

## PLACEBO MARKS

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### *Abstract*

*Scholars often complain that sellers use trademarks to manipulate consumer perception, instead of communicating valuable information. This manipulation is said to harm consumers by limiting their ability to make informed choices. For example, holding other things constant, consumers spend more money on goods with a high performance reputation. Critics characterize that choice as wasteful. But trademarks with a high performance reputation may sometimes “trick” consumers to their benefit.*

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

*This placebo effect stems from a distortion in consumer perception, but not one that limits consumer autonomy. In fact, the cost of consumer manipulation may not be as high as scholars previously estimated. Moreover, reforming trademark law to prevent all manipulative trademark use might have the unintended consequence of unraveling beneficial placebo effects.*

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## INTRODUCTION

Under the standard economic account, the law protects a trademark as an exclusive source identifier for a given product because the mark provides important information to consumers.<sup>1</sup> Protecting the mark incentivizes the owner to maintain and improve product quality.<sup>2</sup> Consumers consequently save search costs because they can rely on the mark to convey accurate information about the product and then more easily compare products from different sellers.<sup>3</sup> Trademark protection thus contributes to an efficient market by enabling competition on price and quality.<sup>4</sup>

But trademarks can also communicate messages and create customer interest independent of accurate signals about price and quality. Emotional appeals can create attachments that are irrational, or at least not grounded in objective quality.<sup>5</sup> To the extent

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

<sup>2</sup> *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985) (“National protection of trademarks is desirable, Congress concluded, because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation.”).

<sup>3</sup> See, e.g., Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1690 (1999) (trademarks are justified to the extent they “communicate useful information to consumers, and thereby reduce consumer search costs.”).

<sup>4</sup> *Scandia Down*, 772 F.2d 1423, 1430 (7<sup>th</sup> Cir. 1985) (“If the seller provides an inconsistent level of quality, or reduces quality below what consumers expect from earlier experience, that reduces the value of the trademark.”); *Smith v. Chanel, Inc.*, 402 F.2d 562, 566 (9<sup>th</sup> Cir. 1968) (“Without some method of product identification, informed consumer choice, and hence meaningful competition in quality, could not exist.”); Robert N. Klieger, *Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection*, 58 U. PITT. L. REV. 789, 856-60 (1997); Sidney A. Diamond, *The Public Interest and the Trademark System*, 62 J. PAT. OFF. SOC'Y 528, 544 (1980); Joseph M. Livermore, *On Use of a Competitor's Trademark*, 59 TRADEMARK REP. 30, 30 (1969) (“In many industries ... the absence of differentiating trademarks would mean that competition in product quality could not exist.”).

<sup>5</sup> JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* 155 (1958) (arguing that advertising and marketing cannot be “reconciled with the notion of independently determined desires, for their central function is to create desires – to bring into being wants that previously did not exist”). See also Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2056-57 (2005) (summarizing scholarship advocating restrictive interpretation of trademark protection based on

consumer loyalty diverges from accurate information about the mark,<sup>6</sup> trademark protection might not play its expected roles of ensuring consumers can rely on marks or fostering competition.<sup>7</sup> Trademark scholarship has generally assumed this mismatch harms consumers while allowing mark owners to expand trademark protection beyond its reasonable bounds.<sup>8</sup>

Recent evidence, however, suggests that the ability of trademarks to influence consumers has some positive spillover effects. In particular, several recent studies suggest that exposure to or use of a product bearing a trademark with a performance enhancing reputation will improve the user's performance on various tasks, compared to a product without a high-performance mark.<sup>9</sup> Surprisingly, this effect is independent of

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manipulation of consumers).

<sup>6</sup> Graeme W. Austin, *Trademarks and the Burdened Imagination*, 69 BROOK. L. REV. 827, 856 (2004), citing Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1747 (2003) (examining consumer expectations in context of products liability). See also Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999) (noting the influence of unyielding cognitive biases on decisionmakers as applied to products liability law).

<sup>7</sup> Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165, 1187 (1948) (“[A trademark] is a narrow bridge over which all the traffic powered by [product] advertising must pass. . . . With time, the symbol comes to be more than a conduit through which the persuasive power of advertising is transmitted, and acquires a potency, a ‘commercial magnetism,’ of its own.”). See also *id.* (“The buyer of an advertised good buys more than a parcel of food or fabric; he buys the pause that refreshes, the hand that has never lost its skill, the priceless ingredient that is the reputation of its maker.”); Theodore Levitt, *The Morality (?) of Advertising*, HARV. BUS. REV., July/Aug. 1970, at 85 (“In the factory, we make cosmetics; in the store we sell hope.”) (quoting Charles Revson of Revlon, Inc.).

<sup>8</sup> Lemley, *The Modern Lanham Act and the Death of Common Sense*, *supra* note 3, at 1713. Stacey L. Dogan & Mark A. Lemley, *Parody As Brand*, 47 U.C. DAVIS L. REV. 473, 493 (2013) (“[A]rtificial product differentiation can lead to higher prices and deadweight loss.”), citing Ann Bartow, *Counterfeits, Copying and Class*, 48 HOUS. L. REV. 707, 707-08 (2011); Jeremy N. Sheff, *Veblen Brands*, 96 MINN. L. REV. 769, 825 (2012).

<sup>9</sup> Aaron M. Garvey, Frank Germann, & Lisa E. Bolton, *Performance Brand Placebos: How Brands Improve Performance and Consumers Take the Credit*, 42 J. CONSUMER RES. 931 (2016); Grainne M. Fitzsimons, Tanya L. Chartrand, & Gavan J. Fitzsimons, *Automatic Effects of Brand Exposure on Motivated Behavior: How Apple Makes You “Think Different”*, 35 J. CONSUMER RES. 21 (2008); S. Adam Brasel & James Gips, *Red Bull “Gives You Wings” for better or worse: A double-edged impact of brand exposure on consumer performance*, 21 J. CONSUMER PSYCH. 57 (2011); Ji Kyung Park and Deborah

actual product quality. For instance, if research subjects believe they are using a Nike putter, they putt better, whether or not Nike made the putter.<sup>10</sup> Consumers may gain measurable benefit from the perception that the product they are using is performance enhancing. This evidence complicates the presumption that consumers only benefit when the trademark conveys information about objectively measurable quality as it relates to source indication. And it provides more data to help improve the fit between trademark law and how consumers use and process information.<sup>11</sup>

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

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

A trademark is any word, name, symbol, or device used to distinguish the seller's product and indicate the (anonymous) source of that product.<sup>12</sup> The law secures the right to use a trademark as an exclusive source designator for a given product on the

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Roedder John, *I Think I Can, I Think I Can: Brand Use, Self-Efficacy, and Performance*, 51 J. MARKETING RES. 233 (2014); R. Friedman & A. Elliot, *Exploring the influence of sports drink exposure on physical endurance*, 9 PSYCHOLOGY OF SPORT AND EXERCISE, 749-759 (2008); Liane Schmidt et al, *Red Bull Gives You Incentive Motivation: Understanding Placebo Effects of Energy Drinks on Human Cognitive Performance* (pre-print, not yet peer-reviewed) (2017). Cf. A. Branthwaite & P. Cooper, *Analgesic effects of branding in treatment of headaches*, 282 BR. MED. J. CLIN. RES. ED. 1576 (1981).

<sup>10</sup> Garvey et al., *supra* note 9.

<sup>11</sup> See, e.g., Thomas R. Lee, Eric D. DeRosia & Glenn Christensen, *An Empirical and Consumer Psychology Analysis of Trademark Distinctiveness*, 41 ARIZ. ST. L.J. 1033, 1036-39 (2009) (using consumer psychology models as a means to determine a trademark's effect); Jake Linford, *Are Trademarks Ever Fanciful?*, 105 GEO. L.J. (forthcoming 2017) (sound symbols in fanciful marks can convey product information, which militates against overprotecting fanciful marks).

<sup>12</sup> 15 U.S.C. § 1127, "trademark". In this article, product indicates goods, services, or both.

assumption that the trademark provides important information to consumers.<sup>13</sup> If a consumer can expect to have a similar experience every time she eats at a McDonald's restaurant, or drinks a Coke-branded cola, the trademark communicates useful information to consumers that reduces the cost of searching for a desired product.<sup>14</sup>

On the other hand, if a new entrant can use the same or a similar mark on the same or similar products, consumers would likely be confused about the source of the competing products. That confusion would likely impair consumers' ability to use the mark to help them select the product they prefer, which would increase search costs.<sup>15</sup> Trademarks are thus protected as exclusive signifiers of a particular product from a particular source so that consumers can rely on the information conveyed.<sup>16</sup>

To the extent the law protects the source significance of a trademark, it also incentivizes the mark owner to maintain consistent product quality.<sup>17</sup> Trademark law allows the mark owner to internalize consumer goodwill (i.e. repeat custom)<sup>18</sup> as the

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<sup>13</sup> Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 549 (2006) (“[T]he ‘information transmission model’ ... views trademarks as devices for communicating information to the market and sees the goal of trademark law as preventing others from using similar marks to deceive or confuse consumers.”); Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099, 2116 (2004) (“[R]educing consumer search costs, maintaining and improving product quality, and remedying intentional deception – all relate to the quality of the product information available to consumers. Even the [quality] incentive ... is linked to safeguarding the information transmission function of marks.”); Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813 (1927) (“[T]he consumer now projects his shopping far from home and comes to rely more and more upon trademarks and tradenames as symbols of quality and guaranties of satisfaction.”).

<sup>14</sup> McKenna, *Normative Foundations*, at 1840 (“[T]rademark law’s core policies [are] protecting consumers and improving the quality of information in the marketplace.”).

<sup>15</sup> William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265 (1987).

<sup>16</sup> See, e.g., Lemley, *The Modern Lanham Act and the Death of Common Sense*, *supra* note 3, at 1690 (trademarks are justified to the extent they “communicate useful information to consumers, and thereby reduce consumer search costs.”).

<sup>17</sup> *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985) (“National protection of trademarks is desirable, Congress concluded, because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation.”).

<sup>18</sup> See Jake Linford, *Valuing Residual Goodwill After Trademark Forfeiture*, draft at 7-8 (draft on file with author), citing *Washburn v. National Wall-Paper Co.*, 81 F. 17, 20 (2d Cir. 1897)

reward for truthfully signaling consistent quality.<sup>19</sup> Without trademark protection, firms might hesitate to create brands with costly, high-quality characteristics, because the benefits of such efforts could be appropriated by new entrants using the owner's mark on similar goods.<sup>20</sup> Correctly calibrated trademark protection thus enables the mark to communicate information to consumers about the source, and therefore quality, of the marked product. New entrants may compete on quality and price, but are discouraged from free riding on the mark's source significance or otherwise impeding the information transmission function of the mark.<sup>21</sup> Under the standard economic account, trademark protection thus contributes to a well-functioning market by ensuring that consumers can rely on the mark as a source signifier, which enables competition on price and quality.<sup>22</sup>

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(describing goodwill as value that represents confidence on the part of consumers that "their experience in the future will be as satisfactory as it has been in the past," earned by the mark owner through long years of "scrupulous" attention to detail and care in maintaining "the standard of goods dealt in."); Elizabeth Cutter Bannon, *Revisiting "The Rational Basis of Trademark Protection": Control of Quality and Dilution - Estranged Bedfellows?*, 24 J. MARSHALL L. REV. 65, 73-74 (1990), quoting MCCARTHY § 2.8(a) ("[Goodwill] exists in the minds of the buying public, where buyers trust the constancy of quality emanating from a particular producer. "Goodwill" thus becomes 'a business value that reflects the basic human propensity to continue doing business with a seller whose goods and services . . . the customer likes and has found adequate to fulfill his needs.'").

<sup>19</sup> Nicholas S. Economides, *The Economics of Trademarks*, 78 TRADEMARK REP. 523, 525-27 (1988) (suggesting that trademarks primarily exist to enhance consumer decisions and to create incentives for firms to produce desirable products).

<sup>20</sup> Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099, 2108 (2004) ("if consumers lacked the ability to distinguish one brand from another, firms would have no reason to create brands with more costly but higher quality characteristics.").

<sup>21</sup> Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 778, 819 (2004) (arguing that the historical normative goal of trademark law is to foster the flow of information in markets, thereby reducing consumer search costs)

<sup>22</sup> *Scandia Down*, 772 F.2d at 1430 ("If the seller provides an inconsistent level of quality, or reduces quality below what consumers expect from earlier experience, that reduces the value of the trademark."); *Smith v. Chanel, Inc.*, 402 F.2d 562, 566 (9th Cir. 1968) ("Without some method of product identification, informed consumer choice, and hence meaningful competition in quality, could not exist."); Klieger, *supra* note 4 at 853-56; Sidney A. Diamond, *The Public Interest and the Trademark System*, 62 J. PAT. OFF. SOC'Y 528, 544 (1980); Joseph M. Livermore, *On Use of a Competitor's Trademark*, 59 TRADEMARK REP. 30, 30 (1969) ("In many industries ... the absence of differentiating trademarks would mean that competition in product quality could not exist.");

This standard economic account does not fully reflect the reality of modern branding practices.<sup>23</sup> Advertising, including the use of trademarks, creates demand that may not otherwise exist:<sup>24</sup> No merchant would pay for advertising that didn't generate sales. And effective advertising often trades on emotional appeals, rather than informative content.<sup>25</sup> As Justice Frankfurter noted in one well-known Supreme Court decision, the "commercial magnetism" or drawing power of a trademark stems in part from the ability of the mark to create consumer desire,<sup>26</sup> instead of meeting or satisfying existing desire.<sup>27</sup>

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<sup>23</sup> Some scholars have focused on the difference between a trademark and a brand. See, e.g., Deven R. Desai & Spencer Waller, *Brands, Competition, and the Law*, 2010 B.Y.U. L. REV. 1425, 1425 (2010):

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

<sup>24</sup> JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* 155 (1958) (arguing that advertising and marketing cannot be "reconciled with the notion of independently determined desires, for their central function is to create desires – to bring into being wants that previously did not exist"). See also Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2056-57 (2005) (summarizing scholarship advocating restrictive interpretation of trademark protection based on manipulation of consumers).

<sup>25</sup> Klieger, *supra* note 4 at 858 ("where product differentiation is built primarily on a nonrational or emotional basis, through the efforts of the ad-man, consumer willingness to pay the premium proves economically inefficient."); Hannibal Travis, *The Battle for Mindshare: The Emerging Consensus That the First Amendment Protects Corporate Criticism and Parody on the Internet*, 10 VA. J.L. & TECH. 3, ¶ 124 (2005) (citing Jacob Jacoby & Maureen Morrin, "Not Manufactured or Authorized by ...": *Recent Federal Cases Involving Trademark Disclaimers*, 17 J. PUB. POL'Y & MKT. 97 (Apr. 1998) (quoting Allan M. Collins, & Elizabeth F. Loftus, *A Spreading Activation Theory of Semantic Processing*, 82 PSYCH. REV. 407, 407-28 (1975)); Carl Obermiller, Eric Spangenberg & Douglas L. MacLachlan, *Ad Skepticism: The Consequences of Disbelief*, J. ADVERTISING 7, 15 (Fall 2005) (consumers may still to emotional appeals, even if they are skeptical of informational claims).

<sup>26</sup> Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 114-15 (2012).

<sup>27</sup> *Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co.*, 316 U.S. 203, 205 (1942) (Frankfurter, J.) ("The protection of trade-marks is the law's recognition of the psychological function of symbols... A trade-mark is a merchandising short-cut which induces a purchaser to



Thus, in many cases, the magnetism of a trademark may have little to do with the quality of the product sold under the mark and depend instead on a “conditioned reflex developed in the buyer by imaginative or often purely monotonous selling of the mark itself.”<sup>28</sup>

To the extent that a trademark's appeal is independent of quality or price, it may drive economically irrational consumer choices.<sup>29</sup> Consumers could even become overly attached to brands.<sup>30</sup> If consumers make irrational choices,<sup>31</sup> then the owners of strong marks may be somewhat insulated from price and quality competition. Irrational consumer attraction may even create barriers to entry, if consumer loyalty depends on that emotional connection more than objective measures of price and quality.<sup>32</sup>

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select what he wants, or what he has been led to believe he wants.”). *See also* Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 973 (1993) (questioning the impact of trademark protection on public discourse, given the “communicative freight” carried by trademarks, and the manner in which trademarks are “injected into the stream of communication with the pressure of a firehose by means of mass media campaigns.”).

<sup>28</sup> Thomas P. Derring, *Trade-Marks on Noncompetitive Products*, 36 OR. L. REV. 1, 2 (1956).

<sup>29</sup> Brown, *supra* note 7 at 1187 (“[A trademark] is a narrow bridge over which all the traffic powered by [product] advertising must pass. . . . With time, the symbol comes to be more than a conduit through which the persuasive power of advertising is transmitted, and acquires a potency, a ‘commercial magnetism,’ of its own.”). *See also id.* (“The buyer of an advertised good buys more than a parcel of food or fabric; he buys the pause that refreshes, the hand that has never lost its skill, the priceless ingredient that is the reputation of its maker.”); Theodore Levitt, *The Morality (?) of Advertising*, HARV. BUS. REV. at 85 (July/Aug. 1970) (“In the factory, we make cosmetics; in the store we sell hope.”) (quoting Charles Revson of Revlon, Inc.).

<sup>30</sup> C. Whan Park, Deborah J. MacInnis & Joseph R. Priester, *Beyond Attitudes: Attachment and Consumer Behavior*, 12 SEOUL J. BUS. 3, 3, 18 (2006), available at <http://ssrn.com/abstract=961469>: [W]hen attachment is high, consumers perceive the brand to be an extension of themselves. They are defensive of attacks or criticisms against their brand and interpret such criticisms as personally threatening. Thus they are willing to engage in behaviors on behalf of the brand, despite the potential self-image-related risks such behaviors may carry. Moreover, since strong brand attachment involves automatic retrieval of brand-self connections, these individuals have less control over brand related defensive behaviors. These consumers are also less cost-benefit oriented in their reactions to their brands.

<sup>31</sup> *See also* Jeremy N. Sheff, *Biasing Brands*, 32 CARDOZO L. REV. 1245, 1254 (2011) (arguing that manipulation of consumers may be mitigated in part by complementary regulation that protects consumers).

<sup>32</sup> A.G. Papandreou, *The Economic Effects of Trademarks*, 44 CALIF. L. REV. 503, 508-09 (1956)

Consumers may well be deceived if they buy a product thinking it conveys some benefit that it does not.<sup>33</sup> Consumers think products bearing marks with a reputation for quality convey some benefit.<sup>34</sup> But if that belief is based more on the emotional connection with the mark than objectively measurable features,<sup>35</sup> spending more on premium performance products may be irrational behavior.<sup>36</sup> Indeed, if consumers believe the source significance of the mark guarantees some level of objectively measurable quality, the trademark itself may deceive consumers,<sup>37</sup> because the goodwill that trademark protection secures may be unrelated to any actual difference in quality.<sup>38</sup> Trademark law presumes that misappropriating the goodwill in the mark is actionable, but there is some danger that many such actions merely “reward advertising expenditures with little accompanying social benefit.”<sup>39</sup> Scholars have thus called for narrowing the scope of

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(“The presence of irrational consumer allegiances may constitute an effective barrier to entry. Consumer allegiances built over the years with intensive advertising, trademarks, trade names, copyrights and so forth extend substantial protection to firms already in the market. In some markets this barrier to entry may be insuperable.”).

<sup>33</sup> But see Shahar J. Dillbary, *Famous Trademarks and the Rational Basis for Protecting “Irrational Beliefs”*, 14 GEO. MASON L. REV. 605, 608 (2007) (arguing that consumers who buy a branded product make an economically rational decision to purchase with the physical product “an intangible product such as fame, prestige, peace of mind, or just a pleasant feeling.”).

<sup>34</sup> Garvey et al., *supra* note 9, at 936.

<sup>35</sup> See *supra* note 6 and accompanying text.

<sup>36</sup> Bart J. Bronnenberg et al, *Do Pharmacists Buy Bayer? Informed Shoppers and the Brand Premium*, Q.J. ECON. 1669 (2015); Jagdish N. Sheth & Rajendra S. Sisodia, *Raising Marketing’s Aspirations*, 26 J. PUB. POL’Y & MARKETING 141 (2007).

<sup>37</sup> Digges, *Is Your Advertising Destroying Your Trademark?*, 35 TRADEMARK REP. 51, 53 (1945):  
When a cigarette manufacturer advises the public in strident tones that the X brand of cigarettes means fine tobacco, he finds many to imitate him. The air waves vibrate with the message of trade-mark owners who aver that the A product means quality, that the B product means a guaranteed life ... or claims of similar import. Of course, they do not mean any of those things. They mean products emanating from a particular source.

<sup>38</sup> Austin, *supra* note 6 at 856:

How can trademarks be neutral vehicles for transmitting information efficiently to consumers to enable them to distinguish between, and express preferences for, goods from one source as opposed to those from other sources, when trademarks themselves are bundled together with promotional and advertising strategies that manipulate consumer desires?

<sup>39</sup> *Id.* at 826. See also Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367, 428 (1999) (suggesting brand loyalty can reach “Pavlovian” levels); Lemley, *The Modern Lanham Act and the*

trademark protection to curtail only behavior by a new entrant that is likely to “confuse the consuming public or destroy the trademark owner’s incentives to invest in product quality.”<sup>40</sup> Narrower protection would allow some free riding on the mark owner’s goodwill, broadly defined, but some have argued the such free riding is part and parcel of effective competition.<sup>41</sup>

These calls to narrow trademark protection are founded in part on a presumption that consumers do not benefit from information unrelated to the source or quality of the mark.<sup>42</sup> Most explicitly, Robert Bone has warned that the case for encouraging the creation of emotion-laden trademarks may not justify the cost.<sup>43</sup> But recent research complicates that presumption. New experimental research offers evidence that exposure to a high-performance trademark, or use of a product bearing a high-performance mark, enhances consumer performance independent of the quality of the product.<sup>44</sup>

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*Death of Common Sense*, *supra* note 3, at [pincite]; Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, [pincite] (1990); Graeme B. Dinwoodie, *The Rational Limits of Trademark Law*, in U.S. INTELLECTUAL PROPERTY LAW AND POLICY (Hansen ed., 2002) (attempting to circumscribe trademark protection in light of the purpose of preventing consumer confusion); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717 (1999); Brown, *supra* note 7, at [pincite]; Stephen L. Carter, *The Trouble with Trademark*, 99 YALE L.J. 759, 794 (1990) (arguing against exclusive rights upon registration and intent-to-use registration).

<sup>40</sup> Lemley, *supra* note 3, at 1713.

<sup>41</sup> Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005) (arguing that “the rhetoric of free riding in intellectual property [is] fundamentally misguided.”); Lunney, *supra* note 39, at 453 (“[F]ree riding alone does not establish market failure, nor does it suffice to justify government intervention.”).

<sup>42</sup> Stacey L. Dogan & Mark A. Lemley, *Parody As Brand*, 47 U.C. Davis L. Rev. 473, 493 (2013) (“[A]rtificial product differentiation can lead to higher prices and deadweight loss.”), citing Ann Bartow, *Counterfeits, Copying and Class*, 48 Hous. L. Rev. 707, 707-08 (2011); Jeremy N. Sheff, *Veblen Brands*, 96 Minn. L. Rev. 769, 825 (2012).

<sup>43</sup> Bone, *Hunting Goodwill*, at 620.

<sup>44</sup> This article uses “high-performance mark” to indicate a trademark with a reputation for improving consumer competence or performance in some field of endeavor. Recent research suggests consumers see some marks as conveying information about performance benefits that stem from using a marked product. *See, e.g.,* Garvey et al., *supra* note 9.

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

A recent series of experiments have uncovered evidence of a placebo effect when subjects use goods or services identified with a high-performance brand. Subjects perform better when they use a tool bearing a trademark with a strong reputation for performance.<sup>45</sup> For example, subjects using a putter with the Nike mark can sink a putt in fewer tries than counterparts using the same putter labeled with the Starter or Gucci trademarks, or with no mark at all. Subjects can correctly answer more math questions when they think they are using 3M branded foam earplugs than peers using exactly the same earplugs with no brand identifier. And subjects who play multiple rounds of a car racing video game drive more aggressively when they drive a car with the Red Bull mark than cars with other marks or an unmarked car. These effects appear to have multiple drivers, but the results have interesting implications for the relationship between brand identity and consumer benefit.

### A. Placebo Effects Generally

First, a word on placebo effects. Placebo effects have a notoriously contested definition.<sup>46</sup> For the purposes of this paper, a placebo effect is a benefit, either self-reported or objectively measured, that correlates with or is caused by the consumption or use of a substance or product that is not objectively more therapeutic or more likely to improve test outcomes than a substance or product from control group. Generally, subjects who experience a placebo effects are not conscious of the effect.<sup>47</sup>

Placebo effects are likely multiply determined,<sup>48</sup> but some likely candidates have emerged. The recipient of the placebo may have increased ability to allocate effort,<sup>49</sup> or

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<sup>45</sup> Garvey et al., *supra* note 9, at 932.

<sup>46</sup> Daniel E. Moerman & Wayne B. Jonas, *Deconstructing the Placebo Effect and Finding the Meaning Response*, 136 ANN. INTERNAL MED. 471 (2002).

<sup>47</sup> Baba Shiv, Ziv Carmon & Dan Ariely, *Placebo Effects of Marketing Actions: Consumers May Get What They Pay For*, 42 J. MARKETING RES. 383 (Nov. 2005); Steve Stewart-Williams & John Podd, *The Placebo Effect: Dissolving the Expectancy versus Conditioning Debate*, 130 PSYCH. BULLETIN 324 (2004); Brasel & Gips, *supra* note 9, at 62-63.

<sup>48</sup> Shiv et al., *supra* note 47 (“Given the substantial power and robustness of placebo effects, these effects are most likely multiply determined.”).

<sup>49</sup> K.C. Berridge, T.E. Robinson, & J.W. Aldridge, *Dissecting Components of Reward: ‘Liking’*,

increased motivation.<sup>50</sup> Placebo effects may also operate by firing up dopamine pathways.<sup>51</sup>

Studies of placebo effects in the pharmaceutical context show that subjects report greater pain relief when the placebo offered bears a trademark associated with the desired effect. For example, subjects who consume branded pain-relieving placebos report more pain relief than those taking non-branded placebos.<sup>52</sup> Actual aspirin works better than either placebo, but the reported relief of the branded placebo compared to non-branded placebo was statistically significant ( $p < .05$ ). Generally, the branded placebo effect improves subjective outcomes, like reported pain relief, but not objectively measurable outcomes like reduced hypertension.<sup>53</sup>

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'Wanting', and Learning, 9 CURR. OPIN. PHARMACOL. 65 (2009); T.D. Wager & L.Y. Atlas, *The Neuroscience of Placebo Effects: Connecting Context, Learning and Health*, 16 NAT. REV. NEUROSCI. 403 (2015).

<sup>50</sup> Caglar Irmak, Lauren G. Block, & Gavan J. Fitzsimons, *The Placebo Effect in Marketing: Sometimes You Just Have to Want It to Work*, 42 J. MARKETING RES. 406 (2005) (pointing to the role of motivation in placebo effects).

<sup>51</sup> P. Schweinhardt et al., *The Anatomy of the Mesolimbic Reward System: a Link between Personality and the Placebo Analgesic Response*, 29 J. NEUROSCI. 4882 (2009); D.J. Scott, et al., *Placebo and nocebo effects are defined by opposite opioid and dopaminergic responses*, 65 ARCH. GEN. PSYCHIATRY 220 (2008); F. Benedetti et al., *Placebo-Responsive Parkinson Patients Show Decreased Activity in Single Neurons of Subthalamic Nucleus*, 7 NATURE NEUROSCIENCE 587 (2004); R. de la Fuente-Fernandez et al., *Expectation and Dopamine Release: Mechanism of the Placebo Effect in Parkinson's Disease*, 293 SCIENCE 1164 (2001); S.C. Lidstone et al., *Effects of Expectation on Placebo-Induced Dopamine Release in Parkinson Disease*, 67 ARCH. GEN. PSYCHIATRY 857 (2010); L. Schmidt et al., *Mind Matters: Placebo Enhances Reward Learning in Parkinson's Disease*, 17 NAT. NEUROSCI. 1793 (2014); GINGER A. HOFFMAN, PAIN AND THE PLACEBO, 262 (some evidence suggests that placebo analgesic responses and analgesic responses caused by morphine or another exogenous opioid are mediated by largely overlapping painmodulating circuits in the brain).

<sup>52</sup> A. Branthwaite & P. Cooper, *Analgesic Effects of Branding in Treatment of Headaches*, 282 BR. MED. J. CLIN. RES. ED. 1576 (1981). See also Suz Redfearn, *Head Rub*, Wash. Post, Sept. 26, 2006, <http://www.washingtonpost.com/wpdyn/content/article/2006/09/25/AR2006092500934.html>.

<sup>53</sup> Asbjorn Hróbjartsson & Peter C. Gøtzsche, *Placebo Interventions for All Clinical Conditions* (Review), 1 Cochrane Library (2010), online at <http://www.dcsience.net/Hrobjartsson-Gotzsche-Cochrane-placebo.pdf> (questioning the extent of reliable research into the placebo effect). See also Kathleen M. Boozang, *The Therapeutic Placebo*, 54 FLA. L. REV. 687, 715-16 (2002).

## B. Consumers and Brand Characteristics

Brand use has been linked to consumer perceptions of self.<sup>54</sup> Marketing research has demonstrated that consumers identify characteristics of brands and often adopt those perceived characteristics. Research has measured other connections between consumers and trademarks. Consumers purchase brands to help construct their self-concept and bolster self-esteem.<sup>55</sup> Brand-conscious consumers typically consider branded products to be higher quality and more efficacious.<sup>56</sup> Bolstering self-concept and self-esteem can improve consumer-brand connections.<sup>57</sup> Consumers tend to build deeper relationships with “sincere” brands compared to “exciting” brands.<sup>58</sup>

Brand exposure shapes consumer perception, but can also shape consumer behavior. For example, consumers exposed to the Kellogg's trademark, which has a reputation for healthiness, self-report an increased likelihood they will take the stairs instead of the elevator.<sup>59</sup> Exposure to Disney Channel logos increases the observer's honesty compared to exposure to E! Channel logos, while exposure to Apple logo increases the observer's creativity compared to exposure to the IBM, consistent with expectations about those brands.<sup>60</sup> Consumers exposed to low-end brand names like Walmart are more likely than

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<sup>54</sup> Jonah Berger & Chip Heath, *Where Consumers Diverge from Others: Identity Signaling and Product Domains*, 34 J. CONSUMER RES. 121 (2007); Ira J. Dolich, *Congruence Relationships Between Self Images and Product Brands*, 6 J. MARKETING RES. 80 (1969); Jennifer E. Escalas & James R. Bettman, *Self-Construal, Reference Groups, and Brand Meaning*, 32 J. CONSUMER RES. 378 (2005); Robert E. Kleine, Susan Schultz Kleine, & Jerome B. Kernan, *Mundane Consumption and the Self: A Social-Identity Perspective*, 2 J. CONSUMER PSYCH. 209 (1993); E Laird Landon Jr., *Self Concept, Ideal Self Concept, and Consumer Purchase Intentions*, 1 J. CONSUMER RES. 44 (1974).

<sup>55</sup> Reimann & Aron, *Self-Expansion Motivation and Inclusion of Brands in Self*, in HANDBOOK OF BRAND RELATIONSHIPS 65 (MacInnis et al, eds. 2009).

<sup>56</sup> Elizabeth Kendall Sproles & George B. Sproles, *Consumer Decision-Making Styles as a Function of Individual Learning Styles*, 24 J. CONSUMER AFFAIRS 134 (1990).

<sup>57</sup> Escalas & Bettman, *supra* note 54.

<sup>58</sup> Aaker, Fournier, & Brasel, *When Good Brands Do Bad*, 31 J. CONSUMER RES. 1 (2004).

<sup>59</sup> Pankaj Aggarwal & Ann L. McGill, *When Brands Seem Human, Do Humans Act Like Brands? Automatic Behavioral Priming Effects of Brand Anthropomorphism*, 39 J. CONSUMER RES. 307, 313 (2011).

<sup>60</sup> Fitzsimons, Chartrand, & Fitzsimons, *supra* note 9, at 28, 31 (brand primes can cue brand identity-consistent behavior).

other consumers to pick high-value, low cost-products.<sup>61</sup> Exposure to the Nike mark with its reputation for boldness and risk taking, can lead research participants to make riskier investment choices than their peers.<sup>62</sup> Likewise, consuming a brand consistent with one's idealized self-worth has the potential to reinforce a positive self-view.<sup>63</sup> These effects can follow even if consumers are viewing, consuming, or using a placebo – something that is not the actual branded product.<sup>64</sup>

### *C. Performance-Enhancing Placebo Effects*

In light of the ability of brands to shape consumer perception and behavior, it is not unreasonable to think that consuming or using a high-performance brand could at least make consumers feel better about their ability to perform, and perhaps to perform better.<sup>65</sup> Scholars have recently shown this effect in various experiments: Consumption or use of a product bearing a performance brand increases performance, even when the product used or consumed is not the mark owner's product, and even though subjects in the high-performance and control groups are using the same product.

For example, Garvey and his coauthors conducted several studies to isolate the effects of high performance brands on the performance of research subjects.<sup>66</sup> Over several experiments, Garvey and co-authors showed a statistically significant correlation between use of a high-performance brand and improved performance in golf putting, taking a math test, and answering GMAT practice questions. The Garvey experiments show that subjects perform better when they are told the tool used comes from a brand

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<sup>61</sup> Tanya L. Chartrand, Joel Huber, Baba Shiv, and Rob Tanner, *Nonconscious Goals and Consumer Choice*, JOURNAL OF CONSUMER RESEARCH (2008-09).

<sup>62</sup> D. Mantovani & F.H. Galvão, *Brand priming effect on consumers' financial risk taking behavior*, REVISTA DE ADMINISTRAÇÃO (2016), <http://dx.doi.org/10.1016/j.rausp.2016.09.002>.

<sup>63</sup> Garvey et al., *supra* note 9, at 934.

<sup>64</sup> Brasel & Gips, *supra* note 9.

<sup>65</sup> Garvey et al., *supra* note 9, at 934, citing *inter alia* Susan Fournier, *Consumers and their Brands: Developing Relationship Theory in Consumer Research*, 24 J. CONSUMER RES. 343, 348-63 (1998) (exploring the relationships that can develop between individuals, their self-identities, and their brand preferences). KEVIN LANE KELLER, STRATEGIC BRAND MANAGEMENT 6 (1998) (“[T]he psychological response to a brand can be as important as the physiological response to the product.”).

<sup>66</sup> Garvey et al., *supra* note 9.

with a strong reputation for performance, although in each case, the difference between tools associated with the high-performance brand and controls was “illusory.”<sup>67</sup> Other studies corroborate these effects.

In the first Garvey experiment, subjects were invited to sink a putt from distances of two, three and four-and-one-half feet. Each subject used the same putter, but in some cases, the putter was identified as a Nike putter. In other cases, the putter was identified as a Starter putter.<sup>68</sup> For the control group, no trademark was identified. Subjects using the Nike putter performed better than other subjects, sinking putts in an average of 1.91 strokes.<sup>69</sup> That was a 20% improvement over subjects who used the non-branded control putter (2.49,  $p < .01$ ) or the Starter-branded putter (2.36,  $p < .05$ ).<sup>70</sup>

Garvey and co-authors hypothesized that increases in performance might depend either on the subjects increased self-esteem or decreased anxiety. Two follow-on studies support these hypotheses. The second Garvey experiment also invited subjects to sink putts of varying lengths, using either a Nike-branded or non-branded putter. Again, all subjects used the same putter with the label manipulated. The performance of those who used the Nike putter (1.71) was 20% better than those who used the unlabeled putter (2.14,  $p < .01$ ). In addition, controlling for each subject’s actual performance, subjects using the Nike-branded putter reported greater self-esteem on a 7-point scale (5.12) than those using the control-branded putter. (4.37,  $p < .05$ ). Also interesting was the subjects’ response to questions designed to elicit their perspective about the source of their success. Subjects who used the Nike-branded putter attributed their performance to their own skills (3.96) as opposed to control users. (3.26,  $p = .01$ ). But there was no significant difference attributed to the brand (4.47 v. 4.08,  $p > .10$ ). In other words, subjects who used the Nike-brand putter and experienced the improved performance consciously attributed their performance to their own skills, rather than the putter.

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<sup>67</sup> *Id.* at 932.

<sup>68</sup> In a separate pretest, a different panel of subjects were asked to assess, using a 7-point scale, the likelihood that each of the three putters would improve or harm performance. Subjects reported a significantly higher expectation of a strong performance using the Nike putter (5.02) than the Starter (3.99,  $p < .01$ ) or the non-branded putter. (4.10,  $p < .01$ ). *Id.* at 936.

<sup>69</sup> *Id.* at 936. The average of subject’s performance was 2.24 strokes.

<sup>70</sup> *Id.*



A third experiment shows the placebo effect extends to cognitive tasks. In the third Garvey experiment, subjects were invited to take a math test. Each subject used the same style of sound-reducing foam ear plugs while taking the test. Some participants wore earplugs taken from a 3M container – a brand with a strong performance reputation.<sup>71</sup> Subjects in the control group wore earplugs from a container with no brand identifier. Those subjects who received the 3M earplugs correctly answered more of the five math questions than the control group. (2.89 v. 2.39,  $p < .05$ ).<sup>72</sup>

After the math test, subjects were asked to rate their motivation, confidence, and anxiety. Like the participants in the second Garvey experiment, those who used the 3M earplugs attributed their performance to self at a significantly higher level than the control group, on a 7 point Likert scale. (5.07 v. 4.46,  $p < .05$ ). There was no statistically significant difference between the 3M and control groups with regard to attribution of success to the earplugs. (2.80 v. 2.49,  $p > .30$ ).

A fourth experiment by Garvey and co-authors invited subjects to prepare for GMAT practice tests with a test prep app. Some subjects were offered an app ostensibly from Kaplan (a mark with a strong performance reputation), while others used a Laserprep app (a name made up for the study).<sup>73</sup> Subjects pre-reported whether they viewed stress as likely to increase or decrease productivity.<sup>74</sup> Subjects who reported that stress was likely to *decrease* performance and used the Kaplan app correctly answered one more question than Laserprep users. ( $p = .05$ ). But Kaplan subjects who reported that stress can be performance enhancing did not perform better than the Laserprep group. ( $p = .05$ ). In fact, they correctly answered one *fewer* question than Laserprep users. Garvey and co-authors surmise that because using a tool with a high-performance mark reduces stress,

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<sup>71</sup> In a pretest, a different group of students asked to assess the likelihood that the 3M or non-branded earplugs would improve concentration on a math test. Those subjects expressed a significantly higher expectation that using the 3M earplugs would improve performance compared to the control group, on a 7-point Likert scale. (4.83 v. 3.95,  $p < .01$ ). *Id.* at 939.

<sup>72</sup> *Id.* at 939.

<sup>73</sup> As with earlier experiment, a different panel of subjects reported a significantly higher expectation that using Kaplan would improve test results, compared to Laserprep, on a 7 point Likert scale (4.63 v. 3.85,  $p < .01$ ). *Id.* at 941.

<sup>74</sup> *Id.* at 940-41. A majority of individuals hold the belief that stress reduces performance, but a minority hold the opposite view. *Id.* at 940, citing Alison Wood Brooks, *Get Excited: Reappraising Pre-Performance Anxiety as Excitement*, 143 J. EXPERIMENTAL PSYCH. 1144 (2013).

those who find stress to enhance performance are likely to have reduced success when they use a high-performance tool.<sup>75</sup>

In a fifth study, subjects once again tried to sink putts.<sup>76</sup> All subjects used the same putter. For this study, in addition to a Nike and non-branded condition, some subjects used a Gucci-branded putter.<sup>77</sup> Pre-tests evaluated subjects' confidence about their golfing abilities.<sup>78</sup> As in studies 1 and 2, subjects were invited to sink putts of varying lengths. Subjects took an average of 1.81 strokes to sink a putt. Subjects in the Nike group sunk putts in significantly fewer strokes than subjects in the Gucci group (1.44 v. 2.11,  $p < .01$ ).<sup>79</sup> That was also significantly lower than the control group (1.44 v. 1.91,  $p < .05$ ). However, for subjects who pre-reported a high level of self-efficacy as a golfer, there was not a significant difference in performance between subjects in the Nike group and subjects in other groups ( $p = .31$ ).

Other studies show that brand exposure and/or brand use can improve performance in strenuous physical exercise,<sup>80</sup> and taking exams,<sup>81</sup> and even playing video games. For instance, in a study by Adam Brasel and James Gips,<sup>82</sup> subjects played a car racing video game in which the cars were skinned with different trademarks. Subjects driving the Red Bull car appeared to reflect behavior consistent with Red Bull's brand identity, which suggests speed, power, and risk-taking.<sup>83</sup> There was no statistically significant pattern for

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<sup>75</sup> Garvey et al., *supra* note 9, at 942.

<sup>76</sup> *Id.* at 943.

<sup>77</sup> A different panel of subjects assessed performance expectations related to the brand of the putter. The subjects reported a higher expectation, on a 7-point scale, that using the Nike putter would improve performance (4.95) compared to the Gucci putter (4.21,  $p < .01$ ) or the control putter (4.06,  $p < .01$ ). There was no significant difference of expectations between the Gucci and control putters ( $p > .80$ ). *Id.* at 943.

<sup>78</sup> *Id.* at 943.

<sup>79</sup> *Id.* at 932.

<sup>80</sup> R. Friedman & A. Elliot, *Exploring the Influence of Sports Drink Exposure on Physical Endurance*, 9 PSYCH. OF SPORT AND EXERCISE 749–759 (2008).

<sup>81</sup> Ji Kyung Park & Deborah Roedder John, *I Think I Can, I Think I Can: Brand Use, Self-Efficacy, and Performance*. 51 J. MARKETING RES. 233 (2014).

<sup>82</sup> Brasel & Gips, *supra* note 9 (participants driving a Red Bull car in a video game drove faster and more recklessly, suggesting a U-shaped impact of the brand on performance).

<sup>83</sup> *Id.* at 58–59 (describing Red Bull's brand identity, and a pre-test using other participants the identified Red Bull as a brand with higher levels of attributes including *fast, powerful, energetic*,

the control car, or cars with brands other than Red Bull. But drivers consistently had either fastest time, or their slowest time, on the race when they drove the Red Bull car. When the Red Bull car was the fastest car, drivers spend 3 seconds less off track than the average of their other races.<sup>84</sup> On the other hand, when it was the slowest car, they spend 4 second more off track.<sup>85</sup> This double-edged or U-shaped effect was significantly different from other cars driven ( $p < .05$ ).<sup>86</sup> The authors suggest exposure to the Red Bull mark, with its reputation for risk taking, encouraged subjects to use riskier, more aggressive strategies, which paid off in some races, but not in others.

Brasel and Gips suggest that similar performance effects could be U-shaped, i.e., working both for and against video game players. Brasel & Gips posit that brand exposure effects may be particularly powerful in interactive media environments when consumers manipulate the branded object.<sup>87</sup> The Brasel & Gips experiment also indicates that subjects do not consciously recognize the effect of the brand on video game performance.<sup>88</sup> Post-experiment questions revealed that subjects did not perceive the Red Bull car as faster or slower than the other cars.<sup>89</sup>

Finally, in a study by Schmidt and her co-authors, consuming what participants thought was an energy drink improved performance on a Stroop task, irrespective of whether the subject was drinking an energy drink or something else.<sup>90</sup> But consuming the unbranded energy drink had a null effect.

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*daring, and aggressive*). See also <http://www.brandtags.com/browse.php?id=172> (crowdsourced depository words or phrases that respondents associate with the Red Bull brand). Subjects did not consume Red Bull, so the drink's chemical attributes – sugar, caffeine, taurine, and ginseng – could not directly impact driving performance.

<sup>84</sup> Brasel & Gips, *supra* note 9, at 61.

<sup>85</sup> *Id.* at 62.

<sup>86</sup> *Id.* at 61.

<sup>87</sup> *Id.* at 63.

<sup>88</sup> *Id.* at 62.

<sup>89</sup> *Id.* In addition, many traditional cognitive measures (self-reports of prior game-playing experience, self-reports of real-life speeding and aggressive driving, or measures of how engaging they found the game) had no measurable impact on the results).

<sup>90</sup> Liane Schmidt et al, Red Bull Gives You Incentive Motivation: Understanding Placebo Effects of Energy Drinks on Human Cognitive Performance (pre-print, not yet peer-reviewed) (2017).

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

These placebo effects may have multiple drivers. Some experiments suggest that the effect stems from stress reduction. Experiencing stress often reduces performance, while reducing stress often increases performance.<sup>91</sup> Stress reduces physical and cognitive performance in multiple disciplines,<sup>92</sup> including verbal and mathematic test taking;<sup>93</sup> musical performance;<sup>94</sup> dance;<sup>95</sup> acting;<sup>96</sup> public speaking;<sup>97</sup> athletic competition;<sup>98</sup> and even sexual performance.<sup>99</sup> Several studies suggest that reducing stress increases self-

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<sup>91</sup> Algaze (1995) demonstrated that a workshop intervention aimed at reducing academic anxiety resulted in improved performance.

<sup>92</sup> MICHAEL W. EYSENCK, *ANXIETY: THE COGNITIVE PERSPECTIVE* (1992); Spencer, Steven J., Claude M. Steele, and Diane M. Quinn (1999), *Stereotype Threat and Women's Math Performance*, 35 *Journal of Experimental Social Psychology*, 4 (January 1997), Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 *AM. PSYCHOLOGIST* 613 (1997); Claude M. Steele and Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 *J. PERSONALITY & SOCIAL PSYCH.* 797 (1995); Jeff Stone et al., *Stereotype Threat Effects on Black and White Athletic Performance*, 77 *J. PERSONALITY & SOCIAL PSYCH.* 1213 (1999).

<sup>93</sup> Naznin Derakshan & Michael W. Eysenck, *Anxiety, Processing Efficiency, and Cognitive Performance*, 14 *EUROPEAN PSYCHOLOGIST* 168 (2009); Rajagopal Raghunathan & Michal Tuan Pham, *All Negative Moods Are Not Equal: Motivational Influences of Anxiety and Sadness on Decision Making*, 79 *ORG. BEHAV. & HUMAN DECISION PROCESSES* 56 (1999).

<sup>94</sup> Diana Rhea Deen, *Awareness and Breathing: Keys to the Moderation of Musical Performance Anxiety*, PhD diss., University of Kentucky (2000); Charlene A. Ryan, *Gender Differences in Children's Experience of Musical Performance Anxiety*, 32 *PSYCH. MUSIC* 89 (2004).

<sup>95</sup> Robert A. Tamborrino, *An Examination of Performance Anxiety Associated with Solo Performance of College-Level Music Majors*, PhD Diss, Indiana U. (2001)

<sup>96</sup> GLENN D. WILSON, *PSYCHOLOGY OF PERFORMING ARTISTS* (2002).

<sup>97</sup> Brooks, *supra* note 74; Merritt, Richards, and Davis, *Performance Anxiety: Loss of the Spoken Edge*, 15 *J. Voice* 257 (2001).

<sup>98</sup> Howard K. Hall & Alistair W. Kerr, *Predicting Achievement Anxiety: A Social-Cognitive Perspective*, 20 *J. SPORT & EXERCISE PSYCH.* 98 (1998); Sheldon Hanton, Stephen D. Mellalieu, & Ross Hall, *Re-Examining the Competitive Anxiety Trait-State Relationship*, 33 *PERSONALITY & INDIVIDUAL DIFFERENCES* 1125 (2002); Damon Burton, *Do Anxious Swimmers Swim Slower? Reexamining the Elusive Anxiety-Performance Relationship*, 10 *J. SPORT & EXERCISE PSYCH.* 45 (1988) (observing that swimmers higher in anxiety immediately prior to competition swam more slowly than expected).

<sup>99</sup> Marita P. McCabe, *The Role of Performance Anxiety in the Development and Maintenance of*

esteem, and the increase in self-esteem then increases performance.<sup>100</sup> The converse also appears to be true: Lower self-efficacy (related but not identical to self-esteem) is accompanied by self-doubt, which can distract from performance.<sup>101</sup>

Some of the placebo effect studies described above indicate that the high-performance brand reduces stress as it increases the user's self-esteem. For the subset of subjects who see stress as performance enhancing or exciting rather than performance reducing, using the high-performance brand does not increase performance. In fact, subjects who see stress as performance enhancing perform more poorly when they use high-performance equipment.<sup>102</sup> Other experiments suggest that the brand will improve performance when the brand's characteristics are consistent with the subject's goals.

These studies have a handful of potentially interesting implications. First, in this case, the placebo effect has positive spillover effects for consumers that appear related to brand reputation rather than objective differences in the product. Pre-screening expectation tests suggest a performance enhancing effect that is born out when different subjects use

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*Sexual Dysfunction in Men and Women*, 12 INT. J. STRESS. MANAGEMENT 379 (2005).

<sup>100</sup> Garvey et al., *supra* note 6, at 934.

<sup>101</sup> Albert Bandura, *Self-Efficacy Mechanism in Human Agency*, 37 AM. PSYCH. 122 (1982); Steve M. Jex & Paul D. Bliese, *Efficacy Beliefs as a Moderator of the Impact of Work Related Stressors: A Multi-Level Study*, 84 J. APPLIED PSYCH. 349 (1999); Alan M. Saks, *Moderating Effects of Self-Efficacy for the Relationship Between Training Method and Anxiety and Stress Reactions of Newcomers*, 15 J. ORG. BEHAV. 639 (1994). Increase of self-esteem tends to increase cognitive blind spots. See, e.g., Bruce Blaine & Jennifer Crocker, *Self-Esteem and Self-Serving Biases in Reactions to Positive and Negative Events: An Integrative Review*, in SELF-ESTEEM: THE PUZZLE OF LOW SELF-REGARD (Baumeister, ed. 1993) (self-serving biases); C. Randall Colvin, Jack Block, & David C. Funder, *Overly-Positive Self-Evaluations and Personality: Negative Implications for Mental Health*, 68 J. PERSONALITY & SOCIAL PSYCH. 1152 (1995) (self-delusions); Christian H. Jordan et al., *Secure and Defensive High Self-Esteem*, 85 J. PERSONALITY & SOCIAL PSYCH. 969 (2003) (narcissism). Attributions for positive outcomes tend to be self-serving. Gifford W. Bradley, *Self-Serving Biases in the Attribution Process: A Reexamination of the Fact or Fiction Question*, 36 J. PERSONALITY & SOCIAL PSYCH. 56 (1978); Bertram F. Malle, *The Actor-Observer Asymmetry in Attribution: A (Surprising) Meta-Analysis*, 132 PSYCH. BULLETIN 895 (2006); Dale T. Miller & Michael Ross, *Self-Serving Biases in the Attribution of Causality: Fact or Fiction*, 82 PSYCH. BULLETIN 213 (1975); Fitch, *Effects of Self-Esteem, Perceived Performance, and Choice on Causal Attributions*, 16 J. PERSONALITY & SOCIAL PSYCH. 311 (1970) (subjects attribute significantly more causality to internal sources for success outcomes than for failure outcomes; importantly, this effect strengthened as self-esteem was enhanced).

<sup>102</sup> See *supra*.

the high-performance branded good or service. These results suggest that the creation of brand meaning can have objectively measurable positive spillover effects for the consumer of the trademarked product. To the extent this effect is generalizable, criticisms of the creation of brand meaning as consumer harming or consumer deceiving may be somewhat overstated.

Second, prestige brands like Gucci do not seem to convey a performance enhancing effect.<sup>103</sup> This, the use of a Gucci branded putter does not reduce the number of strokes required to sink a putt, even though Gucci is perceived as a strong brand.<sup>104</sup> Unlike high-prestige products, the use of high-performance products conveys an objectively measurable, statistically significant effect with a reasonable effect size. Subjects take 20% fewer putts, correctly answer more test questions, & etc. Thus, those skeptical of protecting the psychological effect of buying a high-prestige good could perhaps be convinced that consumers will actually benefit from purchasing a high-performance good.

Some caution is necessary. These studies do not establish that all the consumer benefit is due to psychological effects of brands. One could imagine that Nike might sell an objectively superior putter to a Starter putter, and to the extent that is the case, purchasers of the Nike putter might benefit both from the psychological and objective superiority of the putter.

In addition, these are early days for studies on performance-enhancing placebo effects. It is possible that future research will falsify this data and we will find there was no “there” there. Moreover, at least one meta-study of the placebo effect in medical research suggests that the effect may simply be regression to the mean, as the body heals

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<sup>103</sup> On prestige brands more generally, see C. Whan Park, Sandra Milberg, & Robert Lawson, *Evaluation of Brand Extensions: The Role of Product Feature Similarity and Brand Concept Consistency*, 18 J. CONSUMER RES. 185 (1991) (brand extensions from high-prestige brands are more successful than other brand extensions, even when there is low similarity between existing and new products); Keith Wilcox, Hyeong Min Kim, & Sankar Sen, *Why Do Consumers Buy Counterfeit Luxury Brands?*, 46 J. MARKETING RES. 247, 248 (2009) (“Social motivations guide people’s propensity to consumer counterfeit brands.”).

<sup>104</sup> Garvey et al., *supra* note 9, at 932. Participants who used a “Nike” putter averaged 1.81 strokes to sink a putt, compared to 1.91 for a control group ( $p < .05$ ) and 2.11 for those who used a “Gucci” putter ( $p < .01$ ).

itself.<sup>105</sup> Studies like the Garvey study are not primarily self-reporting studies – they include objective measurements of effect that many medical placebo studies do not include. In addition, they are unlikely to be driven by a regression to the mean. But neither are they longitudinal studies. In studies measured over time, the placebo effect could weaken.

Furthermore, these effects may not be fully generalizable. For experiments where the stress effect appears important, recall that for a subset of the population, stress is not seen as performance impairing but performance enhancing.<sup>106</sup> Study participants who hold this view experience reduced performance when using the high-performance product. In addition, the high-performance placebo effect may be strongest for low-skilled consumers. For participants who report a high skill level, use of the high performance compared to the low-performance or control brand provides no effect at all.<sup>107</sup>

It's also not entirely clear that mark owners can internalize all the benefit from this effect. Subjects who experience a performance boost don't credit the brand. They instead credit their innate ability. This suggests that consumers are not likely to consciously recognize this effect.<sup>108</sup>

Discounting the perceived price of the product used or consumed may also reduce placebo effects. Some studies suggest a connection between the price of the good and the placebo effect. For example, study participants offered a discount-brand placebo analgesic report experiencing more pain from an electric shock to the wrist than participants who consume a higher cost placebo.<sup>109</sup> Likewise, subjects performed poorly

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<sup>105</sup> Hróbjartsson & Gøtzsche, *supra* note 53.

<sup>106</sup> Brooks, *supra* note 74 (indicating that some individuals may reframe anxiety as excitement and thereby enhance performance outcomes).

<sup>107</sup> Effect of performance brand was significant at low levels of self-efficacy, but not at higher levels of self-efficacy. Garvey et al., *supra* note 9, at 944.

<sup>108</sup> *Id.* at 932. *But see* Park et al., *Brand Attachment and Brand Attitude Strength: Conceptual and Empirical Differentiation of Two Critical Brand Equity Drivers*, 75 J. MARKETING 1 (2010) (highly brand-attached consumers see branded products as more instrumental to relevant outcomes).

<sup>109</sup> Rebecca L. Waber, Baba Shiv, Ziv Carmon, & Dan Ariely, *Commercial Features of Placebo and Therapeutic Efficacy*, 299 JAMA 1016 (2008) (reporting a 35% reduction in reported pain for the high-cost placebo, compared to a 25% reduction in reported pain for the low-cost placebo ( $p = .02$ )). *Cf.* Rao & Monroe, *The Effect of Price, Brand Name, and Store Name On Buyers' Perceptions of Product Quality*, 26 J. MARKETING RES. 351 (1989) (commercial variables influence patients' quality expectations); Berns et al, *Neurobiological Substrates of Dread*, 312 SCIENCE 754 (2006) (commercial

on a test when they were charged a discount price for the energy drink they consumed, compared to subjects who paid full price.<sup>110</sup>

Finally, effect size also matters. A 20% reduction in the number of tries it takes to sink a putt can really matter to the enthusiastic amateur golfer. On the other hand, it is unclear whether improving the number of correct test answers from 2.4 to 2.9 is an effect size that should drive consumer purchases, or would drive consumer purchases if they became aware of it.

These studies summarized in Part II do not show that placebo effects outperform actual differences. And they do not attempt to show the absence of objective differences between Nike and Starter putters, for example. But they indicate, in the absence of an actual difference in the products used, that users experience a boost in proficiency when they think they are using a high-performance brand.<sup>111</sup> Part III identifies possible changes to trademark law that might reasonably follow if these findings are generalizable.

### III. IMPLICATIONS

Descriptively, evidence of a performance-enhancing placebo effect for high-performance brands provides a piece of the puzzle in a general movement to take better account of the cognitive aspects of consumer engagement with and creation of trademark meaning.<sup>112</sup> But this research into consumer-benefitting placebo effects might also

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variables influence patients' expectations about therapeutic efficiency).

<sup>110</sup> Baba Shiv, Ziv Carmon & Dan Ariely, *Placebo Effects of Marketing Actions: Consumers May Get What They Pay For*, 42 J. MARKETING RES. 383 (2005) (reporting lower benefits from placebo effects when subjects were told the product was purchased at a discount), replicated by Scott A. Wright et al, *If It Tastes Bad It Must Be Good: Consumer Naïve Theories and the Marketing Placebo Effect*, 30 INT'L J. RES. MARKETING 197 (2013). In related research, wine is perceived as more pleasurable to drink wine when those who drink it see it as a higher-cost option. Hilke Plassmann et al, *Marketing Actions Can Modulate Neural Representations of Experienced Pleasantness*, 105 PNAS 1050 (2008). See also Justin Hughes, *Champagne, Feta, and Bourbon: The Spirited Debate About Geographical Indications*, 58 HASTINGS L.J. 299, 321-23 (2006); Jake Linford, *A Linguistic Justification for Protecting "Generic" Trademarks*, 17 YALE J.L. & TECH. 110, 154 (2015).

<sup>111</sup> Garvey et al., *supra* note 9, at 933.

<sup>112</sup> See e.g., Thomas R. Lee, Eric D. DeRosia & Glenn Christensen, *An Empirical and Consumer Psychology Analysis of Trademark Distinctiveness*, 41 ARIZ. ST. L.J. 1033, 1036-39 (2009) (using consumer psychology models as a means to determining a trademark's effect); Jake Linford, *The False Dichotomy Between Suggestive and Descriptive Trademarks*, 76 OHIO ST. L.J. 1367, 1367 (2015);



motivate changes in trademark doctrine, and even its normative justifications. If trademark law already extends protection for the creation of psychological benefits through emotional advertising appeals and embraced by consumers, research into performance-enhancing placebo effects may suggest this protection is, at a minimum, not entirely misguided. Indeed, recognizing the placebo effect of high performance trademarks might provide space for some normative reframing of trademark law. This has been attempted by other scholars with regard to prestige goods.<sup>113</sup> As the argument goes, trademark protection of prestige goods provides some value to consumers who buy them to feel better about themselves, and that value can and should be protected by strong rights against passing off and sales of counterfeit goods. As discussed above, high performance goods appear to convey a more readily measurable benefit to consumers, distinguishable from the self-esteem or hedonic benefit that may come from consuming a prestige good. For instance, high-prestige branded goods don't improve putting efficiency, but high-performance branded goods seem to do so.

We may still wonder whether trademark protection should extend to marks that secure competitive advantage through consumer manipulation. Trademark law bars

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Jake Linford, *Are Trademarks Ever Fanciful?*, 105 GEO. L. REV. (forthcoming 2017). *But see* Katya Assaf, *Magical Thinking in Trademark Law*, 37 LAW & SOC. INQUIRY 595, 619 (2012) (“Trademark law should stop being concerned with the psychological benefits trademarks might bring; it should stop attempting to grasp what happens in the depths of the consumer's mind.”); *See also* Jerre B. Swann, Sr., David A. Aaker, & Matt Reback, *Trademarks and Marketing*, 91 TRADEMARK REP. 787 (2001) (“When consumers can communicate a favorable self-image through a brand, they receive self-expressive benefits.”); DAVID A. AAKER, *MANAGING BRAND EQUITY: CAPITALIZING ON THE VALUE OF A BRAND NAME* 163 (1991) (“Transformational advertising transforms the use experience making the brand user feel (for example) more elegant, adventuresome, or warm, thereby potentially adding value to the customer.”). Indeed, Jeremy Sheff has advanced a justification for trademark protection grounded in correcting errors in consumer rationality. This research may contribute to that overarching agenda. Jeremy N. Sheff, *The (Boundedly) Rational Basis of Trademark Liability*, 15 TEX. INTELL. PROP. L.J. 331, 333-34 (2007) (“trademark liability – whether imposed under the label of infringement or dilution – serves neither to protect property rights of trademark owners, nor to protect them against the unfair trade practices of competitors, but to shape consumer markets in such a way as to conform to the innate cognitive processes of boundedly rational consumers”).

<sup>113</sup> Irina Manta, *Hedonic Trademarks*, 74 OHIO ST. L.J. 241 (2013) (“[A] robust trademark system must account for the possibility that producers serve as providers of hedonic values to consumers.”).

protection to marks likely to deceive consumers, but trademark's anti-deception mechanisms likely would not reach marks solely because provide a placebo effect. Recent scholarship has also questioned whether psychological effects that a trademark capitalizes on might be functional elements that are denied trademark protection because competitors who cannot utilize those same functional elements might face a costly, non-reputation related disadvantage.<sup>114</sup> This Part considers and refutes a functionality argument for placebo effects.

The placebo effect of high performance marks may instead militate against protection from passing off or counterfeiting with regard to those goods. If a knock-off Nike putter has the same performance enhancing placebo effect as an authentic putter, there is no low quality against which to protect consumers. Counterfeiting or passing off may thus cause no actionable injury if the psychologically-determined performance enhancing aspects of an authentic and counterfeit good are the same. But as this Part argues, narrowing trademark protection in this way may well unravel the placebo effect and simultaneously undermines incentives to invest in actual quality control.

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

Some scholars have argued that spending on premium performance products is wasteful. Marketing is frequently seen as at best uneconomical and at worst exploitative or unethical.<sup>115</sup> Informed or expert consumers have been shown less likely to spend extra on national brands.<sup>116</sup> The Garvey experiments, and similar studies by other researchers suggest that this spending may not be wasteful. Even if the objective difference between the goods is overstated or nonexistent, performance benefits may still inure to a subset of consumers who use the branded goods to enhance performance.

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<sup>114</sup> See, e.g., Xiyin Tang, *A Phonoaesthetic Theory of Trademark Functionality* [draft on file with author] (arguing that sound symbols may be aesthetically functional and thus unprotectable elements of trademarks), *But see* Jake Linford, *Are Trademarks Ever Fanciful?*, 105 *GEO. L.J.* (forthcoming 2017) (arguing that evidence of the effect of sound symbols does not support applying a functionality bar to protecting sound symbols as components of a trademark).

<sup>115</sup> Jagdish N. Sheth & Rajendra S. Sisodia, *Raising Marketing's Aspirations*, 26 *J. PUB. POL'Y & MARKETING* 141 (2007).

<sup>116</sup> Bart J. Bronnenberg et al, *Do Pharmacists Buy Bayer? Informed Shoppers and the Brand Premium*, 2015 *Q.J. ECON.* 1669.

Scholars have raised similar arguments about protecting the hedonic benefits (increased happiness or well-being) provided by consuming prestige goods. Protections against post-sale confusion, dilution, and sponsorship or affiliation confusion are often criticized from a search-cost perspective, as extending protection beyond a level necessary for mark owners to effectively transmit information to consumers.<sup>117</sup> But these aspects of trademark protection may provide consumers of prestige goods a hedonic benefit from consuming prestige goods.<sup>118</sup> If consumers sincerely value that hedonic effect, the law should continue to provide protection against post-sale confusion, dilution, and sponsorship or affiliation confusion, because protecting consumer's ability to purchase prestige goods provides consumers with utility in the form of hedonic enjoyment, whether or not those prestige goods are objectively of higher quality.<sup>119</sup>

The argument for protecting high-performance placebo effects is stronger than the argument for protecting hedonic placebo effects. While psychological effects can be hard to measure, the high-performance placebo effect provides a measurable benefit (like putting more effectively) that is not conveyed by prestige goods in the same context.<sup>120</sup> But arguments for protecting hedonic benefits raise a potential counter-argument to strong protection. The Garvey studies show that performance effects benefit lower skilled entrants, rather than higher skilled experts.<sup>121</sup> The performance enhancing effect provides the most benefit to those most likely priced out if trademark protection conveys something akin to monopoly pricing power.<sup>122</sup> While nearly anyone could obtain hedonic

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<sup>117</sup> See, e.g., Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137, 188 (2010) (criticizing anti-dilution protection from a search-cost perspective); Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 427 (2010) (criticizing sponsorship and affiliation confusion and arguing that the law should instead concern itself only with confusion “about who is responsible for the quality of the defendant's goods or services.”); Jeremy N. Sheff, *Veblen Brands*, 96 MINN. L. REV. 769, 772-73 (2012) (criticizing post-sale confusion as inappropriately targeted at enforcing social hierarchies).

<sup>118</sup> Manta, *Hedonic Trademarks*, *supra* note 113, citing John Bronsteen et al., *Welfare as Happiness*, 98 GEO. L.J. 1583 (2010); John Bronsteen et al., *Well-Being Analysis vs. Cost-Benefit Analysis*, 62 DUKE L.J. \_\_ (2013).

<sup>119</sup> Manta, *Hedonic Trademarks*, *supra* note 113.

<sup>120</sup> See *supra* Part II.

<sup>121</sup> Garvey et al., *supra* note 6.

<sup>122</sup> Cf. William P. Kratzke, *The Biblical Fool and the Brander: The Law and Economics of Propertization in American Trademark Law*, 34 CARDOZO ARTS & ENT. L.J. 699, 734–35 (2016).

benefit if they could just afford the price, it's possible that the benefit from high-performance goods might benefit only the most amateur. It is unclear whether amateur status has a positive correlation, negative correlation, or no correlation with reduced ability to pay.

These placebo effects may also suggest that it is more difficult than one might otherwise assume for new entrants to compete on quality. Critics of advertising and marketing worry that trademark protection effectively creates barriers to entry. For instance, consumers may disregard an objectively better product to purchase those offered under a trusted trademark like Nike. Thus, if consumers think a Nike putter is 20% better than a comparable "NewCo" putter, NewCo's putters must be significantly cheaper than Nike's or significantly better than Nike's to sell as well. (Of course, that pressure incentivizes NewCo to provide cheaper, better putters. Allowing NewCo to free ride on the Nike brand would weaken that incentive.) Perhaps then these studies into the performance-enhancing placebo effect suggest that trademarks really could convey a form of market power about which the law should be skeptical.<sup>123</sup>

The dominant competition narrative suggest that the price competition is always good for consumers. Under that narrative, cheaper is better, all other things being equal. Courts identify a "strong public interest in lowest possible prices."<sup>124</sup> If the cheaper good is of equivalent quality to the more expensive good, every consumer should prefer it. Even if the cheaper good is of somewhat lower quality, so long as the offerings from each competitor are clearly identified, consumers benefit from the ability to make the decision. Indeed, this is the rationale for permitting competitive advertising – the use of one seller's mark by another seller to advertise the differences in their respective offerings.<sup>125</sup>

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<sup>123</sup> Antitrust law similarly attempts to prevent the development of market power with its accompanying reduction in quality and increase in price.

<sup>124</sup> *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 505 (8th Cir. 1987).

<sup>125</sup> *Furminator, Inc. v. Ontel Prod. Corp.*, 429 F. Supp. 2d 1153, 1178 (E.D. Mo. 2006), *aff'd*, 214 F. App'x 982 (Fed. Cir. 2007) ("[A] customer decision based on price is not a harm cognizable under the Lanham Act."), citing *Cellular Sales, Inc. v. Mackay*, 942 F.2d 483, 487 (8th Cir. 1991) (no irreparable harm where lost customer chose a lower price competitor); *General Mills*, 824 F.2d 622, 627 (8th Cir. 1987). *See also* *A.J. Canfield Co. v. Honickman*, 808 F.2d 291, 303, n.18 (3d Cir. 1986) (noting that some have suggested using cross-elasticity of demand as a means of determining whether goods belong in the same or different product genus), citing John F. Coverdale, *Trademarks and Generic Words: An Effect-on-Competition Test*, 51 U. CHI. L. REV. 868, 884-

One should not overstate the advantage to be garnered if we maximize price competition above all other factors. A mark that has acquired source significance may have something like the market power that antitrust polices against: consumers will pay more for Coke than a private label cola.<sup>126</sup> But stripping all of that “market power” out of trademark law would almost certainly harm consumers, even if prices fell, because consumers could no longer rely on the mark as a source of information.<sup>127</sup> Trademark law thus recognizes some harm when infringing use causes a reduction in the mark owner’s revenues. For example, courts have held that a mark owner can show harm from infringing junior use by pointing to sales made at lower prices.<sup>128</sup> Similarly, protection against the importation of gray-market goods – goods authorized for sale in foreign markets but not in the U.S. – is grounded in part on material differences between goods intended for different markets. A significant difference in price can be material.<sup>129</sup> Protection against post-sale confusion – confusion of bystanders who view an alleged infringer’s goods outside of the retail store<sup>130</sup> – has a related function, protecting higher prices for luxury goods by preventing uses that would confuse bystanders even if the purchase of the counterfeit luxury good did not confuse the buyer at the point of sale.<sup>131</sup>

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85 (1984).

<sup>126</sup> Lunney, *supra* note 39; McKenna & Lemley, *Owning Mark(et)s*, *supra* note 117. *But see* Beverly W. Pattishall, *Trade-Marks and the Monopoly Phobia*, 50 MICH. L. REV. 967 (1952) (arguing that unlike monopoly rights, trademarks rights are not a restraint to trade).

<sup>127</sup> Lunney, *supra* note 39, at 434 (“[T]he marginal welfare gains that would result from rooting out the last vestiges of market power associated with a minimally-protective trademark regime are far outweighed by the welfare losses entailed in forcing producers and consumers to abandon trademarks altogether as an information source.”).

<sup>128</sup> *Int’l Star Class Yacht Racing Ass’n v. Tommy Hilfiger, U.S.A., Inc.*, 80 F.3d 749, 753 (2d Cir. 1996) (“sales at lower prices” are an indication of pecuniary loss).

<sup>129</sup> *Societe Des Produits Nestle, S.A. v. Casa Helvetia, Inc.*, 982 F.2d 633, 644 (1st Cir. 1992) (significant difference in price is a material difference in gray market goods cases).

<sup>130</sup> *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 872–73 (2d Cir. 1986).

<sup>131</sup> *See* Manta, *Hedonic Trademarks*, *supra* note 113. *See also* Jerre B. Swann, Sr., David A. Aaker, & Matt Reback, *Trademarks and Marketing*, 91 TRADEMARK REP. 787 (2001) (“When consumers can communicate a favorable self-image through a brand, they receive self-expressive benefits.”); DAVID A. AAKER, *MANAGING BRAND EQUITY: CAPITALIZING ON THE VALUE OF A BRAND NAME* 163 (1991) (“Transformational advertising transforms the use experience making the brand user feel (for example) more elegant, adventuresome, or warm, thereby potentially adding value to the customer.”). Shahr Dillbary makes a similar argument for the value of protection against

And in other contexts, one can see how lowering prices can be anticompetitive.<sup>132</sup>

The placebo effect of high-performance products may also be price dependent, and its price dependence may suggest an additional reason for caution in maximizing price competition above other metrics. High price, like advertising expenditures, can signal quality.<sup>133</sup> Perhaps surprisingly, placebo effects seem likewise to turn in part on price. For example, in one study of placebo pain relief, subjects given a higher priced placebo experienced more pain reduction than subjects given a lower-priced placebo.<sup>134</sup> Likewise, subjects performed poorly on a test when they were charged a discount price for the energy drink they consumed, compared to subjects who paid full price.<sup>135</sup> To the extent that consumers benefit from placebo effects, changes to trademark law focused on maximizing price competition may have unintended negative consequences for the consumers that should presumably benefit from such competition.

### *B. Manipulation, Deception, and the Function of Placebo Effects*

Perhaps the law should nonetheless reflect skepticism about the psychological manipulation of consumers, even if that manipulation creates a positive spillover effect

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dilution, which protects a consumer's pre-purchase expectations about the famous product. Dillbary, *supra* note 33, at 608. See also Haochen Sun, *Reforming Anti-Dilution Protection in the Globalization of Luxury Brands*, 45 *Geo. J. Int'l L.* 783, 786 (2014) ("anti-dilution protection plays an important role in preserving and enhancing the exclusivity and quality reputation of luxury brands.").

<sup>132</sup> *Developments in the Law Trade-Marks and Unfair Competition*, 68 *HARV. L. REV.* 814, 906 (1955), citing *United States v. Corn Products Refining Co.*, 234 *Fed.* 964, 1010-11, 1013-15 (S.D.N.Y. 1916), *appeal dismissed*, 249 *U.S.* 621 (1919). See § 3, 49 *Stat.* 1528 (1936), 15 *U.S.C.* § 13(a) (1952). See also *U.S. v. Apple, Inc.*, 791 *F.3d* 290, 349-50 (2d Cir. 2005) (Jacobs, J., dissenting) (recognizing that Amazon's below-cost pricing of e-books can have anticompetitive and monopolistic effects).

<sup>133</sup> Paul Milgrom & John Roberts, *Price and Advertising Signals of Product Quality*, 94 *J. POL. ECON.* 796 (1986) (modeling how price and advertising can signal product quality to consumers in a market with repeat sales). *But see* Lynn A. Stout, *The Unimportance of Being Efficient: An Economic Analysis of Stock Market Pricing and Securities Regulation*, 87 *MICH. L. REV.* 613, 695 (1988) (critiquing the management-quality signaling argument that suggests consumers can and should use stock prices as evidence of efficient management).

<sup>134</sup> Waber et al, *supra* note 109, at 1017 (reporting a 35% reduction in reported pain for the high-cost placebo, compared to a 25% reduction in reported pain for the low-cost placebo ( $p = .02$ )).

<sup>135</sup> See *supra* note 110.

like the placebo effect described above.<sup>136</sup> The law does not extend protection to a mark that would deceive consumers or, if protected, would harm competition. This section of the Article argues that the mental operations that drive these placebo effects do not interfere with consumer autonomy in a manner that should bar trademark validity. In addition, they do not provide the mark owner with protection of functional elements that would hamper competition or impose non-reputation related harms on new entrants.

### 1. Trademark Validity and Consumer Deception

Trademark law prevents a new entrant from confusing consumers by adopting a (similar) mark already in use for the same or proximate goods. The law also denies protection to trademarks that may deceive consumers. For instance, a mark owner cannot secure protection in a mark that falsely indicates the goods from a particular geographic region, if the location would be material to consumers. Thus, registration was denied to applicant's HAVANA CLUB mark for cigars made from non-Cuban tobacco on grounds of deceptive geographic misdescriptiveness.<sup>137</sup> Likewise, a mark will be denied registration if it falsely suggests an association with a celebrity who is not affiliated with the brand. For example, registration was denied to applicant's ROYAL KATE mark for cosmetics and apparel, among other goods, because the mark would falsely suggest a connection with Kate Middleton, the Duchess of Cambridge.<sup>138</sup> False affiliation and geographical misdescription are quite dissimilar to a placebo effect. Whether the effect is

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<sup>136</sup> To the extent that is true, perhaps trademark law "should encourage the [ ] construction of self-image through choice by exhibiting greater skepticism of aspects of trademark law that interfere with [consumer] autonomy." Laura A. Heymann, *The Public's Domain in Trademark Law: A First Amendment Theory of the Consumer*, 43 GA. L. REV. 651, 697 (2009). Heymann suggests that modern marketing scholarship recognizes the importance of consumer autonomy, even if marketers are not maximizing consumer autonomy. *Id.* at 700, citing Ruby Roy Dholakia & Brian Sternthal, *Highly Credible Sources: Persuasive Facilitators or Persuasive Liabilities?*, 3 J. CONSUMER RES. 223, 224 (1977); Marian Friestad & Peter Wright, *The Persuasion Knowledge Model: How People Cope with Persuasion Attempts*, 21 J. CONSUMER RES. 1, 3 (1994).

<sup>137</sup> *Corporacion Habanos, S.A. v. Anncas, Inc.*, 88 U.S.P.Q.2d 1785, 2008 WL 4409768 (T.T.A.B. 2008) (granting opposition even though the tobacco in question was grown from Cuban tobacco seeds because "the record in this case shows that cigars from Cuban seed tobacco share few, if any, qualities or characteristics of genuine or 100% Cuban cigars.").

<sup>138</sup> *In re Nieves & Nieves LLC*, 113 U.S.P.Q.2d 1629 (T.T.A.B. 2015).

psychological or scientific, the claimed benefit of a Nike product comes from Nike, Inc. as its source (unless we think the law should treat the Greek goddess Nike as an entity with whom one can falsely claim to associate), and the Nike mark offers no geographic indication (unless every trademark inspired by an ancient Greek deity conveys something Greek about the source of the product offered).

Another prohibition, the bar against protecting deceptive trademarks, is close enough to the placebo effect to merit some discussion. This bar against deceptive marks prevents registration of a mark that falsely suggests the mark-bearing product has features that are material to the consumer's purchasing decision. For example, a mark owner cannot secure protection in a mark, like LOVEE LAMB for automobile seat covers, that are not in fact made of lambskin, if that feature is likely to influence the purchasing decision of a significant number of potential purchasers.<sup>139</sup>

Assume that Nike's putters convey no "real" or non-psychological benefit on consumers, compared to other putters on the market. Nike's mark has nevertheless come to indicate, through long years of successful branding, some benefit related to scientific research.<sup>140</sup> Should Nike's use of its mark on putter be treated as invalid because the benefit is psychological rather than scientific? Typically, deceptive marks are actually deceptively misdescriptive – the mark directly communicates some product feature, like in the LOVEE LAMB example above.<sup>141</sup> That is not the case with regard to a mark like

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<sup>139</sup> *In re Budge Mfg. Co.*, 857 F.2d 773 (Fed. Cir. 1988) (affirming the TTAB's refusal to register the mark). Deceptive marks can also be denied protection against infringement at common law under the doctrine of unclean hands. RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 14, 32 (1995).

<sup>140</sup> *See, e.g., A Look Inside Nike's Sport Research Lab*, NIKE NEWS, Sept. 8, 2014, <http://news.nike.com/news/a-look-inside-nike-s-sport-research-lab>.

<sup>141</sup> *See also* *Gold Seal Co. v. Weeks*, 129 F. Supp. 928 (D.D.C.1955), affirmed 230 F.2d 832 (D.C. Cir.), cert. denied 352 U.S. 829 (1956) (GLASS WAX is deceptively misdescriptive for a glass and metal cleaner that contains no wax); *In re Shapely, Inc.*, 231 U.S.P.Q. 72 (T.T.A.B. 1986) (SILKEASE on polyester blouses held deceptive); *R. Neumann & Co. v. Overseas Shipments, Inc.*, 326 F.2d 786 (C.C.P.A.1964) (DURA-HYDE for plastic material with the appearance of leather held deceptive); *American Speech-Language-Hearing Ass'n v. National Hearing Aid Soc.*, 224 U.S.P.Q. 798 (T.T.A.B. 1984) (CERTIFIED HEARING AID AUDIOLOGIST as collective mark for organization whose members are not audiologists held deceptive); *Evans Products Co. v. Boise Cascade Corp.*, 218 U.S.P.Q. 160 (T.T.A.B. 1983) (CEDAR RIDGE on siding not made of cedar held deceptive).



NIKE for putters or RED BULL for energy drinks, which may suggest virtues (Nike was a Greek goddess of victory; a bull is powerful) but could not be construed to describe product features. In the absence of both a placebo effect and an objective difference in quality between Nike and other putters, courts would still be reluctant to find the mark deceived consumers. For example, overstated laudatory marks are typically not denied protection on deceptiveness grounds.<sup>142</sup> The same should apply to marks that have developed a high-performance reputation, even if the benefits from that reputation are somewhat overstated. And the existence of a placebo effect that increases golfing efficiency by 20% is not inconsistent with a high-performance reputation, even if the efficiency is derived from psychology instead of engineering or biomechanics.

## 2. Competition and Functionality

Some barriers to trademark protection turn instead on the functionality of a product feature claimed to be source signifying.<sup>143</sup> A seller is generally not allowed to use trademark law to secure protection in functional product features. For example, if a dual-spring design improves the ability of a road hazard sign to stand up in a strong wind, a mark owner will likely be unsuccessful in claiming the dual-spring feature is source signifying.<sup>144</sup> Is a performance-enhancing placebo effect functional in the same maner? The research suggests the placebo effect (like the Nike putter effect) conveys a benefit which a purchaser might choose over another product. But the improved performance is not due to a product feature like the shape, weight, or materials from which the putter is made. Those are the features typically denied protection under the utility functionality doctrine.

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<sup>142</sup> *Hoover Co. v. Royal Appliance Mfg. Co.*, 238 F.3d 1357, 1361, 57 U.S.P.Q.2d 1720 (Fed. Cir. 2001) (the slogan NUMBER ONE IN FLOORCARE for vacuum cleaners was self-laudatory and descriptive but was not deceptive: “Because substantial evidence supports the finding that the phrase does not either misdescribe or misrepresent Royal's goods, the board correctly held that Royal's mark was not deceptive.”).

<sup>143</sup> 15 U.S.C. 1052(e)(5) (matter which, “as a whole, is functional” cannot be registered as a trademark).

<sup>144</sup> Courts are more likely to deny protection if the functional element was the subject of a utility patent. *See Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 33 (2001).

Aesthetic elements can also be functional, and thus unprotectable. Aesthetic functionality forbids the exclusive use of a claimed aesthetic feature if that exclusivity would put competitors at a significant non-reputation-related disadvantage.<sup>145</sup> Unlike utility functionality, aesthetic functionality is contested and relatively controversial. For example, Robert Bone has articulated two difficulties that aesthetic functionality adds to the standard utility functionality analysis: aesthetic preferences are heterogeneous, and there is a close connection between aesthetic value and source identification.<sup>146</sup> Thomas McCarthy instead expresses skepticism regarding aesthetic functionality because there is “an infinite ... range of possible aesthetic designs and configurations.”<sup>147</sup>

As Justin Hughes notes, the least controversial aesthetic functionality cases tend to turn on “cognitive and psychological responses among consumers that predate the putative trademark holder's activities.”<sup>148</sup> Cases often find a claimed aesthetic product feature functional for cognitive or neurological reasons.<sup>149</sup> For example, in *Brunswick Corp. v. British Seagull Ltd.*,<sup>150</sup> the Federal Circuit affirmed a decision by the Trademark Trial and Appeal Board denying trademark registration and holding that black in relation to outboard motors for boats was functional in part because “objects colored black appear smaller than they do when they are painted other lighter or brighter colors” and “people

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<sup>145</sup> *TrafFix*, 532 U.S. at 33. See also Mark P. McKenna, *(Dys)functionality*, 48 HOUS. L. REV. 823 (2011); *Qualitex Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159, 170 (1995) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION §17 cmt. c (1995) (“[I]f a design's aesthetic value lies in its ability to confer a significant benefit that cannot practically be duplicated by the use of alternative designs, then the design is functional.” (internal quotation marks omitted))); Christina Farmer, *Red in the Eye of the Beholder: The Case for Aesthetic Functionality*, 28 BERKELEY TECH. L.J. 777 (2013). But see Justin Hughes, *Cognitive and Aesthetic Functionality in Trademark Law*, 36 CARDOZO L. REV. 1227, 1248 (2015) (“[W]hat we have called ‘aesthetic’ functionality can be better understood as functionality arising from how consumers process and respond to sensory inputs”).

<sup>146</sup> Robert G. Bone, *Trademark Functionality Reexamined*, 7 J. LEGAL ANALYSIS 183, 238-240 (2015).

<sup>147</sup> 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 7:81, at 7-256 (4th ed. 2010), quoting Deborah J. Krieger, Note, *The Broad Sweep of Aesthetic Functionality: A Threat to Trademark Protection of Aesthetic Product Features*, 51 FORDHAM L. REV. 345, 380 (1982).

<sup>148</sup> Hughes, *Cognitive and Aesthetic Functionality*, *supra* note 145, at 1267.

<sup>149</sup> Hughes, *Cognitive and Aesthetic Functionality*, *supra* note 145, at 1252-53.

<sup>150</sup> 35 F.3d 1527 (Fed. Cir. 1994), affirming *British Seagull Ltd. v. Brunswick Corp.*, 28 U.S.P.Q.2d (BNA) 1197, 1199 (T.T.A.B. 1993).

who buy outboard motors for boats . . . find it desirable under some circumstances to reduce the perception of the size of the motors in proportion to the boats.” Functionality might likewise turn on cultural expectations.<sup>151</sup> For instance, in *In re Florists’ Transworld Delivery, Inc.*,<sup>152</sup> the Trademark Trial and Appeal Board held the color black was aesthetically functional on packaging for floral arrangements in part because black was culturally significant for formal events, to convey grief or condolence, or in connection with Halloween displays.<sup>153</sup> These cultural expectations led the TTAB to uphold the Trademark Examiner’s finding that “there is a competitive need for others in the industry to use the color black in connection with floral arrangements and flowers.”<sup>154</sup>

While the placebo effect is almost certainly psychological in some general sense, most placebo effects measured by the research outlined in Part II do not arguably predate the mark holder’s activities. Instead, the effect is generated by the mark owner’s branding and advertising activities. Therefore, as Justin Hughes has argued, “where the aesthetic appeal is actually the achievement of the trademark holder or its predecessors, courts should be hesitant to use aesthetic functionality to deny trademark rights – precisely because building such aesthetic appeal is endemic to modern marketing [and] building brands.”<sup>155</sup> If consumers subjectively believe that a mark-bearing product is functionally better than a competitor’s goods, that is a “psychological” effect, to be sure, but it is an effect that stems from mark owner efforts rather than pre-programmed consumer expectations, irrespective of whether those pre-programmed expectations are hardwired or culturally determined.

There is one final challenge one might raise against extending protection to the placebo effect: In cases where the sole difference between the high performance mark and the new entrant is the psychological effect of the mark, consumers may benefit from infringing entry, so long as they believe the new entrant’s counterfeit goods come from the high-performance source. The next section considers whether trademark protection

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<sup>151</sup> Hughes, *Cognitive and Aesthetic Functionality*, *supra* note 145, at 1253-54.

<sup>152</sup> 106 U.S.P.Q.2d (BNA) 1784 (T.T.A.B. 2013).

<sup>153</sup> *Id.* at 1789.

<sup>154</sup> *Id.* at 1791.

<sup>155</sup> Hughes, *Cognitive and Aesthetic Functionality*, *supra* note 145, at 1273. For example, Hughes argues that the distinctive rounded trunk lid hump on Ford’s Lincoln Continental cars was a creation of Ford Motor Company’s marketing efforts, rather than a preexisting cognitive response, and thus not a basis for a finding of aesthetic functionality. *Id.* at 1274-75.

should be narrowed to enable new entrants to free ride on the high-performance brand placebo effect.

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

Passing off is the common law progenitor of much of trademark law.<sup>156</sup> The law prevents the new entrant from passing off its goods as those of the mark owner by preventing the new entrant from using the owner's mark.<sup>157</sup> Passing off is problematic in part because consumers who buy a knock-off are in danger of buying a low-quality lemon as they mistakenly rely on the trademark.<sup>158</sup> Passing off thus uses consumer deception as the measure of harm from trademark infringement.<sup>159</sup>

But counterfeiting or passing off may cause no actionable injury if the psychologically-determined performance enhancing aspects of an authentic and counterfeit good are the same. If a knock-off Nike putter has the same performance enhancing effect as an authentic putter, there is no low quality against which to protect consumers. To the extent that performance benefits can be attributed to the brand rather than the quality of the branded product, it may be less important to protect the consumers from passing off. Similarly, if prohibitions against passing off are aimed at protecting

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<sup>156</sup> Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 820 (1927).

<sup>157</sup> *Id.*

<sup>158</sup> Lemley & McKenna, *Irrelevant Confusion*, *supra* note 117, at 414 (“When it works well, trademark law facilitates the workings of modern markets by permitting producers to accurately communicate information about the quality of their products to buyers .... If competitors can falsely mimic that information, they will confuse consumers, who won't know whether they are in fact getting a high quality product. Indeed, some consumers will be stuck with lemons.”).

<sup>159</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 9, cmt. d (“The earliest cases involving trademarks were actions on the case in the nature of deceit.... These actions eventually evolved into a distinct tort of ‘passing off,’ or ‘unfair competition’ as it came to be known in the United States.”). *See also* 15 U.S.C. § 1114(1) (2008) (trademark protection aims to prevent use that is “likely to cause confusion, or to cause mistake, or to deceive”). Some case law has suggested that consumer confusion is the metric by which to measure passing off, but not the right protected. *See, e.g., Manhattan Shirt Co. v. Sarnoff-Irving Hat Stores, Inc.*, 19 Del. Ch. 151, 164 Atl. 246 (Ch. 1933), *aff'd per curiam*, 20 Del. Ch. 455, 180 Atl. 928 (Sup. Ct. 1934), *cited by Developments in the Law Trade-Marks and Unfair Competition*, 68 HARV. L. REV. 814, 889 (1955).

consumer from lemons, it may be less unnecessary to protect the mark owner from the appropriation of its mark. If the quality of the product is all in its psychological effect, there may be no difference in the counterfeit and an authentic product.

Note, however, that the studies in Part II do not compare high and low quality putters, or offer evidence of the lack of objectively measurable quality. One could imagine that Nike benefits from the psychological benefit which provides the placebo effect to consumers, but that protection of that benefit – *i.e.*, protection of the Nike mark – also provides Nike with the ability to recoup its investment in product development and technological improvements. If Nike can invest in technology that might also increase the likelihood of sinking a putt, it would be difficult to protect actual quality differences without also protecting the placebo effect. Failing to protect the psychological effect could lead to reduced quality output if Nike finds itself unable to recoup the costs of research and development by charging a premium for its branded products. Thus, reducing protection against passing off in such a market would still leave consumers to suffer from a lemons market. And over time, confidence in the trademark system generally could erode, which could erode the placebo effect. If consumers learn that some Nike putters are worse than others, but they are not sure which ones, then Nike's current reputation as a high-performance brand could erode. Even in the absence of objectively measurable differences between putters, if consumers become aware that Nike cannot legally prevent the use of its mark by a new entrant, the placebo effect would likely unravel.

Conventional wisdom suggests that placebo effects unravel as consumers become aware of them.<sup>160</sup> The studies in Part II do not provide us with a means of ascertaining a tipping point. However, at least one recent study suggests in the medical context, some subjects can receive relief from a pill they are told is a placebo.<sup>161</sup> It could therefore be possible that the unraveling point is lower than the conventional wisdom would suggest.

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<sup>160</sup> Ben Goldacre, *Placebo Effect Works Even If Patients Know They're Getting a Sham Drug*, THE GUARDIAN, Dec. 22, 2010.

<sup>161</sup> Ted J. Kaptchuk, *Placebos without Deception: A Randomized Controlled Trial in Irritable Bowel Syndrome*, 5 PLOS ONE e15591 (2010), <http://dx.doi.org/10.1371/journal.pone.0015591>.

## CONCLUSION

Studies showing a placebo effect for high-performance good may reinforce the concern that some of the benefits consumers perceive with regard branded goods are psychologically generated by mark owners and disconnected from reality. But that does not necessarily lead to the conclusion that consumers must be protected from a tendency to believe what advertisers are selling them. Indeed, consumers may be able to reap positive externalities in the form of the performance-enhancing placebo effect from the mark owner's attempt to manipulate perception. These studies suggest that in the market for high-performance goods, what consumers are told might well matter to them. The Nike brand may work like Dumbo's feather in the famous Disney film. It may not matter why consumers believe they can fly, so long as they believe it. As Mars Blackmon once amusingly proclaimed in ads for Air Jordan shoes, perhaps when consumers perform well in high-performance branded goods, it really "must be the shoes," just not for the reasons they were told. Reforming trademark law to reverse psychological manipulation out of an earnest effort to keep consumers from being misled might also unravel beneficial spillover effects. To that extent, such reforms may well be misguided.