ABSTRACT

People in all societies have a tendency toward magical thinking. This human tendency is extensively exploited by modern advertising, which routinely suggests that consuming goods will make us successful, happy, etc. Employing anthropological research, this article suggests that such advertising creates a system of beliefs resembling a totemic religion. In this religion, brands perform the role of sacred objects.

The article further demonstrates that trademark law endorses the commercial religion of brands. Trademark law initially aims at preventing consumer confusion. Yet, today famous trademarks are extensively protected against non-confusing associations. This article argues that this broad protection is based on magical thinking. Pointing out the parallels between the laws of magic and various trademark doctrines, it suggests that famous marks are legally treated as magical, sacred objects. This legal approach amounts to endorsing the religion of brands. This result is undesirable.

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INTRODUCTION

"I can't believe that!" said Alice. "Can't you?" the Queen said in a pitying tone. "Try again: draw a long breath and shut your eyes." Alice laughed. "There's no use trying," she said: "One can't believe impossible things." "I daresay you haven't had much practice," said the Queen. "When I was your age I always did it for half-an-hour a day. Why sometimes I've believed as many as six impossible things before breakfast."1

The idea of rationality is a very basic element in our concept of what it means to be a human being. Alice's remark that "one can't believe impossible things" sounds even somewhat tautological—to say that one considers something impossible is almost the same as saying she can't believe it. The Queen's suggestion appears to be ridiculous at first sight. And yet, nowadays the Queen's seemingly illogical approach increasingly gains followers, while Alice's straightforward view gradually looses its appeal. Empirical studies consistently show that the Queen was right: one can believe impossible things, and sometimes may even find it difficult not to believe them. Time after time, psychological research shows that people have a strong tendency toward irrational thought and behavior.

1 LEWIS CARROLL, THROUGH THE LOOKING-GLASS, AND WHAT ALICE FOUND THERE, Chapter V: Wool and Water (1871).
The legal system largely follows Alice's approach, normally treating individuals as rational beings. As empirical evidence clearly contradicts this approach, scholars increasingly suggest modifying the legal rules in various fields, so that the legal system would reflect the human nature more adequately.

In this article, I will examine the question how the legal system treats irrational thinking, also known as "magical thinking" in the specific context of advertising and brands. This article proceeds as follows: Part 1 describes the psychological tendency toward magical thinking and explains how modern advertising utilizes this tendency. It further elaborates on the question how advertising promising impossible, miraculous effects influences consumers despite the fact that consumers do not believe such promises. Part 2 demonstrates that the legal system does not impose any restrictions on advertising applying to irrational, magical thinking. While dealing with magical advertising claims, courts largely ignore the human tendency toward irrational thinking and refuse to provide protection against the influence of such claims.

Part 3 employs anthropological research to suggest that magical advertising creates a coherent system of beliefs closely resembling a totemic religion. In this religion, brands of commercial products play the role of sacred objects. Part 4 demonstrates how this perception of brands as sacred objects is adopted in various doctrines of trademark law. Trademark law treats famous trademarks according to the laws of magical thinking thus departing from the
presumption of consumer's rationality and implicitly supposing that consumers perceive famous trademarks as magical objects. This incoherent legal approach, which assumes that the consumer is not influenced by magical advertising, but at the same time supposes that she accepts the magical status of brands, is criticized. I further submit that protecting the magical aura of brands, trademark law grants legal support to the commercial religion of brands.

Part 5 argues that the current legal situation is undesirable. Although the magical aura of brands may provide consumers with real benefits, this part explains why this fact does not provide a sufficient justification for its protection. Finally, the conclusion submits that trademark law should cease treating trademarks as magical objects and restrict the scope of its protection to the purely informative function of trademarks.

1. MAGICAL THINKING AND MODERN ADVERTISING

(A) Rationality and Magic

Do you believe in magic?

Most people in Western societies would answer this question with a definite "no." Modern society praises rational thought and disdains magic. Yet, experiments demonstrate that educated adults in Europe and in the United States show the same degree of magical beliefs as uneducated people living in
"magic tolerant" cultures. For instance, in one experiment, British students who all denied that magic could happen in real life were asked to imagine that a woman at dusk on an empty street approached them, introducing herself as a witch and offering to cast a magic spell on the future life of the participant. In one condition, this spell was intended to make the participant rich and happy, while in the other it was intended to make the participant miserable. While in the first condition most participants said they would go for the spell, none agreed to do so in the second condition.

A consistent body of research shows that in modern western societies magical thinking is commonplace.

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the only difference between "primitive" and developed societies is that while the former openly accept magical thinking, the latter deny being influenced by it.  

Anthropological literature applies the term "magical thinking" to a broad variety of human thought based on associations and emotions rather than on strict logic. A wide range of not purely rational human behavior is explained in terms of magical thinking. Examples include reluctance to drink from a bottle with sugar water after the participants themselves label the bottle as “poison,” unwillingness to put on a sweater previously worn by a disliked

This has led sociologists to conclude that


person\(^8\) and tendency to ascribe to people properties of the animals they eat.\(^9\) Magic is often juxtaposed to science and, more generally, rational thought – while rational, scientific thought is based on strict logical reasoning and experience, magic is based on associations, emotions and hope.\(^10\) I will also use the term “magical thinking” in this broad sense. This, however, would require a brief excursion into the discourse on rationality.

In this article, the term “rationality” will be employed in its strict scientific sense: beliefs are rational only if they are based on good evidence or can be logically induced from previous knowledge; one’s actions are rational only if they are based on one’s (rational) beliefs.\(^11\) Stemming from 17\(^{th}\) century’s “mechanical philosophy,” this notion of rationality still predominates in contemporary scientific and popular thought.\(^12\) And yet, it

\(^8\) Paul & Nemeroff, *supra* note 4.

\(^9\) *Id.*

\(^10\) *Emile Durkheim, The Elementary Forms of the Religious Life* 26 (Joseph Ward Swain, trans., 1969); *Bronislaw Malinowski, Magic, Science and Religion, and Other Essays* 67 (1948); Subbotsky *supra* note 5, at 338; *Styers, supra* note 6, at 161-62.


\(^12\) Tambiah, *id.* at 12-14, 18; *Styers, supra* note 6, at 45-50.
should be noted that the scientific view of rationality has been repeatedly
criticized for being too narrow, unrealistic, ideological, and even
“dehumanizing”.13 Indeed, if we apply the scientific standard of rationality,
many of our everyday beliefs will turn out to be irrational.14 The same is true
for religious beliefs: as they cannot be falsified, they must be deemed
irrational.15 Scientific standard of rationality cannot capture religious
inspiration; it can neither be applied to art, poetry or any kind of human
creativity.16 Accordingly, scholars have suggested several alternative, broader

13 See, e.g., TAMBIAH, id. at 146-150, 153; STYERS, id. at 122-23; PETER
al., Revisiting the Rational Choice and Rationality Debate in the Social
Sciences: Is Theory Possible Without Rationality?, 1 International Journal of
Interdisciplinary Social Sciences 27 (2009); MIKAEL STENMARK,
14 STENMARK, id. at 6.
15 See, e.g., TAMBIAH, supra note 11, at 152-54; Jarvie & Agassi, supra note 6,
at 57; STENMARK, id. at 77, 84; Richard Sosis & Candace Alcorta, Signaling,
Solidarity, and the Sacred: The Evolution of Religious Behavior, 12
16 TAMBIAH, id. at 91-92, 152-54.
definitions of rationality. Some have further argued that the distinction between reality and imagination is not clear, that multiple realities may coexist, and that the vision of reality as purely materialistic should be rejected.

And yet, for the specific context of this article, the common narrow understanding of rationality seems applicable and appropriate. This article discusses the legal regulation of advertising and trademarks. Both these institutions lie in the area of market transactions and both enjoy legal protection on the assumption that they provide the consumer with valuable information. Their legal protection is based on the presumption of market


18 Geschiere, supra note 13, at 19-21.

19 Tambiah, supra note 11, at 101-108, 153-54.

20 For advertising see, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); for trademarks see below, Part 4.
players acting according to the rational choice theory—that is, being rational in the narrow scientific sense. It would thus be consistent to analyze these legal regulations in accord with their basic assumptions.

(B) "Magical" Advertising: the Phenomenon

Magic is found in all societies, however modern or however primitive. Lévy-Bruhl has argued that mystical mentality is fundamental and indestructible in the nature of human beings. It coexists with rational mentality in every mankind and in every human mind. Psychologists consider magical thinking to be a universal aspect of human thought, resulting from emotional reactions and cognitive-processing limitations of the human mind. As cultural and social contexts change, magic does not disappear, but takes on new shapes. Several communication scholars have pointed out that modern advertising extensively exploits the natural human tendency toward magical thinking. In her classic book, "Decoding Advertisements," Judith Williamson

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21 We will revisit this issue later on.

22 O'KEEFE, supra note 5, at xv; COVINO, supra note 5, at 11-12; Subbotsky, supra note 5, at 338; MALINOWSKI, supra note 10, at 17, 56.

23 I am referring to his essay “Les Carnets,” cited and discussed in TAMBIAH, supra note 11, at 91-108.

24 Shweder et al., supra note 4, at 637-38.

25 GESCHIERE, supra note 13 166, 200-1; STYERS, supra note 6, at 25.
describes magic as production of results disproportionate to the effort put in.26 

This type of magical thinking is indeed very widespread in the advertising context. Williamson explains that most of modern advertising follows the logic of a magical spell, as it promises us great results—beauty, love, success, security, etc.—from a minimal action: buying the advertised product.

Likewise, Comaroff & Comaroff note that the common shape of magic in contemporary capitalist culture is the allure of acquiring value from minimal input.27

Williamson further suggests that products appear in advertising as miraculous containers of ideas, feelings and meanings. Each advertisement presents the product as the key to the whole scene of happiness or joy it depicts: the little detail which produces great results.28


28 WILLIAMSON, supra note 26, at 140-149.
systems in simpler societies."  

Employing the logic of magic, advertising attempts to associate physical products with deepest human needs and desires.  

Elaborating on this idea, Sut Jhally notes that in advertising, products magically transform and bewitch people, bring instant gratification and hold within themselves the essence of important social relationships.

In fact, all advertising claims that communicate something else than factual product information, exploit our tendency toward irrational, magical thinking to a greater or lesser extent. Consider, for instance, the vague and largely unverifiable claims such as "Bayer works wonders," "There's a smile in every Hershey bar," "Coca-Cola—Open Happiness." Another example is advertising emphasizing ingredients that do nothing to enhance the product performance. Some of these ingredients are simply invented; others are scientific-sounding but essentially valueless; yet others bear no actual relevance to product performance, such as silk in a shampoo.

29 RAYMOND WILLIAMS, PROBLEMS IN MATERIALISM AND CULTURE 40 (1980).

30 Id. at 47.


32 Amity Hartman, FDA's Minimal Regulation of Cosmetics and the Daring Claims of Cosmetic Companies that Cause Consumers Economic Harm, 36 W. ST. U. L. REV. 53, 78-80 (2008); Gregory S. Carpenter et al., Meaningful
generally, most of modern advertising promises us, implicitly or explicitly, essentially magical results in terms of professional success, social status, love and happiness. This common message of advertising interestingly echoes with the ideology of modern capitalism, as described by several scholars:

Western culture stresses consumption as the main source of value and meaning.

(C) "Magical" Advertising at Work

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When asked, most people say they do not believe any advertising claims and are generally skeptical toward advertising. Theoretically, consumers should be especially skeptical toward advertising with non-verifiable claims and entirely unbelievable claims. Yet, the extensive use of magical claims in advertising is readily apparent. Moreover, marketing experts advocate using vague and unverifiable claims and avoiding specific product information in advertising. Thus, it seems sensible to assume that magical advertising works.

Indeed, a large body of research has found that non-factual claims are effective in changing the consumer's attitude toward the advertised product.


36 Obermiller et al., id.

37 Carpenter et al., supra note 32, at 340.


39 See, e.g., Obermiller et al., id.; Terence A. Shimp & Ivan Preston, Deceptive and Nondeceptive Consequences of Evaluative Advertising, 45 THE
While consumers identify non-factual claims as less credible, the exposure to these claims shifts their evaluation of the advertised product to be more positive.40

One of the explanations for this phenomenon is related to a debate between René Descartes and Baruch Spinoza on the question of correlation between comprehension and belief. Descartes asserted that comprehension is independent of belief. When a person perceives a claim, she first comprehends it, and then decides whether to accept or reject it.41 Spinoza, on the other hand, argued that to understand an idea, a person must accept it, however briefly.


She may reject the idea after having understood it, but she cannot avoid the initial acceptance, which is inherent in the process of comprehension.  

A large body of psychological research has found a clear empirical support for the Spinozan, rather than the Cartesian view. While comprehending information, people involuntarily accept it. Studies have constantly revealed a "truthfulness bias"—the tendency to accept information as true when it is equally probable that it is false. Moreover, it was found that people often fail to reject or ignore assertions they have comprehended, even when explicitly informed that these assertions are false. For example, while being asked to play the role of trial judges, test persons failed to ignore information about the defendant, which was known to be false.

These empirical findings explain many features of human perception, such as believing obviously false rumors, the ability to accept the unreality

\[\text{Id.}\]
\[\text{See, e.g., Gilbert, id. at 117; Gilbert et al. (1990), id. at 607, 611; Gilbert et al. (1993), id. at 230.}\]
\[\text{Id.}\]
\[\text{Gilbert et al. (1993), id. at 231.}\]
\[\text{Id. at 223-227.}\]
\[\text{Claudiu V. Dimofte & Richard F. Yalch, Consumer Responses to False Information: Is Believability Necessary for Persuasion? in Applying Social}\]
of Spiderman$^{48}$ and the inability to escape the influence of prejudice and stereotyping.$^{49}$ In the field of consumer research, the truthfulness bias serves to explain the effectiveness of non-factual, apparently false or entirely unbelievable advertising claims. It is speculated that during the comprehension process, consumers initially perceive such claims as true and find it difficult to reject or ignore them afterwards.$^{50}$

Interestingly, non-supportive experience with products does not eliminate the psychological effect of advertising, and sometimes even enhances it.$^{51}$ For example, in one experiment the subjects were exposed to

\begin{quote}
Cognition to Consumer-Focused Strategy 281-82, 291 (Frank R. Kardes et al., eds., 2005).
\end{quote}


$^{50}$ Cowley, supra note 40, at 729-33.

ads claiming that the advertised coffee contained no bitterness and then tasted coffee which was deliberately made bitter. Those subjects tended to rate the tasted coffee as less bitter and were more intended to purchase it than persons who were not exposed to the ads.52 A similar effect was demonstrated in an experiment with diluted orange juice containing some vinegar.53

This phenomenon is attributed to the tendency known as "cognitive conservatism"—the psychological inclination to seek evidence confirming previous data and disregard evidence contradicting it. Exposure to an advertisement induces the consumer to entertain a hypothesis about the advertised product, although its discredited source usually prevents her from initially believing this hypothesis. Later, while encountering evidence about the product, the consumer tests the hypothesis, employing heuristics that tend to favor its confirmation.54

54 Stephen J. Hoch & John Deighton, Managing What Consumers Learn from Experience 53 THE JOURNAL OF MARKETING 1, at 2, 8(1989); Deighton, supra note 54. at 763; Hoch & Ha, supra note 35, at 221.
product. Further purchases provide additional evidence for the initial hypothesis further increasing the confidence in its validity. 55

Obviously, the more ambiguous the advertising claim, the more the product experience is likely to be interpreted in its favor. 56 Non-factual claims—such as "Bayer works wonders"—can hardly be disconfirmed by experience. Because of the tendency toward cognitive conservatism, lack of disconfirming evidence enhances the credibility of such claims even when confirming evidence is lacking, too. Therefore, such claims may be more effective than factual claims. 57 An additional factor that is believed to increase the influence of even entirely incredible advertising is addressing fundamental human problems, such as excessive weight, aging, low income, lack of social acceptability, etc. Since the consumer eagerly seeks solutions to these problems, she may be even more inclined to interpret evidence in favor of the advertising claims and attribute its most critical difficulty to the advertised product's inability to live up to these claims. 58

56 Deighton, supra note 54, at 764; Hoch & Deighton, supra note 58, at 9.
57 Hoch & Deighton, id.
58 Dimofte & Yalch, supra note 47, at 282.
Given this data, it is hardly surprising that advertising tends to promise, mostly vaguely and implicitly, that products will have great, miraculous effects, especially in the most important spheres of our lives. Such advertising functions very similarly to magic. Just like advertising recipients, people who believe in magic tend to interpret ambiguous and even disconfirming evidence in accordance with this belief: occasional success is celebrated and remembered, while failures are disregarded and forgotten.\(^{59}\)

While product failures are attributed to task difficulty, failures of magic are similarly explained by incorrect performance of the complicated magical rites.\(^{60}\) While experience with the advertised product enhances the confidence in advertising claims, performing magical rituals likewise enhances the core belief.\(^{61}\) And finally, just like advertising, magic tends to touch the most important spheres of human lives, where people are especially susceptible to influence.\(^{62}\)


\(^{60}\) Malinowski, *id.* at 65; Settle, *supra* note 17, at 180; Tambiah, *supra* note 11, at 21.


From a psychological perspective, magic is described as an immature response to the limits of one’s ability. Magic satisfies the psychological need to acquire a feeling of control where the sought result cannot be ensured by rational means. Magic in this view is the mistaken belief in the power of one’s wish. Magic satisfies the psychological need for optimism: it is the belief that hope cannot fail nor desire deceive. Modern advertising bears great resemblance to magic in this sense as well. While promising great results in terms of professional, social and personal success from the banal action of buying a product, it exploits our basic psychological need for a feeling of control in these insecure spheres. While promoting “magic pills” against overweight, poor fitness, aging, health problems, etc. it plays upon our psychological disinclination to recognize the limits of our ability.

2. THE LEGAL ATTITUDE TOWARD "MAGICAL" ADVERTISING

Scholars speculate that magical advertising claims are so widespread not only due to their effectiveness, but also because of their immunity from

63 J. H. M. Beattie, Other Cultures 67 (1964); Malinowski, id. at 59-60; Styers, supra note 6, at 172.
64 O’Keeffe, supra note 5, at 39; Malinowski, id. at 29, 55, 59-60.
65 Jarvie & Agassi, supra note 6, at 56; Styers, supra note 6, at 162-63, 171. See also Malinowski, supra note 10, at 59-61.
66 Malinowski, id. at 65, 69-70; Tambiah, supra note 11, at 22, 81.
legal liability. § 43(a)(B) of the Lanham Act establishes civil liability for misleading advertising. Yet, judicial practice has developed the "puffing" defense: vague or grossly exaggerated advertising claims are not actionable under the Lanham Act. The puffing defense embraces all hyperbolized, non-realistic and fantastic advertising claims. For instance, the puffing defense succeeded with respect to the unsubstantiated claims that Bayer Aspirin "works wonders," that a toothpaste would beautify the smile and brighten the teeth and that candy mints would make weight-reduction easy. Similarly, the claim that "Magic Secret" cream caused an "astringent sensation" was deemed non-actionable, since such claims have become "so associated with the familiar exaggerations of cosmetics advertising that virtually everyone can be presumed to be capable of discounting them as puffery."  

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71 Bristol-Myers Co., 46 F.T.C. 162, 185 (1949).
72 Carlay Co. v. F.T.C., 153 F.2d 493, 496 (7th Cir. 1946).
While establishing whether an advertisement contains false factual claims, courts apply the standard of "reasonable consumer." As the examples above illustrate, this fictive consumer figure is characterized by skeptical attitude toward advertising—the "reasonable consumer" is not easily misled by advertising's hyperbole. This view is based upon a general legal approach that regards individuals as rational beings who scrutinize all information they receive and whose behavior is motivated by pure reason. This approach has recently come under heavy fire in various areas of law. Scholars increasingly question the adequacy of the legal presumption of rationality in the face of extensive empirical research demonstrating that people tend to act irrationally under many circumstances.


In the field of advertising, numerous scholars have argued that the "reasonable consumer" figure is a legal fiction. What is considered innocuous puffing by courts actually misleads consumers or otherwise influences their behavior. The puffing defense is arguably based on a false conception of human thinking and is entirely devoid of empirical support.\(^7^6\)

A somewhat less discussed aspect of the puffing defense is materiality. Puffing exempts from liability false advertising claims, when the incorrect data is immaterial for the purchasing decision.\(^7^7\) For example, false claims about patent and design rights were held to be non-material and thus, permitted\(^7^8\) and a similar conclusion was reached in respect of the trademark “Glass Wax” used for a product not containing wax.\(^7^9\)


\(^7^7\) McCarthy, supra note 75, at § 27:35.


contrast with empirical research showing that irrelevant product information considerably influences purchasing decisions. 80

Routinely presuming that the consumer will only be influenced by credible and material statements of fact, courts implicitly apply Cartesian rather than Spinozian logic. 81 For example, two apparently misleading trade names—"Profile" for a bread that was not low in calories and "Hi-C" for a drink not containing vitamin C—were allowed on the condition that the companies run corrective advertising explaining that the bread was not effective for weight reduction and the drink did not contain vitamin C, respectively. 82 According to Cartesian approach, such corrective advertising should entirely eliminate the influence of the misleading names. However, research demonstrates that people are poor at rejecting information that is known to be false, the required corrective advertising could probably do little to eliminate the confusion caused by the trade names. 83

The widespread use of advertising claims legally regarded as non-actionable puffing confirms that advertisers themselves do believe in the

80 Carpenter et al., supra note 32.

81 Cowley, supra note 40, at 728-29.


83 Dorothy Cohen, Surrogate Indicators and Deception in Advertising, 36 THE JOURNAL OF MARKETING 10, 13 (1972).
efficacy of such claims. Commenting on this situation, Ivan Preston noted:

"There has never been a better example of people having their cake and eating it too than advertisers using claims on the assumption that they work, while being protected by the law's assumption that they don't." 

Apparently, judges are not unaware of the fact that the figure of the "reasonable consumer" is a fiction. Thus, sometimes even evidence of actual consumer confusion does not prevent the legal conclusion that the advertisement in question is not misleading. For example, the *Mead Johnson & Co. v. Abbott Laboratories* case dealt with an advertisement claiming that the Similac baby formula was the "1st Choice of Doctors." The court was presented with survey evidence demonstrating that most consumers understood this claim to mean that a substantial majority of doctors recommended Similac and that they do so because of its medical superiority over other brands. None of these implications was true. Yet, the court concluded that the claim was non-actionable and noted generally that the meaning of words should be established according to dictionaries, and not to "the first impressions of people on the street."

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85 Preston, *id.* at 95.

86 201 F.3d 883, 886 (7th Cir. 2000).
*Pasta v. New World Pasta*, survey evidence was brought to demonstrate that a substantial number of consumers understood the slogan "Americans' Favorite Pasta" as implying that the advertised brand was number-one, or at least national brand. Again, this was not true. The court accepted the puffing defense, reasoning that since the meaning of the word "favorite" was subjective and vague, the statement could not be regarded as a factual claim.\(^{87}\)

These cases reveal that the high standard set by the figure of the "reasonable consumer" is not a result of simple misunderstanding of the purchasing public.\(^{88}\) Rather, it's a policy choice made by the legal system: courts, in a way, deliberately prefer the freedom of commercial speech to the consumer's interest not to be misled.\(^{89}\) Thus, in *American Italian Pasta*, the court noted: "Defining puffery broadly provides advertisers and manufacturers considerable leeway to craft their statements […] ensuring vigorous competition, and protecting legitimate commercial speech. […] To allow a consumer survey to determine a claim's benchmark would [result in]

\(^{87}\) 371 F.3d 387, 394 (8th Cir. 2004).


\(^{89}\) MCCARTHY, *supra* note 75, at § 27:38.
unpredictability [and] could chill commercial speech[.]

A similar observation was made in *Mead Johnson.*

In a sense, puffing is regarded as an immanent right of corporations. Two cases brought before the Federal Trade Commission (FTC) illustrate this point. In the first case, the Firestone Company asked the FTC to amend its prior order, preventing the company from using unsupported safety claims, so that the order would not extend to puffing. The order was modified, so that the company could use the unsubstantiated claim "quality you can trust." In a similar case, C&H Sugar complained that an FTC order preventing it from making unsubstantiated claims covered puffing, such as "I love C&H the best" or "C&H tastes best." Modifying the order, the FTC observed: "the homogeneous nature of the product means that there are few truthful, nondeceptive comparisons that can be made among competing products. In order to promote their brands, sugar refiners must rely on [...] subjective endorsement claims. [...] [T]he order as currently structured inhibits competition in the granulated sugar industry."

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90 371 F.3d at 391.
91 201 F.3d at 886.
This view gained support in the Uniform Commercial Code (UCC). A proposal to amend the UCC made in the 1990s was perceived by the advertising industry as a threat to the puffing defense. Many advertising executives sent letters urging the UCC Commission not to accept this amendment, as the elimination of the puffing defense would diminish the ability of many companies to compete. According to these letters, thousands of products cannot compete on factual grounds, because they are essentially the same and the only way to differentiate brands one from another is by the appeal of advertising. In response to these concerns, the Commission revised its proposal and codified the puffing defense into the UCC.

All this indicates that the legal system does not overlook the impact of subjective, exaggerated and non-factual advertising claims falling into the all-permissive area of puffing. Rather, the opposite is true: puffing is actually recognized as the advertiser's right to influence the consumer without providing her with any information. This right enables the advertiser, inter alia, to make the consumer perceive physically indistinguishable products differently. Puffing is thus a legally recognized privilege of advertisers to exploit the human tendency toward irrational and magical thinking.

3. THE PANTHEON OF BRANDS

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94 Preston, supra note 90, at 66-86; MCCARTHY, supra note 75, at § 27:38.

95 Preston, id. at 85-86.

96 MCCARTHY, supra note 75, at § 27:38.
As discussed above, modern advertising often appeals to magical thinking. It can be thus said that advertising induces us to believe in magic. In this part I will demonstrate that advertising does even more than that: it creates a system of beliefs similar to religion. Although magic and religion are closely related phenomena, they are not entirely identical.\(^{97}\) Therefore, the argument that advertising creates religious-like beliefs deserves a separate discussion.

The parallels between modern advertising and religion have been repeatedly observed in the literature. Scholars have noted the similarity between shopping malls and cathedrals,\(^{98}\) pointed out the common elements between successful brands and religion\(^{99}\) and revealed the sacred dimensions

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\(^{97}\) Durkheim, supra note 10, at 42-44; Malinowski, supra note 10, at 67-70; Mauss, supra note 65, at 25-30, 56-69.


of consumption experience,\textsuperscript{100} as well as the fetishistic character of consumer culture.\textsuperscript{101} They have shown how advertising adopts religious symbols,\textsuperscript{102} described the process of consumption taking the place of religious institutions,\textsuperscript{103} and, finally, concluded that advertising and consumption have become "the very religion of late capitalism."\textsuperscript{104}

Yet, no study so far has seriously inquired whether advertising fulfills any anthropological definition of religion, as will be done here. Anthropological literature offers a plethora of definitions of religion\textsuperscript{105}

\textsuperscript{100} Russell W. Belk et al., \textit{The Sacred and the Profane in Consumer Behavior: Theodicy on the Odyssey}, 16 \textit{The Journal of Consumer Research} 1, 2 et seq. (1989).

\textsuperscript{101} Williamson, \textit{supra} note 26, at 150-51; Jhally, \textit{supra} note 31, at 224-27.


\textsuperscript{104} Pop, \textit{id.} at 369.

\textsuperscript{105} See, \textit{e.g.}, Edward B. Tylor, \textit{Primitive Culture} 424 (1874); William James, \textit{The Varieties of Religious Experience: A Study in Human Nature} 53 (1902); Clifford Geertz, \textit{Religion as a Cultural System, in
modern advertising can probably fulfill most of them, if not all. Yet, a comprehensive examination of this question lies outside the scope of the current study. In the following analysis, I will concentrate on the classical Emile Durkheim's definition. Durkheim defines religion by two criteria: (A) the idea of the sacred and (B) a unifying principle that binds all rules regarding the sacred things together.106 I will now demonstrate that much of modern advertising fulfills both these criteria.

(A) The Idea of the Sacred

Durkheim has argued that all religions presuppose a classification of things into two opposed groups: sacred and profane. Sacred things are unique in their very nature, for they have virtues and powers absent in the domain of the profane.107 Usually, the efficacy of these powers is so imperfectly determined that the believer is able to form only a vague notion of it.108

Sacred things are usually unimpressive in themselves. Nothing in their physical characteristics reveals their extraordinary nature.109 Any object can

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106 DURKHEIM, supra note 10, at 37-47.

107 Id. at 37-39. See also MALINOWSKI, supra note 10, at 17.

108 DURKHEIM, id. at 200.

109 Id. at 212, 205, 322-23.
be sacred—a piece of wood, a rock, a tree, an animal.\textsuperscript{110} It is the human consciousness that makes the difference between the sacred and the profane: the sacred dimension is added to the physical world by the religious imagination.\textsuperscript{111} For instance, "churinga"—sacred objects in totemic societies—are simple pieces of wood or bits of stone. They are distinguished from profane things by only one particularity: the totemic mark, which is drawn or engraved upon them. Yet, churinga are considered highly sacred, exchanged for high price and believed to heal, give courage, force, perseverance, success, etc.\textsuperscript{112} Durkheim concludes that in case of churinga, the sacred character is bestowed upon the physical object by the totemic mark. This mark attracts religious sentiments to these objects and inspires belief in their supernatural powers.\textsuperscript{113}

For its large part, modern advertising substantially correlates with Durkheim's idea of the sacred. Its rhetoric routinely tries to convince us that choosing the right brand will bring us success, social acceptance, love, health, beauty etc. This is very similar to functions ascribed to churinga in totemic societies. Advertising employs the fantastic logic of the sacred, according to

\textsuperscript{110} Id. at 37.

\textsuperscript{111} Id. at 322-24, 345-46.

\textsuperscript{112} Id. at 121-22, 204.

\textsuperscript{113} Id. at 122-26.
which trivial physical objects can be powerful means of achieving highest human aspirations.

Today, in many market areas, products have little material differences.\(^{114}\) Clothing items bearing high-end brand names are frequently manufactured in the same production line with cheaper brands and unbranded items.\(^{115}\) Private label products are significantly cheaper and often essentially identical to their branded counterparts.\(^{116}\) Experiments show that in blind tests, consumers are unable to distinguish between different brands of beer, cigarettes, whiskey, soft drinks, etc.\(^{117}\) It has already become common wisdom


\(^{115}\) **Lindstrom, supra** note 105, at 122.


\(^{117}\) Ralph I. Allison & Kenneth P. Uhl, Influence of Beer Brand Identification on Taste Perception, 1 Journal of Marketing Research 36, 39 (1964); Stephen J. D. Chadwick & Hugh A. F. Dudley, Can Malt Whisky Be Discriminated from Blended Whisky?, 287 British Medical Journal 1912,
in marketing literature that in such competitive environment, the only way to
distinguish one's product from its rivals is to add a powerful emotional and
symbolic dimension to the physical product.\textsuperscript{118} This dimension should induce
the consumer to prefer the products of this brand to largely indistinguishable
alternatives and allow the brand's owner to charge premium prices.\textsuperscript{119} As
discussed above, this commercial practice enjoys legal support: one of the
objectives of the puffing defense is to enable differentiation between largely
homogeneous products through advertising appeals.

Brands that differentiate largely identical products resonate with the
idea of the sacred, as described by Durkheim. Just like the totemic mark
distinguishes churinga from similar pieces of wood and stone, a strong brand
marks out goods from physically similar counterparts. Just like churinga,
branded goods are valued much higher than their unbranded counterparts.
While the totemic mark adds the sacred character to the physical object, the
trademark adds a symbolic dimension to the physical product.

\textsuperscript{118} See, e.g., Holt, \textit{supra} note 38, at 80; Craig J. Thompson et al., \textit{Emotional}
\textit{Branding and the Strategic Value of the Doppelgänger Brand Image}, 70

\textsuperscript{119} \textit{Atkin} \textit{supra} note 109, at 109-110; \textit{David A. Aaker & Erich
Joachimsthaler, Brand Leadership} 14-16 (2000).
Another point of similarity relates to the authenticity of the forces persistent in sacred objects and branded products. As Durkheim notes, the religious forces are delirious, but nevertheless real. Eating a forbidden animal makes a person feel sick and may even cause death.\textsuperscript{120} A man wearing churinga feels stronger and he is stronger; he may accomplish great missions due to his confidence in his protector.\textsuperscript{121} His enemy, on the other hand, sometimes loses self-assurance seeing churinga and is easily defeated.\textsuperscript{122} Much in the same way, the powers bestowed upon brands by advertising may be real. People may indeed feel more confident, more socially accepted and even happier while using products of a certain brand. If the use is conspicuous, other people may also react to socially accepted signals—for instance, treat with more respect a person wearing a Versace suit and a Rolex watch.

One special feature of the sacred is its ability to inspire sentiments that function as a verification of faith. For example, the sentiments inspired in a devoted Christian by a cross or the phrase "Jesus Christ is the son of God" provide a kind of proof of the truthfulness of her belief. This type of

\textsuperscript{120} Durkheim, supra note 10, at 226-28.

\textsuperscript{121} Id. at 159, 228.

\textsuperscript{122} Id. at 121.
verification is non-falsifiable, a fact that makes the religious belief very stable.  

Similarly, advertising attempts to create non-falsifiable emotional experiences referring to brands—consider, for instance, the slogans "There's a smile in every Hershey bar," "Coca-Cola—Open Happiness" and "Oh, what a feeling! Toyota." As noted above, advertising may indeed transform product experience, making it more pleasurable than it would otherwise have been or even than it has actually been. For example, it is widely known that while in a blind test most people prefer Pepsi to Coke, the same people tasting the drinks with their brands usually prefer Coke.  

A brain-scan study has revealed that while the blind test stimulates only the brain region responsible for taste, brands stimulate the region responsible for higher thinking. This might indicate that emotions inspired by the Coke brand override the test preference for Pepsi.


125 LINDSTROM, id.
commonly associated with love, engagement and marriage, caused women's heart rates to go up 20%. Feelings generated by brands are thus might be entirely real. Just like religious sentiments, these feelings can strengthen the beliefs created by advertising.

Moreover, one relatively recent study has found that when devoted consumers viewed their favorite brands, their brains registered exactly the same patterns of activity as they did when these persons were presented with religious images, such as a cross, rosary beads and the Bible. These results might indicate that powerful brands and religious symbols inspire largely identical emotions. Interestingly, even favorite sport stars do not generate similar emotional responses. Our emotional engagement with brands might thus be rather unique in the parallels it shares with religious feelings.

(B) A Unifying Principle that Binds All Rules Regarding the Sacred Things Together

The totemic societies (tribes) described by Durkheim are divided into clans, whereas each clan has its own totem and practices its own cults and rites. And yet, totemism is a single religion and not a group of isolated cults. Members of one clan do not regard the beliefs of neighboring clans with the

126 Id. at 154.
127 Id. at 123-26.
128 Id.
129 Id. at 126.
skepticism one regards a foreign religion. Just as they believe that their totem protects their own clan, they also believe that totems of the neighboring clans protect these clans. Therefore, the whole totemic tribe shares the same beliefs: although each cult has its autonomy, together they form a complex system, just like the Greek polytheism.\footnote{\textsc{Durkheim}, supra note 10, at 102-3, 154-56.}

Scholars have noted the similarity between modern advertising and totemic religions: advertising creates brands as group identifiers, dividing people into "clans" according to their consumption habits.\footnote{\textsc{Williamson}, supra note 26, at 45-49; \textsc{Jhally}, supra note 31, at 224.} In advertising, just like in totemism, people are identified through the brands they consume: Coke drinkers are different from Pepsi drinkers; Chanel 5 identifies you as a different person from someone who uses Babe.\footnote{\textsc{Williamson}, \textit{id.} at 45-46.} Advertising, just like totemism, creates a polytheistic universe, a world dominated by a sheer pantheon of powerful forces residing in products of consumption.\footnote{\textsc{Jhally}, supra note 31, at 227 (citing Martin Esslin).}

Empirical research suggests that advertisers were not unsuccessful in their mission of creating brand totemism: there is evidence that people sometimes identify themselves and perceive the identity of others through...
brands. Several powerful brands, such as Apple Macintosh, Saab, Bronco and Harley-Davidson, were even found to serve as objects of cults and rituals; their followers form "brand communities."\footnote{Muniz & O'Guinn, supra note 109, at 420, 423; Belk et al., supra note 106, at 15; Ronald W. Pimentel & Kristy E. Reynolds, \textit{A Model for Consumer Devotion: Affective Commitment with Proactive Sustaining Behaviors}, 5 \textit{Academy of Marketing Science Review} 1, 24 (2004), available at: http://www.amsreview.org/articles/pimentel05-2004.pdf.}

As Williamson notes, consumer totemism differs from tribal totemism in that unlike totemic clans, consumer "clans" inevitably overlap, since we consume so many products.\footnote{WILLIAMSON, supra note 26, at 48.} It is possible, for example, for a single person to belong at the same time to the Coke clan and to the Macintosh clan. Another noteworthy difference is that, in contrary to consumer society, clan membership in totemic societies is involuntary and is usually determined by birth.\footnote{DURKHEIM, supra note 10, at 161-62.} Yet, one form of traditional totemism resembles consumer totemism very closely: the individual totem. The individual totem is acquired by a deliberate act and is considered a benefit rather than a necessity. A person may acquire several individual totems, and may deliberately replace any of them if
it does not fulfill its function properly. Interestingly, the faith in the individual
totems is stronger than the belief in the totem of the clan. Durkheim gives an
example of a man who has abandoned totemism and was baptized, but his
faith in the efficacy of the individual totem remained unshaken. Moreover,
traces of individual totemism are still observable in many European
countries.\textsuperscript{138} Individual totemism resembles consumer totemism in that both
can peacefully coexist with other religions.\textsuperscript{139}

It is important to note that individual totemism, despite its more liberal
form, fulfills Durkheim's definition of religion: this is a collective and general
belief in the ability of totems to protect, grant power, bring success, etc.\textsuperscript{140}
Similarly, advertising, as a whole system, promotes the perception according
to which branded consumer goods have the power to bring success, love,
happiness, etc. Hence, advertising can also be regarded as a system unified by
a single principle, thus fulfilling the second criterion of Durkheim's definition
of religion.

This religion of consumer totemism has been promoted by advertising
for several decades by now\textsuperscript{141}

\textsuperscript{138} Id. at 157-65.

\textsuperscript{139} Pop, supra note 108, at 369.

\textsuperscript{140} Durkheim, supra note 10, at 424-25.

\textsuperscript{141} According to Sut Jhally, advertising entered the "stage of totemism" in the
1960s: Jhally, supra note 31, at 224.
Empirical evidence demonstrates that people attribute great importance to consumption and associate it with pleasure, freedom, self-reward and happiness.\textsuperscript{142}

It is interesting to note that while in traditional totemic societies pleasure is not one of the effects expected from sacred things, it seems to play a rather central role in consumer totemism. Churinga is believed to bring courage, power, success, etc.—and advertising ascribes similar functions to brands. Yet, advertising also convinces us very frequently that branded products are able to bring pleasurable experiences: consider, for instance, "Oh, what a feeling! Toyota" or "There's a smile in every Hershey bar." And indeed, as discussed above, brands can transform product experience, making it more pleasurable.\textsuperscript{143} Churinga fulfills no similar functions.

This discrepancy between brands and churinga is noteworthy, since it reveals a fundamental difference in the value system of the two societies. Consumer society is much focused on the satisfaction of individual desires; it is built around "the cult of the self."\textsuperscript{144} As Jean Baudrillard has observed, and has apparently taken roots in our society.

\textsuperscript{142} See Frey & Stutzer, \textit{supra} note 34, at 29; Fromm, \textit{supra} note 34, at 123.

\textsuperscript{143} See above, Part 1(C).

\textsuperscript{144} Pop, \textit{supra} note 108, at 372; see generally Christopher Lasch, \textit{The Culture of Narcissism: American Life in an Age of Diminishing Expectations} (1979); Tom Wilfe, \textit{The 'Me' Decade and the Third Great
today pleasure and enjoyment are essentially regarded as an important mission every person must accomplish: "The consumer is haunted by a fear of missing something—some experience, some form of enjoyment—[…] it is the "fun morality," the imperative to enjoy oneself, to exploit one's full potential for thrills, pleasure and gratification." Thus, branded products, unlike churinga, are endowed with pleasure-bringing function because in modern consumer society, unlike in totemic societies, pleasure is considered one of the important goals a person has to achieve in her life.

4. TRADEMARK LAW AND MAGICAL THINKING

As demonstrated in the previous part, magical advertising attempts to create a totemic-like religion, in which brands perform the role of sacred things. In all religions, sacred things are essentially miraculous objects that obey the peculiar laws of magic. In addition, they are protected by particular rules against profanation. This part will examine the legal attitude toward brands. It will inquire whether trademark law adopts, to any extent, the

*Awakening*, 23 NEW YORK 26 (1976), available at

145 BAUDRILLARD, *supra* note 120, at 80.


147 DURKHEIM, *supra* note 10, at 299 et seq.
perception of brands as sacred things that should be treated according to the laws of magic and protected against profanation.

Trademark law is traditionally based on the general legal presumption of human rationality. Its primary purpose is to protect trademarks as informational devices identifying the source of goods and allowing the consumer to gather information about their quality. The primary goal of trademark law is to prevent consumer confusion as to the source of goods. This goal is entirely consequent with the perception of consumer as a rational being. For instance, if the consumer learns that Toyota cars are of a high quality, she will be able to make a rational purchasing decision only if no other car manufacturer is allowed to confuse her by marking his cars with the "Toyota" trademark.

With the course of time, the notion of consumer confusion has been sufficiently broadened. Furthermore, today the doctrine of dilution provides additional protection to famous trademarks. This doctrine is not concerned

149 MCCARTHY, supra note 75, at § 2:8.
with consumer confusion, but solely with preserving the selling power of the mark. \textsuperscript{151} The broad consumer confusion test coupled with the doctrine of dilution increasingly results in protecting trademarks against unauthorized uses that merely evoke associations, without causing any meaningful deception. I will argue that protecting trademarks against associations, trademark law essentially adopts the laws of magical thinking into its domain.

But first, it should be clarified what associations have to do with magic.

Anthropological literature describes "sympathetic magic"—magic based on similarity or contact—as the most common type of magic. \textsuperscript{152} The laws of sympathetic magic are observed across a wide range of traditional and modern cultures and are thus believed to reflect general patterns of human thought. \textsuperscript{153}

The laws of sympathetic magic are similar to the laws of cognitive association of ideas. Yet, anthropologists have pointed out an important difference between them: while the laws of association operate only within the


\textsuperscript{153} Rozin & Nemeroff, id. at 205-7; Subbotsky & Quinteros, supra note 2, at 521 et seq.; Shweder et al., supra note 4, at 637-38.
human mind, the laws of magic project these cognitive laws into the real world. For instance, while we may cognitively associate a person with her photograph, this association does not yet lead to the conclusion that destroying the photograph would harm the person. Such conclusion is, however, typical for magical thinking. Thus, sympathetic magic is largely based on the false assumption that the real world is organized according to principles similar to the cognitive laws of association.154

Sympathetic magic is governed by two principles: the law of similarity and the law of contagion.155 The following discussion will briefly explain these principles and show how they are applied in the domain of trademark law.

(A) The Law of Similarity

The law of similarity is essentially captured by the phrase "like produces like": an effect resembles its cause.156 For example, a fruitful woman makes plants fruitful; a barren woman makes them barren. Cherokee Indians believe that washing one's hair with the tough wiry roots of the catgut plant will make the hair strong.157

154 Rozin & Nemeroff, id. at 206-7.

155 Id. at 205-6; Frazer, supra note 158, at 12-14.

156 Rozin & Nemeroff, id. at 206; Frazer id. at 14.

157 Frazer, id. at 33.
magical law. For instance, several brands of shampoo are advertised as containing silk, although silk has no scientifically known effect on hair.  

According to the law of similarity, objects that superficially resemble one another, share fundamental properties. Sacred things are especially powerful in transmitting their qualities to things resembling them. For example, anything even remotely resembling or recalling the totemic mark is considered sacred. Thus, a stone may be sacred solely because of an accidental resemblance of its shape to a sacred symbol.

What does trademark law have to do with the magical law of similarity? Trademark law aims to prevent confusion as to the source of goods. It is a well-settled principle that merely creating an association with a trademark is allowed and does not constitute infringement.

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158 See, e.g., Carpenter et al., supra note 32, at 339.

159 Advertising frequently employs the logic of this

159 Rozin & Nemeroff, supra note 4, at 206.

160 DURKHEIM, supra note 10, at 222, 324.

161 Id. at 103.

"Lardache" brand with a pig logo for large size jeans was held not to infringe the Jordache trademark with its horse logo.\(^{163}\)

Although this principle has never been challenged directly, the legal notion of trademark confusion increasingly expands into the domain of associations. One aspect of this tendency is the growing judicial hostility toward trademarks that clearly sound as alternatives to famous brands. Thus, one court has found "Lessbucks" confusingly similar to "Starbucks," although the name was clearly meant to suggest cheaper coffee.\(^{164}\) Similarly, a natural, herbal alternative to "Prozac" named "Herbozac" was held to infringe the famous mark because of the defendant's intent to create an association with "Prozac."\(^{165}\) Additional examples include the holding that "A.2" meat sauce infringes on the famous "A.1"\(^{166}\) and that "Gucchi Goo" for a diaper bag infringes on "Gucci."\(^{167}\) Although parody does constitute a factor that weights

\(^{163}\) Jordache Enterprises, Inc. v. Hogg Wyld, Ltd., 828 F.2d 1482, 1486 (10th Cir.1987).


\(^{165}\) Eli Lilly & Co. v. Natural Answers, Inc., 86 F.Supp.2d 834, 838 et seq. (7th Cir. 2000).


against establishing trademark infringement, courts consistently hold that parody cannot exempt from liability where "the purpose of the similarity is to capitalize on a famous mark's popularity for the defendant's own commercial use." This statement comes very close to holding that creating associations with famous marks is no longer allowed.

Furthermore, courts increasingly recognize so-called "subliminal confusion" as an actionable trademark infringement. One of the first cases to recognize this type of infringement dealt with two manufacturers of drugs that prevent women from developing antibodies to Rh-positive cells during pregnancy. The market leader used the name "RhoGAM" and sought to prevent a newcomer from using the name "Rho-Immune." The court found


that the similarity between the marks was not sufficient to cause confusion, but went on to hold that "this is a case in which confusion or deception occurs on a subliminal or subconscious level, causing the consumer to identify the properties and reputation of one product with those of another, although he can identify the particular manufacturer of each. The trade-mark laws protect against this kind of psychological confusion implanted by similar trade-marks in the mind of a consumer."\textsuperscript{171}

The correlation between "subliminal confusion" and the magical law of similarity is readily apparent. The belief that similarity in external features indicates resemblance of fundamental properties is at the very heart of this magical law. Since people have a natural tendency toward magical thinking, the court's speculation that the consumer will unconsciously attribute the properties of "RhoGAM" to "Rho-Immune" because of the similarity in names and despite lack of confusion seems realistic. Yet, recognizing the exploitation of the tendency toward magical thinking as an actionable legal wrong, this decision, along with other cases on "subliminal confusion," represents a clear departure from the legal presumption of human rationality.

This broadened confusion test makes it increasingly impossible for a competitor to gain consumer attention by evoking an association with a famous trademark. Thus, in one case, the court concluded that a magazine

subtitle "America's Edition of Italy's Playmen" is not likely to cause substantial confusion with "Playboy." Yet, it granted an injunction relief, reasoning that the subtitle created "a danger of continued subliminal reinforcement […] so as to raise the level of anticipated quality of the product."\(^{172}\) Another court found that "Gunsmoke" cigarettes infringed upon Marlboro's trade dress because of a subliminal association created with the "Marlboro Man" motifs. The court went on to explain that the whole purpose of the advertising industry is to create trademarks with "commercial magnetism," a positive atmosphere that influences the consumer even if she is not fully aware of this influence. Exploitation of this positive atmosphere by competitors is not allowed, even when made without causing consumer confusion.\(^{173}\)

Interestingly, while courts take little account of the tendency toward irrational thinking while dealing with claims of misleading advertising, they do take this tendency into consideration while protecting famous trademarks. Although trademark infringement cases recite the "reasonable consumer"


In addition, trademark infringement formally requires proving that the confusion is material for the purchasing decision. Although this requirement could have served to limit trademark rights, in practice it is hardly enforced. Here, again, courts seem to picture different consumers in the field of misleading advertising and in the field of trademark infringement. One could wonder if subliminal associations with market leaders influence the purchasing decisions of the skeptical consumer, the consumer who perfectly

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176 With the exception of “grey market” goods: MCCARTHY, supra note 75, at § 29:51.75.
knows that it makes no difference if a product is protected by patent or design rights or not.177

While Cartesian logic is apparent in cases dealing with misleading advertising, in the field of trademark infringement courts take a position much closer to Spinozian view. Although this latter view is much more realistic, this does not justify the diverse legal standards of consumer confusion. The legal system may deliberately choose to ignore certain human tendencies. Its general presumption of human rationality expresses a liberal and anti-paternalistic approach. This approach often makes perfect sense: the tendency toward irrational thinking should not necessarily lead to the conclusion that people need protection from influences that might induce irrational behavior. Once this liberal approach has been chosen, one needs some justification to deviate from it.

The legal system could have chosen to protect the consumer from the influences of advertising appealing to irrational thinking because of her relatively weak position in the market. But once it has chosen to ignore this tendency in the context of misleading advertising, there seems to be no reason to change this approach in the context of trademark law. The interest of trademark owners to protect the "commercial magnetism" of their marks does not provide a sufficient justification for such an inconsistency. This "commercial magnetism" is nothing else than an outcome of advertising...

177 See supra note 84.
appealing to irrational, magical thinking. As the "Gunsmoke" court recognized, the "commercial magnetism" is a positive atmosphere that influences the consumer even when she is not aware of it.178

The primary goal of trademark law is to enable the consumer to gather information about the various goods, so that she can make an educated purchasing choice. The protection of "commercial magnetism" takes trademark law far away from this goal, turning it instead into a tool of protecting competitive advantages gained by exploitation of the human tendency toward irrational, magical thinking. In addition, protecting "commercial magnetism," trademark law ultimately makes the investment in magical advertising more profitable, thus providing corporations with an additional incentive to employ it. This outcome can hardly be regarded as desirable.

Moreover, applying the laws of magical thinking to trademarks grants trademarks an exceptional status in the legal landscape. The legal system thus indirectly communicates the message that people employ magical thinking in relation to brands, but not in other contexts. This message essentially supports the efforts of the advertising industry in creating the perception of brands as unusual, magical things. It also contributes to the perception of brands as sacred things, since the sacred is the primary subject of magical laws in all

religions. As noted above, even a remote resemblance of an object to churinga leads to the conclusion that the object is sacred, that is, has the same properties as churinga. Similarly, in the view of the legal system, even a superficial and (consciously) non-confusing resemblance to a famous brand—such as the use of "Marlboro Man" motifs—should make the consumer believe that the product partakes in some of the brand's properties.

Another tool of protecting famous trademarks against associations is the doctrine of dilution, which protects trademarks in absence of consumer confusion. Since the 2006 amendment of the Lanham Act, dilution is explicitly defined as "association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark." Examples of dilution include "Haha," which was held to dilute "Wawa," when both marks were used for convenience stores and "Pro-Techniques," which was found dilutive of "Nailtiques," when both marks were used for fingernail care products. The doctrine of dilution specifically aims

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179 See supra note 152.


to protect the "unique character,"\textsuperscript{183} the "selling power"\textsuperscript{184} and the "magic"\textsuperscript{185} of famous marks.\textsuperscript{186}

The protection against essentially non-confusing associations, provided by the broad confusion test and the doctrine of dilution, promotes the perception of trademarks as sacred things in one additional way. As Durkheim explains, the sacred and the profane are two classes radically opposed to each other. When we think of holy things, the idea of a profane object cannot enter the mind without encountering grave resistance. And if the ideas do not coexist, things should not touch each other either. Therefore, it is important to keep the profane at a respectful distance from the sacred, to create a sort of vacuum between them.\textsuperscript{187}

\textsuperscript{183} Community Federal Sav. & Loan Ass'n v. Orondorff, 678 F.2d 1034, 1037 (11th Cir. 1982).

\textsuperscript{184} Sally Gee, Inc. v. Myra Hogan, Inc., 699 F.2d 621, 625-26 (2d Cir. 1983).


\textsuperscript{187} Durkheim, \textit{supra} note 10, at 317-18.
This idea of separation exists in advertising as well: ads for leading brands usually avoid direct comparisons with competitors and attempt to present the brand as something unique and profoundly different from everything else. Preventing competitors from using trademarks that call to mind famous brands endorses this perception: trademarks such as "Lessbucks," "A-2," "Playmen" and "Wawa" suggest that the products provide alternatives to the famous brands. Enjoining such uses, trademark law lends support to the idea that famous brands are beyond comparison. Protecting these brands from non-confusing associations creates the sort of vacuum needed to keep the profane in a respectful distance from the sacred.

(B) The Law of Contagion

The second law characterizing sympathetic magic is the law of contagion. This law is expressed by the phrase "once in contact, always in contact": a contact between two things may transfer properties from one thing to the other. Amulets, talismans and the laying on of hands are examples of contagious magic. Particularly names are considered to be capable of transmitting the object's essence, hence the belief in magical spells:


189 Rozin & Nemeroff, supra note 4, at 206; FRAZER supra note 158, at 43.

190 Rozin & Nemeroff, id. at 209.
pronouncing a certain name will evoke the power of the entity bearing that name.191

The magical law of contagion has two facets: "positive contagion" and "negative contagion," which will be discussed separately.

(B.1) Positive Contagion

"Positive contagion" is the ability of things to transfer their benevolent powers.192 Sacred things are especially effective in producing positive contagious effects: the religious emotions attached to them are so powerful that they have a strong tendency to spread themselves. Thus, anything coming into contact with a sacred thing may obtain its powers.193

Religious forces are immanently contagious, and hence, they can extend to any object.194 For instance, the totemic mark can bind together things of entirely different classes: any object coming into contact with the sacred symbol is sacred. Thus, minerals, plants, animals, etc. are all considered sacred when they bear the totemic mark.195 All such things are regarded as having the same qualities.196 The religious sentiments inspired by

191 Id. at 225-26.
192 Id. at 208-9.
193 DURKHEIM, supra note 10, at 321.
194 Id. at 323-24.
195 Id. at 235-36.
196 Id. at 150.
the vastly different sacred things obviously do not derive from their intrinsic properties, but from the totemic mark.\textsuperscript{197} As Durkheim notes, religion substitutes the world perceived by senses with a different one.\textsuperscript{198}

The commercial religion of brands relies heavily on the principles of positive contagion. Strong brands are often extended into very distant product fields.\textsuperscript{199} For example, Harley-Davidson has been extended from motorbikes to sunglasses, hair accessories, and underwear; Virgin sells, \textit{inter alia}, music, airlines, vodka, credit cards, and mobile phones while Jaguar, along with its cars, markets perfume, lipstick, and body lotion.\textsuperscript{200} Licensing brands into new product fields is a very profitable commercial practice. It allows the licensee to charge premium prices,\textsuperscript{201} while the trademark owner benefits from high license fees without substantial efforts.\textsuperscript{202}

\begin{itemize}
\item \textsuperscript{197} \textit{Id.} at 122-26, 229.
\item \textsuperscript{198} \textit{Id.} at 236.
\item \textsuperscript{199} See Assaf, supra note 156, Part I(D).
\item \textsuperscript{200} Christina Binkley, \textit{Like Our Sunglasses? Try Our Vodka!}, available at \url{http://online.wsj.com/article/SB119448403906785900.html}.
\end{itemize}
Corporations are usually unable to exercise any meaningful quality control while licensing their brands into distant product categories and do not exercise such control as a matter of fact. Commentators speculate that an ordinary consumer would not expect the trademark licensor to be significantly involved in the manufacturing process when the product lies far from its initial field of activity. What, if so, explains the consumer's preference of an extension of a famous brand to other products in the same category? Why would she be inclined to prefer, and to pay a higher price, for a "Jaguar" lipstick when the company obviously has no expertise in this product field? Rational considerations do not seem to provide a plausible explanation to such consumer behavior.

Far-flung brands extensions are made possible *inter alia* because of the human tendency toward magical thinking, particularly toward positive


205 See Assaf, *id*.
contagion. As discussed above, famous brands evoke strong emotions, which are similar to religious sentiments. Exploiting the rules of positive contagion, corporations license their marks as triggers of these emotions in deliberate product fields. An extensively extended brand functions much like a totemic mark, binding dissimilar things together. Just like minerals, plants and animals may be bound by a totem, products as diverse as motorbikes and hair accessories, as cars and perfume, as music recordings and airlines, can be united by a single brand. This totem-like behavior implicitly suggests that a famous brand is especially effective in transferring its benevolent powers: any product bearing the brand name partakes in its aura. Since strong effects of positive contagion characterize the sacred, brand extensions contribute to the perception of brands as miraculous, sacred things.

Trademark law has essentially internalized the idea that famous brands should be treated according to the magical law of positive contagion. Two doctrines that most explicitly demonstrate this are, again, the broad test of consumer confusion and the doctrine of dilution.

Let us start with the consumer confusion test. The current broad scope of this test results not only in protecting trademarks from associative uses in the same product category, but also in an extensive protection across product categories. Today, consumer confusion is frequently established when a famous mark is used in a product field very distant from its initial one. Courts routinely assume that the "reasonable consumer" expects famous marks to function in a broad variety of product areas. For example, the consumer
presumably anticipates that "Hallmark" auto dealership is connected to the producer of the greeting cards, that "Lloyd's of London" aftershave originates with "Lloyd's of London" insurance services and that "Harley-Hog" pork is a new product line of "Harley-Davidson."

Obviously, Hallmark Cards, Inc. has no expertise in the auto dealership business, "Lloyd's of London" is hardly skilled to exercise quality control on aftershave and Harley-Davidson Inc. employs no experts in pork. If indeed licensed into such distant product areas, these brands would provide the consumer with little information about the quality of the respective goods. Thus, the broad confusion test does not protect trademarks as informative


tools. Rather, it protects the magical, sacred dimension of brands. Assuming that the consumer expects famous brands to be extended so far, trademark law essentially internalizes the idea that a brand may produce effects of positive contagion, binding together entirely different products in some meaningful way.

Since the use of a brand in a distant product field provides the consumer with no meaningful information, confusion resulting from such use, when made without authorization, causes her no real harm. Yet, famous brands may be harmed by such use. As Durkheim explains, the sacred character of things derives entirely from human imagination; it ceases to exist when people stop believing in it.209

209 DURKHEIM, supra note 10, at 345-46.
The doctrine of dilution provides an additional powerful tool of protecting trademarks across product categories. This kind of protection lies at the heart of this doctrine. Its primary purpose is to protect the unique character of a famous mark from a "gradual whittling away" caused by non-confusing uses on dissimilar products.\textsuperscript{210} Dilution protects famous trademarks from unauthorized uses in such distant product fields that consumer confusion is deemed unlikely even under the current broad confusion test.\textsuperscript{211} For instance, the use of the name "Tiffany" for restaurant services\textsuperscript{212} was found to dilute the famous jewelry mark; "Bacardi" on jewelry was enjoined as a dilution of the trademark for rum\textsuperscript{213} and the "Lexus" automobile mark was protected against the use on personal care products.\textsuperscript{214} If unauthorized uses of brands in distant product fields become widespread, the consumer would ultimately learn that the uses are unauthorized and cease to believe that brands can be extended very far from their initial product fields. This would undermine the entire practice of far-flung brand extensions. Accordingly, the perception that a famous brand can bind entirely different things together would fade: the brand would be perceived as an entity capable of operating only in its limited product field. This would likely impair the sacred character of famous brands. The broad test of consumer confusion is thus an important factor that allows corporations to advance the perception of brands as sacred things.

\textsuperscript{210} \textit{McCarthy, supra} note 75, at § 24:73.

\textsuperscript{211} \textit{Id.} at § 24:69.


struggle to understand the underlying rationale of this doctrine, which is indeed somewhat puzzling. The evil of dilution lies in the additional association added by a non-confusing use to a famous trademark. This additional association is said to impair the selling power and the uniqueness of the mark, as it ceases to be mentally linked exclusively with its owner. Thus, when the consumer comes upon a "Tiffany" restaurant, she understands that it is not connected to the jewelry company. Hence, "Tiffany" starts signifying two different things for her: the jewels and the restaurant. The doctrine of dilution presumes that this will blur the power of the famous trademark: the mental connection between the word "Tiffany" and the jewelry company will loose its uniqueness and grow weaker.

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218 McCarthy, supra note 75, at §§ 24:73, 24:118; Schechter, supra note 221, at 830–33.
For several decades, the concept of dilution was largely based on mere
intuition. Only in the 1990s researchers started looking for a scientific
support to this doctrine. Theories on memory suggest that information is
stored in a network of nodes (concepts) connected by links (associations).
When additional links are added to the network, the speed of retrieval is
typically slowed. A dilutive use adds an associative link to the node
representing a famous brand, thereby inhibiting the retrieval of the association
with its first owner. For instance, having been exposed to a "Tiffany"
restaurant, the consumer will create a node linking "Tiffany" with the
restaurant. This additional node will interfere with the retrieval of the node
linking "Tiffany" to jewels.

Experiments have indeed found that consumers need some more time
to associate the brand with its core products after having been exposed to

219 Simonson, supra note 222, at 150.
220 See, e.g., id.; Morrin & Jacoby, supra note 222; Maureen Morrin et al.,
Determinants of Trademark Dilution, 33 Journal of Consumer Research 248
(2006); Chris Pullig et al., Brand Dilution: When Do New Brands Hurt
221 Morrin & Jacoby, id. at 266-68; Morrin et al., id. at 249-50; Pullig et al., id.
at 54-55.
222 Id.
dilutive uses.\textsuperscript{223} Some commentators regard this evidence as a proof that dilution damage is real: the consumer incurs "internal search costs" when she has to think harder to link a trademark to its owner.\textsuperscript{224} The trademark owner is damaged, too, as the communicative function of his mark becomes less effective.\textsuperscript{225} Other scholars point out that the delay effect found in experiments was rather insignificant, 129 milliseconds on average. This negligible "damage" can hardly justify a legal doctrine seriously restricting the freedom of competition, they argue.\textsuperscript{226}

Increasing the search costs by one tenth of a second hardly explains the intuition that dilution causes real damage. Furthermore, there is one rather salient discrepancy between legal assumptions in the field of dilution and the findings of empirical research. The doctrine of dilution protects only famous

\textsuperscript{223} Morrin & Jacoby, \textit{id.} at 269-70, 272-74; Pullig et al., \textit{id.} at 52, 61-62.


trademarks. The legal assumption is that the more famous the mark, the more it deserves protection against dilution.227 Yet, theories on memory lead to an opposite conclusion. Researchers explain that famous marks, with which the consumer is very familiar, are stored in strong cognitive networks, while less familiar brands are stored in weaker networks. Therefore, weaker brands are more likely to suffer from a diluting use than famous brands.228 Experiments have demonstrated that weaker brands are indeed much more vulnerable to the harmful effects of dilution. Very familiar brands, such as "Coca-Cola," "Hyatt" and "Continental Airlines," are largely immune from dilution.229 Yet, these very brands are most extensively protected against it.230 For instance, while the "Hyatt" trademark for hotels has been legally protected against dilution supposedly caused by its use in relation to legal services,231 an experiment has demonstrated that this specific mark is resistant to dilution.232

227 McCARTHY, supra note 75, at § 24:87.

228 Morrin & Jacoby, supra note 222, at 270-71.

229 Id. at 272-74.

230 McCARTHY, supra note 75, at § 24:87.

231 Hyatt Corp. v. Hyatt Legal Services, 736 F.2d 1153, 1157-58 (7th Cir. 1984).

232 Morrin & Jacoby, supra note 222, at 269-70.
likely to be affected by dilutive uses, but are not legally protected against them. 

Literature has paid unduly little attention to this contradiction between the legal intuition and empirical findings. Yet, this contradiction is no minor disagreement between theory and practice. Rather, it reveals that the "internal search costs" rationale cannot sufficiently explain the legal intuition behind the dilution doctrine. The decision to protect against dilution marks such as Coca-Cola, but not such as Viking backpacks, is not a result of some inaccuracy of the legal doctrine: it is the very keystone of the legal perception of dilution. The doctrine of dilution simply protects against some other damage, not against the damage caused by one tenth of a second increase in search costs.

I suggest that the doctrine of dilution is largely inspired by magical thinking. This doctrine reflects the legal acceptance of the idea that famous brands—such as Coca-Cola, but not such as Viking backpacks—are sacred, and not vulnerable to some other damage.

\[233\] Id. at 272.  

\[234\] McCarthy, supra note 75, at § 24:87.  


\[236\] McCarthy, supra note 75, at § 24:87.
miraculous objects that obey the laws of magic. Some of the religious rules intended to maintain distance between the profane and the sacred are based on the tendency of the sacred toward positive contagion.\textsuperscript{237} For example, many religions forbid mentioning the God's name in profane situations.\textsuperscript{238} Because, according to the laws of magic, the name evokes the powers of the sacred, its mentioning in profane situations results in conflating the sacred with the profane.

The doctrine of dilution is based on the intuition that famous trademarks should be protected against a similar process of profanation. The real harm of an additional, non-confusing association with a famous mark lies in impairing the psychological perception of the mark as unique and untouchable. This is how we should understand the purpose of dilution to protect the "selling power," the "unique character," and the "magic" of the mark. Thus, "Hyatt" legal services may not cause any delay in the recall of the famous hotel brand. Yet, such use is able to make the name "Hyatt" less distinctive, less unique and less "magical." Such use pulls the mark toward the domain of the common and the ordinary—toward the realm of the profane. I believe that this kind of damage is the real subject matter of protection against dilution.

\textit{(B.2) Negative Contagion}

\textsuperscript{237} Durkheim, supra note 10, at 318.

\textsuperscript{238} Rozin & Nemeroff, supra note 4, at 225.
According to the magical law of "negative contagion," a thing coming in contact with an impure entity becomes "polluted," impure in itself. For example, people commonly refuse to try on a sweater previously worn by a resented person, such as Hitler. The negative contagion is much more salient than the positive one: pollution always overcomes purity. For example, an equivalent positive action (such as a loved person wearing Hitler's sweater) can hardly purify the contaminated substance. In every religion, holy objects are eagerly protected from vulgar contact by interdictions (taboos), which are designed to preserve the respect of these objects.

Much in the same way, famous trademarks are also protected from vulgar contexts. This protection is provided by "tarnishment"—a later developed branch of the dilution doctrine. Tarnishment protects against "association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark." This type of infringement occurs when a famous trademark is used in a manner that clashes with its image. Typically, tarnishment is found when famous trademarks are placed in contexts of sexual activity, illegal drugs.

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239 Id. at 209-211.
240 DURKHEIM, supra note 10, at 299-322.
dissonant with their wholesome image. Examples of tarnishment include posters displaying “Enjoy Coca-Cola” logo with the second word altered so as to read “Enjoy Cocaine,” t-shirts bearing an imprint resembling the General Electric trademark reading “Genital Electric,” a magazine parody of the Pillsbury's characters “Poppin Fresh” and “Poppie Fresh” engaged in sexual intercourse and t-shirts reading “Buttweiser” in an imprint resembling “Budweiser.”

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The protection against tarnishment distinguishes trademarks with an exceptional status in the liberal landscape of the US legal system. There is no other example of an entity being legally protected from negative associations. For the sake of comparison, the flag and other official insignia of the United Stated do not enjoy similar protection.\textsuperscript{249} Neither do people: libel and defamation protect only against provably false statements of fact.\textsuperscript{250} The Supreme Court has repeatedly held that this rule is mandated by the First Amendment.\textsuperscript{251} It assures that public debate will not suffer for lack of "imaginative expression" or "rhetorical hyperbole."\textsuperscript{252}

Satire, caricature, parody and other offending publications do not fall into the scope of defamation, since they do not constitute statements of fact.\textsuperscript{253}


\textsuperscript{253} MARGARET E. O'NEILL, LIBEL AND SLANDER § 156 (2009)
rendezvous with his mother in an outhouse,” the court declined the action for
defamation. The parody was only a rhetorical hyperbole and could not
reasonably be understood as a statement of fact, it reasoned.\(^{254}\)

Similarly, when Andrea Dworkin, a radical feminist strongly opposed to pornography,
appeared in a series of sexually explicit cartoons and given the epithet
"asshole of the month," the court found no defamation, since no statements of
fact were made.\(^{255}\) In another case, a humorous publication implying that a
lawyer serves his customers illegal drugs was found non-actionable.\(^{256}\)

The vast difference between defamation and tarnishment cases is
readily apparent. Put simply, while placing a living person in a context of sex
or illegal drugs is permitted, doing the same to a famous trademark is


\(^{255}\) Ault v. Hustler Magazine, 860 F.2d 877 (9th Cir. 1988).


\(^{257}\) Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as
Language in the Pepsi Generation*, 65 Notre Dame L. Rev. 397 (1990);
Rosemary J. Coombe, *Objects of Property and Subjects of Politics:
Intellectual Property Laws and Democratic Dialogue*, 69 Texas L. Rev. 1853,
1866 (1991); Sonia K. Katyal, *Performance, Property, and the Slashing of*
of human rationality. As discussed above, while dealing with claims of misleading advertising, courts presume that a rationally thinking person is not influenced by non-factual statements. The same presumption is evident in defamation cases, too. Yet, in tarnishment cases, courts choose a basically different position, assuming that people *are* influenced by uses that simply put famous trademarks in vulgar contexts, without making any statements of fact. Here, again, courts employ Spinozian logic, while the legal system is generally based on Cartesian view.

Of course, not all trademark parodies are restricted as tarnishment. Parodies that convey graspable critical messages on the trademark or its owner are allowed. Commentators note in this context that while the trademark owner can effectively rebut criticism, the harm caused by putting a trademark in an unwholesome context, such as "Enjoy Cocaine" or "Genital Electric," cannot be remedied by more speech. While this general legal presumption is true, it can hardly justify the legal protection against tarnishment. Thus, Ms. Dworkin, too, could do nothing to confute the epithet "asshole of the month"

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258 For examples and discussion see Assaf, *supra* note 33, at 62-71.

or her appearance in the sexually explicit cartoons. Yet, this did not lead the court to conclude that she should be protected against this kind of speech. Similarly, non-factual advertising claims are effective exactly because of the fact that the consumer cannot rebut them. And yet, the general presumption of human rationality precludes the restriction of such claims.

How, then, is tarnishment different? I submit that tarnishment is different in that it applies to famous brands, and the mysticism created around them has been unconsciously internalized by the legal system. Apparently, neither courts nor the federal legislator are immune from the influence of magical advertising. Trademark law is a unique area where damage caused by appeals to irrational, magical thinking gives rise to legal claims. The damage caused by "Enjoy Cocaine" or "Genital Electric" is so severe because of the rules of negative contagion. In addition to being non-refutable, these expressions cannot be neutralized by image-enhancing advertising, such as "Coca-Cola—Open Happiness" or "GE—Imagination at Work." This is because negative contagion has especially powerful effects: in magical thinking, pollution always overcomes purity.260

Although it's a legal truism that "trademark is not a taboo," protecting famous marks from the impure touch of negative contagion does resemble a religious interdiction. As Durkheim notes, interdictions designed to protect things from vulgar contacts necessarily imply sacredness of these things: they

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260 Rozin & Nemeroff, supra note 4, at 209.
preserve the respect of the sacred.\textsuperscript{261} Therefore, protecting famous trademarks against vulgar contexts necessarily implies accepting their sacred character. Tarnishment thus echoes the basic rule of all religions, according to which "the sacred thing is \textit{par excellence} that which the profane should not touch, and cannot touch with impunity."\textsuperscript{262}

A further support to the idea that tarnishment is based on an essentially religious way of thinking may be found in an analogy to the crime of blasphemy. Throughout the 18\textsuperscript{th}-19\textsuperscript{th} centuries, blasphemy was based on the theory that Christianity was part of the common law.\textsuperscript{263} Blasphemy consisted in any word or deed which exposed Jesus Christ, the Christian religion, or the Holy Scriptures, to contempt and ridicule.\textsuperscript{264} While blasphemy punished publications such as pamphlets mocking Christ's arrival in Jerusalem\textsuperscript{265} and expressions such as "Jesus Christ was a bastard, and his mother must be a whore,"\textsuperscript{266}

\begin{notes}

\textsuperscript{261} Durkheim, \textit{supra} note 10, at 301.

\textsuperscript{262} Id.


\textsuperscript{264} State v Mockus, 113 A 39, 43 (1921).

\textsuperscript{265} King v. Gott, 16 Crim.App. 87 (1922).

\textsuperscript{266} People v. Ruggles, 8 Johns. 290 (N.Y. 1811).

\end{notes}
religion may be attacked without the writer being guilty of blasphemy." A similar rule can be observed today in relation to famous marks: it is permitted to decently criticize them, but not to expose them to ridicule. The logic behind the two provisions is similar: both assume that decent critique does not diminish the respect of its object, while pure mocking does. Both rules are based on the logic of the magical law of negative contagion and both mark the object of their protection with a very special status. This resemblance to blasphemy best illustrates the point that, to some extent, famous brands are legally treated as sacred things.

A serious argument against protection of the sacred status of brands can be made in terms of cultural hegemony legally granted to commercial corporations. It can be convincingly argued that corporations should not be able to control and to freeze the meaning of cultural signs, even if these signs consist of trademarks or famous marks. Similar rules are recognized in attacks on religious works: generally forbidden is the direct or indirect ridicule of sacred things, even if certain decencies of controversy are observed, even the fundamentals of religious works are touched. Such a rule can be observed today in relation to famous marks: it is permitted to decently criticize them, but not to expose them to ridicule. The logic behind the two provisions is similar: both assume that decent critique does not diminish the respect of its object, while pure mocking does. Both rules are based on the logic of the magical law of negative contagion and both mark the object of their protection with a very special status. This resemblance to blasphemy best illustrates the point that, to some extent, famous brands are legally treated as sacred things.


make another point against the extensive trademark protection described above.

5. SHOULD THE LEGAL SYSTEM PROTECT THE "MAGIC" OF BRANDS?

Thus far, this article has attempted to demonstrate two things. First, it has submitted that advertising promotes religious-like beliefs about brands. Second, it has argued that trademark law applies the laws of magical thinking while protecting famous brands, thus essentially accepting the perception of brands as sacred things and endorsing the totemic religion created in advertising. Now it is time to ask whether such legal attitude is desirable. I do not intend to suggest that the religion of brands promoted by advertising is a fraud. In fact, it may be argued that the magical powers of brands are entirely real. As mentioned above, an advertisement may make us believe that a bitter coffee is not bitter or that a diluted orange juice with vinegar tastes good. While it may be said that such advertising is misleading, it can just as well be argued that such advertising creates better-tasting products.

whether there exists any objective reality, *i.e.* another reality than what is perceived by one's senses, has been subject to philosophical debates for centuries.\(^{269}\)

If we choose a solipsistic position that nothing exists outside a person's mind,\(^{270}\) we may come to the conclusion that brands produce real and valuable effects. Just like churinga makes a sick person feel better, brings courage and power, so too brands may bring a feeling of exclusivity, self-confidence, and even make one happier. Besides, famous brands evoke strong feelings. These feelings are entirely real and perhaps desirable for the consumer. The belief in magical effects of brands is not very different from any other religious or magical belief. Such beliefs cannot be said to be true or false, and, as anthropologists note, they fulfill basic psychological needs.\(^{271}\) It may be thus argued that the market simply delivers what consumers want: if advertising endows products with magical powers, it means that there exists consumer demand for these powers.

It could further be argued that the sacred character of famous brands should be protected in order to preserve their magical effects. As Durkheim

\(^{269}\) *See* \textsc{The Stanford Encyclopedia} at \url{http://plato.stanford.edu/entries/rationalism-empiricism}.

\(^{270}\) *See* \textsc{Britannica Online Encyclopedia}, at \url{http://www.britannica.com/EBchecked/topic/553426/solipsism}.

\(^{271}\) *See above*, Part I(C).
explains, a sacred thing is effective only to the extent that people believe in it. If they cease doing so, the magical powers of the sacred will vanish.\textsuperscript{272} If the legal system stops treating famous brands according to the laws of magical thinking, the perception of brands as magical, sacred things might be shaken. This may be regarded as a genuine loss for the consumer: she will no longer be able to enjoy the magical effects of these brands. Several scholars have similarly suggested that the positive psychological effects of brands on the consumer are beneficial and thus, deserve protection.\textsuperscript{273}

Nonetheless, the need to preserve the psychological effects of brands, real as they may be, does not justify the broad protection currently provided by trademark law. All religious and magical beliefs provide similar benefits and yet, none of them is legally protected. Even Christianity, the religion of the majority in the United States, is no longer shielded against offensive attacks.\textsuperscript{274}

\textsuperscript{272} Durkheim, \textit{supra} note 10, at 322-24, 345-46.


assume a neutral position in relation to religion. Blasphemy statutes have been repeatedly struck down as unconstitutional to the extent they aimed to preserve and perpetuate the Christian religion.\textsuperscript{275}

In addition, while famous trademarks are protected from dilution of their symbolic power, religious and cultural icons are not protected from a similar process caused by their commercialization.\textsuperscript{276} Particularly, they are usually not protected from appropriation as trademarks, although occasionally attempts are made to prevent the commercialization of certain symbols.\textsuperscript{277} While this interesting asymmetry has been discussed at length elsewhere,\textsuperscript{278} it is worthwhile to illustrate it here by one example. Consider that while Native Americans have been unable to preserve the sacred status of “Crazy Horse,” the name of their legendary hero, from the association imposed on it by its use

Since the middle of the 20\textsuperscript{th} century, the Supreme Court started recognizing the "neutrality" principle, according to which the state must

\textsuperscript{275} Torcia, \textit{id.} at § 513.

\textsuperscript{276} Assaf, \textit{supra} note 33, at 19-21.


\textsuperscript{278} Assaf, \textit{supra} note 33.
as a brand of alcohol, the “Tiffany” trademark has been legally protected from the mental link with restaurant services.

Thus, while no religious or cultural symbols enjoy legal protection of their sacred status, famous brands largely do. Obviously, this is not because the magical aura of a brand is considered to be more socially beneficial than the halo of a religious symbol. What, then, could explain such a discrepancy? I dare speculate that the main rationale behind the legal intuition that brands should be protected against the erosion of their magic, while religious symbols should not, lies in the commercial character of brands. In contrast to the sacred character of religious symbols, the magical aura of brands is created by a purposeful and substantive financial investment of private corporations. This aura constitutes a very valuable economic asset. Yet, on a close look, this rationale does not hold water.

The mere fact that something is valuable and costly to create, does not mean that it should be protected. The legal system generally presumes that copying, imitation and exploiting the ideas of others are perfectly legitimate and even desirable forms of competition. Intellectual Property rights impose

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281 See, e.g., B. H. Bunn Co. v. AAA Replacement Parts Co., 451 F.2d 1254, 1259 (5th Cir. 1990); Aromatique, Inc. v. Gold Seal, 28 F.3d 863, 875 (8th Cir. 1994).
limited restrictions on this general rule of free competition.\textsuperscript{282} These rights are generally granted for the purpose of encouraging creation of the protected intangible assets.\textsuperscript{283} Trademark rights in particular are traditionally granted in order to encourage the investment in the quality of goods and business goodwill.\textsuperscript{284} This purpose is entirely satisfied by protecting the purely informative function of the mark, that is, by merely protecting trademarks from conscious and meaningful consumer confusion. To make a case for legal protection of an additional asset—the magical aura of the trademark—it should be demonstrated that our society has a sufficient interest in encouraging its creation at the significant expense of restricting free speech and free competition.

Furthermore, Intellectual Property rights are primarily granted in order to solve market failures. The legal assumption is that had copyright, patent and trademark rights not existed, the market would not provide enough incentive for creating artistic works, technological inventions and business goodwill.\textsuperscript{285}

Thus, in order to justify protection of the magical aura of brands, it must be shown that this protection is necessary to ensure a sufficient supply of this asset.

Even assuming that people sufficiently benefit from believing magic, it can hardly be argued that the protection provided by trademark law is needed to guarantee the supply of magical objects or magical beliefs. For thousands of years, people held all kinds of magical beliefs without any intervention of the legal system. Today, too, religions and other mystical teachings seem to provide a great variety of such beliefs. The sphere of magical beliefs thus does not seem to suffer from any "market failures," which could justify a legal intervention.

As discussed above, magical beliefs can reside in any object. Brands with magical dimensions probably generate more financial gain than any other magical objects. Thus, the market naturally provides greater incentives to create magical beliefs in brands than in anything else. This is evident from the eager efforts of advertising to channel our tendency toward magical thinking to brands. No other magical objects are advertised with the same intensity. Protecting the magical dimension of brands, the legal system makes the investment in these dimensions even more profitable, thus further directing the "market" for magical beliefs toward the supply of commercial brands. Such legal interference in the sphere of mysticism may hardly be justified.

Speaking more generally, the legal system usually assumes a neutral position in relation to irrational beliefs and, more broadly, to any beliefs not
based on verifiable facts. In this article, we have seen two examples of this approach: the lack of any restrictions on advertising applying to irrational thinking and the exclusion of non-factual statements from the scope of the defamation tort. This choice to ignore the human tendency to be influenced by factors other than factual information is consistent with the general legal assumption of human rationality. Although this assumption is essentially unrealistic, it should not be abandoned altogether. The legal assumption of human rationality reflects the general reluctance of the legal system to enter the shaky domain of our latent and unconscious motives, to analyze our minds and souls. And it does make generally much sense to leave this domain outside the reach of legal regulations. It is a part of human dignity to be treated as a rational being, and not as an organism performing largely predictable psychological reactions.

While protecting the "magic" of brands, trademark law essentially abandons the presumption of rationality. Being concerned with the erosion of the unique character of a brand caused by subliminal confusion or non-confusing associations, the legal system enters an area it should generally avoid. If asked, most people would probably say that an "Enjoy Cocaine" poster would not change their opinion on Coca-Cola drinks, and a "Lexus" face cream would not alter their views on Lexus cars. And probably, they would be wrong. Experiments will likely show that such uses modify the associative networks existing in our minds in relation to these brands. Maybe, we cannot even resist such modifications. Nevertheless, this is not a sufficient
reason for the legal system to intervene. By the same token, we probably can't help generating positive associations with Bayer after having seen an advertisement claiming that it "works wonders," or generating negative associations with Andrea Dworkin after having seen caricatures depicting her as the "asshole of the month." Yet, the legal system neither considers the former expression misleading nor the latter defamatory, and rightly so.

The legal system should generally restrict the scope of its regulation to the level of rational communication and refrain from speculations about what happens inside our minds. Sometimes, special circumstances require deviations from this rule: for instance, when the psychological influence reaches the level of manipulation, such as in case of subliminal advertising, or when the influence has especially dire consequences for the individual or the society, such as in case of advertising for tobacco, alcohol, or weapons. But the commercial interest of corporations owning famous brands certainly does not justify deviation from the legal presumption of human rationality. The magical, sacred character of brands exists only in the associative networks of our minds. Corporations may assume no rights to this territory.

Trademark law should return to its initial purpose of protecting trademarks as informational devices. It should treat the consumer as a rational being, who uses trademarks as tools that allow her making an educated purchasing decision and save her (real) search costs. Trademark law should stop being concerned with the psychological benefits trademarks might bring and, more generally, it should stop attempting to grasp what happens in the
depths of the consumer's mind. Third parties should be enjoined from using a mark only when the use causes conscious and meaningful consumer confusion. The figure of the "reasonable consumer" employed in the field of misleading advertising should equally apply to the field of trademark infringement: only when the use in question is likely to deceive the consumer, it should be restricted. By contrast, the field of associations famous brands evoke should be left outside the reach of legal regulation, even if these associations have significant economic value.

Analogically, several anthropologists have suggested that magical and religious practices can be regarded as rational, as they have symbolic and expressive functions, and because they satisfy important psychological and societal needs.286 Yet, as Tom Settle rightly points out, expressive behavior is rational only when its goal is to express something.287 This is not the case with practitioners of magic, who believe in its effectiveness. In the case of mentally healthy people, psychological explanations may throw some light upon the causes of human behavior, but they cannot show why the behavior is rational.288 Similarly, trademarks are legally designated to provide consumer with information, and consumers usually perceive them as shortcuts of product

286 See, e.g., TAMBIAH, supra note 11, at 81; STENMARK, supra note 13, at 265-68.

287 Settle, supra note 17, at 191.

288 Id.
information and not as means of satisfying their psychological needs. It would thus be paternalistic to justify trademark protection with unconscious benefits gained from the mental associations some brands evoke in consumers’ minds.

**CONCLUSION**

Having made a trip through the Wonderland of Brands, we return to Alice and the Queen. The Queen's view is, in a sense, much closer to reality: people have a surprisingly strong tendency to believe the impossible. This article has dealt with one specific aspect of this tendency—magical beliefs. However impossible, magical beliefs are very common in our modern, logic-oriented society. Alice's adventures in Wonderland themselves are the best illustration of how our ostensibly rational minds readily accept magical ideas, such as that eating a mushroom can make one grow taller or shorter.\(^{289}\)

This article has focused on magical beliefs in the particular context of advertising and brands. We all know that advertising persuading us that products of a certain brand work miracles should not be believed. Despite ads suggesting otherwise, our rational minds perfectly understand that Bayer does not work wonders, that Magic Secret cream can hardly cause any astringent sensation and that there is no happiness in a Coca-Cola bottle. And yet, because of our natural tendency toward magical thinking, the influence of such claims may be difficult to resist.

\(^{289}\) *Lewis Carroll, Alice's Adventures in Wonderland*, Chapter V: Advice from a Caterpillar (1865).
Modern advertising attempts to direct our natural inclination to believe in magic toward brands of consumer goods. When it succeeds, brands take on magical dimensions. Like all magic, the magic of brands may have entirely real effects. For instance, the magic of Rolex may make one more self-confident; the magic of Coke makes it taste better than Pepsi; the magic of Tiffany raises women's heart rates.

The legal approach in this field is somewhat contradictory. While dealing with advertising that builds up the magical aura of brands, the legal system adopts Alice's view and ignores the human tendency toward irrational thinking. Since people are not supposed to believe the impossible, there are no restrictions whatsoever on attempts to make the consumer believe in the magic of brands. Yet, while protecting famous brands against unauthorized uses, the legal system radically changes its approach. Although the traditional purpose of trademark law is to protect brands as informational devices allowing rational purchasing decisions, this functional view has long been abandoned. Today, trademark law essentially recognizes the magical dimension of brands as an entirely real and valuable asset, subject of private property and legal protection. Corporations invest much money and effort in creating the magic of their brands, and trademark law protects the outcome of this investment against misappropriation and injury. Doing so, it implicitly adopts the Queen's view that people can believe the impossible: it's only a matter of practice.

This inconsistent legal approach is obviously undesirable, but the question is, what view should the legal system choose – Alice's or the
Queen's? Although empirical research has found much support for the Queen's view, this article has argued that Alice's approach should generally be preferred as a legal standard. The legal system is not a looking-glass. Its purpose is not to perfectly reflect every single trait of the real world. The legal system should regulate human behavior according to certain standards, which do not necessarily have to accurately reflect the human nature. The legal system generally assumes human rationality. This presumption should not be abandoned. When special circumstances do not require otherwise, the legal system should treat people as rational beings, however unrealistic this assumption may be.

The whole field of irrational, magical and religious beliefs should be generally left outside the scope of legal regulation. Such beliefs are neither verifiable nor falsifiable, and the legal system should refrain from taking sides in their respect. And usually, it does. For instance, both, preaching and attacking the Christian religion is legally allowed. In the past, this was different: while preaching the Christian religion was, of course, permitted, the crime of blasphemy prohibited mocking it. This asymmetry reflected the perception of that time, according to which Christianity was part of the legal system. Similarly, permitting to build a magical aura around brands and then restricting uses that may harm this aura essentially turns the belief in the magic of brands into part of the legal system. This result is undesirable. The legal system should assume a neutral position in relation to such beliefs.
Trademark law should stop attempting to determine the merits of its protection according to the actual consumer’s perception of brands. Real as they may be, magical beliefs in brands should be left outside the scope of legal regulation. Trademark law should protect only the purely informational dimension of brands. It should treat the consumer as a rational being, who uses trademarks to make educated purchasing decisions. By contrast, associations, emotions and all sorts of irrational and magical beliefs brands evoke should have no legal significance.