

Amazon's Quiet Overhaul of the Trademark System

Jeanne C. Fromer* & Mark P. McKenna**

Amazon's dominance as a platform is widely documented. But one aspect of that dominance has not received sufficient attention—the Amazon Brand Registry's sweeping influence on firm behavior, particularly in relation to the formal trademark system. Amazon's Brand Registry serves as a shadow trademark system that dramatically affects businesses' incentives to seek legal registration of their marks. The result has been a surge in the number of applications to register, which has swamped the U.S. Patent and Trademark Office (PTO) and created delays for all applicants, even those that previously would have registered their marks. And the increased value of federal registration has drawn in bad actors who fraudulently register marks that are in use by others on the Amazon platform and use those registrations to extort the true owners.

DOI: <https://doi.org/10.15779/Z38W08WJ4R>

Copyright © 2025 Jeanne C. Fromer & Mark P. McKenna

* Vice Dean and Walter J. Derenberg Professor of Intellectual Property Law, New York University School of Law; Co-Director, Engelberg Center on Innovation Law & Policy.

** Vice Dean for Faculty and Intellectual Life and Professor of Law, UCLA School of Law; Faculty Co-Director, UCLA Institute of Technology, Law & Policy; Of Counsel, Lex Lumina PLLC. The authors are grateful to David Abrams, Amy Adler, Arnaud Ajdler, Olivia Ajdler, Barton Beebe, Robert Brauneis, Richard Brooks, Vincent Buccola, Colleen Chien, Julie Cohen, Cynthia Dahl, Naama Daniel, Kevin Davis, Rachael Dickson, Graeme Dinwoodie, Stacey Dogan, Rochelle Dreyfuss, Noam Elcott, Gena Feist, Michael Frakes, Daniel Francis, Kristelia Garcia, Deborah Gerhardt, Eric Goldman, Michael Goodyear, Michael Grynberg, Laura Heymann, David Hoffman, Kobi Kastiel, Jon Lee, Mark Lemley, Daryl Levinson, Daphna Lewinsohn-Zamir, Jake Linford, Giovanna Massarotto, Troy McKenzie, Tejas Narechania, Jan Osei-Tutu, Betsy Rosenblatt, Jennifer Rothman, Jason Schultz, Peter Shane, Catherine Sharkey, Jeremy Sheff, Jessica Silbey, Christopher Sprigman, David Stein, Katherine Strandburg, Madhavi Sunder, Rebecca Tushnet, Molly Van Houweling, Rory Van Loo, Polk Wagner, Michael Weinberg, and Kenji Yoshino, and participants at workshops at Georgetown University, New York University, Vanderbilt, University of California, Berkeley, University of California, Los Angeles, and University of Pennsylvania Carey law schools, the Intellectual Property Scholars Conference, Trademark and Unfair Competition Scholars Roundtable, and Works in Progress in Intellectual Property Colloquium for their extensive comments. Thanks also to Harper Johnson, Clare Platt, and Brittany Von Rueden for excellent research assistance. Jeanne Fromer also gratefully acknowledges support from the Filomen D'Agostino and Max E. Greenberg Research Fund.

Amazon's policies also create incentives for businesses to adopt different kinds of marks. Specifically, businesses are more likely to claim descriptive or generic terms, advantageously in stylized form or with accompanying images, and to game the scope limitations that would ordinarily attend registration of those marks. And the same Amazon policies have given rise to the phenomenon of "nonsense marks," which are strings of letters and numbers unrecognizable as words or symbols. In the midst of these systemic changes, Amazon has consolidated its own branding practices, focusing on a few core brands and expanding its use of those marks across a wide range of products. In combination, Amazon's business model and Brand Registry have overhauled the American trademark system, and they have done so with very little public recognition of the consequences of Amazon's business approach.

Amazon's impact raises profound questions for trademark law and for law more generally. There have been powerful players before, and other situations in which private dispute resolution procedures have affected parties' behavior. But Amazon's effect on the legal system is unprecedented in scale and scope. What does—or should—it mean that one private party can so significantly affect a legal system? Do we want the trademark system to have to continually adapt to Amazon's rules? If not, how can the law disable Amazon from having such a profound impact? In this regard, we explore the ways in which Amazon's practices affect competition, harm the trademark system, and reshape how we think about trademark law at its foundation.

Introduction	1171
I. The Conventional Trademark System.....	1177
A. The Distinctiveness Requirement.....	1178
B. The Use Requirement.....	1182
C. The Trademark Registration Process	1186
II. Amazon's Business Model and Brand Registry	1189
A. Amazon's Business Model and Evolution	1189
B. The Brand Registry as a Business Tool	1192
III. Amazon's Overhaul of the Trademark System	1197
A. Small Businesses' Approach to PTO Registration.....	1198
B. Trademark Extortion and Fraudulent Filings	1202
C. Descriptive and Generic Terms.....	1205
D. Nonsense Marks	1211
E. Amazon's House Brands	1218
IV. Implications.....	1223
A. Precursors	1224
1. Sears Catalog.....	1224
2. Network Solutions Policy	1226

B. When a Single Company Has Such an Impact on a Legal System	1231
C. Adjusting the Trademark System?	1234
1. Amazon's Indirect Capture of the Trademark System	1234
2. PTO Adjustments	1241
3. Amazon Adjustments	1243
D. The Future of Trademarks and Competition	1245
Conclusion	1248

INTRODUCTION

Amazon's dominance as a platform is widely documented.¹ Congress held hearings focused on Amazon for more than a year,² the Federal Trade Commission (FTC) recently sued Amazon for unfair competition,³ and scholars and commentators (including Amazon critic Lina Khan, Chair of the FTC during the Biden Administration) debate the effects of this dominance on consumer welfare.⁴ But one aspect of that dominance has not received sufficient attention—the Amazon Brand Registry's sweeping influence on firm behavior, particularly in relation to the formal trademark system. Amazon's Brand Registry serves as a shadow trademark system⁵ that dramatically affects

1. See, e.g., Rebecca Haw Allensworth, *Antitrust's High-Tech Exceptionalism*, 130 YALE L.J. F. 588, 603–04 (2021) (“Amazon Marketplace is an open online-sales platform that accounts for 52.4% of American online-retail spending; its closest competitor has just 6.6%. Amazon allows independent merchants to sell their goods on the Marketplace for a fee and a percentage of sales revenue. It also sells its own products, with 137 private-label brands, including Amazon Basics.” (footnotes omitted)); Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 985 (2019) [hereinafter Khan, *Separation of Platforms and Commerce*] (describing Amazon as “the dominant online marketplace, the world’s largest cloud computing service, a massive shipping and logistics network, a media producer and distributor, a grocer, a small-business lender, a live video-gaming streaming platform, a digital home assistant, a designer of apparel, and an online pharmacy”); John B. Kirkwood, *Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy*, 69 U. MIAMI L. REV. 1, 4 (2014) (noting “Amazon’s dominant position as an e-book retailer”); Lina M. Khan, Note, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 712–17 (2017) [hereinafter Khan, *Amazon’s Antitrust Paradox*] (calling Amazon “the titan of twenty-first century commerce,” and explaining why).

2. Annie Palmer, *Amazon Axes Some Private-Label Brands as Part of Wider Cost Cuts*, CNBC (Aug. 10, 2023), <https://www.cnbc.com/2023/08/10/amazon-axes-some-private-label-brands-as-part-of-wider-cost-cuts.html> [<https://perma.cc/3797-TEGT>].

3. See Complaint, *FTC v. Amazon.com, Inc.*, No. 2:23-cv-01495-JHC (W.D. Wash. Nov. 2, 2023).

4. *Supra* note 1.

5. By “shadow trademark system” we mean a system existing outside of the traditional system established by law, as with shadow banking. See Patrick M. Corrigan, *Shining a Light on Shadow Banks*, 49 J. CORP. L. 1 (2023) (demonstrating that “shadow banks” typically are engaged in investing, not lending or extending credit); Note, *Danger Lurking in the Shadows: Why Regulators Lack the Authority to Effectively Fight Contagion in the Shadow Banking System*, 127 HARV. L. REV. 729, 738 (2013) (emphasizing that “shadow banks . . . rely . . . on forms of short-term funding that serve as functional

businesses' incentives to seek registration of their marks and to choose certain types of marks to designate their goods.

The Brand Registry is, most basically, a private dispute resolution system that allows mark owners to object to unauthorized uses of their marks on Amazon without having to file formal legal proceedings.⁶ What makes Amazon's system different than other private dispute resolution systems is the extent to which it influences parties' behavior within the legal system itself.⁷ The Brand Registry not only gives parties a cheaper and more efficient way to resolve disputes, but it also creates incentives for parties to use the trademark system differently than they otherwise would, and in ways that were not anticipated in the design of that system.

Most directly, the Brand Registry has changed the incentives to register trademarks. The American trademark system is use-based: Trademark rights arise out of use, not registration, and registration in the U.S. Patent and Trademark Office (PTO) simply records those rights and provides certain enforcement benefits.⁸ But because unregistered marks have long been enforceable under federal law on largely the same terms as registered marks,⁹ unregistered rights have often been perfectly adequate for many smaller businesses. Indeed, the availability of those unregistered rights has traditionally been seen as a benefit of the American system for small and medium-sized businesses.¹⁰

Amazon's policies have shifted that calculus because parties can participate in the Brand Registry in the United States only if their mark is registered with the PTO—or, as of very recently, if their application to register is pending.¹¹ Given Amazon's dominance as an online shopping platform, small and medium-sized businesses feel compelled to sell on the platform, and registration in the PTO is the ticket to the meaningful enforcement and search benefits provided to participants in the Brand Registry.¹² Businesses therefore have strong incentives to register marks when they previously would have relied on unregistered rights.¹³

substitutes for deposits"). We do not mean to use the term to suggest an ominousness as in "valley of the shadow of death" or "shadow of one's former self." *Id.* at 729.

6. See *infra* Part II.B.

7. See *infra* Part IV.A.2.

8. See *infra* Part I.B.

9. See *infra* Part I.C.

10. See Jeanne C. Fromer & Mark P. McKenna, *Claiming Design*, 167 U. PA. L. REV. 123, 128–29 (2018) (describing the benefits of unregistered rights); *infra* Part I.B.

11. See *infra* Part II.B.

12. See *infra* Part II.B.

13. See *infra* Part III.A. Businesses have incentives to apply to register even if they do not sell on Amazon because selling on the platform is not a condition to participate in the Brand Registry. Non-sellers obviously do not benefit from the algorithmic tools, so their incentive is strictly about enforcement advantages.

The result has been a dramatic increase in the number of applications to register, which has swamped the PTO and created delays for all applicants, including those that would have previously registered their marks.¹⁴ Our data show that annual PTO applications estimated to originate with small businesses have approximately doubled since Amazon's Brand Registry began, from about one hundred thousand to two hundred thousand, increasing the proportion of filings from these entities from about 30 percent to about 40 percent annually.¹⁵ In response to the delays that Amazon's policies helped create, Amazon has recently started qualifying parties for the Brand Registry based only on a pending application.¹⁶ This change enables parties to privately enforce marks that might ultimately be rejected by the PTO and is likely to increase applications even more, creating further PTO delays.

By conditioning participation in the Brand Registry on PTO registration or at least an application to register, Amazon has created opportunities for pirates to extort sellers that operate on the platform using unregistered marks.¹⁷ Like old-fashioned cybersquatters, these bad actors apply to register the unregistered marks in their own names and then seek to extort the true owners of those marks by threatening the owners with exclusion from Amazon's platform.

Not only does the Brand Registry increase incentives to register marks for which the owners would previously have relied on unregistered rights, but it also creates incentives for businesses to adopt different kinds of marks. Descriptive terms (like NATIONAL CAR RENTAL for nationwide car rental services) and generic terms (such as APPLE for apples) are especially more valuable in light of Amazon's policies.¹⁸ Descriptive words are normally not protectable or registrable without evidence that consumers actually associate the term with a single source (what trademark law calls "secondary meaning"), and this additional proof requirement is supposed to be a deterrent to claiming descriptive terms.¹⁹ Generic terms are categorically excluded from protection, even if they have secondary meaning.²⁰ Despite these rules, there has always been some incentive to claim descriptive and generic terms as trademarks because control over those terms can provide meaningful competitive benefits.²¹ But with Amazon, there is an overwhelming incentive to control descriptive or generic terms because consumers often use those terms to search on Amazon.

14. See *infra* Part III.A.

15. See *infra* Part III.A. We do not suggest that all this increase is attributable to Amazon alone. As we discuss in Part III.A, other factors may also have played a role.

16. See *infra* Part II.B.

17. See *infra* Part III.B.

18. See *infra* Part III.C.

19. See *infra* Part II.A.

20. See *infra* Part II.A.

21. See Christopher Buccafusco, Jonathan S. Masur & Mark P. McKenna, *Competition and Congestion in Trademark Law*, 102 TEX. L. REV. 437, 438–40 (2024); Jeanne C. Fromer, *Against Secondary Meaning*, 98 NOTRE DAME L. REV. 211, 248–49 (2022).

The Brand Registry's structure also enables parties to game the trademark registration system and effectively get the full benefits of exclusive rights in descriptive and maybe even generic terms.²² Of particular relevance, parties can avoid descriptiveness and genericness rejections in the PTO by applying to register those terms in a stylized format (such as a particular font) or with an accompanying image, sometimes disclaiming rights in the descriptive or generic word(s) themselves. In those cases, trademark law supposedly limits the scope of rights accorded to the registered mark to reflect the stylization or accompanying image.²³ But while Amazon is capable of considering the format in which a mark is presented, it does not require visual matching: A simple text match is sufficient to trigger exclusion.²⁴ That means a highly descriptive term, and maybe even a generic one, might be deemed registrable in the PTO because of its stylization but then enforced on Amazon as if it were a registration of the unprotectable word itself. That gaming disrupts the balance that the formal legal system tries to strike between recognition of the source-identifying capacity of design features on the one hand and the need for competitive access to descriptive and generic terms on the other, ignoring the reasons why those marks get any protection at all.²⁵

The Brand Registry also creates greater incentive to claim so-called "nonsense marks," which are strings of letters or numbers that are not comprehensible as words. For example, ELXXROONM, SUJIOWJNP, XUFFBV, and LXCJZY are all nonsense marks parties have recently applied to register in the PTO.²⁶ Indeed, the PTO data suggest a tremendous increase in filings for nonsense marks in the past few years, from almost none to over twenty thousand applications annually (0.5 percent of annual filings to approximately 4.5 percent).²⁷

Nonsense marks are currently easy to register as trademarks because they appear not to provide any information about the goods or services with which they are used, making them inherently distinctive and thus immediately protectable.²⁸ But those "marks" pose significant conceptual problems for trademark law, which presumes that parties are claiming terms that will have some meaning to consumers.²⁹ That is a sensible assumption in a world where consumers search and buy by brand. But when algorithms do the searching,

22. See *infra* Part III.C.

23. See Barton Beebe & Jeanne C. Fromer, *Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion*, 131 HARV. L. REV. 945, 984–85, 985 n.162 (2018). There are, of course, good reasons to doubt that trademark law effectively enforces that scope, but at least the scope restrictions are supposed to follow. Mark A. Lemley & Mark P. McKenna, *Scope*, 57 WM. & MARY L. REV. 2197 (2016).

24. See *infra* Parts II.B, III.C.

25. See *infra* Part I.A.

26. See *infra* Part III.D.

27. See *infra* Part III.D.

28. See *infra* Parts I.A, III.D.

29. See *infra* Part I.A.

businesses just need something that the algorithm can use to preference them. Nonsense will do.³⁰

Critics of excessive branding might rejoice about that de-centering and potential democratization of the online marketplace. But there is irony here: Amazon's de-centering third-party branding will likely amplify Amazon's own power by making its search function and algorithm even more important in finding products. And it certainly enhances the value of Amazon's own branding strategies, as reflected in the massive expansion of products sold under the Amazon Basics and Amazon Essentials brands.³¹ Amazon controls the platform and can preference its own products in search results based on product descriptor keywords, making its house brand more important than product line brands. To take just one example, a search for "Hanes T-shirt" returns an Amazon Essentials T-shirt as the first result, followed by several Hanes results.³²

In all of these ways, actors affected by Amazon's business model and Brand Registry have overhauled central aspects of the trademark system in ways that are potentially troublesome. The Brand Registry has increased incentives to register and to register different types of marks, putting pressure on several substantive validity doctrines and forcing the PTO to deal with a huge influx of applications that examiners cannot manage in a timely way. Moreover, this legal overhaul has happened with very little public recognition of the consequences of Amazon's business approach.³³

We do not claim that Amazon specifically intended to affect the trademark system in any of the ways we describe or even that Amazon has fully understood the extent of its impact. It seems very likely that Amazon adopted policies that it thought were sensible for its business and that it created the Brand Registry in part to address actual concerns about counterfeit goods and product liability—and, not incidentally, to avoid regulation like it would face under Congress's proposed SHOP SAFE Act.³⁴ In that regard, it may be that Amazon's policies and practices have simply had the unintended, though not necessarily unforeseeable, consequences that we describe.

Regardless of Amazon's intent, its business model and Brand Registry raise profound questions for trademark law and law more generally. Amazon is not the first commercial powerhouse, nor is it the first to create a private dispute

30. See *infra* Parts I.A., III.D.

31. See *infra* Part III.E.

32. See *infra* Part III.E.

33. Even when there has been any recognition of the consequences, it has generally been of a single aspect, typically the phenomenon of nonsense marks, rather than a comprehensive sense of Amazon's impact on the trademark system. See John Herrman, *All Your Favorite Brands, From BSTOEM to ZGGCD*, N.Y. TIMES (Feb. 11, 2020), <https://www.nytimes.com/2020/02/11/style/amazon-trademark-copyright.html> [http://perma.cc/MLU2-6DJS] (highlighting the nonsense marks on Amazon); Note, *Fanciful Failures: Keeping Nonsense Marks off the Trademark Register*, 134 HARV. L. REV. 1804 (2021) [hereinafter *Fanciful Failures*] (thinking through how the trademark system should handle nonsense marks).

34. See *infra* Part II.B.

resolution system. But Amazon's effect on the trademark system is unprecedented. One set of questions is institutional and structural. What does, or should, it mean that one private party can so significantly affect a legal system? Do we want the legal system to have to continually adapt to Amazon's rules? If not, how can the law disable Amazon from having such a profound impact?

Another set of questions focuses more specifically on the overall effects of Amazon's policies on competition and on trademark law's normative commitments. As we describe, Amazon's model and its policies likely increase its own power vis-à-vis third-party brands, de-centering branding more generally. The net value of that shift may be in the eye of the beholder: It depends on how one weighs the potential benefits of search simplification and lower prices for consumers, as well as the ease of marketplace entry for third-party sellers, against the costs of Amazon's increased power over third-party sellers. Likewise, the benefits of a reduction in the power of brands depend on whether alternative search tools, particularly algorithms that focus on product information and consumer reviews, convey relevant information to consumers as effectively as trademarks. In the end, whether and how we should respond to Amazon's effects on the trademark system depends on whether we want the trademark system to demand that trademarks play their traditional role or whether instead the facts on the ground have changed so much that the premises of that system no longer hold.

Many legal scholars have considered whether and how law might have to adjust to new platforms, asking, among other things, whether Uber drivers should be treated as employees and how to assess trademark liability for platforms.³⁵ These scholars, as exemplified by Julie Cohen, recognize that the platform is "the core organizational form of the emerging informational economy" and has replaced the more traditional marketplace as the locus for barter and exchange.³⁶ We extend this literature by demonstrating how a dominant platform like Amazon can spearhead an overhaul of a legal system, at least with the assistance of its third-party sellers.³⁷

35. See, e.g., Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 203–04 (2017) (suggesting that law will have to adapt to platforms and platforms will have to adapt to the law); Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 161–66 (2016) (analyzing how platforms and the laws regulating them will evolve together); Sonia K. Katyal & Leah Chan Grinvald, *Platform Law and the Brand Enterprise*, 32 BERKELEY TECH. L.J. 1135, 1139–40 (2018) (arguing that platforms facilitate the rise of both macrobrands and microbrands and that trademark law should adapt to this situation).

36. Cohen, *supra* note 35 at 136–37; accord Katyal & Grinvald, *supra* note 35, at 104–06; Lobel, *supra* note 35, at 91, 106.

37. In many ways, this insight is a bookend to Lina Khan's influential work arguing that Amazon's conduct violates antitrust laws (and the recent antitrust lawsuit brought against Amazon by the Federal Trade Commission under Khan's leadership). David McCabe, *U.S. Accuses Amazon of Illegally Protecting Monopoly in Online Retail*, N.Y. TIMES (Sept. 26, 2023), <https://www.nytimes.com/2023/09/26/technology/ftc-amazon.html> [<https://perma.cc/A43K-RT3H>]. Khan seeks to reorient antitrust law for the platform era, suggesting that reorientation is actually a return to antitrust law's founding principles, by proposing that antitrust analysis focus on "the underlying

Part I describes the conventional trademark system's aim and design. Part II turns to Amazon's business model and Brand Registry. Part III builds on these two parts by investigating how Amazon's practices have provoked the businesses selling wares there to change how they think about registering marks and the marks they choose, plus the trademark extortionists that have arisen in response to this ecosystem. Part IV considers whether potential precursors like Sears and Network Solutions provide useful analogies and concludes that Amazon's impact on the trademark system is unprecedented. That Part then discusses possible changes to PTO practice and Amazon policies that would address Amazon's impact. Finally, it considers the broader impact of Amazon's practices on trademark law and competition more broadly.

I.

THE CONVENTIONAL TRADEMARK SYSTEM

Scholars have long debated whose interests trademark law primarily serves. On one account, trademark law aims to protect businesses against illegitimate uses of their marks that would divert customers or confuse consumers about those businesses' relationship to the goods bearing their marks.³⁸ Other accounts, particularly in modern commentary, make consumer interests primary. Trademark law makes misleading uses of trademarks actionable so that consumers are not defrauded and can rely on marks to select goods from the sellers they wish to patronize.³⁹

structure and dynamics of markets" rather than consumer welfare measured through "short-term effects on price and output." Khan, *Amazon's Antitrust Paradox*, *supra* note 1, at 716–17. In particular, she argues that even though consumers generally love Amazon, its low prices, and broad availability of products, Amazon's "willingness to sustain losses and invest aggressively at the expense of profits and integration across multiple business lines" is problematic as a matter of antitrust. *Id.* at 746–47. Khan suggests that these features have caused numerous problems for competition, including in the e-book market, the delivery sector, and Amazon's direct competition with its third-party sellers. *Id.* at 754–90; Khan, *Separation of Platforms and Commerce*, *supra* note 1, at 977; *see infra* Part III.E.

38. Many older Supreme Court cases are consistent with this view. *See, e.g.*, *Canal Co. v. Clark*, 80 U.S. 311, 322–23 (1871) ("[I]n all cases where rights to the exclusive use of a trade-mark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another; and that it is only when this false representation is directly or indirectly made that the party who appeals to the court of equity can have relief. This is the doctrine of all the authorities.").

39. Here is a classic account from William Landes and Richard Posner:

Rather than reading the fine print on the package to determine whether the description matches his understanding of brand *X*, or investigating the attributes of all the different versions of the product (of which *X* is one brand) to determine which one is brand *X*, the consumer will find it much less costly to search by identifying the relevant trademark and purchasing the corresponding brand A trademark conveys information that allows the consumer to say to himself, "I need not investigate the attributes of the brand I am about to purchase because the trademark is a shorthand way of telling me that the attributes are the same as that of the brand I enjoyed earlier."

WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 167 (2003) (footnote omitted).

Courts often present business and consumer interests as harmonious, so that trademark protection simultaneously advances both. As the Supreme Court has stated,

[T]rademark law, by preventing others from copying a source-identifying mark, “reduce[s] the customer’s costs of shopping and making purchasing decisions” . . . for it quickly and easily assures a potential customer that *this* item—the item with this mark—is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past. At the same time, the law helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product.⁴⁰

But regardless of how one prioritizes the respective interests, source indication is the conceptual center of every serious theoretical justification of trademark law. All of the benefits of trademark protection depend on a mark’s capacity to identify goods or services as emanating from a single source, and all of the harms trademark law targets result from interference with that source-indicating function.

Given that focus on source indication, it is no surprise that modern doctrine defines trademark subject matter fundamentally in terms of capacity to indicate source. According to the Lanham Act, a trademark is “any word, name, symbol, or device, or any combination thereof” that is used “to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods.”⁴¹ Because “human beings might use as a ‘symbol’ or ‘device’ almost anything at all that is capable of carrying meaning,” as the Supreme Court noted, trademark subject matter is broad and capacious, including colors, product packaging, and even the design of products, to the extent they identify source.⁴²

The following sections elaborate, respectively, on trademark’s distinctiveness requirement, the requirement of trademark use, and the registration process of the trademark system.

A. *The Distinctiveness Requirement*

Trademark law calls source designation “distinctiveness,” and that concept is the foundation of protectability.⁴³ Consumers are unlikely to be confused about

40. *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163–64 (1995) (internal citation omitted).

41. 15 U.S.C. § 1127; *see also* 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 3:1 (5th ed. 2024).

42. *Qualitex*, 514 U.S. at 162 (finding color protectable with secondary meaning); *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 209–16 (2000) (finding product packaging capable of being inherently distinctive and product design protectable with secondary meaning). Sounds and scents have also been recognized as trademarks in some cases. *See, e.g., In re Clarke*, 17 U.S.P.Q.2d (BL) 1238, 1239 (T.T.A.B. 1990) (ruling that the scent of yarn is protectable with secondary meaning).

43. Beebe & Fromer, *supra* note 23. American trademark law requires use in commerce, which is discussed in the next section in the context of the trademark registration process.

the source of a product or service if they do not recognize a particular designation as source-indicating in the first place.⁴⁴ Relatedly, consumers are only able to use marks to reduce their search costs—the costs of identifying goods or services with the characteristics they want—if those marks reliably indicate who is responsible for the goods or services they are used with.⁴⁵ Moreover, from a business's perspective, if consumers know that a term or symbol identifies the business as the source of goods or services, the business will be encouraged to invest in the consistent quality of its goods or services, an important goal of trademark law.⁴⁶ In addition to the benefits of requiring distinctiveness, there is a cost to granting trademark rights to words or symbols that do not identify source. The principal worry is that protecting those words or symbols would inefficiently prevent other businesses from using them in competitively useful ways.⁴⁷

The framework to assess distinctiveness and thus protectability in trademark law is set out most famously in *Abercrombie & Fitch Co. v. Hunting World, Inc.*, a 1976 Second Circuit decision authored by Judge Friendly⁴⁸ that was widely relied upon by other courts, including the Supreme Court.⁴⁹ *Abercrombie* identified five different categories of terms with respect to trademark protection: “Arrayed in an ascending order which roughly reflects their eligibility to trademark status and the degree of protection accorded, these classes are (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or [(5)] fanciful.”⁵⁰ As explained by the Second Circuit, a term is categorized based on the amount of information it supplies about the goods or services with which the term is being used.⁵¹

As per *Abercrombie*, a “generic” term “refers, or has come to be understood as referring, to the genus of which the particular product is a species.”⁵² For example, IVORY would be generic for products made from elephant tusks, but

44. According to the Supreme Court, confusion about source is trademark law's “bête noire.” *Jack Daniel's Props., Inc. v. VIP Prods., LLC*, 599 U.S. 140, 147 (2023). See also Graeme B. Dinwoodie, *Reconceptualizing the Inherent Distinctiveness of Product Design Trade Dress*, 75 N.C. L. REV. 471, 483 (1997) (“Distinctiveness is central to trademark protection because, without it, no goodwill attaches to the claimed mark. Absent that goodwill, use by competitors of the same or a similar mark would neither be an appropriation of the property of others, nor would it confuse consumers.”).

45. See Mark P. McKenna, *Teaching Trademark Theory Through the Lens of Distinctiveness*, 52 ST. LOUIS U. L.J. 843, 850 (2008).

46. See *id.* at 849–51.

47. See William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 288 (1987).

48. 537 F.2d 4, 7, 9–11 (2d Cir. 1976).

49. See, e.g., *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 210–12 (citing *Abercrombie*, 537 F.2d at 10–11); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 162–63 (citing *Abercrombie*, 537 F.2d at 9–10).

50. *Abercrombie*, 537 F.2d at 9. *Abercrombie* combines “arbitrary” and “fanciful,” but those categories are technically different. See *id.* at 11 n.12.

51. *Id.* at 9.

52. *Id.*

not for soap products.⁵³ Generic terms are never protectable as trademarks, even if they develop secondary meaning.⁵⁴ As courts routinely say, competitors should have the absolute right to call their goods or services by their category name; if they could not, they would be unable to compete effectively and consumers would ultimately be hurt by confusion and illegitimate restriction of competition.⁵⁵

“Descriptive” terms are presumptively unprotectable, but they can earn their way into trademark status. As the Second Circuit has explained, a descriptive term “describe[s] a product or its attributes.”⁵⁶ These are terms like HOLIDAY INN for inns in which people stay while on holiday, ALL BRAN for all-bran cereal, and AMERICAN GIRL for American girl dolls.⁵⁷ To the Seventh Circuit, “[a] descriptive mark is not a complete description, . . . but it picks out a product characteristic that figures prominently in the consumer’s decision whether to buy the product or service in question.”⁵⁸ Similar to generic terms, the fear with protecting descriptive marks is that competitors might want to use a term because it describes their product too, and those competitors would be unfairly disadvantaged if one business in the competitive landscape has exclusive rights in such a term.⁵⁹

Descriptive terms are not inherently distinctive because they give direct information about the nature or characteristics of the goods or services they are used with and therefore do not automatically signify source.⁶⁰ Only when consumers have to come to understand a descriptive term primarily as a source indicator, and not just as a descriptor of the products or services, can it be protected as a trademark.⁶¹ The upshot of that rule is that descriptive terms cannot be protected immediately upon use; it takes time (and usually substantial advertising) for them to become trademarks.⁶² As Judge Friendly explained in *Abercrombie*, in allowing protection for descriptive marks that have acquired

53. *Id.* at 9 n.6.

54. *Id.* at 9.

55. *Id.*

56. *TCPIP Holding Co. v. Haar Commc’ns Inc.*, 244 F.3d 88, 93 (2d Cir. 2001); *accord* 1 MCCARTHY, *supra* note 41, § 11:16 (discussing what makes a mark descriptive, including to whom it must be descriptive and as to which aspects of a product, including ingredients, size, function, and provider).

57. *Custom Vehicles, Inc. v. Forest River, Inc.*, 476 F.3d 481, 483 (7th Cir. 2007).

58. *Id.*

59. *Id.*

60. *TCPIP Holding Co.*, 244 F.3d at 93.

61. *See* 15 U.S.C. § 1052(e)(1), (f); *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9–10 (2d Cir. 1976); *Custom Vehicles*, 476 F.3d at 483; *TCPIP Holding Co.*, 244 F.3d at 94. Secondary meaning can be shown through direct or circumstantial evidence, and courts weigh this evidence using a multifactor test to assess whether there is a “mental association by a substantial segment of consumers and potential consumers ‘between the alleged mark and a single source of the product.’” *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1354 (9th Cir. 1985) (citation omitted).

62. Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2029 (2005); Dinwoodie, *supra* note 44, at 487–88.

secondary meaning, trademark law “strikes the balance . . . between the hardships to a competitor in hampering the use of an appropriate word and those to the owner who, having invested money and energy to endow a word with the good will adhering to his enterprise, would be deprived of the fruits of his efforts.”⁶³

Even when descriptive terms develop secondary meaning, trademark law recognizes that competitors might still need to use the terms in their primary, descriptive sense. The descriptive fair use defense permits a business to use a competitor’s protected descriptive mark, not as a mark, but “fairly and in good faith only to describe the [business’s] goods or services.”⁶⁴ For example, if Delta Airlines described itself patriotically as “an American airline,” that might be permissible as a descriptive fair use of the AMERICAN AIRLINES mark, as long as Delta was using “American” in a non-trademark way. The defense is an important one,⁶⁵ but it is relatively narrow because it does not allow others to use the term as a mark—including a domain name or slogan—even if that term also describes the defendant’s goods or services.⁶⁶ Lisa Ramsey documents that the defense is murky, and “[r]elevant factors for determining whether a use is a trademark or descriptive use include the size, style, location, and prominence of the descriptive term in comparison to the defendant’s use of its own trademark or other descriptive matter in advertising or product packaging.”⁶⁷

“Suggestive,” “arbitrary,” and “fanciful” terms are considered inherently distinctive and therefore protectable without proof of secondary meaning.⁶⁸ As explained by the Fifth Circuit, a “suggestive” term “suggests, rather than describes, some particular characteristic of the goods or services to which it applies and requires the consumer to exercise the imagination in order to draw a

63. *Abercrombie*, 537 F.2d at 10.

64. 15 U.S.C. § 1115(b)(4); *see also* KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S. 111, 124 (2004) (holding that a defendant raising such a defense need not demonstrate that consumers will not be confused by the use).

65. *See* Deborah R. Gerhardt, *A Masterclass in Trademark’s Descriptive Fair Use Defense*, 52 AKRON L. REV. 739, 740 (2019) (explaining how this defense “involves careful balancing of a mark owner’s right to protect its reputation against the rights of competitors to compete fairly and effectively so that consumers will have access to accurate, informative speech that is not bounded by monopolies on descriptive words”).

66. Lisa P. Ramsey, *Descriptive Trademarks and the First Amendment*, 70 TENN. L. REV. 1095, 1167–68 (2003) (citing cases); *see also* Stephen L. Carter, *The Trouble with Trademark*, 99 YALE L.J. 759, 771 (1990) (discussing the competitive tensions in allowing businesses to protect descriptive marks); Rebecca Tushnet, *Fixing Incontestability: The Next Frontier?*, 23 B.U. J. SCI. & TECH. L. 434, 436 (2017) (describing the defense as “burdensome to prove”).

67. Ramsey, *supra* note 66, at 1168. She concludes that “[w]ith such a limited and uncertain fair use defense, competitors will likely self-censor their commercial expression rather than risk the cost and inconvenience of having to defend a trademark infringement action.” *Id.* at 1169; *see also* William McGeveran, *The Trademark Fair Use Reform Act*, 90 B.U. L. REV. 2267, 2275–76 (2010) (“In response to the risk of litigation—not the risk of liability—rational actors, including large institutions such as Hollywood studios or insurance companies, adopt risk-averse policies concerning the unauthorized use of trademarks.”).

68. *Abercrombie*, 537 F.2d at 11.

conclusion as to the nature of the goods and services.”⁶⁹ For example, courts have found SWAP for a watch with interchangeable parts,⁷⁰ 5 HR ENERGY for an energy drink,⁷¹ and GLASS DOCTOR for glass installation and repair services all to be suggestive.⁷² “Arbitrary” terms are preexisting words that are used in “an unfamiliar way” that is conceptually unrelated to the category of goods or services at hand.⁷³ Examples of marks courts have classified as arbitrary are STARBUCKS for coffee,⁷⁴ VEUVÉ (meaning “widow” in French) for champagne,⁷⁵ and KIRBY for vacuum cleaners.⁷⁶ “Fanciful” terms are “invented solely for their use as trademarks.”⁷⁷ Courts have deemed fanciful marks to include CARSONITE for highway markers⁷⁸ and LUMAR for fabric softener.⁷⁹ Suggestive, arbitrary, and fanciful terms are immediately protectable because they do not provide any direct information about the goods or services and are therefore assumed automatically to convey source information. Protection of those terms also does not “depriv[e] others of a means of describing their products to the market.”⁸⁰

Thus, a claimed mark’s protectability depends on its distinctiveness, which is determined according to *Abercrombie*’s classification scheme. As discussed in the next Section, a claimed mark’s protectability also depends on the way the claimant uses the purported mark.

B. The Use Requirement

Eligibility for trademark status depends not only on a sign’s capacity to identify source, but also on evidence that the claimant has actually used that sign in a particular trademark way.⁸¹ “Use” in this sense has special meaning: It has a quantitative dimension (some, rather than none), and it also connotes particular functional characteristics, namely that the sign as used has the effect of identifying source.⁸² As the Supreme Court recently explained, a trademark

69. *Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 791 (5th Cir. 1983).

70. *Swatch AG v. Beehive Wholesale, LLC*, 739 F.3d 150, 157–58 (4th Cir. 2014).

71. *Innovation Ventures, LLC v. N.V.E., Inc.*, 694 F.3d 723, 730 (6th Cir. 2012).

72. *Synergistic Int’l, LLC v. Korman*, 470 F.3d 162, 172 (4th Cir. 2006).

73. *See Abercrombie*, 537 F.2d at 11 n.12.

74. *Starbucks Corp. v. Wolfe’s Borough Coffee, Inc.*, 736 F.3d 198, 212 (2d Cir. 2013).

75. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1372 (Fed. Cir. 2005).

76. *Scott Fetzer Co. v. House of Vacuums Inc.*, 381 F.3d 477, 485 (5th Cir. 2004).

77. *Abercrombie*, 537 F.2d at 11 n.12.

78. *Carson Mfg. Co. v. Carsonite Int’l Corp.*, 686 F.2d 665, 670 (9th Cir. 1981).

79. *Luzier Inc. v. Marlyn Chem. Co.*, 442 F.2d 973, 974 (C.C.P.A. 1971).

80. *Landscape Forms, Inc. v. Columbia Cascade Co.*, 113 F.3d 373, 380 (2d Cir. 1997). Trademark scope also turns on the categorization of a claimed term: All else equal, terms classified as further along on the *Abercrombie* distinctiveness spectrum get broader protection. Fromer, *supra* note 21, at 227–29.

81. *See* Alexandra J. Roberts, *Trademark Failure to Function*, 104 IOWA L. REV. 1977, 1981 (2019); 1 MCCARTHY, *supra* note 41, § 3:1.

82. 1 MCCARTHY, *supra* note 41, § 3:4.

“identifies a product’s source (this is a Nike) and distinguishes that source from others (not any other sneaker brand).”⁸³ Indeed, to the Court, “whatever else it may do, a trademark is not a trademark unless it” performs this source-identifying function, “tell[ing] the public who is responsible for a product.”⁸⁴

It is easy enough to state the principle that a sign must be used as a trademark to qualify for protection; it is much harder in practice to say what that means. In theory, the ultimate issue is whether consumers regard the mark as used as identifying source, which suggests that trademark use is an empirical question.⁸⁵ But because it is often impractical to assess consumer understanding directly, courts have long used proxies to make that judgment, focusing on the prominence and location of a use; the consistency of presentation of the sign, stylization, and coloration; and the presence or absence of other identifying signs.⁸⁶ In one recent case, for example, the court concluded that Jaymo’s use of “S’Awesome” for food sauces, as shown in Figure 1, was not trademark use.⁸⁷ The court explained that despite the consistency of Jaymo’s use, “S’Awesome blend[ed] into a smattering of text on the label style used on most of Jaymo’s sauces,” and that “placement and emphasis on other terms coupled with the comparatively small, plain font of the term fail[ed] to adequately demonstrate it [was] being used as a source indicator on the bottle labels.”⁸⁸

83. *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 146 (2023).

84. *Id.*

85. *In re Eagle Crest, Inc.*, 96 U.S.P.Q.2d (BL) 1227, 1229 (T.T.A.B. 2010).

86. 1 MCCARTHY, *supra* note 41, § 3:4; *see also, e.g., In re Lululemon Athletica Canada Inc.*, 105 U.S.P.Q.2d (BL) 1684, 1687 (T.T.A.B. 2013); *In re Greater Anchorage, Inc.*, Serial No. 77561929, 2011 WL 810198, at *2 (T.T.A.B. Feb. 14, 2011).

87. *Jaymo’s Sauces LLC v. Wendy’s Co.*, No. 1:19-cv-01026, 2021 WL 4712685, *9 (C.D. Ill. Oct. 8, 2021).

88. *Id.* at *6–7.

Figure 1. Jaymo's food sauces



The PTO considers whether a sign functions as a mark when considering a claimed mark's registrability. In that context, the rule operates in the negative. A claimed mark is not registrable when it *fails* to function as a mark. The PTO's Trademark Manual of Examining Procedure describes a purported mark's failure to function primarily by reference to other functions performed by the claimed matter. A claimed mark might fail to function as a mark, for example, "because it is merely ornamentation,"⁸⁹ it constitutes "informational matter,"⁹⁰ or is a "model or grade designation."⁹¹ Especially when evaluating whether a claimed mark is merely ornamentation, the Trademark Office puts significant weight on the location of the claimed mark, as shown in the specimen filed with the PTO showing the mark's use, presuming that signs in "trademark spaces" function as marks.⁹² To illustrate, the PTO rejected an application to register the "Shorebilly" word and design mark shown in Figure 2 when the applicant

89. U.S. PAT. & TRADEMARK OFF., TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1202.03 (Nov. 2023) [hereinafter TMEP].

90. *Id.* § 1202.04.

91. *Id.* § 1202.16(a).

92. *Id.* § 1202.16(b)(i)(C) ("The display of a proposed mark in a prominent location on the goods themselves . . . is a factor that may contribute to finding that it serves as a trademark."). For a description of trademark spaces and their effect, see Mark A. Lemley & Mark P. McKenna, *Trademark Spaces and Trademark Law's Secret Step Zero*, 75 STAN. L. REV. 1 (2023).

submitted a specimen showing use of that claimed mark in large format in the center of a T-shirt.⁹³

Figure 2. Shorebilly and design on T-shirt



But the applicant was able to register that same mark when he submitted a substitute specimen using the mark, as shown in Figure 3, “in the Polo and Izod fashion that the examiner had told him was illustrative of a proper trademark use.”⁹⁴

93. *Teal Bay Alls., LLC v. Southbound One, Inc.*, No. CIV.A. MJG-13-2180, 2015 WL 401251, at *3 (D. Md. Jan. 26, 2015).

94. *Id.* at *4.

Figure 3. Revised T-shirt design



In sum, while the principle that a sign must be used as a trademark to qualify for protection is straightforward in theory, its application often hinges on nuanced and context-specific factors, such as presentation, placement, and consumer perception. This complexity underscores the pivotal role of both judicial proxies and PTO guidelines in evaluating whether a claimed mark functions as a source identifier, setting the stage for further exploration of the trademark registration process.

C. The Trademark Registration Process

Signs that satisfy trademark law's legal requirements, including distinctiveness and use as a mark, are eligible to be registered with the PTO.⁹⁵ But registration is not central to American trademark law, or at least historically it has not been.⁹⁶ Unlike most other countries in the world, trademark rights in the United States arise through use rather than registration,⁹⁷ and unregistered marks are enforceable under federal law on substantially the same terms as registered marks.⁹⁸

95. See 15 U.S.C. § 1052.

96. See, e.g., *Application of Deister Concentrator Co., Inc.*, 289 F.2d 496, 501 (C.C.P.A. 1961) (explaining that the Lanham Act does not create trademark rights but merely provides a mechanism for registering preexisting rights); *U.S. Jaycees v. S.F. Junior Chamber of Com.*, 354 F. Supp. 61, 70 (N.D. Cal. 1972) (“[M]ere registration of a trade-mark does not in itself confer any greater rights than existed at common law without registration.”).

97. 1 MCCARTHY, *supra* note 41, § 16:18. As originally passed, the Lanham Act required use of a mark as a condition of application to register. The statute now allows parties to apply to register based on a bona fide intent to use, but intent-to-use applications do not mature into registration unless and until the applicant can prove that it has made use. 15 U.S.C. § 1051(b), (d).

98. See 15 U.S.C. §§ 1114(1)(a), 1125(a)(1), 1127; *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992).

That is not to say that registration is irrelevant; indeed, registration has several important legal benefits. For one thing, registration confers nationwide priority as of the date of application, subject to uses that predate the registrant's use or application to register.⁹⁹ Unregistered marks, by contrast, are protected only in the geographic areas in which they were in use prior to the allegedly infringing use.¹⁰⁰ Registered marks are also presumed valid and owned by the registrant,¹⁰¹ and certain of those presumptions become irrebuttable if the registration becomes incontestable.¹⁰² Moreover, registered marks are subject to customs enforcement,¹⁰³ and some enhanced remedies are only available for registered marks.¹⁰⁴ Under the Lanham Act, then, registration serves as a carrot rather than a stick.

Some of the legal incentives to register are more significant for certain types of businesses. There are meaningful incentives to register for businesses that anticipate significant geographic expansion, as nationwide constructive use effectively secures rights across the country, even in advance of actual use in many places.¹⁰⁵ Incontestability is particularly valuable for marks—like descriptive terms, geographic terms, surnames, and product design—that owe their existence to secondary meaning,¹⁰⁶ because marks that are incontestably registered cannot be challenged for lack of secondary meaning.¹⁰⁷ Customs enforcement is valuable for parties that sell on a scale that is likely to attract widespread copying. And registration can be extremely helpful for parties with international aspirations because various treaty provisions make it easier to secure foreign trademark rights when a party has registered in the United States.¹⁰⁸

99. 15 U.S.C. §§ 1057(c), 1072, 1127.

100. *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 101–02 (1918); *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 30 cmt. a (AM. L. INST. 1995).

101. 15 U.S.C. §§ 1057(b), 1115(a).

102. *Id.* § 1065.

103. To qualify for customs enforcement of a registered trademark, the mark owner must record the mark with the Customs Service. 19 C.F.R. § 133.

104. *See* 15 U.S.C. §§ 1117(b), 1127.

105. Deborah R. Gerhardt & Jon J. Lee, *A Tale of Four Decades: Lessons from USPTO Trademark Prosecution Data*, 112 TRADEMARK REP. 865, 873–74 (2022).

106. *See* *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 205 (1985) (applying this principle to descriptive terms); *Tonka Corp. v. Tonka Phone Inc.*, 229 U.S.P.Q. (BL) 747 (D. Minn. 1985), *aff'd sub nom.* *Tonka Corp v. Tonk-A-Phone, Inc.*, 805 F.2d 793 (8th Cir. 1986) (applying this principle to geographically-descriptive terms); 1 MCCARTHY, *supra* note 41, § 13:36 (applying this principle to surnames).

107. 15 U.S.C. § 1065 (identifying the grounds on which incontestable registrations can be challenged).

108. Section 44 of the Lanham Act, for example, allows a foreign trademark owner to file a U.S. trademark application and claim priority based on a foreign trademark registration that was filed within six months prior to the U.S. application. 15 U.S.C. § 1126. That treatment is available only to applicants whose country of origin is a party to a convention or treaty that provides reciprocal rights to U.S. nationals. *Id.* § 1126(b). U.S. nationals seeking registration in any country granting such reciprocity therefore benefit from the U.S. filing date.

Beyond these legal encouragements, practical considerations also might counsel in favor of registration. Registered marks are more easily findable, particularly in the PTO's publicly-available database, and public notice of claims to those registered marks helps avoid conflict to the extent it prompts others to avoid using similar marks.¹⁰⁹ Registration also enables the PTO to refuse third-party trademark applications for confusingly-similar marks.¹¹⁰

At the same time, there are also advantages to unregistered rights. Most obviously, unregistered rights are free: The rights attach naturally as soon as the party starts using the mark to indicate the source of its goods. That means that less-resourced parties can develop rights without having to spend time or money filing trademark applications.¹¹¹ Registration favors large, sophisticated companies, which generally are familiar with the registration system and have the resources to seek registration of each new potential trademark.¹¹² Given the lack of expense associated with unregistered rights and the ability to enforce those rights under federal law on substantially the same terms as applicable to registered marks, unregistered rights are perfectly adequate, and may be superior, for many trademark owners.¹¹³ Even sophisticated parties might have reason to prefer unregistered rights for marks that are less likely to be durable branding elements over time. A party that goes to the expense of registering a mark has some incentive to stick with that mark over longer periods of time, whereas unregistered rights are better suited to marks that might be adapted or used in connection with different goods or services in the future.¹¹⁴

Trademark registration, while historically secondary to the use-based foundation of American trademark law, offers meaningful legal and practical

109. Gerhard & Lee, *supra* note 105, at 874–75.

110. *Id.* The statute empowers the PTO to deny registration to any mark that is likely to cause confusion with any mark previously registered *or in use*, 15 U.S.C. § 1052(d), but the PTO proactively searches only registered marks and pending applications during *ex parte* examination. TMEP, *supra* note 89, § 1207.01. Owners of marks previously in use must establish their priority in an opposition proceeding. *See id.* § 1503.01.

111. PTO trademark application filing fees range from \$250–\$750 per class of goods and services, with additional fees in the three figures for special circumstances per class. U.S. PAT. & TRADEMARK OFF., USPTO FEE SCHEDULE (2025), <https://www.uspto.gov/learning-and-resources/fees-and-payment/uspto-fee-schedule> [<https://perma.cc/AS6U-9MUQ>]. In a run-of-the-mill case, legal representation for trademark registration runs in the three figures on the low end but often costs four figures or more. *Trademark Cost Guidebook*, COUNS. FOR CREATORS (Apr. 30, 2024), <https://counselforcreators.com/log/trademark-cost> [<https://perma.cc/4X AQ-4SJK>].

112. *See* Jessica M. Kiser, *To Bully or Not to Bully: Understanding the Role of Uncertainty in Trademark Enforcement Decisions*, 37 COLUM. J.L. & ARTS 211, 221–23 (2014); Gideon Parchomovsky & Alex Stein, *The Relational Contingency of Rights*, 98 VA. L. REV. 1313, 1349–50 (2012).

113. Indeed, many (perhaps most) trademarks are not registered. Beebe & Fromer, *supra* note 23, at 961–62.

114. *Cf.* Fromer & McKenna, *supra* note 10, at 171 (observing that early claiming of designs, as in registration, “force[s] businesses to think through their designs and how they intend to commercialize and market those designs,” and acts as “an incentive to articulate claims that correspond to their market intentions, which they might not otherwise have thought through as thoroughly at that stage”).

advantages that make it a valuable tool for many businesses. However, the cost and complexity of registration often favor larger, resource-rich entities, leaving unregistered rights as a viable and often preferred option for smaller or more flexible businesses. With this understanding of trademark law's framework, we now shift focus to Amazon's business model and its Brand Registry.

II.

AMAZON'S BUSINESS MODEL AND BRAND REGISTRY

Since Amazon launched, it has not only grown what is perhaps the most vibrant online commerce platform, with 9.7 million third-party businesses selling goods on Amazon,¹¹⁵ but it has also created a brand that is valued at over \$576.6 billion.¹¹⁶ To better understand how Amazon's business practices have upended central aspects of the conventional trademark system, we must first examine how Amazon has achieved such market dominance. Part II.A provides background on Amazon's business model and its evolution, and Part II.B turns to Amazon's Brand Registry and its role in Amazon's business model.

A. *Amazon's Business Model and Evolution*

Amazon was founded in 1995 as an online bookseller, and it has since evolved into a pervasive e-commerce platform and then some.¹¹⁷ Indeed, a recent in-depth cultural study of Amazon describes it as the most ubiquitous company in history: "the 'everything' brand for 'everyone.'"¹¹⁸ It is the biggest online retailer in the United States, controlling an estimated half of online retail sales.¹¹⁹ And its reach is global: Amazon serves customers in nearly two hundred countries.¹²⁰

115. Jannik Lindner, *Amazon Seller Statistics: Insights into the World of E-Commerce Entrepreneurs*, GITNEX (July 17, 2024), <https://blog.gitnux.com/amazon-seller-statistics> [<http://perma.cc/MVS2-GBBA>].

116. *Amazon's Global Brand Value from 2006 to 2024*, STATISTA (July 3, 2025), <https://www.statista.com/statistics/326086/amazon-brand-value> [<https://perma.cc/2BNU-H8DN>].

117. Amazon now provides cloud services, a streaming service for movies and other programming, Ring doorbell services, Twitch videogame streaming services, the Whole Foods supermarket chain, and much more. *See generally* BRAD STONE, *AMAZON UNBOUND: JEFF BEZOS AND THE INVENTION OF A GLOBAL EMPIRE* 18–20, 91–99, 125–45, 167–91, 323 (2022) (detailing these expansions by Amazon).

118. EMILY WEST, *BUY NOW: HOW AMAZON BRANDED CONVENIENCE AND NORMALIZED MONOPOLY* 3, 14–15 (Joshua Braun & Ramon Lobato eds. 2022) (exploring "Amazon's market dominance and our increasing dependence on its convenient services in relation to the resulting costs—on product sellers, market diversity, labor, and the environment, and on our own power as consumers").

119. *Id.* at 3, 197.

120. *Id.* at 197. Even as Amazon is available nearly globally, it has had to share ".amazon" top-level internet domain rights with South American countries where the Amazon River basin is located as a compromise to getting many of those domain rights. *Id.* at 171–72.

From the start, Amazon has had grand ambitions, as evidenced by early marketing materials drawing on its trademark:¹²¹ “Amazon.com’s name pays homage to the Amazon River. Just as the Amazon River is more than six times the size of the next largest river in the world, Amazon.com’s catalog is more than six times the size of the largest conventional bookstore.”¹²² Even with these aspirations, founder Jeff Bezos always intended for Amazon to be much more than the largest online bookstore. He began selling books only after considering twenty product categories, with the books as the entry point to, as communications scholar Emily West puts it, ultimately “build[ing] a mammoth e[-]commerce website.”¹²³ According to Bezos himself, “we’re not trying to be a book company or trying to be a music company—we’re trying to be a customer company.”¹²⁴

Amazon’s business strategies have generally been in service of this overarching goal of attracting loyal customers and distributing to them, rather than just selling books. In particular, Amazon has sold books and other products at very low prices as loss leaders to attract customers, which has also led to accusations of predatory pricing.¹²⁵ In doing so, Amazon has demonstrated its willingness to delay profits to build up its customer base, all the while drawing consumers away from its competitors.¹²⁶ Indeed, Amazon only became consistently profitable in 2015.¹²⁷ More generally, especially in its early years, Amazon did not spend much on traditional advertising and marketing but instead spent its money improving the platform’s customer experience, including its unprecedented fast, free shipping that ultimately became the central feature of its popular Prime membership service.¹²⁸

To broaden its product base and attract yet more customers, since 1999 Amazon has allowed third parties to sell their products on the Amazon platform.¹²⁹ Amazon now has almost ten million third-party sellers on its

121. The company considered several other names, including Cadabra, Awake.com, Bookmall.com, Aard.com, and Relentless.com, the last of which still redirects to Amazon’s website. BRAD STONE, *THE EVERYTHING STORE: JEFF BEZOS AND THE AGE OF AMAZON* 31 (2013).

122. WEST, *supra* note 118, at 172.

123. *Id.* at 87. Though Amazon has expanded well beyond books and now sells just about everything, books are still Amazon’s largest product category (16 percent of items sold). *Id.* at 83. Moreover, Amazon is by far the largest retailer of physical books and e-books in the United States. *Id.*

124. *Id.* at 6; *cf.* STONE, *supra* note 121, at 24 (referring to Jeff Bezos’s 1994 plans with David Shaw for an “everything store”).

125. WEST, *supra* note 118, at 87–88; Khan, *Amazon’s Antitrust Paradox*, *supra* note 1, at 753 (“The fact that Amazon has been willing to forego profits for growth undercuts a central premise of contemporary predatory pricing doctrine, which assumes that predation is irrational precisely because firms prioritize profits over growth. In this way, Amazon’s strategy has enabled it to use predatory pricing tactics without triggering the scrutiny of predatory pricing laws.”).

126. WEST, *supra* note 118, at 35, 88.

127. *Id.* at 35.

128. *Id.* at 16, 58–59. Now that Amazon has become dominant, it engages in more traditional advertising. *Id.* at 16–17.

129. *Id.* at 34.

platform,¹³⁰ which has created network effects to lure consumers, which in turn attracts more sellers, *ad infinitum*.¹³¹ Amazon's offering of one-click ordering (and the resulting patent it obtained on it) typifies how the platform has sought to provide extreme convenience for consumers.¹³²

Since its launch, Amazon has sought to gain consumer trust by collecting and sharing consumer reviews of the products it sells. Initially, competitors and experts scoffed at that practice, believing it would be counterproductive because consumers would at least sometimes leave bad reviews.¹³³ But Amazon seems to have won that bet: Its collection of reviews, one of the world's largest, has fostered a "reputation economy" and propelled Amazon's market dominance.¹³⁴ Amazon also collects reams of data about consumer behavior in service of developing its predictive models.¹³⁵ It uses these models to continually adapt its platform and product offerings, which encourages consumers to keep using Amazon.¹³⁶

All of these strategies are reflected in the logo that Amazon redesigned in 2000.¹³⁷

Figure 4. Amazon's logo, redesigned in 2000



The logo has an arrow going from the 'a' to 'z' in AMAZON, to suggest that all products from A–Z can be found and bought on the platform.¹³⁸ And the

130. See *supra* text accompanying note 115.

131. WEST, *supra* note 118, at 9, 34. Relatedly, Amazon began to extract higher margins from the third-party transactions completed on its platform than from its own sales. *Id.* at 10.

132. *Id.* at 45–46.

133. *Id.* at 91.

134. *Id.* at 91–93.

135. *Id.* at 12.

136. *Id.*

137. *Id.* at 19–20.

138. *Id.*

arrow also suggests that Amazon brings products from all locations and sellers to consumers' homes.¹³⁹

As a result of these unique strategies and practices, Amazon's business model has been a smashing success.¹⁴⁰ After Walmart, Amazon is the second largest retailer in the United States, with \$355.1 billion in sales in 2023.¹⁴¹ And it is by far the largest online retailer in the United States, controlling about half of the online retail market.¹⁴²

Third-party sales have become a critical part of Amazon's business model. Indeed, the money Amazon makes from charging third parties to use its platform, such as listing fees, represented 23 percent of Amazon's revenues in 2022 (\$117.7 billion), second only to the 43 percent of Amazon's revenues generated in first-party sales that year (\$220 billion).¹⁴³ As important as the third-party sellers are to Amazon, Amazon is even more essential to the third-party sellers. As one seller pointed out, "If you say no to Amazon, you're closing the door on tons of sales."¹⁴⁴

Amazon's market dominance is also reflected in the great degree of public confidence in Amazon. Amazon is at or near the top of the list of most-loved brands in the United States.¹⁴⁵ In fact, one recent poll done by Georgetown University found that Americans trust Amazon more than any institution except the military, ranking the company above all other parts of the U.S. government and above universities, non-profit institutions, and major businesses.¹⁴⁶ And Amazon is also one of the world's most market-capitalized companies.¹⁴⁷

With this exploration of Amazon's business model generally, we now turn to how Amazon has deployed its Brand Registry to advance its business goals.

B. The Brand Registry as a Business Tool

As Amazon sought to advance its overall business model, it encountered concerns from the third-party sellers and consumers (both of which were essential to attract to and keep on its platform), as well as from the government.

139. *Id.*

140. *Id.* at 6, 10.

141. *Worldwide Retail Sales of the Leading U.S. Retailers in 2023*, STATISTA (Jan. 14, 2025), <https://www.statista.com/statistics/196002/worldwide-retail-sales-by-the-top-50-retailers> [<https://perma.cc/8SPW-X3ZY>].

142. WEST, *supra* note 118, at 3, 197. Even with Walmart ahead of Amazon in overall retail sales, analysts recognize Amazon's advantages as the dominant online platform. Given its digital edge, Amazon can be yet more efficient in distribution than Walmart. *Id.* at 48.

143. Tony Owusu, *Here's How Much Amazon Takes from Every Third-Party Sale*, THE STREET (Feb. 14, 2023), <https://www.thestreet.com/investing/heres-how-much-amazon-takes-from-every-third-party-sale> [<https://perma.cc/8PUU-PUCL>].

144. Angus Loten & Adam Janofsky, *Sellers Need Amazon, but at What Cost?*, WALL ST. J. (Jan. 14, 2015), <https://www.wsj.com/articles/sellers-need-amazon-but-at-what-cost-1421278220> [<http://perma.cc/W7TQ-F6HC>].

145. WEST, *supra* note 118, at 20.

146. *Id.* at 20–21.

147. *Id.* at 3, 35.

Third-party sellers—both potential and actual—wanted Amazon to do more to prevent counterfeit versions of their goods from appearing on its platform.¹⁴⁸ Those sellers expressed unwillingness to sell their genuine goods on Amazon unless Amazon took further action to exclude counterfeits.¹⁴⁹ And consumers were unhappy when they accidentally purchased knockoffs instead of the genuine goods they were trying to buy.¹⁵⁰ As complaints mounted, Congress held hearings on counterfeit goods being sold on online platforms like Amazon.¹⁵¹ Several legislators introduced the SHOP SAFE Act, which would make online platforms “liable for infringement of a registered trademark by a third-party seller of goods that implicate health and safety unless the platform takes certain actions.”¹⁵²

Sellers’ and consumers’ anxiety about Amazon’s platform, and the looming threat of regulation, posed real threats to Amazon’s market dominance.¹⁵³ In response, Amazon launched the first version of its Brand Registry in 2015.¹⁵⁴ That fairly limited program allowed businesses to better control their own listings and to contest other listings on copyright grounds.¹⁵⁵ Yet the filing process under that program was time-consuming and cumbersome,¹⁵⁶ and the program did little to address counterfeit goods, which are principally targeted through trademark claims, not copyright claims.¹⁵⁷

In 2017, Amazon launched the second version of its Brand Registry. In addition to providing enhanced branding capabilities for businesses’ own

148. Some of these sellers would also like to control which businesses sell their respective products and for how much, but Amazon does not offer them that power. Robyn Johnson, *How Amazon's New Brand Registry Helps Protect Your Brand*, SEARCH ENGINE J. (June 16, 2017), <https://www.searchenginejournal.com/amazon-brand-registry-2/201570> [https://perma.cc/W4TA-6XZT].

149. Amazon has adopted an anti-counterfeiting policy. See *Amazon Counterfeit Crimes Unit (CCU) Frequently Asked Questions*, AMAZON, <https://trustworthyshopping.aboutamazon.com/counterfeitcrimesunit/faq> [https://perma.cc/YD3Z-VFDQ] (last visited June 14, 2025).

150. Brittney Myers, *Some Shoppers Are Fleeing Amazon Because of Counterfeit Goods*, ASCENT (Jan. 17, 2023), <https://www.fool.com/the-ascent/personal-finance/articles/some-shoppers-are-fleeing-amazon-because-of-counterfeit-goods> [https://perma.cc/N89U-GNFV].

151. E.g., *The SHOP SAFE Act: Stemming the Rising Tide of Unsafe Counterfeit Products Online: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 117 Cong. 25 (2021).

152. SHOP SAFE Act of 2021, S. 1843, 117th Cong. (2021); SHOP SAFE Act, H.R. 5374, 117th Cong. (2021). The SHOP SAFE Act has not passed as of the date of this writing.

153. See *supra* Part II.A.

154. AJ Kelley, *A Seller's Guide to Amazon Brand Registry*, VIRAL LAUNCH (Aug. 24, 2018), <https://blog.viral-launch.com/news-updates/amazon-news-updates/amazon-brand-registry-guide> [https://perma.cc/2XPW-T2XD] (archived version retrieved via the Internet Archive Wayback Machine).

155. Johnson, *supra* note 148; Kelley, *supra* note 154.

156. See Kelley, *supra* note 154.

157. See, e.g., *U.S. Customs and Border Protection Services for Trademark Owners*, U.S. PAT. & TRADEMARK OFF. (2024), <https://www.uspto.gov/trademarks/protect/customs-and-border-protection> [https://perma.cc/QL27-CUM5].

listings, the new Registry made it easier to remove listings of counterfeit goods.¹⁵⁸ Businesses could qualify for the Brand Registry in the United States if they had registered their trademark on the Principal Register of the PTO and were using that mark on their products or packaging.¹⁵⁹ Only trademarks that contain alphanumeric characters can be listed in the Brand Registry, though the marks can also be stylized or include an image.¹⁶⁰ The word(s) in the trademark must identically match the spelling, spacing, and punctuation found in the U.S. trademark registration.¹⁶¹

With the launch of the second version of the Brand Registry, Amazon put in place a three-hundred-person customer service team dedicated to addressing reports of trademark and copyright infringement from Brand Registry members.¹⁶² Amazon now promises round-the-clock service to address these reports, twenty-four hours a day, seven days a week.¹⁶³ Rather than taking days to address such seller claims, the team would resolve these claims within a few hours and without a court order.¹⁶⁴ The Brand Registry made it easier for registered businesses to identify potential infringements by providing search tools, including reverse-image search technology, to help locate other products using the same name or packaging as the registrant.¹⁶⁵ And the Registry enables mark owners to benefit from predictive protections that block improper listings from third parties in the first place.¹⁶⁶ The Brand Registry has also been attractive to third-party sellers because it offers them higher visibility in consumer search results on Amazon, brand analytic tools, and the ability to give one's products to credible buyers for Amazon reviews.¹⁶⁷

In 2019, Amazon made it even easier for sellers to protect their brands and qualify for the Brand Registry by launching the Intellectual Property Accelerator, which is a curated network of intellectual property law firms providing trademark registration services at pre-negotiated rates.¹⁶⁸ Amazon explained that

158. Kelley, *supra* note 154.

159. *Id.*; see *Brand Registry FAQ*, AMAZON, <https://brandservices.amazon.com/brandregistry/faq> [<https://perma.cc/4KPE-QUDJ>].

160. Kelley, *supra* note 154.

161. *Id.*

162. *Id.*

163. *Amazon Brand Registry*, AMAZON, <https://brandservices.amazon.com/brandregistry> [<https://perma.cc/5667-5FYD>]. A business that is not a part of the Brand Registry can still report trademark infringement to Amazon, but it is not assured such a dedicated and quick response. *Id.*

164. See Kelley, *supra* note 154.

165. See Johnson, *supra* note 148.

166. See AMAZON, *supra* note 163.

167. Kelley, *supra* note 154; see also Maria Navolykina, *How to Register a Brand on Amazon—A Succinct Guide on Enrollment*, SELLERLABS (Jan. 21, 2022), <https://www.sellerlabs.com/blog/getting-started-with-amazon-brand-registry> [<https://perma.cc/KE3H-TVXX>].

168. Dharmesh Mehta, *Amazon Intellectual Property Accelerator*, AMAZON (Oct. 1, 2019), <https://www.aboutamazon.com/news/policy-news-views/amazon-intellectual-property-accelerator> [<https://perma.cc/MV55-X4LS>].

it “created [the] Accelerator specifically with small and medium businesses in mind,” so as to help them “more quickly obtain intellectual property . . . rights and brand protection in Amazon’s stores.”¹⁶⁹ Businesses participating in the Accelerator get charged only by the law firm they are using, not Amazon.¹⁷⁰

Businesses that use the Accelerator program get “accelerated access to brand protection” on Amazon.¹⁷¹ Rather than having to wait for their trademark registration to issue, Amazon provides Accelerator participants access to the Brand Registry as soon as they have filed a trademark application with the PTO.¹⁷² Amazon says that it provides that early access because “the participating law firms have been thoroughly vetted,” and the marks Accelerator participants apply to register will therefore “be strong candidates for registration.”¹⁷³ Though Amazon does not make public all of the specific Brand Registry benefits that it provides on this accelerated basis, it has indicated that Accelerator participants get “automated brand protections, which proactively block bad listings from Amazon’s stores, increased authority over product data in our store, and access to our Report a Violation tool, a powerful tool to search for and report bad listings that have made it past our automated protections.”¹⁷⁴

More recently, as of approximately 2023, Amazon made all sellers, not just those using the Accelerator program, eligible for its Brand Registry as soon as they have a pending application to register a trademark with the PTO.¹⁷⁵ Amazon has not publicly explained its reasons for that expanded eligibility, but it certainly calls into question the previous claim that Accelerator participants warranted early access because the marks they applied to register were particularly likely to be registered.¹⁷⁶

The new and improved Brand Registry has been a hit among third-party sellers. In 2021, there were more than seven hundred thousand active marks enrolled in the Brand Registry worldwide, a 40 percent increase over the previous year.¹⁷⁷ In 2022, more than sixteen thousand trademarks were the

169. *Id.*

170. *Id.*

171. *Id.*

172. *AMAZON*, *supra* note 163.

173. Mehta, *supra* note 168.

174. *Id.*

175. *AMAZON*, *supra* note 163; Jeremy Green Eche, *Amazon Brand Registry Now Accepts Pending Trademark Applications*, JPG LEGAL: ASK A JEWISH LAWYER® (Jan. 13, 2021), <https://jpglegal.com/amazon-brand-registry-accepts-pending-trademarks> [https://perma.cc/85UV-6ZV2].

176. As explained below, the most likely explanation for Amazon’s acceptance of applications to register is the longer pendency of applications at the PTO—pendency lengthened in significant part because of the volume of applications, which Amazon has played a substantial role in increasing. *Infra* Part III.A.

177. *AMAZON, BRAND PROTECTION REPORT 2* (June 2022), <https://assets.aboutamazon.com/68/b7/27c5eeee4121971b3d330fd6c16c/amazon-brand-protection-report-2022.pdf> [https://perma.cc/AY6F-YRXD].

subject of the Accelerator program.¹⁷⁸ Amazon advertises the successes of the Brand Registry and the Accelerator program in promoting its participants and removing infringing listings.¹⁷⁹ For example, Amazon boasts that it has blocked or removed 99 percent of listings suspected of offering counterfeit goods.¹⁸⁰ The growth and success of the Brand Registry have been noticed by businesses and business writers, who have written about the obvious advantages to being part of the Brand Registry.¹⁸¹

Despite the general success of the Brand Registry from the perspective of many, some larger companies like Nike have not been as impressed with Amazon's anti-counterfeiting measures.¹⁸² Nike began selling on Amazon only after Amazon created the Brand Registry, believing the Registry would help stop counterfeiting. But Nike later reversed course and stopped selling directly on the platform because it thought Amazon was still not sufficiently controlling counterfeit sales.¹⁸³ Not many companies can afford to take that position. According to Emily West, "Nike had confidence in the power of its brand to leave Amazon, but as one industry analyst put it, 'I don't think as many brands can be as selective as Nike.'"¹⁸⁴ Because most sellers do not have Nike's power and need to sell on Amazon, the Brand Registry is essential for them.

All in all, Amazon's Brand Registry undergirds the platform's business model by helping to keep the vast majority of third-party businesses comfortable and motivated to sell their wares on Amazon, which in turn keeps customers hooked on the platform. The Registry does so by making it easier for registrants to have infringing sellers removed from the site expeditiously, and by giving registrants superior search optimization tools. The resulting seller and consumer satisfaction removes some of the ongoing pressures for the government to regulate Amazon in this regard, such as through the SHOP SAFE Act, which would expose Amazon to significantly greater liability for selling counterfeit goods.¹⁸⁵

178. AMAZON, BRAND PROTECTION REPORT (Mar. 2025), <https://trustworthyshopping.aboutamazon.com/2024-brand-protection-report> [<https://perma.cc/AHW3-QKBP>].

179. Mickey Toogod, *Amazon Selling Stats*, AMAZON (Mar. 31, 2022), <https://sell.amazon.com/blog/amazon-stats> [<http://perma.cc/64CD-RBGQ>].

180. *Id.*

181. See, e.g., Josh VanAkker, *Amazon Brand Registry: Benefits & Complete Overview for Sellers in 2024*, HELIUM10 (May 10, 2024), <https://www.helium10.com/blog/amazon-brand-registry-fast> [<https://perma.cc/7WJQ-96MQ>]; r/FulfillmentByAmazon, *Brand Registry—Worth It?*, REDDIT (Aug. 19, 2021), https://www.reddit.com/r/FulfillmentByAmazon/comments/p7i0w3/brand_registry_worth_it [<https://perma.cc/29FH-97SM>].

182. WEST, *supra* note 118, at 38–39.

183. *Id.*

184. *Id.* at 39.

185. *Supra* text accompanying note 152.

III.

AMAZON'S OVERHAUL OF THE TRADEMARK SYSTEM

Third-party sellers' widespread participation in Amazon's Brand Registry has not only promoted Amazon's business model. As this Part addresses, it has also put significant hydraulic pressure on the U.S. trademark system, in effect overhauling the system and calling into question many of trademark law's foundational assumptions.¹⁸⁶ Because Amazon's Brand Registry is built on the U.S. trademark registration system—as opposed to being a system entirely of Amazon's creation—businesses have developed very different practices with regard to the selection and registration of trademarks. In this Part, we detail some of the most significant of these changed practices: small businesses' increased use of the trademark register, trademark extortion, registration of descriptive and generic marks, and registration of nonsense marks. We also discuss how Amazon's use of its own internal house brands fits into this story. These changes have happened relatively quietly without much public attention, but they have materially overhauled the trademark system.

Even though Amazon's Brand Registry might be seen as a shadow trademark system, the story here is not one about a community that relies primarily on norms rather than formal legal rules, such as those described by other legal scholars focusing on the fashion industry, cuisine, stand-up comedy, roller derby, tattoos, or magic.¹⁸⁷ Those situations are often described as

186. We focus on the U.S. trademark system. Even though there are parallel versions of Amazon's Brand Registry in other countries, see *Brand Registry Eligibility*, AMAZON, <https://brandservices.amazon.com/brandregistry/eligibility> [<https://perma.cc/4KPE-QUDJ>], the effects of each registry are principally domestic. That is because a third-party seller needs trademark rights in a particular country to take advantage of the Brand Registry's features to sell to customers in that country. *Id.* Moreover, trademark systems in other countries are different, such as with regard to the requirement of use in commerce, see, e.g., Barton Beebe & Jeanne C. Fromer, *The Future of Trademarks in a Global Multilingual Economy: Evidence and Lessons from the European Union*, 112 TRADEMARK REP. 902, 916–29 (2022), so it makes sense to analyze the effects of the Brand Registry on a country-by-country basis. By comparison, it might be more sensible to evaluate other platforms' shadow legal systems globally. For example, in reaching its decisions, the Meta Oversight Board has applied more globally relevant human rights frameworks over the U.S.-centered First Amendment. Evelyn Douek, *The Meta Oversight Board and the Empty Promise of Legitimacy*, 37 HARV. J.L. & TECH. 373 (2024).

187. On fashion, see, for example, Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381 (2005); C. Scott Hemphill & Jeannie Suk, *The Fashion Originators' Guild of America: Self-Help at the Edge of IP and Antitrust*, in INTELLECTUAL PROPERTY AT THE EDGE 159 (Rochelle Dreyfuss & Jane Ginsburg eds., 2014); C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147 (2009); Kal Raustiala & Christopher Jon Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006); Kal Raustiala & Christopher Jon Sprigman, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201 (2009). On cuisine, see Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121 (2007); Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187 (2008). On stand-up comedy, see Dotan Oliar & Christopher Jon Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008). On roller derby, see David Fagundes, *Talk Derby to Me:*

involving “intellectual production without intellectual property” (or “IP without IP”) or a “negative space.”¹⁸⁸ Amazon’s Brand Registry is different because it influences parties’ use of the formal trademark system. Indeed, the story here is more like “IP plus IP” or an “exponential space.”

A. *Small Businesses’ Approach to PTO Registration*

As noted above, American trademark law has long protected unregistered marks on largely the same terms as registered marks, making registration a set of advantages rather than a requirement.¹⁸⁹ For many small and medium-sized businesses, those advantages were not significant enough to justify the time and expense of registration, which means that registration has traditionally been more the province of larger, established companies.

Amazon is changing that dynamic. Because the Brand Registry requires PTO registration, or now at least a pending application to register,¹⁹⁰ the incentives for small and medium-sized businesses selling on Amazon are very different. Because most smaller businesses want to be in the Brand Registry, they are much more likely to register than they once were.¹⁹¹

PTO data suggest that the incentives to register are growing.¹⁹² Specifically, as shown in Figure 5, the proportion of new applications filed by single filers (entities that have not previously filed other trademark applications) has risen substantially since about 2015, from approximately 30 percent to 40 percent annually. This rate increased most sharply after 2019.¹⁹³ By comparison, as the figure shows, the proportion of new applications filed by businesses that have

Intellectual Property Norms Governing Roller Derby Pseudonyms, 90 TEX. L. REV. 1093 (2012). On tattoos, see Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511 (2013). On magic, see Jacob Loshin, *Secrets Revealed: Protecting Magicians’ Intellectual Property Without Law*, in LAW AND MAGIC: A COLLECTION OF ESSAYS 123 (Christine A. Corcos ed., 2010).

188. JEANNE C. FROMER & CHRISTOPHER JON SPRIGMAN, COPYRIGHT LAW: CASES AND MATERIALS 11 (v6.0 2024).

189. *Supra* Part I.C.

190. *Supra* Part II.B.

191. To be sure, regardless of size, businesses vary in why they would like to be on the Brand Registry. Some businesses probably care a lot about the Registry’s enforcement tools, whereas others might care about its search-optimization tools.

192. For all empirical data provided in this Article, we use the PTO’s Trademark Case Files Dataset, which the PTO made publicly available in 2012 and has since updated annually. *Trademark Case Files Dataset*, U.S. PAT. & TRADEMARK OFF. (2023), <https://www.uspto.gov/learning-and-resources/electronic-data-products/trademark-case-files-dataset-0> [<https://perma.cc/RD9D-5AAL>]; see also STUART GRAHAM, GALEN HANCOCK, ALAN MARCO & AMANDA FILA MYERS, U.S. PAT. & TRADEMARK OFF., THE USPTO TRADEMARK CASE FILES DATASET: DESCRIPTIONS, LESSONS, AND INSIGHTS 3, 35 (2013), https://www.uspto.gov/sites/default/files/ip/officechiefecon/Trademark_Case_File_Data_Documentation_31January2013_final.pdf [<https://perma.cc/ATG5-UGG9>] (describing the dataset and surveying trends in trademark applications and registrations).

193. This data includes applications filed based on an intent to use the mark rather than on current use of the mark. Applications based on an intent to use the mark require that a statement of actual use be filed before the registration is issued. 15 U.S.C. § 1051(d). Approximately 10 percent of annual filings by single filers are based on an intent to use the mark rather than on current use of the mark.

applied to register ten or more marks (likely bigger companies) has correspondingly declined during this time. These data are supported by Figure 6, which shows that the gross number of applications by single filers has increased slowly from the 1980s through the early 2010s. The number has doubled since 2015, from about one hundred thousand to two hundred thousand.

Figure 5. Proportion of Applications by Single and Ten+ Filers, by Filing Year

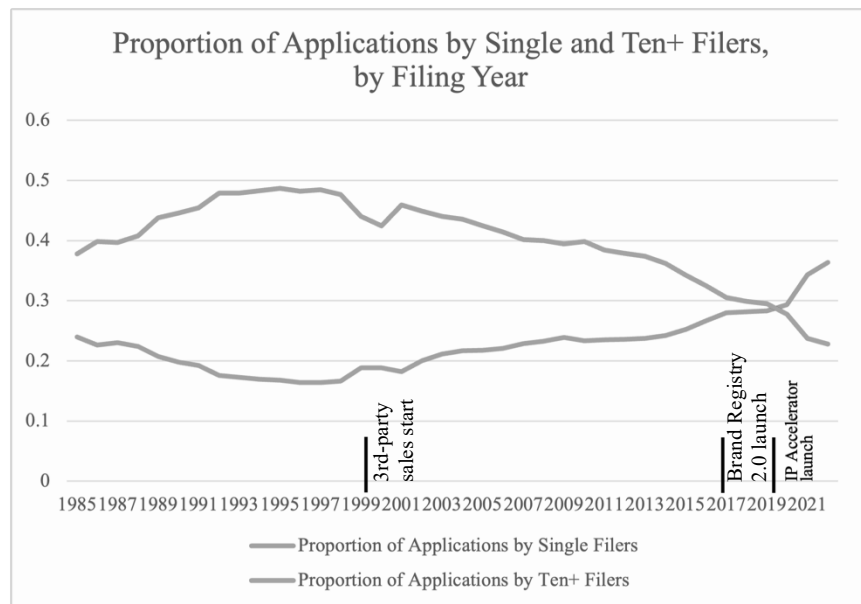


Figure 6. Number of Applications by Single Filers, by Filing Year

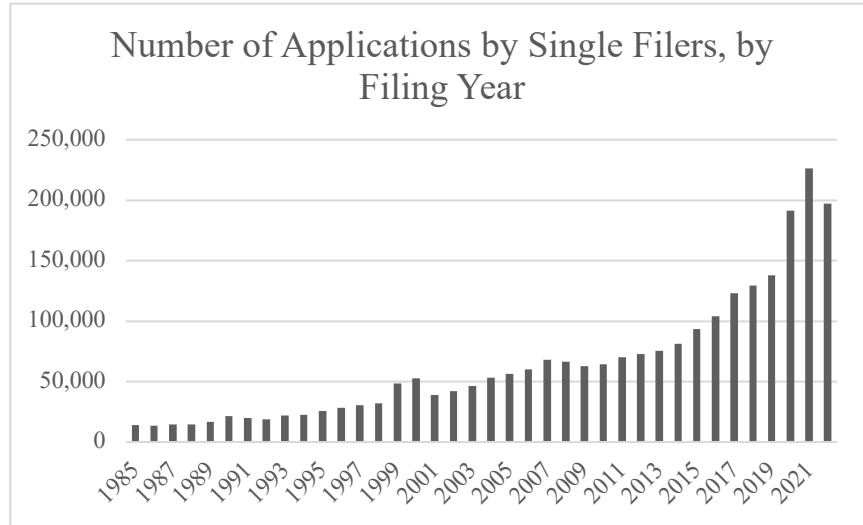
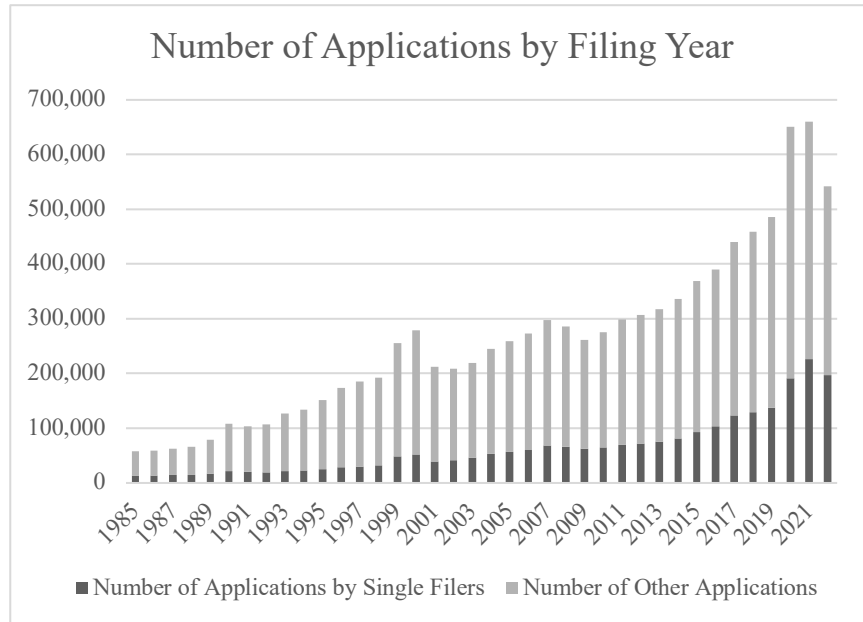


Figure 7. Number of Applications by Filing Year



As Figure 7 indicates, the total number of applications has risen dramatically, to more than six hundred thousand per year in two of the last three years. While there may have been other factors that contributed to this increase,

it is hard to imagine that Amazon's policies were not substantial drivers.¹⁹⁴ There are now just under ten million third-party businesses selling on Amazon,¹⁹⁵ while there were over seven hundred thousand brands in the Brand Registry just in 2021.¹⁹⁶ In other words, at least 7 percent of third-party businesses selling on Amazon either have PTO trademark registrations or have pending trademark applications. Many of these trademarks probably were not registered in the PTO before their entry into the Brand Registry, either because the brands were new or because the businesses using them had made the rational, pre-Amazon Brand Registry choice not to register.¹⁹⁷ Approximately sixteen thousand new brands enrolled in Amazon's accelerator program in 2022—the trademark applications filed by those brands represent the ones least likely to have been filed but for the desire to be part of Amazon's Brand Registry.¹⁹⁸

It is true, of course, that Amazon has enabled many more small and medium-sized businesses to engage in interstate commerce, and that alone might explain some increase in applications to register.¹⁹⁹ But it seems clear that Amazon's Brand Registry is an extra push toward registration. In Figures 5–7, we can see a small increase in trademark registrations after Amazon enabled third-party selling on its platform in 1999. However, that increase pales in comparison to the jump in small-business trademark applications after the launch of Amazon's second version of the Brand Registry in 2017.

The increase in applications in the PTO has significantly increased examiner workload and lengthened the pendency of applications. The PTO now reports an average total application pendency of 14.4 months, compared to 9.6 months in the first quarter of 2021 (which was similar to prior years).²⁰⁰ The

194. Other contributing factors to the increase in trademark filings might also include a small-business boom during the COVID-19 pandemic, see Maureen Soyars Hicks, *The COVID-19 Small Business Boom: Startups Surge During Pandemic*, U.S. BUREAU OF LAB. STATS.: MONTHLY LAB. REV. (Sept. 2021), <https://www.bls.gov/opub/mlr/2021/beyond-bls/the-covid-19-small-business-boom-startups-surge-during-pandemic.htm> [<https://perma.cc/5GUK-AUSP>]; the PTO's push to encourage women- and minority-owned businesses to register their marks, see *Statement of Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office Kathi Vidal before the United States House of Representatives*, U.S. PAT. & TRADEMARK OFF. (Apr. 27, 2023), <https://www.uspto.gov/about-us/news-updates/statement-under-secretary-commerce-intellectual-property-and-director-united> [<https://perma.cc/HKG2-5J8W>]; and an increase in fraudulent trademark filings, often from China, see *infra* notes 219–221 and accompanying text. The COVID-19 bump, to the extent it exists, cannot really be disentangled from the Amazon effect, because many (most?) of the small businesses that sprang into existence during the pandemic were selling online—likely on Amazon.

195. *Supra* text accompanying note 115.

196. *Supra* text accompanying note 177.

197. *Supra* Part I.C.

198. *Supra* text accompanying note 178.

199. See *supra* Part I.C. We thank Deborah Gerhardt and Rochelle Dreyfuss for encouraging us to consider this point.

200. *Trademarks Data Q3 2024 at a Glance*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/dashboard/trademarks> [<https://perma.cc/C3DD-YC3M>]; *USPTO—Trademark Average Total Pendency (Months)*, U.S. DEP'T OF COM., <https://performance.commerce.gov/KPI->

average time to receive a first office action is 8.5 months, up from less than 5 months in the first quarter of 2021 (also similar to prior years).²⁰¹ As one expert recently said about the costs of the PTO's delays:

Until recently, the average time until a first office action . . . allowed business owners to file trademark applications for new products or ventures, and to obtain feedback and a 'read' on the position of the [PTO before the trademark was placed in commercial use. Now, the longer wait time before examination has been 'too long to wait', [sic] and has forced many businesses to move forward with commercial introductions without this initial feedback, and with more uncertainty about their trademark rights.²⁰²

Likely as a response to the PTO delays and business complaints, Amazon has now made the Brand Registry available to its sellers based only on an application to register, a move that will presumably further increase the number of applications and delay registration even more.²⁰³

B. Trademark Extortion and Fraudulent Filings

Not only has Amazon's Brand Registry created incentives for legitimate small businesses to register marks they might not have felt the need to register in the past, but it has also created incentives for other parties to seek registration of unregistered trademarks that are used by others on Amazon. Why? Because if that registration is successful (and now perhaps as long as the application is pending), the registrant can threaten to invoke the Brand Registry against the prior user, the legitimate owner of the mark. This situation could lead to trademark extortion, with fraudulent registrants extracting payments from legitimate businesses that are trying to avoid having their businesses taken down by Amazon.

A trademark extortion scheme of this nature was recently at issue in a case in the Eastern District of New York. In that case, the district court granted a preliminary injunction, ruling that a New York-based plaintiff was likely to succeed in its claim seeking the cancellation of the China-based defendant's U.S.

USPTO/USPTO-Trademark-average-total-pendency-months-/c2xn-w3ui [https://perma.cc/P2UX-E3DJ].

201. U.S. PAT. & TRADEMARK OFF., *supra* note 200; *USPTO—Trademark Average First Action Pendency (Months)*, U.S. DEP'T OF COM., <https://performance.commerce.gov/KPI-USPTO/USPTO-Trademark-average-first-action-pendency-month/u4d2-gq5s> [https://perma.cc/N8YL-D6GF].

202. Tim Lince, "On the Right Path"—Goeder Expands on USPTO's Ambitious Trademark Pendency Reduction Plan, *WORLD TRADEMARK REV.* (Dec. 11, 2023) (quoting Joseph Lewis), <https://www.worldtrademarkreview.com/article/the-right-path-goeder-expands-usptos-ambitious-trademark-pendency-reduction-plan> [https://perma.cc/4W6Y-FWKN].

203. It is even more concerning that Amazon has made the Brand Registry partially available to applicants filing to register a trademark in the PTO based only on an intent to use the mark. *See supra* note 97. This change dramatically increases the risk of giving Brand Registry protection to a mark that is not ultimately registered. It could also significantly lengthen the Brand Registry interim protection that ultimately goes away if the registration is denied.

trademark registration because the defendant fraudulently used a photograph of the plaintiff's product as its specimen of use.²⁰⁴ The plaintiff had been selling home furniture and organizers on Amazon for many years using the mark SAGANIZER, but it had never attempted to register that mark.²⁰⁵ The defendant seized the opportunity, filing an application to register SAGANIZER and submitting a photo of one of the plaintiff's products as its specimen of use.²⁰⁶ The PTO registered the mark in the name of the defendant on this basis.²⁰⁷ The defendant then relied on its registration to complain to Amazon about the plaintiff's use of the SAGANIZER mark, and Amazon delisted some of the plaintiff's products.²⁰⁸ Given the number of complaints by the defendant against the plaintiff's products on Amazon, the plaintiff was at imminent risk of being suspended on Amazon altogether.²⁰⁹ The plaintiff alleged that this would destroy its business, given how focused its model was on Amazon sales,²¹⁰ as many small businesses are.

This is not an isolated example of this form of trademark extortion. Presumably with the goal of maintaining the legitimacy of its Brand Registry, Amazon has recently filed multiple lawsuits, including some seeking cancellations of PTO registrations, against entities operating under the same fraudulent model as the SAGANIZER registrant.²¹¹ According to Amazon, these entities fraudulently obtained PTO registrations of marks owned and used by businesses operating on Amazon and then used those registrations to join the Brand Registry.²¹² The fraudulent registrants "then created fake, disposable websites, with product images scraped from the Amazon store, to use as false evidence when making thousands of claims that selling partners were violating their [intellectual property]."²¹³ Amazon alleged that one of the three entities filed almost four thousand takedown requests over a few months.²¹⁴ Amazon

204. *Home It, Inc. v. Wen*, No. 19-CV-7070 (MKB) (VMS), 2020 WL 353098, at *6 (E.D.N.Y. Jan. 21, 2020).

205. *Id.* at *1.

206. *Id.*

207. *Id.*

208. *Id.* at *2.

209. *Id.*

210. *Id.*

211. First Amended Complaint for Cancellation of Federal Trademark (Registration No. 6,334,242), Damages, and Equitable Relief, *Amazon.com, Inc. v. Liu*, No. 2:23-cv-00484-JHC-SKV (W.D. Wash. May 15, 2024); *Amazon Targets Multiple Bad Actors in Novel Lawsuit, Further Protecting Selling Partners from Fraud*, AMAZON (Mar. 30, 2023), <https://www.aboutamazon.com/news/policy-news-views/amazon-targets-multiple-bad-actors-in-novel-lawsuit-further-protecting-selling-partners-from-fraud> [<https://perma.cc/CAJ3-6UKB>].

212. AMAZON, *supra* note 211.

213. *Id.*

214. Mitchell Clark, *Amazon Sues Sellers for Issuing Bogus Takedown Requests on Competitors*, VERGE (Mar. 30, 2023), <https://www.theverge.com/2023/3/30/23663339/amazon-sues-sellers-copyright-takedown-competitors> [<https://perma.cc/LH82-C3YS>].

ultimately detected these entities' behavior, shut down their accounts, and sued them.²¹⁵

In response to incidents like these, Amazon has announced it is working with the PTO to prevent trademark fraud.²¹⁶ It claims to "directly receive[] and act[] upon information from the []PTO regarding registration status and parties that have been subject to []PTO sanctions" for fraudulent filings, which it uses to remove the fraudulent registrants from its Brand Registry.²¹⁷ Amazon claims to have removed five thousand false brands from its platform in this way.²¹⁸

In recent years, as Barton Beebe and one of us have demonstrated empirically, fraudulent trademark filings using fake specimens of use have become a significant problem at the PTO, even outside of the Amazon context.²¹⁹ This work estimates that "with respect to use-based applications originating in China that were filed at the . . . PTO[] in 2017 solely in Class 25 (apparel goods), . . . 66.9% of such applications included fraudulent specimens. Yet 59.8% of these fraudulent applications proceeded to publication, and 38.9% then proceeded to registration."²²⁰ The extent of this fraud led Congress to pass the Trademark Modernization Act in 2020, which provided for new reexamination and expungement procedures to remove fraudulent marks from the trademark register.²²¹

There are many reasons for the substantial and increasing number of fraudulent trademark filings. Until now, those investigating the issue have suspected that a major reason for this fraud—often coming from applications originating in China—is that some regional Chinese governments have been offering their citizens a financial subsidy for each U.S. trademark registration secured.²²² This subsidy encourages Chinese citizens to file fraudulent PTO trademark applications, while avoiding the costs of operating an actual business.²²³

But Amazon's business model and Brand Registry also have contributed to the rise in fraudulent PTO trademark applications. Shrewd operators can and have extorted legitimate businesses operating on Amazon by fraudulently registering their unregistered marks, sometimes even using these businesses' real specimens of use.

215. *Id.*

216. AMAZON, *supra* note 178.

217. *Id.*

218. *Id.*

219. See Barton Beebe & Jeanne C. Fromer, *Fake Trademark Specimens: An Empirical Analysis*, 120 COLUM. L. REV. F. 217 (2020).

220. *Id.* at 218.

221. Trademark Modernization Act of 2020, Pub. L. No. 116-260, 134 Stat. 1182, 2200 (2020).

222. Beebe & Fromer, *supra* note 219, at 225–26.

223. *Id.*

C. Descriptive and Generic Terms

For the reasons described in Part III.A, Amazon's Brand Registry increases businesses' incentives to seek PTO registration. It also affects the types of marks for which parties seek registration, significantly increasing business incentives to register generic and descriptive terms. Recall that trademark law categorically refuses to protect or register generic terms like "apple" for a company selling apples; it does so to prevent businesses from monopolizing those terms to the detriment of competition.²²⁴ And descriptive terms like AMERICAN AIRLINES for an American airline are protectable only if they have developed secondary meaning.²²⁵

As discussed by one of us in prior work, businesses have long had an incentive to choose a descriptive or generic term as a mark when they think that "consumers will rely on [the term] to seek out their products even though consumers do not associate that term with them as a source."²²⁶ For example, once upon a time, a business might have chosen a generic term in the hope that a telephone operator would direct business to them when a consumer requested a particular category of goods or services.²²⁷ But the value of that strategy has likely increased sharply in the search engine era. Now, businesses can capitalize on consumers using generic or descriptive terms as search terms, even when those consumers are not looking for any particular provider of goods or services.²²⁸ Indeed, courts have sometimes recognized the competitive advantage that highly descriptive marks have in these search listings—marks like 24 HOUR FITNESS for a gym that is always open,²²⁹ 1-800 CONTACTS for contact lenses,²³⁰ HOME-MARKET.COM for homeowner referral services,²³¹ and BOOKING.COM for travel booking services.²³²

But there have also been historical disadvantages to choosing a generic or descriptive term to identify the source of particular goods or services.²³³ Businesses that do so understand that they cannot obtain exclusive rights in a generic term, so they cannot prevent other businesses from using that term in the

224. *Supra* Part I.A.

225. *Supra* Part I.A.

226. Fromer, *supra* note 21, at 248.

227. *Id.* at 248 n.221.

228. *Id.* at 248.

229. *See* 24 Hour Fitness USA, Inc. v. 24/7 Tribeca Fitness, LLC, 277 F. Supp. 2d 356, 366 (S.D.N.Y. 2003) (discussing how a Google search for the descriptive terms "24," "hour," and "fitness" produces a million hits, with 24 HOUR FITNESS being the second).

230. *See* 1-800 Contacts, Inc. v. Lens.com, Inc., 755 F. Supp. 2d 1151, 1179 (D. Utah 2010) (explaining that phrases like "1-800" and "contacts" are commonly searched by consumers looking for contact lenses or for the toll-free number of a contact lens company).

231. *See* Shade's Landing, Inc. v. Williams, 76 F. Supp. 2d 983, 989–90 (D. Minn. 1999) (noting that the key phrase "home market" instantly identifies what kinds of services the website offers and places it highly in search engine listings).

232. U.S. Pat. & Trademark Off. v. Booking.com B.V., 591 U.S. 549, 562–63 (2020).

233. Fromer, *supra* note 21, at 245–49.

course of competition.²³⁴ Likewise, businesses have incentives not to choose descriptive terms as their marks because they have to deal with the cost and uncertainty of developing secondary meaning; they also cannot use their exclusive rights to prevent competitors from using the term in its descriptive sense.²³⁵

Amazon's business model, combined with its Brand Registry, disrupts this traditional calculus by increasing the benefits of using and even seeking to register descriptive or generic terms. A business might reasonably conclude that it wants to use a descriptive or generic term as a mark for its Amazon-sold goods to improve the odds of prominent placement in search results. Companies have already been adopting names like "Thai Food Near Me" or "Plumber Near Me" to promote themselves in Google search results for those exact terms.²³⁶ The incentive to use generic or descriptive terms is likely even greater for goods sold on Amazon because Amazon's search results put consumers directly into a position to buy the listed goods they see, regardless of brand. As one recent academic analysis of Amazon puts it, "Although in theory Amazon's digital shelf space is limitless, in practice the first few results—especially those on the first page of the smartphone screen—are tremendously important. According to industry research, more than two-thirds of product clicks happen on the first page of Amazon's search results, with half of those focused on the first two rows of products that appear."²³⁷

Importantly, the search-related benefits are amplified for any mark in the Brand Registry because of the search result preference entailed in that program.²³⁸ That means there is extra incentive not just to use those marks, but to try to register them. The PTO might erroneously register the mark, and even if it does not, the applicant can now get the benefits of the Brand Registry for at least the time during which the application is pending. While pending applications have always had a notice function, specifically by making a party's

234. *Supra* Part I.A.

235. *Supra* Part I.A.

236. Mia Sato, *The Restaurant Nearest Google*, VERGE (Oct. 26, 2023), <https://www.theverge.com/2023/10/26/23931825/google-search-local-seo-thai-food-near-me-maps> [<https://perma.cc/M94M-7LEN>] (noting, however, that this strategy does not necessarily boost these businesses' prominence in search results).

237. WEST, *supra* note 118, at 38.

238. *Supra* Part II.B; cf. MOIRA WEIGEL, DATA & SOC'Y, AMAZON'S TRICKLE-DOWN MONOPOLY: THIRD-PARTY SELLERS AND THE TRANSFORMATION OF SMALL BUSINESS 6 (2023), https://datasociety.net/wp-content/uploads/2023/01/Weigel_Trickle-Down-Monopoly_01252023.pdf [<https://perma.cc/UE84-VWJH>] ("[Amazon's] dominance of online search and global logistics has given rise to a new kind of small business optimized for Amazon.").

claim of ownership visible,²³⁹ applications have never before had this kind of enforceable “legal” significance.²⁴⁰

Additionally, participation in the Brand Registry makes it more likely that the business can prevent others from selling competing goods with the same generic or descriptive term.²⁴¹ For example, one Amazon seller that has filed a PTO application to register “tactical hanger” as a trademark has purportedly gotten Amazon to deactivate another seller’s listings, even though the reported seller claims to be using the term descriptively.²⁴² While descriptive marks risk invalidation when enforced in court, the owners of those marks enjoy significant competitive advantages with relatively little risk when they enforce their rights primarily within Amazon’s system.

Of course, none of those benefits would be available if trademark law effectively disincentivized registration of generic or descriptive terms. Amazon relies on the PTO’s trademark registry, after all. And, of course, there are rules that attempt to do just that. As we noted, generic marks are not at all protectable or registrable, and descriptive marks are not protectable or registrable without secondary meaning.²⁴³

But as both of us have separately argued, those rules are not sufficient. Businesses have often found loopholes that allow them to claim and even register with the PTO seemingly generic or descriptive terms, thus gaining access to the Brand Registry. For one thing, the threshold for establishing secondary meaning is regarded by many (including us) as often being too low, so a business might be able to easily clear that bar to obtain a registration.²⁴⁴ For another thing, a business can often get a registration for marks that contain generic or descriptive

239. Cf. Greg Reilly, *Misleading Patent Signals*, 38 HARV. J.L. & TECH. 107, 167–68 (2024) (arguing that marking a product as “patent pending” is a misleading signal because it does not have legal significance even though many see it as an important market signal).

240. A pending application can give a trademark applicant provisional priority over a later-filed application in an administrative proceeding, preventing the later-filed application from proceeding to registration. But that effect is only provisional: The PTO will only tentatively reject the later-filed application and then stay further consideration during the pendency of the earlier-filed application. If the earlier-filed application does not mature into registration, the PTO will reverse course and allow the later-filed application to go forward. *Larami Corp. v. Talk to Me Programs Inc.*, 36 U.S.P.Q.2d (BL) 1840, 1845 n.7 (T.T.A.B. 1995); *accord* *Spirits Int’l, B.V. v. S.S. Taris Zeytin Ve Zeytinyagi Tarim Satis Kooperatifleri Birligi*, 99 U.S.P.Q.2d (BL) 1545, 1549 (T.T.A.B. 2011).

241. *Supra* Part II.B.

242. Seller_cU1ooL1s3eXwg, *My Competitor Reported Me for Trademark Infringement but the Term Is Generic and Merely Descriptive as Proven by the USPTO*, AMAZON SELLER FORUMS (2024), <https://sellercentral.amazon.com/seller-forums/discussions/t/a5ad2dce-b658-4462-84c4-ac16885d3880> [<https://perma.cc/DQD9-P263>]. It is therefore unclear (to us, at least) that Amazon permits descriptive fair use, *supra* text accompanying notes 64–67, and even when it does, how those who make descriptive uses are treated in search rankings and other aspects of the Brand Registry.

243. *See supra* Part I.A.

244. Fromer, *supra* note 21, at 230–34; *see also* Buccafusco, Masur & McKenna, *supra* note 21, at 457–58 (explaining how courts often fail to consider threshold questions about the number of consumers that must treat the term as a trademark for a term to acquire secondary meaning).

words as long as it disclaims its rights to the unprotectable word components.²⁴⁵ According to the Lanham Act, the PTO “may require the applicant to disclaim an unregistrable component of a mark otherwise registrable. An applicant may voluntarily disclaim a component of a mark sought to be registered.”²⁴⁶ Indeed, 26.9 percent of applications filed from 1985 through 2016 contain disclaimed matter.²⁴⁷

On Amazon, those disclaimers mean nothing.²⁴⁸ Consider the following example, depicted in Figure 8. In 2017, a business applied to register a mark that contained a single word, MUSTACHES, for fake mustaches.²⁴⁹ As is self-evident, this term is generic for mustaches. Yet the business was able to obtain a registration for this mark because the word was part of an image, and the applicant disclaimed “the exclusive right to use [‘mustaches’] apart from the mark as shown.”²⁵⁰

245. See, e.g., *In re Miller Brewing Co.*, 226 U.S.P.Q. (BL) 666, 670 (T.T.A.B. 1985) (allowing registration of stylized mark **Lite**, disclaiming the generic term “lite”); *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1564 (Fed. Cir. 1987) (finding stylized mark **sweats dd** protectable despite the disclaimed generic term “sweats”); see also Brandon Meyer, *What Happens If I Can’t Get Away With It?: Disclaimer Law and Practice*, 19 J. CONTEMP. LEGAL ISSUES 125, 125–29 (2010).

246. 15 U.S.C. § 1056(a). Nonetheless, a disclaimer does not prejudice an applicant’s common law rights or any future rights that might arise as to disclaimed words. *Id.* § 1056(b). Furthermore, disclaimed language still might be protectable because courts evaluate it together with nondisclaimed language in assessing trademark infringement. See, e.g., *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1341 (Fed. Cir. 2015) (evaluating the nondisclaimed words “PEACE LOVE” in conjunction with the disclaimed word “JUICE”); *Shen Mfg. Co. v. Ritz Hotel, Ltd.*, 393 F.3d 1238, 1243 (Fed. Cir. 2004) (emphasizing the importance of evaluating the nondisclaimed word “RITZ” in conjunction with the disclaimed words “PARIS” and “HOTEL” when assessing similarity).

247. Beebe & Fromer, *supra* note 23, at 985 n.162.

248. There is another way the Brand Registry potentially gives trademark registrations greater scope than trademark law would. Marks are registered for particular goods or services, in recognition of the fact that trademark rights are not rights in gross. Fromer & McKenna, *supra* note 10, at 147. It is unclear to us whether the Brand Registry enforces the goods and services restriction. There is nothing in Amazon’s publicly available information that clearly limits enforcement to the goods or services for which a mark is registered. If enforcement is not limited that way, then parties might be able to game registration by registering for one set of goods or services but enforce that mark against other goods or services for which they could not have gotten a registration (because, among other things, the registered mark would have been generic or descriptive as applied to those goods or services).

249. U.S. Trademark Application Serial No. 87/488784 (filed June 14, 2017).

250. MUSTACHES, Registration No. 5,426,365.

Figure 8. Trademark registration for MUSTACHES



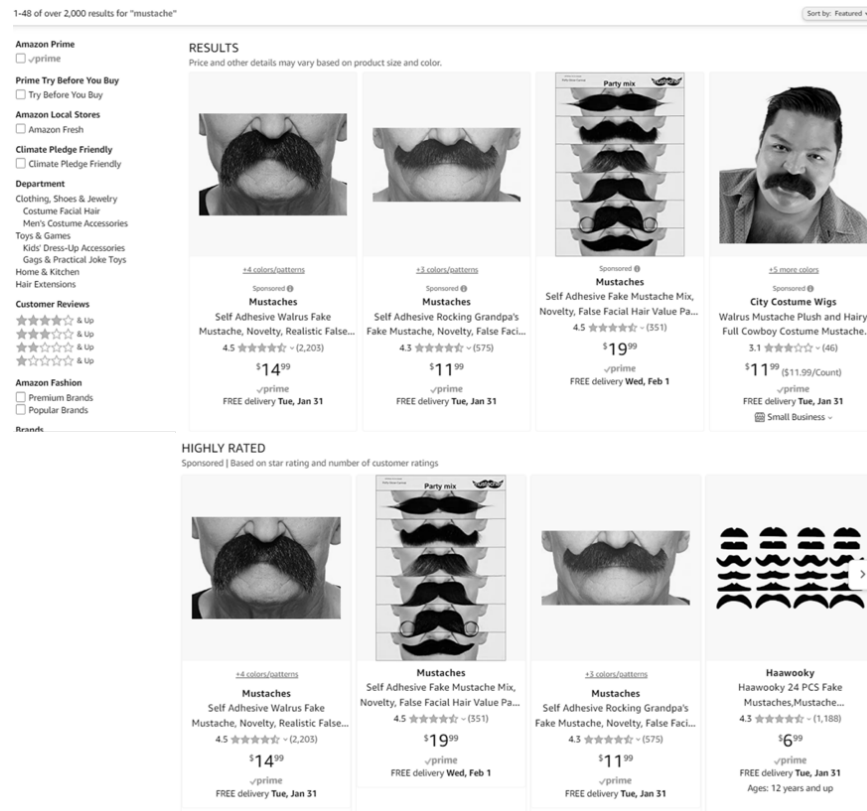
Armed with this registration and despite having disclaimed rights to the word MUSTACHES for mustaches, the business can now take part in Amazon's Brand Registry claiming, as per Amazon's rules, the exact wording in its trademark registration: MUSTACHES.²⁵¹ The business is now prioritized in search results—depicted in Figure 9—and can call upon Amazon to prevent other fake-mustache sellers from using the term MUSTACHES. This trademark registrant has effectively bootstrapped its trademark registration, which disclaims protection for a generic term, into protection—at least on Amazon—of exactly that generic term. And although Amazon claims to consider descriptive fair use when considering infringement, there is no available public information about how it does that,²⁵² and at least some sellers have alleged that Amazon does not, in fact, insulate those uses.²⁵³

251. *Supra* Part II.B (describing this Brand Registry requirement). This feature of Amazon's Brand Registry is an active choice: Amazon allows mark owners to file complaints based on claimed rights that include design elements, so it is capable of matching more than text. Amazon's choice to focus on text matching even when the qualifying registration is in stylized form or has accompanying images asymmetrically benefits registrants.

252. *Supra* note 243. Descriptive fair use is notoriously fact-specific, requiring consideration of whether the use is "otherwise than as a mark," "fair," and in "good faith"—all questions that are ill-suited to rapid and consistent implementation in private dispute resolution. On the difficulty of applying descriptive fair use, see Buccafusco, Masur & McKenna, *supra* note 21, at 459. *See generally* William McGeveran & Mark P. McKenna, *Confusion Isn't Everything*, 89 NOTRE DAME L. REV. 253 (2013) (arguing that the excessive emphasis courts place on consumer confusion conflicts with trademark defenses such as descriptive fair use).

253. *See, e.g., supra* text accompanying note 243.

Figure 9. Amazon search results for “mustache”



As another more technologically-focused example, consider German business MXP Prime (operating as SellerX), which buys up small Amazon businesses and has received the rare unicorn valuation.²⁵⁴ It recently sought to register over thirty marks for different electronics parts using the parts' generic identifiers, such as IRF520, ATMEGA328, and DHT11 (the letters represent their maker and the number identifies the part).²⁵⁵ The PTO trademark examiner,

254. *SellerX Raises \$500 Million in Additional Financing, Reaching Unicorn Valuation*, SELLERX (Dec. 9, 2021), <https://sellerx.com/sellerx-raises-500-million-in-additional-financing-acquires-kw-commerce> [https://perma.cc/X85M-4QJ6].

255. U.S. Trademark Application Serial No. 90/633051 (filed Apr. 8, 2021) (IRF520); U.S. Trademark Application Serial No. 90/633110 (filed Apr. 8, 2021) (ATMEGA328); U.S. Trademark Application Serial No. 90/633066 (filed Apr. 8, 2021) (DHT11). For an explanation of these naming conventions, see *List of IC Manufacturer Codes*, ULTRA LIBR. (Sept. 15, 2020), <https://www.ultralibrarian.com/2020/09/15/list-of-ic-manufacturer-codes-ulc> [https://perma.cc/URX8-W3XP]. For a database of these parts, see OCTOPART, <https://octopart.com> [https://perma.cc/E7JM-T7PC].

likely wondering if these identifiers are generic, and therefore unprotectable, responded with office actions asking SellerX to explain the significance of the symbols in the industry.²⁵⁶ While SellerX subsequently abandoned these applications in the face of the office actions, it could have used the MUSTACHE trick and resubmitted an application to register the same alphanumeric combinations but with a drawing of anything—a sun, a clown, a hat—accompanying the word while disclaiming the alphanumeric combinations themselves. This would have allowed SellerX to register trademarks with generic text that would then hold muster in the Amazon Brand Registry.

In all, Amazon's business policies have bulked up the incentive for businesses to seek registration of generic and descriptive terms, often using loopholes to get the benefits of both trademark registration with the PTO and admission to the Amazon Brand Registry.

D. Nonsense Marks

Another way Amazon's policies have influenced the marks parties seek to register is reflected in the new phenomenon of nonsense marks. These are marks that are comprised of random strings of letters or numbers that are not comprehensible as words or as symbols with any meaning.²⁵⁷ As Grace McLaughlin has noted, these marks pose serious conceptual problems for trademark law. Most obviously, they confound distinctiveness determinations because the marks seem to be fanciful (and therefore inherently distinctive). Nonsense marks do not provide any information about the goods or services and do not have any other ordinary meaning.²⁵⁸ But fanciful terms are generally considered especially strong trademarks because they are assumed to be understandable only as trademarks.²⁵⁹ Nonsense marks flout that assumption because they are not comprehensible as trademarks or, for that matter, as anything at all.

It is also extremely difficult to determine whether these marks are being used as trademarks.²⁶⁰ As discussed above, the PTO refuses to register claimed marks that do not function as marks because those features do not indicate the

256. U.S. PAT. & TRADEMARK OFF., Non-Final Office Action, U.S. Trademark Application Serial No. 90633051 (Dec. 8, 2021), <https://tsdr.uspto.gov/documentviewer?caseId=sn90633051&docId=OOA20211208174824&linkId=3#docIndex=2&page=1> [<https://perma.cc/MWW7-HHAK>]; U.S. PAT. & TRADEMARK OFF., Non-Final Office Action, U.S. Trademark Application Serial No. 90633141 (Dec. 8, 2021), <https://tsdr.uspto.gov/documentviewer?caseId=sn90633141&docId=OOA20211208173734&linkId=6#docIndex=5&page=1> [<https://perma.cc/E2NL-V3YH>].

257. *Fanciful Failures*, *supra* note 33, at 1804 (providing examples of nonsense marks, such as LJXOAIEU for hair clips, QIANDLEE for apparel, JANRSTIC for headphones, and AEZLHJYA for jewelry).

258. *See id.* at 1811.

259. Fromer, *supra* note 21, at 225–26.

260. *Supra* Part I.B.

source of the goods or services with which they are used.²⁶¹ Those refusals for what the PTO calls “failure to function” are typically based on contextual determinations: They focus on whether a particular sign functions as a mark as it is shown in a particular specimen of use.²⁶² That is why the failure-to-function doctrine has primarily focused on the location of a claimed mark and not its intrinsic nature. Consumers often recognize that a sign is a trademark when it is located in a prototypical “trademark space,” even if they have not previously encountered that mark, but signs used in other places may not be understood by consumers as trademarks at all.²⁶³ Nonsense marks likely do not function as marks, but the reason is their intrinsic nature, not that they do not indicate source when used in a particular manner. They are not vehicles for any meaning, let alone trademark meaning.²⁶⁴

Even likelihood of confusion, the standard used to assess trademark infringement, is complicated in the context of nonsense marks. Trademark law does not have a good way of assessing similarity when one of the things being compared is not comprehensible as a word or understandable as a symbol. Similarity is usually assessed in terms of sight, sound, and meaning, and only sight is even possibly relevant for nonsense marks.²⁶⁵ Is NXLYP confusingly similar to NYLPX, or for that matter to PTXWA? On the one hand, these marks might not be confusing because confusion depends on the ability to attach external meaning to the terms—in that sense, because people do not attach any meaning to nonsense marks, they might rarely be similar enough to cause confusion. On the other hand, it might be that all nonsense marks are potentially confused with other nonsense marks because none of them are distinct. Either way, trademark law has no good framework to evaluate such confusion.²⁶⁶ Perhaps just as troubling is that a nonsense mark might be seen as confusingly similar to a more traditional mark, such as McLaughlin’s examples of MAJCF being confused with MAJI, or JANRSTIC with JANSTICK, preventing the more traditional mark applicant from being able to register their mark in the face of the already-registered nonsense mark.²⁶⁷

261. *Supra* Part I.B.

262. *See* Roberts, *supra* note 81 (arguing for this understanding, all the while noting that courts and the PTO tend to emphasize the distinctiveness of a mark over use of a mark when assessing protectability).

263. *See generally* Lemley & McKenna, *supra* note 92 (discussing the development of “trademark spaces” as a factor in the PTO’s determination of trademark status).

264. *Cf. Fanciful Failures*, *supra* note 33, at 1821 (positing that while failure to function as a mark means something different in other contexts, “concerns animating failure to function doctrine apply to nonsense marks, and trademark examiners should extend the doctrine to them, asking whether they perform the source-indicating function trademarks are meant to and denying registration to those that do not”).

265. 3 MCCARTHY, *supra* note 41, § 23:21 (discussing the “sight, sound[,] and meaning trilogy”).

266. *Fanciful Failures*, *supra* note 33, at 1816.

267. *Id.* at 1814.

Precisely because nonsense marks are not comprehensible, they are extremely unlikely to be memorable as marks. For that reason, there was never previously much incentive to use nonsense marks.²⁶⁸ Regardless of the availability of legal protection, a mark is first and foremost a marketing tool that is supposed to indicate the source of goods.²⁶⁹ If the mark a business chooses is not memorable, it will not provide real commercial benefits because consumers are not likely to attach any meaning to it.

Amazon's policies significantly change those incentives. The usual disincentive against a nonsense mark disappears or is greatly diminished for a third-party business selling on Amazon. For one thing, participating in Amazon's Brand Registry does not just help a business enforce its mark, a benefit that probably does not matter much to a nonsense mark user, but it gives the participating business valuable preference in Amazon's search algorithm.²⁷⁰ Moreover, Amazon's business model diminishes the incentive to choose memorable marks in the traditional sense because businesses can rely on consumers being attracted to the AMAZON mark and the Amazon platform. Many consumers also focus more heavily on consumer reviews and search results listing products based on searches for the type of good rather than for the branded good than they would in other shopping contexts.²⁷¹ When searching and purchasing are not necessarily done by people who are looking for particular brand names, businesses just need something to make the algorithm prefer them.²⁷²

Indeed, the forgettability of nonsense marks might be precisely their point. Owners of nonsense marks can collect product reviews on their listings. If they are positive, they can rely on the search algorithm to deliver them more customers. If the reviews are negative, they can easily relaunch under another forgettable nonsense mark and avoid the reputational consequences of those

268. The possible exceptions are the few now-archaic names (like A AAAAA BCALVY for fire and water carpet-damage specialists) that were chosen so that the owner would appear first in alphabetically-ordered Yellow Pages business listings. *'A Alphabetical Advantage' Helps Businesses Listed in Yellow Pages*, CHI. TRIB. (Nov. 8, 1992), <https://www.chicagotribune.com/1992/11/08/a-alphabetical-advantage-helps-businesses-listed-in-yellow-pages> [<https://perma.cc/A3Z3-UC9N>].

269. See *supra* text accompanying notes 38–42.

270. *Supra* Part II.B.

271. As Emily West elaborates, “Since 2015, products that perform well on price, customer reviews, return rate, and availability to ship immediately via Prime have the chance to be highlighted as ‘Amazon’s Choice’ (although the exact formula and decision process remains a mystery, even to companies whose products are chosen).” WEST, *supra* note 118, at 37. Additionally, since 2012, businesses can pay to be in sponsored search results, appearing near the top, or at the top, of search results for certain types of goods, further reducing the dominance of trademarks and brands in this context. *Id.*

272. WEST, *supra* note 118, at 37 (“[S]trong retail brands like Sears, Walmart, or Amazon can erode the value of product brands. Retailers [otherwise] generally carry particular product brands to bring consumers into their stores.”); *cf. id.* (“Amazon’s platform characteristics and relationship with consumers position it particularly well to erode the value of well-known product brands. The ability to sort product searches by price, the availability of customer reviews, and advantageous placement in searches (at a cost) can all level the playing field across brands.”).

reviews.²⁷³ In this way, nonsense marks undermine the very function of trademarks: an easy way for consumers to attach reputation to the right party.²⁷⁴

Despite their conceptual difficulty, the current substantive requirements for PTO registration make nonsense marks attractive to businesses selling on Amazon that simply want a registration to participate in the Brand Registry. Nonsense marks are likely to be treated as fanciful and therefore inherently distinctive, they are likely to be seen as functioning as marks despite being gibberish, and they are unlikely to be confusingly similar to other marks given their composition. For these reasons, nonsense marks are relatively easy to register and to bootstrap into the benefits of the Amazon Brand Registry.

The PTO data bear this out in our analysis. To approximate the rate of nonsense marks in trademark applications and publications,²⁷⁵ we counted the number of applications and publications with a word mark of more than four characters, comprising only one word, that was not of the one hundred thousand most frequently used words in American English,²⁷⁶ and that contained either four consonants in a row or three vowels in a row.²⁷⁷ This approach properly counts ELXXROONM, SUJIOWJNP, XUFFBV, and LXCJZY as nonsense marks. But the approach is both somewhat overinclusive and underinclusive. It counts OLDSMOBILE and SHIRTCRAFT as nonsense marks when it should

273. Scholars have documented parallel behavior on eBay, where sellers drop one eBay account for another once a lot of negative reviews have accumulated. Ginger Zhe Jin & Andrew Kato, *Price, Quality, and Reputation: Evidence from an Online Field Experiment*, 37 RAND J. ECON. 983, 985 (2006); Luís Cabral & Ali Hortaçsu, *The Dynamics of Seller Reputation: Evidence from eBay*, 58 J. INDUS. ECON. 54, 75 (2010); accord James Gibson, *Reputation Reconsidered*, 77 FLA. L. REV. (forthcoming 2025).

274. *Supra* Part I.

275. If the PTO determines that the trademark application satisfies all requirements for registration, it will approve the mark for publication in the Official Gazette. 15 U.S.C. § 1062(a). Third parties then have thirty days from the date of publication to oppose the registration. *Id.* § 1063(a). Unless there is a successful opposition, a use-based application (an application based on the applicant's current use of the mark) will automatically proceed to registration. *Id.* § 1063(b). Applications based on an intent to use the mark require that a statement of actual use be filed before the registration will issue. *Id.* § 1051(d). We focus on publication rates rather than registration rates because many intent-to-use applications succeed to publication but then are not registered because the applicant fails to file a statement of use. See Barton Beebe, *Is the Trademark Office a Rubber Stamp?*, 48 HOUS. L. REV. 751, 773, 774 tbl.9 (2011).

276. We use the Corpus of Contemporary American English (COCA) rank order of the one hundred thousand most frequently used words in American English. See *Word Frequency Data: Based on 450 Million Word COCA Corpus*, WORD FREQUENCY DATA, <https://www.wordfrequency.info/100k.asp> [<https://perma.cc/K4YS-DEBR>]; see also Mark Davies, *The Corpus of Contemporary American English as the First Reliable Monitor Corpus of English*, 25 LITERARY & LINGUISTIC COMPUTING 447 (2010) (explaining how the COCA synthesizes data and allows for changes in the English language to be tracked over time). The data is available on a proprietary basis from Professor Mark Davies. We downloaded the data on November 4, 2014. COCA is the largest structured corpus of American English. *Id.* at 453. For more on COCA and its use for research in law, linguistics, computational linguistics, psychology, and marketing, see Beebe & Fromer, *supra* note 23, at 974–75, 974 n.134.

277. We count three vowels in a row when a “y” is the second or third vowel in the sequence, but not the first.

not, but it does not include EARKOHA as a nonsense mark when it likely should. Even with these mistakes, we think counting marks using a metric like this one can reveal trends in nonsense marks over time, especially when there is no reason to think it undercounts or overcounts marks at different rates out of proportion to true nonsense marks over time.

We find that the number of applications to register nonsense marks has increased markedly in recent years. As Figure 10 shows, the proportion of applications with one-word nonsense marks has risen sharply in just the past few years. For decades, applications for nonsense marks accounted for only about 0.5 percent of applications. That proportion is now approximately 4.5 percent. As the number of applications has risen steadily over time, we also find, as depicted in Figures 11 and 12, that the absolute number of applications comprised of a nonsense mark has risen from almost none for decades, to over twenty thousand annually in the past few years.

Figure 10. Proportion of Applications with a One-Word Nonsense Mark

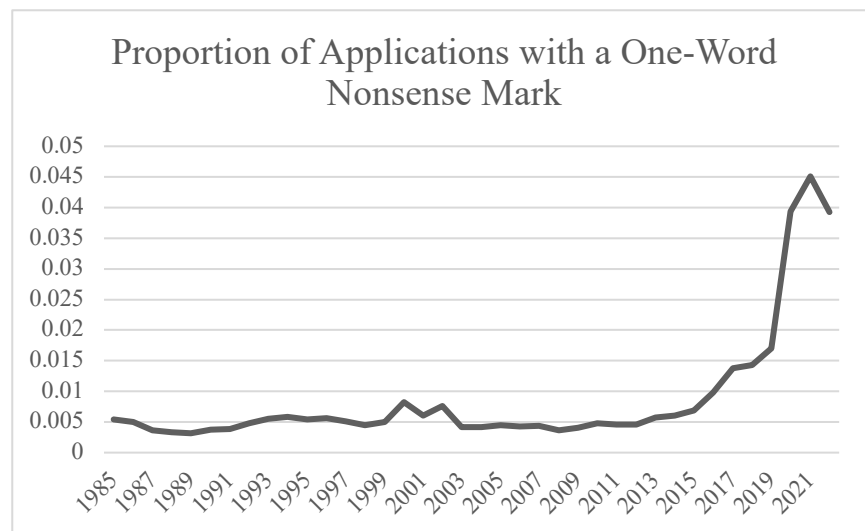


Figure 11. Number of Applications for a One-Word Nonsense Mark, by Filing Year

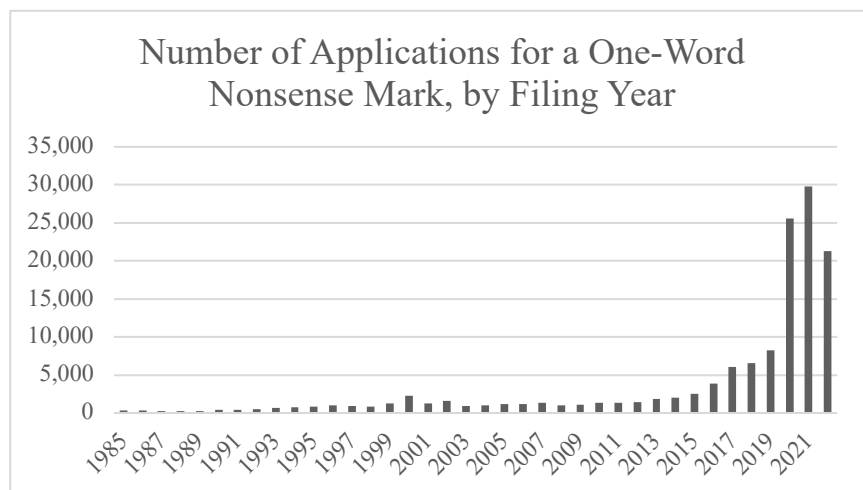
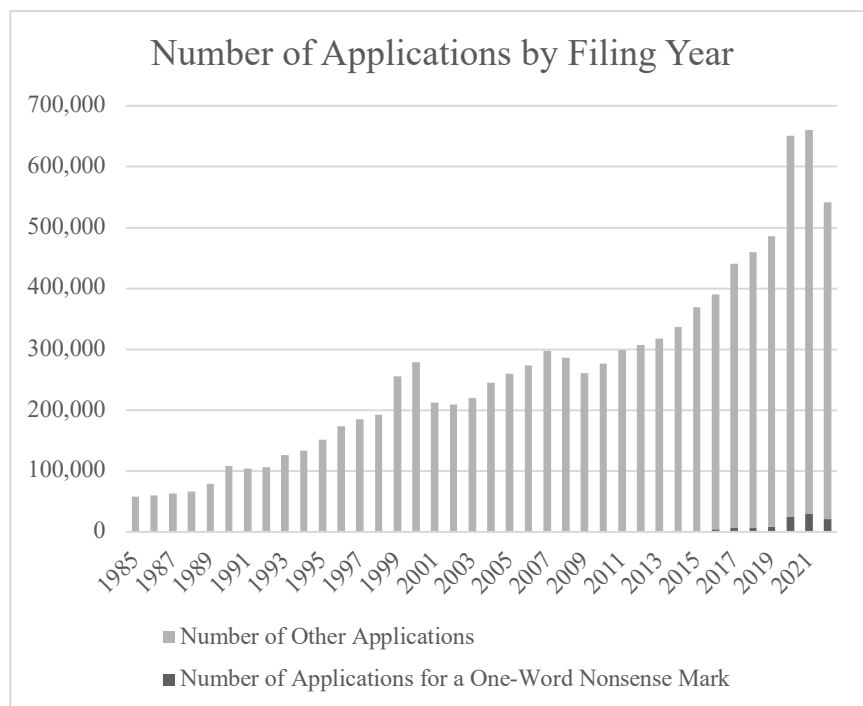


Figure 12. Number of Applications by Filing Year



Corresponding to the increase in applications, more nonsense marks have been published for opposition by the PTO. As Figure 13 demonstrates, nonsense

marks are published at roughly the same rate as all other non-nonsense marks. Thus, the rising number of nonsense mark applications proceeding to publication in recent years reflects the substantial increase in the number of newly filed nonsense mark applications, not any increased propensity of the PTO to publish nonsense mark applications. As Figure 14 shows, over twenty-five thousand nonsense marks proceeded to publication in 2021, the most recent year for which we are likely to have nearly complete rates of publication, as compared to nearly zero such marks annually going back decades, except in recent years.

Figure 13. Rates of Publication for Nonsense Marks and All Marks

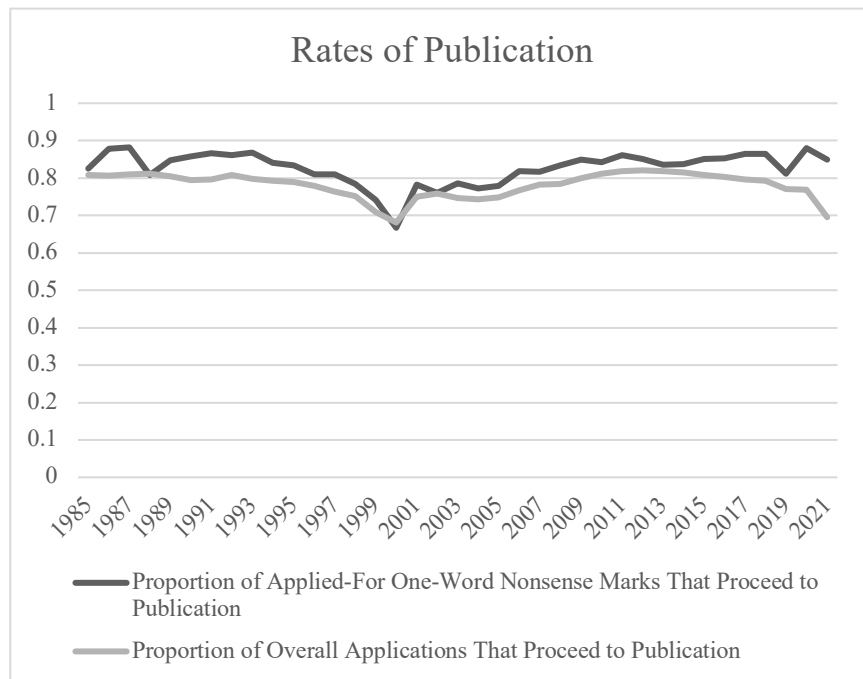
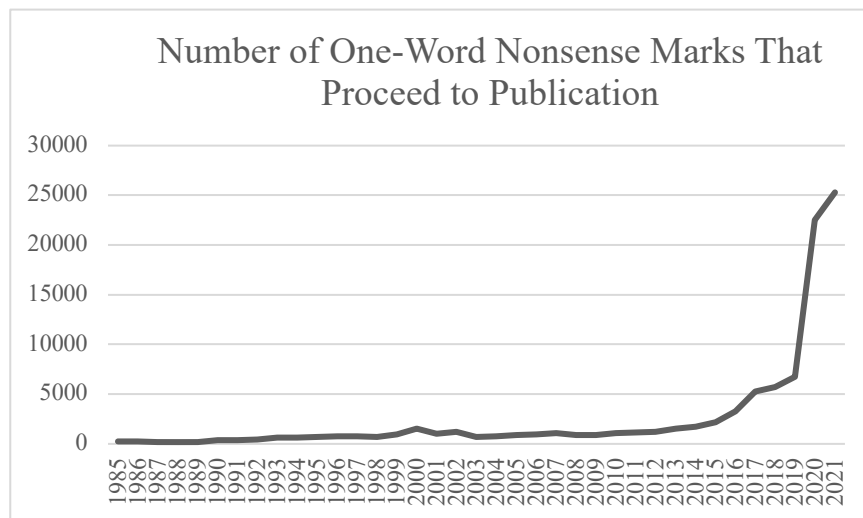


Figure 14. Number of One-Word Nonsense Marks That Proceed to Publication



E. Amazon's House Brands

A final important way that Amazon's business model and Brand Registry have shifted the trademark system, and competition more broadly, is Amazon's focus on first-party sales, rather than the third-party sales explored thus far. Recall that when Amazon launched, it engaged exclusively in first-party sales.²⁷⁸ While its business model has shifted toward substantial numbers of third-party sales, Amazon still engages heavily in first-party sales, and those sales generate the largest share of its revenue.²⁷⁹

In recent years, Amazon's first-party sales practices have garnered substantial attention, particularly its practice of launching products under Amazon brands in product categories where third-party sellers are doing well. As Eric Johnson describes it, "[t]hanks to the massive amounts of data that platform giants [such as Amazon] are able to collect about what is sold through their site, they can cherry-pick the bestselling items from third-party retailers and

278. *Supra* Part II.A.

279. *Supra* Part II.A. Its first-party sales can either be of products made by others sold with a third-party mark (such as ADVIL pain relief tablets), or products sold under an Amazon brand—whether made by Amazon or by others. This section focuses on sales under an Amazon brand, which Amazon has said account for 1 percent of its total retail sales. Dana Mattioli, *Amazon Cuts Dozens of House Brands as It Battles Costs, Regulators*, WALL ST. J. (Aug. 10, 2023) <https://www.wsj.com/articles/amazon-cuts-dozens-of-house-brands-as-it-battles-costs-regulators-3f6ad56d> [<https://perma.cc/UVJ4-4RWH>].

then enter as a retailer, grabbing much of the sales volume.”²⁸⁰ Indeed, there are many stories of third-party sellers that lose half of their sales or more when Amazon enters the space, undercuts the price of the third-party sellers, and gives itself prominent search-result placement.²⁸¹ For example, a ProPublica study found that Amazon gave the products it sells under its own brands better search-result placement approximately 75 percent of the time, even when other sellers’ prices for these products are lower.²⁸²

Feng Zhu and Qihong Liu provide more systematic evidence of Amazon’s approach, finding that over the course of ten months, Amazon began directly competing against third-party sellers on 3 percent of over 160,000 products offered across twenty-two product spaces.²⁸³ The spaces Amazon entered already had higher sales and better product reviews, whereas the spaces they did not enter tended to be those requiring greater seller effort for growth.²⁸⁴ Amazon is in a unique position when it decides to sell in a product category because it is not only a platform participant like third-party sellers, it is also the platform provider.²⁸⁵ By leveraging the massive amount of sales data it collects in its platform provider role, Amazon can outcompete the third-party sellers it relies on for its platform’s success.²⁸⁶

Scholars and regulators have expressed a range of views on Amazon’s first-party sales practices. Some view these practices as worrisome. Lina Khan says it is “anticompetitive” for Amazon to use its dominance to exploit its customers, the third-party sellers, as competitors.²⁸⁷ Johnson calls Amazon’s practice

280. Eric E. Johnson, *An Intellectual Property Fix for Platform Salesjacking*, 116 NW. U. L. REV. ONLINE 306, 307 (2022); accord Khan, *Amazon’s Antitrust Paradox*, *supra* note 1, at 780–83; Khan, *Separation of Platforms and Commerce*, *supra* note 1, at 992–94.

281. See, e.g., Johnson, *supra* note 280, at 307 (describing how an entrepreneur’s sales of a hanging toiletry bag halved after Amazon released the same product under its AmazonBasics brand); Khan, *Amazon’s Antitrust Paradox*, *supra* note 1, at 781–82 (examining how third-party sales of Pillow Pets and aluminum laptop stands both fell after Amazon entered these markets); cf. Rory Van Loo & Nikita Aggarwal, *Amazon’s Pricing Paradox*, 37 HARV. J.L. & TECH. 1, 7 (2023) (presenting “evidence that Amazon’s search results systematically bury the lowest priced items even if they have equal or better ratings”). Amazon also prioritizes its first-party products in sponsored placements and limits third-party sellers in such placements. Khan, *Separation of Platforms and Commerce*, *supra* note 1, at 988–89.

282. Julia Angwin & Surya Mattu, *Amazon Says It Puts Customers First. But Its Pricing Algorithm Doesn’t*, PROPUBLICA (Sept. 20, 2016), <https://www.propublica.org/article/amazon-says-it-puts-customers-first-but-its-pricing-algorithm-doesnt> [<https://perma.cc/DW6V-QMFM>].

283. Feng Zhu & Qihong Liu, *Competing with Complementors: An Empirical Look at Amazon.com*, 39 STRATEGIC MGMT. J. 2618, 2620, 2627 (2018). But cf. Van Loo & Aggarwal, *supra* note 281, at 26 (finding that “only five percent of relevant items at the top of the search results in [their] dataset were Amazon brands,” and speculating that “Amazon [may have] scaled back this form of self-preferencing in light of the scrutiny”).

284. Zhu & Liu, *supra* note 283, at 2620, 2627.

285. Johnson, *supra* note 280, at 309.

286. *Id.* at 307–09.

287. Khan, *Amazon’s Antitrust Paradox*, *supra* note 1, at 782–83; accord Khan, *Separation of Platforms and Commerce*, *supra* note 1, at 1065–90 (presenting potential remedies to the extreme dominance that platforms like Amazon exert over their sellers).

“salesjacking” and often suppressive of third-party innovation.²⁸⁸ Indeed, a House of Representatives subcommittee led a sixteen-month investigation into Amazon on these and other practices,²⁸⁹ and the FTC, under Khan’s leadership, recently sued Amazon for unfair competition for related practices.²⁹⁰ By contrast, Daniel Francis views Amazon’s self-preferencing more benignly as part and parcel of competition in a vertically integrated entity.²⁹¹ Others have even suggested it might be procompetitive because consumers get more competitors offering products, often at better prices.²⁹²

Whether or not Amazon’s self-preferencing is problematic from an antitrust perspective, it has important consequences within the trademark system. When Amazon sells its own goods, it does so under its own mark. That mark might be an Amazon sub-brand that contains the term AMAZON, most commonly AMAZON BASICS or AMAZON ESSENTIALS, or a separate house brand like GOODTHREADS apparel or RIVET furniture.²⁹³ In 2020, Amazon’s private-label business had 243,000 products across forty-five different house brands.²⁹⁴ For cost-cutting reasons, and perhaps out of fear of government regulation, Amazon recently eliminated a number of its house brands, winnowing them down to fewer than twenty.²⁹⁵ For example, Amazon dropped twenty-seven of its thirty clothing brands, leaving just AMAZON ESSENTIALS, AMAZON COLLECTION, and AMAZON AWARE.²⁹⁶ Amazon also opted to focus on its AMAZON BASICS brands for a range of home goods and technology accessories.²⁹⁷ Amazon’s vice president of private brands explained to the *Wall Street Journal* that “[w]e always make decisions based on what our customers

288. Johnson, *supra* note 280, at 307–09, 317–21.

289. See Palmer, *supra* note 2.

290. Complaint, *FTC v. Amazon.com, Inc.*, No. 2:23-cv-01495-JHC (W.D. Wash. Nov. 2, 2023). Amazon’s practices have been subject to scrutiny in other jurisdictions as well. A formal investigation by the European Commission led to Amazon committing “not to use non-public data relating to, or derived from, [third-party] sellers’ activities on [Amazon’s] marketplace, for its retail business” and “not to use such data for the purposes of selling branded goods as well as its private label products.” EUR. COMM’N, *Antitrust: Commission Accepts Commitments by Amazon Barring It from Using Marketplace Seller Data, and Ensuring Equal Access to Buy Box and Prime* (Dec. 20, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777 [<http://perma.cc/MV53-VBAE>]. Amazon’s business therefore looks different in EU countries than in the United States.

291. Daniel Francis, *Making Sense of Monopolization*, 84 ANTITRUST L.J. 779, 828–31 (2022); accord Angelos Vlazakis & Angeliki Varela, *Amazon’s Antitrust Fair Play, a Transatlantic Evaluation*, 41 N. ILL. U. L. REV. 64 (2020) (arguing that Amazon faces significant competition from other online retailers and thus has adapted its strategies to fairly compete on the market).

292. Ben Bloodstein, Note, *Amazon and Platform Antitrust*, 88 FORDHAM L. REV. 187, 221–23 (2019).

293. Palmer, *supra* note 2.

294. Mattioli, *supra* note 279.

295. Palmer, *supra* note 2. Before the FTC sued Amazon, Amazon apparently discussed ceasing house-brand sales as a concession to the FTC were the company to be sued. Mattioli, *supra* note 279. It is unclear if Amazon has since followed through. See *id.* And Amazon previously stated that it had not seriously considered stopping these sales and was going to continue focusing on them. *Id.*

296. Mattioli, *supra* note 279.

297. See *id.*

want, and we've learned that customers seek out our biggest brands—like Amazon Basics and Amazon Essentials—for great value with high quality products at great price points.”²⁹⁸ In all, it seems that Amazon has both consolidated most of its house brands to those containing the AMAZON mark and cut tens of thousands of products.²⁹⁹

PTO data give a sense of the range of goods (and services) for which Amazon uses its AMAZON BASICS and AMAZON marks. Between 2009 and 2022, Amazon filed thirty-eight applications to register AMAZON BASICS. Twenty-four of those applications proceeded to publication; the remaining applications, which were all filed since the beginning of 2022, have not yet proceeded to publication or have been abandoned. Like the fictional ACME mark used in the *Looney Toons* cartoons for just about every possible item, including rubber bands, anvils, cars, nitroglycerin, artificial rocks, and superhero suits,³⁰⁰ Amazon's applications collectively are for goods in twenty-four of the thirty-four classes of goods in the “Nice Classification” system and for services in one of the eleven classes of services.³⁰¹ Between 2007 and 2022, Amazon filed fifty-five applications to register AMAZON. Fifty-two of those applications proceeded to publication, while the one application filed in 2022 has neither proceeded yet to publication nor been abandoned. These applications are for goods and services in fifteen of the thirty-four Nice classes of goods and nine of the eleven Nice classes of services.³⁰²

Amazon has two mutually reinforcing trademark-related advantages in selling its private goods with a house mark. First, it controls its search algorithm and can preference its own goods in product search results.³⁰³ This aspect is trademark-related because it gives increased prominence and emphasis to the

298. *Id.*

299. *Id.*

300. *Acme Corporation*, LOONEY TUNES WIKI, https://originallylooneytunes.fandom.com/wiki/Acme_Corporation [https://perma.cc/HRV6-9DUW]; *List of ACME Products*, LOONEY TUNES WIKI, https://looneytunes.fandom.com/wiki/List_of_ACME_Products [https://perma.cc/5S8Y-A3HQ].

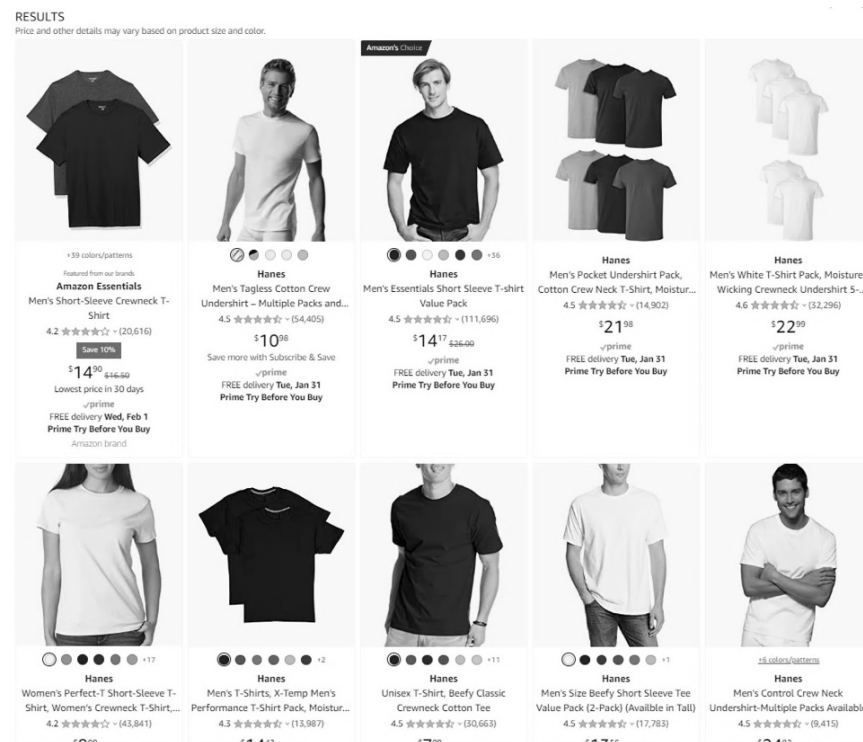
301. A trademark applicant must specify the goods and services in connection with which the applicant claims the exclusive right to use the mark. 15 U.S.C. § 1051(a)(2). The applicant must do so in the form of a written description of the goods and services and by reference to one or more of the forty-five categories of goods and services contained in the International Classification of Goods and Services for the Purposes of the Registration of Marks, otherwise known as the “Nice Classification” after the French city where it was established in 1957. TMEP, *supra* note 89, § 1401.03; *List of Classes with Explanatory Notes*, WORLD INTELL. PROP. ORG., https://www.wipo.int/classifications/nice/nclpub/en/fr/?explanatory_notes. [https://perma.cc/R3F-WJDM]. The Nice classes in which Amazon has applied for the AMAZON BASICS mark are 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, and 35.

302. The Nice classes in which Amazon has applied for the AMAZON mark are 2, 3, 5, 7, 8, 9, 10, 11, 14, 16, 18, 20, 21, 25, 28, 35, 36, 37, 38, 39, 40, 41, 42, and 45.

303. Angwin & Mattu, *supra* note 282; Khan, *Amazon's Antitrust Paradox*, *supra* note 1, at 781; Leon Yin & Adrienne Jeffries, *How We Analyzed Amazon's Treatment of Its “Brands” in Search Results*, MARKUP (Oct. 14, 2021), <https://themarkup.org/amazons-advantage/2021/10/14/how-we-analyzed-amazons-treatment-of-its-brands-in-search-results> [https://perma.cc/VCT5-UNGL].

Amazon house brands over third-party brands, thereby further advancing the Amazon marks' strength. Even when consumers search on Amazon for third-party branded products, Amazon can give prominent search-result placement to its own Amazon-branded products over the third-party products for which the consumers were explicitly searching. Consider this striking example from February 2023, shown in Figure 15, of the Amazon search results for the query "Hanes T-shirt." Amazon's first result is its own Amazon Essentials crewneck T-shirt, followed only then by Hanes-branded T-shirts. In fact, Hanes might very well have to pay Amazon for its own T-shirts to appear this prominently in response to searches for Hanes T-shirts.³⁰⁴ These results translate into increased sales for Amazon's house brands: 70 percent of Amazon consumers never look beyond the first page of search results, and 35 percent of them click on the first result.³⁰⁵

Figure 15. Amazon search results for "Hanes T-shirt"



304. See WEST, *supra* note 118, at 38 ("Even a well-known name like the luggage brand Samsonite finds it has to pay Amazon to appear in searches for its own brand name. At the same time, it's competing against Amazon's own branded products that, according to both consumer observation and investigative reporting, are increasingly advantaged by Amazon's search algorithm.") (internal citations omitted).

305. Mohammad Yaqub, *Amazon Statistics: The Ultimate Numbers Must Know in 2024*, CONTIMOD (Nov. 5, 2024), <https://www.onlinedasher.com/amazon-search-statistics> [<https://perma.cc/T59J-K8NY>].

The second trademark-related advantage for Amazon in selling under its own brands, particularly AMAZON BASICS or AMAZON ESSENTIALS, is that Amazon is a beloved, trusted, and widely recognized brand.³⁰⁶ Indeed, communications scholar West emphasizes that “Amazon has normalized its own ubiquity[, which] should be viewed as an accomplishment borne of branding, public relations, and relationship marketing.”³⁰⁷ Consumers who shop on Amazon are very likely to be drawn to Amazon-branded products. In that vein, West observes that “Amazon has . . . leveraged the trust that consumers have in its brand to launch sub-brands” like AMAZON BASICS and AMAZON ESSENTIALS.³⁰⁸ Furthermore, Amazon’s de-centering of third-party branding, which is the same de-centering that leads many businesses to opt for nonsense marks,³⁰⁹ likely amplifies Amazon’s own branding strategies. The fact that Amazon is consolidating its house brands under the AMAZON BASICS, AMAZON ESSENTIALS, and related house brands containing the AMAZON mark, while discarding unrelated house marks, suggests that Amazon recognizes the power of its AMAZON-centered marks.

Unlike the incentives for small and medium-sized business registration and for adoption of nonsense marks, Amazon’s branding practices have not profoundly affected the total number of trademark applications filed with the PTO. But Amazon’s practices are part of a larger story of the increasing importance of Amazon’s marks in the Amazon marketplace and the corresponding diminishment of third-party sellers’ marks. We consider the implications for the trademark system and competition writ large in the next Part.

IV. IMPLICATIONS

This Part addresses how, if at all, trademark law, the PTO, and Amazon should address the overhaul of the trademark system wrought by Amazon’s business model and Brand Registry. After discussing some precursors to Amazon’s pervasive effect on third-party business practices in Part IV.A, we consider what it means for a single dominant company to have such an impact on trademark law in Part IV.B. In Part IV.C, we discuss how the law should be adjusted. Part IV.D considers what Amazon’s practices might mean for the future of trademark law and competition more broadly.

306. *Supra* Part II.A.

307. WEST, *supra* note 118, at 13. She elaborates: “Amazon’s brand can stretch like taffy because its focus is not the things it sells so much as the service relationship it cultivates with customers.” *Id.* at 37.

308. *Id.* at 37.

309. *See supra* Part III.D.

A. Precursors

In our view, Amazon's effect on the trademark system is unprecedented in its scale and scope. Here we consider two possible precursors: the Sears mail-order catalog in the late nineteenth and early twentieth centuries and the Network Solutions dispute resolution policy for internet domain names in the early years of this century. Sears is the most analogous to Amazon in terms of its power as a commercial platform, while the Network Solutions policy is most analogous in terms of the relationship between a private dispute resolution system and parties' use of the formal legal system.

Both caused many businesses to change their practices and the law in turn adjusted to accommodate or constrain these practices. But, as we demonstrate, neither approaches the magnitude of Amazon's effect.

1. Sears Catalog

Though the technologies involved were more rudimentary than those that Amazon uses, there are many parallels between Amazon's success as an e-commerce platform and the Sears mail-order catalog. Both Amazon and Sears brought easier shopping experiences to consumers, offering a wide range of low-priced products that would be shipped to the consumer.³¹⁰ Yet Sears provided a quite different retail experience.

Richard Sears launched his mail-order business in 1886 in an attempt to lower retail prices.³¹¹ Sears acted as a mass distributor, selling the goods of small manufacturers, thereby competing with large manufacturers.³¹² Sears launched his business at a time when the United States was expanding and building out railroad and postal systems, so existing in-person shopping opportunities were limited by geography and transportation.³¹³ When Sears began his business, he was therefore focused on selling mainly to rural customers.³¹⁴ He started by selling watches, but his catalog of offerings quickly expanded to a wide range of products, including jewelry, silverware, clocks, sewing machines, dishes,

310. Cf. STONE, *supra* note 121, at 44 (recording Jeff Bezos as seeking to build "the next Sears" with Amazon); WEST, *supra* note 118, at 29 ("From the Sears catalogue as a tool for broadening the reach of not just consumer goods but also consumer desires, to Walmart's mastery of logistics, to the United States Postal Service's historic role as the primary distributor of printed material and packages, to UPS as a privately held but ubiquitous delivery brand, the historic importance of distribution brands to both the economics and culture of the United States cannot be underestimated."); WEIGEL, *supra* note 238, at 11–12 ("When they started, Amazon marketplace functioned mostly like a catalog—an online version of the Sears Roebuck catalog from the 1890s, or of Stewart Brand's Whole Earth Catalog . . . Like manufacturers and brands that sold through older catalogs, sellers paid a modest fee to sign up to list goods on Amazon.com and for Amazon to handle the transaction.").

311. See BORIS EMMET & JOHN E. JEUCK, CATALOGUES AND COUNTERS: A HISTORY OF SEARS, ROEBUCK AND COMPANY at ix, 2–3 (1950).

312. See *id.* at 4.

313. *Id.* at 9–15.

314. See GARY CROSS, AN ALL-CONSUMING CENTURY: WHY COMMERCIALISM WON IN MODERN AMERICA 28 (2000); EMMET & JEUCK, *supra* note 311, at 35.

clothing, harnesses, saddles, firearms, wagons, buggies, bicycles, shoes, baby carriages, and musical instruments.³¹⁵ A few years into the business, Sears' catalogs were hundreds of pages long.³¹⁶ Sears would generally choose which categories of goods he wanted to sell, such as sewing machines and bicycles in earlier years, and then he would create a market for these products.³¹⁷

As the business grew, it offered an alternative retail option not just to rural consumers—who typically had no significant retail stores nearby—but to all consumers, including those located near independent retail merchants.³¹⁸ Feeling hostility from these merchants, Sears decided to target a rural audience by placing advertising for his catalogs in magazines catering to that audience.³¹⁹

Sears faced several challenges in getting small manufacturers to make and supply goods for Sears to sell by mail order. For one thing, the small manufacturers feared boycotts from the independent retailers threatened by the Sears model.³²⁰ Sears also had to find manufacturers that would provide goods at the low prices Sears would pay.³²¹ Finally, Sears had to overcome manufacturers' reluctance to commit all of their product to Sears because of their fear of the chokehold the distributors would have on them.³²² Sears solved these problems in two ways: first, by locating manufacturers that wanted to work with Sears, providing capital to those companies if necessary, and second, by making goods in house if outside manufacturers could not be located.³²³ Sears generally sold all of these goods without branding other than the Sears name or house brands that Sears chose.³²⁴

Starting around 1925, Sears launched retail stores and married them with its mail-order business.³²⁵ With this combination of urban retail and rural mail order, Sears became the largest U.S. retailer of general merchandise in the mid-twentieth century.³²⁶

Julie Cohen has observed that Sears' mail-order catalog business can be understood as a proto-platform.³²⁷ As she explains, "[i]nclusion of a product in the Sears, Roebuck catalog gave its manufacturer access to a marketing

315. EMMET & JEUCK, *supra* note 311, at 35–36.

316. *Id.* at 37.

317. *Id.* at 119–22, 219, 240.

318. *Id.* at 59–60.

319. *Id.*

320. *Id.* at 117–18. The independent retailers went even further, using racist attacks, advertising boycotts, and editorial assaults to fight Sears. *Id.* at 150–63. They also fought in Congress against the parcel post system to diminish Sears' business, but lost the battle when Congress enacted the system into law in 1912. *Id.* at 187–95.

321. *Id.*

322. *Id.* at 118.

323. *Id.* at 118–19.

324. *Id.* at 414–20.

325. CROSS, *supra* note 314, at 28; EMMET & JEUCK, *supra* note 311, at 313.

326. EMMET & JEUCK, *supra* note 311, at 3.

327. See Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 137–39 (2017).

juggernaut with the ability to reach consumers nationwide, the range to offer concert gran[d] pianos and engraved shotguns, and the power to undercut the prices charged by local ‘five-and-ten-cent stores’ for everyday essentials.”³²⁸ In that sense, Sears’ business model bears more than a passing resemblance to Amazon’s.³²⁹

But Amazon’s model differs from Sears’s in two key ways. First, just about any third-party business can partner with Amazon to sell any of its wares on Amazon’s platform.³³⁰ By contrast, Sears would internally determine which products it wanted to sell and then solicit particular third-party businesses to manufacture those items. Second, Amazon has considerably more power vis-à-vis small businesses than Sears did. Businesses operating in Sears’ heyday could still thrive without Sears by engaging in local commerce, which was then more prominent.³³¹ Sears therefore did not have the grip that Amazon has on third-party business practices. One recent report has described this phenomenon as Amazon’s “trickle-down monopoly.”³³²

These two differences in combination make Amazon’s operation unlike Sears’. As Emily West puts it, even though distributors like Sears have network effects and economies of scale in common with Amazon, “the logics of *digital* capitalism have launched Amazon into a sphere of market dominance and expansion into horizontal and vertical integrations that are unprecedented relative to” other distributors.³³³

Because of that dominance, Amazon’s practices have a much more substantial impact on the U.S. trademark system. One important difference is that Sears used its own brand or internally branded the goods it sold via its mail-order catalogue, whereas Amazon has many third-party branded goods. Sears therefore was much less likely to impact third parties’ trademark practices. The second precursor, to which we now turn, is more like Amazon in terms of its effect on the trademark system.

2. *Network Solutions Policy*

As the commercial internet took off in the 1990s, everyone and their dog³³⁴ rushed to claim internet domain names. Whereas in 1992 there were fifteen

328. *Id.* at 137.

329. *See supra* Part II.

330. *See supra* Part II.

331. *See* Cohen, *supra* note 35, at 139.

332. WEIGEL, *supra* note 238.

333. WEST, *supra* note 118, at 30, 49–50.

334. *See generally* Peter Steiner, *On the Internet, Nobody Knows You’re a Dog*, NEW YORKER, July 5, 1993. Steiner’s classic comic is viewable at *Lot #71036*, HERITAGE AUCTIONS, <https://fineart.ha.com/itm/mainstream-illustration/peter-steiner-american-b-1940-on-the-internet-nobody-knows-you-re-a-dog-the-new-yorker-cartoon-july-1993ink/a/8137-71036.s> [<https://perma.cc/RH58-22K7>].

thousand registered domain names,³³⁵ by 2000, there were over thirty million.³³⁶ By 2022, there were 350.4 million.³³⁷

Many businesses wanted to, and still want to, register their brand name as a domain name in the .com top-level domain.³³⁸ Some businesses readily claimed a .com domain that matched their trademark, as Cisco did with cisco.com and Apple did with apple.com.³³⁹ But one problem quickly became apparent: Domain names are, by their very nature, exclusive, but it is common for multiple different companies to use the same or very similar marks for different goods or services. So, for example, Delta Airlines coexists with Delta Financial and Delta Faucets because the uses are different enough that consumers are unlikely to be confused by the concurrent uses.³⁴⁰ But as the domain system is set up, there can only be one owner of delta.com.³⁴¹

Sometimes, businesses in this situation amicably worked out allocation. DeltaComm Internet Services originally claimed delta.com; it then transferred the domain name to Delta Financial, which subsequently transferred to Delta Airlines, the current registrant of that domain name.³⁴² But multiple potentially legitimate claims to a domain name often led to conflict, such as when Nissan Motor Company sued Nissan Computer Corporation, alleging that the latter's registration and use of nissan.com constituted trademark infringement.³⁴³

Those conflicts had a different character when they involved domain name registrants with no prior interest in marks corresponding to the domain names they registered. Because domain name registration was initially a gold rush, many opportunists rushed to claim domain names corresponding to existing marks whose owners had not yet claimed the domains. They then turned around

335. Damjan Milenkovic, *35+ Must-Know Domain Name Statistics (2024)*, DOMAIN WHEEL (Jan. 18, 2024), <https://domainwheel.com/domain-name-statistics> [<https://perma.cc/YA2K-FFP7>].

336. Linda Harrison, *Domain Names Set to Double to 60M by 2002*, REGISTER (Oct. 14, 2000), https://www.theregister.com/2000/10/14/domain_names_set_to_double [<https://perma.cc/TAU6-QJLS>].

337. *Verisign Domain Name Industry Brief: 350.4 Million Domain Name Registrations in the Fourth Quarter of 2022*, VERISIGN (Mar. 9, 2023), <https://blog.verisign.com/domain-names/verisign-q4-2022-the-domain-name-industry-brief> [<https://perma.cc/JD4N-BUC2>].

338. See, e.g., Frank Schilling, *The House Always Wins—SEM Arbitrage and Keyword Domain Names*, SEVEN MILE (Mar. 23, 2007), http://frankschilling.typepad.com/my_weblog/2007/03/the_house_alway.html [<https://perma.cc/DQB5-AWPK>].

339. Frederic Cambus, *Oldest Domains in the .Com, .Net, and .Org TLDs*, FREDERIC CAMBUS (June 26, 2018), <https://www.cambus.net/oldest-domains-in-the-com-net-and-org-tlds/> [<https://perma.cc/G79F-U93C>].

340. See Beebe & Fromer, *supra* note 23, at 952.

341. See Michael Karanicolas, *The New Cybersquatters: The Evolution of Trademark Enforcement in the Domain Name Space*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 399, 411 (2020).

342. Jacqueline D. Lipton, *A Winning Solution for YouTube and UTube? Corresponding Trademarks and Domain Name Sharing*, 21 HARV. J.L. & TECH. 509, 516 (2008).

343. See *Nissan Motor Co. v. Nissan Comput. Corp.*, 89 F. Supp. 2d 1154 (C.D. Cal.), *aff'd*, 246 F.3d 675 (9th Cir. 2000).

and offered to sell them to the mark owners. One individual registered over one hundred domain names by 1995, including domain names corresponding to the names of apparel company Eddie Bauer and the airline Lufthansa, and then attempted to sell the domain names to the companies operating under those names.³⁴⁴ Others registered domain names corresponding to generic category names, such as cars.com and insurance.com, because they thought those domain names would give them a unique advantage among consumers looking for goods or services in those categories.³⁴⁵

This domain name activity spilled over into the trademark system to a large extent, with businesses racing to the PTO to apply to register domain names as trademarks.³⁴⁶ By 1995, the PTO announced a policy that it would register domain names so long as they were used as trademarks.³⁴⁷ Indeed, empirical data on trends in trademark applications and registrations over time tend to have spikes in the data from 1999 to 2000, which are primarily attributable to this domain name activity.³⁴⁸

Policies outside the trademark system regarding domain name registration and dispute resolution shaped trademark registration practice during this time period. In the 1990s, Network Solutions, a private company, held a U.S. government-sanctioned monopoly on registration of domain names.³⁴⁹ Beginning in 1995, Network Solutions adopted a series of policies under which it could suspend a challenged domain name on the complaint of the owner of a registered trademark that exactly matched the domain name, minus the top-level domain, like .com.³⁵⁰ It would suspend the domain name even though the domain name registrant might have its own relevant trademark, if the complainant could show that it registered its trademark before the domain name holder activated its

344. Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1319 (9th Cir. 1998).

345. Ben Howard, *The Top 10 Most Expensive Domains Ever Sold*, NAME.COM (Dec. 20, 2022), <https://www.name.com/blog/the-top-10-most-expensive-domains-ever-sold> [https://perma.cc/3YJ3-D7RT].

346. Joan Meadows, Comment, *Trademark Protection for Trademarks Used as Internet Domain Names*, 65 U. CIN. L. REV. 1323, 1340 (1997).

347. Gary W. Hamilton, *Trademarks on the Internet: Confusion, Collusion or Dilution?*, 4 TEX. INTELL. PROP. L.J. 1, 5 n.10 (1995) (citing INT'L TRADEMARK ASS'N, SPECIAL BULLETIN: REGISTRATION OF INTERNET DOMAIN NAMES IN THE USPTO (1995)). See generally *supra* Part I.B.

348. See, e.g., Beebe & Fromer, *supra* note 23, at 972; *supra* Parts III.A, III.D.

349. David S. Hilzenrath, *Holding the Keys to Internet Addresses*, WASH. POST (July 22, 1996), <https://www.washingtonpost.com/archive/business/1996/07/22/holding-the-keys-to-internet-addresses/9f8d7e88-d404-49eb-b89d-31c5cb5d22f5> [https://perma.cc/6YHM-Y98R].

350. See Andre Brunel & May Liang, *Trademark Troubles with Internet Domain Names and Commercial Online Service Screen Names: Roadrunning Right into the Frying Pan*, 5 INT'L J.L. & INFO. TECH. 1, 11 (1997); Carl Oppedahl, *Trademark Disputes in the Assignment of Domain Names*, in COORDINATING THE INTERNET 154, 157 (Brian Kahin & James H. Keller eds., 1997); Adrian Wolff, *Pursuing Domain Name Pirates into Uncharted Waters: Internet Domain Names that Conflict with Corporate Trademarks*, 34 SAN DIEGO L. REV. 1463, 1480 (1997).

domain or registered its trademark.³⁵¹ Trademark registrations in any country qualified under the Network Solutions policies.³⁵²

Network Solutions' policy did not align with domestic trademark law in important ways. In particular, Network Solutions would suspend a domain name based on the complaint of the owner of a foreign trademark registration that predated the domain name registrant's use, even though American trademark law would give priority to the first user in the United States.³⁵³ Network Solutions also gave priority to the owner of a trademark registration even if the domain name registrant had use in the United States that predated the registration or application to register.³⁵⁴ Relatedly, the first to register a domain name with Network Solutions would win any challenge even if there were two parties holding concurrent trademark registrations for unrelated geographic areas.³⁵⁵ According to scholars writing at the time of the domain name rush, trademark owners sometimes felt compelled to challenge domain name registrations because of their concern that acquiescence in a competing use would weaken their mark's strength and limit the scope of their rights.³⁵⁶

Perhaps most significantly for current purposes, Network Solutions' policy encouraged businesses to apply to register their trademarks when they might otherwise not have done so because those businesses needed trademark registrations to be able to challenge domain names with Network Solutions.³⁵⁷ And because Network Solutions gave priority to any registration that issued before a domain name was registered, those businesses had a strong incentive to seek registration wherever it was fastest. That turned out to be Tunisia, which would register an applied-for mark in a matter of days, rather than the year or so it took at the time in the U.S. PTO.³⁵⁸ Indeed, so many domain name registrants

351. See Brunel & Liang, *supra* note 350, at 6–7; Oppedahl, *supra* note 350, at 157; Alexander Gigante, "Domain-ia": *The Growing Tension Between the Domain Name System and Trademark Law*, in COORDINATING THE INTERNET 135, 139 (Brian Kahin & James H. Keller eds., 1997). This was despite past practice of many trademark lawyers to include ".com" in their PTO trademark registrations. Brunel & Liang, *supra* note 350, at 15.

352. See Stephen Moccaldi, *Do Any Viable Solutions Exist to Prevent the Exploitation of Trademarks Used as Internet Domain Names?*, 21 SUFFOLK TRANSNAT'L L. REV. 179, 183 n.19 (1997).

353. Gigante, *supra* note 351, at 140.

354. Under the Lanham Act, the registrant's nationwide priority is subject to prior actual use, meaning that prior common law rights persist in the areas in which the earlier user made use predating the application to register. 15 U.S.C. § 1057(c).

355. Michael B. Landau, *Problems Arising out of the Use of "www.trademark.com": The Application of Principles of Trademark Law to Internet Domain Name Disputes*, 13 GA. ST. U. L. REV. 455, 485 (1997).

356. See *id.* at 467 n.55.

357. At the time, Carl Oppedahl speculated that tens of thousands of trademark registration applications would be filed in the PTO that would not otherwise have been filed. Oppedahl, *supra* note 350, at 164.

358. See sources cited *supra* note 351.

and challengers registered in Tunisia that Network Solutions eventually amended its policies to erase the impact of the Tunisian registrations.³⁵⁹

The effects of the Network Solutions policy turned out to be relatively short-lived because domain name dispute resolution came to be governed overwhelmingly by the Uniform Dispute Resolution Policy (UDRP) adopted by the Internet Corporation for Assigned Names and Numbers (ICANN) in 1999.³⁶⁰ The UDRP established procedures that were grounded in recommendations by a United Nations World Intellectual Property Organization study.³⁶¹ Under the UDRP, which all domain name registrants must accept as a condition of registration, trademark owners can object to any identical or confusingly similar domain name on the ground that the domain name registrant has no rights or legitimate interest in the domain name and that the domain name has been registered and used in bad faith.³⁶² Complaints are resolved under the UDRP through ICANN-accredited dispute resolution service providers via arbitration.³⁶³

The UDRP effectively nullified Network Solutions' policy and reduced the impact of domain name registration on trademark registration practice. In one of the most cited decisions under the UDRP, a case involving the domain name *madonna.com*, the panel ruled that a Tunisian trademark registration by a business not located in Tunisia did not reflect a legitimate interest in the disputed name and, in fact, might have reflected the registrant's bad faith.³⁶⁴ Decisions like that significantly decreased interest in Tunisian trademark registration among non-Tunisian businesses and pushed domain name dispute resolution policy more in the direction of substantive trademark law.

Congress also enacted the Anti-Cybersquatting Consumer Protection Act (ACPA) in 1999. That statute prohibits the act of registering with the "bad faith intent to profit . . . a domain name that . . . [is] confusingly similar" to a registered or unregistered mark or personal name, or is dilutive of a famous mark.³⁶⁵ The ACPA provided a more effective legal framework for resolution of trademark disputes relating to domain names. Together with the UDRP and the general cooling of the internet boom, the ACPA decreased the number of applications to register domain names as trademarks.³⁶⁶

359. Michael Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, 27 BROOK. J. INT'L L. 903, 915 (2002).

360. ICANN was founded as a nonprofit corporation to, among other things, manage domain name policy that would be responsive to global interests through a multi-stakeholder model. Karanickolas, *supra* note 341, at 402–04.

361. *Id.* at 417–18.

362. *Id.*

363. *Id.* at 419.

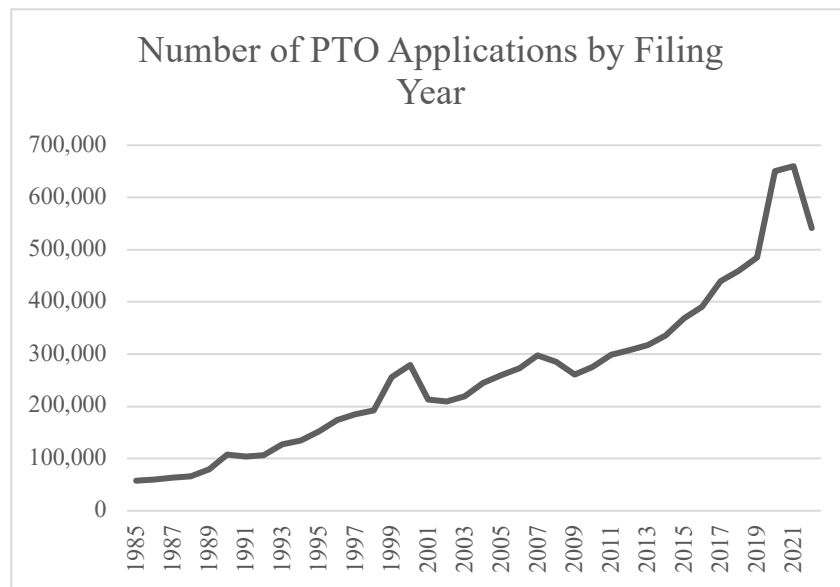
364. *Madonna Ciccone v. Dan Parisi*, WIPO Case No. D2000-0847 (WIPO Arb. & Mediation Ctr. Oct. 12, 2000).

365. 15 U.S.C. § 1125(d) (yet providing defenses for certain fair uses).

366. *Infra* fig.17.

The effect of the Network Solutions policy and the domain name system paled in comparison to Amazon's effect in terms of its magnitude. Figure 16 shows the small and brief bump in applications filed during the internet boom of the early aughts as compared with the larger increase in filings in recent years. In scale and in duration, Amazon's effect on the formal trademark system is truly unprecedented. The Sears experience helps demonstrate why: Amazon's influence as a platform is orders of magnitude larger than any conceivably analogous predecessor.

Figure 16. Number of PTO Applications, by Filing Year



These two examples highlight the uniqueness of Amazon's effects. Amazon is a market-dominant platform, and as a result, it has affected the trademark system on an unprecedented scale. Those effects are also qualitatively different in that they are traceable to the policies of a single company rather than more general economic conditions or changing technology generally.

B. When a Single Company Has Such an Impact on a Legal System

Amazon's recent and ongoing impact on the shape of the trademark system is staggering. Its Brand Registry and business model are largely responsible for a huge increase in trademark applications from small businesses that might never have otherwise filed for registration. Its policies have provoked trademark extortionists to file fraudulent applications, increased the incentive to apply to register descriptive and generic terms, and driven up applications for nonsense marks. All of those effects will no doubt be further amplified now that Amazon has begun allowing businesses with pending trademark registration applications

to join its Brand Registry. As we have noted, there is irony here because the acceptance of pending applications seems to have been motivated by longer pendency of trademark applications in the PTO, to which Amazon surely contributed. Any other alterations in Amazon's business model or changes to the Brand Registry qualification rules and advantages are likely to shape-shift the trademark system in other unforeseen ways.

A recent *Data and Society* report describes and analyzes the "trickle-down monopoly" that Amazon has imposed on its third-party sellers. In particular, the report suggests that "[b]y platformizing such a huge swath of retail, Amazon has enrolled countless [third-party] sellers in expanding the company's influence. But it has also projected [its] own logics of monopoly onto these small-to-mid-sized scale sellers, who stockpile inventory in their own homes, sell at losses to try to corner niche markets, and diligently guard all information about their businesses."³⁶⁷ For similar reasons, its capture of the market has also crept across to and seized the PTO.

Amazon's impact on the trademark system is perhaps not so surprising when considering the role that trademarks play for many third-party businesses selling on the Amazon platform.³⁶⁸ As Sonia Katyal and Leah Grinvald explain, "the platform economy facilitates the emergence of . . . 'macrobrands'—the rise of platform economies whose sole source of capital inheres in the value of the brand itself—the Airbnbs, Ubers, and eBays of the world."³⁶⁹ There is also the "parallel emergence of the 'microbrand'—the rise of discrete, small enterprises made up of individual businesses."³⁷⁰

In many ways, consumers are attracted to Amazon because they trust it, because of the platform's network effects, and because of the company's consumer-focused model.³⁷¹ They are drawn to Amazon's macrobrand, much like consumers are drawn to a franchise brand regardless of its operators.³⁷² The third parties that sell their wares on Amazon are attracted to the platform for similar reasons.³⁷³ Much like franchisees, third-party sellers realize that any microbrands they use might not matter as much to consumers as they would in other contexts.³⁷⁴ Still, those sellers are likely to recognize the value of applying

367. WEIGEL, *supra* note 238, at 1.

368. *See supra* Parts III.C–E.

369. Katyal & Grinvald, *supra* note 35, at 105.

370. *Id.* at 106.

371. *See supra* Part II.A.

372. *Cf.* WEIGEL, *supra* note 238, at 9 ("Amazon sellers more closely resemble franchisees. Amazon sellers resemble . . . franchisees in that they assume forms of risk and responsibility that entrepreneurship entails, while relinquishing much of the freedom it has historically provided. Insofar as sellers give Amazon, on average, 34% of each sale that they make through the platform, they also facilitate the transfer of loans and other resources that the state has designated to support small businesses—including minority-owned businesses—to one of the largest corporations in the world.").

373. *See supra* Part II.A.

374. *See* Michael Grynberg, *AI and the "Death of Trademark,"* 108 KY. L.J. 199, 226, 231 (2019–20).

to register marks that will benefit them in terms of search result placement and qualify them for the Brand Registry. That is why sellers are picking nonsense marks and descriptive or generic terms as marks when they would be much less likely to do so if they were not selling on Amazon's platform. Whereas Katyal and Grinvald suggest that microbrands "have a strong interest in utilizing the basic principles of branding and trademark protection,"³⁷⁵ at least some of Amazon's third-party sellers are throwing these basic principles out the window to maximize their impact on Amazon. The increased importance of Amazon's macrobrand and the decreased importance of third-party sellers' brands likely explain why Amazon is tripling down on its AMAZON-centered trademarks like Amazon Basics.

Without wading into the merits of Lina Khan's antitrust analysis³⁷⁶ or the contrary positions taken by others,³⁷⁷ we think it is clear that Amazon's dominant position in internet commerce substantially affects the shape of competition and dramatically influences the operation of areas of law that intersect with Amazon's business practices. Because of Amazon's dominance, its business model and Brand Registry have changed private parties' use of the trademark system so much that it has effectively overhauled that system.

To some, Amazon's singular impact on the trademark system will suggest that the platform is simply too powerful, whatever one thinks of the antitrust issues. At the very least, the effects we have described here should force us to reflect on whether we are comfortable with a single company setting internal rules for its own benefit when the effect is to reconfigure a legal system that was not developed with such a powerful actor in mind. Amazon is leveraging the existing trademark system, outsourcing decisions about trademark validity to resolve conflicts on its platform and protect its business model. Importantly, it is seeking to ward off prospective regulation that would expose the company to products liability claims and liability for counterfeits sold on its platform.³⁷⁸ Amazon's leveraging of the trademark system is not incidental to that goal. By piggybacking on the U.S. trademark system rather than building an independent brand verification system from scratch, Amazon is able to claim the high ground of the government's own gold-standard system, making government regulation

375. Katyal & Grinvald, *supra* note 35, at 106.

376. See Khan, *Separation of Platforms and Commerce*, *supra* note 1; Khan, *Amazon's Antitrust Paradox*, *supra* note 1.

377. See, e.g., Francis, *supra* note 291, at 781–82; Vlazakis & Varela, *supra* note 291, at 67.

378. See *supra* Part II.B; see also Catherine M. Sharkey, *Products Liability in the Digital Age: Online Platforms as "Cheapest Cost Avoiders,"* 73 HASTINGS L.J. 1327, 1349–50 (2022) (addressing products liability for Amazon).

unwarranted.³⁷⁹ But Amazon's practices have profoundly affected the trademark system in ways that impact consumers and every other trademark applicant.³⁸⁰

Should trademark law be adapted to accommodate or respond to Amazon's practices? On the one hand, it seems absurd to suggest that trademark law should continually adapt to Amazon's internal business decisions. On the other hand, it seems absurd for it not to recognize commercial reality. Either way, Amazon's seismic impact on the trademark landscape forces us to consider where changes to the current system should be made to accommodate the platform's continued, unprecedented efforts.

C. *Adjusting the Trademark System?*

After considering the various trademark and other legal harms at stake here, this Section considers how the trademark system might be adjusted in light of Amazon's influence on it. It also considers how Amazon's influence might be used to restore aspects of the trademark system. Indeed, the combination of the trademark system and Amazon's business model might be used to advance the goals of trademark and competition.

1. *Amazon's Indirect Capture of the Trademark System*

Amazon's considerable impact on the trademark system raises important rule-of-law questions. The practices of a single company have dramatically changed the functioning of the legal system, and those changes have not been the result of any public process with legislative or regulatory legitimacy.³⁸¹ Several scholars have explored the related, but analytically distinct, issue of

379. It is also likely significantly cheaper to incorporate the U.S. trademark system at the base of the Brand Registry rather than create a fully independent system. That is surely attractive to Amazon, a notoriously frugal company. *See generally* KRISTI COULTER, EXIT INTERVIEW: THE LIFE AND DEATH OF MY AMBITIOUS CAREER (2023) (emphasizing repeatedly, in a memoir by an ex-Amazon employee, the company's thrift).

380. In addition to the impact Amazon has on the trademark system because of its business model and Brand Registry, the company also has until recently had an arguably outsized role in further setting trademark policy by having one of its trademark lawyers occupy one of the nine seats on the PTO's Trademark Public Advisory Committee. *Trademark Public Advisory Committee Members Biographical Information*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/about-us/organizational-offices/public-advisory-committees/trademark-public-advisory-committee-0> [<https://perma.cc/BV5G-ESNM>]. In March 2025, Secretary of Commerce Howard Lutnick ended all current appointments to this advisory committee, thereby removing Amazon's lawyer from this committee, without yet appointing new members. *See* Gene Quinn & Steve Brachmann, *Commerce Secretary Disbands PPAC and TPAC*, IP WATCHDOG (Mar. 18, 2025) <https://ipwatchdog.com/2025/03/18/secretary-lutnick-disbands-ppac-tpac> [PERMA]. In this role, Amazon's lawyer might have provided helpful insight into its role in shaping the trademark system or other trademark issues it faces, including fraud and counterfeit goods. But it also further enlarged Amazon's outsized influence on the trademark system.

381. *See generally* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006) (analyzing the ways that federal government might implement a rule of law through the lens of party competition).

platforms' role as private sovereigns³⁸² that engage in rulemaking or adjudicatory acts.³⁸³ For example, Rory Van Loo has considered corporations' development of large-scale dispute resolution systems for customers.³⁸⁴ As Van Loo notes, on the one hand, these forms of dispute resolution have some of the features of court adjudication, such as access to redress, accountability, truth, and justice. But these systems lack other judicial features, such as transparency, procedural equality, and aggregation mechanisms.³⁸⁵ Van Loo has generally recommended both governmental oversight of these private systems and procedural rules similar to those used in courts, to promote due process and transparency.³⁸⁶ Similarly, Hannah Bloch-Wehba analyzes how platforms act as regulators and "are performing quintessentially administrative functions."³⁸⁷ She therefore proposes that "platform governance [be] accountable to the public."³⁸⁸

Even though we could tell a similar story about Amazon creating a private trademark dispute resolution system parallel to the government's,³⁸⁹ our focus is different and is on the extent to which Amazon's "system" influences parties' behavior within the legal system itself.³⁹⁰ This is not a story of Amazon overtly seeking to capture the trademark system. But it is perhaps a story of indirect capture, with Amazon taking over the PTO, even without realizing as much, by

382. Cf. Cohen, *supra* note 35, at 199 (characterizing how platforms' "role in the international legal order increasingly resembles that of sovereign states"); K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1632 (2018) (observing that "corporations [have] exercised quasi-sovereign authority and influence over . . . the economy and society as a whole, absent the kinds of checks and balances that accompany the exercise of public power in republican governance"); Rory Van Loo, *Federal Rules of Platform Procedure*, 88 U. CHI. L. REV. 829, 832 (2021) [hereinafter Van Loo, *Federal Rules*] ("[P]latforms such as Twitter, Facebook, Google, and Amazon exert quasi-sovereign influence over commerce, speech, elections, and myriad other spheres of activity.").

383. See also Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526 (2022); Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418 (2020); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1668 (2018).

384. Van Loo, *Federal Rules*, *supra* note 382, at 837–40; Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. REG. 547, 551 (2016) [hereinafter Van Loo, *Corporation as Courthouse*].

385. Van Loo, *Corporation as Courthouse*, *supra* note 384, at 571–84.

386. *Id.* at 584–94 (recommending more agency oversight, class action availability, and "visibility into businesses' internal operations" in the face of failures of corporate courthouses); Van Loo, *Federal Rules*, *supra* note 382 (proposing procedures to govern platform adjudication systems to advance public values, including due process and transparency).

387. Hannah Bloch-Wehba, *Global Platform Governance: Private Power in the Shadow of the State*, 72 SMU L. REV. 27, 29 (2019).

388. *Id.* at 28.

389. See *supra* text accompanying notes 5–9.

390. Others analyze the flipped issue of how to think of due process with regard to government use of technology, automation, or big data. See, e.g., Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1255 (2008) (exploring how "automation undermines several pivotal assumptions at the heart of twentieth-century administrative law"); Kate Crawford & Jason Schultz, *Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms*, 55 B.C. L. REV. 93, 93 (2014) (proposing a right to "procedural data due process" to address predictive privacy harms that can come from using data in an adjudicatory process).

shaping third parties' trademark registration behavior.³⁹¹ The worry here is that Amazon's model is materially affecting the trademark system as an indirect result of the company's pursuit of its own interests, which might diverge from the interests of the public, as reflected in trademark policy.³⁹² As Rachel Barkow points out in generally thinking through agency capture, "one person's political pressure is another person's democratic accountability. What policy makers who seek insulation want to avoid are particular pitfalls of politicization, such as pressures that prioritize narrow short-term interests at the expense of long-term public welfare."³⁹³ This concern suggests taking a hard look at the substantive ways in which the trademark system's operation has changed and exploring whether any of those changes are out of line with the way the trademark system ought to operate.³⁹⁴ We return to that constellation of issues shortly in discussing trademark-specific harms provoked by Amazon.

Moreover, the indirectness of this capture itself might be problematic because the effects materialized without the PTO or other actors in the trademark system being aware of the role of Amazon's policies or attempting to account for them. To the extent this hiddenness is worrisome, it can be addressed through sunlight provided by this and other scholarship and more self-reflection by the PTO on the changes it is experiencing, as well as an attempt to grapple with whether and how to respond to such changes.

Another general concern with capture is the instability it can foster when there are future political changes in elected offices like Congress or the presidency.³⁹⁵ Amazon's de facto capture here brings potential instability in a different sense: To the extent Amazon decides further to adjust its practices in ways that affect third-party seller behavior vis-à-vis the trademark system, the trademark system could repeatedly experience massive and relatively abrupt legal shifts in whichever direction Amazon's winds blow.³⁹⁶

391. On capture, see generally Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006) (taking the position that harmonization should underpin centralized review of agency actions rather than focus on cost reduction); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337 (2013) (exploring the role that the Office of Information and Regulatory Affairs plays in preventing capture of individual agencies); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975) (arguing that the interest representation model of administrative law is lacking).

392. Cf. Van Loo, *Federal Rules*, *supra* note 382, at 849 ("Unlike federal courts' procedural rules, however, platforms' rules are influenced by an economic analysis that prioritizes profit.").

393. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 19 (2010).

394. Cf. Van Loo, *Corporation as Courthouse*, *supra* note 384, at 594 ("[P]ublic intervention should rely on the economic incentives of firms as much as possible. This reliance would mean defaulting whenever possible to private ordering and its mainstays . . .").

395. Barkow, *supra* note 393, at 24–25.

396. Trademark law too has to grapple with gradual concerns, such as growing rates of trademark depletion and congestion, where it is hard to detect a crisis point. Beebe & Fromer, *supra* note 23, at 1021–24.

To be sure, market and social conditions often shift, create demands, or subvert existing regulatory premises, and government actors routinely adapt to those changes. When cars became mainstream, we suddenly needed a Department of Motor Vehicles and driver's licenses. New voter identification requirements increased the demand for driver's licenses. The advent of the internet opened the floodgates of businesses rushing to register domain names as trademarks.³⁹⁷ But Amazon's influence on the trademark system is different. For one thing, Amazon's effects are different in scale. For another, those effects are attributable to the policies of one company and its market dominance rather than being the result of more diffuse background conditions. The singularity of Amazon's influence creates challenges, given that Amazon can unilaterally provoke massive legal shifts. But it also creates opportunities because Amazon might be amenable to helpful changes; if it is not, it is a single locus for regulation.

Amazon's effect on the trademark system may be a species of a broader problem and dominant platforms might provoke similar shifts in other areas of the law, such as Uber with insurance and employment laws or Facebook with privacy law. In that way, these rule-of-law concerns are not Amazon- or trademark-specific. Yet Amazon's policies have also inflicted several trademark-specific harms. Trademark law assumes that businesses will use the trademark system in certain ways. Amazon has upended many of those assumptions, leaving the PTO and other legal actors ill-equipped to deal with the kinds of applications many businesses now file. For example, consider applications for descriptive or generic terms that businesses operating on Amazon might be tempted to seek.³⁹⁸ For well-considered reasons, the trademark system makes it harder, if not impossible, to obtain protection for rights in these terms because of the impact that protection can have on fair competition.³⁹⁹ It is much easier to register descriptive or generic terms if they are stylized or accompanied by an image.⁴⁰⁰ Indeed, the PTO might very well require an applicant to disclaim rights in the descriptive or generic term itself.⁴⁰¹

If a business were to succeed in registering a descriptive or generic term because of its stylization or accompanying image and then seek enforcement of its rights in court, a court would be sensitive to the aspects of the mark that are either not protectable or weak by virtue of them being descriptive or generic. For example, the Second Circuit found no likelihood of confusion between the PARENTS magazine and PARENT'S DIGEST magazine trademarks in part because the PARENTS registration "protect[ed] not the name or the word

397. *Cf. supra* Part IV.A.2.

398. *Supra* Part III.C.

399. *Supra* Parts I.A, III.C. *But cf.* Buccafusco, Masur & McKenna, *supra* note 21 (arguing for changes in these rules because they are not protective enough of competition); Fromer, *supra* note 21 (arguing for other changes in these rules for similar reasons).

400. *Supra* Part III.C.

401. *Supra* Part III.C.

‘parents,’ but rather the stylized logo of that name including the unusual form and shape of the letters comprising the word,” and thus did not prevent others’ use of the generic term “parent.”⁴⁰² Yet Amazon’s brand registry rules are not similarly sensitive because Amazon ignores stylization and accompanying images, focusing only on the text of a registered mark. Functionally speaking, Amazon will allow a descriptive or generic term to be the basis for protection and preferential treatment,⁴⁰³ which means that the as-applied trademark system has a different character on Amazon: Amazon lacks the ability to meter scope in the way that justifies registration of these terms in the first place.

More broadly, Amazon’s policies result in behavior that tends to undermine the trademark system’s core assumptions. In particular, that happens when third-party sellers pick descriptive, generic, or nonsense terms to use on Amazon. Use of those marks contravenes trademark law’s central premise that marks serve to identify the source of goods or services and as shorthand for their qualities and characteristics.⁴⁰⁴ The reasons are assorted yet related. By their nature, those kinds of marks are unlikely to be memorable to consumers, let alone associated with a particular source. But those features are less important on Amazon, where consumers can rely on product searches, product reviews, and the pull of Amazon as a brand to find and buy products.⁴⁰⁵ Some kind of mark is needed to be in the Brand Registry, but that mark does not need to carry all of the weight that trademarks traditionally have been expected to.

That kind of shift in the functions of trademarks opens an intriguing possibility. Modern trademark scholars have long lamented the extent to which trademarks enable artificial differentiation and the development of pure brand value, which is disconnected from real information about the nature or characteristics of a product or service.⁴⁰⁶ At the same time, while scholars differ

402. *Gruner + Jahr USA Pub. v. Meredith Corp.*, 991 F.2d 1072, 1078 (2d Cir. 1993); *accord Fed’n Internationale De Football Ass’n v. Nike, Inc.*, 285 F. Supp. 2d 64 (D.D.C. 2003) (finding no likelihood of confusion between FIFA’s “USA 2003” mark and Nike’s use of the phrase “USA 03” in connection with the 2003 Women’s World Cup because FIFA’s mark was a composite logo and Nike’s use involved a dissimilar visual presentation).

403. *Supra* Parts II.B, III.C.

404. *Supra* Part I.

405. For these reasons, the mark is not much different than a UPC code to uniquely identify the goods at hand. A related harm is that many of these businesses, particularly the ones registering nonsense marks, are primed to rebrand with a new (nonsense) mark if they get sufficiently negative product reviews on Amazon. Such rebranding would give them an opportunity to resurface on Amazon with the same product but with a clean slate. And it is not as if consumers remembered the mark anyhow. While such rebranding might also see to contravene trademark’s core values, trademark law does not stand in the way of businesses rebranding, as can happen when a business wants to escape scandal, as with ValuJet Airlines becoming AirTran Airways after a plane crash; an association with a negative term, such as ISIS mobile banking app becoming Softcard; or a dated symbol, as with American Telephone & Telegraph becoming primarily known as AT&T. See Roy Baharad & Gideon Parchomovsky, *Cainmarks* (2023) (unpublished manuscript) (on file with authors); Sonia K. Katyal, *Source Distortion*, 114 CALIF. L. REV. (forthcoming Apr. 2026).

406. Beebe, *supra* note 62, at 2069–72; Jeanne C. Fromer, *The Role of Creativity in Trademark Law*, 86 NOTRE DAME L. REV. 1885, 1916–20 (2011); Mark A. Lemley & Mark P. McKenna, *Owning*

over how best to limit trademark law's reach, most have accepted that some enablement of brand exploitation is an inevitable, if unfortunate, cost of a system that protects trademarks' core functions. If, however, trademarks are less important for conveying product-related information because algorithmic tools can provide that information equally or better, then we should not worry if Amazon's practices lead more companies away from source-indicating marks. Indeed, we might celebrate that result and hope it undermines trademark law's incentives.

But it is not clear to us that we are yet at a point where the alternatives to trademarks are better. Empirical evidence suggests that Amazon consumer reviews are inaccurate in important ways (because consumers tend to write reviews only if they are extremely positive or negative), that consumers do not process reviews in cognitively accurate ways, and that as many as one in every three reviews are fake.⁴⁰⁷ And of course the Amazon algorithm is not designed to neutrally provide the products consumers are really looking for. As we have noted, Amazon has routinely given preference to its own products in search results even when consumers search for other products by brand name. Furthermore, it gives participants in the Brand Registry access to various search optimization tools.⁴⁰⁸ For those reasons, one might reasonably conclude that trademark law's emphasis on source designation remains important, and that Amazon's policies are undermining the incentives that trademark law properly creates.

Another trademark-related harm is the clutter of the PTO's trademark register. The increasing number of applications, particularly for marks that do not function as trademarks, imposes costs on the PTO, other businesses, and consumers. Increased registrations lead to a so-called "trademark thicket."⁴⁰⁹ A thicket makes it harder for trademark examiners and businesses to search the

Mark(et)s, 109 MICH. L. REV. 137, 179 (2010); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1721–25 (1999); Mark P. McKenna, *Testing Modern Trademark Law's Theory of Harm*, 95 IOWA L. REV. 63, 67–68 (2009).

407. Gibson, *supra* note 273, at 24–29, 39–41. Amazon is making some effort to deal with fake reviews. For example, it created a team to address the issue and filing lawsuits against sellers or platform users that create and post those reviews. *Amazon's Latest Actions Against Fake Review Brokers: Lawsuits Against Fraudsters Target the Source of Fake Reviews*, AMAZON (May 1, 2024), <https://www.aboutamazon.com/news/policy-news-views/amazons-latest-actions-against-fake-review-brokers> [<https://perma.cc/5S4M-F39J>]. But even if Amazon could make a significant dent in the number of fake reviews, the other problems with relying on reviews would remain.

408. *Supra* Part III.

409. As one of us describes in a previous work, "[a] trademark thicket is analogous in some ways to the patent thicket, a crowded area of patent rights, in which rights to the many patents comprising the thicket must be secured for freedom of operation in the space, which can raise cost issues and anticompetitive concerns." Beebe & Fromer, *supra* note 23, at 1024 n.237 (citing Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1614–15, 1627, 1694–95 (2003); Rochelle Cooper Dreyfuss, *Giving the Federal Circuit a Run for Its Money: Challenging Patents in the PTAB*, 91 NOTRE DAME L. REV. 235, 235–39 (2015); Katherine J. Strandburg, Gábor Csárdi, Jan Tobochnik, Péter Érdi & László Zolányi, *Law and the Science of Networks: An Overview and an Application to the "Patent Explosion"*, 21 BERKELEY TECH. L.J. 1293, 1322, 1346–48 (2006)).

register to ascertain whether there are existing registrations that are potentially confusingly similar. This is a difficult cost to impose, particularly when many of these registrations are undermining trademark's core assumptions. The clutter also makes it harder for businesses that want to choose a new mark, particularly one that is used in a traditional trademark sense, to settle on one that is not confusingly similar to previously-registered marks.⁴¹⁰ Moreover, even when a business finds a mark that it can clear through this thicket, that mark might be less useful because it is more difficult for its user to develop source distinction, compared to other options that might have been available.⁴¹¹ Relatedly, a thicket can also harm consumers by making it harder for them to distinguish between marks in the crowd.⁴¹²

To be sure, this cluster of harms is less sharp and perhaps not significant for third-party sellers that are registering source-designating marks that they would have used but not registered in the absence of Amazon's policies.⁴¹³ On one side, notwithstanding their contribution to clutter, registration of these marks might be welcomed for making the register more comprehensive. This registration, in turn, makes it easier for third parties and the PTO to locate these marks and gives these businesses the benefits of registration.⁴¹⁴ On the flip side, registration of these marks might be seen as wasteful papering of rights and only very marginal improvement of notice, given the widespread availability of search engines.

But the increase in the number of applications itself causes a distinct trademark harm. Specifically, the delay imposed on everyone seeking registrations with the PTO is harmful even if the marks for which registration is sought would otherwise have been used.⁴¹⁵ The PTO's months-long backlog is harmful to businesses that want to use the trademark system for its core purposes because they must wait that much longer to get the benefits of registration and operate with some legal uncertainty. The volume of applications might also undermine the quality of trademark examinations because examiners are juggling more applications at a time and waiting longer periods before being able to return to an application they have already begun working on.

An additional harm to the trademark system is the fraud committed on the PTO by trademark extortion. The fraud harms legitimate businesses whose

410. Cf. Beebe & Fromer, *supra* note 23, at 1021 (“[A]s [trademark] depletion worsens, entrants face higher costs than incumbents had faced earlier when devising a mark that is both competitively effective and also not confusingly similar to an already-registered mark.”).

411. Cf. *id.* at 1026 (“Even when they do not confuse consumers as to source, parallel uses of the same mark diminish the mark’s distinctiveness of source. They do so in the sense that parallel uses blur the link between the mark and any one source.”).

412. Cf. *id.* (“Upon exposure to the mark, consumers who are aware that the same mark comes from multiple sources must at the very least think for a moment before linking the mark with one of those multiple sources.” (internal quotation marks omitted)).

413. *Supra* Part III.A.

414. *Supra* Part I.C.

415. *Supra* Part III.A.

marks have been commandeered, as these businesses are the true source designation of those marks. All the while, it consumes scarce PTO resources.

Finally, third-party sellers' increased use of descriptive and generic terms as marks might be problematic for competing sellers on Amazon whose products get ranked lower in search results by virtue of the descriptive or generic term being claimed on the Brand Registry. Those competing sellers using Brand Registry-protected marks in their Amazon listings might also be accused of infringement. Even if Amazon ultimately clears them of any violation, the costs of investigation and possible suspension can be significant. By contrast, trademark law has developed tools to make it harder to protect these terms in the first place.⁴¹⁶ And when the law does allow protection, it has developed defenses of fair use to enable competitors to use such terms descriptively and in other ways that do not put them at a competitive disadvantage.⁴¹⁷

Now that we have cataloged some of the harms that might manifest from Amazon's capture of the trademark system, we turn to what the PTO and Amazon might do to ameliorate them.

2. *PTO Adjustments*

With regard to the rule-of-law or capture concerns, the PTO ought to at least pay attention to the effect of Amazon's policies on trademark filings and consider whether it wants to change its approach to examining applications that are likely attributable to Amazon's influence. The PTO can also engage in discussions with Amazon and its Trademark Public Advisory Committee, as well as more publicly ask for feedback, about whether the new trends reflect the assumptions and approaches of the current trademark system, the PTO should adapt, or whether the PTO should encourage Amazon to make its own changes to ameliorate these trends. Proactivity and self-reflection will be critical, especially because small initial shifts in filing trends can quickly become massive given the number of third-party sellers on Amazon.

One of the biggest and most immediate problems the PTO faces is its backlog of applications and the accompanying delays in registration. The PTO has expressed sensitivity to this backlog. It recently announced plans to hire eighty-six more trademark examiners before the end of 2023 and up to sixty more in 2024, as well as considering incentives to encourage speedier examination.⁴¹⁸ The PTO was correspondingly targeting an average total application pendency of eight and a half months and an initial office action within five months, targets that would likely take two to three years to achieve.⁴¹⁹ However, these plans have more recently been derailed by President Donald Trump's hiring freeze across

416. *Supra* Part I.A.

417. *Supra* Part I.A.

418. Lince, *supra* note 202.

419. *Id.*

the executive branch.⁴²⁰ Even if the hiring freeze is eventually lifted, the PTO ought to be cautious in trading off speed for careful examination, especially because Amazon's policies have seemed to encourage fraudulent applications. PTO Trademark Commissioner David Gooder concedes as much, stating that in a world with fraudulent and different sorts of applications, trademark examiners will need to proceed slower and with more caution.⁴²¹

Dealing with this volume undoubtedly adds cost, and those costs must be paid somehow. The PTO should consider whether to adjust fees to better align the increased costs with their source. That will not be entirely straightforward. New applications will not, on their face, announce themselves to be Amazon-related, even if the trends can be identified in broad categories.⁴²² But, for example, the PTO might consider different fees for descriptive terms and for any mark that is registrable only because of a disclaimer of words.

The PTO has also already begun to address the issues it faces with fraudulent filings, including from trademark extortionists capitalizing on Amazon's system and other fraudulent filings (many of which originate from China for other reasons).⁴²³ In particular, the PTO has announced that it will seek to identify scams and other untoward filings and shuttle them to its newly-created Register Protection Unit.⁴²⁴ Moreover, the PTO is working cooperatively with Amazon to identify fraudulent filings.⁴²⁵

Beyond fraud wrought by trademark extortionists, the PTO ought to confront the other substantive issues raised by the shifts in filing for different types of marks. In particular, it ought to consider whether and how to apply different, more appropriate rules for determining the protectability of nonsense marks. It should first grapple with what qualifies as a nonsense mark. It should then assess whether to continue to classify such marks as fanciful and thus inherently distinctive.⁴²⁶ While these terms are indeed coined, they are quite distinct from "conventional" fanciful marks like KODAK, EXXON, and PEPSI. Those words have no existing meaning, but they are pronounceable in English and more memorable than nonsense marks because they can be assimilated as words.⁴²⁷ Indeed, nonsense marks do not sit easily within any of the *Abercrombie*

420. Bill (William) Honaker, *President Trump's Hiring Freeze and Return-to-Office Policy Could Spell Trouble for Product Innovators and Trademark Owners*, LINKEDIN (Jan. 31, 2025), <https://www.linkedin.com/pulse/president-trumps-hiring-freeze-return-to-office-policy-honaker-hxllc> [<https://perma.cc/6V7A-SD8B>].

421. Lince, *supra* note 202.

422. The most obvious category of new applications is for marks that previously would have been used but not registered—marks that are most likely owned by small- and medium-sized businesses. But there is no clear way to identify a mark that previously would not have been registered, and it is not clear that a fee structure targeting these applications would be politically feasible or even desirable.

423. Beebe & Fromer, *supra* note 219; *supra* Part III.B.

424. Lince, *supra* note 202.

425. *Supra* Part III.B.

426. *Supra* Part I.A.

427. *Supra* Part III.D.

distinctiveness categories. They are like generic terms or descriptive terms without secondary meaning, in that they do not identify source. But they are unlike generic or descriptive terms in that they do not have any alternate meaning. Nonsense marks should also frequently be rejected on failure-to-function grounds.⁴²⁸ Even if registration is allowed, the PTO should give more consideration to what makes a nonsense mark confusingly similar to another mark. Given that nonsense marks can only be compared in terms of sight and not sound or meaning, perhaps all nonsense marks are confusingly similar to one another as a mere jumble of letters.

The PTO should also reconsider the practice of registering generic or descriptive terms because of their stylization or accompanying images. As we noted, the justification for those registrations is that the scope can be limited to reflect the source-indicating value of the stylization or images.⁴²⁹ But when those marks can effectively be enforced without the scope limitations, there is additional reason to be concerned about their registration even if the generic or descriptive terms are disclaimed.⁴³⁰

3. *Amazon Adjustments*

The PTO cannot fully address Amazon's impact on the trademark system alone. Ideally, Amazon would play a role too.⁴³¹ Indeed, it might want to play such a role. Much of Amazon's effect on the trademark system is a byproduct of Amazon's legitimate interest in the concerns of its branded third-party sellers and the company's interest in avoiding government regulation.⁴³² In fact, Amazon has been piggybacking on the U.S. trademark system as a way to signal to regulators that it is taking the government's concerns with fraudulent goods in its marketplace seriously.⁴³³ Instead of building its own fully functioning trademark system, Amazon is using the U.S. trademark system and its validation of trademarks by registration as the core of its Brand Registry. In this regard, Amazon should not be shocked that its sanctification of the U.S. trademark system has reverberated back into the U.S. trademark system itself. Amazon has a responsibility to support the U.S. trademark system in return for its piggybacking on it.

428. *Supra* Parts I.B, III.D.

429. *Supra* text accompanying notes 399–404.

430. Even with such restrictions, we worry about registration of such terms because the bar to establishing secondary meaning is set so low—making it too easy to register descriptive terms as such—and because of the harm that protection and registration of such terms can inflict on fair competition. Buccafusco, Masur & McKenna, *supra* note 21 (recommending raising the bar for establishing secondary meaning of terms); Fromer, *supra* note 21 (proposing that a term not be protectable when the conceptual relatedness of its primary meaning to the goods or services it is used for is too high).

431. The changes we suggest could be adopted by Amazon voluntarily, or they might be imposed on Amazon as government regulation. We take no position at this juncture on whether that regulation is necessary, given the many systemic changes suggested herein that might be made first and evaluated.

432. *Supra* Part II.B.

433. *Supra* Part B.

Beyond moral obligation, Amazon might be motivated by self-interest to cooperate more robustly with the PTO to smooth out the trademark system. In recent years, a number of Amazon's practices have been criticized as anticompetitive, most recently in an FTC lawsuit and congressional investigations.⁴³⁴ If only for the public-relations benefits, Amazon might emphasize how it wants to help third-party sellers compete fairly on its platform. To that end, it could ramp up its cooperation with the PTO to improve its Brand Registry rules in ways that promote the operation of the trademark system.

Most fittingly, Amazon could help rein in the ways in which it is enabling the unfettered protection of descriptive and generic terms. For example, it could change its rules to allow for participation in the Brand Registry only when the corresponding mark is registered in plain text, without stylization or accompanying images.⁴³⁵ In this way, third-party sellers would not be able to acquire rights to descriptive or generic terms in Amazon's Brand Registry without clearing them through the PTO. In most cases, given trademark's distinctiveness rules, they would not be able to get a PTO registration unless they have a descriptive term that has developed secondary meaning.⁴³⁶ In this vein, Amazon also should clarify its rules on descriptive fair use⁴³⁷ to ensure that, even when a third-party seller secures a PTO registration for a descriptive term, Amazon would not prioritize the third-party seller in its search results for that descriptive term. Moreover, in this instance, Amazon should allow other third-party sellers to use that term descriptively in its listings without fear of repercussion on the platform. By making these changes, Amazon might very well tamp down third-party sellers' incentive to seek registrations of descriptive and generic terms.

Amazon should also reconsider its policy of allowing businesses to participate in the Brand Registry with only a pending application for registration, as opposed to an issued registration. Amazon likely adopted this policy because of the long pendency of applications, a problem it is largely responsible for having created. But that policy exacerbates the "thicket" at the PTO. Additionally, it further encourages fraudulent applications and enables parties to enforce marks that they are unlikely to be able to register, enticing more businesses to file baseless applications.

More generally, Amazon should be more transparent about the ways in which it advantages Brand Registry participants and its rules of qualification, many aspects of which are not clear to the public. Transparency would better

434. *Supra* text accompanying notes 2–4.

435. Amazon might apply this rule to all marks seeking registration in its Brand Registry or only to those that are descriptive or generic. We thank Rebecca Tushnet for this suggestion.

436. *Supra* Part I.A. That is, the PTO is applying its rules in this regard properly and the distortion to the trademark system happens only because of Amazon's Brand Registry rules. Therefore, the focus should be on adjusting Amazon's rules.

437. *Supra* Part I.A.

enable the PTO and watchdogs to respond, when appropriate, to the effects of these rules on third-party sellers.⁴³⁸

With regard to the delays in the PTO provoked by the Brand Registry's requirement that a seller obtain a PTO registration, and now merely have a pending application, perhaps Amazon ought to bear some of the cost of the delays it has caused in the PTO.⁴³⁹ Such a tax could take many forms. For example, a tax could correspond to the number of applications filed in a year that are then registered in the Brand Registry. Alternatively, the PTO could consider changes to the fee structure that would specifically target the kinds of applications most likely attributable to Amazon policies.

As the driver of these changes, Amazon bears some responsibility for helping adjust the trademark system to its impact. However, doing so may require Amazon to take more of an enforcement role on its platform and to change its own successful business practices. Regardless, effectively responding to these changes and upholding the trademark system will require interaction and even collaboration between Amazon and the PTO.

D. The Future of Trademarks and Competition

The previous Parts focus on how Amazon's policies, and especially the Brand Registry, warp existing trademark law, and they offer suggestions about how to change either PTO rules or Amazon policies to better approximate the pre-Amazon balance in the trademark system. With this in mind, it is worth considering broader concerns about Amazon's impact on branding practice, and the implications for the role of trademark law in the future.

As we noted, Amazon's model is largely responsible for the rise of nonsense marks and has motivated sellers to claim descriptive and generic terms as marks.⁴⁴⁰ Because consumers search for products on Amazon using either product categories, descriptive and generic terms, or consumer reviews, and because search results use that kind of information as much or more than brand information, Amazon sellers have diminished incentive to select a memorable brand name. Sellers need some mark that they can register in the PTO; nonsense, descriptive, or generic terms will often do. At the same time, Amazon's own branding practices, particularly its increasing emphasis on AMAZON-centered brands like AMAZON BASICS and AMAZON ESSENTIALS, and its preferencing of its own products in search results, have diminished the importance of third-party brands in favor of the Amazon brand.

438. Cf. Kate Crawford & Jason Schultz, *AI Systems as State Actors*, 119 COLUM. L. REV. 1941 (2019) (arguing that third-party vendors of algorithms used by governments be held accountable in court); Vincent M. Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Legal System*, 80 MD. L. REV. 487 (2021) (proposing rules to oversee algorithmic tools used in the criminal legal system).

439. These delays are costly both to the PTO, which must hire new examiners and institute new systems to improve its capacity and abilities, and to the businesses waiting for registrations.

440. *Supra* Parts III.C–D.

On the one hand, these features have positive value for many smaller third-party sellers, whose brands typically cannot compete against large, better-known brands. Indeed, there is an important way in which Amazon's practices de-center brands altogether. Whereas search-costs theory has maintained that the value of a trademark is in its ability to decrease search costs by enabling consumers to use marks as a shorthand for product information,⁴⁴¹ Amazon's model makes that product information more directly available and the basis for algorithmic search.⁴⁴² The result is a more democratic marketplace, less dominated by big brands. For the many critics of expansive trademark protection and its contribution to an overly brand-focused economy,⁴⁴³ that should sound like a win.⁴⁴⁴ On the other hand, Amazon de-centers third-party brands in large part to center its own brand. In that respect, the effects are hardly democratic, as they further entrench the power of a dominant platform.

In terms of the net effects on competition, then, Amazon's practices are a mixed bag: Amazon to some extent enhances the visibility of third-party businesses, but it does so in a structure that primarily benefits Amazon and may ultimately promote Amazon's brand over all others.⁴⁴⁵ In some ways, this is a long-term response to the rise of brands and their ascendancy vis-à-vis retailers, in which powerful brands wrested value away from retailers by reaching over the shoulders of the retailers and creating direct relationships with consumers who specifically demand those brands.⁴⁴⁶ Amazon reverses those trends, reasserting the dominance of the platform over third-party brands. In that respect, one's views of Amazon's competitive effects are like a Rorschach test about Amazon: The combined effect of Amazon's policies is likely to be a more powerful Amazon, however one perceives the platform.

441. See, e.g., Landes & Posner, *supra* note 47, at 269–70; Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 786–87 (2004).

442. Cf. Christine Haight Farley, *Trademarks in an Algorithmic World*, 98 WASH. L. REV. 1123 (2023) (arguing that the growing surveillance capitalism that is intertwined with developments in artificial intelligence may well render trademark's informational function obsolete); Lisa Larrimore Ouellette, *Does Running Out of (Some) Trademarks Matter?*, 131 HARV. L. REV. F. 116, 123 (2018) ("If consumers have trouble keeping track of the exploding number of craft beers, they can keep track of favorites with the Untappd app—including by scanning barcodes rather than searching by name. Consumers can scan barcodes or take pictures of other products to see reviews and prices with shopping tools such as the Amazon app."). Cf. generally ITAMAR SIMONSON & EMANUEL ROSEN, ABSOLUTE VALUE: WHAT REALLY INFLUENCES CUSTOMERS IN THE AGE OF (NEARLY) PERFECT INFORMATION (2014) (arguing that branding is losing its value now that consumers can turn to expert opinions, customer reviews, and price comparison apps).

443. See sources cited *supra* note 407.

444. To be sure, Amazon has outsourced to the PTO the kinds of decisions that need judgment, even while creating conditions that pervert those judgments. It possibly does so to ensure its own system is algorithmically administrable.

445. Cf. Van Loo & Aggarwal, *supra* note 281 (arguing for an integration of antitrust and consumer protection).

446. See, e.g., CROSS, *supra* note 314; SUSAN STRASSER, SATISFACTION GUARANTEED: THE MAKING OF THE AMERICAN MASS MARKET (1989).

Perhaps more radically, we might see some of the de-centering of brands as evidence that Amazon is merely emblematic of a decreasing significance of the brand. In this sense, signs may be transforming into what Barton Beebe and one of us characterize in a different context as “indistinguishable ambient noise.”⁴⁴⁷ That would be welcome news for those persuaded by Naomi Klein’s *No Logo*, which puts some of the blame for the costs of globalization on brands.⁴⁴⁸

If the emergence of nonsense marks—not to mention the increased incentive to register descriptive and generic terms—indicates a broader de-centering of brands, then Amazon’s practices go to the very core of trademark law’s justification. Trademarks have long been understood to have an important informational function: They are the shorthand for information about the qualities or characteristics of goods.⁴⁴⁹ Critics have frequently observed that brands also, and maybe even primarily, create artificial product differentiation, allowing brand owners to extract value from consumers based on brand values that have little to do with underlying product quality.⁴⁵⁰ To the extent those two functions are in conflict, we seem to accept the enablement of pure brand building as a necessary byproduct of protecting trademark law’s central informational function. In Beebe’s language, we have allowed mark owners to increase their ability to persuade so that they can assume consumers’ search costs.⁴⁵¹

That balance may well need rethinking. If Amazon’s algorithm and consumer reviews are as good or better at conveying information about products, then the informational function of brands is less important. In that respect, branding critics might celebrate the emergence of nonsense marks because they have the effect of de-centering brands, thereby reducing brands’ ability to create artificial differentiation. In that sense, nonsense marks might seem like a partial antidote to trademark law’s decades-long promotion of brand value, with ever-expanding protections across a range of trademark doctrines.⁴⁵²

Although largely the same formal legal rules apply to all marks, in practice the modern trademark system functions as two different systems: one for luxury brands like CHANEL, and one for the workaday brands. Many of trademark

447. Beebe & Fromer, *supra* note 186, at 990.

448. See NAOMI KLEIN, *NO LOGO: TAKING AIM AT THE BRAND BULLIES* (1999).

449. *Supra* Part I.

450. See, e.g., Stefan Bechtold & Christopher Jon Sprigman, *Intellectual Property and the Manufacture of Aura*, 36 HARV. J.L. & TECH. 291 (2023); Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809 (2010); Litman, *supra* note 406. See generally Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165 (1948) (describing the debate about whether trademark law promotes such artificial differentiation).

451. Beebe, *supra* note 62, at 2068 (“The story of American trademark law is a story in which producers have been encouraged to bring ever more information to the marketplace, inside of which is persuasion, and consumers have been allowed to bring ever less, inside of which might have been persuasion sophistication.”).

452. See sources cited *supra* note 407

law's expansions over recent decades have deepened that difference and worked primarily to benefit the famous brands.⁴⁵³ Amazon's practices seem likely to shift the balance even more radically in favor of certain well-known brands, and especially Amazon's own brands. It is notable here that the truly rarified luxury brands are largely unaffected by the changes we have described. Those brands have never really trafficked in the informational function of brands, at least not in the sense of information about the tangible characteristics of those products, which is the kind of information that might be replaced by algorithms and consumer reviews. Instead, they have primarily benefited from their aura.⁴⁵⁴ Perhaps unsurprisingly, those brands do not sell on Amazon. They sell through their own stores and a highly curated group of retailers.⁴⁵⁵

In the longer term, it remains to be seen whether any countermoves are available to brands that might shift the balance back in their direction. Perhaps one countermove is more use of direct-to-consumer approaches via other platforms, especially social media.⁴⁵⁶ Such moves might ultimately affect a shift from product-based competition to platform-based competition, and the competitive effects of a platform-based model will depend on its overall value.⁴⁵⁷

CONCLUSION

Amazon's market dominance has frequently drawn the attention of scholars and regulators. But one aspect of its dominance has mostly escaped their attention: the impact of Amazon's policies, and especially its Brand Registry, on the U.S. trademark system. Because sellers need to be on Amazon, and because being a part of the Brand Registry provides them with enforcement benefits and preferential treatment in search results, those sellers have substantially increased incentives to apply to register their marks. But, because an application to register is the ticket to inclusion in the Brand Registry, many small businesses that previously would have relied on unregistered rights now feel compelled to register. The result has been an explosion in the number of applications and a growing backlog at the PTO, leading to longer pendency for all applications. Amazon's policies have also affected the content of those applications. Sellers on Amazon have stronger motivation to claim descriptive and generic terms, especially in stylized format or with accompanying images, and to game the

453. See sources cited *supra* note 407.

454. Bechtold & Sprigman, *supra* note 450; Beebe, *supra* note 450.

455. Renata Geraldo, *In Luxury Market, Being Amazon Is Still a Burden*, WALL ST. J. (Oct. 31, 2020), <https://www.wsj.com/articles/in-luxury-market-being-amazon-is-still-a-burden-11604136601> [<https://perma.cc/CXE5-CWQN>].

456. Michael Southworth, *Amazon vs. D2C: The Pros and Cons for E-Commerce Brands*, FORBES (Oct. 7, 2020), <https://www.forbes.com/sites/forbesbusinesscouncil/2020/10/07/amazon-vs-d2c-the-pros-and-cons-for-e-commerce-brands> [<https://perma.cc/J4UV-2A4J>]; Thales S. Teixeira, *Case Study: Should a Direct-to-Consumer Company Start Selling on Amazon?*, HARV. BUS. REV. MAG. (Mar.–Apr. 2019), <https://hbr.org/2019/03/case-study-should-a-direct-to-consumer-company-start-selling-on-amazon> [<https://perma.cc/K4K7-YEUR>].

457. We thank Chris Sprigman for this observation.

scope limitations those terms would ordinarily have. Amazon has increased—and really, created—incentives to claim nonsense marks. And businesses have more opportunities to extort legitimate Amazon sellers with fraudulent applications.

These effects may not have been intended by Amazon, but as our data show, they have had a profound impact on trademark registration practice. Some of the effects are problematic from a trademark perspective, and there are broader rule-of-law concerns about the fact that a single company's policies can so dramatically change the legal landscape.

Though Amazon's market dominance has been unprecedented, the net effect of its policies on competition is potentially more mixed. On one hand, the collective effect of Amazon's policies, combined with Amazon's own concentration of its branding practices for its own goods, has been to de-emphasize third-party brands on the platform. In some ways, this democratizing effect enables smaller parties to better compete with established brands. On the other hand, Amazon's practices de-emphasize third-party brands to the benefit of Amazon, whose algorithm chooses how to present the goods sold on its platform—regardless of brand strength, for example—and allows Amazon to prioritize its house-branded goods over those offered by third-party sellers. In that respect, the diminished significance of third-party brands is likely to further entrench Amazon and enhance its dominance.

Amazon does not seem to be slowing down anytime soon. As the platform keeps pushing its Brand Registry, sellers will continue to find reasons to participate in the program to protect their marks and remain competitive. While the full consequences of these practices are yet to be seen, as this Article shows, Amazon affects much more than the sellers on its platform: It is starting to reshape the normative and structural underpinnings of the U.S. trademark system. In the end, whether and how we respond to these profound effects on the trademark system depends on the extent to which we consider Amazon's overhaul troublesome for the goals that drive our trademark system.