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# Stealth Marketing and Antibranding: The Love that Dare Not Speak Its Name

SONIA K. KATYAL†

## INTRODUCTION

In the 1992 film classic, *Wayne's World*,<sup>1</sup> Mike Myers (Wayne) and Dana Carvey (Garth), two metalheads, are confronted with stardom after their homemade cable access show gets purchased by a local television station.<sup>2</sup> Their new corporate producer, Benjamin Kane (played brilliantly by Rob Lowe) entreats them to allow a sponsor, Noah Vanderhoff, a prominent spot on the show, gently reminding the two that they are bound by contract to do so.<sup>3</sup> "Well, that's where I see things just a little differently," Wayne replies, opening a Pizza Hut box, with the company's famous logo emblazoned directly before the camera.<sup>4</sup> "Contract or no, I will not bow to any sponsor," he proclaims loudly, opening the box and taking out a large pizza slice.<sup>5</sup> They continue to discuss the matter ("It's just the nature of the beast," Lowe tries to explain to Wayne).<sup>6</sup> "Maybe I'm wrong on this one," Wayne tepidly responds, "but for me, the beast doesn't involve *selling out*," chomping loudly on a chip from a large Doritos Chips bag.<sup>7</sup> "Garth, you know what I'm talking about, right?" Wayne asks, while the

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† Professor of Law, Fordham Law School. The author wishes to express her thanks to the participants at the Buffalo Advertising Conference, especially Mark Bartholomew, Rebecca Tushnet, and Lisa Ramsey, and Rachael Braswell, Jana Checa Chong, Sarah Constantine, Justin Ferguson, Rachel Kronman, Dan Feng Mei, Alison Schilling, and Genan Zilkha for excellent research assistance. Thanks also to the participants in the Trademarks, Branding and Freedom of Expression course for such stimulating discussions of these issues.

1. WAYNE'S WORLD (Paramount Pictures 1992).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

camera pans over to Garth, dressed in head-to-toe Reebok gear, who poignantly agrees, "It's like people only do these things because they can get paid. And that's just really sad."<sup>8</sup> The scene ends with Wayne proclaiming that his choice was, "the choice of a new generation," while sipping from a prominently displayed Pepsi can, offering a wide toothy grin.<sup>9</sup>

The scene turned out to be one of the most unforgettable moments of product placement in the history of American film, with the sponsors (Pizza Hut, Doritos, Pepsi, etc.) engaging in both indirect forms of advertising and blatant self-parody. As one commentator explains, the genius of the scene was motivated by the filmmaker's willingness to engage in the direct selling of commodities even as it poked fun at product placement.<sup>10</sup> It may have masqueraded as an ironic or satirical commentary on branding and commerciality, but it still comprised product placement nonetheless.<sup>11</sup> As one report observed, "*Wayne's World* may have skewered the concept of product placement, but they also cashed the checks and laughed all the way to the bank."<sup>12</sup>

Nearly twenty years later, things have not really changed, except that the world is now, even more, perhaps, a landscape of product placement and branding.<sup>13</sup> "In the twenty-first century," one commentator notes, "brands have acquired a place in the world unimaginable in any previous period of history."<sup>14</sup> Consumers, too, have fallen in love with the brand.<sup>15</sup> Brands permeate the fabric of our lives—they

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8. *Id.*

9. *Id.*

10. Michael Joshua Rowin, *Capital Won*, REVERSE SHOT, May 2007, [http://www.reverseshot.com/article/waynes\\_world](http://www.reverseshot.com/article/waynes_world).

11. *Id.*

12. K. Thor Jensen, *Guide to Product Placement*, June 30, 2008, <http://www.ugo.com/movies/product-placement/?cur=waynes-world>.

13. See DAVID A. AAKER & ALEXANDER L. BIEL, BRAND EQUITY & ADVERTISING: ADVERTISING'S ROLE IN BUILDING STRONG BRANDS 67 (1993) ("Anthropologist John Sherry (1987) noted that brands have become so ubiquitous in 20<sup>th</sup>-century America that we could say we are living in a rich 'brandscape.'").

14. THE EXPRESSIVE ORGANIZATION: LINKING IDENTITY, REPUTATION, AND THE CORPORATE BRAND 52 (Majken Shultz et al. eds., 2000).

15. *Id.*

help construct our identities, our expressions, our desires, and our language. Yet inasmuch as they serve as powerful expressions of consumer identity and desire, they are also an important vessel of corporate identity and property.

By inhabiting these two worlds—the world of the consumer, and the world of the corporation—brands have come to play an increasingly vexing role in public consciousness. On one hand, they represent a proprietary vessel, a trade symbol that allows a company to symbolically encapsulate its identity—its goals, its products, and, increasingly, its philosophy.<sup>16</sup> Yet on the other hand, brands are also becoming an expressive index of consumer identity and philosophy. Branding offers us a curious transformation of the corporate to the personal; it offers individuals a way to express certain identities, preferences, and passions symbolically: some wear Adidas and Nike shoes because they favor an active, athletic, physically competitive lifestyle, along with the philosophy of competitive living; others dress themselves in Prada's subtle shades to suggest a demure, classic, sophisticated presence. These associations are tightly socially constructed through advertising, but they are also images that are malleable and easily changed.

Further, at the same time that brands are expressive, they are also powerful devices of economic power and market dominance, a factor which leads to potent struggles over their meaning and definition. For, aside from the idealized convergence between personal and corporate identity that a brand represents, a brand can be also simultaneously deeply political and deeply commercial, and as part of our cultural consciousness, a brand can often serve as a powerful organizing principle for political action. In just the last few decades, a new movement of activists has sprung up internationally and domestically, engaging in artistic and political activity to challenge the expansion of the brand into public discourse.<sup>17</sup> Some types of “antibranding” seek to retake public space for their own expression, using graffiti and street art to dissent from the commercialization of the public sphere; some seek to simply

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16. For an excellent discussion, see Laura Heymann, *The Public's Domain in Trademark Law: A First Amendment Theory of the Consumer*, 43 GA. L. REV. 651 (2009).

17. Sonia Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489 (2006).

rebrand or recode existing brands for the purposes of humor or social commentary. Sometimes antibrands might target a certain brand for opposition; at other times, they might utilize a brand for the purposes of satirical or humorous commentary on another subject. And yet, the ways in which these artists have done so have raised complicated questions of identity, language, and control—setting up a clash between the First Amendment and intellectual property.

Admittedly, antibrands highlight a critical disjunction between the economic rationale of the marketplace and freedom of speech, and the regulatory, mediating role played by law. But today a major shift has taken place within the spheres inhabited by the brand and the antibrand, respectively. For many years, the brand and the antibrand peacefully coexisted, and most consumers were largely able to identify both by drawing upon context, in both the worlds of real and digital space. However, more recently as consumers have grown more and more overloaded with information, advertisers have been forced to seek out more creative ways to communicate their messages to the public, leading to a blurring of the lines between commercial and noncommercial forms of expression. Witness the *Wayne's World* sketch as a preliminary example of this trend—blending satire, product placement, and parody.<sup>18</sup> Here, a branding event utilized the power and parody of antibranding to cleverly both subvert and continue to sell its image in real and digital space.

While most of us who live in urban landscapes are familiar with the recognizable dialogue offered by branding and antibranding, the increasing prevalence of guerrilla or stealth marketing has tended to blur the lines between traditional and nontraditional forms of advertising. Now,

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18. For examples, see Dale Buss, *A Product-Placement Hall of Fame*, BUSINESSWEEK, June 22, 1998, available at <http://www.businessweek.com/1998/25/b3583062.htm>; Mark R. Greer, *Going Hollywood: Beverage Companies are Dealing with Advertising Overload With Less Traditional Tie-Ins*, BEVERAGE INDUSTRY, May 1, 2003, available at <http://www.commercialalert.org/issues/culture/product-placement/going-hollywood-beverage-companies-are-dealing-with-advertising-overload-with-less-traditional-tie-ins-marketing>; Alex Fascilla, *Co-op Advertising the Product Placement Way!*, BaliHoo, Feb. 5, 2010, <http://marketing.balihoo.com/blog/co-op-marketing-software/0/0/co-op-advertising-the-product-placement-way>.

many stealth or guerrilla advertisements employ product placement, word-of-mouth marketing, and user-generated content, often employing self-mocking humor in the process, transforming the world of advertising as a result. Normally, the blurring of boundaries between product placement and parody might be considered unproblematic from a viewer's perspective. One might ask, what's wrong with a little humor in advertising, however subtle the advertising might be? But the crossing of borders between parody and marketing—particularly regarding user-generated content and advertising messages that mimic its style and presentation—has presented particular challenges for lawyers, who must navigate the boundaries between non-commercial speech (usually the sphere of parody or an antibrand) and commercial speech (traditionally the sphere occupied by advertising).

A difficult set of legal issues stem from the crossover between stealth marketing and user generated content in both real and digital space. Today, branding opportunities can be cloaked within ordinary noncommercial expression, as corporate sponsorship extends further and further toward resembling user generated content, making it difficult to discern when content is sponsored and when it is not. Since many forms of stealth marketing often takes place within the nontraditional channels that antibranding occupies (public space, websites, and other forms of media and content), it becomes more difficult then for the consumer to distinguish between the brand and the antibrand, destabilizing the division between them. This shift carries substantial legal implications for trademark owners. When advertising is no longer limited to its traditional channels, the public sphere becomes littered with examples of both branding and antibranding. As a result, it becomes all the more necessary for trademark law to intervene, leading brand managers to act more readily to protect the goodwill behind their marks through an increasing reliance on trademark surveillance and cease-and-desist strategies.

In this symposium piece devoted to the study of advertising in the law, I focus on the relationship between the brand and the antibrand, and the implications of their dialectic for trademark law generally. Trademark law, I argue, has facilitated a dual trend: while brand sponsorship stretches into noncommercial domains, mimicking the style and substance of user-generated content, it risks overtaking

the traditional sphere and functions occupied by the antibrand. In Parts I and II, I discuss the rise of both the brand and the antibrand in public spaces. In Part III, I discuss how advertising, increasingly, has begun to draw upon the traditional channels occupied by antibranding strategies, and in Part IV, I discuss some potential legal implications from this expansion.

### I. THE RISE OF THE BRAND

In 1999, a *Financial Times* article prominently displayed a heading that said, “Ford to Outsource Important Parts of Car Assembly.”<sup>19</sup> The article quoted a high-ranking executive who predicted that “[t]he manufacture of cars will be a declining part of Ford’s business.” He announced that Ford would instead “concentrate in the future on design, branding, marketing, sales, and service operations.”<sup>20</sup>

It is difficult to underestimate the historical significance of this shift, given Ford’s powerful role in the manufacturing industry in the United States. Rather than manufacturing cars, as Ford has done for so long, the announcement declares that Ford will simply engage in branding instead.<sup>21</sup> Since the rise of the Industrial Revolution, and for many of the last several decades, Ford Motor Company symbolized the victory of American invention over the uncertainties created by economic and political challenges. The success of Ford Motor Company marked a new path for industry—for the economy, for America—to follow. Now, almost several decades after that fateful moment when the first Ford car left its manufacturing plant, it appears that the American economy has steadfastly grown to value the Ford symbol—the brand—over the function of the original product. There has been much ink spilled on the dangers of Ford’s strategy of

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19. Tim Burt, *Ford to Outsource Important Parts of Car Assembly*, FIN. TIMES, Dec. 10, 1999, at 1; see also THE EXPRESSIVE ORGANIZATION, *supra* note 14, at 51.

20. Burt, *supra* note 19, at 1; see also THE EXPRESSIVE ORGANIZATION, *supra* note 14, at 51.

21. Burt, *supra* note 19, at 1; see also THE EXPRESSIVE ORGANIZATION, *supra* note 14, at 51.

outsourcing for the American economy, but none on the impact of its switch to a branding factory.

The Ford story typifies the power of the brand. A brand is usually thought to be synonymous with trademarks and trade symbols, comprising an important and valuable component of a corporation's intellectual property portfolio. Here, the economic and the semiotic spheres of language delineate the specific role that brands play in the parallel marketplaces of both goods and speech.<sup>22</sup> In the past, a brand played a relatively limited role in marketing: it served to merely identify and distinguish a certain product. Today, however, the corporate branding strategy has both magnified and amplified these functions by reversing the function of a trademark. In other words, instead of serving as a product identifier, branding strategies today make the trademark—and the cultural identities associated with the mark—the product *itself*.<sup>23</sup> This inversion between product and trademark is precisely what gives rise to the Ford narrative explored above—companies no longer focus on the product, but its brand instead.<sup>24</sup>

A complex matrix of meanings, products, and identities constitutes the essence of a brand. Yet this “essence,” so difficult to define and to pin down, is also the very thing that constructs a brand as both a commodity, as well as a sign of expressive significance. Indeed, the most successful brands enable a triadic convergence of sign, self, and corporate identity. And intellectual property law, too, plays an intimate role in enabling this convergence: corporate branding strategies focus specifically on the creation and propagation of trademarks through advertising. In this way, trademarks have become part of not only an *economic* market, but also a *metaphorical* market because they involve—and propagate—a system of using signs to control meaning and language. In this sense, therefore, brands are economic, expressive, and identificative at the same time—for *both* the consumer, as well as the corporation.

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22. For a longer discussion, see Sonia Katyal, *Trademark Intersectionality*, 57 UCLA L. REV. (forthcoming Aug. 2010).

23. For a related perspective, see Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 960 (1993), who writes “[N]o longer do trademarks merely identify sources; frequently today they become part of the product itself.”

24. THE EXPRESSIVE ORGANIZATION, *supra* note 14, at 51.



How did this happen? The story here begins, at the end of the nineteenth century, when the corporate world was ensconced in an identity crisis.<sup>25</sup> Despite the 1886 case of *Santa Clara County v. Southern Pacific Railroad*,<sup>26</sup> in which the Supreme Court endowed the business corporation with the legal status of “person” under the Fourteenth Amendment, corporations were largely regarded in the public eye as “soulless” entities, bereft of a definable essence or personality.<sup>27</sup> As the giant business corporation became a permanently transfixed entity on the American business landscape, it became the very symbol of impersonality and diffidence. Thus, corporations became increasingly aware of a massive need for public respect and social recognition. Public perception of “corporate soullessness” involved a perceived lack of conscience on the part of the corporation, coupled with the immense power, efficiency, and profit that large-scale companies represented.<sup>28</sup>

The public perception of a corporation as a cold, impenetrable entity created a need for corporate redefinition. Across the board, corporations had to overcome these perceptions in order to become a definable personality, in order to attain and to communicate a sense of internal vitality to its employees, and to the general public. Part of this strategy focused on advertising as the central and most powerful way to alter this perception. Entrepreneurs began to infuse advertising with their image and personality, almost as if they were running for office: Henry Ford participated in automobile races; legendary

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25. See ROLAND MARCHAND, *CREATING THE CORPORATE SOUL: THE RISE OF PUBLIC RELATIONS AND CORPORATE IMAGERY IN AMERICAN BIG BUSINESS* 7 (1998).

26. See *Bell v. Maryland*, 378 U.S. 226, 262 (1964); *Minneapolis & Saint Louis Ry. Co. v. Beckwith*, 129 U.S. 26 (1889); *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886).

27. MARCHAND, *supra* note 25, at 7.

28. See *id.* at 7-8. Marchand writes, during that time:

Gone were the days when “the maker of goods dealt personally . . . with the customer and was known and understood by him, as man to man.” As Vice President Hall of AT&T lamented in a 1909 address, “The public does not know us . . . It has never seen us, never met us, does not know where we live, who we are, what our good qualities are. It simply knows that we are a corporation, and to the general public a corporation is a thing.”

*Id.*

shoe manufacturer W.L. Douglas published ads in national magazines emblazoning his picture; King Gillette placed his clean-shaven personage on his ads; the Smith brothers placed their likenesses on boxes of cough drops.<sup>29</sup> In the early 1900s, the increased use of colors, simple logos, letterheads, and even depictions of the corporate factory all helped to suggest an image of an entity that constituted the sum total of the living, breathing individuals that worked within its auspices, rather than a cold, monolithic entity.<sup>30</sup>

At the very same time, corporate branding began to develop.<sup>31</sup> Earlier, brands were largely synonymous with particular products,<sup>32</sup> usually home products, including soap, jam, toothpaste, and breakfast cereals.<sup>33</sup> Most companies during this early period used advertising that appealed to one's rational considerations: the written text of an advertisement, for example, offered an in-depth justification for a product's use coupled with little suggestive imagery, and ads comprehensively detailed the good's superior quality, attributes, and performance.<sup>34</sup> Because publishers tended to require that advertisement submissions conform to a rigid, dual-column format, advertising was mostly limited to specific drafting of language, rather than the uses of symbols and dramatic imagery to describe a product.<sup>35</sup> However, in the latter part of the nineteenth century, magazines, increasingly, became more and more dominant carriers of advertising, leading to a transition from *verbal* to *visual* styles of advertising. Agencies, rather than manufacturers themselves, became increasingly saddled with the responsibility of creating a particular essence, or identity, around the product in order to differentiate it from its competition. Advertising began to rely on an increasingly common array of symbols, slogans, poetry, testimonials, coupons, contests, stars, and humor.<sup>36</sup>

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29. *See id.* at 26-27.

30. *See id.* at 28-29.

31. THE EXPRESSIVE ORGANIZATION, *supra* note 14, at 52.

32. *Id.* at 53.

33. *Id.*

34. WILLIAM LEISS ET AL., SOCIAL COMMUNICATION IN ADVERTISING: PERSONS, PRODUCTS AND IMAGES OF WELL-BEING 124 (1990).

35. *Id.*

36. *Id.*

As a result, the advertising agency attained a newfound prominence as the vehicle by which home products became not only marketed, but personified as well.<sup>37</sup>

Today, branding strategies make up a significant portion of general corporate strategy; financial analysts claim that brand equity makes up a tremendous amount of company value.<sup>38</sup> At times, a company's brand equity has been more important than the book value ascribed to a particular product.<sup>39</sup> Unlike the actual product, which is something with a functional purpose, a brand offers something in addition, an "added value" that consumers value enough to purchase.<sup>40</sup> This 'brand value' or 'brand equity' is precarious and complex, comprising a host of tangible—and legally protectable—qualities such as physical appearance, packaging, design. On a more complex level, however, a brand also encompasses a host of intangible qualities, such as consumer attitudes toward the manufacturing company, or beliefs about the brand in relationship to one's self and others.<sup>41</sup> Increasingly, the intangibility of the latter has become a primary vehicle in building brand equity. Here, a brand encapsulates much more than a tangible product or trade symbol, logo, or name—it encapsulates the critical essence of a corporation—its products, its employees, and, increasingly, its consumers. It is this ephemeral added value that constitutes the value of a brand—its intangible essence.

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37. *Id.* at 105-07.

38. See Deven R. Desai & Sandra L. Rierson, *Confronting the Genericism Conundrum*, 28 CARDOZO L. REV. 1789, 1794-1797 (2007); Steve Hartman, *Brand Equity Impairment – The Meaning of Dilution*, 87 TRADEMARK REP. 418, 419-22 (1997).

39. LEISS ET AL., *supra* note 34, at 105-07. At its simplest level, a brand is defined as "a name that refers to the product of a particular manufacturer in a particular product category." AAKER & BIEL, *supra* note 13, at 33; see also Deborah R. Gerhardt, *Consumer Investment in Trademark*, 88 N.C. L. REV. 427, 459-67 (2010); Jerre B. Swann, *An Interdisciplinary Approach to Brand Strength*, 96 TRADEMARK REP. 943, 946-955 (2006).

40. JOHN PHILIP JONES & JAN S. SLATER, *WHAT'S IN A NAME? ADVERTISING AND THE CONCEPT OF BRANDS* 31 (2d ed. 2003).

41. AAKER & BIEL, *supra* note 13, at 33.

II. ANTIBRANDING AND PUBLIC SPACE<sup>42</sup>

There is, however, an aspect of the branding enterprise that is often overlooked. As countless scholars both inside and outside of the legal academy have argued, language is both immutable and mutable at the same time; just as signs serve as vessels for corporate identification, they can also serve as vessels for consumer recoding as well. Put another way, the “perfect convergence” that a corporation strives for between the consumer, the corporation, and the brand is not always a stable fixture, particularly in public space. Instead, this convergence can be dismantled, dissected, exposed, and ultimately reformulated into another, parallel system of meaning. This process is distinctly empowering for the consumer, and allows for a space of contestation between the intended audience, the brand, and the corporation.

As Deven Desai has pointed out, since modern trademark theory tends to focus primarily on the commercial functions that marks play, it tends to overlook the multivariate and expressive roles that brands often play in society—particularly for consumers and the companies that sponsor their creation.<sup>43</sup> This is particularly so regarding the growing role of consumers in marketing practices, where they appear, not merely as passive recipients of information, but instead, as “active participants in a trademark dialogue.”<sup>44</sup>

A. *The Audience as Participant*

According to prominent media theorist Stuart Hall, a consumer can choose between three possible modes of interpretation of a given text.<sup>45</sup> Consider advertising as an example. First, a consumer can choose to adopt the dominant interpretation and fully accept, adopt, and

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42. Heymann, *supra* note 16.

43. Devin R. Desai, *A Brand Theory of Trademark Law* 6 (Thomas Jefferson Sch. of Law Research Paper No. 1585327), available at <http://ssrn.com/abstract=1585327>.

44. See Heymann, *supra* note 16, at 655.

45. See Stuart Hall, *Encoding/Decoding*, in *CULTURE, MEDIA, LANGUAGE* (Stuart Hall et al. eds., 1980), reprinted in *MEDIA AND CULTURE STUDIES* 174-75 (Meenakshi Gigi Durham & Douglas M. Kellner eds., 2001).

reproduce the preferred reading of the producer or advertiser.<sup>46</sup> This is often the path chosen by a consumer who chooses to purchase a product for the 'brand image' and associations that it conveys. Second, alternatively, a consumer might choose to adopt an oppositional reading whereby the consumer understands, but then rejects the proffered interpretation.<sup>47</sup> In the case of advertising, an oppositional reading might comprise a situation whereby a consumer might observe, but then disagree with a particular message conveyed by an advertiser, and choose not to purchase a product.

Hall's third alternative involves a reader who adopts a *negotiated* reading, whereby the reader might choose to adopt the preferred reading, but also might resist and modify the code to reflect his or her "own positions, experiences, and interests."<sup>48</sup> This position might be represented by an individual who engages in a practice like parody, one that draws upon an image but also subverts it at the same time. Hall's second and third approaches overlap nicely with the idea of an antibrand, which places the consumer or prospective consumer at the center of a different cultural matrix, one that seeks to reinterpret and resignify the semiological process described in the previous section. Some antibranding projects adopt an oppositional framework to a certain brand, following Hall's observations; the more complex commentaries, however, adopt Hall's tactic of negotiation, seeking to both *decode* and *recode* particular images in ways that subtly reveal the need for consumers to actively "talk back" to the hidden codes within advertising.

Antibranding responses may not always be as oppositional as one might presume, however. One might suggest that Hall's descriptions pave the way for a variety of antibranding possibilities that would fall under the broad category of a "negotiated" reading. One example might be a situation where an individual might appropriate, modify, or rebrand an advertising message to critique the product, the corporation, or something else. A great example might be

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46. *See id.*; *see also* Daniel Chandler, *Semiotics for Beginners*, <http://www.aber.ac.uk/media/Documents/S4B/index.html> (last visited July 29, 2010).

47. Chandler, *supra* note 46.

48. *Id.*

the publication *Adbusters*, which targets both particular companies and advertising campaigns, but also targets the more general trend of consumption in both the United States and Canada. In some examples from their magazine and website, particularly their 'spoof ads,' an individual might initially take up a proffered message from mainstream advertising, but then later, appropriate and modify an advertising campaign to send a message that diverges from the one intended. In one example, titled, *Absolut Nonsense*, an image of an Absolut vodka bottle is depicted with the slogan, "Any suggestion that our advertising campaign has contributed to alcoholism, drunk driving, or wife and child beating is absolute nonsense. No one pays any attention to advertising."<sup>49</sup> The message of the ad is unmistakably ironic: do not believe that such undesirable activities are tied to the scourge of alcohol consumption and associated advertising.<sup>50</sup>

Parodies like *Absolut Nonsense* raise important textual questions: is the parody targeting Absolut (the vodka), Absolut's marketing campaign, or the general practice of alcohol consumption? Or is it targeting all three? And if so, should trademark law interfere? The *Absolut Nonsense* ad is an example of one particular technique to illustrate the practice of antibranding: "subvertising," which is basically ad parody.<sup>51</sup> Subvertising involves the conscious recoding of various brand images in order to expose and thereby transgress the proffered construction of social meaning offered by the corporation.<sup>52</sup> Consider these examples:

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49. Mark Dery, Mark Dery's Shovelware, *Culture Jamming: Hacking, Slashing, and Sniping in the Empire of Signs*, Oct. 10, 2004, [http://www.markdery.com/archives/books/culture\\_jamming/#000005%23more](http://www.markdery.com/archives/books/culture_jamming/#000005%23more).

50. Indeed, the brand Absolut has been the target of both veneration and criticism; one book meticulously represents the rise of the brand, see CARL HAMILTON, *ABSOLUT: BIOGRAPHY OF A BOTTLE* (2000), while a series of subverts focus specifically on Absolut's images and bottle design to communicate anti-drinking messages. See *Adbusters, Spoof Ads*, <https://www.adbustser.s.org/gallery/spoofads/alcohol> (last visited July 29, 2010).

51. Alexander Barley, *Battle of the Image*, *NEW STATESMAN*, May 21, 2001, at 45 ("Subvertising is an attempt to turn the iconography of the advertisers into a noose around their neck. . . . A subvert is a satirical version or the defacing of an existing advert, a *detournement*, an inversion designed to make us forget consumerism and consider instead social or political issues.").

52. Dery, *supra* note 49.

· A person has created a near-perfect replication of an Old Navy logo on a clothing tag that is usually attached to the inside of a person's apparel. The subvert, which is designed to replicate the percentage of fibers on a tag, instead says "77% child labor 22% adult labor and 'Made in Sweatshops'" underneath. The implication of the ad is unmistakable, reminding the consumer that he or she is making a purchase that is not only composed of particular types of fibers, but also a substantial degree of child labor.

· The character of "Joe Chemo" is designed to replicate almost perfectly the infamous figure of "Joe Camel," who was used to sell Camel cigarettes.<sup>53</sup>

· On December 3, 2002, the 18th anniversary of the toxic gas leak at a chemical plant in Bhopal, India, the Yes Men e-mailed thousands of journalists a press release purporting to be from Dow chemical, which explained Dow's failure to resolve the health and environmental consequences of the accident. "We understand the anger and the hurt," claimed an (alleged) Dow spokesman. "But Dow does not and cannot acknowledge responsibility."<sup>54</sup> The Yes Men also included a link to their own Dow-Chemical.com, a Website resembling the corporation's real site at [www.dow.com](http://www.dow.com).<sup>55</sup>

· Just this past year, in response to the British Petroleum oil spill in the Gulf, Greenpeace, an environmental awareness group, announced a contest to 'Redesign BP's logo,' explaining:

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53. See <http://www.joechemo.org/> (last visited March 18, 2010); Adbusters, *Spoof Ads: Tobacco*, <https://www.adbusters.org/gallery/spoofads/tobacco> (last visited March 10, 2010). "Joe Chemo" first appeared in print in the Adbusters magazine in 1996. See <http://www.joechemo.org/about.htm>.

54. See Caleb Carr, *Dow v. Thing: A Free-Speech Infringement That's Worse Than Censorship*, VILLAGE VOICE, Jan. 21, 2003, available at <http://www.villagevoice.com/2003-01-21/news/dow-v-thing/> (quoting the Yes Men).

55. *Id.* In response to Dow's threats of copyright and trademark infringement, the entire host server was shut down, making it impossible for a variety of organizations to access their network. *Id.*

A few years ago, BP rebranded themselves as 'beyond petroleum'. And yet BP is pursuing . . . deepwater drilling, despite the massive environmental damage that's being caused by their business.

That's why we want you to rebrand them.

The campaign concludes, "BP's slick green logo doesn't suit a company that engages in dangerous offshore drilling. We're inviting you to design them a new logo that's more suitable for their dirty business."<sup>56</sup>

Typically, subvertising can cover a whole variety of different types of ad parody—everything from projects that appropriate particular brands to those that communicate a certain political statement that may or may not be indirectly tied to a corporation. At times, subvertisements can also include 'gripe sites' that may resemble an official corporate website. One newspaper reports that "conservatively, more than half of the Fortune 1000 companies have encountered some type of website critical of their business."<sup>57</sup> These sites take on a myriad of different

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56. Redesign BP's Logo, Greenpeace, <http://www.greenpeace.org/usa/news/gulf-oil-spill/bp-logo> (last visited July 29, 2010).

57. Jacqueline D. Lipton, *Commerce Versus Commentary: Gripe Sites, Parody, and the First Amendment in Cyberspace*, 84 WASH. U. L. REV. 1327 (2006); Robert Trigaux, *Gripe.com*, ST. PETERSBURG TIMES (Fla.), Jan. 31, 1999, at H1; see also Margreth Barrett, *Domain Names, Trademarks and the First Amendment: Searching for Meaningful Boundaries*, 39 CONN. L. REV. 973, 1006-34 (2007); Richard D. Salgado, *Piracy and Chaos in the Marketplace of Ideas: Why Money Cannot Be Everything When Assessing Initial-Interest Confusion and Nonprofit Trademark Holders*, 61 ARK. L. REV. 241, 258-69 (2008); 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, 74-94 (2005); Mindy P. Fox, Note, *Does It Really Suck? The Impact of Cutting-Edge Marketing Tactics on Internet Trademark Law and Gripe Site Domain Disputes*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 225 (2009); Nate Anderson, *Glen Beck Loses Domain Dispute, Still Ends Up with Domain*, ARS TECHNICA, Nov. 9, 2009, available at <http://arstechnica.com/tech-policy/news/2009/11/glenn-beck-loses-domain-dispute-still-ends-up-with-domain-ars>; Brian Baxter, *Gripe Site Targeted by Goldman Sachs Slaps Back*, THE AM. LAWYER, Apr. 15, 2009, available at <http://www.law.com/jsp/article.jsp?id=1202429904594>; Jacqui Cheng, *Gripe Site Prevails in Domain Cybersquatting Case*, ARS TECHNICA, Mar. 3, 2010, available at



characters—some simply offer various narratives from consumers who have been disappointed by a particular product or company, pairing a trademark with the word “sucks” in a web address<sup>58</sup>—to the most sophisticated and seductive of ad parodies. Many subvertisements, like the Absolut example, reveal a subconscious message in an advertisement, uncovering a perceived deeper meaning or truth hiding behind the euphemism.<sup>59</sup>

Today, the modern antibranding movement is widely associated with the early 1990s anti-globalization movement, even though similar projects regarding an “aesthetics of democracy” have been a significant part of the counter-culture art movements of the 50s, 60s, and 70s.<sup>60</sup> These counter-culture movements, from the 1950s to the early 1990s, led to the formation of a new movement in North America and Europe that called itself “culture jamming,” which referred to taking existing media generated text and altering it to say something different.<sup>61</sup>

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<http://arstechnica.com/tech-policy/news/2010/03/gripe-site-prevails-in-domain-cybersquatting-case.ars>.

58. Indeed, there are so many sites that Yahoo has created a particular directory for complaint sites alone. See, e.g., Yahoo! Directory Consumer Opinion>Individual Companies, [http://dir.yahoo.com/Society\\_and\\_Culture/Issues\\_and\\_Causes/Consumer\\_Advocacy\\_and\\_Information/Consumer\\_Opinion/Individual\\_Companies](http://dir.yahoo.com/Society_and_Culture/Issues_and_Causes/Consumer_Advocacy_and_Information/Consumer_Opinion/Individual_Companies) (last visited July 29, 2010).

59. See NAOMI KLEIN, NO LOGO 279 (2002) [hereinafter NO LOGO]; Naomi Klein, *Culture Jamming: Ads Under Attack*, BRANDWEEK, July 10, 2000, at 28 [hereinafter *Culture Jamming*].

60. See Martin Morris, *Contradictions of Post-modern Consumerism and Resistance*, 64 STUD. IN POL. ECON. 25 (2001) (listing German Expressionists, Russian Constructivists, as prologues); see also FIONA BRADLEY, SURREALISM (MOVEMENTS IN MODERN ART) (Tate Gallery 1997) (documenting major surrealist artists); GUY DEBORD AND THE SITUATIONIST INTERNATIONAL: TEXTS AND DOCUMENTS 285, 293 (Tom McDonough ed., John Goodman trans., 2002); ROBERT MOTHERWELL, THE DADA PAINTERS AND POETS: AN ANTHOLOGY (1989) (1951) (collection of essays, manifestos, and illustrations from Dada artists including Tristan Tzara, Georges Hugnet, and Marcel Duchamp); HANS RICHTER, DADA: ART AND ANTI-ART (World of Art) (Thames and Hudson Inc. ed., 1985) (1964); NAHMA SANDROW, SURREALISM: THEATER, ARTS, IDEAS (iUniverise.com, Inc. ed., 2000) (1972).

61. For discussion on these projects see KALLE LASN, CULTURE JAM: THE UNCOOLING OF AMERICA (1999); NO LOGO, *supra* note 59; David Darts, *Visual Culture Jam: Art, Pedagogy, and Creative Resistance*, STUD. ART EDU., Summer 2004, at 313, 319 (describing the ways in which “culture jammers” and socially engaged artists have helped to undermine and expose cultural, political, social,

The world of culture jamming has a number of different approaches.<sup>62</sup> It includes a number of approaches to visual and verbal representation—including recoding, subverting, and reclaiming certain kinds of government, corporate, and private property, both intellectual and real in character.<sup>63</sup> Other forms of culture jamming include advertising campaigns against consumerism, “smart mob” interruptions in public space, ironic defacement of billboards, the promotion of international “buy nothing day” and other acts of minor civil disobedience such as trespassing and public protest.<sup>64</sup>

Antibranding activism serves to expose, dissect, and then recode various messages in advertising. The message of the antibrand is simple: if images can create a brand, they can also destroy one.<sup>65</sup> As the journalist Naomi Klein recounts in her book, *No Logo*, the antibranding movement operates at the cross-section between art, labor, and anti-globalization.<sup>66</sup> By targeting companies that have invested millions in building strong global brands, antibranders seek to expose potential hypocrisy between corporate philosophy and corporate activity to the average consumer.<sup>67</sup> Anti-

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and religious mechanisms that inform the actions of individuals); Christine Harold, *Pranking Rhetoric: “Culture Jamming” as Media Activism*, 21 CRITICAL STUD. MEDIA COMM. 189, 190 (2004) (also describing culture jammers); Dennis Harvey, *Popaganda: The Art & Crimes of Ron English*, VARIETY, July 11-17, 2005, at 31 (reviewing a documentary detailing the billboard exploits of culture jammer and artist Ron English); Katyal, *supra* note 17, at 503-09. For a typical Billboard Liberation Front work see for example [http://www.billboardliberation.com/images/doomed/doomed\\_lrg.jpg](http://www.billboardliberation.com/images/doomed/doomed_lrg.jpg); [http://www.billboardliberation.com/images/sappho/sappho\\_1\\_lrg.jpg](http://www.billboardliberation.com/images/sappho/sappho_1_lrg.jpg).

62. See Paul Baines, *A Pie in the Face (Cultural ‘Jamming’)*, ALTERNATIVES J., Mar. 22, 2001, at 14. The term was coined by the music band Negativland, which uses audio and visual collage for the purposes of social commentary. In *Jamcon ‘84*, a band member comments, “As awareness of how the media environment we occupy affects and directs our inner life grows, some resist . . . The skillfully reworked billboard . . . directs the public viewer to a consideration of the original corporate strategy. The studio for the culture jammer is the world at large.” See NEGATIVLAND, FAIR USE: THE STORY OF THE LETTER U AND THE NUMERAL 2 (1995); Dery, *supra* note 49.

63. See Baines, *supra* note 62.

64. See Morris, *supra* note 60; see also Dery, *supra* note 59.

65. Dery, *supra* note 50.

66. NO LOGO, *supra* note 59.

67. *Id.*

sweatshop movements were galvanized in 1992 when the National Labor Committee performed an expose of corporate and U.S. government subsidies of *maquilas*.<sup>68</sup> Afterward, major labels like the GAP, Nike, Disney, and Guess were forced to respond to consumer concerns about their labor practices with partners in developing nations, even though they had claimed only years earlier to be “innocent global shoppers.”<sup>69</sup>

In addition to a growing concern about corporate social responsibility, a second factor has added to the growth in antibranding: the increasing force of “consumer sovereignty,” which has led many consumers to respond and publicize their complaints against particular corporations.<sup>70</sup> These dynamics have reframed the relationship between advertising and consumers into a much more dialogic relationship, as opposed to a one-way relationship of corporate inculcation. In many cases, antibranding activists have decidedly turned to the advertising executives’ own arsenal of tools to address consumer concerns, using appropriative strategies to address the increasing dominance of branding strategies in both private and public space.

Finally, another key factor has also contributed to this contestatory dynamic: technology. Digital technology and the internet has created a world that makes copying, pasting, and rebranding relatively simple tasks: something that takes hours to create with paper and paintbrush now takes minutes through the ease of graphic technology. And messages are just as easy to disseminate, in seconds, to thousands of individuals. In this way, the Internet has effectively transformed the world of brands, trademarks and

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68. Morris, *supra* note 60, at 26.

69. *Id.*

70. See Robert Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 UNIV. PITT. L. REV. 503, 503 (2001) (defining consumer sovereignty as “the state of affairs where the consumer has the power to define his or her own wants”). For more discussion on the role of the consumer, see Graeme W. Austin, *Trademarks and the Burdened Imagination*, 69 BROOK. L. REV. 827 (2004); Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2025-26 (2005); Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165 (1948); Laura A. Heymann, *The Reasonable Person in Trademark Law*, 52 ST. LOUIS U. L.J. 781, 785 (2008).

symbols into something that is largely up for grabs; a “semiotic democracy” that enables individuals to respond to and reframe brand dominance.<sup>71</sup>

Given the investment that corporations make in branding their identities and products, one could argue that the simple act of antibranding in the marketplace can be both devastating for trademark owners and deeply empowering for critical consumers. Yet intellectual property law is often caught between the need to protect the intellectual property of a certain brand and the imperative to allow for freedom of expression to flourish. The economic arguments against antibranding are readily understood. According to the traditional view, in order for a trademark to have value, it must exist as separate and unique from all other symbols; it must carry its own qualities that distinguish it from other signs; but this conception of value-from-differentiation is somewhat different than the utilitarian conception that has been historically associated with brands.<sup>72</sup> As applied to modern-day branding philosophy, this conception of value turns on the notion of brand equity and brand image, both of which draw from intangible essences like corporate image, identity, and brand personality.<sup>73</sup>

Antibranding, by its own admission, is designed to both dissect and perhaps weaken the proffered message of the advertisement. It introduces “noise” to the signal of the corporate speaker, and instead suggests a wide array of less desirable (but informative and often humorous) connotations to the buyer. It adds potential costs to the goodwill that is associated with a tightly constructed sign, altering its meaning, and exposing—and potentially making light of—certain hidden messages. In some cases, an antibrand may actively dilute the meaning of a mark by associating the mark, either with undesirable connotations,

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71. See Giselle Fahimian, *How the IP Guerillas Won: ®™Mark, Adbusters, Negativland, and the “Bullying Back” of Creative Freedom and Social Commentary*, in *CENSORING CULTURE* 132 (Robert Atkins & Svetlana Mintcheva eds., 2006) (describing a semiotic democracy as “a society in which all persons are able to participate in the generation and circulation of cultural meaning-making”). See generally Yochai Benkler, *Freedom in the Commons: Towards a Political Economy of Information*, 52 *DUKE L.J.* 1245 (2003).

72. See Beebe, *supra* note 70, at 642.

73. See Desai, *supra* note 43.

or with an entirely different issue or product, raising issues of tarnishment, as well as potential blurring as well. In short, an antibrand performs all of the same functions that a traditional trademark performs—it offers information and signals certain qualities, and it is also expressive of a particular philosophy. In other words, it functions just like any other brand, except that it derives its value, not from differentiation, but from similarity to another brand, and by communicating—and recoding—a particular message that an original brand represents.

But while traditional advertising directs itself towards building further economic value, an antibrand aims towards the opposite result. Antibranding uses the same arsenal of weapons as advertising—language and image—to flip the social meaning of a brand. By employing speech and visual expression and exploiting the instability of the brander's reliance on an unstable medium, antibranding offers the consumer a different way to construct the dialogue, even while still using the brand philosophy and image. The message may be separate and distinct from the original corporate brand message, but it still converges with the mark because it uses the trademark or the sign in order to communicate a particular message. In doing so, a trademark transgresses its own identity as a vessel for corporate identity and property, and instead, arguably, becomes remade into something else, an antibrand—constituting expressive speech, a satire, or at other times, a parody.

Because it is most often connected to a particular message, rather than a certain product, an antibrand demonstrates how a trademark can become transformed from a commodifiable property—part of the marketplace of goods—into a symbolic expression within the marketplace of speech. Rather than existing within a marketplace of goods that derives value from a brand's association with a product or corporation, the antibrand participates in the marketplace of ideas that derives its value from its expressive commentary on the brand instead. This transition, from brand to antibrand, and thus from trademark into speech, in turn highlights another key difference: even though trademark law (by protecting the mark's stability of essence and identity) suggests that a mark is immutable, the First Amendment's protection of consumer commentary suggests that trademarks are indeed

unstable, immutable entities, open to constant reinterpretation and resignification.

### B. *Early Treatments of Antibranding*

As some of my earlier work suggested with respect to copyright law, courts have tended to protect the polarities of expression that appropriates from prior texts.<sup>74</sup> Copyright law tends to protect individuals who either adopt or oppose (transform) particular context. Within copyright law, works that assimilate previous texts are considered derivative; works that transform previous texts are considered to be fair uses. Yet the law has little to say about encouraging the kind of creativity that falls between these two poles.<sup>75</sup> While the fair use doctrine offers some protection for transformative works, under the law's treatment of creativity, Hall's third category, that of *negotiation*, seems to receive less protection even though it represents an important facet of audience participation and creative interactivity.<sup>76</sup>

Consider satire as one example. In *Campbell v. Acuff-Rose Music, Inc.*,<sup>77</sup> the Supreme Court held that some types of parody could be protected if they transformed the original work. Yet the Court drew a firm line between parody and satire, noting that whereas "[p]arody needs to mimic an original to make its point . . . satire can stand on its own two feet and so requires justification for the very act of borrowing."<sup>78</sup> In practice, however, this distinction is unworkable. As Robert Merges has persuasively argued, using a copyrighted work as a vehicular tool rather than as a target for commentary and criticism is even more deserving of fair use protections because it serves the goal of

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74. Katyal, *supra* note 17.

75. See, e.g., *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1401 (9th Cir. 1997) (finding that a book about the O.J. Simpson trial did not transform Seuss's original work); *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981) (noting that a parody of a song was not transformative of the original).

76. See Hall, *supra* note 45 and accompanying text.

77. 510 U.S. 569, 579 (1994).

78. *Id.* at 580-81.

promoting more commentary on larger social issues.<sup>79</sup> Yet, curiously, copyright law draws a firm line between parody and satire, dividing the marketplace into two oppositional polarities, one protected and one arguably prohibited.

When one considers the wide range of commentaries that antibranding usually involves, especially in the trademark context, it often becomes difficult to tell whether those commentaries comprise protected parody, less protected satire, or whether it comprises actionable dilution. Antibrands take on many forms, some which address a brand directly, and some which use a brand for the purpose of commentary on another subject. Nevertheless, it is also important to consider how trademark law has changed over time to address these variations. As Hannibal Travis has described, trademark law, as it developed, slowly began to abandon "passing off" as a requirement, setting the stage for credible litigation against a wider variety of unauthorized uses.<sup>80</sup> By the 1980s, a variety of cases broadened the definition of infringement to include uses that might suggest either affiliation or sponsorship, which became especially numerous given the wide proliferation of corporate sponsorships in non-advertising content, such as films, editorial magazines, and the like.<sup>81</sup>

At the same time that brand sponsorships began to seep into forms of media like films and novels, unauthorized brand references also began to creep into the commercial domain, raising issues of tarnishment in the marketplace of goods. This trend was perhaps best represented by the famed Dallas Cowboys Cheerleaders case, which involved a pornographic film in which the main character's outfit, a Dallas Cheerleaders uniform, was considered to be infringing.<sup>82</sup> The Dallas Cowboys case served as an early example of how courts dealt with unauthorized brand references, setting a tone that suggested that such

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79. Robert P. Merges, *Are You Making Fun of Me? Notes on Market Failure and the Parody Defense in Copyright*, 21 AM. INTELL. PROP. L. ASS'N Q.J. 305, 311-12 (1993); see also Sheldon N. Light, *Parody, Burlesque, and the Economic Rationale For Copyright*, 11 CONN. L. REV. 615 (1979); Richard A. Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUD. 67 (1992).

80. See Travis, *supra* note 57, at 14.

81. *Id.*

82. See *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200 (2d Cir. 1979).

references deserved injunctive relief, even if they were used for expressive or referential purposes, or within nontraditionally commercial formats like film. By the 1990s, the trend towards trademark expansion continued, leading courts to enjoin use of a company name on union materials<sup>83</sup> and the use of the term Delta Airlines by a retiree association of the company.<sup>84</sup> One court enjoined use of the Pink Panther name by a gay activist group on the grounds that the name would confuse the association with the movie character by the same name.<sup>85</sup>

While some of these uses may have been more referential or nominative in nature, others began to take on the dimensions of an antibrand by offering social and political commentary on other subjects. Again, however, courts often failed to extend protection. The Eighth Circuit instituted an injunction against a parody ad appearing in a humor magazine called "Michelob Oily," which stated: "At the rate it's being dumped into our oceans, lakes and rivers, you'll drink it oily sooner or later, anyway."<sup>86</sup> The ad was made in reference to an oil spill that poisoned the water source for the beer factory, and was accompanied by a disclaimer for the purposes of dispelling confusion.

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83. Travis, *supra* note 57, at 23 (citing Brach Van Houten Holding, Inc. v. Save Brach's Coalition for Chicago, 856 F. Supp. 472 (N.D. Ill. 1994)).

84. *Id.* at 24 (citing Delta Air Lines, Inc. v. Hudson, 868 F. Supp. 1383 (N.D. Ga. 1994)).

85. *Id.* (citing MGM-Pathe Communications Co. v. Pink Panther Patrol, 774 F. Supp. 869 (S.D.N.Y. 1991)).

86. *Id.* at 25-26 (citing Anheuser-Busch v. Balducci Publ'ns, 28 F.3d 769, 772 (8th Cir. 1994)). Travis lists an impressive array of other cases that included parodic, critical, or 'nominal' references to trademarks litigated during this period: parody baseball cards; a Muppet named "Spa'am"; T-shirts that read "Just Did It" with a swoosh symbol; beach towels bearing the logo, "This Beach is For You"; "Spy Notes" parodies of the Cliffs' Notes format and works of fiction; "Lardashe" designer jeans for large-sized consumers, poking fun at the term "Jordache"; an "L.L. Beam Back-To-School Sex Catalog" magazine insert; a "Donkey Kong" Nintendo game; a humanizing parody of Superman in a television series called "Greatest American Hero"; a portable toilet called "Here's Johnny"; Sears' "Bagzilla" garbage bags; a caricature of utility companies' advertising in publications critical of their practices; a speech in opposition to the strategic defense initiative, a military program, that used the phrase "Star Wars"; and parody T-shirts picturing "Miami Mice." Travis, *supra* note 57, at 25.



Other cases handed down reached similar conclusions, though at other times, the results varied widely: a court permitted an environmental groups' use of a character called "Reddy Kilowatt," owned by an electrical utility company, even though the character was used on a pamphlet criticizing the electric company's policies.<sup>87</sup> The court firmly rejected a constitutional First Amendment defense. According to the court, the defendant had argued that the trademark constituted "the functional equivalent of public property either because it is generic or because plaintiff has exposed it to the 'marketplace of ideas' with respect to the debate over public utilities." The court rejected this argument, concluding that "no open ended invitation to the public [exists] to use [plaintiff's property] for any and all purposes, however incompatible with the interests of both [the plaintiff] and the [customers] whom they serve," arguing that the appearance of the trademark in the marketplace of ideas did not convert it from property into speech.<sup>88</sup> Interestingly, it still permitted the mark's appropriation on the grounds that it did not confuse the public.

In short, the outcomes of these cases were not easily reconciled. Some of these uses, like *Reddy*, enjoyed protection on the grounds that they did not create a likelihood of confusion. Another court similarly permitted the use of the Olympic symbol (with prison bars superimposed on the symbol) to protest a planned conversion of an Olympic Village at Lake Placid into a prison,<sup>89</sup> and yet another allowed the appropriation of Smokey the Bear's image in fliers protesting the U.S. Forest Service.<sup>90</sup> In another case, involving a labor dispute at a restaurant, a defendant union created fliers that parodied the plaintiff's trademark and listed violations by a health inspector.<sup>91</sup> The Fifth Circuit rejected a likelihood of

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87. *Reddy Communications, Inc. v. Environmental Action Foundation, Inc.*, 199 U.S.P.Q. 630 (D.D.C. 1977).

88. *Id.*

89. *Stop the Olympic Prison v. USOC*, 489 F.Supp. 1112 (S.D.N.Y. 1980).

90. *See Lighthawk, the Environmental Airforce v. Robertson*, 812 F. Supp. 1095 (W.D. Wash. 1993).

91. *WHS Entertainment Ventures v. United Paperworkers Int'l Union*, 997 F. Supp. 946, 947, 952 (M.D. Tenn. 1998).

confusion, arguing that “no reasonable person would believe that one would purposefully distribute a flyer containing a listing of its health food violations—even as a part of a distasteful or unconventional advertising campaign.”<sup>92</sup>

At other times, however, courts acted swiftly to enjoin expression that commented on particular brands and organizations, particularly in the early days of domain name litigation, where courts broadly construed commercial uses even when there was an expressive dimension to the commentary.<sup>93</sup> Some courts found the risk of diversion unacceptable where the mark was used in connection with the sale of goods and services, demonstrating that it was designed to, and therefore likely to, prevent some Internet users from reaching the official website of the corporation.<sup>94</sup> The most famous of these cases involves a case from the Fourth Circuit, *People for the Ethical Treatment of Animals v. Doughney*, in which a person purchased the website [www.peta.org](http://www.peta.org) for an organization called “people eating tasty animals.”<sup>95</sup> Doughney claimed that the site was used to create a parody of People for the Ethical Treatment of Animals, and described the site as a “resource for those who enjoy eating meat, wearing fur and leather, hunting, and the fruits of scientific research.”<sup>96</sup> The site also offered hyperlinks to various sites that offered meat, fur, leather, hunting, and animal research, among other things.<sup>97</sup> Doughney defended his activities, claiming that his site was constitutionally-protected parody under the First Amendment. In assessing these claims, the court held that the site did not constitute protected parody because the site did not convey two simultaneous and contradictory messages. While the court conceded that some initial confusion is necessary for a parody to be effective, an effective parody will diminish the risk of confusion “by conveying [only] just enough of the original design to allow

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92. *Id.* at 952.

93. Barrett, *supra* note 57; Lipton, *supra* note 57.

94. See *Faegre & Benson LLP v. Purdy*, No. 03-6472, 2004 WL 167570, at \*2 (D. Minn. Jan. 5, 2004).

95. See 263 F.3d 359, 362-63 (4th Cir. 2001).

96. *Id.* at 363. The site also asked the viewer whether he or she was “Feeling lost? Offended? Perhaps you should, like, exit immediately.” *Id.*

97. *Id.*

the consumer to appreciate the point of parody.”<sup>98</sup> The court concluded:

Looking at Doughney’s domain name alone, there is no suggestion of a parody. The domain name *peta.org* simply copies PETA’s mark, conveying the message that it is related to PETA. The domain name does not convey the second, contradictory message needed to establish a parody—a message that the domain name is not related to PETA, but that it is a parody of PETA.<sup>99</sup>

The appropriation of the domain name as a source identifier, for the court, effectively foreclosed it from use for other purposes, even alternative commentaries.<sup>100</sup> Moreover, the court found clear evidence of commercial intent on skimpy evidence; namely: (1) the defendant linked to sites that sold certain products, (2) because prospective supporters of PETA might be diverted from finding the correct site and he intended to mislead potential consumers who were seeking the legitimate PETA site; (3) he offered to settle with PETA; and (4) because he had also registered other domain names that reflected the use of other’s marks or likenesses.

Further, consider the impact of these findings, particularly in comparison to the Court’s definition of commercial speech. The site did not do “no more than propose a commercial transaction,” which comprises the classic definition of commercial speech.<sup>101</sup> Nowhere did the site purport to sell various items on its own; its only

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98. *Id.*

99. *Id.* at 360. In a similar case, *Morrison & Foerster LLP v. Wick*, an individual purchased a host of websites that used the trademarks of the aforementioned law firm, Morrison and Foerster, along with dozens of other law firms. The various websites Wick set up displayed a number of messages like, “We’re your paid friends!”, “Best Friends Money Can Buy”, “Greed is Good”, “We Bend Over for You . . . because You Bend Over for Us!”, “Parasites . . . No Soul . . . No Conscience . . . No Spine . . . No Problem.” The court rejected Wick’s parody defense, and held instead that Mr. Wicks’s use of the law firm’s mark in his domain name did not convey two simultaneous and contradictory messages, but only produced confusion. 94 F. Supp. 2d 1125, 1132-33 (D. Colo. 2000) “Because his websites rely on confusion to convey their points, Mr. Wick’s argument that his use of the mark as a parody fails.” *Id.* at 1135.

100. 263 F.3d at 369.

101. *Va. St. Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 728, 776 (1976) (establishing the definition of commercial speech).

evidence of commercial intent involved the site owner's referral to other, conspicuously commercial websites. Nor did the defendant's desire to confuse or divert customers of PETA demonstrate a clear commercial intent. Yet, many courts mistakenly reached similar conclusions by relying, in part, upon the principle of "initial interest confusion," which facilitated the finding of trademark infringement or dilution even when the parody or gripe site offered a clarifying disclaimer or clearly stated that it was not endorsed by the original company.<sup>102</sup>

Cases like *PETA* have a strong impact on antibranding practices, raising obvious risks of chilling consumer commentary and parody. In many of these cases, the appropriation of a brand—even for antibranding, parodic, or satirical purposes—can become especially vulnerable if commercial use is broadly construed. Consider another example. The Starbucks logo, as most of us know, consists of a green and white graphic depiction of a mermaid, which is emblazoned on countless Starbucks items, including cups, napkins, apparel, mugs, ice creams, coffees, and other assorted retail items.<sup>103</sup> In classic antibranding fashion, cartoonist Kieron Dwyer reworked the logo extensively, first by anatomically enhancing it, adding a navel ring as well as a cellular phone, opening the mermaid's eyes, and then by replacing the words "Starbucks Coffee" with the words "Consumer Whore."<sup>104</sup> The stars are replaced with dollar signs.<sup>105</sup> And some versions of the parody include the slogan "Buy More Now" underneath the logo.<sup>106</sup>

Although well aware that there were some risks of a lawsuit involved in his logo, Dwyer insisted on publishing his work on the cover of his comic magazine, and selling a

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102. Initial interest confusion has been described as a "bait and switch that allows infringing producers to impact the purchasing decisions of consumers by confusing them, and thereby allowing the competitor to get its foot in the door." *Northland Ins. Cos. v. Blaylock*, 115 F. Supp. 2d 1108, 1119 (D. Minn. 2000). See Jennifer Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 CARDOZO L. REV. 105 (2005).

103. See Sarah Mayhew Schlosser, Note, *The High Price of (Criticizing) Coffee: The Chilling Effect of the Federal Trademark Dilution Act on Corporate Parody*, 43 ARIZ. L. REV. 931, 937-38 (2001).

104. *Id.*

105. *Id.*

106. *Id.*

few t-shirts along the way.<sup>107</sup> Soon after, he was faced with a suit from Starbucks alleging copyright infringement, trademark infringement, and dilution. The suit contended that the logo was “sexually offensive” and would tarnish the trademark by associating it with what many consumers will consider lewd, immoral, and unacceptable.<sup>108</sup>

The court’s approach in resolving this case typifies the difficulty courts have with integrating antibranding artworks into the doctrinal categories of the past. While the court rejected Starbucks’ trademark and copyright infringement claims on the grounds that the mark represented protected parody and fair use, the court ultimately granted an injunction against further publication on the grounds that the parody tarnished Starbucks’ image, thus constituting dilution.<sup>109</sup> In other words, the parody’s negative, humorous association had to be enjoined, simply, because it worked successfully in alleging the subtle motivations behind the Starbucks enterprise.

Central to the Starbucks ruling was the judge’s finding that Dwyer’s work constituted commercial use of a mark, given his sale of the mark on various shirts and comic books. In other words, the court concluded that Dwyer’s work constituted parody, and perhaps constitutionally protected parody, *but only if it remained noncommercial*. Once the recoded logo was sold on various items—mugs, t-shirts, comic books—the work was transformed from a piece of parasitic art to a competitive commodity that tarnished the original, pristine Starbucks image.<sup>110</sup> The injunction barred Dwyer from selling the image, even on comic books, and on any website that contains both editorial commentary and a separate linked page of merchandise for sale.<sup>111</sup>

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107. Schlosser, *supra* note 103, at 940.

108. See Comic Book Legal Defense Fund, *CBLDF Case Files – Starbucks v. Dwyer*, available at <http://cbldf.org/about-us/case-files/dwyer/>. For more info on Dwyer’s anti-Starbucks crusade, see Kieron Dwyer, *Sued by the Siren, Pt. 1: Confessions of a Frap-addict*, available at [http://www.tmc.com/pages/mag\\_content/tm0/sued\\_pt1.html](http://www.tmc.com/pages/mag_content/tm0/sued_pt1.html).

109. Schlosser, *supra* note 103, at 940 (noting that the parody could conjure “in the minds of consumers negative associations that clash with those generated by Starbucks’ use of the mermaid logo”).

110. *Id.*

111. *Id.*

Although Dwyer was initially permitted to keep the logo on his website, the court later barred him from doing so and the case eventually settled after Dwyer found himself unable to find financial assistance for the trial and appeals.<sup>112</sup>

This case is a particularly powerful example of how the law's divergence between commercial and non-commercial speech has a determinative impact on the outcome of a dispute.<sup>113</sup> The outcome suggests a significant departure from First Amendment protection for expressive commentary, and it also suggests a radical expansion of commercial speech in the trademark domain. As the Starbucks case suggests, courts might enjoin an antibrand even when a court finds no risk of infringement or likelihood of confusion. The crux of this determination rests on the fact that the antibrand, like the Starbucks brand, can be *sold*—since it appeared on goods, such as cups, T-shirts, mugs, and the like—it was deemed less likely to deserve protection than the same logo circulated without a profit motive. In some cases, courts regularly distinguish between antibrands that are sold versus those that are not, even though the political impact of the antibrand might be identical whether it is sold as a good or whether it is circulated throughout the marketplace of speech.

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112. *Id.* at 941.

113. To offer another example, in one case, a defendant marketed various goods—coffee mugs, T-shirts—with the phrase “Mutant of Omaha,” to convey an anti-nuclear war message by creating a parody of the trademark Mutual of Omaha. The court ruled:

There are numerous ways in which [defendant] may express his aversion to nuclear war without infringing on a trademark in the process. Just as [defendant] may not hold an anti-nuclear rally in his neighbor's backyard without permission, neither may he voice his concerns through the improper use of Mutual's registered trademark. Under these facts, the first amendment proves no defense.

Mutual of Omaha Ins. Co. v. Novak, 648 F. Supp. 905, 911 (D. Neb. 1986). On appeal, the Eighth Circuit concluded that the visual parody offered by the artist deserved less protection than a possible editorial parody. Mutual of Omaha Ins. Co. v. Novak, 836 F.2d 397, 402 (8th Cir. 1987) (noting that the injunction “in no way infringes upon the constitutional protection the First Amendment would provide were [the artist] to present an editorial parody in a book, magazine, or film”).

Although more recent cases have been much more protective of the antibrand, a point I discuss further in Part IV, these earlier cases signify, at the very least, some risk of chilling antibranding projects and expression. Each case raises similar questions about the proper line that should be drawn between parody, satire, and other forms of protected expression. When does a reference to a brand or other form of protected work comprise protected speech, and when does it constitute unacceptable dilution? A similar question is impressively posed in Lisa Ramsey's piece in this Symposium, which explores the growing phenomenon of individuals registering brands on Twitter and Facebook, a phenomenon that she calls 'brandjacking.'<sup>114</sup> In many of the cases that she details, it is not always entirely clear that the use of the brand is for the purposes of parody or commentary, and at times, it appears to move further and further towards unauthorized impersonation, particularly if the public is likely to be confused and may be harmed by the confusion.<sup>115</sup>

### III. STEALTH AND SPONSORSHIP

Antibrands force the law to perform a difficult balancing act, traversing the boundaries of both the First Amendment and the law of intellectual property. But today, the antibrand—its mixture of humor, satire, and parody, sometimes successful, sometimes not—has both directly and indirectly influenced the development of branding and advertising. Today, marketing experts have replicated the irony and humor of the antibrand as a key tool in coming up with new forms of advertising. As consumers have grown more and more overloaded with information, advertisers have been forced to seek out more creative ways to communicate their messages to the public. This expansion indirectly influences the antibrand. As sponsored product placement grows more powerful, unsponsored references shrink in both stature and visibility. As the law sorts out the boundaries between commercial and noncommercial

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114. Lisa P. Ramsey, *Brandjacking on Social Networks: Trademark Infringement by Impersonation of Markholders*, 58 BUFF. L. REV. 851 (2010).

115. See an example offered by Ramsey where someone set up a 'Nine-West Model Auditions' page on Facebook and solicited photographs of their faces, bodies, and feet to a site with their contact information. *Id.* at 853-54.

speech, often by reference to user-generated content, advertising strategies continue to develop at breakneck speed, constantly inventing new ways to connect to the consumer. The best example of this trend involves the dual rise of stealth marketing, peer promotions, and product placement in both real and digital space.<sup>116</sup>

Many people often fail to recognize that behind many brand appearances in a motion picture, music video, television show, video game, and even, at times, a website, lies a carefully negotiated product placement agreement that ensures that the brand appear natural and non-advertised in nature. “When a character is in a kitchen and there are Doritos on the counter or someone’s in a mall and they pass a Coca-Cola sign, [those brands] don’t just happen to be there,” says one marketing expert. “Everything is carefully placed—it’s a constructed reality.”<sup>117</sup> In many forms of content, the vast shadow of the world of product placement transforms ordinary references to brands and copyrighted media into licensing opportunities.

Consider another example, also from *Wayne’s World*. Few people realize that the unforgettable opening notes to the song, Stairway to Heaven, were also supposed to make an appearance in the film, in a scene where Garth attempts to play the song in a music store. After the film’s theatrical release in the United States, however, the opening bars of the song were removed from the international, cable, and videotape releases. Why? Because the movie studio was unable to secure the proper copyright licenses for the song’s opening notes. As a result, any inclusion of the song meant that the makers of the film risked violating the laws of copyright every time the film was shown. So the song was removed.

As one commentator noted, fans of the song “must accept the excision of this song . . . as a natural occurrence, no different than a commercial interruption or product placement.”<sup>118</sup> The author is making an important point,

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116. See Ellen P. Goodman, *Peer Promotion and False Advertising Law*, 58 S.C. L. REV. 683, 685 (2007).

117. See Julie Mehta, *NOT Buying IT*, CURRENT HEALTH, Vol. 32, Issue 6, 10-13 (Feb. 2006) (quoting Lynda Bergsma, President of the Alliance for a Media Literate America).

118. Rowin, *supra* note 10.



suggesting that the flip side of product placement involves the excision, or removal, of content that is not licensed from mainstream media. As a result, what the viewer sees as a “natural” appearance of a brand is actually the product of an explicit licensing agreement between the copyright or trademark owner, and the studio that is producing the motion picture (or music video). In other words, as a result of product placement, almost every brand reference we see—in movies, songs, and music videos—turns out to be sponsored, but the viewer does not always realize that this is the case.

In Ellen Goodman’s landmark article, *Stealth Marketing and Editorial Integrity*,<sup>119</sup> published in the *Texas Law Review*, she describes two kinds of stealth marketing. The first kind involves “conventional payola,” or pay-for-play broadcasting, which typically involves the purchase of audience exposure to the promotional item.<sup>120</sup> It resembles the use of slotting fees in retail stores, supermarkets, and book stores, to sell items in a prominent place. The other kind of stealth marketing explored by Goodman involves “immersive” or “embedded” advertising, and in this type of promotional activity, the products are part of the content. Product placement falls squarely into this realm, along with branded entertainment or sponsored journalism, all of which cloak a desire for publicity by concealing its sponsorship for the purpose of subtlety. Goodman details the vast rise of product placement, all the way from the use of Reese’s Pieces in the movie *E.T.* to between 1999 and 2004, where the average advertising dollar share attributable to product placement jumped, on average, to twenty-one percent a year.<sup>121</sup>

Since the cost of movie promotion has also skyrocketed, more and more movie studios are turning to product placement as a profitable means to recoup some of their costs. One documentary, *Behind the Screens*, details the lucrative prospects of cross-merchandising, tie-ins, and merchandising—Pampers’ paid \$50,000 for its products to appear in *Three Men and a Baby*; Cuervo Gold paid

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119. Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 89 (2006).

120. *Id.*

121. *See id.* at 93-94.

\$150,000 to appear in *Tequila Sunrise*; Exxon paid \$300,000 to appear in *Days of Thunder*, and there was a bidding war over which business magazine would make its appearance in the film *Wall Street*.<sup>122</sup> Today, television studios consider using reality shows as vehicles to sponsor product placement; videogames offer multiple opportunities; individuals sponsor viral videos on products on YouTube (with or without official sponsorship); product placement sponsors sit in on editorial meetings for television and new media; and advertisers themselves produce their own entertainment (called 'brandvertising' or 'advertainment').<sup>123</sup> In the film *Up in the Air*, the audience saw heavily placed product placement from American Airlines and Hilton Hotels—the deal, apparently, was that the airline and hotel companies paid for hotel stays and airline rentals for the cast and crew—all in exchange for some prominence within the film.<sup>124</sup>

Section 317 of the Communications Act requires broadcasters to disclose the identity of sponsors, but in the case of product placement, it is not necessary to disclose so long as "it is clear that the mention of the name of the product constitutes a sponsorship identification," and the

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122. See BEHIND THE SCREENS (Media Education Foundation 2000), available at <http://www.brandhype.org/MovieMapper/Resources/BehindTheScreens.jsp>; see also Ronald Grover, *I Can Make Your Product a Star*, BUSINESSWEEK, July 2, 2009, at 68, available at [http://www.businessweek.com/magazine/content/09\\_28/b4139068367113.htm](http://www.businessweek.com/magazine/content/09_28/b4139068367113.htm); Stuart Kemp, *UKFC, Film Tree Team for Ad-Funded Finance*, HOLLYWOOD REPORTER, Dec. 1, 2009, available at [http://www.hollywoodreporter.com/hr/content\\_display/world/news/e3icc2aee71977fdb176550a1d97b94ef82](http://www.hollywoodreporter.com/hr/content_display/world/news/e3icc2aee71977fdb176550a1d97b94ef82); Marcy Medina, *Summer Movies, Fashion and Profits*, WOMEN'S WEAR DAILY, May 3, 2006, available at <http://www.wwd.com/fashion-news/summer-movies-fashion-profits-536925>; Joel Russel, *Ad-Ventures in Film Financing: Adidas Deal to Bankroll Trilogy of Soccer Movies Elevates Concept but Raises Concerns over Control*, 28 L.A. BUS. J. 14 (2006), available at <http://www.labusinessjournal.com/news/2006/jun/19/ad-ventures-in-film-financing/>; T.L. Stanley, *'Star Trek' Film Beams Up BK, Kellogg*, BRANDWEEK, Apr. 17, 2009, available at [http://www.brandweek.com/bw/content\\_display/esearch/e3i76c769b73ce8515865c29004f7961198?pn=1](http://www.brandweek.com/bw/content_display/esearch/e3i76c769b73ce8515865c29004f7961198?pn=1).

123. For more information on these strategies and their effects on public discourse, see Goodman, *supra* note 119, at 95-96.

124. See Alex Fascilla, *Co-op Advertising the Product Placement Way!*, BaliHoo, Feb. 5, 2010, available at <http://marketing.balihoo.com/blog/co-op-marketing-software/0/0/co-op-advertising-the-product-placement-way>.

sponsorship disclosure rules do not apply unless the sponsor has paid for its promotion (which explains why the donations of flight and hotel accommodations in *Up in the Air* were so perfectly calculated).<sup>125</sup> Although sponsorship disclosure rules became strengthened after a widely publicized payola scandal in the late 1950s, a wide degree of confusion persists as to how these rules apply to sponsorship within new media, and also marketing strategies that blur the line between sponsorship and entertainment.

The law's failure to regulate product placement, I would respectfully suggest, also helps to explain precisely why the practice can be so effective. Its subtle strategies also become especially useful for an advertiser as an indirect result of the rise of the antibrand, which has, in part, fueled the rise of consumer cynicism, making stealth or guerrilla marketing techniques seem even more attractive, as opposed to direct, face-to-face advertising. "People these days," one advertiser argues (currently engaged in designing a viral marketing campaign called "Sweet," to rebrand corn syrup), "don't respond to commercials. Traditional advertising doesn't speak their language, so we're trying to come up with new ways" of communication.<sup>126</sup>

The new generation of product placement is actually far more subtle than the previous generation's strategies. Snapple Beverages partners with Fox Sport's extreme sport show to require that the host and all guests consume the beverage on set while its logo appears on the screen.<sup>127</sup> Companies have propped up throughout Hollywood, combing scripts for branding and tie-in opportunities.<sup>128</sup> "The concept of integration is a big push," one marketing firm vice president reports. "There are a lot of corporations that realize being integrated from a product placement

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125. Goodman, *supra* note 119, at 98.

126. UnNews, *Corn Refiners Association Launches Viral Marketing Campaign for HFCS*, Sept. 11, 2008, [http://uncyclopedia.wikia.com/wiki/UnNews:Corn\\_Refiners\\_Association\\_launches\\_viral\\_marketing\\_campaign\\_for\\_HFCS](http://uncyclopedia.wikia.com/wiki/UnNews:Corn_Refiners_Association_launches_viral_marketing_campaign_for_HFCS).

127. Mark R. Greer, *Going Hollywood: Beverage Companies are Dealing with Advertising Overload with Less Traditional Tie-Ins*, COMMERCIAL ALERT, Apr. 30, 2003, available at <http://www.commercialalert.org/issues/culture/product-placement/going-hollywood-beverage-companies-are-dealing-with-advertising-overload-with-less-traditional-tie-ins-marketing>.

128. *Id.*

standpoint has a greater value than a 30-second spot. . . . Irrespective of what ad agencies tell you, there's a falloff in commercial. People get up, they change the channel and TiVo gets around commercials altogether, so by being integrated into the program, you have a large captive audience—and an interested one."<sup>129</sup> Big Fat Promotions, a stealth marketing company in New York City, claims that it has paid individuals in bars to talk up a certain liquor, doormen to prominently place packages from an online children's retailer in a building entryway, and mothers to talk about a new laundry detergent at baseball games.<sup>130</sup> Even the *Wayne's World* example of 'self parodying irony,' with the subtle payoffs of product placement, is often the goal of a successful marketing campaign, desired in press, on film, or on the Web.

This creates a convergence of opposites. At the same time that brand value has skyrocketed, and as advertising continues to comprise the link between the brand and the product to the public, we see more and more examples of consumer cynicism and "information overload."<sup>131</sup> Saddled with these trends, advertisers are forced to explore new channels of communication, often leading advertisers to poke fun at their own industries, just as *Wayne's World* did. At times, the branded entertainment borrows the messaging from a classic antibrand parody or approach, like Dove's *Evolution* video, where it showed the artificiality of the beauty industry by showing the transformation of a blond model from everyday girl into gorgeous model, through hundreds and hundreds of screenshots of makeup,

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129. *Id.*

130. See Daniel Eisenberg & Laura Bradford, *Its an Ad, Ad, Ad World*, TIME, Sept. 2, 2002 at 38-41.

131. Claire Beale, *On Advertising: Consumers Will Shape Brands in 2010*, INDEPENDENT (UK), Jan. 4, 2010, available at <http://www.independent.co.uk/news/media/advertising/claire-beale-on-advertising-consumers-will-shape-brands-in-2010-1856669.html>; Michael Bush, *In Age of Friending, Consumers Trust Their Friends Less*, ADVERTISING AGE, Feb. 8, 2010, available at [http://adage.com/article?article\\_id=141972](http://adage.com/article?article_id=141972); Brian Morrissey, *Forrester: Consumers Distrust Corporate Blogs*, ADWEEK, Dec. 9, 2008, available at [http://www.adweek.com/aw/content\\_display/news/digital/e3i4bd301b9abd26e41d2a4fc3b30731040](http://www.adweek.com/aw/content_display/news/digital/e3i4bd301b9abd26e41d2a4fc3b30731040); Rob Walker, *Faux Logo*, N.Y. TIMES, May 14, 2006, (Magazine), available at [http://www.nytimes.com/2006/05/14/magazine/14wwln\\_consumed.html?ex=1305259200&en=02fdfa03b0cee421&ei=5088&partner=rssnyt&emc=rss](http://www.nytimes.com/2006/05/14/magazine/14wwln_consumed.html?ex=1305259200&en=02fdfa03b0cee421&ei=5088&partner=rssnyt&emc=rss).

hair, and Photoshop additions, ending the ad with the (seemingly wise observation) “No wonder our perception of beauty is distorted.”<sup>132</sup>

Dove’s ad is but a single example of a massive shift in advertising content. Today, in cyberspace and real space, advertisers attempt to blend the boundaries between the brand and the antibrand, often by drawing strategies like parody, where companies often poke fun at themselves or a competitor:

· Ask.com instituted its own guerrilla marketing campaign against Google when it set up ads that said, “STOP THE ONLINE INFORMATION MONOPOLY,” which directs you to a site called the Information Revolution owned by Ask’s ad agency.<sup>133</sup>

· Mozilla set up its own anti-Internet Explorer website, called Fight Against Boredom, and which has a fake talk show setup and fake Facebook page, all designed to promote Firefox against Internet Explorer.<sup>134</sup>

A second strategy involves recoding in real space, where the line between guerrilla art and guerrilla advertising is swiftly disappearing, making it hard to tell what’s branded, and what’s been antibranded.<sup>135</sup> Public space becomes littered with messaging that is both corporately sponsored, and non-corporately sponsored, making it difficult for the law to govern each separately. Sony hired graffiti artists in urban cities to spray-paint buildings with images of kids playing with their PSPs, Rockstar did the same to promote its Warriors game for the PSP;<sup>136</sup> and Smirnoff faced charge

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132. See Dove Evolution, <http://www.youtube.com/watch?v=iYhCn0jf46U> (last visited May 4, 2010).

133. Posting of Danny Sullivan to Search Engine Land, *Ask’s Guerrilla Marketing Campaign Against Google*, <http://searchengineland.com/asks-guerrilla-marketing-campaign-against-google-10731> (Mar. 14, 2007, 13:18 EST).

134. Duncan Riley, *Exclusive: Mozilla Secretly Launches a Viral Campaign for Firefox*, Jan. 7, 2008, <http://techcrunch.com/2008/01/07/exclusive-mozilla-secretly-launches-a-viral-campaign-for-firefox/>.

135. Posting of Delana to WebUrbanist, *Guerrilla Art Versus Guerrilla Advertising: What’s the Difference?*, <http://weburbanist.com/2008/07/03/guerrilla-art-versus-guerrilla-advertising-whats-the-difference/> (July 3, 2008).

136. Posting of Boy of Tomorrow to GayGamer.net, *Rockstar Employs Graffiti in Warriors’ Guerilla Marketing Campaign*, [http://gaygamer.net/2007/02/rockstars\\_employs\\_graffiti\\_in.html](http://gaygamer.net/2007/02/rockstars_employs_graffiti_in.html) (Feb. 10, 2007); Ryan Singel, *Sony Draws*

of 'vandalism' after it decorated a busy underpass in order to promote its new alcoholic drink to the younger public in the United Kingdom;<sup>137</sup> IBM's advertising agency spray painted Linux advertisements in the cities of Chicago and San Francisco (leading to \$120,000 in fines).<sup>138</sup> In another example, a person posting guerrilla advertisements for Microsoft's Zune was detained by police in Austin, TX for posting them illegally.<sup>139</sup> The irony is that guerrilla artists face harsh criminal repercussions from their work, including imprisonment, while guerrilla advertising campaigns face, for the most part, fines, an observation that has compelled groups like the Graffiti Research Lab and the Anti-Advertising Agency to draw attention to the sheer number of illegal ads in urban spaces.<sup>140</sup>

The line between the two—guerrilla art and advertising—and the boundaries of each, begin to blur as a result. In a notorious stunt in 2007, a variety of LED signs to promote the television show *Aqua Teen Hunger Force* were taken to be explosive devices, ushering in a citywide bomb scare throughout Boston.<sup>141</sup> (Other reports suggested that the youth of Boston felt differently, immediately recognizing it for what it was: a viral marketing campaign.)<sup>142</sup> Was it advertising, performance art, or something else? Consider one blogger's observation:

You might think that the distinction between the two [art and advertising] would be obvious. After all, the goal of advertising is to sell you something, while the goal of art is less easy to define.

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*Ire With PSP Graffiti*, WIRED, Dec. 5, 2005, <http://www.wired.com/culture/lifestyle/news/2005/12/69741>.

137. *Guerilla Marketing Examples: How Not to Do It*, BIZHELP24, Oct. 19, 2005, <http://www.bizhelp24.com/marketing/guerrilla-marketing-examples-how-not-to-do-it.html> [hereinafter *Guerilla Marketing Examples*].

138. Singel, *supra* note 136.

139. Posting of Urbanist to WebUrbanist, *5 Great Examples of Guerilla Marketing Gone Wrong: Olympic Belly-Flops to the Boston Globe Scare*, <http://weburbanist.com/2008/05/06/5-great-examples-of-guerilla-marketing-gone-wrong-from-olympic-fumbles-to-bomb-scares/> (May 6, 2008).

140. Posting of Steve Lambert to Anti-Advertising Agency, *Light Criticism*, <http://antiadvertisingagency.com/2007/01/23/light-criticism/> (Jan. 23, 2007).

141. Urbanist, *supra* note 139.

142. See Michael Levenson & Maria Cramer, *Marketing Gambit Exposes a Wide Generation Gap*, BOSTON GLOBE, Feb. 1, 2007, at A1.

Guerrilla art states a political message, subverts a common belief, [and] exists simply for the pleasure of the beholder, or any number of other reasons. . . . But what about advertisements that are truly beautiful? What about the street artists who are paid to use their art to advertise a product? Is that still advertising, or can it also be art? Street art that isn't commissioned and for which the artist hasn't received permission may very well be a masterpiece, but in the eyes of the law it is a criminal offense.<sup>143</sup>

Third, in both cyberspace and real space, increasingly, more and more advertisers are relying on explicit consumer generated content—or mimicking such strategies—to circulate their messages to the public. Peer promotions are relied upon—wikis, blogs, Facebook, Twitter, MySpace, and YouTube—to generate “brand buzz.”<sup>144</sup> There are numerous examples of this blending of the commercial within a traditionally noncommercial medium. Consider, for example, the flash mob, utilized by everyone from Michael Jackson fans to T-Mobile, which managed to cull thousands of willing participants to a sing-along in Trafalagar Square in London.<sup>145</sup> Or, consider another example offered by Ellen Goodman, whereby two men created a variety of fountains from placing Mentos breath mints into bottles of Diet Coke.<sup>146</sup> As Rebecca Tushnet observes regarding this event, the films were “first disavowed, then embraced, by the manufacturers of the candy and soda.”<sup>147</sup> At times, these events can turn out to be disastrous if the public catches wind of the identity of the true sponsor. In 2006, Walmart was caught running a fake blog site about an average American couple traveling across the country in an RV spending each night in a Walmart parking lot, where they recounted stories about the kindness of its employees (“going the extra mile”) and their extensive array of

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143. Delana, *supra* note 135.

144. See Goodman, *supra* note 116, at 684-85.

145. Jennifer Gidman, *Guerrilla Event Marketing: A Mob in a Flash*, Brandchannel.com, Aug. 31, 2009, [http://brandchannel.com/features\\_effect.asp?pf\\_id=493](http://brandchannel.com/features_effect.asp?pf_id=493).

146. See Goodman, *supra* note 116, at 684.

147. Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721, 738 (2010).

products.<sup>148</sup> It turned out to be a promotional tactic that was funded by Working Families for Wal-Mart, launched by Wal-Mart's public relations firm, which was a paid sponsor of the trip.<sup>149</sup>

In many cases, an example of stealth marketing looks, feels, and sounds like everyday user-generated content, often wacky and weird, even though it happens to be sponsored by a company for commercial purposes, and at times, may challenge the boundaries of speech classifications in its desire to harness consumer imagination. And there are different types of such promotions: Ellen Goodman details a 'pure peer' promotion (a consumer generated ad that is entirely unrelated to the brand owner); 'fake peer' (where a fake blog is actually sponsored by a brand owner, or a 'flog'); or 'mixed peer' (where a brand owner might solicit, invite, or adopt pure peer content for its promotional purposes).<sup>150</sup> While pure peer promotion usually falls within noncommercial content, 'fake peer' or 'mixed peer' raises more complicated issues, raising the question of whether they should be more heavily regulated as commercial speech. For example, Trident gum (which is famous for its tag line about 4 out of 5 dentists recommend Trident to their patients who chew gum) created a fake website and asked two North Carolina men to demonstrate the strength of their teeth—one ripping an axle off of a car, and the other being hit in the face with a bowling ball.<sup>151</sup> The idea behind the campaigns was to demonstrate the strength of their teeth due to Trident. Was this content commercial advertising, user-generated speech, or something else?

An additional example of stealth advertising involves the world of 'buzz marketing,' or word-of-mouth marketing techniques, many of which deputize ordinary citizens—your friends, family (or even your professor, unbeknownst to

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148. Posting of Kevin O'Keefe to LEXBLOG: Real Lawyers Have Blogs, *Fake Blog? Walmart Gets Caught With Its Pants Down*, <http://kevin.lexblog.com/2006/10/articles/public-relations/fake-blog-walmart-gets-caught-with-its-pants-down/> (Oct. 13, 2006).

149. *Id.*

150. Goodman, *supra* note 116, at 701-02.

151. Posting of Frank Reed to WebProNews, *Trident Viral Marketing Campaign Isn't Working*, <http://webpronews.com/blogtalk/2009/02/16/trident-viral-marketing-campaign-isnt-working> (Feb. 16, 2009).



you)—to serve as “agents” for specific products.<sup>152</sup> Agents are usually sent coupons, free materials, and directions on how to market or “talk up” certain products, and are often asked to send information on their experiences to the company. Celebrities pitch drugs and products without stating that they are paid by the company to tout its products. As one commentator observes,

Corporations have long conducted focus groups (small groups of people who offer a sampling of the public’s opinions) to find out what teens think of potential products. Now, knowing that teens often look to peers to see what’s in, some companies are recruiting trend-conscious teens to sample new products and then spread the word about them. For example, a teen may get sneak-preview movie tickets or a discount at a local store in exchange for talking up the movie or recruiting friends to patronize the shop. And the teens getting the freebies may not be required to tell their audience about that part of the deal—so uninformed teens may think they’re getting a real recommendation, instead of an advertising pitch.<sup>153</sup>

Often, these experiences mirror ordinary behavior usually displayed by everyday consumers. Rob Walker of the New York Times recounts an event where Sony Ericsson hired sixty actors in ten cities to ask strangers if they would mind taking the actors’ pictures, at which point the actor would remark about how great their camera was to the person.<sup>154</sup> “And thus,” Walker writes, “an act of civility was converted into a branding event.”<sup>155</sup> One company profiled by Walker, BzzAgent, which has thousands of agent volunteers, tells its volunteers that they aren’t obligated to hide their associations with the company and its campaigns, but their volunteers certainly don’t always volunteer that information to others.<sup>156</sup> “It just seems more natural, when I talk about something, if people don’t think I’m trying to push a product,” explained one BzzAgent to Walker.<sup>157</sup>

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152. See Rob Walker, *The Hidden (In Plain Sight) Persuaders*, N.Y. TIMES, Dec. 5, 2004 (Magazine), at 69, 70.

153. Mehta, *supra* note 117, at 10-13.

154. Walker, *supra* note 152, at 70.

155. *Id.*

156. *Id.* at 130.

157. *Id.*

There are myriad issues that stealth marketing and guerrilla advertising raise, but one of the most underappreciated stems from a concern about the role of public space and engagement, and the potential for commercial speech to encroach on the familiar territory usually occupied by noncommercial speech.<sup>158</sup> Since these strategies utilize virtually the same channels of communication and styles of expression as those occupied by traditional noncommercial forms of expression and antibrands, the brand slowly encroaches into antibrand territory. This transition becomes even more pronounced especially as antibrands become less and less oppositional to the overall brand, and seem more satirical in nature, and as brands become more and more willing to engage in self-parody. While Goodman laudably discusses many of the problems associated with such kinds of stealth marketing, her most powerful analysis indirectly implicates the ability of stealth marketing to blur the line between the brand and the antibrand, making it difficult for the consumer to tell the difference between the two. Indeed, when the channels that are relied upon, in both real space and cyberspace, are the very same ones that also host antibrands, it becomes difficult to tell whether the content is sponsored, or not.

#### IV. RECONCILING THE ANTIBRAND AND THE BRAND

As these examples suggest, advertisers are now developing more and more subtle ways to harness the interest and subconscious attention of the consumer, drawing on classic antibranding strategies in the process. The growth of antibrands has indirectly influenced the scope and direction of stealth advertising, forcing the advertiser to come up with new ways to communicate product information and “image” to the public. Consequently, just as antibrands now populate public space (which I define to include areas that have been traditionally free from branded entertainment and messaging), they also, indirectly, pose an invitation to the commercial advertiser to enter these areas as well. As a result, the antibrand and the brand engage in a delicate dance of recognition and response to one another, often indirectly.

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158. See Goodman, *supra* note 119.

The relationship between antibranding and branding, I shall argue, demonstrates an underlying tension between corporate and consumer identity that dovetails nicely into a corresponding conflict between two different kinds of markets; the market of economic value (goods and property), and the market of meaning and metaphor. Yet the most challenging set of questions stems from the role of trademark law in facilitating the relationship between the brand and the antibrand. On this point, this concluding section sketches out a couple of possible shifts that the law might take. Whereas in prior years, courts have been less willing to protect antibrands and their expressive implications, more recently, the law has slowly shifted towards recognizing the important contributions offered by consumer commentary and parody, even when those parodies are not entirely successful, nor entirely oppositional to the original brand.

In this section, I describe the increasing scope of legal protection afforded to antibrands generally, a more recent shift that diverges from the situation I described in Part II. The last part of this section discusses the implications of the expanding sphere of protection of the antibrand on the channels that stealth marketing normally employs, suggesting that the expansion of protection of the antibrand makes it all the more necessary for a regulatory regime to focus on transparency and disclosure in reaching the consumer.

#### A. *Contemporary Protection of the Antibrand*

Initially, as I described in Part II, courts tended to adversely affect the legal protection of antibranding practices, lending credence to the fears of First Amendment advocates. However, in more recent cases, it appears that courts are beginning to lean in favor of protecting critiques and parodies, at least in the end on appeal.<sup>159</sup> The trend began, slowly at first, to turn in the other direction, starting largely from the Ninth Circuit. In 1992, in a seminal case, Judge Kozinski, on the Ninth circuit, rejected a trademark action for a case that involved a USA Today poll that asked

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159. See William McGeeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49, 51 (2008) (observing that courts are beginning to favor the protection of critiques and parodies).

the public, "Which one of the New Kids [on the Block] is the most popular?"<sup>160</sup> In that case, Kozinski outlined the contours of what later came to be called a "nominative use" exception, crafting an exception for "comparison, criticism, or point of reference."<sup>161</sup> The test requires that the product or service be one that is not readily identifiable without reference to the trademark; second, that only so much of the mark is used that is reasonably necessary; and third, that the user does nothing to suggest "sponsorship or endorsement by the trademark holder."<sup>162</sup> Kozinski aptly recognized that the line between trademarks and speech is often blurred, but most valuably also recognized the need for an exception that would enable others to have access to marks for expressive purposes.<sup>163</sup>

The *New Kids* case suggested an emerging sphere of protection for referential uses of a mark, even despite clear commercial interests, a point that carried strong implications for protecting the antibrand. However, it was not until a few years later that the Ninth Circuit dealt with more direct commentaries, and like the *New Kids* case, continued a trend towards expanding protection. In a case involving a photographer who used Barbie dolls in compromising positions with food and kitchen appliances, the Ninth Circuit found that his work constituted a complex social statement about gender roles and the position of women in society, and thus deserved protection, based on his positioning of Barbie in a series of defenseless and overtly sexualized poses.<sup>164</sup> In other words, it recognized the

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160. *New Kids on the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302, 304 (9th Cir. 1992).

161. *Id.* at 306.

162. *Id.* at 308.

163. In the trademark context, the line between speech and trademark infringement has also caused a number of challenges for First Amendment advocates and scholars. See Robert C. Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158; Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397 (1990); Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960 (1993); Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687 (1999); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717 (1999).

164. See *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 802 (9th Cir. 2003).

need to use brands in such commentaries. “Undoubtedly,” the court wrote, “one could make similar statements through other means about society, gender roles, sexuality, and perhaps even social class. But Barbie, and all the associations she has acquired through Mattel’s impressive marketing success, conveys these messages in a particular way that is ripe for social comment.”<sup>165</sup> It concluded that the artist’s use was a fair one under the Copyright Act, and employed another balancing test under trademark law, known as the *Rogers* test, that directed the court to “apply [the Lanham Act] to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression.”<sup>166</sup>

The same court also used the *Rogers* test in another, earlier case, involving a song based on Barbie, called “Barbie Girl,” by a popular music group that mocked and parodied Barbie, reaching largely the same result.<sup>167</sup> As Judge Kozinski noted in that case, “[a]lthough the boundary between commercial and noncommercial speech has yet to be clearly delineated, the ‘core notion of commercial speech’ is that it ‘does no more than propose a commercial transaction’ . . . . If speech is not ‘purely commercial’—that is, if it does more than propose a commercial transaction—then it is entitled to full First Amendment protection.”<sup>168</sup> Since the Barbie Girl song lampooned Barbie’s image, offering a humorous commentary on the cultural values she represented, the court found that the song was not commercial speech.<sup>169</sup>

More recently, the protection of the antibrand culminated with a case that directly contradicted the Starbucks case discussed in Part II, protecting a consumer commentator who set up a website and sold related merchandise—coffee mugs and t-shirts—that compared Wal-Mart to a Nazi regime, using a variety of slogans, including “Walocaust,” and depicted the company logo.<sup>170</sup>

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165. *Id.* at 802.

166. *Id.* at 807 (citing *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989)).

167. *See Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 898-99 (9th Cir. 2002).

168. *Id.* at 906 (citations omitted).

169. *Id.* at 908.

170. *Smith v. Wal-Mart Stores, Inc.*, 537 F. Supp. 2d. 1302 (N.D. Ga. 2008).

After receiving a cease-and-desist letter, the defendant adjusted his website to use a disclaimer, filed a declaratory action for protection, and registered the domain name 'Wal-Quaeda' in order to compare Wal-Mart's intellectual property protection to a terrorist group.<sup>171</sup> The defendant won, on a summary judgment action, finding that the merchandise conveyed a "scathing parody," and that it did not constitute classic commercial speech.<sup>172</sup> In its opinion, the court quoted a Fifth Amendment case that noted, "speech that is principally based on religious or political convictions, but which may also benefit the speaker economically, would fall short of the requirement that the speech was economically motivated" and therefore would be considered noncommercial.<sup>173</sup> It also cited a Seventh Circuit case that concluded that t-shirts were "a medium of expression prima facie protected by the free-speech clause of the First Amendment, and they do not lose their protection by being sold rather than given away."<sup>174</sup> Since commercial success was a secondary motive to his expression of distaste for Wal-Mart, the court considered the defendant's antibrand, even though it was sold on mugs and T-shirts, to be parodic and noncommercial speech, and outside of the bounds of trademark dilution.

Even in cases that might indirectly poke fun at a brand, courts are beginning to permit a wider sphere of commercial uses of an antibrand. The operable question often turns on whether or not the parody is successful, that is, whether it communicates that it is like the original, but not the original. For example, in a Fourth Circuit case involving a series of dog chew toys marketed under the term "Chewy Vuitton," in reference to "Louis Vuitton," the court put a great deal of weight on finding that:

[D]og toys are not the equivalent to "expensive, luxury" Louis Vuitton handbags . . . CV is not LV; the designs on the dog toy are simplified and crude, not detailed and distinguished. The toys are inexpensive; the handbags are expensive and marketed to be expensive. And, of course, as a dog toy, one must buy it with pet

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171. *See id.* at 1311.

172. *Id.* at 1316-17.

173. *See id.* at 1339 (quoting *Proctor & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 552-53).

174. *Id.* (citing *Ayres v. City of Chi.*, 125 F.3d 1010, 1015 (7th Cir. 1997)).

supplies and cannot buy it at an exclusive LVM store or boutique within a department store.<sup>175</sup>

It continued that that the “irreverent representation” conveyed a “joking and amusing parody,” pointing out that “[t]he LVM handbag is provided for the most elegant and well-to-do celebrity, to proudly display to the public and the press, whereas the imitation ‘Chewy Vuitton’ ‘handbag’ is designed to mock the celebrity and be used by a dog.”<sup>176</sup> Interestingly, the court used the terms “parody” and “satire” interchangeably, noting that the dog toy was a comment on both “the rich and famous,” conspicuous consumption, as well as the Louis Vuitton name.<sup>177</sup>

This Fourth Circuit case was also especially instructive on the question of the relationship between parody and dilution in light of the recently passed Trademark Dilution and Revision Act by Congress.<sup>178</sup> The Court noted that parody was not automatically a complete defense to a claim of dilution by blurring where the defendant uses the parody

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175. *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 260 (4th Cir. 2007).

176. *Id.* at 261.

177. *Id.* The Court also noted that the parody was enhanced by the fact that “Chewy Vuitton” dog toys are sold with similar parodies of other famous and expensive brands—“Chewnel No. 5” targeting “Chanel No. 5”; “Dog Perignonn” targeting “Dom Perignon”; and “Sniffany & Co.” targeting “Tiffany & Co.” *Id.*

178. To determine whether a junior mark is likely to dilute a famous mark through blurring, the TDRA directs the court to consider all factors relevant to the issue, including six factors that are enumerated in the statute:

- (i) The degree of similarity between the mark or trade name and the famous mark.
- (ii) The degree of inherent or acquired distinctiveness of the famous mark.
- (iii) The extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark.
- (iv) The degree of recognition of the famous mark.
- (v) Whether the user of the mark or trade name intended to create an association with the famous mark.
- (vi) Any actual association between the mark or trade name and the famous mark.

as its own designation of source, i.e., *as a trademark*. Under the statute's plain language, parodying a famous mark is protected by the fair use defense only if the parody is *not* "a designation of source for the person's own goods or services."<sup>179</sup> Yet even though the parody, in this case, was used as a trademark, the court found that the parody did not dilute the LV mark's distinctiveness, largely because it was such an imperfect replication of the famous LV mark, concluding "by making the famous mark an object of the parody, a successful parody might actually enhance the famous mark's distinctiveness by making it an icon. The brunt of the joke becomes yet more famous."<sup>180</sup> A similar result also befell another pet-related cologne product named Tommy Holedigger, named to reference and parody the Tommy Hilfiger cologne, with a slogan that read, "If You Like Tommy Hilfiger Your Pet Will Love Timmy Holedigger."<sup>181</sup> The court recognized its comical nature, observing, "[o]ne can readily see why high-end fashion brands would be ripe targets for such mockery, and why pet perfume is a clever vehicle for it. Even if not technically a parody, [defendant's] use is at least a pun or comical expression—ideas also held to be entitled to First Amendment protection."<sup>182</sup>

Elsewhere, courts have begun to protect antibranding activities on the web, particularly in cases of consumer commentary. In one case involving a website called "ballysucks.com," which involved a series of complaints

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179. As the statute provides:

The following shall not be actionable as dilution by blurring or dilution by tarnishment under this subsection:

- (A) Any fair use . . . *other than as a designation of source for the person's own goods or services*, including use in connection with . . . parodying . . . .

15 U.S.C. § 1125(c)(3)(A)(ii) (2010) (emphasis added); *Vuitton*, 507 F.3d at 267.

180. *Vuitton*, 507 F.3d at 267.

181. *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*, 221 F. Supp. 2d 410 (S.D.N.Y. 2002).

182. Significantly, while the court recognized that the bar towards protection is slightly higher when a mark is used as a source designation (i.e. a trademark use), such as this one and the Chewy Vuitton mark, the plaintiff did not show enough of a risk of consumer confusion. *Id.* at 416.



against the health club, a court drew a line between Bally's sponsored site, which was a "commercial advertisement," and the gripe site, referred to as "consumer commentary."<sup>183</sup> The court concluded that "no reasonably prudent Internet user would believe that "Ballysucks.com" is the official Bally site or is sponsored by Bally."<sup>184</sup> Other cases began to support consumer commentary, even when the websites utilized a company name alone or in connection with other disparaging terms.<sup>185</sup> Notably, the Fourth Circuit also backtracked from its earlier view in the PETA case, when it protected a site that deliberately misspelled the Reverend Jerry Falwell's name in a site, fallwell.com, that took issue with the Reverend's views on homosexuality.<sup>186</sup> It distinguished its earlier findings in PETA on the grounds that the earlier case involved questions of parody, whereas the Falwell case involved a somewhat different question of consumer confusion.

At first glance, one might conclude that the tide is changing in enabling the antibrand to flourish in both real and cyberspace. It seems patently unthinkable, to many nonlawyers, that the parodies we have discussed in this paper would lead to legal scrutiny. However, while the cases we've discussed from the Ninth, Fourth, and other circuits lead to some amelioration of the concerns about chilling speech and commentary, it also bears mention that not all of the cases, in recent years, have followed this direction.

The issue of commercial sales of an antibrand still remains a thorny one for courts. In prior work, I suggested that trademark doctrine tended to conflate commercial and non-commercial speech.<sup>187</sup> The result, as I suggested in Part II, is that courts often construed commercial speech

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183. *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161 (C.D. Cal. 1998).

184. *Id.* at 1165.

185. *See, e.g.*, *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002 (9th Cir. 2004); *TMI, Inc. v. Maxwell*, 368 F.3d 433 (5th Cir. 2004); *Taubman Co. v. Webfeats*, 319 F.3d 770, 777-78 (6th Cir. 2003); *Ford Motor Co. v. 2600 Enters.*, 177 F. Supp. 2d 661 (E.D. Mich. 2001); *Lucent Techs., Inc. v. LucentSucks.com*, 95 F. Supp. 2d 528 (E.D. Va. 2000). For more discussion of these cases, see Travis, *supra* note 57.

186. *See Lamparello v. Falwell*, 420 F.3d 309 (4th Cir. 2005).

187. *See Katyal, supra* note 22.

overinclusively, thereby enjoining parodic representations, both in real space and online. While the law has shifted somewhat, when the commercial element is a more dominant aspect of the parody, the outcome can be less predictable. For example, in yet another parody case involving dog toys, Anheuser-Busch successfully enjoined a dog toy that resembled a Budweiser beer bottle that was called “Buttwiper,” on the grounds that the survey evidence reflected some confusion, and that since Budweiser did produce comparably-priced dog toys, they competed in the same market.<sup>188</sup>

As William McGeveran has observed, the doctrines that courts employ to protect defendants are “overlapping, confusing, volatile, and [even] cumbersome,” leading to significant uncertainty.<sup>189</sup> For McGeveran, the uncertainty of these standards has created a classic chilling effect on unlicensed uses of trademarks, even when those uses may be ultimately considered perfectly lawful under existing doctrines.<sup>190</sup> Less protection, for example, might be extended in cases where the antibranding is less directly oppositional than the ones we have discussed. Consider that in most of the antibrand examples I have outlined—Barbie in a food blender,<sup>191</sup> a song celebrating Barbie’s “plastic” and superficial cultural attributes,<sup>192</sup> a low-priced chew toy or perfume,<sup>193</sup> or a gripe site<sup>194</sup>—the critique of a brand (or a certain lifestyle celebrated by a particular brand) is relatively straightforward to the audience. In other words, it is pretty clear when a brand is being made fun of. As many courts have observed, it seems ludicrous to think that a plaintiff would sponsor its very own “gripe site,” or a low-priced, inferior chew toy that pokes fun at its own brand name.

But in cases where the commentary is more oblique, or less directly oppositional to a particular brand, or perhaps

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188. *Anheuser-Busch, Inc. v. VIP Prods.*, 666 F. Supp. 2d 974 (E.D. Mo. 2008).

189. McGeveran, *supra* note 159, at 51.

190. *Id.* at 52.

191. *See supra* notes 164-66 and accompanying text.

192. *See supra* notes 167-69 and accompanying text.

193. *See supra* notes 175-80 and accompanying text.

194. *See supra* notes 183-84 and accompanying text.

more promotional or commercial in nature, an antibrand may risk losing legal protection due to any one of these variables. This is particularly so when survey evidence demonstrates some form of confusion among the consuming public. The Southern District of New York, for example, enjoined a popcorn maker manufacturer that marketed a product called "Dom Poppingon," on the grounds that survey evidence also suggested a relationship between the popcorn maker and the champagne producer.<sup>195</sup>

Finally, and perhaps most important, while common and statutory law seems to have evolved to protect the antibrand, significant questions remain regarding the powerful reach of informal trademark enforcement at the hands of everyday lawyers. As McGovernan writes:

Markholders policing their portfolios send cease-and-desist letters attacking virtually any unlicensed use of their trademarks. From television networks to insurance companies, risk-averse institutional gatekeepers demand expansive rights clearance. Lawyers counsel clients to avoid the trouble of a potential lawsuit. In response to this array of powerful entities, speakers either avoid unlicensed uses of trademarks entirely or withdraw them at the first hint of legal action.<sup>196</sup>

Taken together, these considerations suggest that while the antibrand has garnered some protection, its protection still pales in comparison to that of the conventional brand—and perhaps understandably so in some cases, particularly those that suggest a strong commercial intent to profit, or which cause consumer confusion or actionable dilution.

### B. *An Economy of Opposites?*

Although some of the above outcomes are extremely positive developments for free speech advocates, as I have also suggested, they are also plagued with uncertainty and unpredictability, leading many risk averse defendants to avoid unlicensed uses, as McGovernan suggests. In addition to the chilling effect that some courts facilitate, the existing

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195. *Schieffelin & Co. v. Jack Co. of Boca, Inc.*, 850 F. Supp. 232 (S.D.N.Y. 1994) (finding that Dom Poppingon popcorn was not a sufficiently strong parody of DOM PERIGNON champagne to avoid confusion, based on the evidence of actual confusion).

196. McGovernan, *supra* note 159, at 52.

sphere of uncertainty may lead a trademark owner to act even more vociferously to protect against unauthorized uses. In other words, the expanding sphere of the antibrand can lead to more brand surveillance, where trademark owners police the boundaries of noncommercial content to control unauthorized references and uses.

The absence of regulation has significant implications for the dialogue between the brand and the antibrand. If a brand takes on characteristics that resembles an antibrand, it still qualifies as commercial speech. However, when a brand deputizes an ordinary citizen to create a promotional campaign, the answer is less clear—is it commercial, noncommercial, or something else? And when an antibrand takes on elements of a brand (that is, it operates as a trademark), it may not necessarily be designated as commercial speech. In the Starbucks and Dom Perignon cases, the commercial intent of the antibrand clearly played a factor in the decision to enjoin the expression. Yet it becomes difficult to discern the line between branding, stealth marketing, and antibranding, when the very same channels are used for each. The same ad, which could be an ad for Levis jeans—could also be an antibrand, a commercial, or a satirical commentary on the jeans' themselves.<sup>197</sup>

As I have suggested, many types of stealth marketing often take place within the traditional channels that antibranding occupies, like YouTube or Facebook, leading to a blurring of the lines between commercial and noncommercial forms of expression. So, as a result, it becomes impossible, then, to distinguish between the brand and the antibrand, and the division between them becomes further destabilized, making it difficult for the consumer to locate the sponsorship behind the message, and making it all the more necessary for brand managers to act more readily to protect the goodwill behind their marks in public space.

Consider Facebook as an example of this growing trend towards potential overenforcement. If you've spent any time on Facebook, you are keenly aware of the vast numbers of pages that are devoted to companies, products, and celebrities, often making it impossible to tell the difference

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197. See Guys Backflip into Jeans, [http://www.youtube.com/watch?v=pShf2VuAu\\_Q](http://www.youtube.com/watch?v=pShf2VuAu_Q) (last visited May 4, 2010).

between official and unofficial pages.<sup>198</sup> Sometimes, fan sponsored pages lead to collaborations with the company, as they did in a case where Coca-Cola collaborated with two fans who created a Facebook page. In other cases, however, companies are less enthused, and may seek to use copyright or trademark protection to prevent individuals from putting up fan pages.

Recently, Facebook decided to require individuals who have company pages demonstrate proof that they legitimately speak for the company. “By helping companies keep control of their messages, analysts say Facebook is looking forward to the day when it can charge companies for all kinds of applications.”<sup>199</sup> Yet by relying on an authentication process, Facebook essentially allows companies to take control of the brand itself, and potentially, to control or to limit “unofficial” commentary—positive or negative—about a particular brand.

These complications extend further outward towards sponsored types of user-generated content, particularly the “mixed” peer production that Goodman describes.<sup>200</sup> As Rebecca Tushnet has pointed out in her article in this Symposium, “[w]here ads don’t necessarily look like ads, a separate kind of consumer deception can be at issue: deception about source, where consumers might give a message a different amount of credibility if they knew its actual sponsorship.”<sup>201</sup> User-generated ads create particular problems on a doctrinal level because individual speakers can generally make false claims about products (as long as they are not defamatory or otherwise create a clear and present danger of harm), whereas traditional advertisers are governed more stringently; they are held strictly liable for falsehoods and are required to substantiate any material claims.<sup>202</sup> From an advertiser’s perspective, then, it makes sense to deputize individuals, rather than corporations, given this less stringent standard—as Tushnet notes,

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198. See Alisha Roth & Kai Ryssdal, *Facebook to Discern Companies, Fans*, MARKETPLACE, Oct. 13, 2009, <http://marketplace.publicradio.org/display/web/2009/10/13/pm-facebook/>.

199. *Id.*

200. Goodman, *supra* note 116.

201. Tushnet, *supra* note 148, at 721.

202. *Id.* at 738-39.

“volunteers may now be able to disseminate misleading claims about products to millions, subject to minimal or no regulation.”<sup>203</sup> Further, as Tushnet argues, evidence from cognitive psychology and related fields suggests that a message’s source plays an important role in enabling consumers to evaluate the quality of the message.<sup>204</sup> The less the content resembles classic advertising, in short, the more credibility the message attains.

The current state of affairs thus calls for some need for administrative clarification. More recently, a disclosure regime has attracted a particular degree of interest from the Federal Trade Commission, which, as Tushnet summarizes, require: “(1) substantiation for ad claims made by endorsers, even in new media, and (2) disclosure of an endorsement relationship that wouldn’t be obvious from context (as it is obvious when a spokesperson appears in a traditional 30-second TV ad).”<sup>205</sup> The FTC also expressed concerns about hiring viral marketing teams to post comments in non-traditional spaces, such as a travel review site; or a fake blog or ‘flog’.<sup>206</sup>

The FTC regulations—recently updated in late June of 2010—herald a new generation of sponsored web content. The FTC page explaining the guidelines points out that “[i]t’s always been the law that if an ad features an endorser who’s a relative or employee of the marketer—or if an endorser has been paid or given something of value to tout the marketer’s product—the ad is misleading.”<sup>207</sup> The updated explanations help to clarify how these principles apply to web based content, pointing out that a speaker

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203. *Id.* at 739.

204. *See id.* at 748 (quoting Helen Norton, *The Measure of Government Speech: Identifying Expression’s Source*, 88 B.U. L. REV. 587, 592-93 (2008)).

205. *Id.* at 745 nn.78-80 and accompanying text.

206. *Id.* at 746. The disjunction between user and producer-generated content has also led to a curious wrinkle with Section 230 of the Communications Decency Act, which immunizes internet service providers from the defamatory speech of their users. See Tushnet’s excellent discussion of this point. *Id.* at 738. Since Tushnet’s discussion of these disclosure regimes is so comprehensive, I wish to draw attention to only a few aspects of her discussion.

207. Press Release, FTC, FTC Facts for Business, The FTC’s Revised Endorsement Guides: What People Are Asking 2 (June 2010), <http://www.ftc.gov/bcp/edu/pubs/business/adv/bus71.pdf> [hereinafter *FTC Facts for Business*].

must disclose a sponsorship relationship if they received anything of value from a marketer. As the guidelines suggest, the simple delineation between “sponsored” or “ad” content can go a long way towards clarifying the source for the consumer. On Facebook, for example, individuals who are compensated by a particular corporation allegedly cannot be “fans” of that institution, helping to delineate “authentic” fanlike emotions from paid endorsements.<sup>208</sup> And on Twitter, the FTC regulations require individuals to quickly demarcate when their posts are paid advertisements.<sup>209</sup>

While disclosure might go a long way towards clarifying commercial messages in everyday web content, it is important to note that a disclosure regime, like any other administrative regime, adds both administrative and agency costs, and may potentially introduce some new forms of confusion for speakers. Some closing reservations therefore may be appropriate. First, it is important to note that despite the benefits of a disclosure regime, much of contemporary product placement—especially on television and film—is brokered through an interesting loophole whereby merchandise is donated to the content producers, thereby eliding the requirement that paid product placement be disclosed.<sup>210</sup> Thus, the new FTC disclosure requirements may be useful, but only insofar that they address all forms of donated and paid placements on the web. Nevertheless, as Tushnet also points out, nondisclosure can contribute to a further erosion of trust from consumers, where they may be saturated with so many advertising messages that an entire medium may lose credibility.<sup>211</sup> This risk is particularly pronounced when we consider the reach of “brand creep” into the areas normally

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208. Posting of Matthew Crane to Twin Cities TECH CORNER: [TC]<sup>2</sup>, <http://www.mndaily.com/blogs/tech-corner/2009/10/05/ftc-advertising-regulation-s-now-extend-facebook-twitter> (Oct. 5, 2009, 21:31 CST); see also *FTC Facts for Business*, *supra* note 207, at 4.

209. *FTC Facts for Business*, *supra* note 208, at 5.

210. See Ross D. Petty & Joan Lindsey-Mullikin, *The Regulation of Practices that Promote Brand Interest: A 3C's Guide for Consumer Brand Managers*, 15 J. PROD. & BRAND MGMT. 22 (Issue 1) (2006) (citing MICHAEL F. JACOBSON & LAURIE ANN MAZUR, *MARKETING MADNESS: A SURVIVOR GUIDE FOR A CONSUMER SOCIETY* 72 (1995)).

211. Tushnet, *supra* note 148, at 764-65.

populated by antibrands. Second, others criticize disclosure regimes—Eric Goldman, most notably, has argued that disclosures can be hidden or, in an age of information overload, can simply add to the distrust that consumers already face.<sup>212</sup>

Nevertheless, despite these reservations, a disclosure regime may assist reconciling the rivalrous relationship between the brand and the antibrand: they may be separate and somewhat unequal, but at least a disclosure regime enables both to peacefully coexist in public space, allowing the consumer to discern the difference between them.

### CONCLUSION

As antibrands demonstrate, clear delineations between commercial and non-commercial speech are often impossible to apprehend, particularly when dealing with converging areas of parody, trademarks, and the marketplace of goods. As this article has suggested, the conflict between trademark and speech protections masks an underlying conflict between different types of markets—one a marketplace of goods, and the other a marketplace of ideas. One answer, then, is to focus on delineating and clarifying the relationship between the corporation and the consumer, between advertising and anti-advertising; for, in recognizing the interaction between the brand and the antibrand, we can value these commentaries for what they suggest about the new generation of consumption and consumer expression.

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212. See Eric Goldman, *Stealth Risks of Regulating Stealth Marketing*, 85 TEX. L. REV. SEE ALSO 11, 11, 14 (2006), available at <http://www.texaslrev.com/seealso/vol/85/responses/goldman>.



