Metabranding and Intermediation: A Response to Professor Fleischer

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I. INTRODUCTION

In his article The MasterCard IPO: Protecting the Priceless Brand, published in this issue, Victor Fleischer contends that the legal structure of the MasterCard initial public offering— in particular, the creation of a charitable foundation to hold a block of the issued shares— suggests that something else is going on rather than pure economics. Had MasterCard truly been motivated by altruism, Prof. Fleischer argues, the credit card association could have found more efficient ways of giving away its money than through a separate foundation. Hence, the foundation’s creation leads Prof. Fleischer to wonder what else might have motivated its genesis, and he concludes that its branding effect is a likely explanation— in other words, that MasterCard will, as a result, be seen as a more altruistic company.

Prof. Fleischer’s work reminds us that branding efforts occur all around us and do not always take the shape of overt advertising campaigns. Just as, in our personal lives, we may take a particular public action (say, rush to open the door for a stranger overburdened with...
shopping bags) not only because it is the right thing to do but also because we are interested in the accretion of personal goodwill, corporations may take public actions that, while not “advertising” in the traditional sense, are intended to burnish their public image. In this vein, Prof. Fleischer may be correct that there is something behind the creation of MasterCard’s new charitable foundation beyond economic efficiency or tax advantages. But it’s not clear that we should be overly concerned about MasterCard’s intentions, even if, as Prof. Fleischer contends, the foundation is nothing more than a “corporate governance gimmick.”

When we talk about the success or failure of a branding campaign, we often focus on the efforts of the branding entity: how much money was spent on advertising campaigns, which advertising entity should be credited with the creative concept, and so forth. But as Barton Beebe and others have noted with respect to trademarks in particular, this focus is placed precisely on the wrong end of the interpretive transaction. Brand meaning is not created until the recipient of the messages both receives those messages and gives them any particular relevance; an advertising campaign falling alone in the forest makes no sound. Thus, a brand’s meaning doesn’t exist in the abstract, nor does it depend on the interpretation intended by the producer; rather, any meaning that exists does so because consumers are willing to give credence to the message that’s conveyed (or, indeed, some alternative message should consumers be so inclined). A brand holder can put as much money as it likes into telling the public what to think about its brand, but at the end of the day, such efforts have value only if consumers agree to give them value. Postmodernism may to some rest in the graveyard of literary theory, but it is alive and well in trademark law.

4. Fleischer, supra note 1, at 153. Indeed, Prof. Fleischer suggests that the public may be well aware that MasterCard has not acted entirely altruistically. Id.


6. See, e.g., Laura A. Heymann, The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law, 80 Notre Dame L. Rev. 1377, 1420-24 (2005); Stephen Brown, Postmodern Marketing 169 (1995) (“In elevating the interpretations of the reader over the authority of the author, Barthes was merely espousing the marketing concept by another name. After all, the revolutionary aspect of the marketing
Trademark law reinforces this view of the cognitive process among consumers by giving little weight to the particular meaning that consumers give to any single mark and focusing instead on consumers' negotiation among marks. Except to the extent that it singles out famous or particularly distinctive marks for special treatment, trademark law does not much care what kind of associations consumers make with the brand: whether a brand is a prestige brand or not, or whether the brand is viewed favorably by consumers or with a certain amount of derision. Rather, trademark law is generally concerned, first, with whether consumers will perceive a mark as a trademark at all (that is, as a source identifier) — hence the initial focus on whether a claimed term is generic, as well as the consideration of whether a mark is inherently distinctive or descriptive — and secondly with whether consumers have the ability in the context in question to distinguish that mark from other, similar marks on related goods or services. In this regard, a valid, protectable mark for a low-prestige item is given just as much protection as a valid, protectable mark for a high-prestige item: *Hustler* and *The New York Times* are equivalents in this respect.

None of this, of course, stops corporations from attempting to influence the meaning that consumers will attach to a particular brand. Millions of dollars are spent on advertising campaigns that encourage consumers to create not only an association between the brand and the product but also an association between the brand and the brand's meaning: not only that "Ford" means one kind of automobile as opposed to others but also that "Ford" means, say, patriotic, or nostalgic, or dependable. A soft drink manufacturer might broadcast commercials showing young, attractive consumers of various nationalities to convey a message of global peace and harmony. A manufacturer of athletic apparel might use a well-known and admired athlete as its spokesperson to convey the message that users of its products can achieve similar heights. Indeed, producers engaging in such advertising efforts act very much in the mold of the Romantic author.\(^\text{8}\)

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believing that repeated claims to primacy in interpretation will eventually succeed of their own weight: If the message is repeated often enough, it will attain the level of truth.

While direct advertising to consumers is perhaps the most prominent way in which corporations work to control the interpretation of their brands, it is not the only way in which such attempts at authorship occur. Prof. Fleischer has made a contribution to the branding literature as well as the corporate finance literature in this issue and elsewhere by focusing on other ways in which companies encourage consumers to give a particular meaning to the brand. Just as certain cosmetic companies hope to attach a particular consumer reaction to their brands by advertising their goods as cruelty-free, or certain supermarkets advertise their brand as indicating the source of organic, healthful goods, it is possible that, as Prof. Fleischer suggests, the IPO structure a company uses can also have a branding effect. In other words, by choosing an unorthodox structure for its initial public offering (an auction, for example), a company can send a message (accepted or not) to the relevant public about the type of company it is (cutting-edge, for example).

But because the audience is the entity that determines brand meaning, not the creator of the brand, it is important in such situations to consider precisely who the audience is and the process of interpretation that takes place as the meaning of a brand develops. In his article in this issue, Prof. Fleischer contends that the creation of a charitable foundation as part of the structure of MasterCard’s initial public offering must be functioning to some extent as a branding

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10. The Body Shop’s product labels, to take one example, state that the company is against animal testing. See The Body Shop, http://www.thebodyshopinternational.com/Values+and+Campaigns/Our+Values/Against+Animal+Testing/Home.htm (last visited Oct. 18, 2006).


12. Courts in trademark law cases recognize this explicitly. See, e.g., Co-Rect Prods., Inc. v. Marvel Adver. Photography, Inc., 780 F.2d 1324, 1332 (8th Cir. 1985) (“Desires or intentions of the creator . . . are irrelevant. Instead, it is the attitude of the consumer that is important.”); Seabrook Foods, Inc. v. Bar-Well Foods Ltd., 568 F.2d 1342, 1345 (C.C.P.A. 1977) (“Regardless of the [mark owner's] intentions, it is the association, by the consumer, of the . . . design with the [mark owner] as the source that is determinative.”); Plastilite Corp. v. Kassnar Imports, 508 F.2d 824, 827 (C.C.P.A. 1975) (holding that in determining distinctiveness, “it is the association of the mark with a particular source by the ultimate consumers which is to be measured—not [the applicant’s] intent” in adopting the mark).

device, given that it is not the most efficient way of engaging in philanthropy. Prof. Fleischer asserts that while the foundation may enhance the brand image of the company, he is not optimistic, noting a "disconnect between the MasterCard foundation’s purported philanthropic goals and its low levels of anticipated charitable giving."\textsuperscript{14} In addition, Prof. Fleischer criticizes the apparent disjuncture between the intended recipients of MasterCard’s philanthropy — programs that support education and microfinance initiatives\textsuperscript{15} — and MasterCard’s brand image as the embodiment of consumerism.\textsuperscript{16} While both of these critiques may be true as a factual matter, they do not take into account the audience that is interpreting this branding effort. When a corporation uses its corporate structure or the structure of its initial public offering to communicate something about the nature of the company itself (whether this meaning is true or not), to whom is it speaking? Is the audience for this message the market for the IPO, the market for the card itself, or some third group? I submit here that the most immediate audience is in fact a third group through which much of the interpretive work is likely to occur — financial newspapers, brokers, and the like — and which will help intermediate this message. If this is the case, then the factual disconnects between the branding message and the realities of implementation become less important: The messenger ultimately conveys the message. And while responsive to Prof. Fleischer’s insight, this critique also has broader implications for trademark law more generally: The fact that such branding intermediaries have a significant role to play in the creation of the brand, including whether to convey or contradict the producer’s intended meaning, calls into question whether other disruption of intended brand meaning (such as that prohibited by dilution law) should be seen as problematic.

II. Creating The Branding Moment

A. Kinds of Branding

Advertising is obviously commonplace in our consumer culture. From print advertising to television and radio commercials, to Internet banner and pop-up advertisements, consumers encounter multitudes of attempts each day to influence their purchasing decisions.

\textsuperscript{14} Fleischer, \textit{supra} note 1, at 139.
\textsuperscript{16} Fleischer, \textit{supra} note 1, at 141.
Each such advertising instance is an attempt not only to communicate something about the product or service at issue to consumers but also to link that communication to the brand attached to that product or service. It does a company little good to persuade consumers about the benefits of its new widget if it does not also firmly cement in consumers' minds the fact that the advertisement concerned an Acme brand widget.  

This is not to say, however, that all advertising is of the brand-recognition ("The new Acme widget — ask for it by name") or brand-distinction ("The new Acme widget is durable, yet pocket-sized") type. A good deal of advertising is comparative, or brand-differentiating, in which the product's or service's qualities are communicated in comparison to those of other producers ("The Acme widget finishes the job faster than Nadir's widget"). Much advertising today, however, neither conveys attributes of the product or service directly nor presents a comparison with other products but instead is "atmospheric advertising": an attempt to create an atmosphere or image surrounding the product as "a contribution to the complex symbol which is the brand image." Indeed, proponents of expansive intellectual property rights for brand owners tout this aspect of branding as what creates the "true worth" of brands. Television and print
advertisements for the Apple iPod MP3 player in 2003 communicated nothing about the features of the product but instead simply featured slick, modern graphics (the black silhouette of various users of the product with the product, featured in white, the only item visible), accompanied (in the television ads) by hip, cutting-edge music. Nike's “Just Do It” television and print campaign likewise related no attributes of the company's athletic wear, instead featuring various well-known athletes engaged in competition. MasterCard's more recent “Priceless” advertising campaign, as discussed below, also falls into this third category.

B. The Branding of MasterCard

First introduced in the 1960s, bank-issued credit cards like MasterCard provide both a convenient means of payment (and an interest-free short-term loan) for those with the financial resources to pay off their bills each month and a source of credit for those without such resources. More than 641 million cards were in circulation in the United States in 2004; MasterCard, for its part, claims 749.3 million MasterCard-branded cards in circulation worldwide, issuing from close to 25,000 financial institutions. The Federal Reserve (1994) (“The true worth of brands... is their capacity, like an ‘old friend,’ to generate a distinct set of warm and welcome associations...”) (footnote omitted). This is not to say, however, that such branding is uniformly successful; indeed, consumers' reaction to branding may be due to their own personalities rather than to what they see in the advertisement. See Todd A. Mooradian, Personality and Ad-Evoked Feelings: The Case for Extraversion and Neuroticism, 24 J. ACAD. MARKETING SCI. 99, 108 (1996) (concluding that “consumers differ in the way they respond to emotional appeals in advertisements and that at least some of these differences are explained by basic, readily measured [personality] traits”).


has estimated that in 2003, 15.2 billion payments were made using the four major general purpose credit card brands (Visa, MasterCard, American Express, and Discover), totaling $1.4 trillion dollars.\(^{25}\)

Like any other provider of goods or services, MasterCard engages in direct consumer advertising. These branding efforts differ, however, from many branding efforts in other industry sectors in two ways. First, because MasterCard is a membership association and not a credit card issuer, its brand is attached to services that MasterCard does not provide to consumers.\(^{26}\) Consumers may encounter the brand on the cards themselves or on merchant displays, but neither of these uses identifies the source of any goods or services, given that MasterCard does not “issue cards, set annual fees on cards, determine annual percentage rates, solicit merchants to accept cards or set their discount rates. Instead, MasterCard’s customer financial institutions manage the relationships with consumers and merchants.”\(^{27}\) Thus, this is not like a traditional franchise situation (McDonald’s, for example), where the brand owner exercises a high degree of control over the franchisees’ activities; if anything, the use of the MasterCard brand is more like instances in which a university or a sports team licenses the use of its logo to be attached to goods (apparel or, indeed, credit cards\(^{28}\)) that it doesn’t itself provide. In each of these cases, the use of the brand conveys to the consumer not source but, at most, affiliation.

Second, because the growth rate of credit card adoption appears to be slowing,\(^{29}\) MasterCard’s brand advertising is likely directed just as much at existing cardholders as at new customers, encouraging those who already hold the card to use it in future transactions and thereby generate income for MasterCard through interchange fees.\(^{30}\)

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26. American Express and Discover, by contrast, issued their own cards until recently. Both now issue cards through financial institutions as well.


28. Thus, consumers may use credit cards as a way of declaring their own affiliations. See Colin Beasty, Online Credit Card Branding Is Weak, http://www.destinationcrm.com/articles/default.asp?ArticleID=5319 (last viewed Apr. 2, 2006) (quoting a research analyst as noting that “card appearance is a decision factor for many customers”).

29. Gerdes et al., supra note 25, at 184 (noting that the credit card is reaching maturity as a payment instrument).

30. See, e.g., Kelly Shermach, “Use My Card, Please,” Credit Card Mgmt., Apr. 2005, at 16 (noting that banks (and, thereby, card associations) obtain revenue from credit cards only when the customer uses the card at a merchant). Thus, credit card brand advertising differs slightly from credit card issuer advertising (such as through
Unlike advertising for dog food or shampoo, the goal of which is to get the consumer to choose a particular product off the shelf during the next shopping experience, MasterCard’s advertising is probably not primarily directed at influencing the consumer’s decision to acquire a new MasterCard. The consumer is more likely to acquire a new credit card through a solicitation from the issuing bank, whether by direct mail or in person. (This may not have been true for single-issuer cards such as American Express, whose “Membership has its privileges” campaign, which launched in the late 1980s, was an attempt to elevate the American Express card to a status good that might be affirmatively acquired by new consumers.) And because many consumers hold more than one credit card, MasterCard must be particularly sensitive to the low switching costs incurred in simply taking one card out of the wallet rather than another.31

Both of these differences – the fact that the MasterCard brand represents affiliation rather than source and the fact that the target audience for MasterCard’s advertising is likely existing, rather than new, consumers – lead naturally to atmospheric advertising over brand-distinguishing or brand-differentiation advertising. Having no day-to-day ability to control the business activities that increase the goodwill of the brand or to encourage consumers to acquire the MasterCard brand in a competitive marketplace, MasterCard must rely most heavily on advertising that contributes to the meaning of the MasterCard brand rather than touts its comparative advantages.32

direct mail solicitations) in that issuer advertising attempts to get the user to acquire an additional card. See Zywicki, supra note 22, at 142 (“[T]he likely effect of credit card advertising is simply to increase competition, increase consumer information, and redistribute credit card users among various issuers, rather than increasing the pool of credit card users generally.”).


32. Of course, credit card associations can (and do) engage in some degree of comparative advertising related to the characteristics of the consumer experience the association can control directly – for example, the number of issuing banks or accepting merchants. Primarily, however, it would seem that the MasterCard brand is, like other brands, used for massive merchandising purposes (such as cartoon characters) in that the value of the brand is less as an indication of source and more in its “power
Like other credit card organizations, MasterCard has devoted significant resources to atmospheric branding. Of particular note is MasterCard’s “Priceless” campaign, which launched in 1997: An announcer, over a heartwarming scene of, say, a grandfather and grandson at a baseball game or a couple exploring China, lists two related items and their costs, then adds a third item corresponding to the feel-good aspect of the event (the cost of which is “priceless”), ending with the tag line “There are some things that money can’t buy. For everything else, there’s MasterCard.”

Like other atmospheric advertising, these commercials tout none of the credit card’s features — there’s no mention of acceptance locations, interest rates, or credit terms. Rather, the goal is to create a wholesome association with the brand itself that will encourage consumers to use MasterCard rather than some other credit card for their next commercial transaction. The advertising does this by telling consumers that the credit card will help them achieve the things that are important to them such as relationships with family, life-affirming travel, and the like. The importance of this brand meaning to MasterCard was revealed in its August 2000 trademark infringement suit against then presidential candidate Ralph Nader.

33. See Visa (“It’s everywhere you want to be.”); American Express (“Don’t leave home without it” and “Membership has its privileges”); Discover (“It pays to Discover”). Even less prestigious credit card brands engage in such activities. See Capital One (“What’s in your wallet?”). See generally Edward McKinley, Brand Takes a Starring Role, CREDIT CARD MGMT., Apr. 2005, at 40.


35. This was the intent of the marketing team at MasterCard. See MasterCard — Finding a Compelling Global Positioning: “Priceless,” http://www.allaboutbranding.com/index.lasso?article=418 (last visited Apr. 2, 2006) (interview with Lawrence Flanagan, Chief Marketing Officer for MasterCard, discussing the “Priceless” campaign) (“[Consumers’] core values are family, security, companionship and ‘making time for yourself.’ It was unique for a credit card company to say to consumers, ‘It’s not about what you buy; it’s about how you take care of yourself.’”). Visa has responded in kind by launching its own “experience” ad campaign, “Life Takes Visa.” Eric Dash, To Make the Card Special, Try the Warm and Familiar, N.Y. TIMES, Feb. 8,
who had broadcast a political advertisement that mocked his opponents using the format of the "Priceless" campaign.\textsuperscript{36} (The suit was not successful: The district court granted summary judgment in favor of Nader, finding no genuine issue of material fact regarding any likelihood of confusion between MasterCard's product and Nader.\textsuperscript{37}) Nader's political advertisement ultimately conveyed two messages: Nader's thoughts on the U.S. political system and the strength of MasterCard's atmospheric advertising efforts. Nader's ad assumed familiarity with its format; it was only because of the pervasiveness of the "Priceless" campaign that Nader was able to make his satire work. MasterCard's reaction to Nader's advertisement illustrated the importance of the brand's image: There was little chance that viewers would conclude, upon seeing Nader's advertisement, that Nader's political campaign was sponsored by MasterCard, but there was a chance (at least in MasterCard's view) that consumers' (wholesome) associations with the "Priceless" campaign would now be tainted with the odor of American politics.

In short, MasterCard's "Priceless" campaign is a classic example of atmospheric advertising that attempts to create meaning in the MasterCard brand. It does so not by accreting meaning that is already inherent in the brand (a convenient method of engaging in commercial transactions, with the attendant problems that interest rates and minimum payments create) but by transmitting messages designed to create the opposite meaning of family values and aspects of life untouched by consumerism. Whether this intended meaning is accepted by consumers is, of course, a function of their interpretation;


\begin{quote}
[The ad] included a sequential display of a series of items showing the price of each ("grilled tenderloin for fund-raiser[: $1,000 a plate"); "campaign ads filled with half-truths: $10 million"; "promises to special interest groups: over $100 billion"). The advertisement ends with a phrase identifying a priceless intangible that cannot be purchased ("finding out the truth: priceless. There are some things that money can't buy").
\end{quote}

\textit{id.} As the court later noted, "Mastercard's message depicted in its Priceless Advertisements is very plain and straightforward. In a series of advertisements, MasterCard presents various intangible moments that are highly valuable, yet unable to be 'purchased' or are 'priceless.' Hence, 'there are some things that money can't buy.'" \textit{id.} at *42.

37. \textit{id.} at *14. The court also granted summary judgment to Nader on MasterCard's trademark dilution claim, concluding that Nader was engaging in noncommercial activity and thus explicitly exempted from the statute's reach and that there was no evidence in the record that Nader's use of MasterCard's trademarks diluted the distinctiveness of those marks. \textit{id.} at *28-30.}
MasterCard’s ability to influence this interpretation ends at the moment the advertisements are transmitted.

C. The MasterCard IPO as a Branding Event

As part of the new structure of the company after the IPO, 10 percent of MasterCard’s equity (representing about 17 percent of its voting rights) was issued to the MasterCard Foundation, a charitable foundation incorporated in Canada. \[38\] MasterCard also intended to record an expense of an additional $40 million in cash to be donated to the Foundation over a period of up to four years. \[39\] The Foundation, MasterCard announced,

will build on MasterCard’s existing charitable giving commitments by continuing to support programs and initiatives that help children and youth to access education, understand and utilize technology and develop the skills necessary to succeed in a diverse and global work force. In addition, the Foundation will support organizations that provide microfinance programs and services to financially disadvantaged persons and communities in order to enhance local economies and develop entrepreneurs. \[40\]

The announcement about the Foundation’s goals has been received with some skepticism. One commentator wrote in December 2005 that some analysts are concerned that the Foundation is a “costly ruse” designed to protect a “clubby governance structure,” particularly given that the company has reportedly asked Canadian authorities to relax legal requirements relating to the timing of the Foundation’s distribution of assets. \[41\] Others, however, see the Foundation as a savvy recognition of philanthropic trends, noting that it “reflects MasterCard’s desire ‘to be on the cutting edge of where it believes corporate responsibility will be in the 21st century.’” \[42\]

In his contribution to this issue, Prof. Fleischer contends that MasterCard’s IPO structure is motivated at least in part by an attempt to influence the meaning of the MasterCard brand by, in particular, establishing a charitable foundation. The message conveyed, in Prof. Fleischer’s view, is that MasterCard is a community-minded organization with philanthropic motivations, contrary to the crass

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38. MasterCard Incorporated Form S-1 (filed Sept. 15, 2005), at 5.
40. Id.; see also http://www.mastercardfoundation.org (last visited July 5, 2006).
42. Id. (quoting David Robertson, publisher of the Nilson Report).
commercialism that the consumer credit industry represents. But even if the creation of the Foundation through the IPO is a branding event, as Prof. Fleischer contends, it is important to recognize the significant differences between this branding attempt and other, more traditional, efforts. First, the branding-through-IPO to which Prof. Fleischer refers is a branding that is slightly different even within the category of atmospheric branding generally, in that it is not an attempt to create brand equity in the product itself but rather brand equity in the corporate entity that, it is hoped, will translate more or less directly into financial equity. Of course, corporate branding is not an unusual endeavor: McDonald's engages in it with its sponsorship of the Ronald McDonald House, a residence for families of children with life-threatening illnesses; other corporations sponsor fundraising road races and other charity events.

Typically, however, even this type of corporate branding includes consumers of the company's products as part of the immediate audience for the atmospheric message. When Nike tells the viewer or reader "Just Do It," it is speaking directly to the people who Nike hopes will buy its athletic gear and will do so because they are inspired by the message of athletic achievement conveyed by the advertisement. But here, and this is the second significant difference, the direct audience for MasterCard's message — "MasterCard is a philanthropic organization" — is not likely to include the consumers that MasterCard hopes the message will ultimately reach (i.e., the same audience to which the "Priceless" campaign is directed). MasterCard's description of the charitable initiative is, like other information about its IPO, included in its financial statements, the target audience for which is primarily investors and those who assist investors (brokers, financial planners, and so forth). This audience will be directly responsive to the announcement of the charitable initiative insofar as its structure affects the value of the corporation (which presumably includes such factors as the amount of the shares that will be owned by the charity, their value, and the charity's future

43. Fleischer, supra note 1, at 152.
45. Sidney J. Levy, Imagery and Symbolism, in BRANDS, CONSUMERS, SYMBOLS & RESEARCH 233, 236 (Dennis W. Rook, ed. 1999) ("The corporate image may be of significance to consumers of the specific products by reassuring them of the responsibility and quality of the manufacturer. It affects the buyers of company shares; it influences the government in its relations with the enterprise; and suppliers to the company will be guided by their image of it.").
ability to control the disposition of those shares). The branding message conveyed by the announcement is important to this audience only insofar as it has the desired effect on consumers, which, in turn, increases the market value of the company. In short, the audience who most directly hears the intended branding message of the charitable foundation is not the audience most directly involved in creating or rejecting branding meaning; it must rely on consumers, the remote audience, to do that work.

Thus, the real target audience for the message that MasterCard is a community-minded organization is, primarily, current cardholders. Current cardholders are the ones who MasterCard hopes will be inspired by the message about charity, attribute those feelings to MasterCard, and choose to pull out their MasterCard rather than their Visa the next time they are making a purchase. In so doing, these consumers are themselves communicating the message that they, too, are charitable, even if that message is received only by the cashier who takes the card. Thus, for consumers, any guilt they might feel over the raw consumerism use of the card entails is palliated by the vague feelings of charity they associate with the brand and, therefore, with themselves.

So how, then, is this branding message (assuming it exists) transmitted, given that the true target audience is not the one to whom MasterCard is speaking? The answer is through branding intermediaries: the financial and general media that report on the details of the IPO to its readership, a readership that is, perhaps, more receptive to the kind of atmospheric advertising the IPO structure represents. In one sense, the brand itself might be said to be an intermediary in its role as a repository for a collection of information about a mark (not only information from the product or producer with which the mark is associated but also information from consumers

46. Many thanks to Trotter Hardy for encouraging me to clarify this point.
47. As with the “Priceless” campaign, the target audience for MasterCard’s branding message here is likely not potential consumers but existing ones: the goal is (again) not to get those consumers to buy more of the product, but to get them to use the product they already have.
48. Sidney J. Levy, Symbols for Sale, HARV. BUS. REV. 117, 119 (July–Aug. 1959) (“A symbol is appropriate (and the product will be used and enjoyed) when it joins with, meshes with, adds to, or reinforces the way the consumer thinks about himself.”).
49. It is possible that future cardholders, merchants, and issuing banks constitute a secondary audience for this message, but they are presumably far in the distance given that both groups rely more on economic information to make their decisions than on brand advertising.
about their reaction to that mark). But here I am focusing on a participant in the trademark conversation whose presence is almost required in order for communication to occur. Without the media communicating MasterCard's IPO branding message to consumers, consumers are unlikely even to know such branding exists. This is different, then, from instances generally when media report on advertising because in those instances the reporting serves to contribute to meaning that has already been communicated directly to the intended audience.

In communicating to consumers the branding messages they would not otherwise receive, branding intermediaries in the media are contributing to what might be called metabranding: the creation of brand meaning for a brand outside of the traditional producer-to-consumer communication stream. Here, MasterCard does not play this role for the IPO; it relies on the media to transmit the brand meaning on its behalf. Of course, branding intermediaries need not play a merely passive role in this exchange. The media might report on the establishment of the charitable foundation without comment, but it might also report favorably on this effort or critically, challenging the branding message intended by MasterCard. The key point is that to the extent the IPO structure is a branding moment at all, there is no branding effect without intermediaries. Someone other than MasterCard must tell the story in order for the message to be conveyed.

III. ASSESSING THE BRANDING MOMENT

A. Branding Through Intermediaries

What, then, is the branding effect of MasterCard's charitable foundation? In his article in this issue, Prof. Fleischer is skeptical,


51. Cf. Ill. High Sch. Ass'n v. GTE Vantage Inc., 99 F.3d 244, 246 (7th Cir. 1996) ("Most people know what they know about college basketball from the media. If the media call the NCAA tournament 'March Madness,' that is what the public will call it, or know it as.").
contrasting the branding effect of a charitable foundation when established by a corporation like Ben & Jerry's, which already has an atmospheric of community-mindedness, with a corporation like MasterCard, for which the fit with charitable impulses is less natural.\textsuperscript{52} Thus, Prof. Fleischer suggests, the branding effect of the MasterCard IPO is weaker because it is seen as inconsistent.\textsuperscript{53} But because the IPO-as-branding event must take place through media intermediaries, it is not at all clear, contrary to what Prof. Fleischer suggests, that MasterCard's stated purposes for its charitable foundation - education and microfinance - render the branding accomplished by the maneuver less effective.

To be sure, corporations like Ben & Jerry's that attempt to create brand meaning through charitable giving consistent with its other attempts at branding may succeed in creating a coherent, single brand. But to the extent that MasterCard is attempting to create a metabrand that is simply divorced from the quotidian drudgery of monthly payments and interest rates and instead is allied with community and family values, creating any kind of charitable institution at all may well accomplish this task. So, too, Prof. Fleischer's critique that structural limits on the Foundation's ability to donate funds may "mute" the brand impact because it makes the charitable nature of the Foundation more theoretical than real\textsuperscript{54} is, I think, beside the point. The point is not actually to provide charitable giving, although this is certainly a laudable goal.\textsuperscript{55} The point is merely to have media intermediaries report on the plan to provide charitable giving, encourage consumers to use the product, and then retain those customers through inertia or future branding efforts, with the assumption that they will not defect if later media reports (no doubt buried in the nether regions of the Business section) note that MasterCard's charitable aspirations inevitably fell short. This is perhaps why MasterCard chose to convey its charitable message through the IPO rather than simply setting up a separate foundation at some later point in

\textsuperscript{52} Fleischer, supra note 1, at 152-53 (suggesting that "the strongest case to be made" is that education and microfinance are both associated with upward class mobility and thus with increased access to consumerism).

\textsuperscript{53} Id.

\textsuperscript{54} Id. at 153.

time or making a large donation to an existing charity. The IPO has received and will continue to receive considerable media coverage in and of itself; the discussion of the Foundation thus becomes part of the story in what amounts to free brand advertising.\textsuperscript{56}

B. Trademark Law's Response

Finally, having spent a bit of time considering how the announcement of the Foundation through MasterCard's IPO might constitute a branding moment, it is worth pondering whether the mechanism of brand intermediaries tells us anything interesting about trademark law itself.

To the extent that trademark law would have anything to say about branding efforts such as the kind Prof. Fleischer describes of MasterCard, that response would likely sound in trademark dilution. In modern trademark law, trademark infringement is the workhorse. In a typical trademark infringement suit, the owner of a valid, protectable trademark brings suit against the second user of the same or a similar mark in the marketplace, alleging that the second ("junior") user's use of the mark is likely to cause confusion among the relevant consuming public as to the source of the junior user's good (or, in some cases, as to the sponsorship or authorization of the good by the senior user). By contrast, trademark dilution focuses not on activity that is likely to lead to consumer confusion but rather on activity that is likely to dilute the selling power of the brand at issue, either by making the brand seem commonplace rather than unique (dilution by "blurring") or by creating negative or unwholesome associations for a famous brand (dilution by "tarnishment").\textsuperscript{57} Of the three types of branding that I described above, trademark infringement relates to brand distinction and brand differentiation, while trademark dilution focuses on the atmospherics of the brand (i.e., the brand's meaning unattached to any product or service).

Whether a trademark dilution cause of action should exist at all has been the subject of considerable scholarly debate. Some argue for

\textsuperscript{56} To the extent one contends that using the IPO, and thus intermediaries, to convey this message risks a loss of control over brand meaning (as compared to direct advertising to consumers about the Foundation), this Essay argues that brand owners lose control over brand meaning in any event as soon as any advertising is released. See supra at 212.

\textsuperscript{57} The Federal Trademark Dilution Act applies only to marks that are distinctive and famous. 15 U.S.C. § 1125(c)(1). The Act provides four factors that courts may consider in order to determine whether a mark so qualifies. § 1125(c)(2)(A).
limitations on the action or outright abandonment of the doctrine.\textsuperscript{58} Others argue in favor of a remedy for the harm sought to be prevented but take issue with the form U.S. dilution law takes.\textsuperscript{59} Still others seek expansion of the property-like rights the law provides to trademark holders.\textsuperscript{60}

Recognition of the existence of trademark intermediaries provides another basis for reconsidering the effectiveness of trademark dilution law. A dilution action essentially argues not “we have spent a lot of money and effort on creating a strong and unique brand, and the defendant’s activities use that brand to lure our customers away” – the core of an infringement action – but rather “we have spent a lot of money and effort on telling consumers what they should think about our brand, and the defendant’s activities have caused them to think something different.” While it may be defensible, under a natural rights or economic theory of trademark law, to contend that a defendant should not be able to free-ride on the value created by the trademark holder, a dilution action (as usually described) contends something different: that the defendant’s fault is in disrupting the associations that the consumer creates upon seeing the brand. In the prototypical dilution cases, “Kodak” engenders not only the corresponding association “film” but also the corresponding association “piano”; “Coca-Cola” engenders not only the corresponding association “All-American” but also “drug use.”\textsuperscript{61} Whether the dilution claim is characterized as blurring or tarnishing is of no matter here; the essence of either claim is that the defendant has conveyed a different meaning for the brand from the one the brand owner intends. The

\textsuperscript{58} See, e.g., Sara Stadler Nelson, The Wages of Ubiquity in Trademark Law, 88 IOWA L. REV. 731 (2003) (contending that a dilution action should be unavailable to trademark holders who have extended their marks so broadly that they have, in effect, diluted the strength of their own marks); Klieger, supra note 17.


\textsuperscript{60} See, e.g., Hartman, supra note 19 (identifying preventing harm to brand equity as the goal of dilution law); Swann & Davis, Jr., supra note 19 (arguing that brand equity should be given broad protection).

brand owner, in other words, is claiming a right to the exclusive mental association with the brand in the minds of the public.62

Given that a brand owner’s efforts to create a particular atmospheric association can be successful only if the public accepts those efforts—in other words, a corporation can spend as much money as it likes on advertising, but those efforts can be deemed a success only if the public agrees with the message—it is unclear why the brand owner alone should be deemed to have any proprietary right over the public’s mental association with the mark.63 A politician can spend many months and millions of dollars attempting to persuade the public that he is an upstanding, reasonable person, but he has no right to demand that the public accept that message. So, too, with trademarks: If another’s use of a mark causes disruption or diminishment in the associations consumers have with that mark, the result is attributable to consumers’ decisions to acknowledge that disruption, not to any deception on the part of the defendant.64

In short, it is control of mental association, not control of words, that is at the heart of trademark law. A trademark holder seeks not to restrict the use of a word or words per se; it seeks to restrict the

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62. See, e.g., Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc., 642 F. Supp. 1031 (N.D. Cal. 1986) (in which the owner of the “Cabbage Patch Kids” brand of children’s dolls prevailed in a dilution suit over the maker of bubble gum trading cards containing images of “Garbage Pail Kids”). As two commentators favorably described the case, “[t]he owner of the Cabbage Patch Kids property...was not seriously concerned that purchasers of Garbage Pail Kids bubble gum trading cards would be deceived as to source; rather...she feared that the gross Garbage Pail images would make it no longer ‘cool’ to own a Cabbage Patch Kids doll.” Swann & Davis, Jr., supra note 19, at 274 (footnote omitted). See also Deere & Co. v. MTD Prods., Inc., 41 F.3d 39, 45 (2d Cir. 1994) (affirming preliminary injunction preventing use of animated version of plaintiff’s trademark by competitor to poke fun at plaintiff on the ground that the “favorable attributes of the mark” would thereby be diminished).

63. Jessica Litman made much the same point in 1999, as did Rochelle Dreyfuss in 1990. See Litman, supra note 32, at 1730 (“The argument that trade symbols acquire intrinsic value—apart from their usefulness in designating the source—derives from consumers’ investing those symbols with value for which they are willing to pay real money.”); Rochelle Cooper Dreyfuss, Expressive Genericity: Trademarks as Language in the Pepsi Generation, 65 NOTRE DAME L. REV. 397, 407 (1990) (suggesting that the “surplus value” of trademarks—the value they have other than as source indicators (such as the value of the Coca-Cola trademark on a T-shirt rather than on a soda can)—should belong to consumers as the ones who give value to the trademark beyond its pure signaling function).

64. To be clear, I am not referring here to competitors who deceive consumers into thinking they are buying the trademark holder’s goods when they are not (i.e., actions that constitute infringement and that are properly made unlawful under trademark and unfair competition law) or who initiate falsehoods about the trademark holder or its product (which are addressed by tort actions such as trade libel and false advertising).
number and kinds of associations with that word in the mind of the consumer, whether that means eliminating associations with other products or producers, as occurs both in infringement actions and in blurring dilution actions, or eliminating associations with certain (unsavory) concepts, as in tarnishment dilution actions. Trademark law is not about the need to keep certain words free for descriptive or other use by competitors; it is about the production of brand meaning. And as Jessica Litman noted in 1999, the creation of trademark meaning is a joint enterprise between the mark holder and the consuming public. This is not simply true in a commercial sense, in that the public creates the need for trademarks by choosing the products on which it will spend its money, although that is undeniable. It is also true in that trademarks work only because of the intellectual dexterity of the consuming public: a public that sees a “swoosh” and is able to associate that symbol with an athletic wear manufacturer called Nike; a public that recognizes that there may well be both a Continental Airlines and a Continental Bank in one commercial space and knows, when it hears “Continental” at a particular moment, to which entity the word refers; a public that can talk about something being a “Mickey Mouse operation” without thinking that Disney is behind the scenes; a public that hears “Where’s the beef?” during a political campaign and gets the joke.

For all its talk about consumer confusion, trademark law actually places a fair amount of trust and confidence in consumers to manage competing associations and negotiate among various meanings attached to the same words or phrases. It requires them not only to make and remember the association between the trademark and the product or producer but also to distinguish that mental link from others using the same or a similar mark. The fanciful mark “Xerox” may have only one user and one association, but the mark “United” has multiple users and multiple associations, including an airline, a moving company, a major league soccer team, and multiple banking institutions in the United States, all of which peacefully coexist. Indeed, as I noted earlier, trademark law imposes on the consumer something of a postmodern task of creating meaning and association for a particular mark.

What, then, can MasterCard’s branding through intermediaries tell us about dilution law? My contention is that the existence and,

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65. Litman, supra note 32, at 1725 (noting that “the law now protects the imaginary values painted by advertising campaigns independent of any features of the products they advertise”).
indeed, necessity of branding intermediaries in the MasterCard scenario point out the infeasibility of dilution law writ large. If branding intermediaries can either accept or reject the call to convey the intended brand message to the consuming base, and by rejecting the task actually convey the reverse message (as occurred in the skeptical reporting on MasterCard’s charitable initiative), those intermediaries have the power to engage in brand dilution. They are contributing to the creation of an association with the brand in the consumer’s mind directly contrary to the one that the brand owner intended. Indeed, these intermediaries are not merely offering commentary on the brand holder’s goods or services – they are engaging in a direct attack on the branding effort itself. If such activity is immune from suit under the First Amendment, as it surely is (assuming the reporting conveys no false facts),\(^{66}\) then it is unclear why a similar disruption of brand meaning by another player in the commercial marketplace should be unlawful.\(^{67}\) By its very nature, a dilution cause of action alleges no diversion of revenue from the brand holder – when Kodak sues the hypothetical maker of Kodak pianos, it is not alleging that consumers are buying the pianos because they believe the film company is associated with the pianos in some way – but rather a harm to the meaning of the brand itself. Some proponents of an expanded view of the intellectual property rights of trademark holders, and thus of an expanded view of what dilution law should protect, articulate the harm to be prevented as the “impairment of brand equity” – in other words, a use that creates associations and meanings contrary to the one the mark holder intends.\(^{68}\) If a trademark holder cannot prevent a branding intermediary from engaging in such activity in its communications with the trademark holder’s consumers, it is curious why it has the right, under current law, to

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\(^{66}\) Even trademark expansionists concede that consumer reporting should fall outside the scope of dilution law, despite its negative effect on brand equity, because such uses “reflect the public’s countervailing interest in full and fair information.” Swann & Davis, Jr., supra note 19, at 296.

\(^{67}\) Mark A. Lemley, The Modern Lanham Act and the Death of Common Sense, 108 YALE L.J. 1687 1699 n.56 (1999) (calling the theory of “contributory dilution” – “that individuals who use a mark generically, or media who do not treat it as a brand name, are contributing to the loss of distinctive significance of the mark” – “the most pernicious concept ever to come out of trademark theory”); Klieger, supra note 17, at 830 (“Unless senior users of a mark have an absolute right to control the mark and its associations, tarnishment without resulting consumer confusion should not be actionable.”).

\(^{68}\) See, e.g., Hartman, supra note 19, at 421 (defining dilution as “the impairment of brand equity caused by a use of the mark that creates associations and images inconsistent with the equity”).
prevent such activity when conducted by other noncompetitors.\textsuperscript{69}

Both the manufacturer of “Ben & Jerry’s pianos” and the newspaper article reporting on the company’s less-than-folksy corporate activities (both wholly hypothetical) arguably disrupt the company’s brand meaning; both the manufacturer and the newspaper can communicate directly with the company’s consumers; and both the manufacturer and the newspaper are engaged in (presumably) profitable activities that are not direct substitutes for any of the company’s sales. Yet dilution law penalizes only the manufacturer’s activities and not the newspaper’s.\textsuperscript{70}

Having relied on the media to transmit a particular characterization of its IPO branding event to its intended audience, MasterCard cannot be heard to complain when the media chooses to transmit a different characterization; it should likewise not be able to complain when others engage in brand disruption that is different only in degree, not in kind.

IV. Conclusion

In contending that unorthodox initial public offering structures may constitute branding moments, Prof. Fleischer has reminded us that brand owners are engaged in a constant effort to shape brand meaning. But it is less important, I think, to look at the nature of that meaning (and whether it aligns with other instances of brand creation) and more useful to consider what the IPO-as-branding exercise can tell us about the construction of brand meaning more generally. Prof. Fleischer’s consideration of the MasterCard IPO in particular provides a useful starting point.

Brand owners are ultimately at the mercy of their consumers. They can hope to influence brand meaning through advertising, but they have no control over whether consumers accept or reject that

\textsuperscript{69} Cf. Nelson, \textit{supra} note 58, at 735 (contending that trademark owners who make “ubiquitous” use of their own marks are engaging in self-dilution and thus should be denied a remedy under dilution law against others).

\textsuperscript{70} The First Amendment cannot explain away this distinction entirely; nondeceptive commercial speech is entitled to constitutional protection. See, \textit{e.g.}, Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 566 (1980) (permitting regulation of commercial speech concerning lawful activity and that is not misleading under the First Amendment only when “the asserted governmental interest is substantial,” “the regulation directly advances the governmental interest asserted,” and the regulation “is not more extensive than is necessary to serve that interest”). The Federal Trademark Dilution Act exempts use of a mark in comparative advertising; noncommercial use of a mark; parody, criticism, or commentary; and news reporting and news commentary from its ambit. 15 U.S.C. § 1125(c)(3).
message. A corporation that hopes to convey a branding message to its consumers through its IPO structure faces the added challenge of not being able to speak to those consumers directly but instead relying on media intermediaries to report (and, possibly, restate) that message. From a postmodern view, the insertion of intermediaries is likely of little moment: Given that consumers are the ultimate creators of meaning, the loss of corporate control over the message occurs immediately upon dissemination, whether the company conveys the message directly to consumers or does so through another entity. If this is true, perhaps we should rethink whether there is any real difference when a competitor, rather than the media or, indeed, the corporation itself, initiates this loss of control. In other words, perhaps trademark law should care much less about the destabilization of brand meaning (at least where no deception is involved) because destabilization is a natural form of brand existence. In this regard, by highlighting a clear example of brand destabilization at work, Prof. Fleischer has given not only corporate scholars but also intellectual property scholars some food for thought.