

NEW-SCHOOL TRADEMARK DILUTION: FAMOUS AMONG THE JUVENILE CONSUMING PUBLIC

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The recently enacted Trademark Dilution Revision Act of 2006 recalibrated the degree of fame necessary to garner protection: the TDRA applies only to a mark “widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark’s owner.” By privileging those major players who succeed in turning their brands into household names, the TDRA strengthens incentives for mark-owners to ensure their logos and brand names are well-recognized not only among adult consumers, but also among children. This Article examines a set of marketing behaviors aimed at children that the TDRA’s revised fame standard both reflects and rewards. Deeming fewer marks famous may serve the immediate purpose of creating a higher bar for plaintiffs to successfully bring dilution claims, but that bar should be set at age twenty-one to avoid rewarding firms for making loyal consumers out of teenagers, tweens, kids and even infants.

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INTRODUCTION

The recently enacted Trademark Dilution Revision Act of 2006 (“TDRA”) recalibrated the degree of fame necessary to garner protection: the TDRA covers only marks that are each “widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark’s owner.”¹ By privileging those major players who succeed in turning their brands into household names, the TDRA strengthens incentives for mark-owners to ensure their logos and brand names are well-recognized not only among adult consumers, but also among children. Young audiences offer firms three markets: primary, influence and future.² In conjunction with increased spending power of children and teenagers and expanded protection for trademark and commercial speech, the new fame standard encourages marketers to favor persuasive over informative advertising. Firms seeking nationwide brand awareness increasingly work to cultivate mindshare across all demograph-

¹ 15 U.S.C. § 1125(c)(2)(A) (2006).

² James U. McNeal, *Tapping the Three Kids’ Markets*, AM. DEMOGRAPHICS, Apr. 1998, at 37. (“Virtually all consumer goods makers target children, either as the primary market, as an influence on parental purchasers, or as future consumers.”).

ics, rather than simply to convey product and source information to those consumers that compose a relevant niche. While the increase in advertising to non-target adult consumers of different genders, ethnicities, locations and hobbies may generate merely a surplus of noise, the proliferation of marketing campaigns directed at young children presents a growing public health threat to kids' mental, social and physical development.

Courts and scholars have yet to resolve how best to establish fame using empirical evidence in federal dilution cases.³ Whether to survey children as part of the relevant universe in any trademark action also remains an open question.⁴ Mapping the TDRA's fame factors onto current advertising trends illuminates how the TDRA increases incentives for firms to engage in certain marketing practices directed toward adolescents, young children and sometimes infants. Those strategies include in-school advertising, animarketing, cross-licensing and product placement deals designed specifically to appeal to kids.

Many critics have urged federal regulation or blanket bans on certain marketing practices, deriding advertisers for targeting young children in insidious and pervasive ways; others invoke the First Amendment to justify both the expansive trademark regime and the massive onslaught of advertisements geared toward young people.⁵ This Article links the marketing trends to changes in the legal landscape, resulting specifically from the enactment of the TDRA. Section I reviews how "fame" has been defined and construed under the TDRA and the Federal Trademark Dilution Act of 1995 ("FTDA"). Section II discusses the amount and variety of advertising that targets children and the three markets children comprise. Section III more closely explores a set of marketing practices that appeal to kids and teenagers. Section IV describes how three brands that relied on the marketing strategies introduced in Section II have fared thus far in establishing their marks' fame for the purpose of proving a dilution claim, and surmises how they might fare in the future under the TDRA.

³ See generally Adam Omar Shanti, *Measuring Fame: The Use of Empirical Evidence in Dilution Actions*, 5 MARQ. INTELL. PROP. L. REV. 177 (2001).

⁴ Robert H. Thornburg, *Trademark Surveys: Development of Computer-Based Survey Methods*, 4 J. MARSHALL REV. INTELL. PROP. L. 91, 99 (2004) ("Assessing the proper universe for children has . . . plagued survey experts with the task of determining whether to seek a survey limited just to children or to adults who purchase for children."); see *infra* Section IV.

⁵ See, e.g., SUSAN LINN, CONSUMING KIDS: PROTECTING OUR CHILDREN FROM THE ONSLAUGHT OF MARKETING AND ADVERTISING 198–219 (2004); JULIET B. SCHOR, BORN TO BUY: THE COMMERCIALIZED CHILD AND THE NEW CONSUMER CULTURE 194–97 (2005); VICTOR C. STRASBURGER & BARBARA J. WILSON, CHILDREN, ADOLESCENTS, & THE MEDIA 376–80 (2002); Campaign for a Commercial-Free Childhood, <http://www.commercialexploitation.org> (last visited May 12, 2009).

The Article concludes that the TDRA protects and thus rewards those brands that rely increasingly or solely on youth audiences to generate the level of fame adequate to satisfy the revised criteria. While current trends likely contributed to changes to the fame standard under the TDRA, those changes will also feed back into and perpetuate the cycle, promising yet another reward for persuasive advertising geared toward kids. The following sections examine a set of marketing behaviors aimed at children that the TDRA's revised fame standard both reflects and rewards. Deeming fewer marks famous may serve the immediate purpose of creating a higher bar for plaintiffs to successfully bring dilution claims, but that bar should be set at age twenty-one to avoid rewarding firms for making loyal consumers out of teenagers, tweens,⁶ kids and even infants.

I. THE EVOLUTION OF FAME

A. *Limiting Dilution Protection to Famous Marks*

With the passage of the TDRA, Congress relaxed the standard of proof for dilution claims, so that mark-owners need establish not actual dilution, but mere *likely* dilution.⁷ While the revisions⁸ ostensibly stemmed from a desire to refine the Supreme Court's narrow interpretation of the FTDA in *Moseley v. V Secret Catalogue*,⁹ a decision which many felt took the teeth out of the FTDA,¹⁰

⁶ The "tween" market refers to those consumers *between* children and teenagers, typically between ages six and twelve.

⁷ The Supreme Court resolved a circuit split to hold that the FTDA unambiguously requires a showing of actual dilution, rather than a likelihood of dilution, by objective proof of actual injury to the economic value of the mark. *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 432 (2003), *superseded by* Trademark Dilution Revision Act, Pub. L. 109-312, 120 Stat. 1730 (2006). Dissatisfaction with the *Moseley* Court's holding eventually led Congress to explicitly overrule the actual dilution requirement by passing the TDRA. *See* H.R. REP. NO. 109-23, at 5 (2005).

⁸ Some consider the "revision" part of the Trademark Dilution Revision Act a misnomer, since the TDRA strikes and replaces, rather than revises, the FTDA. *See, e.g.*, Michael Atkins, *The Trademark Dilution Revision Act is Misnamed*, Seattle Trademark Lawyer, Apr. 18, 2007, <http://seattletrademarklawyer.com/blog/2007/4/18/the-trademark-dilution-revision-act-is-misnamed.html> (last visited May 1, 2009). Several courts continue to refer to the FTDA while applying the revised Act. *See, e.g.*, *Biosafe-One, Inc. v. Hawks*, 524 F. Supp. 2d 452, 467 (S.D.N.Y. 2007).

⁹ 537 U.S. 418, 432 (2003), *superseded by* Trademark Dilution Revision Act, Pub. L. 109-312, 120 Stat. 1730 (2006).

the standard of proof was not the only thing revised. The TDRA also clearly defined “blurring” and “tarnishment,” limited dilution actions to claims for relief from those two types of injury, refined the explanation of “use in commerce,” modified the damages provision and clarified the set of viable fair use defenses.¹¹ Lastly, it heightened the degree of fame necessary to garner protection, trimming the list of factors for evaluating fame from eight to four and excluding niche fame.¹²

Regarding the latter, the TDRA covers only those marks “widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark’s owner.”¹³ In heightening the fame requirement, the Act jettisons the “niche fame” standard that once sufficed in many circuits¹⁴ to shield from dilution a brand famous within the confines of its sub-community, whether a particular geographic region,¹⁵ group of consumers¹⁶

¹⁰ William G. Barber, *The Trademark Dilution Revision Act of 2005: Breathing Life Back into the Federal Dilution Statute*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1113, 1123 (“Unfortunately, the Supreme Court’s *Moseley* decision essentially emasculates the FTDA.”).

¹¹ 15 U.S.C. § 1125(c)(2)(A) (2006).

¹² *See id.*

¹³ *Id.*

¹⁴ Many, but not all, courts applied the FTDA to protect niche fame. Scott C. Wilcox, *The Dilution Solution: Populating the Trademark A-List*, 105 MICH. L. REV. FIRST IMPRESSIONS 113, 114 (2006). Nonetheless, some critics felt the protection unwarranted and even nonsensical, arguing infringement claims adequately protected owners of marks famous only among a particular segment of the consuming public. *See, e.g.*, Barber, *supra* note 10, at 1123. Conversely, some feel a line is impossible to draw, as every product is somewhat “niche.” Those niches simply vary in size: brands of snow blowers or winter gloves can probably never achieve fame among the general consuming public, given residents of some regions of the country never see a single snowflake. Jacob Jacoby, *Considering the Who, What, When, Where, and How of Measuring Dilution*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 601, 605 (2008). Shanti suggests the courts or Congress, for the sake of consistency, settle on a degree of recognition among surveyed consumers that will serve as the minimum point a mark must reach to establish its fame under the TDRA. Shanti, *supra* note 3, at 203. He recommends seventy percent of surveyed consumers as the minimum point; Nguyen suggests forty percent might be adequate. Xuan-Thao N. Nguyen, *The New Wild West: Measuring and Proving Fame and Dilution Under the Federal Trademark Dilution Act*, 63 ALB. L. REV. 201, 234 (1999).

¹⁵ *See, e.g.*, *Wawa, Inc. v. Haaf*, 40 U.S.P.Q.2d (BNA) 1629, 1631 (E.D. Pa. 1996) (illustrating that WaWa, a convenience store and filling station chain, is well known in the five Mid-Atlantic states, in which it operates more than 570 stores, and is therefore a strong and famous mark); *see* Jessica L. Ingram, *The Dilution Solution: Modifying the Requirements of Fame for a Trademark Under the Proposed Amendment to the Federal Trademark Dilution Act*, 75 UMKC L. REV. 245, 245 (2006) (arguing that eliminating niche fame punishes owners of strong, regionally famous marks like WaWa, which deserve protection); *see also* Barton Beebe, *A Defense of the New Federal Trademark Antidilution Law*, 16 FORDHAM INTELL.

or product line.¹⁷ Myriad scholars, many of whom oppose the dilution doctrine based upon a belief that it lacks any foundation in consumer protection, have criticized the TDRA and its “likelihood of confusion” standard as protecting corporate interests to an offensive degree, creating excessive property rights in intangible symbols of business investment and implicating First Amendment speech rights in the process. But to others, the narrowed fame standard offsets the broadened standard of proof.¹⁸ Scot Duvall, one of the TDRA’s drafters, suggests that the higher degree of recognition the TDRA demands for famous marks actually constitutes a “significant reform” that will keep dilution law “in check” and resolve concerns that courts applied the FTDA too broadly.¹⁹

Under the TDRA’s new definition of fame, Congress limited the scope of dilution protection to what one writer approvingly terms “A-List brands.”²⁰ For example, those surveying mark recognition would be hard-pressed to find American consumers who do not recognize many of the brands and logos that Interbrand’s ranking of the hundred most valuable global marks includes.²¹ A sizeable number of the brands produce goods that appeal to children, including soft drinks (Coca-Cola ranks first, with Pepsi trailing behind), snacks (including Kellogg, Wrigley, Nestle and Kraft), restaurants (McDonald’s comes in eighth, then Pizza Hut and Starbucks), apparel (including Nike and Adidas) and entertainment (Disney ranks ninth; Nintendo and MTV follow). Several ostensibly

PROP. MEDIA & ENT. L.J. 1143, 1158–59 (2006) (asserting that WaWa would likely not be held famous under the TDRA’s revised standard of fame).

¹⁶ See, e.g., *Lozano Enters. v. La Opinion Publ’g Co.*, 44 U.S.P.Q.2d (BNA) 1764, 1766 (C.D. Cal. 1997) (showing how *La Opinión* is a newspaper widely-recognized among a significant portion of the Spanish-speaking population).

¹⁷ See, e.g., *Pebble Beach Co. v. Tour 18 I, Ltd.*, 942 F. Supp. 1513, 1527 (S.D. Tex. 1996) (applying Texas’s antidilution statute in an action involving Pebble Beach, a course well-known among golfers) (“Pebble Beach Golf Links has consistently been named among the top five golf courses in the United States . . . [and] the evidence establishes that Pebble Beach Golf Links is a famous golf course among golfers nationwide.”).

¹⁸ Scot A. Duvall, *The Trademark Dilution Revision Act of 2006: Balanced Protection for Famous Brands*, 97 TRADEMARK REP. 1252, 1260 (2007).

¹⁹ *Id.* at 1262 (noting that while other provisions of the TDRA were modified after submission to Congress, the new definition of a “famous” mark remained unchanged at the time of passage). Indeed, many of the TDRA’s supporters and detractors alike have asserted that the increased protection offered by the change to “likely dilution” is at least alleviated by its recalibration of “fame,” as though the two changes are inconsistent.

²⁰ Wilcox, *supra* note 14, at 113.

²¹ *The 100 Top Brands*, BUS.WK., Aug. 6, 2007, at 59. The listed brands came in at the following slots: Coca-Cola (1); McDonald’s (8); Disney (9); Pepsi (26); Nike (29); Kellogg (40); Nintendo (44); MTV (52); Wrigley’s (59); Nestle (63); Adidas (69); Pizza Hut (74); Kraft (86); and Starbucks (88). *Id.*

adult brands also warrant mention: automobile companies (Toyota, BMW and Mercedes-Benz all rank in the top fifteen), alcohol brands (Budweiser, Smirnoff, Hennessy and Moet & Chandon make the list) and electronic goods and services (including Google, Nokia, Apple, Sony and many others). A number of those “adult” brands have nonetheless targeted children through various media, aiming to secure “household word”²² status and future sales if not to reap immediate rewards through children’s spending and the phenomenon anthropologists have dubbed KGOY, for “kids getting older younger.”²³

For those A-List marks, brand identity and widespread recognition in the future take greater priority than do next quarter’s profits. Such mega-firms often invest as heavily in cultivating brand awareness as on perfecting existing goods, so that the products come to serve primarily as “brand delivery vehicles.”²⁴ For many companies, the brand itself *becomes* the product.²⁵ The

²² The phrase derives from Shakespeare: “Familiar in his mouth as household words.” WILLIAM SHAKESPEARE, HENRY THE FIFTH act 4, sc. 3. The presumption that dilution doctrine protects only those marks that constitute “household words” or “household names” predates the FTDA, and was first articulated by Frank Schechter, often considered the pioneer of dilution doctrine. Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 825 (1927), reprinted in 60 TRADEMARK REP. 334, 342 (1970). DuPont, Buick and Kodak are examples of “marks that for the major part of the century have been household words throughout the United States[,] . . . representative of the best known marks in commerce.” TCPIP Holding Co., Inc. v. Haar Commc’ns, Inc., 244 F.3d 88, 99 (2d Cir. 2001) (citing H.R. REP. NO. 104-374, at 3 (1995), reprinted in 1995 U.S.C.C.A.N. 1029, 1030).

²³ Camille Sweeney, *Never Too Young for That First Pedicure*, N.Y. TIMES, Feb. 28, 2008, at G3, available at <http://www.nytimes.com/2008/02/28/fashion/28Skin.html>.

²⁴ Victor Fleischer, *Brand New Deal: The Branding Effect of Corporate Deal Structures*, 104 MICH. L. REV. 1581, 1632 (2006); see Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 397 (1990) (calling trademarks “the emerging lingua franca” and tracking their journey from “ideograms that once functioned solely as signals denoting the source, origin, and quality of goods” to “products in their own right, valued as indicators of the status, preferences, and aspirations of those who use them”).

²⁵ Naomi Klein describes this phenomenon in her seminal book NO LOGO:

[P]ioneers [like Nike, Microsoft, Tommy Hilfiger, and Intel] made the bold claim that producing goods was only an incidental part of their operations, and that thanks to recent victories in trade liberalization and labor-law reform, they were able to have their products made for them by contractors, many of them overseas. What these companies produced primarily were not things, they said, but *images* of their brands.

NAOMI KLEIN, NO LOGO: NO SPACE, NO CHOICE, NO JOBS 4 (1999) (also published as NO LOGO: TAKING AIM AT THE BRAND BULLIES).

TDRA's redefined fame both stems from, and provides incentives for, the movement toward fewer, broader brand powerhouses.

B. Old-School Fame

Prior to 2006, the FTDA offered eight nonexclusive factors to aid in determining whether a mark was famous enough to garner federal protection from dilution:

(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 mark's 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.²⁶

After the FTDA and before the TDRA, the marks found to satisfy the fame standard promulgated in 1995 varied from the indisputably well-recognized (including POST-IT,²⁷ PORSCHE,²⁸ PEPSI²⁹ and PROZAC³⁰) to those less familiar to most (including SPORTY'S,³¹ TELETECH³² and PIRELLI³³). In some circuits, courts explicitly construed the FTDA to protect marks famous only within a specific geographic zone³⁴ or among a subset of

²⁶ 15 U.S.C. § 1125(c) (1996) (amended in 2006).

²⁷ *Minn. Mining & Mfg. Co. v. Taylor*, 21 F. Supp. 2d 1003, 1005 (D. Minn. 1998).

²⁸ *Porsche Cars N. Am., Inc. v. Manny's Porshop, Inc.*, 972 F. Supp. 1128, 1129 (N.D. Ill. 1997) (PORSCHE likely famous on preliminary injunction motion).

²⁹ *PepsiCo, Inc. v. Reyes*, 70 F. Supp. 2d 1057, 1060 (C.D. Cal. 1999).

³⁰ *Eli Lilly & Co. v. Natural Answers, Inc.*, 86 F. Supp. 2d 834, 848 (S.D. Ind. 2000).

³¹ *Sporty's Farm, L.L.C. v. Sportsman's Market, Inc.*, 202 F.3d 489, 493 (2d Cir. 2000) (famous for aviation products).

³² *TeleTech Customer Care Mgmt., Inc. v. TeleTech Co., Inc.*, 977 F. Supp. 1407, 1413 (C.D. Cal. 1997) (TELETECH deemed famous on preliminary injunction motion).

³³ *Pirelli Armstrong Tire Corp. v. Titan Tire Corp.*, 4 F. Supp. 2d 794, 802 (C.D. Ill. 1998) (PIRELLI and ARMSTRONG deemed famous; court reasoned only that "the trademarks have been registered for over 80 years and are incontestable").

³⁴ *Lozano Enters. v. La Opinion Publ'g. Co.*, 44 U.S.P.Q.2d (BNA) 1764, 1766 (C.D. Cal. 1997) (LA OPINIÓN famous in those areas boasting large Hispanic populations); *Wawa, Inc. v. Haaf*, 40 U.S.P.Q.2d (BNA) 1629, 1631 (E.D. Pa. 1996) (WAWA famous only within five states).

consumers who compose the market for a particular type of product.³⁵ Some courts decried a lack of guidance: the FTDA demands a mark be famous to qualify for its protection, without prescribing *how* famous a mark must be, nor providing adequate guidelines for evaluating fame. The word “famous” is subject to a broad range of interpretations.³⁶ Courts and market players knew that the marks BUICK, KODAK and DUPONT were incontestably famous, because Congress explicitly told them.³⁷ But jurisdictions were less confident in sussing out the fame of in-between marks, treating the empirical evidence inconsistently and failing to set out specific criteria that plaintiffs in dilution litigation could aspire to satisfy.

Indeed, consider the marks deemed famous and those not famous under the FTDA: when it came to toys, CLUE was not famous,³⁸ though BARBIE,³⁹ ETCH A SKETCH,⁴⁰ HOT WHEELS,⁴¹ TOYS “R” US⁴² and the children’s book character Arthur⁴³ were. At snacktime, GOLDFISH⁴⁴ and DAIRY QUEEN⁴⁵ warranted protection that the trade dress for REESE’S PEANUT BUTTER CUPS ostensibly did not.⁴⁶ In fashion brands and icons, the ETERNITY perfume bottle was not famous,⁴⁷ nor was brand name BONGO,⁴⁸

³⁵ Hodgdon Powder Co., Inc. v. Alliant Techsystems, Inc., 497 F. Supp. 2d 1221, 1232 n.3 (D. Kan. 2007) (CLAY found famous for those who purchase gunpowder; the court explicitly applying the FTDA despite reaching trial after the enactment of the TDRA); Consol. Cigar Corp. v. Monte Cristi de Tabacos, 58 F. Supp. 2d 188, 200 (S.D.N.Y. 1999) (MONTECRISTO for cigar smokers); N.Y. State Soc’y of Certified Pub. Accountants v. Eric Louis Assocs., Inc., 79 F. Supp. 2d 331, 344 (S.D.N.Y. 1999) (accountants).

³⁶ TCPIP Holding Co., Inc. v. Haar Commc’ns, Inc., 244 F.3d 88, 98 (2d Cir. 2001).

³⁷ H.R. REP. NO. 104-374, at 3 (1995), *reprinted in* 1995 U.S.C.C.A.N. 1029, 1030.

³⁸ Hasbro, Inc. v. Clue Computing, Inc., 66 F. Supp. 2d 117, 131 (D. Mass. 1999).

³⁹ Mattel, Inc. v. Jcom, Inc., 48 U.S.P.Q.2d (BNA) 1467, 1470 (S.D.N.Y. 1998) (concluding BARBIE mark famous “by any measure”).

⁴⁰ Ohio Art Co. v. Watts, 49 U.S.P.Q.2d (BNA) 1957, 1957 (N.D. Ohio 1998) (showing mark to be “well known to the Court and to the American public”).

⁴¹ Jada Toys, Inc. v. Mattel, Inc., 496 F.3d 974, 982 (9th Cir. 2007) (reversing and remanding summary judgment for the plaintiff, Jada Toys, and noting that a reasonable trier of fact could find HOT WHEELS mark famous under the FTDA standard).

⁴² Toys “R” Us, Inc. v. Abir, 45 U.S.P.Q.2d (BNA) 1944, 1948 (S.D.N.Y. 1997).

⁴³ Brown v. It’s Entertainment, Inc., 34 F. Supp. 2d 854, 859 (E.D.N.Y. 1999).

⁴⁴ Nabisco, Inc. v. PF Brands, Inc., 50 F. Supp. 2d 188, 205 (S.D.N.Y. 1999).

⁴⁵ Am. Dairy Queen Corp. v. New Lines Prods., Inc., 35 F. Supp. 2d 727, 732 (D. Minn. 1998).

⁴⁶ Hershey Foods Corp. v. Mars, Inc., 998 F. Supp. 500, 512 (M.D. Pa. 1998).

⁴⁷ Conopco, Inc. v. Cosmair, Inc., 49 F. Supp. 2d 242, 259 (S.D.N.Y. 1999) (denying plaintiff’s motion for preliminary injunction).

⁴⁸ Michael Caruso & Co. v. Estefan Enters., Inc., 994 F. Supp. 1454, 1463 (S.D. Fla. 1998).

but courts placed both POLO⁴⁹ and JAMES BOND⁵⁰ in the league of famous marks. In the technology field, ALLETEL didn't make the cut,⁵¹ but HOTMAIL,⁵² AOL,⁵³ INTERMATIC⁵⁴ and the aforementioned TELETECH apparently did.⁵⁵ The NEW YORK STOCK EXCHANGE did not warrant the FTDA's protection from dilution,⁵⁶ but herbal supplement PYCNOGENOL did.⁵⁷ The following marks were deemed famous, at least at the time courts heard their federal dilution claims: THE SPORTING NEWS,⁵⁸ PANAVISION⁵⁹ and JEWS FOR JESUS.⁶⁰ The following marks were characterized not famous: FUN SHIP cruises,⁶¹ LANE CAPITAL MANAGEMENT,⁶² WEATHER GUARD⁶³ and BIG STAR.⁶⁴ The Southern District of New York noted that the mark COLUMBIA was not famous for the University.⁶⁵ However, applying the FTDA standard two months after the TDRA's passage, neither the court nor the

⁴⁹ Polo Ralph Lauren L.P. v. Schuman, 46 U.S.P.Q.2d (BNA) 1046, 1048 (S.D. Tex. 1998).

⁵⁰ Danjaq L.L.C. v. Sony Corp., 49 U.S.P.Q.2d (BNA) 1341, 1346 (C.D. Cal. 1998) (fame of JAMES BOND mark deemed "undisputed"), *aff'd*, 165 F.3d 915 (9th Cir. 1998).

⁵¹ Alltel Corp. v. Actel Integrated Commc'ns, Inc., 42 F. Supp. 2d 1265, 1273 (S.D. Ala. 1999).

⁵² Hotmail Corp. v. Van\$ Money Pie, Inc., 47 U.S.P.Q.2d (BNA) 1020, 1024 (N.D. Cal. 1998).

⁵³ Am. Online, Inc. v. IMS, 24 F. Supp. 2d 548, 552 (E.D. Va. 1998).

⁵⁴ Intermatic, Inc. v. Toeppen, 947 F. Supp. 1227, 1239 (N.D. Ill. 1996).

⁵⁵ TeleTech Customer Care Mgmt., Inc. v. TeleTech Co., Inc., 977 F. Supp. 1407, 1413 (C.D. Cal. 1997).

⁵⁶ N.Y. Stock Exch., Inc. v. N.Y., N.Y. Hotel L.L.C., 69 F. Supp. 2d 479, 488–90 (S.D.N.Y. 1999) (NEW YORK STOCK EXCHANGE, in combination with the facade of the Stock Exchange building, was deemed not famous).

⁵⁷ Horphag Research Ltd. v. Garcia, 475 F.3d 1029, 1036 (9th Cir. 2007) (court did not conduct a fame analysis, but applied FTDA to protect niche fame of mark for pine bark extract used in many herbal supplements).

⁵⁸ Times Mirror Magazines, Inc. v. Las Vegas Sports News L.L.C., 212 F.3d 157, 165 (3d Cir. 2000) (usually cited as the first to establish and articulate niche fame).

⁵⁹ Panavision, Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1324 (9th Cir. 1998).

⁶⁰ Jews for Jesus v. Brodsky, 993 F. Supp. 282, 306 (D.N.J. 1998).

⁶¹ Carnival Corp. v. SeaEscape Casino Cruises, Inc., 74 F. Supp. 2d 1261, 1271 (S.D. Fla. 1999).

⁶² Lane Capital Mgmt., Inc. v. Lane Capital Mgmt., Inc., 15 F. Supp. 2d 389, 391 (S.D.N.Y. 1998) (mark not famous for purposes of summary judgment motion), *aff'd on other grounds*, 192 F.3d 337 (2d Cir. 1999).

⁶³ Knaack Mfg. Co. v. Rally Accessories, Inc., 955 F. Supp. 991, 1005 (N.D. Ill. 1997).

⁶⁴ BigStar Entm't, Inc. v. Next Big Star, Inc., 105 F. Supp. 2d 185, 218 (S.D.N.Y. 2000).

⁶⁵ Trs. of Columbia Univ. v. Columbia/HCA Healthcare Corp., 964 F. Supp. 733, 750 (S.D.N.Y. 1997).

dilution defendant questioned the fame of BOWFLEX,⁶⁶ the exercise machine that airs its infomercials to insomniacs.

C. *New-School Fame*

To evaluate whether a mark possesses the requisite fame under the TDRA,

the court may consider all relevant factors, including the following: (i) [t]he duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties; (ii) [t]he amount, volume, and geographic extent of sales of goods or services offered under the mark; [and] (iii) [t]he extent of actual recognition of the mark; and (iv) [w]hether the mark was registered.⁶⁷

A number of courts have already heard dilution claims under the new standard. In the first year and a half after the enactment of the TDRA, courts acknowledged the fame of a few classics, like EBAY,⁶⁸ STARBUCKS,⁶⁹ TEMPUR-PEDIC⁷⁰ and NISSAN.⁷¹ They have deemed famous a number of iconic snack foods, including SPAM,⁷² CHEETOS, DORITOS and FRITOS,⁷³ as well as bubbly beverages PEPSI, DIET PEPSI, MOUNTAIN DEW and SIERRA MIST.⁷⁴ In fashion, NIKE⁷⁵ and LOUIS VUITTON⁷⁶ are predictably

⁶⁶ Nautilus Group, Inc. v. Icon Health & Fitness, Inc., No. C02-2420RSM, 2006 WL 3761367, at *3 (W.D. Wash. Dec. 21, 2006).

⁶⁷ 15 U.S.C. § 1125(c)(2) (2006).

⁶⁸ PerfumeBay.com, Inc. v. eBay Inc., 506 F.3d 1165, 1180 n.7 (9th Cir. 2007).

⁶⁹ Starbucks Corp. v. Wolfe's Borough Coffee, Inc., 477 F.3d 765, 766 (2d Cir. 2007).

⁷⁰ Dan-Foam A/S v. Brand Named Beds, L.L.C., 500 F. Supp. 2d 296, 323 (S.D.N.Y. 2007) (denying defendant's motion for summary judgment because a reasonable juror could find fame).

⁷¹ Nissan Motor Co. v. Nissan Computer Corp., No. CV 99-12980 DDP, 2007 U.S. Dist. LEXIS 90487, at *31 (C.D. Cal. Sept. 21, 2007).

⁷² Hormel Foods Corp. v. Spam Arrest, L.L.C., Cancellation No. 92042134, at *37 (T.T.A.B. Nov. 21, 2007) (finding the food product SPAM famous, but finding "spam" as related to e-mail to be generic, and thus not dilutive of SPAM for spiced ham).

⁷³ PepsiCo, Inc. v. # 1 Wholesale, L.L.C., 84 U.S.P.Q.2d (BNA) 1040, 1042 (N.D. Ga. 2007).

⁷⁴ *Id.*

⁷⁵ Nike, Inc. v. Nikepal Int'l, Inc., 84 U.S.P.Q.2d (BNA) 1521, 1526 (E.D. Cal. 2007).

⁷⁶ Louis Vuitton Malletier S.A. v. Haute Diggity Dog, L.L.C., 507 F.3d 252, 267 (4th Cir. 2007) (finding no dilution, but concluding LVM marks famous without engaging in fame analysis).

famous, but surprisingly so are DVF for Diane Von Furstenberg,⁷⁷ the “arcuate” stitching on the back pockets of Levi’s jeans⁷⁸ and the three stripes that mark Adidas’s shoes.⁷⁹ At the least famous end of the spectrum, a handful of decisions suggest that the “general consuming public” standard has yet to become uniformly applied. Notably, the alleged fame of CHEM-DRY,⁸⁰ RUSTIC LEDGE,⁸¹ CLIFFSTONE,⁸² PET SILK⁸³ and the color yellow for water slide toys⁸⁴ demonstrates that not all jurisdictions have truly left behind niche fame.

Plenty of marks not found famous under the TDRA would likely not have succeeded under the FTDA standard either. Some marks failed to provide sufficient evidence to establish fame of any stripe, like Major League Baseball pitcher TYLER GREEN⁸⁵ or the owners of marks AMERICAN BLINDS,⁸⁶ BIO-SAFE,⁸⁷ SUNSHINE IN A BOX⁸⁸ or DEMON INTERNATIONAL.⁸⁹ Oth-

⁷⁷ Diane Von Furstenberg Studio v. Snyder, No. 1:06CV1356(JCC), 2007 U.S. Dist. LEXIS 66633, at *11 (E.D. Va. Sept. 10, 2007).

⁷⁸ Levi Strauss & Co. v. Fox Hollow Apparel Group, L.L.C., No. 06-3765, 2007 WL 1140648, at *3 (N.D. Cal. Apr. 17, 2007) (assuming fame for default judgment without addressing TDRA factors).

⁷⁹ Adidas Am., Inc. v. Payless Shoesource, Inc., 529 F. Supp. 2d 1215, 1245 (D. Or. 2007).

⁸⁰ Harris Research, Inc. v. Lydon, 505 F. Supp. 2d 1161, 1166 (D. Utah 2007).

⁸¹ Eldorado Stone, L.L.C. v. Renaissance Stone, Inc., No. 04cv2562, 2007 WL 2403572, at *4–5 (S.D. Cal. Aug. 20, 2007) (neglecting to address “fame” at all in the opinion, let alone whether Plaintiff’s marks met the TDRA standard).

⁸² *Id.*; see Michael Atkins, *Applying TDRA Standard, Court Upholds Jury’s Finding of Dilution*, Seattle Trademark Lawyer, Aug. 28, 2007, <http://seattletrademarklawyer.com/blog/2007/8/28/applying-tdra-standard-court-upholds-jurys-finding-of-diluti.html> (“Anyone heard of RUSTIC LEDGE or CLIFFSTONE before? Not exactly household names.”) (last visited May 1, 2009).

⁸³ Pet Silk, Inc. v. Jackson, 481 F. Supp. 2d 824, 830 (S.D. Tex. 2007) (granting injunction explicitly based on mark’s niche fame, despite ostensibly applying TDRA).

⁸⁴ SLB Toys USA, Inc. v. Wham-O, Inc., No. 06-1382, slip op. at 2 (C.D. Cal. Dec. 5, 2007), available at <http://seattletrademarklawyer.com/blog/2007/10/16/jury-finds-competitor-infringed-and-diluted-wham-os-yellow-t.html> (click on “found” in the first sentence).

⁸⁵ Green v. Fornario, 486 F.3d 100, 105–07 (3d Cir. 2007) (“[I]t seems several steps short of probable that a person with such a brief, and largely undistinguished, professional career limited to one team in one area would have a name that is ‘widely recognized by the general consuming public of the United States.’ . . . [I]t is unclear just how well-recognized, even regionally, Green was when Fornario acted.”).

⁸⁶ Google Inc. v. Am. Blind & Wallpaper Factory, Inc., No. 03-5340, 2007 U.S. Dist. LEXIS 32450, at *39 (N.D. Cal. Apr. 18, 2007).

⁸⁷ Biosafe-One, Inc. v. Hawks, 524 F. Supp. 2d 452, 466–67 (S.D.N.Y. 2007).

ers appeared too generic to be famous as a source identifier, such as TOP for loose tobacco⁹⁰ or RAAGA for a style of music.⁹¹ A few mark owners neglected to even assert their marks were well-recognized among the general consuming public of the United States, as in cases alleging dilution of PHASE FORWARD, INCORPORATED,⁹² a gold checkered pattern for firefighters' gear⁹³ or a red, gray and black color scheme for electronic power tools.⁹⁴

Other marks that do not possess TDRA fame might have fared better under the niche fame regime. Where the FTDA included LA OPINIÓN under its umbrella of niche fame,⁹⁵ the TDRA rejects JARRITOS despite the soda's popularity among Hispanic Americans.⁹⁶ Although WAWA operated stores in only five states, it found relief under the FTDA,⁹⁷ COSI, however, did not fare as well under the TDRA with restaurants in more than three times as many states and the nation's capital.⁹⁸ The longhorn silhouette logo that serves as University of Texas's mascot, well-recognized by Texans and fans of college athletics, was not deemed famous under the TDRA.⁹⁹ Likewise, a mark famous

⁸⁸ Verilux, Inc. v. Hahn, No. 3:05CV254, 2007 U.S. Dist. LEXIS 58507, at *15 (D. Conn. Aug. 7, 2007) (granting defendant's motion for summary judgment on dilution claims; plaintiff did not prove the fame of marks SUNSHINE IN A BOX, SUNSHINE SIMULATOR or SUNSHINE IN A LAMP).

⁸⁹ Demon Int'l LC v. Lynch, 86 U.S.P.Q.2d (BNA) 1058, 1059 (T.T.A.B. Feb. 5, 2008).

⁹⁰ Top Tobacco, L.P. v. N. Atl. Operating Co., 509 F.3d 380, 383–84 (7th Cir. 2007).

⁹¹ Vista India v. RAAGA, L.L.C., 501 F. Supp. 2d 605, 623–24 (D.N.J. 2007) (fame limited to niche audience and generic within that niche to refer to Indian or South Asian music generally).

⁹² See Phase Forward, Inc. v. Adams, No. C 05-4232 JF, 2008 WL 340951, at *1 (N.D. Cal. Feb. 5, 2008).

⁹³ PBI Performance Prods. v. NorFab Corp., No. 05-4836, 2007 U.S. Dist. LEXIS 58689, at *35 (D. Pa. Aug. 2, 2007) (“PBI does not even argue that the trade dress has achieved fame on such a broad scale. Instead, its argument is much more limited. It merely asserts that the unique design of PBI's MATRIX fabric . . . has become distinctive in the fire service industry.”).

⁹⁴ Milwaukee Elec. Tool Corp. v. Robert Bosch Tool Corp., No. 05 C 1171, 2007 U.S. Dist. LEXIS 75201, at *9 (N.D. Ill. Sept. 28, 2007).

⁹⁵ Lozano Enters. v. La Opinion Publ'g. Co., 44 U.S.P.Q.2d (BNA) 1764, 1769 (C.D. Cal. 1997).

⁹⁶ Jarritos, Inc. v. Los Jarritos, No. C 05-02380 JSW, 2007 WL 1302506, at *18 (N.D. Cal. May 2, 2007).

⁹⁷ Wawa, Inc. v. Haaf, 40 U.S.P.Q.2d (BNA) 1629, 1631–32 (E.D. Pa. 1996).

⁹⁸ Cosi, Inc. v. WK Holdings, L.L.C., No. 05-2770, 2007 U.S. Dist. LEXIS 31990, at *6 (D. Minn. May 1, 2007).

within a specific segment of the computer information technology industry will not receive protection from dilution under the new standard.¹⁰⁰

II. CHILDREN ARE THREE MARKETS

How do marketing firms catapult a mark from famous in its niche to becoming widely recognized among the general consuming public of the United States? One way firms have sought to increase brand awareness has been by appealing to young consumers through marketing to teenagers, school-age children, toddlers and infants. Companies may spend up to fifteen billion dollars annually on television, Internet, print and viral-marketing campaigns, all to target kids.¹⁰¹ Young children are burning through income and allowance and heavily influencing how their parents spend their own money; they also provide a steady stream of new customers as they come of age.¹⁰² Marketing expert James McNeal believes that “the consumer embryo begins to develop during the first year of existence,” and marketers ought to capitalize on children as a viable market from their infancy, when they “begin their consumer journey.”¹⁰³ He points out that children are valuable targets because they constitute three distinct consumer markets: primary, influence and future.¹⁰⁴ McNeal credits four factors with substantially increasing children’s influence and spending power in recent decades: (1) parents are having fewer children per family; (2) single parents are more likely to let their kids shop; (3) mothers are older and wealthier, because they delay childbearing; and (4) seventy percent of American households with kids are dual-income, fostering greater independence and self-reliance in those kids.¹⁰⁵

⁹⁹ Bd. of Regents, Univ. of Tex. Sys. *ex rel.* Univ. of Tex. at Austin v. KST Elec., Ltd., 550 F. Supp. 2d 657, 678–89 (W.D. Tex. 2008) (recommending summary judgment for defendant on dilution claim; while logo may possess niche fame, it is likely not famous among the general consuming public).

¹⁰⁰ ComponentOne, L.L.C. v. ComponentArt, Inc., No. 02:05CV1122, 2007 U.S. Dist. LEXIS 89772, at *8 (W.D. Pa. Dec. 6, 2007).

¹⁰¹ MICHELE STOCKWELL, PROGRESSIVE POLICY INST., CHILDHOOD FOR SALE: CONSUMER CULTURE’S BID FOR OUR KIDS 1 (Aug. 4, 2005), available at www.ppionline.org/documents/MARKETING_0804.pdf.

¹⁰² Janice Rosenberg, *Brand Loyalty Begins Early; Savvy Marketers ‘Surround’ Kids to Build Connection*, ADVERTISING AGE, Feb. 12, 2001, at s2.

¹⁰³ JAMES U. MCNEAL, THE KIDS MARKET: MYTHS AND REALITIES 37–38 (Paramount 1999).

¹⁰⁴ McNeal, *supra* note 2, at 37.

¹⁰⁵ James U. McNeal, *The Littlest Shoppers*, AM. DEMOGRAPHICS, Feb. 1992, at 48.

Counting on children in corporate marketing arithmetic is far from a new practice. Sixty years ago, David Riesman observed that where publications geared toward children formerly promoted qualities like self-discipline and perseverance, the comparable media in 1950 “train[ed] the young for the frontiers of consumption—to tell the difference between Pepsi-Cola and Coca-Cola, as later between [popular cigarette brands].”¹⁰⁶ Before him, Clyde Miller exhorted companies to “[t]hink of what it can mean to your firm in profits . . . if you can condition a million or ten million children who will grow into adults trained to buy your products as soldiers who are trained to advance when they hear the trigger words ‘Forward, march.’”¹⁰⁷ Today, companies market to increasingly younger children in increasingly more aggressive ways. Firms believe the key to reaching younger consumers lies in beating competitors to the punch, in order to capture kids before they have developed opinions on any other brands at all.¹⁰⁸

Susan Gregory Thomas, in her book *Buy, Buy Baby: How Consumer Culture Manipulates Parents*, noted the mid-1990s emergence of the phrase “[c]radle-to-grave marketing” and the practices it encapsulated: “attracting a customer to a particular brand early on in life and keeping her loyal to that brand into adulthood and even old age.”¹⁰⁹ McNeal estimates that corporations whose marketing campaigns appeal to a toddler can expect to collect as much as \$150,000 from that toddler over the course of her lifetime.¹¹⁰ The firm begins to profit off her patronage in early childhood through the products others buy her, continues to do so as she spends her own money on herself, and retains her as a lucrative customer when she eventually spends money on her own children and grandchildren.

For example, a child born today can begin consuming Hello Kitty merchandise immediately upon entering the world. Her grandparents might greet her at the hospital with Hello Kitty burping cloth, diapers, pacifier and matching rattle.¹¹¹ Her parents can stash those dirty diapers in a Hello Kitty diaper ge-

¹⁰⁶ DAVID RIESMAN, *THE LONELY CROWD* 98 (Yale Univ. Press 1950).

¹⁰⁷ CLYDE MILLER, *THE PROCESS OF PERSUASION* 217 (Crown 1946).

¹⁰⁸ Julie Bosman, *Hey, Kid, You Want to Buy a Toyota Scion?*, N.Y. TIMES, June 14, 2006, at C2, available at <http://www.commercialfreechildhood.org/news/toyotascion.htm>.

¹⁰⁹ SUSAN GREGORY THOMAS, *BUY, BUY BABY: HOW CONSUMER CULTURE MANIPULATES PARENTS AND HARMS YOUNG MINDS* 125 (Houghton Mifflin Co. 2007).

¹¹⁰ JAMES U. MCNEAL, *KIDS AS CUSTOMERS: A HANDBOOK OF MARKETING TO CHILDREN* 95 (Lexington Books 1992). According to a U.S. government inflation calculator, \$150,000 in 1992 equals approximately \$227,415 in 2009. CPI Inflation Calculator, <http://data.bls.gov/cgi-bin/cpicalc.pl> (last visited May 13, 2009).

¹¹¹ See Hello Kitty Rattle Set, Chi. Creative Cakes Corp., http://www.chicagocreativecakes.com/ccc/bdc/bdc_bm.htm (last visited May 13, 2009).

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nie.¹¹² They can adorn her room with Hello Kitty crib bedding, wallpaper, rug, chair, window valance and nightlight to keep her company in the dark,¹¹³ not to mention the myriad Hello Kitty plush toys with which she can play, Hello Kitty videos she can watch and Hello Kitty clothes in which her parents can dress her.¹¹⁴ As she grows, she will discover a plethora of Hello Kitty products she might request from family and friends, like a radio, puzzle, card game, Etch A Sketch, umbrella and Pez dispenser all emblazoned with Hello Kitty's familiar image.¹¹⁵ She can eat her Hello Kitty candy bracelet, Hello Kitty Pop Tarts (in a flavor called Meow-Berry), Hello Kitty fruit snacks and Hello Kitty cereal from a Hello Kitty bowl with a Hello Kitty spoon.¹¹⁶

A. Primary

Although acknowledging children as potential consumers is nothing new, products for children have increased exponentially over the past two decades. While only a third of retailers were "child-oriented" in the mid-1980s, that number had nearly doubled by 1991.¹¹⁷ The number of videos and DVDs

¹¹² E.g., Hello Kitty Diaper Genie Cover, <http://www.collector-connection.com/hello-kitty-diaper-genie-cover.html> (last visited May 13, 2009).

¹¹³ Lambs & Ivy Products for Baby, www.lambsivy.com (follow "BEDDING" hyperlink) (last visited May 13, 2009).

¹¹⁴ These products are for sale at many retailers and countless websites, including Sanrio's official site. Sanrio Home, <http://www.sanrio.com> (follow "Shop" hyperlink) (last visited May 13, 2009).

¹¹⁵ Giftapolis, <http://www.giftapolis.com> (search for "Hello Kitty") (last visited May 13, 2009).

¹¹⁶ Hello Kitty Hell: One Man's Life with Cute Overload, www.kittyhell.com (last visited May 13, 2009). She will also need Hello Kitty to accompany her to school on her backpack, lunchbox, thermos, pencils, stickers, mousepads and book covers. *Id.* In a few years, she may be ready to fill her Hello Kitty purse with Hello Kitty lip gloss, hairbrush, hand mirror and barrettes (as long as she does not break a Hello Kitty press-on nail in the process). Later, she can graduate to a Hello Kitty digital camera, or even a Hello Kitty guitar strap with matching picks. Sanrio Home, *supra* note 114. Once she reaches true adulthood, she can continue to surround herself with her favorite icon, with Hello Kitty floor mats and steering wheel cover to adorn her car, Giftapolis, *supra* note 115, diamond Hello Kitty jewelry designed by fashion-maven Kimora Lee Simmons and even Hello Kitty lingerie or a controversial Hello Kitty massager. Azadeh Ensha, *Is Hello Kitty Turning Feral?*, N.Y. TIMES MAGAZINE, Dec. 2, 2007, at 10, available at <http://www.nytimes.com> (search for "hello kitty turning feral" and follow article hyperlink).

¹¹⁷ 37% of the retail outlets McNeal surveyed in 1984 were child-oriented, compared to 68% in 1991. McNEAL, *supra* note 110, at 111–13.

aimed at babies climbed from practically none in 1998 to about 750 in 2006.¹¹⁸ Sales of toys billed as “educational” increased fifty percent in the span of just one year, from 2002 to 2003.¹¹⁹ The food and beverage industry allocates more than ten billion dollars to advertising targeted at children each year.¹²⁰ Many of the brands kids recognize most consistently are edible or potable, including Cheerios, McDonald’s, Coca-Cola, Pop Tarts and Froot Loops.¹²¹

Children’s familiarity and comfort with electronics and technology has also risen dramatically: a 2007 report indicates the average age at which American children begin to use consumer electronic devices, from DVDs to MP3 players, is 6.7 years old.¹²² Just two years earlier that average was 8.1 years old.¹²³ The average age at which children receive their first cell phone has dropped to eight years old,¹²⁴ suggesting that a number of children start even earlier.¹²⁵ Phone companies cater to young users with cartoon mobile phone merchandise featuring Hello Kitty, Barbie,¹²⁶ dangly phone charms and sparkly

¹¹⁸ Wendy Melillo, *Bringing Up Baby: Where’s the Line and Who Should Draw It*, In *Advertising to Children*, ADWEEK, Feb. 13, 2006, at 14, available at <http://www.adweek.com> (search for “bringing up baby” and follow article hyperlink).

¹¹⁹ THOMAS, *supra* note 109, at 25.

¹²⁰ Alice Park, *Hooked on McDonald’s at Age 3*, TIME, Aug. 06, 2007, <http://www.time.com/time/health/article/0,8599,1650268,00.html> (last visited May 1, 2009).

¹²¹ Melillo, *supra* note 118, at 18.

¹²² Fred J. Aun, *Study: Kids Latching On to Tech at Earlier Ages*, TECHNEWSWORLD, June 6, 2007, available at <http://www.ecommercetimes.com> (search for “kids latching on to tech at earlier ages” and follow article hyperlink).

¹²³ *Id.*

¹²⁴ Marie Woolf, Political Editor, *Phone Firms Targeting of Under-fives is ‘as Bad as Marketing Junk Food’ Say MPs*, THE INDEPENDENT, Feb. 19, 2006, available at <http://www.independent.co.uk> (search for “phone firms targeting under-fives” and follow article hyperlink).

¹²⁵ Many consumer groups object to firms’ marketing cell phones to children because cell phone use may present health hazards, and young people’s thinner skulls and developing brains could render them more vulnerable to radiation. Consumer Affairs, *WHO Study Examines Cellphone Risks to Kids*, July 12, 2005, available at http://www.consumeraffairs.com/news04/2005/who_cellphones.html. Class-action lawsuits currently pending in Maryland, New York and Pennsylvania allege that cell phone radiation can cause brain tumors and that manufacturers are aware of the danger and have deliberately kept consumers in the dark. Consumer Affairs, *Supreme Court Clears Cell Phone Cancer Suits for Trial*, Nov. 1, 2005, available at http://www.consumeraffairs.com/news04/2005/cell_phone_cancer_suits.html.

¹²⁶ Consumer Affairs, *WHO Study Examines Cellphone Risks to Kids*, *supra* note 125.

add-ons, and several new phones are even designed specifically for the small hands and poor dexterity of five- to nine-year-olds.¹²⁷

Marketers breed brand recognition earlier than ever in young people. The zero-to-three demographic itself represents a twenty billion dollar market.¹²⁸ A 2000 survey of children aged two to five found that nearly half had “demonstrated brand awareness before age three.”¹²⁹ By the time they are ten years old, children can name three hundred to four hundred different corporate brands.¹³⁰ When pressed to explain why so many cable channels were eager to pursue the preschool market, a top executive at Nick Jr.¹³¹ explained: “It’s about building allegiance to a brand.”¹³² By the time those children fall into the demographic known as “tween,” almost every global brand is crafting a message specifically to reach them, and they are increasingly reachable.¹³³ Young people engage with a slew of electronic media daily, from iPods and instant messages to cell phones and television. Through multitasking, kids manage to pack 8.5 hours of media exposure into every day of the week, suggesting they spend more time plugged in than they do in classrooms.¹³⁴

On a typical day, sixty-one percent of children between six- and twenty-three months old watch television; by the time they are three years old, that proportion grows to eighty-eight percent.¹³⁵ Despite recommendations from the

¹²⁷ Firefly’s “glowPhone” is one of the phones designed for small hands. See Lisa Flam, *Old Enough to Go Cellular?*, ASSOCIATED PRESS, Feb. 19, 2008, available at <http://www.pantagraph.com/articles/2008/03/11/family/doc47baeaaefafa836710381.txt>; Consumer Affairs, *A Cell Phone for Kids*, Mar. 10, 2005, available at http://www.consumeraffairs.com/news04/2005/cell_firefly.html.

¹²⁸ CBS News, *The Hard Sell: Marketing To Kids: From Babies In Front Of The TV To Teens On Laptops, How The Advertising Industry Targets The Vulnerable*, May 14, 2007, available at <http://www.cbsnews.com/stories/2007/05/14/eveningnews/main2802643.shtml>.

¹²⁹ Melillo, *supra* note 118, at 18.

¹³⁰ STOCKWELL, *supra* note 101, at 1.

¹³¹ Nick Jr. is a division of children’s network Nickelodeon aimed at pre-school children. See generally Nick Jr. Home, www.nickjr.com (last visited May 13, 2009).

¹³² THOMAS, *supra* note 109, at 10.

¹³³ According to a leading expert on branding, eighty percent of all global brands deployed a “tween strategy” in 2004. Ann Hulbert, *Tweens ‘R’ Us*, N.Y. TIMES MAGAZINE, Nov. 28, 2004, at 31, available at <http://www.nytimes.com> (search “tweens ‘r’ us” and follow article hyperlink).

¹³⁴ DONALD F. ROBERTS, ULLA G. FOEHR, VICTORIA RIDEOUT, THE HENRY J. KAISER FAMILY FOUND., *GENERATION M: MEDIA IN THE LIVES OF 8-18 YEAR-OLDS* 36, Mar. 9, 2005, available at www.kff.org/entmedia/upload/Generation-M-Media-in-the-Lives-of-8-18-Year-olds-Report.pdf.

¹³⁵ THOMAS, *supra* note 109, at 9.

American Academy of Pediatrics that children younger than two should not be exposed to television at all, a 2003 study found that one in four children under two has a television inside his bedroom.¹³⁶ When it comes to older children, between fifty and seventy percent have televisions in their bedrooms.¹³⁷ Experts have posited correlations between televisions in kids' bedrooms and numerous health and educational problems.¹³⁸ Children with televisions in their rooms are ostensibly more likely to be overweight, smoke and suffer from sleep problems.¹³⁹ In addition to watching more television, they snack more than other kids, and score significantly lower on math, reading and language-arts tests than peers without their own televisions.¹⁴⁰

In addition to the direct effects of television and other media, parents and media experts have raised concerns about the sexual imagery that dominates many of the marketing campaigns and products that target children who are not yet cognitively nor emotionally equipped to handle them. Such hypersexual messages have been accused of increasing eating disorders among girls, leading to precocious sexual behavior and robbing kids of the time they need for age-appropriate developmental tasks.¹⁴¹ Two authors assert that advertising and immersion in consumer culture are factors in increasing childhood obesity, precocious sexuality, irresponsible behavior, youth violence, underage drinking and tobacco use.¹⁴²

The allegiance marketers covet may be more easily fostered among children than adults precisely because children are naïve to the persuasive process. Research by an American Psychological Association task force indicates that children younger than eight do not, and cannot, critically comprehend

¹³⁶ Melillo, *supra* note 118, at 15.

¹³⁷ Tara Parker-Pope, *A One-Eyed Invader in the Bedroom*, N.Y. TIMES, Mar. 4, 2008, at F5, available at www.buffalo.edu/news/pdf/March08/NYTEpsteinTVAndObesity.pdf.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ STOCKWELL, *supra* note 101, at 2.

¹⁴² SCHOR, *supra* note 5, at 167–72; CBS News, *supra* note 128. Many writers have taken particular brands to task over demeaning or hypersexualized advertising campaigns, urging consumers to boycott the products, government to regulate the messages, and media outlets to censor their format. One of the most recent controversies receiving wide press coverage reveals outrage at Unilever. While one of its brands promotes women's self-esteem and body acceptance through "Dove[']s Campaign for Real Beauty," another brand, Axe, consistently trucks out stereotypically demeaning images of women as sexual objects. Michelle Gillett, Op-Ed., *A Company's Ugly Contradiction*, BOSTON GLOBE, Nov. 5, 2007, at 15A, available at <http://www.boston.com/bostonglobe> (search for "Michelle Gillett," then follow article hyperlink).

persuasive advertisements.¹⁴³ They accept advertisers' messages as truthful, accurate and nonbiased.¹⁴⁴ Dr. Victor Strasburger, a spokesperson for the American Academy of Pediatrics, labels marketing to children "electronic child abuse."¹⁴⁵ According to Dr. Strasburger, children younger than two or three not only cannot separate advertising from programming, they think that the characters on their televisions "crawled into the TV through the electric plug."¹⁴⁶ While children may notice that an advertisement looks different from the show it interrupts, they do not grasp that the ad is designed solely to sell a product or that the item depicted may not look in reality exactly as it appears on the screen. The disconnect described does not reflect intelligence; instead, it simply correlates to developmental and psychological maturity.¹⁴⁷

Most of the studies cited reflect the role of television before digital-video-recorder technology placed a TiVo or other digital-video recorder ("DVR") in over one third of American homes.¹⁴⁸ While parents and kids have become more likely to fast-forward through traditional ads, it seems self-evident that the alternative forms of advertising rising up to replace them—product placement, school partnering and viral marketing—are even more insidious ways to cultivate brand loyalty in unwitting children. The Federal Trade Commission advised that marketing to children under eight was intrinsically unethical because advertisers aggressively target children and exploit the absence of those children's parental "gatekeepers," exposing babies and kids to 20,000 ads a year.¹⁴⁹

¹⁴³ AM. PSYCHOLOGICAL ASS'N, TELEVISION ADVERTISING LEADS TO UNHEALTHY HABITS IN CHILDREN; SAYS APA TASK FORCE, Feb. 23, 2004, *available at* <http://www.apa.org/releases/childrenads.html>. Legislators in other countries have based strict regulatory regimes upon this fact. "The governments of Sweden and Norway prohibit television advertising directly targeting children under the age of twelve." Miriam H. Zoll, *Psychologists Challenge Ethics of Marketing to Children*, AMERICAN NEWS SERVICE, Apr. 5, 2000, *available at* <http://www.mediachannel.org/originals/kidsell.shtml>. "Greece bans television stations from advertising toys to children between the hours of 7:00 am and 10:00 pm." *Id.* "Quebec restricts all television advertising directed at children under the age of thirteen." *Id.*

¹⁴⁴ AM. PSYCHOLOGICAL ASS'N, *supra* note 143.

¹⁴⁵ Park, *supra* note 120.

¹⁴⁶ Melillo, *supra* note 118, at 15.

¹⁴⁷ THOMAS, *supra* note 109, at 13.

¹⁴⁸ See STAN SCHATT & CLINT WHEELOCK, ABI RESEARCH, PAY-TV AND THE AMERICAN CONSUMER: A PROFILE OF TODAY'S AUDIENCE AND HOW IT WILL CHANGE 11 (2008), <http://dckorea.co.kr/tt/attachment/3852042282.pdf> (last visited May 21, 2009).

¹⁴⁹ THOMAS, *supra* note 109, at 55.

Very young children may not understand what it means that they are the targets of persuasive advertising, rather than programming intended strictly to inform or entertain. Yet they clearly see, understand and remember advertising. In fact, they exhibit skill at remembering logos and associating a product with its trademark. One study asked several hundred preschool children to match logos with one of a dozen products pictured on a game board.¹⁵⁰ Twenty-two logos were tested, including several representing children's products, several for adult products, and two logos for popular cigarette brands.¹⁵¹ The study found substantial recognition among children, increasing with age.¹⁵² Approximately thirty percent of three-year-old children and over ninety percent of six-year-old children correctly matched Joe Camel with a picture of a cigarette.¹⁵³ Other studies suggest "that by the time they are 36 months old, American children recognize an average of 100 brand logos."¹⁵⁴

American children receive more than \$200 billion dollars each year from their families, their household responsibilities and work, and they spend the vast majority of it on a variety of products and services to please themselves.¹⁵⁵ One United Kingdom survey examined the saving and spending habits of children seven to sixteen years old and found that in the last twenty years children's pocket money has increased approximately 600%, rising about six times faster than inflation.¹⁵⁶ For example, kids spend their cash on snacks, drinks, clothes, toiletries, computer games, equipment, cell-phone bills and social activities with friends. In the early 1990s, McNeal tracked similar trends in American children's spending money. He found many children as young as four years old received income, and that American kids' pocket money also increased at a pace that substantially exceeded inflation.¹⁵⁷ McNeal's research revealed that however parents articulated the reasons they provided their child

¹⁵⁰ P.M. Fischer et al., *Brand Logo Recognition by Children Aged 3 to 6 Years: Mickey Mouse and Old Joe the Camel*, 266 JOURNAL AM. MED. ASS'N, Dec. 1, 1991, No. 22, at 3145, available at <http://tobaccodocuments.org/ti/TIMN0024042-4059.html>.

¹⁵¹ *Id.* at 3146.

¹⁵² *Id.* at 3146-47.

¹⁵³ *Id.* at 3147.

¹⁵⁴ Zoll, *supra* note 143.

¹⁵⁵ McNEAL, *supra* note 110, at ix.

¹⁵⁶ The figure refers to pocket money of children in the United Kingdom. HALIFAX BANK OF SCOTLAND, HALIFAX PRESS RELEASE: POCKET MONEY RISES 600% IN 20 YEARS (July 21, 2007), available at <http://www.hbosplc.com/media/pressreleases/articles/halifax/2007-07-21-Pocketmone.asp?section=Halifax> (examining the saving and spending habits of children 7-16 years old).

¹⁵⁷ McNEAL, *supra* note 110, at 24.

with an allowance, teaching kids to be consumers seems the primary objective.¹⁵⁸ Most importantly for marketers, the allowance or income that children spend each year is almost entirely discretionary.¹⁵⁹

Online shopping and interactive websites make spending even easier as long as kids have access to a credit card. Young Minds Inspired, an educational marketing firm that focuses on children, tells prospective clients that “the younger the target audience, the more open it is to accepting an advertising message as truth.”¹⁶⁰ McNeal demystifies the process by which children learn to shop under parents’ tutelage: “Children’s first purchases may be clumsy But they give businesses a golden opportunity to encourage the bonding that could last a lifetime.”¹⁶¹ A little boy whose father hands him a dollar and patiently guides him as he buys a Hershey bar at Rite-Aid may remember not only that moment, but the Hershey bar and the Rite-Aid as integral characters in the story. That’s why, McNeal coaches marketers, “it is well worth the effort to understand and anticipate the needs and desires of even the smallest consumers.”¹⁶² By cultivating the loyalty of young shoppers, a company stands to gain phenomenal profits.

McNeal describes the process by which children grow into active consumers, learning from advertisers and family members, beginning to associate particular stores with desired products, and accompanying parents on shopping excursions from the age of three or four, where children first learn to request products and then to select items themselves under supervision.¹⁶³ He reminds marketers of the importance of not only advertising, but using kid-friendly packaging (the “silent salesman”), training retail personnel to ingratiate themselves to children, and working to make the first few consumer transactions pleasant ones to encourage future patronage.¹⁶⁴ He notes wistfully that the child’s first shopping experience “usually leaves an indelible impression on the youngster, and the stores associated with early purchases tend to have a special place in the heart that may continue throughout life.”¹⁶⁵

Interpreting children’s attitudes toward shopping based on a drawing exercise, McNeal found that most of the children in his study associated shop-

¹⁵⁸ *Id.* at 28.

¹⁵⁹ *Id.* at 32.

¹⁶⁰ THOMAS, *supra* note 109, at 197.

¹⁶¹ James McNeal & Chyon-Hwa Yeh, *Born to Shop*, AM. DEMOGRAPHICS, June 1993, at 39.

¹⁶² *Id.*

¹⁶³ *See id.*

¹⁶⁴ MCNEAL, *supra* note 110, at 133.

¹⁶⁵ *Id.* at 12.

ping with positive emotions.¹⁶⁶ The majority of the drawings featured the children smiling and the pictures demonstrated “a high degree of exhilaration” and a “zest” for consumer spending.¹⁶⁷ He tracked children’s ages at their first independent purchases when shopping with parents, finding the age distribution in 1989 had decreased significantly since his 1984 study. More than half of the children had made their first purchase by age five and eighty-eight percent did so by age seven.¹⁶⁸ Over seventy percent of the children studied “definitely viewed themselves as independent shoppers.”¹⁶⁹ What’s more, within the 112 drawings, ninety brands and twenty-two retail outlets were depicted.¹⁷⁰ Based on his research, McNeal counsels retailers that they “only need insure that children are welcome in their stores in order to turn these positive shopping attitudes into profitable, long-term shopping behavior.”¹⁷¹

B. Influence

Scholastic, a book publisher known for its educational materials and book clubs, partners with corporations who wish to market to children in day-care or preschool programs and, through them, reach parents. In its promotional materials, Scholastic boasts of its ability to target parents as potential customers by recruiting their children: “[B]ecause you’re working with Scholastic, the single most trusted brand with parents, your message achieves extra credibility.”¹⁷² Even more compelling, the publisher promises that when a company partners with Scholastic, its marketing message is “delivered by the single most persuasive and irresistible person in [the parents’] life—their little one.”¹⁷³

In *Kids As Customers: A Handbook of Marketing to Children*, James McNeal declared: “[T]oday the consumer life cycle begins in childhood, not in adolescence as it did before the baby boom.”¹⁷⁴ Since 1992 that cycle has continued to infiltrate children’s lives; we may now assert that consumerhood be-

¹⁶⁶ Drawings came from three groups of children randomly selected to participate from the second, third and fourth grades of a “middle-class” school. Trained researchers used content analysis to assess the drawings. They used the cue: “Draw what comes to mind when you think about going shopping.” *Id.* at 47.

¹⁶⁷ *Id.* at 59, 61.

¹⁶⁸ *Id.* at 44–45.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 54–55.

¹⁷¹ *Id.* at 61.

¹⁷² THOMAS, *supra* note 109, at 201.

¹⁷³ *Id.*

¹⁷⁴ MCNEAL, *supra* note 110, at 36.

gins in infancy, preceding not only money from the tooth fairy, but even speech. While children's spending continues to account for an increasing share of the market, children are simultaneously influencing their parents' purchasing choices to a degree not previously seen. Susan Gregory Thomas, who has studied the phenomenon of children as influence market, found that parents will include children as young as two, and sometimes younger, in decisions ranging from choosing breakfast cereal at the supermarket to choosing the family's restaurant and vacation destinations¹⁷⁵ to buying a new car or even a home.¹⁷⁶ Indeed, it has not gone unnoticed that children are weighing in on parents' shopping decisions about everything from computer software to groceries. One market research firm reports that thirty-nine percent of parents of ten- and eleven-year-olds acknowledge that their children significantly impact their brand purchases.¹⁷⁷ By most estimates, children influence several billion dollars of their parents' spending.¹⁷⁸

In the late 1970s, advertisers began to exploit the divide between parents and children, giving rise to the "nag factor" that persists today as a whiny sleeve tug, a polite plea or a toy-store-aisle tantrum.¹⁷⁹ In fact, marketers have studied these interactions quite closely, analyzing at what ages the influencing behaviors develop, how they are learned, what forms they take,¹⁸⁰ what product categories they span¹⁸¹ and how parents typically respond.¹⁸² Children learn to

¹⁷⁵ CBS News, *supra* note 128.

¹⁷⁶ THOMAS, *supra* note 109, at 147.

¹⁷⁷ Bosman, *supra* note 108, at C2.

¹⁷⁸ Marketing research group Packaged Facts estimated children influenced about \$196 billion in spending in 1999. Rosenberg, *supra* note 102, at s2. More recently, researchers at Texas A&M University concluded that children influence \$600 billion a year in family spending on small- and big-ticket items. T. L. Stanley, *Babes in Brandland*, BRANDWEEK, Oct. 17, 2007, at 28, available at <http://www.commercialexploitation.org/news/babesinbrandland.htm>.

¹⁷⁹ THOMAS, *supra* note 109, at 57 ("The toys of the late 1970s and early 1980s were the first to be completely foreign to parents. Rather than exploiting nostalgia as an advertising ploy, toy makers and marketers joined forces to sharpen the line separating the world of working parents and the rapidly evolving youth culture brought about by latchkey children and the rise of TV as babysitter."). Even Senator John McCain admits to sometimes holding his breath when he didn't get what he wanted as a child. JOHN MCCAIN & MARK SALTER, FAITH OF MY FATHERS 99 (HarperCollins 2000). At times the standoff lasted until McCain blacked out. *Id.*

¹⁸⁰ McNeal understands children's primary styles for influencing parental purchase to be "[p]leading," "[p]ersistent," "[f]orceful," "[d]emonstrative," "[s]ugar-coated," "[t]hreatening" and "[p]ity." MCNEAL, *supra* note 110, at 73–74. Children are most likely to make a request in the store, in the presence of the item they desire. *Id.* at 75.

¹⁸¹ According to McNeal, influence on parents "principally embraces the following areas": "[i]tems for the children," "[i]tems for the home" and "[n]onhousehold items for the family

obtain things by requesting them from their parents, which marketers view as the first stage of consumer behavior;¹⁸³ next, they develop and fine-tune their persuasive techniques.¹⁸⁴ Children can even influence parents' purchases without being present: parents often ask their kids to choose from what restaurant the parent should pick up dinner or what flavor of cough medicine to buy. Research suggests that when a parent goes to a store without her child expressly to buy him something, that child suggests which store she should buy from more than half the time.¹⁸⁵ Children even have a significant impact on their parents' catalog purchases.¹⁸⁶ McNeal reported that parents honor children's requests for products about half the time;¹⁸⁷ fifty-five percent of kids surveyed in 2002 said they are usually successful in getting their parents to acquiesce when they ask for particular items.¹⁸⁸

Yet a child need not engage in sophisticated debate with his parents to persuade. He need not even be able to articulate his endorsement of a particular product. As soon as he can point to the Pizza Hut billboard he sees out the window from his car seat, or grab the box of Frosted Flakes placed deliberately at toddlers' eye-level on the grocery store shelf, he can communicate a brand request.¹⁸⁹ Placing goods in the sightline of the target consumer is an old trick: if it's within kids' reach, then they will try to touch it, and if they touch it, they increase the chance that their parent will relent and buy it.¹⁹⁰ When they do learn to ask for Hot Pockets or Hot Wheels by name, children may average fif-

members," as well as several minor categories like gifts for others. *Id.* at 63–64. Children derive their information on products from their peers, as well as stores, catalogues and advertisements. *Id.* at 70–71.

¹⁸² McNeal characterizes parents' responses as falling into four categories: (1) acquiesce and buy the item; (2) substitute another item; (3) postpone the purchase; or (4) ignore or refuse the child's request. *Id.* at 77.

¹⁸³ *Id.* at 65.

¹⁸⁴ *Id.* at 66.

¹⁸⁵ *Id.* at 76.

¹⁸⁶ According to two studies, fourteen percent and twenty percent of parents, respectively, report that their children influence their catalogue shopping decisions. *Id.* at 76.

¹⁸⁷ *Id.* at 77.

¹⁸⁸ CTR. FOR A NEW AM. DREAM, THANKS TO ADS, KIDS WON'T TAKE NO, NO, NO, NO, NO, NO, NO, NO, NO FOR AN ANSWER (2002), <http://www.newdream.org/kids/poll.php> (last visited May 1, 2009).

¹⁸⁹ THOMAS, *supra* note 109, at 2.

¹⁹⁰ Dan Cook, *Lunchbox Hegemony?: Kids and the Marketplace, Then and Now*, LIP MAGAZINE, Aug. 20, 2001, available at http://www.lipmagazine.org/articles/featcook_124_p.html.

teen purchase requests to parents during just one store visit.¹⁹¹ In fact, studies have found that children can discern brands at as early as eighteen months old.¹⁹² By two years old, they ask for products by brand name.¹⁹³ When it comes to teenagers, practice in requesting products makes nearly perfect. A national survey on the “nag factor” reports that children aged twelve to seventeen ask their parents for products they have seen advertised an average of nine times until the parents finally give in.¹⁹⁴ Ten percent of twelve- and thirteen-year-olds have requested a single product more than fifty times.¹⁹⁵ The nagging strategy pays dividends for marketers: most of the teenagers surveyed claimed they are usually successful in persuading their parents to comply with their demands.¹⁹⁶

Marketers have been studying children’s brand requests intently, to better induce and orchestrate them. The Geppetto Group, a leading “NY-based marketing firm that works for such blue chippers as Coca-Cola, Reebok, ConAgra and Unilever,”¹⁹⁷ takes marketers on a guided tour of Disneyland to facilitate their understanding of how kids cajole and manipulate their parents into purchasing the Cinderella backpack or Monsters, Inc. stuffed Sully they’ve been eyeing.¹⁹⁸ The leaders of the “kids’ scavenger hunt” teach their disciples the nine principles that determine a brand’s power in the marketplace, focusing on the balance between a child’s wants and those of her mother.¹⁹⁹ Each scavenger hunt participant trolls Disneyland armed with a checklist of scenes he seeks.²⁰⁰ He has precise instructions to describe the parent-child interaction and then deconstruct it, determining whether the child got her way by manipulation, persuasion, negotiation or command-demand style.²⁰¹ Whether the mother conceded or blocked the request, her actions too are analyzed.²⁰²

While the antagonistic model of children influencing parents’ purchases often dominates discourse, a second model reflects a change in parenting styles. Some parents are eager to act as their children’s friends and equals, and many

¹⁹¹ MCNEAL, *supra* note 110, at 63.

¹⁹² THOMAS, *supra* note 109, at 5.

¹⁹³ *Id.*

¹⁹⁴ CTR. FOR A NEW AM. DREAM, *supra* note 188.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Stanley, *supra* note 178, at 32.

¹⁹⁸ THOMAS, *supra* note 109, at 122–23.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

choose movies, toys, clothing and other products without truly considering whether they are age-appropriate.²⁰³ According to one market research group: “Gen-X mothers are repelled by the ‘nag factor’ that worked like such a charm with their mothers.”²⁰⁴ To a mother of a certain era, “nagging embodies a dynamic from her childhood that she is striving to erase as a parent: division and manipulation born of neglect.”²⁰⁵ These moms do not view their roles as dictatorial. Rather, they prefer to see themselves as “consensus builders, . . . treating their children as people whose voices deserve to be heard, people worthy of respect and dignity.”²⁰⁶

McNeal estimated child-influenced spending at \$50 billion in 1984, \$132 billion in 1990 and around \$188 billion in 1997.²⁰⁷ He has even gone so far as to break down “influence” spending across product categories as specific as “bar soap” (he posits an influence factor of twenty percent on a \$1.5 billion dollar market, for a total of \$300 million dollars) to “hot cereals” (fifty percent kid influence, for a total of \$370 million) to automobiles (just four percent influence, totaling \$8.87 billion in a \$221.7 billion industry).²⁰⁸ Meanwhile, “marketers are keenly aware of children’s purchase requests to their parents, aware that these requests are honored probably half of the time or more and that, in total, these requests are responsible for billions of dollars a year in spending by the parents.”²⁰⁹ To those who hope to influence the influencers, McNeal counsels, “[a]ll that is necessary is to inform children of an offering and create desire for it, in the case of a child-related product, or create a favorable attitude in the case of a household-related item.”²¹⁰

²⁰³ Mothers who fondly remember playing with Barbie consistently disregard the safety warnings of a choking hazard when they buy Barbies for their own two- or three-year-old daughters; a new couture line of Barbie fashion for adults called “Barbie Luxe” perpetuates the cycle, as sales for the toys and clothes feed off of each other. *Id.* at 154. Fathers, meanwhile, took their preschool sons to see *Revenge of the Sith* in droves, despite its PG-13 rating and George Lucas’s own warning that the film was too dark and violent for young children. *Id.* at 153.

²⁰⁴ *Id.* at 147.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ McNeal, *supra* note 2, at 42.

²⁰⁸ MCNEAL, *supra* note 110, at 68–69.

²⁰⁹ *Id.* at 81.

²¹⁰ *Id.* at 85.

C. Future

Children may spend a few billion dollars²¹¹ and influence several hundred billion more, but for firms willing to expend the time and money to invest in the future, the best returns will come when those children mature. McNeal advises marketers that “children’s patronage should be cultivated now so that they will favor the firms’ offerings when they reach market age.”²¹² McDonald’s approach provides a classic example of the cradle-to-grave marketing to which Thomas alludes. The fast food chain cultivates children as a primary source of new customers because it has found them loyal to a fault—often loyal for a lifetime. Recently, researchers at Stanford University confirmed that children as young as three years old responded to the familiar McDonald’s logo and packaging.²¹³ Most of the children surveyed said that the food from a McDonald’s bag tasted better than the same food when it came in a plain paper bag.²¹⁴ Children with more access to television in their homes and those who owned toys from McDonald’s were more likely to find the branded foods tastier.²¹⁵ Apparently even healthy foods taste better when they are stamped with golden arches: the foods taste-tested included not just hamburgers, French fries and chicken nuggets, but also apples, baby carrots and milk.²¹⁶ The study demonstrates McDonald’s success at cultivating positive brand equity. A brand has positive customer-based equity if consumers react more favorably to the product, price, promotion or distribution of the brand than they do to the same element when attributed to a fictitious or unnamed version of the product.²¹⁷ A recent study of online search engine users found such a pattern for search results: people judged Google and Yahoo! results more relevant than identical results from other search engines.²¹⁸

²¹¹ Stanley, *supra* note 178, at 29–30. According to the Campaign for a Commercial-Free Childhood, children between ages four and twelve spent \$30 billion in 2002, up from the \$6.1 billion in 1989 when McNeal wrote *KIDS AS CUSTOMERS*. *Id.*

²¹² McNEAL, *supra* note 110, at 89.

²¹³ Park, *supra* note 120.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Kevin L. Keller, *Conceptualizing, Measuring, and Managing Customer-based Brand Equity*, 57 *J. MARKETING* 1, 8 (1993).

²¹⁸ Bernard J. Jansen, et al., *The Effect of Brand Awareness on the Evaluation of Search Engine Results*, 2007 CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 2471, 2475, available at <http://portal.acm.org/citation.cfm?doid=1240866.1241026>.

The preceding sections dealt primarily with marketing products that appeal to children. But what about those adult products that seem worlds away from toys, fast food and cool sneakers? According to McNeal, children start to develop preferences for particular brands and stores in early childhood, even before they begin school.²¹⁹ Their preferences reach beyond child-oriented products to encompass adult-oriented items such as gasoline, radios and soaps.²²⁰ It is incumbent upon the makers of those adult products to win over their future customers in childhood. Nickelodeon, for example, now makes a sizable profit off of advertisers in such non-kid-friendly goods and service “categories like insurance, automotive, travel, financial services, consumer electronics, and wireless.”²²¹ Potential consumers come from two places: some are persuaded to switch over from a competitor, and others are won from the pool of those who have yet to enter the market at all.²²² While the switchers may just as soon switch back without qualms, or jump from one competitor to another to follow the lowest price or best offer, new customers prove far more loyal.²²³

In 2006, Toyota moved to capitalize on children’s consumer power both as influencers of family decisions and as future buyers. The company began marketing its Scion to kids as the only automobile for sale in Whyville, an online interactive community of eight- to fifteen-year-olds.²²⁴ Parents were unlikely to frequent the site, and children in that age bracket not only couldn’t afford a Scion, but couldn’t even legally drive one. Nonetheless, Toyota hoped to reach kids who might affect their parents’ purchasing decisions and ideally grow up to yearn for Scions of their own. The company considered the partnership a success in its attempt to promote brand awareness among kids: Just “ten days into the campaign, [site visitors] had used the word ‘Scion’ in online chats more than 78,000 times.”²²⁵ Whyville citizens purchased hundreds of virtual Scions using “clams,” the currency of Whyville, and they visited “Club Scion,” the community meeting place, nearly 34,000 times.²²⁶ The site’s users bought Scions, custo-

²¹⁹ MCNEAL, *supra* note 110, at 90.

²²⁰ *Id.*

²²¹ Anthony Crupi, *Attack of the Kids: Nickelodeon and Cartoon Network Look to Schedule an Upfront Playdate with Media Buyers as the Obesity Flap Fades and Market Dollars Expand*, MEDIAWEEK, Mar. 17, 2008, at 18.

²²² MCNEAL, *supra* note 110, at 91.

²²³ *Id.* at 91, 102.

²²⁴ James Goin & Jay Goss, *Whyville and Scion Get Kids Behind the Wheel*, IMEDIA CONNECTION, July 5, 2006, <http://www.imediaconnection.com/content/10253.asp> (last visited May 3, 2009).

²²⁵ Bosman, *supra* note 108, at C2.

²²⁶ *Id.*

mized them with real world and fantasy accessories, adorned them with personalized decals they designed in a Whyville bumper-sticker factory and cruised around their virtual city.²²⁷

III. CULTIVATING FAME

A. *Marketing in Schools*

Firms cultivate “household name” status by appealing to older children learning to exercise their purchasing power and younger ones who cannot yet handle money or distinguish commercials from entertainment.²²⁸ Recent decades have seen a massive increase in marketing practices geared at promoting brand awareness among teenagers, toddlers and even infants. In towns that allow it, big brands advertise on athletic scoreboards, in school hallways, on free textbook covers, inside school buses and in cafeterias.²²⁹ Clever companies have integrated marketing messages with educational materials, disseminating M&M counting books, promising to instill moral values in preschoolers with the Care Bears or Clifford the Big Red Dog, and placing televisions in schools to breed loyalty in future consumers. Such firms hope not only to capitalize on the consumer habits of young shoppers and persuaders in the present, but also to foster longevity and situate themselves as household words in the future. They interject brand consciousness into adolescents’ everyday life, making affiliation crucial to both group- and self-identity.

Cover Concepts, a free magazine for parents distributed through their children’s schools and day cares, sends home samples of products like Nutri-Grain bars, comic books and book covers bearing advertisers’ names.²³⁰ The venture has been successful because advertisers like Nike, Gatorade and McDonald’s are able to mine schools’ demographic information to tailor their messages according to geography, age, race and ethnicity of children and parents. In fact, the marketing firm responsible offers marketers the ability to select the schools they target based on information that includes parents’ socioeconomic status.²³¹ Such an option suggests that their drive to sell products outweighs the desire to educate students. Children, in turn, develop a taste for the samples and

²²⁷ Goin & Goss, *supra* note 224.

²²⁸ See *supra* text accompanying notes 117–171.

²²⁹ CorpWatch, *The Education Industry Facts: An Overview*, July 8, 1998, available at <http://www.corpwatch.org/article.php?id=3289>.

²³⁰ Cover Concepts, <http://www.coverconcepts.com> (last visited May 13, 2009).

²³¹ THOMAS, *supra* note 109, at 196.

then request the products from parents, who are apt to trust those products that come with school endorsement.²³² Another marketing company employs a similar tack with older students, providing girls with a “TeenPak” containing samples and coupons for Noxema and Tampax.²³³ The agency promises its clients that it can “place samples of [their] brand[s] into the hands of up to two million junior and senior high school students in a controlled classroom environment.”²³⁴ NutraSweet teaches weight control in school through its “Total Health” program, McDonald’s introduces ecology with its *Wecology* magazine, Proctor & Gamble instructs girls in the use of its menstrual products through its booklet *Changing*, Colgate teaches oral hygiene in the guise of its “Superstar Magic Club dental health program” and Chef Boyardee offers recipes through its “Good Nutrition” program.²³⁵

Schools are increasingly engaged in teaching young people to be consumers. Advertisers have discovered that lean public school budgets create fertile ground for branded products and licensed characters in classrooms, on school buses and in cafeterias. Marketers recognize the potential of promoting products through school activities and appreciate that schoolchildren can serve as a captive audience. Students often board the bus with money in their pockets and without parents by their sides to monitor how that money is spent.²³⁶ One writer paints a picture of a typical branded school day for a six-year-old:

[T]here’s a little TV before breakfast or maybe 20 minutes with a computer game or an online visit to Neopets. Licensed cartoon characters, free advergames built around sweet treats and messages for snack food abound on both screens. The trip to school is accompanied by a dose of Bus Radio, with ads from blue-chip marketers like News Corp., Disney, Cartoon Network and AT&T. The school grounds are dotted with corporate sponsor logos, branded vending machines, and book covers sponsored by PepsiCo, Hasbro and Cadbury Adams. Ronald McDonald might pop into the classroom for a chat about literacy. Finally, an evening visit to KFC touts a buy-this-DVD message about PBS’ *Curious George*, with coupons in 4.5 million kids meals.²³⁷

²³² *Id.* at 200.

²³³ Consumers Union, *Selling America’s Kids: Commercial Pressures on Kids of the 90’s*, <http://www.consumersunion.org/other/sellingkids/summary.htm> (last visited May 14, 2009).

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ Susan Carney, *Books, Pizza Hut, and Bratz Dolls: Does In-School Marketing Push Unhealthy Products on our Kids?*, Mar. 2, 2007, http://youthdevelopment.suite101.com/article.cfm/books_pizza_hut_and_bratz_dolls (last visited May 1, 2009).

²³⁷ Stanley, *supra* note 178, at 29. Kentucky Fried Chicken calls its “Laptop Pack” kids’ meal “edu-tainment” because it incorporates trivia, puzzles and math games. Press Release, Kentucky Fried Chicken, The New KFC Kids Laptop Pack Kids Meal: Great Food & Loads of

The branded materials purport to teach crucial skills, from math to morals. Youngsters learning to count may rely on help from books like *Kellogg's Froot Loops! Counting Fun Book*; Mars's *M&M's Brand Counting Book*; Pepperidge Farm's *Goldfish Counting Fun Book* and Kraft Foods' *Oreo Cookie Counting Book*,²³⁸ which teaches children to count all the way down from ten cookies to "one little Oreo . . . too tasty to resist."²³⁹ Their more advanced siblings can learn math from *Reese's Pieces: Count by Fives*, the *Hershey's Milk Chocolate Bar Fractions Book* and *Skittles Math Riddles*.²⁴⁰ As a publisher of some of these branded books acknowledges, "It's not that these books resemble advertising—they *are* advertising."²⁴¹

In fact, some have made a similar observation about many more children's books, including those without branded products in their titles. In 1991, Tom Engelhardt, a longtime editor at Pantheon, wrote *Reading May Be Harmful To Your Kids*. In it he lamented that children's book publishing had come to be motivated only by the merchandise a book could spawn, including tapes, CDs, videos, clothing and toys.²⁴² Engelhardt asserted that the state of the industry made reading just another way of shopping.²⁴³ More recently, major booksellers and discount stores have dealt almost exclusively in books that feature licensed characters, contributing to the demise of the library and its model of trained educators carefully selecting quality books.²⁴⁴ Instead, the children's book industry represents the converse of the long-tail trend, carrying fewer different books but selling more of them.²⁴⁵ One ghost writer of licensed children's books describes how publishing companies treat the books like any other licensed properties: writers must stay within specific parameters, adhere to the character's "brand identity" and follow a strict style guide that mandates how they are allowed to depict the character.²⁴⁶ Eleven years after Tom Engelhardt's diatribe,

Fun-in-One, (Nov. 13, 2002) <http://www.kfc.com/about/newsroom/111302.asp> (last visited May 1, 2009).

²³⁸ Rosenberg, *supra* note 102, at s2.

²³⁹ David D. Kirkpatrick, *Snack Foods Become Stars of Books for Children*, N.Y. TIMES, Sept. 22, 2000, at A1.

²⁴⁰ *Id.*

²⁴¹ *Id.* (quoting Kate Klimo, publisher of Random House children's books division) (emphasis added).

²⁴² See Tom Engelhardt, *Reading May Be Harmful to Your Kids*, HARPER'S MAG., June 1991, at 55, 62.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ THOMAS, *supra* note 109, at 174.

²⁴⁶ *Id.* at 177–80.

a graduate student in children's literature set out to disprove his allegations but found the state of affairs even more dismal. After a decade of mergers left the production of most children's books under the domain of just a few publishers, "Clifford, Arthur, the Magic School Bus, Madeline, Curious George, Peter Rabbit, Harry Potter, and scores of other book characters have been stamped, stitched, webbed, printed, woven, filmed, and recorded onto a seemingly endless range of products"²⁴⁷ whose most powerful message to children appears to be not "read" but "buy."²⁴⁸

Clifford the Big Red Dog, for example, has recently made a comeback. Clifford was originally the subject of a book series in the early 1960s, earning moderate popularity. Then in 2000, Scholastic launched a Clifford show on PBS Kids and developed a line of curriculum for use in classrooms.²⁴⁹ Forty years after Norman Bridwell created Clifford and his friends, they acquired superstar status overnight.²⁵⁰ In school, Clifford modeled socioemotional learning: "sharing, compassion, kindness, and cooperation."²⁵¹ Scholastic marketed "Clifford's Kit for Personal and Social Development," including bilingual books, posters and videos, to pre-kindergarten classrooms for \$2600.²⁵² Even though toddlers are not developmentally capable of sharing, empathy or the other skills the Clifford curriculum purports to teach, daycare providers requested that the publishing company scale down the curriculum to make it suitable for even younger children, and Scholastic obliged.²⁵³ Children too young to read the books nonetheless seemed to enjoy the videos, recognizing Clifford and pointing him out enthusiastically on the posters that hung around their classroom.²⁵⁴ Teachers even admitted that they could invoke Clifford to keep children in line when they misbehaved.²⁵⁵ Myriad products followed, riding the wave of Clifford mania with backpacks, dolls, puzzles, costumes and more.²⁵⁶ Scholastic

²⁴⁷ Daniel Hade, *Storyselling: Are Publishers Changing the Way Children Read?*, HORN BOOK MAG., Sept. 1, 2002, at 509.

²⁴⁸ THOMAS, *supra* note 109, at 169.

²⁴⁹ *Id.* at 181.

²⁵⁰ *Id.* at 182.

²⁵¹ *Id.*

²⁵² Clifford's Kit for Personal and Social Development, <http://teacher.scholastic.com/products/secp/ck.htm> (last visited May 13, 2009).

²⁵³ THOMAS, *supra* note 109, at 184–85.

²⁵⁴ *Id.* at 184.

²⁵⁵ *Id.*

²⁵⁶ The Scholastic Store offers seventy-five Clifford products, subdivided into categories based on the child's age, the product type, and the price. The Scholastic Store, <http://store.scholastic.com> (last visited May 13, 2009).

called the Clifford series “part of a comprehensive brand marketing campaign, including home entertainment, consumer products, [and] publishing extensions, such as television tie-in books, interactive media and consumer promotions, supporting Clifford’s position as a leading pre-school brand.”²⁵⁷

B. Animarketing

Sometimes the product marketers want to sell not only forms the basis for the brand marketing campaign, it precedes the entertainment or educational component entirely. At a 2004 marketing conference, the most concise presentation came from a Fischer-Price executive who held up an action figure in one hand and announced, “Product!,” and then waved a video in the other hand, declaring it “Marketing!”²⁵⁸ Animarketing is using spokescharacters, often but not always cartoons, to market a product or brand to children.²⁵⁹ Spokescharacters abound in the supermarket, from the Keebler Elves, the Pillsbury Doughboy, the Snuggles Fabric Softener Bear and Mr. Peanut to Aunt Jemima, Chester the Cheetah and the Energizer Bunny. Even “the O in SpaghettiOs is a personified character, with his own little complex of joys, sorrows and anxieties” and his own strict parameters.²⁶⁰

In the 1980s, toy companies began to release program-length commercials, known as PLCs within the industry, simply by wrapping story lines around a toy or product.²⁶¹ The television shows designed solely to market He-Man, G.I. Joe, the Care Bears and Strawberry Shortcake drew rapt attention from the Saturday morning crowd, until by 1985 all ten of the best-selling toys starred in their own television shows.²⁶² While in 1980 only ten percent of the

²⁵⁷ THOMAS, *supra* note 109, at 171.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 124. A recent study of such characters primed subjects by explaining that “an advertising spokes-character is an animated rather than human product representative in a television commercial.” Kate Peirce & Michael McBride, *Aunt Jemima Isn’t Keeping Up with the Energizer Bunny: Stereotyping of Animated Spokescharacters in Advertising*, 40 SEX ROLES: J. RESEARCH 959, 963 (1999). This Article counts iconic spokespeople like Ronald McDonald (sometimes animated, sometimes human) and the Pillsbury Doughboy (CGI animated, formerly stop-motion claymation) among that group.

²⁶⁰ Ruth Shalit, *The Mr. Peanut Chronicles*, SALON.COM, Mar. 24, 2000, <http://archive.salon.com/media/col/shal/2000/03/24/doughboy2/index.html> (last visited May 1, 2009).

²⁶¹ THOMAS, *supra* note 109, at 55.

²⁶² *Id.*

toys sold in the United States were based on licensed characters, by 1987, the proportion had jumped to roughly sixty percent.²⁶³

While PLCs seem extreme, the urge to capitalize on kid-friendly characters through merchandising efforts is not new. Walt Disney released the first Mickey Mouse products in 1929,²⁶⁴ one year after Mickey was born, and Winnie the Pooh paraphernalia has been selling like gangbusters since the moment Disney added Pooh to its cadre in the 1930s.²⁶⁵ When Forbes calculated a ranking of the top-earning fictional characters in 2003, Pooh took first place at \$5.9 billion.²⁶⁶ Mickey followed, with earnings of \$4.7 billion for the year, then *Lord of the Rings*'s Frodo in third place with \$2.9 billion, Harry Potter in fourth with \$2.8 billion and the stars of *Finding Nemo* in fifth with \$2 billion.²⁶⁷

Although pairing spokescharacters with the products they hawk seems straightforward, strict guidelines govern every aspect down to the number of stripes on Ronald McDonald's socks. The proprietors of both Cheetos's Chester Cheetah and Lucky Charms's Lucky the Leprechaun at one point feared their spokesmen were seen as too goofy, and took careful steps to repair their images.²⁶⁸ One of the artists who worked on the Pillsbury doughboy campaign noted the importance of avoiding shots of the Doughboy's rear end, because it is simply "not a flattering point of view for our little spokesguy," who needs to maintain his dignity.²⁶⁹

Paul Anderson, a psychologist who assisted several marketers in targeting children through animarketing, undertook a study on the effects of character exposure on brand affinity. Prior to a 2004 study published in *Pediatrics* that declared television viewing by children aged one to three could result in "a constellation of attention-deficit problems by age seven,"²⁷⁰ Anderson shuffled up episodes of television programs *Teletubbies* and *Sesame Street* to gauge whether

²⁶³ *Id.*

²⁶⁴ *Id.* at 114.

²⁶⁵ *Id.* at 114–15. A.A. Milne first created Winnie-the-Pooh in the early 1920s. See A.A. MILNE, *Teddy Bear, in WHEN WE WERE VERY YOUNG* (1924).

²⁶⁶ THOMAS, *supra* note 109, at 115.

²⁶⁷ *Id.*

²⁶⁸ Shalit, *supra* note 260. In one spot, Chester breaks into a factory while the security guard sleeps. While the old Chester would have tripped and bungled his way in, the new Chester is crafty and suave, dusting off the security camera with his tail to avoid detection. *Id.*

²⁶⁹ *Id.* The doughboy likewise "doesn't do a lot of clenched-fist stuff," since doing so would draw attention to his lack of fingers. *Id.* "[W]hen he runs, he doesn't take large strides. He takes little steps. Then, when he falls down, his hat can jump off his head a little bit. That gives him the opportunity to readjust it, and give a little sheepish smile." *Id.*

²⁷⁰ THOMAS, *supra* note 109, at 88–89.

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young children actually followed the story lines.²⁷¹ He found the youngest viewers showed no signs of comprehension whether the shows they watched were scrambled or untouched.²⁷² In fact, while both background and foreground television distracted children and disrupted their play, they did not seem to actually learn anything from the shows other than the ability to recognize its characters.²⁷³

Building on Anderson's work, another group of researchers designed a mouse character and created a set of mock advertisements in which the mouse performed various activities, ate crackers or other snacks or simply appeared with the snacks.²⁷⁴ They played different ads for groups of children, noting subjects' attention levels, and then tested the kids' responses to both the mouse and the products.²⁷⁵ The researchers were surprised to find that the mouse's actions did not matter one bit in predicting what message the children gleaned.²⁷⁶ They found that no matter what the mouse did, "[t]he children's defining response to each scenario was simply *character recognition*. . . . The chief piece of learning that very young children mastered from watching characters on television was the ability to recognize them."²⁷⁷ In other words, the PLCs, cereal spokescharacters, Clifford the Big Red Dog curricula and character/fast food cross-promotions succeed with children not due to any message they bear or lesson they teach, but because of their ubiquity. Characters may prompt little ones to point excitedly to a Dora the Explorer poster on the subway or beg for a board book about Elmo, but the sheer ability to recognize those characters is all the programs teach.

²⁷¹ *Id.* at 94–95.

²⁷² *Id.* at 95.

²⁷³ *Id.* at 96.

²⁷⁴ Sabrina M. Neeley & David W. Schumann, *Using Animated Spokescharacters in Advertising to Young Children: Does Increasing Attention to Advertising Necessarily Lead to Product Preference?*, 7 J. ADVERTISING 7, 13 (2004).

²⁷⁵ *Id.* at 12–13.

²⁷⁶ *Id.* at 14.

²⁷⁷ THOMAS, *supra* note 109, at 129; Neeley & Schumann, *supra* note 274, at 15.

C. *Licensing and Product Placement*²⁷⁸

In the early 1990s, McNeal noted a particular marketing strategy gaining prevalence. He called it “integrated marketing” and described it as noncompeting firms working together to produce joint communications efforts that linked them in kids’ minds, as when Tyson sold frozen Looney Tunes meals featuring licensed cartoon characters or Nickelodeon and Pizza Hut collaborated to sell pizza to Spongebob Squarepants fans and sell Spongebob to pizza fans.²⁷⁹ Today, such cross-licensing campaigns have become omnipresent, as marketers scramble for “shared space.”²⁸⁰ Children need not wait until they arrive at Walt Disney World to see their favorite characters; they might just board a Delta airplane with the Powder Puff Girls painted on its side.²⁸¹ Tie-ins with Brach’s candy corn accompanied the 2007 release of Jerry Seinfeld’s *Bee Movie*.²⁸² Cover Girl recently partnered with a mainstream young adult novel to secure mentions of several of its products by the book’s teenage heroine.²⁸³ Sesame Street, once considered a paragon of virtue by many parents, has over seven hundred licensing agreements with makers of toys, greeting cards, clothing, toothbrushes and other products.²⁸⁴ It has paired with several companies to peddle fruit, breakfast items and packaged snacks.²⁸⁵

Plenty of integrated marketing promotions target teenagers and adults as well.²⁸⁶ Marvel comics inked a deal with Cadbury Schweppes, which explains

²⁷⁸ In keeping with the TDRA fame factor that considers third-party mentions, “product placement” in this Article refers not only to paid placements or explicit contracts to cross-promote, but also to spontaneous mentions or appearances of branded products and to all those in between, such as appearances with permission, mutually beneficial unpaid endorsement deals, free gifts or favors to compensate for product mentions, under-the-table deals, etc.

²⁷⁹ MCNEAL, *supra* note 110, at 131–32.

²⁸⁰ See e.g., Rosenberg, *supra* note 102, at s2 (giving various examples of cross-licensing including Burger King and Nickelodeon’s eight tie-ins and Delta Express and Cartoon Network’s collaboration in which Delta Express painted a plane with the likeness of the Powder Puff Girls).

²⁸¹ *Id.*

²⁸² T.L. Stanley, *Jerry Seinfeld Busy Promoting “Bee Movie,”* ADWEEK, Oct. 22, 2007, at 8; BEE MOVIE (DreamWorks Animation, 2007).

²⁸³ SEAN STEWART & JORDAN WEISMAN, *CATHY’S BOOK: IF FOUND CALL* (650) 266-8233, at 76 (2006); see Motoko Rich, *Product Placement Deals Make Leap From Film to Books*, N.Y. TIMES, June 12, 2006, at C1.

²⁸⁴ Wendy Melillo, *supra* note 118, at 14.

²⁸⁵ *Id.*

²⁸⁶ Some recent ad campaigns have even led to successful spin-off products that surprised their creators, like the Staples “Easy” button, of which the company sold \$7.5 million dollars

why the actors in *X-Men*, *Spider Man* and *Spider Man 2*²⁸⁷ all drink copious amounts of Dr. Pepper. The characters also appeared on cans of Dr. Pepper timed to coincide with the releases of each movie.²⁸⁸ The sodas were even digitally replaced with a competing soft drink brand, PepsiCo's Mirinda, when the movie was released in countries that do not sell Dr. Pepper.²⁸⁹ When New Line Cinema released *Sex and the City: The Movie*²⁹⁰ in May of 2008, viewers found eight different partner brands included in the film in ways that ranged from verbal mentions to repeated appearances on screen.²⁹¹ One of those companies enabled visitors to its web site to watch the movie trailer, win tickets to the premiere and shop for merchandise inspired by the show's characters.²⁹² Kim Cattrall, who drives a Mercedes GLK as Samantha in the movie, joined Daimler in January to introduce the GLK at the Detroit auto show. The Coca-Cola Company relabeled two flavors of Glacéau Vitaminwater in tribute to the film, and worked with New Line Cinema to advertise the water and movie on popcorn bags, posters in grocery stores and the brand's web site.²⁹³ Likewise, recent re-

worth, or the Travelocity gnomes, which sold so well at \$20 that the company released a new, bigger model for \$65. Noreen O'Leary, *Your Big Idea, Their Next Great Thing*, ADWEEK, Mar. 12, 2007, at 8. The Geico cavemen even star in their own spin-off television show. *Id.*

²⁸⁷ X-MEN (Twentieth Century-Fox Film Corp. 2000); SPIDER MAN (Columbia Pictures Corp., 2002); SPIDER MAN 2 (Columbia Pictures Corp., 2004).

²⁸⁸ David Finnigan, *Tie-ins: X Marks the Spot for Dr. Pepper, Mazda and Fox Summer '03 Release*, BRANDWEEK, Sept. 23, 2002, available at <http://www.allbusiness.com/marketing-advertising/branding-brand-development/4675856-1.html>.

²⁸⁹ Abram Sauer, *Brandchannel's 2004 Product Placement Awards*, INTERBRAND, Feb. 21, 2005, http://brandchannel.com/features_effect.asp?pf_id=251; see Mark Litwak, *When Products Become Stars*, 23 DELAWARE LAWYER 8, 9 (2006) ("This technology allows advertisers to seamlessly replace old products digitally with new ones. On a rerun of a *Seinfeld* episode, for instance, Jerry might drink a PepsiOne even if his character originally drank a Diet Coke.").

²⁹⁰ SEX & THE CITY: THE MOVIE (Darren Star Productions, 2008).

²⁹¹ Stuart Elliott, "*Sex and the City*" and Its Lasting Female Appeal, N.Y. TIMES, Mar. 17, 2008, at C8. Despite its adult content, *Sex & The City*, the television show on which the movie is based, attracts a great deal of young viewers, especially teenage girls. The show began on HBO but now runs on TBS, the network whose viewers' median age is younger than all five major broadcast networks, including The CW. Turner Broadcasting System, Inc., *TBS Scores Ad-Supported Cable's Best-Ever First-Quarter Delivery of Adults 18-34 in Primetime*, FUTON CRITIC, Mar. 26, 2008, available at <http://www.thefutoncritic.com/news.aspx?id=20080326turner01>.

²⁹² Bag Borrow or Steal, <http://www.bagborroworsteal.com/ui/specialty-shops/sex-and-the-city> (last visited Mar. 4, 2009).

²⁹³ Elliott, *supra* note 291, at C8.

lease *Semi-Pro*²⁹⁴ contracted with Bud Light and Old Spice, lending its protagonist, played by Will Ferrell, to television commercials for both.²⁹⁵

In addition to affiliating characters with products and services, firms often cross-promote to children through “clubs” like the Burger King Kids’ Club, which sends members coupons for noncompeting products, or Kraft’s Cheese ‘n Macaroni Club.²⁹⁶ Minute-Maid launched its Read-a-Book-a-Week program,²⁹⁷ McDonald’s its Ronald McDonald Reading Corner²⁹⁸ and Pizza Hut its “Book It” promotion, rewarding avid readers with pizza and a barrage of promotional freebies to associate their brands with literacy and education.²⁹⁹ According to the National Soft Drink Association, around two-thirds of American schools have signed “pouring rights” contracts, giving soda companies exclusive access.³⁰⁰ Marketers have successfully infiltrated schools, plastering ads on billboards, yearbooks, newsletters, textbook covers, screen savers, team uniforms, vending machines and school buses.³⁰¹

Children may be especially vulnerable to cross-promotion tactics by marketers. In 2003, critics universally panned Dr. Seuss’s *The Cat in the Hat*.³⁰² But thanks to tie-ins with major corporate sponsors Burger King, Kraft, Kellogg, Hershey and Procter & Gamble, the film nonetheless dominated the box office.³⁰³ In 2008, the movie *Hannah Montana/Miley Cyrus: Best of Both Worlds Concert Tour*³⁰⁴ showed off Disney’s line of Hannah Montana singing dolls, CDs and DVDs, but the movie also featured Adidas, Aéropostale, Alesis, Apple, Baldwin, BMW, Coca-Cola, Converse, Nike, Range Rover, Sabian and

²⁹⁴ SEMI-PRO (Donners’ Co. 2008).

²⁹⁵ Interbrand, Brand Cameo: Product Placement in Movies 2008, http://www.brandchannel.com/brandcameo_films.asp?movie_year=2008#top (last visited May 14, 2009). SEMI-PRO also featured appearances by Adidas, Busch, Cadillac, Converse, Denver Nuggets, Hitachi, Indiana Pacers, NBA, New Jersey Nets, Penthouse, PUMA, San Antonio Spurs, Shasta and Sports Illustrated. *Id.*

²⁹⁶ McNEAL, KIDS AS CUSTOMERS, *supra* note 110, at 98.

²⁹⁷ *Id.* at 72.

²⁹⁸ THOMAS, *supra* note 109, at 201.

²⁹⁹ McNEAL, *supra* note 110, at 99; Carney, *supra* note 236.

³⁰⁰ Katherine Battle Horgen, *Big Food, Big Money, Big Children*, in CHILDHOOD LOST: HOW AMERICAN CULTURE IS FAILING OUR KIDS 123, 128 (Sharna Olfman ed., 2005).

³⁰¹ Michele Stockwell, *Childhood For Sale*, BLUEPRINT MAG., July 23, 2005, at 22.

³⁰² Cindy Tsai, *Starring Brand X: When the Product Becomes More Important Than the Plot*, 19 LOY. CONSUMER L. REV. 289, 297 (2007); THE CAT IN THE HAT (Universal Pictures 2003).

³⁰³ Tsai, *supra* note 302, at 297.

³⁰⁴ HANNAH MONTANA/MILEY CYRUS: BEST OF BOTH WORLDS CONCERT TOUR (Walt Disney Pictures 2008).

Yamaha.³⁰⁵ 2007's kid-friendly *Enchanted*³⁰⁶ starred not just Amy Adams, but a host of goods and services designed to appeal to its target audience, including Swatch, Sephora and McDonald's.³⁰⁷

Studies about product placement in movies aimed at teen and tween audiences find that paid sponsorships abound. *Superbad*³⁰⁸ provided publicity for cigarette brands Camel, Kool and Marlboro, as well as snacks and beverages like Cheetos, Doritos, Fritos, Cocoa Puffs, Quaker Oats, Red Bull, Sierra Mist, Slim Jim, Slushee and Welch's.³⁰⁹ In another high school film, *Stomp the Yard*,³¹⁰ teenagers might notice a wide range of footwear and apparel marks, including Adidas, New Balance, New Era, Nike, Puma, Sean John, G-Star Raw and Timberland.³¹¹ The movie *Transformers*³¹² showcases a number of automobile marks: AAA, Austin-Healey, BMW, Cadillac, Escalade, Chevrolet, Camaro, Dodge, Ford, Mustang, GMC, Yukon, Hummer, Pontiac, Porsche, Saturn, Toyota, Volkswagen and Beetle.³¹³

The characters and brands well-recognized by children are not featured only in television commercials and in-store promotions. In addition to placing merchandise and marketing materials in schools, firms are increasingly relying on product placement within, rather than between, before, after and around, television shows, movies, songs, videogames and theme parks. Some early forays into product placement provided impressive returns for the brands behind them: Reese's Pieces saw a sixty-five percent sales increase after protagonist Elliot enjoyed them with his extraterrestrial friend in *E.T.: The Extra-Terrestrial*,³¹⁴ and sales of Ray-Ban sunglasses tripled after Tom Cruise wore them in *Risky*

³⁰⁵ Interbrand, Brand Cameo: Product Placement in Movies 2008, *supra* note 295.

³⁰⁶ ENCHANTED (Walt Disney Pictures 2007).

³⁰⁷ Interbrand, Brand Cameo: Product Placement in Movies 2007, http://www.brandchannel.com/brandcameo_films.asp?movie_year=2007#top (last visited May 14, 2009). Those also included AOL, Bank of America, BMW, Coca-Cola, DHL, Ford, Hallmark, Kodak, Loews, Planet Hollywood, Prada, Samsung, Sony, T.G.I. Friday's, Time Warner, Verizon and Virgin. *Id.* *Bee Movie* boasts guest appearances by Bumble Bee, Cinnabon, Emmy Awards, Golden Blossom Honey, New York Mets, New York Post, NPR, Polo Ralph Lauren, Timberland, TiVo, Variety and Vogue. *Id.*

³⁰⁸ SUPERBAD (Columbia Pictures 2007).

³⁰⁹ Interbrand, Brand Cameo: Product Placement in Movies 2007, *supra* note 307.

³¹⁰ STOMP THE YARD (Rainforest Films, 2007).

³¹¹ Interbrand, Brand Cameo: Product Placement in Movies 2007, *supra* note 307.

³¹² TRANSFORMERS (DreamWorks SKG, 2007).

³¹³ Interbrand, Brand Cameo: Product Placement in Movies 2007, *supra* note 307.

³¹⁴ Mark Litwak, *When Products Become Stars*, *supra* note 289 at 9; *E.T.: THE EXTRA-TERRESTRIAL* (Universal Pictures 1982).

Business.³¹⁵ More recently, a single episode of HBO's *The Sopranos*³¹⁶ prominently featured fourteen different branded products, including Cingular, Oris Watches, Puma, Chanel, Fossil and Mont Blanc.³¹⁷ One writer articles that "[t]he products [almost] seemed to get more face time than the main characters themselves as the camera often lingered over them for several seconds before breaking away to the actors."³¹⁸

The entertainment and advertising industries have become increasingly intertwined, morphing into a hybrid beast called "advertainment."³¹⁹ That trend will only amplify as the number of households with DVRs, and thus the ability to fast-forward through traditional television advertisements, continues to grow. One television producer acknowledges the role of DVR in heightening the benefits of product placement: "With TiVo out there, commercial messages are being obliterated So [product placement] is genius for [brands] because they are getting their products embedded in a show, and it will be there for the repeat, for the syndication run and on the DVD."³²⁰ The proliferation of remote controls and increase in television channels contributed to a rise in the popularity of product placement that predates the DVR;³²¹ all three make it easier for viewers to avoid ads if they so choose. The vast increase in product placement also dates to the advent of reality television, specifically the show *Survivor*, for which paid sponsors covered almost all of the production expenses and enabled CBS to air the show with no real financial risk.³²²

Producers and marketers refer to "three basic types of product placement: visual, spoken, and usage."³²³ With a visual placement, viewers can simp-

³¹⁵ Brian Goldman, *Putting Lamborghini Doors on the Escalade: A Legal Analysis of the Unauthorized Use of Brand Names in Rap/Hip-Hop*, 8 TEX. REV. ENT. & SPORTS L. 1, 4 (2007); RISKY BUSINESS (The Geffen Company 1983).

³¹⁶ *The Sopranos: Luxury Lounge* (HBO television broadcast Apr. 23, 2006).

³¹⁷ Phillip Swann, *The Sopranos: Artistic Integrity Gets "Whacked,"* TVPREDICTIONS.COM, Apr. 24, 2006, <http://www.tvpredictions.com/sopranoads042406.htm>.

³¹⁸ *Id.*

³¹⁹ See Matthew Savare, Comment, *Where Madison Avenue Meets Hollywood and Vine: The Business, Legal, and Creative Ramifications of Product Placements*, 11 UCLA ENT. L. REV. 331, 333-34, 369 (2004).

³²⁰ Meg James, *In-Show Product Pushing Chided*, L.A. TIMES, Nov. 14, 2005, at C-1 (quoting Joe Davola, television president at Tollin/Robbins Productions and executive producer of several WB shows, including *Smallville*, *One Tree Hill* and *What I Like About You*).

³²¹ Litwak, *supra* note 289, at 9.

³²² Lorne Manly, *When the Ad Turns Into the Story Line*, N.Y. TIMES, Oct. 2, 2005, § 3, at 1, available at <http://nytimes.com> (search for "when the ad turns into the story line" and follow article hyperlink).

³²³ Tsai, *supra* note 302, at 291-92.

ly observe a product, service or logo. For example, high school drama *Smallville* has featured Acuvue contact lenses, while kid favorite *One Tree Hill* has showcased Cingular cell phones, Sunkist soda and Secret deodorant.³²⁴ Spoken use occurs when someone mentions a corporation or branded item, as when Bernie Mac referred to Roloids multiple times during a rant about life and heartburn on his eponymous show.³²⁵ For a usage placement, an actor or actress (or reality star) actually handles or interacts with the product. Consider Carrie on *Sex & The City* typing on her Mac PowerBook or shopping for, salivating over, and wearing Manolo Blahnik shoes.

A fourth, more intense level of integration is analogous to the PLC, when the storyline of the show or movie revolves around the product itself: in the past few years, the starlets of *What I Like About You* competed to be “the Herbal Essences Girl”³²⁶ and Harold and Kumar spent an entire movie just trying to reach their holy grail, a White Castle franchise.³²⁷ For the movie *Are We There Yet?*, the producers inked a deal with Ford guaranteeing that the Lincoln Navigator driven by the film’s star, Ice Cube, would appear in 75% of the movie.³²⁸ On the high school drama *Gossip Girl*, a main character’s mother signed on to design a line of “retro lingerie” for Victoria’s Secret, discussing the brand, handing out gift bags and meeting with the CEO over the course of the episode.³²⁹ The restaurant chain Chili’s partnered with teen-oriented network The CW and became a regular backdrop on shows like *Veronica Mars*.³³⁰ The CW, in exchange, got its logo “on all of Chili’s in-store assets, including coasters, bag stuffers, table tents, in-store signage and gift cards.”³³¹ Chili’s has also finagled its way onto *The Office*³³² and *The OC*, shows popular with middle school and high school crowds. The characters on *Friday Night Lights*, on the other hand, convene at Chili’s competitor Applebee’s: one character works there as a waitress and the others eat there constantly.³³³

³²⁴ Gary Levin, *The Newest Characters on TV Shows: Product Plugs; Story Lines Make It Very Hard to Skip Commercial Messages*, USA TODAY, Sept. 20, 2006, at 1A.

³²⁵ Manly, *supra* note 322, § 1, at 1.

³²⁶ James, *supra* note 320, at C-1.

³²⁷ HAROLD & KUMAR GO TO WHITE CASTLE (Endgame Entertainment 2004).

³²⁸ Litwak, *supra* note 289, at 9.

³²⁹ Daily Intel, *A Very ‘Gossip Girl’ Christmas*, N.Y. MAG., Dec. 20, 2007, available at http://nymag.com/daily/intel/2007/12/a_very_gossip_girl_christmas.html.

³³⁰ See, e.g., *Veronica Mars* (The CW television broadcast).

³³¹ *Chili’s Pacts with the CW*, MEDIA WEEK, Sept. 18, 2006.

³³² Levin, *supra* note 324, at 1A.

³³³ *Id.*

Mark Litwak points out that reality shows like *American Idol* and *Survivor* “actively partner with brands,” rendering the entire show “a product placement forum.”³³⁴ Meanwhile, “specialized cable networks such as the Food Channel and The Learning Channel enable their producers to deliver niche audiences of great interest to certain manufacturers.”³³⁵ MTV high school pseudo-reality show *Laguna Beach* and its sequel, *The Hills*, provide a case in point. The series has offered major publicity for established brands like Teen Vogue, Chanel, Starbucks and Blackberry,³³⁶ as well as up-and-comers like Pinkberry³³⁷ and Rebecca Minkoff.³³⁸ In addition, fans can now participate in a virtual MTV world.³³⁹ Less than a year after *The Virtual Hills* launched, more than 7,000 visitors had bought in-world cans of Pepsi and 99% of the site’s visitors had seen the sponsor’s brand;³⁴⁰ Pepsi also “published an in-world ’zine.”³⁴¹ If users spent enough time in the virtual world, they began to “rack up MTV dollars” that they could use “for in-world purchases or Pepsi-branded items.”³⁴² Proctor & Gamble’s Secret brand extended its “Tell us your secret” campaign, running virtual booths where avatars could air their secrets.³⁴³

Nielsen data reveals that during the 2004 to 2005 television season, shows on the six broadcast networks featured over a hundred thousand product placements, an increase of about twenty-eight percent from the previous season.³⁴⁴ In the same year, the value of overall TV product placements rose 46.4

³³⁴ Litwak, *supra* note 289, at 9.

³³⁵ *Id.*

³³⁶ Kay Lyn, *Product Placement on MTV*, PRODUCT PLACEMENT TODAY, Mar. 5, 2007, <http://productplacementtoday.blogspot.com/2007/03/product-placement-on-mtv.html> (last visited May 1, 2009).

³³⁷ Pinkberry, PRODUCT PLACEMENT, <http://melissa-productplacement.blogspot.com/2007/02/pinkberry.html> (Feb. 16, 2007, 14:04).

³³⁸ Posting of Megs Mahoney Dusil to PurseBlog, *Lauren Conrad with Rebecca Minkoff Wine Nikki*, THE PURSE BLOG, <http://www.purseblog.com/rebecca-minkoff/lauren-conrad-with-rebecca-minkoff-wine-nikki.html> (Mar. 25, 2008).

³³⁹ Virtual MTV, <http://virtual.mtv.com/homepage> (last visited May 14, 2009).

³⁴⁰ Anne Becker, *MTVN Digital Chief: More Virtual Worlds*, BROADCASTING & CABLE, May 23, 2007.

³⁴¹ Ilya Vedrashko, *Study: Brands in Virtual Laguna Beach*, ADVERTISING LAB, Jan. 19, 2007, <http://adverlab.blogspot.com/2007/01/study-brands-in-virtual-laguna-beach.html> (last visited May 1, 2009).

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ Manly, *supra* note 322, § 1, at 1.

percent, to \$1.88 billion.³⁴⁵ More controversially, a 1999 study by the Federal Trade Commission found that alcohol product placements occur in several teen-oriented contexts, including PG and PG-13 movies with “significant appeal to teens and children”—movies that the advertiser knew had a primary target market that included a large underage contingent—and on eight of the fifteen television shows most popular among teenagers.³⁴⁶ A National Institute on Media and Family study found that as beer company spending increases, then children from the seventh to twelfth grade are more likely to know a beer brand and even drink that brand.³⁴⁷ Consider the titular crashers in the movie *Wedding Crashers*³⁴⁸ sucking down Budweisers through a paid promotion with the beer company:³⁴⁹ while advertising alcohol is banned on network television and heavily regulated on cable television, the teen-friendly, romantic comedy movie used its R rating to escape censor scrutiny. Likewise, Courvoisier sales increased in 2002 following the chart-topping success of Busta Rhymes’s music single, “Pass the Courvoisier Part II.”³⁵⁰

In fact, rap and hip-hop artists have been dropping brand names in their songs lyrics for a long time, from Will Smith’s “DKNY all up in my eye / you gotta Prada bag with a lot a stuff in it”³⁵¹ to Lil’ Kim’s

All we wanna do is party / And buy everybody at the bar Bacardi / Black Barbie dressed in Bulgari / I’m tryin’ to leave in somebody’s Ferrari / . . . This is

³⁴⁵ *Id.*

³⁴⁶ JANET M. EVANS & RICHARD F. KELLY, FED. TRADE COMM’N, SELF-REGULATION IN THE ALCOHOL INDUSTRY—A REVIEW OF INDUSTRY EFFORTS TO AVOID PROMOTING ALCOHOL TO UNDERAGE CONSUMERS § IV (1999), available at <http://www.ftc.gov/reports/alcohol/alcoholreport.htm> (citing Paul Farhi, *On TV, A Prime Time for Teens*, WASH. POST, Oct. 21, 1998, at A1 (identifying shows most popular with teens in fall 1998 and reporting one to two million viewers age 12–17 for these shows)).

³⁴⁷ Jonathan Rowe & Gary Ruskin, *The Parent’s Bill of Rights: Helping Moms And Dads Fight Commercialism*, MOTHERING, Jan./Feb. 2003, available at http://www.mothering.com/articles/growing_child/consumerism/bill_of_rights.html.

³⁴⁸ WEDDING CRASHERS (New Line Cinema 2005).

³⁴⁹ Litwak, *supra* note 289, at 12.

³⁵⁰ Although Busta Rhymes and Courvoisier claim they made no agreement prior to the song’s release, industry insiders have speculated that the liquor firm and the rapper might have brokered a deal for the endorsement. Erik Parker, *Hip-Hop Goes Commercial: Rappers Give Madison Avenue a Run for Its Money*, THE VILLAGE VOICE, Sep. 10, 2002, <http://www.villagevoice.com/2002-09-10/news/hip-hop-goes-commercial/1> (last visited May 1, 2009).

³⁵¹ WILL SMITH, *Gettin’ Jiggy Wit It*, on BIG WILLIE STYLE (Sony 1997).

for my peeps, with the Bentleys, the Hummers, the Benz / Escalades twenty three inch rims / Jumpin' out the Jaguar with the Tims³⁵²

Marketers are beginning to capitalize on that exposure. While most mentions of brands are not sponsored endorsements,³⁵³ Seagram's gin managed to garner paid mentions in five different rap songs from artists including Kanye West and Petey Pablo.³⁵⁴ One of the songs wound up the number two hip-hop song of 2004; it played over 350,000 times on the radio.³⁵⁵ In 2005, McDonald's hired an entertainment marketing firm to help it woo artists to incorporate references to Big Macs into their songs and raps.³⁵⁶ McDonald's director of brand entertainment strategy explains: "The stars of hip-hop have become brands. . . . This partnership reflects our appreciation and respect for the most dominant youth culture in the world."³⁵⁷ While critics like Dr. Susan Linn thought the "adversongs" would deceive fans, especially young listeners, McDonald's disagrees: it believes that "the McDonald's brand is so omnipresent already in America that having it in music, having it in TV, having it in movies, is no more intrusive than anything else children experience nowadays."³⁵⁸ In 2007, marketers for Nike commissioned KRS-One, Nas and Kanye West to record a song, "Better Than I've Ever Been," to commemorate the Air Force One sneaker's 25th anniversary. Despite its foul language and branded content, the song was nominated for a Grammy.³⁵⁹ In fact, a recent article in *Advertising Age* opines that the product placement landscape leaves new artists little choice: "[I]t's become nearly impossible to develop a major following without a branded tie-in."³⁶⁰

³⁵² LIL' KIM, *The Jump-Off*, on LA BELLA MAFIA (Atlantic 2003).

³⁵³ Brian Goldman, *Putting Lamborghini Doors on the Escalade: A Legal Analysis of the Unauthorized Use of Brand Names in Rap/Hip-Hop*, 8 TEX. REV. ENT. & SPORTS L. 1, 5 (2007) (citing estimates that 90% of the mentions are unpaid).

³⁵⁴ Taryn-Lee Biggar, *Pimp My Track*, MUSIC INDUSTRY ONLINE, Aug. 16, 2006, <http://www.mio.co.za/article/pimp-my-track-2006-08-16> (last visited May 1, 2009).

³⁵⁵ Marc Graser, *McDonald's on Lookout to Be Big Mac Daddy; Critics Pan Fast-feeder's Plan for Rappers to Sing Praises of the Sandwich*, ADVERTISING AGE, Mar. 28, 2005, at 123.

³⁵⁶ Renee Graham, *Slip a Big Mac Into a Rap, Get a Check From Ronald*, BOSTON GLOBE, Apr. 5, 2005, at C1.

³⁵⁷ Graser, *supra* note 355, at 123.

³⁵⁸ *Id.*

³⁵⁹ Charlie Moran, *Nike Scores Grammy Nomination for a Branded Song*, ADVERTISING AGE, Dec. 17, 2007, http://adage.com/songsforsoap/post?article_id=122675 (last visited May 1, 2009).

³⁶⁰ Charles Moran, *Indie Act Seeks Backup Brand*, ADVERTISING AGE, Mar. 10, 2008, at 3.

624 *IDEA—The Intellectual Property Law Review***IV. GOLDFISH, TOUCANS AND THREE-STRIPE SNEAKERS**

Courts assessing fame and other issues of public perception of trademarks have not ignored the role of children and teenagers as both primary and influence markets. When children compose a product's universe of consumers, or a significant part of that universe, courts have accepted empirical evidence³⁶¹ surveying children in their capacity as a brand's relevant consumers and persuaders.³⁶² When children are the recipients of goods or services and appear, in effect, to select those products, their influence power is acknowledged, although courts have sometimes accepted and other times disregarded³⁶³ survey evidence focusing either on the children who make up the relevant universe or on their parents.³⁶⁴

³⁶¹ See, e.g., *Frosty Treats, Inc. v. Sony Computer Entm't Am., Inc.*, 426 F.3d 1001, 1006 (8th Cir. 2005) (using as evidence "a survey of 204 children and 200 adults who had purchased ice cream from an ice cream truck in Frosty Treats's largest markets" to determine that Frosty Treats had not acquired secondary meaning); *Morrison Entm't Group Inc. v. Nintendo of Am., Inc.*, 56 F. App'x 782, 785 (9th Cir. 2003) (accepting Nintendo's survey showing children in target age-group unlikely to confuse marks); *Processed Plastic Co. v. Warner Commc'ns, Inc.*, 675 F.2d 852, 854, 856 (7th Cir. 1982) (allowing survey evidence from children age 6–12, despite defendant's contention that it "only indicate[d] that 'some small children thought the PPC car was sponsored or authorized by 'The Dukes of Hazzard' television program'"); *Warner Bros., Inc. v. Gay Toys, Inc.*, 658 F.2d 76, 79 (2d Cir. 1981) (finding confusion based on survey evidence demonstrating that the children, at the time of purchase by their parents, were confused); *Nabisco Inc. v. PF Brands, Inc.*, 50 F. Supp. 2d 188, 211 (S.D.N.Y. 1999), *aff'd*, 191 F.3d 208 (2d Cir. 1999) (PF Brands unlikely to succeed on infringement claim because it failed to show that its target market, children between six and twelve, were likely to be confused by defendant's product); *STX, Inc. v. Trik Stik, Inc.*, 708 F. Supp. 1551, 1554–55, 1559–60 (N.D. Cal. 1988) (denied motion to dismiss and granted preliminary injunction after citing survey of 712 teenage skateboarders in which 65% associated the plaintiff's kneepad with its mark based on appearance alone and 37% of the interviewees believed plaintiff made the product after being shown the defendant's product in its original packaging).

³⁶² Thornburg, *supra* note 4, at 100 ("Often, a product that has been directly and substantially marketed toward children requires that children be part of or predominate the universe of a trademark survey." (citing *E.S. Originals, Inc. v. Stride Rite Corp.*, 656 F. Supp. 484, 492 (S.D.N.Y. 1987))).

³⁶³ *Ty Inc. v. Softbelly's, Inc.*, 353 F.3d 528, 530–31 (7th Cir. 2003) (dismissing defendant's survey of thirteen- to eighteen-year-old girls as "worthless" compared to plaintiff's survey of adults over eighteen in determining whether Ty's "Beanies" was generic, even though a Ty employee testified its "prime market consists of girls 5 to 14, followed by girls/women 14 to 80").

³⁶⁴ See, e.g., *Kenner Parker Toys Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 351, 355 (Fed. Cir. 1992) (finding PLAY-DOH famous based on survey of mothers); *Binney & Smith v. Rose Art Indus.*, 60 U.S.P.Q.2d (BNA) 2000, 2003 (E.D. Pa. 2001) (survey universe is "mothers of

Products geared toward kids capitalize on kids' unsophisticated palates, preferences and attention spans. As such, makers of toys and snacks have an easier time demonstrating a likelihood of confusion in infringement cases than do those selling big-ticket items, couture fashion or wine and caviar.³⁶⁵ Judge Glasser, disregarding survey evidence and expert opinions proffered in a trademark action brought by Toys "R" Us against the owners of Kids "R" Us, described how

[a] common, if not nagging, experience of parenthood is the coercion of children that their clothing be of a current style and purchased in a designated place. Those vigorous promptings of children to which parents not infrequently succumb make the children, in reality, the true purchasers with the resultant lowering of the level of sophistication.³⁶⁶

Other courts have tried to consider the viewpoint of children in conducting an infringement analysis of competing products targeted at children, adhering to the principle that the similarity of child-oriented works must be viewed

children aged 2–12, who are the primary purchasers of children's art products"); *Nat'l Football League Props., Inc. v. N.J. Giants, Inc.*, 637 F. Supp. 507, 514, 517 (D.N.J. 1986) (appropriate survey universe consisted of persons over fourteen who had either purchased a clothing item with a name, slogan or picture on it in the past twelve months or planned to do so in the next six months, since "apparel items are not purchased by children age 13 and under but rather by adults such as parents or other relatives" and children under thirteen "are not likely to understand the concepts of 'authorization' and 'sponsorship'"); *Am. Greetings Corp. v. Dan-Dee Imps., Inc.*, 619 F. Supp. 1204, 1215–16 (D.N.J. 1985), *aff'd in relevant part*, 807 F.2d 1136 (3d Cir. 1986) (concluding that appropriate survey universe for toys included mothers of daughters age four to twelve); *Nestle Co. v. Chester's Market, Inc.*, 571 F. Supp. 763, 771 (D. Conn. 1983) (accepting a survey that excluded children, limiting the homemade cookie consumer universe to individuals eighteen years and older who actually baked such cookies).

³⁶⁵ See, e.g., *Binney & Smith*, 60 U.S.P.Q.2d at 2003 ("The Court finds that the purchasers of markers would not likely devote much care to distinctions between Plaintiffs' and Defendant's products because the products are relatively inexpensive and consumers frequently bring little care or sophistication to their purchase."); *Hershey Foods Corp. v. Mars, Inc.*, 998 F. Supp. 500, 505, 512 (M.D. Pa. 1998) (finding "[t]he consumers are not sophisticated. The parties' products are inexpensive, and targeted to children between the ages of 8 and 17 years of age" and, further, Reese's peanut butter cups' orange, brown and yellow package not famous as trade dress); *Educ. Testing Serv. v. Touchstone Applied Sci. Assocs., Inc.*, 739 F. Supp. 847, 853 (S.D.N.Y. 1990) (although purchasers of computer-based reading program were teachers and administrators, it was the ultimate consumers, namely the school children, who might be confused because they lacked the sophistication to differentiate among the products); *STX, Inc. v. Trik Stik, Inc.*, 708 F. Supp. 1551, 1559–60 (N.D. Cal. 1988) ("The consumer of the skateboard kneepad is likely to be young and unsophisticated (at least when compared to champagne purchasers).").

³⁶⁶ *Toys "R" Us, Inc. v. Canarsie Kiddie Shop, Inc.*, 559 F. Supp. 1189, 1199 (E.D.N.Y. 1983).

from the perspective of the young audience for which the products are intended.³⁶⁷

If courts are willing to consider children's familiarity with marks sufficient—or even necessary—evidence of whether a mark is famous, distinctive, confusing or generic, and children wield both primary and influence (not to mention future) market power, it follows that companies may be motivated to exploit the loyalty of such a credulous audience. For marks that garnered dilution protection under the FTDA's more lenient standard but find their footing less sure after the TDRA, or those that have yet to achieve fame or find fame slipping away, marketing to children and teenagers provides a compelling opportunity to cultivate the kind of widespread, generalized fame the TDRA contemplates. Children are not just the general consuming public of America's future; they are the general consuming public of America's present.

To bring the claims of this Article to life, it helps to examine several marks that have relied on renown among children to successfully establish their fame under the FTDA. Goldfish crackers, Kellogg's Toucan Sam character and Adidas's signature stripes are three such marks. In 1999 Pepperidge Farm demonstrated the fame of its signature Goldfish and proved a likelihood of success on the merits of its claim that Nabisco crackers in the shape of fish, bones and half-cat and half-dog creatures diluted the Goldfish mark, earning a preliminary injunction against Nabisco.³⁶⁸ In 2003 Kellogg failed to persuade the Sixth Circuit that golf paraphernalia featuring a toucan logo diluted its spokescharacter's fame, but it had no trouble establishing Sam's fame under the FTDA's multi-factor test.³⁶⁹ In 2007 a federal district court found Adidas's Three-Stripe trade dress famous under "either set of factors," those of the FTDA or the TDRA.³⁷⁰ However, its holding could be revisited by later courts since (1) Adidas offered no survey evidence to demonstrate the mark is widely recognized among the general consuming public; (2) the 2007 opinion relies mainly on the fame discussions from two cases decided prior to the TDRA; and (3) in dicta, the court acknowledged the marks may have ebbed and flowed in fame over time, implying that they may continue to do so.³⁷¹ These cases are noteworthy because the three marks epitomize three forms of marketing discussed above: Pepperidge Farm has recently begun targeting children through "educational" promotions and curriculum for use in school and at home; Kellogg continues to rely heavily

³⁶⁷ Lyons P'ship, L.P. v. Morris Costumes, Inc., 243 F.3d 789, 803 (4th Cir. 2001).

³⁶⁸ Nabisco Inc. v. PF Brands, Inc., 50 F. Supp. 2d 188, 192–93 (S.D.N.Y. 1999).

³⁶⁹ Kellogg Co. v. Toucan Golf, Inc., 337 F.3d 616, 628 (6th Cir. 2003).

³⁷⁰ Adidas Am., Inc. v. Payless Shoesource, Inc., 529 F. Supp. 2d 1215, 1245 (D. Or. 2007).

³⁷¹ *Id.* at 1243, 1245 & n.11.

on animarketing for Froot Loops and its other children's cereals; and Adidas is one of the brands most reliant on product placement. In addition, all three brands have stepped up their Internet presence recently to appeal to their young, plugged-in target audience members.

A. "Educational" Marketing: Fishful Thinking

Pepperidge Farm makes small, bright-orange puffed cheese crackers in the shape of goldfish.³⁷² It created Goldfish crackers in 1962, and since then has added smiling fish, colored fish, flavor-blasted fish, larger goldfish crisps and other variations,³⁷³ including twenty-four flavors of fish. At different times in its storied history, the Goldfish brand has relied on animarketing through a character named Finn,³⁷⁴ product placement in movies like *Garfield: The Movie*,³⁷⁵ tie-ins through a partnership with the NBA³⁷⁶ and copious television advertisements featuring memorable jingles. Its most recent effort, however, focuses on teaching. Since Clifford cornered the market on morals, and the Care Bears covered emotional intelligence, Goldfish opted to use its brand personality and connection with consumers to focus on optimism and teach children to harness the power of positive thinking.

With the guidance of a prominent academic psychologist³⁷⁷ and other authorities, the Goldfish brand developed and launched "Fishful Thinking," a "program designed to educate parents and teachers about the power of Optim-

³⁷² *Nabisco*, 50 F. Supp. 2d at 192.

³⁷³ See Pepperidge Farm—Heritage and History, <http://www.pepperidgefarm.com/History.aspx> (last visited May 14, 2009); Pepperidge Farm—Goldfish Crackers, <http://www.pepperidgefarm.com/ProductLanding.aspx?catID=722> (last visited May 14, 2009).

³⁷⁴ Carlye Adler, *Mascot Makeover*, FORTUNE SMALL BUSINESS MAGAZINE, Oct. 23, 2006, at 30 (Finn's friends include shy Gilbert, a pretzel gold fish; smart Brooke, a Parmesan fish; and daredevil XTreme, a Flavor Blasted fish); Amy Corr, *Out to Launch*, MEDIAPOST NEWS, Jan. 18, 2006, http://www.mediapost.com/publications/index.cfm?fa=Articles.showArticle&art_aid=38699 (describing spots on Nickelodeon and Cartoon Network featuring animated goldfish Finn and friends).

³⁷⁵ Goldfish Crackers Jump Into a New Current With a Role in 'Garfield' *The Movie*, BUSINESS WIRE, May 26, 2004.

³⁷⁶ Pepperidge Farm Scores Partnership with NBA All-Stars Dwyane Wade and Chris Bosh to Help Promote Fitness among America's Youth, BUSINESS WIRE, Feb. 16, 2008.

³⁷⁷ Fishful Thinking—About Dr. Karen Reivich, <http://fishfulthinking.com/FishfulThinking/AboutDrReivich> (last visited May 14, 2009).

ism and its role in childhood development.”³⁷⁸ The program touts optimism as a teachable skill and claims to provide the tools teachers³⁷⁹ and parents need to teach their kids how to think optimistically about themselves in order to “overcome life’s obstacles, persist in the face of adversity, and transform setbacks into manageable challenges.”³⁸⁰ The Fishful Thinking site is replete with advice columns, quizzes, tips and a book club with discussion suggestions for “sharing stories and experiences with your closest friends,”³⁸¹ as well as web graphics and wallpapers classified as “Family Fun” that enable kids to “[e]xpress [their] positive thinking.”³⁸² Fans of the campaign and the snack can sign up to receive newsletters, e-mails and useful tips to help them “inspire Optimism”³⁸³ in the children around them.

The Fishful Thinking site features exercises for kids that focus on such goals as “Positive Frustration,” “Mastery,” “Emotion Awareness,” “Savoring and Positive Emotion” and “Hope.”³⁸⁴ The site also suggests physical activities for children aged three to six, six to twelve and all ages, including games like “Leap Fish,”³⁸⁵ “Fish Out of Water,”³⁸⁶ “Scavenger Hunt Story Time”³⁸⁷ and “FINN in the Middle.”³⁸⁸ The video section features tutorials on projects for kids that tie into classroom learning, such as a poster to “[r]emind your children what they like about school,” an end of summer party to “get your kids and their classmates ready for the school year” and an eight-part optimism workshop.³⁸⁹ In addition to reaching out to parents and teachers through its site and publicity,

³⁷⁸ Fishful Thinking—What is Fishful Thinking?, <http://fishfulthinking.com/FishfulThinking/Whats> (last visited May 14, 2009).

³⁷⁹ Fishful Thinking—Optimism Facts, <http://fishfulthinking.com/Optimism/Facts> (last visited May 14, 2009).

³⁸⁰ What is Fishful Thinking?, *supra* note 378.

³⁸¹ Fishful Thinking—Fishful Thinking Book Club, <http://fishfulthinking.com/Resources/BookClubSelectionSecretLife> (last visited May 14, 2009).

³⁸² Fishful Thinking—Downloads, <http://fishfulthinking.com/Resources/Downloads> (last visited May 14, 2009).

³⁸³ Fishful Thinking—Stay Connected, <http://www.fishfulthinking.com/stayconnected> (last visited May 14, 2009) (“Optimism” is capitalized consistently throughout the site).

³⁸⁴ Fishful Thinking—Optimism Activities, <http://www.fishfulthinking.com/Optimism/Activities> (last visited May 14, 2009).

³⁸⁵ *See* Fishful Thinking, <http://www.fishfulthinking.com/> (last visited May 14, 2009).

³⁸⁶ *See id.*

³⁸⁷ *Id.*

³⁸⁸ *See id.*

³⁸⁹ Fishful Thinking—Video Center, <http://www.fishfulthinking.com/Resources/VideoCenter> (last visited May 14, 2009).

the Goldfish brand has pledged \$625,000 to City Year over three years and sponsors City Year's "Starfish" after-school program.³⁹⁰ City Year, in turn, "will broaden the reach of Fishful Thinking."³⁹¹ As a tie-in, Goldfish incorporated starfish-shaped crackers into its fish mix, and features "the starfish story" on the Fishful Thinking site, its companion kids' site³⁹² and City Year's own promotional materials.

The Goldfish kids' site, Goldfish Central, promises parents a safe environment for kids to learn and play; the site does not gather personal information or enable users to interact with one another.³⁹³ Kids can design their own goldfish characters, vote on which proposed new fish will join the group or create a customized homepage.³⁹⁴ The site features music videos, arcade games, movies, quizzes and polls.³⁹⁵ The more kids interact with the site, the more "Cheddar Points" they earn, which they can trade in at the "Cheddar Shop" for downloads, screensavers, homepage songs and decorations, as well as headgear, eyewear, accessories and activities for their fish.

In 1998 Nickelodeon Television Network's popular cartoon program *CatDog* launched with a ten million dollar advertising campaign featuring *CatDog*-themed product tie-ins and copious merchandising.³⁹⁶ The show centered around a character who was half-cat and half-dog;³⁹⁷ the dog half ate bones and the cat half ate fish and the bone/fish hybrid provided a recurring image for the show and related merchandise. The two halves made for an odd couple: Cat was "fastidious and emotionally reserved" while Dog was "slovenly and boisterous."³⁹⁸ *CatDog* targeted children aged six to twelve³⁹⁹ and earned a 3.9 Nielsen rating in its first three months of existence,⁴⁰⁰ placing it nearly on par with

³⁹⁰ Pepperidge Farm and City Year Unite to Make a Difference for Children, 8 City Year E-Newsletter 1 (2008), available at <http://www.cityyear.org/about/pressroom/NatEnews.cfm?Date=09-07&v=2&i=7&Article=s2> (last visited May 14, 2009).

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ Goldfish Kids Site, <http://www.pfgoldfish.com/default.aspx> (follow "Hey Mom & Dad: See why Goldfish Central is a safe place for kids. FIND OUT MORE" hyperlink) (last visited May 14, 2009).

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Nabisco, Inc. v. PF Brands, Inc.*, 50 F. Supp. 2d 188, 195, 209 (S.D.N.Y. 1999), *aff'd*, 191 F.3d 208 (2d Cir. 1999).

³⁹⁷ *Id.* at 192.

³⁹⁸ *Id.* at 195–96.

³⁹⁹ *Id.* at 205.

⁴⁰⁰ *Id.* at 209.

the leading children's television show at the time, *Rugrats*.⁴⁰¹ To promote *CatDog*, Nickelodeon relied on tie-ins with a number of products and brands, including Burger King, Jell-O and Duracell.⁴⁰²

The kids' network also partnered with Nabisco to develop a CatDog snack. By the time distribution was slated to begin, Nabisco had invested approximately \$3.4 million in inventory; developed television advertising; prepared print materials that included full-page ads, free-standing inserts and coupons;⁴⁰³ and contracted with retail customers over shipping and shelf space.⁴⁰⁴ By including a contest entry form, game board and game pieces, Nabisco designed the CatDog box so that children would keep it and continue playing with it after they finished snacking.⁴⁰⁵ The snack itself comprised small orange crackers in three shapes: half the crackers in a package resembled the two-headed CatDog character, one-quarter were bone-shaped and the remaining quarter were fish-shaped.⁴⁰⁶

It was the fish-shaped component, of course, that proved problematic. While the CatDog fish crackers were a little flatter and a little longer, they resembled Pepperidge Farm's Goldfish in their color, shape, size and cheese flavor.⁴⁰⁷ Pepperidge Farm sued Nabisco as soon as it saw a sample cracker, alleging state and federal trademark dilution⁴⁰⁸ as well as infringement based on post-purchase consumer confusion.⁴⁰⁹ The district court concluded the Pepperidge Farm Goldfish mark was nonfunctional, distinctive, famous and protectable under the anti-dilution and infringement statutes.⁴¹⁰ It held that Pepperidge Farm had proven a likelihood of success on the merits of its dilution claims under the FTDA, as well as state laws,⁴¹¹ and issued a preliminary injunction against Nabisco, mandating that it "cease using the Goldfish mark (*i.e.* a *gold* goldfish) in

⁴⁰¹ *Id.*

⁴⁰² *Id.* at 195.

⁴⁰³ *Id.* at 196.

⁴⁰⁴ *Id.* at 212.

⁴⁰⁵ *Id.* at 211.

⁴⁰⁶ *Id.* at 196.

⁴⁰⁷ *Id.* at 205 ("They are both small, bright-orange crackers clearly shaped as goldfish. The Pepperidge Farm Goldfish is slightly shorter and puffier. Some Goldfish have imprinted smiles, others are featureless. Nabisco's goldfish is slightly longer, flatter, and imprinted with an 'X' for eyes and gills.")

⁴⁰⁸ Pepperidge Farm has also registered a number of trademarks in Goldfish, including the fish shape of the Goldfish cracker. *Id.* at 192.

⁴⁰⁹ *Id.* at 192–93.

⁴¹⁰ *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 214 (2d Cir. 1999).

⁴¹¹ *Id.*

connection with the manufacture, distribution, sale, advertisement or promotion of any of its products.”⁴¹² The Second Circuit affirmed, declaring that “[a] second major seller of goldfish-shaped, orange-colored, cheddar-flavored, bite-sized crackers can hardly fail, in our view, to dilute the distinctiveness in the eyes of the consumers of the senior mark in a goldfish-shaped, orange-colored, cheddar-flavored, bite-sized cracker.”⁴¹³

Neither court hesitated to declare the Goldfish mark famous, deeming children aged six to twelve the “target consumers”⁴¹⁴ and noting that “children ages two to five-years old account[] for 12% of brand volume.”⁴¹⁵ The district court framed the question as one that “centers around how children—the target consumers of Nabisco’s product and approximately half the consumers of Pepperidge Farm’s product—perceive this fish-shaped cheese cracker.”⁴¹⁶ It also classified mothers as a large part of the relevant universe, but acknowledged the role of kids as influencers, because it is “children who, for the most part, drive the purchasing decision.”⁴¹⁷ In assessing fame under the FTDA standard, each court also described Goldfish’s market efforts, expenditures, popularity and unsolicited press:

In 1994, [Pepperidge Farm] launched an aggressive marketing campaign directed at children, who make up about half of Goldfish consumers, and between 1995 and 1998, it spent more than \$120 million marketing the Goldfish line nationwide. The cracker has also been the subject of substantial media coverage, including a feature on “The Today Show” and an episode on “Friends.” From 1995 to 1998, net sales of Goldfish crackers more than doubled, to \$200 million per year. Measured by sales volume, Pepperidge Farm’s Goldfish is the second-largest selling cheese snack cracker in America today. Measured in sales dollars, Goldfish ranks number one.⁴¹⁸

No survey evidence factored into the determination.⁴¹⁹ While Nabisco offered into evidence a survey it claimed showed the absence of consumer con-

⁴¹² *Nabisco*, 50 F. Supp. 2d at 212.

⁴¹³ *Nabisco*, 191 F.3d at 219.

⁴¹⁴ *Id.* at 220 (“Children are . . . target audiences for both products.”); *Nabisco*, 50 F. Supp. 2d at 211.

⁴¹⁵ *Nabisco*, 50 F. Supp. 2d at 195 n.6.

⁴¹⁶ *Id.* at 192.

⁴¹⁷ *Id.* at 194.

⁴¹⁸ *Nabisco*, 191 F.3d at 212–13; *Nabisco*, 50 F. Supp. 2d at 195.

⁴¹⁹ *Nabisco*, 50 F. Supp. 2d at 202–05.

fusion based on the fish shape in *CatDog*, the district court rejected it based on its failure to focus on the correct universe.⁴²⁰

In analyzing the likelihood of blurring, both courts also characterized the target consumers as “unsophisticated”⁴²¹ because of their age and the relatively low cost of the products. If children are the typical buyers of a brand of candy or toys, a lower standard of care may be reasonable.⁴²² Both Pepperidge Farm and Nabisco concurred that children are likely to drive the decision behind the purchase of Goldfish.⁴²³ However, while Pepperidge Farm believed and both courts affirmed that the sophistication factor weighed in its favor, “Nabisco argue[d] that [the] factor strongly supports *its* case, because children will have no difficulty recognizing the Nabisco product as a reference to the CatDog and will thus keep the two marks separate and distinct.”⁴²⁴ While the court disagreed with Nabisco in this case,⁴²⁵ Nabisco’s argument is not unreasonable: children, as members of a niche audience, will differentiate Winslow Oddfellow⁴²⁶ from Tommy Pickles⁴²⁷ more easily than will their parents or a panel of judges, making them “sophisticated” consumers in that limited sense.

⁴²⁰ *Id.* at 210 n.29. The opinion does not specify what universe Nabisco actually surveyed, but suggests that it considers relevant consumers to be mothers aged 18 to 49, children aged 6 to 12 and some other adults, as adult consumption accounts for approximately 56% of the market. *Id.* at 195 & n.6.

⁴²¹ *Nabisco*, 191 F.3d at 220; *Nabisco*, 50 F. Supp. 2d at 210.

⁴²² *Nabisco*, 50 F. Supp. 2d at 206 (citing 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:98 at 23–191 (4th ed. 1988)).

⁴²³ *Nabisco*, 50 F. Supp. 2d at 206.

⁴²⁴ *Nabisco*, 191 F.3d at 220–21 (emphasis added); *Nabisco*, 50 F. Supp. 2d at 206.

⁴²⁵ *Nabisco*, 191 F.3d at 220–21.

Even if Nabisco is correct in that surmise, it seems to us to have only moderate importance, for two reasons. First, while children may be the primary ultimate consumers of the crackers, they are generally not the purchasers. Adult purchasers of crackers may be less sophisticated than children in recognizing the differences between the two fish. Even if, in the minds of children, the addition of Nabisco’s CatDog family to the cheese cracker landscape does not lessen the distinctiveness of Pepperidge Farm’s mark in its Goldfish, it is likely to do so among adults who will have less awareness of Nickelodeon’s CatDog and of the differences between the two competing crackers.

Furthermore, even though children maybe [sic] the primary target of Pepperidge’s marketing, they make up only one half the Goldfish market.

Id.

⁴²⁶ Oddfellow was another character from *CatDog* whom Nabisco contemplated making into a cracker. *Nabisco*, 50 F. Supp. 2d at 196 n.10.

⁴²⁷ Tommy was a character on Nickelodeon’s *Rugrats*.

While the Goldfish brand has been held famous under an FTDA analysis, and Goldfish crackers are available and marketed in all fifty states, would the mark fare the same under the TDRA? The district court declared the mark “famous in the area of cheese cracker snack foods”⁴²⁸ and “recognized among consumers, the media, and the cracker and cookie industry as a famous brand.”⁴²⁹ But while wide recognition among kids and moms sufficed under the old regime, Pepperidge Farm would likely need to provide more extensive empirical evidence if the same case were brought today. If it did so, it could likely include young children in its survey universe and capitalize on its marketing to kids as primary, influence and future markets: even those young people who never partook of the crackers undoubtedly recognize them and their signature appearance because of Goldfish’s copious advertising campaigns.⁴³⁰

Even more to the point, the Goldfish brand message has entered children’s lives delivered not only by traditional television ads, but also by parents, educators and moviemakers. To engage its target audience, Pepperidge Farm has employed animarketing, product placement, tie-ins, websites and a counting book. Through its recent partnership with City Year, the Pepperidge Farm wisely borrows the halo of education and philanthropy to involve its Goldfish brand in children’s lives and make itself a household word in the present and future. This Article contends that the TDRA rewards such a strategy; the Fishful Thinking curriculum represents one way smart marketers are securing the protection the TDRA provides to only those brands that have achieved nationwide fame.

B. Animarketing: “Follow My Nose. It Always Knows!”

Cereal offers dozens of examples of animarketing, including Frosted Flakes’s Tony the Tiger, Sugar Smacks’s Dig-Um Frog, Lucky Charms’s Lucky the Leprechaun, Trix’s rabbit and Toucan Sam, the mascot for Kellogg’s Froot Loops cereal.⁴³¹ Kellogg is the largest cereal maker in the world and Froot Loops is one of its best-selling cereals;⁴³² in recent years Froot Loops has ranked

⁴²⁸ *Nabisco*, 50 F. Supp. 2d at 204.

⁴²⁹ *Id.* at 202.

⁴³⁰ From 1995 through 1998, Pepperidge Farm spent more than \$120 million to market the Goldfish line. Print and broadcast advertisements for Goldfish “prominently feature the Goldfish design.” *Id.* at 195.

⁴³¹ Additional examples include Kellogg’s Corn Flakes’ Corny the Rooster, Cocoa Krispies’ Sonny the Cuckoo, Golden Crisp’s Sugar Bear, Honey Nut Cheerios’ Bee Captain Crunch’s Captain, Cookie Crisp’s Cookie Crook and the Rice Krispies trio of Snap!, Crackle! and Pop!.

⁴³² *Kellogg Co. v. Toucan Golf, Inc.*, 337 F.3d 616, 624 (6th Cir. 2003).

among the top ten best-selling cereals in the United States.⁴³³ While Kellogg claims its ads never target children younger than six,⁴³⁴ Toucan Sam has clearly proved he has broad appeal over time and across demographics, as he has been following his nose to Froot Loops since Kellogg launched the cereal in 1963.⁴³⁵

The Sixth Circuit described the mascot as “an anthropomorphic cartoon”⁴³⁶ who does not resemble a real toucan.⁴³⁷

[Toucan Sam] is short and stout and walks upright. He is nearly always smiling with a pleasant and cheery demeanor, but looking nothing similar to a real toucan. He has a royal and powder blue body and an elongated and oversized striped beak, colored shades of orange, red, pink, and black. He has human features, such as fingers and toes, and only exhibits his wings while flying. . . . He speaks with a British accent, allowing him to fervently sing the praises of the cereal he represents, and to entice several generations of children to “follow his nose” because “it always knows” where to find the Froot Loops.⁴³⁸

The campaign has remained virtually unchanged worldwide since its inception,⁴³⁹ featuring Sam in every print and television advertisement it created.⁴⁴⁰

Kellogg has registered marks in a number of brand names, slogans and spokes-characters, including Toucan Sam’s name and image. It polices those marks diligently; it has opposed marks and filed claims against not only several food and beverage companies,⁴⁴¹ including cereal competitor General Mills Corp.,⁴⁴² but also gas company Exxon Corp. for a tiger mascot that vaguely re-

⁴³³ Kellogg Co. v. Toucan Golf, Inc., No. 4:99-cv-91, 2001 U.S. Dist. LEXIS 14451, at *3 (W.D. Mich. Sept. 6, 2001), *aff’d*, 337 F.3d 616 (6th Cir. 2003).

⁴³⁴ KELLOGG COMPANY WORLDWIDE MARKETING & COMMUNICATION GUIDELINES 6 (June 2008) [hereinafter Kellogg Marketing Guidelines], *available at* http://www.kelloggcompany.com/uploadedFiles/KelloggCompany/Corporate_Responsibility/WWMCG_guidelines.pdf.

⁴³⁵ *Toucan Golf*, 337 F.3d at 624.

⁴³⁶ *Id.* at 620.

⁴³⁷ *Id.* at 624.

⁴³⁸ *Id.* at 620.

⁴³⁹ Kellogg Canada, Inc.—Who Are We, <http://www.kelloggs.ca/whoweare/index.htm> (last visited May 14, 2009).

⁴⁴⁰ *Toucan Golf*, 337 F.3d at 620.

⁴⁴¹ *See, e.g.*, Kellogg Co. v. Western Family Foods, Inc., 209 U.S.P.Q. (BNA) 440, 440 (TTAB Dec. 22, 1980) (opposing registration of mark for canned fruits and vegetables); Bruce Walkley, *Toucan Sam’s Cereal Killer*, SYDNEY MORNING HERALD (Australia), July 27, 1999, at 3 (recounting Kellogg’s complaints against a company making fruit juice).

⁴⁴² Gen. Mills, Inc. v. Kellogg Co., 824 F.2d 622, 628 (8th Cir. 1987) (upholding the district court’s denial of Kellogg’s motion to preliminarily enjoin General Mills from using the name OATMEAL RAISIN CRISP on a new breakfast cereal based on alleged infringement of Kellogg registered trademark APPLE RAISIN CRISP).

sembles its Tony the Tiger mark;⁴⁴³ a Seattle band called “Toucans” for infringing Toucan Sam;⁴⁴⁴ and the maker of flavored frozen “Frootee Ice” bars for allegedly creating confusion with Froot Loops.⁴⁴⁵ In 1994, an Ohio family founded Toucan Golf, Inc. (“TGI”), a small business that uses a more realistic⁴⁴⁶ toucan drawing it calls “Lady GolfBird” as a logo to represent its products, playing off the bird references prevalent in the sport.⁴⁴⁷ TGI manufactures putter heads and other golf equipment, primarily for companies who order them to use as promotional gifts at charity events.⁴⁴⁸ Kellogg filed an opposition with the Trademark Trial & Appeals Board (“TTAB”) to TGI’s marks; when the TTAB dismissed its opposition, Kellogg twice appealed, alleging trademark infringement and dilution.⁴⁴⁹

Like many courts analyzing dilution under the FTDA,⁴⁵⁰ the Sixth Circuit wasted little time analyzing Toucan Sam’s fame, which it characterized as “not in dispute and requir[ing] no discussion.”⁴⁵¹ However, while the TTAB held Kellogg’s toucan design marks famous for cereal, it found that the word mark TOUCAN SAM had not been shown famous for cereal or any other item.⁴⁵² The district court disagreed, finding both the design marks and word

⁴⁴³ Kellogg Co. v. Exxon Corp., 209 F.3d 562, 564–65 (6th Cir. 2000).

⁴⁴⁴ Sylvia Wieland Nogaki, *Seattle Band Throws Kellogg for a Loop*, SEATTLE TIMES, Mar. 10, 1995, at A1, available at <http://gamma.sitelutions.com/~toucans/Trademark/SeaTimes.html> (“[Kellogg] claims the band—which plays Afro-Caribbean music on recycled oil drums, beaten with drumsticks made from sawed-off TV antennas—is infringing on its trademark for the Froot Loops’ avian icon, Toucan Sam.”). The small band succeeded in registering its name for entertainment services after seven years of negotiations with Kellogg. Toucans Win 6-Year Trademark Battle With Cereal Giant!, <http://gamma.sitelutions.com/~toucans/Trademark/finalrelease.html> (last visited May 14, 2009).

⁴⁴⁵ Kellogg Co. v. Pack’em Enters., Inc., 951 F.2d 330, 331–32 (Fed. Cir. 1991).

⁴⁴⁶ Kellogg Co. v. Toucan Golf, Inc., 337 F.3d 616, 622 (6th Cir. 2003) (“GolfBird has a multi-colored body, and TGI displays GolfBird in a myriad of color schemes for different purposes. Invariably, however, she has a long, narrow, yellow beak with a black tip, not disproportionate to or unlike that of a real toucan. GolfBird is always seen perched upon a golf iron as if it were a tree branch. She has no human features whatsoever, and resembles a real toucan in all aspects except, perhaps, her variable body coloring.”).

⁴⁴⁷ See, e.g., *id.* at 627 (“eagle,” “birdie” and “albatross”).

⁴⁴⁸ *Id.* at 621.

⁴⁴⁹ *Id.* at 622.

⁴⁵⁰ See, e.g., *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, L.L.C.*, 507 F.3d 252, 267–69 (4th Cir. 2007); *Jada Toys, Inc. v. Mattel, Inc.*, 496 F.3d 974, 980–82 (9th Cir. 2007); *Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1035–36 (9th Cir. 2007).

⁴⁵¹ *Toucan Golf*, 337 F.3d at 621.

⁴⁵² *Kellogg Co. v. Toucan Golf, Inc.*, No. 4:99-cv-91, 2001 U.S. Dist. LEXIS 14451, at *25 (W.D. Mich. Sept. 6, 2001).

mark famous for cereal, but not famous for golf equipment or any other products.⁴⁵³

The Sixth Circuit affirmed the district court's finding of no likelihood of dilution and no evidence of actual dilution under the stricter post-*Moseley* standard.⁴⁵⁴ It noted that Kellogg's 1991 survey indicated that 94% of consumers recognized Toucan Sam, and its 1997 survey showed no evidence of dilution, since after TGI began doing business, 94% of consumers still recognized Toucan Sam.⁴⁵⁵ That conclusion requires a slight inferential leap given that the first survey consisted entirely of children from six to twelve years old, while the second survey universe included adults and consumers of all ages.⁴⁵⁶ The first group more accurately reflects Froot Loops's target market, "because Kellogg considers Froot Loops to be 'kid-driven' cereal, aimed primarily at children as the consumers."⁴⁵⁷ But the inference that 94% recognition points to an absence of dilution by TGI seems appropriate given that the second survey universe ought to reveal less recognition, since it represents a cross-section of the general consuming public, not the niche target audience.

Like the opinions in the Goldfish cases, the Toucan Sam decision addressed consumer sophistication in assessing the viability of Kellogg's infringement claim.⁴⁵⁸ If the Sixth Circuit treated the young Froot Loop eaters as the relevant parties, it would likely find them relatively less sophisticated based on their youth and the cereal's inexpensive price tag. It could also have deemed them *more* sophisticated than typical shoppers; as lifetime viewers of ads featuring Toucan Sam, children would be less likely than other shoppers to confuse Sam with a dissimilar cartoon toucan logo marking non-competing goods. The court did neither, instead classifying only TGI's potential consumers, highly sophisticated "corporations and wealthy golfers."⁴⁵⁹ Likewise, the district court found "no evidence suggests that the types of potential purchasers who would receive such advertising materials [as promotional golf clubs for its competitors in the cereal market] would be likely to be confused."⁴⁶⁰ The fame question did

⁴⁵³ *Id.* at *31.

⁴⁵⁴ *Toucan Golf*, 337 F.3d at 627–29.

⁴⁵⁵ *Id.* at 628.

⁴⁵⁶ The district court maintains that the second recognition study was performed "using all age groups but sampling in favor of children." *Toucan Golf*, 2001 U.S. Dist. LEXIS 14451, at *8. The Sixth Circuit summarizes the same study as having "determined that 94% of adults likewise recognized Toucan Sam." *Toucan Golf*, 337 F.3d at 628.

⁴⁵⁷ *Toucan Golf*, 2001 U.S. Dist. LEXIS 14451, at *7.

⁴⁵⁸ *Toucan Golf*, 337 F.3d at 627.

⁴⁵⁹ *Id.*

⁴⁶⁰ *Toucan Golf*, 2001 U.S. Dist. LEXIS 14451, at *27 n.11.

not prove highly relevant in any event, as both courts found that Kellogg failed to adequately prove likely dilution or confusion.⁴⁶¹

In 2007, perhaps prompted by the lawsuit threat from parents and advocacy groups worried about child obesity,⁴⁶² Kellogg announced a voluntary commitment to make Froot Loops and some of its other most popular brands healthier or stop marketing them worldwide to children under twelve.⁴⁶³ Based on its “Global Nutrient Criteria,” Kellogg promised it would either reformulate or cease marketing to kids those foods that exceed set amounts of calories, saturated fat, sodium, sugar and trans fat per serving.⁴⁶⁴ If Kellogg failed to bring roughly half of its products into compliance with its new parameters by the end of 2008, it would stop using licensed characters or branded toys to promote them on TV, print, radio and third-party Internet media.⁴⁶⁵ It vowed not to market the offending foods to the under-twelve set via product placement, viral campaigns, celebrity spokespersons or on the front of the foods themselves.⁴⁶⁶ It promised it would not market any products—no matter how healthy—in elementary and preschools and planned to implement content changes on all child-directed websites that include healthy lifestyle messages, limits on interactive games and length of sessions.⁴⁶⁷

What, then, will become of Toucan Sam and his fame among children? At the time Kellogg issued its announcement, it directed 27% of its U.S. advertising at children under twelve years old.⁴⁶⁸ Just as the new sugary “Froot Loops straws”⁴⁶⁹ were designed to adhere to the new nutritional guidelines by the smallest margin, Kellogg is likely to tweak its most popular children’s products to

⁴⁶¹ *Toucan Golf*, 337 F.3d at 627–28; *Toucan Golf*, 2001 U.S. Dist. LEXIS 14451, at *27.

⁴⁶² *Kellogg to Boost Nutrition in Cereals, Snacks*, MSNBC.COM DIET AND NUTRITION, Jun. 14, 2007, <http://www.msnbc.msn.com/id/19214818> (last visited May 1, 2009).

⁴⁶³ The company’s restrictions apply only to media that has half its viewership under twelve, so children who watch television programs with more adult audiences will still see those foods advertised. Todd Zwillich, *Kellogg Cuts Junk-Food Pitch to Kids: Food Company Will Reduce Marketing of Less Healthy Foods to Children Under 12*, WEBMD HEALTH NEWS, Jun. 14, 2007, <http://www.webmd.com/parenting/news/20070614/kellogg-cuts-junk-food-pitch-to-kids> (last visited May 12, 2009).

⁴⁶⁴ The limits are: no more than 200 calories, 2 grams of saturated fat, 230 milligrams of sodium, 12 grams of sugar, nor any trans fat per single serving. Kellogg Marketing Guidelines, *supra* note 434, at 6.

⁴⁶⁵ *Id.* at 6–8.

⁴⁶⁶ *Id.* at 10.

⁴⁶⁷ *Id.* at 13, 16–19.

⁴⁶⁸ *Kellogg to Boost Nutrition*, *supra* note 462.

⁴⁶⁹ Kellogg’s Froot Loops Cereal Straws, <http://www.frootloops.com/cerealstraws> (last visited May 14, 2009).

meet the new criteria, perhaps substituting a sugar replacement for the 12.5 grams of sugar that currently sweetens each cup of Froot Loops. If it does not bring the product into compliance, Kellogg may take advantage of the principle of aspirational marketing ad firms know all too well: “If a fifteen-year-old sibling has it, then the eight-year-old is sensitized to that brand now If you want to get your product in the hands of a six-year-old, get it in the hands of a nine-year-old.”⁴⁷⁰ Marketing the brand explicitly to teenagers will not expunge it from the consciousness of tweens; the effect is quite the opposite. Targeting ads to the thirteen- to eighteen-year-old crowd, or even undergraduates, only makes it more appealing to Froot Loops’s primary audience, children age six to twelve years old. In fact, increasing the supposed target age of audiences for promotional efforts for Froot Loops, Apple Jacks, Pop Tarts and other non-complying products might bring those brands one step closer to surviving under a TDRA fame analysis.

C. Product Placement: “Rock My adidas—Never Rock Fila”⁴⁷¹

While Kellogg targets tweens with Toucan Sam and Goldfish cultivates brand awareness in elementary school children through its Fishful Thinking curriculum, sneaker brand Adidas has long appealed to teenagers and young adults by relying on celebrity endorsements and product placement, both through traditional media and online. The athletic apparel company spent about eighty million dollars on marketing in 2007,⁴⁷² a good deal of which focused on the youth market. Its investment in young people has paid off: teens consistently rank Adidas as one of the trendiest brands,⁴⁷³ placing it among their most preferred footwear labels;⁴⁷⁴ they purchase Adidas more often than any other shoe brand but one.⁴⁷⁵ Adidas has aligned itself with musicians that appeal to young listeners, creating the “Respect Me” line in conjunction with hip-hop artist Mis-

⁴⁷⁰ THOMAS, *supra* note 109 at 134.

⁴⁷¹ Beastie Boys, *The Sounds of Science*, on PAUL’S BOUTIQUE (Capitol Records 1989). Fittingly, the Adidas reference precedes one to Toucan Sam in the same song: “With my nose, I knows and with my scopes, I scope.” *Id.*

⁴⁷² Stephanie Kang, *New Balance Steps Up Marketing Drive*, WALL ST. J., Mar. 21, 2008, at B3.

⁴⁷³ Cecily Hall, *Coolness Factor: The Top 12 Footwear and Apparel Brands that Teens Consider to be the Trendiest*, WOMEN’S WEAR DAILY, Jun. 7, 2007, at 17.

⁴⁷⁴ Jeffrey P. Klinefelter et al., *Taking Stock with Teens Survey, Spring 2007*, PIPER JAFFRAY, at 3, available at <http://www.deca.org/pdf/PiperSurvey.pdf> (surveying 1200 students, an average of 16.8 years old).

⁴⁷⁵ *Id.* at 94.

sy Elliott⁴⁷⁶ and sponsoring music events like Lollapalooza.⁴⁷⁷ It has endorsed Olympic competitors since before it was legal to do so,⁴⁷⁸ and sponsors a number of young, high-profile athletes⁴⁷⁹ like Kevin Garnett, Kobe Bryant, Anna Kournikova and David Beckham. More recently, Adidas has forged a strong presence on teen-dominated sites, including MySpace,⁴⁸⁰ YouTube⁴⁸¹ and Facebook,⁴⁸² disseminating videos, commercials, fashion shows and behind-the-scenes footage.

On the big screen, viewers might have spotted Adidas product placement in a slew of recent movies⁴⁸³ aimed at kids and teenagers, including the Hannah Montana movie,⁴⁸⁴ *Blades of Glory*,⁴⁸⁵ *Harry Potter and the Sorcerer's*

⁴⁷⁶ ANDREW ROHM, FAREENA SULTAN & DAVID WESLEY, *THE BRAND IN THE HAND: MOBILE MARKETING AT ADIDAS* 15–16 (Richard Ivey School of Business 2005).

⁴⁷⁷ Steve Miller, *Sponsorships: I'm With The Band: Brands Jump On Summer Tours*, BRANDWEEK, Mar. 31, 2008, http://www.brandweek.com/bw/eseach/article_display.jsp?vnu_content_id=1003782487 (last visited May 21, 2009).

⁴⁷⁸ At the 1964 Tokyo Olympics, Adidas agents would leave envelopes stuffed with several hundred dollars in bathroom stalls for those athletes who wore their shoes. Ninety-nine medals were won by athletes sporting Adidas that year. BARBARA SMIT, *SNEAKER WARS: THE ENEMY BROTHERS WHO FOUNDED ADIDAS AND PUMA AND THE FAMILY FEUD THAT FOREVER CHANGED THE BUSINESS OF SPORT* 70 (HarperCollins 2008). Adidas secured sponsorship rights in the 2008 Olympics in Beijing for an estimated two hundred million dollars. Samuel Shen, *China Sports Brand Takes Short Cut to Olympic Fame*, REUTERS, Mar. 21, 2008, <http://www.reuters.com/article/newsOne/idUSSHA34340220080321> (last visited May 21, 2009).

⁴⁷⁹ For a full list of sponsored athletes, see <http://www.adidas.com>. See also SMIT, *supra* note 478, at xiii (describing how Adidas's three stripes always accompany soccer star David Beckham, from his footwear to the outfits of his teammates on both Real Madrid and Los Angeles Galaxy). Adidas even sued the NCAA in 1998, challenging its limits on the size and number of apparel company trademarks and logos that student-athletes may wear on their uniforms. NCAA Press Release, *Adidas Lawsuit Resolved*, <http://www.ncaa.org/databases/adidas/index.htm> (settlement clarified bylaw 12.5.4-(b) to “giv[e] Adidas some flexibility and certainty when designing distinctive team uniforms that are reflective of Adidas'[s] brand heritage”).

⁴⁸⁰ See <http://www.myspace.com/adidas>.

⁴⁸¹ Hall, *supra* note 473, at 17.

⁴⁸² Gino Cosme, *Adidas Celebrates Originality on YouTube & Facebook*, COSMEDIA, Feb. 7, 2008, <http://www.cosmedia.co.za/adidas-celebrates-originality-on-youtube-facebook> (“This is of course not the first time Adidas has played in the Web 2.0 landscape. Some examples include embarking on a Yahoo Avatar promotion in 2005 and opening a store on a private island in Second Life in 2006.”).

⁴⁸³ BrandChannel.com, *Tracking Brands in Films*, http://www.brandchannel.com/brandcameo_brands.asp?all_year=all_year#brand_list (last visited May 14, 2009).

⁴⁸⁴ HANNAH MONTANA/MILEY CYRUS: BEST OF BOTH WORLDS CONCERT TOUR (PACE 2008).

*Stone*⁴⁸⁶ and *I Now Pronounce You Chuck and Larry*.⁴⁸⁷ On the computer screen, a YouTube search for “adidas” returns over 30,000 hits.⁴⁸⁸ Similarly, “Adidas: Impossible is Nothing” boasts 23,273 friends on MySpace.⁴⁸⁹

Thanks to its extensive marketing efforts and popularity among children and adults alike, Adidas has fared well in its attempt to protect its registered marks, including not only the trefoil and brand logo, but the Three-Stripe trade dress. In several cases, Adidas has brought claims against stores selling confusingly-similar knockoffs or dilutive striped sneakers. Most recently, Adidas sued discount footwear retailer Payless Shoesource under a federal dilution claim. When the case came to trial in 2007, the district of Oregon found itself exploring the murky territory between the FTDA and TDRA with Adidas’s Three-Stripe mark and Superstar trade dress.⁴⁹⁰ The court relied on a hybrid of the FTDA and TDRA, applying the new standard retroactively to Adidas’s claims for injunctive relief and the FTDA to its claims for monetary damages based on the timeline of Payless’s allegedly dilutive actions.⁴⁹¹ Payless argued that Adidas could not prove dilution under either standard, because the fame of its Three-Stripe mark was insufficient.⁴⁹²

The district court disagreed, finding that under either the FTDA or TDRA factors, the record supported a finding that the Three-Stripe mark was famous and had been since as early as 1970.⁴⁹³ It cited two prior cases from the same court that had reached the same conclusion in what it called “two separate, but factually identical cases,” although it bears mentioning that both of those

⁴⁸⁵ BLADES OF GLORY (DreamWorks SKG 2007).

⁴⁸⁶ HARRY POTTER AND THE SORCERER’S STONE (1492 Pictures 2001).

⁴⁸⁷ I NOW PRONOUNCE YOU CHUCK & LARRY (Universal Pictures 2007). For even more examples, see JACKASS: THE MOVIE (Dickhouse Productions 2002), NORBIT (DreamWorks 2007), OCEAN’S THIRTEEN (Warner Bros. Pictures 2007), SEMI-PRO (Donners’ Co. 2008), STOMP THE YARD (Rainforest Films, 2007), SWIMFAN (Cobalt Media Group 2002), THE DUKES OF HAZZARD (Gerber Pictures 2005), THE PACIFIER (Walt Disney Pictures 2005), PINK PANTHER (Metro-Goldwyn-Mayer 2006), YOU GOT SERVED (Screen Gems 2004), AMERICAN PIE 2 (LivePlanet 2001), BAD BOYS II (Columbia Pictures Corp. 2003) and SCARY MOVIE 3 (Dimension Films 2003).

⁴⁸⁸ YouTube, <http://www.youtube.com> (results as of May 22, 2009). For comparison’s sake, on YouTube, popular girls’ brand “Steve Madden” returns 546 results, Adidas-owned “Reebok” 6,620, “K-Swiss” 917 and “Juicy Couture,” 1,090. *Id.* However, perennially first-ranked Nike returns an impressive 112,000 results. *Id.*

⁴⁸⁹ Adidas Friends, www.myspace.com/adidas (last visited May 14, 2009).

⁴⁹⁰ Adidas Am., Inc. v. Payless Shoesource, Inc., 529 F. Supp. 2d 1215, 1243–44 (D. Or. 2007).

⁴⁹¹ *Id.*

⁴⁹² *Id.* at 1244.

⁴⁹³ *Id.* at 1244–45.

“identical” analyses preceded the TDRA’s enactment.⁴⁹⁴ The court noted that Adidas’s failure to submit survey evidence of its marks’ fame was not dispositive,⁴⁹⁵ given Adidas’s extensive use of the Three Stripe mark and Superstar trade dress on its footwear since 1952⁴⁹⁶ and 1969, respectively,⁴⁹⁷ its massive advertising expenditures and its extensive efforts promoting and developing brand identity, as well as its wide recognition within the athletic apparel industry.⁴⁹⁸

The Three-Stripe Mark comprises three parallel, equidistant, double-serrated stripes of contrasting color that run diagonally from the mid-sole to the shoelaces on the side of the shoe.⁴⁹⁹ The principle features of the Superstar Trade Dress include the Three-Stripe Mark, a rubber “shell toe,” a completely flat sole and “a colored portion on the outer back heel that identifies the shoes as Adidas’[s] brand.”⁵⁰⁰ The trade dress warranted protection in part because Adidas had not merely manufactured and sold the shoes quietly, but had registered those elements of trade dress and consistently and actively promoted itself as “The Brand With Three Stripes.”⁵⁰¹ The company has many times partnered with professional athletic teams and events, enabling it to use the mark in connection with “the World Cup soccer tournament, the Boston Marathon, the New York Yankees, University of Notre Dame, the University of California at Los Angeles, the University of Nebraska, and the University of Tennessee.”⁵⁰² As the district court noted, “[A]didas’[s] annual sales of products bearing the

⁴⁹⁴ *Id.* (citing *adidas Am., Inc. v. Kmart Corp.*, No. CV-05-120-ST, 2006 WL 2044857, at *12 (D. Or. Jun. 15, 2006) (“[B]y the early 1970s, the Three-Stripe Mark and the Superstar shoe were well-known and famous.”)); *adidas-Salomon AG v. Target Corp.*, 228 F. Supp. 2d 1192, 1216 (sufficient evidence to withstand summary judgment on the issue of the Three-Stripe Mark’s fame).

⁴⁹⁵ *Payless*, 529 F. Supp. 2d at 1245 n.11 (citing *Google Inc. v. Am. Blind & Wallpaper Factory, Inc.*, No. C 03-5340 JFR, 2007 WL 1159950, at *11 (N.D. Cal. Apr. 18, 2007) (unpublished decision) (failure to conduct survey not dispositive on the question of fame where plaintiff submitted evidence of fame in the form of declarations, trademark registration and extensive sales and advertising); *800-JR Cigar, Inc. v. GoTo.com, Inc.*, 437 F. Supp. 2d 273, 294 (D.N.J. 2006) (finding mark famous based on trademark registration, sales and third-party recognition without requiring fame survey)).

⁴⁹⁶ *Payless*, 529 F. Supp. 2d at 1223.

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.* at 1244–45 (citing *adidas-Salomon AG v. Target Corp.*, 228 F. Supp. 2d 1192, 1216 (D. Or. 2002)).

⁴⁹⁹ *Id.* at 1222.

⁵⁰⁰ *Id.* at 1223.

⁵⁰¹ *Id.* at 1222–23.

⁵⁰² *Id.* at 1223.

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Three-Stripe mark totaled in the billions of dollars globally, and in the hundreds of millions of dollars within the United States” in the several years preceding the litigation.⁵⁰³

Adidas has also exerted a great deal of effort to promote the Superstar Trade Dress since the company introduced the style in 1969. The court acknowledged that “[t]he general public, professional and amateur athletes, hip-hop music artists, and the media commonly associate the Superstar Trade Dress with [A]didas.”⁵⁰⁴ Musicians including the Beastie Boys and Run-DMC helped popularize the Superstar; Run-DMC’s “My Adidas” shills the product like no song before or since,⁵⁰⁵ with about twenty mentions of the brand. The lyrics include verses like:

Now the adidas I possess for one man is rare / myself homeboy got fifty pair /
got blue and black cause I likes to chill / and yellow and green when it’s time
to get ill / . . . they’re black and white, white with black stripe / the ones I like
to wear when I rock the mic.⁵⁰⁶

In the late 1980s, the shell toe “reemerged as a fashion shoe”⁵⁰⁷ and remains popular to this day. The “sales of Superstar shoes exceeded \$711 million” between 1999 and 2006, “with more than 5 million pair sold in the United States in 2001.”⁵⁰⁸

Like the Goldfish and Toucan Sam decisions, the Adidas case also addressed consumer sophistication and the degree of care exercised by the average purchaser.⁵⁰⁹ While it did not discuss the age of Adidas’s target audience, the district court noted that purchasers of “relatively inexpensive athletic and sportswear” are unlikely “to exercise a high degree of care in distinguishing between trademarks when purchasing the goods.”⁵¹⁰ It held that “relatively unsophisticated, value-conscious consumers are more likely” to be both drawn to

⁵⁰³ *Id.*

⁵⁰⁴ *Id.*

⁵⁰⁵ The song led to an explosion in Adidas’s popularity among Run DMC fans; some pinpoint the event as marking the birth of hip-hop marketing and a turning point in the industry, especially in conjunction with Nike’s “Air Jordan” commercials directed by Spike Lee. *See, e.g., JUST FOR KICKS* (Caid Productions, Inc. 2003).

⁵⁰⁶ RUN-D.M.C., *My Adidas*, on RAISING HELL (Profile Records 1986); *see also* Just for Kicks, *supra* note 505.

⁵⁰⁷ *Payless*, 529 F. Supp. 2d at 1223.

⁵⁰⁸ *Id.*

⁵⁰⁹ *Id.* at 1241–42.

⁵¹⁰ *Id.* (citing *M’Otto Enters., Inc. v. Redsand, Inc.*, 831 F. Supp. 1491, 1502 (W.D. Wash. 1993); *Gucci Am., Inc. v. Action Activewear, Inc.*, 759 F. Supp. 1060, 1066 (S.D.N.Y. 1991)).

and confused by striped imitators, thus tipping the scales in favor of Adidas for that factor.⁵¹¹ Even Payless's counsel acknowledged that the store's typical consumers were "not particularly sophisticated."⁵¹²

Although the district court found the marks' fame obvious, it neglected to perform a true TDRA analysis, so its decision is not binding on future litigants. Nonetheless, Adidas is on the right track toward ensuring the TDRA protects not only its brand, but its trade dress and cherished stripes. As discussed above, the TDRA offers protection to only those marks "widely recognized by the general consuming public" as a designation of source, and that phrase has been interpreted to mean that a mark must be famous among nearly the entire population of the United States.⁵¹³ To not only achieve that kind of notoriety, but maintain it, Adidas must continue to make use of endorsement, sponsorship, athletic corporation partners and social networking sites, in addition to traditional media like television and print ads. Under the TDRA, it can establish the registration and duration factors, but it needs to strive for even greater sales and recognition before it can rest assured of fame under the TDRA.

V. CONCLUSION

The TDRA provides several nonexclusive factors to evaluate whether a mark is widely recognized among the general consuming public. The first fame factor suggests courts consider the duration, extent and geographic reach of advertising and publicity by the mark's owner or third parties.⁵¹⁴ With the advent of digital recording devices enabling viewers to skip television advertisements, firms have increasingly used product placement in television and movies. Many have experimented with less traditional formats, such as printing advertisements on eggshells,⁵¹⁵ cross-promotions on potato chips⁵¹⁶ and licensed characters'

⁵¹¹ *Id.* at 1242.

⁵¹² *Id.* (citations omitted).

⁵¹³ *Id.*

⁵¹⁴ 15 U.S.C. § 1125(c)(2) (2006).

⁵¹⁵ David S. Joachim, *For CBS's Fall Lineup, Check Inside Your Refrigerator*, N.Y. TIMES, Jul. 17, 2006, at C2.

⁵¹⁶ For the promotion, Pringles chips came imprinted with questions from Hasbro's Trivial Pursuit game. John Nolan, *Printed Pringles: Trivia Questions to Appear on Chips*, USA TODAY, May 20, 2004, http://www.usatoday.com/money/industries/food/2004-05-20-printed-pringles_x.htm (last visited May 1, 2009).

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images on candy bars.⁵¹⁷ For example, Adidas relies heavily on celebrity endorsements, athletic event sponsorship and product placement to cultivate mindshare among young consumers. Recently it has capitalized on the brand's appearances in film, cyberspace and hip-hop, both firm-orchestrated and organic, to increase its appeal to teenagers and young adults. In its quest to become a household name and expand its reach, Adidas has successfully recruited kid and teens as loyal fans, and in the process, it has apparently rendered its trade dress famous for dilution purposes.

The second factor points to the amount, volume and geographic extent of sales of the goods as playing a role in determining fame for the TDRA.⁵¹⁸ Kellogg has leveraged spokescharacters like Toucan Sam and Tony the Tiger to position itself as the largest⁵¹⁹ and most famous⁵²⁰ cereal maker in the world. Kellogg considers children aged six to fourteen its target audience for Froot Loops and tailors its ads to appeal to youngsters as its primary, influence and future markets despite resistance from parents over its products' poor nutritional value. While its initial path to FTDA fame has been smooth, self-imposed industry regulations and the new "general consuming public" standard under the TDRA may threaten the fame that once seemed obvious.⁵²¹ Because federal dilution doctrine rewards fame handsomely, Kellogg has even greater incentive to continue animarketing to grade school kids and to keep its mascots relevant, ubiquitous and, most importantly, widely recognized.

The third fame factor, the extent of actual recognition of the mark, comes closest to restating the new definition of fame itself. Many of the brands discussed above have begun marketing to kids during their school day by creating and disseminating branded curriculum. Pepperidge Farm's "Fishful Thinking" campaign features activities that emphasize optimism, relying on the halo of so-called "educational" marketing to ensure that kids engage with, recognize, request and seek out Goldfish, and that parents endorse that choice. Since a large number of the brand's fans are either young or influenced by young people, the campaign cleverly positions Goldfish to wield the TDRA against competitors while benefiting from its continued protection.

⁵¹⁷ Steven Mallas, *Printing on a Pringle*, THE MOTLEY FOOL, May 25, 2004, www.fool.com/investing/general/2004/05/25/printing-on-a-pringle.aspx (last visited May 1, 2009).

⁵¹⁸ 15 U.S.C. § 1125(c)(2).

⁵¹⁹ Kellogg Co. v. Toucan Golf, Inc., 337 F.3d 616, 620 (6th Cir. 2003).

⁵²⁰ See *The 100 Top Brands*, *supra* note 21, at 59–60.

⁵²¹ Adidas Am., Inc. v. Payless Shoesource, Inc., 529 F. Supp. 2d 1215, 1244 (D. Or. 2007).

The heightened degree of fame the TDRA requires narrows the universe of marks it protects, leaving insufficiently famous marks with protection only under trademark infringement laws. Yet, for marks that qualify, the TDRA offers hefty rewards upon a showing that dilution is merely likely. As such, it provides strong incentives for wealthy companies to strive to make each mark “widely recognized by the general consuming public of the United States.”⁵²² While the dilution doctrine offers more potent protection, children have simultaneously become both more sophisticated and more sought-after as consumers. Many courts have already vindicated consultants’ use of children as part or all of the relevant universe for survey purposes. Children’s impressions and opinions about brands will only increase in importance as they continue to gain spending power and product savvy. These legal and social forces coalesce where the TDRA meets marketing to kids, making dilution law a driving force in the commercialization of childhood.

⁵²² *Id.*