U.S.P.Q.2d 1629, 2015 WL 496132, at \*4 (T.T.A.B. 2015).

341. *Id.*

342. *Compare* 15 U.S.C. § 1052(e) (2013) (denying registration to those marks that deceptively affiliate themselves to a geographic region, entity, or person), *with* Lee et al., *Trademark Distinctiveness*, *supra* note 17, at 1038 (concluding that a trademark's possible placebo effects are not derived from such deniable misdescriptions; they are derived from "non-linguistic visual cues . . . rather than the mark's semantic meaning[s]").

343. *See* Nike Inc. v. Variety Wholesalers, Inc., 274 F. Supp. 2d 1352, 1356 (S.D. Ga. 2003) ("The Nike trademarks are well known to the consuming public and trade as identifying and distinguishing Nike exclusively and uniquely as the source of high quality products to which such trademarks are applied.").

344. *See* 15 U.S.C. § 1052(a), (e) (2013) (prohibiting the registration of trademarks that are "deceptive" (§ 1052(a)) or "[c]onsist[] of a mark which . . . when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive" (§ 1052(e))).

345. *See id.*; *In re* Quady Winery, Inc., 221 U.S.P.Q. 1213, 1984 WL 63115, at \*1 (T.T.A.B. 1984) (setting forth a test for trademark deceptiveness that considers "whether the misrepresentation would materially affect the [consumer's] decision to purchase the goods").

purchasing decision of a significant number of potential buyers.<sup>346</sup>

How would this dynamic play out for goods with a high-performance reputation? Assume that Nike's putters convey no non-psychological benefit on consumers, compared to other putters on the market.<sup>347</sup> Nike has nonetheless successfully persuaded consumers that its products are high quality in part because of the firm's investment in scientific research.<sup>348</sup> Should Nike's use of its mark on a putter be treated as invalid because the benefit is psychological or reputational rather than scientific or mechanical? Typically, deceptive marks are actually deceptively misdescriptive—the mark directly communicates some product feature, like in the LOVEE LAMB example above.<sup>349</sup> That is not the case with regard to a mark, like NIKE for putters or RED BULL for energy drinks, which may suggest virtues (Nike was a Greek goddess of victory; “It's got to be the shoes”; a bull is powerful; “Red Bull gives you wings”), but could not be construed to describe product features.<sup>350</sup> Thus,

346. *In re Budge Mfg. Co.*, 857 F.2d 773, 777 (Fed. Cir. 1988) (affirming the TTAB's refusal to register the mark). Deceptive marks can also be denied protection against infringement at common law under the doctrine of unclean hands. RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 14, 32 (AM. LAW INST. 1995).

347. See Fitzsimons et al., *supra* note 14, at 23 (“[V]ia associations with desired human qualities, goal-relevant brands may acquire the ability to trigger these ideal-self goals and shape behavior. For example, the athletic brand Nike is associated with traits such as ‘active’ and ‘confident’ . . . so Nike likely plays a motivational role for many people . . . . In the case of Nike, then, we would expect that brand exposure could lead people to pursue goals to be confident and active.”).

348. See, e.g., *A Look Inside Nike's Sport Research Lab*, NIKE NEWS (Sept. 8, 2014), <http://news.nike.com/news/a-look-inside-nike-s-sport-research-lab>.

349. See also *Gold Seal Co. v. Weeks*, 129 F. Supp. 928, 932 (D.D.C. 1955), *aff'd, sub nom.*, S. C. Johnson & Son, Inc. v. *Gold Seal Co.*, 230 F.2d 832 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 829 (holding GLASS WAX is deceptively misdescriptive for a glass and metal cleaner that contains no wax); *In re Shapely, Inc.*, 231 U.S.P.Q. 72, 1986 WL 83693 (T.T.A.B. 1986) (finding SILKEASE on polyester blouses held deceptive); *R. Neumann & Co. v. Overseas Shipments, Inc.*, 326 F.2d 786, 788 (C.C.P.A. 1964) (finding DURA-HYDE for plastic material with the appearance of leather held deceptive); *Am. Speech-Language-Hearing Ass'n v. Nat'l Hearing Aid Soc.*, 224 U.S.P.Q. 798, 1984 WL 63174 (T.T.A.B. 1984) (finding CERTIFIED HEARING AID AUDIOLOGIST as collective mark for organization whose members are not audiologists held deceptive); *Evans Prods. Co. v. Boise Cascade Corp.*, 218 U.S.P.Q. 160, 1983 WL 51946 (T.T.A.B. 1983) (finding CEDAR RIDGE on siding not made of cedar held deceptive). *But see* J. Shahar Dilbary, *Trademarks as a Media for False Advertising*, 31 CARDOZO L. REV. 327, 329 (2009) (arguing that trademark law should be expanded to “protect consumers against the trademark owner that uses its own non-descriptive mark to misrepresent its own goods (intra-brand fraud).”).

350. *But see* Garvey et al., *supra* note 13, at 947 (warning that strong brands “are susceptible to criticism for exaggerating the true performance benefits” and noting the need to “ensure trust in advertising). For example, although Red Bull's slogan is not construed by customers to actually give



courts should be reluctant to find the mark deceived consumers based on advertising claims that build a high performance reputation.<sup>351</sup> Similarly, overstated laudatory marks are typically not denied protection on deceptiveness grounds.<sup>352</sup> The same should apply to marks that have developed a high-performance reputation, even if the benefits from that reputation are somewhat overstated. As discussed in more detail in Section IV.C.3, such a claim is at worst non-actionable puffery.<sup>353</sup> Furthermore, the existence of a placebo effect that increases golfing efficiency by twenty-percent is not inconsistent with a high-performance reputation, even if the efficiency is derived from psychology instead of engineering or biomechanics.<sup>354</sup>

## 2. Competition and Functionality

Some barriers to trademark protection turn instead on the functionality of a product feature claimed to be source signifying.<sup>355</sup> A seller is generally not

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them wings, the company paid \$13m to settle a lawsuit over the deceptive use of its slogan to suggest that the product provides a “superior source of ‘energy’ worth a premium price.” Oliver Duggan, *\$13m Lawsuit Proves Red Bull Doesn’t Give You Wings*, TELEGRAPH (Oct. 11, 2014), <https://www.telegraph.co.uk/news/worldnews/northamerica/usa/11155731/13m-lawsuit-proves-Red-Bull-doesnt-give-you-wings.html>.

351. See *Nike Inc. v. Variety Wholesalers, Inc.*, 274 F. Supp. 2d 1352, 1356 (S.D. Ga. 2003) (holding that Nike’s trademark is protected as “identifying and distinguishing Nike exclusively and uniquely as the source of high quality products”).

352. See *Hoover Co. v. Royal Appliance Mfg. Co.*, 238 F.3d 1357, 1361 (Fed. Cir. 2001) (holding that the slogan NUMBER ONE IN FLOORCARE for vacuum cleaners was self-laudatory and descriptive but was not deceptive). “Because substantial evidence supports the finding that the phrase does not either misdescribe or misrepresent Royal’s goods, the board correctly held that Royal’s mark was not deceptive.” *Id.*

353. See Lee et al., *Trademark Distinctiveness*, *supra* note 17, at 1053–54 (“[C]ourts evaluate secondary meaning on the basis of whether consumers associate a mark with a producer of goods. . . . [S]econdary meaning is present when ‘the [mark] and the business have become synonymous in the mind of the public, submerging the primary meaning of the term in favor of its meaning as a word identifying that business.’ There are nuances in each circuit’s case law, but the tests for secondary meaning overwhelmingly focus on the perceptions of the consumer—with little regard for the needs of competitors.” (internal footnotes omitted)).

354. See Garvey et al., *supra* note 13, at 937 (“These results support our theorizing regarding the performance brand placebo, with objective improvements of over 20% from using a strong performance brand.”).

355. 15 U.S.C. § 1052(e)(5) (stating that a matter which, “as a whole, is functional” cannot be registered as a trademark).

allowed to secure trademark protection in functional product features.<sup>356</sup> For example, if a dual-spring feature improves the ability of a road hazard sign to stand up in a strong wind, a mark owner is generally barred from enforcing trademark rights in the feature, even if the feature is also source signifying to the average consumer.<sup>357</sup>

Is a performance-enhancing placebo effect functional in the same manner? The research suggests the placebo effect (like increased test-taking results when using 3M earplugs) conveys a benefit which might lead a purchaser to choose one product over another. But the improved performance from the placebo effect is not due to a product feature like the shape, weight, or materials from which the earplug is made. Those are the features typically denied protection as source signifiers under the utility functionality doctrine.<sup>358</sup> The placebo effect identified in the aforementioned studies instead creates a benefit from the user's perception of the brand instead of functional features.<sup>359</sup>

Aesthetic elements can also be functional, and aesthetically functional elements may also fail to qualify for trademark protection.<sup>360</sup> Under a doctrine of aesthetic functionality, product or packaging features that are aesthetically pleasing and an important ingredient in a product's commercial success would not qualify for trademark protection.<sup>361</sup> For example, a candy maker cannot

356. *Id.*

357. *Id.* Courts are more likely to deny protection if the functional element was the subject of a utility patent. See *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 33 (2001).

358. See Allan Zelnick, *The Doctrine of Functionality*, 73 TRADEMARK REP. 128, 129 (1983) (“If the thing copied is ‘functional’ then to prohibit its use would be anticompetitive—to grant a pseudo patent; but if it is not functional, prohibiting its use would be competitively inconsequential and thus appropriate, if necessary to avoid confusion.”); Mark P. McKenna & Christopher Jon Sprigman, *What’s In, and What’s Out: How IP’s Boundary Rules Shape Innovation*, 30 HARV. J.L. & TECH. 491, 494–96 (2017) (discussing potential interactions between utility patent and trade dress protection for placebo effect driven by the color of a pill for depression).

359. See Garvey et al., *supra* note 13, at 937–39 (finding conclusive evidence “for a positive performance brand placebo on objective outcomes”).

360. See Zelnick, *supra* note 358, at 129 (“[T]he courts have divided the [doctrine of functionality] into two doctrines . . . mechanical and aesthetic or ornamental functionality. . . . [W]e are, in all cases, dealing with the perception of a conflict between the right . . . to use . . . subject matter in a competitive economy, on the one hand, and the desirability of protecting the entrepreneur’s investment in his good will and the public from confusion, on the other. The decisions in all of the cases lie along this central dividing line.”).

361. See *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 33 (2001); see also *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 170 (1995) (“[I]f a design’s aesthetic value lies in its ability to confere[r] a significant benefit that cannot practically be duplicated by the use of alternative designs,

secure trademark rights in the exclusive use of a red heart-shaped box, because consumers associate that color and shape combination with romance.<sup>362</sup> If no alternative design could satisfy consumers' aesthetic desires, then granting trademark protection would hamper competition, because competitors could not offer a suitable replacement package.<sup>363</sup> As the Supreme Court noted in *Qualitex Co. v. Jacobson Products Co.*, an aesthetic feature might be functional if there is a competitive necessity for that feature—if the inability to use it would put competitors at a “significant non-reputation-related disadvantage.”<sup>364</sup>

Unlike utility functionality, aesthetic functionality is somewhat contested.<sup>365</sup> For example, Robert Bone has articulated two difficulties that aesthetic functionality adds to the standard utility functionality analysis: Aesthetic preferences are heterogeneous, and there is a close connection between aesthetic value and source identification.<sup>366</sup> Thomas McCarthy expresses sim-

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then the design is functional.” (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 17 cmt. c (AM LAW INST. 1995)) (alteration in original) (internal quotation marks omitted)); Christina Farmer, *Red in the Eye of the Beholder: The Case for Aesthetic Functionality*, 28 BERKELEY TECH. L.J. 777 (2013); Mark P. McKenna, *(Dys)functionality*, 48 HOUS. L. REV. 823 (2011). *But see* Justin Hughes, *Cognitive and Aesthetic Functionality in Trademark Law*, 36 CARDOZO L. REV. 1227, 1248 (2015) [hereinafter Hughes, *Cognitive and Aesthetic Functionality*] (“[W]hat we have called ‘aesthetic’ functionality can be better understood as functionality arising from how consumers process and respond to sensory inputs . . .”).

362. RESTATEMENT (THIRD) UNFAIR COMPETITION § 17 cmt. c, illus. 8 (AM LAW INST. 1995); *see, e.g., Qualitex*, 514 U.S. at 170.

363. RESTATEMENT (THIRD) UNFAIR COMPETITION § 17 cmt. c, illus. 8 (AM LAW INST. 1995).

364. *Qualitex*, 514 U.S. at 165 (quoting *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 850 n.10 (1982)); *see also Traffix*, 532 U.S. at 33.

365. *See, e.g.,* *Maker’s Mark Distillery, Inc. v. Diageo N. Am., Inc.*, 679 F.3d 410, 418 (6th Cir. 2012) (“It seems we have not yet plainly stated which test we would apply under aesthetic functionality doctrine, or that we have even adopted aesthetic functionality doctrine at all.” (citing *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.*, 280 F.3d 619, 641 n.16, 642–43 (6th Cir. 2002))); *Antioch Co. v. W. Trimming Corp.*, 347 F.3d 150, 155–56 (6th Cir. 2003) (questioning the validity of aesthetic functionality doctrine in the Sixth Circuit); *Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc.*, 457 F.3d 1062, 1064 (9th Cir. 2006) (“The doctrine of aesthetic functionality has a somewhat checkered history.”). *But see* Michael Grynberg, *Things are Worse Than We Think: Trademark Defenses in a “Formalist” Age*, 24 BERKELEY TECH. L.J. 897, 923 (2009) (criticizing the Au-Tomotive Gold opinion on the ground that the court showed “no inclination to adjust trademark defenses to accommodate a practice that arguably offers consumers the benefits of enhanced price competition”).

366. Robert G. Bone, *Trademark Functionality Reexamined*, 7 J. LEGAL ANALYSIS 183, 238–40 (2015) [hereinafter Bone, *Trademark Functionality Reexamined*].

ilar skepticism regarding aesthetic functionality “because the range of possible aesthetic designs and configurations is . . . infinite.”<sup>367</sup>

Are performance-enhancing placebo effects functional in a manner that should call trademark protection into question? As Justin Hughes notes, the least controversial aesthetic functionality cases tend to turn on “cognitive and psychological responses among consumers that predate the putative trademark holder’s activities.”<sup>368</sup> Cases often find a claimed aesthetic product feature functional for preexisting cognitive or neurological reasons.<sup>369</sup> For example, in *Brunswick Corp. v. British Seagull Ltd.*,<sup>370</sup> the Federal Circuit affirmed a decision by the Trademark Trial and Appeal Board denying trademark registration and holding that the black color of an outboard boat motor was functional in part because “objects colored black appear smaller than they do when they are painted other lighter or brighter colors” and “people who buy outboard motors for boats . . . find it desirable under some circumstances to reduce the perception of the size of the motors in proportion to the boats.”<sup>371</sup>

Aesthetic functionality might instead turn on cultural expectations.<sup>372</sup> For instance, in *In re Florists’ Transworld Delivery, Inc.*,<sup>373</sup> the Trademark Trial and Appeal Board held the color black was aesthetically functional on packaging for floral arrangements in part because black was culturally significant for formal events, to convey grief or condolence, or in connection with Halloween displays.<sup>374</sup> These cultural expectations led the TTAB to uphold the Trademark Examiner’s finding that “there is a competitive need for others in

367. MCCARTHY, *supra* note 264, at § 7:81 (5th ed. 2019) (quoting Deborah J. Krieger, *The Broad Sweep of Aesthetic Functionality: A Threat to Trademark Protection of Aesthetic Product Features*, 51 FORDHAM L. REV. 345, 380 (1982)).

368. Hughes, *Cognitive and Aesthetic Functionality*, *supra* note 361, at 1267. *But see* Christopher Buccafusco & Mark A. Lemley, *Functionality Screens*, 103 VA. L. REV. 1293, 1348 n.225 (2017) (“Unless a preference for more attractive features is a preexisting cognitive ‘bias’ (and perhaps it is), his approach would permit protection of works based not on their source-identifying qualities but merely because people like them better. Protecting the intrinsic value of a design is something best left to copyright and design patent law.”).

369. Hughes, *Cognitive and Aesthetic Functionality*, *supra* note 361, at 1252–53.

370. *Brunswick Corp. v. British Seagull Ltd.*, 35 F.3d 1527 (Fed. Cir. 1994), *aff’g* 28 U.S.P.Q.2d (BNA) 1197, 1199, 1993 WL 409141 (T.T.A.B. 1993).

371. *See* Hughes, *Cognitive and Aesthetic Functionality*, *supra* note 361, at 1252 (quoting *Brunswick Corp.*, 28 U.S.P.Q.2d at 1199).

372. Hughes, *Cognitive and Aesthetic Functionality*, *supra* note 361, at 1253–54.

373. 106 U.S.P.Q.2d (BNA) 1784, 2012 WL 8254584 (T.T.A.B. 2013).

374. *Id.* at 1789.

the industry to use the color black in connection with floral arrangements and flowers.”<sup>375</sup>

While the placebo effect is almost certainly psychological in some sense, most placebo effects measured by the research outlined in Part II could not predate the mark holder’s use. Instead, the effect is generated by the mark owner’s branding and advertising activities.<sup>376</sup> Therefore, as Justin Hughes has argued, “where the aesthetic appeal is actually the achievement of the trademark holder or its predecessors, courts should be hesitant to use aesthetic functionality to deny trademark rights—precisely because building such aesthetic appeal is endemic to modern marketing [and] building brands.”<sup>377</sup>

Similarly, if consumers subjectively believe that a mark-bearing product is functionally better than a competitor’s goods, that is a “psychological” effect, to be sure. Nonetheless, it is an effect that stems from mark owner efforts rather than pre-programmed consumer expectations, irrespective of whether those pre-programmed expectations are hardwired into perceptive faculties or culturally determined.<sup>378</sup> Courts therefore should not deny protection to a mark that provides a performance enhancing placebo effect on aesthetic functionality grounds.

### 3. False Advertising

False advertising liability turns quite decidedly on deception. Pursuant to § 43(a)(1)(B) of the Lanham Act, a competitor who believes they are injured by a false statement can bring a cause of action to seek redress when a party

375. *Id.* at 1791.

376. *Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc.*, 457 F.3d 1062, 1073 (9th Cir. 2006) (declining to embrace an argument that automaker’s logos and marks are functional because they “constitute . . . the actual benefit the consumer wishes to purchase” (citing *Vuitton Et Fils S.A. v. J. Young Enters., Inc.*, 644 F.2d 769, 773 (9th Cir. 1981)) (alteration in original)). The *Vuitton* court “rejected the notion that ‘any feature of a product which contributes to the consumer appeal and saleability of the product is, as a matter of law, a functional element of that product.’” *Id.* (quoting *Vuitton* 644 F.2d at 773).

377. Hughes, *Cognitive and Aesthetic Functionality*, *supra* note 361, at 1273–75. For example, Hughes argues that the aesthetic value of the distinctive rounded trunk lid hump on Ford’s Lincoln Continental cars “was a creation of Ford Motor Company’s marketing efforts,” rather than a preexisting cognitive response, and thus “not a basis for a finding of aesthetic functionality.” *Id.* at 1274–75.

378. *Id.* at 1248 (“[W]hat we have called ‘aesthetic’ functionality can be better understood as functionality arising from how consumers process and respond to sensory inputs, based either on evolution or deeply rooted acculturation that may or may not be ‘aesthetic.’”).

“misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities.”<sup>379</sup> Establishing false advertising generally requires showing the alleged malefactor made a materially false or misleading statement about a product which deceived or had the capacity to deceive a substantial segment of potential purchasers.<sup>380</sup>

The Federal Trade Commission Act also empowers the Federal Trade Commission to prevent and penalize false advertising.<sup>381</sup> Section 12 of the Act prohibits the dissemination of “any false advertisement” in order to induce the purchase of “food, drugs, devices, services, or cosmetics.”<sup>382</sup> Section 12 also provides that disseminating a false advertisement is an “unfair or deceptive act or practice in or affecting commerce” within the meaning of section 5 of the Act.<sup>383</sup> The Act defines “false advertisement” as “an advertisement, other than labeling, which is misleading in a material respect.”<sup>384</sup> Similar to requirements for establishing a claim of false advertising under the Lanham Act, the FTC must show that a deceptive practice is a material representation, omission, or practice that is likely to mislead reasonable consumers.<sup>385</sup> The FTC can bring an action against a deceptive practice either on a falsity theory,<sup>386</sup> or “because the advertisers lacked a reasonable basis for their claims.”<sup>387</sup>

379. 15 U.S.C. § 1125(a)(1)(B) (2013).

380. Michael Grynberg, *More Than IP: Trademark Among the Consumer Information Laws*, 55 WM. & MARY L. REV. 1429, 1437 (2014) (citing *Clock Spring, L.P. v. Wrapmaster, Inc.*, 560 F.3d 1317, 1329 n.10 (Fed. Cir. 2009) (citing *Pizza Hut, Inc. v. Papa John’s Int’l, Inc.*, 227 F.3d 489, 495 (5th Cir. 2000))).

381. 15 U.S.C. § 55 (2006) (stating that the FTC shall find it “unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement”).

382. 15 U.S.C. § 52(a)(2) (2006).

383. *Id.* § 52(b).

384. *Id.* § 55.

385. *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 164–65 (1984).

386. *In re Thompson Med. Co.*, 104 F.T.C. 648, 818–19 (1984) (explaining that to prevail on the falsity theory, the government must “carry the burden of proving that the express or implied message conveyed by the ad is false”).

387. *F.T.C. v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 8 (1st Cir. 2010) (“When the FTC brings an action based on the theory that advertising is deceptive because the advertisers lacked a reasonable basis for their claims, the FTC must: (1) demonstrate ‘what evidence would in fact establish such a claim in the relevant scientific community’; and (2) ‘compare the advertisers’ substantiation evidence to that required by the scientific community to see if the claims have been established.’” (quoting

Consumers might also sue under state unfair competition laws or for common law fraud.<sup>388</sup> The common theme in actionable claims by competitors, consumers, and regulators is that the defendant either told a deliberate falsehood or made a representation of fact with no reasonable basis.<sup>389</sup> False advertising laws pursue twin goals: “[D]eterring future frauds and compensating the victims.”<sup>390</sup>

The reporters are awash with cases where a seller of snake oil attempts to defend against a charge of deceptive practices by arguing its non-therapeutic offering provides a placebo effect to some consumers. For example, in *F.T.C. v. QT, Inc.*,<sup>391</sup> defendant QT sold its Q-Ray Ionized Bracelet to consumers touting nonexistent therapeutic benefits (like pain relief generated by “enhancing the flow of bio-energy”) and product characteristics (like non-existent ionization, a “memory cycle specific to each wearer,” and “gold” and “silver” models of a brass bracelet)—claims described subsequently by a reviewing court as “techno-babble,” “blather,” and “bunk.”<sup>392</sup> The FTC brought an action against the firm for false and misleading advertising.<sup>393</sup> QT tried to defend the outlandish claims by arguing some consumers experienced a placebo effect—perceiving pain relief because of their belief in the product.<sup>394</sup> On appeal, the Seventh Circuit was unsympathetic to the argument, holding that the laundry list of false claims and outright lies offered to consumers could not be justified by a placebo effect.<sup>395</sup> The court expressed concern that even if some consumers benefitted from the placebo effect, it was far more likely, in response to QT’s claims, that consumers would purchase a \$200 bracelet

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*Removatron Intern. Corp. v. F.T.C.*, 884 F.2d 1489, 1498 (1st Cir. 1989)) (applying to administrative determination of deceptive advertising)); *see also* *F.T.C. v. Garvey*, 383 F.3d 891, 901 (9th Cir. 2004) (applying the same test to claims by FTC in court).

388. Anup Malani, *Regulation with Placebo Effects*, 58 DUKE L.J. 411, 456 (2008) (citing DEE PRIDGEN & RICHARD M. ALDERMAN, *CONSUMER PROTECTION AND THE LAW* § 2:9, at 41 (2007)) (suing under common law fraud); *id.* § 3:9, at 124–26 (suing under state consumer protection statutes).

389. Malani, *supra* note 388, at 456.

390. Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 460–61 (1991).

391. 512 F.3d 858 (7th Cir. 2008).

392. *Id.* at 861–62.

393. *Id.* at 860–61.

394. *Id.* at 862–63.

395. *Id.* at 863.

for pain relief that a one-cent aspirin could provide.<sup>396</sup> Worse, consumers might forgo effective medical treatment in reliance on QT's false promises, trading real relief for false belief.<sup>397</sup>

Nonetheless, the court in *QT* observed that in some circumstances, one could imagine a less specific claim rendered true by a placebo effect.<sup>398</sup> Following that logic, if a firm makes an ostensibly false statement using a trademark, but the placebo effect makes the statement true, then one might wonder if the statement is no longer false.<sup>399</sup> It could be true enough for the subset of consumers that experience therapeutic relief or a performance enhancing benefit. Courts repeatedly reject placebo creation as a defense to a false advertising claim.<sup>400</sup> But Anup Malani has argued that, given the absence of evidence that untrue claims cannot generate a beneficial placebo effect, perhaps we would be well advised “to allow the defendant a defense that its claim generated placebo effects.”<sup>401</sup> Society might benefit from the effect generated and, as Malani concludes, “it is wrong-headed to forego valuable placebo effects simply because they are not ‘inherent[.]’ in a given product.”<sup>402</sup> It bears noting, however, that false advertising cases generally do not focus on a product's inherent nature. Those cases instead focus on material untruths.

While false advertising cases seem hostile to placebo effects generally, advertising and branding should not lead to legal penalty solely because a firm's persuasive activity yielded psychologically driven fruits like a performance enhancing placebo effect.<sup>403</sup> As Mark McKenna has argued in advo-

396. *Id.*

397. *Id.*

398. *Id.* at 862–63 (“We appreciate the possibility that a vague claim—along the lines of ‘this bracelet will reduce your pain without the side effects of drugs’—could be rendered true by the placebo effect. To this extent we are skeptical about language in *FTC v. Pantron I Corp.*, 33 F.3d 1088 (9th Cir. 1994), suggesting that placebo effects always are worthless to consumers.”).

399. *Id.* (stating how a vague claim could be rendered true by the placebo effect).

400. Malani, *supra* note 388, at 457 (“The defendant cannot claim the bracelet cures pain in order to generate placebo effects. Such a claim without prior reasonable basis is false advertising. Puffery is no defense.”).

401. *Id.* at 458 (arguing, in light of a dearth of evidence whether unsupported claims could generate placebo effects, that it might be reasonable).

402. *Id.* at 459.

403. *But see* Ramsi A. Woodcock, *The Obsolescence of Advertising in the Information Age*, 127 *YALE L.J.* 2270, 2270 (2018) (arguing that persuasive advertising is anticompetitive and information advertising is obsolete in the modern information age).



cating for trademark law to become more like false advertising law, the trademark regime “should specifically decline to regulate non-deceptive attempts to shape [consumer] preferences.”<sup>404</sup> If McKenna is right, it is hard to imagine an interpretation of current false advertising laws that would penalize the creation of a high-performance reputation unless the seller is telling outright lies or peddling unsubstantiated facts as reasonably supported.

Moreover, there are key differences between the behavior courts penalized in cases like *QT* and the creation of a performance enhancing placebo effect identified in the studies cited in this Article. First, the performance enhancing placebo effect isn’t claiming a therapeutic benefit created from whole cloth, but instead improving the effectiveness of a good or service. A putter is a tool for knocking in a golf ball irrespective of the myths that the seller of a putter may weave around its product. Second, instead of merely providing relief as measured through self-reporting, the performance enhancing placebo effects reported are externally measurable. The performance increase may stem from what some could categorize as deceit, but it is an increase quantifiable independent of self-reporting by subjects.

Malani’s general point is defensible. In cases of uncertainty, the fact that a high-performance reputation might provide spillover benefits to consumers using branded products should lead courts to lean against treating claims about that effect as actionable false advertising.<sup>405</sup> The FTC recognized a similar logic in concluding there was no violation of the Sherman Act where the challenged advertisements had both informative and persuasive elements.<sup>406</sup>

Nonetheless, Malani’s proposed modification to false advertising laws may overcorrect. The creation of a placebo effect doesn’t necessarily require false statements or the intent to mislead, merely the intent to claim a certain level of quality. Nike can craft folklore around its golf clubs without telling obvious whoppers or making scientific claims with no support. And crafting that folklore, which Rebecca Tushnet has described as the advertiser’s attempt to create a “warm fuzzy glow” about the product in the minds of consumers,

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404. McKenna, *Consumer Decision-Making*, *supra* note 38, at 122.

405. Malani, *supra* note 388, at 458–59.

406. Woodcock, *supra* note 403, at 2318 (citing, *inter alia*, Gen. Foods Corp. II, 103 F.T.C. 204, 364 (1984) (providing information about differences between coffees); *see also supra* note 272 and accompanying text.

is non-actionable puffery.<sup>407</sup> False statements are actionably false in similar ways under the Lanham Act, the Federal Trade Commission Act, and state consumer protection laws. Puffery—image making and myth generating—is not actionable.<sup>408</sup> If both are equally effective ways to generate placebo effects, reasonable policy makers might continue to allow puffery and punish false claims about a product, because the collateral damage on the way to creating placebo effects is much greater when the myth is created by making false but falsifiable claims about therapeutic benefit.

Thus, the creation of a performance enhancing placebo effect should generally not provide a defense against a claim of false advertising.<sup>409</sup> Courts should simply ask whether the seller makes a materially false or misleading description of fact or representation of fact that misrepresents the nature or qualities of the defendant's goods, services or commercial activities. If so, then those statements should trigger liability, whether or not they also create a performance enhancing placebo effect. On the other hand, if Nike were to begin advertising the high-performance placebo effect and claiming a twenty-percent decrease in strokes required to sink a putt, courts should apply the tests currently applied to determine whether Nike has a reasonable basis for making such claims.<sup>410</sup> If there is a reasonable basis, like the studies reported in Part III, such claims should not trigger liability, whether the mechanism is mechanical or psychological.<sup>411</sup>

#### D. *Passing Off and Unraveling Placebo Effects*

There is a final challenge one might raise against extending protection to marks that generate a placebo effect. In cases where the sole difference between products offered by the incumbent and the new entrant is the psychological effect of the incumbent's high-performance mark, consumers may

407. Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721, 774–75 (2010) (“There are some kinds of talk which no sensible man takes seriously, and if he does he suffers from his [own] credulity.” (quoting *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853, 856 (2d Cir. 1918) (Hand, J.))).

408. Tushnet, *supra* note 407, at 774–75 (supporting that certain advertising methods should be acceptable because puffery is non-actionable).

409. See Malani, *supra* note 388, at 457 (“Puffery is no defense.”).

410. See generally *F.T.C. v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 8 (1st Cir. 2010) (discussing the reasonable basis test).

411. See *supra* Part III.

benefit from the new entrant's infringing use, so long as they actually believe the new entrant's counterfeit goods also come from the high-performance source.<sup>412</sup> This section considers whether trademark protection should be narrowed to enable new entrants to free ride on the high-performance placebo effect.<sup>413</sup>

Passing off is the common law progenitor of much of trademark law.<sup>414</sup> The law prevents the new entrant from passing off its goods as those of the mark owner by preventing the new entrant from using the owner's mark.<sup>415</sup> Passing off is problematic because consumers who buy a knock-off are in danger of buying a low-quality lemon as they mistakenly rely on the trademark.<sup>416</sup> Consistent with that history, an action for passing off uses consumer deception as the measure of harm to the mark owner.<sup>417</sup>

But counterfeiting or passing off may cause no actionable injury to the consumer if the psychologically determined performance-enhancing aspects of an authentic and counterfeit good are the same. If a knock-off Nike putter has the same performance-enhancing effect as an authentic putter, there is no

412. See Lemley & McKenna, *Irrelevant Confusion*, *supra* note 252, at 414.

413. See *infra* note 414–19 and accompanying text. Consider an analogous outcome in legal history, long abandoned but never quite refuted. See Woodcock, *supra* note 403, at 2290–99. In the mid-twentieth century, the FTC decided, in several cases involving homogenous goods like bleach and steel wool, that persuasive advertising was anticompetitive. *Id.* Ramsi Woodcock ably summarizes that history. See *id.*

414. Schechter, *supra* note 23, at 820.

415. *Id.*

416. Lemley & McKenna, *Irrelevant Confusion*, *supra* note 252, at 414 (“When it works well, trademark law facilitates the workings of modern markets by permitting producers to accurately communicate information about the quality of their products to buyers . . . . If competitors can falsely mimic that information, they will confuse consumers, who won’t know whether they are in fact getting a high-quality product. Indeed, some consumers will be stuck with lemons.”); see also Akerlof, *supra* note 275, at 489–90, 500.

417. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 9 cmt. d (1995) (“The earliest cases involving trademarks were actions on the case in the nature of deceit . . . . These actions eventually evolved into a distinct tort of ‘passing off,’ or ‘unfair competition’ as it came to be known in the United States.”); see also 15 U.S.C. § 1114(1) (2008) (explaining that trademark protection aims to prevent use that is “likely to cause confusion, or to cause mistake, or to deceive”). Some case law indicates that consumer confusion is the metric by which to measure passing off, but that consumers do not enjoy a right to be protected from confusion. See, e.g., *Manhattan Shirt Co. v. Sarnoff-Irving Hat Stores, Inc.*, 19 Del. Ch. 151, 164 Atl. 246 (Ch. 1933), *aff’d per curiam*, 20 Del. Ch. 455, 180 Atl. 928 (Sup. Ct. 1934), *cited by* Developments in the Law Trade-Marks and Unfair Competition, 68 HARV. L. REV. 814, 889 (1955).

low quality from which to protect consumers.<sup>418</sup> To the extent that performance benefits can be attributed to brand reputation rather than the quality of the branded product, it may be less important to protect the consumers from passing off. Similarly, if prohibitions against passing off are aimed at protecting consumers from lemons, and a market for high-performance branded goods has no lemons because the value is all in consumers' collective imaginations, it may be less necessary to protect the mark owner from the appropriation of its mark. If the quality of the product is all in its psychological effect, there may be no difference between the counterfeit and an authentic product.<sup>419</sup>

Note, however, that the studies in Part III do not compare objectively high and low quality putters or offer evidence of the lack of objectively measurable quality.<sup>420</sup> One could imagine that Nike profits from the psychological benefit which provides the placebo effect to consumers, but that protection of that benefit—i.e., protection of the Nike mark—also provides Nike with the ability to recoup its investment in product development and technological improvements. If Nike can invest in technology that might also increase the likelihood of sinking a putt, it would be difficult to protect actual quality differences without also protecting the placebo effect. Failing to protect the psychological effect could lead to reduced quality output if Nike finds itself unable to recoup the costs of research and development by charging a premium for its branded products.<sup>421</sup> Thus, reducing protection against passing off would still leave consumers to suffer from a lemons market.

Moreover, confidence in the trademark system generally could erode, which would also erode the placebo effect. If consumers learn that some Nike putters are worse than others, but they are not sure which ones, then Nike's current reputation as a high-performance brand might dissipate. Even in the

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418. See Garvey et al., *supra* note 13, at 936 (discussing a study of the placebo effect of knock-off Nike putters).

419. But see Mayoor Mohan et al., *Brand Skill: Linking Brand Functionality with Consumer-Based Brand Equity*, 26 J. PROD. & BRAND MGMT. 477 (2017) (noting that consumers who see the use of a particular brand as increasing their skill connect function with brand equity).

420. See *supra* Part III.

421. See, e.g., *Ty Inc. v. Perryman*, 306 F.3d 509, 510 (7th Cir. 2002) (holding trademark protection "gives producers an incentive to maintain high and uniform quality, since otherwise the investment in their trademark may be lost as customers turn away in disappointment from the brand"); Jenkins, *supra* note 261, at 160 ("Trademarks promote technological advancement.").

absence of objectively measurable differences between putters, if consumers become aware that Nike cannot legally prevent the use of its mark by a new entrant, the placebo effect would likely unravel. Indeed, the standard account suggests that placebo effects unravel as consumers become aware of them.<sup>422</sup>

To be sure, the bulk of the studies in Part III do not provide us with a means of ascertaining a tipping point at which the placebo effect would unravel.<sup>423</sup> A particularly delayed unraveling point could permit more appropriation of brand value without dissipating a placebo effect than conventional wisdom would suggest. Nonetheless, the evidence doesn't suggest that placebo effects will never unravel. Moreover, the Amar study indicates that consumers may harbor negative feelings towards counterfeits, and those negative feelings can be sufficiently powerful to counteract a performance-enhancing placebo effect.<sup>424</sup> Indeed, that study reported feelings of disgust toward a counterfeit can even contaminate consumer perception of authentic branded goods.

## V. CONCLUSION

Studies showing a placebo effect from high-performance marks may reinforce the concern that some of the benefits consumers perceive with regard to branded goods are psychologically generated by mark owners and not grounded in "reality." But that does not necessarily lead to the conclusion that consumers must be protected from a tendency to believe what advertisers are selling them. Indeed, consumers may be able to reap positive externalities like the performance-enhancing placebo effect from the mark owner's attempt to manipulate perception. These studies suggest that in the market for high-performance goods, consumers may derive value from the branding myths they are sold. The Nike brand may work like Dumbo's feather in the famous Disney film—it may not matter why consumers believe they can fly, so long

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422. Ben Goldacre, *Placebo Effect Works Even if Patients Know They're Getting a Sham Drug*, GUARDIAN (Dec. 22, 2010), <https://www.theguardian.com/science/2010/dec/22/placebo-effect-patients-sham-drug>. But see Ted J. Kaptchuk et al., *Placebos Without Deception: A Randomized Controlled Trial in Irritable Bowel Syndrome*, PLOS ONE (Dec. 22, 2010), <http://dx.doi.org/10.1371/journal.pone.0015591> (reporting that some subjects can receive relief from a pill even when they are aware it is a placebo).

423. See *supra* Part III.

424. See Amar et al., *supra* note 179.

as they believe it.<sup>425</sup> As Spike Lee's character Mars Blackmon once amusingly proclaimed in ads for Air Jordan shoes, perhaps when consumers perform well when using high-performance branded goods, it's really "gotta be the shoes,"<sup>426</sup> just not for the reasons they were told. Reforming trademark law to reverse psychological manipulation out of an earnest effort to keep consumers from being misled might also unravel beneficial spillover effects. If consumers lose more than they gain, those reform efforts will prove to be misguided.

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425. See *DUMBO* (Walt Disney Productions 1941).

426. "It's Gotta Be the Shoes" (Nike Advertisement 1989).

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