
MARK TALK ♦

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The trier of fact, like a lexicographer of modern slang, must attempt to find out what meaning the public now attaches to a designation that already has a primary meaning in the language.

— J. Thomas McCarthy¹

INTRODUCTION

In late 2015, breakout beauty brand Glossier launched “Boy Brow,” a grooming pomade designed to shape and add volume to eyebrows and create a more androgynous, less fussy brow.² Glossier successfully applied to register BOY BROW as a trademark for “eyebrow cosmetics” in 2016, and the application sailed through without objection.³ Today, though, an examining attorney might pause to consider whether the mark is merely descriptive—whether it directly describes the product’s

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¹ 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 15:30, Westlaw (5th ed., database updated Dec. 2020).

² Tina Ferraro, *The Boy Brow Is the New Man Bun*, TEEN VOGUE (Nov. 3, 2015), <https://www.teen-vogue.com/story/glossier-boy-brow-launch> [<https://perma.cc/7Q55-W24W>].

³ BOY BROW, Registration No. 5,170,111.

purpose or desired effect (enabling users to give themselves a “boy brow”). If so, the next question for the applicant and the examining attorney would be secondary meaning: has the phrase come to serve as an indicator of source? Given Glossier sold four million tubes of Boy Brow in five years⁴ and invested significantly in advertising, the traditional secondary meaning markers are very likely met. But secondary meaning is explicitly a measure of *consumer* perception—what matters is whether consumers understand something to be a trademark, not whether the mark owner wants it to be one. In ascertaining whether secondary meaning exists, then, factfinders ought to be less interested in how the brand owner uses the term and more interested in how the public does.

A quick search for “boy brow” on Reddit, a popular website with a number of fora devoted to beauty and makeup,⁵ returns ninety-eight threads that reference “boy brow” in the title, ninety-four of which appear to reference the Glossier product.⁶ Clues that the uses reference the brand include users capitalizing both terms, pairing the phrase with the brand name (“glossier boy brow”), and posting the thread on the Glossier subreddit. The four posts that use the phrase in a descriptive, non-branded way include one post describing a male dog’s eyebrows, two posts about drag makeup,⁷ and just one that uses the phrase “boy brow” to refer to a general look rather than a product.⁸ A search for the hashtag #boybrow or “boy brow” on social networking platforms Instagram, TikTok, Twitter, Pinterest, Tumblr, and Twitch returns results of which all or the vast majority use the phrase in reference to the branded product.⁹ And search engine Google—which Lisa Larrimore Ouellette has persuasively argued may hold a key to determinations like secondary meaning because its

⁴ Erica Smith, *Glossier Finally Made a Boy Brow for Redheads*, N.Y. MAG: THE CUT (Sept. 14, 2020), <https://www.thecut.com/2020/09/glossier-boy-brow-auburn.html> [<https://perma.cc/BV2V-5M9K>].

⁵ See u/justpointeyourtoes, *A Master List of the Makeup Related Subreddits! Please Add to It if I've Left Anything Out!*, REDDIT (Apr. 19, 2015), https://www.reddit.com/r/MakeupAddiction/comments/333xed/a_master_list_of_the_makeup_related_subreddits/ [<https://perma.cc/QJ64-U32T>] (listing sixty-one different subreddits (fora within Reddit) devoted to makeup, not including those devoted to specific brands, like Glossier).

⁶ See Search Results for “boy brow,” REDDIT, <https://www.reddit.com/search/?q=%22boy%20brow%22> [<https://perma.cc/48VS-TAPW>] (last visited Mar. 5, 2021).

⁷ u/MacAttack2015, *Tips for Keeping the Boy Brows Hidden*, REDDIT (Aug. 19, 2020), https://www.reddit.com/r/Drag/comments/iczqp0/tips_for_keeping_the_boy_brows_hidden/ [<https://perma.cc/3X4M-AEKG>]; u/Miguelitojpg, *I Used My Boy Brows and Love the Turn Out*, REDDIT (Jan. 9, 2021), https://www.reddit.com/r/Drag/comments/ku74bu/i_used_my_boy_brows_and_i_love_the_turn_out/ [<https://perma.cc/YV22-Q2VH>].

⁸ u/isbettermuchbetter, *Boy Brows Are Out, Skunk Brow Is In*, REDDIT (Sept. 18, 2020), https://www.reddit.com/r/Youniqueamua/comments/iv5n8v/boy_brows_are_out_skunk_brow_is_in/ [<https://perma.cc/P38C-AEJQ>].

⁹ The fact that uses of “boy brow” or #boybrow reference the branded product is indicated, on these platforms, by the user tagging #glossier or @glossier, referencing “Glossier” elsewhere in the text, capitalizing both terms, or including the product itself or other Glossier trade dress in the image posted.

algorithm is trained to give consumers the results they're seeking¹⁰—also returns primarily Glossier-related results for a “boy brow” search.

In the case of “boy brow,” then, the “mark talk”—what I call consumers using marks in online speech—presents clear-cut evidence of secondary meaning. And unlike traditional secondary meaning factors like ad spend and length of producer use, mark talk directly reflects how consumers understand and use the phrase.

Until approximately the 1920s, descriptive terms and phrases were not eligible for trademark protection.¹¹ By 1938, though, the Supreme Court recognized that even descriptive terms were capable of serving as trademarks and thus merited protection if their owners could show they had acquired distinctiveness in the minds of consumers.¹² The Lanham Act formalized that recognition¹³ in 1946, providing that even for those categories of marks deemed merely descriptive, “nothing . . . shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce.”¹⁴ When descriptive marks become distinctive for goods or services based on use and exposure, courts refer to that new, source-indicating denotation as “secondary meaning.”¹⁵

A lot has changed since 1946, particularly in the ways that trademarks accrue meaning. But the approaches that courts and the U.S. Patent

¹⁰ Lisa Larrimore Ouellette, *The Google Shortcut to Trademark Law*, 102 CALIF. L. REV. 351 (2014).

¹¹ 2 MCCARTHY, *supra* note 1, § 11:25. *But see, e.g.*, *Am. Waltham Watch Co. v. U.S. Watch Co.*, 53 N.E. 141, 142 (Mass. 1899) (“[T]he word ‘Waltham,’ which originally was used by the plaintiff in a merely geographical sense, now, by long use in connection with the plaintiff's watches, has come to have a secondary meaning as a designation of the watches which the public has become accustomed to associate with the name.”).

¹² *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315 (1938).

¹³ *But see* U.S. Pat. & Trademark Off. v. *Booking.com B.V.*, 140 S. Ct. 2298, 2311 (2020) (“It is true that the Lanham Act altered the common law in certain important respects. Most significantly, it extended trademark protection to descriptive marks that have acquired secondary meaning.”).

¹⁴ Lanham Act § 2(f), 15 U.S.C. § 1052(f) (2018). Except, of course, for bars on specific categories of marks, including those that are generic or functional, those that create a false association with a living individual, and those that create a likelihood of confusion with another registered mark. *Id.* § 2(a)–(e), 15 U.S.C. § 1052(a)–(e).

¹⁵ Another term for the same concept is “acquired distinctiveness,” and the two phrases are frequently treated as synonymous. *See, e.g.*, *Booking.com*, 140 S. Ct. at 2303 (“[T]o be placed on the principal register, descriptive terms must achieve significance ‘in the minds of the public’ as identifying the applicant's goods or services—a quality called ‘acquired distinctiveness’ or ‘secondary meaning.’”) (quoting *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 211 (2000)). But marks that are inherently distinctive may gain additional distinctiveness through use, sometimes also referred to as “acquired distinctiveness” (or “commercial strength,” in the language of many jurisdictions' multi-factor tests for likelihood of confusion). “Secondary meaning,” however, is not used for inherently distinctive marks, so this Article favors “secondary meaning” to describe the acquisition and achievement of distinctiveness by the kind of marks that would be unprotectable and unprotected without it.

and Trademark Office (USPTO) take to assess the existence of secondary meaning¹⁶ have scarcely evolved at all.¹⁷

The judge-made doctrine of secondary meaning is premised on the existence of a simpler world—one in which producers create advertisements for general audiences on broad-reaching platforms and offer products for sale while consumers passively view those ads and either purchase the products or don't. While published opinions paid lip service to the importance of consumer perception in assessing trademark validity and incursion upon others' rights, producers had little ability to actually ascertain consumers' views. They could only offer up their own actions, aspirations, and investments. For decades, courts have used advertising expenditures, length of use, and other company actions as proxies to evaluate secondary meaning because, other than by survey or affidavit, they could not measure consumer perception directly.

But the Internet has upset the old model by destabilizing the binary roles of producers investing in trademarks and consumers passively receiving information about them.¹⁸ Now, consumers might learn about trademarked goods not only from producers but also from peers, paid influencers, or strangers posting on social media. And consumers don't just

¹⁶ The USPTO accepts the following three categories of evidence to establish secondary meaning under section 2(f) of the Lanham Act:

(1) *Prior Registrations*: A claim of ownership of one or more active prior registrations on the Principal Register of the *relevant portion of the mark* for goods or services that are sufficiently similar to those identified in the pending application;

(2) *Five Years' Use*: A verified statement that the *relevant portion of the mark* has become distinctive of the applicant's goods or services by reason of the applicant's substantially exclusive and continuous use of the mark in commerce for the five years before the date on which the claim of distinctiveness is made; or

(3) *Other Evidence*: Other appropriate evidence of acquired distinctiveness

TMEP § 1212.02(f)(i)(1)–(3) (July 2021) (citations omitted) (this Article focuses primarily on the third subsection “other evidence” and the evidence considered by federal courts); 15 U.S.C. § 1052(f); 4 LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 20:16, Westlaw (4th ed., database updated Dec. 2020).

¹⁷ The secondary meaning factors that courts apply today differ little from those considered in the earliest days of recognition of descriptive terms as protectable trademarks, even before the passage of the Lanham Act. *See, e.g.*, *Trappey v. McIlhenny Co.*, 281 F. 23, 24 (5th Cir. 1922) (considering length and exclusivity of use and extent of advertising efforts in finding geographically descriptive term TABASCO distinctive for hot sauce); *Lincoln Motor Co. v. Lincoln Auto. Co.*, 44 F.2d 812, 817 (N.D. Ill. 1930) (finding LINCOLN had acquired secondary meaning for cars) (“[I]t has come to be understood that a secondary meaning may be established in a name or word as designating the product of a particular manufacturer and a good will built up under the name by length of use, fair dealing, the intrinsic merit of the product, and expenditures of large sums for advertising to familiarize the public therewith”); *Locatelli, Inc. v. Tomaiuolo*, 129 F. Supp. 630, 634 (D.N.J. 1955) (“The evidence relevant to the question of secondary meaning is: (a) the period of time the name has been used, (b) the nature and extent of advertising expenditures, (c) sales volume.”); *Goodyear Tire & Rubber Co. v. H. Rosenthal Co.*, 246 F. Supp. 724, 727–29 (D. Minn. 1965) (finding secondary meaning based on advertising expenditures, size of company, length and scale of use, and affidavits from purchasers and prospective retailers).

¹⁸ *See generally* Dustin Marlan, *Is the Word “Consumer” Biasing Trademark Law?*, 8 TEX. A&M L. REV. 367 (2021) (exploring unintended effects of situating members of the public as constant “consumers” in the language of Lanham Act cases).

internalize those messages and vote with their wallets; they talk to and about brands by posting reviews, sharing experiences, making expressive uses,¹⁹ complaining publicly, or avowing fandom through follows and likes. Producers and factfinders have unfettered access to consumer speech that both talks about and incorporates marks—speech that reflects whether, how, and what trademarks mean to the speakers. In fact, consumers play an increasingly important role in making trademarks “mean” in the first place, through dialogue with firms and one another.²⁰

Why does it matter?

Trademark law has been slow to respond to that paradigm shift. While courts and scholars have grappled with difficult questions around infringement and liability in the digital age—and some trademark doctrines have evolved significantly since the Lanham Act was passed in 1946—little attention has been paid to how online use can reveal whether a mark has acquired distinctiveness.²¹ This Article proposes adopting more direct proof of consumer perception given the ready availability of a tremendous body of online consumer speech using and discussing trademarks. If factfinders truly want to measure consumers’ perceptions rather than producers’ aspirations, they must not be constrained by outdated approaches.²² Instead, they can and should look to that online consumer

¹⁹ See generally Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397 (1990); Jessica M. Kiser, *Brandright*, 70 ARK. L. REV. 489 (2017); Steven Wilf, *Who Authors Trademarks?*, 17 CARDOZO ARTS & ENT. L.J. 1 (1999).

²⁰ As Jessica Kiser has written, “The modern concept of branding includes substantial creative content produced by the trademark owner and its marketing professionals, but also content created by consumers in response to the company’s creative content.” Kiser, *supra* note 19, at 496. “A consumer contributing to brand development actually furthers the unique recognition of that brand as the source of the underlying good or service.” *Id.* at 502. See also Wilf, *supra* note 19, at 10 (arguing “the public forms an interpretive community whose reading of trademark symbolism casts it in the role of creating authorial-like meanings about the mark itself.”). Further, “individuals invest marks with meaning far beyond what is assigned by marketers” *Id.* at 15.

²¹ Notable exceptions include Ouellette, *supra* note 10; Ronald Coleman, *Fashion Dos: Acknowledging Social Media Evidence as Relevant to Proving Secondary Meaning*, 106 TRADEMARK REP. 776, 780 (2016), cited in *YETI Coolers, LLC v. RTIC Coolers, LLC*, No. 1:15-cv-00597, 2017 U.S. Dist. LEXIS 11957, at *10 n.3 (W.D. Tex. Jan. 27, 2017) (“[C]ommentators have noted that social media can be one of the best indicators of secondary meaning [and that] that analysis of social media is no more inherently unreliable than other methods that summarize consumers’ impressions.” (citation omitted)); Brief of Prof. Peter N. Golder, Ph.D. and Other Marketing Academics as Amici Curiae in Support of Respondent, *U.S. Pat. & Trademark Off. v. Booking.com BV*, 140 S. Ct. 2298 (2020) (No. 19-46) [hereinafter Golder Brief].

²² Technically, producers are not constrained; the USPTO and some courts explicitly acknowledge that in addition to the applicable secondary meaning factors, any other evidence tending to show a mark has become distinctive will be considered. See, e.g., *Schlafly v. Saint Louis Brewery, LLC*, 909 F.3d 420, 424 (Fed. Cir. 2018) (citing *Yamaha Int’l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 1583 (Fed. Cir. 1988)); *Shammas v. Rea*, 978 F. Supp. 2d 599, 611–12 (E.D. Va. 2013) (citing *Perini Corp. v. Perini Const., Inc.*, 915 F.2d 121 (4th Cir. 1990) but noting that the *Perini* factors for determining secondary meaning are “non-exhaustive”).

speech and new forms of analysis²³ for more direct evidence of consumer perception, which will in turn lead to more accurate outcomes.

I. SECONDARY MEANING

So how do trademarks “mean,” and who makes that meaning?

Descriptive words and phrases are not protected as trademarks immediately upon use. Instead, to meet the Lanham Act’s requirement that marks must be distinctive to be protectable, federal trademark law requires evidence that those descriptive terms have acquired secondary meaning—a trademark meaning second to their primary meaning, the descriptive one.²⁴ Surnames,²⁵ geographic descriptors,²⁶ misdescriptive phrases,²⁷ and laudatory terms²⁸ are also subject to the secondary meaning requirement, as are colors,²⁹ product design,³⁰ and many other categories of nonverbal marks. While the Lanham Act doesn’t define secondary meaning (or even use the phrase at all),³¹ it states that a mark that isn’t inherently distinctive will be protectable and protected once it “has

²³ See, e.g., Suneal Bedi, *The Myth of the Chilling Effect*, HARV. J.L. & TECH. (forthcoming 2022) (using text analysis to measure the chilling effect of social media speech restrictions on restaurant reviews).

²⁴ Some courts go further, calling secondary meaning a misnomer because when it truly exists, the trademark meaning becomes primary. *Kellogg Co. v. Nat’l Biscuit Co.*, 305 U.S. 111, 118 (1938) (“[T]o establish a trade name in the term ‘shredded wheat’ the plaintiff must show more than a subordinate meaning which applies to it. It must show that the primary significance of the term in the minds of the consuming public is not the product but the producer.”); *In re Steelbuilding.com*, 415 F.3d 1293 1297 (Fed. Cir. 2005); *Walt-W. Enters., Inc. v. Gannett Co.*, 695 F.2d 1050, 1060 (7th Cir. 1982); *In re Serial Podcast, LLC*, 126 U.S.P.Q.2d (BL) 1061 (T.T.A.B. 2018); TMEP § 1212 (July 2021) (quoting *Ralston Purina Co. v. Thomas J. Lipton, Inc.*, 341 F. Supp. 129, 133 (S.D.N.Y. 1972) (“To establish secondary meaning, it must be shown that the primary significance of the term in the minds of the consuming public is not the product but the producer.”)); see also John T. Cross, *Language and the Law: The Special Role of Trademarks, Trade Names, and Other Trade Emblems*, 76 NEB. L. REV. 95, 119 (1997) (“The acquisition of ‘secondary’ meaning is really a change in the primary definition of the word, at least when that word is used in the context of a particular good or service.”).

²⁵ 15 U.S.C. § 1052(e)(4) (2018); TMEP § 1211; *In re Benthin Mgmt. GmbH*, 37 U.S.P.Q.2d (BL) 1332, 1333–34 (T.T.A.B. 1995).

²⁶ 15 U.S.C. § 1052(e)(2); TMEP § 1210.

²⁷ 15 U.S.C. § 1052(e)(1); Misdescriptive phrases must not be deceptive; deceptive marks are barred from registration regardless of whether the owner can establish secondary meaning. TMEP § 1209.04.

²⁸ TMEP § 1209.03(k); *Duopross Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247 (Fed. Cir. 2012); *In re Positec Grp. Ltd.*, 108 U.S.P.Q.2d (BL) 1161, 1172 (T.T.A.B. 2013); *In re Dos Padres Inc.*, 49 U.S.P.Q.2d (BL) 1860 (T.T.A.B. 1998).

²⁹ *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159 (1995); but see *In re Forney Indus., Inc.*, 955 F.3d 940 (Fed. Cir. 2020).

³⁰ *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205 (2000). Other categories of trade dress that are capable of inherent distinctiveness may not possess it and thus will also require secondary meaning for protection. For example, product packaging that is not inherently distinctive requires secondary meaning before it qualifies for trademark protection, even though some product packaging may be inherently distinctive.

³¹ Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1891 n.224 (2007) (“‘Secondary meaning’ is a term from the common law; the Lanham Act refers to marks that have acquired source significance as ‘ha[ving] become distinctive.’” (alteration in original)).

become distinctive of the applicant's goods in commerce."³² Even before the Lanham Act abolished the distinction between technical and descriptive marks, the Supreme Court acknowledged that the existence of "secondary signification" can transform a descriptive term into a source indicator, which in turn makes possible deceptive use by others.³³ Distinctiveness is necessary for federal registration and is a threshold requirement for establishing the valid trademark rights necessary to enjoin infringing uses.

Trademark law is said to have two main goals—consumer protection and producer reward.³⁴ While some scholarship treats as primary the goals of informing consumers, protecting them against deception, and enabling them to make efficient decisions, the goal of motivating producer investment in trademarks is by most accounts equally important. As Mark McKenna has argued, it was this second goal that gave rise to modern trademark law.³⁵ Different trademark doctrines serve these two goals to different extents—antidilution doctrine, for example, is almost entirely motivated by producer reward and related goals like preserving brand purity.³⁶ The prohibition on registration of deceptive marks, on the other

³² 15 U.S.C. § 1052(f).

³³ *Elgin Nat'l Watch Co. v. Ill. Watch Case Co.*, 179 U.S. 665, 673–74 (1901) ("It is undoubtedly true that where such a secondary signification has been acquired, its use in that sense will be protected by restraining the use of the word by others in such a way as to amount to a fraud on the public, and on those to whose employment of it the special meaning has become attached."), *abrogated by* *Hurn v. Oursler*, 289 U.S. 238 (1933); *see also* *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315 (1938) ("Here we have a secondary meaning to the descriptive term, 'Nu-Enamel.' This establishes, entirely apart from any trade-mark act, the common law right of the Nu-Enamel Corporation to be free from the competitive use of these words as a trade-mark or trade name.").

³⁴ GRAEME B. DINWOODIE & MARK D. JANIS, *TRADEMARKS AND UNFAIR COMPETITION: LAW AND POLICY* 16 (5th ed. 2018) (citing S. REP. NO. 79-1333, at 3 (1946)); 1 MCCARTHY, *supra* note 1, § 2:2; *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 854 n.14 (1982); *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 782 n.15 (1992) (Stevens, J., concurring). A third oft-cited goal, improving efficiency, can be said to serve both consumers and producers, as well as competition and capitalism more broadly. William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265 (1987); Stephen L. Carter, *The Trouble with Trademark*, 99 YALE L.J. 759, 762 (1990) ("The principal benefit of trademark protection is that it lowers consumer search costs."); Stacey L. Dogan & Mark A. Lemley, *A Search-Costs Theory of Limiting Doctrines in Trademark Law*, 97 TRADEMARK REP. 1223, 1223 (2007) ("Under Landes and Posner's 'search costs' theory, trademarks have value because they reduce consumer search costs and thus promote overall efficiency in the economy. Over the past two decades, the search costs theory of trademark law has attracted a substantial following among both commentators and courts.") (citing *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163–64 (1995); *Brennan's, Inc. v. Brennan's Rest., L.L.C.*, 360 F.3d 125, 132 (2d Cir. 2004); *Ty Inc. v. Perryman*, 306 F.3d 509, 510 (7th Cir. 2002); *New Kids on the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302, 305 & n.2 (9th Cir. 1992)).

³⁵ McKenna, *supra* note 31, at 1848–49 ("[C]lose study of traditional trademark principles suggests that critics delude themselves when they seek to limit trademark law by tying protection to consumer expectations.").

³⁶ Sara Stadler Nelson, *The Wages of Ubiquity in Trademark Law*, 88 IOWA L. REV. 731, 775 (2003) ("Since the effective date of the Federal Trademark Dilution Act, the dilution remedy in section 43(c) has been used most often to reward wealthy trademark owners for achieving

hand, is primarily concerned with consumer safety³⁷ (though it also aids producers by curbing unfair competition in the form of deceptive speech).³⁸ Giving producers statutory causes of action against uses that infringe registered or unregistered marks serves both camps. In applying likelihood of confusion factors to a junior user's use, a court rewards the senior user for investing in a mark by prohibiting a junior user from free-riding on that goodwill, while simultaneously protecting consumers who might be misled by the infringing mark.

Perhaps it's unsurprising, then, that most secondary meaning indicators foreground a mark owner's continued investment in a mark; those factors simply reflect the goal of producer reward. If a producer values a mark highly enough to invest substantial time and money in it, advertise it, register it, and police others' uses of marks similar to it, then that mark is likely to stick around for a while. Granting it federal protection rewards the investment the producer has made up to that point³⁹ and provides incentive for continued investment.⁴⁰ And as courts and scholars reiterate, actual consumer perception is impossible to intuit without survey evidence, which is (or has frequently been portrayed as) expensive, unreliable, and malleable in the hands of experts.⁴¹ Survey evidence of

trademark fame."); Ira S. Nathenson, *Internet Infoglut and Invisible Ink: Spamdexing Search Engines with Meta Tags*, 12 HARV. J.L. & TECH. 43, 121 (1998) ("[D]ilution rewards trademark holders for their efforts in establishing a famous mark . . ."); Leigh A. Hansmann, Comment, *Sex, Selling Power, and Salacious Commentary: Applying the Copyright Fair Use Doctrine in the Trademark Context*, 2008 MICH. ST. L. REV. 843, 870 (2008) ("[D]ilution law seeks to protect the perceived value in a mark's purity . . ."); Stacey L. Dogan, *An Exclusive Right to Evoke*, 44 B.C. L. REV. 291, 312 (2003) ("[A] standard of dilution based solely on a mark conjuring another reflects a view that a famous mark has a singular association in people's minds and is entitled to protection against any background noise that might interfere with the purity of that association.").

³⁷ David A. Simon, *Trademark Law & Consumer Safety*, 72 FLA. L. REV. 673, 715–17 (2020).

³⁸ Emily L. DeStefano, Note, *A "Real Interest": Limiting Standing to Challenge Allegedly "Scandalous" Trademarks*, 39 AIPLA Q.J. 103, 110 (2011) ("Congress's rationale behind barring the registration of certain marks—namely, confusing and deceptive marks—is consistent with its stated objective to protect consumers in the marketplace: '[b]y insuring correct information in the marketplace, the [trademark] laws reduce losses caused by misunderstanding and deceit and thus permit consumers and merchants to maximize their own welfare confident that the information presented is truthful.'") (quoting *Falcon Rice Mill, Inc. v. Cmty. Rice Mill, Inc.*, 725 F.2d 336, 348 (5th Cir. 1984)).

³⁹ Marc C. Levy, *From Genericism to Trademark Significance: Deconstructing the De Facto Secondary Meaning Doctrine*, 95 TRADEMARK REP. 1197, 1214 (2005) ("Trademark law rewards the marketing efforts of [owners] . . . by granting [them] . . . registration[s] By allowing for the registration of descriptive (but not generic) marks upon proof of secondary meaning, trademark law sanctions and approves of the marketing investments of companies, which seek to change how we use language.").

⁴⁰ Enrico Bonadio, *Brands, Morality and Public Policy: Some Reflections on the Ban on Registration of Controversial Trademarks*, 19 MARQ. INTELL. PROP. L. REV. 39, 52 (2015) ("There is indeed no doubt that a trademark registration constitutes an incentive to make investments in a certain sign.").

⁴¹ Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099, 2131 (2004) ("Consumer surveys are the best evidence of secondary meaning, but surveys are difficult to design properly and expensive to conduct. . . . Judges also find it difficult to evaluate survey methodology,

secondary meaning is rarely put forward,⁴² and courts vary substantially in how they interpret it.⁴³ So the doctrine has evolved to reward what's easiest to measure.

But producers' actions can never tell the whole story, and pretending they do is disingenuous. Descriptive terms and phrases are not immediately protectable for two reasons. First, we expect that consumers will initially understand them as providing information about the goods and services rather than indicating source.⁴⁴ Trademark law presumes that consumers will regard fanciful marks like KODAK for cameras or arbitrary marks like PENGUIN for books as trademarks from those marks' first use because KODAK is a made-up word that possesses no other meaning aside from its trademark meaning. PENGUIN has a primary dictionary meaning but no logical descriptive meaning when applied to books. But consider WEIGHT WATCHERS for weight loss services, or TASTY for snack foods, or NO MORE TANGLES for hair detangler spray. When we first encounter them, they appear informational, describing some aspect of the goods' or services' purpose, taste, or effect, respectively. Only after consumers repeatedly encounter the marks used or advertised in connection with specific goods or services will they come to understand them as source indicators—or so the story goes.

The second reason that descriptive marks are not automatically granted protection is a policy reason. If it were too easy to obtain exclusive rights for descriptive terms, producers would monopolize them at the expense of new entrants, impeding competition and consumer access to information.⁴⁵ Even in the face of empirical evidence suggesting that

especially when confronted with competing expert testimony, and this increases the likelihood of error.”) (citations omitted); Jake Linford, *Democratizing Access to Survey Evidence of Distinctiveness*, in RESEARCH HANDBOOK ON TRADEMARK LAW REFORM 225, 225–26 (Graeme B. Dinwoodie & Mark D. Janis eds., 2021) (“[T]he costs of conducting a trademark survey have historically been high enough to discourage many mark owners from offering survey evidence of consumer perception. Well-heeled litigants can fund surveys, but those with a smaller war chest cannot.”).

⁴² Survey evidence is only mentioned in about 15–20% of trademark infringement decisions, and most of those surveys are likely designed to measure actual confusion rather than secondary meaning. See Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581, 1622, 1641 (2006); Robert C. Bird & Joel H. Steckel, *The Role of Consumer Surveys in Trademark Infringement: Empirical Evidence from the Federal Courts*, 14 U. PA. J. BUS. L. 1013, 1035 (2012).

⁴³ See Dominic A. Azzopardi, *Disarray Among the Circuits: When Are Consumer Surveys Persuasive?*, 104 IOWA L. REV. 829, 841 (2019) (finding that while most courts agree that surveys showing secondary meaning among less than 25% of respondents are insufficient and surveys showing secondary meaning among over 60% of respondents are sufficient, results in the 25–60% range tend to be interpreted differently in different jurisdictions).

⁴⁴ Alexandra J. Roberts, *How to Do Things with Word Marks: A Speech-Act Theory of Distinctiveness*, 65 ALA. L. REV. 1035, 1052 (2014); Lisa P. Ramsey, *Descriptive Trademarks and the First Amendment*, 70 TENN. L. REV. 1095, 1149 (2003).

⁴⁵ Roberts, *supra* note 44, at 1052–53 (citing *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 214–15 (1985) (Stevens, J., dissenting), *In re Abcor Dev. Corp.*, 588 F.2d 811, 813 (C.C.P.A. 1978), *Am. Heritage Life Ins. Co. v. Heritage Life Ins. Co.*, 494 F.2d 3, 11 (5th Cir. 1974)).

manner of use matters as much as distinctiveness and that displaying a descriptive term in a trademark-like way can lead consumers to perceive matter as a mark from their very first exposure to it,⁴⁶ trademark law declines to award rights in descriptive terms until secondary meaning is established. It makes sense that exclusive rights in language that will be desirable and useful to competitors should only be granted upon an impressive showing that consumer perception has shifted, and that, therefore, if competitors make use of identical or very similar matter, their use may deceive consumers. And of course, the Lanham Act explicitly requires distinctiveness, either inherent or acquired.

Most circuits consider a number of factors⁴⁷ in assessing whether a descriptive mark, or any mark that is not inherently distinctive, has acquired sufficient secondary meaning to deem it protectable.⁴⁸ In theory, secondary meaning assessments gauge consumer perception—have consumers come to view the mark as a source indicator rather than merely a descriptor of the goods or services? In practice, most secondary meaning indicators provide only circumstantial evidence. But as J. Thomas McCarthy has acknowledged in his treatise, “direct evidence ‘is not a requirement and secondary meaning can be, and most often is, proven by circumstantial evidence.’”⁴⁹

⁴⁶ Thomas R. Lee, Eric D. DeRosia & Glenn L. Christensen, *An Empirical and Consumer Psychology Analysis of Trademark Distinctiveness*, 41 ARIZ. ST. L.J. 1033, 1059 (2009); Alexandra J. Roberts, *Trademark Failure to Function*, 104 IOWA L. REV. 1977, 2020 (2019).

⁴⁷ Of course, “[n]o single factor is determinative and every one need not be proven.” *Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc.*, 270 F.3d 298, 312 (6th Cir. 2001).

⁴⁸ Circuits consider anywhere from a few to close to a dozen factors. *See, e.g.*, *Sally Beauty Co. v. Beautyco, Inc.*, 304 F.3d 964, 978 (10th Cir. 2002) (“(1) [A] history of successful sales; (2) evidence of intentional copying . . . ; and (3) long use of the . . . trade dress.”); *FN Herstal SA v. Clyde Armory Inc.*, 838 F.3d 1071, 1083–84 (11th Cir. 2016) (“(1) [T]he length and manner of its use; (2) the nature and extent of advertising and promotion; (3) the efforts made by the plaintiff to promote a conscious connection in the public’s mind between the name and the plaintiff’s product or business; and (4) the extent to which the public actually identifies the name with the plaintiff’s product or venture”); *Parks LLC v. Tyson Foods, Inc.*, 863 F.3d 220, 231 (3d Cir. 2017) (“(1) [T]he extent of sales and advertising leading to buyer association; (2) length of use; (3) exclusivity of use; (4) the fact of copying; (5) customer surveys; (6) customer testimony; (7) the use of the mark in trade journals; (8) the size of the company; (9) the number of sales; (10) the number of customers; and, (11) actual confusion.”); *Test Masters Educ. Servs., Inc. v. Robin Singh Educ. Servs., Inc.*, 799 F.3d 437, 445 (5th Cir. 2015) (“(1) [L]ength and manner of use of the mark or trade dress, (2) volume of sales, (3) amount and manner of advertising, (4) nature of use of the mark or trade dress in newspapers and magazines, (5) consumer-survey evidence, (6) direct consumer testimony, and (7) the defendant’s intent in copying the [mark].”) (second alteration in original); *Converse, Inc. v. Int’l Trade Comm’n Skechers U.S.A., Inc.*, 909 F.3d 1110, 1120 (Fed. Cir. 2018) (“(1) [A]ssociation of the trade dress with a particular source by actual purchasers (typically measured by customer surveys); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage of the product embodying the mark.”).

⁴⁹ *Booking.com B.V. v. Matal*, 278 F. Supp. 3d 891, 922 (E.D. Va. 2017) (citing 2 MCCARTHY, *supra* note 1, § 15:30) (noting that defendant’s argument that plaintiff has not demonstrated actual market recognition “appears to challenge the very nature of the secondary meaning test, which acknowledges that five of the six factors—advertising expenditures, sales success, media coverage,

Courts vary in what factors they consider indicative of secondary meaning,⁵⁰ but the most common secondary meaning factors are indeed circumstantial. They include amount and manner of producer advertising; advertising expenditure; exclusivity, length, and manner of use of the mark; sales success, amount of sales, and number of customers; established place in the market; proof of deliberate copying or attempts to plagiarize;⁵¹ and the proprietor's use of the term and efforts to promote a conscious connection, in the public's mind, between the name or mark and a particular product or venture.⁵² When trade dress is at issue, litigants often also tout (and factfinders often also inquire about) "look-for" advertising that explicitly highlights the specific feature for which protection is sought or "image" advertising that features the trade dress.⁵³ Most jurisdictions openly acknowledge those factors to provide only indirect evidence.⁵⁴ Per the Seventh Circuit,

The facts that [a mark owner used a mark for a number of years] and spent large sums of money in advertisements containing the term are simply not germane unless it can show that the way in which it employed the term dispelled the tendency of listeners to regard the term as [descriptive] and instead [led them to] regard the primary significance of the term as designating a single . . . source⁵⁵

The majority of circuits keep consumer perception at the fore and make clear that evidence related to producer investment serves only as proxy—the more producers invest in a mark, the more likely consumers are to come to view the term or phrase *as* a mark. But many judicial opinions lean heavily on circumstantial evidence, treating it as definitive proof of

attempts to plagiarize, and exclusivity of use—are all circumstantial evidence.”), *vacated*, *Booking.com B.V. v. U.S. Pat. & Trademark Off.*, 141 S. Ct. 187 (2020).

⁵⁰ See Ingrida Karins Berzins, *The Emerging Circuit Split over Secondary Meaning in Trade Dress Law*, 152 U. PA. L. REV. 1661, 1663 (2004) (describing “the growing rift among the circuits in the application of factors that are used to evaluate secondary meaning” and concluding upon surveying recent case law that “secondary meaning litigation reveals that circuits vary both in the types of factors considered and in the depth of evidentiary support required”).

⁵¹ There are “(1) cases and jurisdictions that “state that secondary meaning is irrebuttably presumed from the act of copying; (2) cases that state that copying is presumed, albeit rebuttably, from the act of copying; and (3) cases that state that copying is merely one factor in the evidentiary determination of secondary meaning.” Timothy R.M. Bryant, Comment, *Trademark Infringement: The Irrelevance of Evidence of Copying to Secondary Meaning*, 83 NW. U. L. REV. 473, 479 (1989) (arguing evidence of copying is irrelevant to establishing whether a mark possesses secondary meaning).

⁵² See Jake Linford, *Trademark Owner as Adverse Possessor: Productive Use and Property Acquisition*, 63 CASE W. RES. L. REV. 703 (2013) (arguing courts might use the prior proxies to determine this last factor).

⁵³ See, e.g., *Vital Pharms., Inc. v. Monster Energy Co.*, 472 F. Supp. 3d 1237, 1258 (S.D. Fla. 2020) (“[I]mage advertising’ . . . supports an inference of secondary meaning While an advertisement that explicitly directs consumers to a product’s trade dress may *help* to foster secondary meaning, it is not *necessary* to do so.”).

⁵⁴ See sources cited *infra* note 62.

⁵⁵ *Walt-W. Enters., Inc. v. Gannett Co.*, 695 F.2d 1050, 1060 (7th Cir. 1982).

secondary meaning rather than just an indicator of how consumers likely perceive a term. And some circuits articulate a multi-factor test of which consumer perception itself is only one of many factors.⁵⁶

The problem with reading producer investment to answer the secondary meaning question should be obvious. A trademark is a collection of consumer perceptions.⁵⁷ Each mark is a product of its interpretive communities,⁵⁸ and those communities are composed of consumers. Without consumer participation, there can be no secondary meaning.⁵⁹ Critical cultural legal studies scholar Rosemary Coombe notes how “law may freeze the play of signification by legitimating authorship, deeming meaning to be value properly redounding to those who ‘own’ the signature or proper name, without regard to the contributions or interests of those others in whose lives it figures.”⁶⁰ Members of the public are expected to engage in the play and work that imbues trademarks with meaning but are seldom credited for that effort.

An “audience-focused theory,” as Laura Heymann has advocated in the context of reputation, better acknowledges a trademark’s social nature. Because secondary meaning is a form of reputation, or what trademark law calls “goodwill,” Heymann’s words apply equally well to it: secondary meaning “is fundamentally a social concept; it does not exist until a community collectively forms a judgment about an individual or firm that has the potential to guide the community’s future interactions.”⁶¹ And while factfinders are asked to reach binary conclusions as to the existence of secondary meaning, goodwill itself is vague and

⁵⁶ See, e.g., UNITED STATES COURTS FOR THE NINTH CIRCUIT, NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS 315 (Sept. 2006), <https://www.rid.uscourts.gov/sites/rid/files/documents/juryinstructions/otherPJI/9th%20Circuit%20Model%20Civil%20Jury%20Instructions.pdf> [<https://perma.cc/Z3X9-X6LM>] (defining secondary meaning in terms of consumer perception but articulating a multi-factor test, of which consumer perception and actual confusion are two of nine factors and the balance of factors focus on producer investment and exclusive use). See also *Blumenthal Distrib., Inc. v. Herman Miller, Inc.*, No. 5:14-cv-01926, 2017 WL 3271706, at *25 (C.D. Cal. Aug. 1, 2017).

⁵⁷ See generally Kevin Lane Keller, *Conceptualizing, Measuring, and Managing Consumer-Based Brand Equity*, J. MKTG., Jan. 1993, at 1; DAVID A. AAKER, *MANAGING BRAND EQUITY* (2009) (1991).

⁵⁸ For more on the concept of “interpretive community” outside of the context of trademark law, see Cheryl L. Keyes, *Empowering Self, Making Choices, Creating Spaces: Black Female Identity via Rap Music Performance*, 113 J. AM. FOLKLORE 255 (2000).

⁵⁹ Chi-Ru Jou, *The Perils of a Mental Association Standard of Liability: The Case Against the Subliminal Confusion Cause of Action*, VA. J.L. & TECH., Winter 2006, at 1, 33 (“The public’s reception is part of the ‘authorship’ process since its acceptance of the new, brand-identifying function for a common word is required before a trademark is created.”); Roberts, *supra* note 44, at 1044 (“The performative function of trademarks is . . . contingent upon audience perception. The mark owner’s intent to use its mark as a source indicator does not suffice to render that use source-constative; only the consumer’s perception of the mark as fulfilling a trademark function makes the use source-constative.” (citation omitted)).

⁶⁰ Rosemary J. Coombe, *Critical Cultural Legal Studies*, 10 YALE J.L. & HUMAN. 463, 472 (1998).

⁶¹ Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1341 (2011).

diffuse—it includes not only the factual but also the emotional and affective.⁶² Brands increasingly call on consumers to help build commercial strength, sometimes actively inviting participation and other times intentionally stepping back to foster brand communities' independent development.⁶³ Nonetheless, trademark law has resisted full acknowledgement and incorporation of the crucial role of consumer speech.⁶⁴

And when it comes to gauging consumer perception directly, whether or not they acknowledge the importance of the endeavor, courts have mostly thrown up their hands. Many consider testimonials and surveys the only permissible forms of direct evidence.⁶⁵ They regard their jurisdiction's factors as indicators of consumer perception, even though what they really measure is producers' attempts to affect consumer perception, not the success of those attempts.⁶⁶ Conversely, in some cases courts disregard those indicators but offer nothing else with which to replace them.⁶⁷ They treat consumer perception as a black box, its contents unknowable to anyone but the individual consumers themselves,⁶⁸ and cling to the factors that courts have recited in their jurisdiction for almost a century.

These indirect indicators of secondary meaning have dominated case law even though they reflect only the producer's attempts to alter consumer perception,⁶⁹ and despite a paucity of evidence establishing that if a producer intends to teach consumers to view their mark as a mark, the producer's desire will come true. Finding secondary meaning based

⁶² Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 555 (2006).

⁶³ Kiser, *supra* note 19, at 523.

⁶⁴ *Id.* at 496 (“Consumers are invited to participate in the development of, and discourse about, a brand, but trademark law is not designed to protect or allow for such discourse and co-development.”).

⁶⁵ 2 MCCARTHY, *supra* note 1, § 15:30 (“Direct evidence of secondary meaning . . . may consist of either the testimony of random buyers in court or ‘quasi-direct evidence’ by means of consumer surveys, professionally conducted.”); *Yankee Candle Co. v. Bridgewater Candle Co., LLC*, 259 F.3d 25, 43 (1st Cir. 2001) (“The only direct evidence probative of secondary meaning is consumer surveys and testimony by individual consumers.”); *Gimix, Inc. v. JS & A Grp., Inc.*, 699 F.2d 901, 907 (7th Cir. 1983) (“Consumer testimony and consumer surveys are the only direct evidence on this question [of secondary meaning.]”); *Aromatique, Inc. v. Gold Seal, Inc.*, 28 F.3d 863, 871 (8th Cir. 1994) (“Consumer surveys and testimony of consumers . . . may be the only direct evidence of secondary meaning”); *Duraco Prods., Inc. v. Joy Plastic Enters., Ltd.*, 40 F.3d 1431, 1452 (3d Cir. 1994) (“Consumer surveys and testimony are probably the only direct evidence of secondary meaning; the other sources are circumstantial, though the plaintiff may rely solely on them.”).

⁶⁶ *See, e.g.*, *Ouellette*, *supra* note 10, at 353 (“Courts frequently lack the evidence to evaluate acquired distinctiveness properly: surveys are expensive and unreliable, and circumstantial evidence such as sales data and advertising spending are weak proxies for consumer perception.”).

⁶⁷ *Id.* at 362 (“[T]hese [secondary meaning] factors are weak proxies for consumer perceptions, and courts often discount this evidence by concluding that it does not indicate the necessary association in consumers’ minds between the mark and the product or service.”).

⁶⁸ *See, e.g.*, *I.P. Lund Trading ApS v. Kohler Co.*, 163 F.3d 27, 42 (1st Cir. 1998) (stating that courts must “look[] into the minds of potential customers”).

⁶⁹ Direct evidence includes direct consumer testimony and consumer surveys.

solely on how much money a producer spends advertising the goods or services it sells under the mark or how long it has offered goods for sale bearing the mark doesn't necessarily reveal anything about how consumers perceive that mark when they encounter it in the marketplace.⁷⁰ As Jake Linford observes, "The U.S. trademark system gives lip service to the importance of consumer perception but fails to accurately account for it."⁷¹

Do any of the traditional circumstantial factors offer insight? Unsolicited media coverage is frequently cited as proof of secondary meaning. While it, too, is a proxy for consumer perception,⁷² it comes closer to providing direct evidence than most of the other factors, and it comes from a more objective source.⁷³ It simultaneously reflects the perception of a subset of the public—journalists—and reinforces among readers that the mark is a mark, helping the mark acquire distinctiveness. Parody has also been cited as evidence of secondary meaning.⁷⁴ Several courts have grouped unsolicited media coverage (traditionally a reference to newspapers, magazines, books, television reporting, and other products of formal journalism)⁷⁵ and social media coverage together as evidence of secondary meaning⁷⁶ or treated social media coverage as analogous to traditional

⁷⁰ Suneal Bedi & Michael Schuster, *Towards an Objective Measure of Trademark Fame*, 54 U.C. DAVIS L. REV. 431, 483–85 (2020).

⁷¹ Linford, *supra* note 41, at 227.

⁷² Some courts have excluded evidence of unsolicited media coverage that was not directed toward a general audience. *See, e.g., In re Gibson Guitar Corp.*, 61 U.S.P.Q.2d (BL) 1948, 1952–53 (T.T.A.B. 2001); *Sports Traveler, Inc., v. Advance Mag. Publishers, Inc.*, 25 F. Supp. 2d 154, 164–65 (S.D.N.Y. 1988).

⁷³ *But see* 1 WILLIAM E. LEVIN, TRADE DRESS PROTECTION § 13:15, Westlaw (2d ed., database updated June 2018) ("[I]t is probably true that much of this coverage, while not paid advertising, results from public relations efforts of the trade dress owner.").

⁷⁴ *See, e.g., In re Serial Podcast, LLC*, 126 U.S.P.Q.2d (BL) 1061, at *15 (T.T.A.B. 2018) (use of composite logos on *Saturday Night Live* and *Sesame Street* "highly probative of acquired distinctiveness") (quoting *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 261 (4th Cir. 2007) ("It is a matter of common sense that the strength of a famous mark allows consumers immediately to perceive the target of the parody, while simultaneously allowing them to recognize the changes to the mark that make the parody funny or biting."); *Combe Inc. v. Dr. August Wolff GMBH & Co. KG Arzneimittel*, 382 F. Supp. 3d 429, 437, 450 (E.D. Va. 2019) (reference to mark on *Saturday Night Live* included among evidence of secondary meaning), *aff'd*, 851 F. App'x 357 (4th Cir. 2021); David S. Welkowitz, *Trademark Parody After Hustler Magazine v. Falwell, COMM'NS & L.*, Dec. 1989, at 65, 72 ("Hence, a parody, to be effective, virtually requires that it parody a well-known trademark.").

⁷⁵ *Simon & Schuster, Inc. v. Dove Audio, Inc.*, 970 F. Supp. 279, 294 (S.D.N.Y. 1997) (newspapers; magazines); *Tri-Star Pictures, Inc. v. Unger*, 14 F. Supp. 2d 339, 350 (S.D.N.Y. 1998) (newspapers; magazines); *Rolls-Royce Motors, Ltd. v. A & A Fiberglass, Inc.* 428 F. Supp. 689, 698 (N.D. Ga. 1977) (newspapers; magazines; books); *Le Sportsac, Inc. v. Dockside Rsch., Inc.* 478 F. Supp. 602, 608 (S.D.N.Y. 1979) (magazines; newspapers; television).

⁷⁶ *See, e.g., Car-Freshner Corp. v. Am. Covers, LLC*, 980 F.3d 314, 329 (2d Cir. 2020) ("The record contains considerable evidence of widespread recognition of the 'Black Ice' mark (in its paper hanging tree form) in unsolicited news and social media coverage and in popular culture."); *George Sink, P.A. Inj. Lawyers v. George Sink II L. Firm, LLC*, 407 F. Supp. 3d 539, 555 (D.S.C. 2019) ("There is also plenty of evidence of unsolicited media coverage of Sink P.A., including

media coverage.⁷⁷ Meanwhile, the Second Circuit in a recent case considering likes and comments on social media pages questioned whether such metrics qualify as “unsolicited,” given that the pages “invite people to ‘follow them.’”⁷⁸ Many courts that consider this factor require that media coverage be unsolicited likely to distinguish it from paid advertising, so it’s unclear why “invited” but unpaid coverage would fail to qualify.

Likewise, social media influencer posts straddle the divide between traditional advertising and consumer mark talk. Influencers purport to share their personal opinions, experiences, and sincere recommendations directly with their followers, giving them an air of authenticity that makes their endorsements particularly persuasive.⁷⁹ Given that influencer marketing plays an increasingly dominant role in many companies’ marketing strategies, and some mark owners believe “‘savvy exploitation of low- and no-cost promotion via social media’ and celebrity endorsements eliminate[] the need for traditional paid advertising,”⁸⁰ litigants are beginning to put forward influencer endorsements as evidence of secondary meaning. In one recent case, the Ninth Circuit affirmed a district court’s finding of secondary meaning based in part on the producer’s gifting the product to influencers and celebrities at the Emmys and Oscars.⁸¹ In another, it affirmed a finding of secondary meaning for adidas’s Stan Smith trade dress, acknowledging that the company “reaps significant but

news articles, social media posts, and awards for Best Law Firm from The State newspaper.”), *modified sub nom.* George Sink PA Inj. Lawyers v. George Sink II L. Firm, LLC, No. 2:19-cv-01206, 2019 WL 6318778 (D.S.C. Nov. 26, 2019), *appeal dismissed sub nom.* Sink v. George Sink II L. Firm, LLC, No. 2:19-cv-01206, 2019 WL 9042869 (4th Cir. Dec. 18, 2019), and *appeal dismissed sub nom.* George Sink, P.A. v. George Sink II L. Firm, LLC, No. 2:19-cv-01206, 2019 WL 8112874 (4th Cir. Dec. 18, 2019); Tee Turtle, LLC v. Albayrak, No. 2:21-cv-00094, 2021 WL 907102, at *2 (E.D. Wash. Mar. 9, 2021) (“The Reversible Octopus Plushies have also been featured in unsolicited media. [They] are the subject of several ‘viral’ TikTok videos, with each video reaching hundreds of thousands of consumers and potential consumers.”).

⁷⁷ Booking.com B.V. v. Matal, 278 F. Supp. 3d 891, 922 (E.D. Va. 2017) (“[J]ust as unsolicited media coverage offers circumstantial evidence of consumer awareness of a brand, the size of a producer’s social media following is indicative of the number of consumers who are familiar with a brand, interested in receiving additional information about it, and presumably tend to feel goodwill toward the producer.”), *vacated*, Booking.com B.V. v. U.S. Pat. & Trademark Off., 141 S. Ct. 187 (2020). But the size of a producer’s social media following can in some cases be misleading, as when an influencer attracts the bulk of their followers before launching a product line and then uses their follower count as evidence of secondary meaning in their clothing brand or product trade dress.

⁷⁸ LVL XIII Brands, Inc. v. Louis Vuitton Malletier S.A., 209 F. Supp. 3d 612, 659 (S.D.N.Y. 2016), *aff’d sub nom.* LVL XIII Brands, Inc. v. Louis Vuitton Malletier SA, 720 F. App’x 24 (2d Cir. 2017).

⁷⁹ Alexandra J. Roberts, *False Influencing*, 109 GEO. L.J. 81, 84 (2020).

⁸⁰ LVL XIII Brands, Inc., 209 F. Supp. 3d at 656 (brand representative testified that he “didn’t feel like it was necessary to invest [LVL XIII’s] dollars into print ads and things of that nature, especially with the dying business of print publications this day and age” (alteration in original)).

⁸¹ H.I.S.C., Inc. v. Franmar Int’l Imps., Ltd., No. 3:16-cv-00480, 2019 WL 1545675, at *3 (S.D. Cal. Apr. 9, 2019), *aff’d sub nom.* H.I.S.C., Inc. v. Rajanayagam, 810 F. App’x 560 (9th Cir. 2020).

difficult-to-quantify value from placing the Stan Smith with celebrities, musicians, athletes, and other ‘influencers’ to drive consumer hype.”⁸²

As for the other forms of circumstantial evidence, advertising expenditures may be meaningful, if the ad features the mark prominently in a trademark way and is the type of ad consumers are likely to view, absorb, and learn from. But they may also be ineffective.⁸³ And ads may be less reflective of secondary meaning in an age of time-shifting and multiple-screen viewing. In some cases, ads may leave lasting impressions about the house brand or the product itself without affecting consumers’ perception of the mark for which secondary meaning is asserted. Likewise, number of sales or customers does not always tell the whole story—if the mark is not featured prominently in a trademark way, or is merely a secondary, tertiary, or limping mark,⁸⁴ consumers may purchase a product repeatedly without ever coming to view the descriptive phrase it bears as a mark.⁸⁵ In *Zatarain’s, Inc. v. Oak Grove Smokehouse, Inc.*, for example—a case often cited and widely taught⁸⁶ to introduce the concept of secondary meaning—the district court treated the number of products sold bearing the mark FISH-FRI as compelling evidence that the mark had acquired secondary meaning, even though the house mark ZATARAIN’S was prominent on the packaging and it would have been equally plausible to assume that consumers understood ZATARAIN’S as the trademark and “fish-fri” as the descriptive phrase explaining what the

⁸² *Adidas Am., Inc. v. Skechers USA, Inc.*, 149 F. Supp. 3d 1222, 1235 (D. Or. 2016), *aff’d in part, rev’d in part*, 890 F.3d 747 (9th Cir. 2018).

⁸³ See Alyssa Morrison, *The Advertising Factor in the Secondary Meaning Instruction*, 19 J. CONTEMP. LEGAL ISSUES 296, 301 (2010) (arguing that the advertising factor does not aid the court in assessing secondary meaning and should therefore be omitted from the Ninth Circuit’s model jury instructions). Traditional media campaigns also don’t enable businesses to evaluate consumer engagement, making them a less precise indicator of secondary meaning than social media campaigns. Caroline Mrohs, Note, *How Many Likes Did It Get? Using Social Media Metrics to Establish Trademark Rights*, 25 CATH. U. J.L. & TECH. 154, 164 (2016).

⁸⁴ See Rebecca Tushnet, *Registering Disagreement: Registration in Modern American Trademark Law*, 130 HARV. L. REV. 867, 923 (2017) (defining “limping marks” as “marks that are always accompanied by, and need the support of, other marks, rather than serving on their own to identify a particular brand, or to create a separate commercial impression”).

⁸⁵ See, e.g., *In re JC Hosp. LLC*, 802 F. App’x 579, 584 (Fed. Cir. 2020) (affirming the TTAB’s refusal to register where “the mark THE JOINT often appeared in connection with other marks (e.g., ‘Hard Rock’ or ‘Hard Rock Hotel & Casino’). The Board stated that ‘it is unclear which mark . . . attracts public attention.’” (omission in original)).

⁸⁶ Westlaw lists 1,392 citing references and many Trademark Law and Intellectual Property Law casebooks include excerpts from the case. See, e.g., DINWOODIE & JANIS, *supra* note 34, at 52; BARTON BEEBE, *TRADEMARK LAW: AN OPEN-SOURCE CASEBOOK* 40 (2020); GLYNN LUNNEY, *CASES AND MATERIALS ON TRADEMARK LAW* 148 (2d ed. 2016); EDMUND W. KITCH & HARVEY S. PERLMAN, *INTELLECTUAL PROPERTY AND UNFAIR COMPETITION* 184 (5th ed. 1998); 2 PETER S. MENELL, ROBERT P. MERGES, MARK A. LEMLEY & SHYAMKRISHNA BALGANESH, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 937 (2021); JASON RANTANEN, *INTRODUCTION TO INTELLECTUAL PROPERTY: CASES AND QUESTIONS* 297 (2021); JAMES BOYLE & JENNIFER JENKINS, *INTELLECTUAL PROPERTY: LAW & THE INFORMATION SOCIETY CASES AND MATERIALS* 119 (5th ed. 2021).

box contained: batter for frying fish.⁸⁷ And when it comes to trade dress, sales and advertising are particularly untrustworthy indicia of secondary meaning, especially without a “look-for” approach or another way of highlighting the trade dress as a source indicator rather than decoration or product feature.⁸⁸

Length of exclusive use suffers from similar flaws as advertising. It may also grant too great a first-mover advantage, as the first producer to sell a particular kind of product can assert proprietary rights in a descriptive term for that product if others don’t quickly adopt the same term to compete in the same space. It is tautological that the factors that focus on producer investment reward wealth and longevity; conversely, they disadvantage newcomers and smaller mark owners. In many cases, applying the secondary meaning factors leads factfinders to affirm the rights of a large, wealthy junior user over those of a smaller senior user—when both use descriptive marks, the first to imbue the mark with secondary meaning gets prior rights regardless of who made use first, and a well-known player with broad reach is far better equipped to generate secondary meaning (or the appearance of secondary meaning based on established proxies) quickly.⁸⁹

Attempts to plagiarize—another factor common across jurisdictions—may or may not be meaningful.⁹⁰ While copying indicates

⁸⁷ *Zatarain’s, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 795 (5th Cir. 1983) (“Since 1950, Zatarain’s and its predecessor have continuously used the term ‘Fish-Fri’ to identify this particular batter mix. Through the expenditure of over \$400,000 for advertising during the period from 1976 through 1981, Zatarain’s has promoted its name and its product to the buying public. Sales of twelve-ounce boxes of ‘Fish-Fri’ increased from 37,265 cases in 1969 to 59,439 cases in 1979. From 1964 through 1979, Zatarain’s sold a total of 916,385 cases of ‘Fish-Fri.’ The district court considered this circumstantial evidence of secondary meaning to weigh heavily in Zatarain’s favor.”), *abrogated by* *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004). *Cf., e.g., In re Bongrain Int’l (Am.) Corp.*, 894 F.2d 1316, 1318 (Fed. Cir. 1990) (“The Board . . . ruled correctly that appellant’s evidence as to acquired distinctiveness or secondary meaning was insufficient to permit registration under Section 1052(f). Growth in sales was the principal factor upon which appellant relied to show distinctiveness. But, as the Board observed, this may indicate the popularity of the product itself rather than recognition of the mark ‘BABY BRIE’ as indicative of origin; or it may indicate acceptance of Bongrain’s other mark ‘Alouette’, which was used along with ‘BABY BRIE’ on the packages.”).

⁸⁸ “Advertising may not support secondary meaning where, as here, ‘the promotional material does not use the design alone but instead with other marks.’” *LVL XIII Brands, Inc. v. Louis Vuitton Malletier S.A.*, 209 F. Supp. 3d 612, 656 (S.D.N.Y. 2016) (quoting TMEP § 1202.02(b)(i)), *aff’d sub nom.* *LVL XIII Brands, Inc. v. Louis Vuitton Malletier SA*, 720 F. App’x 24 (2d Cir. 2017); *id.* at 655 (“Even more damaging [to its claim of secondary meaning], LVL XIII has not established that any of its promotional materials called attention to the [toe plate] as an indication of source.”); *see also In re Soccer Sport Supply Co.*, 507 F.2d 1400, 1403 (C.C.P.A. 1975); *In re Mogen David Wine Corp.*, 372 F.2d 539, 542 (C.C.P.A. 1967).

⁸⁹ *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992).

⁹⁰ *See generally* Bryant, *supra* note 51 (arguing copying is irrelevant for secondary meaning); Steven J. Paterson, *Defining the Role of the Defendant’s Intentions Under Section 43(a) of the Lanham Act*: Centaur Communications v. A/S/M Communications, 46 WASH & LEE L. REV. 335 (1989) (“[A]lthough evidence of copying is persuasive it is not a sufficient showing of secondary meaning on its own.”).

awareness on the part of competitors, it doesn't necessarily provide persuasive evidence that consumers—who are less likely to be attuned to product details and more likely simply to buy the item they want for other reasons, such as availability and price, especially in the age of Amazon⁹¹—perceive matter that is descriptive or not inherently distinctive as a mark.

Expert surveys of consumers provide direct, or at least quasi-direct,⁹² evidence of consumer perception and are considered by many courts the best evidence of secondary meaning.⁹³ But surveys are not required for a finding of secondary meaning.⁹⁴ One reason courts have refrained from requiring surveys is that they have tended to be expensive. But as Jake Linford has argued persuasively, options like Mechanical Turk make conducting surveys far more affordable.⁹⁵ While experts with prestigious resumes rack up big bills, there are only a few types of secondary meaning surveys that courts have blessed as acceptable; litigants tend to stick with those rather than try to forge new ground⁹⁶ by experimenting with new survey forms, venturing into corpus linguistics, or investing time and energy into gathering less common kinds of direct evidence of secondary meaning. It should therefore be possible for litigants to rely on less highly-credentialed experts whose rates aren't upwards of a thousand dollars an hour.⁹⁷

But proxies, surveys, and direct testimony are no longer the only ways to gauge consumer sentiment.

II. USING MARK TALK

Times have changed since courts began evaluating “secondary significance” and the Lanham Act codified protection for descriptive marks as long as they had acquired distinctiveness. Today, consumers have so much to say about the goods they love and hate, the labels that define them, and the service providers that did them wrong. Mark talk abounds. Consumers talk about brands and marks all over social media, from

⁹¹ See Grace McLaughlin, Note, *Fanciful Failures: Keeping Nonsense Marks off the Trademark Register*, 134 HARV. L. REV 1804 (2021) (highlighting the use by Amazon sellers of random, often unpronounceable strings of letters as trademarks).

⁹² 2 MCCARTHY, *supra* note 1, § 15:30.

⁹³ *Id.* (citing *Vision Sports, Inc. v. Melville Corp.*, 888 F.2d 609, 615 (9th Cir. 1989)). *Accord* *Correct Prods., Inc. v. Marvy! Advert. Photography, Inc.*, 780 F.2d 1324, 1333 n.9 (8th Cir. 1985) (“Consumer surveys are recognized by several circuits as the most direct and persuasive evidence of secondary meaning.”).

⁹⁴ 2 MCCARTHY, *supra* note 1, § 15:30.

⁹⁵ Linford, *supra* note 41, at 239–41; see Suneal Bedi & David Reibstein, *Measuring Trademark Dilution by Tarnishment*, 95 IND. L.J. 683 (2020).

⁹⁶ Robert H. Thornburg, *Trademark Surveys: Development of Computer-Based Survey Methods*, 4 J. MARSHALL REV. INTELL. PROP. L. 91 (2005).

⁹⁷ Linford, *supra* note 41, at 226.

Facebook to TikTok to Twitter to YouTube, on individual profiles, company pages, affinity groups, and influencer posts.⁹⁸ Product reviews and feedback are everywhere, especially Yelp and Amazon, where reviews can number in the thousands and the star rating a product receives determines whether shoppers select it. Online fora dedicated to specific groups and interests are rife with product and service recommendations and reactions. Readers respond to blog posts, newspaper and magazine articles, and reviews by posting thoughts of their own. Even information like the number of Facebook likes or Twitter followers a corporate account accrues can reflect consumer awareness of marks, with some caveats.⁹⁹ Altogether, this mark talk represents a tremendous corpus of online conversations using or discussing trademarks, and that corpus is capable of answering the secondary meaning question at least as well as producer-centric proxies like ad expenditure and length of use.¹⁰⁰ Taking both types of evidence in combination provides stronger proof of secondary meaning or its absence than either type of information alone and better serves the goals of trademark law.

Scholars have considered how to extract brand information from a corpus to glean whether a term is a name or a noun by conducting content analysis,¹⁰¹ web scraping,¹⁰² close-reading data sets, using algorithms,¹⁰³ or simply counting. Julian Nyarko trained a language model on Reddit

⁹⁸ See Heymann, *supra* note 61, at 1352–53 (“[R]eputation development has, it goes without saying, been enhanced by the Internet. . . . What was formerly communicated via in-person word of mouth or through letters to company executives can now be broadcast to a worldwide audience, retransmitted, and discussed.”).

⁹⁹ Because a “like” or “follow” requires a single click, not all will indicate recognition of the account as a brand name. For example, consumers may click in response to a campaign offering a discount code; they may “like” something they perceive as a generic or descriptive term or phrase, rather than a trademark; they may be responding to an image, rather than a name.

¹⁰⁰ Quentin J. Ullrich, *Corpora in the Courts: Using Textual Data to Gauge Genericness and Trademark Validity*, 108 TRADEMARK REP. 989, 1031 (2018) (arguing that “[c]orpora consisting of language from social media, blogs, and other mediums in which the average consumer more frequently produces language . . . are more representative of the consuming population and consequently should hold more weight in court” than corpora comprising data from books, magazines, and newspapers); *Scooter Store, Inc. v. SpinLife.com, LLC*, No. 2:10-cv-00018, 2011 WL 6415516, at *8 (S.D. Ohio Dec. 21, 2011) (quoting *Citizens Banking Corp. v. Citizens Fin. Grp., Inc.*, 320 F. App’x 341, 347 (6th Cir. 2009) (“[C]orpora data is in the category of ‘[e]vidence of consumer recognition,’ which can be ‘relevant to assessing the strength of the mark.’” (second alteration in original)); see also Jake Linford & Kyra Nelson, *Trademark Fame and Corpus Linguistics*, 45 COLUM. J.L. & ARTS (forthcoming 2022).

¹⁰¹ Tracy G. Harwood & Tony Garry, *An Overview of Content Analysis*, 3 MKTG. REV. 479 (2003); Harold H. Kassarian, *Content Analysis in Consumer Research*, 4 J. CONSUMER RSCH. 8 (1977).

¹⁰² Golder Brief, *supra* note 21, at 16.

¹⁰³ *Id.* at 16–17 & n.24 (citing Anindya Ghose, Panagiotis G. Ipeirotis & Beibei Li, *Designing Ranking Systems for Hotels on Travel Search Engines by Mining User-Generated and Crowdsourced Content*, 31 MKTG. SCI. 493 (2012); Anindya Ghose & Sha Yang, *An Empirical Analysis of Search Engine Advertising: Sponsored Search in Electronic Markets*, 55 MGMT. SCI. 1605 (2009); Sha Yang & Anindya Ghose, *Analyzing the Relationship Between Organic and Sponsored Search Advertising: Positive, Negative, or Zero Interdependence*, 29 MKTG. SCI. 602 (2010)).

posts to extract empirical data on how similar or different consumers' use of a trademark is to their use of a generic term.¹⁰⁴ Adam Kilgarriff's research focuses on "whether a disputed term exhibits the linguistic behavior characteristic of a name (identifying the source or producer of a product or service) or the linguistic behavior characteristic of an ordinary common noun" using corpus linguistics.¹⁰⁵ Experts increasingly look to empirical data to better understand trends in trademark law and beyond.

In fact, some evidence suggests that mark talk not only reflects consumer perception but also helps shape it. Researchers in a study about learning new meanings for old words found that participants recognized words they already had in their vocabulary more quickly when they were paired with related new meanings, but only when the study required participants to *use* the words' new meanings in a new context; the same learning effect did not take place after a more superficial or passive learning period.¹⁰⁶ And Jessica Kiser's work describes how consumers who participate in discourse about and development of a brand may consider it more valuable and feel more loyalty toward and a deeper connection with that brand,¹⁰⁷ all of which translate to secondary meaning or goodwill. So expert testimony that reviews a robust set of examples of consumers using or referencing descriptive marks as trademarks ought to be considered persuasive evidence of secondary meaning. Likewise, expert testimony that presents evidence of its absence¹⁰⁸ should weigh toward the opposite conclusion.

Applicants to register trademarks and litigants asserting protection for common law marks are beginning to cite what goes on in online spaces to the USPTO and courts,¹⁰⁹ who sometimes take heed and sometimes don't. Litigants have cited as evidence of secondary meaning the number of people that have visited their social media pages,¹¹⁰ how many

¹⁰⁴ Interviews with Julian Nyarko, Assistant Professor of Law, Stanford Law School (Mar. 12, 2021; Apr. 1, 2021; Aug. 17, 2021).

¹⁰⁵ Adam Kilgarriff, *Corpus Linguistics in Trademark Cases*, 36 *DICTIONARIES: J. DICTIONARY SOC'Y N. AM.* 100, 100 (2015).

¹⁰⁶ Jennifer M. Rodd, Richard Berriman, Matt Landau, Theresa Lee, Carol Ho, M. Gareth Gaskell & Matthew H. Davis, *Learning New Meanings for Old Words: Effects of Semantic Relatedness*, 40 *MEMORY & COGNITION* 1095 (2012).

¹⁰⁷ Kiser, *supra* note 19, at 496, 516.

¹⁰⁸ Mark talk might also reveal a word or phrase is being used in reference to more than one brand's products, which could—like evidence of descriptive use—suggest the absence of secondary meaning. *See* Roberts, *supra* note 44, at 1083–85.

¹⁰⁹ Mark owners may even cite mark talk in cease-and-desist letters, responses, and coexistence negotiations. For example, Attorney Jessica Cardon recounted a response to a cease-and-desist letter regarding her client's use of the registered trademark #NOMOSTACHE that cited widespread descriptive use of the hashtag by people with newly shaved faces, helping to establish that at least a portion of the hashtag use by the public was not in reference to the mark owner. Discussion during *Trademark Reporter* Committee Meeting, May 5, 2021 (notes on file with author).

¹¹⁰ *Kalamazoo Cnty. Convention & Visitors Bureau, Inc. v. Sw. Mich. First Corp.*, No. 1:17-cv-00303, 2017 WL 8640798, at *5 (W.D. Mich. Nov. 28, 2017).

follow their corporate Twitter account;¹¹¹ how many have liked their corporate or brand Facebook page;¹¹² the number of “impressions” on Facebook and “likes” spread across posted content;¹¹³ their “social media following” overall;¹¹⁴ and the number of online reviews their branded products have received.¹¹⁵

Still, few factfinders have moved beyond producers’ advertising efforts on social media and consumers’ decisions to smash that like button to actually put forward examples of consumers using or referencing trademarks in their posts, reviews, comments, and complaints. But the few that have are blazing a path that others ought to follow.

Several federal courts have acknowledged the relevance of mark talk to a finding of secondary meaning or commercial strength.¹¹⁶ In one case, the court acknowledged “positive and unsolicited reviews and recommendations by consumers” as compelling evidence of secondary meaning.¹¹⁷ In another, a court held evidence of unsolicited consumer reviews of a chair weighed toward a finding of secondary meaning in the

¹¹¹ T-Mobile US, Inc. v. AIO Wireless LLC, 991 F. Supp. 2d 888, 898 (S.D. Tex. 2014).

¹¹² Clearly Food & Beverage Co. v. Top Shelf Beverages, Inc., 102 F. Supp. 3d 1154, 1772 (W.D. Wash. 2015); CrossFit, Inc. v. 2XR Fit Sys., LLC, No. 2:13-cv-01108, 2014 WL 972158, at *7 (D.N.J. Mar. 11, 2014) (holding CrossFit’s more than 500,000 “likes” on Facebook supported a finding of distinctiveness); Frito-Lay N. Am., Inc. v. Real Foods Pty. Ltd., Opposition Nos. 91212680 & 912135872017, 2017 WL 914086, at *18 (T.T.A.B. Feb. 21, 2017) (holding the fact that “applicant had more than 16,000 Facebook ‘likes’ and its products have been featured on several blogs” insufficient to establish secondary meaning for highly descriptive mark CORN THINS for crispbread slices), *aff’d in part, vacated in part, remanded by* Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc., 906 F.3d 965 (Fed. Cir. 2018).

¹¹³ LHO Chi. River, L.L.C. v. Rosemoor Suites, L.L.C., No. 1:16-cv-06863, 2017 WL 467687, at *11 (N.D. Ill. Feb. 3, 2017).

¹¹⁴ Vital Pharms., Inc. v. Monster Energy Co., 472 F. Supp. 3d 1237, 1257 (S.D. Fla. 2020) (holding that “social media network [that] spans hundreds of thousands of followers and reaches over 230 million people worldwide” could support a finding “that VPX’s advertising efforts support its claim that Bang’s trade dress has achieved secondary meaning”); Sazerac Co. v. Fetzer Vineyards, Inc., 251 F. Supp. 3d 1288, 1288, 1304, 1307 (N.D. Cal. 2017) (determining that a genuine issue of material fact as to whether trade dress had acquired distinctiveness precluded summary judgment on infringement claim), *aff’d*, 786 F. App’x 662 (9th Cir. 2019).

¹¹⁵ LHO Chi. River, L.L.C., 2017 WL 467687, at *11; Dead End Survival, LLC v. Does 1-3, No. 1:18-cv-02008, 2018 WL 3954756, at *6 (N.D. Ga. May 21, 2018) (“While Dead End has not submitted concrete evidence that ‘the public actually identifies the name with the plaintiff[’]s product or venture,’ Dead End has shown that its products . . . sold well on Amazon and earned a high ranking from customers.”).

¹¹⁶ See, e.g., Fletcher’s Original State Fair Corny Dogs, LLC v. Fletcher-Warner Holdings LLC, 434 F. Supp. 3d 473, 485 (E.D. Tex. 2020) (“The uncontroverted evidence, including evidence from social media and press commentary, confirms that the corn-dog consuming public affiliates the ‘Fletcher’s’ word mark with Fletcher’s business of selling corn dogs. Therefore, this factor weighs in favor of finding secondary meaning.”); Penshurst Trading Inc. v. Zodax LP, No. 1:14-cv-02710, 2015 WL 4716344, at *3 (S.D.N.Y. Aug. 7, 2015) (denying defendant attorney’s fees where plaintiff’s evidence of secondary meaning, including “voluminous social media posts’ invoking the trade dress,” cut against defendant’s argument that the suit was exceptionally meritless), *aff’d sub nom.* Penshurst Trading Inc. v. Zodax L.P., 652 F. App’x 10 (2d Cir. 2016).

¹¹⁷ Kid Car NY, LLC v. Kidmoto Techs. LLC, No. 1:19-cv-07929, 2021 WL 466975, at *5 (S.D.N.Y. Feb. 9, 2021) (denying motion to dismiss infringement claims).

chair's trade dress.¹¹⁸ In a third, the owner of MOROCCANOIL for hair treatment products retained an expert who created a corpus of over 580,000 Amazon product reviews, ultimately concluding that 62% of the relevant references reflected use as a trademark rather than as a descriptive or generic term;¹¹⁹ the court held on summary judgment that the mark was protectable rather than generic.¹²⁰

In other cases, litigants have put forward evidence of mark talk that factfinders have ignored or deemed inadequate.¹²¹ For example, the owner of MYO MASSAGE cited the massage parlor's ratings, rankings, and reviews on multiple sites, but the court found the mark's high degree of descriptiveness and lack of exclusive use weighed more heavily than that evidence and rendered the mark weak.¹²² The owner of registered mark PRETZEL CRISP offered up 1,155 LexisNexis database results for "pretzel crisp" and related terms, including blog posts and online recipes, purportedly showing 83–88% reflected use of the phrase as a distinctive trademark; the court conducted its own analysis of the articles and found they merited "little or no weight as a relevant indication of consumer perception," except that some provided evidence that consumers use the phrase generically.¹²³ And in a trade dress dispute between two candy stores in which the plaintiff put forth mark talk as demonstrating both acquired distinctiveness and actual confusion, the court dismissed that evidence as "largely circumstantial, non-scientific, and culled from social media";¹²⁴ ultimately, it concluded that all secondary meaning factors "clearly militate[d] against a finding of secondary meaning" and denied the plaintiff's request for preliminary injunction.¹²⁵

¹¹⁸ *Blumenthal Distrib. v. Exec. Chair, Inc.*, No. 1:10-cv-01280, 2010 WL 5980151, at *9 (E.D.N.Y. Nov. 9, 2010).

¹¹⁹ Expert Report of Oliver B. Northrup at 10, *Moroccanoil, Inc. v. Marc Anthony Cosms., Inc.*, 57 F. Supp. 3d 1203 (C.D. Cal. 2014) (No. 2:13-cv-02747), *discussed in* Ullrich, *supra* note 100, at 1017–18.

¹²⁰ *Moroccanoil, Inc. v. Marc Anthony Cosms., Inc.*, 57 F. Supp. 3d 1203, 1218 (C.D. Cal. 2014). The court's opinion does not mention the Northrup Report. Defendant's expert argued, and Ullrich agrees, that trademark-type uses were likely overrepresented in the Report's Amazon sample. Ullrich, *supra* note 100, at 1017–18 (citing Expert Report of Joel H. Steckel, Ph.D. at 41–42, *Moroccanoil, Inc.*, 57 F. Supp. 3d 1203 (No. 2:13-cv-02747)).

¹²¹ *See, e.g., In re JC Hosp. LLC*, 802 F. App'x 579, 584 (Fed. Cir. 2020) (affirming refusal to register based on lack of secondary meaning despite applicant's evidence of twenty-five years of exclusive use, substantial marketing expenditures and revenue, and "a variety of online websites and forums (e.g., various social media websites, Yelp and TripAdvisor forums, and YouTube) [that] show press and public recognition").

¹²² *Myo, LLC v. Brull & York, LLC*, No. 1:18-cv-00370, 2019 WL 136820, at *4–5 (W.D. Tex. Jan. 8, 2019).

¹²³ *Snyder's Lance, Inc. v. Frito-Lay N. Am., Inc.*, ___ F. Supp. 3d ___, No. 3:17-cv-00652, 2021 WL 2322931, at *17 (W.D.N.C. June 4, 2021).

¹²⁴ *IT'SUGAR LLC v. I Love Sugar, Inc.*, No. 4:13-cv-01644, 2013 WL 6077353, at *5 (D.S.C. Nov. 19, 2013).

¹²⁵ *Id.* at *8.

Evidence of mark talk may be cited more frequently in USPTO proceedings than in federal litigation. The TTAB has taken into account mark talk on online message boards,¹²⁶ blogs,¹²⁷ and consumer reviews¹²⁸ to gauge whether a term is descriptive for a given product category. In a cancellation proceeding before the TTAB, the Board found that the evidence submitted by the owner of registered trademark BUCK for bourbon failed to establish the absence of a genuine dispute of material fact as to whether the mark had acquired distinctiveness. It relied heavily on mark talk in the form of online drink recipes the petitioner put forth to support its assertion that BUCK was merely descriptive for bourbon because a “buck” is a well-known bourbon-based drink.¹²⁹ In an opposition proceeding, the TTAB pointed to mark talk when it acknowledged the strength of the opposer’s mark AUTODUEL, highlighting how “some observers on Twitter” reacting to the applicant’s application to register the same mark supported the Board’s conclusion that the opposer’s mark was “well-known among gamers.”¹³⁰

Likewise, in an application to register a stylized version of GT THE GRAND TOUR for apparel, the applicant successfully rebutted an examining attorney’s assertion that the matter was ornamental by citing Amazon reviews that demonstrated purchasers’ awareness of the mark as an indicator of secondary source.¹³¹ And when Tootsie Roll Industries applied to register the cylindrical “midgee” shape of its candy as trade dress, it initially received an office action deeming the product design nondistinctive.¹³² In the brand’s response, it appended numerous consumer-generated online recipes for “homemade tootsie rolls” with instructions for forming the candy into the signature midgee shape, which it characterized as “direct evidence that consumers associate the brown cylindrical shape

¹²⁶ *E.g.*, *In re* Petroglyph Games, Inc., No. 78806413, 2009 WL 1759327, at *11–12 (T.T.A.B. July 19, 2009) (citing user reviews and gaming websites to support refusal to register BATTLECAM as merely descriptive for a feature of computer game software).

¹²⁷ *E.g.*, *In re* ZeroNines Tech., Inc., No. 77404271, 2010 WL 2783883 (T.T.A.B. June 22, 2010).

¹²⁸ *E.g.*, *In re* Murad, Inc., No. 77556539, 2010 WL 667931 (T.T.A.B. Feb. 4, 2010).

¹²⁹ *Frank Lin Distillers Prods., Ltd. v. NJoy Spirits, LLC*, Opposition No. 91211205, Cancellation No. 92060288, 2016 WL 837731, at *1–3 (T.T.A.B. Feb. 5, 2016) (granting summary judgment on descriptiveness issue and citing petitioner’s evidence of the use of “buck” on Reddit, bartender wikis, and numerous other websites on which users can post drink recipes, along with books and magazines); *see also* Applicant/Petitioner’s Memorandum in Support of Motion for Summary Judgment, *Frank Lin Distillers Prods., Ltd.*, 2016 WL 837731 (T.T.A.B. Nov. 4, 2015) (Opposition No. 91211205, Cancellation No. 92060288).

¹³⁰ *Steve Jackson Games Inc. v. inXile Ent., Inc.*, No. 91225722, 2019 WL 912110, at *6–7 (T.T.A.B. Jan. 22, 2019).

¹³¹ Request for Reconsideration After Final Office Action at 2–3, Exhibit 4, GT THE GRAND TOUR, Registration No. 6,389,483 (U.S. Pat. & Trademark Off. Mar. 10, 2021).

¹³² Office Action at 1, Midgee Trade Dress, Registration No. 5,552,922 (U.S. Pat. & Trademark Off. Feb. 15, 2017).

of the subject application with applicant Tootsie Roll”,¹³³ the examining attorney apparently found the evidence persuasive, as the application was approved for publication several weeks later.¹³⁴

Luxury handbag brand Céline offers another example of using mark talk to establish secondary meaning in trade dress. When the brand applied to register its “iconic Céline luggage ‘face’ design,”¹³⁵ the USPTO initially refused registration based on lack of distinctiveness. Céline responded, attempting to rely on the five years’ use provision.¹³⁶ When that didn’t work, likely because the provision is inapplicable to the type of trade dress for which Céline sought protection,¹³⁷ the brand argued that its trade dress had acquired distinctiveness based on all of the usual factors.¹³⁸ But the USPTO found those traditional forms of evidence unconvincing too.¹³⁹



Celine Luggage Bag

¹³³ Second Office Action Response at 1, Midgee Trade Dress, Registration No. 5,552,922 (U.S. Pat. & Trademark Off. Nov. 10, 2017).

¹³⁴ Trademark Snap Shot Publication Stylesheet, Registration No. 5,552,922 (U.S. Pat. & Trademark Off. Dec. 5, 2017).

¹³⁵ Second Office Action Response at 2, Handbag Trade Dress, Registration No. 4,879,264 (U.S. Pat. & Trademark Off. Jan. 15, 2015).

¹³⁶ First Office Action Response, Handbag Trade Dress, Registration No. 4,879,264 (U.S. Pat. & Trademark Off. June 9, 2014).

¹³⁷ TMEP § 1212.05(a) (July 2021) (“For matter that is not inherently distinctive because of its nature (e.g., nondistinctive product design, overall color of a product, mere ornamentation, and sounds for goods that make the sound in their normal course of operation), evidence of five years’ use is not sufficient to show acquired distinctiveness. In such a case, actual evidence that the mark is perceived as a mark for the relevant goods/services/classes would be required to establish distinctiveness.”).

¹³⁸ That included the brand’s 5.5 years of continuous use; sales totaling over \$71.8 million in 2013–2014 alone; extensive unsolicited media attention; advertising expenditures in excess of \$17 million, with \$1 million specifically directed to advertising and promoting the bag’s design; intentional copying; and efforts to maintain exclusive rights by policing the trade dress. Second Office Action Response at 1–6, Handbag Trade Dress, Registration No. 4,879,264 (U.S. Pat. & Trademark Off. Jan. 15, 2015).

¹³⁹ Third Office Action, Handbag Trade Dress, Registration No. 4,879,264 (U.S. Pat. & Trademark Off. Feb. 12, 2015).

Céline then took a different approach to bolster its assertion of the design’s secondary meaning. It gathered evidence that individual consumers recognized the trade dress as a face—a horizontal zipper framed in a rectangle arguably representing a mouth, beneath two handle supports regarded as eyes—and associated it uniquely with Céline.¹⁴⁰ A declaration by John Maltbie, Céline’s U.S. legal representative, appended a table of user comments posted online in response to blog posts about the bag,¹⁴¹ like “*Now all I see is a Sad Robot when I look at that bag!*”; “*I can’t get over the fact that it looks like a :/ face*”; “*Is it me or do the contrasting leather bits and zipper look like two eyes and a square mouth . . . ?*”; “*I see the funny face in it too!*”; and many more.¹⁴² Céline also submitted examples of consumer posts about knockoffs, some of which reference the trade dress with specificity (“Celine Inspired Smiley Bag”).¹⁴³ This time, the USPTO was convinced.

It’s possible that factfinders considering evidence of mark talk creates a one-way ratchet: including evidence of mark talk supports a finding of secondary meaning, while the absence of mark talk has no effect.¹⁴⁴ But the same Reddit pages that reflect consumers’ consistent use of BOY BROW as a mark reveal that other terms, like Devachan’s registered trademark NO-POO, are used far more often in the descriptive sense than the trademark one.¹⁴⁵ And courts have occasionally indicated the absence

¹⁴⁰ Request for Reconsideration at 10–12, Handbag Trade Dress, Registration No. 4,879,264 (U.S. Pat. & Trademark Off. Aug. 12, 2015) [hereinafter Request for Reconsideration]; Declaration of John Maltbie ¶ 23, Request for Reconsideration, *supra* [hereinafter Maltbie Declaration].

¹⁴¹ According to Maltbie, the idea to play up the “face” aspect of the trade dress and do so using consumers’ own words came out of a phone conversation with the trademark examining attorney to whom the application was assigned. John Maltbie (@jmaltbie), TWITTER (Oct. 27, 2020, 10:16 PM). <https://twitter.com/jmaltbie/status/1321274571371253766> [<https://perma.cc/TN6X-EFTK>] (“[The examining attorney] mentioned a line in an early affidavit about the bag looking like a face—so we jumped on that and found a surprising number of face call outs online and tied the face idea to Jobson’s affidavit.”).

¹⁴² “I agree with everyone who said it *looks like a face with a zipped mouth*”; “The ever-so omnipresent Celine luggage tote. *The sad face bag, that makes everyone so happy!*”; “It was never my kind of bag—too structured *and to have a bag with a face*, nope for me.” Maltbie Declaration ¶ 27, *supra* note 140.

¹⁴³ *Id.* ¶ 28.

¹⁴⁴ See Bone, *supra* note 62, at 553 (goodwill’s “elasticity tends to drive trademark law in expansive directions”).

¹⁴⁵ The subreddit entitled “NoPoo” has 111,000 members and is dedicated to discussion of a no-shampoo philosophy or method; redditors use the space to discuss eliminating shampoo or using it only rarely. *NoPoo: No shampoo!*, REDDIT, <https://www.reddit.com/r/NoPoo/> [<https://perma.cc/7V79-EFSY>]; u/shonaich, *NoPoo FAQ and General Information*, REDDIT (Feb. 26, 2021), https://www.reddit.com/r/NoPoo/comments/lt9c9z/nopoo_faq_and_general_information/ [<https://perma.cc/FV2A-UDPP>] (defining “NoPoo” as “using water only mechanical cleaning techniques to wash your hair and scalp and supplementing with ingredients in their natural states as needed for water quality, health, presentability and preference”). A search for “nopoo” across the site returns almost solely generic uses of the term, rather than branded uses, on the first page of results. Search Results for “no poo,” REDDIT, <https://www.reddit.com/search/?q=nopoo> [<https://perma.cc/E4ZA-DSYP>] (last visited May 14, 2021). Exceptions seems to reference Deva by name, e.g.,

of mark talk weighed against a finding of commercial strength.¹⁴⁶ The Sixth Circuit held the word mark DJ LOGIC commercially weak based on the evidence submitted and noted that more information about the artist's social media presence would have been helpful: "[A] plaintiff with low album sales or no representation could nevertheless show commercial success suggesting broad recognition of his mark using web-based indicators of popularity, *e.g.*, YouTube views."¹⁴⁷ The court also provided examples of the kind of social media evidence that might be indicative of a mark's strength:

For instance, how many and what kind of Twitter followers does Kibler have? A large number of followers, or celebrities likely to re-tweet Kibler's messages to their large number of followers, for example, would suggest that many types of people know his work and mark. We can say the same of the number and kind of Kibler's Facebook fans, likes, posts, and re-posts.¹⁴⁸

Because the trademark owner did not proffer any such evidence of mark talk or social media clout, the court concluded the mark lacked commercial strength.

Mark talk poses various challenges, of course. Applicants and litigants may face some admissibility hurdles when putting forth mark talk evidence, but those hurdles are not insurmountable; several practitioners have offered practical advice to those seeking to get social media evidence admitted.¹⁴⁹ Astroturfing is already a widely-acknowledged

u/HauteLlama, *PSA: Stop Using Deva NoPoo. Its [sic] Made All My Clients [sic] Hair Fall Out*, REDDIT (Dec. 15, 2019), https://www.reddit.com/r/curlyhair/comments/eb8v91/psa_stop_using_deva_nopoo_its_made_all_my_clients/ [<https://perma.cc/GP7J-AZ53>]. A review of the results for a "nopoo" search on Reddit reveals few to none relate to the Devachan-owned brand, and those uses that do reference the brand tend to include its main trademark "Deva" (or Deva trademarks "Devachan" or "Devacurl").

¹⁴⁶ See, *e.g.*, *Car-Freshner Corp. v. Am. Covers, LLC*, 980 F.3d 314, 330 (2d Cir. 2020) (finding BAYSIDE BREEZE lacks commercial strength where "the record lacks evidence that 'Bayside Breeze' has prompted unsolicited news and consumer social media coverage"); *LVL XIII Brands, Inc. v. Louis Vuitton Malletier S.A.*, 209 F. Supp. 3d 612, 668 (S.D.N.Y. 2016) (a reasonable jury could not find secondary meaning for plaintiff's trade dress where the plaintiff referenced social media promotion but "offered no concrete proof of the existence, let alone success, of such an action plan." *Id.* at 656. Plaintiff produced evidence of twelve social media posts, but none were from the relevant time period. *Id.* at 659), *aff'd sub nom. LVL XIII Brands, Inc. v. Louis Vuitton Malletier SA*, 720 F. App'x 24 (2d Cir. 2017); *In re Minky Couture*, No. 87589711, 2020 WL 1873064, at *6 (T.T.A.B. Apr. 2, 2020) ("There is no direct evidence of consumer recognition such as consumer surveys, customer declarations, or posts from Facebook or other social media expressing a potential or actual customer's perception as to the source of 'minky couture' blankets.").

¹⁴⁷ *Kibler v. Hall*, 843 F.3d 1068, 1076 (6th Cir. 2016).

¹⁴⁸ *Id.* at 1075.

¹⁴⁹ Social media evidence can be admitted by general authentication or via expert testimony. Coleman, *supra* note 21, at 780. *But see, e.g., LVL XIII Brands, Inc.*, 209 F. Supp. 3d at 638, 648 (excluding testimony of plaintiff's expert witness on secondary meaning as unqualified and excluding his expert report, which found secondary meaning based in part on social media evidence—specifically, his review of "over 100,000 unsolicited third-party online posts," *id.* at 644, focusing on "the

problem, and many companies have been accused of writing their own reviews, paying employees to do it for them, or amplifying and upvoting positive reviews from others.¹⁵⁰ A practice called “brushing,” in which a company sends an unsolicited product to an Amazon user and then posts a product review using their name, is on the rise.¹⁵¹ Some mark owners use trademark law as a weapon to prune negative speech so that only positive speech remains.¹⁵² Secondary meaning does not care about good versus bad press—a consumer who posts “Crunch is the worst brand of chocolate bar” and one who posts “Crunch is my favorite brand of chocolate bar” provide equally useful evidence of secondary meaning by demonstrating awareness that “Crunch” is a brand name rather than a mere descriptor. But if courts are to take social media evidence of secondary meaning seriously, they will also have to be aware of the risks of

content of the images [of LVL XIII sneakers posted on social media platforms], the comments that accompany the images, [] the number of likes, [and] the dates.” *Id.* at 647 (alterations in original). To authenticate mark talk offered into evidence, the proponent must demonstrate that it accurately reflects the information as it appeared on the website and that the evidence was posted by the purported source. Dan Farino & Douglas G. Leney, *Social Media Can Be a Minefield—Or a Gold Mine*, NAT’L L.J. (Aug. 15, 2016), <https://www.archerlaw.com/wp-content/uploads/2016/08/Social-Media-Can-be-a-Minefield-or-a-Gold-Mine.pdf> [<https://perma.cc/E7QT-URRU>]. Farino and Leney compare several jurisdictions’ approaches to authenticating social media evidence and conclude that cases reveal “widely disparate outcomes and a lack of clarity and predictability . . .” *Id.* USPTO Rules of Practice provide that Internet printouts are self-authenticating and admissible into evidence in the same manner as printed publications in general circulation under Trademark Rule 2.122 (e), 37 C.F.R. § 2.122(e). *See Swiss Watch Int’l, Inc. v. Fed’n of the Swiss Watch Indus.*, 101 U.S.P.Q.2d (BL) 1731, 1735 (T.T.A.B. 2012) (“[P]rintouts from Internet webpages may now be made of record by notice of reliance, without requiring the testimony of the witness printing out the webpages to introduce and authenticate them.”); *Safer, Inc. v. OMS Invs., Inc.*, 94 U.S.P.Q.2d (BL) 1031 (T.T.A.B. 2010). The probative value of Internet documents is limited to what they show on their face: “Although they do not prove the truth of the statements made therein, the printouts are acceptable to show that the statements were made or the information was reported in the webpages.” *Swiss Watch*, 101 U.S.P.Q.2d (BL) at 1735.

¹⁵⁰ *See, e.g., Vitamins Online, Inc. v. HeartWise, Inc.*, 207 F. Supp. 3d 1233 (D. Utah 2016), *vacated in part on reconsideration*, No. 2:13-cv-00982, 2017 WL 2733867 (D. Utah May 11, 2017). *See generally* Mrohs, *supra* note 83, at 175 (“For those managing social media accounts for brand development purposes, a major key to ensuring that the content of the accounts will be helpful in demonstrating secondary meaning among customers is by curating the account, assuring that the information provided by brand owner and the customers communicating with it is both authentic and unbiased.”).

¹⁵¹ Kelly Tyko, *First Free Seeds from China, Now Free Amazon Packages. What You Need to Know About ‘Brushing’ Scams*, USA TODAY (Aug. 4, 2020), <https://www.usatoday.com/story/money/2020/08/04/free-amazon-orders-scam-mysterious-seeds-packages-brushing/5580858002/> [<https://perma.cc/5P85-PXB3>] (“The [unsolicited] deliveries, which are not gifts, are what authorities call a ‘brushing scam,’ in which people receive unsolicited items from a seller who then posts false customer reviews to boost sales.”).

¹⁵² Eric Goldman, *Online Word of Mouth and Its Implications for Trademark Law*, in TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH 404, 428 (Graeme B. Dinwoodie & Mark D. Janis eds., 2008) (“Online word of mouth can play an essential marketplace-disciplining/rewarding function for brands (rewarding the good; punishing the bad), but trademark law can interfere with that mechanism, acting as a tool to curb the production and dissemination of online word of mouth. . . . [T]rademark owners can selectively excise content from the Internet—favorable word of mouth can stay, but unfavorable word of mouth must go.”). Conversely, Goldman highlights how producers can control word of mouth far less than other factors like advertising and quality. *Id.* at 410.

producers cherry-picking evidence, injecting their own mark talk inorganically, or taking down those comments and reviews that demonstrate consumers view a term as merely descriptive or generic.

CONCLUSION

This Article has focused specifically on using mark talk as direct evidence of secondary meaning. But of course, mark talk can be useful in a number of other contexts, including proving trademark strength, fame,¹⁵³ genericness,¹⁵⁴ use as a mark, likelihood of confusion,¹⁵⁵ and residual goodwill.¹⁵⁶ If courts and the USPTO update their understanding of viable evidence of consumer perception to include mark talk, mark owners and junior users trying to establish protectability or its absence will benefit from more direct, more accurate information about how consumers perceive and use their marks. Accepting mark talk may also lead producers to reconsider how they invest in marks, motivating them to prioritize approaches that truly alter consumer perception rather than simply throwing their budget at advertising in satisfaction of the traditional secondary meaning factors.

In the seventy-five years since the passage of the Lanham Act, so much has changed—from how we make purchasing decisions and interact with brands to how we measure language evolution. Yet the secondary meaning factors have somehow remained static. If a finding of secondary meaning purports to reflect consumers' actual understanding of a putative mark, it's time to reconsider our methods for assessing it.

¹⁵³ See Linford & Nelson, *supra* note 100.

¹⁵⁴ See Ullrich, *supra* note 100, *passim*.

¹⁵⁵ *E.g.*, *Steve Jackson Games Inc. v. inXile Ent., Inc.*, No. 91225722, 2019 WL 912110, at *10 (T.T.A.B. Jan. 22, 2019) (finding actual confusion, and therefore a likelihood of confusion, between applicant's and opposer's marks based in part on mark talk in the form of tweets and consumer comments in response to reports of the application; the Board found "a sufficient number of postings on their face show[ed] that the reader believed a license was in place"); *Opposer's Trial Brief* at 25–27, *Steve Jackson Games Inc.*, 2019 WL 912110 (No. 91225722).

¹⁵⁶ The mark talk evidence in the *Steve Jackson Games* opposition also demonstrated residual goodwill in the mark AUTODUEL. *Steve Jackson Games Inc.*, 2019 WL 912110.