Reading the Product: Warnings, Disclaimers, and Literary Theory

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I. INTRODUCTION

Few television commercials for alcohol end with the protagonist slumped unconscious on the couch, falling off a bar stool, or driving a car into a telephone pole. To the contrary, as many of us have experienced, advertising writes a very different narrative: that purchase and consumption of the advertised beverage will make one more attractive, expand one’s social circle, and yield unbridled happiness. It is a story that, the advertiser hopes, will inspire consumers to choose its beverage during the next trip to the store; in this vein, the true protagonist of the commercial is the brand.

Marketing scholars and, to a lesser extent, trademark scholars have increasingly viewed advertising and branding through the lens of literary theory, recognizing that consumers interpret communications about a product using many of the same tools that they use to interpret other kinds of texts. But this lens has not been similarly focused on an important counternarrative: the warning or disclaimer (such as “Caution: This product may contain nuts” on a candy bar or “Not authorized by

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Starbucks” on a poster that uses the chain’s logo to humorous effect). 2
While all forms of branding, advertising, and marketing are ways of communicating information about a product to consumers, warnings and disclaimers are a special kind of communication: unadorned, declarative statements purportedly meant to cause a consumer to act in a particular way or reach a specific cognitive result. 3 They are counternarratives both in the voice they adopt—less emotional, more stentorian—and in the message they communicate. 4 But narratives they remain.

The fact that warnings and disclaimers are counternarratives does not, however, mean that consumers are powerless to interpret them in the face of the emotional appeal of the primary narrative of the brand. For example, as one court noted, “a beer manufacturer’s commercial images, although enticing, are not enough to neutralize or nullify the immense body of knowledge a reasonable consumer possesses about the dangers of alcohol.” 5 In other words, the average consumer can receive, and even be

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2. The closest appears to be Victor E. Schwartz and Russell W. Driver, Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory, 52 U. CIN. L. REV. 38 (1993); a related effort from the linguistics scholarship is Roger W. Shuy, Warning Labels: Language, Law, and Comprehensibility, 65 AM. SPEECH 291 (1990). More recent attempts to address the interplay between advertising and product warnings have relied on behavioral economics and cognitive science. See, e.g., MARTIN LINDBLOM, BUYOLOGY: TRUTH AND LIES ABOUT WHY WE BUY 15 (2008) (reporting on IMRI study that showed that cigarette warning labels “not only failed to deter smoking, but by activating the nucleus accumbens . . . actually encouraged smokers to light up”); Jon D. Hanson & Douglas A. Kysar, Taking Behavioralism Seriously, 74 N.Y.U. L. REV. 630, 696-721 (1999) (reviewing literature); id. at 637 (noting that “advertising, promotion, and price setting all become means of altering consumer risk perceptions, regardless of mandated hazard warnings”).

3. Cf. JOHN SEARLE, SPEECH ACTS 67 (1969) (suggesting that a warning “is like advising, rather than requesting. It is not, I think, necessarily an attempt to get you to take evasive action.”). Of course, some producers may include warnings and disclaimers simply in an attempt to avoid liability; courts or regulators that reward this activity are presumably doing so based on a belief that such communications have some effect on consumers.

4. See, e.g., R. George Wright, Your Mileage May Vary: A General Theory of Legal Disclaimers, 7 PIERCE L. REV. 85, 88 (2008) (“Generally, a disclaimer tells some audience that some other text or circumstance does not mean or imply what one might otherwise think.”). One might say that the authoritative voice of a warning or disclaimer renders these messages the primary narrative, with the more emotional appeal of the branding effort then becoming the counternarrative. (Thanks to Barton Beebe for this point.) Indeed, recent regulation of cigarette branding proposed by the Australian government achieves this result visually. See Bettina Wassener & Meniah Foley, Australia Fights Tobacco with Taxes and Plain Packs, N.Y. TIMES, Apr. 30, 2010, at B9 (describing Australian law that will require, as of July 1, 2012, tobacco products to be sold in packaging “with few or no logos, brand images, or colors” but with “graphic health warnings, including photographs of the effects of smoking-related diseases.”). My focus here is on the purported tension between the branding message and the warning or disclaimer; the precise position each occupies, while very interesting to consider, is not critical to the argument.

5. Gawloski v. Miller Brewing Co., 644 N.E.2d 731, 736 (Ohio Ct. App. 1994); id. (“[A] reasonable consumer could not, as a matter of law, ignore basic common knowledge about the dangers of alcohol and justifiably rely upon beer advertisements and their idyllic images to conclude that the prolonged and excessive use of alcohol is safe and acceptable.”). See also, e.g., Robinson v. Anheuser-Busch, Inc., No. 00-D-300-N, 2000 U.S. Dist. LEXIS 22974, at *7 (M.D. Ala. July 7, 2000) (“In light of the public’s common knowledge, Anheuser-Busch had no duty to add in its advertising[‘] ‘to the flow of information’ about the dangers of drinking. Where the public possesses common knowledge about the risk of harm flowing from the use of a product, a manufacturer is not required to provide a ‘redundant warning.’”) (citation omitted), aff’d, 2000 U.S. Dist. LEXIS 22475 (M.D. Ala. Aug. 1, 2000); Bertovich v. Advanced Brands & Importing Co., No. 5:05CV74, 2006 U.S. Dist.
emotionally affected by, the romantic narrative of a television commercial and still reconcile a competing narrative, whether that story comes from an explicit statement from the advertiser ("Please drink responsibly") or from other sources. If this were not the case, regulators would not require manufacturers to include warnings on product packaging or in advertising, and courts in product liability cases would not fault manufacturers for failing to adequately warn consumers of the risks posed by their products.

This belief is not, however, universal. Indeed, the prevailing view among some commentators and courts appears to be that consumers are too susceptible to advertising stories to fully understand the information in a disclaimer or warning—that their commitment to the brand narrative leaves them unable (or unwilling) to make room for dissenting voices. If this were not the case, regulators would not require manufacturers to include warnings on product packaging or in advertising, and courts in product liability cases would not fault manufacturers for failing to adequately warn consumers of the risks posed by their products. Consumers, in this worldview, often take little notice of warnings about the risks of using a product and remain confused about a product’s source even after hearing a direct message that no affiliation or endorsement exists. For example, one court was willing to leave to the jury the question of whether a manufacturer was required to provide a warning about alcohol’s effects, concluding that advertising’s depiction of “the good life” as including moderate consumption of alcohol might require an equally prominent disclosure to make the beer “safe for its intended uses”.


6. See, e.g., Escola v. Coca Cola Bottling Co., 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring) ("The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks."); Peter Tiersma, The Language and Law of Product Warnings, in LANGUAGE IN THE LEGAL PROCESS 54, 58 (Janet Cotterill ed., 2002) ("Faced with an apparent contradiction between the name of a product in large print (Sure-Guard) and a warning in much smaller letters that the product is not unbreakable, we tend to give more credence to the emphasized message."). Cf. Douglas A. Kysar, The Expectations of Consumers, 103 COLUM. L. REV. 1700, 1733-34 (2003) ("The history of products liability jurisprudence is littered with eloquent paeans to the consumer, whose acquiescent habits are seen as representing the driving force behind the success of modern capitalism, but whose haplessness and gullibility are seen to require constant safeguarding by the courts."); id. at 1753 (describing views by some courts of consumers as so blinded by advertising and marketing efforts that they are unable to effectively assess risk).

Another court held that the word “UNAUTHORIZED” in “relatively small lettering, surrounded by an orange bordering” at the top of the front cover of a book about Godzilla was insufficient to alert readers that the book was not authorized by the maker of the Godzilla films; instead, the court suggested, the front cover should have stated that “the publication [had] not been prepared, approved, or licensed by any entity that created or produced” the original film, despite the fact that this same information was provided on the back cover of the book in capital letters, “highlighted by its appearance against a blue background.” Thus, among these courts and commentators, warnings and disclaimers are like footnotes: they provide important information that explains, supports, or offers caveats to the message in the main part of the text, but we don’t always expect readers to take notice of them.  

Thus, the law sends a mixed message regarding what it expects of consumers as readers of products. In some instances, the law encourages these types of communications even when consumers are faced with highly persuasive advertising. For example, the failure-to-warn doctrine in product liability cases is predicated on the claim that the plaintiff’s injuries would not have occurred if the manufacturer had provided an appropriate warning, which assumes that the consumer would have read and heeded such a warning had it been available. But at other times, courts are more skeptical, crediting the views of commentators that such communications are ineffective. For example, in trademark infringement cases, courts sometimes send discouraging signals about disclaimers, requiring empirical evidence that such communications are ineffective.

8. Hon v. Stroh Brewery Co., 835 F.3d 510, 515-515 (3d Cir. 1987) (“If a jury finds that Stroh’s marketing of its product has effectively taught the consuming public that consumption of beer on the order of eight to twelve cans of beer per week can be a part of the ‘good life’ and is properly associated with healthy, robust activities, this conclusion would be an important consideration for the jury in determining whether an express warning was necessary to make Old Milwaukee beer safe for its intended purpose.”). Similarly contrasting cases occur with respect to injuries suffered from hot beverages. Compare Amended Complaint for Damages, at ¶ IV.C, Liebeck v. McDonald’s Restaurants, P.T.S., Inc., No. CV-93-02419, 1993 WL 13651163 (N.M. Dist. Ct. Oct. 5, 1993); Plaintiff’s Response to Defendant McDonald’s Corporation’s Motion for Post-trial Relief, Liebeck v. McDonald’s Restaurants, P.T.S., Inc., No. CV-93-02419, 1994 WL 16777828 (N.M. Dist. Ct. Sept. 12, 1994) (jury award of $160,000 in compensatory damages and $2.7 million in punitive damages for third-degree burns sustained from coffee spill despite warning on cup reading “Caution. Contents hot.”) with Immormino v. J & M Powers, 91 Ohio Misc. 2d 198, 202-203 (Ohio C.P. 1998) (granting defendant’s motion for summary judgment on claim alleging injury from hot tea, noting that “the population of society is thoroughly aware from childhood of the dangers of a hot liquid spill”).

9. Toho Co., Ltd. v. William Morrow & Co., 33 F. Supp. 2d 1206, 1213-14 (C.D. Cal. 1998); id. at 1214 (concluding that, due to the ineffectiveness of the disclaimer and the low purchase price of the book, “many consumers will simply buy the [b]ook with the most attractive cover”).

10. J. M. Balkin, The Footnote, 83 Nw. U. L. Rev. 275, 276 (1989) (noting that readers of legal writing “skim over [footnotes], or even disregard them, on the assumption that the ‘essence’ of the article is contained in the body of the text”). Cf. Arthur D. Austin, Footnotes as Product Differentiation, 40 Vand. L. Rev. 1131, 1138 (1987) (characterizing academic footnote writers as “[t]aking a cue from the Madison Avenue advertising tactics that exult the irrelevant and divert consumers’ attention from the values of substance by resorting to mind conditioning techniques”).
the harm posed by the consumer's engagement with the product. This conflicted approach suggests that, at the very least, courts haven't yet abandoned faith in consumers' interpretive skills; accordingly, the goal should be to find ways to ensure that warnings and disclaimers are effective, rather than assuming ab initio that they simply don't work.

While behavioral economics has contributed many important insights to this debate, literary theory provides an additional consideration. By recognizing that warnings and disclaimers are texts, we might well discover that the narrative of the text (instead of or in addition to its visual presentation) can affect its reception. Literary theory helps us to recognize that both disclaimers and warnings are part of a larger category of texts that appear, on their face, to be counternarratives: They involve authorial voices, reader responses, and meanings different from those of the main narrative of the advertisement, telling consumers that the message they have previously received requires additional information to form a complete communication. But it also helps us to understand that simply because a text comprises both a primary narrative and its counternarrative doesn't mean that consumers abandon their interpretive skills. To the contrary, consumers often encounter and interpret such texts successfully, particularly when these writings appeal to context and are cognizant of the interpretive communities to which they are presented.

Literary theory's role in reconciling the law's vacillations in this area is particularly crucial today. A focus on "law as narrative" requires us to determine who functions as storytellers and who functions as audience. In an age and a medium in which we all can be both, consumers have become increasingly adept at reading and negotiating communications that diverge from the direct producer-consumer, one-way conversation of the past century. Incorporating the insights of literary theory into the law of marketing closes a conceptual circle that has long been forming: the idea that we are created by, and in turn create, the products with which we engage, and that we are in a constant process of interpretation with regard to the messages that attend this creation.

II. WARNINGS AND DISCLAIMERS

Both warnings and disclaimers seem to be a natural outgrowth of modern commerce, in which products may pass through several hands before reaching the consumer, and in which the use of the product may be separated both in time and in distance from the point of sale. Whereas consumers could previously communicate directly with the seller in a face-to-face conversation, many of consumers' conversations with manufacturers about products now take place via text: from the manufacturer through advertising, operating manuals, warnings, and disclaimers and from the consumer through e-mails, blogs, and other
social media technologies (and, if things go wrong, legal filings). Although the lawfulness of manufacturers' communications to consumers turns on how those communications are interpreted, courts and commentators have reached differing views on the nature of this interpretive activity.

A. Warnings

Product warnings, as commentators have noted, have two purposes: to "inform[] consumers of the risk level associated with a product or an activity," and to encourage users of the product or participants in the activity to exercise appropriate care, such as by wearing safety goggles or taking other precautionary measures. The presence or absence of a product warning has been one criterion for judging whether a manufacturer has met its legal requirement to provide a safe product to consumers. The Restatement (Second) of Torts provides for strict liability for physical harm for a seller of a product in a "defective condition unreasonably dangerous to the user or consumer or to his property," so long as the seller "is engaged in the business of selling such a product," and the product "is expected to and does reach the user or consumer without substantial change in the condition in which it is sold." Comment j to section 402A notes that the absence of a warning may make a product unreasonably dangerous if the danger is not one that is generally known or that the consumer would reasonably expect. In contrast, a seller is not required to warn of dangers that are "generally known and recognized," such as the risk of injury from the use of a kitchen knife. Indeed, if a consumer already knows of the risk, a warning

11. As of this writing, Twitter in particular has become a popular way for consumers to broadcast unsatisfying experiences and for corporations to monitor (and respond to) such feedback. See, e.g., Jack Neff, Can One Bad Tweet Taint Your Brand Forever?, ADVERTISING AGE, Feb. 22, 2010, http://adage.com/digital/article?articleid = 142205.
13. Id.; see also, e.g., Scheman-Gonzalez v. Saber Mfg. Co., 816 So. 2d 1133, 1139 (Fla. Dist. Ct. App. 2002) (noting that an appropriate warning should "cause a reasonable man to exercise for his own safety caution commensurate with the potential danger" and "contain some wording directed to the significant dangers arising from failure to use the product in the prescribed manner").
14. Product liability law is largely a matter of state law and therefore varies from jurisdiction to jurisdiction. I make no attempt to provide anything approaching a comprehensive review here. For an overview, see RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998).
15. Id. cmt. j; see also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998) (noting that a product is defective when, "at the time of sale or distribution," it bears "inadequate instructions or warnings"). The "overwhelming majority" of U.S. case law had followed comment j of the Second Restatement, Victor E. Schwartz, See No Evil, Hear No Evil: When Clear and Adequate Warnings Do Not Prevent the Imposition of Product Liability, 68 U. CIN. L. REV. 47, 52 (1999); the full effect of the Third Restatement, released in 1998, remains to be seen.
16. Id. cmt. j. See also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1977).
17. Id. cmt. j (1977); see also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. j (1998) (same).
imposes additional costs, both on the manufacturer (which must invest resources in devising and communicating the warning) and on the consumer (who will waste time on already known information and, as a result, possibly fail to read important, unknown information). 18

The activity of warning is not enough, of course; the warning must also be read and understood (whether actually or constructively) to constitute a complete communication. 19 Many commentators, focusing on consumers’ cognitive abilities, have concluded that consumers do not always read, understand, or respond to product warnings. 20 This can result from a number of factors, including suboptimal presentation of the warning, information overload or other cognitive biases, deliberate decisions to disregard the information, lack of English literacy, or exigent circumstances. 21 The Restatement also recognizes the myriad factors at play, noting that “[i]t is impossible to identify anything approaching a perfect level of detail that should be communicated in product disclosures.” 22 Despite these foundational assumptions, the law continues to accord product warnings legal significance, presuming that consumers will read and follow an appropriate warning. 23 The Second Restatement provides that when an appropriate warning is given, “the seller may reasonably assume that it will be read and heeded”; the product is thereby understood not to be defective or unreasonably dangerous. 24 The Third Restatement, while retreating from the suggestion that a warning absolves a manufacturer from the duty to implement a reasonably safer design, did not eliminate the presumption that consumers are able to interpret appropriate warnings as to any remaining risk. 25 Indeed, the plaintiff in a failure-to-warn case relies on such a presumption in alleging that the manufacturer’s failure to provide a warning caused her injuries. Had an

18. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. j (1998); Henry E. Smith, The Language of Property: Form, Context, and Audience, 55 STAN. L. REV. 1105, 1168-69 (2003) (“As in the context of warnings of tort law, the costs of furnishing notice (or a warning) are sometimes taken to embrace only the costs of writing down a description of the problem. This ignores the problem of the recipient of the message and her costs.”) (footnote omitted).

19. In the area of pharmaceutical warnings, courts have adopted the “learned intermediary” doctrine, in which the physician takes on the responsibility of communicating the substance of the warning to the end user. Ames v. Apothecon, Inc., 431 F. Supp. 2d 566, 568 (D. Md. 2006) (“The doctrine’s essence is that if the prescribing doctor (the learned intermediary) has received adequate notice of a drug’s risks the manufacturer has no duty to warn the consumer.”).

20. Cf. Kysar, supra note 6, at 1747 (characterizing the work of scholars who promote disclaimers and warnings as reflecting a “robust conception of consumer sovereignty”).


22. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. i (1998) (“For example, educated or experienced product users and consumers may benefit from inclusion of more information about the full spectrum of product risks, whereas less-educated or unskilled users may benefit from more concise warnings and instructions stressing only the most crucial risks and safe-handling practices.”).

23. Latin, supra note 7, at 1196 (calling this view an “unrealistic behavioral presumption”).


appropriate warning been provided, the argument goes, the injury the plaintiff sustained would not have occurred because the plaintiff would have read and followed such a warning. Thus, there appears to be no motivation to eliminate such communications: consumers desire them and the law creates incentives to provide them.

B. Trademark Disclaimers

Corporations use trademarks or service marks in order to communicate to consumers the source of their goods; by using these marks, a consumer can easily locate the products or services she wishes to buy in the marketplace. Trademark infringement occurs when a defendant uses the trademark of another in a way that is likely to create confusion among relevant consumers as to the source of its goods or services. But because trademark rights are not rights in gross, entities may seek to use a term or logo that, on its face, is similar or identical to the mark of another entity. For example, a manufacturer engaging in comparative advertising may want to mention the trademarked good of its competitor in order to make the comparison more directly, while a commentator engaging in parody or satire may want to use a trademarked logo in order to communicate effectively.

In such instances, the second entity may include a disclaimer in its advertising or other promotional materials that attempts to disassociate such use from the trademark holder by disclaiming any relationship, sponsorship, or authorization.

As with product warnings, scholars often assert that trademark disclaimers are ineffective, raising similar questions of information overload, graphic presentation, and other cognitive concerns. More
specifically, some commentators have taken the view that the presence of the trademark owner's mark in the disclaimer (as in, for example, "not authorized by Brand XYZ") serves to reinforce the connection between the defendant and the plaintiff rather than disrupt it, thus constructing the consumer as so much under the sway of the brand that she is incapable of interpreting the disclaimer's counternarrative as such. In contrast to their view on product warnings, however, courts sometimes agree with this assessment, rejecting the limited remedy of a disclaimer as ineffective in the face of consumer confusion or placing the burden on the defendant to demonstrate empirically that the disclaimer in question is effective rather than to assume that a properly presented disclaimer would be in the consumer's best interest.

When courts and commentators do favor the use of trademark disclaimers, it is often due to First Amendment–related or competitive interests rather than due to any particular view of the consumer as reader.

33. See, e.g., Radin, supra note 32, at 65.
34. See, e.g., August Storck K.G. v. Nabisco, Inc., 59 F.3d 616, 619 (7th Cir. 1995) (noting that “few consumers will read” a disclaimer); Harley-Davidson, Inc. v. Grottanelli, 164 F.3d 806, 813 (2d Cir. 1999) (holding use of prefix “UN” before “AUTHORIZED DEALER” insufficient “when used on signage designed to attract speeding motorcyclists”); Home Box Office, Inc. v. Showtime/Movie Channel, Inc., 832 F.2d 1311, 1315 (2d Cir. 1987) (holding disclaimer ineffective due to distance between disclaimer and infringing material).
35. See, e.g., Profitness Physical Therapy Ctr. v. Pro-Fit Orthopedic & Sports Physical Therapy P.C., 314 F.3d 62, 70-71 (2d Cir. 2002); Charles of Ritz Group, Ltd. v. Quality King Distributors, Inc., 832 F.2d 1317, 1324 (2d Cir. 1987).
36. See, e.g., Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co., 290 F.3d 578, 599 (3d Cir. 2002) (“We believe that district courts should consider ordering the narrowest remedy possible to protect the public from misleading product names or advertising. This may include using disclaimers rather than absolute prohibitions on speech.”); Stacey L. Dogan & Mark A. Lemley, The Merchandising Right: Fragile Theory or Fait Accompli?, 54 EMORY L.J. 461, 488-89 (2005) (suggesting that a “conspicuous disclaimer” could be an appropriate remedy in certain cases involving confusion as to sponsorship of merchandising); Mark A. Lemley & Mark McKenna, Irrelevant Confusion, 62 STAN. L. REV. 413, 449-50 (2010) (suggesting that courts could require disclaimers "as the cure for certain minor types of trademark harm"); Lisa P. Ramsey, Increasing First Amendment Scrutiny of Trademark Law, 61 SMU L. REV. 381, 446-447 (2008) (suggesting that a disclaimer in lieu of an injunction may be required as a First Amendment matter); Tushnet, supra note 7, at 748 (contending that disclaimers would be a preferred remedy in trademark infringement cases if courts correctly applied First Amendment doctrine, which requires that "government interventions into the commercial speech market be minimal"). Cf Richard Craswell, Interpreting Deceptive Advertising, 65 B.U. L. REV. 657, 708 (1985) ("In theory, then, a decision to require a more prominent disclaimer [in advertising] should depend on a balance between the benefits of a reduced risk of deception and the costs of an increased risk of interference with useful information."). This is not to say, of course, that defendants' interests and consumers' interests cannot be aligned. See, e.g., Michael Gryenberg, Trademark Litigation as Consumer Conflict, 83 N.Y.U. L. REV. 60 (2008) (advocating recognition of the interests of nonconfused consumers in trademark cases).

Scholars have also endorsed the use of disclaimers by users of copyrighted works as a normative matter if not as a legal requirement. See, e.g., ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES 151-55 (2010) (advocating disclaimers as part of a proper moral rights regime); Rebecca Tushnet, Payment in Credit: Copyright Law and Subcultural Creativity, 70 LAW & CONTEMP. PROBS. 135, 155 (2007) (suggesting that disclaimers in fan fiction have become less prevalent but that fans still value giving credit to original authors).
suggested that disclaimers have little or no effect in preventing consumer confusion,” nevertheless concluded that a disclaimer may well be appropriate when a case involves “a defendant who had a substantial interest in continued use of the mark, either because of past investment that had built up goodwill or because of the defendant’s interest in using its own name.”37 Similarly, courts have encouraged the use of disclaimers by resellers of used goods. For example, in Champion Spark Plug Company v. Sanders,38 the Supreme Court rejected the trademark owner’s argument that the defendant’s retention of the plaintiff’s trademark on reconditioned goods constituted trademark infringement, given the presence of a disclaimer noting that the goods were used.39 As long as the reconditioned article was “clearly and distinctly sold as repaired or reconditioned rather than new,” held the Court, there was no harm to the trademark owner.40 Additionally, when parody or satire is involved, courts are more sanguine about consumers’ ability to understand a disclaimer. For example, in Anheuser-Busch, Inc. v. Balducci Publications,41 the defendant published a parody advertisement on the back cover of a humor magazine, using the Michelob trademark to make a point about environmental issues. Although the Eighth Circuit reversed the district court, holding that the parody was likely to cause confusion as to Anheuser-Busch’s participation in or approval of the advertisement, the appellate court suggested that changes in the parody’s presentation, including “an obvious disclaimer,” could have led to a different result.42 Indeed, although the cases did not involve trademarked goods, the Supreme Court has on several occasions endorsed the use of disclaimers when First Amendment interests were at stake, without expressing concern that individuals might be incapable of interpreting such

37. Adray v. Adry-Mart, Inc., 76 F.3d 984, 990-91 (9th Cir. 1996). See also Greater Anchorage, Inc. v. Nowell, No. 91-35232, No. 91-35473, 1992 U.S. App. LEXIS 22906, at *11 (9th Cir. Sept. 14, 1992) (holding that the defendant’s interest in using the plaintiff’s trademark name on a commemorative pin rendered a disclaimer an effective remedy to dispel any lingering consumer confusion as to the source of the pin).
38. 331 U.S. 125 (1947).
39. Id. at 127-28.
40. Id. at 130 (“[T]he second-hand dealer gets some advantage from the trade mark. But... that is wholly permissible so long as the manufacturer is not identified with the inferior qualities of the products resulting from wear and tear or the reconditioning by the dealer. Full disclosure gives the manufacturer all the protection to which he is entitled.”).
41. 28 F.3d 769 (8th Cir. 1994).
42. Id. at 776. The actual disclaimer, the court noted, was “found in extremely small text running vertically along the right side of the page.” Id. at 772; see also Faegre & Benson, L.L.P v. Purdy, 367 F. Supp. 2d 1238, 1244 (D. Minn. 2005) (“Although the Lanham Act does not require that a parody carry a disclaimer, the fact that the parody carries a label stating ’satire’ or ’parody’ should alert most consumers that the item is a parody.”) (internal quotation marks omitted). One court has suggested that consumers are adept enough to recognize parodies involving trademarks such that no disclaimer may be needed. See Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ’g Group, 886 F.2d 490, 496 (2d Cir. 1989) (“There is no requirement that the cover of a parody carry a disclaimer that it is not produced by the subject of the parody, and we ought not to find such a requirement in the Lanham Act.”).
In one respect, this approach mirrors that taken with respect to product warnings, in that a disclaimer does not relieve an entity of the obligation to take reasonable steps to avoid consumer confusion but can serve to remedy any residual harm (just as a warning does not relieve a manufacturer of the duty to provide a reasonably safe product but can serve to limit risk remaining thereafter). On the other hand, the view that disclaimers are appropriate only when the defendant is engaging in speech-related or other valued activity serves to highlight the inconsistent approach the law takes to counternarratives in the product space. Consumers can either interpret such texts or they can't; the countervailing values that are present in the case should not change that result.

C. Summary

Both product warnings and trademark disclaimers, then, constitute an instance of communication from a manufacturer to a consumer, presenting information that may bear on the consumer's decision to purchase the product in the first place, use the product, or make additional purchases in the future from the same manufacturer. Despite general statements from some courts and commentators that these texts are ineffective because consumers rarely notice, read, or internalize such communications, courts continue to accord legal significance to warnings and disclaimers, particularly when the harm to be prevented cannot be reduced in an otherwise cost-effective or principled manner. Thus, unless courts are intentionally encouraging inefficiency by requiring defendants to engage in window dressing, they must be operating under the assumption that consumers do in fact understand properly presented disclaimers. If this were not the case, courts would presumably have abandoned reliance on such communications as an appropriate remedy across the board.

III. READING THE PRODUCT

Given that courts are willing to credit consumers with the ability to interpret product-related communications, one might question the conventional view that consumers lack this ability. The behavioral

43. See, e.g., Citizens United v. Fed. Election Comm'n, No. 08-205, 2010 WL 183856 (Jan. 21, 2010), at *39 ("The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way."); (statutory requirement that corporate sponsors of electioneering communications provide a disclaimer noting their affiliation with the advertisement); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 782 (1985) (O'Connor, J., concurring) (noting that a reasonable person "would certainly be able to read and understand an adequate disclaimer"); (religious displays); Zauderer v. Office of Disciplinary Counsel of Supreme Court, 471 U.S. 626, 651 (1985) (noting that warnings or disclaimers might be "appropriately required" in order to "dissipate the possibility of consumer confusion or deception") (internal quotation marks omitted) (lawyer advertising).
economics literature has contributed to this belief about consumers, noting that consumers operate under a number of cognitive constraints, heuristics, and biases that lead them to draw inferences different from that intended by the manufacturer. But literary theory—and specifically a reader-response approach to textual interpretation—provides an additional layer of explanation, suggesting that narrative voice, reader autonomy, and interpretive communities are also part of the equation.

A. Reader-response theory

The development of the concept of the Romantic author at the end of the eighteenth century was necessarily in tension with a focus on the reader. Describing the author in reverential terms, such as a "genius," led to a view of the author as deity and his creative output as a demonstration of spiritual inspiration. As Louise Rosenblatt suggests, this rendered the reader virtually superfluous, "freeing the poet from even the duty of seeking to communicate to a reader." Reader-response theorists, by contrast, locate meaning in the reader, rather than in the author or in the text, highlighting the malleability of language and the resulting multiplicity of meanings. It follows, however, that a text's meaning is stable only when an interpretive community of readers coalesces around a particular interpretation, informed by its experiences and context; no such stability is inherent in the text itself or derives from the author's intentions or desires. In short, reader-response theory holds that "understanding is a product of both the text and the prior knowledge and viewpoint that the

44. See, e.g., Hanson & Kysar, supra note 2; Latin, supra note 7.
45. As with the earlier background discussion, the overview here of literary theory is necessarily cursory and incomplete.
47. Commentators have suggested that the term "reader-response theory" does not represent a "conceptually unified critical position" but rather comprises a variety of theories that focus on readers' interpretation of texts as a source of meaning. See, e.g., Jane P. Tompkins, An Introduction to Reader-Response Criticism, in READER-RESPONSE CRITICISM: FROM FORMALISM TO POST-STRUCTURALISM ix, ix (Jane P. Tompkins ed., 1980).
48. ROSENBLATT, supra note 46, at 15 (noting that literary critics who claim to be objective "do not include in their theoretical assumptions recognition of the fact that even the most objective analysis of 'the poem' is an analysis of the work as they themselves have called it forth"); Scott, The Bridge, supra note 1, at 463 ("A reader-response interpretation tries to show how a text works with the probable knowledge, expectations, or motives of the reader.").
49. STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 14-15 (1980) (hereinafter FISH, IS THERE A TEXT?); ROSENBLATT, supra note 46, at 58; Stanley Fish, Working on the Chain Gang: Interpretation in Law and Literature, 60 TEX. L. REV. 551, 563 (1982) ("[T]he act of reading itself is at once the asking and answering of the question, 'What is it that is meant by these words?', a question asked not in a vacuum, but in the context of an already in place understanding of the various things someone writing a novel or a decision (or anything else) might mean (i.e., intend)."
reader brings to it.\footnote{50}

Although framing analysis in terms of reader-response theory has fallen somewhat out of fashion, its values are so fundamental to modern creative production and interpretation that it seems almost superfluous to invoke it. Recognition of the importance of readers and audiences as creators of meaning is a defining aspect of modern culture. Mashups and fan-made videos are attempts by audiences to extract new meaning from existing cultural products. Many elements of modern film and television—convoluted plot lines, narrative arcs that extend over an entire season, mysteries that are revealed episode by episode, and subtle humor, all elements requiring reader commitment and even participation—are a far cry from the straightforward character- and plot-driven narratives of years past.\footnote{51} Indeed, one commentator has asserted that “twenty-five years of increasingly complex television has honed [modern television viewers’] analytic skills,” including by presenting narratives in which “crucial information has been deliberately withheld.”\footnote{52}

The same might be said of the use of literary theory in legal interpretation, a practice dating from the mid-1970s.\footnote{53} As with literary theory generally, legal studies have not had much more than a brief engagement with reader-response theory, particularly after the rise of the law-and-economics movement and its forceful exposition by Chicago School scholars and judges such as Richard Posner and Frank Easterbrook.\footnote{54} Here, too, the lack of prominence of reader-response as an explicit theory of interpretation belies the entrenched position of readers as sources of meaning throughout the law. While an author can attempt to shape interpretation by the use of form—text formatted as a legal complaint or as a contract will cause a reader to interpret the text in a

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52. \textit{Johnson, supra} note 51, at 75, 77 (describing how, for example, \textit{The West Wing} “constantly embeds mysteries into the present-tense events”).


54. Paul Gewirtz, \textit{Narrative and Rhetoric in the Law}, in \textit{Law’s Stories: Narrative and Rhetoric in the Law} 2, 13 (Peter Brooks & Paul Gewirtz eds., 1996) (suggesting that the law and literature movement was a reaction to the law and economics and critical legal studies movements); \textit{cf. Richard A. Posner, Law and Literature} 209-211 (rev. ed. 1998) (asserting that “interpretation is unlikely to be improved by being made a subject of theory or reflection”). Judge Posner does seem, however, to find some useful insights in reader-response theory. \textit{See id. at} 225 & n.38.
particular way, just as will text formatted as a poem—\textsuperscript{55}—\textit{the ultimate meaning and success of any legal text depends on who is functioning as the reader.}\textsuperscript{56} In some instances (as with a contract), the court will fill this role itself; in others (false advertising law or defamation), the court will ostensibly put itself in the role of the consumer/reader in order to determine the meaning of a text.\textsuperscript{57}

Thus, while scholars in literary theory typically confine their discussions to text that can properly be called "literature," there is no reason to so confine it, so long as the differentiating characteristics of the text at issue are taken into account.\textsuperscript{58} And, indeed, scholars in marketing and related fields have started to apply the insights of literary theory to the kinds of texts that we probably engage with most frequently: advertising, branding, and other forms of commercial communication.\textsuperscript{59} In particular, reader-response theories appear to have gained particular traction, as they

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\item[55.] ROSENBLATT, supra note 46, at 82. As Rosenblatt notes, this supplying of context does not minimize the reader's role; the text is "a necessary, but not sufficient, condition for any literary work of art." \textit{Id.} at 83. \textit{See also} Jonathan Culler, \textit{Literary Competence}, in \textit{READER-RESPONSE CRITICISM: FROM FORMALISM TO POST-STRUCTURALISM} 101, 103 (Jane P. Tompkins ed., 1980) (describing how formatting journalistic prose as poetry would cause a reader to "subject the text to a different series of interpretive operations" even though the text itself had not changed); \textit{FISH, IS THERE A TEXT, supra note 49, at 332-37 (conducting such an experiment among his students); HANS ROBERT JAUSS, TOWARD AN AESTHETIC OF RECEPTION 23 (Timothy Bahti trans., 1982) ("A literary work, even when it appears to be new, does not present itself as something absolutely new in an informational vacuum, but predisposes its audience to a very specific kind of reception by announcements, overt and covert signals, familiar characteristics, or implicit allusions. It awakens memories of that which was already read, brings the reader to a specific emotional attitude, and with its beginning arouses expectations for the 'middle and end' which can then be maintained intact or altered, reoriented, or even fulfilled ironically in the course of the reading according to specific rules of the genre or type of text.").}
\item[56.] See POSNER, supra note 54, at 211 ("In the case of documents, whether literary or legal, 'interpretation' just means reading to make whatever kind of sense one happens to be interested in. This might coincide with the writer's intended meaning, but equally it might be a sense that the reader wants to impress on the writing for reasons remote from anything the writer had in mind.").
\item[57.] Johnson & Johnson * Merck Consumer Pharmaceuticals Co. v. Smithkline Beecham Corp., 960 F.2d 294, 297-298 (2d Cir. 1992) ("It is not for the judge to determine, based solely upon his or her own intuitive reaction, whether [an] advertisement is deceptive. Rather, as we have reiterated in the past, the question in such cases is — what does the person to whom the advertisement is addressed find to be the message?") (internal quotation marks and citations omitted). Robert Rotstein has noted that defamation law "regards the text as a reader-dependent process" in that whether or not a particular statement is defamatory depends on how it is perceived by its audience. See Robert H. Rotstein, \textit{Beyond Metaphor: Copyright Infringement and the Fiction of the Work}, 68 CHI.-KENT L. REV. 725, 741 & n.73 (1993).
\item[58.] JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY 270-71 (1984) (noting that although, unlike a literary text, a legal text is "in its own terms... authoritative," the authority of a legal text "is not unquestioned" but is "checked, not only against other parts of the reader's being — other standards and sentiments and wishes — but against other parts of the literature of the law."). \textit{Cf.} Gewirtz, supra note 54, at 5 ("[T]he words of court decisions have a force that differentiates them from most other utterances. However provocative and generative it may be to treat law as literature, we must never forget that law is not literature.").
\item[59.] \textit{Cf.} Scott, \textit{The Bridge, supra note 1, at 464 ("Advertising, as a genre in its own right, has conventions and 'rules for reading' that cannot be discovered by simply superimposing the conventions that typify poems, dramas, or novels."). Barbara Stern wrote in 1996 that deconstruction had, at that point, "not yet made much of an impact on consumer research." \textit{Barbara B. Stern, DECONSTRUCTIVE STRATEGY AND CONSUMER RESEARCH: CONCEPTS AND ILLUSTRATIVE EXEMPLAR, 23 J. CONSUMER RES. 136, 136 (1996).}
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focus on the consumer as an equal meaning-maker in the cultural exchange, perhaps aided by (or responsive to) the modern trend in both entertainment and advertising to communicate to one's audience in ways that demand sophistication, willingness to exchange in wordplay, and the like. In this school of thought, scholars assess an advertisement as a literary text: as something to be "read" and interpreted by a consumer, its meaning dependent on the community to which the reader belongs as well as the cultural and other tools of interpretation that she brings to the table.

B. Reader-response and the warning/disclaimer

Even if we are willing to read advertisements as literary text, given their frequent use of imagery and metaphor, we might still resist reading a warning or disclaimer as such because doing so implies an author, and our image of an author is still, even in an age of collaboration, largely the Romantic one. Advertisements typically involve some degree of creativity (if not brilliance), designed to elicit an emotional response, whereas warnings and disclaimers typically are presented in unadorned prose, designed to engender an intellectual response. But, as Foucault has noted, characterizing the creator of text as an "author"—and thus her text as something worthy of theoretical evaluation—is purely a matter of convention. Like an advertisement or brand, a warning or disclaimer is a communication from an unseen corporate author to the consumer; like an advertisement or brand, the creation of meaning in such communications ultimately depends on the consumer. There is no principled basis for treating the emotional part of an advertisement as text subject to interpretation but treating the informational part of the advertisement as empty rhetoric. A reader-response approach to these texts, then, assumes an actively engaged reader with respect to both parts of the communication, even when the text may be less "literary."

A product communication involves at least two authors and at least two readers. The first author is the persuasive voice communicating the text of the trademark, the advertisement, the commercial, or the other attributes

60. See supra note 1; see also Craswell, supra note 36, at 672 (noting that modern advertising relies on consumers' ability to make inferences about implied but unstated messages); Linda M. Scott, Images in Advertising: The Need for a Theory of Visual Rhetoric, 21 J. CONSUMER RES. 252, 265 (1994) (discussing advertising as assuming "an implied viewer who exercises selectivity, uses experience with the genre of advertising, and engages in metaphorical thinking").


62. This approach parallels that of one category of the marketing literature, which views consumers as able to use their knowledge of persuasion techniques to "maintain control over the outcome(s) and thereby achieve whatever mix of goals is salient to them." Marian Friestad & Peter Wright, The Persuasion Knowledge Model: How People Cope with Persuasion Attempts, 21 J. CONSUMER RES. 1, 3 (1994); Anna Kirmani & Margaret C. Campbell, Goal Seeker and Persuasion Sentry: How Consumer Targets Respond to Interpersonal Marketing Persuasion, 31 J. CONSUMER RES. 573, 574 (2004) (reviewing literature).
that make a product desirable. For example, an advertisement for a sports car might target an ideal reader who is male, in his forties, and with significant disposable income. The product warning or disclaimer, however, involves two additional voices: the authoritarian voice of the law speaking through the manufacturer, and the actual consumer who is expected to rationally evaluate this second communication. The ideal consumer and the actual consumer are, of course, merged in one physical being; thus, her engagement with these texts requires her to be adept at counternarrative readings, to understand that a product can be x and also not x: beneficial and yet potentially risky, bearing the name of another and yet not the other.

As an example, consider a standard print advertisement for cigarettes. The brand message is conveyed by one author—the manufacturer encouraging the consumer to see herself as part of the group in the photo or to substitute himself for the Marlboro Man. The warning is conveyed by another author—the government, whose message is confined to a boxed area of the ad—speaking through the manufacturer. The former text is alluring and metaphorical; the latter text is unadorned and stentorian. From a reader-response perspective, however, the “authors” of each of these messages—and, in particular, the fact that they are different corporate institutions—becomes irrelevant; all that matters is the consumer’s ability to reconcile these apparently conflicting texts.

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63. Scott, The Bridge, supra note 1, at 468 (noting that the “implied author” in an advertisement is not the corporate advertiser “but a fictive personality suggested by the text itself” that is “closely related to the concept of brand personality”). Of course, peers and critics can participate in this conversation by recommending or criticizing particular brands. See, e.g., William McGeeveran, Disclosure, Endorsement, and Identity in Social Marketing, 2009 U. Ill. L. Rev. 1105, 1109-1113.

64. Cf. James Boyd White, Law as Language: Reading Law and Reading Literature, 60 Tex. L. Rev. 415, 430 (1982) (“[A]s the reader works through a text he is always asking who the ‘ideal reader’ of this text is, and deciding whether he wishes to become such a one, even for the moment.”).

65. Cf. Marchant v. Dayton Tire & Rubber Co., 836 F.2d 695, 701 (1st Cir. 1988) (“Few questions are more appropriately left to a common sense lay judgment than that of whether a written warning gets its message across to an average person.”) (internal quotation marks omitted); Michael G. Johnson, Language and Cognition in Products Liability, in LANGUAGE IN THE JUDICIAL PROCESS 291, 304 (Judith N. Levi & Anne Graffam Walker eds., 1990) (“The duty of the plaintiff, as an ordinary reasonable person, is to comprehend and heed a warning message communicated by the defendant if the comprehension of the warning is a probable enough interpretation of the message from the vantage of an outside observer.”).

66. Cf. Hirschman, Scott & Wells, supra note 1, at 34 (noting that the imagery in a Marlboro ad is an “intertextual reference” to all other Marlboro advertisements, while the government’s warning is an intertextual reference relating the advertisement to “a myriad of other texts — medical research, congressional reports, court records — written to address smoking as a public health issue”); Stern, supra note 59, at 141 (describing the contrast between the warning included in a Joe Camel cigarette advertisement and the rest of the advertisement as a “power struggle”). Recent legislation in the United States will require warnings in cigarette advertising to constitute 20 percent of the area of the advertisement. See 15 U.S.C. § 1333(b)(2) (2009).

67. See Kysar, supra note 6, at 1756 (“The Marlboro Man endures, therefore, not because consumers are psychologically vulnerable to rustic, romantic imagery, but because they rationally
From here, we can imagine two sets of possible results: one in which the consumer rejects the warning or disclaimer and one in which the consumer engages with it. First, this reconciliation might result in a consumer who so thoroughly accepts the role of ideal reader for the advertisement/brand imagery that she cannot accept the counternarrative of the warning/disclaimer and so disregards it, seduced by the text of the brand. Alternatively, the consumer might have learned to be skeptical of all communications from producers and so, in this position, rejects not only the warning or disclaimer but also the brand narrative. (Presumably, however, this consumer has decided not to purchase the product at all and so is not the law’s primary concern.) Second, the reconciliation might result in a consumer who accepts and understands the warning or disclaimer, either because she is an enthusiastic reader of all product communications or because she is a skeptical reader who can moderate her response to distinguish between seduction and warning.

The literature seems to suggest that the first reader—the one seduced by the brand or advertising narrative—predominates, thus leading to the conclusion that warnings and disclaimers are ineffective. But this is not the story that literary theory gives us. Although more work can always be done to discover how consumers read cultural texts, we know, at least, that the fact that a text is facially ambiguous doesn’t mean that consumers are unable to negotiate with it. Modern readers are accustomed to making meaning out of facially inconsistent text, both in the commercial space and outside it. For example, as Stanley Fish has described, we can understand the meaning of signs with spelling, grammatical, or punctuation errors because we anticipate the meaning from the context; a sign reading “PRIVATE MEMBERS ONLY” on the door of a club is understood to bar those who are not members from entering rather than excluding members who are circumspect. (Of course, context is critical to interpretation; as one court has noted, a sign reading simply “Keep Off the Grass” would utilize the imagery to construct their own escapist fantasies.”) (discussing George J. Stigler & Gary S. Becker, De Gustibus Non Est Disputandum, 67 AM. ECON. REV. 76 (1977)).

68. See Hanson & Kysar, supra note 2, at 698-99 (describing a similar view as an instance of cognitive dissonance in which “consumers who make a purchase will be reluctant to process safety information that conflicts with their sense of having selected a beneficial, risk-free product”); Latin, supra note 7, at 1232 (suggesting that consumers will discount the risk of products in light of the product’s virtues touted in advertising).

69. Scott, The Bridge, supra note 1, at 464 (“[R]eaders as consumers means understanding the text as an effort to sell, which in turn implies not only issues of brand awareness or product attribute beliefs, but also outright skepticism and resistance.”); Hirschman, Scott & Wells, supra note 1, at 48 (noting that commentary on advertising “can enforce cultural mistrust”; Carrie McLaren, Preface, in AD NAUSEAM: A SURVIVOR’S GUIDE TO AMERICAN CONSUMER CULTURE xv, xvii-xviii (Carrie McLaren & Jason Torchinsky eds., 2009) (hereinafter AD NAUSEAM) (noting that “[a] well-developed sense of skepticism” is “crucial in navigating consumer culture” but that “it gets exhausting quickly”). In other words, consumers may believe that advertisers never mean what they say and extend this view to the warning or disclaimer.

70. FISH, IS THERE A TEXT, supra note 49, at 275-77.
probably not be interpreted to suggest the presence of deadly snakes.\footnote{Post v. American Cleaning Equipment Corp., 437 S.W.2d 516, 520 (Ky. Ct. App. 1968); see also Gerald Graff, "Keep Off the Grass," "Drop Dead," and Other Indeterminacies: A Response to Sanford Levinson, 60 TEx. L. REV. 405, 407-08 (1982) (noting that "[k]eep off the grass' would mean something entirely different if we overheard the expression uttered by a narcotics-counselor, in appropriate circumstances, to a person known to us as a convicted marijuana-user").}

Slang also sometimes incorporates facially contradictory lexical forms; witness, for example, the use of "bad" in some circles to mean "good."\footnote{Michael Adams, SLANG: THE PEOPLE'S POETRY 62 (2009).} Trademark law allows for similar types of ambiguity in reference by allowing companies in different markets to use the same trademark, thus requiring the consumer to resolve any uncertainty and discard irrelevant meanings.\footnote{Scott, The Bridge, supra note 1, at 475 (describing the "mind that is implied by an advertising parable" as "one that can hold fiction and reality together at once and select that which is claiming to be real from that which is not"); Barbara B. Stern, A Revised Communication Model for Advertising: Multiple Dimensions of the Source, the Message, and the Recipient, 23 J. ADVERTISING 5, 11 (1994) ("[J]ust as the audience for Goldilocks agrees to believe in talking bears, so too does the audience for Star-Kist advertisements agree to believe in talking tuna.") (citation omitted); James H. Leigh, The Use of Figures of Speech in Print Ad Headlines, 23 J. ADVERTISING 19-22 (1994) (cataloging examples of advertisements involving figures of speech). Cf. Geoffrey Nunberg, The Non-Uniqueness of Semantic Solutions: Polysemy, 3 LINGUISTICS AND PHILOSOPHY 143, 180 (1979) ("[W]e construe metaphorical word-uses by making a set of assumptions about how the world would have to be for the use to be entirely rational and efficient, much as we construe ironic utterances by reference to the world in which the utterance might be intended sincerely.").} As I have previously noted,

[T]rademarks 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.\footnote{Laura A. Heymann, Metabranding and Intermediation: A Response to Professor Fleischer, 12 HARV. NEGOT. L. REV. 201, 220 (2007).}

And, as marketing scholars have noted, modern advertising often depends on irony, parody, and other literary tropes that involve facially contradictory texts.\footnote{Edward F. McQuarrie & David Glen Mick, On Resonance: A Critical Pluralistic Inquiry Into Advertising Rhetoric, 19 J. CONSUMER RES. 180, 180-81 (1992) (concluding that "resonance" in magazine advertising — defined as "wordplay in the presence of a relevant pictorial" — "appears to be a widespread phenomenon").} Thus, consumers should be presumed to be able to engage with messages from two different voices within the same text;
indeed, as several courts have held, parody depends on a reader’s recognition that the text conveys “two simultaneous—and contradictory—messages: that it is the original, but also that it is not the original and is instead a parody.” 77 Parody is a particularly useful comparison, because parody constitutes a counternarrative in two ways: first, by subverting the reader’s initial impression that it is, in fact, its subject and, second, by ultimately assuming a critical stance toward its subject. 78 Thus, readers comfortable with the concept of parody should not be completely averse to the idea that a warning or disclaimer might occupy the same stance with respect to the advertising it accompanies. 79

This is not to say, however, that the reader’s task is simple. The experience that one brings to the interpretive effort may well be shaped by class, age, race, and gender, just to name a few interpretive lenses. 80 As Walker Gibson noted over fifty years ago, a text asks a reader to take on a certain role as a participant in the narrative. A science fiction or fantasy novel, for example, demands a certain suspension of disbelief on the part of the reader; if the reader cannot take on “that set of attitudes and qualities which the language asks [him] to assume,” he “throw[s] the book away.” 81 In product communications, these roles are at odds: The narrative communicated by the advertising or branding for the product asks the consumer to imagine herself as heroic, sensitive, attractive, and capable. If she needs the assistance of the product or service being advertised, it is likely due to factors beyond her control, such as health issues, an accident, or the pressures of modern life. The narrative communicated by the warning or disclaimer, however, often asks the consumer to imagine herself in a nondominant role: as careless, incompetent, hapless, or confused. 82 In order to reconcile these

78. See, e.g., Deborah F. Rossen-Knill & Richard Henry, The Pragmatics of Verbal Parody, 27 J. PRAGMATICS 719, 722 (1997) (noting that “the nature of the information conveyed through parody is, at minimum a criticism of some object”); id. at 723 (contending that a successful verbal parody must, inter alia, effect an “intentional verbal re-presentation of the object of parody”); id. at 728 (“In re-presentation, however, the hearer must be aware of the original act, hold it up next to the parodying version, and work out the parodist’s commentary on the original.”).
79. I do not mean to minimize the different interests a consumer might have with respect to each of these counternarratives, ranging from entertainment in the case of parody, to product selection in the case of trademarks, to personal safety in the case of a product warning. One wonders, however, whether the increase in interest along this spectrum might not be accompanied by a commensurate intensity of interpretive effort.
81. Walker Gibson, Authors, Speakers, Readers, and Mock Readers, in READER-RESPONSE CRITICISM: FROM FORMALISM TO POST-STRUCTURALISM 1, 1 (Jane P. Tompkins ed., 1980); see also WHITE, supra note 58, at 16 (“[O]ne element in the relationship between reader and writer is a kind of negotiation in which the reader constantly asks himself what this text is asking him to assent to and to become and whether or not he wishes to acquiesce.”).
82. Cf. The Idiot Consumer, in AD NAUSEAM, supra note 69, at 247-262 (tracing the advertising industry’s view of the typical consumer); Grynberg, supra note 36, at 76 (discussing views of consumers).
counternarratives, the reader must engage with the former while not
simultaneously pushing back against the latter.83

To the extent, then, that (as commentators have suggested) some
consumers appear to be unable to reconcile these roles, a reader-response
approach would suggest attention to whether the text is, in fact, perceived
as a counternarrative. Many warnings and disclaimers take the form of
what might be called “boilerplate”—standard language in a standard form.
At first glance, one might characterize such text as a counternarrative,
since the message it conveys is contrary to that connoted
by
the
advertising or brand messages.84 But once the law opines on the legal
validity of that text, manufacturers, eager to reduce their risk, will heed the
red pen of the judicial editor, conforming their text to the norm
suggested.85 Commentators, likewise, seeking predictability for
consumers, encourage the use of standard vocabulary and sentence
structure.86 But it is in precisely this way that the text ceases to be a
counternarrative. Once consumers expect to see a certain structure and
vocabulary in a given text, it is no longer surprising to them, and so they
may well disregard it, meeting a standard text with a standard reaction.87

83. Gibson, supra note 81, at 2 (“We resist the blandishments of the copywriter just in so far as
we refuse to become the mock reader his language invites us to become. . . . Recognition of a violent
disparity between ourself as mock reader and ourself as real person acting in a real world is the
process by which we keep our money in our pockets.”).

consumers’ search costs increase when terms that contradict those made in the primary part of an
advertisement are included in “fine print”).

2002) (suggesting form of standard warning); cf. Michelle E. Boardman, Contra Proferentem: The
Allure of Ambiguous Boilerplate, 104 MICH. L. REV. 1105, 1107 (2006) (noting that drafters of
contracts “care more that a clause have a fixed meaning than a particular meaning”); Robert B.
effect of boilerplate language in contracts as arising “not from the substance of the term offered but
from the proposed term’s consistency with or deviation from the preexisting contracting norm”) (footnote omitted).

86. Mark A. deTurck, Persuasive Effects of Product Warning Labels, in THE PERSUASION
HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 345, 347 (James Price Dillar & Michael Pfau
eds., 2002) (suggesting a four-part structure for product warnings, consisting of a “signal word,” a
“hazard statement,” a “hazard avoidance statement,” and a “consequences statement”); Viscusi &
Zeckhauser, supra note 7, at 109 (contending that warnings “printed in a standardized format and
written using a standardized vocabulary” are more easily processed). DeTurck notes, however, that
“research regarding the necessity of all four elements is inconclusive.” DeTurck, supra, at 347.

87. Aaron C. Ahuvia, Social Criticism of Advertising: On the Role of Literary Theory and the Use
of Data, 27 J. ADVERTISING 143, 154 (1998) (noting that, for example, “[v]iewers have come to expect
a certain kind of ad from, say, Hallmark cards, so when they see a new Hallmark ad they are not
surprised to find a touching and uplifting vignette about the warmth of human relationships”); Jennifer
J. Argo & Kelley J. Main, Meta-Analyses of the Effectiveness of Warning Labels, 23 J. PUB. POL’Y &
MARKETING 193, 205 (2004) (discussing research showing that “advertisements tend to lose their
effect through repeated exposure” because “over time messages may become increasingly boring, and
thus consumers may pay less attention to them”); cf. FISH, IS THERE A TEXT, supra note 49, at 45
(suggesting that rules shared by speakers “will also be constraints on the range, and even the direction
of response; they will make response, to some extent, predictable and normative.”). In Balducci,
discussed supra notes 41-42, the court concluded that consumers were likely to be confused as to the
source of the (parodic) advertisement at issue because of its location on the magazine’s back cover,
given that consumers are “accustomed to seeing advertisements on the back cover of magazines.”
In other words, because consumers have become used to seeing warnings and disclaimers attached to product communications—so much so that warnings and disclaimers have themselves become subjects of parody and derision\(^8\)—the facially disruptive voice actually becomes not disruptive at all.\(^9\) Faced with a presumably predictable text, the consumer as reader may assume the text’s contents rather than actually read and interpret them, whereas the manufacturers that write these messages and courts that construe them do so with close attention, reflection, and discernment.\(^90\) In short, if consumers are told, either directly or indirectly, that a warning or disclaimer is legal boilerplate—included only to satisfy some legal requirement and not to effectively communicate information—they will likely treat it as such.\(^91\) If this is true, then it may be the case that the most effective warnings and disclaimers are those adopting a truly counternarrative stance—in the sense that they contravene the consumer’s expectations by, for example, adopting a narrative voice that does not suggest mere compliance with legal rules or that speaks in an unexpected (i.e., non-stentorian) tone.\(^92\) For example, these communications might

Anheuser-Busch, Inc. v. Balducci Publications, 28 F.3d 769, 774 (8th Cir. 1994).


89. See, e.g., Latin, supra note 7, at 1247-48 (“As warnings proliferate in number and length, consumers may come to believe that some (or many) are included more to protect manufacturers against potential liability than to inform users of significant dangers.”) (discussing Temple v. Velcro USA, Inc., 196 Cal. Rptr. 531 (Cal. Ct. App. 1983)). Cf. Jacob Jacoby & George J. Szybillo, Why Disclaimers Fail, 84 Trademark Rep. 224 (1994) (suggesting that disclaimers that “rely on brief negator words such as ‘no’ or ‘not’ are particularly likely to be ineffective).

90. See Boardman, supra note 85, at 1105 (construing boilerplate in contracts as “a private conversation between drafters and courts; excused from the table is the consumer, who could have no fair duty to understand, and so has no duty to read”).

91. Cf. Fish, Is There a Text, supra note 49, at 326-27 (noting that being told that a text is a poem leads one to analyze it as such, regardless of the text’s formal characteristics).

92. See, e.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471, 1537 (1998) (discussing the “ingenious” governmental safe-driving campaign that encouraged drivers to “[w]atch out for the other guy” rather than targeting the reader of the ad as careless); Kysar, supra note 6, at 1786 n.364 (suggesting that manufacturers might use emotionally based tactics in devising product warnings similar to those used in advertising); Mary Ann Stutts & Garland G. Hunnicutt, Can Young Children Understand Disclaimers in Television Commercials?, 16 J. Advertising 41, 46 (1987) (suggesting that advertisers may want to test “the effectiveness of making the disclaimer [in a commercial aimed at children] part of the action of the commercial rather than as a voiceover and/or a written disclaimer”). Cf. Steven McElroy, Act I, Scene I: The Cellphone Must Not Go On, N.Y Times, Feb. 21, 2010 (Arts & Leisure), at 4 (describing how theaters are using irreverent announcements to remind theatergoers to turn off their cellphones).

Parodies, for example, may want to consider phrasing their disclaimers in a similar tone to that of the primary text. See, e.g., Debra Cassens Weiss, The North Face Sues the South Butt for Trademark Infringement, ABA J., http://www.abajournal.com/weekly/article/the_north_face_sues_the_south__butt_for_trademark_infringement (Dec. 15, 2009) (noting that disclaimer on online parody site reads, “If you are unable to discern the difference between a face and a butt, we encourage you to buy North Face Products.”); Josh Margolin, Playboy Wants to Muzzle Doggy Web Site, Star-Ledger
speak in a conversational rather than an authoritative tone, inviting the consumer to participate in the creation of meaning. Indeed, some of the marketing literature indicates that consumers express positive feelings and better recall when wordplay and other rhetorical devices are used in advertising, simply because such techniques challenge the consumer and make the process of interpretation more enjoyable. Thus, to draw the parallel to parody once more, if "the parodist highlights the differences between the parodying and parodied voice," thereby "distancing him/herself from the parodied point of view," perhaps the warning or disclaimer, to be truly seen as counternarrative, should distance itself not from the primary voice of the advertisement but from the expected voice of the warning or disclaimer itself.

Neither of these conclusions from literary theory—that consumers are adept at interpreting counternarratives but may assume certain interpretations from context—requires a view of the consumer as cognitively challenged. There is an important normative goal in crediting consumers with the responsibility of creating meaning from text—in part, to encourage consumers to use the critical skills they have developed in engaging with popular culture to negotiate with the more prosaic transactions of their daily lives. The continued presence of intelligent disclaimers and warnings sends such a signal of expectation, just as the

(NEWARK, N.J.), Nov. 18, 1999, at 43 (discussing disclaimer on website for dog lovers called "Playdog" that read, "While there is dog nudity, this site is appropriate for viewers of all ages. If you're looking for dirty pictures, you're barking up the wrong tree."). It may be the case that, as one commentator has suggested, that the use of certain rhetorical devices, such as irony, "may attract attention to themselves, away from the arguments, and so reduce persuasion." William J. McGuire, *Standing on the Shoulders of Ancients: Consumer Research, Persuasion, and Figurative Language*, 27 J. CONSUMER RES. 109, 112 (2000). To my mind, this provides even more support for thinking of these communications as examples of text or rhetoric and then using the tools developed in these fields to analyze their efficacy.

93. See, e.g., PETER M. TIERSMA, LEGAL LANGUAGE 206 (1999) ("Although there are sometimes valid reasons for the law's reliance on impersonal constructions, use of first- and second-person pronouns is preferable when legal documents address members of the public."); id. at 229-230 (discussing product warnings).

94. McQuarrie & Mick, supra note 76, at 194; id. at 192 (suggesting that readers experience pleasure as a result of successful decoding of advertisements); Barbara J. Phillips, *The Impact of Verbal Anchoring on Consumer Response to Image Ads*, 29 J. ADVERTISING 15, 16 (2000) (noting that "the entertainment value of rhetorical figures is believed to be the reason that consumers expend the cognitive effort necessary to understand the advertising message"); *I'm With the Brand: Consumer as Fan*, in *AD NAUSEAM*, supra note 69, at 70, 73 ("Ads all but beg to be read ironically: the 'not believing' is built right in. That sense of detachment flatters us and keeps us watching.").

95. Rossen-Knill & Henry, supra note 78, at 728.

96. I should note here that not every consumer is likely to be so conversant; consumers without strong literacy skills or from diverse cultural backgrounds may not interpret text similarly. See, e.g., Ahuvia, supra note 87, at 153 (suggesting that reader-response analysis of advertising should understand "a reader's positioning within society"); McQuarrie & Mick, supra note 76, at 50-51 (explaining how consumers without relevant cultural backgrounds may find advertising relying on visual tropes difficult to interpret); Bruce L. Stem & Robert R. Harmon, *The Incidence and Characteristics of Disclaimers in Children's Television Advertising*, 13 J. ADVERTISING 12, 15 (1984) (noting that disclaimers in advertising aimed at children use adult language such as "partial assembly required" rather than "you have to put it together to make it work"). *Cf.* FISH, *IS THERE A TEXT*, supra note 49, at 14-15 (describing how interpretive communities produce meaning in a text).
norm of including footnotes, endnotes, and other marginalia in academic literature sends a similar encouragement to the reader to interrogate the main text. By contrast, if the metanarrative of warnings and disclaimers is that, despite their presence, they are directed at a reader other than the relevant consumer, this narrative becomes dominant. Consumers will understand that they are not expected to read such communications and may, as a result, ultimately discredit them.

IV. CONCLUSION

To return to the example with which we started: Many television commercials for alcohol now conclude with the tag line “Please drink responsibly.” Although not phrased as a typical product warning, the average consumer will (through implicature98) understand it as such: a warning that excessive consumption of alcohol risks harm to the consumer and/or others. In light of the persuasive imagery that precedes this request, some commentators have characterized the tag line as sending a mixed message. But as literary theory suggests, the fact that a message is mixed doesn’t mean that it can’t be interpreted. The issue at the core of disclaimer, warnings, and similar communications, then, is not that consumers are unable to interpret these messages—it is that there is disagreement among various interpretive communities as to what these messages mean, as the case law in the Introduction illustrates. Rather than abandoning warnings and disclaimers as ineffective, courts and commentators may well wish to consider ways in which interpretive communities form meaning around these texts and, then, to use their powers of adjudication and persuasion to help shape interpretive strategies.

97. Balkin, supra note 10, at 279; Graeme B. Dinwoodie, Developing Defenses in Trademark Law, 13 LEWIS & CLARK L. REV. 99, 136 (2009) (suggesting that “the objective truth that [trademark disclaimers] proclaim may become more important than the effects on the subjective understanding of consumers”). Contract doctrine’s provision that failure to read a contract’s terms does not prevent enforcement of an otherwise enforceable contract operates similarly. Todd D. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 HARV. L. REV. 1174, 1187 (1983) (“[T]he traditional treatment requires that adherents to form contracts be treated as if they had read and understood the document presented to them, even if that conclusion is false and known by the other party to be so.”); id. at 1191-93 (discussing exceptions).


