MAKING A MARK: TAKING A GLANCE AT TRADEMARKS AND GRAPHIC INFRINGEMENT

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“[T]here are signs that a craftsman puts upon the objects he makes, such as on swords, other metal objects or paper. No one else is allowed to use this mark for his own products.”

Bartolus de Saxoferrato, a renowned Italian professor and attorney, authored this—the oldest written trademark law—in his Medieval Era treatise, circa 1355. Almost a millennium later, trademarks have evolved into an intellectual property device and are the subject of contentious litigation by individuals and companies seeking to protect their rights, ideas, designs, and brands.

I. INTRODUCTION

Review of case law indicates the vast majority of trademark claims center on the name or words encompassed by the mark, rather than the visual imagery. Perhaps this is true because assessing similarity of “non-word marks” is “even more difficult.” The challenge of analyzing the visual component of marks, however, does not detract from the importance of doing so. In fact, the American Institute of Graphic Arts (“AIGA”)—a leading authority on graphic design—recognizes that “[i]mage-based design is employed when the designer determines that, in a particular case, a picture is indeed worth a thousand words.” Those graphic images carrying a trademark serve to “identify and distinguish” a person’s goods or services. Because it is not always clear when a graphic infringes upon or dilutes an established trademark,
concerns and sometimes legal claims arise.\textsuperscript{10}

While there are two legal standards under which a trademark may be protected, there is no clearly defined mechanism for evaluating graphic images in this context. As such, graphic trademarks may be stripped of their value. Not only does this void stand to deprive a mark’s owner of intellectual property rights, but it also risks consumer confusion and threatens brand identity as a result. As one graphic designer explains, a brand can be defined as a “personality” or “corporate image” that is the sum of many elements, including a logo or mark.\textsuperscript{11} To be sure, logos\textsuperscript{12} and product packaging\textsuperscript{13} typically feature graphics. So much forethought, time, effort, manpower, and cost goes into the creation of a brand and its elements that an industry specializing in brand development now exists.\textsuperscript{14} Thus, identifying a test that would allow courts to determine when a graphic image infringes\textsuperscript{15} on a mark could have broad beneficial implications for the consuming public and the identities to which marks attach. A specialized test reliant on intuitive reactions at a “single glance”\textsuperscript{16} will help resolve the ambiguity inherent in employing a word-based test for analyzing graphic-based marks.

To that end, this Comment will discuss a variety of graphic images,\textsuperscript{17} analyzing where each fits within the scheme of trademark history and protection. Part II will serve as the backdrop for that which constitutes graphic images and trademarks, and it will lay the historical foundation for connecting the two. Part III will detail the evolution of

\textsuperscript{10} See, e.g., Starbucks Corp. v. Wolfe’s Borough Coffee, Inc., 477 F.3d 765, 765 (2d Cir. 2007) (demonstrating the two types of trademark claims—confusion and dilution—in a single lawsuit).
\textsuperscript{13} See J. THOMAS MCCARTHY, 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 8:1 (4th ed. 2015).
\textsuperscript{15} Many legal authorities, including judicial opinions, refer to a “confusion” claim as a “traditional infringement” claim. However, as used in this Comment, “infringe” and “infringement” will refer to the depleting or harmful effect a contested graphic, image, or design has upon another trademarked graphic, image, or design, whether in the context of a “confusion” claim or a “dilution” claim. Further discussion of these claims continues in Part III.A.1 of this Comment, and any use of “infringement” solely in the context of a “traditional infringement” claim will be supplemented with clarification as a “confusion” claim.
\textsuperscript{16} The phrase “single glance” will be referenced and developed later in this Comment. See discussion infra Parts V–VII.
\textsuperscript{17} See supra note 8.
trademark protection, including the current legal standards, legislation, and an additional suggested standard. Part IV will discuss why these standards are insufficient for assessing graphic infringement. Part V will examine a quasi-standard articulated by the Ninth Circuit and propose it be adopted. Part VI will address recent cases and pending litigation where this standard would prove actionable and invaluable. Finally, Part VII of the Comment will conclude with a brief reinforcement of why the proposed standard is a needed solution.

II. THE FOUNDATION OF GRAPHIC IMAGES AND TRADEMARKS

A. What Constitutes a Graphic Image?

Graphic design may be defined as the use of visuals to communicate a message.\(^\text{18}\) The AIGA classifies graphic design into four categories: (1) image-based design, (2) type-based design, (3) image and type, and (4) symbols, logos, and logotypes.\(^\text{19}\) While this Comment will focus on image-based design and logos, the categories sometimes overlap. Therefore, an explanation of all categories will help place the discussion in context.

1. Image-Based Design

Image-based design relies on the ability of a picture or an image to speak for itself.\(^\text{20}\) It is human instinct to respond to images because of the moods and emotions that these “incredibly powerful and compelling tools of communication” often elicit.\(^\text{21}\) Whether rendered through a photograph, painting, drawing, or computer, images categorized as image-based design must stand alone to “carry the entire message.”\(^\text{22}\) This notion has become increasingly important in the Information Age as attention spans decrease and consumers seek greater visual stimulation than text-based layouts can offer.\(^\text{23}\)

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\(^{18}\) THE AM. INST. OF GRAPHIC ARTS, supra note 7 (describing logos, magazine advertisements, and computer print-outs as just a few examples of graphic design vehicles).

\(^{19}\) Id.

\(^{20}\) See id.

\(^{21}\) Id.

\(^{22}\) Id.

2. **Type-Based Design**

Type-based design encompasses “handmade lettering” and typography (printed words), the latter consisting of typeface (font), page layout, text size, and style.\(^{24}\) When a designer relies solely “on words to convey a message[,] . . . what the words look like is as important as their meaning.”\(^{25}\) The FedEx logo epitomizes successful type-based design. Landor\(^{26}\) designed the logo in 1994, and in it, the cleverly placed “E” and “x” in the appropriate font create a right-facing arrow.\(^{27}\)

Calendars (illustrated below), books, and magazine layouts are also examples of type-based design, and their layouts can garner great recognition as well.\(^{28}\)

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\(^{24}\) **THE AM. INST. OF GRAPHIC ARTS, supra** note 7.  
\(^{25}\) *Id.*  
\(^{26}\) *See LANDOR, supra* note 14.  
\(^{30}\) *Id.*
3. Image and Type

Designers may combine and balance image (image-based design) and type (type-based design) to create a visual that both represents a client and speaks to its audience. Serving as “the link between the client and the audience[,] . . . [designers] often collaborate with market researchers and other specialists to understand the nature of the audience.” Accordingly, the role of the designer is pivotal in the construction and success of a brand.

4. Symbols, Logos, and Logotypes

“Symbols and logos are special, highly condensed information forms or identifiers,” while “[l]ogotypes are corporate identifications based on a special typographical word treatment.” Symbols and logotypes are frequently combined to represent a corporate vision, which plays into brand identity. The NBC “peacock” is an example of “abstract representation” symbolizing a recognizable brand.

When a designer—or a corporation that has paid the designer for a logo—wants to stake ownership rights and protect the graphic creation, the designer or corporation will apply for a trademark. In the United States, trademarks are registered with the United States Patent and Trademark Office (“USPTO”). The person or entity that successfully registers a mark becomes the trademark owner.

B. What Constitutes a Trademark?

1. Trademark Classification, Origin, and Purpose

A word or symbol constitutes a trademark when it meets the following three criteria: (1) it is a tangible “word, name, symbol or device or any combination” thereof; (2) it is adopted and used by a manufacturer or seller of goods or services; and (3) its function is “to identify and distinguish the seller’s goods” or services from others’ in

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31 THE AM. INST. OF GRAPHIC ART, supra note 7.
32 Id.
33 Id.
34 See id.
35 Id.
38 Trademark, Patent, or Copyright?, supra note 36.
the market. To determine whether a word or symbol is eligible for trademark protection, it will be placed in one of four categories: (1) generic, (2) descriptive, (3) suggestive, or (4) arbitrary or fanciful. Each category is necessarily distinct.

When a term is the commonly used way to describe an object, it is deemed generic and not protectable as a trademark. Similarly, “merely descriptive” terms will not acquire trademark protection, except when their secondary meaning has come to distinguish the seller’s “goods in commerce.” While descriptive terms may impute “ingredients, qualities or characteristics,” suggestive terms require a person’s “imagination” and “perception” to surmise “the nature of the goods.” Fanciful terms are typically invented words that have been created expressly to be used as trademarks. Arbitrary terms are the trademarked use of already existing and common words “applied in an unfamiliar way.” Trademark applicants for suggestive terms as well as arbitrary and fanciful terms, are afforded protection.

39 McCarthy, supra note 13, § 3:1.
41 Id. Although the categories must be distinct to accurately protect marks, drawing the line has proved challenging. See infra notes 164–166 and accompanying text.
42 Abercrombie, 537 F.2d at 9.
43 Id.
45 Abercrombie, 537 F.2d at 11.
46 Id. at n.12.
47 Id.
48 Id. at 11.
Regardless of a mark’s classification, “[t]he primary and proper function of a trademark is to identify the origin or ownership of the article to which it is affixed.” 49 Frank Schechter (“Schechter”), the father of trademark dilution theory, 50 clarified that a trademark’s “origin or ownership” must be “personal origin or ownership.” 51 His reasoning relied on Canal Co. v. Clark, in which the court held that a seller of coal who derived his product’s name purely from geographic origin did not have an ownership right to that name. 52 In his “seminal work,” 53 Schechter also recognized that the “value” of one’s mark “depended in large part upon its uniqueness.” 54 Well-established precedent echoes this sentiment, calling misappropriation “fraud” and declaring that “[n]o man has a right to sell his own goods as the goods of another.” 55 Accordingly, trademarks are long-rooted in law and time, as the next section will catalog.

2. Background and History as Trademarks Relate to Graphic Images

“In surveying history, it appears that humans have used symbols to identify ownership or origin of articles for thousands of years.” 56 The Ancient World witnessed the oldest known man-made markings of any kind, beginning with the branding of cattle and other animals. 57 Egyptian hieroglyphics from this period memorialize images of cattle, as do European cave paintings from the Bronze and Stone Ages. 58 Predating reading and writing, design marks are thus used to communicate, much like we use the modern written word. 59 Additionally, quarry marks dating from 4,000 B.C.E. dot Egyptian structures, Jerusalem’s Temple of Solomon, and the ruins of Troy. 60

51 Frank I. Schechter, The Rational Basis of Trademark Protection, 40 HARV. L. REV. 813, 814 (1927) (italics in original) (quoting Canal Co. v. Clark, 80 U.S. 311, 324 (1871)).
53 Abdel-khalik, supra note 6, at 601 (calling Schechter’s law review article a “seminal work”).
56 MCCARTHY, supra note 13, § 5:1.
57 Trademark Timeline, supra note 1, at 1022.
58 Id.
59 Id.
60 Id.
The need for “source identification” in the Ancient World increased with the rise of commerce, and distinctive marks appeared on Roman oil lamps. With it, what may be the world’s first recognizable brand—“FORTIS”—emerged between 35 B.C.E. and 265 A.D. The “trendiest of all pottery brands,” FORTIS was such a success that its lamps (second from left, next page) were copied and pirated throughout the Roman Empire.

In addition to commercial marks, personal marks, such as coats of arms and seals, were popularized in the Medieval Era. In the 12th Century, paper watermarks appeared, as did bakers’ marks on loaves of bread; England even required its bakers to mark their bread by law as a means to assign fault if any loaf was below the proper weight. With the emergence of artisans’ guilds in the 14th Century, “[g]uild marks evolve[d] into trademarks in the modern sense” as goods were shipped to far off places, and consumers directly interacted with artisans to develop merchant preferences. It was around this time that Italian law

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61 Id.
62 Id.
64 Id.
65 Trademark Timeline, supra note 1, at 1023.
66 Id.
67 Id.
68 Id. at 1023–24.
professor Bartolus de Saxoferrato recorded the first trademark law.\(^{69}\)

Legal ramifications associated with trademarks began in 16th Century England and 18th Century America.\(^{70}\) For example, those found to have placed a “false trademark” on gold or silver cloth were deemed counterfeiters and sentenced to death.\(^ {71}\) In 1659, *Southern v. How* became England’s first reported trademark case.\(^ {72}\) And in 1772, “[t]he first written reference to trademark registration in the United States” was recorded under the name “G. Washington;”\(^ {73}\) trademarking our first President’s flour, the writing is in the court records of Fairfax County, Virginia.\(^ {74}\) In 1825, *Snowden v. Noah* became the first reported trademark case in the United States,\(^ {75}\) followed by the enactment of the country’s first federal trademark statute in 1870.\(^ {76}\)
The first modern trademark was recorded in 1875 in the United Kingdom with the passage of the first Trade Marks Registration Act. Limiting registration to those “word marks” already in use, Michael Arthur Bass made the inaugural registration—“a red triangle device”—for “pale ale.” Representations of some of the first Bass trademarks are pictured below.

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77 Id. at 1027.
78 Id. See also ANHEUSER-BUSCH, Bass Pale Ale Fact Sheet, http://www.anheuser-busch.com/s/uploads/Bass-Fact-Sheet.pdf (last visited Sept. 26, 2015) (listing 1777 as the year Bass Pale Ale was introduced and showing the product was “already in use” by the Act’s 1875 passage).
Commemorating history and capitalizing on the brand’s status as the first registered trademark in Britain, Bass Pale Ale (now owned by Anheuser-Busch) recently changed its name to “Bass Trademark No. 1.” Below are images of a previously used (but relatively recent) Bass logo (at left) and the new Bass Trademark No. 1 bottle (at right).

Trademarks in the form of images thus have a rich history, seemingly dating back to the dawn of humanity. More than simply designating ownership and origin, the need for proper protection multiplied as marks became more prominent.

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81 Bass Ale Celebrates Its Heritage as Bass Trademark No.1, ABINBEV (June 24, 2013), http://www.ab-inbev.co.uk/2013/06/bass-ale-celebrates-its-heritage-as-bass-trademark-no-1/.


III. HOW IS A TRADEMARK PROTECTED?

Two standards exist to protect ownership rights in a trademark: (1) likelihood of confusion and (2) dilution. This Comment will now discuss the nature and purpose of these standards and the terms under which trademark infringement claims are measured.

A. Existing Legal Standards

1. Likelihood of Confusion (Traditional Infringement)

Infringement occurs when a new user appropriates an already existing mark to his own goods and services in such a way that consumers will think each product originates from the same maker. The centuries old “likelihood of confusion” standard arises out of these traditional infringement principles and affords a trademark owner “the right to adopt and use a symbol or a device to distinguish” his goods in order to protect consumers from the likelihood of confusion and fraud. The crucial inquiry in determining whether trademark infringement or unfair competition has occurred “is whether there is any likelihood that an appreciable number of ordinarily prudent purchasers are likely to be misled, or indeed simply confused, as to the source of the goods in question.” This question is derived from a case in which the court held that Defendant’s use of “Your Maternity Shop” caused confusion and intentionally misled customers to associate the store with its nearby competitor, “Maternally Yours.”

As the global market has expanded, the need to further clarify the likelihood of confusion standard has followed. Courts will generally conclude that infringement has occurred when “marks are sufficiently similar that confusion can be expected.” This test only

84 See McCarthy, supra note 13, at § 24:72.
85 See Canal Co. v. Clark, 80 U.S. 311, 327 (1871).
86 In re Trade-Mark Cases, 100 U.S. 82, 92 (1879) (recognizing trademark as a category distinct from copyright and patent).
87 See McCarthy, supra note 13, at § 24:72.
89 Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 542–43 (2d Cir. 1956). “Maternally Yours” began operating a specialty maternity wear shop—one of the first of its kind, if not the first—in the New York metropolitan area in 1945 and quickly added new stores. One year later, “Your Maternity Shop” opened a store in New Rochelle, N.Y. and soon expanded into the New York metropolitan area. As the nature of the shops was so novel at the time, “Your Maternity Shop” was held to infringe upon the “Maternally Yours” trademark.
90 AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348 (9th Cir. 1979), abrogated in part by Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003)
applies to related goods because consumers are unlikely to be confused when goods are “totally unrelated.” Accordingly, related goods that are non-competing must be analyzed with a host of other factors in addition to mark similarity. As the Ninth Circuit set forth in AMF Inc. v. Sleekcraft Boats, a court must look to the following eight factors to determine whether a likelihood of confusion exists between related goods: (1) mark strength, (2) “proximity of the goods, (3) similarity of the marks, (4) evidence of actual confusion, (5) marketing channels used,” (6) type of goods and degree of care that the purchaser is likely to demonstrate, (7) intention of the defendant in choosing the specified mark, and (8) likelihood of each product line expanding. While these factors must be weighed under a totality of the circumstances, the third Sleekcraft factor—mark similarity—must also be assessed via the “trilogy” of “sight, sound, and meaning.” When comparing image-based designs and graphic-based logos, the analysis of “sight” becomes especially critical.

Motivations entirely distinct from consumer protection ultimately emerged as common-law developments surrounding trademarks evolved, and the traditional infringement (likelihood of confusion) standard was solidified. Despite the importance of confusion claims, it therefore became evident that “broader protection” was needed, especially when comparing unrelated or non-competing marks. It was at this juncture in history that Schechter “provided the framework for modern dilution law.”

(“Sleekcraft”).

91 Id. at 348 & n.10 (describing related goods as “products which would be reasonably thought by the buying public to come from the same source if sold under the same mark” (quoting Standard Brands, Inc. v. Smidler, 151 F.2d 34, 37 (2d Cir. 1945))).

92 Id. at 348.

93 Id. at 348–49.

94 Abdel-khalik, supra note 6, at 595 (referring to “sight, sound, and meaning” as a “trilogy”).

95 Sleekcraft, 599 F.2d at 351.

96 See infra Part IV pp. 19–20 and notes 137–41.


98 Abdel-khalik, supra note 6, at 597 (citing Frank I. Schechter, The Rational Basis of Trademark Protection, 40 HARV. L. REV. 813, 828–30 (1927)).

2. *Dilution by Blurring or Tarnishment*

While the traditional trademark standard for likelihood of confusion is designed to protect consumers, the dilution standard aims to protect an owner’s property right in her trademark.\textsuperscript{100} In his groundbreaking piece on anti-dilution law, Schechter characterized the idea of dilution as the “gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name by its use upon non-competing goods.”\textsuperscript{101} And he continued vividly, writing:

If “Kodak” may be used for bathubs and cakes, “Mazda” for cameras and shoes, or “Ritz-Carlton” for coffee, these marks must inevitably be lost in the commonplace words of the language, despite the originality and ingenuity in their contrivance, and the vast expenditures in advertising them which the courts concede should be protected to the same extent as plant and machinery.\textsuperscript{102}

Although Schechter’s proposal only contemplated protecting “coined, arbitrary or fanciful words or phrases . . . [that] have, from the very beginning, been associated in the public mind with a particular product,”\textsuperscript{103} his astute reasoning led to the establishment and evolution of federal dilution doctrine. One of the preeminent reasons marks warrant additional protection is because their flippant use by sellers in unrelated markets robs brands of their uniqueness, value, and financial investment.\textsuperscript{104} Accordingly, Congress began to grant property rights, albeit limited ones, to trademarks with the enactment of the Lanham Act in 1946.\textsuperscript{105}

The Lanham Act marked the official birth of both state and federal dilution law, with new statutes and legislation soon following.\textsuperscript{106} In 1947, Massachusetts passed the first state dilution statute, and many other states did the same over the next fifty years.\textsuperscript{107} Combining these “state laws and the trend toward additional protection,”\textsuperscript{108} Congress amended the Lanham Act to include the Federal Trademark Dilution

\textsuperscript{100} M\textsuperscript{c}C\textsuperscript{a}RTHY, supra note 13, § 24:72.
\textsuperscript{101} Schechter, supra note 51, at 825.
\textsuperscript{102} Id. at 830.
\textsuperscript{103} Id. at 829. See also Ringling Bros.-Barnum & Bailey Combined Shows v. Utah Div. of Travel Dev., 170 F.3d 449, 454 (4th Cir. 1999).
\textsuperscript{104} See Abdel-khalik, supra note 6, at 593.
\textsuperscript{105} 15 U.S.C. § 1127 (2012). See also Abdel-khalik, supra note 6, at 598.
\textsuperscript{106} See Ringling Bros., 170 F.3d at 454–55.
\textsuperscript{107} Id. at 454.
\textsuperscript{108} Abdel-khalik, supra note 6, at 599.
Act ("FTDA") of 1995. The FTDA “allowed owners of [established,] famous marks to raise dilution claims” and effectively broadened the Lanham Act, as evidenced by the code’s title alone: “False designations of origin, false descriptions, and dilution forbidden.” Subsequently, the Second Circuit outlined the five elements a senior mark must establish to prove dilution by a junior mark: (1) “the senior mark must be famous” and (2) distinctive, while (3) the junior mark must be used commercially in the marketplace with (4) that use commencing after the senior mark is already famous; and (5) the junior’s use “must cause dilution of the distinctive quality of the [famous,] senior mark.” As such, the FTDA detailed the factors contributing to a mark’s “fame” but failed to articulate “what kind of junior mark would ‘dilute’ a famous mark, nor did it define dilution.” A circuit split resulted, and it was not until 2003 that the Supreme Court resolved the matter in Moseley v. V Secret Catalogue, holding that the FTDA “unambiguously requires a showing of actual dilution, rather than a likelihood of dilution.”

Moseley’s clear standard was the precursor to additional legislation, and it reinforced the definition of “dilution.” Quoting the FTDA, Justice Stevens wrote: “‘dilution’ means . . . lessening the [ability] of the famous mark to identify and distinguish [its] goods or services, regardless of” (1) whether competition exists between the marks, or (2) whether there is a “likelihood of confusion, mistake, or deception.” Because the intent of the FTDA had been to require only a likelihood of dilution, Congress amended the statute and enacted the Trademark Dilution Revision Act ("TDRA") of 2006. With it also came the distinction between the two types of dilution: (1) dilution by blurring, which “impairs the distinctiveness of the famous mark[,]” and (2) dilution by tarnishment, which “harms the reputation of the famous

110 Abdel-khalik, supra note 6, at 599.
112 A “senior mark” refers to a trademark that is already well established and acting as the plaintiff in a dilution claim; a “junior mark” is the alleged infringer and defendant in such an action.
114 Abdel-khalik, supra note 6, at 599.
115 Id. at 600.
116 Moseley, 537 U.S at 433.
117 Id. (citing statutory language which defines the term “dilution”).
118 Id. (citing 15 U.S.C. § 1127 (2012)).
119 15 U.S.C. § 1125(c)(1) (2012); Abdel-khalik, supra note 6, at 600.
Moreover, the TDRA states that both types of dilution initially arise from a similarity between a famous, senior mark and a junior, potentially infringing mark. Thus, the current scope of anti-dilution law, as defined by the TDRA, clarifies three core concepts: (1) plaintiffs must prove mere likelihood of dilution, (2) “dilution claims only apply to marks that are widely recognized by the general consuming public of the United States,” and (3) tarnishment and blurring are both grounds for such claims. Though designed for the sole benefit of trademark owners and sellers, dilution claims add a powerful and significant tool to the many layers required for trademark protection.

B. A Recently Proposed Standard: The Filtration Test

In addition to the established confusion and dilution standards, another trademark protection test was recently proposed that involves a filtration comparison mechanism. The author offering the standard borrows from the law of copyright and suggests the following two-prong test for evaluating the similarity of trademarks: (1) filter out the protectable elements of the mark “that reflect originality in expression,” and (2) assess what remains to see if the “ordinary observer would find substantial similarity” sufficient to warrant protection. Thus, this test filters out that which copyright would not purport to protect. Applied to the trademark context, this filtration process would preclude protection of the mark itself and protect only the expression of the mark.

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121 Id.
123 TCPIP Holding Co. v. Haar Commc’ns, Inc., 244 F.3d 88, 95 (2d Cir. 2001).
124 Abdel-khalik, supra note 6, at 596.
125 Id. at 626.
126 Id. at 629.
127 See id. at 627.
128 See id. at 626–29.
Taking the Starbucks logo (below) as an example, the filtration test would protect the company’s portrayal of the mermaid pictured rather than the general idea of using a mermaid as a symbol.\footnote{Id. at 627.}

![Starbucks logo evolution](image)

It seems obvious enough that Starbucks does not possess universal ownership rights to the image of a mermaid, even absent a process identifying the mark’s expression. Moreover, the evolution of the Starbucks logo from 1971 to 2011\footnote{See id.} underscores the “unique power of the [graphic] mark itself.”\footnote{Abdel-khalik, supra note 6, at 595.} The Starbucks mermaid has become so ubiquitous and readily recognizable that words are no longer needed,\footnote{As of 2011, the Starbucks logo is text-less. See Nudd, supra note 130.} and one would be challenged to filter out any elements since the entire logo is the expression of the mark. It is undeniable that consumers instantly associate Starbucks with the enlarged, cropped mermaid knock-out\footnote{The term “knock-out” refers to a white version of a logo such that it appears to be “knocked out” from the background color on which it is placed.} on a clover green colored background.

Based on this analysis, the filtration test does not seem workable. Furthermore, it does not appear that courts have embraced the test.\footnote{Based on KeyCite research in WestlawNext.} Creators and owners of trademarks—particularly iconic marks (such as
Starbucks) in which substantial sums of money and time have been invested—will want to protect the actual mark itself, and not just its essence.\textsuperscript{136} Accordingly, the law still lacks a fitting standard for protecting graphic images and trademarks.

\section*{IV. The Deficiency in Protection for Graphic Trademarks}

Neither the confusion and dilution tests that currently protect trademarks nor the proposed filtration test are sufficient for protection of graphic images and marks. Claims arising from confusion or dilution have generally featured word-based marks\textsuperscript{137} and thus often examine sound and meaning more so than sight.\textsuperscript{138} When evaluating sight, “courts consider the presentation of the mark as it occurs in the marketplace rather than the format, if any, in the related trademark registration.”\textsuperscript{139} Specific factors examined include “the size and stylization of letters and accompanying disclaimers, housemarks, and slogans.”\textsuperscript{140} As a result of the limited review given to “sight” and the focus on elements accompanying the graphic, traditional likelihood of confusion and blurring or tarnishment claims are not appropriately examining the look of graphic trademarks. In fact, the third \textit{Sleekcraft} factor for mark similarity is the only factor in either existing standard that even addresses comparing marks from a visual standpoint.\textsuperscript{141}

Just as the law encompassing likelihood of confusion and antidilution evolved in response to once unmet needs, it is clear that a new standard is needed to properly evaluate and protect graphic images and marks. A separate test for specific use in cases of alleged graphic infringement would thus fill a significant gap in the trademark arena. Establishing such a standard is crucial, not only because of the prominence that symbols and graphics play in the human consciousness, but also because of the intellectual property rights that are being

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\textsuperscript{136} From my time working as a graphic designer in advertising and marketing, I know this to be true. A significant investment of time and creativity is involved in not only selecting the style of a mark but also the colors, typography, and scale, for instance. Designers also consider trends and the current associations society may have with an image.
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\textsuperscript{137} See, e.g., A & H Sportswear, Inc. v. Victoria’s Secret Stores, Inc., 237 F.3d 198, 221 (3d Cir. 2000) (holding that Plaintiffs for “MIRACLESUIT” suit failed to demonstrate a sufficient likelihood of confusion with Defendant’s “THE MIRACLE BRA” mark to warrant infringement).
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\textsuperscript{138} See Abdel-khalik, \textit{supra} note 6 at 595 (citing AMF Inc. v. Sleekcraft Boats, 599 F.2d 341 (9th Cir. 2003)).
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\textsuperscript{139} \textit{Id.} at 612.
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\textsuperscript{140} \textit{Id.} (citing A & H Sportswear, Inc. v. Victoria’s Secret Stores, Inc., 237 F.3d 198, 217–18 (3d Cir. 2000)).
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\textsuperscript{141} \textit{See supra} text accompanying notes 92–94.
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thwarted. As previously mentioned, imagery is the most basic and universal form of communication, originating long before textual communication.\textsuperscript{142} Symbols are sometimes so profound that they cross cultural and global lines where no amount of words will do. For instance, the familiar McDonald’s golden arches\textsuperscript{143} may have originated in America but now have a home in all but one-hundred-and-five countries spanning the globe.\textsuperscript{144} Therefore, both travelers and natives in almost any given locale will instantly understand what product is being sold in an establishment bearing the McDonald’s logo, in spite of any verbal language barriers. This notion encapsulates the value of graphic imagery as a communication and branding tool, and substantiates why protecting it remains paramount.

Expanding on the importance of graphics in the construction of brand identity and as a communication instrument, it is helpful to again look to the evolution of the Starbucks logo.\textsuperscript{145} When the company’s Senior Vice President of marketing was asked why Starbucks chose to prominently feature the mermaid sans text, he replied, “we all unanimously gravitated toward the images that freed the siren\textsuperscript{146} from the word mark. . . . This allows us to bring our identity to life anytime and anywhere.”\textsuperscript{147} This statement so precisely conveys the sheer force of iconic imagery—that graphic strength is so great it can be “freed” from accompanying text and will speak entirely on its own, perhaps even more fluidly than words could. Indeed, the Senior Vice President noted that the siren visual alone would permit Starbucks to take its brand “anywhere” at “anytime.”\textsuperscript{148} Starbucks also credited Nike as an “inspiration,” having witnessed that brand’s success when it began using the swoosh icon independent of the word “Nike.”\textsuperscript{149} Such is the reason for the primacy of graphics in brand identity—when the image is so recognizable it can stand alone, the company receives consumer acknowledgment that it has built a mighty brand.

By examining both the McDonald’s and Starbucks marks, the power

\textsuperscript{142} See discussion supra Part II.B.2.
\textsuperscript{143} So familiar are the golden arches, in fact, that this author did not feel it necessary to insert an image of the logo for reference. That level of instantaneous association speaks to the utter power of graphic marks.
\textsuperscript{145} See \textit{supra} pp. 18–19 and note 130.
\textsuperscript{146} The Starbucks “siren” is also referred to as a “mermaid” by some, with the terms being interchangeable in reference to the company’s logo.
\textsuperscript{147} Nudd, \textit{supra} note 130.
\textsuperscript{148} See id.
\textsuperscript{149} See id.
and purpose that logos, symbols, and trademarked graphic imagery serve for society is clearly evident. Therefore, identifying a test that will adequately protect graphics is essential to preserving both creative ingenuity and to continually developing trademark law.

V. A NEW PROPOSED STANDARD FOR GRAPHIC IMAGES AND MARKS

While there are only a limited number of cases that have explored graphic infringement, the Ninth Circuit assessed a set of allegedly similar logos using what initially appears to be a non-test. With a closer look at the intuitive mechanism the court applied, however, this rather simplistic standard functions well as a realistic test for protecting graphic marks.

A. The “Single Glance” Test

When the fledgling internet search engine GoTo.com (“GoTo”) learned The Walt Disney Company (“Disney”) was about to launch the Go Network, a Web portal serving as the landing page connecting consumers to Disney’s myriad online properties, there was grave concern over logo similarity. At a time in which the Internet boom was just beginning and brands were seeking to establish themselves on the Web, GoTo brought a trademark infringement action for likelihood of confusion pursuant to the Lanham Act.

150 See GoTo.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1203–06 (9th Cir. 2000).
152 GoTo, 202 F.3d at 1203–04.
153 Brookfield Commc’ns, Inc. v. W. Coast Entm’t Corp., 174 F.3d 1036, 1044 (9th Cir. 1999) (“With the Web becoming an important mechanism for commerce . . . companies are racing to stake out their place in cyberspace.”).
154 GoTo, 202 F.3d at 1204.
The GoTo Court swiftly held there was “no difficulty concluding” the marks (that is, the logos themselves) were “overwhelmingly similar.” In analyzing the images, the Ninth Circuit considered the Sleekcraft factors, focusing on similarity of the marks, the relatedness of the two companies’ goods or services, and the marketing channel used (here, the Web). Examining the court’s reasoning, it enunciated a new standard: “[w]ith a single glance at the two images, one is immediately struck by their similarity. Both logos consist of white capital letters in an almost identical sans serif font rendered on a green circle. The circle in turn is matted by a square yellow background.” By extracting the process the court used to analyze the logos and to find “overwhelming[ ] similarity,” the “single glance” test is born.

Simple and direct, the “single glance” test is just the sort of standard we want and need to ensure protection of graphic marks and images. The test is quick and easy, and it makes sense because it simulates the real-world, modern consumer experience. In today’s market, consumers are bombarded with images at rapid-fire. The simple days of billboards and newspaper ads are long-gone, as we are all subject to electronic advertisements and marketing with nearly every mouse click and smartphone or tablet swipe. The resulting oversaturation diminishes attention spans and causes consumers to make an increasing number of split-second decisions. Additionally, the market has gone

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156 Id. at 1205.
157 Id. at 1206.
158 Id. at 1205.
159 Id.
160 Id. at 1206.
161 Id.
162 Id.
global, and as interconnectivity between consumers and distant sellers rises, so too does product competition. All of these factors contribute to a swarming international economy, which means a likelihood of confusion among goods and services is also more inevitable. Knowing the very minimal reaction time a seller has to entice a consumer to buy its product, the “single glance” test is both highly appropriate and integral to preserving brand identity. Such a test has been a long time coming, as early indications from collected judicial opinions show the tests protecting trademarks were not definitive enough.  

B. The Reasoning of Judge Learned Hand

Well before the current state of the marketplace came to be, the revered Judge Learned Hand mused upon the disorder created by the likelihood of confusion test’s innately ambiguous standards and troublesome lack of trademark protection. He reacted to the difficulty of distinguishing between generic, suggestive, arbitrary, or fanciful marks when analyzing the name of a product, proclaiming, “[i]t is quite impossible to get any rule out of the cases beyond this: That the validity of the mark ends where suggestion ends and description begins.” These words were uttered when Judge Hand unhappily obliged to hold for Defendant’s “Fashionit” mark because Plaintiff’s “Fashionknit” mark was deemed a descriptive use on similar items in commerce.

Judge Hand’s reasoning was applied to a later case in which the manufacturer of “Sportscreme” sought a preliminary injunction against its competitor for using the name “SportsGel” on its product. There, the Second Circuit explained that “the determination whether a mark is descriptive or suggestive cannot be made in a vacuum; it is necessary to surmise the mental processes of those in the marketplace at whom the mark is directed.” Logically connected with the confusion test, this reasoning underscores the role of the perceiver in distinguishing between marks.

The rationale from these cases is exactly what underlies the “single glance” test.
glance” test, as the key lies in the process of the observer experiencing and internalizing the image or mark. Therefore, Judge Hand’s reasoning regarding names and word-based marks can be applied to graphics and used to explain and bolster the “single glance” test. When measuring consumer confusion, one must take the perspective of the perceiver and the ordinary way he or she views selected goods in commerce—at a quick glance. If confusion or mistake about the identity of a product arises after only a moment of observation (that is, in a single glance), the marks are too similar. Though the standard is certainly subjective, it accounts for the actual behavior of persons fueling the market. Accordingly, the “single glance” standard goes straight to the heart of the consumer experience and proves to be a viable, realistic test for protecting graphic marks.

VI. THE “SINGLE GLANCE” TEST IN ACTION

In order to fully understand the scope and impact of the “single glance” test, it is helpful to review both subsequent cases that have considered the standard and pending litigation where the test would be illuminating.

A. Cases That Have Considered the “Single Glance” Test

Though no cases have come to a substantive ruling on a “single glance” test application, some courts have made procedural decisions based on such considerations. For example, clothier Abercrombie & Fitch Co. (“Abercrombie”) and competitor Moose Creek, Inc. (“Moose Creek”) have been embroiled in trademark litigation over infringing moose logos.

In their second suit, Abercrombie sued Moose Creek for infringing upon the new “Outline Moose Logo” Abercrombie had created in response to the previous action brought by Moose Creek. Citing GoTo, the Ninth Circuit again reasoned “the similarities between the

170 GoTo.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1206 (9th Cir. 2000).
172 Abercrombie & Fitch Co., 486 F.3d at 632.
marks [were] striking” and “the crossed front legs [of Moose Creek’s logo] . . . a ‘trivial distinction[ ]’ with no effect on our observation.”

Pictured below is Abercrombie’s logo at left and Moose Creek’s at right.

The court remanded, rather than reversed, the district court’s ruling due to other errors, but the “single glance” test proved convincing and effective in analyzing logo similarity.

Another court found two marks in conjunction with related imagery to be confusingly similar when applying the “single glance” standard from GoTo. Blockbuster filmmaker Warner Brothers Entertainment (“Warner Brothers”) sought to enjoin film producer The Global Asylum, Inc. (“Asylum”) from releasing its “mockbuster” to DVD just three days before the scheduled release of Warner Brothers’ similarly named film. Warner Brothers’ “The Hobbit: An Unexpected Journey” was scheduled for release to theaters on December 14, 2012, while Asylum’s “Age of the Hobbits” was scheduled for in-home release on December 11, 2012. The movie

174 Abercrombie & Fitch Co., 486 F.3d at 636 (citing GoTo.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1206 (9th Cir. 2000)).
177 Abercrombie & Fitch Co., 486 F.3d at 638.
179 Mockbusters “are cheaper parodies of major films that often have titles very similar to major releases.” Id. at *1.
180 Id.
181 Id.
Based on the “similar overall appearance of the posters and the prominent use of the trademarked term, [‘Hobbit’],” the court found the Asylum image (at right) to infringe upon the Warner Brothers’ image (at left). The decision noted that although Warner Brothers does not have “exclusive rights” to the “fantastical images of swords, mythical creatures, and the like,” looking at the posters “in their entirety as they appear in the marketplace, ‘the total effect of [Asylum’s] product and package on the eye of the ordinary purchaser’ is likely to cause confusion.” This outcome reflects the essence of employing the “single glance” test because it considers how the visuals will be experienced by consumers in the market, particularly moviegoers and movie-watchers interested in such film genres.

In contrast to the moose logo and the “Hobbit” poster cases, another court evaluated two marks with juxtaposed graphics and text under the “single glance” test and found dissimilarity. The parties to the action were two trade associations and used purportedly similar logos, both containing the capital letters “SIIA” accompanied by differing visual

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184 Id.

Plaintiff Self-Insurance Institute of America, Inc. (logo pictured above at left) unsuccessfully sued defendant Software and Information Industry Association (logo pictured above at right) for trademark infringement.\textsuperscript{189} The court applied the “single glance” test to hold that just as one was “struck” by the similarity of the marks in GoTo, “it is equally apparent that the Marks [here] are not similar.”\textsuperscript{190} In spite of the similarity of the logos textually, the drastically different graphics of each mark would keep consumers from being confused as to the source of the services when viewed at a single glance.\textsuperscript{191}

Each of the highly distinct examples provided used the “single glance” test to evaluate graphics and imagery as they would be perceived in the marketplace. The following examples address trademark infringement in additional new contexts, and with litigation just beginning, this author suggests that the “single glance” test would aid in speedy resolution of these cases.

\textsuperscript{186} Id. at 1060–61.
\textsuperscript{187} Id. at 1061.
\textsuperscript{188} Id.
\textsuperscript{189} Id. at 1060.
\textsuperscript{190} Id. at 1071 (emphasis added).
\textsuperscript{191} Id. at 1071–72.
B. Pending Litigation Where the “Single Glance” Test Would Prove Useful

Two court battles are currently heating up, and their outcomes could lead to major developments—possibly even setting precedent for the “single glance” test—in graphic-based trademark infringement cases. The first lawsuit concerns two very famous mice with one in opposition to a trademark registration,192 while the second suit involves a confectioner and a campaigning political candidate.193

The infamously litigious Walt Disney Company (“Disney”),194 though on the defending end of the GoTo decision,195 recently filed a trademark infringement lawsuit against international DJ “Deadmau5” (pronounced “dead mouse”);196 this time, however, the “single glance” test has potential to work in Disney’s favor. Deadmau5 (real name Joel Zimmerman) is known for sporting oversized headpieces with rounded ears when he performs.197 Though Zimmerman only recently filed his trademark application with the USPTO, his “mau5head” is already trademarked in thirty countries worldwide.198

As the image below depicts, there are certainly some similarities. Zimmerman’s Deadmau5 application is at left and Disney’s trademark is at right.

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194 Mike Larkin, Not Taking the Mickey! Disney Launch Legal Action Against Deadmau5 Over Mouse Ears Logo Trademark, MAILONLINE (Sept. 2, 2014), http://www.dailymail.co.uk/tvshowbiz/article-2741513/Disney-legal-fight-Deadmau5-mouse-ears-logo-trademark.html (“The Walt Disney Company is well known for zealously protecting its trademark on the Mickey Mouse character.”).

195 See discussion supra Part V.A.

196 STITCH KINGDOM, supra note 192.

197 Larkin, supra note 194.

Disney contends ownership of Mickey’s face and likeness from at least 1928 and fears that an official grant of the mau5head “would damage their business in the U.S. and around the world.” The company further argues that if the USPTO approves the Deadmau5 trademark application, consumer confusion will result. Defending his brand, Zimmerman tweeted, “Disney thinks you might confuse an established electronic musician/performer with a cartoon mouse. . . . That’s how stupid they think you are.”

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199 STITCH KINGDOM, supra note 192.
200 Id.
202 STITCH KINGDOM, supra note 192.
204 Vulpo, supra note 198.
Given Zimmerman’s brazen comments, the “single glance” test could arguably help Disney preserve the single-most “‘famous,’ ‘iconic’ and ‘classic’” image of its brand—Mickey Mouse’s ears. In support of its claim, Disney detailed both the financial and intangible value of its mark: “[W]e have expended many millions of dollars of advertising and promoting [our] products and . . . [have] ‘earned many million[s] of dollars in revenues’ as a result.” Though Zimmerman feels people will not be “stupid” enough to confuse a Mickey Mouse head with his mau5head, the picture may be less clear to those unfamiliar with the performer.

Furthermore, Zimmerman’s decision to wear the headpieces with large rounded ears and refer to himself as “dead mouse” may indicate he intended to mock Disney. Thus, approving the Deadmau5 application may genuinely cause consumer confusion and potentially even serious tarnishment such that Disney’s brand would be adversely affected. If the perceived threat to Disney became a reality, the repercussions could diminish the image and the exponential financial investment the company has already made in the Mickey Mouse brand.

Yet another established brand fighting to protect its trademark is The Hershey Company (“Hershey Co.”), maker of a symbol of Americana—the “Hershey’s Milk Chocolate” bar. Hershey Co., founded in 1894, sells chocolate and other candy under the Hershey’s trademark and owns trade dress rights to its iconic “Hershey’s Milk Chocolate” bar wrapper (pictured below at right). The company was recently granted the preliminary injunction it sought against Senator Stephen Hershey of Maryland (“Sen. Hershey”), who used campaign signs bearing an uncanny resemblance to the chocolate bar (pictured below).

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206 STITCH KINGDOM, supra note 192.

207 Vulpo, supra note 198.

208 Of the handful of people I surveyed, the average score was 7.33 on a scale of 1 to 10 (with 10 being the most likely to cause confusion) when participants viewed the Deadmau5 trademark application image aside Disney’s trademark. If time had permitted, I would have enjoyed expanding this survey.


210 Id.

211 Hershey’s chocolate bars instantly connote images of s’mores and campfires, the essence of Americana.

212 Hershey Co., 33 F. Supp. 3d at 590.
The court in this case looked at five infringement factors provided by the Lanham Act and a nine-factor test, much like the *Sleekcraft* factors,\(^{215}\) to assess likelihood of confusion.\(^{216}\) Trade dress was also assessed, and the court listed typical factors for consideration, including “advertising expenditures, consumer studies linking the mark to the source, sales records, and length and exclusivity of the plaintiff’s use of the mark when considering the mark’s strength.”\(^{217}\) Moreover, the court stated, “The marks ‘need only be sufficiently similar in appearance, with greater weight given to the dominant or salient portions of the mark.’”\(^{218}\)

All the standards employed here are overly complex and too ambiguous to assess the potency of graphic images. Instead, the pendency of this case is an ideal vehicle for furthering the use of the “single glance” test. As noted by one reporter, “The senator’s name, in block capital letters over a brown Maryland flag, looks strikingly similar to the wrapper of a certain confection.”\(^{219}\) Calling the images “strikingly similar” epitomizes why the “single glance” test is ideal for cases involving graphic trademarks—the word usage draws on the explicit language announced in the original Ninth Circuit opinion.\(^{220}\)

While Sen. Hershey argues his logo is “unlike” the chocolate bar wrapper because it uses a “two-tone brown background in the pattern of

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213 *Id.*


215 See AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348 (9th Cir. 1979), *abrogated* by Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003).


217 *Id.*

218 *Id.* at 593 (quoting Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc., 43 F.3d 922, 936 (4th Cir. 1995)).

219 Duncan, *supra* note 214.

220 See *supra* text accompanying notes 160–62.
the state flag,” his contention is thin at best. It is blatantly apparent
that Sen. Hershey chose to capitalize on the fame Hershey Co. spent
over a century building. Consider the possibility that a designer
would come up with a campaign sign so similar to the “Hershey’s Milk
Chocolate” bar without intending to free-ride off of the public’s
recognition of the icon. In my own experience as a graphic designer,
the chances are zero on the brown coloring alone. This bold statement
is based on both personal observation and the knowledge that American
political candidates are highly selective about the color and font choices
in their campaign materials.

Red, white, blue, and yellow—traditional American hues—are
disproportionately chosen for the color palette. There is nothing
about brown—the color used in Sen. Hershey’s sign—that conveys
anything American other than the Americana of Hershey Co. chocolate.
Furthermore, designers and political candidates tend to favor fonts that
suggest strength, forward movement, and openness. Typefaces that
reflect these qualities are generally bold, italicized, and tracked with
comfortable spacing between the letters. Sen. Hershey’s sign features bold text but neither of the other font qualities.

The combination of color and text in campaign imagery thus
conveys unspoken messages, much like symbols and other graphic
images. Additionally, campaign signage tends to feature other

221 Jessica Gresko, Hershey Company Clashes with Maryland Candidate,
222 Hershey Co. v. Friends of Steve Hershey, 33 F. Supp. 3d 588, 590 (D. Md.
2014) (discussing length of time “Hershey Trade Dress” has been used).
223 See Carissa M. Nee, What Makes a Presidential Campaign Logo Effective:
Best Practices and a Semiotic Analysis of the Logos of Barak Obama, George W.
Bush and John McCain 22-23 (Apr. 21, 2011) (unpublished Masters Capstone,
American University) (on file with American University), available at
https://www.american.edu/soc/communication/upload/Carissa-Nee.pdf (explaining
logo colors are an expression of the candidates’ personality and therefore a
“powerful tool”); Jillian Plomin, 7 Tips for Creating a Winning Campaign Logo,
GOPCAMPAIGNER.COM, http://gopcampaigner.com/blog/7-tips-creating-winning-
campaign-logo/ (last visited Sept. 26, 2015).
224 Kristen Ditsch, The Influence of Logo Design and Branding on Political
225 HOEFLER & CO., …and Non-Fontogenic…., FONTS BY HOEFLER & CO. (Feb.
226 Ellen Tave Glassman, The Branding of an American President, THE
CONVERSATION (May 18, 2015, 6:17 AM), http://theconversation.com/the-branding-
of-an-american-president-40451.
227 Hershey Co. v. Friends of Steve Hershey, 33 F. Supp. 3d 588, 590 (D. Md.
2014).
American regalia, such as stars and stripes.\(^{228}\) All of this is not to say that political campaign signs always contain the same colors, symbols, and fonts, but the frequency of these elements in combination is considerable. Lastly, when designing logos and creating brand identity with great impact, designers look to many of the factors assessed in trade dress, as they were in the *Hershey Co.* action.\(^{229}\) Therefore, it is highly unlikely that a designer would purposely create a sign resembling the one Senator Hershey used.

Unfortunately for companies fighting to protect their brands, “[i]n many—perhaps even most—trademark cases, the aggrieved company


\(^{230}\) Gresko, *supra* note 221 (showing Senator Hershey posing with his contested campaign sign).
tends to come across as a bit silly.”\textsuperscript{231} The matter of brand identity, however, is far from being funny. Much like Disney, Hershey Co. reports spending millions in advertising and earning billions in sales revenues to create, support, and perpetuate its brand.\textsuperscript{232} Hershey Co. is so successful at marketing that over ninety percent of U.S. consumers report brand awareness of the “Hershey’s Milk Chocolate” bar and “[a] 2014 brand health study listed Hershey’s milk chocolate, bearing “Hershey Trade Dress, as the top-ranked brand of chocolate candy.”\textsuperscript{233} With this level of fame, Hershey Co.—and any brand, for that matter—has every right to be adamant about protecting its hard-earned and distinguished reputation in the public eye. Because the bulk of a brand is built upon the symbols, logos, and other graphic components that meld to create an identity, a unique test designed to protect these trademarks is a necessity. The “single glance” test fits the bill for this tall order by upholding brand identity, valuing the role of the consumer, and fully considering the burgeoning market.

VII. CONCLUSION

For as long as human civilization has existed, design and graphics have been used as a means to communicate and demonstrate ownership. Though formal trademark law did not develop for centuries, remnants of drawings, markings, and early written works document the need for merchant identification and protection. In the United States, a motivation to keep consumers from being misled in the marketplace fueled the implementation of traditional infringement or likelihood of confusion claims. As the world became smaller and competition increased, the need for owners to preclude diminished value in their marks followed; in response, trademark anti-dilution law was legislatively enacted. Confusion and dilution are the two standards that still exist in this country, though others (such as a filtration test discussed herein) have been proposed. Each of these standards focuses on word-based marks and thus has proven inadequate for addressing cases of alleged trademark infringement involving graphics, logos, and other image-based design. Because of the value imagery brings to society in facilitating communication and building brand awareness and recognition, the need for a specialized test that caters to graphic infringement is vital to the future of trademark law. The Ninth Circuit has presented a viable standard—the “single glance” test—that has


\textsuperscript{232} Hershey Co., 33 F. Supp. 3d at 590.

\textsuperscript{233} Id.
shown to be a usable, impactful solution, and this author proposes it be adopted.

Finding a workable test is imperative because two major problems result when graphic infringement occurs: (1) both the graphic itself as well as the represented brand becomes diluted, and (2) judges are forced to make arbitrary decisions because no clear standard for evaluation of the images is in place. To have a fair and equitable legal system, decisions need to be as consistent as possible. In spite of the subjectivity inherent in the proposed “single glance” test, it is better than having no solution at all and allowing brands to suffer. The “single glance” test is simple and accurately accounts for the way consumers tend to distinguish and consider goods in the increasingly chaotic marketplace.

Shoppers are making instantaneous decisions among a bevy of whirling choices, logos, packaging, and signage. Though it may be argued that there are consumers who take the time to read product packaging and that true brand loyalists would not be easily misled, these persons are the exception. With the lightning pace at which society now moves and the competition in product pricing, this is purely reality, rather than a commentary on human behavior. Thus, a test that takes account of this reality is currently the most accurate way to evaluate graphics that infringe upon established marks. A standard that is intuitive and reactionary is what the market demands. If a test for infringement were to require that consumers carefully study branded images, how many people can we actually expect will do that? We want people making quick choices in the market, not speculating and acting as art critics. As the applied reasoning of Judge Learned Hand allows us to understand, a test that actually utilizes the processes already followed by consumers is the most reliable test we can adopt.

In order to protect brand identity, the integrity of graphic marks, and invaluable intellectual property rights, a change in the current approach to trademark law in the United States must happen. The investment that companies make in their brands is not unlike the investment people make in building their careers and livelihoods. Graphics and logos representing these brands are interwoven with corporate identities. Protection against marks that are confusingly similar and deprive these brands of their uniqueness is thus warranted and essential to continuity of commerce. Applying the “single glance” test will achieve this vital protection for consumers, graphic images, trademarks, and the brands they represent.