No More Clowning around: Ringling Bros.-Barnum & (and) Bailey Combined Shows, Inc. v. Utah Division of Travel Development Evaluates the Federal Trademark Dilution Act

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I. Introduction

"If it is true that we live by symbols, it is no less true that we purchase goods by them. A trade-mark[sic] is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants." Trademark owners bring suits primarily to protect a mark's unique character and to keep competitors from using the mark to obtain profits that the original owner would otherwise have gained. Courts began to protect trademarks used in commerce by providing a cause of action based on a "likelihood of confusion" standard. This early standard marked the start of protection from dilution — "the lessening of the capacity of a famous mark to identify and distinguish goods or services." Until 1995, dilution protection consisted of varying state anti-dilution standards. Differing state anti-dilution standards created a call for statutory uniformity that would offer more predictable protection. Congress responded by enacting the Federal Trademark Dilution Act.


2. See Bible, supra note 1, at 296-97. The author also noted that traditional theory of trademark dilution is based on the "ground that a party has a valuable interest in the good-will of his trade or business, and in the trade-marks [sic] adopted to maintain and extend it." Id. (quoting Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 412 (1916)).

3. See id. at 295. This standard protects original ("senior") mark owners from competitors who use junior marks to deceive consumers, rob sales from the original owners and gain profits. See id.

4. Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev. ("Ringling II"), 170 F.3d 449, 452 (4th Cir. 1999). For further discussion of dilution, see infra note 33 and accompanying text.

5. See Bible, supra note 1, at 300-01 (outlining history of state anti-dilution standards and describing standards as "scattered" and "inconsistent").

6. See id. at 301.

(279)
Trademark Dilution Act of 1995 (the "Act").

7 The Act requires proof of "actual dilution," which is arguably more stringent than the state statutes' "likelihood of dilution" standard. Recently, the Fourth Circuit held in Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Division of Travel Development that the Act requires proof of actual economic harm to a famous mark's value by a lessening of the mark's selling power and that "actual economic harm" does not encompass the "likelihood of dilution" standard. This decision brought the issue of trademark dilution under the Act into the public eye. This case involves a dilution suit brought by Ringling Bros.-Barnum & Bailey Circus, the "Greatest Show on Earth" for over a century, and a source of entertainment for millions across the nation. Trademark protection is critical in the entertainment industry, where the item being sold is not a tangible product but a program or show that must rely heavily on its image.

Part II of this Note introduces the parties and facts of Ringling. Part III reviews the jurisprudential and legislative history preceding the case. Part IV examines the Fourth Circuit's opinion in Ringling, and Part V critically analyzes the Fourth Cir-

7. See id. at 301-02.
8. See id. at 307. But see id. at 308 (recognizing that although "the 'causes dilution' language in the Act suggests an actual dilution standard, some contend that the 'causes dilution' standard in the Act encompasses the likelihood of dilution standard").
10. See id.
11. See id.
12. For a discussion of Ringling's use of its mark, see infra notes 20-24 and accompanying text.
13. See, e.g., Gilbert Nicholson, ESPN Suing CSPN Over Trademark, Birm. Bus. J., July 26, 1999, at 1. "ESPN . . . CSPN . . . sound familiar? Well, ESPN thinks so . . . ." Id. ESPN, a major cable sports network brought a federal suit under New York law against CSPN, a southern local cable network in a New York federal court because CSPN's mark (CSPN) was so similar to ESPN that it would likely dilute ESPN's mark ("ESPN") or cause confusion for viewers who are likely to assume a relationship between CSPN and ESPN. See id.; see also Chris Koseluk & Noe Gold, Over My Dead Body, Hollywood Rep., Feb. 9, 1999, at 16. The article points out that "reselling Hollywood has become big business." Koseluk & Gold, supra, at 18. According to Christopher Nassif, owner of Christopher Nassif Agency & Associates, a talent agency, "[e]very aspect of a personality's image is controllable by that person." Id. In fact, some celebrities have trademarked their images and used the Lanham Act to protect those images. See id.
14. For a discussion of the facts of Ringling II, see infra notes 18-33 and accompanying text.
15. For a discussion of the relevant law leading up to Ringling II, see infra notes 34-78 and accompanying text.
cuit's holding in *Ringling.* Finally, Part VI discusses the likely effect of *Ringling* on future cases involving trademark dilution.

II. FACTS

Since 1872, Ringling has been entertaining the public with circus shows advertised as the "Greatest Show on Earth" ("Greatest Show"). Each year, Ringling travels and presents its show to approximately twelve million people across the nation. In 1961, Ringling received federal trademark registration for the Greatest Show mark. Due to substantial advertising, more than seventy million people have been exposed to the Greatest Show mark in connection with the circus. For the fiscal year ending in January 1997, revenues derived from goods and services bearing the Greatest Show mark exceeded $103 million. Advertising expenditures using the mark totaled approximately $19 million. The Greatest Show mark itself receives substantial free advertising because of its renown.

Utah Division of Travel Development, an agency of the state of Utah, has been using the "Greatest Snow on Earth" ("Greatest Snow") mark since at least 1962 in connection with Utah tourism services. The Utah Ski Association also uses the Greatest Snow mark in its promotion of the state's tourism. Utah advertises tourism using the Greatest Snow mark primarily on motor vehicle li-

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16. For a discussion and critique of the Fourth Circuit's decision in *Ringling II,* see *infra* notes 79-141 and accompanying text.
17. For a prediction of the effect *Ringling II* will have on future trademark case law, see *infra* notes 142-47 and accompanying text.
19. See id.
20. See id.
21. See id.; see also *Ringling Bros.-Barnum & Bailey Combined Shows, Inc.* v. *Utah Div. of Travel Dev.* ("Ringling II"), 170 F.3d 449, 451 (4th Cir. 1999) (noting that Ringling advertises its circus using Greatest Show mark in print advertising, radio, television, videos, outdoor billboards, direct-mail pieces, press announcements, posters, program books, souvenirs, and joint promotions with other companies). The court also noted that Ringling gains additional exposure through joint promotion with retailers. See id.
22. See *Ringling I,* 955 F. Supp. at 609.
23. See id. at 610.
24. See id.
25. See id. at 611.
26. See id.
license plates, but the mark is also used in print advertising. Utah’s budget for winter advertising, which includes advertising the Greatest Snow mark, has ranged from $300,000 to $450,000 annually for the past fifteen years. In 1975, Utah registered its mark with the state of Utah, ten years after the Utah Attorney General decided that Utah’s mark did not impair or violate Ringling’s Greatest Show mark. Utah applied for federal registration for its mark over Ringling’s objections and was granted this registration on January 21, 1997.

Ringling commenced an action against Utah on June 6, 1996, alleging the Greatest Snow mark “diluted” Ringling’s Greatest Show mark and sought monetary and injunctive relief. The district court held that Ringling failed to show dilution by “blurring.” On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the district court decision that Ringling had not established dilution under the Act.

III. BACKGROUND

Traditional trademark theory is based on the idea that “a party has a valuable interest in the good-will of his trade or business, and in the trademarks adopted to maintain and extend it.” Courts protected parties from defendants’ unauthorized use of trademarks by allowing plaintiffs to demonstrate that consumers were likely to confuse sources of defendants’ products with sources of plaintiffs’

27. See Ringling II, 170 F.3d at 451 (explaining that Utah has used its mark in magazine advertisements every year from 1962 to present except 1963, 1977 and 1989).

28. See Ringling I, 955 F. Supp. at 611; see also Ringling II, 170 F.3d at 451.

29. See Ringling II, 170 F.3d at 451. The court also noted that Utah renewed state registration in 1985 and again in 1995. See id.

30. See Ringling I, 955 F. Supp. at 611.

31. See id. at 613.

32. See id. at 605, 622. Before trial, Utah moved to strike Ringling’s request for jury trial. See id. The district court granted the motion and, after a bench trial, found for Utah. See id. at 609. For a discussion of blurring, see infra notes 64-65 and accompanying text.

33. See Ringling II, 170 F.3d at 449, 451; see also I.P. Lund Trading v. Kohler Co., 163 F.3d 27 (1st Cir. 1998). Dilution is “the lessening of the capacity of a famous mark to identify and distinguish good [sic] or services.” Id. at 48 (quoting 15 U.S.C. § 1127 (1996)).

34. Bible, supra note 1, at 296-97. For a discussion of trademark dilution theory, see Bible, supra note 1 and accompanying text.
products. The Lanham Act codified this trademark theory, offering protection against defendants’ use that is “likely to cause confusion, or to cause mistake, or to deceive.” Dilution theories differ from traditional trademark theory in the area of infringement, however, in that infringement concerns competing parties’ trademarks, while dilution concerns non-competing parties’ trademarks.

Although trademark dilution originated in German and English courts, Professor Frank I. Schechter introduced the concept to the United States. Schechter proposed the idea that “confusion” should not be applied universally to trademark protection actions. He suggested that the value of a trademark lies in its “selling power” and that injury to the owner’s trademark constituted the “gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name.” Though Schechter’s “whittling away” theory was not incorporated into the Lanham Act, it did influence common law unfair competition claims, and, as a

35. See Bible, supra note 1, at 297. Courts devised this standard with the trademark owner’s reputation and good-will in mind, and realizing that a trademark owner’s primary motivation in bringing a trademark suit was to prevent a competitor from infringing the mark in an effort to gain profits that would otherwise belong to the owner. See id. at 296-97; see also Elliot B. Staffin, The Dilution Doctrine: Towards a Reconciliation With the Lanham Act, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 105, 156-57 (1995). Staffin explains that “subliminal confusion” is the best theory to describe situations triggering dilution doctrine: “[T]his phenomenon requires an extremely strong mark, which will invite unauthorized uses to conjure up unconscious associations of quality and reliability. However, these associations properly refer to – and belong only – to the senior mark holder and its business.” Id. at 157. For example, a customer may not be consciously confused by a senior mark used on a non-competing, unrelated product, but may be induced to buy it because of subliminal associations triggered by the similar mark. See id.


39. See Bible, supra note 1, at 297 (citing Frank I. Schechter, The Rational Basis of Trademark Protection, 40 HARV. L. REV. 813 (1927)).


result, state legislatures began to recognize dilution claims and enact anti-dilution statutes.42

In early 1996, after serious efforts by a variety of parties to influence Congress to adopt such a rule, Congress enacted a bill to amend the Lanham Act, entitled the Federal Trademark Dilution Act of 1995.43 Because the Act does not provide a clear outline of

42. See Bible, supra note 1, at 298. Schechter tried to create a federal trademark act to codify his “whittling away” dilution theory but Congress passed the Lanham Act instead, which did not protect trademarks from dilution. See id. at 298. Schechter’s theory, however, was influential in common law and states began enacting their own anti-dilution statutes. See id. at 300. In March 1995, United States Representative from California Carlos Moorhead introduced a bill to amend the Lanham Act to include dilution protection. See id. The House of Representatives passed the bill in December 1995, and it was approved by the Senate without debate and signed into law by President Clinton in early 1996. See id. at 297-303.

43. See Bible, supra note 1, at 297; see also 15 U.S.C. §§ 1125(c), 1127 (Supp. II 1996). The Act reads, in pertinent part:

(c) Remedies for dilution of famous marks.
(1) The owner of a famous mark shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to an injunction against another person’s commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark, and to obtain such other relief as is provided in this subsection. In determining whether a mark is distinctive and famous, a court may consider factors such as, but not limited to—

(A) the degree of inherent or acquired distinctiveness of the mark; (B) the duration and extent of use of the mark in connection with the goods or services with which the mark is used; (C) the duration and extent of advertising and publicity of the mark; (D) the geographical extent of the trading area in which the mark is used; (E) the channels of trade for the goods or services with which the mark is used; (F) the degree of recognition of the mark in the trading areas and channels of trade used by the marks’ owner and the person against whom the injunction is sought; (G) the nature and extent of use of the same or similar marks by third parties; and (H) whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

(2) In an action brought under this subsection, the owner of the famous mark shall be entitled only to injunctive relief unless the person against whom the injunction is sought willfully intended to trade on the owner’s reputation or to cause dilution of the famous mark. If such willful intent is proven, the owner of the famous mark shall also be entitled to the remedies set forth in sections 1117(a) and 1118 of this title, subject to the discretion of the court and principles of equity . . . .

(4) The following shall not be actionable under this section:

(A) Fair use of a famous mark by another person in comparative commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark.
(B) Noncommercial use of a mark.
(C) All forms of news reporting and news commentary.


Further, the definition of “dilution” is:

[1] the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of
what constitutes trademark dilution or how to prove it, courts have interpreted the Act in light of state anti-dilution case law and legislative intent.\textsuperscript{44}

Congress passed the Act to "protect 'famous' trademarks against uses that were non-competing but that nevertheless blurred or diluted the distinctiveness of the famous trademarks."\textsuperscript{45} The Act defines dilution as the "lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of (1) competition between the owner of the famous mark and other parties, or (2) likelihood of confusion, mistake or deception."\textsuperscript{46} In order to have a dilution claim under the Act, a plaintiff must show that: (1) its mark is famous; (2) defendant is making a commercial use of the mark in commerce; and (3) defendant's use began after the mark became famous.\textsuperscript{47}

Congress passed the Act for three reasons: first, to "protect famous marks from subsequent uses that blur the distinctiveness of the mark or tarnish or disparage it;"\textsuperscript{48} second, to provide judicial uniformity in dilution protection across the nation;\textsuperscript{49} third, to

\begin{itemize}
\item [(1)] competition between the owner of the famous mark and other parties, or
\item [(2)] likelihood of confusion, mistake or deception.
\end{itemize}

\textit{Id.} § 1127.

\textsuperscript{44} See Bible, supra note 1, at 304. \textit{But see} Kenneth L. Port, \textit{The "Unnatural" Expansion of Trademark Rights: Is a Federal Dilution Statute Necessary?}, 18 \textit{SETON HALL LEGIS. J.} 433, 449 (1994) (stating that state dilution statutes are overbroad and have had "virtually no impact on the outcome of trademark cases").


\textsuperscript{46} 15 U.S.C. § 1127.

\textsuperscript{47} See \textit{Ringling II}, 170 F.3d at 452; \textit{see also} Sony Computer Entm't, Inc., v. Connectix Corp., 48 F. Supp. 2d 1212, 1222 (N.D. Cal. 1999) (applying 15 U.S.C. § 1125(c)(1)).

\textsuperscript{48} Sony, 48 F. Supp. 2d at 1222 (quoting H.R. REP. No. 104-574, at 2 (1995)); \textit{see also} Toys "R" Us, Inc. v. Akkaoui, 40 U.S.P.Q.2d 1836, 1838 (N.D. Cal. 1996); Serad, supra note 41, at 221. In addition to blurring and tarnishment, the Second Circuit in Deere & Co. v. MTD Prods., Inc., 41 F.3d 39, 45 (2d Cir. 1994) found "alteration of a distinctive mark" to be a third aspect of trademark dilution under New York law. \textit{See id.} at 44. Alteration can occur when a senior mark's selling power is "made fun of" and thereby diluted. \textit{See id.; see also} Staffin, supra note 35, at 139-42 (recognizing a fourth aspect of trademark dilution under California law — dilution by genericization). A defendant's use of plaintiff's mark dilutes by genericization when it "creates a serious threat to the uniqueness and distinctiveness' [sic] of the trademark, and if continued would create a risk of making . . . generic . . . the words of which the trademark is composed." \textit{Id.} at 142 (quoting Sikes Lab., Inc. v. Kalvin, 610 F. Supp. 849, 858 (C.D. Cal. 1985)). For example, in Murphy Door Bed Co., Inc. v. Interior Sleep Systems, Inc., the Second Circuit found that "murphy bed" had become a generic name for a fold-out closet bed. 874 F.2d 95, 97 (2d Cir. 1989).

\textsuperscript{49} See Bible, supra note 1, at 300. Bible states that, arguably, the reason for the Act was to promote judicial uniformity. The author noted, however, that the fact that Congress passed FTDA to supplement, not to preempt state statutes,
"'harmonize and nationalize' the often conflicting and sometimes non-existent state laws in effect at the time."50

Even after the Act was passed, however, dilution case law has continued to be "nebulous."51 Some courts, contrary to the language of the Act, still require a "likelihood of confusion" to prove dilution.52 Other courts, because of the vagueness of the statutory definition of dilution, have either skipped steps of the proof process or have completely refused to apply the Act to non-competitive actions.53 Furthermore, inconsistent decisions have occurred because the Act did not incorporate the "likelihood of dilution" language previously used by most state anti-dilution statutes.54 Results

seems contrary to the stated purpose. See id. (citing Hearing, supra note 41, at 121-23); see also Miles J. Alexander & Michael K. Heilbroner, Dilution Under Section 43(c) of the Lanham Act, 59 LAW & CONTEMP. PROBS. 93, 99 (1996) (stating that state dilution standards have been interpreted unevenly).

50. Nike, 50 U.S.P.Q.2d at 1206 (quoting Circuit City Stores, Inc. v. OfficeMax, Inc., 949 F. Supp. 409, 418 (1996)); see also David S. Welkowitz, Oh Deere, What's to Become of Dilution?, 4 UCLA ENT. L. REV. 1, 20 (1996) (explaining that placing dilution under federal protection affords plaintiffs ability to obtain nationwide relief - previously a problem when only relief was under state laws). But see Port, supra note 44, at 454. The author argues that trademarks are not subject to dilution, are vague and unarticulated and therefore, inconsistencies in state applications of dilution rights should be expected. See id. Port adds that the belief that courts will amend their views of dilution because of the enactment of a federal statute "seems very naïve." Port, supra note 44, at 455.

51. See Lori Krafte-Jacobs, Judicial Interpretation of the Federal Trademark Dilution Act of 1995, 66 U. CIN. L. REV. 659, 694-95 (1998) (discussing different courts' approaches to analyzing dilution cases and predicting that cases will not become more consistent because Act's definition of dilution is vague).

52. See id. at 696; see also I.P. Lund Trading ApS., Kroin Inc. v. Kohler Co., 163 F.3d 27 (1st Cir. 1998). The court illustrates the difference between "consumer confusion" and "dilution": "No one would confuse Kodak pianos with Kodak film, but the use of the name on the piano could dilute the effectiveness as a mark for the film." I.P. Lund, 163 F.3d at 49.


in dilution cases will continue to be unpredictable until the language of the Act is amended or defined.\textsuperscript{55}

These interpretation inconsistencies have occurred despite the Supreme Court's principle on statutory interpretation. The dissent in \textit{Landgraf v. USI Film Products}\textsuperscript{56} states the principle that the "starting point for interpretation of a statute 'is the language of the statute itself.'"\textsuperscript{57} It qualifies the plain meaning rule by adding that "a statute must, if possible, be construed in such a fashion that every word has operative effect."\textsuperscript{58} In addition, the rule dictates that "if the statutory language is plain and admits of no more than one meaning, the duty of the interpretation does not arise, and . . . the sole function of the courts is to enforce [the statute] according to its terms."\textsuperscript{59} Nevertheless, courts have differed in their interpretations of the Act by ignoring plain meaning interpretation.\textsuperscript{60}

Regardless of how each court interprets and applies the Act, all courts recognize two forms of dilution: tarnishment and blurring.\textsuperscript{61} Tarnishment occurs when a defendant's mark ("junior mark") degrades the positive impressions of the original user's mark ("senior mark") in the minds of consumers.\textsuperscript{62} Usually the junior mark cre-

\textsuperscript{55} See Krafte-Jacobs, \textit{supra} note 51, at 694 (stating that "[b]ecause the FTDA's definition of dilution is not especially helpful in establishing guidelines for determining whether dilution exists, standards will likely be no more consistent than before the FTDA took effect").

\textsuperscript{56} 511 U.S. 244 (1994) (Blackmun, J., dissenting).


\textsuperscript{59} Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274, 277 (4th Cir. 1997) (quoting United States v. Murphy, 35 F.3d 143, 145 (4th Cir. 1994)) (noting that court should interpret term according to its ordinary or natural meaning when Congress does not expressly define statutory term).

\textsuperscript{60} See \textit{Ringling II}, 170 F.3d at 455 (recognizing that courts grappling with dilution issues have not yielded consistent decisions).

\textsuperscript{61} For a discussion of dilution, see \textit{infra} notes 62-66 and accompanying text.

\textsuperscript{62} See \textit{id.; see also} Sony Computer Entm't Inc. v. Connectix Corp., 48 F. Supp. 2d 1212, 1223 (N.D. Cal. 1999). The court held that Sony established likelihood that Connectix' VGS diluted its PlayStation trademark because some PlayStation
ates negative impressions of the senior mark by associating it with poor quality or with negative images. Blurring, however, is more subtle and less direct. Blurring occurs when a junior mark injures a senior mark’s selling power by lessening the senior mark’s ability to serve as a “unique identifier” of an owner’s products or services. By creating a mental association with the senior mark in the minds of consumers, the senior mark’s use as an identifier of the original goods or services is undermined.

Courts have used different standards to prove dilution, requiring either a showing of “likelihood of dilution” or, alternatively, “actual dilution.” The two standards differ not only in the amount of time a plaintiff has to bring a claim of dilution but also in the level of accuracy necessary to prove the dilution claim. In general, courts following the “likelihood of dilution” standard are those either interpreting state anti-dilution statutes or interpreting the Act according to those state statutes. Courts using the “actual dilution” standard, the junior mark must have been on the market before the plaintiff brings the dilution claim. The author explains that under the actual dilution standard, the junior mark’s existence has been on the market before the plaintiff brings the dilution claim. The author also notes that under the actual dilution standard generally tends to produce more accurate and substantial evidence.

See Bible, supra note 1, at 307. See id. at 307-08. See Nabisco, 50 F. Supp. 2d at 210 (stating that showing likelihood of dilution will automatically establish irreparable harm and holding that, “over time, the presence of Nabisco’s goldfish-shaped cracker within the CatDog mix is likely to weaken the focus of consumers on true source of the Goldfish.”); see also WAQA, 40 U.S.P.Q.2d at 1629 (following “Sweet factor test” to find likelihood of dilution); Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc., 875 F.2d 1026, 1035-40 (2d Cir. 1989) (using six “Sweet factors” in considering likelihood of dilution by blurring under New York anti-dilution statute); Muters Corp. v. Matsui Am., Inc.
tion" standard, however, remain consistent with the plain meaning rule.70

There are a number of different methods courts use to find dilution under the "likelihood of dilution" standard.71 In Mead Data Central, Inc. v. Toyota Motor Sales, U.S.A., Inc.,72 Second Circuit Judge Sweet wrote a concurring opinion setting out certain factors to determine "blurring" and "likelihood of dilution."73 Some courts have focused on specific language in their respective state anti-dilution statutes to determine whether the "likelihood" standard applies.74 The Eleventh Circuit has enforced a different standard of proof depending on whether a mark is strong or weak, while the Seventh Circuit has held that a plaintiff need only show dilution of the "distinctiveness of the marks."75

730 F. Supp. 790, 802 (N.D. Ill. 1989) (holding that under Illinois' "likelihood of dilution" standard, Matsui's use of word "honeycomb" is not likely to dilute Munter's "Honeycombe" mark).

70. See Playboy Enters., Inc. v. Netscape Communications Corp., 55 F. Supp. 2d 1070 (C.D. Cal. 1999) (following standard set out in Ringling to hold that Playboy failed to provide evidence of actual dilution by defendant); see also Am. Cyanamid Co. v. Neutraceutical Corp., 54 F. Supp. 2d 379, 393 (D.N.J. 1999) (granting defendant's motion for summary judgment because plaintiff failed to prove actual harm to plaintiff's product's selling power by showing defendant's mark actually made consumers unable to identify and distinguish products with appropriate goods and services); I.P. Lund Trading ApS., Kroin, Inc. v. Kohler Co., 163 F.3d 27, 46 (1st Cir. 1998) (using "higher standard" to determine whether mark qualifies as "famous" under Act, court did not employ "likelihood" language and stated that no relief is given unless "the mark has been diluted").

71. See Bible, supra note 1, at 500 (discussing proponents' arguments to gain support for Federal Dilution Act and pointing out "patchwork system" of state statutes).

72. 875 F.2d 1026 (2d Cir. 1989).

73. See Mead, 875 F.2d at 1032-40 (holding that LEXUS was not likely to cause blurring between LEXIS and LEXUS marks even in market where LEXIS is used because, for general public, LEXIS has no distinctive quality to be diluted); see also Richard L. Kirkpatrick, Trademark Infringement and Dilution Update, in UNDERSTANDING BASIC TRADEMARK LAW 1999, at 61, 66 (PLI Patents, Copyrights, Trademarks, & Literary Prop. Course, Handbook Series No. 569, 1999) (listing "Sweet factors": (a) similarity of the marks; (b) similarity of the products; (c) sophistication of consumers; (d) predatory intent; (e) renown of senior mark; and (f) renown of junior mark).

74. See Munters Corp. v. Matsui Am., Inc., 730 F. Supp. 790, 801 (N.D. Ill. 1989) (determining that "likelihood" standard stems from statutory language "will dilute").

75. See Freedom Sav. & Loan Ass'n v. Way, 757 F.2d 1176, 1186 (11th Cir. 1985). The court explained that if senior mark is distinctive, plaintiff need only prove that defendant has made significant use of very similar mark. See id. If mark is weak, and lacks distinctiveness, plaintiff must prove that defendant's use of mark decreased senior mark's value in its relevant market. See id.; see also Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Celozzi-Ettelson Chevrolet, Inc., 855 F.2d 480, 482 (7th Cir. 1988) (stating that "an injunction must be granted if the prior user can show that the subsequent user's use dilutes that distinctiveness").
Those courts that follow the “actual dilution” standard base their interpretations on a more narrow reading of the Act, which follows the plain meaning rule of statutory interpretation. According to this standard, a plaintiff must prove “actual harm” to the senior mark by showing that a junior mark lessened the senior mark’s selling power. Surveys have been plaintiffs’ primary tools to prove “actual harm” to courts using the “actual dilution” standard.

IV. NARRATIVE ANALYSIS

In Ringling II, the Fourth Circuit addressed the issue of whether Utah’s use of the trademark “Greatest Snow” constituted dilution by blurring Ringling’s “Greatest Show” trademark. To decipher whether Utah’s mark diluted Ringling’s mark, the court discussed the three elements a plaintiff must prove to establish dilution under the Act:

(1) a sufficient similarity between the junior and senior marks to evoke an instinctive mental association of the two by a relevant universe of consumers which (2) has caused (3) actual economic harm to the famous mark’s economic

76. See Bible, supra note 1, at 310 (noting that Act provides relief only when junior mark causes dilution of original mark and commenting that use of “causes” suggests that plaintiff must show actual dilution); see also WAWA, 40 U.S.P.Q.2d at 1629 (relying on survey results as evidence of “actual harm”); Ringling II, 170 F.3d at 452-53 (using survey evidence as proof that no “actual harm” occurred). But see Virginia R. Richard, U.S. Trademark Law 1999 Developments, in PLI’s FIFTH ANNUAL INST. FOR INTELLECTUAL PROP. LAW, at 595, 635 (PLI Patents, Copyrights, Trademarks, & Literary Prop. Course, Handbook Series No. 573, 1999) (doubting efficacy of surveys as method of proving actual dilution); Simone A. Rose, Will Atlas Shrug? Dilution Protection for “Famous” Trademarks: Anti-Competitive “Monopoly” or Earned “Property” Right?, 47 FLA. L. REV. 653, 692-94 (1995). The author describes a form of actual dilution in terms of “consumer search cost” – the time a consumer spends searching through numerous brands of a product to find quality and consistency of products associated with distinctive trademarks. See id. When a defendant uses a mark substantially similar to or the same as plaintiff’s mark, the consumer search costs increase and as a result plaintiff must spend more on advertising and decrease the price of its marked product. See id. In these situations, dilution causes actual harm. See id.

77. See Bible, supra note 1, at 310 (noting that “[i]n contrast to standard prescribed in Judge Sweet’s decision, a standard requiring proof of actual dilution through direct evidence tends to be more accurate and dispositive”). For a list of the “Sweet factors,” see supra note 73.

78. See Bible, supra note 1, at 313 (explaining that in trademark dilution cases, survey clearly demonstrating actual dilution is probably “the plaintiff’s strongest and most persuasive evidence”).

79. See Ringling II, 170 F.3d at 451.
value by lessening its former selling power as an advertising agent for its goods and services.\textsuperscript{80}

The court based its analysis of Ringling's dilution claim on the language of the Act, the legislative purpose behind passing the Act, and the plain meaning rule of statutory interpretation.\textsuperscript{81} The court's final decision rested on its interpretation of "actual economic harm."\textsuperscript{82}

1. Statutory Language of the Act

According to the court, the controversy surrounding statutory interpretation turns on how courts interpret "capacity" in the Act's definition of dilution as the "lessening of the capacity of a famous mark to identify and distinguish goods or services."\textsuperscript{83} By refuting the argument that "capacity" indicates the power of the mark to dilute another mark in the future, the court rejected the "likelihood of dilution" standard.\textsuperscript{84} The \textit{Ringling II} court defined "capacity" according to the words surrounding it in the Act.\textsuperscript{85} The verb immediately preceding "capacity" is "lessening," not "will lessen" or "may lessen." Additionally, elsewhere in the statute, the conduct being prohibited is described as "another person's... use."\textsuperscript{86} The court indicated that the lack of such limiting phrases as "threatened use" shows the legislature's intent to keep the "likelihood" standard out of the statute.\textsuperscript{87}

The court also briefly contrasted the damages awarded in state anti-dilution statutes with those awarded in the Act.\textsuperscript{88} While state statutes provide only injunctive relief, apparently anticipating "likelihood of dilution" and future harm, the Act provides compensatory and restitutionary relief for consummated economic harm if willful conduct on the part of the defendant is demonstrated.\textsuperscript{89}

\textsuperscript{81} \textit{See id.}
\textsuperscript{82} \textit{See id.} at 459-65.
\textsuperscript{83} \textit{Id.} at 460-61 (quoting 15 U.S.C. § 1127).
\textsuperscript{84} \textit{See Ringling II,} 170 F.3d at 461.
\textsuperscript{85} \textit{See id.} at 460-61 (citing 15 U.S.C. § 1125(c)(1)).
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{See id.} The court here found that interpretation of statute as meaning "future capacity" or "likelihood" of lessening capacity went against "ordinary intrinsic meaning" and did not make sense in light of the words' context. \textit{See id.}
\textsuperscript{88} \textit{See id.} at 460-61.
\textsuperscript{89} \textit{See Ringling II,} 170 F.3d at 461 (citing 15 U.S.C. §§ 1125 (c)(2), 1117(a), 1118).
lowing for these remedies shows the focus moving away from the “likelihood” standard.90

Finally, the court underscored the fact that the Act does not include the phrase “likelihood of dilution,” that is ubiquitous in state anti-dilution statutes.91 This, the court reasoned, is the “most telling” textual indication of the legislature’s intent not to use the “likelihood” standard.92

2. Legislative Purpose

After reviewing the relevant statutory provisions of the Act, the court reasoned that the narrow interpretation of dilution as encompassing “actual harm” is in accord with the legislative intent.93 Because the Act’s legislative record is limited, the court looked to the evolution of dilution theory preceding the Act to determine its meaning.94

The court indicated that since the beginnings of anti-dilution law, courts were inconsistent in their interpretations of “likelihood of confusion.”95 Furthermore, when states began enacting anti-dilution statutes, courts were not eager to apply them to trademark cases.96 When courts did apply the statutes, they would often deny claims on the grounds that the plaintiffs did not prove “likelihood of confusion,” despite the clear statutory language rejecting this as

90. See id.

91. See id. (supplementing observation with recognition that commentators have noticed this difference between Act and previous state anti-dilution statutes and asserting that while commentators have noticed difference, most do not give helpful textual analyses and ultimately are “hopelessly divided” in their interpretations of issue).

92. See id. at 461 (stating that “[f]inally and most telling, there is the fact that in the face of the obvious centrality of ‘likelihood of dilution’ provisions in the interpretation and application of state anti-dilution statutes for the fifty years of their existence, the federal Act does not so provide”).

93. See id. at 458-59. The court admitted that interpretation of dilution including only consummated harm is more narrow than state anti-dilution statutes but also stated that key textual differences between state and federal acts dictates this interpretation as “exactly what was intended by Congress.” Id. (citing I.P. Lund Trading ApS., Kroin Inc. v. Kohler Co., 163 F.3d 27, 45 (1st Cir. 1998)). The court explained that “dilution is a term of art given specific, rigorous meaning by the Act.” Id. at 459.

94. See Ringling II, 170 F.3d at 452. The court examined the Act’s legislative record and the vast background of trademark dilution theory after admitting that its interpretation of the Act did not “leap fully and immediately from the statutory text.” Id. at 453.

95. See id. at 456 (stating that “this bare-boned codification, centered on an unelaborated term of art having no previously acquired meaning through the common law decisional process, has puzzled courts from the outset as to just exactly what legal interest it sought to protect, and legal harm to prevent”).

96. See id. at 455 (citing summary in Restatement on Unfair Competition).
a cause of action. Eventually, courts followed state statutory language and found dilution based on a "likelihood of dilution" standard; yet this standard allowed for differing proof methods and, consequently, resulted in unpredictable outcomes. In light of the varied state anti-dilution case law, the court recognized Congress' creation of a federal dilution statute omitting the "likelihood" language, as intending to narrow the scope of anti-dilution actions and to provide protection solely for actual dilution.

3. Plain Meaning Rule & Actual Dilution Standard

The court in Ringling asserted that the plain meaning rule of statutory interpretation supports the "actual dilution" standard. The statute on its face requires "actual dilution." According to the Supreme Court, the plain meaning rule dictates that "[i]f the words convey a definite meaning, which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be ac-

97. See id. at 457 (explaining that courts required plaintiffs prove dilution by showing some sort of customer confusion regarding products) (citing Cue Publ'g Co. v. Colgate-Palmolive Co., 256 N.Y.S.2d 239, 245-46 (N.Y. Sup. Ct. 1965)).

98. See id. Before the Act, many courts deciding dilution issues followed the "Sweet factor" test, devised by Judge Sweet in Mead, requiring that likelihood of harm to selling power be proven and recognizing that harm could occur without presence of consumer confusion. See id. (citing Mead, 875 F.2d at 1035). For an explanation of the "Sweet factors," see supra note 73 and accompanying text. Some courts approached the dilution issue by assuming that dilution could be proven by simply showing similarities between junior and senior marks. See Mead, 875 F.2d at 1035. Courts using this standard consider likelihood of harm to mark's selling power impossible to prove and therefore hold likelihood should simply be assumed from two similar marks. See Ringling II, 170 F.3d at 457 (citing Ringling Bros.-Barnum & Bailey Combined Shows v. Celozzi-Ettelson Chevrolet, Inc., 855 F.2d 480, 484 (7th Cir. 1988); Freedom Sav. & Loan Assoc. v. Way, 757 F.2d 1176, 1186 (11th Cir. 1985); Gaeta Cromwell, Inc. v. Banyan Lakes Vill., 523 So.2d 624, 626-27 (Fla. Dist. Ct. App. 1988)).

99. See Ringling II, 170 F.3d at 454 (noting that state anti-dilution case law provided background for enactment of the Act in 1995); see also id. at 458-59. The court admitted its interpretation of the Act is stringent, but supported interpretation by citing I.P. Lund Trading ApS., Kroin Inc. v. Kohler Co., 163 F.3d 27, 45 (1st Cir. 1996) (stating that dilution is given "rigorous meaning by the Act") and asserting strict interpretation is Congress' intent. See Ringling II, 170 F.3d at 459.

100. See Ringling II, 170 F.3d at 461 n.6 (following plain meaning interpretation of Act set out and rejected in Robert N. Kliger, Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection, 58 U. Pitt. L. Rev. 789, 840 (1997), and asserting that according to plain meaning rule, this interpretation cannot be rejected). For a definition of the plain meaning rule, see supra notes 57-60 and accompanying text.

101. See Ringling II, 170 F.3d at 460-61. The court asserted that its interpretation of the Act is in accord with ordinary intrinsic meaning of statutory language and presumed the Act includes "likelihood standard" when statute does not contain language indicating such, cannot be accepted as Act's plain meaning. See id.
cepted . . .". The court found that the words of the Act convey a definite meaning and involve no absurdity. Therefore, according to Supreme Court precedent, the "actual dilution" standard must be accepted.

4. Proving Actual Dilution

One issue with which the court struggled in *Ringling II* was how to prove that the junior mark actually harmed the senior mark’s selling power. Since the Act excludes the consumer confusion test as a tool to trace harm to the senior mark back to the junior mark, courts have agreed that a plaintiff must prove this causal connection by some mental association between the two marks. Courts in the past have adopted two distinct approaches to proving that a mental association exists: (1) the *Mead* factor analysis; and (2) the "property rights in gross" model. Both methods were devised in order to find a "likelihood of dilution."

The court rejected the *Mead* factor test, deeming it inappropriate for assessing a claim under the Act. The *Mead* factor test permits both the cause and the harm to be adduced from the similarity of the marks alone. The court discarded the balancing test as a "chancy process at best."

102. *Id.* at 461 n.6 (citing Lake County v. Rollins, 130 U.S. 662, 670 (1889)).
103. See *id.* (noting Klieger’s opposing opinion that while actual harm standard represents plain meaning of statute, this meaning cannot be accepted because it would be absurd to require an interpretation that would create "an impenetrable barrier to any federal dilution action" and dismissing it with argument that actual dilution standard must be proven by ordinary processes).
104. See *id.* at 457 (identifying "selling power" as representing economic power of mark then noting that issue of proving harm to senior mark’s selling power is and has been "real interpretive problem").
105. See *id.* at 457-58 (noting that in absence of consumer confusion, mental association must be shown to be cause of harm).
106. See *Ringling II*, 170 F.3d at 458-59 (noting that courts have used these methods to determine "likelihood of dilution" rather than "actual dilution"). For an explanation of the *Mead* factor analysis ("Sweet factor" test), see *supra* note 73 and accompanying text.
107. See *Ringling II*, 170 F.3d at 458.
108. See *id.* at 464 (citing *I.P. Lund*, 163 F.3d at 49-50); see also Klieger, *supra* note 100, at 826-27 (explaining test factors and problems associated with applying *Mead* factor test).
109. See *Ringling II*, 170 F.3d at 459 (stating that Act requires only proof of sufficient visual similarity of marks to evoke in consumers "instinctive mental association" of marks).
110. *Id.* at 464 (noting "obvious utility in making the long leaps of inference that can be used to find mere ‘likelihood of dilution’ and highlighting problems caused by inferring actual harm and effective causation in this manner).
The court also rejected Ringling’s contention that the “property in-gross” method is the correct means to prove harm.111 Ringling asserted that to prove dilution under the Act, a sufficient visual similarity between the marks evoking “instinctive mental association” for consumers, is evidence of “actual harm.”112 In other words, mental association alone is sufficient to prove harm under the Act.113 This “property rights” model stems from Schechter’s definition of dilution as perfect replication of a senior mark by a junior mark, harming the senior mark by lessening its “uniqueness.”114 The court concluded that Ringling’s mental-association-as-proof-of-dilution proposal, in conjunction with the theory that in cases of identical marks the mental-association is presumed, creates property rights in-gross by means of injunction.115

In contrast, the Act specifically requires the commercial use of the junior mark to create a mental association between the junior mark and the senior mark. It further requires that this mental association causes “actual harm” to the senior mark’s selling power by a lessening of its ability to identify and distinguish goods.116 In light of these requirements, the court held that the Act “will not bear a property right in-gross interpretation.”117

Ringling argued that the purpose of the Act is to find “likelihood of dilution” since likelihood is much easier to prove than actual economic harm.118 While the court acknowledged that “actual

111. See id. at 459 (rejecting “property rights” argument as conflicting with Congressional intent by ignoring Act’s prescribed elements of specific harm and causal nexus).

112. See id. (stating Ringling’s proposed method of proof). For a discussion of the standard of proof under the Act, see supra text accompanying note 77.

113. See Ringling II, 170 F.3d at 459 (stating mental-association-alone interpretation is in opposition with rigorous dilution standard intended by Congress).

114. See id. at 456 (citing Frank I. Schechter, The Rational Basis of Trademark Protection, 40 HARV. L. REV. 813, 829-30 (1927)). Schechter assumed that any replication would lessen senior mark’s uniqueness and no proof of economic harm would be required beyond replication of senior mark by junior mark. See Bible, supra note 1, at 297 (citing Frank I. Schecter, The Rational Basis of Trademark Protection, 40 HARV. L. REV. 813, 829 (1927)).

115. See Ringling II, 170 F.3d at 459 (asserting that had statutory incorporation of property rights in-gross model been legislative intention, it is one that could have easily been expressed by proscribing use of any substantially similar junior mark).


117. Id. (stating that Ringling’s argument not only contradicted relevant statutory language but also only addressed cases involving identical marks which are not at issue here).

118. See id. at 465 (addressing Ringling’s argument that even though Act does not include “likelihood” language, this language should be presumed because proof under this method is easier, and as court pointed out, may even be presumed).
dilution" may be harder to prove, it indicated that there are feasible methods to prove the causal nexus between the mental associations and the economic harm to the senior mark. Alternate methods make the proof process practicable.

Ringling also argued that its consumer survey evidence supports a finding of dilution under the Act. Though the court generally accepted consumer survey evidence as appropriate proof under the Act, it found that Ringling’s survey shows no evidence of a lessening of Ringling’s selling power resulting from consumers’ mental associations. For a consumer survey to show actual harm under the Act, the mental associations must “go beyond mere association of the marks in isolation and involve some mistake or confusion as to the marks and their respective goods or services.” Because Ringling’s survey merely proved that consumers associated “Greatest Show” and “Greatest Snow” with their respective services, Ringling did not prove the required mental association between the marks and consequently could not prove that a mental association between the two caused actual economic harm to the “Greatest Show” mark. Accordingly, the court held that Ringling did not prove the required “actual dilution” under the Act.

V. CRITICAL ANALYSIS

While the Ringling court decision is internally consistent, the court’s interpretation of the Act to protect only against “actual dilution” is not consistent with prior dilution case law. This narrower

119. See id. at 461 n.6 (stating that “the Act is susceptible to proof by ordinary processes, though with obvious difficulties given the substantive uncertainties of harm and causation elements of the claim”). The court proposed three general means to prove actual dilution: (1) proof of actual loss of revenues; (2) consumer survey designed to show both “mental association” between marks as well as further consumer impressions from which connection between cause and harm could be inferred; (3) relevant factors such as extent of junior mark’s exposure, similarity of marks, firmness of senior mark’s hold as indirect evidence to complement other proof. See id. at 465.

120. See Ringling II, 170 F.3d at 465.

121. See id. at 463.

122. See id. (concluding that evidence provided did not even show mental association between marks much less proof that mental association caused actual harm to Ringling’s selling power).

123. Id., Over Ringling’s objections, the court reasoned that the lower court’s interpretation of consumer survey results was in accordance with the Act. See id.

124. See id. (affirming district court’s decision that Ringling’s survey evidence did not prove actual dilution under clearly erroneous standard).

125. For an explanation of courts’ interpretation of the Act as requiring “likelihood of dilution” under the Act as opposed to “actual dilution” interpretation, see supra notes 67-78 and accompanying text.
interpretation, however, is justifiable in light of the legislative intent in creating the Act.

The court's decision in Ringling, interpreting the Act as requiring proof of "actual dilution," is not consistent with prior courts' decisions following a "likelihood of dilution" standard.126 Prior to 1996, courts had to rely on cases using state anti-dilution statutes as precedent because no case law existed interpreting the Act.127 The Act is different from the state statutes, however, because it incorporates the "actual dilution" rather than the "likelihood of dilution" language.128 By imputing state law standards into the Act, courts risk misinterpretation similar to earlier courts' enforcement of "likelihood of confusion" standards under state anti-dilution statutes.129

Although the Ringling court's "actual dilution" interpretation of the Act breaks away from prior decisions' reliance on the "likelihood" standard, its interpretation of the Act is consistent with the rules of statutory interpretation. As a general rule, the "starting point for interpretation of a statute 'is the language of the statute itself.'"130 The statute on its face requires "actual dilution," not "likelihood of dilution."131 Justice Blackmun argued similarly that that there is "no reason to dismiss as 'unlikely,' the most natural reading of the statute, in order to embrace some other reading that is also 'possible.'"132 In Ringling, the court followed this rule by interpreting the Act according to its plain meaning rather than reading it to include a "likelihood of dilution" standard, which, according to past case law, is also plausible.

The court rejected the argument that interpreting the Act to cover only "actual dilution" imposes an impossible burden of proof.

126. See id.
127. See Krafte-Jacobs, supra note 51, at 693 (observing that because substantial case law interpreting Act was naturally unavailable to courts in 1996, it was logical for courts to rely on state dilution case law).
128. See Bible, supra note 1, at 308 (stating that two standards differ largely regarding when plaintiff can bring claim and what plaintiff must prove).
129. See Krafte-Jacobs, supra note 51, at 694 (warning that courts relying on state statutes to aide in interpretation of Act may import some of same "misunderstandings that have plagued state and federal courts' treatment of state law dilution cases").
130. For a discussion of the effect of the Act, see Krafte-Jacobs, supra note 51 and accompanying text.
131. For an explanation of the court's statement that its interpretation of the Act is in accord with ordinary intrinsic meaning of statutory language, see supra notes 95-99 and accompanying text.
132. Landgraf v. USI Film Prods., 511 U.S. 244, 296 (1994) (Blackmun, J., dissenting).
on the plaintiff, making the standard "absurd" and, therefore, contrary to the plain meaning rule.\textsuperscript{133} The court admitted that the burden of proof is more difficult than that for "likelihood of dilution," but contended that there are reasonable means of proving "actual dilution," supporting its contention with various means to prove dilution.\textsuperscript{134} One of these methods, the survey, has been used frequently in litigation, in early trademark cases finding consumer confusion, and successfully in past dilution cases.\textsuperscript{135} Because there are possible means to prove "actual dilution," the court's reading is not absurd and, therefore, follows the plain meaning rule.\textsuperscript{136}

By enforcing the "actual dilution" interpretation of the Act, the court set out a standard of proof that is "more accurate and dispositive" than the "likelihood standard."\textsuperscript{137} The legislative intent of the Act was to implement a nationwide, uniform dilution statute to mend the problems of the patchwork system of state statutes.\textsuperscript{138} The problem with the state statutory "likelihood" method of proof is that it is easier to prove than "actual dilution," resulting in a "scattered and often inconsistent approach to dilution protection."\textsuperscript{139} The court's narrow interpretation of the Act is consistent with the

\textsuperscript{133} See Ringling II, 170 F.3d at 464 (stating that proof of actual dilution cannot be considered impossible and therefore, not possibly what Congress could have intended).

\textsuperscript{134} See id. For a list and explanation of proof methods, see supra note 119 and accompanying text; see also Bible, supra note 1, at 814 (endorsing use of surveys as viable means to prove "actual dilution" under Act, noting that surveys often have been used in trademark cases to show likelihood of confusion and explaining methodologies to help litigants compile reliable surveys).

\textsuperscript{135} See Bible, supra note 1, at 314-17 (noting that surveys are used frequently in litigation, and there are guidelines provided in the Manual for Complex Litigation); see also WAWA, Inc. v. Haaf, 40 U.S.P.Q.2d 1629, 1632 (1996) (finding plaintiff's evidence of marketing survey concluding that twenty-nine percent of people in HAHA's neighborhood who were interviewed about defendant's market associated HAHA markets with WAWA markets was credible); Staffin, supra note 35, at 161 (speculating that surveys will be used more frequently as evidence of dilution and that "criticism that the dilution doctrine is too ephemeral, does not address a real injury, and is incapable of empirical proof is not valid"); But see Vassallo & Dickey, supra note 54, at 520.

\textsuperscript{136} For a discussion of "actual harm" standard, see supra note 116 and accompanying text.

\textsuperscript{137} Bible, supra note 1, at 312 (stating that "[i]n contrast to the standard prescribed in Judge Sweet's decision, a standard requiring proof of actual dilution through direct evidence tends to be more accurate and dispositive").

\textsuperscript{138} See id. at 302 (looking to arguments by certain members of Congress in support of passing Act); see also Krafte-Jacobs, supra note 51, at 696 (acknowledging that goal of legislature in passing Act was to provide uniform, nationwide solution); Serad, supra note 41, at 221-22.

\textsuperscript{139} Bible, supra note 1, at 301 (noting that state statute approach did not offer consistent results). The "actual dilution" standard is more reliable and more accurate than "likelihood" standard. See id. at 312.
legislative intent to create greater predictability and uniformity in trademark dilution cases nationwide. Anti-dilution cases decided since Ringling have followed its “actual dilution” interpretation, indicating that state statute dependency is not the only feasible solution.

VI. IMPACT

The court’s decision in Ringling II could have repercussions for both plaintiffs seeking preliminary injunctive relief and defendants who would be enjoined under a “likelihood of dilution” standard. One result of the “actual dilution” standard presumes that a plaintiff does not have a valid dilution claim until the defendant’s mark has been on the market long enough to have measurably harmed the senior mark’s selling power. This standard could be detrimental to both parties since the owner of the senior mark must wait to be actually harmed by the junior mark, and the owner of the junior mark will inevitably spend money and time marketing its product and corresponding mark, only to have them possibly taken off the market.

Although the Supreme Court denied certiorari to Ringling II, if courts follow Ringling II, the Fourth Circuit’s decision to require the “actual dilution” standard under the Act will be reinforced. In the entertainment industry, this could make the dilution standard less

140. See Krafte-Jacobs, supra note 51, at 694-96 (supporting “actual dilution” standard but also doubting that Act will truly be uniform solution until significant case involving Act reaches Supreme Court).

141. See I.P. Lund Trading ApS., Kroin Inc. v. Kohler Co., 163 F.3d 27, 49-50 (1st Cir. 1998) (holding that actual harm is necessary in dilution case involving competing products); see also NFL Props., Inc. v. Prostyle, Inc., 57 F. Supp. 2d 665, 671 (E.D. Wis. 1999) (holding that tally of defendants’ sales was not sufficient to show “actual harm and cause” and that consumer survey should not merely demonstrate mental association of marks); American Cyanamid Co. v. Nutraceuti- cal Corp., 54 F. Supp. 2d 379, 392 (D.N.J. 1999) (adopting Ringling II standard and holding that plaintiff’s claim for dilution failed as a matter of law because plaintiff did not offer any evidence of actual lessening of Centrum’s selling power through its mark’s “capacity to distinguish goods or services”).

142. See Bible, supra note 1, at 307-08 (noting that under Act, plaintiff may only bring claim after actual dilution has occurred, whereas state statutes requiring “likelihood of dilution” allow plaintiff to bring action before actual dilution has occurred).

143. See id. at 308 (citing J. THOMAS McCARTHY, McCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:1 (4th ed. 1996)).

144. See id.; see, e.g., Nabisco, Inc. v. PF Brands, Inc., 50 F. Supp. 2d 188, 196 (S.D.N.Y. 1999), aff’d 191 F.3d 208 (2d Cir. 1999). The court noted that at the time of the action, Nabisco had already developed television and print advertising and had approximately $3.4 million in inventory of its CatDog product ready for distribution. See id.
vague, creating a brightline rule. Consequently, the sought after judicial uniformity in federal dilution law could become a reality. In the entertainment industry, where image is not only central to selling a product, but many times, is a major component of the product itself, greater uniformity in trademark law could put an end to the virtual circus created by state anti-dilution statutes by offering more concrete guidelines to senior and junior mark owners who wish to protect, preserve or launch programs or shows.

Christina M. Bidlingmaier

145. See Bible, supra note 1, at 302-03 (noting that uniformity in federal dilution law would make it possible for companies to develop “national brand management strategies,” while preventing forum shopping for state courts offering the broadest protection).

146. See Krafte-Jacobs, supra note 51, at 696 (stating Congress’ purpose in passing Act); see also Welkowitz, supra note 50, at 20-22 (predicting that uniformity would allow plaintiffs the opportunity to obtain nationwide relief and explaining that greater certainty in dilution law would eliminate much of guesswork involved in predicting how courts will rule on dilution issues).

147. For discussions of both the effect of dilution on the entertainment industry as well as an explanation of the consistency of dilution standards used in courts, see supra notes 13 and 55 and accompanying text.