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Fear and Loathing in Trademark Enforcement

Jeremy N. Sheff
St. John's University School of Law

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Associate Professor of Law, St. John's University School of Law. This Essay developed from a talk given in the "Trademark Enforcement Considerations" panel of the Fordham Intellectual Property, Media & Entertainment Law Journal's 2011 Symposium entitled "IP Bullying or Proactive Enforcement?" Thanks to the organizers of the symposium, the panel moderator Hugh Hansen, and my fellow panelists Irina Manta and James Barabas.

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INTRODUCTION

Much academic commentary these days concludes that trademark enforcement has become overly aggressive. Commentators argue that the increasingly expansive claims of rights by well-funded trademark owners are unreasonable, and thus that lawsuits asserting those rights amount to trademark bullying.[1] But I think many, if not most, trademark practitioners would take the contrary view that enforcement can only barely keep up with the constantly evolving and worsening threats to their clients'

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[1] *See generally* Leah Chan Grinvald, *Shaming Trademark Bullies*, 2011 WIS. L. REV. 625 (2011) (defining trademark bullying and providing a framework for curtailing the phenomenon through "shaming"); *cf.* Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413 (2010) (analyzing some particularly dubious theories of liability asserted by plaintiffs in trademark cases).

brands, particularly internationally and online.[2] The purpose of this Essay is to try and bridge these two positions by critiquing each one from the perspective of the other.

The first step in this exercise is to challenge my own camp, the academic camp, in this debate over the appropriate scope of enforcement. If we academics think that trademark owners are over-enforcing their marks, we should ask ourselves: why would they do that? Why would any trademark owner seek to enforce its marks unreasonably? Why would its trademark attorneys advise it to do so? I will examine these questions in three stages. The first stage is a bare psychological inquiry: what might motivate somebody to do something unreasonable? This is where I will introduce the dichotomy suggested by the title of this Essay (with apologies to the late Hunter S. Thompson).[3] The second stage is a doctrinal inquiry: once we think we understand trademark owners' psychological motivations, we can look at the law's role in mediating them. In particular, we ought to ask whether trademark doctrine is generating these motivations or responding to them in some way. The third stage of the inquiry looks to the profession as the nexus of doctrine and action and questions the role of trademark attorneys in mediating these dynamics and advising their clients.

I. THE PSYCHOLOGY OF ENFORCEMENT

To begin with psychology, let me explain what I mean by fear and loathing. By "fear," I mean that a trademark owner might take some enforcement action out of some concern that if they do not, they will lose something of value that they currently enjoy. By

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[2] *See generally* Dalila Hoover, *Coercion Will Not Protect Trademark Owners in China, But an Understanding of China's Culture Will: A Lesson the United States has to Learn*, 15 MARQ. INTELL. PROP. L. REV. 325 (2011) (discussing persistent frustrations of American trademark owners with lax enforcement by the Chinese government, and the limits of legal and economic pressure in ameliorating the problem); Uli Widmaier, *From Metatags to Sponsored Ads: The Evolution of the Internet-Related Trademark Infringement Doctrine*, 4 LANDSLIDE 9 (2012) (discussing clients' frustration with keyword advertising and domain names that use their trademarks, and the difficulties their lawyers face in meeting these clients' demands to curtail such conduct).

[3] *Cf.* HUNTER S. THOMPSON, FEAR AND LOATHING IN LAS VEGAS: A SAVAGE JOURNEY TO THE HEART OF THE AMERICAN DREAM (Random House 1971).

"fear," then, I refer generally to fear of loss. For example, the mark owner may be concerned that the conduct of a target of potential enforcement, if left unchecked, will result in a loss of business for the trademark owner. The classic example and the easiest case is the passing off of an inferior product, which threatens not only to divert customers from the mark owner to the target of enforcement[4] but also, over time, to deplete the mark owner's goodwill.[5] We can understand enforcement actions against a defendant engaged in passing off shoddy goods as being motivated by this entirely justifiable fear.

Alternatively, mark owners might be concerned about losing some legal interest or right that they currently enjoy if they fail to take enforcement action. The classic example here is abandonment through acts of omission.[6] Failing to enforce a mark over an extended period of time can ultimately, in an extreme case, lead to a complete loss of trademark rights.[7] Again, enforcement actions taken to stave off the loss of one's trademark rights would seem to be entirely justifiable.

If these examples suffice to illustrate "fear," the question remains what I mean when I refer to "loathing." By "loathing," I simply mean that a trademark owner might take some enforcement action, not because it is worried that in failing to do so it will lose something of value that it currently enjoys, but rather because it simply does not like or approve of the conduct against which it is pursuing enforcement. One could imagine innumerable reasons for such disapproval. One highly controversial reason might be that the enforcement target is expressing a viewpoint about, or

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4 *See* Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1860–63 (2007).

5 *See id.*; *see also* William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 269–70 (1987).

6 *See* Lanham Act, 15 U.S.C. § 1127 (2006) ("A mark shall be deemed to be 'abandoned' . . . [w]hen any course of conduct of the owner, including acts of omission as well as commission, causes the mark . . . to lose its significance as a mark.").

7 *See* J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 17:8 (4th ed. 2012) ("Sometimes a mark becomes abandoned to generic usage as a result of the trademark owner's failure to police the mark, so that widespread usage by competitors leads to a generic usage among the relevant public, who see many sellers using the same word or designator."); *see also* BellSouth Corp. v. DataNational Corp., 60 F.3d 1565, 1569–70 (Fed. Cir. 1995).

creating some sort of connotation around, the mark owner's brand that paints the mark owner in an unflattering light in the eyes of the public,[8] or is otherwise inconsistent with the mark owner's marketing or branding strategy.[9]

We can see dilution by tarnishment as an example of this. Pillsbury may not want its family-friendly Doughboy character going into pornography, for obvious reasons.[10] But we can also look at mark owners' efforts to discourage the use of their products by persons or in expressive works that are somehow inconsistent with the mark owners' brand strategies. Such efforts do not always take the form of legal proceedings, or even saber rattling, but can rather take the form of persuasion, suggestion or even pleading with potential enforcement targets. Consider the recent spat between Abercrombie & Fitch and the cast of *The Jersey Shore*, in which the clothing retailer publicly offered to pay the boorish cast members of the hit reality program *not* to wear its products.[11] There was no legal action taken, but there was, if not a threat, at least an attempt to persuade the target not to engage in certain conduct regarding the brand.[12]

Another form of loathing might arise where the enforcement target is using the mark in a way that does not inflict any business losses on the mark owner (as, for example, passing-off would), but provides the potential target of enforcement with some benefit that the mark owner thinks is undeserved or is perhaps better deserved by the mark owner itself, even though the mark owner is not currently enjoying that benefit. Here we can look to the emergence of a merchandising right,[13] the expansion of infringement liability to non-competing goods,[14] and, of course, dilution by blurring.[15]

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[8] *See generally* Robert C. Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158 (1982); Wendy J. Gordon, *A Property Right in Self Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993).

[9] *See generally* Jeremy N. Sheff, *Brand Renegades*, 1 N.Y.U. J. INTELL. PROP. & ENT. L. 128 (2011).

[10] *See generally* Pillsbury Co. v. Milky Way Prods., Inc., 215 U.S.P.Q. 124 (N.D. Ga. 1981).

[11] *See* Sheff, *supra* note 9, at 137–40.

[12] *See id.* at 139.

[13] *See generally* Boston Prof'l Hockey Ass'n v. Dallas Cap & Emblem Mfg., 510 F.2d 1004 (5th Cir. 1975); Univ. Book Store v. Univ. of Wisc. Bd. of Regents, 33 U.S.P.Q.2d

It has to be admitted that the dichotomy that I have set up in this Part, between fear and loathing, is not a perfect one. There is obviously going to be a mixture of motivations behind any particular enforcement effort, and they might mix to greater or lesser degrees. But for reasons I will explore below, these appear to be the rhetorical poles that drive the debate over the proper scope of enforcement measures.

II. TRADEMARK DOCTRINE: LEADING OR FOLLOWING?

What, then, is the role of doctrine in enforcement decisions? Is trademark doctrine, including the examples cited above, leading or following? Is it creating mark owners' enforcement motivations or is it providing those motivations an outlet they would not otherwise have? And in either case, is the motivation that doctrine is either creating or serving primarily one of fear or one of loathing?

It is easiest to identify the one area—and I think it is really the only area—where doctrine is explicitly *creating* a motivation, and that is the so-called duty to police. Professors Deven Desai and Sandra Rierson have argued that the threat of losing trademark rights incentivizes mark owners to undertake wasteful and undesirable policing activities, activities that even the mark owners do not want to undertake, but which they feel they must undertake on pain of losing some right that they currently enjoy.[16] It may be that this fear is indeed responsible for driving at least some enforcement actions that we academics would denounce as bullying.

(BNA) 1385 (T.T.A.B. 1994); Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 EMORY L.J. 461, 478–84 (2005).

[14] *See* Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137, 181–84 (2010); *see also* James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 907–23 (2007).

[15] *See* Lanham Act, 15 U.S.C. § 1125(c) (2006); *see also* Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 519–22 (2008).

[16] *See* Deven R. Desai & Sandra L. Rierson, *Confronting the Genericism Conundrum*, 28 CARDOZO L. REV. 1789, 1791, 1834–42 (2007).

In most other areas, I think that doctrine has generally been playing catch-up with the enforcement objectives of trademark owners, moving where the owners want enforcement to go, for the reasons that they want it to go there. The merchandising right is one example. In cases like *University Book Store v. Board of Regents*[17] and *Boston Hockey Association v. Dallas Cap & Emblem Manufacturing*,[18] a monopoly was created literally out of whole cloth and used to stamp out what had up to that point been a competitive market in branded merchandise—for example, for university and professional sports teams.

With respect to sponsorship and affiliation confusion, Professor Jim Gibson at the University of Richmond has argued that doctrine responds to enforcement activity in a feedback loop of expanding trademark rights.[19] In his telling, incrementally more aggressive enforcement actions by trademark owners produce a marketplace in which consumers develop increasingly credulous views of what might be a sponsorship or affiliation relationship, and those increasingly credulous views feed back into the likelihood-of-confusion standard, to make ever-more aggressive assertions of trademark rights at least plausible.[20] Again, the scope of infringement liability appears to be expanding to serve the motivations of trademark owners as expressed in their enforcement actions, rather than the other way around.

A third example is the federal dilution statute,[21] which, from my point of view, is a solution in search of a problem.[22] For years the statute was a top legislative priority of the organized trademark

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17 33 U.S.P.Q.2d (BNA) 1385 (T.T.A.B. 1994).

18 510 F.2d 1004 (1975).

19 *See* Gibson, *supra* note 14, at 887.

20 *See id.* at 907–23; *see also* Sheff, *supra* note 9, at 145–48.

21 *See* Lanham Act, 15 U.S.C. § 1125(c) (2006).

22 *See generally* Barton Beebe, *The Continuing Debacle of U.S. Antidilution Law: Evidence from the First Year of Trademark Dilution Revision Act Case Law*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 449 (2008) (finding that courts treat dilution claims as superfluous to infringement claims); Clarisa Long, *Dilution*, 106 COLUM. L. REV. 1029 (2006) (documenting the decline in judicial favor for dilution claims). *Compare* Lanham Act, 15 U.S.C. § 1125(c)(2)(b) (2006) (setting forth statutory factors for determining whether dilution is likely), *with* Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492, 495 (2d Cir. 1961) (setting forth remarkably similar common-law factors for determining whether confusion is likely).

bar.[23] Congress eventually acquiesced, not only by passing a federal trademark dilution statute,[24] but also by amending it to roll back a challenge to that statute from the Supreme Court in *Moseley v. V Secret Catalogue*.[25]

So it seems that rather than generating fear among trademark owners that leads to enforcement activity, the law seems to be responding to trademark owners' demands by creating ever-greater opportunities for enforcement. Moreover, in each of these examples, I would argue that the motives of mark owners that the law is scrambling to accommodate are not based in fear of loss, but rather in the desire to expand trademark rights into new frontiers where they had not yet been established—frontiers where they might well generate economic value for the mark owner, but also where others might otherwise (but for the expansion of those rights) have been able to realize some sort of commercial or expressive benefit *without* imposing any loss on the trademark owner. So as a matter of doctrine, I would submit that trademark law has been much more a vehicle for mark owners' loathing rather than a source of their fear.

III. THE ROLE OF COUNSEL

Perhaps, however, this is an unfair assessment. Let's take a step back at this point to consider the point of view of the trademark owner—or, more to the point, his counsel. A trademark plaintiff's counsel might object that what I am categorizing as loathing really is fear: fear of losing the value of sunk investments in a marketing strategy; fear of losing prospective opportunities and potential areas of future expansion; fear of a slippery slope, of a death by a thousand cuts, of letting whatever strength a mark

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[23] *See generally* Jerre B. Swann, Sr., *INTA and Dilution*, 93 TRADEMARK REP. 159 (2003) (discussing the influence of the International Trademark Association on the development, passage, and amendment of federal trademark dilution law).

[24] *See* Federal Trademark Dilution Act of 1995 (FTDA), Pub. L. No. 104-98, 109 Stat. 985 (1996).

[25] 537 U.S. 418 (2003) (interpreting the FTDA as requiring a showing of actual, as opposed to likely, dilution); *see also* Trademark Dilution Revision Act of 2006 (TDRA), Pub. L. No. 109-312, 120 Stat. 1730 (2006); 152 CONG. REC. S1921-01 (daily ed. Mar. 8, 2006) (statement of Sen. Patrick Leahy) (describing the TDRA as a measure to clarify Congress's intent in the wake of *Moseley*, and undo that case's central holding).

currently has be whittled away, a process that begins with a single unanswered stroke by a potential enforcement target. We academics have two responses to this line of argument.

The first response is to disagree over baselines. That is, academics argue that whatever mark owners are afraid of losing in these areas—a brand image or a brand personality, a prospective market of expansion in which the mark owner is not currently operating—is not properly theirs to begin with. That is, what you are characterizing as fear is really loathing in disguise. This is an argument that has been made in one form or another by a number of commentators, including Judge Kozinski,[26] Professors Rochelle Dreyfuss,[27] Wendy Gordon,[28] Mark Lemley (joined alternately by Stacey Dogan[29] and Mark McKenna[30]), and even myself.[31] The baseline argument has considerable power because as a matter of intuition, I think, we are inherently more sympathetic to actions taken out of a fear of losing something than we are to actions taken based on loathing or jealousy of someone else's gain. Such an intuition might be grounded in the cognitive psychology of gain and loss—losses loom larger than gains, the behavioral economists teach us.[32] Moreover, this type of argument is not something that should be new to most lawyers; in our first year of law school we all learn that whether one considers a particular legal intervention to be preventing a harm or conferring a benefit is often in the eyes of the beholder and of the advocate.[33]

This baseline debate is an important one to have. It is a debate on which we might not ultimately come to some sort of agreement,

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[26] *See generally* Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960 (1993).

[27] *See* Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 397–99 (1990).

[28] *See generally* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993).

[29] *See generally* Dogan & Lemley, *supra* note 13.

[30] *See generally* Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137 (2010).

[31] *See generally* Jeremy N. Sheff, *Veblen Brands*, 96 MINN. L. REV. 767 (2012).

[32] *See generally* CHOICES, VALUES, AND FRAMES (Daniel Kahneman & Amos Tversky eds., 2000) (collecting research on loss aversion, status quo bias, framing effects, and other cognitive biases that can be influenced by the selection of a baseline).

[33] *See generally, e.g.*, Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922) (wherein Justices Holmes and Brandeis dispute this distinction in a takings case).

but the arguments we will inevitably raise in defending our positions implicate values that are fundamental to setting up our markets and our society—values of competition, expression, and fairness.[34] They implicate not only the efficiency of our consumer markets, but the distribution of the value generated by those markets and the non-economic interests of participants in those markets.[35] These are all complicated empirical and moral issues that I think, as a discipline, we have not sufficiently grappled with.

The empirical aspect of such questions leads us to the second response of academics to the practitioner's argument that what motivates zealous enforcement is fear of loss. This argument accepts that mark owners' motivations are not only—or perhaps not at all—venal, but merely misinformed or misguided.[36] This is a position that has been taken by Professor Rebecca Tushnet with respect to dilution,[37] and by Professors McKenna and Lemley with respect to sponsorship and affiliation confusion.[38] As an empirical matter, they argue, the slippery slope model is just not an accurate description of how consumers respond to the types of third-party uses of trademarks that are at issue in some of the more controversial cases where trademarks are being enforced in a particularly aggressive way.[39] In fact, many such uses have no effect on consumer perception of the mark or its owner at all.[40] This argument is admittedly somewhat in tension with Professor Gibson's argument about enforcement feedback loops,[41] but it has the benefit of being supported by empirical evidence in cognitive and consumer psychology.[42]

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[34] *See generally* Jeremy N. Sheff, *Marks, Morals, and Markets*, 65 STAN. L. REV. (forthcoming 2013) (establishing a framework for analyzing the moral arguments at work in trademark doctrines).

[35] *See* Jeremy N. Sheff, *Biasing Brands*, 32 CARDOZO L. REV. 1245, 1249–51 (2011) (discussing the complex empirical issues underlying judgments about the appropriate scope of trademark rights).

[36] *See generally* Tushnet, *supra* note 15.

[37] *See id.*

[38] *See generally* Lemley & McKenna, *supra* note 1.

[39] *See id*. at 429.

[40] *See generally* Mark P. McKenna, *Testing Modern Trademark Law's Theory of Harm*, 95 IOWA L. REV. 63 (2009).

[41] *See* Gibson, *supra* note 14 at 907–23.

[42] *See* McKenna, *supra* note 40, at 101–03.

This second argument raised by academics highlights the central role played by the trademark lawyer in the dynamics of enforcement—not only as advocate, but also as counselor. For every unauthorized use of a mark that might become the target of enforcement activity by that mark's owner, there is an important question as to what the effect of the use on consumers, and thus on the mark owner's business, is likely to be. One example that I have drawn in other work is the liquor market.[43] For over a century, Courvoisier was known as the brandy of Napoleon, but today it is the brandy of Busta Rhymes.[44] It may be just shy of exaggeration to say that the transformation saved Courvoisier. It began, not with a planned shift of the marketing strategy within Courvoisier, but rather with the unauthorized invocation of the brand name in hip-hop lyrics, going back to the early 1990s.[45]

Under the expansive notions of sponsorship and affiliation confusion that we have today, and potentially also under dilution doctrine, those types of invocations might well be the subject of at least a colorable claim that might survive a motion to dismiss. But bringing that claim would have been a huge disaster for Courvoisier. Consider Jay-Z's reaction to Cristal when an executive in the company that makes Cristal suggested—just suggested in an interview—that maybe he was not crazy about the association of Cristal with hip-hop nightlife.[46] Jay-Z launched a boycott.[47] He started promoting a competing brand.[48] He took to the pages of Time magazine to drag Cristal through the mud.[49] Thus, the public relations consequences of enforcement action, and the business losses that can result from negative publicity, must be a consideration in any decision whether to take such action.

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43 *See* Sheff, *supra* note 9, at 134–36.

44 *See id.* at 135–36.

45 *See id.*

46 *See* Sheff, *supra* note 9, at 136–37 & n.40, 140 & n.59.

47 *See id.*

48 *See* Louis Lanzano, *Jay-Z Launches Bubbly Boycott of Cristal*, USA TODAY (June 15, 2006, 6:02 PM), http://www.usatoday.com/life/people/2006-06-15-jayz-cristal_x.htm ("Jay-Z plans to replace Cristal . . . with Krug and Dom Perignon at the Manhattan and Atlantic City locations of his 40/40 Club.").

49 *See* Jay-Z, *Jay-Z on Cristal: 'Disrespect for the Culture of Hip-Hop,'* TIME (Nov. 18, 2010), http://www.time.com/time/arts/article/0,8599,2032217,00.html.

CONCLUSION

In short, perhaps the most important piece of the enforcement puzzle is not the law that we academics sometimes complain is moving in the wrong direction, but the lawyers who bring trademark claims, and in particular the judgment that they bring to bear on the decision whether or not to assert a trademark claim. To be fair, it is almost certainly malpractice not to advise your client on the potential consequences of failing to take action against an unauthorized user. But the duty to police is not absolute—not every forbearance from enforcement will negatively affect a mark owner's legal rights[50]—and clients should know about that as well. Moreover, clients deserve to be reminded that enforcement activity comes at a cost, not only to society, not only to the targets of enforcement, but to the client itself. Those costs are not just the direct costs of the enforcement in terms of attorneys' fees and expenses, but the indirect costs in terms of negative publicity and loss of business. These indirect costs can be subtle but they are vitally important, as our culture continues to generate increasing demand for intangible and subjective sources of value.

I recognize that many trademark attorneys undoubtedly face significant financial and professional incentives to maximize enforcement activity. But I would suggest that those attorneys might still do well to critically examine the motivations for a particular enforcement action before advising a client whether or not to undertake it. On the question of whether a particular motivation is properly categorized as fear or as loathing, it may not be the advocate's place to second-guess their client. We academics and practitioners continue to fight that out, as we have in the past. But on the question of whether a particular fear is well founded, I believe it is the attorney's duty—as counselor rather than advocate—to apply judgment and counsel moderation to her

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[50] *See* MCCARTHY, *supra* note 7, at § 17:17 ("While many defendants, and some courts, talk about such a failure to sue in terms of 'abandonment,' other courts state with vigor that the failure to sue others is totally irrelevant. The truth lies somewhere in between."); *see also* STK LLC v. Backrack, Inc., Cancellation No. 92049332, 2012 WL 2024459 (T.T.A.B. 2012), slip op. at 43–52, *available at* http://des.uspto.gov/Foia/RetrievePdf?flNm=92049332-05-21-2012&system=TTABIS (holding that failure to police keyword advertising uses of a trademark did not render a mark generic).

client, to resist the traditional risk-aversion of our profession that might be triggered by the potential consequences of forbearance, and to consider, above all, the business interests of her client. This is especially true in a world where the actions of a mark owner towards its customers, its fans, its secondary market, its competitors, and even its critics increasingly play a role in constructing brand image and ultimately in generating demand.