

Ferrari S.P.A. v. Roberts
944 F.2d 1235 (6th Cir. 1991)



1971 Ferrari 365 GTS4 Daytona Spyder*



Ferrari Testarossa

* <http://blog.hemmings.com/index.php/tag/ferrari-365-gts4-daytona-spyder/>.

RYAN, Circuit Judge.

This is a trademark infringement action brought pursuant to the Lanham Act, 15 U.S.C. § 1051, *et seq.* The principal issue is whether the district court correctly concluded that plaintiff Ferrari enjoyed unregistered trademark protection in the exterior shape and appearance of two of its automobiles and, if so, whether defendant Roberts' replicas of Ferrari's designs infringed that protection, in violation of section 43(a) of the Lanham Act

We hold that the district court properly decided all of the issues and, therefore, we shall affirm.

I. The Facts

Ferrari is the world famous designer and manufacturer of racing automobiles and upscale sports cars. Between 1969 and 1973, Ferrari produced the 365 GTB/4 Daytona. Because Ferrari intentionally limits production of its cars in order to create an image of exclusivity, only 1400 Daytonas were built; of these, only 100 were originally built as Spyders, soft-top convertibles. Daytona Spyders currently sell for one to two million dollars. Although Ferrari no longer makes Daytona Spyders, they have continuously produced mechanical parts and body panels, and provided repair service for the cars.

Ferrari began producing a car called the Testarossa in 1984. To date, Ferrari has produced approximately 5000 Testarossas. Production of these cars is also intentionally limited to preserve exclusivity: the entire anticipated production is sold out for the next several years and the waiting period to purchase a Testarossa is approximately five years. A new Testarossa sells for approximately \$230,000.

Roberts is engaged in a number of business ventures related to the automobile industry. One enterprise is the manufacture of fiberglass kits that replicate the exterior features of Ferrari's Daytona Spyder and Testarossa automobiles. Roberts' copies are called the Miami Spyder and the Miami Coupe, respectively. The kit is a one-piece body shell molded from reinforced fiberglass. It is usually bolted onto the undercarriage of another automobile such as a Chevrolet Corvette or a Pontiac Fiero, called the donor car. Roberts marketed the Miami Spyder primarily through advertising in kit-car magazines. Most of the replicas were sold as kits for about \$8,500, although a fully accessorized "turnkey" version was available for about \$50,000.

At the time of trial, Roberts had not yet completed a kit-car version of the Miami Coupe, the replica of Ferrari's Testarossa, although he already has two orders for them. He originally built the Miami Coupe for the producers of the television program "Miami Vice" to be used as a stunt car in place of the more expensive Ferrari Testarossa.

The district court found, and it is not disputed, that Ferrari's automobiles and Roberts' replicas are virtually identical in appearance.

Ferrari brought suit against Roberts in March 1988 alleging trademark infringement, in violation of section 43(a) of the Lanham Act, and obtained a preliminary injunction enjoining Roberts from manufacturing the replica cars. The injunction was later amended to permit Roberts to recommence production of the two models.

Five months later, Roberts filed a voluntary petition in bankruptcy. Despite the Chapter 11 proceedings, the bankruptcy court, in a carefully limited order, lifted the automatic stay and permitted Ferrari to continue to prosecute this action. Prior to trial, the district court denied Roberts' request for a jury, and the case was tried to the court resulting in a verdict for Ferrari and a permanent injunction enjoining Roberts from producing the Miami Spyder and the Miami Coupe.

II.

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The protection against infringement provided by section 43(a) is not limited to "goods, services or commercial activities" protected by registered trademarks. It extends as well, in certain circumstances, to the unregistered "trade dress" of an article. "Trade dress" refers to "the image and overall appearance of a product." *Allied Mktg. Group, Inc. v. CDL Mktg., Inc.*, 878 F.2d 806, 812 (5th Cir. 1989)

Ferrari's Lanham Act claim in this case is a "trade dress" claim. Ferrari charges, and the district court found, that the unique and distinctive exterior shape and design of the Daytona Spyder and the Testarossa are protected trade dress which Roberts has infringed by copying them and marketing his replicas.

Roberts asserts that there has been no infringement under section 43(a) for a number of reasons: (1) the design of Ferrari's vehicles are protected only under design patent law, *see* 35 U.S.C. § 171, and not the Lanham Act; (2) there is no actionable likelihood of confusion between Ferrari's vehicles and Roberts' replicas at the point of sale; and (3) the "aesthetic functionality doctrine" precludes recovery.

We shall take up each argument in turn.

III.

To prove a violation of section 43(a), Ferrari's burden is to show, by a preponderance of the evidence:

- 1) that the trade dress of Ferrari's vehicles has acquired a "secondary meaning,"
- 2) that there is a likelihood of confusion based on the similarity of the exterior shape and design of Ferrari's vehicles and Roberts' replicas, and

3) that the appropriated features of Ferrari's trade dress are primarily nonfunctional.

See *Kwik-Site Corp. v. Clear View Mfg. Co., Inc.*, 758 F.2d 167, 178 (6th Cir. 1985).

A. Secondary Meaning

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Ferrari's vehicles would not acquire secondary meaning merely because they are unique designs or because they are aesthetically beautiful. The design must be one that is instantly identified in the mind of the informed viewer as a Ferrari design. The district court found, and we agree, that the unique exterior design and shape of the Ferrari vehicles are their "mark" or "trade dress" which distinguish the vehicles' exterior shapes not simply as distinctively attractive designs, but as Ferrari creations.

We also agree with the district court that Roberts' admission that he intentionally copied Ferrari's design, the survey evidence introduced by Ferrari, and the testimony of {various witnesses} amount to abundant evidence that the exterior design features of the Ferrari vehicles are "trade dress" which have acquired secondary meaning.

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B. Likelihood of Confusion

1. District Court's Findings

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The district court found, based upon an evaluation of the eight *Frisch* factors, that the similarity of the exterior design of the Ferrari vehicles and the Roberts replicas was likely to confuse the public. The court noted that while no evidence was offered on two of the factors, evidence of actual confusion and likelihood of expansion of the product lines, two others, marketing channels and purchaser care, favored Roberts and the remaining factors "radically favor[ed] Ferrari." Summarized, the district court's findings on the *Frisch* "likelihood of confusion" factors are as follows:

Factors	Favor
1. Strength of the mark	Ferrari
2. Relatedness of the goods	Ferrari
3. Similarity of the marks	Ferrari
4. Evidence of actual confusion	No evidence
5. Marketing channels used	Roberts
6. Likely degree of purchaser care	Roberts
7. Roberts' intent in selecting "mark"	Ferrari
8. Likelihood of expansion of product lines.	No evidence

Recalling that the claimed mark involved here is the trade dress—the exterior shape and design of the Ferrari vehicles—it is clear that Ferrari's mark is very strong. The strength of the mark is its distinctiveness and Ferrari's designs are unquestionably distinctive. The survey evidence we have discussed, as well as the testimony that the shape of the plaintiff's vehicles "says Ferrari," is evidence of that distinctiveness. Indeed, Roberts' purposeful effort to copy the Ferrari designs is strong circumstantial evidence of the distinctiveness of the originals.

There is no dispute about the relatedness of the goods factor. The products produced by both parties are sports cars.

Likewise, the similarity of the marks—the exterior designs of the vehicles—is indisputable. Ferrari offered survey evidence which showed that 68% of the respondents could not distinguish a photograph of the McBurnie replica, upon which Roberts' Miami Spyder is based, from a photograph of the genuine Ferrari Daytona Spyder. In these photographs, the cars were shown without identifying insignia. Drawings for Roberts' cars show identifying insignia, an "R" on the parking lens and vent window, but the cars produced at the time of trial did not include the "R". Because the survey respondents saw photographs of the McBurnie cars, and because all of the identifying insignia were removed, the survey has limited value in showing the likelihood of confusion between the Roberts and Ferrari vehicles if displayed with identifying emblems. The survey, however, does show that the trade dress of the two car designs, the shapes and exteriors, were quite similar. An examination of the photographs of the cars which are in evidence confirms the striking similarity of the dress of the originals and the replicas. They are virtually indistinguishable.

Finally, Roberts conceded that his intent in replicating the exterior design of Ferrari's vehicles was to market a product that looked as much as possible like a Ferrari original, although Roberts made no claim to his customers that his replicas were Ferraris. "[The] intent of [a party] in adopting [another's mark] is a critical

factor, since if the mark was adopted with the intent of deriving benefit from the reputation of [the plaintiff,] *that fact alone may be sufficient to justify the inference that there is confusing similarity.*” *Frisch’s Restaurants*, 670 F.2d at 648 (emphasis in original) (quoting *Amstar Corp. v. Domino’s Pizza, Inc.*, 615 F.2d 252, 263 (5th Cir.), *cert. denied*, 449 U.S. 899, 101 S.Ct. 268, 66 L.Ed.2d 129 (1980)); *see also Mastercrafters*, 221 F.2d at 467. This is especially true in cases, such as this one, where the defendant sold a comparatively cheap imitation of an expensive, exclusive item. As the court in *Rolex Watch* explained:

By selling the bogus watches, only one inference may be drawn: the Defendants intended to derive benefit from the Plaintiff’s reputation. This inference is no less reasonable when weighed against the Defendants’ assertion that in selling these watches, they did not fail to inform the recipients that they were counterfeits.

Rolex Watch, U.S.A., Inc. v. Canner, 645 F.Supp. 484, 492 (S.D.Fla. 1986). Intentional copying, however, is not actionable under the Lanham Act “absent evidence that the copying was done with the intent to derive a benefit from the reputation of another.” *Zin-Plas Corp. v. Plumbing Quality AGF Co.*, 622 F.Supp. 415, 420 (W.D.Mich. 1985). “Where the copying by one party of another’s product is not done to deceive purchasers and thus derive a benefit from another’s name and reputation, but rather to avail oneself of a design which is attractive and desirable, a case of unfair competition is not made out.” *West Point Mfg.*, 222 F.2d at 586. In this case, where Ferrari’s design enjoyed strong secondary meaning and Roberts admitted that he designed his cars to look like Ferrari’s, the intent to copy was clear.

We conclude that aside from the presumption of likelihood of confusion that follows from intentional copying, Ferrari produced strong evidence that the public is likely to be confused by the similarity of the exterior design of Ferrari’s vehicles and Roberts’ replicas.

2. Roberts’ Objections

Roberts disagrees with the legal significance of the district court’s findings of likelihood of confusion. He argues that for purposes of the Lanham Act, the requisite likelihood of confusion must be confusion at the point of sale—purchaser confusion—and not the confusion of nonpurchasing, casual observers. The evidence is clear that Roberts assured purchasers of his replicas that they were not purchasing Ferraris and that his customers were not confused about what they were buying.

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b. Confusion at Point of Sale

Roberts argues that his replicas do not violate the Lanham Act because he informed his purchasers that his significantly cheaper cars and kits were not

genuine Ferraris and thus there was no confusion at the point of sale. The Lanham Act, however, was intended to do more than protect consumers at the point of sale. When the Lanham Act was enacted in 1946, its protection was limited to the use of marks “likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services.” In 1967 {*recte* 1962}, Congress deleted this language and broadened the Act’s protection to include the use of marks “likely to cause confusion or mistake or to deceive.” Thus, Congress intended “to regulate commerce within [its control] by making actionable the deceptive and misleading use of marks in such commerce; [and] . . . to protect persons engaged in such commerce against unfair competition . . .” 15 U.S.C. § 1127. Although, as the dissent points out, Congress rejected an anti-dilution provision when recently amending the Lanham Act, it made no effort to amend or delete this language clearly protecting the confusion of goods *in commerce*. The court in *Rolex Watch* explicitly recognized this concern with regulating commerce:

The real question before this Court is whether the alleged infringer has placed a product *in commerce* that is “likely to cause confusion, or to cause mistake, or to deceive.” . . . The fact that an immediate buyer of a \$25 counterfeit watch does not entertain any notions that it is the real thing has no place in this analysis. Once a product is injected into commerce, there is no bar to confusion, mistake, or deception occurring at some future point in time.

Rolex Watch, 645 F.Supp. at 492-93 (emphasis in original). The *Rolex Watch* court noted that this interpretation was necessary to protect against the cheapening and dilution of the genuine product, and to protect the manufacturer’s reputation. *Id.* at 495; *see also Mastercrafters*, 221 F.2d at 466. As the court explained:

Individuals examining the counterfeits, believing them to be genuine Rolex watches, might find themselves unimpressed with the quality of the item and consequently be inhibited from purchasing the real time piece. Others who see the watches bearing the Rolex trademarks on so many wrists might find themselves discouraged from acquiring a genuine because the items have become too common place and no longer possess the prestige once associated with them.

Rolex Watch, 645 F.Supp. at 495; *see also Mastercrafters*, 221 F.2d at 466. Such is the damage which could occur here. As the district court explained when deciding whether Roberts’ former partner’s Ferrari replicas would be confused with Ferrari’s cars:

Ferrari has gained a well-earned reputation for making uniquely designed automobiles of quality and rarity. The DAYTONA SPYDER design is well-known among the relevant public and exclusively and positively associated with Ferrari. If the country is populated with

hundreds, if not thousands, of replicas of rare, distinct, and unique vintage cars, obviously they are no longer unique. Even if a person seeing one of these replicas driving down the road is not confused, Ferrari's exclusive association with this design has been diluted and eroded. If the replica Daytona looks cheap or in disrepair, Ferrari's reputation for rarity and quality could be damaged

Ferrari, 11 U.S.P.Q.2d at 1848. The dissent argues that the Lanham Act requires proof of confusion at the point of sale because the eight factor test used to determine likelihood of confusion focuses on the confusion of the purchaser, not the public. The dissent submits that three of the factors, marketing channels used, likely degree of purchaser care and sophistication, and evidence of actual confusion, specifically relate to purchasers. However, evidence of actual confusion is not limited to purchasers. The survey evidence in this case showed that members of the public, but not necessarily purchasers, were actually confused by the similarity of the products. Moreover, the other five factors, strength of the mark, relatedness of the goods, similarity of the marks, defendant's intent in selecting the mark, and likelihood of product expansion, do not limit the likelihood of confusion test to purchasers.

Since Congress intended to protect the reputation of the manufacturer as well as to protect purchasers, the Act's protection is not limited to confusion at the point of sale. Because Ferrari's reputation in the field could be damaged by the marketing of Roberts' replicas, the district court did not err in permitting recovery despite the absence of point of sale confusion.

. . . .

KENNEDY, Circuit Judge, dissenting.

I respectfully dissent because the majority opinion does more than protect consumers against a likelihood of confusion as to the source of goods; it protects the source of the goods, Ferrari, against plaintiff's copying of its design even if the replication is accompanied by adequate labelling so as to prevent consumer confusion. I believe the majority commits two errors in reaching this result. The majority first misconstrues the scope of protection afforded by the Lanham Act by misapplying the "likelihood of confusion" test and reading an anti-dilution provision into the language of section 43(a). The majority then affirms an injunction that is overbroad

I. Section 43(a) and Trade Dress Protection

The majority invokes the appropriate test to determine whether protection is available for an unregistered trademark pursuant to section 43(a) of the Lanham Act. *Kwik-Site Corp. v. Clear View Mfg. Co.*, 758 F.2d 167 (6th Cir. 1985) (secondary meaning; likelihood of confusion; and nonfunctionality of trade dress). While I agree that Ferrari's designs have acquired secondary meaning and are

primarily nonfunctional, I disagree with the majority's construction and application of the likelihood of confusion test and their conclusion that the Lanham Act protects against dilution of a manufacturer's goods.

This Circuit applies an eight-factor test to determine whether relevant consumers in the marketplace will confuse one item with another item. *Frisch's Restaurants, Inc. v. Elby's Big Boy, Inc.*, 670 F.2d 642 (6th Cir.), *cert. denied*, 459 U.S. 916 (1982). The majority correctly points out one purpose this test is *not* designed to accomplish: "Where the copying by one party of another's product is not done to *deceive purchasers* and thus derive a benefit from another's name and reputation, but rather to avail oneself of a design which is attractive and desirable, a case of unfair competition is not made out." *West Point Mfg. v. Detroit Stamping Co.*, 222 F.2d 581, 586 (6th Cir.) (emphasis added), *cert. denied*, 350 U.S. 840 (1955). This passage properly notes that the statute is triggered when a copier attempts to "palm off" his replica as an original. In other words, the protection afforded by the Lanham Act is primarily to potential purchasers. The protection accruing to a producer is derivative of and only incidental to this primary protection: a producer can market his goods with the assurance that another may not market a replica in a manner that will allow potential purchasers to associate the replica with the producer of the original. Unfortunately, the majority merely pays lip service to this fundamental tenet in its application of the eight-factor test.

The majority never clearly defines the target group that is likely to be confused. Although *West Point* counsels that purchasers must be deceived, the majority concludes that the target group is the "public." The majority errs to the extent that its analysis shifts from potential purchasers to the broader more indefinite group of the "public."

The eight-factor test contemplates that the target group is comprised of potential purchasers. For example, the importance of one factor—evidence of actual confusion—is determined by the kinds of persons confused and degree of confusion. "Short-lived confusion or confusion of individuals casually acquainted with a business is worthy of little weight . . ." *Homeowners Group, Inc. v. Home Marketing Specialists, Inc.*, 931 F.2d 1100, 1110 (6th Cir. 1991) (quoting *Safeway Stores, Inc. v. Safeway Discount Drugs, Inc.*, 675 F.2d 1160, 1167 (11th Cir. 1982)). Two other factors obviously refer to potential purchasers: the marketing channels used and the likely degree of purchaser care and sophistication. Thus, three of the eight factors expressly focus on the likelihood of confusion as to potential purchasers.

Other courts have made clear that section 43(a) is concerned with the welfare of potential purchasers in the marketplace. See *Kwik-Site*, 758 F.2d at 178 (referring to "intending purchasers" when discussing likelihood of confusion); see also *Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162, 168 (2d Cir. 1991) (stating that plaintiff must prove that "purchasers are likely to confuse the

imitating goods with the originals”); *West Point*, 222 F.2d at 592 (referring to “purchasers exercising ordinary care to discover whose products they are buying . . .” (quoting *Reynolds & Reynolds Co. v. Norick*, 114 F.2d 278 (10th Cir. 1940))).

Plaintiff’s replicas are not likely to confuse potential purchasers. Plaintiff’s vehicles display an “R” on the parking lenses and vent windows. No symbols or logos affiliated with Ferrari are displayed. Roberts informs all purchasers that his product is not affiliated with Ferrari. In light of these distinctions, and the high degree of customer care and sophistication that normally accompanies such a purchase—defendant’s vehicles at issue sell for a minimum of \$230,000, as well as the distinctly different marketing channels employed by the parties, I find the evidence insufficient to prove a likelihood of confusion by potential purchasers in the marketplace.

To be sure, some courts have expanded the application of the likelihood of confusion test to include individuals other than point-of-sale purchasers. These courts have included potential purchasers who may contemplate a purchase in the future, reasoning that in the pre-sale context an “observer would identify the [product] with the [original manufacturer], and the [original manufacturer]’s reputation would suffer damage if the [product] appeared to be of poor quality.” *Polo Fashions, Inc. v. Craftex, Inc.*, 816 F.2d 145, 148 (4th Cir. 1987); see *Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-Le Coultre Watches, Inc.*, 221 F.2d 464 (2d Cir.), *cert. denied*, 350 U.S. 832 (1955); *Rolex Watch, U.S.A., Inc. v. Canner*, 645 F.Supp. 484 (S.D.Fla. 1986).

In applying the test in this manner, these courts appear to recognize that the deception of a consumer under these circumstances could dissuade such a consumer from choosing to buy a particular product, thereby foreclosing the possibility of point-of-sale confusion but nevertheless injuring the consumer based on this confusion. The injury stems from the consumer’s erroneous conclusion that the “original” product is poor quality based on his perception of a replica that he thinks is the original. These cases protect a potential purchaser against confusion as to the source of a particular product. Hence, even when expanding the scope of this test, these courts did not lose sight of the focus of section 43(a): the potential purchaser. The majority applies the likelihood of confusion test in a manner which departs from this focus.

The cases which have expanded the scope of the target group are distinguishable from the instant case, however. In *Rolex*, the counterfeit watches were labelled “ROLEX” on their face. Similarly, the *Mastercrafters* court found that the clock was labelled in a manner that was not likely to come to the attention of an individual. It is also noteworthy that the Second Circuit has limited *Mastercrafters* “by pointing out that ‘[i]n that case there was abundant evidence of actual confusion, palming off and an intent to deceive.’” *Bose Corp. v. Linear*

Design Labs, Inc., 467 F.2d 304, 310 n. 8 (2d Cir. 1972) (quoting *Norwich Pharmacal Co. v. Sterling Drug, Inc.*, 271 F.2d 569 (2d Cir. 1959), *cert. denied*, 362 U.S. 919 (1960)). No evidence was introduced in the instant case to show actual confusion, palming off or an intent to deceive and, as previously noted, plaintiff does not use any name or logo affiliated with Ferrari on its replicas.

Further, these cases conclude that the proper remedy is to require identification of the source of the replica, not prohibit copying of the product. *See West Point*, 222 F.2d at 589 (stating that under such circumstances “the only obligation of the copier is to identify its product lest the public be mistaken into believing that it was made by the prior patentee”); *see also Coach Leatherware*, 933 F.2d at 173 (Winter, J., dissenting in part) (stating that “[a copier] thus has every right to copy [a product] so long as consumers know they are buying [the copied product]”). Accordingly, even if I were to conclude that plaintiff’s copies created confusion in the pre-sale context, I would tailor the remedy to protect only against such confusion; this would best be accomplished through adequate labelling. The majority’s remedy goes well beyond protection of consumers against confusion as to a product’s source. It protects the design itself from being copied. *See supra* at 1239.

In sum, the relevant focus of the eight-factor test should be upon potential purchasers in the marketplace. Plaintiff’s replicas present no likelihood of confusion because plaintiff provides adequate labelling so as to prevent potential purchasers, whether in the pre-sale or point-of-sale context, from confusing its replicas with Ferrari’s automobiles. The majority errs by expanding the target group to include the “public,” an expansion unsupported by the language and purpose of the Lanham Act. To the extent that the majority expands the target group, the test increasingly protects the design from replication and the producer from dilution, rather than the potential purchaser from confusion.¹

¹ I also note that the survey relied upon by the majority to prove a likelihood of confusion is fatally flawed. Generally, “[i]n assessing the likelihood of confusion, a court’s concern is ‘the performance of the marks in the commercial context.’” *Homeowners Group, Inc. v. Home Marketing Specialists, Inc.*, 931 F.2d 1100, 1106 (6th Cir. 1991) (quoting *Frisch’s Restaurants, Inc. v. Shoney’s, Inc.*, 759 F.2d 1261, 1266 (6th Cir. 1985)). “It is the overall impression of the mark, not an individual feature, that counts.” *Id.* at 1109. Applied to the instant case, this means that the analysis must be based on the products as they appear in the marketplace. The ultimate question is “whether relevant consumers are likely to believe that the products or services offered by the parties are affiliated in some way.” *Id.* at 1107.

The survey lacks any probative value on the issue of consumer confusion because of the manner in which it was conducted. The survey was conducted by showing photographs of Ferrari’s cars and Roberts’ replicas *stripped of their*

The majority does more than implicitly recognize a dilution cause of action by its misapplication of the eight-factor test; it expressly reads such a cause of action into the statute. To justify this interpretation, the majority points out that Congress deleted the word “purchasers” from the statutory language in 1967 {*recte* 1962}. According to the majority, this congressional act demonstrates that Congress intended “to protect against the cheapening and dilution of the genuine product, and to protect the manufacturer’s reputation.” I fail to see how this one congressional act leads to such a conclusion.

As an initial matter, the majority’s method of reasoning should compel it to reach a different conclusion. In 1989, Congress specifically considered and rejected adding an anti-dilution provision to the Lanham Act.² This action, it can be asserted, demonstrates that Congress does not now consider the protection of the Lanham Act to encompass injuries to a manufacturer based on dilution. The majority cannot look to one action of Congress to bolster its position, but ignore other actions which undercut its position.

More importantly, the language of the Lanham Act does not afford such protection to producers of goods. As noted in the previous section, the Lanham Act’s protection runs to relevant consumers in the marketplace; its protection to producers is incidental to this primary protection. Requiring adequate labelling ensures that a producer will not have the poor quality of a replica imputed to its product by a confused potential purchaser. This is the only benefit accruing to a producer. Trademark dilution is not a cause of action under the Lanham Act. *See Eveready Battery Co. v. Adolph Coors Co.*, 765 F.Supp. 440 (N.D.Ill. 1991).

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identifying badges. By conducting the survey in this manner, no assessment could be made of the likelihood of confusion in the “commercial context.” Purchasers of plaintiff’s cars are not purchasing from photographs. Accordingly, the survey is meaningless as to the likelihood of confusion.

² The most recent amendment to the Lanham Act, the Trademark Law Revision Act of 1988, Pub.L. No. 100-667, 102 Stat. 3935 (1988) (effective Nov. 16, 1989), as originally introduced in both houses of Congress, permitted separate causes of action for dilution, disparagement and tarnishment. All of these provisions were deleted from the legislation which eventually was enacted. House Rep. 100-1028 (Oct. 3, 1988), *reprinted in* United States Trademark Ass’n, The Trademark Law Revision Act of 1988, The Legislative History, Reports, Testimony, and Annotated Statutory Text 277, 278 (1989); Cong.Rec. H10411, H10421 (Oct. 19, 1988). [Congress eventually created Lanham Act § 43(c) in 1995 to provide for federal antidilution protection and amended § 43(c) in 2006.]