VISUAL METAPHOR AND THE DISTINCTIVENESS OF IMAGES IN TRADEMARK LAW

Dustin Marlan[*]

ABSTRACT

Trademark law has long used the *Abercrombie* spectrum to distinguish descriptive word marks, which are unprotectable absent secondary meaning, from distinctive ones eligible for protection upon first use. Under this framework, a word mark is inherently distinctive (valid) if it passes an "imagination" test by establishing a metaphorical connection in the consumer's mind as to the mark's associated product or service. Because marks are symbols and the sine qua non of a symbol is its figurative quality, trademark law properly uses *verbal* metaphor (a figure of speech) as its doctrinal trigger in evaluating the distinctiveness of words. Yet, the trademark regime lacks a coherent, uniform mechanism for deciding the distinctiveness of images—i.e., logos and certain forms of trade dress. This results in subjective "eyeball" tests and thus little predictive value.

Research in cognitive linguistics and in analytical psychology reveals that metaphor is not merely a figure of speech, however, but rather refers to a fundamental mode of thought (characterized as understanding one concept in terms of another). Modern brands rely heavily on *visual* metaphor—the visual representation of metaphorical concepts and thoughts. Prominent examples include the Apple logo, Starbucks' siren, and Nike's swoosh. Use of visual metaphor, like verbal metaphor in the word mark context, enables an image mark to serve as an automatic source identifier by (1) denoting (referring specifically to) a brand, as well as (2) connoting (suggesting or implying) qualities, values, or aesthetics associated with a marked product or service.

This Article thus argues that visual metaphor provides a figurative, cognition-based vehicle by which to extend *Abercrombie's* imagination test from word to image marks. To this end, the Article proposes a definitional test of visual metaphor to decide the validity of an image mark based, at least in part, on whether it is: (1) the representation of a person, place, thing or idea, (2) by means of a visual image, (3) that suggests a particular association or point of similarity as to its underlying product or service. Indeed, while trademark law perhaps rightly rejects *Abercrombie's* spectrum as a hierarchy of the *scope* of protection accorded images, it loses sight of the forest for the trees in failing to accept *Abercrombie's* imagination test as to the *validity* of images to trademark status.

[*] Clinical Teaching Fellow, University of Michigan Law School. J.D., University of Pennsylvania Law School, 2012.

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INTRODUCTION

What we call a symbol is a term, a name, or even a picture that may be familiar in daily life, yet that possesses specific connotations in addition to its conventional and obvious meaning.
C. G. Jung[1]

The protection of trade-marks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them.
Felix Frankfurter, J.[2]

We live in an age where visuals dominate commerce and branding, yet trademark law does not properly analyze images. Courts and the Trademark Trial and Appeal Board apply superficial and inconsistent tests in evaluating the distinctiveness of image marks—i.e., logos, product packaging, and services-related trade dress. The Patent and Trademark Office translates descriptions of trade dress into reductive word-based categories.[3] Even the leading trademark treatise, invoking Justice Potter Stewart's infamous statement regarding the law's inability to define obscenity,[4] resorts to "I know it when I see it" judgments as to the similarity of image marks.[5] The law is overall content not to grapple with the symbolism behind images.[6] However, the first requirement of a trademark

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[1] CARL G. JUNG, MAN AND HIS SYMBOLS, 20 (New York: Dell Pub. Co. 1964).

[2] Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203, 203 (1942) (Frankfurter, J.).

[3] *See, e.g.*, Donna K. Hopkins, *Searching for Graphic Content in USPTO Trademark Databases*, 25 World Pat. Info. 107, 107-08 (2003) (explaining the PTO's trademark classification system of design codes, which relies largely on using words to describe image marks); Rebecca Tushnet, *Looking at the Lanham Act: Images in Trademark and Advertising Law*, 48 HOUS. L. REV. 861, 873 (2011) ("Images enter into this legal system, not exactly as an afterthought, but as a category in need of discipline through words. Registration for trademarks, unlike that for copyrights, involves entry into a detailed classification scheme, and, therefore, requires all marks to be described in words, at least in part.").

[4] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know [obscenity] when I see it.").

[5] J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 23.25, at 23-153 to -54; *see also* § 23.25, at 23-153 ("Similarity of appearance between marks is really nothing more than a subjective 'eyeball' test."); *cf.* Rebecca Tushnet, *Looking at the Lanham Act: Images in Trademark and Advertising Law*, 48 HOUS. L. REV. 861, 876 (2011) (remarking on the unequal power dynamics and lack of predictability inherent in such an "eyeball" test).

[6] Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687, 1699 (2014) ("Words, not images, are a lawyer's most essential tool."); *cf.* Rebecca Tushnet, *Sight, Sound, and Meaning: Teaching Intellectual Property with Audiovisual Metaphors*, 52 ST. LOUIS U. L.J. 891 (2008).

is that it be "a *symbol*."[7] And, the "basic characteristic of a symbol is its *figurative* quality."[8]

This Article thus argues that the trademark regime's superficial analysis is insufficient as a measure of an image mark's *inherent* distinctiveness—its tendency "to identify the goods sold as emanating from a particular, though

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[7] Qualitex Co. v. Jacobsen Prods. Co., 514 U.S. 159, 166 (1995) (citing 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 3.1 (4th Ed. 2002) (explaining the "requirements for qualification of a word or symbol as a trademark are that it be (1) a 'symbol,' (2) 'use[d] . . . as a mark,' (3) 'to identify and distinguish the seller's goods from goods made or sold by others,' but that it not be 'functional'"); *see also, e.g.*, Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203 (1942) (Frankfurter, J.) ("The protection of trade-marks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them."); Duraco Prods., Inc. v. Joy Plastics, Enters., Ltd., 40 F.3d 1431, 1440 (3d Cir. 1994) (noting that a distinctive trademark or trade dress must be "a symbol according to which one can relate the signifier (the trademark, or perhaps the packaging) to the signified (the product)."); Deer & Co. v. MTD Prods., Inc., 860 F. Supp. 113, 120 (S.D.N.Y. 1994), aff'd 41 F.3d 39 (2d Cir. 1994) ("Trademarks are symbols—symbols of products and their origins. When a trademark is successfully employed, favorable associations accrue not only to its referent—the product or source for which the trademark stands—but also to the trademark itself."). *See generally* Thomas D. Drescher, *The Transformation and Evolution of Trademarks—from Signals to Symbols to Myth*, 82 TRADEMARK REP. 301-340 (1992).

[8] 4 CALLMANN ON UNFAIR COMP., TR. & MONO. § 17:1 (4th Ed.) (emphasis added). Beyond the law of trademarks, the figurative requirement of the symbol is consistent across disciplines. Noteworthy definitions include the following by experts in hermeneutics, mythology, psychoanalysis, theory of metaphor, and narrative theory. See PAUL RICOEUR, *Existence and Hermeneutics*, in THE CONFLICT OF INTERPRETATION: ESSAYS IN HERMENEUTICS, 13 (1974) ("I define 'symbol' as any structure of signification in which a direct, primary, literal meaning designates, in addition, another meaning which is indirect, secondary, and figurative and which can be apprehended only through the first."); CARL G. JUNG, MAN AND HIS SYMBOLS, 20 (1964) ("What we call a symbol is a term, a name, or even a picture that may be familiar in daily life, yet that possesses specific connotations in addition to its conventional and obvious meaning."); JOSEPH CAMPBELL, THE SYMBOL WITHOUT MEANING, 153 (1958) ("[A] symbol, like everything else, shows a double aspect. We must distinguish, therefore between the 'sense' and the 'meaning' of the symbol."); HEINRICH R. ZIMMER, PHILOSOPHIES OF INDIA 1-2 (9. Paperback print. Ed., Princeton Univ. Press). ("Concepts and words are symbols, just as visions, rituals, and images are; so too are the manners and customs of daily life. Through all of these a transcendent reality is mirrored. They are so many metaphors reflecting and implying something which, though thus variously expressed, is ineffable, though thus rendered multiform, remains inscrutable."); JOLANDE JACOBI, COMPLEX/ARCHETYPE/SYMBOL IN THE PSYCHOLOGY OF C. G. JUNG, 77 (Princeton Univ. Press 1971) (equating the terms "symbol" and metaphor," and noting that "[t]he word symbol (symbolon), derived from the Greek symballo, has long been the object of the most diverse definitions and interpretation. But all these definitions and interpretations are agreed that symbols present an objective, visible meaning behind which an invisible, profounder meaning is hidden.").

possibly anonymous, source" at first use in commerce.[9] The Article proposes instead a test of figurative significance in the form of visual metaphor. In fact, little other scholarship exists with respect to images in trademark law. This oversight is unsurprising given the emphasis that trademark law—and the legal profession as a whole, for that matter—puts on words to the exclusion of visuals.[10] Rebecca Tushnet, one of few intellectual property scholars to squarely address images, aptly notes that "images can make claims, just as words do."[11] Words, though, "are the prototypical regulatory subjects for trademark and advertising law, despite our increasingly audiovisual economy."[12]

As such, trademark law has long used the *Abercrombie* spectrum to distinguish descriptive word marks, which are unprotectable absent a showing of secondary meaning, from inherently distinctive ones eligible for federal protection upon first use in commerce.[13] Under this framework, a word mark is suggestive—and thus distinctive rather than descriptive—if it passes an "imagination" test by establishing a figurative, metaphorical connection in the consumer's mind as to the mark's associated product or service.[14] Because

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[9] Paddington Corp. v. Attiki Importers & Distributors, Inc., 996 F.2d 577, 585 (2d Cir. 1993).

[10] *See* Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687, 1696 (2014) ("'I know it when I see it' is not merely an aphorism: It's the reigning, if not sole, canon of visual interpretation in law."); Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright Law*, 125 HARV. L. REV. 683, 688 (2012).

[11] Rebecca Tushnet, *Looking at the Lanham Act*, 48 HOUS. L. REV. 861, 917 (2011).

[12] *Id.* at 862.

[13] Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4 (2d Cir. 1976).

[14] *See, e.g.*, BigStar Entm't, Inc. v. Next Big Star, Inc., 105 F. Supp. 2d 185, 196 (S.D.N.Y. 2000) ("When choosing what to call the article, the creator of the suggestive name meaningfully fixes upon associational terms that will identify the product figuratively and will appeal to the consumer by allusion and metaphor."); Synergistic Int'l, Inc. v. Windshield Doctor, Inc., No. CV-03-579 FMC (CWx), 2003 U.S. Dist. LEXIS 12660, at *13 (C.D. Cal. Apr. 28, 2003) (finding the mark "Glass Doctor" for glass installation and repair services to be suggestive given the "creative metaphorical combination of the terms 'Doctor' and 'Glass'"); Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 671 n.29 (2004) ("Suggestive marks, such as ATLAS for moving services or ROACH MOTEL for insect tarps, are textbook metaphors and are described as such by the doctrine."); Jake Linford, *The False Dichotomy Between Suggestive and Descriptive Marks*, 76 OHIO ST. L.J. 1367, 1372 (2015) ("Suggestive marks are . . . metaphorically related to the good or service sold, like using GLEEM to sell toothpaste indirectly invokes the bright, shiny quality one could expect from thoroughly cleaned teeth."); Laura A. Heymann, *The Grammar of Trademarks*, 14 LEWIS & CLARK L. REV. 1313, 1330 (2010) ("[T]he concept of metaphor is fundamental to how most trademarks work. Except for words invented to serve as trademarks—such as "Kodak" and "Xerox"—all trademarks, being words in the English language, operate on a level other than a literal one in that they require consumers to use a familiar word or expression in a new and initially unfamiliar context."); Laura A. Heymann, *A Name I Call Myself: Creativity and Naming*, 2 UC IRVINE L. REV. 585, 603 (2012) ("[T]he inherent strength of a mark (and therefore whether it gets protection ab initio or requires additional evidence)

marks are symbols and the sine qua non of a symbol is its figurative quality, trademark law properly uses verbal metaphor (i.e., a figure of speech) as its doctrinal trigger in evaluating the distinctiveness of word marks.[15] Yet the trademark regime lacks a coherent, uniform mechanism for deciding the distinctive of image marks.[16] This results in subjective "eyeball" tests and thus little predictive value.[17]

Research in cognitive linguistics[18] and in psychology reveals that metaphor is not merely a form of figurative language, however, but rather refers to a fundamental mode of thought.[19] Conceptual metaphor theory in particular defines metaphor broadly as "the phenomenon of understanding and experiencing one kind of thing in terms of another."[20] Because metaphor is not

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depends on how creative the mark is. The mark might be a commonplace and dull description of the good's qualities (and therefore might need to be used by others), or use metaphor to suggest a good's characteristics, or create a new meaning for an existing word.").

[15] *See supra* notes 7 and 8 and accompanying discussion.

[16] *See, e.g.*, Forney Indus. v. Daco of Mo, Inc., 835 F.3d 1238, 1252 (10th Cir. 2016) ("The law relating to whether a trademark is inherently distinctive is more developed for word marks than it is for trade dress."). Certain courts apply the *Abercrombie* spectrum to image marks. See, for example, McNeil Nutritionals, LLC v. Heartland Sweeteners LLC, 566 F. Supp. 2d 378, 389 (E.D. Penn. 2008) and Best Cellars, Inc. v. Grape Finds at Dupont, Inc., 90 F. Supp. 2d 431, 451 (S.D.N.Y. 2000). Other courts apply the *Seabrook* test. See, for instance, Mattel, Inc. v. MGA Entm't, Inc., 782 F. Supp. 2d 911, 1004 (C.D. Cal. 2010) and Miller's Ale House, Inc. v. Boynton Carolina Ale House, LLC, 702 F.3d 1312, 1323 (11th Cir. 2012). Yet, others apply both tests. See, for example, Yankee Candle Co. v. Bridgewater Candle Co., 259 F.3d 25, 42 (1st Cir. 2001) and Ashley Furniture Indus. v. Sangiacomo N.A., 187 F.3d 363, 370-71 (4th Cir. 1999). Still, others apply neither. See, for instance, Forney Indus. v. Daco of Mo., Inc. 835 F.3d 1238, 1245-46, 1252 (10th Cir. 2016) and Mexican Food Specialties, Inc. v. Festida Foods, Ltd., 953 F. Supp. 846, 851 (E.D. Mich. 1997).

[17] *See* Tushnet, *supra* note 12.

[18] Cognitive linguistics began in the 1970s as a response to the generative linguistics paradigm. Unlike generative linguistics, exemplified by the work of prominent thinker Noam Chomsky, which treats language as largely autonomous, cognitive linguistics places primary importance on the conceptual mappings of cognitive thought underlying the formal structures. As examples, see George Lakoff, *The Invariance Hypothesis: Is Abstract Reason Based on Image-Schemas*, 1 COGNITIVE LINGUISTICS 39-74 (1990); RAYMOND W GIBBS, JR., THE POETICS OF MIND: FIGURATIVE THOUGHT,, LANGUAGE, AND UNDERSTANDING (New York: Cambridge University Press 1994).

[19] GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY, 204 (1980); *see also* Edward F. McQuarrie & Barbara J. Phillips, *Indirect Persuasion in Advertising: How Consumers Process Metaphors Presented in Pictures and Words*, JOURNAL OF ADVERTISING 7, 9 (2005); CHARLES FORCEVILLE, PICTORIAL METAPHOR IN ADVERTISING (1998), New York: Routledge; Jacqueline C. Hitchon, *The Locus of Metaphorical Persuasion: An Empirical Test*, J. AND MASS COMM. Q., 55,74 (1997); 9:1 CARL G. JUNG, *Archetypes of the Collective Unconscious*, in THE COLLECTED WORKS OF C.G. JUNG 1, 267 (Princeton Univ. Press 1969).

[20] GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY, 5 (1980).

limited to language, its use may potentially enable word *and* image marks to function as distinctive trade symbols by creating linkages in meaning between the differing concepts of product and source (typically referring to a brand). In conceptual metaphor theory terms, this is called "mapping" from one domain of meaning to another.[21] Specifically, metaphor allows either a word or image mark to serve as an automatic source identifier by (1) denoting (referring specifically to) a brand, as well as (2) connoting (suggesting or implying) qualities, values, or aesthetics associated with a marked product or service.[22]

Moreover, the consumer psychology literature finds that modern brands rely heavily on visual—as well as verbal—metaphor. Prominent examples include the Apple logo,[23] Starbucks' siren,[24] and Nike's swoosh.[25] Research in this field further suggests that verbal and visual metaphor contribute to a brand's

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[21] George Lakoff, *The Contemporary Theory of Metaphor, in* METAPHOR AND THOUGHT 202, 206 (Andrew Ortony ed., 1993). This is similar to the concept of "mediation" from semiotics—the study of signs and symbols. See, for example, Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621 (2004); *infra* Part I.C.

[22] *See* Jake Linford, *Are Trademarks Ever Fanciful?*, 105 GEO. L. J., 731 (forthcoming 2017) ("Trademarks operate on at least these two levels. First, the mark denotes source—it indicates 'a single thing coming from a single source.' Second, because the mark points to a consistent, if anonymous source, it also connotes or hints at qualities of the marked product. What the mark denotes and connotes in turn is determined in part by the symbol appropriated for use as a trademark.").

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(1) vividness, (2) personality, and (3) differentiation in the marketplace.[26] Hence, while the *Abercrombie* spectrum's degrees of word mark strength—generic, descriptive, suggestive, arbitrary and fanciful classifications—may not translate easily outside of the word mark context, its yes-no binary distinctiveness threshold—metaphor—may be seen to apply equally well to image marks.

This Article thus argues that visual metaphor provides a figurative, cognition-based vehicle by which to extend *Abercrombie's* imagination test from word to image marks. To this end, the Article proposes that trademark law adopt a definitional test of visual metaphor to decide the validity of an image mark based, at least in part, on whether it is: (1) "the representation of a person, place, thing, or idea," (2) "by means of a visual image," (3) "that suggests a particular association or point of similarity as to its underlying product or service."[27] Indeed, though trademark law perhaps rightly rejects the *Abercrombie* spectrum as a hierarchy of the *scope* of protection accorded images, it loses sight of the forest for the trees in failing to accept *Abercrombie's* imagination test as to the *validity* of images to trademark status.

This Article is the first to draw on cognitive linguistics and analytical psychology to offer a unifying theory of trademark distinctiveness that hinges on the symbolic, metaphorical significance of a mark—whether it be a word, image, or otherwise. Part I marshals cognitive linguistics and psychology research as it applies in the trademark and advertising context. First, this Part finds that metaphor is not only a figure of speech, but refers to a fundamental mode of thought (I.A). Second, it demonstrates how metaphor, especially in its visual aspect, is used in advertising and branding in ways that allow trademarks to function as automatic source identifiers (I.B). Finally, this Part discusses the manner in which trademarks function as trade symbols, both in an economic and cultural sense (I.C). Part II examines verbal metaphor as it relates to the distinctiveness of word marks. It first reviews the anonymous source doctrine, which dictates an inherently source-signifying mark must be conceptually separate from its corresponding product or service (II.A). Second, this Part examines the *Abercrombie* spectrum as a "hierarchy of figurativeness" (II.B). Lastly, it describes the imagination test, which hinges on the use of metaphor as a measure of word mark validity (II.C). Part III applies visual metaphor to image marks. This Part first provides relevant background on image marks—logos and trade dress (III.A). Second, it describes current tests for the inherent distinctiveness of images and concludes that each is inadequate (III.B). Finally,

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[26] *See infra* Part I.B.

[27] "The representation of a person, place, thing, or idea by way of a visual image that suggests a particular association or point of similarity" is a commonly accepted definition of visual metaphor. *See, e.g.*, Charles H. Noble, Mark N. Bing, & Elmira Bogoviyeva, *The Effects of Brand Metaphors as Design Innovation: A Test of Congruency Hypotheses*, 30 J. PROD. INNOV. MANAG. 126, 127 (2013) (citing Edward McQuarrie & D.G. Mick, *Figures of rhetoric in advertising language*. J. CONSUMER RES. 424, 424-38 (1996)).

this Part proposes instead a test of visual metaphor (III.C). The Article then briefly concludes.

A note on terminology before beginning. This Article uses the term "metaphor" in its broad aspect to encompass both figurative language and thought.[28] This conceptualization of metaphor involves comparisons or systems of concepts where one thing is understood in terms of another, or which are incongruities or "artful deviations" from the literal use of a word or concept.[29] These include analogy, incongruity, simile, wordplay, and pun. However, the Article does draw a distinction between a metaphor and a metonym. Metonyms are also figurative rather than literal depictions.[30] But, instead of understanding one thing in terms of another as with metaphor (i.e., analogous similarity), a part stands for a whole or vice versa in metonymy (i.e., association or contiguity).[31] Examples of metonyms include the statements "the White House announced today…" and "she's just a pretty face," or referring to a business executive as a "suit." As Jake Linford notes in his research on semantic shift, metonyms in trademark law can be equated at least roughly with descriptive—inherently non-distinctive—word marks that have a contiguous connection with their underlying product or service.[32] While likely capable of serving as source-identifiers due to their figurative nature, descriptive marks are thought to be needed by market competitors, and are thus, at least for this reason, disallowed protection without first attaining secondary meaning in the marketplace.[33]

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[28] *Cf. Metaphor*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/metaphor (last visited April 16, 2017) ("[A] figure of speech in which a word or phrase literally denoting one kind of object or idea is used in place of another to suggest a likeness or analogy between them (as in drowning in money); broadly: figurative language—compare simile); *with* George Lakoff & Mark Johnson, METAPHORS WE LIVE BY, 204 (1980) (defining metaphor as "the phenomenon of understanding and experiencing one kind of thing in terms of another.").

[29] *See, e.g.*, Edward F. McQuarrie and Barbara J. Phillips, *Indirect Persuasion in Advertising: How Consumers Process Metaphors Presented in Pictures and Words*, 34 JOURNAL OF ADVERTISING 7, 9 (2005) (adapting this broad view of metaphor and applying it in the advertising context).

[30] For a thorough discussion of the differences between metaphor and metonymy, see, for example, METAPHOR AND METONYMY AT THE CROSSROADS: A COGNITIVE PERSPECTIVE (Antonio Barcelona ed. Mouton de Gruyter 2003) and METAPHOR AND METONYMY IN COMPARISON AND CONTRAST (Rene Driven & Ralf Porings eds., Mouton de Gruyter 2003).

[31] *See, e.g.*, Barbara J. Phillips and Edward F. McQuarrie, *Beyond Visual Metaphor: A New Typology of Visual Rhetoric in Advertising*, 4 MARKETING THEORY 113, 115 (2006).

[32] Jake Linford, *The False Dichotomy Between Suggestive and Descriptive Marks*, 76 OHIO ST. L.J. 1367, 1402 (2015) ("Selecting a descriptive mark, which is metonymically related to the product identified, or a suggestive mark, which is metaphorically related to the product, connects the mark to the product in a manner that will readily allow consumers to slip between source-signifying and product-designating meanings.").

[33] This Article does not endorse, nor challenge, the initial invalidity of descriptive word

I. CONCEPTUAL METAPHOR AND THE FIGURATIVE DIMENSIONS OF COMMERCE

Archetypal images, as universal patterns or motifs which come from the collective unconscious, are the basic content of religions, mythologies, legends and fairy tales. An archetypal content expresses itself, first and foremost, in metaphors.

C. G. Jung[34]

This Part reviews conceptual metaphor theory, and then its application to advertising and branding and finally to trademark law. Part I.A examines metaphor as a fundamental mode of thought rather than as merely a figure of speech. It lays foundation for the claim that trademark law's imagination test has applicability to image marks through use of visual metaphor. Indeed, metaphor has been called "the language of the imagination."[35] The word metaphor is derived from the Greek words "meta," meaning "over," and "pherein," or "to carry."[36] This "carrying over" describes the import of one concept to another, which results in a meaning that integrates the two. As the founders of conceptual metaphor theory, cognitive linguist George Lakoff and philosopher Mark Johnson, explain, "the essence of metaphor is understanding and experiencing one kind of thing in terms of another."[37] And, "[n]othing in the fundamental definition of a figure either requires a linguistic expression or precludes a visual expression."[38]

Part I.B examines the use of metaphor in advertising and branding.

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marks. For a challenge of this nature, see generally Lisa P. Ramsey, *Descriptive Trademarks and the First Amendment*, 70 TENN. L. REV. 1095 (2005).

[34] 9:1 CARL G. JUNG, *Archetypes of the Collective Unconscious*, in THE COLLECTED WORKS OF C.G. JUNG 1, 267 (Princeton Univ. Press 1969).

[35] Robert Lake, *Metaphor: The Language of Our Imagination*, 9 J. OF THE IMAGINATION IN LANGUAGE LEARNING 125, *available at* http://www.academia.edu/2007562/Metaphor_The_Language_of_the_Imagination.

[36] TERENCE HAWKES, METAPHOR (1972).

[37] Lakoff and Johnson, METAPHORS WE LIVE BY (1980); *see also, e.g.*, STEVEN PINKER, THE STUFF OF THOUGHT: LANGUAGE AS A WINDOW INTO HUMAN NATURE, Chapter 5, The Metaphor Metaphor (Penguin 2007), at 176 ("[M]etaphor really is a key to explaining thought and language."); GERALD ZALTMAN & LINDSAY H. ZALTMAN, MARKETING METAPHORIA 38 (2008) (citing GERALD M. EDELMAN, SECOND NATURE: BRAIN SCIENCE AND HUMAN KNOWLEDGE (Yale Univ. Press 2006) ("In its earliest form, thought is dependent on metaphorical modes.").

[38] Edward F. McQuarrie & David Glen Mick, *Visual Rhetoric in Advertising: Text-Interpretive, Experimental, and Reader-Response Analyses*, 26 J. OF CONSUMER RES. 37, 39 (1999) (citing E.H. GOMBRICH, ART AND ILLUSION: A STUDY IN THE PSYCHOLOGY OF PICTORIAL REPRESENTATION (Princeton Univ. Press (1960); Scott, Linda M., *Images in Advertising: The Need for a Theory of Visual Rhetoric*, 21 J. OF CONSUMER RES. 252 (1994) (noting that visual figures in fact has roots in art history)).

Metaphors are attractive to consumers because they are archetypal in nature—serving to "capture essential, universal commonalities across a variety of experiences."[39] Brands rely heavily on both verbal and visual metaphor.[40] Research in consumer psychology suggests that use of metaphor in a word or image mark's design contributes to a brand's (1) vividness, (2) differentiation from other brands, and (3) personality, thus contributing to its source identifying function. On a conceptual level, metaphors can be used to connect brand and product by creating linkages in meaning by mapping across source and target domains.

Part I.C. discusses the role of trademarks as trade symbols. For a trademark to function as a source identifier, it must both denote the source, as well as connote qualities, values, or aesthetics of its associated product or service.[41] Metaphor permits the trade symbol to, in semiotic terms, "mediate" between the product and its "source," which most often refers to the mark itself, or brand.[42] Thus, metaphors enable word or image marks to create linkages between a product and its source. This allows them to function effectively as symbols, and for consumers to then derive inherent meaning from them even at first use.

A. Conceptual Metaphor Theory

The traditional definition of metaphor is a figure of speech, where a word that literally means one idea or object is used in place of another word to suggest a likeness or analogy between the two ideas or objects.[43] Examples of metaphors in this linguistic sense include "drowning in money" and "bleeding

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[39] *See, e.g.*, GERALD ZALTMAN & LINDSAY H. ZALTMAN, MARKETING METAPHORIA (Boston: Harvard Business Press, 2008); MARGARET MARK & CAROL S. PEARSON, THE HERO AND THE OUTLAW: BUILDING EXTRAORDINARY BRANDS THROUGH THE POWER OF ARCHETYPES (New York: McGraw-Hill, 2001), 13; SAL RANDAZZO, THE MYTH MAKERS: HOW ADVERTISERS APPLY THE CLASSIC MYTHS AND SYMBOLS TO CREATE MODERN DAY LEGENDS (Cambridge: Probus Publishing, 1995).

[40] *See, e.g.*, Se-Hoon Jeong, *Visual Metaphor in Advertising: Is the Persuasive Effect Attributable to Visual Argumentation or Metaphorical Rhetoric?*, 14 J. of Marketing Comm. 59, 60 (2008) (citing Pradeep Sopory & James Price Dillard, *The Persuasive Effects of Metaphor: A Meta-Analysis*, 28 HUMAN COMM. RES. 382 (2002)).

[41] *See, e.g.*, Jake Linford, *Are Trademarks Ever Fanciful?*, 105 GEO. L. J., 731 (2017) (forthcoming); Nabil Mzoughi and Samar Abdelhak, *The Impact of Visual and Verbal Rhetoric in Advertising on Mental Imagery and Recall*, International Journal of Business and Social Science, Vol. 2 No. 9 (May 2011) at 257 (citing J. Durand, *Rhetorique et image publicitaire*, Communications, n15, 70-95) (explaining that an advertisement is composed of literal (denoted) and connoted (symbolic) dimensions and that therefore "creative advertising is based on the transposition of rhetorical figures to image advertising.")).

[42] *See infra* note 147.

[43] *See, e.g.*, *Metaphor*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/metaphor (last visited Apr. 16, 2017).

heart." However, conceptual metaphor theory defines metaphor instead as an essentially cognitive phenomenon that structures much of human thought.[44] Lakoff and Johnson note that "our conceptual system is likely metaphorical."[45] In conceptual metaphor theory, the focus of metaphor is no longer on words and language. Instead, it is on understanding how one idea or concept can be understood in terms of another one, i.e., "A is B."[46] Hence, any form of communication may be seen as an instance of metaphor, provided that it induces metaphorical thought processes. This view of metaphor as a cognitive—rather than linguistic—occurrence also has vast empirical backing.[47]

Conceptual metaphors are "mappings across conceptual domains that structure our reasoning, our experience, and our everyday language."[48] Metaphor occurs as a consequence of the pairing (i.e., connection) of two "domains"—the "source" and the "target."[49] The source domain is one that is normally familiar whereas the target domain is typically unfamiliar.[50] Most often, conceptual metaphors result from our natural tendency to conceptualize an abstract idea or experience in terms of one more concrete, and thus more easily understood. Humans typically perceive concrete phenomena—what we can see, hear, smell, touch, or taste—as easier to make sense of and understand than more abstract phenomena—like the concepts of intellectual property or of metaphor, for example.[51]

Lakoff and Johnson describe abstract concepts as containing "a literal core . . . extended by metaphors, often by many mutually inconsistent metaphors. Abstract concepts are not complete without metaphors. For example, love is not love without metaphors of magic, attraction, madness,

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[44] LAKOFF & JOHNSON, METAPHORS WE LIVE BY (1980); *see also* Edward F. McQuarrie & Barbara J. Phillips, *Indirect Persuasion in Advertising: How Consumers Process Metaphors Presented in Pictures and Words*, 34 J. OF ADVERTISING 7, 9 (2005) ("[S]ome researchers have hypothesized that metaphor does not occur at the surface level of representation (i.e., pictures versus words), but rather at the level of cognitive thought."); Jacqueline C. Hitchon, *The Locus of Metaphorical Persuasion: An Empirical Test,* 74 J.& MASS COMM. Q. 55, 74 (1997).; Charles Forceville, MULTIMODAL METAPHOR (1996).

[45] LAKOFF & JOHNSON, METAPHORS WE LIVE BY (1980).

[46] Robin Coulter & Gerald Zaltman, *The Power of Metaphor*, *in* THE WHY OF CONSUMPTION: CONTEMPORARY PERSPECTIVES ON CONSUMER MOTIVES, GOALS, AND DESIRES 5 (S. Ratneshwar, David Glen Mick, & Cynthia Huffman eds., 2001).

[47] *See, e.g.*, Mathew McGlone & Julia Harding, *Back (or Forward) to the Future: The Role of Perspective in Temporal Language Comprehension*, 24 JOURNAL OF EXPERIMENTAL PSYCHOLOGY: LEARNING, MEMORY, AND COGNITION, 1211-1223 (1998); Raymond Gibbs & Jennifer O'Brien, *Idioms and Mental Imagery: The Metaphorical Motivation for Idiomatic Meaning*, COGNITION, 35-64 (1990).

[48] George Lakoff, *The Contemporary Theory of Metaphor, in* METAPHOR AND THOUGHT 202, 206 (Andrew Ortony ed., 1993).

[49] *Id.*

[50] *Id.*

[51] *See* Charles Forceville, MULTIMODAL METAPHOR (1996).

union, nurturance and so on."[52] Further, life may be thought of as a *journey* ("I'm at a *crossroads* in my life") or a story ("Tell me the *story* of your life").[53] Emotions may be represented in terms of forces ("I was *overwhelmed* with grief," or "I was *swept off* my feet").[54] Time may be comprehended as spatial motion ("The time for action *has arrived*" or "Time is *flying by*").[55] Each of these ideas is so embedded in our basic thought processes that it appears natural to us. That is, we instinctually and unconsciously move from the concrete source domain to the abstract target domain and vice versa.

The conscious *metaphorical expressions*—words, phrases, and sentences that are the surface realizations of the mappings between the target and source domains—may manifest either verbally or visually.[56] However, conceptual metaphor *itself* originates in unconscious (sometimes referred to as subconscious) cognition.[57] The prevailing consensus in the cognitive science and neuroscience fields is that thought is mostly (about 95%) unconscious. Unconscious thought (and by extension most thought) tends to be figurative rather than literal, with "metaphors and particularly systems of metaphors signal[ing] unconscious evaluations of things and processes."[58] Thus, conceptual metaphors are articulated in conversation not in raw, figurative form, but as mere metaphorical expressions of deeper metaphorical thought.[59]

To illustrate, let us consider a common example: the metaphor "argument is war." Here, the target domain—the concept trying to be understood by the metaphor—is "argument." The source domain—the domain from which the relation or understanding is drawn—is the concept of "war." The actual words and language used here are ancillary to the mode of thought employed. What matters, on a fundamental level, is the way that one concept is mentally conceptualized in terms of another concept. A variety of metaphorical expressions are used to support the conceptual metaphor "argument is war," including:

Your claims are *indefensible*.
He *attacked every weak point* in my argument.
His criticisms were *right on target*.
I *demolished* his argument

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[52] GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 272 (1st ed. 1980).
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] Robin Coulter & Gerald Zaltman, *The Power of Metaphor*, *in* THE WHY OF CONSUMPTION: CONTEMPORARY PERSPECTIVES ON CONSUMER MOTIVES, GOALS, AND DESIRES 5 (S. Ratneshwar, David Glen Mick, & Cynthia Huffman eds., 2001).
[58] *Id.*
[59] *Id.*

I've never *won* an argument with him.
You disagree? Okay, *shoot*!
If you use that strategy, she'll *wipe you out*.
He *shot down* all of my arguments.[60]

These expressions are not considered to be poetic. Instead, they are just the basic method we describe when arguing with someone else. Lakoff and Johnson explain:

> It is important to see that we don't actually just talk about arguments in terms of war. We actually win or lose arguments. We see the person we are arguing with us as an opponent. We gain and lose ground. We plan and use strategies. If we find a position indefensible, we can abandon it and take a new line of attack. Many of the things we do in arguing are structured by concepts of war. Though there is no physical battle, there is verbal battle, and the structure of an argument—attack, defense, counterattack, etc.—reflect[s] this.[61]

In conceptual metaphor theory, a "mapping" breaks down the metaphor into a series of corresponding phrases that map how the knowledge about the source domain is applied to knowledge about the target domain. In the "argument is war" example, the mappings would be: (1) participants correspond to soldiers; (2) the discussion between participants corresponds to a battle; (3) points made by each participant are blows to one another; and (4) each participant's goal is to defend and protect his or her territory.[62] These correspondences allow us to reason about argument using the same mode of thought that we use to reason about war." For instance, the "his argument was right on target" expression evokes knowledge about war (dealing a successful blow to an opponent) in order to conceptualize and understand how a particular analytical point (i.e., battle) affected the overall argument (i.e., war).

Further, Lakoff and Johnson propose that conceptual schemas are shaped by both cognitive and sensorimotor experiences.[63] For example, the metaphor "affection is warmth" derives as a result of the feeling of warmth experienced while being held affectionately.[64] Other examples include "knowing is seeing," which comes as a result of our observing through our eyes,

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[60] GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 4(1980).
[61] *Id.*
[62] *Id.* at 207.
[63] GEORGE LAKOFF & MARK JOHNSON, PHILOSOPHY IN THE FLESH, 52-54 (1999).
[64] *Id.*

and "difficulties are burdens," which derives from our experience of having difficulty lifting heavy physical objects.[65] Indeed, metaphor as a phenomenon of thought characterizes the connections between mind and body as manifested through the imagination. Put another way, the use of metaphor often manifests as a result of connecting the external, physical world with the inner world of conscious and unconscious thoughts and ideas.[66]

B. Verbal and Visual Metaphor in Advertising and Branding

Prominent marketing professor Gerald Zaltman has written extensively about the use of metaphor in advertising. Drawing on conceptual metaphor theory and analytical psychology as well as contemporary cognitive science and neuroscience, Zaltman notes that conceptual metaphors are influenced by our shared cognitive thinking processes and thus are presumed to be similar for all humans.[67] Zaltman explains that conceptual metaphors, systems of metaphor, and metaphorical expressions provide the basis for what are called "deep metaphors."[68] Deep metaphors "serve as a means to organize a whole system of concepts," and thus operate on a higher layer of abstraction than other metaphors.[69] Zaltman writes regarding deep metaphors:

> They are deep because they operate largely unconsciously. They are metaphors because they re-present, or play around with, nearly everything we encounter. They unconsciously add, delete, and distort information while continuously giving us the impression that we engage our world exactly as it is.[70]

Deep metaphors reflect and guide unconscious thought processes. Deep metaphor theory is premised on Carl Jung's theory of archetypes—i.e., symbols, images, and patterns in the unconscious mind that represent basic

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[65] *Id.*

[66] *See* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 4 (1980) (referring to metaphor as "imaginative rationality" because it unites the imagination and rational thought).

[67] *See, e.g.*, Robin Coulter & Gerald Zaltman, *The Power of Metaphor*, *in* THE WHY OF CONSUMPTION: CONTEMPORARY PERSPECTIVES ON CONSUMER MOTIVES, GOALS, AND DESIRES 5 (S. Ratneshwar, David Glen Mick, & Cynthia Huffman eds., 2001); GERALD ZALTMAN & LINDSAY H. ZALTMAN, MARKETING METAPHORIA 35-36 (2008); GERALD ZALTMAN, HOW CUSTOMERS THINK (2003); Robin Higie Coulter & Gerald Zaltman, *Using the Zaltman Metaphor Elicitation Technique to Understand Brand Images*, 21 ADVANCES IN CONSUMER RESEARCH 501 (1994).

[68] GERALD ZALTMAN & LINDSAY H. ZALTMAN, MARKETING METAPHORIA (2008).

[69] *Id.*

[70] *Id.*

"primordial thought forms" shared by all, irrespective of culture.[71] Deep metaphors, like archetypes, "capture essential universal commonalities across a variety of experiences."[72] According to Zaltman and other experts, marketers who seek to influence consumers at a fundamental level create stories around archetypes, each of which involve a universal theme coupled with a deep metaphor.[73]

Zaltman has identified seven oft-recurring deep metaphors that consistently emerge from the unconscious—(1) balance, (2) connection, (3) container, (4) control, (5) journey, (6) resource, and (7) transformation.[74] In Zaltman's classification, balance refers to maintenance of psychological or social equilibrium (e.g., "It feels slightly *off*" or "I am *centered*").[75] Connection involves a sense of belonging ("A *loose cannon*" or "A *team player*").[76] Container describes emotional or psychological states ("*Out* of your mind" or "*In* a good mood").[77] Control suggests the mastery of events ("We're *on the same page*" or "It's *out of my hands*").[78] Journey implies movement toward or away from a goal ("We're *on course*" or "We got *waylaid*").[79] Resources are basic needs such as food, money, and family ("My job is my *lifeline* or "*bread and butter* issues").[80] Lastly, transformation references physical or psychological change ("She's a *different*

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[71] *See* 9:1 CARL G. JUNG, *Archetypes of the Collective Unconscious*, *in* THE COLLECTED WORKS OF C.G. JUNG (Princeton Univ. Press 1969); ANTHONY STEVENS, ARCHETYPE REVISITED (classic ed. 2015); JOLANDE JACOBI, COMPLEX, ARCHETYPE, SYMBOL IN THE PSYCHOLOGY OF C.G. JUNG (digital reprint 2002) (1925). *Cf.* GERALD ZALTMAN & LINDSAY H. ZALTMAN, MARKETING METAPHORIA 35-36 (2008). Jung has described archetypes as "primordial thought forms" existing in the "collective unconscious," a deeper layer of the psyche separate from the personal unconscious. 9:1 Carl G. Jung, *Archetypes of the Collective Unconscious*, *in* THE COLLECTED WORKS OF C.G. JUNG. According to Jung, the collective unconscious is "identical in all men and thus constitutes a common psychic substrate of a suprapersonal nature which is present in every human." *Id.* In contrast, the personal unconscious is a more superficial layer of the psyche deriving from personal experience and consisting of "feeling toned" complexes that make up the personal and private aspect of psychic life. JOLANDE JACOBI, COMPLEX, ARCHETYPE, SYMBOL IN THE PSYCHOLOGY OF C.G. JUNG (digital reprint 2002) (1925).

[72] GERALD ZALTMAN & LINDSAY H. ZALTMAN, MARKETING METAPHORIA (2008).

[73] *See* GERALD ZALTMAN & LINDSAY H. ZALTMAN, HOW CONSUMERS THINK (2003); *see also* MARGARET MARK & CARL PEARSON, THE HERO AND THE OUTLAW: BUILDING EXTRAORDINARY BRANDS THROUGH THE POWER OF ARCHETYPES 13 (2001); SAL RANDAZZO, THE MYTH MAKERS: HOW ADVERTISERS APPLY THE CLASSIC MYTHS AND SYMBOLS TO CREATE MODERN DAY LEGENDS (1995).

[74] GERALD ZALTMAN & LINDSAY H. ZALTMAN, MARKETING METAPHORIA (2008).

[75] JAMES GEARY, I IS AN OTHER: THE SECRET LIFE OF METAPHOR AND HOW IT SHAPES THE WAY WE SEE THE WORLD, 65 (2011) (citing *id.*).

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

person now" or "He turned over a *new leaf*").[81]

These deep metaphors and their corresponding metaphorical expressions are applied in the context of advertising and branding as (1) verbal, (2) visual, or (3) multimodal metaphors. The most traditional are verbal metaphors, which can be defined broadly as representing one thing in terms of another through use of an analogy or other implicit comparison.[82] For example, common terms like "product life cycle" (journey) and "price war" (control) are verbal metaphors.[83] In branding, suggestive and other distinctive word marks—e.g., GLASS DOCTOR for glass installation and repairs (resource) or GREYHOUND for bus services (control)—are also verbal metaphors.[84] Yet, advertising and branding relies heavily on visual metaphor as well.

A visual metaphor is commonly defined as "a representation of an idea, thing, person, or place by way of a visual image *that suggests* a point of similarity or a particular association."[85] A visual metaphor may simply be a color, like green, that is used to convey the environmentally friendly nature of an associated product (resource), or a combination of colors, for example a red and white color scheme representing the United States (connection).[86] Visual metaphors may also be used in more complex logos, product packaging, or other visual symbols—such as a restaurant's décor—that convey information or suggest points of association or similarity as to a brand. For example, the Apple logo is perhaps used to convey the enticing, but iconoclastic nature of the Apple brand by invoking reference to the biblical story of Adam and Eve's fall from grace after consuming an apple—the "forbidden fruit"—from the tree of knowledge of good and evil (transformation).[87] Another example is Starbucks' siren. Starbucks' logo—a mermaid, or siren, with long, spiraling locks of hair—invokes the archetype of the explorer and the theme of the sea (connection).[88] In myth, sirens have long been associated with luring sailors in with enchanting songs, and Starbucks similarly lures consumers in with the promise of a hot beverage and a recess from the daily grind (resource).[89] Starbucks' trade dress

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[81] *Id.*

[82] Charles H. Noble, Mark N. Bing, & Elmira Bogoviyeva, *The Effects of Brand Metaphors as Design Innovation: A Test of Congruency Hypotheses*, 30 J. PROD. INNOV. MANAG. 126 (2013*).*

[83] *Id.*

[84] Synergistic Int'l, Inc. v. Windshield Doctor, Inc., No. CV-03-579 FMC (CWx), 2003 U.S. Dist. LEXIS 12660, at *13 (C.D. Cal. Apr. 28, 2003) (finding GLASS DOCTOR to be suggestive and thus distinctive due to metaphorical significance).

[85] *See, e.g.*, Charles H. Noble, Mark N. Bing, & Elmira Bogoviyeva, *The Effects of Brand Metaphors as Design Innovation: A Test of Congruency Hypotheses*, 30 J. PROD. INNOV. MANAG. 126 (2013) (emphasis added).

[86] *Id.*

[87] MARGARET MARK & CARL PEARSON, THE HERO AND THE OUTLAW: BUILDING EXTRAORDINARY BRANDS THROUGH THE POWER OF ARCHETYPES (2001).

[88] *Id.*

[89] *Id.*

is likewise metaphorical. Its prominent green color evokes natural, ecological imagery, while its in-store décor combines wood and metal piping reminiscent of a voyaging ship (journey).[90]

In the case of a visual metaphor, both the target and source domains are depicted pictorially.[91] Multimodal metaphors are "metaphors in which target, source, and/or mappable features are represented or suggested by at least two different sign systems (one of which may be language) or modes of perception."[92] Edward McQuarrie and Barbara Phillip, experts in the field of metaphor as applied to advertising and branding, explain that visual metaphor and multimodal metaphors are generally more powerful than verbal ones:

> [T]he more deviant the metaphor, or the greater the discrepancy between the unlike things being equated, the more powerful it can be in changing meaning. Verbal metaphor suggests by comparison, especially when it rests on a single word: put a tiger in your tank, as the Esso gasoline ads used to urge. All words are alike, no matter how distant the concepts they invoke: an arbitrary arrangement of phonemes, similar in length, with tens of thousands constructed from the same few dozen available phonemes. The field of pictures is vastly larger and more varied, hence the unlikeness of two objects.[93]

While conceptual metaphor theory refers to the target domain as abstract and the source domain as concrete, that is not always the case in the advertising and branding context.[94] Instead, the target domain is seen to correspond with the product or service being advertised. The source domain—conveniently from a semantic standpoint—can be equated with the source (i.e., the brand or producer) of the product or service. Products or services are often depicted in advertising and branding in a concrete rather than abstract manner. For example, a beer may be portrayed as a wine to show its sophistication, or an

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[90] *Id.*

[91] Charles Forceville, *Metaphor in a Cognitivist Framework*, *in* MULTIMODAL METAPHOR 19, 24 (Charles J. Forceville & Eduardo Urios-Aparisi eds., 2009).

[92] Charles Forceville, *Metaphor in Pictures and Multimodal Representations*, *in* THE CAMBRIDGE HANDBOOK OF METAPHOR AND THOUGHT 462 (Raymond W. Gibbs, Jr. ed., 2008).

[93] BARBARA J. PHILLIPS & EDWARD F. MCQUARRIE, VISUAL BRANDING: A RHETORICAL AND HISTORICAL ANALYSIS 179 (2016).

[94] For this reason and others, at least one scholar has argued that the conceptual metaphor framework is limiting in the advertising and branding context, and that metaphor can better be seen as part of a larger "metaphor scenario" in which consumer interpretations vary. See Charles Forceville, *Metaphor in a cognitivist framework*, in MULTIMODAL METAPHOR 27 (2006).

elegant watch is represented as a butterfly to allude to its beauty. In the trademark context, Prudential Insurance's "Rock of Gibraltar" logo can be seen as a concrete visual representation of the abstract concept of stability—suggesting a characteristic of the brand's insurance-related services.[95] Regardless of concreteness versus abstraction, the metaphor invites a comparison of two objects—the product and the brand—by suggesting that they are like one another despite coming from different domains. The product is the target, while the brand—including its associations, imagery and archetypal significance—is the source.[96]

To decipher metaphors in advertising and branding, consumers must use "imagination, thought and perception" to draw inferences and find similarities between the target and source domains. Based on findings in cognitive science, this occurs through a core process of cognitive thought separable into four mental steps: (1) the relevant terms are accessed from long-term memory; (2) the source is mapped to the target to identify correspondences; (3) analogical inferences are made about the target, thus creating new knowledge; and (4) learning occurs when new links in memory are created.[97] Gerald Zaltman writes about Budweiser as an example:

> When a brand succeeds in establishing a basic association (literally, a neural pathway) in consumers' minds, subsequent activations of this association increase the strength of the pathway so that an entire neural network eventually forms to reinforce it. The beer brewer Anheuser-Busch has repeatedly used the idea of connection as its deep metaphor in advertising its Budweiser brand over time, so that Budweiser owns that association. Consumers' minds implicitly associate Budweiser and social connection. The association hinders other brands from making the same association, and when one of Anheuser-Busch's competitors uses social connection, consumers will think of Budweiser as well.[98]

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[95] Barbara B. Stern, *Figurative Language in Services Advertising: The Nature of Uses of Imagery*, 15 ADVANCES IN CONSUMER RES. 185 (1988).

[96] JAMES GEARY, I IS AN OTHER: THE SECRET LIFE OF METAPHOR AND HOW IT SHAPES THE WAY WE SEE THE WORLD, 72 (2011) ("An ad is a metaphor in which the product is the target and a set of affects—imagery, associations, archetypes—is the source") (citing JUDITH WILLIAMSON, DECODING ADVERTISEMENTS: IDEOLOGY AND MEANING IN ADVERTISING (London and New York: Marion Boyards, 1985)).

[97] Barbara J. Phillips & Edward F. McQuarrie, *Beyond Visual Metaphor: A New Typology of Visual Rhetoric in Advertising*, 4 MARKETING THEORY 113, 119 (2004).

[98] GERALD ZALTMAN & LINDSAY H. ZALTMAN, MARKETING METAPHORIA (2008).

Use of metaphor leads to increased (1) "vividness" and (2) "brand differentiation," as well as (3) contributes to a brand's "personality."[99] First, metaphor has been found to make advertising and branding more vivid. Vividness has been defined as "emotionally interesting, concrete, and imagery provoking."[100] It is the branding corollary to trademark distinctiveness.[101] A fundamental goal of branding involves developing a brand that is perceived by consumers as a vivid one.[102] Vivid information in the form of metaphor has been shown to attract consumer attention and add interest more so than pallid and abstract stimuli.[103] For example, use of the verbal metaphor "Today's Slims at a very slim price" will likely engage consumers more than the literal statement "Today's Slims at a very low price."[104] In terms of visual metaphor, when Kellogg's uses its Tony the Tiger trademark, "that act of personification invites the consumer to transfer meaning from . . . a very enthusiastic and youthful cartoon tiger to the brand and product."[105] As Rebecca Tushnet notes, vividness is helpful in serving trademark law's information function because "[a] term a consumer can't remember is by definition not doing a good job as an indicator of source, and, thus can't serve the functions we attribute to trademarks of protecting consumers from confusion and incentivizing producers to keep quality high."[106]

Second, metaphor has been linked to brand differentiation. Similar to

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[99] *See* Charles H. Noble, Mark N. Bing, & Elmira Bogoviyeva, *The Effects of Brand Metaphors as Design Innovation: A Test of Congruency Hypotheses*, 30 J. PROD. INNOV. MANAG. 126 (2013); *see also* Katherine L. Spencer, *Evaluating Trademark Design* (Master's Thesis 2011) (finding that "[t]rademarks with high subject-content compatibility and trademarks that use visual metaphor resulted in significantly higher comprehension (as measured by ability to match trademark to company description), indicating that the graphic design community may want to consider utilizing graphics with high subject-content compatibility, or visual metaphor if comprehension is determined to be an important focus during the trademark design process.").

[100] Rebecca Tushnet, *Looking at the Lanham Act: Images in Trademark and Advertising Law*, 48 HOUS. L. REV. 861, 869 (2011) (citing RICHARD E. NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 45 (1980)).

[101] Rebecca Tushnet, *Looking at the Lanham Act: Images in Trademark and Advertising Law*, 48 HOUS. L. REV. 861, 869 (2011).

[102] *E.g.*, Charles H. Noble, Mark N. Bing, & Elmira Bogoviyeva, *The Effects of Brand Metaphors as Design Innovation: A Test of Congruency Hypotheses*, 30 J. PROD. INNOV. MANAG. 126, 129 (2013).

[103] *Id.*

[104] Edward F. McQuarrie & David Glen Mick, *Visual Rhetoric in Advertising: Text-Interpretive, Experimental, and Reader-Response Analyses*, 26 J. OF CONSUMER RES. 37, 38-39 (1999).

[105] BARBARA J. PHILLIPS & EDWARD F. MCQUARRIE, VISUAL BRANDING: A RHETORICAL AND HISTORICAL ANALYSIS 178 (2016).

[106] Rebecca Tushnet, *Looking at the Lanham Act: Images in Trademark and Advertising Law*, 48 HOUS. L. REV. 861, 870 (2011).

vividness, brand differentiation "is an essential element of a brand that makes it noticeable in the marketplace and meaningful to consumers."[107] While vividness involves an isolated assessment of a single brand for clarity and strength, differentiation measures a brand in comparison to competitors as reference points.[108] Branding expert David Aaker has identified four factors that contribute to the distinctiveness and strength of a brand: (1) differentiation, which "[m]easures how *distinctive* the brand is in the marketplace"; (2) relevance, i.e., "whether a brand has personal relevance for the respondent"; (3) esteem, which "[m]easures whether a brand is held in high regard and considered the best in its class"; and (4) knowledge, which is "[a] measuring of understanding as to what a brand stands for."[109] Yet, David Aaker notes that based on a structured survey of over 13,000 brands in more than thirty countries, "differentiation is the key to a strong brand, more so than esteem, relevance, and knowledge."[110] Use of metaphor has been found to have a positive influence on brand differentiation. Indeed, research "stresses the importance of brand metaphors, particularly when used strategically and in combination, in order to create differentiated and desirable products in the marketplace."[111]

Third, metaphor has an influence on a brand's personality. Consumers use brands as indicators of source and quality, but also as expressions of individuality, self-identity, and self-image.[112] Brands thus encompass a symbolic, emotional component that appeals to consumers through use of metaphor. This subjective, emotional, and aesthetic aspect of brands involves "more complex . . . characteristics . . . which are related to image building and include status/power, inherent value and finally, the development of brand personality."[113] As will be discussed in the next sub-Part, this symbolic function is entangled with a trademark's source-identification function.

According to David Aaker's brand identity theory, a brand starts with a

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[107] Charles H. Noble, Mark N. Bing, & Elmira Bogoviyeva, *The Effects of Brand Metaphors as Design Innovation: A Test of Congruency Hypotheses*, 30 J. PROD. INNOV. MANAG. 126, 130 (2013).

[108] *Id.*

[109] DAVID A. AAKER, BUILDING STRONG BRANDS 304 (1995).

[110] DAVID A. AAKER & ERICH JOACHIMSTHALER, BRAND LEADERSHIP 263 (2000).

[111] Charles H. Noble, Mark N. Bing, & Elmira Bogoviyeva, *The Effects of Brand Metaphors as Design Innovation: A Test of Congruency Hypotheses*, 30 J. PROD. INNOV. MANAG. 126, 129-130 (2013); *see also* Katherine L. Spencer, *Evaluating Trademark Design* (Master's Thesis 2011).

[112] *See, e.g.*, John W. Schouten & James H. McAlenxander, *Subcultures of Consumption: An Ethnography of the New Bikers*, 22 J. CONSUMER RES. 43, 55 (1995) (focusing on Harley-Davidson enthusiasts); Tereza Kuldova, *Hells Angels Motorcycle Corporation in the Fashion Business: Interrogating the Fetishism of the Trademark Law*, OXFORD ACAD. J. OF DESIGN HIST. (Oct. 5, 2016) https://academic.oup.com/jdh/article-pdf/doi/10.1093/jdh/epw041/8190428/epw041.pdf; Russell W. Belk & Gulnur Tumbuat, *The Cult of Macintosh*, 8:3 CONSUMPTION MKTS. & CULTURE 205 (2005).

[113] WEBER WALLER, BRANDS, COMPETITION, AND IP 79 (ed. Devan Desai et al. 2015).

corporate identity, which consumers then interpret as a brand's image, or—metaphorically—as its personality. Personification of a brand means "to invoke a metaphor for it."[114] As one expert notes:

> Brands as intangible entities represent the cognitive-affective concepts stakeholders maintain about a particular product, service, or in the case of corporate brands, company. To make these abstract models graspable, companies have since the 1980s sought to conceptualize themselves and their *brands as living organisms*, even endowing them with a quasi-human personality.[115]

Jennifer Aaker has developed a theoretical and psychological framework of brand personality based on the "Big Five" personality model. [116] In Jennifer Aaker's framework, five dimensions of brand personality are considered—(1) extraversion, (2) agreeableness, (3) openness to experience, (4) conscientiousness, and (5) neuroticism.[117]

As an example, consider again Kellogg's use of its Tony the Tiger mark in connection with its Frosted Flakes cereal. Cereal is nothing like a tiger in the literal sense. However, from a figurative lens, McQuarrie and Phillips note:

> Personification positions the brand as living, not dead, and as an emotional partner rather than an inert thing. This positioning makes it easier to attribute a personality to the brand and to elaborate upon and associate personal characteristics with the brand. If Tony the Tiger is perceived as perky and energetic and trustworthy, then the Kellogg's brand can take on these characteristics as well, and the consumer can relate to the brand as it would relate to such a person.[118]

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[114] BARBARA J. PHILLIPS & EDWARD F. MCQUARRIE, VISUAL BRANDING: A RHETORICAL AND HISTORICAL ANALYSIS 178 (2016) ("In rhetorical terms, and consistent with a long tradition dating back to the Greeks, to personify a brand is to invoke a metaphor for it. More exactly, personification initiates a metaphorical transfer of meaning.").

[115] Veronika Koller, *Brand Images: Mutimodal Metahpor in Corporate Branding Messages*, *in* MULTIMODAL METAPHOR 45, 50 (Charles J. Forceville & Eduardo Urios-Aparisi eds., 2009) (emphasis added).

[116] Jennifer L. Aaker, *Dimensions of Brand Personality*, 34 J. OF MARKETING RES. 347 (1997).

[117] *Id.*

[118] BARBARA J. PHILLIPS & EDWARD F. MCQUARRIE, VISUAL BRANDING: A RHETORICAL AND HISTORICAL ANALYSIS 178 (2016).

In sum, use of verbal and visual metaphor has been found to increase a brand's vividness, differentiation in the marketplace, and personality. Vividness and differentiation allows consumers to identify a brand in an economic, concrete, and informational aspect, while personality functions in a cultural, aesthetic, and psychological aspect. The next sub-Part explains how trademark law, perhaps latently, acknowledges the symbolic and metaphorical nature of marks in both these aspects.

C. Trade Symbolism

While the definition of symbol varies across disciplines, all agree that the sine qua non of a symbol is that it contain a literal, denotative aspect in addition to a figurative, connotative dimension expressed through metaphor.[119] For instance, noted philosopher and hermeneutics expert Paul Ricoeur has defined symbol "as any structure of significance in which a direct, primary, literal meaning designates, in addition, another meaning which is indirect, secondary, and figurative and which can be apprehended only through the first.[120] Carl Jung, founder of analytical psychology—the psychology premised on understanding the symbolism of the unconscious psyche—explains that "[w]hat we call a symbol is a term, a name, or even a picture that may be familiar in daily life, yet that possesses specific connotations in addition to its conventional and obvious meaning."[121] And, renowned literary scholars Rene Wellek and Austin Warren describe the relationship between symbols, images, and metaphor in their seminal *Theory of Literature*:

> Is there any important sense in which "symbol" differs from "image" and "metaphor"? Primarily, we think, in the recurrence and persistence of the "symbol." An "image" may be invoked once as a metaphor, but if it persistently recurs, both as presentation and representation, it becomes a symbol, and may even become part of a symbolic (or mythic) system.[122]

Trademarks—or trade symbols as they are often called[123]—are part of a

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[119] *See supra* note 8.

[120] PAUL RICOEUR, *Existence and Hermeneutics*, in THE CONFLICT OF INTERPRETATION: ESSAYS IN HERMENEUTICS 13 (1974).

[121] Carl G. Jung, MAN AND HIS SYMBOLS 20 (1964).

[122] RENE WELLEK & AUSTIN WARREN, THEORY OF LITERATURE 178 (1948).

[123] *See, e.g.*, Ralph S. Brown, *Advertising and the Public Interest: Legal Protections of Trade Symbols*, 57 YALE L.J. 1165 (1948). (referring to trademark law as the law of trade symbols and analyzing their effect, as such, on the public interest); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1, 18 (1999) (same).

symbolic and mythic system of commerce.[124] The United States Supreme Court, in *Qualitex Co. v. Jacobsen Prods. Co.*, held that "'the requirements for qualification of a word or symbol as a trademark are that it be (1) a '*symbol*,' (2) 'use[d] . . . as a mark,' (3) to identify and distinguish the seller's goods from goods made or sold by others,' but that it not be 'functional.'").[125] The Court adopted this reformulation of the Lanham Act's definition of "trademark" from trademark luminary J. Thomas McCarthy's treatise:

> The requirements for qualification of a word or symbol as a trademark can be broken down into three elements: (1) the tangible *symbol*: a word, name, symbol or device or any combination of these; (2) type of use: actual adoption and use of the symbol as a mark by a manufacturer or seller of goods or services; (3) the function: to identify and distinguish the seller's goods from goods made or sold by others.[126]

Trademarks are recognized in their symbolic aspect in each of (1) law and economic, (2) linguistic and semiotic, and (3) brand-based and psychological accounts of trademark law.

1. Law and Economics

Law and economic theory, often referred to as the "search costs" theory, predominates trademark law—including at its highest levels.[127] It owes its origins to the economic analysis of the Chicago School, and specifically to William Landes and Richard Posner's influential law review article, *Trademark Law: An Economic Perspective*.[128] Professor Landes and Judge Posner hypothesized that trademark law can best be *explained* as attempting to promote economic

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[124] *See generally* Thomas D. Drescher, *The Transformation and Evolution of Trademarks—from Signals to Symbols to Myth*, 82 TRADEMARK REP. 301, 301-340 (1992).

[125] Qualitex Co. v. Jacobsen Prods. Co., 514 U.S. 159, 166 (1995) (citing 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 3.1 (4th Ed. 2002)).

[126] 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 3.1 (4th Ed. 2002).

[127] *See, e.g.*, Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 624 (2004); Jeremy Sheff, *Biasing Brands*, 32 CARDOZO L. REV. 1246, 1249 (2011). § 3.1 (4th Ed. 2002).

[128] *See generally* William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L & ECON. 265, 265-66 (1987).

efficiency. However, it is often seen today as trademark law's foremost *normative* goal.[129]

According to the Chicago School approach, the fundamental purpose of trademark law is to reduce consumer search costs by providing a concise and unequivocal identifier of a particular good or service.[130] A consumer who is able to quickly determine whose brand he or she is being asked to buy is able to purchase more goods and services if the brand pleases, or whom to hold responsible if it disappoints. This in turn provides producers with an incentive to maintain quality control, since otherwise the investment in a mark may be lost if consumers turn away from the brand in disappointment. A less successful brand may be incentivized to pass themselves off as a more successful one, though, by adopting a confusingly similar mark. The goal of trademark law is to prevent against this practice and thus consumer confusion.[131]

The economic justification ostensibly provides a normative explanation for trademark distinctiveness.[132] Under the search costs rationale, a trademark is protected because, and protectable to the extent that, it is "distinct from the product it brands and also conveys information about that separate product."[133] According to Landes and Posner, a lack of trademark distinctiveness renders a mark incapable of distinguishing one brand's goods and services from those of another. Thus, under the economic rationale, for a distinctive trademark to accomplish its source-identifying goal,—consistent with its status as a trade symbol— it must (1) denote source and (2) connote qualities or values relating to its associated product.[134] However, Landes and Posner claim that consumers rely on trademarks only as informational devices, which commentators have

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[129] *Id.* at 265-66 (1987) (claiming that "trademark law, like tort law in general . . . can best be explained on the hypothesis that the law is trying to promote economic efficiency."); *see also* Mark McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1842 (2007) (explaining that [t]he law and economics scholars . . . relied on [a] descriptive account to lend legitimacy to their normative conclusion.").

[130] *Id.*; *see also generally* Stephen L. Carter, *The Trouble With Trademark*, 99 YALE L.J. 759 (1990); NICHOLAS ECONOMIDES, TRADEMARKS, IN THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 601 (1998); Nicholas Economides, *The Economics of Trademarks*, 78 TRADEMARK REP. 523 (1988); Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687 (1999).

[131] *See, e.g.,* Polaroid Corp. v. Polaroid Elecs. Corp., 287 F.2d 492, 495 (2d Cir. 1961) (internal citations omitted); Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 549 (2006) ("[T]he 'information transmission model' . . . views trademarks as devices for communicating information to the market and sees the goal of trademark law as preventing others from using similar marks to deceive or confuse consumers.").

[132] Jake Linford, *The False Dichotomy Between Suggestive and Descriptive Trademarks*, 76 OHIO ST. L.J. 1367, 1369 (2015).

[133] PETER GROVES, SOURCEBOOK ON INTELLECTUAL PROPERTY LAW 540 (1997).

[134] Jake Linford, *Are Trademarks Ever Fanciful?*, 105 GEO. L. J. 731 (2017).

since heavily debated.[135] Trademarks, as symbols, have cultural and aesthetic functions as well.[136]

2. Linguistic and Semiotic Analyses

Given trademarks' status as symbols, scholars such as Barton Beebe have seen fit to analyze them from the lens of semiotics—the branch of linguistics studying signs and symbols.[137] While semiotics (unlike linguistics) has a visual aspect, Beebe limits his analysis to word marks. Beebe explains that trademark law is a hybrid economic and semiotic doctrine:

> Though powerful, the economic analysis of trademark law remains incomplete. It cannot explain, predict, or justify certain outcomes in the law, nor can it articulate the need for necessary reforms. This is nowhere near more apparent than in its treatment of the concepts of trademark "distinctiveness" and trademark "dilution." The economic analysis falls short for two reasons. First, trademark doctrine is a hybrid doctrine. It is not simply an economic doctrine elaborating the principles of the market. It is also, and at the same time, a semiotic doctrine elaborating the principles of sign systems of language. If there is a "language of commodities," then trademark doctrine is its grammar, and this grammar must be understood not simply in economic, but also in linguistic terms. The second reason follows in part from the first. In asserting that trademarks do no more than facilitate search and encourage quality, the Chicago School has long declined to acknowledge what is obvious: that firms produce trademark as status goods, and that consumers consume trademarks to signal status, and that courts routinely invest trademarks with legal protection in an effort to preserve this status-signaling function.[138]

Invoking Saussurean semiotics and the work of postmodern

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[135] *See, e.g.*, Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2024 (2005).

[136] *See, e.g.*, *id.*; Scott Magids, *The New Science of Customer Emotions,* HARV. BUS. REV. 1 (2015).

[137] For an introduction to semiotics generally, see for example THOMAS A. SEBEOK, SIGNS: AN INTRODUCTION TO SEMIOTICS (Univ. Toronto Press, 1994).

[138] Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. Rev. 621, 624 (2004); *see also* Jeremy Sheff, *Veblen Brands*, 96 MINN L. REV. 769, 825 (2012).

philosopher Jean Baudrillard,[139] Beebe theorizes that the "triadic structure" of the trademark consists of three elements: (1) the "signifier," or tangible symbol "conveying into the mind something from without"; (2) the "referent," "which can be a physical 'object of the world' or a mental entity 'of the nature of thought or of a sign"; and (3) the "signified," which constitutes the "proper significate effect . . . of the sign."[140] Under Beebe's semiotic theory, these elements are each one corner of the "semiotic triangle" that corresponds with trademark law's "requirements for qualification of a mark or symbol as a [distinctive] trademark."[141]

Beebe equates this "triadic structure" with the elements of a trademark articulated by J. Thomas McCarthy and embraced by the Supreme Court in *Qualitex*. Put simply, each of these elements may be likened to the semiotic triangle. The first element—the tangible symbol—corresponds with the signifier because each refers to "the perceptible form of the mark."[142] The second element—the type of use—corresponds with the referent in that it is needed to connect the marked goods and services (via the consumer's imagination) with the tangible signifier.[143] Finally, the third element—the function of the mark—is associated with the signified, meaning (in the trademark context) the specific source of the goods or services.[144] As an example, the mark NIKE consists of a signifier (the mark NIKE), a signified (Nike, Inc., the entity or its brand), and the referent (the goods—athletic wear).[145]

To function as a symbol, marks must operate on both literal and figurative levels so as to designate source as well as reveal information about a product or service.[146] Metaphor—by invoking both the signified and the referent—allows the trademark, as the signifier, to "mediate" between the signified (i.e., the source) and the referent (i.e., the product or service).[147] In this

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[139] *See, e.g.*, JEAN BAUDRILLARD, THE CONSUMER SOCIETY: MYTHS AND STRUCTURES (Chris Turner trans., Safe Publ'ns 1998) (1970) (critiquing the symbolic meaning of consumption and mass media in modern culture); JEAN BAUDRILLARD, SIMULACRA AND SIMULATION (Sheila Faria Glaser trans. 1988) (examining the increasingly tenuous connection between symbols and reality). The latter work served loosely as source material for the *Matrix* films, in which the main protagonist, Neo, finds out he is living in a manufactured "hyper-reality." *See infra* notes 167 to 170 and accompanying discussion.

[140] Barton Beebe, *The Semiotic Analysis of Trademark Law,* 51 UCLA. L. REV. 621 (2004).

[141] *Id.* at 625.

[142] *Id.* at 637.

[143] *Id.* at 646

[144] *Id.*

[145] *See id.* at 654.

[146] Laura A. Heymann, *The Grammar of Trademarks*, 14 LEWIS & CLARK L. REV. 1313 (2010).

[147] Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 653 (2004); Duraco Prods., Inc. v. Joy Plastics Enters., Ltd., 40 F.3d 1431, 1440 (3d Cir. 1994).

way, the trademark, as analogous to the signifier, "is understood to function as the hinge within the sign"—the sign consisting of the commodity itself.[148] The trade symbol via metaphor thus "identifies and distinguishes the good's source, and the identification of the goods' source identifies and distinguishes in turn the goods themselves."[149]

Other commentators, too, have applied aspects of linguistics to trademark law.[150] In particular, Jake Linford's research finds that additional insight into trademark meaning and its relationship to lowering consumer search costs can be gleaned by "examining how language changes, how change is processed, and how new meanings are added to the lexicon."[151] As to trademark distinctiveness especially, understanding "semantic shift" may help in evaluating the ways in which consumers react to word marks whose meanings derive from already-existing words.

Linford finds that categories of semantic shift correspond with the various classifications of word marks posited by the *Abercrombie* spectrum. Except for those employing sound symbolism,[152] Linford equates fanciful marks—words coined for use as marks and not derived from preexisting words—with *monosemes*: words having only one meaning.[153] Arbitrary marks—derived from a preexisting word allegedly having no connection with the product or service sold—are comparable to *homonyms*: words having no connection between an existing meaning and a new brand-related meaning.[154] Suggestive marks—preexisting words requiring an "imaginative leap" between the mark and the product are *metaphors*: marks establishing a figurative connection between the existing meaning of the word and its new trademark-related meaning.[155] Descriptive marks—preexisting terms directly describing a

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[148] *Id.*

[149] *Id.* at 653.

[150] *See generally* Laura A. Heymann, *The Grammar of Trademarks*, 14 LEWIS & CLARK L. REV. 1313 (2010); Laura A. Heymann, *A Name I Call Myself: Creativity and Naming*, 2 UC IRVINE L. REV. 585 (2012); Jake Linford, *A Linguistic Justification for Protecting "Generic" Trademarks*; 17 YALE J.L. & TECH. 110 (2015); Graeme B. Dinwoodie, *What Linguistics Can Do for Trademark Law, in Trade Marks and Brands*, in TRADEMARKS AND BRANDS 140, 157 (Lionel Bently et al. eds. 2008); Alan Durant, *How Can I Tell the Trade Mark on a Piece of Gingerbread from All the Other Marks on It?' Naming and Meaning in Verbal Trade Mark Signs*, in TRADEMARKS AND BRANDS 107, 132 ((Lionel Bently et al. eds. 2008); Katya Assaf, *The Dilution of Culture and the Law of Trademarks*, 49 IDEA: THE JOURNAL OF LAW AND TECHNOLOGY 1 (2008).

[151] Jake Linford, *The False Dichotomy Between Suggestive and Descriptive Marks*, 76 OHIO ST. L.J. 1367, 1376 (2015).

[152] *Id.*

[153] *Id.* at 1397.

[154] *Id.* at 1398; *but see* Part II.B.

[155] Laura A. Heymann, *The Grammar of Trademarks*, 14 LEWIS & CLARK L. REV. 1313 (2010); Laura A. Heymann, *A Name I Call Myself: Creativity and Naming*, 2 UC IRVINE L. REV. 585 (2012); *see also id.*.

feature of an equated product or service—are roughly comparable to *metonyms*: terms having a contiguous connection between an already existing meaning and a new sense such as a part for a whole (e.g., "suit" used to describe a corporate employee).[156] Finally, generic marks are words restricted from trademark protection that are used to describe general categories or members of a specific category.[157] Under the *Abercrombie* framework, Linford notes that to accomplish its source-identifying goal, a distinctive trademark—consistent with its status as a trade symbol, and from a linguistic standpoint too— must (1) denote source and (2) connote qualities or values relating to its associated product.[158]

3. Consumer Psychology and Brand-Focused Theories

Beyond the word-based limits of linguistics, commentators have begun to explore the trademark as contributing to an overall brand concept that includes images.[159] Devan Desai finds that "trademarks and brands are not the same," and rejects the widespread assumption that trademarks seek only to lower consumer search costs.[160] On the other hand, he argues that several of trademark law's doctrines—including distinctiveness—serve to protect the various dimensions of brands beyond their information function.[161] According to Professor Desai's research into the advertising literature, trademarks are part of an integrated brand concept containing (1) word marks, (2) an "emotional, symbolic component," and (3) various types of images in the form of logos and trade dress.[162] Consider Coca-Cola, for example:

> Part of Coke's power comes from Coke the brand. Coke's label with the words 'Coca-Cola' flowing across a red field in white cursive script or Coke's iconic glass bottle are aspects of Coke's brand. Coke's brand has an emotional, symbolic component, as the brand evokes a sense of being

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156 Jake Linford, *The False Dichotomy Between Suggestive and Descriptive Marks*, 76 OHIO ST. L.J. 1367, 1404 (2015).

157 *Id.* at 1404.

158 Jake Linford, *Are Trademarks Ever Fanciful?*, 105 GEO. L. J. 731 (2017).

159 *See, e.g.*, Devan Desai, *From Trademarks to Brands*, 64 FLA. L. REV. 981 (2012); Devan R. Desai & Spencer Waller, *Brands, Competition and the Law,* 2010 B.Y.U. L. REV. 1425 (2011); Irina D. Manta, *Hedonic Trademarks*; 74 OHIO ST. L. J. 242 (2013), Irina D. Manta, *Branded*, 69 SMU. L. REV. 713 (2016); Jeremy N. Scheff, *Veblen Brands*, 96 MINN. L. REV. 769 (2012); Jeanne C. Fromer, *The Role of Creativity in Trademark Law,* 86 NOTRE DAME L. REV. 1885 (2011); Katya Assaf, *Magical Thinking in Trademark Law,* 37 LAW & SOCIAL INQUIRY 597 (2012); Katya Assaf, *Brand Fetishism,* 43 CONN. L. REV. 83 (2009).

160 Devin R. Resai, *From Trademarks to Brands*, 64 Fla. L. Rev. 981, 988 (2012).

161 *Id* at 1009.

162 *Id.*; *see also* Timothy Denny Green & Jeff Wilkerson, *Understanding Trademark Strength*, 16 STANFORD TECH. L. REV. 535 (2013).

> all-American, 'Classic,' and the perfect refreshing drink, whether it is the Fourth of July or Christmas. A sip of Coke means imbibing an entire culture.[163]

Here, it is not simply the trade dress (in the form of product packaging) in its literal form that grants the mark its source signifying power. It is also the brand's "emotional, symbolic component" that appears as a visual metaphor—the red field in white cursive script that is a metaphor for America. Metaphorical significance provides the trade dress with conceptual separation from the soft drink product itself, thereby providing it with a figurative and connotative dimension of meaning for consumers to interpret.[164]

Desai draws sharp contrast between a trademark's information function and its persuasive one. He claims that trade dress does not usually serve to indicate a product's source in the informational sense—by lowering consumer search costs.[165] Rather, it is linked to a brand's "total image," thus serving a symbolic, emotional and persuasive function beyond conveyance of product information.[166] While Desai questions why modern trademark law protects this interest, other scholars find that even marks that are subjective, emotional, and abstract in nature—such as most trade dress—are not easily distinguished by consumers from marks that refer to concrete, objective product associations thought to function as source identifiers in the traditional sense.[167]

One scholar has effectively illustrated this false dichotomy by invoking the metaphor of the red pill and the blue pill from the movie *The Matrix*. In linking advertising's "real" information function with the red pill and the manufactured "fake reality" of branded products with the blue pill, we find that there is no real way to differentiate the two: "As a result of the deep relationship between marks and advertising, as well as other factors, people genuinely have different physiological responses to some products than others."[168] To return to the Coke example above, "brain scans reveal that even though Pepsi might win out in blind taste tests, individuals who drink Coke have a different cerebral experience when drinking branded as opposed to unbranded Coke."[169] Thus, even the persuasive, "hedonic" function of brands conveys to consumers a very

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[163] Devin R. Resai, *From Trademarks to Brands*, 64 FLA. L. REV. 981, 983 (2012).

[164] This is in contrast to Coke's iconic glass bottle, which, as a form of product design, is not protectable without secondary meaning. The Supreme Court established that as a bright-line rule, as at least most cases product designs do not connote anything, they "just are." *See* Duraco Prods., Inc. v. Joy Plastics Enters., Ltd., 40 F.3d 1431 (3d Cir. 1994).

[165] Devin R. Resai, *From Trademarks to Brands*, 64 FLA. L. REV. 981, 993 (2012).

[166] *Id* at 1023.

[167] *See generally* Jeremy N. Sheff, *Biasing Brands,* 23 CARDOZO L. REV. 1245 (2011); Irana D. Manta, *Hedonic Trademarks* 74 OHIO ST. L. J. 241 (2013); Jake Linford, *Placebo Marks* (manuscript on file with author).

[168] Irina D. Manta, *Hedonic Trademarks,* 74 OHIO ST. L.J. 241, 243 (2013).

[169] *Id.* at 254.

real form of information.[170] As Baudrilliard and Beebe claim, we are perhaps living in an ever-increasingly manufactured hyper-reality of which there is no purely economic and informational escape hatch.[171]

Similarly, branding has been found to bias consumers by leading them to hold subjective beliefs which diverge from objective behavior about a product or service, which in turn influences consumer preferences and consumptive behavior.[172] This "brand bias" has been observed universally across consumer experience levels, product categories, and cultures.[173] Brand bias, like deep metaphor, operates on an unconscious level.[174] Consumers do not realize that their preferences are being altered and are thus unable to correct for it. Yet, the issue is not simply one of subjective and irrational belief.[175] Recent research suggests that there is actually a placebo effect associated with using trademarks with high-performance reputations.[176] These findings illustrates that trade symbols have real power in an objective sense. For example, consumers using a putter with a Nike mark on it were found to have sunk a putt in 20% less strokes than those using a putter with another label.[177]

The "sticky" entanglement of a trade symbol's information and aesthetic functions[178] leads to the conclusion that trademark law must take into account the fact that consumer use brands not just as narrow "source" identifiers that reduce search costs, but also as symbolic resources that they gravitate to for social and even spiritual reasons. From a psychological perspective, logos and trade dress act as subjective "vehicles for the transfer of meaning from a brand to the consumer," who in turn engage in a process called symbolic consumption, using brands as "symbolic resources for the construction and maintenance of identity."[179] The metaphorical meaning of brands is in turn perceived by

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[170] Irina D. Manta, *Hedonic Trademarks*, 74 OHIO ST. L.J. 241, 254 (2013).

[171] *See supra* notes 138 to 149 and accompanying discussion.

[172] Jeremy N. Sheff, *Biasing Brands*, 32 CARDOZO L. REV. 1245, 1278 (2011).

[173] *Id.* at 1293.

[174] Jeremy N. Sheff, *Biasing Brands*, 32 CARDOZO L. REV. 1245, 1280 (2011); *supra* notes 67 to 81 and accompanying discussion.

[175] *Cf.* Katya Assaf, *Magical Thinking in Trademark Law*, 37 L. & SOC. INQUIRY 595, 596 (2012) (acknowledging that the psychological effects of brands are real, but arguing that does not justify the broad protections that trademark law currently provides to them).

[176] See, e.g., Jake Linford, *Placebo Marks* (manuscript on file with author)

[177] *Id.* (citing Aaron M. Garvey, Frank Germann, & Lisa E. Bolton, *Performance Brand Placebos How Brands Improve Performance and Consumers Take the Credit*, 42 J. CONSUMER RES. 931 (2016)).

[178] Jeremy N. Sheff, *Biasing Brands*, 32 CARDOZO L. REV. 1245, 1294 (2011).

[179] Veronika Koller, *Brand Images: Mutimodal Metahpor in Corporate Branding Messages*, *in* MULTIMODAL METAPHOR 45, 51 (Charles J. Forceville & Eduardo Urios-Aparisi eds., 2009) (citing Majken Schultz, Mary Jo Hatch, & Francesco Ciccolella, *Brand Life in Symbols and Artifacts: The LEGO Company*, *in* ARTIFACTS AND ORGANIZATIONS: BEYOND MERE SYMBOLISM 141, 150 (Anat Rafaeli & Michael G. Pratt eds., 2006)).

consumers as containing "emotional and self-expressive benefits."[180]

Because consumers assign value to the cultural meaning of marks, these subjective, abstract and value-laden dimensions of brands contribute to a mark's source-identifying significance just as does objective information regarding product attributes and qualities. An analysis of the distinctiveness of word marks, logos, and trade dress must therefore consider the subjective and symbolic aspects of brands just as it considers the objective and economic dimensions of trademarks as efficiency-generating devices. No matter the theory of trademark law under consideration, the symbolic, metaphorical aspect of the trademark is unavoidable. Just as Justice Felix Frankfurter remarked in 1942, "[t]he protection of trade-marks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them."[181]

II. VERBAL METAPHOR AND THE DISTINCTIVENESS OF WORD MARKS

The concept of distinctiveness is the hinge on which trademark law turns.

Barton Beebe[182]

This Part explains that trademark law currently uses metaphor as its doctrinal trigger for deciding the inherent distinctiveness of word marks. Part II.A examines trademark law's "anonymous source" doctrine. Rather than symbolizing a business's underlying goodwill, trademarks today are a symbolic form of entity creation in their own right. Because the actual source of a product or service is usually anonymous, trademarks must be linked—creatively, through metaphor—to their underlying good or service to imprint them in the minds of consumers.[183] Part II.B reviews the *Abercrombie* spectrum as a "hierarchy of figurativeness."[184] Part II.C explains that trademark law's primary test for determining the inherent distinctiveness of word marks, the "imagination" test, is implicitly a test of metaphorical thought in that it seeks a figurative or incongruous connection between a mark and its associated product or service. The inherent distinctiveness of a word mark thus hinges on the use of a verbal metaphor. Indeed, "[t]he most 'intellectual of the intellectual properties, trademarks are a property purely of consumers' minds."[185]

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[180] *Id.*

[181] Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203 (1942).

[182] Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 625 (2004).

[183] *See* Irina D. Manta, *Branded*, 69 SMU L. REV. 713 (2016); Jeanne Fromer, *The Role of Creativity in Trademark Law*, 86 NOTRE DAME L. REV. 1885 (2011).

[184] Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 670 (2004).

[185] Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2021

A. The Anonymous Source Doctrine

Trademark distinctiveness is defined as the "tendency to identify the goods [or services] sold as emanating from a particular, though possibly anonymous, source."[186] The doctrine holds that a mark must represent a single source, but consumers do not need to know its actual origin. This "anonymous source doctrine" is a departure from historic trademark law in that it serves to link source with a particular brand rather than its specific origin.[187] Modern trademark law sees the mark—itself—as "a repository for meaning."[188] Consider Nike again, for instance. The word mark NIKE or the swoosh logo need only indicate the seller-brand, e.g., "Nike" or its logo equivalent, rather than indicate the largely unknown actual producer of the shoes.[189] Laura Heymann, who has written extensively on this topic, employs the analogy of a writer who is free to write under a pseudonym to explain this concept.[190] For example, J.K. Rowling, the author of the Harry Potter book series, has written under the name Robert Galbraith so as not to reveal to readers her true identity.[191]

In this way, the mark—actually the brand—is now seen as synonymous with source. The mark serves as a symbol for a particular brand and thus facilitates the sale of a good or service. It does not merely symbolize goodwill, but instead creates goodwill in and of itself.[192] Consumers care about the mark

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(2005); *see also* Dustin Marlan, *Trademark Takings: Trademarks as Constitutional Property Under the Fifth Amendment Takings Clause*, 15 U. PA. J. CONST. L. 1581 (2013) (claiming that trademarks are both intangible private property and constitutional property for purposes of the Fifth Amendment Takings Clause).

[186] Paddington Corp. v. Attiki Importers & Distributors, Inc., 996 F.2d 577, 585 (2d Cir. 1993).

[187] *See* Zino Davidoff SA v. CVS Corp., 571 F.3d 238, 244 (2d Cir. 2009); Laura A. Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377, 1381 (2005); Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 EMORY L.J. 461, 467 (2005);

[188] Glynn S. Lunney, Jr., *Trademark Monopolies,* 48 EMORY L.J. 367, 417 (1999).

[189] The anonymous source doctrine reflects corporations' shift of focus to branding while contracting out production to suppliers in other parts of the world. Gerald Davis uses the term "Nikeification" to describe the widespread adoption of this model. See Gerald F. Davis, *What Might Replace the Modern Corporation? Uberization and the Web Page Enterprise*, SEATTLE U. L. REV. 501, 502 (2015). Thus, the word "producer"—used widely in trademark law to refer to mark owners—is something of an anachronism.

[190] Laura A. Heymann, *The Birth of the Authornym*, 80 NOTRE DAME. L. REV. 1377, 1379 (2005).

[191] *See, e.g.*, ROBERT GALBRAITH, THE CUCKOO'S CALLING (2013).

[192] *See* Jessica Silbey, *The Mythical Beginnings of Intellectual Property*, 15 GEO. MASON L. REV. 319, 360 (2008) (citing Frank I. Schecter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 831 (1927) ("[T]oday, the trademark is not merely the symbol of good

rather than the actual—and typically unknown—producer. The trade symbol must therefore be distinctive vis-à-vis its associated product or service. Professor Heymann writes:

> [The anonymous source doctrine] is what frees producers from the requirement of a single mark from the guild era and permits them to affirmatively choose an identity to be associated with their product. As a result, the mark may well suggest some quality about the product (or suggest qualities the producer wishes to convey about the product, whether or not it is empirically true), but it need not directly convey any information about the identity of the producer itself.[193]

Indeed, there is likewise no requirement that mark owners limit themselves to a single trade symbol. Rather, as Frank Schechter pointed out almost a century ago, "[t]he modern manufacturer may use a mark or several marks or no marks just as he pleases."[194] Mark owners may invent marks that differ from their corporate name and use separate marks for different products or services. In most cases, trademark law will protect a mark so long as it is distinct—conceptually separate from its product or service—and available—not confusingly similar to other marks in the relevant consumer market.

At one time, the trademark informed the consumer of the name of the producer, yet now serves as a form of identity creation in its own right. While the goal of trademark law may well still be to reduce search costs (or incentivize mark owners to create, or consumers to consume[195]), but the method for doing so has changed. An indicator of source now must only indicate a brand rather than a producer. For example, consider the producer Altria (formerly Phillip Morris). This entity makes macaroni and cheese under its "Kraft" brand and cigarettes under its Marlboro brand. Yet trademark law does not require that the mark holder use the Altria designation.[196] Roughly, identification of "source" for trademark law purposes equals identification, sponsorship, or

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will but often the most effective agent for the creation of good will, imprinting upon the public mind an anonymous and impersonal guaranty of satisfaction, creating a desire for further satisfactions. The mark actually sells the goods.").

[193] Laura A. Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377, 1381 (2005).

[194] Laura A. Heymann, *Naming, Identity, and Trademark Law*, 86 INDIANA L.J. 382, 388 (2011) (citing Frank I. Schechter, THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADE-MARKS 122 (1925)).

[195] *See generally* Irina Manta, *Branded*, 69 SMU L. REV. 713 (2016) (explaining that trademarks—not unlike other intellectual property regimes—serves to further creative incentives).

[196] Laura A. Heymann, *Naming, Identity, and Trademark Law*, 86 INDIANA L.J. 382 (2011).

affiliation with a brand. In the corporate context at least, the concept of source is nothing but a legal fiction roughly equating to brand. In this regard, Barton Beebe writes:

> Even if consumers cannot identify precisely what factory or company a trademark refers, still, consumers will assume that a specific instance of a trademark is referring to the same source as are other instances of the trademark. This "anonymous source" will receive trademark protection. The tendency of consumers to construct an anonymous source, a model, from which is produced specific instances of a commodity, is not limited to conventional word or image marks, however. In the case of mass-produced commodities, consumers will also construct such a source for [trade dress].[197]

Using trademarks to link product and brand (rather than product to producer or some other variant of source) allows for a level of creativity that was absent in the age where marks served merely to identify the producer. Irina Manta aptly notes that "[t]he expansion of protection for marks outside traditional words and written media generally potentially signals a shift away from the earlier view of trademarks as naked source identifiers whose creativity was of little relevance."[198] Professor Manta explains further:

> Creativity is required to establish the unique links between customers and the brand that the seller wants its customer to experience . . . Creativity made its way into trademark law once trademark law moved from protecting significations of a single known mark to marks indicating a single, but typically unknown source. There the mark must be linked—usually by creativity—to the underlying good to imprint it on the consumer's mind. Establishing this link is also an undertaking in creativity.[199]

This creative "link" is one that most often results from establishing a metaphorical connection between the mark and its product or service, satisfying its required function as a symbol. As a result of the anonymous source doctrine,[200] "the concept of metaphor is fundamental to how most trademarks

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[197] Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 663 (2004)

[198] Irina D. Manta, *Branded*, 69 SMU L. REV. 713 (2016).

[199] *Id.*

[200] Jake Linford, *Are Trademarks Ever Fanciful?*, 105 GEO. L. J. 731 (2017). Linford

work."[201] The vast majority of trademarks operate on a figurative level "in that they require consumers to use a familiar word or expression in a new and initially unfamiliar context."[202] For example, the mark BRAWNY for paper towels is designed to serve as a literal product name, but also to associate the brand, figuratively, with human strength. Professor Heymann notes:

> A trademark works because it causes consumers to think of a particular lexical unit as a proper name in addition to whatever literal meaning the word holds. The lexical unit "camel" engenders no metaphorical associations when it is used in connection with the desert animal; the same word used in connection with cigarettes operates on an additional "dimension of meaning."[203]

In this sense, distinctiveness of word marks can be seen to depend simply on whether a mark operates on a strictly literal level as the generic name of a product or service, or on a metaphoric one as a name creatively linking a brand with its underlying service.[204] However, the *Abercrombie* spectrum, while imperfect, provides a more nuanced inquiry.

B. The Abercrombie *Spectrum*

Judge Friendly, in his influential 1976 Second Circuit Court of Appeals decision, *Abercrombie & Fitch Co. v. Hunting World, Inc.*, developed what is known today as the *Abercrombie* spectrum.[205] Put simply, it is a "hierarchy of

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writes:

> Like other words, trademarks are both denotative and connotative. As the court noted in G. Heileman Brewing Co. v. Anheuser-Busch Inc., to "denote" is "to refer to specifically; mean explicitly while to "connote" means "to suggest or imply in addition to literal meaning." Trademarks operate on at least these two levels. First, the mark denotes source—it indicates "a single thing coming from a single source." Second, because the mark points to a consistent, if anonymous source, it also connotes or hints at qualities of the marked product. What the mark denotes and connotes in turn is determined in part by the symbol appropriated for use as a trademark.

[201] Laura A. Heymann, *The Grammar of Trademarks*, 14 LEWIS & CLARK L. REV. 1313, 1330 (2010).

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *See generally* Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d at 4 (2d Cir. 1976).

figurativeness."[206] Under this framework, word marks are divided into five categories, from least to most protectable: (1) generic, (2) descriptive, (3) suggestive, (4) arbitrary, and (5) fanciful.[207] The spectrum is used to determine both a mark's "eligibility to trademark status"—its inherent distinctiveness, or validity—and "the degree of protection accorded" it—the mark's conceptual strength, or scope.[208] A determination of inherent distinctiveness involves a yes-no, *binary* judgment separate from the tiered, hierarchical evaluation of mark strength.[209] A mark is inherently distinctive when, "at the time it is first used, [its] intrinsic nature serves to identify a particular source.[210] Mark strength, on the other hand, is a matter of *degree*.[211] Rather than its validity, the strength of a mark is used to determine the degree of protection a mark is afforded compared to other confusingly similar or diluting marks.[212]

On one end of the *Abercrombie* spectrum sit generic marks, which define a class of things (e.g., BOOK STORE for a book store, BOTTLED WATER for bottled water, or LITE BEER for light beer).[213] Generic marks may never serve as protectable trademarks under the theory that they are unable to identify the source of a product or service.[214] Generic marks denote (rather than connote) the product or service, and do not denote the source at all.

Next, descriptive marks convey an immediate idea of the ingredients,

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[206] Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 670 (2004).

[207] *Abercrombie*, 537 F.2d at 8. For a thorough scholarly review of the *Abercrombie* spectrum's categories, *see also* Lisa P. Ramsey, *Descriptive Trademarks and the First Amendment*, 70 TENN. L. REV. 1095, 1102-1121 (2005).

[208] *Abercrombie*, 537 F.2d at 8.

[209] *See, e.g.*, Lisa L. Ouellette, *The Google Shortcut to Trademark Law*, 102 CAL. L. REV. 351, 375 (2014) ("Whether a mark passes the distinctiveness threshold for validity is a binary yes-no question, but evaluating the strength of a mark—a critical issue in trademark infringement suits—requires evaluation of the degree of distinctiveness.") (citing *Abercrombie*, 537 F.2d at 9 (2d Cir. 1976) (explaining that the *Abercrombie* spectrum reflects two discrete inquiries: "eligibility to trademark status" and "the degree of protection accorded")); Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2028 (2005) (equating "source distinctiveness" with what "a trademark must possess to fall within the subject matter of trademark protection," and "differential distinctiveness" with trademark strength, "the extent of which prescribes the *scope* of trademark protection when protection is given.").

[210] Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 2011 (2000).

[211] *Abercrombie*, 537 F.2d at 9.

[212] *Id.*

[213] *Id.* ("A generic term is one that refers, or has come to be understood as referring to the genus of which the particular product is a species.").

[214] *Id.* The prohibition on trademarking generic names is a longstanding one. See Delaware & Hudson Canal Co. v. Clark, 80 U.S. 311 (1872) ("Nor can a generic name, or a name merely descriptive of an article or its qualities, ingredients, or characteristics, be employed as a trademark and the exclusive use of it be entitled to legal protection.").

qualities, or characteristics of a related product or service (e.g., AMERICAN AIRLINES for a U.S.-based airline, ENTREPRENEUR for a business-oriented magazine, or SALTY for anchovies).[215] Descriptive marks are protectable only upon a showing of acquired distinctiveness—commonly referred to as secondary meaning in the marketplace, i.e., when the mark becomes sufficiently distinctive so as to establish "a mental association in the buyers' minds between the alleged mark and a single source of the product."[216] As mentioned previously, descriptive marks are metonymic—typically having a literal or contiguous connection as to their marked product or service.[217]

Nearing the center of the spectrum, suggestive marks are "textbook metaphors and are described as such by the doctrine."[218] That is, they require "imagination, thought or perception" to reach a conclusion as to the nature of their associated products or services (e.g., KLONDIKE for ice cream, ROACH MOTEL for roach traps, or GREYHOUND for a bus service).[219] Unlike their descriptive brethren, suggestive marks are immediately protectable upon first use and without a showing of secondary meaning.[220]

Next on the spectrum are arbitrary marks. Arbitrary marks are also protectable absent secondary meaning, but are presumed to be conceptually stronger than suggestive marks. While arbitrary marks have meaning in the everyday sense, that meaning bears no obvious, concrete connection to their associated product or service (e.g., NIKE for footwear, CAMEL for cigarettes, or APPLE for computers).[221] But, while not often recognized as such, arbitrary marks are also metaphorical. In evoking values or aesthetics associated with a product or service, they are *catachrestic* metaphors.[222] Catachrestic metaphors are

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[215] *E.g.*, Zatarains, Inc. v. Oak Grove Smokehouse, Inc., 698 F.2d 786, 792 (5th Cir. 1983).

[216] 2 MCCARTHY § 15:5 (4th ed. 2016); *see also* Sara Lee Corp. v. Kayser-Roth Corp., 81 F.3d 455, 464 (4th Cir. 1996) (defining secondary meaning as existing when "in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself.") (quoting Dayton Progress Corp. v. Lane Punch Corp., 917 F.2d 836, 839 (4th Cir. 1990)).

[217] Jake Linford, *The False Dichotomy Between Suggestive and Descriptive Trademarks*, 76 OHIO ST. L.J. 1369, 1369 (2015).

[218] Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. at 670.

[219] 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:67 (4th ed. 2016); U.S. Patent & Trademark Office, Trademark Manual of Examining Procedure § 1209.01(a) (July 2015) [hereinafter TMEP].

[220] *Id.*

[221] *Abercrombie*, 537 F.2d 4, at 9.

[222] *Cf.* Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. at 671 (noting that in the case of "arbitrary marks such as APPLE for computers or SHELL for gasoline, the figurative relation is not so much metaphorical as it is catachrestic"), with ALAN SINGER, A METAPHORICS OF FICTION, 1984 (defining "catachrestic *metaphor*" as "a trope that strayed beyond the field of contextual determinations warranting its usage.") (emphasis added).

metaphors used in a way that departs from conventional or traditional use. One expert on narrative writes:

> A catachresis differs from the typical comparison metaphor in that there is no semantic connection between the name and its referent. The catachrestic metaphor is chosen because of its rhetorical color rather than the oblique message it conveys . . . It is a metaphorical form that refers without any suggestion of a second meaning.[223]

Finally, on the far end of the spectrum, fanciful marks are often considered to be the strongest marks because, under the theory of linguistic arbitrariness, their only linguistic function is to identify the source of the products or services with which they are associated (e.g., GEICO for insurance services, XEROX for document services, or KODAK for imaging products).[224] Yet research finds that many so-called fanciful marks employ sound symbolism—i.e., a direct linkage between sound and meaning—and thus have a metaphorical connection to their underlying products and services.[225] Jake Linford notes:

> Empirical research into sound symbolism . . . calls into question [the] presumption of linguistic arbitrariness. Evidence of sound symbolism thus also challenges the notion that fanciful marks bear no inherent meaning. If the building blocks of words convey meaning, then the presumption that fanciful marks communicate no product-relevant information will be inaccurate in many cases. In fact, the owner of a fanciful mark may get a head start to consumer recognition and brand loyalty relative to competitors, and may establish protection in a mark that communicates product qualities to consumers without paying the toll that the law requires of other marks that convey product characteristics—a showing of source

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[223] Hugh C. White, *Metaphor as Performative*, in READING COMMUNITIES READING SCRIPTURE: ESSAYS IN HONOR OF DANIEL PATTE (Gary A. Phillips and Nicole Wilkinson Duran ed. Trinity Press 2002).

[224] *See* Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 162-63 (1995) (Breyer, J.) (noting that arbitrary and fanciful marks are assumed to "almost automatically tell a customer that they refer to a brand."); *but see generally* Jake Linford, *Are Trademarks Ever Fanciful?,* 105 GEO. L. J. 731(2017) (explaining that, contrary to the theory of linguistic arbitrariness, many or most fanciful marks rely on sound symbolism—a link between sound and word meaning--and thus connote product qualities like other trademarks).

[225] *See generally* Jake Linford, *Are Trademarks Ever Fanciful?*, 105 GEO. L. J., 731 (forthcoming 2017).

significance.[226]

Thus, inherently distinctive word marks—suggestive, arbitrary, and even many fanciful designations—are metaphorical in that they contain both denotative (literal) and connotative (figurative) dimensions of meaning. The next sub-Part explains that the predominant test for distinctiveness, the imagination test, tests for metaphorical significance as a validity threshold.

C. The Imagination Test

When evaluating a word mark's validity, trademark law uses the *Abercrombie* spectrum to decide whether a mark is "merely descriptive," and thus not eligible for trademark protection absent secondary meaning, or if it is suggestive and thus inherently distinctive and entitled to immediate protection.[227] At least one commentator has referred to this dividing line as the "descriptive-suggestive dichotomy."[228] Courts use an "imagination" test as the primary criterion in making this determination.[229] According to the imagination test, a word mark is suggestive—and thus inherently distinctive rather than merely descriptive—if it requires "imagination, thought and perception" for consumers to reach a conclusion as to the nature of its corresponding product or service.[230] Less often, courts will also use the imagination test in deciding whether a word is arbitrary or fanciful.[231] At a high level, "if the mark imparts information directly it is descriptive. If it stands for an idea which requires some operation of the imagination to connect it with the goods, it is suggestive."[232] Yet, what the test seeks more precisely is a figure of speech—a metaphorical expression that denotes the brand and connotes qualities or values associated with a product or service. In the terms of conceptual metaphor theory, a metaphorical mapping from the source (i.e., brand) to the target (i.e., product or service) domains is required.

Deciding whether a trademark is descriptive (invalid) or suggestive

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[226] *Id.*

[227] *See, e.g.*, Cytosport, Inc. v. Vital Pharmaceuticals, Inc., 617 F. Supp. 2d 1051, 1070 (E.D. Cal. 2009).

[228] Jake Linford, *The False Dichotomy Between Suggestive and Descriptive Trademarks,* 76 OHIO ST. L. J. 1367 (2015).

[229] *See, e.g.*, Zobmondo Entmt', LLC v. Falls Media, LLC, 602 F.3d 1108, 1116 (9th Cir. 2010) (citing Self-Realization Fellowship Church v. Ananda Church of Self-Realization, 59 F.3d 902 (9th Cir. 1995)).

[230] MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:67 (4th ed. 2016); TMEP § 1209.01(a) (July 2015).

[231] *See, e.g,* ToHo Co. v. William Morrow and Co., 33 F. Supp. 2d 1206, 1214 (C.D. Cal. 1998).

[232] Union Carbide Corp. v. Ever-Ready Inc., 531 F.2d 366, 379 (7th Cir. 1976) (quoting Arthur H. Seidel, TRADEMARK LAW AND PRACTICE 77 (1963)).

(valid) is an important endeavor. In the litigation setting, proving that a plaintiff's mark is descriptive without it having established secondary meaning often spells victory for a defendant, whereas a showing that it is suggestive entitles the mark to protection and thus allows a likelihood of confusion or other cause of action to move forward.[233] In the transactional context, at a fundamental level, the suggestiveness determination is instrumental in deciding whether a particular mark is cleared for use as a brand.[234] Indeed, the act of acquiring secondary meaning in the marketplace is time-consuming (typically taking five years or longer), expensive, and difficult to prove.[235] Thus, the descriptive-suggestive dichotomy is a frequent point of contention in trademark law.

The imagination test, a test of metaphor, requires an "imaginative leap" to connect the mark with the product.[236] The "imagination" needed to link a

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[233] *See, e.g.*, Jake Linford, *The False Dichotomy Between Suggestive and Descriptive Trademarks,* 76 OHIO ST. L. J. 1367 (2015); Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 1581 CAL. L. REV. 1581 (2006) (finding that plaintiff win rates usually correspond with a mark's conceptual strength in accordance with their *Abercrombie* spectrum classification).

[234] Specifically, issues of distinctiveness come up in four different ways: First, when an applicant files an application to register a mark with the PTO, the trademark examiner analyzes whether the mark is distinctive, merely descriptive, or generic. Second, during an opposition proceeding (if a third party opposes a trademark application) or a petition to cancel (if a third party seeks to cancel an already issued registration). Third, if a mark owner sues for infringement of a *registered* mark, the defendant may claim that the registered mark is not distinctive and thus unprotectable—barring a ruling of incontestability which is used to prevent a challenge as to distinctiveness. Fourth, if an unregistered mark owner sues in federal court under Lanham Act Section 43(a)(1)(A), the mark owner must establish distinctiveness or the claim will typically be dismissed. *See* Mark Janis, TRADEMARK AND UNFAIR COMPETITION IN A NUTSHELL, 19-20 (2013).

[235] *See, e.g.*, Laura A. Heymann, *Naming, Identity, and Trademark Law*, 86 IND. L. J. 381, 389 (2011) ("Indeed, it would not be surprising to learn that the marketing department and the legal department in a typical company find themselves frequently at odds—the legal department recommending more fanciful names so as to acquire trademark protection more easily, and the marketing department desiring a more descriptive name that efficiently conveys to consumers the product's qualities without the need to spend millions of advertising dollars in consumer education.").

[236] To explain the imagination test, the examples of the marks ROACH MOTEL for a roach trap, and ENTREPRENEUR for a business-focused magazine, are illustrative. ENTREPRENEUR as used in connection with a business magazine is descriptive because consumers understand the term to refer in literal fashion to the business focus of the magazine. No imagination is required in making that connection. In comparison, consumers who see or hear the term ROACH MOTEL would think of a roach-infested motel room. They would not immediately jump to the realization that the product is a roach trap. Thus, unlike ENTREPRENEUR, ROACH MOTEL does not describe the product's features metonymically; it instead hints at and suggests them metaphorically. *See* Entrepreneur Media, Inc. v. Smith, 279 F.3d 1135, 1141 (9th Cir. 2001); Am. Home Prods.

suggestive word mark with its corresponding product or service "refers to the mental process required to connect a name that is incongruous or figurative with the product (e.g., 'Roach Motel' with an insect trap or 'TIDE' with soap."[237] The test—not unlike the *Abercrombie* spectrum generally[238]—has been oft-criticized. Judge Learned Hand wrote that "[i]t is quite impossible to get a rule out of the cases beyond this: That the validity of the mark ends where suggestion ends and description begins."[239] Others have since referred to the test, in metaphor, as "shadowy,"[240] "murky,"[241] and "not always clear."[242]

Yet those who understand that what the imagination test seeks is metaphorical thought are better able to utilize and appreciate its depth. One court has articulated the imagination test in an especially complementary and eloquent manner:

> [Suggestive word marks] generally do not, unlike the merely descriptive phrase, direct the consumer immediately to the producer by way of road signs that prominently advertise the goods. Instead, the journey to the market source leads them through an intermediate loop at the cloverleaf in thought. Where the descriptive common words lead the buyer by the hand, the rarer suggestive mark ushers through the mind. From the commercial name to the product or its market to its source, the rarer suggestive mark ushers through the mind. From the commercial name to the product or its market to its source, the suggestive term transports both

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Corp. v. Johnson Chem. Co., 589 F.2d 103, 107 (2d Cir. 1978).

[237] G. Heileman Brewing Co., Inc. v. Anheuser-Busch, Inc., 873 F.2d 985 (7th Cir. 1989) (citing G. Heileman Brewing Co., Inc. v. Anheuser-Busch Inc., 676 F. Supp. 1436, 1491 (E.D. Wis. 1987)).

[238] *See, e.g.*, Beverely W. Pattishall, *The Lanham Trademark Act—Its Impact Over Four Decades*, 76 TRADEMARK REP. 193, 220 (1986) (calling the *Abercrombie* spectrum "artificial and regrettable" and "[o]ne of the worst blights [on trademark law] . . . which has spread from the Second Circuit into others and now appears to be settling in generally."); Thomas R. Lee, *An Empirical and Consumer Psychology Analysis of Trademark Distinctiveness*, FROM THE SELECTED WORKS OF THOMAS R. LEE (2009), https://works.bepress.com/thomas_lee/4/download/; Rebecca Tushnet, *Looking at the Lanham Act: Images in Trademark and Advertising Law*, 48 HOUS. L. REV. 861 (2011).

[239] Franklin Knitting Mills, Inc. v. Fashionit Sweater Mills, Inc., 297 F. 247, 248 (S.D.N.Y. 1923), aff'd per curiam, 4 F.2d 1018 (2d. Cir. 1925) (Learned Hand, J.).

[240] Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 75 N.C. L. Rev. 471, 519 (1997).

[241] Graeme B. Dinwoodie, *Reconceptualizing the Inherent Distinctiveness of Product Design Trade Dress*, 75 N.C. L. Rev. 471, 519 (1997).

[242] Surgicenters of Am., Inc. v. Med. Dental Surgeries, Co., 601 F.2d 1011, 1016 (9th Cir. 1979).

> through purposefully evocative words laden with intimation and through the contemplated imagery and associations the name conjures. That passage is neither linear nor strait. It demands a mental exercise, multiple bounds in a dual act of perception and imagination. A first stage is associated with the creative energy exerted by the maker of the mark. When choosing what to call the article, the creator of the suggestive name *meaningfully fixes upon associational terms that will identify the product figuratively and will appeal to the consumer by allusion and metaphor*. The second mental act closes that loop. It is that which occurs in the mind of the consumer allured to the product, and who may accept it in part on the strength of the purposeful imagery summoned by its name . . . Suggestiveness is an artful quality of inherent imagery and obliqueness infused into a fine turn of a word or phrase which, at the moment of perception when it all clicks and the association intended becomes apparent, stirs the response often with admiration. "That's it." It is, for example, the roundabout recognition evoked by calling a computer clicker a "mouse," or conceiving of the name "Big Star" to mark a small town in Bethlehem.[243]

While the imagination test is the primary criterion for deciding distinctiveness, courts do sometimes consider other tests in making validity determinations either in combination with or instead of the imagination. These include (1) the "competitor's need" test, and (2) the "dictionary" test. These tests do not test for distinctiveness by use of metaphor, but rather test for non-descriptiveness, which is similar to, but not quite the same as, distinctiveness from a conceptual standpoint.[244]

The competitor's need test "focuses on the extent to which a mark is needed by market competitors to identify their goods and services."[245] From an economic perspective, granting exclusive rights to use of generic marks has long been thought to give trademark owners a monopoly and thus hinder

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[243] BigStar Entm't, Inc. v. Next Big Star, Inc., 105 F. Supp. 2d 185, 196-97 (S.D.N.Y. 2000) (emphasis added).

[244] *See* Thomas R. Lee, *An Empirical and Consumer Psychology Analysis of Trademark Distinctiveness*, FROM THE SELECTED WORKS OF THOMAS R. LEE (2009), https://works.bepress.com/thomas_lee/4/download/ (arguing that the "perception of inherent *distinctiveness*" differs from an evaluation of the "immediacy or degree of inherent *descriptiveness*.") (emphasis in original).

[245] Rodeo Collection, Ltd. v. W. Seventh, 812 F.2d 1215, 1218 (9th Cir. 1987).

competition.[246] This logic provides the basis for the competitor's need test.[247] The competitor's need test is a policy determination ancillary to the conceptual measure of distinctiveness, though.

The dictionary test is at times used by courts and the Patent and Trademark Office along with, or instead of, the imagination test.[248] The test looks at the common usage of the term or terms comprising a mark for evidence of the mark's non-distinctiveness. If the word mark is used as, or as part of, the dictionary definition of the word at issue, it is typically considered descriptive rather than suggestive. Evidence that a mark is merely descriptive may be obtained from sources such as dictionaries, surveys, or newspapers.[249] The dictionary test is essentially an inversion of the imagination test in that it tests for mere descriptiveness (by use of a dictionary or similar source) instead of inherent distinctiveness (via metaphor and the consumer imagination).

In sum, the inherent distinctiveness and thus initial validity of word marks hinges on establishing a metaphorical connection with their underlying product or service. Word marks that have no metaphorical significance either because they are literal designations (generic marks) or metonymic representations (descriptive marks) are ineligible for initial trademark status. Word marks that are metaphorical, though, are deemed eligible for all of the benefits of trademark protection *ab initio*. This is consistent with the figurative quality of a symbol, which is the first requirement of a valid trademark under

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[246] For example, granting a trademark for the word BANANA to a company selling bananas would force competitors to label their products as something else, which would perhaps raise transaction costs. Debatably, descriptive marks create the same issue, which is, at least partly, why secondary meaning must be shown before trademark protection is granted to a descriptive mark. For instance, use of the descriptive term YELLOW as a mark used in connection bananas would force competitors to use another word to describe their product. Less harmful to competition than ownership of the term BANANA perhaps, such practice is presumed to be problematic nonetheless.

[247] A similar test is the "third party's actual use" test. Instead of looking prospectively, this test seeks to determine whether third parties have actually used to the term to describe the qualities of their own products or services. If so, the term is likely to be deemed merely descriptive.

[248] *See, e.g.*, Xtreme Caged Combat v. ECC Fitness, No. 12–CV–3855, 2013 WL 6022135, *5 (E.D. Penn. Nov. 14, 2013); Vision Center v. Opticks, Inc., 596 F.2d 111, 116 (5th Cir. 1979).

[249] For example, the Trademark Trial and Appeal Board found the word COACH to be merely descriptive when used in connection with educational materials used to prepare students for standardized tests because it "immediately conveys to purchasers the purpose of the materials." In support of the finding, the Board pointed to the dictionary definitions of the word "coach," which include: (1) "a private tutor who prepares a student for an examination"; and (2) "to give instruction or advice in the capacity of a coach; instruct." Coach Services, Inc. v. Triumph Learning LLC, 668 F.3d 1356, 1378 (2012) (citing Coach Services, Inc. v. Triumph Learning LLC, 96 U.S.P.Q.2d 1600, 2010 WL 3798519 (Trademark Tr. & App. Bd.)).

Supreme Court precedent.

III. VISUAL METAPHOR AND THE DISTINCTIVENESS OF IMAGE MARKS

Metaphor is a weapon in the hand-to-hand struggle with reality.

Jehuda Amichai

As explained in Part II, the inherent distinctiveness of word marks hinge on the use of metaphor. Yet courts and commentators quickly abandon this figurative framework when analyzing image marks. As J. Thomas McCarthy, author of the leading—and usually otherwise very helpful—treatise, *Trademarks and Unfair Competition*, puts it:

> Because a picture is worth a thousand words, there is little in the way of guidelines to determine the visual similarity which will cause a likelihood of confusion with buyers. Obviously, for picture and design marks (as opposed to word marks), similarity of appearance is controlling. There is no point in launching into a long analysis of the judicial pros and cons regarding visual similarity of marks. Regarding visual similarity, all one can say is "I know it when I see it."[250]

Here, Professor McCarthy is not referring to an evaluation of inherent distinctiveness, but rather likelihood of confusion analysis. Nonetheless, the statement illustrates the tendency of trademark law to "eyeball" images and the endorsement of this practice even amongst trademark law's top influencers.

This Part demonstrates that this line of thinking is incorrect given that metaphor is able to manifest visually and not just verbally. Part III.A provides a description of image marks that are, under current law, eligible for trademark protection without secondary meaning—logos, product packaging, and services-related trade dress. Part III.B reviews the most prominent tests for deciding the inherent distinctiveness of image marks—the *Seabrook* test and the *Abercrombie* spectrum's hierarchy of word mark strength—and concludes that they are analytically shallow and overly literal, and thus ineffective. Part III.C proposes, in taking into account the research presented in the previous Parts of this Article, a definitional test of visual metaphor. According to the test proposed, the distinctiveness of an image mark would be based, at least in part, on whether it is (1) the obvious representation of a person, place, thing or idea; (2) by means of a visual image; (3) that suggests a particular association or point of similarity as to its underlying product or service. Such a framework is

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[250] 4 MCCARTHY, *supra* note 6.

conceptually coherent with the trademark's status as a symbol, and would mirror the predictability inherent in the word mark distinctiveness context.

A. Image Marks: Logos and Trade Dress

The Lanham Act's definition of a trademark "includes any word, name, symbol, or device, or any combination thereof . . . used by a person . . . to identify and distinguish his or her goods, including unique products, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown."[251] This definition makes clear that almost any symbol, including images, capable of consumer perception may potentially function as a trademark. The simplest type of image mark is a logo or design mark. Consider these common examples: Starbucks' siren logo, Nike's swoosh, and Adidas' "three-stripe" pattern. Logos, like word marks, may be inherently distinctive. But, the method for evaluating such validity remains less than clear.

More complex is the issue of trade dress.[252] Trade dress has in the past been defined as the overall appearance of labels, wrappers, and containers used as product packaging.[253] Over time, that definition has broadened to include any elements that are used in the presentation of a good or service to a consumer.[254] This includes elements used to identify the "source" of the goods or services associated with a trade dress, such as size, shape, color(s), textures, and graphics used on both the product and the packaging of the product. Like other types of marks, trade dress must be distinctive to be protectable.[255] Consistent with Supreme Court precedent, trade dress may be categorized into three basic areas: (1) product packaging, product design, and what Justice Antonin Scalia described as "tertium quid"—services-oriented and experiential trade dress like a restaurant's décor. For example, McDonald's golden arches.

Some carve-outs to trade dress protection exist for conceptual and policy reasons. First, if trade dress is purely—or largely—"decorative" or "ornamental" (rather than source-indicating), it is not eligible for protection under the Lanham Act. Examples of trade dress found to be "merely decorative" are designs on sweaters, arrangements of gems on rings, and means of displaying produce in grocery stores. Second, trade dress protection is generally not available for product design or product packaging that is "functional" to the product. The rationale being that trade dress protection extended to the functional elements of a product could deprive consumers of

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[251] Lanham Act § 45, 15 U.S.C. § 1127 (LEXIS through Pub. L. No. 115-22).

[252] For a scholarly analysis of distinctiveness and trade dress as set against the backdrop of the Supreme Court's jurisprudence in the area, *see generally* Lars Smith, *Trade Distinctiveness: Solving Scalia's Tertium Quid Trade Dress Conundrum*, 2005 MICH. ST. L. REV. 243 (2006).

[253] *See*, *e.g.*, RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 16 (1995).

[254] 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 8:1 (4th ed.).

[255] *See* Two Pesos, Inc. v. Taco. Cabana, Inc., 505 U.S. 763, 767 (1992).

the opportunity to purchase competing products, and marketplace competitors of the chance to create alternative product versions.

Certain types of trade dress may be inherently distinctive, whereas other types are only protectable upon a showing of secondary meaning. The Supreme Court has commended on the distinctiveness of trade dress in three cases: *Two Pesos, Inc. v. Taco Cabana, Inc.* (1992),[256] *Qualitex Co. v. Jacobsen Prods. Co.* (1995),[257] and *Walt-Mart Stores v. Samara Bros.* (2000).[258] In *Two Pesos*, having found no textual basis in the Lanham Act for treating trade dress differently than word marks or logos, the Court held that product packaging and similar trade dress can be inherently distinctive and thus registrable absent secondary meaning.[259] In *Qualitex*, the Court held that a single color or a combination of colors could be a form of distinctive trade dress, but only after first acquiring secondary meaning.[260] Lastly, in *Wal-Mart Stores*, the Court carved out product design as a discrete category of trade dress incapable of protection without secondary meaning. Roughly, the Court's rationale was that the purpose of product design is so often functional instead of source-identifying.[261] Protection of product design from the outset would thus impair competition and make it difficult for new competing businesses to form.

In sum, product packaging (minus color alone), and services-related and experiential trade dress—like Starbucks' sea-theme, for example—remains able to be protected upon a showing that it is inherently distinctive. Colors and product designs, though, must first acquire secondary meaning in commerce, and are therefore not considered as candidates for a visual metaphor-based test of inherent distinctiveness.

B. Current Tests for Determining the Inherent Distinctiveness of Image Marks are Insufficient

Trademark law has no uniform, coherent test for evaluating the inherent distinctiveness of image marks. Most often, courts, the Patent and Trademark Office, and the Trademark Trial and Appeal Board use a test derived from *Seabrook Foods v. Barwell Foods*—the *"Seabrook"* test.[262] Others use the *Abercrombie* spectrum without recognizing its figurative significance. Some courts use elements from both tests, while others use neither.

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256 505 U.S. 763.
257 514 U.S. 159.
258 529 U.S. 205.
259 505 U.S. at 772.
260 514 U.S. at 519.
261 *Wal-Mart*, 529 U.S. at 214.
262 *See* Seabrook v. Bar-Well, Ltd., 568 F.2d 1342 (C.C.P.A. 1977).

1. Seabrook

The most prominent test for evaluating the distinctiveness of image marks is the *Seabrook* test. *Seabrook* involved the appearance of product packaging trade dress, yet is now used in cases involving both logos and various forms of trade dress. Under the *Seabrook* test, courts will consider the following factors:

> [1] Whether [the logo or trade dress] was a "common" basic shape or design, [2] whether it is unique or unusual in a particular field, [3] whether it was a mere refinement of a commonly-adopted and well-known form of ornamentation for a particular class of goods viewed by the public as a dress or ornamentation for the goods, or [4] whether it was capable of creating a commercial impression distinct from the accompanying words.[263]

The *Seabrook* test does not refer to the symbolic dimensions of the mark at issue. Instead, the test factors amount to "variations on a theme rather than discrete inquiries," each of which is used to ascertain whether an image mark is "commonplace." For example, the Fifth Circuit applied the *Seabrook* test in *Amazing Spaces, Inc. v. Metro Mini Storage* in connection with a logo in the form of a "star symbol" used in connection with moving and storage services.[264] Here, the mark at issue was stylized—shaded and set within a circle—and had been registered with the Patent and Trademark Office. Nonetheless, the Fifth Circuit held that these attributes did not sufficiently distinguish it from other star-formative logos. The court thus held that the mark was not inherently distinctive, i.e., that it is not so "unique, unusual or unexpected" in the market that consumers would perceive it as identifying of source. As evidence for its judgment, the Fifth Circuit cited Professor McCarthy's *Trademarks and Unfair Competition* treatise for the proposition that *Abercrombie* is typically ill-suited for application to images.[265] The Court also cited a Restatement of Trademarks comment addressing symbols and graphic designs:

> A symbol or graphic design is not inherently distinctive unless the nature of the designation and the manner of its use make it likely that prospective purchasers will perceive

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[263] *Id.* at 1344.

[264] Amazing Spaces, Inc. v. Metro Mini Storage, 608 F.3d 225, 240 (5th Cir. 2010).

[265] *Id.* (citing 2 MCCARTHY ON TRADEMARKS § 11:2, at 11—7 ("Use of the spectrum of descriptive, suggestive, arbitrary and fanciful is largely confined to word marks. It is usually not suitable for nonword designations such as shapes and images . . . [which] must be judged by other guidelines.").

> the designation as an indication of source. Commonplace symbols and designs are not inherently distinctive since their appearance on numerous products makes it unlikely that consumers will view them as distinctive of the goods or services of a particular seller. Thus, unless the symbol or design is striking, unusual, or otherwise likely to differentiate the products of a particular producer, the designation is not inherently distinctive.[266]

One issue with deciding whether a "symbol or design is striking, unusual, or otherwise likely to differentiate the products of a particular producer" is that it is entirely subjective and does not establish anything close to a bright-line rule. In this way, it is not much different than "eyeball" tests and "I know it when I see it judgments" with respect to image mark similarity.

Lars Smith notes that the *Seabrook* test "puts the court in the position of having to make quasi artistic or design decisions, unrelated to the real issue of whether [the image] is functioning as a source identifier."[267] The test also conflates validity with scope of protection. Indeed, word marks often are protectable even if they are commonplace, provided that they are used in connection with goods and services dissimilar to other uses of the same or similar mark. Here, the star symbol was in use by numerous third-parties such as the Dallas Cowboys NFL team and as Wal-Mart's logo. Yet, both of these uses are outside of the moving and storage field, making consumer confusion unlikely. In fact, commonplace basic shapes—like a star—may be unusual in a particular field. And, coupled with their strong figurative connotations, may therefore be strong inherent source identifiers. Thus, the main inquiry under *Seabrook*—whether an image is "commonplace"—is a reductive and largely unhelpful one.

2. Abercrombie

In *Two Pesos*, the Supreme Court noted (perhaps in dicta) that *Abercrombie* is directly applicable to evaluating the inherent distinctiveness of trade dress, yet provided no guidance on how to actually apply it.[268] Courts are split as to whether to use *Abercrombie* for image marks. Even when it is applied, its spectrum—rather than its binary distinctiveness judgment—is extended to images haphazardly. For instance, the Fifth Circuit in *Amazing Spaces* noted that the star symbol "resists categorization under the *Abercrombie* test."[269] It was

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[266] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 13 cmt. d, at 107 (1995).

[267] Lars Smith, *Trade Distinctiveness: Solving Scalia's Tertium Quid Trade Dress Conundrum*, 2005 MICH. ST. L. REV. 243 (2006).

[268] 505 U.S. 763.

[269] Amazing Spaces, Inc. v. Metro Mini Storage, 608 F.3d 225, 240 (5th Cir. 2010).

unwilling, though, "to hold that the *Abercrombie* test is eclipsed every time a mark other than a word is at issue."[270]

When courts do apply *Abercrombie* to images—which is only a minority of the time—they nearly always apply its degree-based hierarchy of strength (generic, descriptive, suggestive, arbitrary and fanciful categories) rather than its binary judgment of validity by use of the imagination test. The result of this misapplication is that courts end up concluding that many logos and nearly all forms of trade dress—having nothing concrete and literal to do with the product or service—are "arbitrary," and thus highly distinctive. When it comes to product packaging especially, the possibilities are virtually limitless and courts are quick to assume anything not resembling the product to be arbitrary. This potentially results in a wide scope of protection for many image marks that is viewed as undesirable from a competition standpoint.

As a result, *Abercrombie* is not always the exclusive test used to determine the inherent distinctiveness of images. In several cases, *Seabrook* is used as a supplement to *Abercrombie* (or vice versa) because a rote application of *Abercrombie* typically results in most images being classified as arbitrary. Yet, this perceived problem results from an incorrect interpretation of *Abercrombie*. In analogizing to words mark, the arbitrary classification is not truly arbitrary in the linguistic sense, i.e., having no meaningful semantic connection to the product or service. Instead, arbitrary marks, as noted in Part II, are generally catachrestic metaphors.[271] Thus, there is no literal connection between the signified (brand) and its referent (the product or service). But, there is typically a figurative connection between the two.

In fact, arbitrary marks are typically chosen for rhetorical color and are a deliberate misuse of a term. Consider NIKE—classified as arbitrary under the *Abercrombie* spectrum. Consumers link the brand to the ideals of strength, victory and ability. This connection from the brand to the athletic wear product is not arbitrary, but instead metaphorical. The Nike swoosh, too, is a visual metaphor. It is designed to represent one wing of Nike, the Goddess of Victory. This connotation is what gives the mark its inherent distinctiveness, as contrasted, for example, with the Adidas three-stripe logo which has no such connotation and should thus not be protectable absent secondary meaning.[272] Therefore, when trademark law tests images under *Abercrombie*, it should test for a metaphorical relation between the mark (brand) and its product or service.

Yet, trademark law and the PTO very rarely apply the imagination test to non-verbal marks. The Ninth Circuit has applied the imagination test to a composite mark in at least one case, though. There, the logo consisted "of a stylized line drawing on the back of an envelope, with a black keyhole design on the back flap of the envelope and the word "POSTX" appearing below the flap."

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[270] *Id.*

[271] *See supra* notes 223-24 and accompanying discussion.

[272] *See infra* Part III.C.

The court found that the logo did not literally describe the product. Instead, it functioned as a metaphor:

> The court finds that plaintiff's mark is suggestive. The drawing itself, an envelope containing a keyhole, suggests a concept of safe mail, though tying the design to plaintiff's product requires some imagination. The word "POSTX" appearing on the envelope drawing is also is [sic] suggestive of mail delivery, requiring, again, a certain degree of imagination to link it to the plaintiff's email product. An envelope bearing a keyhole and the word "POSTX" does not literally describe plaintiff's product, it suggests it by analogy and thereby requires that the viewer use some imagination.[273]

The Ninth Circuit then explained that the mark was suggestive and thus "moderately strong based on the design of the mark and the product it represents."[274] However, more fundamental to the mark's protectability than its scope of protection is the binary distinctiveness threshold established by the mark's metaphorical significance.

C. Proposal: An Imagination Test of Visual Metaphor

In light of the aforementioned, this sub-Part proposes that trademark law would do well to look to the metaphorical significance of an image or composite mark when evaluating its inherent distinctiveness, i.e., the mark's initial validity as demonstrated by its conceptual, symbolic significance. Given that trademark law already does this in its evaluation of word mark distinctiveness, implementing such a test should not be too difficult in the context of image marks. The test proposed places the burden on the mark owner to—in cases where the figurative significance of a mark is not obvious—provide a *plausible* explanation of the metaphorical quality of the mark in mapping from the brand to the product.

In the trademark prosecution setting, this would be the equivalent of overcoming a genericness or descriptiveness refusal issued by the Patent and Trademark Office.[275] That is, trademark examiners could, if uncertain of the metaphorical quality of the image, issue an objection in the form of an Office Action to the trademark applicant for lack of distinctiveness. In response to the

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[273] PostX Corp. v. docSpace Co., 80 F. Supp. 2d 1056, 1060–61 (N.D. Cal. 1999).

[274] *Id.* at 1061.

[275] *See* Trademark Act § 2(e)(1), 15 U.S.C. § 1052(e)(1); TMEP §§ 1209.

objection, the applicant would need to describe the figurative significance of the mark, i.e., that it both denotes source and connotes its related product or service. In the litigation context, if the validity of a mark is in dispute, both parties could provide arguments as to the image mark's metaphorical qualities or lack thereof.

Notably, this proposal utilizes *Abercrombie's* imagination test, but does not rely dogmatically on its hierarchical classifications—generic, descriptive, suggestive, arbitrary and fanciful.[276] Other than the descriptive-suggestive dichotomy, the classifications are not needed for a threshold determination of the validity of images, just as they are not necessary to the yes-no validity judgment in the word mark context. While "[t]he strength of a given mark rests on its distinctiveness,"[277] the reverse is not true. The threshold showing of distinctiveness is binary. It hinges only on a figurative connection between the mark and its corresponding product.

Thus, trademark law could use the imagination test as a binary measure of the inherent distinctiveness—removed from the hierarchical, scope-based inquiry—of images. As discussed in Part II.C, the imagination test seeks the figurative nature of a mark, and thus the symbolic requirement of a valid trademark. If there is a figurative, metaphorical connection between an image and its marked product or service, then the image should be seen as inherently distinct. Its connotation is inherent by virtue of its symbolism, instead of having to be acquired through secondary meaning. The strength of an image mark, while more difficult to determine, might more accurately come to depend on the "depth" of the metaphor being conveyed.[278] That is subject matter beyond the scope of this Article, however.

Further, there may be reasons to restrict the protection of image marks even if they function in a metaphorical sense. For instance, consider the image of a heart on a box of chocolates. It has inherent figurative significance, but is so common as to perhaps be seen as generic. The proposed test of visual metaphor need not function as an exclusive test for the inherent distinctiveness of images—just as the imagination test does not function as the exclusive test for word marks. Other tests are sometimes employed in tandem with it, like the competitor's need test or dictionary test.[279] But, from a conceptual lens, the imagination test serves as an important first cut in satisfying the symbol requirement of a valid trademark.

The imagination test, in the word mark context, seeks "imagination, thought, or perception" on the part of consumers. More specifically, this is a figure of speech or incongruity. In the image context, this roughly parallels the common definition of a visual metaphor: "the representation of a person, place,

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[276] *See supra* notes 206-227 and accompanying discussion.

[277] Miss World (UK) v. Mrs. America Pageants, Inc., 856 F.2d 1445, 1448 (9th Cir. 1988).

[278] *See supra* notes 206-227 and accompanying discussion

[279] *Supra* notes 245-250.

thing, or idea by means of a visual image that suggests a particular association or point of similarity." This proposal recommends separating this definition into elements, as is common among legal tests. Moreover, it adds to the end of the definition a trademark-related qualifier, "as to its underlying product or service." This additional language references the need for "mapping" from source (brand) to target (product or service) domains. Below are some thoughts as to how the imagination test might be implemented in the image mark context. In connection with the following, let us return to the examples presented in the Introduction: (1) the Apple logo[280] (2) Starbucks siren,[281] and (3) Nike's swoosh.[282] As a counterexample, consider the Adidas "three-stripe" logo.

1. The representation of a person, place, thing, or idea;

This first factor indicates that the image mark must be a concrete representation of a person, place, thing, or idea. It refers to the mark's denotative aspect. This factor alludes to the source domain—the mark itself as representative of a producer—or more often a brand.[283] What it seeks is a definable representation that can be used in commerce. All three examples—the Apple logo, Starbucks's siren, and Nike's swoosh would likely meet this factor of the test, as would the Adidas logo. An apple is a representation of a

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283 *See supra* Part II.A.

"thing" or "idea." Starbucks siren is a representation of a "person" or "idea."[284] Nike's swoosh—in representing the wing of Nike, the Goddess of Victory, can likewise be seen as a "person" or "idea." The three-stripe logo too would likely meet this factor as arguably a representation of a "thing," i.e., the number three.

2. A visual image;

The second factor requires that an inherently distinctive image mark contain a visual image separate from the wording or other non-visual elements of the mark. It largely tracks *Seabrook's* fourth factor—that the image must create its own commercial impression apart from other verbal or non-verbal elements of the mark.[285] This factor is needed because an "image" may be classified in multiple ways, and is not limited to visual matters. First, imagery may refer to the basic "representation through language of sense experience."[286] In this sense, it is not limited to purely visual matters. Second, an image can exist as a figure of speech—a verbal metaphor where the image refers to "something else."[287] In fact, "it is at this point that image and symbol begin to merge."[288] Finally, a third category of images "emphasizes the capacity of an image to embody a symbolic division."[289]

Because the definition of "image" is subject to multiple interpretations, this factor requires that image is interpreted narrowly to refer to a pictorial design containing a visual dimension. In the case of composite marks, the visual part of the mark must—without the assistance of the verbal portion—satisfy factors one and three of this test. Each of the prior factors meets this definition of image. The Apple logo is entirely a visual illustration of an apple (with a bite out of it). The swoosh is a rough sketch of the Goddess Nike's wing, and Starbucks logo is a visual representation of a siren/mermaid. Less clearly, the Adidas three-stripe pattern is likewise a pictorial or graphical representation of three parallel lines.

3. That suggests a particular association or point of similarity as to its underlying goods or services.

This final factor requires that an image connote its associated product or service. In conceptual metaphor theory terminology, it requires conceptual mapping from the brand to the product. Consistent with the economic and psychological dimensions of trade symbols discussed in Part I, the image must

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[284] *Supra* note 27.
[285] *See supra* note 219.
[286] L. L. DICKSON, THE MODERN ALLEGORIES OF WILLIAM GOLDING 10 (1990).
[287] *Id.*
[288] *Id.*
[289] *Id.*

therefore refer to qualities, values, or aesthetics relating to its marked product or service. The inherently distinctive image mark further cannot be metonymic. For example, if an image mark is for restaurant services, it could not be a utensil-formative logo. Thus, in addition to being both a concrete and a visual representation, the image mark, as indicative of the source domain, must visually suggest—rather than describe—characteristics of its target domain. The Apple logo, Starbucks' siren, and Nike's swoosh would satisfy this final factor, yet the Adidas three-stripe would not.

Both Apple's word marks—APPLE and "Think Different"—and its logo mark—an apple with a bite out of it—are metaphorical in perhaps invoking "the first act of rebellion in the Garden of Eden, a powerful distillation of the brand's iconoclastic identity."[290] The biblical story of Adam and Eve symbolizes humankind's fall from grace following consumption of an apple—the "forbidden fruit"—from the tree of knowledge of good and evil.[291] Leaving the Garden of Eden meant that mankind could no longer live in a state of paradise, but were allowed, in exchange, free will.[292] The Apple marks—including its visual logo—call forth these, or other, figurative associations.[293]

Starbucks expresses the metaphors of the sea and of exploration consistently, including in its word mark, logo, and trade dress.[294] First, STARBUCKS, the brand's so-called arbitrary name, is a reference to Herman Melville's classic American novel Moby Dick.[295] Starbuck was first mate on the ill-fated whaling ship, the Pequod. Second, Starbucks' logo—a mermaid, or siren—with long, spiraling locks of hair—serves in contrast to the masculine name Starbucks, but similarly invokes the theme of exploration in the form of a sea voyage.[296] In myth, sirens have long been associated with luring sailors in with enchanting songs, and the Starbucks logo was likely designed to have a similar effect of luring consumers in with the promise of a hot beverage and a recess from the daily grind.[297] Starbucks' trade dress is likewise metaphorical. Its prominent green color evokes natural imagery, while its in-store décor combines wood and metal piping reminiscent of a voyaging ship.[298]

Lastly and as previously discussed, Nike's swoosh has obvious figurative

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[290] Margaret Mark and Carol S. Pearson, THE HERO AND THE OUTLAW: BUILDING EXTRAORDINARY BRANDS THROUGH THE POWER OF ARCHETYPES (New York: McGraw-Hill, 2001).

[291] *Id.*

[292] *Id.*

[293] *See supra* note 227.

[294] Margaret Mark and Carol S. Pearson, THE HERO AND THE OUTLAW: BUILDING EXTRAORDINARY BRANDS THROUGH THE POWER OF ARCHETYPES (New York: McGraw-Hill, 2001).

[295] *Id.*

[296] *Id.*

[297] *Id.*

[298] *Id.*

significance. Like the word mark NIKE, the swoosh logo is representative of the wing of Nike, the Goddess of Victory, thus mapping from the brand to the athletic wear products the values of strength, victory and ability. This serves in sharp contrast to the Adidas three-stripe logo, which has no plausible connotative significance and thus fails this factor and hence the whole test. Under this proposal, the three-stripe logo is not inherently distinctive. Of course, it has now become a source-identifier as a result of acquiring vast secondary meaning in the marketplace, and consumers have come to associate the three stripes with Adidas just as consumers do with the other three marks mentioned.

Finally, it is important to reiterate that the figurative connection must be *plausible*. Many other figurative interpretations of the brands and products and services mentioned are possible. What is important is that a plausible—i.e., fair or reasonable—metaphorical connection is established, whether or not the exact connotations differ from consumer to consumer. The particular connotations are subjective, but the definitional test of visual metaphor is designed to create an objective measure—like the imagination test in requiring an (any) "imaginative leap."

IV. POTENTIAL OBJECTIONS

The most "intellectual" of the intellectual properties, trademarks are a property purely of consumers' minds.

Barton Beebe[299]

Having examined how a test of visual metaphor might be implemented in trademark law, this Part briefly discusses three potential objections to such a test. These include (1) the abstract nature of the concept of metaphor, (2) criticisms of the *Abercrombie* spectrum and the imagination test in the word mark context, and (3) that it serves to incentivize symbolic consumption and therefore contribute to the dilution of culture in the form of commodification.

A. Vagueness and Abstraction

At first, blush, applying a test of visual metaphor may seem like an unworkable idea. The concept of metaphor is quite abstract, with the basic conceptual metaphor definition laid out in this Article as being the understanding of one thing or concept in terms of another. Yet, the proposal just laid breaks the definition of visual metaphor into constituent parts. As discussed in Part I.B, there is further an entire literature to fall back on in the

[299] Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2021 (2005).

consumer psychology field that relates conceptual metaphor theory and similar theories to the branding context. The rules of trademark law—in filtering through millions of consumer's subject mindsets—are bound to be amorphous.[300] Yet, the test presented, even given its potential subjectivity, would be far less than the current judgments of commonality under *Seabrook*, or the confusion stemming from attempting to fit images into *Abercrombie's* categorical framework in a literal, scope-based sense. As a binary judgment, the majority of cases seeking visual metaphor should be fairly obvious. Of course, at the margins there will be close calls, which is not unlike other doctrines in trademark law which likewise revolve around the consumer's subjective mindset. These include the multi-factor likelihood of confusion analysis, dilution, and pre-and-post sale confusion doctrines. Trademarks—especially in its imaginal, inner, and subjective aspects—is unfortunately not a clear-cut area of the law.[301]

B. Import of Abercrombie's *Imagination Test*

The proposal may also be criticized based on its (partial) import of the *Abercrombie* spectrum, which has been oft-criticized in trademark law.[302] At least, though, *Abercrombie* provides a certain amount of predictability and a general framework for evaluating what is a quite metaphysical judgment—how marks are perceived by the consumer in his or her subjective imagination. And, from a practical lens, the *Abercrombie* framework is unlikely to change substantially, lest be eliminated entirely. As Joseph S. Miller notes, "the *Abercrombie* hierarchy of distinctiveness for trademarks—approaching its fortieth birthday with citations in more than 850 cases and more than 580 law review pieces, now the dominant framework for classifying the conceptual strength of word marks—looks more than stout enough to weather a pitched knife fight without a scratch." From an economic perspective, Jake Linford too offers a limited defense of *Abercrombie*:

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[300] *See, e.g.*, Laura A. Heymann, *The Reasonable Person in Trademark Law*, 52 ST. LOUIS L.J. 781, 784 (noting that "in trademark law, we are considering the (re)actions of potentially millions of consumers. So . . . trademark law must of necessity take certain shortcuts to ensure that litigation does not devolve into a morass of evidentiary issues; true, too, that in a field (law) that depends on precedent for efficient private ordering, there must be certain general rules that can be derived and followed.") (citing Graeme B. Dinwoodie, *What Linguistics Can Do for Trademark Law*, in TRADE MARKS AND BRANDS: AN INTERDISCIPLINARY CRITIQUE 8 (J. Ginsburg, et al. eds., Cambridge University Press 2007)).

[301] Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2021 (2005).

[302] *See* Joseph Scott Miller, *Abercrombie 2.0: Can We Get There From Here? Thoughts on "Suggestive Fair Use*," 77 OHIO ST. L. J. FURTHERMORE 1 (2016).

> Abandoning the simplicity of the *Abercrombie* spectrum will increase administrative costs, and increased administrative costs can serve as a barrier to entry for some plaintiffs. If a firm cannot protect a mark without presenting evidence of source significance, it will take the firm longer to settle its claim to the mark. The delay can be costly. In addition, amassing evidence of source significance is itself a cost endeavor. But the accuracy of the *Abercrombie spectrum* has recently been called into question. This is in part because judges with limited information designed the spectrum as a cost-saving mechanism, and in part because reduced administrative costs typically correlate with increased error costs. By definition, rules and rule-like proxies both over and under correct. The *Abercrombie* categories serve as a shorthand for the inquiry that we would always prefer to have in a costless universe.[303]

C. Symbolic Consumption

A third potential objection is normative rather than descriptive. Commentators have increasingly debated the effect that the language of consumption—and, by extension, symbolic consumption in the image mark context—has on culture and thus the public interest.[304] Katya Assaf has written extensively on this issue and notes that commodification, especially in its figurative aspect, has deleterious effects on culture.[305] Professor Assaf points out that a trademark's meaning is most often created by metaphorically linking a mark to various cultural signs and symbols totally unrelated to its use in commerce.[306] By incentivizing creativity with higher degrees of protection, trademark law, and the imagination test particularly, can be seen to encourage this practice. Often, trademarks absorb the meaning and values contained within symbols for no rational, economic reasons.[307] According to Assaf, this leads to a diluted and commodified culture in the form of "brand fetishism": the

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[303] Jake Linford, *Are Trademarks Ever Fanciful?*, 105 GEO. L. J. 731, 759-760 (2017).

[304] *See, e.g.*, Ralph S. Brown, *Advertising and the Public Interest*: *Legal Protection of Trade Symbols*, 57 YALE L.J. 1165, 1206 (1948) (explaining that "[a]dvertising has two main functions, to inform and to persuade," and that the law should not protect the latter because it disadvantages competition and gives to society no corresponding public benefit); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 Yale L.J. 1717, 1735 (1999) (remarking that "[w]hile there is nothing wrong with encouraging Warner Brothers to sell the public on atmospherics and to devise clever ways to exploit those atmospherics commercially, neither incentive theory nor moral desert offers a reason to protect them from competition.").

[305] Katya Assaf, *The Dilution of Culture and the Law of Trademarks*, 49 IDEA J. L. & Tech. 1 (2008).

[306] *Id.*

[307] *Id.*

phenomenon of consumers perceiving brands and trademarks as "spiritual entities" rather than informational devices.[308]

Thus, extending such a framework to image marks—which are archetypal and deep-seated in the consumer imagination—would perhaps serve to further incentivize imaginative branding and hence consumers' "magical thinking" regarding trade symbols. As Jean Baudrillard notes:"[l]ike every great myth worth its salt, the myth of 'Consumption' has its discourse and its anti-discourse. In other words, the elated discourse on affluence is everywhere shadowed by a morose, moralizing, 'critical' counter-discourse on the ravages of consumer society and the tragic end to which it inevitably dooms society as a whole." This author is thus encouraging of alternatives that would lessen doctrinal dependence on the symbolic dimensions of commerce. For example, Judge Thomas Lee has proposed, based on empirical studies, that trademark validity should revolve entirely on a physical trademark use requirement so long as the mark at issue is not generic.[309] However, in the expected event that trademark law continues to pry into the consumer imagination as a doctrinal matter, it should at least do so equally as between word and image marks so as to create a workable and predictable—if dystopian—framework. [310]

CONCLUSION

Fog

The fog comes
on little cat feet.

It sits looking
over harbor and city
on silent haunches
and then moves on.

Carl Sandburg[311]

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[308] Katya Assaf, *Brand Fetishism*, 43 Conn. L. Rev. 83, 147-148 (2010); *see also* Katya Assaf, *Magical Thinking in Trademark Law*, 37 L. & SOC. INQUIRY 595, 596 (2012) (likening the aesthetic function of trademarks to a form of magical thinking resembling a totemic religion).

[309] *See* Thomas R. Lee et al., *An Empirical and Consumer Psychology Analysis of Trademark Distinctiveness*, 41 ARIZ. ST. L.J. 1033, 1040 (2009).

[310] *See, e.g.*, ROLF JENSEN, THE DREAM SOCIETY: HOW THE COMING SHIFT FROM INFORMATION TO IMAGINATION WILL TRANSFORM YOUR BUSINESS 111-113 (New York: McGrew-Hill, 1999 (examining the shift in commerce from commercial product information to imagination in the form of narratives).

[311] Carl Sandburg (1916), *Fog*, IN POETRY SPEAKS. P. 57. Naperville Sourcebooks (2001).

If distinctiveness is the hinge upon which the rest of trademark law turns,[312] and trademarks are property purely of the consumer imagination,[313] this Article envisions metaphor as the hinge on which the distinctiveness of all marks—including images—turns. The current threshold for word mark distinctiveness is already metaphor—the imagination test used to determine suggestiveness requires a figure of speech between the mark and its underlying product or service. From a doctrinal perspective, this is correct given that trademarks are symbols[314] and in order to meet the definition of a symbol, figurative significance is required.[315] Yet metaphor is not the test for the distinctiveness of images. The various tests rather lack conceptual coherence or uniformity. In having noted that metaphor refers to a phenomenon of thought rather than merely of language,[316] though, visual metaphor is an extension that seems to fit quite well into the distinctiveness framework.

This Article's intended contributions to the literature are threefold. First, it has conceived of metaphor as a unifying theory and consistent requirement for the inherent distinctiveness of all trade symbols, regardless of the medium in which the particular mark is embodied. Second, from a doctrinal standpoint, the Article has attempted to replicate for images the modicum of predictability inherent in the *Abercrombie* spectrum's word mark framework. Finally, the proposal put forward in this Article is envisioned as a starting point, of which optimistically a more robust future dialogue on images in intellectual property law will soon follow. Indeed, the law is encased in deep fog with regard to its understanding of images.[317] It is hoped that this Article will lift a metaphorical layer of it.

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312 *See supra* note 299.
313 *See supra* note 182.
314 *See supra* note 2.
315 *See supra* note 1.
316 *See supra* note 34.
317 *See* Porter, *supra* note 6.