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BALANCING TRADEMARK DILUTION AND CONSUMER RIGHTS: A THEORETICAL PERSPECTIVE

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I. Introduction

Trademark Dilution and Consumer Protection are often seen as conflicting interests in modern times. While traditional trademark[1] protection focused on preventing consumer confusion, dilution law primarily safeguards the distinctiveness and reputation of well-known marks, even when there is no direct confusion. This article delves into the tension between these two concepts, examining how trademark dilution can be placed within the context of consumer welfare and how legal frameworks can strive to balance the preservation of advertising value of the trademark with the foundational goal of protecting consumers. The origins of trademark law emphasise on consumer protection by ensuring that trademarks serve as reliable indicators of source and quality. However, with the rise of powerful global brands, dilution laws have emerged to prevent harm to a trademark's distinctiveness and value, even in cases where consumer confusion is not a direct threat. This shift, while necessary in certain cases, raises concerns about prioritising brand interests over the public's rights and perceptions.

II. Consumer Rights in Trademark

The modern characteristics of the trademark was only established in the late nineteenth century by British courts of law.[2] With its humble beginning as a property mark[3] and later as a sign of membership in a guild in the 12th century[4], the current trademark law has come a long way.

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[1] The term 'traditional trademark' is used to indicate the law developed by the courts of law in the 19th century and is compared to modern concepts of trademark dilution, cybersquatting etc. Author Mark P Mckenna distinguishes this in his paper, the Normative Foundations of Trademark Law. Mark P McKenna, 'The Normative Foundations of Trademark Law', *Notre Dame Law Review* 82, no. 5 (2007): 1839–915. *See also*, Brian A Jacobs, 'Trademark Dilution on the Constitutional Edge', *Columbia Law Review* 104, no. 1 (2004): 164.

[2] Lionel Bently, 'The Making of Modern Trade Marks Law: The Construction of the Legal Concept of Trade Mark (1860–80)', in *Trade Marks and Brands: An Interdisciplinary Critique*, ed. Lionel Bently et al., Cambridge Intellectual Property Rights and Information Law (Cambridge University Press, 2008).

[3] Abraham S. Greenberg, 'The Ancient Lineage of Trade-Marks', *Journal of the Patent Office Society* 33, no. 12 (1951): 876–87.

[4] Sidney A Diamond, 'The Historical Development of Trademarks', *Trademark Reporter* 73 (1983): 222–47.

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Ancient Greeks marked their sculptors with name of the sculptor, the Romans inscribed the name of the maker or the consuls on bricks.[5]

Industrial revolution accelerated the growth of trademark with fast paced machines and new means of transportation which helped businesses to reach far away consumers.[6] The protection of trademark began as an action against deceit or misrepresentation.[7] It was based on the notion that, "the courts should intervene where one trader fraudulently uses the mark of another."[8] Historically, the common law foundation of trademark was deeply intertwined with consumer protection, serving primarily as a badge of origin to prevent deception in the marketplace.[9] A trademark identified the goods of a specific manufacturer and established a connection in the course of trade, assuring consumers they would get the product they desired.[10] The core common law mechanism for protecting consumers was the action of 'passing off' or 'palming off,' which prevented one producer from imitating another's trade name or distinctive trade dress to deceive consumers into purchasing their goods.[11] Under the British law, trademark was afforded dual protection under the Common Law courts and the Chancery courts.[12] Under common law, rights in a mark vested in its owner through actual prior use in commerce.[13] This meant that a mark only gained protection to the extent it had established use and meaning to consumers, inherently linking it to the goodwill or reputational value created by a business.[14] This goodwill was considered a property right itself, arising from a company's 'productive

[5] Edward S. Rogers, 'Some Historical Matter Concerning Trade-Marks', *Michigan Law Review* 9, no. 1 (1910): 29–43.
[6] Diamond, 'The Historical Development of Trademarks' at 238.
[7] Lionel Bently, 'The Making of Modern Trade Marks Law: The Construction of the Legal Concept of Trade Mark (1860–80)'.
[8] Lionel Bently, 'From Communication to Thing: Historical Perspective of the Conceptualisation of Trademarks as Property', in *Trademark Law and Theory: A Handbook of Contemporary Research*, ed. Graeme B. Dinwoodie et al., Research Handbooks in Intellectual Property (Edward Elgar Publishing, 2008), https://doi.org/10.4337/9781848441316.
[9] Lisa P Lukose, 'Consumer Protection Vis a Vis Trademark Law', *International Journal on Consumer Law and Practice* 1 (2013): 89–101; Stephen L Carter, 'The Trouble with Trademark', *Yale Law Journal* 99, no. 4 (1990): 759–800.
[10] Abraham S. Greenberg, 'The Ancient Lineage of Trade-Marks'; Lionel Bently, 'The First Trademark Case at Common Law? The Story of Singleton v. Bolton (1783)', *University of California, Davis* 47 (2014): 969–1014.
[11] Peter Charleton and Sinéad Reilly, 'Passing Off: An Uncertain Remedy', *Fordham Intellectual Property Conference, Cambridge University*, April 2015, 1–29; K C Kailasam, *Venkateswaran on Trademarks & Passing Off*, 6th ed., vol. 1 (LexisNexis, 2015).
[12] Lionel Bently, 'From Communication to Thing: Historical Perspective of the Conceptualisation of Trademarks as Property' at 4. The Common law court remedy was based on deceit which required an intention to deceive whereas in the Chancery court, it was misrepresentation which required an intention to mislead.
[13] Adam Mossoff, 'Trademark as a Property Right', *Kentucky Law Journal* 107, no. 1 (2018): 1–33, https://doi.org/10.2139/ssrn.2941763.
[14] Stephen L Carter, 'The Trouble with Trademark'; Lukose, 'Consumer Protection Vis a Vis Trademark Law'; Adam Mossoff, 'What Is Property? Putting the Pieces Back Together', *Arizona Law Review* 45 (2003): 371–443.

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labours in the marketplace.' This indicates that unlike in other forms of intellectual property, the property right was not in the trademark itself. But it was linked to the goodwill or the reputational value attached to the mark through use. In this respect trademark were often called as 'Use-right' property.[15] Irrespective of the forum, the focus of the trademark protection seemed to be the consumers. The question in common law courts is whether the use of a trademark by another trader was with the intention to deceive the consumers,[16] and this involves a question of bad faith whereas in the courts of equity the trademark owner just needs to show that use of his mark by another would likely mislead the consumer.[17] The question of intention is irrelevant in chancery courts thus making it easier for trademark owner to get remedy in chancery courts. Also, under common law, rights in a mark vested in its owner through actual prior use in commerce.[18] A mark without established use and meaning to consumers was traditionally not protected. This meant protection was coextensive with the goodwill the mark represented. Further the trademark protection was 'local in scope' where the mark was actually in use or would expand naturally.[19] Thus there was geographical limitation on the common law protection available to trademarks.

Fundamentally the trademark law protects the consumer expectation.[20] A consumer seeing the mark 'Goodday' on a biscuit has a reasonable expectation that the mark on a biscuit indicates the same manufacturer. Here, trademark functions as an 'indication of source'. Here, trademark law prevents an infringer from using the same mark on similar goods to protect the expectation of the consumer.[21] The established standard for trademark infringement suit is the 'likelihood of confusion' by the consumer.[22] But increasingly, this standard has been misused by the courts. In the late nineteenth century, the courts found only those kinds of confusion actionable which

[15] A trademark was conceptualized as a "use-right" property or "usufruct," derived from and logically appurtenant to the broader property right in goodwill. This distinct nature meant a trademark was not a freestanding, full property right like a fee simple in land or a patent. Mossoff, 'Trademark as a Property Right'; Lionel Bently, 'From Communication to Thing: Historical Perspective of the Conceptualisation of Trademarks as Property'.
[16] Frank I Schechter, *The Historical Foundations of Law Relating to Trade-Marks* (Columbia University Press, 1925) at 143.
[17] Lionel Bently, 'From Communication to Thing: Historical Perspective of the Conceptualisation of Trademarks as Property' at 5.
[18] Mossoff, 'Trademark as a Property Right'.
[19] Stephen L Carter, 'The Trouble with Trademark'.
[20] Graeme B. Dinwoodie, 'Ensuring Consumers "Get What They Want": The Role of Trademark Law', *Cambridge Law Journal*, 2024, 1–26.
[21] Graeme B. Dinwoodie, 'Ensuring Consumers "Get What They Want": The Role of Trademark Law'.
[22] Robert G. Bone, 'Taking the Confusion Out of Likelihood of Confusion: Toward a More Sensible Approach to Trademark Infringement', *Northwestern University Law Review* 106, no. 3 (2012): 1307–78.

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led to trade diversion.[23] The only confusion trademark law protects is the one regarding the source of the goods and service when the mark is used by the defendant.[24] All or every kind of confusion is not protected by the law. This concept was central to most trademark infringement cases and was indication of the need to safeguard the consumer's ability to identify the source of a product or service.[25] This misuse has reached a position where even in the absence of consumer confusion an action for trademark infringement can be found.

III. The Emergence of Trademark Dilution

The concept of trademark dilution arose in the wake of a supposed gap that the traditional trademark law is not equipped to the protect the distinctiveness and the brand value of a well-known mark. It is the most acknowledged fact that trademark dilution is the most 'elusive and controversial' concept of trademark law.[26] It is controversial because of its departure from the traditional trademark law and the fact that it encourages trademark law to be producer-centric and not consumer-centric.[27] Unlike traditional trademark law, which is primarily concerned with protecting consumers by ensuring that they can correctly identify the source of goods or services, trademark dilution shifts the focus towards the rights of the trademark owner. This doctrine diverges from the conventional approach by recognizing that a mark's distinctiveness and brand value can be eroded even in the absence of direct competition or consumer confusion.[28] In his seminal work[29] Schechter claims that the 'mark *sells* the goods.' This leads to the construction that there is property right in the mark itself.[30] Ordinarily, trademark cannot be bought or sold like a common property. It is always in conjunction with the 'goodwill' that a trademark is sold.[31]

[23] Mark P McKenna, 'A Consumer Decision-Making Theory of Trademark Law', *Virginia Law Review* 98, no. 1 (2012): 67–114.
[24] McKenna, 'A Consumer Decision-Making Theory'.
[25] David S. Welkowitz, 'Reexamining Trademark Dilution', *Vanderbilt Law Review* 44, no. 3 (1991): 531–88.
[26] Mark A. Lemley and Mark McKenna, 'Irrelevant Confusion', *Stanford Law Review* 62 (2010): 413–54; Laura R. Bradford, 'Emotion, Dilution and the Trademark Consumer', *Berkeley Technology Law Journal* 23, no. 4 (2008): 1227–98.
[27] Graeme B. Dinwoodie, 'Ensuring Consumers "Get What They Want": The Role of Trademark Law'.
[28] Frank I. Schechter, 'The Rational Basis of Trademark Protection', *Harvard Law Review* 40, no. 6 (1927): 813–33.
[29] Schechter, 'The Rational Basis of Trademark Protection'.
[30] David S. Welkowitz, 'Reexamining Trademark Dilution'.
[31] In the case *M'Andrew v Bassett*.(1864) 4 De G J & S 380, 10 LT(NS) 445, Lord Westbury states that, "property in a word for all purposes cannot exist; but property in that word, as applied by way of a stamp upon a particular vendible article, as a stick of liquorice, does exist the moment the article goes into the market so stamped, and there obtains acceptance and reputation whereby the stamp gets currency as an indicator of superior quality, or of some other circumstance which renders the article so stamped acceptable to the public." This makes it clear that mark is not the property. But, when a product on which mark is affixed is sold and with time when that product is accepted by the general public and it gains reputation through use and it is known for its superior quality or any other characteristics which is accepted by the public, there exists a property.

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The concept of dilution was notably popularized by Frank Schechter's influential 1927 article, "The Rational Basis of Trademark Protection."[32] Schechter argued that the true function of a trademark was its 'selling power' or 'drawing power,' which stemmed from its uniqueness and psychological hold upon the public.[33] He proposed that unauthorized use of distinctive marks, even on unrelated products (e.g., 'Kodak' on bicycles or 'Rolls-Royce' on bathtubs and cakes), would 'gradually whittle away or dilute' this distinctiveness, thereby lessening its selling power. The term 'dilution' itself finds its birthplace in early German court decisions, such as the 1924 'Odol' case, where the German word 'Verwaesserung' (dilution) was used to describe this impairment of selling power.[34]

Historically, trademark protection was primarily concerned with preventing consumer confusion and deception, ensuring that consumers could identify the origin or ownership of goods and that sales were not diverted due to misrepresentation.[35] The common law action for passing off, for instance, requires a showing of misrepresentation causing damage to goodwill, which is often linked to confusion leading to lost sales. Dilution, however, represents a fundamental shift, positing that harm can occur to the trademark itself, as an asset, separate from actual consumer confusion or direct competition.[36]

Trademark Dilution occurs when the unauthorised use of a mark in unrelated goods and service may cause harm even in the absence of consumer confusion.[37] This expansive protection is available only for well-known mark or famous marks.[38] Dilution protection is typically reserved for 'famous' or 'well-known' marks that have achieved a high degree of public

[32] Schechter, 'The Rational Basis of Trademark Protection'; David S. Welkowitz, 'Reexamining Trademark Dilution'; Wee Loon Ng-Loy, 'The Sense and Sensibility in the Anti-Dilution Right', *Singapore Academy of Law Journal* 24 (2012): 927–77.
[33] Schechter, 'The Rational Basis of Trademark Protection'; T. G. Agitha, 'Trademark Dilution: Indian Approach', *Journal of Indian Law Institute* 50, no. 3 (2008): 339–66.
[34] Walter J. Derenberg, 'The Problem of Trademark Dilution and the Antidilution Statutes', *California Law Review* 44, no. 3 (1956): 439–88, https://doi.org/10.2307/3478748; Wee Loon Ng-Loy, 'The Sense and Sensibility in the Anti-Dilution Right'.
[35] Robert G Bone, 'Schechter's Ideas in Historical Context and Dilution's Rocky Road', *Santa Clara High Technology Law Journal* 24, no. 3 (2008): 469–506; Alfred C. Yen, 'The Constructive Role of Confusion in Trademark', *North Carolina Law Review* 93 (2014): 77–137.
[36] David J. Franklyn, 'Debunking Dilution Doctrine: Toward a Coherent Theory of the Anti-Free-Rider Principle in American Trademark Law', *Hastings Law Journal* 56, no. 1 (2004): 117–68; Derenberg, 'The Problem of Trademark Dilution and the Antidilution Statutes'; Robert N. Klieger, 'Trademark Dilution: The Whitling Away of the Rational Basis for Trademark Protection', *University of Pittsburgh Law Review* 58 (1997): 789–864.
[37] Sarah Lux, 'Evaluating Trade Mark Dilution from the Perspective of the Consumer', *University of New South Wales Law Journal* 34, no. 3 (2011): 1053–79.
[38] Famous mark as used in the context of the United States and Well-Known mark as in India.

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recognition and renown. This ensures that the protection is limited to marks that have genuinely acquired significant 'celebrity' or 'reputation' in the public consciousness. For instance, the US federal law explicitly requires a mark to be 'widely recognized by the general consuming public' to qualify for dilution protection, disallowing "niche fame."[39] Trademark dilution protects the selling power[40] or the 'commercial magnetism'[41] of the mark, it does not prevent the consumer confusion among the well-known marks.[42] In the words of Frank I. Schechter, trademark dilution is the *"it is the gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name by its use upon non-competing goods."*[43] The central aim of dilution is the preservation of the uniqueness and singularity of the trademark.[44] It is concerned with the impairment of the mark's distinctiveness or its capacity to identify and distinguish goods or services.[45] The idea is that the constant use of a well-known mark by others, even if non-confusing, can erode its unique association, making it harder for consumers to connect it singularly with the original product.

Primarily there are two forms of trademark dilution. Dilution by 'blurring' or dilution by 'tarnishment.'[46] 'Blurring' occurs because of the secondary use of the mark on unrelated goods and services.[47] And through such use the distinctiveness of the mark is eroded or diluted.[48] This occurs when a famous mark's distinctiveness is impaired, making it harder for consumers to uniquely associate it with the original goods or services.[49] Frank Schechter, envisioned this as the 'gradual whittling away' of a mark's unique identity, even if used on 'totally unrelated products or services' like 'Kodak' on bicycles or 'Rolls-Royce' on cakes.[50] The concern is that

[39] Wee Loon Ng-Loy, 'The Sense and Sensibility in the Anti-Dilution Right'; T. G. Agitha, 'Trademark Dilution: Indian Approach'.
[40] T. G. Agitha, 'Trademark Dilution: Indian Approach'.
[41] Mark R Becker, 'Streamlining the Federal Trademark Dilution Act to Apply to Truly Famous Marks', *Iowa L. Rev.* 85, no. 4 (2000): 1387–472.
[42] David S. Welkowitz, 'Protection Against Trademark Dilution in the U.K. and Canada: Inexorable Trend or Will Tradition Triumph', *Hastings International and Comparative Law Review* 24, no. 1 (2000): 63–124.
[43] Schechter, 'The Rational Basis of Trademark Protection'.
[44] Schechter, 'The Rational Basis of Trademark Protection'; Frank I Schechter, *The Historical Foundations of Law Relating to Trade-Marks*; Frank I. Schechter, 'Fog and Fiction in Trade-Mark Protection. Part I', *Columbia Law Review* 36, no. 1 (1936): 60–87, https://doi.org/10.2307/1116240.
[45] Bone, 'Schechter's Ideas in Historical Context'; Wee Loon Ng-Loy, 'The Sense and Sensibility in the Anti-Dilution Right'.
[46] T. G. Agitha, 'Trademark Dilution: Indian Approach'.
[47] David S. Welkowitz, 'Protection Against Trademark Dilution in the U.K. and Canada: Inexorable Trend or Will Tradition Triumph'.
[48] Jason R. Edgecombe, 'Off the Mark: Bringing the Federal Trademark Dilution Act in Line with Established Trademark Law', *Emory Law Journal* 51, no. 3 (n.d.): 1247–80.
[49] Bone, 'Schechter's Ideas in Historical Context'; Wee Loon Ng-Loy, 'The Sense and Sensibility in the Anti-Dilution Right'; Sarah Lux, 'Evaluating Trade Mark Dilution from the Perspective of the Consumer'.
[50] William Marroletti, 'Dilution, Confusion, or Delusion- The Need for a Clear International Standard to Determine Trademark Dilution', *Brooklyn Journal of International Law* 25, no. 3 (n.d.): 659–92; Wee Loon Ng-

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a ‘one mark, one product’ association becomes ‘one mark, two products.’[51] Many scholars find the blurring concept uncomprehensible.[52] In comparison dilution by ‘tarnishment’ is easier to understand. It happens when the well-known mark is used on ‘unsavoury’ or ‘shoddy’ or ‘low quality’ products.[53] When the use of the mark results in a ‘negative association’ tarnishment arises.[54] A classical example of this is the use of the trademark ‘Benz’ on undergarments.[55]

Other lesser-known forms of dilution is dilution by ‘cybersquatting’ and ‘free-riding.’ Mostly prevalent in the cyberspace where a ‘nobody’ holds the domain name to a well-known trademark, who then sell it to the original trademark owner.[56] ‘Free-riding’ or taking unfair advantage is recognized in some jurisdictions like the European Union and Singapore.[57] It involves a junior user benefiting from the senior mark's reputation or "aura" without necessarily causing blurring or tarnishment, essentially "riding the coattails" of the famous mark's commercial success.[58] This is distinct from blurring and tarnishment, which focus on preventing harm to the senior mark's distinctive character or repute.

IV. Conflict or Cooperation

The conflict between dilution and earlier trademark law is evident in its theoretical differences. The traditional trademark law is based on the principal that the use of a mark on same or similar goods and services will cause confusion among the consumers as to the origin of the goods.[59] Whereas in dilution, the mark has proprietary rights and any use of the same by another person is considered injurious. Such use reduces the distinctiveness of the mark. What is the injury which the dilution purports to prevent is yet to be understood. Under the traditional trademark the injured party is consumer who has been deceived, it is the trademark owner whose trade has been diverted. Advocates of dilution argue that such expansive protection is essential in the

Loy, ‘The Sense and Sensibility in the Anti-Dilution Right’; Schechter, ‘The Rational Basis of Trademark Protection’.

[51] Maureen Morrin and Jacob Jacoby, ‘Trademark Dilution: Empirical Measures for an Elusive Concept’, *Journal of Public Policy & Marketing* 19, no. 2 (2024): 265–76; William Marroletti, ‘Trademark Dilution’.

[52] Robert N. Klieger, *Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection*, 58 (1997): 789; Jonathan E. Moskin, ‘Dilution or Delusion: The Rational Limits of Trademark Protection’, *Trademark Reporter* 83 (1993): 112.

[53] Zahraa Hadi, ‘If Disparagement Is Dead, Dilution Must Die Too’, *Berkeley Technology Law Journal* 33, no. Annual Review (2019): 1189–222; Becker, ‘Trademark Fame’.

[54] Becker, ‘Trademark Fame’.

[55] *Daimler Benz Aktiegessellschaft & Anr. v. Hybo Hindustan* (AIR 1994 Del. 239).

[56] Becker, ‘Trademark Fame’.

[57] Barton Beebe, ‘The Semiotic Analysis of Trademark Law’, *UCLA Law Review* 51 (2004): 621–704.

[58] Sarah Lux, ‘Evaluating Trade Mark Dilution from the Perspective of the Consumer’.

[59] David S. Welkowitz, ‘Protection Against Trademark Dilution in the U.K. and Canada: Inexorable Trend or Will Tradition Triumph’.

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global market where the brand value acquired through rigorous advertisement needs to be protected.[60] It is not mark but rather business investments which are protected by dilution principles.

Regardless of the constant opposition to the concept of dilution, it is here to stay. It has inevitably become an integral part of trademark law. This area of trademark is riddled with confusion, uncertainty and chaos. The only remedy is to regulate the same. The lack of a clear conceptual understanding, an absence of consensus on the essentials of the principles and its subject matter further abets the problem.

V. Conclusion

While protecting well-known marks from dilution is important, consumer welfare must remain the primary focus. Overemphasis on dilution can lead to legal outcomes that disproportionately benefit trademark owners at the expense of competition and consumer choice. Therefore, a nuanced approach is essential, one that upholds the integrity of well-known marks while placing the consumer's interest at the core of trademark law. Undoubtedly, a balance can be reached when consumer perceptions guide legal interpretations, ensuring that trademark law remains true to its origins while accommodating the evolving dynamics of trademark protection.

[60] Alexandra J Roberts, 'New-School Trademark Dilution: Famous among the Juvenile Consuming Public', *IDEA: The Intellectual Property Law Review* 49, no. 4 (2009): 579–646.