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The Controversy over Miss Piggy's New Friend: Issues of Infringement and Dilution in Hormel Foods Corp. v. Jim Henson Productions

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THE CONTROVERSY OVER MISS PIGGY’S NEW FRIEND:
ISSUES OF INFRINGEMENT AND DILUTION IN
HORMEL FOODS CORP. v. JIM HENSON
PRODUCTIONS

I. INTRODUCTION

One of the most recent trends in the field of marketing is the advent of full scale merchandising of motion picture inspired products. With new products on the market resulting from this phenomenon, there is increased opportunity for potential infringement and dilution of already existing trademarks. As a remedy for possible trademark violations, both federal and state legislatures have enacted statutes which protect consumers and trademarks in instances where two marks compete.

This body of legislation provides two different causes of action. First, in federal legislation, the Lanham Act provides for a trademark infringement action to protect consumers against confusion about the source or origin of a product. Second, state statutes provide for a trademark dilution action which protects the trademark’s inherent selling power. In Hormel Foods Corp. v. Jim Henson Productions, these statutes create causes of action for trademark violations. For a discussion of the federal Lanham Act, see infra notes 18-62 and accompanying text. For a discussion of state antidilution statutes see infra notes 63-103 and accompanying text.

1. See Sophie McKenzie, Licensing: Reel Money, MARKETING WEEK, Sept. 6, 1996, at 1, available in 1996 WL 10307599. Movie merchandising is highly valued by studios. See id. Today, movies are viewed as major investments capable of producing related merchandise. See id. As a result of such potential for increased revenue, many film studios have created their own merchandising divisions to meet the demands of movie merchandising. See id. While it is true that a movie studio must take a risk and merely speculate as to the success of its movie and related merchandise, the potential for a substantial profit is large. See id. In 1995, movie related merchandise marketed to coincide with a motion picture accounted for $16.2 billion in retail sales. See Kristen Baldwin, TOYS IN THE ‘HOOD: THE SUMMER-MOVIE MERCHANDISING BONANZA KICKS OFF, ENT. WEEKLY, Mar. 15, 1996, at 1, available in 1996 WL 8794146.

2. These statutes create causes of action for trademark violations. For a discussion of state antidilution statutes see infra notes 63-103 and accompanying text.


the Second Circuit Court of Appeals analyzed both a federal trademark infringement claim and a state dilution claim and denied relief on both grounds. While evaluating the claim of trademark infringement and dilution in this case, the court faced the task of considering such claims in the context of a parody. Such a situation places the court in a position of having to balance the need to protect an established trademark and the need to protect artistic expression. The *Hormel* decision signifies a justifiable balance of such competing interests.

This Note examines the Second Circuit’s decision in *Hormel*. The second section delineates the relevant statutes and case law pertaining to both an infringement and a dilution claim. Section three explains the factual background for the *Hormel* case. Section four, the narrative analysis, details the Second Circuit’s reasoning in reaching its holding. Section five critically analyzes the Second Circuit’s decision in light of related precedent in trademark and dilution law relating to a type of parody exception in trademark disputes. Finally, section six explores the impact the *Hormel* decision will have in the area of infringement and dilution law.

II. BACKGROUND

The competitive marketplace contains countless trademarks used to identify specific products. Generally, there are two sources of protection for such trademarks. The Lanham Act creates for trademark infringement. See *id.* State antidilution statutes grant protection to “distinctive” marks, even without a likelihood of confusion. See *id.*

5. 73 F.3d 497 (2d Cir. 1996).
6. *Id.* at 508.
7. *See id.* at 503. The court sees the use of the “Spa’am” character as “simply another in a long line of Muppet lampoons.” *Id.*
8. For a discussion of section two, see *infra* notes 13-126 and accompanying text.
9. For a discussion of section three, see *infra* notes 127-44 and accompanying text.
10. For a discussion of section four, see *infra* notes 145-211 and accompanying text.
11. For a discussion of section five, see *infra* notes 212-46 and accompanying text.
12. For a discussion of section six, see *infra* notes 247-49 and accompanying text.
ates a federal claim for trademark infringement which protects consumers from confusion as to the source or origin of the goods.\textsuperscript{15} The second source of protection is a state's antidilution statute. A state claim for dilution under a state's specific antidilution statute protects a trademark's inherent and unique selling power for a specific good.\textsuperscript{16} Case law interpreting state antidilution statutes demonstrates the judicial struggle to define "dilution" and determine if dilution occurred.\textsuperscript{17} This judicial struggle is intensified by the tension between protecting consumers from confusion and protecting a manufacturer's trademark.

A. Federal Lanham Act

In 1946, Congress enacted the Lanham Trademark Act.\textsuperscript{18} In passing the Lanham Act, Congress had two goals. First, Congress wanted to codify existing trademark law; second, Congress desired

\textsuperscript{15} See Shire, supra note 4, at 273. The notion of infringement under the Lanham Act seeks to limit consumer confusion as to the source or sponsorship of products and services available in the marketplace. See Smith, supra note 3, at 1527. The analysis under the Lanham Act is therefore limited to whether a reasonably prudent consumer would be confused as to the source of a particular good or service. See id.

\textsuperscript{16} See Nancy S. Greiwe, Antidilution Statutes: A New Attack on Comparative Advertising, 72 TRADEMARK REP. 178, 182 (1982). The underlying concern of the original supporters of the dilution theory was the protection of the selling power of trademarks. See id. As the theory of dilution evolved, protection extended to additional types of trademarks. See id. Originally, courts conceived the protection to extend to unique marks. See id. Then, courts expanded protection to marks with secondary meanings. See id. Eventually, protection focused exclusively on the actual selling power of a mark so that states would protect any mark with "commercial magnetism," regardless of the nature of the mark or the source of the selling power. See id.


\textsuperscript{18} See Trademark Act of 1946 (Lanham Act), 15 U.S.C. §§ 1051-1127 (1994). See David S. Welkowitz, Reexamining Trademark Dilution, 44 VAND. L. REV. 531, 532 (1991) (generally explaining Lanham Act). The passage of the Lanham Act represents the culmination of a series of bills introduced in Congress since 1938. See Smith, supra note 3, at 1530. See id. The protection granted to the trademark owner has evolved over time. See id. Earlier decisions protected against piracy by sanctioning competitors who attempted to compete dishonestly by passing off their products as those of the trademark owner. See Welkowitz, supra at 532. The common law provided protection against this dishonest practice in the nineteenth and early twentieth centuries. See id. After World War II, Congress passed the Lanham Act which had a nationwide scope as federal law and became the main source of trademark protection. See id.
to protect trademarks and secure business and public goodwill.\textsuperscript{19} The legislative history reveals the Senate Committee's attempt to protect trademark holders from unfair competition based upon the use of the trademark holder's goodwill.\textsuperscript{20} The Lanham Act reflects the dual goals of common law trademark principles: protecting consumers from confusing product imitations and saving manufacturers' investments from misappropriation.\textsuperscript{21}

Section 1114(1) of the Lanham Act\textsuperscript{22} deals specifically with an infringement action protecting against consumer confusion when similar marks are used.\textsuperscript{23} The standard courts use to identify a violation under section 1114(1) is the "likelihood of consumer confusion" between the two marks.\textsuperscript{24} Confusion among an appreciable

\begin{footnotesize}
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\item \textsuperscript{19} See Smith, supra note 3, at 1530. The Senate Committee that reviewed the Lanham Act stated that the Act "has as its object the protection of trade-marks, securing to the owner the good will of his business and protecting the public against spurious and falsely marked goods." See id. (quoting S. REP. No. 79-1333, at 1274 (1946)).
\item \textsuperscript{20} See Smith, supra note 3, at 1530-32 (discussing legislative history of Lanham Act).
\item \textsuperscript{21} See Steven M. Perez, Comment, Confronting Biased Treatment of Trademark Parody Under the Lanham Act, 44 EMORY L.J. 1451, 1457 (1995) (explaining dual goals of common law that are reflected in Lanham Act).
\item \textsuperscript{22} 15 U.S.C. § 1114(1) (1994). Section 1114(1) provides for civil liability against any person who shall, without consent of the registrant:
\begin{itemize}
\item (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive;
\item (b) or reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.
\end{itemize}
\item \textsuperscript{23} See Smith, supra note 3, at 1532. Clearly targeted by the Lanham Act are those infringers utilizing the trademarks of another to sell a similar product. See id.
\item \textsuperscript{24} See Perez, supra note 21, at 1454. In Universal City Studios, Inc. v. Nintendo Co., the court articulated the standard for a violation of section 1114(1) by stating "[i]t is well settled that the crucial issue in an action for trademark infringement . . . is whether there is any likelihood that an appreciable number of ordinarily prudent purchasers are likely to be misled, or indeed simply confused, as to the source of the goods in question." 746 F.2d 112, 115 (2d Cir. 1984) (quoting Mushroom Makers, Inc. v. R.G. Barry Corp., 580 F.2d 44, 47 (2d Cir. 1978)). For a discussion of various tests used to examine likelihood of confusion, see J. THOMAS McCARTHY, McCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23.01[1], at 25-6 (3d ed. 1992). For example, a plaintiff in a § 1114(1) infringement action attempting to demonstrate a likelihood of confusion may use survey evidence, evidence of actual confusion or argue based upon a clear inference arising from a comparison of the conflicting marks and the context of their use. See id.
\end{itemize}
\end{footnotesize}
number of reasonable buyers satisfies the likelihood of confusion test. Finally, for a section 1114(1) claim, the confusion must be "probable," it is not sufficient if the confusion is only "possible."26

Decisions concerning federal claims of trademark infringement under section 1114(1) of the Lanham Act reflect a degree of judicial certainty.27 Courts consistently apply the "likelihood of consumer confusion" standard to determine whether section 1114(1) of the Lanham Act has been violated.28 The consistent application of this standard leads to judicial certainty in trademark infringement cases. Cases analyzing an infringement claim look to a multi-factor test to balance the interests of both sides to reach an equitable conclusion.29

Courts rely on the Second Circuit Court of Appeals' landmark decision, Polaroid Corp. v. Polarad Electronics Corp.,30 when analyzing a likelihood of confusion claim. In that case, the plaintiff, Polaroid, alleged that defendant's use of the name Polarad as a trademark,

§ 23.01[2], at 23-10. In the majority of trademark cases, the measurement of the extent of likelihood of confusion will not be exact, but more of a calculated estimate. See id. More important perhaps than the number of instances of confusion is the class of persons confused and the degree of their confusion. See id. 25. See McCarthy, supra note 24, § 23.01[2], at 23-9. For a complete discussion of the elements of the likelihood of consumer confusion, see id. § 23.01[1]-23.01[2], at 23-6 to 23-11.

26. See id. § 23.01[3][a], at 23-11. The test of infringement is the probability of confusion, not proof of actual confusion. See id. § 23.02[1], at 23-30. The plaintiff does not have to prove any instances of actual confusion. See id.


28. See McCarthy, supra note 24, § 23.01[1], at 23-8. McCarthy states that "the test of likelihood of confusion is the touchstone of trademark infringement." Id.

29. See Marla J. Kaplan, Antidilution Statutes and the First Amendment, 21 Sw. U. L. Rev. 1139, 1159 (1992). In order to prove a likelihood of confusion claim, a court generally requires that the plaintiff satisfy a multi-factor test. See id. The court in Nikon, Inc. v. Ikon Corp. noted that “[i]t is well settled that in cases involving a claim under the Lanham Act the trier of fact must consider and balance the factors set forth in [Polaroid] to determine the ‘likelihood of confusion.’” 987 F.2d 91, 94 (2d Cir. 1993) (citation omitted).

30. 287 F.2d 492 (2d Cir. 1961).
infringed on Polaroid's federal trademark rights. The Polaroid court set forth an eight factor test to help determine if a likelihood of confusion occurred. The eight factors cited by the Polaroid court include: strength of the mark, degree of similarity between the marks, proximity of the products, bridging the gap, actual confusion, bad faith, quality of the products, and consumer sophistication.

While the eight Polaroid factors serve as a useful guide in any likelihood of confusion analysis, a court balances these factors as it deems appropriate. The Second Circuit Court of Appeals' decision in Nikon Inc. v. Ikon Corp. demonstrates this judicial freedom. A manufacturer of expensive cameras, Nikon, brought suit against Ikon, a manufacturer of inexpensive cameras, alleging trademark infringement and dilution by Ikon's logo, "Ikon Cameras." In analyzing whether a likelihood of confusion existed, the Second Circuit Court of Appeals applied the Polaroid factors. The court

31. Id. at 493. The plaintiff, Polaroid Corporation, owned the trademark "Polaroid." See id. Polaroid has become a well known name because of the products produced from its sheet polarizing process. See id. at 494. The defendant, Polarad Electronics, was in the principal business of selling microwave devices. See id. Polarad claimed it created its name by combining the names of its founders. See id. Polaroid objected to the name Polarad and claimed to be entitled to protection of its distinctive mark in at least certain areas of the large electronics field. See id.

32. Id.

33. See id. The Polaroid factors include: strength of the mark - this factor examines the ability of the trademark to identify the goods sold; similarity between the marks - this factor compares how alike the marks are, especially how similar the marks appear in their settings and context; proximity of the products - this factor focuses on whether the products compete within a certain market; bridging the gap - this factor turns on the likelihood of whether the senior user will enter the market of the junior user; actual confusion - this factor centers on whether there is any evidence of genuine confusion among consumers between the two marks; bad faith - this factor examines whether there has been any predatory intent or bad will on the part of the junior user; quality of the products - this factor focuses on the quality of the junior user's product which might reflect on the senior user's product and mark; consumer sophistication - this factor explores how careful the average consumer of a product is. See Smith, supra note 3, at 1546-52.

34. 987 F.2d 91 (2d Cir. 1993).

35. Id. at 96.

36. See id. at 92-93. The defendant, manufacturer of inexpensive 35 mm and 110 mm pocket cameras, claimed he selected the trademark "Ikon" because of the familiarity of the word and the religious connotations associated with it. See id. at 93. Furthermore, he claimed he was aware of the existence of Nikon cameras, (manufactured by the plaintiff Nikon in this case); but claimed he did not foresee a potential for confusion between the two names because he never intended to compete with such a dominant force in the camera industry. See id.

37. See id at 94-96. The court discussed each of the Polaroid factors in turn. First, the court concluded that there was no dispute over the strength of the Nikon mark and accordingly, the mark deserved broad protection. See id. at 94. Second, the court found that the two marks were indeed similar by focusing on the similar-
explained, however, that the Polaroid list of factors is not exhaustive and no single factor is determinative. According to the Nikon court, the Polaroid factors were an analytical tool, not a rigid formula. In Universal City Studios, Inc. v. Nintendo Co., the Second Circuit Court of Appeals analyzed another "likelihood of confusion" claim. The Universal court utilized Polaroid's eight factors in its analysis. The court recognized, however, that in order to determine if there was a likelihood of confusion, the court could take other factors into account beyond those enumerated in Polaroid. As a result, the Universal court employed a new factor when it compared the extent to which the allegedly infringing character captured the total concept of the protected characters. The Second Circuit Court of Appeals considered a variety of factors before finding in sound between the two marks and the similar display and packaging of the products. See id. at 94-95. Third, the court looked to the proximity of the products and concluded that even though the parties have cameras at opposite ends of the spectrum in terms of price, there was substantial overlap between the two companies' products. See id. at 95. Fourth, the court found that the bridging the gap factor weighed in favor of Nikon because there was already market overlap between the two competitors. See id. Fifth, the court looked to the sophistication of consumers and determined that the purchasers of the less expensive cameras were often amateur photographers and as such, could be confused about an affiliation between the products. See id. Sixth, the court looked at the quality of the products and concluded that while Ikon's quality is good for its price, it does not have the same quality controls as Nikon does over its products. See id. Seventh, the court found that the actual confusion factor weighed in favor of Ikon because there was very limited evidence of such actual confusion. See id. at 95-96. Finally, the court found that there was sufficient evidence that Ikon acted in bad faith since it rejected the advice of counsel to adopt a different mark. See id. at 96. The court concluded that with the exception of actual confusion, the factors weighed heavily in favor of Nikon. See id.
ing no likelihood of confusion as to the source or sponsorship of Donkey Kong.44

The Eighth Circuit Court of Appeals altered the Polaroid factors in Squirtco v. Seven-Up Co.45 In Squirtco, the court applied a six factor test to determine likelihood of confusion in an infringement dispute.46 By adopting a six factor approach to determining a likelihood of confusion, the Eighth Circuit Court of Appeals departed from Polaroid's eight factor test that many courts had relied upon for Lanham Act claims. The Eighth Circuit Court of Appeals found that confusion existed between the two competitors' marks and enjoined Seven-Up from using the name "Quirst" for its drink.47

The Ninth Circuit Court's approach is somewhat different from both the Second Circuit and the Eighth Circuit approaches. In Toho Co. v. Sears, Roebuck & Co.,48 a Japanese corporation that was the exclusive merchandising representative of the Godzilla name, brought an infringement action against Sears, the manufacturer of "Bagzilla" garbage bags.50 The Toho court's analysis focused on the marketing channels used by the secondary or junior user.51 This factor looks at the possible convergence of the methods used by each user to sell their product.52 The Ninth Circuit Court of Appeals held that Sears' use of "Bagzilla" did not "impair the effectiveness of the name and image of Godzilla."53

44. See id. at 116-20. The court concluded that the two characters and stories were so different that no question of fact was presented on the likelihood of consumer confusion issue. See id. at 117.

45. 628 F.2d 1086 (2d Cir. 1980). The plaintiff, Squirtco, objected to the Seven-Up Company's introduction of the "Quirst" trademark in 1978. See id. at 1088. Squirtco first used its "Squirt" trademark in 1937 to identify a carbonated grapefruit drink. See id. Squirtco believed the names "Squirt" and "Quirst" were too similar and would therefore create confusion among consumers. See id.

46. Id. at 1091. The six factors applied by the Squirtco court are: the strength of the plaintiff's mark, the similarity between the trademark and the defendant's mark, the competitive proximity of the products on which the respective marks are placed, the intent of the alleged infringer to pass off his goods as those of the trademark holder, the incidents of actual confusion, and the degree of care likely to be exercised by the potential customers of the trademark holder. See id.

47. See id. at 1092.

48. 645 F.2d 788 (9th Cir. 1981).

49. Id. at 789. Godzilla is a fictitious movie monster who is green and gigantic in appearance. See id.

50. Id. at 789-90.

51. Id. at 790. The court used this factor rather than adopting the Polaroid factor of quality of the junior user's mark. See id.

52. See id. (citing AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341, 349 (9th Cir. 1979)).

53. See Toho, 645 F.2d at 793. The court found that the representation of the creature was a humorous caricature, an exact copy. See id. at 790.
Some trademark infringement cases are decided on wholly different grounds. Some courts characterize the trademark in dispute as a parody and examine the facts in light of such a classification. For example, in 1969, the District Court for the Southern District of New York denied injunctive relief to the Girl Scouts in *Girl Scouts of the U.S.A. v. Personality Posters Mfg.* The court held Personality's poster was a parody which, while angering the Girl Scouts, did not lead to a likelihood of confusion.

In another parody analysis, the District Court for the Eastern District of New York, in *Coca-Cola Co. v. Gemini Rising, Inc.*, found an attempt at a parody to infringe and dilute. Like the defendant in *Girl Scouts*, Gemini was a manufacturer who produced and distributed posters. The *Coca-Cola* court found that Gemini's posters infringed upon and diluted Coca-Cola's mark.

*Coca-Cola* is distinguishable from *Girl Scouts* for a variety of reasons. For example, the *Coca-Cola* court emphasized the widespread use of Coca-Cola's mark, the similarity between Coca-Cola's and Gemini's marks and the injury to Coca-Cola deemed likely to result. Unlike *Girl Scouts*, where the court held that the evidence presented failed to show that any consumer would believe the Girl

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54. For a discussion of parodies, see infra notes 104-126 and accompanying text.

55. 304 F. Supp. 1228, 1236 (S.D.N.Y. 1969). The plaintiff, Personality Posters Mfg., produced and distributed posters depicting a smiling girl wearing the well-known green uniform of the Junior Girl Scouts with her hands clasped above her protruding, clearly pregnant stomach with the phrase "Be Prepared." See id. at 1230.

56. See id. at 1231, 1233. The court cites the absence of any evidence showing that the poster has damaged the plaintiff in any way. See id. at 1235. The court found that the Girl Scouts failed to establish the requisite element of customer confusion. See id. at 1233. Even though the Girl Scouts received phone calls from the public expressing indignation concerning the poster, the court found that indignation is not equal to confusion. See id. at 1231. In fact, the court found to the contrary that the indignation of those who called appear to make it clear that they feel that the Girl Scouts are being unfairly put upon, not that the Girl Scouts are the manufacturers or distributors of the poster. See id. The Girl Scouts also brought a cause of action under New York's antidilution statute. See id. at 1233-34. The district court denied relief on this cause of action based on similar grounds. See id.

57. 364 F. Supp. 1183 (E.D.N.Y. 1972). Defendant Gemini Rising, Inc., created a poster which replaced and enlarged the familiar Coca Cola logo and altered it to read "Enjoy Cocaine." Id. at 1186.

58. See id. at 1187.

59. Id. at 1193.

60. Id. at 1191.
Scouts produced such a poster, the Coca-Cola court found a clear indication of public confusion.

B. State Antidilution Statutes

Another form of trademark protection falls under the ambit of state law. While an action under the Lanham Act protects consumers from confusion, state antidilution statutes protect manufacturers against damage to the inherent selling value of their mark. The doctrine of dilution originated in 1927 with Frank I. Schechter's seminal article, *The Rational Basis of Trademark Protection*. As proposed by Schechter, the purpose of the dilution concept is to protect the senior user's mark from losing its selling power due to "the gradual whittling away or dispersion" of the senior user's mark. This early dilution doctrine considered the trademark's advertising power the primary, and perhaps the only, real value of the trademark worthy of protection. The dilution concept focuses on protecting the manufacturer's interest in the goodwill and selling power of a mark.

61. See *Girl Scouts*, 304 F. Supp. at 1231.
63. See *Shire*, *supra* note 4, at 273. State law trademark protections exist separate from infringement based federal Lanham Act protections. See *id*.
64. See *Kaplan*, *supra* note 29, at 1149. The dilution doctrine emerged "to protect a trademark owner from an unauthorized use that is likely to injure the owner's business reputation or the distinctiveness of the trademark." See *id* at n.78 (citing Mark A. Dagitz, Note, *Trademark Parodies and Free Speech: An Expansion of Parodists' First Amendment Rights in L.L. Bean, Inc. v. Drake Publishers, Inc.*, 73 Iowa L. Rev. 961, 967-68 (1987)).
65. 40 *Harv. L. Rev.* 813 (1927).
67. See *Taviss*, *supra* note 66, at 1455. The original dilution theory of protection did not require a showing of confusion among consumers. See *id*. Schechter inherently believed uses that tended to diminish the public's association of the mark with a certain level of satisfaction in certain goods and services bearing that mark were to be discouraged. See *id*.
68. See *McCarthy*, *supra* note 24, § 24.13[1][b], at 24-108. The dilution doctrine's concern is the granting of protection to trademarks beyond that provided by the classic likelihood of confusion test. See *id*. The dilution theory grants protection to strong, well-recognized marks even without a likelihood of confusion. See *id*.
Although the history of judicial reaction to the concept of dilution is filled with ambiguities as to the meaning of “dilution,” common concepts of dilution emerged in case law.\textsuperscript{69} Generally, dilution is a weakening of the mark’s ability to clearly distinguish one source from another.\textsuperscript{70} Schechter explained this concept by noting that if a court permitted such things as Rolls-Royce restaurants, Rolls-Royce cafeterias, Rolls-Royce pants, and Rolls-Royce candy, then in time, the Rolls-Royce mark would disappear as a distinguishing mark.\textsuperscript{71}

There are two subsets of the dilution doctrine. The first subset is dilution by blurring.\textsuperscript{72} Dilution by blurring occurs when consumers see the plaintiff’s unique mark used on a plethora of different goods.\textsuperscript{73} The mark’s unique and distinctive significance to identify and distinguish one source may be diluted and weakened by the defendant’s use of the plaintiff’s mark on the defendant’s goods.\textsuperscript{74} For example, the use of the word Tiffany on a restaurant, while not likely to cause confusion with the jeweler Tiffany, is likely to blur or weaken the association of the name Tiffany to solely the jeweler.\textsuperscript{75} The Tiffany mark would no longer serve as a unique identifier of the certain jewelry store.\textsuperscript{76} The unique and distinctive link between the word Tiffany and a certain jewelry store is weakened through a blurring of the Tiffany mark.\textsuperscript{77}

The second subset is dilution by tarnishment. Dilution by tarnishment occurs when the plaintiff’s mark is associated with products which are of shoddy quality.\textsuperscript{78} Additionally, dilution by

\textsuperscript{69} See Beverly W. Pattishall, \textit{The Dilution Rationale for Trademark-Trade Identity Protection, Its Progress and Prospects}, 67 TRADEMARK REP. 607, 610 (1977). Legislative acceptance of the antidilution concept has been demonstrated in the past thirty years. See \textit{id}. The dilution concept however, has remained so misunderstood or unpalatable to the courts that it has been largely ignored. See \textit{id}. For a discussion of judicial treatment of the dilution doctrine and the difficulties courts still have with the concept, see Shire, \textit{supra} note 4, at 274-75.

\textsuperscript{70} See \textit{McCarthy}, \textit{supra} note 24, § 24.13[1][a], at 24-106.

\textsuperscript{71} See \textit{id}.

\textsuperscript{72} See \textit{id}. § 24.15[1], at 24-127. Dilution by blurring can occur when the plaintiff’s trademark becomes a strong and famous mark. See \textit{id}. In such situations, a trademark creates a strong and unique connection between the word and a single source of goods and the defendant’s use of a similar trademark creates a question about the origin of the goods. See \textit{id}.

\textsuperscript{73} See \textit{id}. § 24.13[1][a][i], at 24-106. Dilution caused by such blurring is the traditional effect of the theory of dilution. See \textit{id}.

\textsuperscript{74} See \textit{id}. § 24.13[1][a][i], at 24-106.

\textsuperscript{75} See \textit{McCarthy}, \textit{supra} note 24, § 24.13[1][a][i], at 24-107.

\textsuperscript{76} See \textit{id}.

\textsuperscript{77} See \textit{id}.

\textsuperscript{78} See \textit{id}. § 24.16[1], at 24-138.1.
tarnishment occurs when the senior user's mark is used by the junior user in an unwholesome context. 79 To illustrate dilution by tarnishment, the case of *Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.* is helpful. 80 The manufacture and distribution of "Garbage Pail Kids" stickers depicting dolls with features similar to Cabbage Patch Kids dolls in "rude, violent and frequently noxious settings" tarnishes the wholesome image of the original dolls. 81

Responding to the concept of dilution first espoused in 1927, the Model State Trademark Bill attempted to articulate the scope of protection for a mark's goodwill. 82 The Model Bill served as a prototype for future state antidilution statutes. 83 Presently, twenty-four states have enacted antidilution statutes based upon the Model Bill. 84 In keeping with the original dilution concept and the lan-

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79. See Jordache Enters., Inc. v. Hogg Wyld, Ltd., 828 F.2d 1482, 1490 (10th Cir. 1987) (holding that logo "Lardashe" on large size jeans was unlikely to be confused with "Jordache," but noting that work can be tarnished if used in unwholesome context). For a full discussion of Jordache, see infra notes 113-119 and accompanying text.


81. Id. at 1040. See also, Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 205 (2d Cir. 1979) (holding that defendant's motion picture featuring uniform strikingly similar to one worn by plaintiff's cheerleading group was likely to confuse consumers and dilute by tarnishment).

82. See Kaplan, *supra* note 29, at 1150 (citing Model State Trademark Bill § 12 (United States Trademark Ass'n 1966)). The Model State Trademark Bill provides in pertinent part:

Likelihood of injury to business reputation or of dilution of the distinctive quality of a mark registered under this Act, or a mark valid at common law, or a trade name valid at common law, shall be a ground for injunctive relief notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services.

*Id.* (quoting Model State Trademark Bill § 12 (United States Trademark Association 1964)).

83. See id. In 1947, Massachusetts enacted the nation's first antidilution statute, twenty years after the concept of dilution first developed. See Taviss, *supra* note 67, at 1457.

guage of the Model Bill, no state requires a showing of competition or a likelihood of confusion. Instead, these state statutes focus on the damage caused to the inherent value of a trademark, not on whether the public has been misled or confused.

Decisions based on state antidilution claims demonstrate ambiguity in interpreting such statutes. This uncertainty is due in part to the small amount of legislative history of the antidilution statutes and the lack of a clear definition of dilution. The dilution concept generally provides protection against injury resulting from a "whittling away" of a mark's power in cases where a plaintiff cannot prove likelihood of confusion.

85. See Kaplan, supra note 29, at 1151. Washington’s antidilution statute in Washington is the only state antidilution statute that differs from the Model State Trademark Bill and the other state antidilution statutes. See Lisa M. Brownlee, Note, Mead Data Central v. Toyota and Other Contemporary Dilution Cases: High Noon for Trademark Law’s Misfit Doctrine? 79 TRADEMARK REP. 471, 474 (1989). The Washington antidilution statute is patterned after the proposed federal antidilution statute which was rejected by Congress in 1988. See Welkowitz, supra note 18, at 581-83 (discussing failed attempt at federal antidilution statute). The Washington antidilution statute offers guidelines to help determine whether a mark is distinctive enough to merit protection and offers a definition of the term dilution which is noticeably absent from state statutes modeled after the Model State Trademark Bill. See Brownlee, supra at 473-75.

86. See Kaplan, supra note 29, at 1151.

87. See Shire, supra note 4, at 283.

88. See id. For years, the courts either refused to apply or in some way misunderstood the clear, literal language of dilution statutes. See id. This judicial reluctance to apply the plain language of these statutes left trademark owners with little certainty as to how their particular claim would be decided by the court. See id.

89. See Milton W. Handler, Are the State Antidilution Laws Compatible with the National Protection of Trademarks?, 75 TRADEMARK REP. 269, 276 (1985). The legislative history of state statutes do not provide any clear indication as to what marks are to be protected, nor to the degree of protection to be afforded. See id. The essential terms - distinctiveness and dilution - are not defined in the legislative history. See id. The statutory purposes or goals or the relationship of the relatively new concept of dilution to the traditional principles of the law of trademarks and unfair competition are unclear from the legislative history. See id.

90. See id. For example, in the legislative history of New York’s antidilution statute, a committee member defined dilution in terms similar to those expressed
The New York Court of Appeals rendered a significant trademark infringement and dilution decision in 1977. Allied Maintenance Corp. v. Allied Mechanical Trades, Inc. set forth a definition of dilution consistent with the language of New York’s antidilution statute. The decision represented a turning point in dilution cases because it recognized that the clear language of New York’s antidilution statute did not make recovery dependent upon a showing of a likelihood of consumer confusion or competition. The court stated that the statute means exactly what it says, and should be applied in accordance with its plain meaning. The New York Court of Appeals defined dilution as “a cancer-like growth of dissimilar products or services which feeds upon the business reputation of an established distinctive trade-mark or name.”

This new dilution definition formed the basis of a two factor test used to determine whether relief for a dilution claim is justified. The first requirement mandates that a senior user’s trademark be distinctive, either through its own strength or through an acquired secondary meaning. The second requirement is that the defendant’s trademark must be likely to dilute. The New York Court of Appeals denied the plaintiff’s request for an injunction by Schechter. See id. Accordingly, the goal of the statute was to provide protection from the “whittling away” of a mark’s selling power. See id.

91. See Taviss, supra note 66, at 1459 (citing Allied Maintenance Corp. v. Allied Mechanical Trades, Inc. 369 N.E.2d 1162 (N.Y. 1977)). Allied Maintenance sought an injunction against Allied Mechanical’s use of Allied Maintenance’s mark under both the Lanham Act and New York’s antidilution statute. See Allied Maintenance, 369 N.E.2d at 1163.


93. See Taviss, supra note 66, at 1459. With the Allied Maintenance decision, a coherent view of dilution, consistent with the language of the statutes, did finally emerge when the New York Court of Appeals embraced the true meaning of New York’s antidilution statute. See id.

94. See id. For a further discussion of the significance of the Allied Maintenance court’s holding, see Shire, supra note 4, at 285-88.

95. See Allied Maintenance, 369 N.E.2d at 1166. The court stated that § 368(d) does not require a showing of confusion to obtain an injunction, but it does require a “likelihood of injury to business reputation or dilution of the trademark.” Id. The plain meaning of the antidilution statute is that confusion or likelihood of confusion is not a prerequisite to an action for dilution. See id. at 1165.

96. Id.

97. See id. at 1166.

98. See id. The court stated that to merit protection, the plaintiff must possess a distinctively strong mark or an acquired secondary meaning capable of dilution. See id.

99. See id. The court did not offer a clear test to determine when dilution is likely but simply stated that it is necessary to show that the defendant’s use of the trademark is likely to dilute. See id.
because the court found that the Allied mark failed the first requirement. 100

The Second Circuit Court of Appeals expanded Allied Maintenance two factor test in Sally Gee, Inc. v. Myra Hogan, Inc. 101 The Sally Gee court offered a third factor to consider in a dilution case, in addition to the Allied Maintenance two factor test. 102 Sally Gee held that a court should also consider whether the junior user purposely sought to capitalize on the senior user’s good will in the mark; that is, did the junior user possess a “predatory intent?” 103

C. Parodies

Another line of cases examine both the federal infringement and state antidilution claims on a different level. These cases involve alleged infringement by the use of a parody. 104 A parody is a popular form of entertainment and humor which is best understood as a humourous “take off” of another work or of a genre of works. 105 When considering a parody, courts are faced with the

100. See Allied Maintenance, 369 N.E.2d at 1166. The Allied mark, according to the court lacked an inherently strong connotation that was susceptible to dilution. See id.

101. 699 F.2d 621 (2d Cir. 1983). This case involved defendant Myra Hogan’s use of the name “Sally Lee” as a name for its line of women’s clothes and accessories. See id. at 623. The plaintiff, Sally Gee, Inc., believed the “Sally Lee” name was too similar to its trademark name “Sally Gee,” which the plaintiff used for its own line of women’s clothing and accessories. See id. at 622-23.

102. Id. at 626. The court acknowledged that confusion and competition are not essential elements in a dilution claim. See id. at 624. To support this finding, the court noted that the purposes for which the antidilution statute was enacted support the view that confusion and direct competition are not necessary elements of an antidilution action. See id.

103. Id. at 626. The court stated that the absence of predatory intent by the junior user is a relevant factor in assessing a claim under New York’s antidilution statute. See id. Finding an absence of predatory intent and therefore no dilution, the Second Circuit Court of Appeals denied Myra Hogan’s request for an injunction. See id.

104. See Katherine C. Spelman, Trademark Parody - Tarnishment or Free Speech?, 454 PRAC. L. INST./PAT. 567, 570 (1996). Traditionally, to create a parody there needs to be a distortion or exaggeration of the original characteristic which must inherently be known to the audience already. See id. The elements of a parody include: (1) an original host work, (2) the original host work must be famous already to the audience, (3) the creator of the derivative work, the parody, must take only so much as is necessary to conjure up the famous host work and (4) the derivative work which conjures up the famous host must result in a new, original work. See id.

105. See Richard A. Posner, When Is Parody Fair Use?, 21 J. LEGAL STUD. 67, 68 (1992). A parody is a deliberate imitation which mocks another’s trademark. See Perez, supra note 21, at 1454. It is a combination of a taking from a previous work with an injection of creativity. See id. A parody’s success depends on how successfully it is able to incorporate recognizable elements of the parody’s object. See id. See also Bruce P. Keller & David H. Bernstein, As Satiric As They Wanna Be: Parody
task of preserving freedom of expression, the integrity of the trademark and the consumer's right not to be confused. Courts attempt to balance the public interest in the free flow of ideas with the trademark holder's interest in his work. The tension created between the fair use of the trademark and the trademark holder's rights is the subject of much litigation. The parody line of cases balance this intrinsic conflict.

The case of Tetley, Inc. v. Topps Chewing Gum, Inc.\(^{106}\) presents a clear example of the parody concept. In Tetley, the District Court for the Eastern District of New York denied relief under both section 1114(1) of the Lanham Act and New York's antidilution statute.\(^{107}\) The court's trademark infringement analysis in this decision was based upon a balancing of the eight factors in Polaroid.\(^{108}\) According to the district court, there was no evidence of actual confusion.\(^{109}\) The broad satirical adaptation of Topps's parodic mark distinguished the mark from Tetley's actual mark.\(^{110}\) This adaptation the court held, made the parody unlikely to confuse consumers.\(^{111}\) Addressing the dilution claim, the district court noted the obvious humor of Topps' action and held that the parody's humor prevented the blurring of Tetley's trademark.\(^{112}\)

Another illustrative parody case, Jordache Enterprises, Inc. v. Hogg Wyld, Ltd.,\(^{113}\) offers insight into the nature of a parody.\(^{114}\) The significance of Jordache in the realm of parody cases stems from its understanding of a parody. The Tenth Circuit Court of Appeals acknowledged that, while a trademark holder has the right to pro-

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\(^{107}\) See id. at 796. The plaintiff, Tetley, Inc., alleged trademark infringement and dilution when the defendant, Topps Chewing Gum, Inc., distributed packs of gum and stickers which satirically depicted a label reading "Petley Flea Bags." See id. at 786.
\(^{108}\) See id. at 789.
\(^{109}\) See id. at 793.
\(^{110}\) See id. at 791-92. The court relied heavily on the fact that the plaintiff's and defendant's products were distributed in different markets and that the defendant did not, in bad faith, attempt to exploit the plaintiff's product. See id. at 792. The court found that the very heavy handedness of defendant's parody appeared to assure a clear distinction in the consumer's mind between the two products. See id.
\(^{111}\) See Tetley, 556 F. Supp. at 792.
\(^{112}\) See id. at 794.
\(^{113}\) 828 F.2d 1482 (10th Cir. 1987).
\(^{114}\) See id. at 1483-84. The defendant Hogg Wyld, Ltd., used the name "Lardasche" on its blue jeans as a parody of plaintiff's "Jordache" jeans trademark. See id. Jordache sued under both the Lanham Act and New Mexico's antidilution statute. See id. at 1484.
tect against consumer confusion, this right does not include the "right" not to be made fun of in the parody context. The court held that to simply intend to copy another's trademark does not necessarily dictate a per se desire to pass off one's goods as another's and to confuse consumers. When selecting another's mark as the object of a parody, the intent is to amuse rather than to derive benefit from another's goodwill. The intent in a parody case must be examined in light of this context. According to the court, the possibility of increased recognition for Jordache would not dilute the power of Jordache to sell jeans.

In the case of Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc., the Second Circuit Court of Appeals balanced the right of free expression in the form of a parody and the rights of the trademark holder in favor of protecting the entertainment value of the parody. The court stated that a parody must convey conflicting dual messages: that it is both a parody and that it is the original. The court subsequently weighed the public interest in free expression against the public interest in avoiding consumer confusion and sided with free expression.

Finally, the Eighth Circuit Court of Appeals had occasion to consider a parody involving infringement and dilution in Anheuser-

115. See id. at 1486.
116. See id. The court clarified this by noting that where a party chooses a mark to be a parody of an existing mark, the intent is not necessarily to confuse the public, but rather to entertain. See id.
117. See id. at 1486.
118. See Jordache, 828 F.2d at 1485-86. The Jordache court also held that the parody in this case might actually increase public identification of Jordache's mark rather than erode or dilute it. Id. at 1489-90.
119. See id. at 1490.
120. 886 F.2d 490 (2d Cir. 1989). The defendant, Bantam Doubleday Dell Publishing Group, Inc., parodied plaintiff Cliff Notes, Inc.'s popular guide to literary works with a guide to three popular modern novels. See id. at 492. These novels were then placed into a book which parodied the plaintiff's successful Cliffs Notes. See id. The two books shared some similarities, however, the Second Circuit Court of Appeals reasoned that there were obvious differences as well. See id. These differences distinguished Bantam's book as a parody rather than a mere imitation of Cliffs Notes study guides. See id.
121. See id. at 495.
122. See id. at 494. The court expressed the function of a parody by stating: A parody must convey two simultaneous-and contradictory-messages: that it is the original, but also that it is not the original and is instead a parody. To the extent that it does only the former but not the latter, it is not only a poor parody but also vulnerable under trademark law, since the customer will be confused.
123. See id. at 495.
Busch, Inc. v. Balducci Publications. The Anheuser-Busch court distinguished this attempt at a parody from other successful parodies because Balducci’s “parody” almost exactly duplicated Anheuser’s mark. The overwhelming similarity between the parody ad and the original trademark weighed in favor of protecting the public’s interest not to be confused.

III. FACTS

The facts surrounding the litigation of Hormel Foods Corp. v. Jim Henson Production involved the alleged infringement and dilution of Hormel’s SPAM trademark through Henson’s Spa’am puppet character in a movie production. The plaintiff, Hormel Foods, is the maker of SPAM, a luncheon meat that has been manufactured and sold in the United States since 1937. In addition to its primary product, SPAM luncheon meat, Hormel began to merchandise secondary objects including tee-shirts and golf balls. These secondary products bore the SPAM mark and a character called “SPAM- MAN.”

The defendant, Jim Henson Productions, enjoys great success and popularity from its motion pictures which feature its cast of character puppets known as the “Muppets.” The Muppets have been featured in numerous television programs and motion pictures. They are distinct and “well known for parodies of brand

124. 28 F.3d 769 (8th Cir. 1994). In this case the defendant Balducci Publications, attempted a parody by placing a satirical Michelob Dry beer advertisement in its humor magazine. See id. at 772. Balducci’s ad in its Snicker magazine was placed on the entire back page of the magazine. See id. The parody was a mock advertisement for the fictitious product “Michelob Oily,” depicting a can of plaintiff Anheuser-Busch, Inc.’s Michelob Dry pouring oil onto a fish. See id. Anheuser-Busch brought both an infringement and a dilution claim in the District Court for the Eastern District of Missouri. See id. On appeal, the Eighth Circuit Court of Appeals applied the six factor test from Squirtco v. Seven-Up Co. and concluded that Balducci’s use of the Michelob mark created a likelihood of confusion. See id. at 777. For a discussion of Squirtco, see supra notes 45-47 and accompanying text. Addressing the state antidilution claim, the court found that dilution occurred through tarnishment of Anheuser’s product when Balducci made a negative inference about the quality of Anheuser’s mark. See id. at 777.

125. See id.

126. See id. at 776.

127. 73 F.3d 497, 500-01 (2d Cir. 1996).

128. See id at 500. Through the expenditure of millions of dollars in advertising, Hormel achieved tremendous commercial success from its SPAM product. See id. In the United States alone, Hormel has sold over five billion cans of its luncheon meat. See id.

129. See id. at 501.

130. See id. at 501-02.

131. See id. at 500.
names, trademarks, television programs, fictional characters and celebrities."\(^{132}\) This type of parody format is commonly associated with Muppet humor.

In February 1996, Henson released a feature film entitled "Muppet Treasure Island."\(^{133}\) In addition to Henson's usual and popular cast of Muppets, the film introduced an additional character named Spa'am.\(^{134}\) In "Muppet Treasure Island", Spa'am, whose name was mentioned only once in the entire movie, was the high priest of a tribe of wild boars.\(^{135}\) Although he posed a humorous threat at first, by the movie's end, Spa'am befriended the Muppets and even helped them escape from the film's villain, Long John Silver.\(^{136}\)

Hormel objected to the appearance of Spa'am whom it viewed as grotesque and unclean.\(^{137}\) Consequently, Hormel filed a lawsuit against Henson, fearing that the unwholesome image of Henson's Spa'am character would cause consumers to question the purity and high quality of its luncheon meat.\(^{138}\)

Additionally, Hormel feared that possible confusion between the Spa'am character and the luncheon meat would interfere with SPAM's sales of its secondary products.\(^{139}\) This was because Henson planned to support the release of its film with its own merchandising program.\(^{140}\) Henson indicated that the merchandise would always carry the Spa'am likeness beside the name Spa'am.\(^{141}\) The Spa'am name would never appear alone and any merchandise containing the Spa'am name or image would clearly display the title of the film.\(^{142}\) Nonetheless, Hormel objected to Henson's plan because Hormel believed that Henson's merchandising would have a

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133. See id. at 500.
134. See id. at 500-01.
135. See id. at 501.
136. See id.
137. See *Hormel*, 73 F.3d at 501.
138. See id. The court noted that by now, Hormel should be accustomed to ridicule. See id. Although SPAM is made from pork shoulder and ham meat, numerous jokes have been made based on the public's unfounded perception that SPAM is a product of unnatural ingredients. See id. The court stated, "In view of the more or less humorous takeoffs . . . one might think Hormel would welcome the association with a genuine source of pork." *Id.*
139. See id. at 501-02.
140. See id. at 501. Henson planned to merchandise licensed products from the motion picture including food, candy, cereal boxes, clothing, books, and a CD-ROM computer game. See id.
141. See id.
142. See *Hormel*, 73 F.3d at 501.
negative effect on Hormel's sale of its secondary products. As a result of Hormel's belief that the Henson movie character would tarnish Hormel's image of its SPAM product, Hormel filed a lawsuit alleging trademark infringement and dilution.

IV. NARRATIVE ANALYSIS

In *Hormel*, the Second Circuit Court of Appeals confronted two issues, federal trademark infringement and state trademark dilution. Specifically, the court decided the issue of whether the use of the "Spa'am" character created a likelihood of confusion and whether there was a likelihood of dilution by way of blurring or tarnishment. The court denied relief under both claims. The court analyzed the federal infringement claim first and then analyzed the state dilution claim.

A. Federal Infringement Claim

The first issue considered by the court was the trademark infringement issue. Under the Lanham Act, a plaintiff's trademark is protected against infringement by use of colorable imitations of the mark which are likely to deceive or cause confusion. When deciding such a claim, the court must look to whether there is a likelihood that an appreciable number of ordinary consumers are likely to be confused as to the source or sponsorship of the goods in question. To determine the likelihood of such confusion, the Second Circuit Court of Appeals relied on the *Polaroid* eight factor test.

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143. *See id.* at 501-02. The lower court in this dispute held that Henson's use of Spa'am did not show a likelihood of consumer confusion. *See Hormel Foods Corp. v. Jim Henson Prod., Inc., No. 95 Civ. 5473, 1995 WL 567369, at *1 (S.D.N.Y. Sept. 25, 1995) [hereinafter *Hormel I*]. Additionally, the lower court held that Hormel failed to show a likelihood of confusion or dilution. *See id.* at *13.

144. *See Hormel*, 73 F.3d at 497.

145. *Id.* at 501. The court also considered the scope of appeal from the district court, and determined that the issue of Henson's future merchandising was ripe for determination by the district court and therefore ripe for appellate review. *See id.* at 508.

146. *See id.* at 479.


149. *See id.*

150. *See id.* For a discussion of the *Polaroid* factors, see *supra* notes 30-33 and accompanying text.
First the court considered the strength of the plaintiff's mark.\textsuperscript{151} The stronger the plaintiff's mark, the more likely it is that the defendant's mark will conjure up the image of the plaintiff's mark.\textsuperscript{152} Hormel argued that Henson's mark would cause the public to associate Spa'am with SPAM, and thus cause confusion as to the source of the two marks.\textsuperscript{153} This confusion, Hormel asserted, would interfere with its merchandising of secondary products.\textsuperscript{154} Henson argued that its use of Spa'am is simply another Muppet-type parody.\textsuperscript{155} When consumers see the name Spa'am associated with the movie, Henson argued that consumers will understand the joke as a humorous parody.\textsuperscript{156} The court held that Henson's parody was particularly subtle and therefore Spa'am was recognized as a parody.\textsuperscript{157}

Next, the court looked to the degree of similarity between the marks.\textsuperscript{158} Hormel contended that although Spa'am in no way resembled Hormel's luncheon meat or character SPAM-MAN, the depiction of Henson's puppet alone would invoke the name SPAM because consumers would associate the name with the figure on Henson's merchandise.\textsuperscript{159}

The Second Circuit Court of Appeals rejected Hormel's argument that the marks were similar because of the possibility of an association of the Hormel name and the Henson mark by consumers.\textsuperscript{160} Although the court noted that there was a passing resemblance between the names Spa'am and SPAM, there were also significant differences.\textsuperscript{161} These differences warranted a finding that no similarity between the marks existed.\textsuperscript{162} The court further found that the setting in which the marks were used influenced the
degree of similarity.163 Since Henson planned to include the name Spa’am next to any depiction of the boarish character, the context in which the Hormel and Henson marks would be used was strikingly different and would distinguish the marks for the consumer.164

The third factor in the likelihood of confusion analysis under Polaroid is proximity of the products.165 The court concluded that Hormel and Henson each occupied distinct merchandising markets.166 SPAM derived its associations primarily from the market of luncheon meat, whereas Henson’s market was motion pictures and television.167 The court found it unlikely that consumers would confuse merchandise featuring Spa’am with similar items displaying the SPAM trademark since the markets were distinctive.168

The Second Circuit Court of Appeals referred to the next factor under the Polaroid analysis as “bridging the gap.”169 This factor refers to the senior user’s interest in related markets and possible expansion into other fields.170 The court concluded that Hormel failed to show any interest in entering the field of puppet motion pictures.171 Absent a desire by Hormel to bridge the gap into the field of entertainment, there was no potential that consumers would relate Hormel to such an enterprise.172

Actual confusion between the two marks is the next Polaroid factor.173 Hormel argued that the media’s misspellings and mispro-

163. See Hormel, 73 F.3d at 503. The court noted that Henson planned to always use the name Spa’am next to a likeness of the wild boar puppet. See id. In addition, the words “Muppet Treasure Island” would always be prominently displayed wherever the name Spa’am appeared. See id. at 504.

164. See id.

165. See id.

166. See id. The court noted that purchasers of SPAM merchandise would generally be consumers of the luncheon meat product, and that consumers of merchandise relating to the movie with the likeness or name of Spa’am would buy it because they liked Spa’am, the Muppets, or the movie “Muppet Treasure Island.” See id. Therefore, the separation between the markets for luncheon meat and puppet entertainment carried over into the secondary merchandising market. See id. at 504.

167. See id.

168. See Hormel, 73 F.3d at 504. The court found that the character Spa’am, even as it appeared on merchandise, would be defined almost entirely by his appearance in “Muppet Treasure Island.” See id.

169. See id.

170. See id.

171. See id.

172. See id.

173. See Hormel, 73 F.3d at 504.
nunciations of Spa'am evidenced actual confusion.\textsuperscript{174} The court dismissed this argument by noting that the media never confused the source or sponsorship of the two marks.\textsuperscript{175} Furthermore, the different contexts in which the marks appeared prohibited a possible finding of confusion as to source or sponsorship.\textsuperscript{176}

Bad faith on the part of the junior user is another factor used to determine a likelihood of confusion in the \textit{Polaroid test}.\textsuperscript{177} Henson's Spa'am character displayed an attempt to create a parody, not a take-off of Hormel's SPAM-MAN.\textsuperscript{178} Therefore, the court reasoned that Henson would not gain anything by creating a confusion between the two marks.\textsuperscript{179} The success of Henson's parody depended on consumer recognition of Hormel's product.\textsuperscript{180} It was not in Henson's interest to create confusion among consumers.\textsuperscript{181}

The court proceeded to examine the quality of the products.\textsuperscript{182} The Second Circuit Court of Appeals concluded that Henson's products were of high quality as was Hormel's SPAM, thus, no injury existed on the basis that Henson's product might cause a consumer to believe Hormel's product was inferior.\textsuperscript{183}

Considering the likelihood of confusion, the Second Circuit Court of Appeals examined the degree of consumer sophistication.\textsuperscript{184} The court found that consumers who would likely purchase Spa'am merchandise would do so because they enjoyed the Muppets, not because they mistakenly believed the Spa'am merchandise was a SPAM product.\textsuperscript{185} Conversely, consumers who purchased

\begin{itemize}
\item \textsuperscript{174} See \textit{id.} at 502. To support this argument, Hormel pointed out that some newspaper accounts already confused the names SPAM and Spa'am. See \textit{id. } The court found that each of these reported accounts antedated the initial public showing of "Muppet Treasure Island." See \textit{id.}
\item \textsuperscript{175} See \textit{id.} at 504.
\item \textsuperscript{176} See \textit{id.}
\item \textsuperscript{177} See \textit{id.} at 505.
\item \textsuperscript{178} See Hormel, 73 F.3d at 505. The court's decision on the factor of bad faith was guided by the notion that Henson's parody depends on consumer recognition that Spa'am is a Muppet lampoon and not simply a modified version of SPAM-MAN. See \textit{id.}
\item \textsuperscript{179} See \textit{id.}
\item \textsuperscript{180} See \textit{id.} at 505.
\item \textsuperscript{181} See \textit{id.}
\item \textsuperscript{182} See \textit{id.}
\item \textsuperscript{183} See Hormel, 73 F.3d at 505. In responding to Hormel's contention that Spa'am would call into question the quality of its SPAM luncheon meat, the court noted that the findings suggest Spa'am is a positive character. See \textit{id.} The court found that Spa'am is not unclean and that a simple humorous reference to the fact that SPAM is made from pork will not be harmful to Spam's public image. See \textit{id.}
\item \textsuperscript{184} See \textit{id. } This factor is related to the concept of market proximity. See \textit{id.}
\item \textsuperscript{185} See \textit{id.}
\end{itemize}
SPAM products did so because of the product's affiliation with SPAM, not the Muppets; thus, there existed minimal threat of competition between the companies respective markets.\textsuperscript{186}

The final factor in the Polaroid analysis used by the Hormel court was likelihood of confusion.\textsuperscript{187} The court concluded that the element of parody in Henson's Spa'am merchandise distinguished it from Hormel's merchandise.\textsuperscript{188} The apparent nature of the parody combined with Henson's use of the "Muppet Treasure Island" mark on its merchandise precluded a likely finding of confusion between SPAM merchandise and Spa'am merchandise.\textsuperscript{189} Balancing these factors, the Second Circuit Court of Appeals held that Hormel's infringement claim was meritless as no likelihood of confusion existed between SPAM and Spa'am.\textsuperscript{190}

B. State Antidilution Claim

The second issue in this appeal was Hormel's claim of dilution under New York's antidilution statute.\textsuperscript{191} The grounds for a dilution claim are based on the likelihood of injury to a business' reputation or of a dilution of the distinctive quality of a trademark.\textsuperscript{192} The court recognized that dilution originates from the notion that "a trademark can lose its 'ability' to clearly and unmistakably distinguish one source through unauthorized use."\textsuperscript{193} The court applied the two part test from Sally Gee, Inc. v. Myra Hogan, Inc.\textsuperscript{194} to establish a dilution claim: (1) ownership of a distinctive mark and (2) a

\textsuperscript{186.} See id. Once again, the court noted that consumers would not be confused as to the source of the products since all Muppet merchandise featuring the image or likeness of Spa'am would carry the "Muppet Treasure Island" mark. See id.

\textsuperscript{187.} Id.

\textsuperscript{188.} See Hormel, 73 F.3d at 505. The obvious, though harmless, character of the parody and the prominence of the "Muppet Treasure Island" mark strongly indicated that consumers were not likely to be confused between merchandise carrying the SPAM logo and products featuring Spa'am. See id.

\textsuperscript{189.} See id.

\textsuperscript{190.} See id.

\textsuperscript{191.} See id. at 506. For a discussion of state antidilution statutes, see supra notes 63-105 and accompanying text. For the text of New York's antidilution law, see supra note 84.

\textsuperscript{192.} See id.

\textsuperscript{193.} Hormel, 73 F.3d at 506 (citing 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24.13[1][a], at 24-106 (3d ed. 1995)). The Hormel court specified that dilution is a "gradual whittling away of a firm's distinctive trade-mark or name." Id. (quoting Allied Maintenance Corp. v. Allied Mechanical Trades, Inc. 369 N.E.2d 1162 (1977)).

\textsuperscript{194.} 699 F.2d 621 (2d Cir. 1983).
likelihood of dilution. The court ruled on the first prong of the test without discussion, accepting that SPAM is an "extremely strong mark." The court, however, analyzed the second element, the likelihood of dilution, in greater detail. The court separated its dilution analysis into two categories, dilution by blurring and dilution by tarnishment.

The Second Circuit Court of Appeals started by recognizing that dilution occurs through blurring when the defendant uses the plaintiff's trademark to identify the defendant's goods. Hormel contended that Henson's use of Spa'am would weaken SPAM's selling power. The court rejected this argument and concluded that Henson's use of a parody would tend to increase consumer association of Hormel's mark to Hormel. In addition, the court held that the dissimilarity between the marks, the placement of Spa'am next to the character likeness and the words "Muppet Treasure Island" would associate Spa'am with Henson, not Hormel. The court concluded that the obvious "parodic intent" and "contextual dissimilarity" between the two marks precluded a finding that Spa'am would blur Hormel's mark.

Next, the court examined whether dilution occurred by tarnishment. Tarnishment of a trademark occurs when the trademark is associated with poor quality products or portrayed in an unwholesome or unsavory context through the junior user's use of the trademark. Hormel argued that tarnishment occurred because the image of Spa'am as a "grotesque," "untidy" wild boar would cause negative and unsavory associations with Hormel's SPAM luncheon meat. Rejecting Hormel's argument, the court affirmed the district court's finding that Spa'am was a likeable, positive character unlikely to tarnish SPAM.

195. See Hormel, 73 F.3d at 506 (citing Sally Gee, Inc. v. Myra Hogan, Inc., 699 F.2d 621, 625 (2d Cir. 1983)).
196. Id. The court disposed of the first element, ownership of a distinctive mark, by finding that it was beyond dispute that SPAM is an extremely strong mark. See id.
197. See id. at 506-08.
198. See id. at 506.
199. See id. at 502.
200. See Hormel, 73 F.3d at 506.
201. See id.
202. Id.
203. See id. at 507.
204. See id. For a discussion of dilution by tarnishment, see supra notes 787-801 and accompanying text.
205. See Hormel, 73 F.3d at 507.
Court of Appeals upheld the district court’s decision because Hormel presented no evidence of any negative associations between Henson’s and Hormel’s products.\(^{207}\) Moreover, Henson’s intent was not to ridicule SPAM in order to sell more products.\(^{208}\) Actually, the parody was part of the product, for “[w]ithout Sp’ama’m, the joke is lost.”\(^{209}\) The court concluded that there was little likelihood of dilution by tarnishment.\(^{210}\) Recognizing the nature of the Spa’ama’m character as that of a parody, the Second Circuit Court of Appeals found neither infringement nor dilution of the luncheon meat trademark.\(^{211}\)

V. CRITICAL ANALYSIS

In light of the highly competitive nature of the entertainment industry, the Second Circuit Court of Appeals’ holding in *Hormel* is a fair decision. While exhausting all avenues of legal precedent, the court successfully balanced the interests of both parties. In so doing, the Second Circuit Court of Appeals interpreted trademark infringement and dilution claims in a manner that is consistent with the purpose of both claims - the protection of consumers and the protection of the mark itself.\(^{212}\)

A. Infringement

The *Hormel* court performed a careful analysis of the trademark infringement claim by utilizing the eight factors set forth in *Polaroid Corp. v. Polarad Electronics Corp.*\(^{213}\) These factors estimate the likelihood of consumer confusion as to the source of the goods in question. Such consumer confusion is the linchpin of a federal trademark action.\(^{214}\) Since *Polaroid*, the Second Circuit Court of Appeals has consistently and correctly relied upon the *Polaroid* factors when examining a Lanham Act claim.\(^{215}\)

\(^{207}.\) See *Hormel*, 73 F.3d at 507.
\(^{208}.\) See id. at 508.
\(^{209}.\) Id.
\(^{210}.\) See id.
\(^{211}.\) See id. at 497.
\(^{212}.\) For a discussion of these claims see supra notes 13-126 and accompanying text.
\(^{213}.\) *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492 (2d Cir. 1961). For a discussion of the eight *Polaroid* factors, see supra notes 30-33 and accompanying text.
\(^{214}.\) See Perez, supra note 21, at 1454.
\(^{215}.\) Cases in the Second Circuit relying on the *Polaroid* factors include: Nikon, Inc. v. Ikon Corp., 987 F.2d 91 (2d Cir. 1993); Universal City Studios, Inc. v. Nintendo Co., 746 F.2d 112 (2d Cir. 1984); Sally Gee, Inc. v. Myra Hogan, Inc., 699
While reliance on the eight Polaroid factors is consistent with precedent, the eight factors are not dispositive of the consumer confusion issue. In fact, precedent dictates that the Polaroid list is not exhaustive.216 Since the Polaroid test is not absolute, the Hormel court correctly decided this case within the ambit of a type of judicially created exception to a Lanham Act infringement claim. This "exception" applies to cases which involve parodies similar to the parody in Hormel.

Parody is a class of humor which incorporates recognizable elements of the object of ridicule into the parody. Parodies are uniquely different from other imitations or uses of similar marks and therefore need to be looked at in a different light. The Hormel court recognized the distinctiveness of this form of humor and properly afforded it the corresponding protection. Such a recognition by the Hormel court follows the trend towards broader protection for parodic works for the sake of entertainment.217 The Hormel court not only protected consumers from confusion, but also protected consumers' right to entertainment by affording the Henson character its status as a parody. What the Hormel decision makes clear is that while the eight Polaroid factors are needed to protect consumers from confusion, the factors are indeed flexible, especially when applied in the case of a parody.

Categorizing a parody as an apparent exception in cases like Hormel may seem at first glance unwarranted. After all, the ultimate test for the success of an infringement claim is likelihood of consumer confusion and a parody may lead to consumer confusion. The Polaroid factors however, are not exhaustive. The Hormel court, therefore, was justified in examining the case on another level, as a parody. By examining a case in this slightly different context, a court can still preserve the original purpose of section 1114(1), to prevent consumer confusion.218 The Hormel court accomplished this by examining whether the parody was likely to confuse. This latitude was justified, as the Second Circuit Court of Appeals rightfully held, because although the two marks were at first glance simi-

217. See Keller & Berstein, supra note 105, at 153.
218. See Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ’g Group, Inc., 886 F.2d 490, 494 (2d Cir. 1989). The Cliffs Notes court stated specifically that "the [Lanham] Act should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression." Id. (quoting Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989)).
lar, it was very likely that the parodic context in which the name Spa’am appeared would distinguish the marks in a consumer’s mind.219

Viewing the Polaroid factors in light of the nature and purpose of a parody allowed the Hormel court to protect the integrity of the Lanham Act without compromising the freedom of the creative process. The Hormel decision was mindful of the tension between protecting the public interest in avoiding consumer confusion and protecting the public interest in free expression. When examining each Polaroid factor in turn, the Second Circuit Court of Appeals consistently reflected on the nature of Henson’s alleged infringement as a parody.220 When deciding on the ultimate question of consumer confusion, the court properly concluded that:

Henson’s use of the name “Spa’am” is simply another in a long line of Muppet lampoons. Moreover, this Muppet brand of humor is widely recognized and enjoyed. Thus, consumers of Henson’s merchandise, all of which will display the words “Muppet Treasure Island,” are likely to see the name “Spa’am” as the joke it was intended to be.221

The court correctly found Spa’am not likely to confuse because it was indeed a parody.

The parody exception to section 1114(1) of the Lanham Act is not absolutely guaranteed simply because a parody is involved.222 The check on the parody exception is the fact that the confusion standard remains. A court must still look to see if consumer confusion is likely. The standard, however, is a likelihood of confusion based on the parody.

The objective of section 1114(1) of the Lanham Act is to protect the reasonable consumer.223 Such a standard does not presuppose a certain class of consumers. Rather, it encompasses “an

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219. See Hormel, 73 F.3d at 504.
220. See id. at 503.
221. Id.
222. Numerous cases involving parodies have been found to violate § 1114(1) of the Lanham Act. See Anheuser-Busch, Inc. v. Balducci Publications, 28 F.3d 769, 777 (8th Cir. 1994) (holding that defendant’s ad parody was likely to cause consumer confusion and infringe on plaintiff’s trademark); Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc., 642 F. Supp. 1031, 1036 (N.D. Ga. 1986) (holding that parody stickers based on plaintiff’s dolls would lead to confusion as to source of stickers); Coca-Cola Co. v. Gemini Rising, Inc., 346 F. Supp. 1183, 1193 (E.D.N.Y. 1972) (holding that defendant’s posters demonstrated high probability of confusion).
223. See McCarthy, supra note 24, § 23.01-23.02[1].
appreciable number of reasonable buyers [who] are likely to be confused." The Hormel decision was again on point when the court looked to the degree of consumer sophistication. The Second Circuit Court of Appeals concluded that consumers who want to purchase SPAM merchandise do so to affiliate themselves with Hormel’s product. Consumers would not be confused by Henson’s merchandise because the elements of parody in Henson’s Spa’am merchandise distinguish those products from ones manufactured by Hormel. This conclusion by the court once again demonstrates the court’s proper application of the Polaroid factors in light of the parody.

B. Dilution

While dilution is still a somewhat nebulous concept, one thing appears clear: dilution has been limited exclusively to protection of the selling power of a mark via the mark’s identifying function. This notion affirms Frank I. Schechter’s founding view of dilution, that the mark actually sells the product and therefore the mark is worthy of protection. The Hormel court focused on the dilution concept envisioned by the concept’s founder. While there is uncertainty concerning the definition of dilution, the Hormel court correctly adopted the earliest definition of dilution as a “gradual whittling away of a firm’s distinctive trade-mark or name.” The Second Circuit considered the dilution doctrine and logically analyzed dilution in terms of blurring and tarnishment.

1. Blurring

Dilution by way of blurring occurs when the plaintiff’s mark is used on a plethora of goods thus decreasing the mark’s ability to serve as a unique identifier. In recent times, the use of a full-blown merchandising campaign to...
promote a motion picture has become common. In fact, the use of this method of merchandising is exactly what Hormel feared would infringe and dilute its SPAM mark. The Second Circuit Court of Appeals' decision to protect Henson's parodic character in Henson's motion picture not only preserved the free flow of creative ideas, but also the full realization of the economic capacity of a movie.

The Second Circuit Court of Appeals properly ruled against Hormel on a theory of blurring. The court's decision on this issue specifically pointed to the notion that dilution by blurring was unlikely, since Henson was not using the name Spa'am as a product brand name, but as a character under the Henson trademark. Again, the Hormel court pointed to the unique nature of the parody to support its finding of no dilution. This holding is correct because parodies are distinctive. The Hormel court relied upon precedent which indicates that parodies "tend[] to increase public identification" of the parodied mark. This increased public identification occurred in the Hormel case. The parody using the Spa'am character is obvious, not subtle. When a parody is so obvious, blurring is unlikely. The Second Circuit Court of Appeals, therefore, was correct because the parody in this case was obvious, especially since the Muppets are known for their parodies. Additionally, the similarities between the two marks are superficial at best.

The Hormel court's holding of no dilution is correct for two more reasons. First, the word Spa'am was spoken only once in the entire movie. The overwhelming infrequency of the use of the name Spa'am in the movie greatly reduced the opportunity that the name SPAM would be diluted. In addition, Henson planned to place the words "Muppet Treasure Island" on any merchandise featuring the name or likeness of Spa'am. These safeguards dispelled the notion that blurring would occur by use of the Spa'am name or likeness on merchandise. The Hormel court made the correct finding with respect to dilution. The merchandising aspect of

232. See Hormel, 73 F.3d at 502. Hormel feared that sales of merchandise featuring Spa'am would directly cut into the sales of secondary SPAM items. See id.
233. See id. at 506.
234. Id. (quoting Jordache Enters., Inc. v. Hogg Wyld, Ltd., 828 F.2d 1482, 1490 (10th Cir. 1987)).
235. See id. at 506. But see Anheuser-Busch, Inc. v. Balducci Publications, 28 F.3d 769, 776 (8th Cir. 1994) (holding that parody was so subtle that likelihood of confusion and dilution existed).
236. See Hormel, 73 F.3d at 500.
237. See id. at 501.
this motion picture was preserved and Hormel's inherent value in its mark was not compromised but arguably increased thanks to Henson's promise to specifically associate Spa'am with "Muppet Treasure Island" on its merchandise.

2. *Tarnishment*

Dilution by tarnishment occurs when the trademark is linked to products of inferior quality, or is portrayed in a seedy or unsavory way.\(^{238}\) The decision in *Hormel* properly denied relief on this theory as well. The Henson Production Company and the Muppets are well known and well respected in the entertainment industry. They are responsible for providing quality entertainment for children, and adults alike. One of the characteristics of their entertainment repertoire are their parodies. The character Spa'am follows in this Henson tradition. Any association of Hormel's product to Henson's Spa'am character would be associating one quality product with another. The prestige or reputation of SPAM will not decrease or suffer tarnishment by any possible association between the two marks.

The *Hormel* decision follows precedent which established a distinction when dealing with dilution by tarnishment. Courts have drawn the line in dilution by tarnishment cases along the lines of good taste.\(^{239}\) The *Hormel* court is no exception. Cases that have found dilution by tarnishment include *Anheuser-Busch, Inc. v. Balducci Publications*,\(^{240}\) *Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.*,\(^{241}\) *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*\(^{242}\) and *Coca-Cola Co. v. Gemini Rising, Inc.*\(^{243}\) All of these cases share the common characteristic of parodies gone wrong. Each involved a parody which the court determined crossed the line of humor over to tastelessness, devoid of any wholesome entertainment value.

The Second Circuit Court of Appeals did not find any tarnishment by use of the Spa'am character. Their decision was based on the finding that Spa'am was not unsavory, but actually a likeable,

\(^{238}\) See *id.* at 507. For a discussion of tarnishment, see *supra* notes 787-801 and accompanying text.

\(^{239}\) See Welkowitz, *supra* note 18, at 556 (discussing how parodies which border on line of good taste are likely to tarnish senior user).

\(^{240}\) 28 F.3d 769 (8th Cir. 1994).


\(^{242}\) 604 F.2d 200 (2d Cir. 1979).

positive character. This finding is consistent with the line of parody cases. The Second Circuit Court of Appeals was aware that the right to a trademark does not include the right not to become the object of humor. With this in mind, the court correctly restrained itself from increasing the scope of New York's antidilution law to prohibit all uses of a trademark that the owner prefers not to be made. When a parody remains in the realm of humor, entertainment and good taste, it will likely be protected. The *Hormel* court recognized this distinction and reached the proper conclusion.

Finally, the Second Circuit Court of Appeals' decision reflects a degree of judicial restraint in applying antidilution statutes. The judicial hesitancy towards dilution is based on a concern that a broad application of the dilution doctrine will inhibit free commercial use of language and foster a monopolization of language. The *Hormel* court seemed to have this same concern. Perhaps the decision in *Hormel* is based upon the recognition that the dilution doctrine, if applied too broadly, can "swallow up all competition in the claim of protection against trade name infringement." Through an exercise of judicial restraint, the Second Circuit Court of Appeals protected the open marketplace of expression.

VI. IMPACT

The Second Circuit Court of Appeals decided, in *Hormel Foods Corp. v. Jim Henson Productions,* that neither infringement nor dilution occurred by use of Henson's Spa'äm character in Henson's movie. Early cases dealing with these same issues reflect a judicial ambiguity and reluctance to confront infringement and especially dilution concepts. The *Hormel* court, however, confronted both issues with certainty. The Second Circuit Court of Appeals' analysis in this case continues the progressive approach courts have taken concerning the treatment of parody cases. This decision reflects a tolerant view of parodies and their place in the entertainment industry.

244. *See Hormel*, 73 F.3d at 507.
245. *See Handler*, *supra* note 89, at 278 (discussing how broad view of dilution could result in undesirable monopolization of language).
247. 73 F.3d 497 (2d Cir. 1996).
248. The *Hormel* decision also reflects the intent of the recently signed Federal Trademark Dilution Act which creates a new federal cause of action for owners of "famous" trademarks. *See Federal Trademark Dilution Act of 1995, § 43(c), 15 U.S.C. § 1125(c) (1996).*
The decision in *Hormel* protected both free competition and creativity. In dealing with a vague antidilution statute, the Second Circuit Court of Appeals used available precedent to guide its decision. What is apparent from this case is the need for more guidance from antidilution statutes. Because this case involved a parody, the court had the luxury of considering the exceptions to the statute which have been carved out by precedent. In cases which do not involve parodies, direction from the language of antidilution statutes would prove helpful. The *Hormel* decision is one in a long line of cases where the protection available from an antidilution statute is implicated. The extensive analysis the court employed to reach its holding would be unnecessary with clear statutory language defining dilution. Through amendments to state antidilution statutes, some guidance as to the precise definition of dilution is greatly needed.

The ramifications of the *Hormel* decision will greatly affect the motion picture industry. Not only does the decision fortify the use of a parody as a comedic device, the decision also strengthens the merchandising market surrounding motion pictures. This increasingly popular component of a movie release gained appreciation by the Second Circuit Court of Appeals in the *Hormel* decision.

The case of *Hormel* although seemingly humourous, is not frivolous.249 It represents the notion that there exists a form of humor that borrows from an original work and expands upon this original in such a way as to turn the original into its own entity. This form of humor is gaining increasing acceptance in our judiciary. Rather than trying to fight this "form of flattery," movie studios with trademarks possibly subject to infringement or dilution should concentrate their energies not on finding subjective evil in the parody but instead on laughing at such a parody objectively with the rest of society.

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