
Bounded by Brands: An Information Network Approach to Trademarks

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Trademarks are indeed about information, but trademark doctrine misunderstands trademarks' information function. Trademark doctrine takes a broadcast view in a networked world. Rather than a world where a single source transmits messages to a passive public, we live in a world where many actors use trademarks to transmit data about a mark. Decisions are made based on data received, but trademark law's broadcast model has a naïve view of whether the data leads to good or bad decisions. This Paper explores what happens if trademarks are taken to be part of an information network. I show that by ignoring the information network nature of trademarks, current trademark doctrine favors herding and cascade problems, ensconces incumbents, and thwarts competition. One way to describe this situation is as one of bounded information and rationality. Although these concepts lie at the heart of the network theory and behavioral economics literature that explains herds, and at the heart of the law and economics approach to trademark law, the law and economics approach reaches conclusions about the implications of bounded information and rationality far different than the other disciplines. I argue that the law and economics conclusions are incorrect. They foster further bounded information and rationality problems that protect incumbent brand holders rather than enhancing consumer welfare. Furthermore, I argue that insights from information network and behavioral economics theory explain and enhance our understanding of how to correct these outcomes. In short, these theories better answer why recent calls favoring less trademark protection and increasing information available to consumers are correct.

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INTRODUCTION

You are thinking about buying a pair of running shoes. You don't know much about running shoes. You go to the Nike, Reebok, Asics, and New Balance websites, gather friends' opinions, search the Web for reviews, and look for discounts. You pick Nike. Why? Why not Reebok, Asics, or New Balance? We'd like to think that our purchases are based on some rational analysis of facts, and trademark law presumes that we do. In some cases we might engage in this sort of search behavior. But we also might admit that there is not that much time to gather all that information, let alone analyze it. So we rely on the brand, advertising, friends, Internet reviews, or some combination to make a faster, and maybe better educated, choice. We may rely on others' work as a shortcut. Trademark law assumes that this behavior is sound, on the premise that after someone purchases, she sends a signal that a given good is a wise purchase. But what if it turns out that friends, reviews, and so on are only telling us what the latest trend or fad is to buy. Do we buy branded goods, not because they are the best choice, but because we follow the herd? Might we follow the herd, even if the herd is incorrect? Might it be rational to follow an incorrect herd? We have two problems here: the need to search for information and reliance on others as we make decisions. The concept of bounded rationality applies to both problems. Bounded rationality holds that consumers face restricted amounts of information, time, and processing capacity and use "fast, frugal algorithms" to solve problems "without incurring substantial information-gathering or processing costs."¹ These concepts lie at the heart of the network theory and behavioral economics literature that explains information and herds. They are also at the heart of the law and economics approach to trademark law. Yet the law and economics approach reaches conclusions about the implications of bounded information and rationality far different than the other disciplines. I argue that the law and economics conclusions are incorrect.

Trademark law fosters bounded information and rationality problems and so protects incumbent brand holders rather than enhancing consumer welfare. In the law and economics approach to trademarks, consumers are rational gatherers and processors of information as they make purchases. After a consumer searches and then decides on what to buy, she should not have to repeat that

¹ Joseph Henrich et al., *Group Report: What Is the Role of Culture in Bounded Rationality?*, in *BOUNDED RATIONALITY: THE ADAPTIVE TOOLBOX* 343, 343 (G. Gigerenzer & R. Selten eds., 2001).

process. A trademark is the fast and frugal heuristic device—“the shorthand” as Landes and Posner call it—that facilitates information efficiency and allows a consumer “not [to] investigate the attributes of the brand.”² Trademark law prevents someone from labeling their goods with another’s mark, because consumers would be confused about the source and quality of the goods. That practice is called passing off. With passing off consumers cannot rely on the mark, and instead they have to search each time to verify that something marked X was indeed X. That goal is laudable and helps reduce search costs. But trademark law takes a broad view of confusion where almost all information not from the corporation leads to consumer confusion. Such information is often seen as misleading and to be eliminated in the name of protecting consumers from any confusion,³ even if consumers are the ones trying to share information about the corporation or its products and services. And yet in this model consumers are economic creatures—“rational, selfish, and [whose] tastes do not change.”⁴ In short trademark law posits a consumer who processes information once and never again, and trademark law limits information lest it disturb a consumer’s initial assessment. These aspects of trademark law are unsound and harm consumer welfare.

Trademark law must recognize that consumers’ tastes change, that those changes happen for a variety of reasons—including because of manipulation by mark holders—and that increasing the amount of information available to consumers enhances the system rather than harming it. Consider again the problem of fads. The information a buyer has is part of a network. We often follow others who have imperfect, independent information, instead of what we know, because it seems they have better information than us. Network theory shows that we may be smart to do that even though that practice can perpetuate suboptimal outcomes.⁵ Following a fad or trend, discounting one’s information in favor of others, is a type of herd behavior. Herds occur because of bounded information and rationality

² William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 269 (1987).

³ See Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 69-70 (2012) (“Indeed, courts routinely say that trademark law targets ‘confusion of any kind.’”).

⁴ DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 269 (2011) (quoting manuscript by Bruno Frey).

⁵ Cf. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974), reprinted in KAHNEMAN, *supra* note 4, at 429 (describing how anchoring and external influence can alter subjective probabilities and produce sub-optimal outcomes).

problems. Herds can be created and manipulated by advertising and branding efforts. Regardless of how they are created, herd effects can be powerful, but herds are fragile. They can be broken when new information reaches the decision-maker. Increasing the amount of information in the system disciplines the herd problem. More information, especially from a variety of sources such as observers, critics, gossips, and institutions, breaks the bounded rationality wall. The irony is that the law and economics approach flips the insights of bounded rationality and network theory on their heads. The law and economics approach holds that once a rational decision-maker decides (apparently not under bounded rationality problems), she has chosen to be boundedly rational, and disrupting that initial decision is inefficient. This position is perverse.

I argue that trademark success is often rooted in herd behaviors, information cascades, and related behavioral manipulation. Trademark law's current structure favors locking in herd behaviors to the benefit of brand incumbents and to the detriment of consumers. Trademark law should focus on information transmission, not content. When trademark law protects against passing off and acts that undermine a mark's ability to be a stable referent, it is allowing information to work well.⁶ The mark is a conduit for information to flow between and among producers and consumers. Information then moves in all directions.

When trademark law privileges a mark holder's information over others, it errs. Recent hostility to comparative advertising and keyword advertising illustrates the problem. Mark holders pursue lawsuits and legislation to prevent competitors from using a mark to compare goods and services. Countries outside the United States have banned comparative advertising on packaging—exactly the moment when a consumer might benefit from the information and know that the good was not someone else's good being passed off. State laws limiting keyword advertising shield mark holders from competition in the marketplace. In the name of reducing search costs, a consumer, searching online, is cut off from the new information. The irony is that the searching consumer may incur higher search costs to find the information in the advertising or never see the possible alternative at all. Calls to increase intermediary liability infect trademark law's ability to operate as a meter on competition as well. Again,

⁶ See Deven R. Desai, *Response: An Information Approach to Trademarks*, 100 GEO. L.J. 2119, 2128-29 (2012) [hereinafter *Information Approach*]; see also Ariel Katz, *Beyond Search Costs: The Linguistic and Trust Functions of Trademarks*, 2010 BYU L. REV. 1555, 1570-71.

information is being policed, and the consumer isolated from options. Insofar as trademark law protects a mark holder's brand and the holder's interest in controlling all thought and image of the brand, trademark law erects barriers to new information in the marketplace. Put simply, trademark law must maintain, if not expand, the room for more information about a mark to reach the consumer. Doing so ensures that even if herd behavior takes control, the possibility of better ideas and better entrants reaching consumers with new information is increased. When that happens, trademark law is on a path to enhancing consumer welfare rather than protecting only brand holders.

I. TRADEMARK LAW'S VIEW OF HOW TRADEMARKS WORK

The law and economics view of trademark law misses parts of how trademarks function, what they offer society, and rests on a model of decision-making that other fields have shown to be unwise.⁷ Trademark law relies on the ideal of a rational consumer who reflects on and then makes purchasing decisions. This consumer requires information to evaluate her decisions. The economic rationale behind trademark law is that trademarks should be protected because they are economically efficient; trademarks help to minimize consumers' search costs, the pre-purchase analysis a consumer performs to make her purchase decision.⁸ Yet, under this approach, the rational information-processor stops investigating her decisions. Professor William Landes and Judge Richard Posner capture this behavior and seem to have no problem with it:

[A] trademark conveys information that allows the consumer to say to himself, "I need not investigate the attributes of the brand I am about to purchase because the trademark is a

⁷ See *infra* notes 53-55, 62-69 and accompanying text. To be clear, I argue that the law and economics core was not exactly rotten, but overstated. My project is to recast trademark law by showing that if one takes information as the touchstone of trademark law, insights about how trademarks function emerge and reforms may follow.

⁸ See, e.g., Ann Bartow, *Likelihood of Confusion*, 41 SAN DIEGO L. REV. 721, 729-30 (2004) (contending that trademarks are beneficial to consumers because they help reduce search costs); Stephen L. Carter, *The Trouble with Trademark*, 99 YALE L.J. 759, 762 (1990) (noting that the primary advantage of trademark protection is that it helps lower consumer costs).

shorthand way of telling me that the attributes are the same as that of the brand I enjoyed earlier.”⁹

If you are a consumer, you need to know what you are buying is in fact what you wanted.¹⁰ But if you are consumer and wish to know that other options exist, this same model interferes with your ability to receive more information. Put differently, the trademark is also a brand, a strategic asset for a corporation. One way to manage a brand thrives on the way the law protects lower provision of information and lower information processing.

Rather than consumers processing information repeatedly, a brand holder would prefer consumers who make a decision once, and then stop receiving and processing information because they now will buy from only the brand holder. The consumer becomes brand loyal. Early approaches to brand management tracked an economics-based approach to trademarks: the holder broadcasted price and quality information to consumers who then processed it and decided whether to purchase the offering.¹¹ Companies used advertising to inform consumers about the target product and to encourage them to purchase it.¹² When consumers were ready to buy, they encountered the target product at the right price. Yet, brand scholarship acknowledges a flaw in the economics approach and criticizes the approach for being focused on short-term, isolated transactions rather than establishing a long-term connection with the consumer.¹³ If a brand only conveys market information, the company is offering a new exchange *each time* a consumer chooses to buy goods. A pure view of the brand as an information resource for the consumer does not necessarily lead to repeat purchases; it merely allows for faster information processing. In addition, the view must assume that the consumer is a fully rational maximizer who does not buy goods based on “emotional and irrational wants and desires.”¹⁴

⁹ Landes & Posner, *supra* note 2, at 269.

¹⁰ See Katz, *supra* note 6, at 1563-65 (observing that once a consumer desires a specific good, even if that reason is manufactured by advertising, trademark law helps assure that the consumer obtains what she wanted).

¹¹ See TILDE HEDING ET AL., BRAND MANAGEMENT: RESEARCH, THEORY AND PRACTICE 31-33 (2009); Landes & Posner, *supra* note 2, at 269-70.

¹² CELIA LURY, BRANDS: THE LOGOS OF THE GLOBAL ECONOMY 23-24 (2004).

¹³ HEDING ET AL., *supra* note 11, at 34 (discussing how theoretical models do not account for external, uncontrollable factors and thus do not explain the interaction between the brand and consumer).

¹⁴ *Id.* at 33; see also LURY, *supra* note 12, at 4-6.

Despite trademark law's insistence on a Platonic ideal of a rational economic person assessing each decision at every moment, branding and advertising executives know and rely on the fact that we do not process information that way.¹⁵ As Ralph Brown stated more than half a century ago, "[M]odern advertising [is] a black art whose practitioners are part of the larger army which employs threats, cajolery, emotions, personality, persistence and facts in what is termed aggressive selling."¹⁶ The symbols that facilitate these practices are brands, which are legally sanctioned as trademarks.¹⁷ Once a brand holder has deployed its brand strategy, it cannot rationally desire that the marketplace have other options in it.¹⁸ The brand critique of the economic view of trademarks is entirely sound from the brand holder perspective. A brand holder favors less, not more, information in the marketplace and embraces choices made outside of rational processing so that purchasers buy goods and services for reasons not captured in the economic story of trademarks and consumers. These preferences map to herd and cascade behaviors in network theory.

II. HERDS AND CASCADES

Trademarks are part of a network of information. People connected to that network "influence each other's behaviors and decisions."¹⁹ What we buy is subject to such influence; understanding herds and information cascades helps explain why we are influenced.²⁰ Consider two interlocked Gs, one facing right, the other left. A hooked curve that trails into an upward slope to the right. Old-school white cursive script on a field of red. A set of golden arches. A bite-missing silhouette of forbidden fruit. A three-pointed star inside a circle. What comes to mind when you think of these images? Gucci, Nike, Coca-Cola, McDonald's, Apple, Mercedes? What comes to mind when you think of these words: IBM, Microsoft, Google, GE, Intel, Disney, HP,

¹⁵ Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 732-33 (1999) [hereinafter *The Problem*].

¹⁶ Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165, 1165-66 (1948).

¹⁷ See *id.* at 1166.

¹⁸ Cf. Hanson & Kysar, *The Problem*, *supra* note 15, at 743 ("Manufacturers will respond to market incentives by manipulating consumer perceptions in whatever manner maximizes profits.").

¹⁹ DAVID EASLEY & JON KLEINBERG, NETWORKS, CROWDS, AND MARKETS: REASONING ABOUT A HIGHLY CONNECTED WORLD 425 (2010).

²⁰ See *id.*

Toyota, Nokia? There are a host of different ideas and images at play. So why do we buy one item over another? We are often imitating others' actions instead of following our data, and according to network theory it may be rational to do so while also leading to suboptimal outcomes.²¹

In simple terms, herd behavior occurs because of limited information. In the classic example, if one is choosing between two restaurants, A and B, and “both [are] more or less unknown to us” we will observe the restaurants to see which is more crowded.²² No one is in A; B is quite full. You believe other diners' tastes track yours, and they have some information about their choice; so “it may be rational to join the crowd at [B] rather than to follow your own information.”²³ The diners have “independent but imperfect information,” and you infer that their choices are better than what you personally know and follow the herd.²⁴ The problem is that the system relies on observable actions, which means that we might “converge on the same wrong action[s]” and that “the error-prone choices of a few early individuals [can] determine the choices of all successors.”²⁵

It does not take much to establish a herd even if it is wrong; but herds can be fragile.²⁶ For example, in one study an urn with three marbles—either two green and one gold or two gold and one green—was placed in front of a large group, and it had to determine whether there was a majority of one color over another.²⁷ Under the rules, each

²¹ See *id.* at 429.

²² Abhijit V. Banerjee, *A Simple Model of Herd Behavior*, 107 Q.J. ECON. 797, 798 (1992).

²³ EASLEY & KLEINBERG, *supra* note 19, at 425.

²⁴ *Id.*

²⁵ Sushil Bikhchandani et al., *Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades*, 12 J. ECON. PERSP. 151, 154 (1998) [hereinafter *Behavior of Others*].

²⁶ *Id.* at 157-58. Economics literature has developed some criticisms and further work on the nature of cascades and herds. Bogachan Çelen and Shachar Kariv have explained that a cascade requires that people ignore their private signal and thus later decision-makers learn nothing, but with herds decision-makers “become more and more likely to imitate but their actions still may provide information.” Bogachan Çelen & Shachar Kariv, *Distinguishing Informational Cascades from Herd Behavior in the Laboratory*, 94 AM. ECON. REV. 484, 485 (2004). According to them it is herd behavior that “is fragile in the sense that a strong signal may cause behavior to shift suddenly and dramatically” whereas in a cascade “no signal can cause a change in the pattern of behavior.” *Id.*

²⁷ See EASLEY & KLEINBERG, *supra* note 19, at 427 (adapting Lisa R. Anderson & Charles A. Holt, *Classroom Games: Information Cascades*, 10 J. ECON. PERSP. 187 (1996)). The group is told there is “a 50% chance that the urn contains two [green] marbles and one [gold] marble, and a 50% chance the urn contains two [gold]

person went to the urn one at a time, drew out one marble, put it back without anyone else knowing what she saw, guessed the urn's status and told everyone that guess.²⁸ By making the guess public, the next guesser did not know what was actually seen, only the choice made. Because of the way the guessing progresses, as soon as two guesses of the same color are made, the next guesser should discount what she sees even if she sees a color different than the two previous guessers.²⁹ If the correct answer was gold, but the first two guesses were green, everyone will still choose green.³⁰ Here there is a one in nine chance of that initial error occurring, and "[t]his [] chance of a population-wide error is not ameliorated by having many people participate, since under rational decision-making, everyone will guess [gold] if the first two guesses are [gold], no matter how large the group [is]."³¹ Although herds can create a long run of conformity, they can be broken. If in the same guessing game, two consecutive guessers, say 60 and 61, both see a gold marble and decide to show the marbles to the remaining guessers (thus breaking the rules), the herd breaks.³² It is the rule that stops information that fosters the herd. At a general level,

marbles and one [green] marble." *Id.*

²⁸ Correct guessers received a reward after all guesses are made. The reward is not essential but helps the experiment. See Lisa R. Anderson & Charles A. Holt, *Classroom Games: Information Cascades*, 10 J. ECON. PERSP. 187, 189 (1996).

²⁹ The first guesser should guess whatever she sees; if she sees green, she should guess green. Based on this point, the second guesser knows what the first guesser saw. If the second guesser draws green, then she should guess green. If she sees gold, she has in essence drawn twice. She knows that the first guesser saw green while she sees gold. "In this case, she is indifferent about which guess to make; we will assume in this case that she breaks the tie by guessing the color she saw." EASLEY & KLEINBERG, *supra* note 19, at 428-29.

³⁰ This guess is correct, because the first two guesses told her exactly what they saw. They outweigh her information that indicates gold. The group will hear green and not know that she saw gold. Furthermore, the fourth guesser is in the same position as the third. She has heard three green guesses. She knows the first guesses reflected what the guessers saw. She also knows the third guesser's guess had to be green, thus her "action conveys no information." See Sushil Bikhchandani, David Hirshleifer & Ivo Welch, *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992, 1000 (1992); accord EASLEY & KLEINBERG, *supra* note 19, at 429. She discounts the third guess, but that means she is in the same position as the third guesser and likewise will have to guess green even if she draws a gold. The pattern is now set for each following guesser. Once the first two guesses are green, all will guess green or vice versa if the first two guesses were green. See Bikhchandani et al., *Behavior of Others*, *supra* note 25, at 164.

³¹ EASLEY & KLEINBERG, *supra* note 19, at 429.

³² Guesser 62 had more information on which she can rely; the guesses of Guessers 1, 2, 60, and 61. There is a tie, and she should guess based on what she draws. See *id.* at 430.

different, and not necessarily large, things—“the arrival of better informed individuals, the release of new public information, and shifts in the underlying value of adoption versus rejection”—can shock or disrupt a cascade, and so cascades are “fragile with respects to small shocks.”³³ Furthermore, individuals can inform others to help them make decisions, and may wish to do so, because they believe more information will improve the ability for better decision-making. When that works, herds’ power is reduced and “the welfare of later individuals generally rises.”³⁴ It turns out that brands can be subject to herd behaviors.

Brands are cultural goods,³⁵ and as Matthew Salganik and Duncan Watts’s work on cultural goods shows, herds for cultural goods can lead astray.³⁶ Cultural goods succeed based on luck and information skews rather than inherent quality. Salganik and Watts were able to use a multiple world set-up “to simultaneously measure the appeal of the songs and measure the effect of initially false information on subsequent success.”³⁷ By establishing a world where songs were independent—that is randomly ordered and without popularity ratings—and worlds with social influence—that is ranked by most to least popular ratings and showing download numbers—the study was able to take an extra step to test influence. After the initial worlds were set, new subjects were assigned to new social influence worlds where the popularity found in the first social influence world was inverted. Thus whatever song had the most downloads at the inversion time was swapped with whatever song had the least.³⁸ They found that people who knew about others’ behavior were likely to imitate that behavior,

³³ Bikhchandani et al., *Behavior of Others*, *supra* note 25, at 158; accord EASLEY & KLEINBERG, *supra* note 19, at 430 (contending that: “[I]t [is] easy for a fresh infusion of new information to overturn [the cascade]. This is the essential fragility of information cascades: even after they have persisted for a long time, they can be overturned with comparatively little effort”).

³⁴ Lones Smith & Peter Norman Sørensen, *Observational Learning*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS 12 (Steven N. Durlauf & Lawrence E. Blume eds., 2011), available at <http://lonessmith.com/sites/default/files/observational-learning.pdf>.

³⁵ See generally Rosemary Coombe, *Embodied Trademarks: Mimesis and Alterity On American Commercial Frontiers*, 11 CULTURAL ANTHROPOLOGY 202, 204 (1996) (discussing how trademarks are a significant cultural form); Deven R. Desai, *From Trademarks to Brands*, 64 FLA. L. REV. 982, 1005-09 (2012) [hereinafter *Trademarks to Brands*] (arguing that brands can have an effect on culture and society as a whole).

³⁶ See Matthew J. Salganik & Duncan J. Watts, *Leading the Herd Astray: An Experimental Study of Self-Fulfilling Prophecies in an Artificial Cultural Market*, 71 SOC. PSYCHOL. Q. 338, 338 (2008) [hereinafter *Leading the Herd Astray*].

³⁷ *Id.* at 340.

³⁸ *Id.* at 341.

where a song was ranked mattered, most saw popularity of a song as a quality signal even if their preference was different, and “initially false perception of their popularity, arising from the inversion, caused their real popularity to change in the direction of the false belief.”³⁹ More generally, one can take Salganik and Watts’s work to ask whether *Harry Potter* novels would necessarily be as popular as they are today or sell only a few thousand books as most novels do.⁴⁰ Before one quickly says *Harry Potter* is obviously great, substitute *Fifty Shades of Grey* for *Harry Potter*. This comparison can be understood even more thanks to J.K. Rowling’s foray into mystery writing. Rowling wrote a novel under the penname, Robert Galbraith.⁴¹ Several publishers turned it down as decent but not great.⁴² The book sold a standard amount for a new author, but sales went up by more than 500% once her identity leaked.⁴³ In short, the feedback effects of social influence contribute to a rich-get-richer effect where once some popularity is established, people follow that lead and thus further the success of the popular thing for reasons other than quality or rationality, and the popularity may be somewhat random.⁴⁴

Marketers love herds and might prefer that they not stop. As Professors Easley and Kleinberg explain:

If [marketers] can induce an initial set of people to adopt the new product, then *those who make purchasing decisions later on may also adopt the product even [if] it is no better than, or perhaps even worse than, competing products*. This is most effective if these later consumers are able to observe the adoption decisions, but not how satisfied the early customers actually were with their choices; this is consistent with the idea that cascades arise naturally when people can see what others do but not what they know.⁴⁵

³⁹ *Id.* at 344-47.

⁴⁰ See Matthew J. Salganik & Duncan J. Watts, *Web-Based Experiments for the Study of Collective Social Dynamics in Cultural Markets*, 1 TOPICS COGNITIVE SCI. 439, 443-44 (2009).

⁴¹ JK Rowling Revealed as Author of the Cuckoo’s Calling, BBC NEWS (July 14, 2013), <http://www.bbc.co.uk/news/entertainment-arts-23304181>.

⁴² *See id.*

⁴³ *See id.*

⁴⁴ See EASLEY & KLEINBERG, *supra* note 19, at 483-85; accord ALBERT-LÁSZLÓ BARABÁSI, LINKED: HOW EVERYTHING IS CONNECTED TO EVERYTHING ELSE AND WHAT IT MEANS FOR BUSINESS, SCIENCE, AND EVERYDAY LIFE 129-30 (2003).

⁴⁵ EASLEY & KLEINBERG, *supra* note 19, at 444 (emphasis added).

Trademark law supports the possibility of this walled garden of information all too easily. A short discussion of bounded rationality and heuristics helps understand this point.

III. BOUNDED INFORMATION

Bounded information concepts drive both the law and economics story of trademarks and the problems of herds and decision-making that call the rational actor model into question.⁴⁶ The basic insight of Herbert Simon, that people use shortcuts to make decisions or operate in “bounded rationality,”⁴⁷ leads to a range of possible problems and

⁴⁶ Jeremy Sheff has discussed the apparent contradiction between pure rationality of classical economics and behavioral economics and concluded that trademark law “accommodate[s] and even harness[es] non-rational human thought processes, rather than suppress[es] or eradicate[s] them.” Jeremy N. Sheff, *The (Boundedly) Rational Basis of Trademark Liability*, 15 TEX. INTELL. PROP. L.J. 331, 333-34 (2007). Sheff has no problem with that result and argues that trademark law’s tests only prevent manipulation of consumers that we ought to prevent. *See id.* at 359. By championing the likelihood of confusion test as a way to protect the trademark as a heuristic, Sheff ignores the question of how that heuristic came into being and the potential harms of that process. *See id.* at 373-74. Although his discussion of having one mark per manufacturer corresponds to what I call the problem of destabilization, he assumes that the system gives the mark holder the incentive to police the mark in ways that will work well for consumers. *See id.* at 374. He does not address the way in which senior mark holders use the same power of manipulation to achieve possibly undesirable results. *See id.* As Rebecca Tushnet has observed, Sheff’s approach in fact supports limiting information; and thus, in my view, protects the mark holder’s incumbent power to exploit bounded rationality. *See* Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 553 n.219 (2008). Later work by Sheff acknowledges that consumers may suffer from bounded rationality in ways that markets may not cure and that branding can operate to bias consumers away from rational choices. *See* Jeremy N. Sheff, *Biasing Brands*, 32 CARDOZO L. REV. 1245, 1286-87, 1293 (2011) [hereinafter *Biasing Brands*]. But Sheff maintains that competition and the market will cure many areas where a mark holder exploits bounded rationality while not explaining what those situations are and whether they work despite his critique of markets and bounded rationality elsewhere. *See id.* at 1301-02. This oddity may flow from the paper’s attempt to address perhaps a false dilemma between market mechanisms and government regulation as interventions for brand problems. *See id.* at 1301-02, 1313.

⁴⁷ Herbert A. Simon, *Rational Choice and the Structure of the Environment*, 63 PSYCHOL. REV. 129, 136 (1956) (“Since the organism . . . has neither the senses nor the wits to discover an ‘optimal’ path . . . we are concerned only with finding a choice mechanism that will lead it to pursue a ‘satisficing’ path, a path that will permit satisfaction at some specified level of all of its needs.”); accord Hanson & Kysar, *The Problem*, *supra* note 15 at 690; Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1075 (2000) (noting that “[b]ounded rationality,” the term coined by Herbert Simon, captures the insight that actors often take short cuts in

strategies. On the one hand, the law and economics approach to trademarks may be understood as a response to bounded rationality problems. Search costs are part of Ronald Coases's transaction costs, and the limited ability to spend time, money, and thought to find a good or service (put differently, the need to have good information) bounds the decision-making capacity of the consumer.⁴⁸ Bounded rationality does not assume consumers have "unlimited information, time and processing ability" and instead offers that consumers "possess fast, frugal algorithms which allow individuals to solve a variety of difficult problems under ecologically realistic circumstances without incurring substantial information-gathering or processing costs."⁴⁹ The law and economics view of trademarks tracks the problems of bounded rationality but errs in its application. In law and economics, a trademark is the fast and frugal heuristic device—"the shorthand" as Landes and Posner call it—that facilitates information efficiency and allows a consumer "not [to] investigate the attributes of the brand."⁵⁰ The problem is that in this model consumers are economic creatures—"rational, selfish, and [whose] tastes do not change."⁵¹ These actors are perfect information processors who calculate expected utility, so they may choose actions that maximize their personal expected utility.⁵² Although relying on bounded rationality concepts, the law and economics approach to trademarks either ignores, denies, or at least over-relies on a consumer who does not exist. The behavioral economics literature of more than a decade ago allowed Professors Jon Hanson and Douglas Kysar to assert: "Ultimately, any legal concept that relies in some sense on a notion of reasonableness or that is premised on the existence of a reasonable or rational decision-maker will need to be reassessed in light of the mounting evidence that a human is 'a reasoning rather than a reasonable animal.'"⁵³ That literature has expanded in the interim and shown numerous ways in which we are subject to bounded rationality. Seemingly scientific and probability-based judgments can be manipulated because of personal hypotheses, false self-confidence,

making decisions that frequently result in choices that fail to satisfy the utility-maximization prediction").

⁴⁸ See Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 853-54 (2008).

⁴⁹ Henrich et al., *supra* note 1, at 343.

⁵⁰ Landes & Posner, *supra* note 2, at 269.

⁵¹ KAHNEMAN, *supra* note 4, at 269 (quoting manuscript by Bruno Frey).

⁵² Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 23 (1989).

⁵³ Hanson & Kysar, *The Problem*, *supra* note 15, at 634-35.

poor statistical analysis, experiential thinking, and risk perception errors.⁵⁴ Preferences can also be manipulated as seen in work on status-quo bias and endowment effect, context effect, irrelevant options, elastic justification, tie-variant preferences, framing effects, and more.⁵⁵

Herding may be an example of both the rational processing problem *and* the manipulable problem of bounded rationality. Economic analysis of herding explicitly looks to problems of bounded information and asks under what circumstances better information might improve learning and decision-making.⁵⁶ With more information, herds may be broken and learning returns. That view seems to be a rational-processor view that contradicts the behavioral economics approach. The apparent contradiction is just that, apparent. Behavioral economics is quite concerned with bounded rationality and learning and complements bounded rationality theory.⁵⁷ For example, prospect theory “is an attempt to articulate some of the principles of perception and judgment that limit the rationality of choice.”⁵⁸ Nonetheless, one might argue that the market would weed out irrational decision-making results, so the information and learning problems identified by behavioral economics would not emerge in the real world. As Hanson and Kysar observe, the weeding mechanism may operate in a stock market, but “in many other contexts the requirements for such arbitrage will not be met.”⁵⁹ Work by Thomas Russell and Richard Thaler shows that markets with a mix of rational and “quasi-rational” decision-makers require specific conditions to attain the outcomes of a purely rational market.⁶⁰ They found that: “[T]hese conditions are quite restrictive and are unlikely to occur in any but the most efficient of financial markets. In goods markets, a

⁵⁴ For a guide to the way in which behavioral economics has documented these areas, and insights gleaned from the work, see generally KAHNEMAN, *supra* note 4, and Hanson & Kysar, *The Problem*, *supra* note 15.

⁵⁵ See Hanson & Kysar, *The Problem*, *supra* note 15, at 672-87.

⁵⁶ See Çelen & Kariv, *supra* note 26, at 487, 496 (describing bounded rationality as it relates to herds and cascades and finding in their experiment their “subjects’ behavior can best be characterized as a mixture of bounded rationality and rationality”).

⁵⁷ See Hanson & Kysar, *The Problem*, *supra* note 15, at 690-91.

⁵⁸ Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, in RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY 67, 89 (Robin M. Hogarth & Melvin W. Reder eds., 1987).

⁵⁹ Hanson & Kysar, *The Problem*, *supra* note 15, at 691.

⁶⁰ Thomas Russell & Richard Thaler, *The Relevance of Quasi Rationality in Competitive Markets*, 75 AM. ECON. REV. 1071, 1075-76 (1985).

mistake by one individual will generally not create an arbitrage or profit opportunity for someone else.”⁶¹ One cannot assume non-rational behavior “will simply be weeded out by an evolutionary process in the market.”⁶² In short, irrational behavior is driven out of the market only under certain, rare circumstances.

Not only will non-rational behavior persist in the market, it can be fostered and manipulated. The work on herds shows that herds can be manipulated by systems that limit information flow and by influencing or setting cultural signals.⁶³ This point connects marketers’ desire to stimulate a herd to behavioral economics problems. The herd strategy and the way marketers and mark holders use advertising aim “to trigger cognitive imperfections in their subjects.”⁶⁴ For example, the Marlboro Man advertising campaign is an identity, “feel-good,” or lifestyle branding strategy that relies on creating positive affect—as a behavioral economist would put it—rather than a rational, utilitarian analysis.⁶⁵ Hanson and Kysar were particularly concerned about the way in which cognitive bias works in consumer products, because consumers are “susceptible to bias manipulation by marketers and manufacturers.”⁶⁶ The concerns of consumer products and trademark law go hand-in-hand. Treating cognitive biases as exogenous is a mistake, because “individual perceptions can be studied, isolated, and manipulated by those in a position to influence the individual’s perceptual context.”⁶⁷ And that is what happens. For example, Campbell’s Soup, Anheuser-Busch, and retailers have used insights from behavioral economics to shape their advertising and marketing campaigns.⁶⁸

Nonetheless, the line between rational economic and behavioral economic decision-making is illusory. Daniel Kahneman’s explanation of System 1 and System 2 modes of thinking shows how the two types of thinking co-exist.⁶⁹ As he describes them: “System 1 operates

⁶¹ Richard H. Thaler, *The Psychological and Economic Conference Handbook: Comments on Simon, on Einhorn, and on Tversky & Kahneman*, in RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY, *supra* note 58, at 95, 97.

⁶² Hanson & Kysar, *The Problem*, *supra* note 15, at 692.

⁶³ See, e.g., Salganik & Watts, *Leading the Herd Astray*, *supra* note 36, at 338 (finding that subjects were influenced by information manipulation).

⁶⁴ Hanson & Kysar, *The Problem*, *supra* note 15, at 693.

⁶⁵ See *id.* at 732.

⁶⁶ *Id.* at 692-93; accord KAHNEMAN, *supra* note 4, at 413.

⁶⁷ Hanson & Kysar, *The Problem*, *supra* note 15, at 723.

⁶⁸ See *id.* at 748.

⁶⁹ KAHNEMAN, *supra* note 4, at 20-21 (adopting the terms first proposed by psychologists Keith Stanovich and Richard West).

automatically and quickly, with little or no effort and no sense of voluntary control. System 2 allocates attention to the effortful mental activities that demand it, including complex computations. The operations of System 2 are often associated with the subjective experience of agency, choice, and concentration.”⁷⁰ System 1 is what takes hold when one has become brand loyal. It is where heuristics and mental shortcuts live. It is “the automatic system.” System 2 is what law and economics claims controls consumer decision-making and, when active, may allow one to override System 1. It is the “effortful” system. The Systems are, however, fictional representations of modes of thinking that work together.⁷¹ In some cases the thinking side may further the mistakes of the automatic side as it “endorses or rationalizes ideas and feelings generated by System 1.”⁷² System 2 can discipline System 1 if attention is paid “and [System 2] is essential to some tasks, [such as] comparison, choice, and ordered reasoning.”⁷³ The problem is that System 2, the effortful system, is limited by “knowledge at hand,” and because “we (our System 2) do not know any better” when deciding.⁷⁴ According to Kahneman, it is not easy to re-educate System 1. The way to solve the problem is to recognize that one is in a behavioral rut from System 1, slow down, and use System 2 to evaluate. Yet we are least likely to take this pause when facing a difficult decision or when we have some doubt.⁷⁵ There is a possible way out of this problem. Observers, critics, gossips, and institutions are better placed to identify the error because they won’t be in the decision process and can see the error. Sources of trusted criticism can enable better decision-making.⁷⁶

Both the herding and the behavioral economics literature look to methods of better information and ways to increase the possibility of learning to discipline problems in decision-making that emerge for a range of reasons. The irony is that in trademark law and in brand strategy the goal is to reduce effort and allow System 1 to take over. The problem is that markets do not cure System 1 non-rational behaviors, *and* mark holders exploit the way System 1 works.⁷⁷ Brand

⁷⁰ *Id.*

⁷¹ *See id.* at 29.

⁷² *Id.* at 415.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *See id.*

⁷⁶ *See id.* at 418.

⁷⁷ *See generally* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999)

practices continually evolve to use identity, personality, packaging, direct-marketing, psychological profiles, and whatever method necessary to shape preferences and grab consumers to stay in System 1 thinking.⁷⁸ If the strategy works, brand holders can extract rent as consumers pay more for otherwise fungible goods.⁷⁹ According to some, brand holders “must capitalize on [such] manipulation or eventually be displaced from the market.”⁸⁰ Although we might say that brand holders will do what they need to do, a free ride is not required. Trademark law, however, provides just that. Trademark law systematically thwarts activities that open the door to breaking bounded rationality errors identified in the herding and behavioral economics literature while favoring activities that promulgate the problems.⁸¹ Thus trademark law fosters, embraces, and entrenches consumer manipulation with little to no awareness of the problem.

IV. TRADEMARK LAW’S BARRIERS TO INFORMATION

Trademark law’s willingness to over-protect an incumbent mark holder in the name of reducing search costs retards the ability to stop the herd and System 1 errors. Although herd behaviors can be powerful, they are fragile *if new information can reach the decision-maker*. Behavioral economics also posits a powerful system that can lead to poor decisions, but that can be reined in if information and discussion are allowed to interrupt habits. Trademark law, however, obstructs information flows.⁸² Instead of promoting information exchange across and within markets, “[trademark] law’s core mission, as it is understood today, is to facilitate the transmission of accurate information *to the market*”⁸³ by the mark holder. This view holds that information relates to economic efficiency,⁸⁴ and the idea that such

[hereinafter *Some Evidence*] (documenting manipulation tactics in food, pharmaceutical, environmental, thrill-seeking, fear-based, and tobacco industries).

⁷⁸ See Desai, *Trademarks to Brands*, *supra* note 35, at 994-99; accord Hanson & Kysar, *The Problem*, *supra* note 15, at 747.

⁷⁹ See Deven R. Desai & Spencer Waller, *Brands, Competition, and the Law*, 2010 BYU L. REV. 1424, 1425; accord Hanson & Kysar, *The Problem*, *supra* note 15, at 747.

⁸⁰ Hanson & Kysar, *Some Evidence*, *supra* note 77, at 1425.

⁸¹ Cf. Sheff, *Biasing Brands*, *supra* note 46, at 1312 (noting choices in consumer law end up shifting transaction costs).

⁸² See Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 778 (2004) (arguing that “trademark law [should] foster[] the flow of information in markets”).

⁸³ Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 548 (2006) (emphasis added).

⁸⁴ See Landes & Posner, *supra* note 2, at 268-69.

efficiency fosters “more competitive markets by improving the quality of information in those markets.”⁸⁵ Under this approach, trademarks must remain stable so that “products and producers [are] easier to identify in the marketplace.”⁸⁶ When the law protects that stability, producers will arguably want to maintain and perhaps improve quality because they will benefit from that investment and the assurance that the law will prevent others from “reap[ing] the reputation-related rewards of that investment.”⁸⁷ This “reliable vocabulary for communications between producers and consumers”⁸⁸ flows only from the producer. Instead of a rich information environment, trademark law favors a purified one where the brand holder is able to decide what can and cannot be said about the brand.

Several doctrines in trademark law unnecessarily reduce information in the marketplace. Doctrines such as anonymous source, goodwill, merchandising rights, initial interest confusion, and dilution further corporate brand interests in building a brand identity and owning a consumer but do not serve search costs and information transmission.⁸⁹ Anonymous source doctrine relies on a consumer not knowing from where the good came.⁹⁰ Goodwill, merchandising, and licensing allow a firm to obscure from where a good came and arguably allow a firm to establish a certain quality to start and then

⁸⁵ Stacey L. Dogan & Mark A. Lemley, *A Search-Costs Theory of Limiting Doctrines in Trademark Law*, 97 TRADEMARK REP. 1223, 1227 (2007) [hereinafter *Search-Costs Theory*].

⁸⁶ Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 623 (2004); see also *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163-64 (1995) (citation and internal quotation marks omitted) (“[T]rademark law . . . reduces the customer’s costs of shopping and making purchasing decisions, . . . for it quickly and easily assures a potential customer that *this* item — the item with this mark — is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past.”).

⁸⁷ Beebe, *supra* note 86, at 623 (noting that trademarks encourage producers to invest in quality); see also *Qualitex Co.*, 514 U.S. at 164 (same).

⁸⁸ Dogan & Lemley, *Search-Costs Theory*, *supra* note 85, at 1226. To be clear, Dogan and Lemley seek to use search costs to limit trademark creep. Nonetheless, there is an open question as to what acts disrupt a reliable vocabulary. Insofar as certain articulations of search costs approach to trademark law are a subset of Landes and Posner’s law and economics approach to trademarks, this Article questions how well that approach captures the way in which trademark law may favor one message — the producer’s message — over other messages.

⁸⁹ See Desai, *Trademarks to Brands*, *supra* note 35, at 1027-29.

⁹⁰ See, e.g., *id.* at 1011 (noting that under the doctrine consumers need not know the corporate source the trademark originated from, but that source still must represent a single source or a certain brand, since that is essentially what consumers look for).

later reduce that quality without penalty.⁹¹ Initial interest confusion explicitly prevents someone from using another's mark to attract a consumer to a good even when the consumer is not confused.⁹² Dilution explicitly rejects confusion and information enhancement as its foundation.⁹³ Recent trends against comparative advertising and demands for greater intermediary liability for trademark infringement undermine the information function of brands in favor of the pure brand message. Although comparative advertising is technically permitted, the likelihood of confusion doctrine as applied does not allow advertising that causes confusion, and the doctrine's application is inconsistent.⁹⁴ This combination leads to a world where engaging in comparative advertising requires being willing to engage in costly litigation.⁹⁵ In free speech terms, the structure chills speech; in business terms, the structure is anti-competitive.⁹⁶

The space where information is relatively cheap, the Internet, is where brand holders have sought to expand trademark doctrines in the name of stopping confusion but in the service of preventing beneficial information flow. As keyword-advertising cases demonstrate, companies would rather prevent people from finding that a competitor may offer a similar good for less or a substitute. The desire to prevent the direct competitor's good from being found is clear. By substitute, I here follow Michael Porter who notes that sometimes a new product will destroy a market, because the incumbent does not realize consumers see a new product as fulfilling a need.⁹⁷ For example, Kodak thought that it was a film company, not a picture company. As digital cameras started to take hold, Kodak did not grasp that people were interested in capturing images more than exactly how they did so. A digital camera producer might have wanted

⁹¹ See *id.* at 1011-19 (detailing how the shift to expansive goodwill and permissive merchandising uncoupled quality control from trademark law); J. Shahar Dillbary, *Getting the Word Out: The Informational Function of Trademark*, 41 ARIZ. ST. L.J. 991, 1029 (2009) (noting difficulty in detecting quality shifts).

⁹² Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 CARDOZO L. REV. 105, 135 (2005).

⁹³ See Desai, *Trademarks to Brands*, *supra* note 35, at 1027-28.

⁹⁴ See, e.g., Mark A. Lemley & Mark P. McKenna, *Is Pepsi Really a Substitute for Coke?: Market Definition in Antitrust and IP*, 100 GEO. L.J. 2055, 2111-12 (2012) (noting that if using a mark is enough to cause confusion, it will disqualify the advertising as comparative advertising).

⁹⁵ See *id.*

⁹⁶ See Rothman, *supra* note 92, at 158-59.

⁹⁷ See Michael E. Porter, *The Five Competitive Forces that Shape Strategy*, HARV. BUS. REV., Jan. 2008, at 25-27, 31.

to show ads when someone was looking for film. Telling a consumer, “Thinking of another roll of Kodachrome? Try a digital camera,” is a powerful way to communicate, but poses no harm to the mark holder other than competition.⁹⁸ The nature of the Web explains why an incumbent would fear the medium and use whatever means possible to prevent informative uses of a brand.

The Web interferes with keeping a consumer in the dark about options; it enables the small shocks that break up herds. This fact troubles brand holders. Brand holders invest in being found; once found, like a Vegas casino spending to attract whales—the big gamblers essential to casinos—brand holders would rather consumers not look elsewhere to satisfy their needs. Before the Web, the relationship between brand holders and consumers was somewhat stable. The brand holder tried to speak directly to consumers and eliminate the power of the middleman retailer to tell consumers what to buy.⁹⁹ If a brand holder can stimulate a herd, the investment in reaching consumers directly pays off quite well. The initial adopters and followers will want a specific brand regardless of other, perhaps better, options. And if consumers only want a specific brand, the retailer has to stock it even though a potential substitute may be available, as good, and cost less.¹⁰⁰ A consumer who is not searching for a good but for a specific brand buys that brand. But if the consumer is searching, the decision on what to buy is not set. For a brand holder, showing up at the top of online search results helps. Thus, brands established online presences, sued vigorously over domain names, and tried to ensure that consumers found only their brand online.¹⁰¹ Despite some success in dominating domain name policy, search ads proved a thorn in brand holders’ side. After all the work to build a brand and establish some rules favorable to brands online, search ads came along and offered a way to inform consumers about options outside the brand.¹⁰² They provide the small shock to

⁹⁸ See Desai, *Information Approach*, *supra* note 6, at 2128; accord McKenna, *supra* note 3, at 138-39.

⁹⁹ See Desai, *Trademarks to Brands*, *supra* note 35, at 1008.

¹⁰⁰ See Desai & Waller, *supra* note 79, at 1440.

¹⁰¹ Cf. Ray Fisman, *Did eBay Just Prove that Paid Search Ads Don’t Work Well?*, HBR BLOG NETWORK (Mar. 11, 2013, 2:15 PM), http://blogs.hbr.org/cs/2013/03/did_ebay_just_prove_that_paid.html (explaining major online ad campaigns compared being found as the top result on a search).

¹⁰² See *id.* (noting that search ads help smaller companies, and companies seeking entry into new markets, grab consumer attention); cf. Thomas Blake, Chris Nosko & Steven Tadelis, *Consumer Heterogeneity and Paid Search Effectiveness: A Large Scale Field Experiment 21* (Mar. 6, 2013) (unpublished manuscript) (on file with eBay

break a cascade. Furthermore, as consumers share opinions both pro and con about a brand and so re-interpret what a brand means or police claims about why to buy a certain brand, the Web offers many small shocks that can disrupt a cascade.

Technology such as search, social networks, and online rating systems present a paradox for brands, because it can allow a brand to benefit from a herd but also disrupt it. When technology allows a brand holder's message to reach consumers and go viral, brand holders are quite pleased. When faced with practices that interfere with full control over the meaning of a brand, brands holders have, however, pursued aggressive trademark suits against consumers for critical sites and review sites, online auction sites, and search engines for keyword advertising.¹⁰³ In some cases, state laws have sought to limit keyword advertising champion brand interests.¹⁰⁴ The lawsuits and legislation separately and together create a world hostile to information enhancing activities online.¹⁰⁵ Outside the United States, comparative advertising has been less possible even in the offline world.¹⁰⁶ Canada has a partial ban on comparative advertising that prevents the use of another's mark on one's package even when it is clearly comparing the other's goods to one's own.¹⁰⁷ A recent case by the European Court of Justice¹⁰⁸ required the Court of Appeal of England and Wales to prohibit truthful comparative advertising.¹⁰⁹ There a perfume maker used the plaintiff's name on packaging to inform customers that its lawfully made scent smelled like the plaintiff and the courts held that

Research Labs), available at <http://conference.nber.org/confer/2013/EoDs13/Tadelis.pdf> (finding that smaller companies must use search ads to compete with large, incumbent brands).

¹⁰³ Even before the Internet, this practice was a problem. See, e.g., Rosemary Coombe & Andrew Herman, *Trademarks, Property, and Propriety: The Moral Economy of Consumer Politics and Corporate Accountability on the World Wide Web*, 50 DEPAUL L. REV. 597, 598 (2000) (noting analog precedents to online trademark enforcement practices).

¹⁰⁴ See Eric Goldman, *Brand Spillovers*, 22 HARV. J.L. & TECH. 381, 400-02 (2009) (discussing Alaskan and Utah statutes).

¹⁰⁵ See *id.* at 400-01; Lisa P. Ramsey, *Brandjacking on Social Networks: Trademark Infringement by Impersonation of Markholders*, 58 BUFF. L. REV. 851, 869 (2010).

¹⁰⁶ See Katz, *supra* note 6, at 1572.

¹⁰⁷ *Clairol Int'l Corp. v. Thomas Supply & Equip. Co.*, [1968] 2 Ex. C.R. 552 (Can.); see also Katz, *supra* note 6, at 1572.

¹⁰⁸ *Case C-87/07, L'Oreal SA v. Bellure NV*, 2009 E.C.R. I-518, ¶ 65.

¹⁰⁹ See *id.* ¶ 65; Carys J. Craig, *Perfume by Any Other Name May Smell as Sweet . . . But Who Can Say?: A Comment on L'Oreal v. Bellure*, 22 INTELL. PROP. J. 321, 323-24, 333-34 (2010).

such use infringed the trademark.¹¹⁰ The claims behind shutting off information rely on search costs theory, which errs if information is the touchstone of trademark law.

V. THE INFORMATION FUNCTION

Trademarks' information function is, and should be, to facilitate the flow of information about a mark; not to protect one view of a mark. Trademarks as information devices will have to endure slightly higher search costs. These costs are not harmful to the system—they enhance it. Trademark law presumes a stability to the mark and the message about a mark; yet mark holders routinely send multiple messages through a mark to consumers.¹¹¹ Mark holders send simultaneous messages about price, a social issue, and personal identity. Mark holders even change the message about a mark as time passes and tastes change.¹¹² None of these practices are bad; they simply belie that there is a single message about a mark. The mark is not the message; the mark is the channel through which many messages are sent. Trademark law treats messages from someone other than the mark holder as noise to be eliminated so that consumers have less to process and their imaginations “are not burdened.”¹¹³ The claim is that search costs are lowered and all are better off. The lowered search costs may not be based on quality and markets as trademark claims. Understanding trademarks as information devices within a network reveals that success is random and a matter of luck. That random luck can also create a situation where welfare is reduced because decision-makers lack information to disturb their behavior.

A strong information system for trademarks permits more information to flow but carves out disturbance that could break the system. This Article, and my previous work, are part of my information and trademarks project.¹¹⁴ The full shape of an

¹¹⁰ See *L'Oreal*, 2009 E.C.R. I-518, ¶¶ 51, 65. For further discussion on the way this approach hinders speech and the way consumers receive information, see Robert Burrell & Dev Gangjee, *Trade Marks and Freedom of Expression: A Call for Caution*, 41 INT'L REV. INTEL. PROP. & COMPETITION L. 544, 559-61 (2010), and Craig, *supra* note 109, at 331-34.

¹¹¹ Desai, *Information Approach*, *supra* note 6, at 2126.

¹¹² See, e.g., Desai, *Trademarks to Brands*, *supra* note 35, at 1038-42 (describing how Harley-Davidson changed the meaning of its brand over time).

¹¹³ See *Ty Inc. v. Perryman*, 306 F.3d 509, 511 (7th Cir. 2002); Graeme W. Austin, *Trademarks and the Burdened Imagination*, 69 BROOK. L. REV. 827, 828-29 (2004).

¹¹⁴ See generally Desai, *Trademarks to Brands*, *supra* note 35 (discussing how trademark law hinders the information functions of brands).

information-based trademark system is beyond the scope of this Article. Nonetheless, I set out some of the contours of the proposed system. It would cabin trademark law so actions that destabilize the ability of the symbol to function as an information device are not permitted, but those which merely require a mark holder to invest in the brand and its messages from the brand holder's view are not. As Ariel Katz points out, even within a law and economics framework there are two distinct aspects to search costs theory: "[F]acilitating the exchange between buyers and sellers" by offering a stable identifier of a good—a linguistic function—and maintenance of "goods and services at defined and persistent qualities," which reduces search costs in a different way—a trust function.¹¹⁵ Trust here is the ability to know the quality of the good matches what the mark holder promises. It permits consumers to know that mark holder's claims are authentic and thus reduces possible lemons problems.¹¹⁶ Increased search costs on the linguistic side do not necessarily decrease the trust function. Under Katz's analysis, rules preventing actions that impair both functions are normatively strong.¹¹⁷ His best example for such a rule, passing off, comports with information theory as I have applied it to trademark law. From either perspective, passing off so destabilizes the ability of the mark to function as referent, that it cannot be allowed.¹¹⁸ Restrictions on truthful comparative advertising fail when they "handicap[] the ability of [a] competitor to provide useful information," because they reduce information in the marketplace and do not hinder the linguistic function or the trust function.¹¹⁹ Consumers still know that the mark refers to the mark holder; that is the whole point of the comparison. Trust still functions, because consumers can look to the mark holder's messages about what its good is and provides. Consumers may not believe the messages, but that is to be expected and fostered for those customers "who were willing to contemplate a switch."¹²⁰

The proposed system also addresses a type of moral hazard the current system fosters. Mark holders may switch the quality of their goods, sell the business, or otherwise stray from what consumers first

¹¹⁵ Katz, *supra* note 6, at 1559-60, 1563.

¹¹⁶ *Id.* at 1608.

¹¹⁷ *Id.* at 1570-71.

¹¹⁸ See Desai, *Information Approach*, *supra* note 6, at 2124; Katz, *supra* note 6, at 1570-71.

¹¹⁹ Katz, *supra* note 6, at 1555.

¹²⁰ *Id.* at 1577.

thought was the message of the brand.¹²¹ Mark holders are apt to manipulate consumers with branding techniques. When any of these things happen, the ability to question the brand and investigate its claims is important. The herd literature calls these challenges “small shocks” which improve the system by increasing learning and breaking herds. As Kahneman argued, critics, gossips, and observers who can share what they know help us use System 2 thinking to evaluate rather than simply respond.¹²² Laws that prevent a search intermediary from presenting such information or a social network from facilitating brand criticism reduce the ability of consumers to shape the marketplace by raising issues regarding whether to trust or lend credence to the mark holder’s claims. Such laws also defeat the possibility of greater learning to address poor decisions driven by behavioral biases. Indeed, one way to read the Supreme Court’s recent decision in *United States v. Alvarez*, which resembled a trademark case,¹²³ is as rejecting protecting the public from even false statements of fact, let alone confusing ones, in favor of corrective speech.¹²⁴ In *Alvarez* someone lied about whether he had won the Congressional Medal of Honor, but the Court struck down a regulation criminalizing the behavior in part because four justices believed that “the dynamics of free speech, of counter speech [sic], of refutation, can overcome [a] lie.”¹²⁵ Justice Breyer’s concurrence, which Justice Kagan joined, acknowledged the power of more accurate information to “counteract the lie.”¹²⁶ The opinion looked especially to the Internet as a resource for such counter-speech and education.¹²⁷ By analogy, rather than relying on a system where the mark holder or a symbol faces no criticisms or even lies, the better option is to let the information flow so that the public can see options and communicate about them. This path will require more thought and could reduce the reliance on heuristics, but as behavioral economics shows, slowing down because one is presented with information that requires some extra work can

¹²¹ See EASLEY & KLEINBERG, *supra* note 19, at 444.

¹²² See KAHNEMAN, *supra* note 4, at 418.

¹²³ *United States v. Alvarez*, 132 S. Ct. 2537, 2554 (2012) (Breyer, J., concurring) (“Statutes prohibiting trademark infringement present, perhaps, the closest analogy to the present statute.”). Justice Breyer makes the connection between trademark law and the case, but conflates confusion doctrine and dilution doctrine. *Id.*

¹²⁴ *Id.* at 2546-47 (majority opinion). (“[This opinion] rejects the notion that false speech should be in a general category that is presumptively unprotected.”).

¹²⁵ *Id.* at 2549.

¹²⁶ *Id.* at 2556 (Breyer, J., concurring).

¹²⁷ See *id.* at 2540 (majority opinion).

improve results.¹²⁸ Whether called corrective speech, consumer criticism, or data about a brand, the decision here is to increase the amount of information while loosening claims about the quality of it. Such an approach adheres to an information foundation for trademark law and comports with insights from information and network theory: in well-functioning information systems, information moves freely. That movement will not cure all problems, but it opens the possibility for better outcomes as it starts to address the problems of how we are bounded by brands.

CONCLUSION

Trademark law ignores what brand managers and theorists live; brands function on many levels and exploit actions well outside the traditional rational economic model that animates trademark law. In maintaining an adherence to old models and unfounded assumptions, trademark law becomes the unwitting servant of a system that has no care for consumer welfare, nor under current law would it. Advertising and psychological manipulation have been around for more than a hundred years. The use of identity, myth, and culture to build brands and sell dates back to at least Greek and Roman times.¹²⁹ These activities will remain, for in our society, they are seen as part of the economy and building a marketplace. Information has taken on a large role in both trademark law's imagination and in how we think about the marketplace in general. I argue that if trademark law truly wishes to protect consumers and rely on information as its lodestar, trademark law's impoverished understanding of information is its downfall. Trademark law must take branding and all its features into account. Furthermore, the shift in how information functions in society requires that trademark law rethink its claims. The high cost information world of thirty years ago has gone in favor of low-cost, ubiquitous, and on-demand information. Brand holders fight to gain consumers attention and use a range of means to keep that attention, but that effort confers no rights on the brand holder other than preventing acts that destabilize the ability of a mark to function in a modern information system. In such a system the mark is a medium through which many messages flow. Brand holders wish to use that system to promote their brands but also wish to exert the same control

¹²⁸ See KAHNEMAN, *supra* note 4, at 65.

¹²⁹ See Heinrich von Staden, Address at the UC Davis Law Review Symposium: Brand New World, Medicinal "Brands" in Ancient Greece and Rome: Authentication, Falsification, "Ownership" and the Trade in "Luxury Goods," (Oct. 5, 2012).

over meaning and consumers that holders enjoyed in a bygone era. Arguments against comparative advertising, consumer criticism, and new search technologies are arguments to reduce information flows and to go back in time. They are a call to a low-information universe that is susceptible to herd behaviors and manipulated outcomes where a few lead others to decisions, because information is isolated from the process. When trademark law supports such results it runs away from enhancing the information marketplace and reveals itself as a servant of brands rather than consumers. One part of the solution to this problem is to embrace the way in which comparative advertising and new technologies allow consumers to use brands to increase information in the marketplace. These interactions are the “small shocks” that break a herd’s run in one direction or break us out of heuristic thinking into evaluative thinking. Enabling such shocks opens the door to greater competition, better ability to police promises by brand holders, and new ways to let producers and consumers be matched as new products and demands emerge.