

BRAND RENEGADES

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Recent appearances of trademarks in popular culture—in rap lyrics, on reality TV shows, even in youth riots—have raised the question whether the owners of those trademarks might pursue legal remedies to protect their brands from unwanted social associations. This Article argues that they cannot, and that we should understand this limitation on trademark rights as grounded in a principle that consumption of certain brands is an expressive act that First Amendment principles place outside trademark owners’ control.

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INTRODUCTION

*I’m gonna look well smart in me Burberry.*¹

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¹ KingLouisXVII, *Chavs in Me Burberry*, YOUTUBE (Sept. 16, 2007), <http://youtu.be/2WDnukuUc84>. Cf. generally Daniel Gross, *To Chav and Chav Not*, SLATE (July 12, 2006), <http://www.slate.com/id/2145165/>.

The modern brand² is a social phenomenon, not just a commercial one. As consumers, we use brands as tokens of social differentiation, identification, and expression,³ and producers covet the commercial advantages that come with the integration of brands into consumers' sense of identity.⁴ But weaving brands into the social fabric is an unpredictable process, one that cannot be controlled completely by brand owners or by consumers. The struggle between brand owners and consumers over the social meaning of the brand itself occasionally spills out onto the airwaves and even onto the streets. Recently, in the space of a single week, we saw two striking examples of this conflict. In one, the major American fashion retailer Abercrombie & Fitch launched a media offensive to try to assert control over the social implications of reality television star Mike "The Situation" Sorrentino's prominent consumption of its products on MTV's *Jersey Shore*.⁵ Meanwhile, across the Atlantic, managers of global brands like Adidas, Nike, and Levi's struggled to contain the fallout from their brands being associated with the worst civil unrest Britain has seen in ages.⁶

² For purposes of this Article, I am defining a "brand" as the conjunction of a trademark, the marketing efforts behind that trademark, and the set of associations that the public as a whole has come to attach to that trademark. Cf. 15 U.S.C. §1127 (2010) ("The term 'trademark' includes any word, name, symbol, or device, or any combination thereof . . . used by a person . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods . . ."); Lisa Wood, *Brands and Brand Equity: Definition and Management*, 38 MGMT. DECISION 662, 664-65 (2000), available at <http://dx.doi.org/10.1108/00251740010379100> (discussing various extant definitions of the term "brand" in the marketing literature, including one that defines a brand as "nothing more or less than the sum of all the mental connections people have around it").

³ See, e.g., Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 852 (2010), available at http://www.harvardlawreview.org/issues/123/february10/Article_6838.php; Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 EMORY L. J. 461, 491 (2005); Jeremy N. Sheff, *Veblen Brands*, 94 MINN. L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=1798867>.

⁴ See, e.g., KEVIN LANE KELLER, *STRATEGIC BRAND MANAGEMENT: BUILDING, MEASURING, AND MANAGING BRAND EQUITY* 387-88 (2d ed. 2003) (describing "brand attachment" and "brand activity" as important components of a brand's economic value).

⁵ Stephanie Clifford, *Abercrombie Wants Off 'Jersey Shore' (Wink-Wink)*, N.Y. TIMES, Aug. 18, 2011, at B1, available at <http://www.nytimes.com/2011/08/18/business/abercrombie-offers-jersey-shore-cast-a-paid-non-product-placement.html>.

⁶ Rupert Neate et al., *UK riots: Love affair with gangster-chic turns sour for top fashion brands*, GUARDIAN, Aug. 12, 2011, at P8, available at <http://gu.com/p/3x7tj>.

In at least one of these episodes, there has been some suggestion that the brand owners might take some sort of legal action to protect the value of their brands.⁷ This suggestion raises a relatively novel question of law. Even though social meaning can be one of the primary sources of a modern brand's value, and the preservation of that value depends on the rights afforded under trademark and unfair competition law, that body of law lacks a coherent framework to deal with conflicts that arise between consumers and producers over brands' social meanings. This Article explores one typical point of potential producer-consumer conflict suggested by the examples of the previous paragraph—what I call the “brand renegade.”

I define a brand renegade as a consumer who uses branded products out of affiliation with some aspects of the image cultivated by the brand owner, but whose conspicuous consumption of the brand generates social meanings that are inconsistent with that image.⁸ Part I of this Article reviews the theoretical literature on the economics and psychology of trademarks to identify the origins of the brand renegade. Part II describes some recent examples of brand renegades in action, as well as the responses of brand owners to those brand renegades, pointing the way toward a legal showdown between the two groups. Part III turns to the availability of legal doctrines to mediate the conflict between brand owners and brand renegades, and finds them surprisingly thin. In the end, I argue that socially expressive consumption (and portrayals of that consumption) ought to be permissible as a matter of trademark law, but note that it is not clear that we have the doctrinal architecture to enforce this (hopefully uncontroversial) principle.

I

WHENCE THE RENEGADE?

We can envision more than one model by which a brand can come to have social significance. Perhaps the simplest model is one in which the brand owner works to establish an image through its marketing activities—advertisements, paid

⁷ Clifford, *supra* note 5. See also Brian Goldman, *Putting Lamborghini Doors on the Escalade: A Legal Analysis of the Unauthorized Use of Brand Names in Rap/Hip-Hop*, 8 TEX. REV. ENT. & SPORTS L. 1 (2007) (analyzing the legal claims and defenses in situations similar to those described in Part II.A, *infra*).

⁸ Cf. *Renegade Definition*, OED ONLINE, <http://www.oed.com/viewdictionaryentry/Entry/162410> (last visited Aug. 18, 2011) (subscription required) (“A person who deserts, betrays, or is disloyal to an organization, country, or set of principles. . . . A person who rejects authority and control or behaves in an unconventional manner; a rebel, a nonconformist.”).

endorsements, product placements, etc.—and consumers individually decide whether to identify with that image (by buying the branded product) or not. This model is consistent with the dominant theoretical model of trademark law—what I have referred to elsewhere as the “search-costs model.”⁹ Under this model, producers are thought to use trademarks to convey information about the unobservable qualities of their products—the flavor of a soda; the reliability of a car—to buyers who would otherwise be unable to find that information on their own. By this mechanism, trademarks provide the basis for both consumer choice and producer competition, building goodwill in the process.¹⁰

Of course, this model is essentially useless in describing a great deal of actual observed behavior surrounding consumer brands. If all consumers cared about were the images generated by the brand owner for adoption or rejection by an atomized consuming public, the fact that a rioting “chav”¹¹ or a boorish braggart were known to consume the brand would be irrelevant. But clearly, brand owners care quite a bit about that type of information,¹² most likely in the belief that consumers do as well.

This suggests that there is some other type of brand information that consumers and brand owners find important, and that this information relates to the interaction between brands and the people who consume them. Brand owners could certainly try to generate such information.¹³ Indeed, much modern marketing, including the widespread use of celebrity endorsements, is directed at

⁹ Jeremy N. Sheff, *Biasing Brands*, 32 CARDOZO L. REV. 1245, 1250-51 & n.24, 1254-59 (2011), available at <http://ssrn.com/abstract=1681187>.

¹⁰ William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J. L. & ECON. 265 (1987); Nicholas S. Economides, *The Economics of Trademarks*, 78 TRADEMARK REP. 523 (1988).

¹¹ *Chav Definition*, OED ONLINE, <http://www.oed.com/view/Entry/264253> (last visited Aug. 19, 2011) (subscription required) (“In the United Kingdom (originally the south of England): a young person of a type characterized by brash and loutish behaviour and the wearing of designer-style clothes (esp. sportswear); usually with connotations of a low social status.”). While my use of this term reflects common usage in Britain, an American audience should be aware that the question of its social acceptability stirs some debate in that country. See, e.g., *Stop Use of ‘Chav’ – Think Tank*, BBC NEWS (July 16, 2008), http://news.bbc.co.uk/2/hi/uk_news/7509968.stm (“[The word] “[c]hav is . . . deeply offensive to a largely voiceless group.”).

¹² See *supra* notes 5-6 and sources cited therein.

¹³ See generally Jennifer Edson Escalas, *Narrative Processing: Building Consumer Connections to Brands*, 14 J. CONSUMER PSYCHOL. 168 (2004), available at http://dx.doi.org/10.1207/s15327663jcp1401&2_19.

persuading consumers to associate particular personality traits with a brand¹⁴—the Gerber Baby;¹⁵ the Marlboro Man;¹⁶ the Avon Lady;¹⁷ the Pepsi Generation.¹⁸ To the extent that such subjective associations are just one more example of brand owners creating and disseminating information to consumers, who passively receive it and react to it solely through their atomized purchasing decisions, they might conceivably be integrated into the search-costs model discussed above—as indeed they have been.¹⁹

The problem is that these personality-based associations—because they do not refer back to anything more substantial than the shifting minds of consumers—behave differently than other types of product information, which refer back to the material qualities of a product. In particular, personality-based associations are freighted with vital but unstable social meaning. As consumer psychologists have shown, consumers themselves play an integral role in constructing the social meanings of the brands they consume, not least by forming, expressing and

¹⁴ See Kevin Lane Keller, *Conceptualizing, Measuring, and Managing Customer-Based Brand Equity*, 57 J. MARKETING 1, 3-8 (1993); see generally Zafer B. Erdogan, *Celebrity Endorsement: A Literature Review*, 15 J. MKTG. MGMT. 291 (1999); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1009 (1995) (“[Michael Jordan] endorses Nike shoes. Some of his social capital is transferred to the product endorsed, and the meaning of wearing Nike shoes changes.”); Grant McCracken, *Who Is the Celebrity Endorser?: Cultural Foundations of the Endorsement Process*, in CULTURE AND CONSUMPTION II: MARKETS, MEANING, AND BRAND MANAGEMENT 97, 97 (2005) (setting forth a “meaning-transfer” theory of the celebrity endorser). This focus on subjective differentiation has long generated criticism from legal and economic commentators. See generally, e.g., Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L. J. 1165 (1948); Shahar J. Dilbary, *Famous Trademarks and the Rational Basis for Protecting “Irrational Beliefs,”* 14 GEO. MASON L. REV. 605, 610-12 (2007) (collecting sources); Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367 (1999).

¹⁵ WHO IS THE GERBER BABY?, http://www.gerber.com/AllStages/About/Gerber_Baby.aspx (last visited Jan. 22, 2012).

¹⁶ *The Marlboro Man*, THE ADVERTISING CENTURY: ADAGE.COM, <http://adage.com/century/icon01.html> (last visited Jan. 22, 2012).

¹⁷ WookieeCookie, *1972 Avon Commercial – The Avon Lady*, YOUTUBE (Mar. 15, 2007), <http://youtu.be/fK9-scvGGWY>.

¹⁸ GiralDiMedia, *Michael Jackson Pepsi Generation*, YOUTUBE (June 26, 2009), <http://youtu.be/po0jY4WvCIc>.

¹⁹ See generally Dilbary, *supra* note 14; see also Economides, *supra* note 10, at 535 (“I believe that perception advertising provides consumers with products (mental images) that they value, and which would have been scarce in its absence. It is not a direct waste. Some resources are wasted, however, in the effort to tie in the desired image with the advertised product.”).

observing one another's social identities and allegiances through acts of conspicuous consumption:

When brand associations are used to construct the self or to communicate the self-concept to others, a connection is formed with the brand. . . . [A]ssociations about reference groups become associated with brands those groups are perceived to use, and vice versa. The set of associations can then be linked to consumers' mental representations of self as they select brands with meanings congruent with an aspect of their current self-concept or possible self, thus forging a connection between the consumer and the brand.²⁰

Importantly, however, the power of consumers to contribute to and draw on brands' social meanings is limited by the instability of those meanings in a fluid and competitive social landscape. As Professor Barton Beebe explains, "commodified forms of distinction . . . produce in the fashion innovator or adopter a feeling of 'significant difference,' of being something other than a mere copy in a mass world of equivalence";²¹ but this feeling is inevitably temporary, as "copying both destroys the distinctiveness of existing fashions and creates the need for new ones."²²

These features of consumer psychology demand a more dynamic model of the construction of a brand's social meaning than trademark law currently has. In particular, they require us to come to terms with a significant amount of back-and-forth between and among brand owners, consumers, and the social audience. From the brand owner's perspective, the participatory, decentralized, and non-hierarchical nature of the construction of a brand's social meaning is a double-

²⁰ Jennifer Edson Escalas & James R. Bettman, *You Are What They Eat: The Influence of Reference Groups on Consumers' Connections to Brands*, 13 J. CONSUMER PSYCHOL. 339, 339 (2003), available at http://dx.doi.org/10.1207/S15327663JCP1303_14. Cf. Laura A. Heymann, *Metabranding and Intermediation: A Response to Professor Fleischer*, 12 HARV. NEGOT. L. REV. 201, 202 (2007) ("Brand meaning is not created until the recipient of the messages both receives those messages and gives them any particular relevance. . . . Thus, a brand's meaning doesn't exist in the abstract, nor does it depend on the interpretation intended by the producer; rather, any meaning that exists does so because consumers are willing to give credence to the message that's conveyed (or, indeed, some alternative message should consumers be so inclined."); Lessig, *supra* note 14, at 1009-12 (describing two mechanisms—tying and ambiguation—by which consumers can participate in constructing the meanings of the objects they consume).

²¹ Beebe, *supra* note 3, at 823.

²² *Id.* at 821.

edged sword. On the upside, it allows brand owners to capture a significant amount of value that is created not by the brand owner itself, but by its customers. On the downside, it creates the risk that brand value could be destroyed by forces beyond the brand owners' control. Chief among these forces is the brand renegade.²³

II THE RENEGADE IN OUR MIDST

The history of mass marketed brands is rife with examples of brand renegades, but reveals some diversity in brand owners' responses. This Part considers some illustrative examples.

A. Adoption and Co-Option

Consider the cognac market. For decades, the House of Courvoisier marketed its product as “the brandy of Napoleon,”²⁴ cultivating associations with European aristocracy (and its wealth and power) through full-page ads in upper-middle-class aspirational magazines like *Fortune* and *Gourmet*.²⁵ But as American society changed, those associations began to lose their appeal in the spirit's target market. By the late 1990s, “you almost couldn't give France's most famous brandy away”; cognac in general was seen “as an old fart's drink, a digestif for tuxedoed geezers smoking cigars in wood-paneled libraries.”²⁶

But a counter-trend was already underway. Over the course of the 1990s, cognac had become a fixture in African-American nightlife, and its rise was reflected in hip-hop culture. As early as 1993, West Coast rapper Ice Cube identified the gangsta rap aesthetic with, among other things, “sippin on Courvoisier.”²⁷ By 2002, hip hop had moved from counterculture to mainstream,²⁸ and Busta Rhymes's single, “Pass the Courvoisier,”²⁹ peaked at number 11 on the

²³ See *supra* note 8 and accompanying text.

²⁴ See, e.g., COURVOISIER HERITAGE, <http://courvoisier.com/heritage/> (last visited Jan. 22, 2012); COURVOISIER COGNAC: THE BRANDY OF NAPOLEON, <http://www.napoleonprisonnier.com/images/postmortem/moderne/courvoisier-large.jpg> (last visited Jan. 22, 2012).

²⁵ See, e.g., Courvoisier Advertisement, GOURMET, Oct. 1950, at 25.

²⁶ Mike Steinberger, *Cognac Attack!*, SLATE (Apr. 2, 2008), <http://www.slate.com/id/2188005/>.

²⁷ ICE CUBE, *Down for Whatever*, on LETHAL INJECTION (Priority Records 1993).

²⁸ See generally NELSON GEORGE, HIP HOP AMERICA (3d ed. 2005).

²⁹ BUSTA RHYMES, *Pass The Courvoisier*, on GENESIS (J Records 2001).

Billboard Hot 100 charts.³⁰ While the old-world image of imperial power and opulence no longer had the same pull for the traditional upwardly mobile (and traditionally white) elite of the American economy, the idioms of material luxury had been appropriated by a formerly marginalized, but now culturally ascendant, segment of that economy. Importantly, hip hop did *not* adopt the trappings of Courvoisier's marketing images even as it adopted the brand as an element of its identity. Rather than affecting a First Empire salon, Ice Cube situated Courvoisier in the driver's seat of a two-tone Ford Explorer tearing down the 110 Freeway;³¹ Busta Rhymes in a prohibition-era Harlem back alley.³²

While the Napoleonic imagery of Courvoisier's marketing efforts shares some thematic points with hip hop's invocations of the brand (among them ostentatious wealth, violence, and misogyny), there are obviously deep cultural differences between the two. Courvoisier's expanding young, urban, African-American clientele were, in this sense, brand renegades: they adopted the brand itself as an element of their identity, but did not otherwise change their identity to conform to the brand's existing marketing strategy. And given the social dynamic described above,³³ the conspicuous consumption of the brand by these renegades could not help but reflect back on the social meaning of the brand itself.³⁴

The House of Courvoisier's response to the reshaping of its brand by forces beyond its control was highly adaptive. Rather than dispute or resist the changes in their brand's social meaning, the brand owner co-opted the changes its customers had wrought. As early as 2000, its marketers had pivoted their messaging to

³⁰ *Pass The Courvoisier—Busta Rhymes*, BILLBOARD.COM, <http://www.billboard.com/#/song/busta-rhymes/pass-the-courvoisier/3694375> (last visited Jan. 22, 2012).

³¹ ICE CUBE, *supra* note 27.

³² allblackamericans, *Busta Rhymes feat. P. Diddy & Pharrell - Pass The Courvoisier Part II*, YOUTUBE.COM (Feb. 20, 2009), <http://youtu.be/JAYXRtNxsGA>.

³³ *See supra* note 20 and accompanying text.

³⁴ *Cf.* Jay-Z, *Jay-Z on Cristal: 'Disrespect for the Culture of Hip-Hop'*, TIME (Nov. 18, 2010), <http://www.time.com/time/arts/article/0,8599,2032217,00.html>, ("Everything that hip-hop touches is transformed by the encounter, especially things like language and brands, which leave themselves open to constant redefinition. With language, rappers have raided the dictionary and written in new entries to every definition . . . The same thing happens with brands—Cristal meant one thing, but hip-hop gave its definition some new entries. . . . Cristal, before hip-hop, had a nice story attached to it: It was a quality, premium, luxury brand known to connoisseurs. But hip-hop gave it a deeper meaning. Suddenly, Cristal didn't just signify the good life, but the good life laced with hip-hop's values: subversive, self-made, audacious, even a little dangerous. The word itself—Cristal—took on a new dimension.").

appeal to a new demographic: “young, urban adults who subscribe to hip-hop culture, the vast majority of whom are African-American.”³⁵ When Busta Rhymes released his single, Courvoisier’s marketers were already on the scene, “skillfully tr[ying] to capitalize on the event, in sponsoring events with P Diddy, Missy Elliott and Lil’ Kim, in particular.”³⁶ By 2007, Courvoisier was touting its product as the brandy of hip-hop mogul Jermaine “JD” Dupri—Napoleon was conspicuously absent from the campaign the company launched that year.³⁷ In short, rather than viewing its brand renegades as a threat, Courvoisier welcomed them as an opportunity.

As a business matter, Courvoisier’s response to its brand renegades makes perfect sense. The release of “Pass the Courvoisier” coincided with an 18.9% rise in Courvoisier’s sales,³⁸ and the adoption of the brand by a new generation of drinkers saved it from a decades-long decline.³⁹ Indeed, it is possible that any other course of action might have threatened to damage Courvoisier’s business—as the makers of Cristal champagne learned when they failed to give rapper Jay-Z the respect to which he felt entitled as a successful and influential brand renegade.⁴⁰ Courvoisier was thus in the fortunate position of capturing the positive value of social meanings it did not create by virtue of those meanings becoming associated with its brand through the actions of brand renegades. But more difficult questions arise when the effect of brand renegades on a brand owner’s bottom line is not so unambiguously positive. The rest of this Part illustrates these difficulties.

³⁵ Bernard Stamler, *A New Campaign for Courvoisier, Brandy of Napoleon, Looks for Younger, Hipper Customers*, N.Y. TIMES (Aug. 29, 2000), <http://www.nytimes.com/2000/08/29/business/media-business-advertising-new-campaign-for-courvoisier-brandy-napoleon-looks.html>; see also Hillary Chura, *Spirits Marketing: Global Hue to Handle Courvoisier Business*, ADVERTISING AGE (Jan. 20, 2003), <http://adage.com/article/news/spirits-marketing-globalhue-handle-courvoisier-business/50448/>.

³⁶ JEAN-MARC LEHU, *BRANDED ENTERTAINMENT: PRODUCT PLACEMENT AND BRAND STRATEGY IN THE ENTERTAINMENT BUSINESS* 175 (2007).

³⁷ Press Release, Beam Global Spirits & Wine, Courvoisier Launches New Advertising Campaign Inspiring Consumers to ‘Find Greatness Within’ (Oct. 16, 2007), <http://finance.bnet.com/bnet/news/read?GUID=3497442>.

³⁸ LEHU, *supra* note 36, at 175.

³⁹ See generally Steinberger, *supra* note 26.

⁴⁰ See generally Jay-Z, *supra* note 34 (explaining the rapper’s decision to publicly boycott the champagne he once touted in his lyrics).

B. Reality Bites

As the row between Jay-Z and the makers of Cristal shows, brand owners who invest in cultivating a certain image may not always be grateful to brand renegades who change that image. This ingratitude strikes us as foolish in the hip-hop context, where the adoption of niche luxury brands by a large but marginalized demographic broadly expands those brands' commercial appeal (and thus their profitability). But such ingratitude may be entirely understandable where the customers attracted to the social meanings created by a brand renegade may be offset or even overwhelmed by customers who are loyal to the brand's preexisting image and who find its new meanings repellent.⁴¹

Take the example of MTV's *Jersey Shore*. The reality series is a ratings bonanza for MTV parent Viacom and a bona fide cultural phenomenon.⁴² It is also deeply offensive to a substantial and vocal population. The arbiters of culture find its cast members—such as the aforementioned “The Situation”⁴³ and Nicole “Snooki” Polizzi—to be the personification of bad taste and bad character.⁴⁴ And

⁴¹ See, e.g., Claire Bothwell, *Burberry Versus the Chavs*, BBC NEWS (Oct. 28, 2005), <http://news.bbc.co.uk/2/hi/business/4381140.stm> (“Only five years ago, Burberry was the darling of the fashion world after undergoing one of the most envied brand reinventions of recent years . . . But all too quickly, the brand became a victim of its own success. Label-conscious football hooligans started to adopt the distinctive check. It was associated with people who did bad stuff, who went wild on the terraces.”) (internal quotation marks omitted); Liz Jones, *The Luxury Brand with a Chequered Past, Burberry's Shaken Off Its Chav Image to Become the Fashionistas' Favourite Once More*, MAILONLINE (June 2, 2008), <http://www.dailymail.co.uk/femail/article-1023460/Burberrys-shaken-chav-image-fashionistas-favourite-more.html>.

⁴² See, e.g., Anthony Venutolo, *Jersey Shore Season 4 Premiere Sets Ratings Record*, NEW JERSEY ONLINE (AUG. 5, 2011), http://www.nj.com/entertainment/tv/index.ssf/2011/08/jersey_shore_italy_florence_ra.html; “*Jersey Shore*” saves MTV from Ratings Slump, CBS NEWS (Aug. 31, 2010), <http://www.cbsnews.com/stories/2010/08/31/entertainment/main6824265.shtml>; David Showalter, *MTV's 'Jersey Shore' Success is a Cultural Phenomenon*, NEW JERSEY NEWSROOM (July 13, 2011), <http://www.newjerseynewsroom.com/movies/success-of-jersey-shore-is-a-cultural-phenomenon>.

⁴³ See *supra* note 5 and accompanying text.

⁴⁴ See, e.g., Neil Genzlinger, *Surf, Skin and Jersey. What's Not to Love?*, N.Y. TIMES Jan. 4, 2010, at C1, available at <http://www.nytimes.com/2010/01/04/arts/television/04shore.html> (“Young People Need Bad Examples. . . . They have no idea how much ignorance, narcissism, predatory sexism and hair-gel abuse lurk out there in the real world. Unless they watch ‘Jersey Shore.’”).

understandably, many people do not want to be associated with such characters.⁴⁵ There are, accordingly, a fair number of brands that do not want to be associated with the cast of *Jersey Shore* either, and those brands' owners will go to some lengths to avoid any such association. For example, in an episode I have discussed elsewhere,⁴⁶ it was rumored that some fashion houses were gifting their *competitors'* high-priced handbags to Snooki in the hopes that her déclassée image would rub off on those competitors, to the gift-giver's benefit.⁴⁷

To be sure, an association with Snooki—to whom the *New York Times* once attributed the epithets “[f]lake, cow, loser, slut, idiot, airhead, trash, penguin, creep, moron, midget, freak, Oompa-Loompa, nobody”⁴⁸—is probably not something most customers of most luxury fashion brands want. But there is a huge population of young people who find her irresistible, even admirable.⁴⁹ The same can be said for *The Situation*.⁵⁰ As *New York Magazine* put it, “*Jersey Shore* . . .

⁴⁵ See, e.g., Letter from New Jersey Italian American Legislative Caucus to Philippe P. Dauman, President and Chief Executive Officer, Viacom, Inc. (Dec. 22, 2009), <http://www.njsendems.com/Docs/Italian%20American%20Caucus%20Letter%20on%20MTV%27s%20%27Jersey%20Shore,%27%2012-23-09.pdf>.

⁴⁶ See generally Jeremy N. Sheff, *The Ethics of Unbranding*, 21 FORDHAM INTELL. PROP., MEDIA & ENT. L. J. 983 (2011).

⁴⁷ Simon Doonan, *How Snooki Got Her Gucci: The Dirt on Purses*, N.Y. OBSERVER (Aug. 17, 2010, 5:55 PM), <http://www.observer.com/2010/culture/pricey-landscaping>.

⁴⁸ Cathy Horyn, *Snooki's Time*, N.Y. TIMES, July 23, 2010, at ST1, available at <http://www.nytimes.com/2010/07/25/fashion/25Snooki.html>.

⁴⁹ As of this writing Snooki has nearly 4.2 million followers on Twitter. Nicole Polizzi, TWITTER, <http://twitter.com/#!/snooki> (last visited Jan. 22, 2012). A substantial number of undergraduates at Rutgers University persuaded their administration to pay her more than \$30,000 to appear on campus, and nearly 1,000 lined up for the chance to hear her speak. Aman Ali, *Rutgers University defends Snooki's \$32,000 appearance*, REUTERS (Apr. 1, 2011), <http://www.reuters.com/article/2011/04/01/us-snooki-idUSTRE7305LQ20110401>; Rutgers University's Statement on Nicole “Snooki” Polizzi and her Comedy Act's Appearance on Campus (Apr. 4, 2011), <http://news.rutgers.edu/medrel/statements/2011/statement-from-rutge-20110401>. One commentator noted that Snooki probably generated ten times that sum in free publicity for the University, much as she boosts publicity—and with it, sales—for bars and clubs at which she appears for as little as a few minutes. Catherine Rampell, *Snookinomics*, N.Y. TIMES: ECONOMIX BLOG (Apr. 11, 2011), <http://economix.blogs.nytimes.com/2011/04/11/snookinomics/>.

⁵⁰ While *The Situation* lacks Snooki's Twitter footprint—at just over a million followers—his Facebook page suggests a much deeper fan base. Compare Michael Sorrentino, Twitter, <http://twitter.com/#!/ITSTHESITUATION> (last visited Jan. 22, 2012); with MIKE “THE

made him famous enough to make money off a branded creatine shake.”⁵¹ And in a recent, highly publicized incident, he stepped into the role of brand renegade.

In August of 2011, a retail analyst noted that a recent episode of *Jersey Shore* had shown The Situation “wearing a pair of neon green A[bercrombie] & F[it]ch sweatpants ‘loudly (and proudly)’ on the streets of Florence.”⁵² Abercrombie & Fitch’s “Brand Senses Department” responded swiftly with a press release proposing what it called “a Win-Win Situation.”⁵³ The release protested that association with *Jersey Shore* “is contrary to the aspirational nature of our brand, and may be distressing to many of our fans.”⁵⁴ Accordingly, Abercrombie & Fitch made it known, the company had offered to pay The Situation (and other members of the *Jersey Shore* cast) *not to wear its clothes*.⁵⁵

This was a bit rich. As the press reported, Abercrombie & Fitch is “no stranger to controversy, with its racy marketing campaigns featuring nearly naked models.”⁵⁶ As The Situation himself had noted some time before, one of Abercrombie & Fitch’s more popular t-shirts is emblazoned with the word “Fitchuation.”⁵⁷ Even while dutifully reporting the release, major media outlets recognized they were the instruments of a publicity stunt that was curiously timed to coincide with a quarterly earnings call and the announcement of a major expansion.⁵⁸

SITUATION”, FACEBOOK, <https://www.facebook.com/MikeTheSituation> (last visited Jan. 22, 2012) (Approximately 3.83 million “likes”).

⁵¹ Emma Rosenblum, *The Situation with The Situation*, NEW YORK MAG. (June 20, 2010), <http://nymag.com/guides/summer/2010/66798/>.

⁵² Elizabeth Holmes, *Abercrombie and Fitch Offers to Pay ‘The Situation’ to Stop Wearing Its Clothes*, WALL ST. J. SPEAKEASY BLOG (Aug. 16, 2011), <http://blogs.wsj.com/speakeasy/2011/08/16/abercrombie-and-fitch-offer-to-pay-the-situation-to-stop-wearing-their-clothes/>.

⁵³ News Release, Abercrombie & Fitch, Abercrombie & Fitch Proposes a Win-Win Situation (Aug. 12, 2011), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=61701&p=irol-newsArticle&ID=1597274>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Holmes, *supra* note 52.

⁵⁷ Rosenblum, *supra* note 51; Holmes, *supra* note 52.

⁵⁸ Holmes, *supra* note 52; see also Andrea Felsted & Alan Rappeport, *Abercrombie Sees Off Awkward Brand Situation*, FINANCIAL TIMES (Aug. 19, 2011), <http://www.ft.com/cms/s/0/0c54f972-ca7c-11e0-94d0-00144feabdc0.html?ftcamp=rss>.

Abercrombie & Fitch did not appear to be seriously distancing themselves from the brand renegade, but at the same time they were not trying to co-opt him, as in the Courvoisier example above. Rather, the company seemed to be trying to leverage him. Clearly, Abercrombie & Fitch wanted the public to know two facts about The Situation: first, that he wears the company's clothes, and second, that the company is not comfortable with him wearing its clothes. The first message is designed for fans of *Jersey Shore*; the second, for their bill-paying parents (and the show's detractors more generally). If successful, this stunt may succeed in capturing the upside value of The Situation's social connotations without suffering their downside—a “Win-Win Situation” indeed.

Still, this is a dangerous high-wire act for a brand owner to play when faced with a brand renegade. Even a rumor or hint that the brand owner is trying to distance itself from the social identities of its customers can be commercially devastating.⁵⁹ As the Recording Industry Association of America discovered at great cost, a business strategy that depends on publicly attacking your customer base is likely to be counterproductive.⁶⁰ Still, a constant threat hovers over the brand owner who tries to court the brand renegade without alienating the brand loyalists. At some point, one of these constituencies may put the brand owner to a choice.

C. Cutting Loose

On the evening of August 4, 2011, 29-year-old Mark Duggan was shot dead by police in the north London neighborhood of Tottenham.⁶¹ On August 6, what started as a peaceful protest over the shooting erupted into a violent anti-police

⁵⁹ See, e.g., Kimberly R. McNeil et al., ‘Did You Hear What Tommy Hilfiger Said?’ *Urban Legend, Urban Fashion and African-American Generation Xers*, 5 J. FASHION MKTG. & MGMT. 234, 235 (2001) (“[T]he persistence of the Tommy Hilfiger rumour suggests that this urban legend could possibly influence sales of the brand in a core market . . . the impact of such rumours could be tremendous.”); cf. generally Jay-Z, *supra* note 35.

⁶⁰ See generally, e.g., Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1, available at <http://online.wsj.com/article/SB122966038836021137.html> (“[T]he legal offensive ultimately did little to stem the tide of illegally downloaded music. And it created a public-relations disaster for the industry, whose lawsuits targeted, among others, several single mothers, a dead person and a 13-year-old girl.”).

⁶¹ *England Riots: Maps and Timeline*, BBC NEWS (Aug. 15, 2011), <http://www.bbc.co.uk/news/uk-14436499> [hereinafter *Timeline*]; *Tottenham Police Shooting: Dead Man Was Minicab Passenger*, BBC NEWS (Aug. 5, 2011), <http://www.bbc.co.uk/news/uk-england-london-14423942>.

riot.⁶² Over the following days, rioting spread throughout London and Britain more generally, evolving into an expression of an undifferentiated amalgam of social, political, and economic discontentment; the conditions of public disorder set the stage for a wave of nihilistic and opportunistic violence and looting.⁶³ Young people in particular seemed to see the riots as an opportunity to assert their independence from political, legal, and economic authority; as two young women interviewed by the BBC explained:

It's the government's fault . . . Conservatives . . . whatever, who it is [T]hat's what it's all about, showing the police we can do what we want, and now we have We're just showing the rich people we can do what we want.⁶⁴

One thing they wanted was fashion brands. The press reported that looters of some clothing stores were seen trying things on before they stole them.⁶⁵ One of the most riveting images of the rioting appeared on the front page of the August 9 issue of *The Guardian*: a masked young man, backlit by the carcass of a burning car, decked head-to-toe in an immaculate Adidas hoodie tracksuit (with the shoes to match).⁶⁶ As looting became widespread, the media began to report that certain brands that had cultivated an image of confrontational, rebellious youth in their marketing—brands like Adidas, Nike, and Levi's—were particularly targeted by the young rioters for theft.⁶⁷ The implication was that these brands had been playing with fire by glorifying resistance to authority and associating it with their unattainably high-priced goods, and that they accordingly deserved some share of

⁶² *Timeline, supra* note 61; *Riots in Tottenham After Mark Duggan Shooting Protest*, BBC NEWS (Aug. 7, 2011), <http://www.bbc.co.uk/news/uk-england-london-14434318>.

⁶³ *Timeline, supra* note 61; *cf.* Zoe Williams, *The UK Riots: The Psychology of Looting*, GUARDIAN (Aug. 9, 2011), <http://www.guardian.co.uk/commentisfree/2011/aug/09/uk-riots-psychology-of-looting>.

⁶⁴ *London Rioters, 'Showing the rich we do what we want'*, BBC NEWS (Aug. 9, 2011), <http://www.bbc.co.uk/news/uk-14458424>.

⁶⁵ Williams, *supra* note 63; Anthony France & Brian Flynn, *Cops Vow to Nail the Twitter Rioters*, THE SUN (Aug. 9, 2011), <http://www.thesun.co.uk/sol/homepage/news/3741129/Cops-vow-to-nail-the-Twitter-rioters.html>.

⁶⁶ Michael Cervieri, *Tomorrow's Cover of the Guardian*, FUTURE JOURNALISM PROJECT (Aug. 8, 2011), <http://futurejournalismproject.org/post/8658034888/guardian-cover-london-riots>.

⁶⁷ *See, e.g.,* Neate et al., *supra* note 6; Janet Street Porter, *Big Brands Pay Price of Flirting with Gangsta Chic*, DAILY MAIL ONLINE (Aug. 15, 2011), <http://www.dailymail.co.uk/femail/article-2025978/UK-riots-Big-brands-like-Nike-Adidas-pay-price-flirting-gangsta-chic.html>.

the blame for the destructive actions of their disaffected young customer base.⁶⁸ Whether this was a fair characterization of the rioters' actions and motives or not,⁶⁹ public association with the lawless mayhem on Britain's High Streets took a toll on several brands,⁷⁰ and their marketers went into "lockdown mode" to determine how best to respond to the crisis.⁷¹ A generation of brand renegades had become a national story.

Adidas drew attention in this story not for any specific aspect of its marketing campaign (except perhaps its choice of hip hop artists with criminal records as paid promoters),⁷² but rather because so many rioters were conspicuously wearing (and stealing) Adidas-branded clothing.⁷³ Like The Situation and the various hip hop artists described above, these looters had become brand renegades—due to their actions the public could not help but associate the Adidas brand with the lawless mobs in the streets. Adidas responded vigorously against this threat to its brand image, and "took the step of condemning its customers for taking part in the riots[:] 'Adidas condemns any antisocial or illegal activity,' the company said. 'Our brand has a proud sporting heritage and such behaviour goes against everything we stand for.'"⁷⁴

Levi's, in contrast, drew particular attention for a global marketing campaign it had unluckily launched just before the riots erupted. The flagship television ad for the campaign, entitled "Go Forth," is a video montage of

⁶⁸ See, e.g., Neate et al., *supra* note 6; Porter, *supra* note 67; Chris Roper, *The Great UK Shopping Riots*, MAIL & GUARDIAN ONLINE (Aug. 10, 2011), <http://mg.co.za/article/2011-08-10-the-great-uk-shopping-riots> ("[F]orce-feeding people adverts about things they'll never have, and lives they will never be allowed to share, was almost certain to result in a mob that has decided to steal life, rather than live it vicariously [T]he thousands who aren't given the opportunities to earn might eventually, as in the UK, decide to just take [T]he Great UK Shopping Riots prove that advertising works. The shops that are being looted are mainly brands that have sold themselves to poor people.")

⁶⁹ See generally Mark Ritson, *Spare Us This Riot of Dodgy Brand Theories*, MARKETINGWEEK (Aug. 18, 2011), <http://www.marketingweek.co.uk/sectors/industry/spare-us-this-riot-of-dodgy-brand-theories/3029361.article>.

⁷⁰ Rosie Baker, *Retailers Targeted by Rioters Suffer Fall in Brand Perception*, MARKETINGWEEK (Aug. 17, 2011), <http://www.marketingweek.co.uk/sectors/retail/retailers-targeted-by-rioters-suffer-fall-in-brand-perception/3029330.article>.

⁷¹ Neate et al., *supra* note 6.

⁷² Porter, *supra* note 67.

⁷³ See, e.g., Neate et al., *supra* note 6; Cervieri, *supra* note 66.

⁷⁴ Neate et al., *supra* note 6.

passionate and rebellious young people set against a reading of Charles Bukowski's poem, *The Laughing Heart*.⁷⁵ In one vignette, a young man stands alone in the middle of a ransacked urban square, taunting a phalanx of riot police in view of cowering onlookers, while the narrator passes over Bukowski's line: "you are marvelous."⁷⁶ The media seized on the ad,⁷⁷ and Levi's backpedaled as hard as it could without explicitly disavowing the imagery it had used.⁷⁸ It postponed its planned release of the "Go Forth" ad in British cinemas and on Facebook, but continued to make it available on YouTube and on the campaign website.⁷⁹ Unlike Adidas, Levi's resorted to vague generalities and the passive voice in an attempt to put some distance between its brand image and the rioters without explicitly criticizing its young customer base:

We are deeply disheartened about the unprecedented events taking place in the UK at the moment and which have impacted communities across the country. While Go Forth is about embodying the energy and events of our time, it is not about any specific movement or political theme; rather, it's about optimism, positive action and a pioneering spirit. Out of sensitivity for what is happening in the UK, we have temporarily postponed our cinema and Facebook spots in the country.⁸⁰

⁷⁵ Levi's, *Levi's® Go Forth 2011 (English)*, YOUTUBE (July 20, 2011), <http://youtu.be/KT16DcHcjRA>; Charles Bukowski, *The Laughing Heart*, in *BETTING ON THE MUSE: POEMS & STORIES 400* (1996) ("your life is your life/don't let it be clubbed into dank submission./be on the watch.").

⁷⁶ Levi's, *supra* note 75.

⁷⁷ See, e.g., Tim Nudd, *Levi's Thinks It's a Good Time for Riot Imagery in Ads*, ADWEEK: ADFREAK (Aug. 9, 2011), <http://www.adweek.com/adfreak/levis-thinks-its-good-time-riot-imagery-ads-134026>.

⁷⁸ See, e.g., *Post-Riots Levi's And Nike To Shift Comms And Marketing Strategy From Rebellion*, PR WEEK (Aug. 18, 2011), <http://www.prweek.com/uk/news/1085216/Post-riots-Levis-Nike-shift-comms-marketing-strategy-rebellion/>.

⁷⁹ Eliza Williams, *Awkward Timing for New Levi's Ad*, CREATIVE REVIEW: CR BLOG (Aug. 10, 2011), <http://www.creativereview.co.uk/cr-blog/2011/august/awkward-timing-for-new-levis-spot>; Sara Kimberley, *Levi's Ad Yanked Over Riot Police Scene*, CAMPAIGN (Aug. 10, 2011), <http://www.campaignlive.co.uk/go/news/article/1084242/levis-ad-yanked-riot-police-scene/>.

⁸⁰ Rosie Baker, *Levi's Pulls Ads Following London Riots*, MARKETING WEEK (Aug. 10, 2011), <http://www.marketingweek.co.uk/sectors/retail/levi%E2%80%99s-pulls-ads-following-london-riots/3029146.article>.

Between the responses of Levi's and Adidas to the UK Riots lies the limit of the win-win strategy's effectiveness against the brand renegade. Levi's seemed to think it could placate the brand renegades' social critics without alienating the renegades themselves—precisely the strategy pursued by Abercrombie & Fitch. It attempted to do so by highlighting what its cultivated image and its brand renegades (in this case, rioters conspicuously looting Levi's goods) have in common, while ignoring what makes those brand renegades different (and threatening to others). Adidas clearly concluded that it could *not* strike this balance, and abandoned the brand renegades in favor of the rest of its customer base. Rather than focusing on what its brand renegades have in common with Adidas's cultivated image, the company focused on what makes the brand renegades different, and explicitly attacked it.

The judgments behind these decisions are both commercial and social. They test the margins of profit and persuasion in the tradeoff between brand renegades and brand loyalists, all against the backdrop of a wider social audience. Adidas, alone out of all the brand owners discussed in this Part, seems to have found itself on the wrong side of those margins. As we approach this limit of the brand owner's tolerance for the brand renegade, we come to the question that began this Article⁸¹: is there any role for law in mediating the conflict between them?

III

THE LEGAL LIMITS OF SOCIAL BRANDS

The law of trademarks and unfair competition is at its most lucid when it purports to regulate competition along commercial dimensions. The most clear-cut applications of trademark law deal with conflicts that arise between competing producers regarding identification of the source of goods offered for sale to the public. When a consumer thinks she is buying a quality widget from Producer A, but in fact she is getting a shoddy widget from Producer B, both the consumer and Producer A have cause to complain, and the law has long given each of them a remedy without generating significant controversy.⁸² The difficulty arises when the law tries to reach past these types of source-confusion conflicts.

⁸¹ See *supra* note 7 and accompanying text.

⁸² See 15 U.S.C. § 1125(a)(1)(A) (2010) (imposing liability against uses of trademarks that are “likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of [the defendant] with another person, or as to the origin, sponsorship, or approval of [the defendant’s] goods, services, or commercial activities by another person”); *see*

A. Trademark Law's Expansion

Trademark law's relentless expansion is the overarching story of the past century of development in the field.⁸³ Whereas once the maker of BORDEN ice cream couldn't recover against a company selling BORDEN condensed milk,⁸⁴ such rigid limits on the market scope of trademark rights began to erode in the early part of the twentieth century.⁸⁵ As consumer markets expanded beyond local and regional boundaries, strict geographic limits on the scope of trademark rights eroded.⁸⁶ And as the law's treatment of trademark licensing went from overtly hostile⁸⁷ to broadly accommodative,⁸⁸ courts came to condemn not only commercial practices that led to consumer confusion as to source, but those which might lead consumers to mistakenly believe that a defendant is affiliated with, or

generally Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839 (2007) (tracing the historical development of Anglo-American trademark law).

⁸³ *See, e.g.*, Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 414 (2010) ("Over the middle part of the twentieth century, courts expanded the range of actionable confusion beyond confusion over the actual source of a product—trademark law's traditional concern—to include claims against uses that might confuse consumers about whether the trademark owner sponsors or is affiliated with the defendant's goods.").

⁸⁴ *See generally* *Borden Ice Cream Co. v. Borden's Condensed Milk Co.*, 201 F. 510 (7th Cir. 1912).

⁸⁵ *See, e.g.*, *Aunt Jemima Mills Co. v. Rigney & Co.*, 247 F. 407 (2d Cir. 1917); *Yale Elec. Corp. v. Robertson*, 26 F.2d 972 (1928); *see generally* Lemley & McKenna, *supra* note 83, at 423-27.

⁸⁶ *Compare* *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90 (1918) (limiting common law trademark rights to geographic region of actual use); *with* 15 U.S.C. § 1072 (2010) (providing that federal registration of a trademark provides nationwide notice of a trademark claim); *Dawn Donut Co., Inc. v. Hart's Food Stores, Inc.*, 267 F.2d 358 (2d Cir. 1959) (holding that nationwide notice does not entitle the federal registrant to relief where geographic distance makes likelihood of confusion unlikely, but does give the registrant priority when and if it expands into the geographic region of a later adopter's actual use).

⁸⁷ RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 33 cmt. a (1995) ("The historical conception of trademarks as symbols indicating the physical source of the goods led a number of early courts to conclude that the owner of a trademark could not license others to use the mark without destroying the significance of the designation as an indication of source. Licenses were sometimes declared invalid as a fraud on the public, and licensors risked forfeiture of their rights in the mark through a finding of abandonment."); *see also* McKenna, *supra* note 82, at 1893-95, Lemley & McKenna, *supra* note 83, at 425-27.

⁸⁸ *See, e.g.*, 15 U.S.C. § 1055 (2010) (codifying the principle that licensing of trademarks to related companies does not invalidate, and can strengthen, the licensed mark).

sponsored by, a trademark owner.⁸⁹ This shift, combined with the rise of product placement and embedded advertising in popular entertainment,⁹⁰ brought the producers of expressive works and cultural products into trademark law's ambit.⁹¹ Finally, in 1995, Congress severed the link between competition and trademark liability for "famous" trademarks entirely, by creating a cause of action—dilution—that is explicitly available "regardless of the presence or absence of . . . competition between the owner of the famous mark and other parties."⁹²

Importantly, the expansion of liability to encompass sponsorship and affiliation confusion generates its own momentum, in what Professor James Gibson has referred to as a "feedback loop."⁹³ Uncertainty about the limits of trademark rights leads risk-averse commercial actors to submit to trademark owners' claims (e.g., by taking a license or removing references to the mark) rather than contest them. The observable results of this behavior then inform consumers' perceptions as to the prevalence of sponsorship or affiliation relationships in the marketplace. This changed understanding of consumers, in turn, expands the universe of conduct which could generate confusion as to affiliation or

⁸⁹ *Id.*

⁹⁰ See generally Zahr Said, *Embedded Advertising and the Venture Consumer*, 89 N.C. L. REV. 99 (2010).

⁹¹ *Anheuser-Busch, Inc. v. Balducci Publ'ns*, 28 F.3d 769 (8th Cir. 1994) (parody ad in a humor magazine for fictitious "Michelob Oily" beer held infringing); *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183 (E.D.N.Y. 1972) (poster copying the style of a Coca-Cola advertisement but altered to read "Enjoy Cocaine" held likely to confuse at preliminary injunction stage); see Lemley & McKenna, *supra* note 83, at 418-21 (collecting examples).

⁹² Federal Trademark Dilution Act of 1995, § 4, 109 Stat. 985, 986 (1996) (codified as amended at 15 U.S.C. § 1127 (2010)). This statute and subsequent amendments also expanded even further the types of effects on the minds of the public that can give rise to liability. Owners of famous trademarks may now seek to enjoin uses of their brands that threaten to "impair[] the distinctiveness" or "harm[] the reputation" of those brands, "regardless of the presence or absence of actual or likely confusion . . . or of actual economic injury." 15 U.S.C. § 1125(c) (2010).

⁹³ James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L. REV. 882, 907-23 (2007); see also Lemley & McKenna, *supra* note 83, at 421 ("[M]any [entertainment producers] simply cave in and change their practices rather than face the uncertainty of a lawsuit."); cf. generally William McGeeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49 (2008) (arguing that the cost of litigating a meritorious defense to a claim of trademark infringement creates a chilling effect on expressive uses of trademarks).

sponsorship.⁹⁴ The result is that trademark liability's boundary is never clear, and yet clearly always expanding.

B. The Brand Renegade at the Outer Limit

The brand renegade represents the final frontier of trademark law's expansion. The self-generated momentum of that expansion is surely accelerated by brand owners' decisions to co-opt (or at least try to leverage) brand renegades. Over time, observers may come to presume that each new brand renegade is actually affiliated with the brand owner—indeed, this already appears to have happened in the hip-hop context.⁹⁵ As subtle, informal, and post hoc cross-promotional relationships become increasingly common in the entertainment industry,⁹⁶ and as user-generated content is increasingly incentivized by marketers themselves,⁹⁷ the line between independent consumer and sponsored affiliate is

⁹⁴ Gibson, *supra* note 93, at 907-23.

⁹⁵ The prevalence of brand mentions in hip-hop lyrics has led many to conclude that artists are paid for such mentions—and indeed sometimes they are, even if only after the fact. Gil Kaufman, *Push The Courvoisier: Are Rappers Paid for Product Placement?*, MTV (June 9, 2003), <http://www.mtv.com/news/articles/1472393/rappers-paid-product-placement.jhtml>; see also Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. 1305, 1313-14 (2011) (“Given the number of lucrative and highly visible product placement deals, . . . trademark owners can argue that consumers see a brand's presence practically anywhere as an indication of endorsement.”). It is thus perhaps unsurprising that MTV's response to Abercrombie & Fitch's publicity stunt regarding The Situation was to suggest a product placement deal. See Clifford, *supra* note 5 (“MTV played along on Wednesday. ‘It's a clever P.R. stunt, and we'd love to work with them on other ways they can leverage ‘Jersey Shore’ to reach the largest youth audience on television,’ it said in an e-mail.”).

⁹⁶ See Kaufman, *supra* note 95; Said, *supra* note 90, at 111-17, 133-38. Cf. Bruce Feiler, *Pocketful of Dough*, GOURMET, Oct. 2000, available at <http://www.gourmet.com/magazine/2000s/2000/10/pocketful> (“Seconds later, with new confidence, I slipped a fifty toward his hand and said, ‘Is there any way you could speed that up?’ The man felt the money, then pushed it back into my hand. ‘Sorry,’ he said, ‘there really is nothing I can do.’ Four minutes later, though, we were seated at a table for two by the window. Moreover, the maître d' came to our table several times to ask if everything was satisfactory. At the end of the evening, not because I had planned it but entirely because I felt like it, I gave him \$30. He graciously accepted. Outside, I realized I had just witnessed the gold standard. The maître d' turned down the money when it was a bribe, gave us the service anyway, then accepted the money as a well-earned tip.”) (emphasis omitted).

⁹⁷ See generally, e.g., Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459; Ellen P. Goodman, *Peer Promotions and False Advertising Law*, 58 S.C. L. REV. 683

already frustratingly difficult to draw.⁹⁸ Finally, as marketers begin to turn to the same social networking tools⁹⁹ and participatory demonstrations that have recently become a hallmark of organized civil unrest,¹⁰⁰ it may be only a matter of time until a significant number of consumers genuinely come to believe (perhaps with good reason) that the latest riot tearing through their communities enjoys corporate sponsorship.¹⁰¹

(2007); Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721 (2010); See David Streitfeld, *In a Race to Out-Rave Rivals, 5-Star Web Reviews Go for \$5*, N.Y. TIMES, Aug. 20, 2011, at A1, available at <http://www.nytimes.com/2011/08/20/technology/finding-fake-reviews-online.html> (noting the growing practice of marketers paying writers to post favorable user reviews on Amazon.com and other sites); Trevor Pinch & Filip Kesler, *How Aunt Ammy Gets Her Free Lunch: A Study of the Top-Thousand Customer Reviewers at Amazon.com*, at 52-55, 78 (June 12, 2011) (unpublished manuscript) (available at <http://www.freelunch.me/filecabinet/HowAuntAmmyGetsHerFreeLunch-FINAL.pdf>) (noting the common practice of sending top reviewers free advance copies of new books, and observing that “[a]s Amazon begins to sell more and more different sorts of goods, reviewers too begin to realize . . . that they can gain even more freebies by reviewing such items”).

⁹⁸ For example, the Federal Trade Commission’s guidelines on endorsements purport to draw extremely fine distinctions between the types of conduct that turn an ordinary consumer into a paid endorser in the blogging context. Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0 ex. 8 (2009), available at <http://ftc.gov/os/2009/10/091005revisedendorsementguides.pdf>. Even the Commission itself seems to have trouble applying its guidelines consistently. See, e.g., Nick Bilton, *F.T.C. Says It Will Not Investigate Ashton Kutcher*, N.Y. TIMES BITS BLOG (Aug. 19, 2011, 1:07 PM), <http://bits.blogs.nytimes.com/2011/08/19/f-t-c-says-it-will-not-investigate-ashton-kutcher/>. Another example of the blurring lines between enthusiastic consumer and paid advocate comes from the increasing use of “brand ambassadors” on college campuses. See Natasha Singer, *On Campus, It’s One Big Commercial*, N.Y. TIMES, Sept. 11, 2011, at BU1, available at <http://www.nytimes.com/2011/09/11/business/at-colleges-the-marketers-are-everywhere.html>.

⁹⁹ See William McGeeveran, *Disclosure, Endorsement, and Identity in Social Marketing*, 2009 U. ILL. L. REV. 1105, 1107 (2009) (describing marketing through online social networks as “a form of reputational piggybacking”).

¹⁰⁰ Compare Wells Fargo ‘Flash Mob’ Yields 1 Million YouTube Views, THE FINANCIAL BRAND (May 9, 2011), <http://thefinancialbrand.com/18345/wells-fargo-times-square-flash-mob-video/>, with David Downs, *The Evolution of Flash Mobs from Pranks to Crime and Revolution*, SAN FRANCISCO EXAMINER (Aug. 28, 2011), <http://www.sfexaminer.com/local/2011/08/evolution-flash-mobs-pranks-crime-and-revolution>.

¹⁰¹ Cf. *L.I. Couple Seeks Trademark for “Occupy Wall St.”*, THE SMOKING GUN (Oct. 24, 2011), <http://www.thesmokinggun.com/documents/occupy-wall-street-trademark-986531> (reporting an application to register the mark “Occupy Wall St.” for use on apparel, bumper

Despite these trends, our intuition is that there must be *some* limit to the power of brand owners to control perceptions of their brands, particularly where those perceptions are based on our observations of actual consumers. As Professor Rebecca Tushnet notes, “[t]here is nothing (as yet) that Coca-Cola can do to erase my memory of the time I spilled a Diet Coke into my keyboard,”¹⁰² and it would strike us as absurd (I hope) to suggest that Coca-Cola might sue Professor Tushnet for having created such a negative association with its brand in her own mind (or, having read her article, in ours). Similarly, I suspect most people would find it implausible that a consumer could be assessed damages for wearing Adidas to a riot,¹⁰³ that a reality television star could be enjoined from walking down the street wearing a pair of neon green Abercrombie & Fitch pants,¹⁰⁴ or that a rapper could be sued for ordering Courvoisier at a nightclub.¹⁰⁵ Our intuition is that there must be some intelligible limit on the legal weapons the brand owner can deploy against the brand renegade. But where in the law are these limits to be found?

We might try to satisfy our intuition by setting certain categories of conduct outside trademark law’s reach. For example, one could argue that *consumption* of a brand owner’s products, and perhaps the *portrayal* of that consumption in expressive works, are categories of conduct that should be outside the bounds of trademark liability. But it is not at all clear that this is the case under current law. Portrayals of brands in expressive works are *not*, as a category of conduct, beyond trademark law’s reach.¹⁰⁶ And there is no doctrine that one can definitively point to in hopes of placing consumption, as a category of conduct, entirely outside of the reach of infringement liability—indeed, there is anecdotal evidence that brand owners *are* moving to regulate consumption directly.¹⁰⁷ Moreover, consideration

stickers, and accessories, and a separate application for the mark “We are the 99%”—both marks being slogans of the protest movement against economic and financial elites that continues to grow and develop as of this writing). This report prompted an apt (if not entirely original) quip by my friend and colleague Professor Laura Heymann: “The revolution will be merchandised.”

¹⁰² Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 540 (2008).

¹⁰³ See *supra* Part II.C.

¹⁰⁴ See *supra* notes Part II.B.

¹⁰⁵ See *supra* notes Part II.A.

¹⁰⁶ See *supra* note 91 and sources cited therein.

¹⁰⁷ See, e.g., Lemley & McKenna, *supra* note 83, at 413-14 (relating an incident in which FIFA required soccer fans to surrender unlicensed team-colored pants as a condition of entering a football match).

of doctrines that might be invoked to impose such conduct-based limits on trademark liability only serve to demonstrate the absence of such limits.

Take, for example, the doctrine of “trademark use” or “use as a mark.” For approximately a decade, scholars and judges debated whether “trademark use” is an element of a trademark infringement or dilution claim, and if so what trademark use means and how it might be established.¹⁰⁸ After the spilling of much ink, we appear to have an answer: there is no trademark use requirement at all for infringement claims,¹⁰⁹ but “use as a mark” is a necessary element of dilution claims.¹¹⁰ The plaintiff’s burden on this element of its dilution claim is simply to show that the defendant’s use involves some goods or services *other than* those of the plaintiff.¹¹¹ This limitation on dilution claims would indeed seem to shield the brand renegade *in his capacity as consumer* from blurring or tarnishment liability. But it would not shield the producers of expressive works that portray the brand renegade’s consumption, nor would it necessarily shield the brand renegade who

¹⁰⁸ See generally, e.g., Graeme B. Dinwoodie & Mark D. Janis, *Confusion over Use: Contextualism in Trademark Law*, 92 IOWA L. REV. 1597 (2007) (rejecting trademark use as an independent doctrine and arguing for “contextual analysis” that focuses on confusion); Stacey L. Dogan & Mark A. Lemley, *Grounding Trademark Law Through Trademark Use*, 92 IOWA L. REV. 1669 (2007) (arguing that trademark use is a doctrine made necessary by the broadening scope of novel trademark claims directed at internet intermediaries); Mark P. McKenna, *Trademark Use and the Problem of Source*, 2009 U. ILL. L. REV. 773 (arguing that trademark use questions inevitably collapse into questions about consumer confusion).

¹⁰⁹ *Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123, 127-40 (2d Cir. 2009); Stacey L. Dogan, *Beyond Trademark Use*, 8 J. TELECOMM. & HIGH TECH. L. 135, 136 (2010) (“The Second Circuit appears to have settled the issue, at least temporarily, in its recent opinion.... The *Rescuecom* court held that the Lanham Act contains virtually no limitation on the type of ‘use’ of a mark that can qualify as direct trademark infringement.”).

¹¹⁰ 15 U.S.C. 1125(c)(3) (2010) (excluding comparative advertising, parody, criticism, and comment, news reporting and commentary, and noncommercial use from the definition of actionable dilution); Stacey L. Dogan & Mark A. Lemley, *The Trademark Use Requirement in Dilution Cases*, 24 SANTA CLARA COMPUTER & HIGH TECH. L. J. 541, 549-54 (2008) (arguing that the language of the amended dilution statute supports the interpretation that only use “as a mark” can trigger dilution liability); *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93, 112 (2d Cir. 2010) (effectively adopting the Dogan & Lemley interpretation of the amended dilution statute).

¹¹¹ See *Tiffany (NJ)*, 600 F.3d at 112 (holding that there can be no dilution where “there is no second mark or product at issue ... to blur with or to tarnish” the plaintiff’s mark); Dogan & Lemley, *supra* note 108, at 552 (“[T]he only actionable ‘uses’ by a defendant of the plaintiff’s famous mark are those in which a defendant uses a trademark or trade name to identify and distinguish its own goods and services.”).

consumes in the process of rendering entertainment services—a reality television star on a shoot, for example, or a rapper appearing at a promotional event. And of course, both the brand renegade and the producer of expressive works portraying his consumption would find no refuge from infringement (as opposed to dilution) liability in the trademark use doctrine.¹¹²

As another potential doctrinal tool to limit brand renegades' liability, consider the related but distinct requirement of use in commerce. By both constitutional¹¹³ and statutory command,¹¹⁴ federal trademark liability may only attach to conduct that constitutes a use of a mark "in commerce"—specifically, in interstate or foreign commerce. But only minimal reflection is required to conclude that this limitation on the reach of trademark liability offers no shelter to the brand renegade. With respect to expressive works that are themselves released into the stream of commerce, a plaintiff would have no trouble satisfying this requirement.¹¹⁵ And as every law student learns, the scope of "commerce" subject to regulation by Congress is exceedingly broad. It is no great leap from the proposition that a farmer can be restrained in growing wheat for his own consumption due to the effect of his self-sufficiency on the economy-wide demand for wheat,¹¹⁶ to the proposition that a consumer can be restrained from consuming branded products due to the effect on the economy-wide market for that brand. This is particularly true where there is a thriving market for brand affiliation, in which brand owners compensate consumers for their conspicuous consumption of and advocacy for the brands they enjoy.¹¹⁷ In short, the use in commerce requirement is perhaps even less useful than the trademark use requirement in satisfying our intuition against holding brand renegades liable to brand owners.

In light of these shortcomings of established doctrine in satisfying our intuitive policy inclinations, some commentators have proposed novel, alternative limits on the reach of trademark liability. Professors Mark Lemley and Mark McKenna, for example, suggest that liability for sponsorship and affiliation

¹¹² See *supra* note 109.

¹¹³ The Trade-Mark Cases, 100 U.S. 82, 95-97 (1879) (invalidating an early federal trademark statute for failure to limit its reach to that sphere of commerce within the power of Congress to regulate).

¹¹⁴ 15 U.S.C. § 1125(a), (c) (2010) (establishing a private right of action against certain uses of a mark "in commerce").

¹¹⁵ See *supra* note 91 and sources cited therein.

¹¹⁶ Wickard v. Filburn, 317 U.S. 111, 127-28 (1942).

¹¹⁷ See *supra* notes 96-102 and accompanying text.

confusion might usefully be restrained by investigating whether the confusion at issue in any given case is likely to materially affect consumers' purchasing decisions, arguing that any other form of confusion is irrelevant to trademark law's policy objectives.¹¹⁸ While the concept of materiality that Professors Lemley and McKenna borrow from false advertising law¹¹⁹ is a useful criterion for restraining the expansiveness of sponsorship and affiliation confusion liability in general, on reflection it does not seem to do much work in the narrow case of the brand renegade. Professors Lemley and McKenna argue, convincingly, that brand owners are unlikely to suffer any lost sales from most forms of sponsorship or affiliation confusion, making materiality a useful policy lever.¹²⁰ But clearly, and particularly for brands that trade on social meaning, brand renegades *do* affect purchasing decisions, at least in some circumstances.¹²¹

¹¹⁸ See Lemley & McKenna, *supra* note 83.

¹¹⁹ *Id.* at 445-53. See generally Tushnet, *supra* note 95 (comparing the applicable standards under trademark law and false advertising law).

¹²⁰ Lemley & McKenna, *supra* note 83, at 437-39.

¹²¹ Compare Harry Wallop, *Burberry admits chav effect checked sales over Christmas*, THE TELEGRAPH (Jan. 13, 2005), <http://www.telegraph.co.uk/finance/2903392/Burberry-admits-chav-effect-checked-sales-over-Christmas.html> (noting that the association of the brand with "chavs" had "not been helpful" to Burberry's sales, though other factors also took a negative impact), with Jeremy Mullman, *Rap Mogul's Boycott of Cristal Champagne Unlikely to Hurt Brand*, ADVERTISING AGE (June 27, 2006), <http://adage.com/article/news/rap-mogul-s-boycott-cristal-champagne-hurt-brand/110203/> (reporting that a boycott by Jay-Z would not impact Cristal's sales because it is a limited production label which is always sold out). See *supra* notes 38-39 and accompanying text. Professors Lemley and McKenna point to a study suggesting that a brand's affiliation with a celebrity endorser who later becomes publicly associated with some moral failing tends not to reflect poorly on the brand absent some responsibility of the brand owner for the endorser's immoral conduct. Lemley & McKenna, *supra* note 83, at 437-39 (quoting Nicole L. Votolato & H. Rao Unnava, *Spillover of Negative Information on Brand Alliances*, 16 J. CONSUMER PSYCHOL. 196 (2006); see also Therese A. Louie, Robert L. Kulik & Robert Jacobson, *When Bad Things Happen to the Endorsers of Good Products*, 12 MARKETING LETTERS 13 (2001) (testing the effect on firm value of celebrity endorser blameworthiness). But see Ace Metrix, *Celebrity Advertisements: Exposing a Myth of Advertising Effectiveness* 1 (2010), available at http://mktg.acemetrix.com/acton/ct/563/p-001d/Bct/-/-/ct14_1/1 (finding that advertisements featuring celebrities "do not perform any better than non-celebrity ads, and in some cases they perform much worse."). Of course, the brand owner is, in some sense, responsible for the brand renegade's conduct, because it is the brand owner's cultivation of its own image that attracts the brand renegade in the first place.

C. Drawing a Line

I propose that the intuition against imposing liability on brand renegades is better served by a principle that has historically served to limit trademark rights: freedom of expression. Professors Lemley and McKenna cite this principle as one justification for their materiality proposal,¹²² but with respect to brand renegades, it is likely the entire issue. At stake in the conflicts described in Part II of this Article is the balance between the expressive interests of brand owners and the expressive interests of brand renegades with respect to the social meanings of the brands in which they each claim a stake. The ultimate question is: will the law give either of these parties any preference in constructing those meanings?

Professor Thomas McCarthy, the author of the leading American treatise on trademark law, has advanced the argument that a trademark owner has a First Amendment interest in *not* being associated with controversial persons (such as brand renegades) and the negative social response to them.¹²³ Notably, though, Professor McCarthy's argument on this point claims exactly zero support from the trademark caselaw. In contrast, First Amendment concerns are reflected in numerous trademark law doctrines under which courts have shielded persons *other than* the brand owner from liability: the protection of criticism¹²⁴ and parody;¹²⁵ the cabining of infringement claims against the titles¹²⁶ or contents¹²⁷ of expressive

¹²² Lemley & McKenna, *supra* note 83, at 441-443.

¹²³ 6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION, § 31:145 (“A trademark is itself a powerful symbol identifying a single person, corporation or commercial source. When it is used without permission as a vehicle for someone else's controversial message, it will be a matter of fact whether the ordinary viewer is likely to believe that the owner of the trademark sponsors or approves of the content of the message. Alternatively, the message itself may be so “morally repugnant” that the person or company would be forced to speak in rebuttal. When the property right resides in the symbol of a trademark itself, the link between defendant's message and the trademark owner should be much more likely to occur than when the property right merely resides in a semi-public shopping center, as in *Pruneyard* [*Shopping Center v. Robins*, 447 U.S. 74 (1980)].”).

¹²⁴ *See, e.g.*, *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1165 (C.D. Cal. 1998) (“[Plaintiff] is exercising his right to publish critical commentary about [defendant].”).

¹²⁵ *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 901 (9th Cir. 2002) (“[W]here an artistic work targets the original and does not merely borrow another's property to get attention, First Amendment interests weigh more heavily in the balance.”).

¹²⁶ *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989) (allowing trademark liability only if the mark in question bears no “artistic relevance” to the work whatsoever).

works; the doctrines of descriptive fair use¹²⁸ and nominative fair use;¹²⁹ and the statutory limits on dilution claims,¹³⁰ to name just a few. In general, these doctrines recognize that overbroad assertions of trademark rights can inhibit the expression of ideas that either promote competition (in the case of fair use) or provide socially useful information regarding trademarks and their owners (in the case of defenses for parody and criticism). To avoid such chilling effects, the law limits the control mark owners may assert over the uses others make of their marks.¹³¹

In many—if not most—of these doctrines courts tend to suggest that the First Amendment interest may be vindicated only where (or even *because*) there is as a factual matter *no* consumer confusion of which the brand owner might complain.¹³² But it must be admitted that this is unlikely to be true for brand

¹²⁷ *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Grp., Inc.*, 886 F.2d 490, 495 (2d Cir. 1989) (extending the *Rogers* test to the content of expressive works).

¹²⁸ 15 U.S.C. § 1115(b)(4) (2010); *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 121-22 (2004) (“The common law’s tolerance of a certain degree of confusion on the part of consumers followed from . . . the undesirability of allowing anyone to obtain a complete monopoly on use of a descriptive term simply by grabbing it first.”).

¹²⁹ *New Kids on the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302, 307-08 (9th Cir. 1992) (“[W]e may generalize a class of cases where the use of the trademark does not attempt to capitalize on consumer confusion or to appropriate the cachet of one product for a different one. Such *nominative* use of a mark—where the only word reasonably available to describe a particular thing is pressed into service—lies outside the strictures of trademark law.”).

¹³⁰ *See supra* note 110.

¹³¹ *See, e.g.*, Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 973 (1993) (“So long as trademark law limits itself to its traditional role of avoiding confusion in the marketplace, there’s little likelihood that free expression will be hindered.”); Robert C. Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protections of Trade Symbols*, 1982 WISC. L. REV. 158, 206 (1982) (“The First Amendment will not permit the trademark owner the power to dictate the form, and thus the effectiveness, of another’s speech simply because his trademark has been used to express ideas that he would prefer to exclude from the public dialogue.”); Rochelle C. Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397 (1990).

¹³² *Bally Total Fitness*, 29 F. Supp. 2d at 1165 n.2 (“[N]o reasonably prudent Internet user would believe that ‘Ballysucks.com’ is the official Bally site or is sponsored by Bally.”); *Cliffs Notes*, 886 F.2d at 494 (“A parody must convey two simultaneous—and contradictory—messages: that it is the original, but also that it is *not* the original and is instead a parody. To the extent that it does only the former but not the latter, it is not only a poor parody but also vulnerable under trademark law, since the customer will be confused.”); *Rogers*, 875 F.2d at 1000 (“[M]ost consumers are well aware that they cannot judge a book solely by its title any

renegades. As discussed above, brand renegades by definition affiliate themselves with some aspects of the brand, and as brand owners continue to co-opt and leverage brand renegades, consumers are increasingly likely to be confused as to whether the affiliation runs both ways. Merely protecting brand renegades who do not confuse as to affiliation or sponsorship is unlikely to avoid trademark infringement liability in the modern marketing environment. The principle of freedom of expression must *trump* the concern over confusion for us to conclude that the conduct of brand renegades is not actionable.

One doctrine reflects precisely such a prioritization of interests, and it is directly applicable to one of the categories of conduct that is the subject of our intuition against the imposition of liability. This is the strict test for infringement applied to expressive works.¹³³ Under *Rogers v. Grimaldi*¹³⁴ and its progeny,¹³⁵ such works will infringe a trademark only where their use of the mark has “no artistic relevance” to the underlying work. Characterized as an exercise in “balance,”¹³⁶ this standard explicitly accepts some degree of confusion in order to avoid chilling expression.¹³⁷ Application of *Rogers* would almost certainly protect a rapper in his lyrics and a reality television producer in its broadcast, while analogous constitutional privileges of the press would surely protect a newspaper in its coverage of a riot.¹³⁸ While the caselaw interpreting the federal dilution

more than by its cover.”); *New Kids on the Block*, 971 F.2d at 308 (“Such use is fair because it does not imply sponsorship or endorsement by the trademark holder.”).

¹³³ Descriptive fair use doctrine reflects similar priorities. The Supreme Court has noted that tolerating confusion in descriptive fair use cases is justified, at least in part, by the trademark owner’s role in creating the circumstances that give rise to that confusion. *KP Permanent Make-Up*, 543 U.S. at 121-22 (“The common law’s tolerance of a certain degree of confusion on the part of consumers followed from the very fact that in cases like this one an originally descriptive term was selected to be used as a mark.”). Brand owners who trade on social images cultivated in their own marketing campaigns find themselves in a similar position when a brand renegade invokes those meanings in ways that might give rise to confusion as to affiliation or sponsorship.

¹³⁴ 875 F.2d 994 (2d Cir. 1989).

¹³⁵ See, e.g., *Mattel*, 296 F.3d at 901-02 (9th Cir. 2002); *Cliffs Notes*, 886 F.2d at 494.

¹³⁶ *Rogers*, 875 F.2d at 999; see also *Cliffs Notes*, 886 F.2d at 495 (describing the *Rogers* test as a “balancing approach”).

¹³⁷ *Rogers*, 875 F.2d at 1000 (“In these circumstances, the slight risk that such use of a celebrity’s name might implicitly suggest endorsement or sponsorship to some people is outweighed by the danger of restricting artistic expression, and the Lanham Act is not applicable.”).

¹³⁸ See *Yankee Pub. Inc. v. News America Pub. Inc.* 809 F. Supp. 267, 276 (S.D.N.Y. 1992) (“[W]here the unauthorized use of a trademark is for expressive purposes of . . . news reporting,

statute is more limited, it suggests a similar result in dilution actions.¹³⁹ Nevertheless, it is not clear that the *subjects* of these expressive works—the consumer brand renegades themselves—would enjoy similar protection. Indeed, if Professor McCarthy’s view is correct, there might be some justification for imposing liability against consumers who create such associations.

Thus we come, finally, to the ultimate question: whether the brand renegade, who alters a brand’s social meaning by the mere act of conspicuously consuming it, is within the reach of trademark liability. If our intuition is that the answer to this question must be no,¹⁴⁰ I submit that this intuition can be justified only by recognizing through law what consumer psychologists have concluded through research:¹⁴¹ that for brand renegades as for the rest of us, *consumption itself* has an expressive character.¹⁴² If the reason for tolerating confusion with respect to the expressive works described in the last paragraph is that there is social value in the expression inherent in portrayals of a brand renegade’s consumption, it follows that the ultimate source of that value is the consumptive act itself—passing the Courvoisier, donning Abercrombie & Fitch pants, or wearing Adidas on a looting spree. As discussed in the first Part of this Article, we engage in such consumption in no small part to forge our social identities, to communicate those identities to others, and to modify our identities in response to similar communications we receive through others’ consumption.¹⁴³ Where that consumption relates to branded goods, the brand itself becomes in at least some measure the subject of a social, not just a commercial, discourse.

and commentary, the law requires a balancing of the rights of the trademark owner against the interests of free speech.”); *cf.* *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964) (holding that private lawsuits against newspapers over the content of their reporting implicate the First Amendment).

¹³⁹ *See, e.g., Mattel*, 296 F.3d at 902-07 (holding that the “noncommercial use” exception to liability under the 1996 dilution statute—preserved in the 2006 amendments—exempts from dilution liability all expressive uses of a mark that do not fall within the definition of commercial speech for First Amendment purposes).

¹⁴⁰ *See supra* notes 102-105 and accompanying text.

¹⁴¹ *See supra* note 20 and accompanying text.

¹⁴² *See Sheff, supra* note 3, Part III (arguing that conspicuous consumption of status goods is expressive conduct under the First Amendment); *cf. Lessig, supra* note 14 at 946-47 (discussing the construction of social meaning—idiosyncratically defined differently than the term is used in this Article—through, among other things, individuals’ acts and behaviors).

¹⁴³ *See supra* notes 20-23 and accompanying text.

The possibility of socially expressive consumption is not novel—quite the opposite.¹⁴⁴ But it is a possibility that American trademark law has yet to fully grapple with—perhaps because the expansion of liability under that body of law is only now reaching the point where consumption itself is implicated. Where the law and commentary have recognized First Amendment interests, it has generally been with respect to either talking *about* (and perhaps critiquing) a brand’s cultivated associations, or directly invoking those associations as a kind of shorthand vocabulary.¹⁴⁵ The brand renegade forces us to recognize a new category of expression—one which both appropriates some aspects of a brand’s meaning and alters that meaning by giving it new social context. We must recognize that consuming a brand can in itself be a form of commentary on and critique of the social meanings inherent in that brand—particularly where the brand owner explicitly trades on those meanings by cultivating personality associations in its marketing.

As brand renegades continue to engage in this form of expression, and brand owners increasingly conflict with them, we are sure to be called on to integrate that conflict into the uneasy legal balance between the ever-expanding sphere of trademark liability and our First Amendment principles. I submit that in this narrow context, the balance is a relatively easy one to strike. Professor McCarthy argues that brand owners should be permitted to contribute to a brand’s social meanings, but that nobody else should (at least not without the brand owner’s approval). He argues, in short, for judicially enforced viewpoint-based restrictions on expression. In contrast, the intuition against liability that has been the subject of the investigation in this Part demands no such discrimination; it merely demands that the law treat the brand owner and the brand renegade on equal footing with respect to their contributions to the social meaning of a brand. As between these two alternatives, the intuition investigated in this Part fares far better under the First Amendment than Professor McCarthy’s alternative.¹⁴⁶ Doctrinally, I propose

¹⁴⁴ Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 703 (2004) (“It has long been a cliché, of social theory as much as of advertising practice, that consumers communicate with each other by the objects they consume.”).

¹⁴⁵ See Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 S.M.U. L. REV. 381, 386 n.22 (2008) (citing sources); see generally, e.g., Kozinski, *supra* note 131, at 973; Denicola, *supra* note 131, at 195–200; Dreyfuss, *supra* note 131.

¹⁴⁶ See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995) (stating that government may not regulate speech based on its substantive content or the message it conveys, nor may it favor one speaker over another); *R.A.V. v. St. Paul*, 505 U.S. 377, 391

that the best vehicle for the intuition I have attempted to vindicate in this Part is to extend the balance struck by *Rogers* and its progeny (and the analogous dilution authorities)¹⁴⁷ from the case of expressive *works* to the case of expressive *consumption*. Absent an explicit claim by the brand renegade that the brand owner approves of his conduct,¹⁴⁸ the expressive dimension of his consumption deserves protection from trademark liability.

CONCLUSION

In this Article, I have argued that conspicuous consumption of brands whose owners have cultivated particular social connotations is, in itself, an expressive act. This act cannot help but contribute to the social meanings of the brand itself, and as brand owners increasingly try to actively manage such associations, public confusion as to affiliation or sponsorship may result. Where the consumption is performed by a brand renegade—someone who identifies with some aspects of the brand’s cultivated image but who also generates social meanings inconsistent with that image—we face a conflict for control between the brand renegade and the brand owner. My argument in this Article—as elsewhere¹⁴⁹—is that in this struggle to control social meaning, which implicates not only the identity of the brand but the identity of members of a community, both parties ought to be equally free to make their case, and the social audience should be free to decide between them.¹⁵⁰

(1992) (invalidating special prohibitions on speakers who express disfavored views on sensitive subjects); cf. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (1948) (“Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information . . . which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.*”) (emphasis in original).

¹⁴⁷ See *supra* notes 133-139 and accompanying text.

¹⁴⁸ Cf. *Rogers*, 875 F.2d at 999 & n.5 (holding that expressive works are not shielded from trademark liability, even where their use of a mark has artistic relevance to the work, if that use “explicitly misleads as to the source or the content of the work”).

¹⁴⁹ Cf. Sheff, *supra* note 3 (arguing that in the absence of confusion as to source or quality, the First Amendment should bar counterfeiting claims for luxury “status” brands); Sheff, *supra* note 46, at 17 (arguing that the stealth marketing campaign involving Snooki’s consumption of authentic luxury handbags is unproblematic from an ethical standpoint).

¹⁵⁰ Cf. MEIKLEJOHN, *supra* note 146; Laura A. Heymann, *The Public’s Domain in Trademark Law: A First Amendment Theory of the Consumer*, 43 GA. L. REV. 651 (2009).