

# What's in a Name? Linguistic and Legal Aspects of Company Names, Product and Service Names, Trademarks, and Brands

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Names have been given to commercial actors and products for centuries, as well as to activities traditionally grouped together as “trades” but now more often viewed as “services”. In Western countries during the 18<sup>th</sup> and 19<sup>th</sup> centuries major changes took place in the use of such names, under the influence of social and economic factors including industrialization and mass production, the growth of international trade, and the development of new techniques of advertising. Business and product names took on additional functions and acquired greater importance. Subsequent shifts often arranged names used in commerce in families, forming networks of “brands” protected by trademarks. Over the same period, of course, commercial names also continued to be interwoven in use with many other kinds of names employed for different purposes.

Modern practices deploying signs as commercial “names” differ from earlier, established conventions in a number of ways: (i) how particular names originate, now including many being invented or selected through market testing; (ii) their typical verbal structure and types of entity they are given to; (iii) the functions such names serve, combining reference to commercial entities with indications of origin and promotional effects; and (iv) the need for names used for commercial purposes to comply with specialized bodies of rules that govern them. The field of “names used in commerce”, viewed in this light, invites a number of lines of enquiry. Because the topic lies at an intersection between linguistics (more specifically, the linguistic study of names, onomastics), business, and law, this chapter examines names used in commerce through interdisciplinary exposition and discussion. Drawing on earlier work by the authors, individually, together, and with others, we seek to show how such names can be understood better by moving beyond paradigms available within any single discipline and bringing approaches in related fields into closer dialogue.

## 1. Essential Background: Names and Naming

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The concept of “name” is beset with difficulties, some of which acquire particular significance in relation to commerce. Relevant general background on names and naming is therefore brought together here before being drawn on later in the chapter.

Broadly, a name – typically one word or a short phrase – identifies something where ostension, or pointing to something, is not possible, making verbal indication essential in the absence of the referent. Using a name efficiently individuates a referent by means of a singular linguistic expression rather than repeated description. In this way, proper names appear inherently definite in that they refer to things treated as already existing. Nevertheless, identifying a referent simply as “something” elides an important issue: whether or not what is named exists physically (e.g., *Highgate Pond*, *Mont Blanc*), has previously existed (e.g., *the Battle of Waterloo*, *Tutankhamun*), has been conceived as an object of thought or imagination, albeit based to some extent on observation or experience (e.g., *Pinocchio*, *Xanadu*, *Game Theory*, *the Anthropocene*), or involves some combined mode of existence, for example, being

physical, historical, or socially constituted, but possibly also mythologized by surrounding associations.

A further complication surrounds the initial move of characterizing names as “identifying something”. A name may identify a singular, “unique” entity (historical period, person, place, sports team, star sign, technical standard) or alternatively a conceptual category or genus of things with many members. In this second sense, a name may be simply an ordinary word with a meaning: *robin*, *rose* – potentially by any other “name” – *roar*, *rocket*, *recidivism*. Such categories, of course, vary in their degree of precision or generality, in concreteness or abstraction, and in respect of what physical or conceptual world they are presumed to exist in.

The boundary between these two axes of “naming” is not clear-cut. Some proper names refer to obviously collective categories including social groups rather than singular referents, and so may define individual, family or social identity (e.g., *Inuit*, *Asian*, *Socialist*). The boundary between the two kinds of naming is not static, either; movement can take place in both directions. Descriptive elements may be embedded in a name’s form, creating “transparent” proper names (cf., *Doc*, *Dozy*, or *Sleepy* in *Snow White*); or movement may occur when proper names begin to denote categories by appearing exemplary and consequently function as generic shorthand (e.g., someone acting like “a modern-day Napoleon”).

Some nuances conveyed by “name” are signalled terminologically. As previously illustrated, the name for a unique entity is a “proper name”. When consisting of only one word, it is a “proper noun” (e.g., *London*, *Leviathan*, *Lithium*). Nouns which refer to categories or types are “common names”, sometimes referred to as “general names”. “Nominal” (i.e., naming) expressions which consist of more than one word take the grammatical form of extendable “noun phrases” (e.g., “John’s Restaurant”, “John’s Fish Restaurant”, “Old John’s Delicious Fish Restaurant by the Beach”). Name-forms of all kinds fit, in turn, into linguistic patterns around them in predictable ways. As well as operating as nouns, they can function as modifiers, being then adjectival: “Highland cattle”, “play the Arsenal way”, a “Michelangelo’s David torso”. Some have separate adjectival inflections: *Byzantine*, *Parisian*, or *Popish*. Proper names, like most words, can also communicate allusively (e.g., “Mona Lisa smile”; “it was Armageddon”). Such figurative uses push names towards functioning as categories even if they are applied to individual entities (“Mona Lisa smile”), though initially the name’s figurative use may have served to express a new perception or comment from which the later category followed (cf., visions of London as *Singapore-upon-Thames* or *Londongrad*).

Whether physical or intangible, an entity identified by a name is its “referent”, rather than its “meaning”, the latter (if it exists for a name) being some combination of linguistic and conceptual properties which allow that referent to be picked out. This distinction complicates the notion of the referent’s identity for names which seem “transparent”, in that they appear to mean what they name; it has less bearing on “opaque” names that do not show descriptive characteristics. Somewhere between opaque and transparent names fall cases where a “transparent” dimension has become obsolete or is unknown. Some names are complicated further by being “affiliative” in indicating provenance, including some personal names (e.g., *Maria* or *Mohamed* based on an actual parent or religious belonging). Related commemorative, celebratory, or sponsored names (e.g., *Diwali*, *Rhodes Scholar*) foreground cultural perspective by signifying origin and authenticity, pride, belonging, or aspiration. In contrast, other names do not so much affiliate the bearer to something that already exists as lend themselves to an emergent identity or serve as encouragement to others to affiliate. As they combine naming with self-promotion, reputation, or charisma, over time such names may acquire established referents. Alternatively, the resonance created around a name may persist even after underlying facts or values have changed. When this happens, names can become a flashpoint of contention, a development seen, for example, in protests over eponymous buildings named after historical personages associated with slavery (e.g., in the UK, *Colston*).

Names generally achieve their basic function of identifying even when used with no thought as to origin, intended purpose, or significance. Theoretical questions nevertheless can arise regarding, for example, what the “meaning” of a proper name is, if indeed it has one. Debates surrounding that question— often involving the philosophers J.S. Mill, Gottlieb Frege, and Saul Kripke, among others — have examined whether names function as condensed or elliptical descriptions, acting as links to extralinguistic information for which they serve as proxies; or whether they refer by way of an originating “cause” in a performative act of dubbing or baptism which *may* have actually taken place or may simply be presumed by later name-users.<sup>1</sup> The first view suggests “meaning” of some general kind; the second indicates some other form of non-descriptive reference. In everyday language use complications with names and naming mostly go unrecognized, however. As will be seen below, issues do nevertheless make themselves felt when names are scrutinized during legal disputes about their commercial use, because their characteristics and effects can be of considerable economic or legal consequence.

## 2. Commercial Names

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Names of many kinds have been investigated not only in the philosophy of language but in onomastics, the scientific study of names and naming.<sup>2</sup> When viewed through either lens, “names used in commerce” are mostly treated as one type among many (e.g., alongside personal names, river names, or street names). This chapter adopts a different approach. We highlight how far the usually singular category of “commercial names” consists of overlapping forms with different properties, which serve multiple purposes in their use. Such names may be unpredictable in nuance, connotation, and effect. Together they do form a category, of course, although the characteristics of the members of that category are not all well understood.

To begin to map this field, in this section we introduce some basic points related to commercial names, picking up details from the general account of naming above.

### 2.1 General Considerations regarding Commercial Names

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The linguistic resources which combine in creating commercial names draw selectively on linguistic resources available for other kinds of naming. Such resources range from letters and sounds, through ready-made words, into made-up words and phrases. While made-up words are not uncommon in general naming, as neologisms and nonce words, they are more often found where names are designed strategically, as commercial names often are. Where names consist of words already in general use, on the other hand, their naming function coexists with one or more meanings carried over from wider use, typically importing both conceptual meaning and affective associations. Even invented neologisms exhibit some degree of non-conceptual resonance, based on “sounds-like” similarity and sound symbolism. Beyond purely linguistic resources, additional semiotic resources are also often deployed in creating name “signs”, resulting in kinds of “get-up” produced by font, color, and other resources of visual design.

The verbal materials used in name creation appear to offer vast choice, reflecting the fact that names, as typically nouns in form, are members of an extendable “open” grammatical class. Marketers have responded to such choice in devising commercial names by evolving a now well-established taxonomy that includes: (i) description of what a company, product, or service is or does, either neutrally or as an act of self-promotion in the case of “laudatory names”; (ii) a statement of origin, often from a place or after a person who started or owns an undertaking, as is the case with “eponymous names”; and (iii) newly coined words, phrases, abbreviations, acronyms, or initials. Many commercial names modify these basic choices to

incorporate: (iv) words ornamented by inventive spellings or creative prefixes or suffixes; or (v) words combined into phrases that create poetic effects through alliteration, rhyme, or other visual or phonological devices. Regarding meaning, broadly understood, names of these varying types convey “atmospherics” in that (v) they are associative or suggestive, and (vi) they refer to an undertaking suggestively rather than literally (e.g., metaphorically or metonymically: by personifying a process, or by presenting an image to convey an aim, vision, or successful outcome).

The desirability and permissibility (or otherwise) of particular verbal features or effects in a commercial name will be viewed differently when assessed against different commercial purposes and relevant legal restrictions. Where names have been shortlisted by a naming or branding consultancy, the fit of each shortlisted candidate name is assessed analytically.<sup>3</sup> Invented names may be preferred over descriptive ones not only because the latter will only be registrable as trademarks in exceptional circumstances, but also because they offer a “blank canvas” on which new, commercially favorable meanings can be projected, then curated. Evocative, abstract names may be liked because they ease territorial expansion, market growth, change of ownership, or product diversification. They may invite transfer of associations from one product onto another, building a brand. Common words may be favored as easier to pronounce and remember and/or because their familiarity facilitates integration of the name into some preferred lifestyle conception.

While their origin may be calculated or spontaneous, proposed commercial names are always evaluated, if only impressionistically, by organizations putting them forward: for how pronounceable, memorable, formal or colloquial they are; and as regards whether unfortunate or obscene meanings may be perceived in them. Account is also taken of marketing considerations, including how well their associations align or conflict with present and desired market positioning. Choice of name is also influenced by legal constraints that vary according to commercial function, introduced below.

## 2.2 Company Names

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Company names are administered in ways evolved to serve a public interest in the effective administration, accountability, and public safety required of economic transactions. Such names also serve a consumer interest by reducing search costs where a trade name functions as an authenticating “signature” to guarantee consistency and quality. While there are no specific property rights in companies’ registered names, businesses do mostly adopt one, though the names of partnerships and sole traders are generally not registered. Despite all businesses being assigned an official reference number for reporting, taxation, and other purposes, company names are widely regarded as offering advantages beyond referential efficiency.

From a regulatory point of view, the core function of company names is to identify clearly a corporate bearer (and juridical owner): a body legally responsible for the business in question.<sup>4</sup> Even in this respect, company names are complicated. Companies may enter into commercial groups. They may serve as a shell for, or be the property of, other companies with different names. Within any particular commercial group, different names may be given to internal divisions in an organizational naming architecture that parallels (or may serve to obscure) its operational and financial structure. Companies can also license their name for third-party use. Even businesses which have registered names may not be publicly known by them, since companies are permitted to adopt alternative, more convenient, ‘business or trade names’ for everyday use, subject to restrictions.

Company names are regulated with regard to what a name should be like, when and how it must be displayed, and how and for what purposes it can be used.<sup>5</sup> In the UK, names cannot be registered for example if their use would result in commission of an offense or would be judged to be offensive. Other names are not directly prohibited but treated as sensitive,

requiring pre-use approval of the Secretary of State (following comment from the relevant government department or other specified body) to ensure the name does not suggest business pre-eminence, status, or function; this applies to names that include, for example, *charity*, *police*, or *dentistry*. In addition, individual symbols within a company's registered name may only be permitted under certain circumstances. Restricted signs and symbols are listed in regulations which, despite introducing minor differences, would result in names that should be treated as identical to a prior, established name. Such rules are designed to restrict "opportunistic registration", which consists of efforts to register a name that would mislead by either suggesting connections with another company or by being the same as or similar to a name in which a complainant already has goodwill.

### 2.3 Product and Service Names

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With product and service names, broadly the same verbal resources are available as for company names. However, selection among them reflects different purposes and constraints. Complications may arise for example where the boundary of a "product name" appears imprecise because it is juxtaposed or combined with a company name, labelling, and additional material such as a strapline or slogan in layouts designed to create an overall brand "look and feel". In such layouts, there is likely to be a combination of proper-name elements with descriptive material, each subject to a regime of regulation but not necessarily the same one. Regulations differ including as regards how, and how far, they govern names for products in different sectors, for example medicines<sup>6</sup> and foods.<sup>7</sup>

Names combined with related promotional material motivate consumers to buy, enhance the appeal of a product or service to its target audience, and build consumer loyalty by implying or evoking attributes, quality, and direct or indirect benefits.<sup>8</sup> Even when such marketing discourse is understood within a paradigm of "commercial speech", and guaranteed its own limited but definite standard of freedom, producer interests and creativity must be balanced against a public interest in receiving relevant and accurate information, if fair competition is to be achieved.<sup>9</sup> Regulatory emphasis is accordingly placed on excluding misleading description and implied false associations while allowing latitude of treatment.<sup>10</sup>

### 3. Legal "Term-of-Art" Names

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Although company and product names clearly present difficulties, they are easy to think of as extensions of established naming conventions adapted for commercial contexts of use. The signs discussed in this section, trademarks, also extend naming conventions. In doing so, however, they suspend or alter intuitive expectations about what names are and how they work. One difference between the kinds of name discussed above and the name-like signs considered below is that "trademark" is not a label for a customary practice of naming but a "term-of-art" category (i.e., a category created and used normatively, in a specialized manner in a designated field). The same might be said, though with less force, of company names and product names. Rules and restrictions imposed on company and product names appear pragmatic constraints seeking to mitigate acknowledged problems when names are used in commercial contexts. In contrast, modern trademarks are performatively created by law—both individually, through the process of registration in the case of registered trademarks, and collectively by being legally defined as a specialised kind of sign that confers exclusive rights under specified conditions.<sup>11</sup> Companies and products have names which are regulated; but without legal stipulation, there is no such thing as a trademark, only protection under other measures such as the common law action of passing off.

### 3.1 Trademarks

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A trademark is not a name for goods or services in the sense of their identity “as such” or “in themselves”. It serves instead as a “name-like” sign: a “badge of origin” denoting one aspect of commercial identity: the fact that goods carrying the registered mark are overseen by the same commercial source. The link between sign and goods must be inferred for each occasion of use; but the legal status and scope of such a link are established by the sign’s registration for exclusive use on stipulated classes of goods or services.

The history of indicating commercial ownership or “source” can be traced to antecedents in marks branded onto animals to demonstrate ownership, signatures on documents and artefacts to show authorship, and signs certifying authentic origin for industrially-produced goods. In modern commerce, however, a trademark functions less directly. Being the commercial source overseeing goods does imply some connection with production, supply, distribution, or sales; but the mark may not communicate much about factual origin. For example, one single developing-world factory may manufacture clothing that will carry a number of different trademarks. Or a mark may represent the business of the goods retailer rather than manufacturer, as with a supermarket’s own brand products. Or a mark may be acquired by a company which bears no direct responsibility for producing the marked goods.

Despite this seeming vagueness, trademarks serve useful purposes. Trademarks name through contrast, differentiating alternative sources of goods in ways that facilitate consumer choice. From a proprietor’s point of view, no goods other than theirs can be marketed as having the same origin. This protects investment and helps ensure quality against deceptive imitation. From the consumer’s point of view, the connection between product and badge of origin reduces search costs by making it easier to repeat a previous purchase or seek competitive alternatives. In a particular market, such differentiating signs enhance competition and incentivise quality. The principal aim of the mark is usually presented as being to prevent consumer confusion, but other functions have extended this basic conception and become important in relation to the notion of brands, as described below.

To ask whether trademarks are “names” in this context is not straightforward; but neither is it a redundant question. To anyone “naming” shops in a mall, writing product names on a shopping list, or searching for goods online, overlap between name, type, and mark is self-evident. Such perceived overlap strengthens a tendency to think of trademarks as enhanced versions of company or product names—an impression encouraged where commercial names are selected with a view to being also registered as trademarks. However, beyond the previously stated difference that a name refers to an entity directly, whereas a trademark obliquely indicates one important commercial attribute of that entity (i.e., its “source” or unique commercial origin), there are two further important ways in which a trademark differs from a prototypical name.

Firstly, the two differ as regards their possible form. To be registered, verbal trademarks often depend on visual characteristics such as their font, which may be an essential, registered feature separating them from plain use of the same word or phrase as merely a name (this makes “trademark” a narrower category). At the same time, other trademarks consist entirely of semiotic resources other than language such as color, sound, or shape (this makes “trademark” a broader category). Secondly, names and trademarks differ in their scope of use. Names identify their referent in all contexts except when employed figuratively. Use of a trademark, on the other hand, is only “use *as* a trademark” in specified circumstances. Other uses may denote or describe the source, and entities on which the mark functions as a badge, yet not amount to a claim to *be* that source. Each of these characteristics calls for further comment if the complex relationship between trademarks and names is to be clarified.

*Trademarks as “Name-like” Signs*

In UK and European trademark law, signs registrable as marks are assessed functionally. The category of registrable signs consists of any sign “which is capable of distinguishing the services of one undertaking from those of other undertakings”.<sup>12</sup> Whether a sign is capable of distinguishing in this way is assessed from the perspective of a hypothetical average consumer of the relevant type of goods; the said consumer is assumed to be reasonably attentive, reasonably well-informed, and circumspect.<sup>13</sup> To be found “distinctive” signs do not need to exhibit linguistic or artistic creativity (though they may). All that is essential is that they are sufficiently contrastive to enable the average consumer to distinguish goods or services in the requisite way.

Many signs are nevertheless not eligible for trademark registration. Some are ruled out on “absolute” grounds (e.g., on grounds of morality or public policy); most of these are deemed “devoid of distinctive character” based either on characteristics of the proposed sign itself or on the relation between the sign and goods (though note the important exception to this introduced by “acquired distinctiveness”, outlined below).<sup>14</sup> Such grounds are prior to further, “relative” grounds for refusal of registration, which prevent registration of signs where another, identical or similar sign has already been registered in relation to identical or similar goods. On related grounds, signs put forward for registration in relation to use on dissimilar goods may also be rejected if the previous mark has a reputation.<sup>15</sup>

Even though the threshold for registration is whether a sign is distinctive or not, in the sense described above, signs assessed for registration are often considered to exhibit a more complex spectrum of characteristics. Such variation was influentially formulated in the US case *Abercrombie & Fitch Co v. Hunting World Inc* (1976), which set out how proposed signs relate differently to the goods on which they would be used.<sup>16</sup> Considering only verbal signs here, as those closest to names, a sign will be most distinctive if it is “fanciful”, typically consisting of one or more made-up words (e.g., *Exxon*, *Xerox*). The closest analogy for such signs in naming at large is “opaque” names. Such fanciful signs are potentially distinctive of any class of goods, because no connection exists, at least initially, between the sign and any particular type of goods. Next on the distinctiveness spectrum are so-called “arbitrary” signs. These consist of existing words or phrases which have meanings but no connection between the sign’s usual meaning and the class of goods on which it would be used (e.g., *Apple* for computers). If, however, that same sign were proposed for use on fruit-flavoured drinks, *APPLE* would not be registrable. The next category, still potentially distinctive but more in need of explication, are “suggestive” signs. These imaginatively evoke the goods in question by prompting a mental leap in consumer imagination, typically through a figurative device or association. An example here would be *Netflix* for online film screening.

These three types of sign will all be registrable, subject to other considerations (e.g., precise details of their ornamentation or get-up). Despite the overall test for registration being binary (i.e., “capable of distinguishing, or not”), calibrating sign-types encourages a more transparent process of analysis in difficult cases where a sign is close to the registration borderline. An excellent example is the UK registered mark for nappies, *Baby Dry*, which was judged to be sufficiently distinctive on the basis of its verbal idiosyncrasy, despite its countervailing characteristic of being descriptive.<sup>17</sup>

Signs failing to meet the threshold for registration fall into one of two categories. First, a “descriptive” sign “consists of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin... or other characteristics of the goods or service”.<sup>18</sup> Description is a broad characteristic, but place names generally fall within this category, as do laudatory names (e.g., *DELUXE*, *SUPREME*, *ULTIMATE*) which praise the commercial undertaking or its goods. “Descriptive signs” are not registrable, subject to a major proviso described below, because they conflict with the interest of other undertakings who might also wish to use the same or a similar description for

their own goods. The second category of non-registrable signs are signs “common to the trade”. These include signs where the proposed name would be “generic” in the sense that it is not only descriptive but also the same as the wider, category-name for the type of goods on which the sign would be used (e.g., *Pencils* for pencils; *Pet food* for pet food).

The *Abercrombie* taxonomy of signs, which draws distinctions paralleled in UK and European law albeit in sometimes different wording, draws attention not only to a sign’s form and meaning but also to its relation to the goods on which it would be used. Such an approach might seem too static, given how far the use and meaning of signs alter according to context. Trademark law does however acknowledge the dynamic character of signs in use, in its approach to the stage at which a sign must show its distinctiveness. As described above, the sign categories outlined assess whether a sign is distinctive “inherently”, prior to use on the market (i.e., at its initial adoption, *ab initio*). An important exception arises, however, in that trademark law also recognizes that signs which were not distinctive when deemed or dubbed as names for registration purposes may nevertheless gain “acquired distinctiveness” through unregistered use on the market. Such signs develop a “secondary meaning” as the name of the source of goods in question. The analogy for this process in naming at large is that of transparent names, where a name has its origin in a descriptive meaning onto which an additional, “proper name” use has been superimposed, so that the same sign has two concurrent uses: a naming use and a descriptive use.

In trademark law, the outcome is this: a sign which includes an otherwise excluded descriptive or otherwise unregistrable aspect has become distinctive for trademark purposes because over time it has become *in fact* capable of distinguishing in the required sense. Conversely, if the meaning of a registered sign shifts in the opposite direction, it may be judged to be generic and its registration cancelled. This decision may be made if, in general use, a sign has become so exemplary of an area that it “owns” the product space to the extent that it has come to represent an entire category. In such circumstances, the sign is no longer understood to distinguish a commercial source but rather a type of goods (e.g., *aspirin* for pain relievers, and *linoleum* for floor coverings).

Clearly, commercial choice of names to register as trademarks requires balancing benefits against costs. With an obviously “distinctive” source-denotative sign, a proprietor may have confidence in gaining legal protection. By comparison, with a more associative, possibly borderline-descriptive sign, the same proprietor might scoop up into the chosen name aspects of evocation from general usage without losing the essential degree of distinctiveness. To the extent that trade-offs are possible, many effective trademark names draw successfully on the capability of “names” to combine distinctiveness with descriptiveness. If successfully registered either initially or after acquiring secondary meaning, the same sign can also be used both as a trademark and as a company or product name, allowing its different functions to converge. However, the availability of names with such multiple capabilities is finite, and greatly restricted by linguistic as well as legal considerations.<sup>19</sup>

#### *Trademark signs and different kinds of use*

The second way trademarks are “name-like” signs, rather than being (or not being) straightforward names, concerns “use on the market”. Such specialist use forms an essential condition of whether a sign is functioning as a trademark at all. This boundary can have a major impact on allegations of and defences available against infringement. Shifts between alternative ways of *using* a registered trademark which are simultaneously and continuously available may be less obvious than other aspects of how trademarks function, such as their acquired distinctiveness or loss of registration resulting from generic use; but they are also important. Legally, as stated above, not all uses *of* a mark constitute use *as* a trademark. Other uses, known broadly as “referential”, are concerned with a trademark as the commercial source



of particular goods without purporting to *be* that source. Such reference can be made without infringement. The precise boundary between authorized and impermissible uses of a mark is settled by the courts on the facts of each case, guided by legislation and established authorities on interpretation.

Stripped of detail, the broad distinctions among different possible situations of use we now offer are in some cases only approximate but they may serve as a guide. Use of a mark in commerce by the trademark proprietor to identify the source of goods in a class for which the mark is registered is prototypical, protected use. Use by others, in commerce, of the same or a similar mark in relation to identical or similar goods is an infringing use. Use in commerce of a trademark with an established reputation by a third party may constitute infringement even if there is no consumer confusion; in such circumstances, infringing use includes use of the same or a similar mark on goods irrespective of their class, if the use of the sign takes advantage of the earlier trademark's reputation or is detrimental to its distinctive character or repute, diluting its distinctiveness or tarnishing its image. A number of further, more nuanced uses are also distinguished. Use by spare-parts suppliers, third-party repairers, and re-sellers to "name" (i.e., refer to) goods associated with a registered mark is not infringing, if such use is necessary either to indicate a product's intended purpose or interoperability, or to advertise the re-sale of trademarked products. Use by an individual trader (formerly also a corporation) of his or her own name will not be infringing provided such use is in accordance with honest practices in industrial or commercial matters as defined by the courts, even if this results in some degree of confusion. Some other uses may also enjoy limited exceptions (e.g., use to provide information in connection with the sale of goods or services, or to create satire or parody, or in comparative advertising).

Crucially, these uses are all use in the course of trade. Beyond trade uses, which are the type of communication that trademark law seeks to regulate, use of trademarks by social actors other than their proprietor will normally be referential or "nominative" use, and not infringing. Even so, generic use of a registered mark in everyday discourse, while outside a commercial context, may nevertheless attract a "cease and desist" letter from a trademark owner. Such proprietary action seeks to mitigate risk to the mark's continuing registration. To many, such action conflicts with language users' presumption that they can name things informally however they wish. Restriction of such use also gives rise to (often exaggerated) notions of efforts being made by the trademark proprietor to gain private, outright ownership of language, a phenomenon sometimes described as the "proPERTIZATION" of language.

#### 4. Brand Names

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As discussed above, name-like signs such as trademarks can be difficult to conceptualize within an established framework of names and naming. The difficulties they present are compounded where nuance and complexity are further obscured by use of the final category-term to be discussed in this chapter. "Brand name" is not a legal term-of-art, like "trademark", and there is no agreed definition of the term. However, its widespread use elides differences outlined above among name types, name-like signs, and what names denote, replacing such distinctions with an imprecise but now highly influential category.

The distance between "brand" and a prototypical name is considerable. In fact, "brand" is scarcely a kind of name at all except when used elliptically for *brand name* (i.e., the name *for* a brand, with "brand" itself being what the name is the name *of*). "Brand", in effect, is a "meaning" aspect of a sign. From a trademark perspective, it is what is conveyed by the trademark (or combination of marks) when, through promotion and use, the mark has acquired significance over and above its core "badge of origin" function. In such circumstances, courts have recognized that the mark serves functions beyond acting as a badge of origin. Enhanced

by advertising, investment, and associations based on consumer experience, the trademark has also gained functions including those known as communication, investment, and advertisement).<sup>20</sup> These functions overlap with the recognized role of a brand; but that does not mean that a trademark equals a brand. Rather, the brand is a signposted destination: a repository of accumulated impressions and feelings prompted by the brand name and whatever goods are associated with it. These include experiences and stories that the name has become imbued with as well as name loyalty. Taken together, this repository amounts to a particular type and degree of reputation (e.g., for reliability, luxury, trend-setting, customer service, innovativeness, and so on).

This is such an extraordinary reversal in the evolution of the intangible conception of “brand” from commercial naming that it is worth recalling why a brand cannot be reduced to more concrete entities. Firstly, the brand cannot consist, or not only consist, of named goods because it may comprise different classes of goods unified only by their common brand (or applied branding). The brand can also be extended to include additional types of goods, whether similar or different, so long as those goods are given the brand “treatment”. Like trademarks, a brand can also be sold from one commercial undertaking to another, with or without any physical assets; such transferability between owners means that a brand, like a trademark, is not reducible to any one commercial undertaking responsible for production, supply, and/or quality of particular goods (a company, conglomerate, or founding entrepreneur). Successive legal owners may take different approaches to brand oversight and might alter or discontinue product lines without altering the brand, including products on which the brand reputation was founded. Like a trademark, a brand indicates commercial “source” or “origin” for the branded goods. But unlike a trademark, where the consumer’s putative relationship to the mark is understood to be rational, in that a guarantee of the quality of goods is sought by purchasing on the basis of origin, with a brand the consumer’s relationship is typically “non-rational” or “emotional”, prompted by the sign rather than attached to prior experience of the goods. The brand’s “identity” consists of meanings and associations; while these are linked to the trademark, they are subjective and go far beyond choice signalled by the mark’s function of distinguishing between alternative offerings.

Interesting consequences follow from seeing brands as separate from any particular undertaking, product, or “source” as a signifier of consistent origin. The question arises, for example, who creates the brand’s content. Some elements are curated by the proprietor, through investment, advertising, and strategic market positioning. Others are created or extended by the brand’s consumers, for example by their statements of loyalty and enthusiasm in online chat groups, personal stories, and (authentic or engineered) consumer campaigns.<sup>21</sup> The brand develops based on an overall pattern of how the brand name and associated marketing materials are used, and how goods associated with those materials are received and positioned. In addition, it is not only how the brand name is used or talked about that is important, but also *by whom*. This may be especially so now, given the consumer impact of social media endorsers and influencers. The brand is exposed to being damaged, however, by hostile or dismissive use of the name or by activity such as brand boycotts. Such brand depreciation happened, for example, following public criticism of the putative relationship between *Nike* and sweat shops. Brand cultivation and communication are in this way a matter of co-production between proprietor and consumer; and to this extent brand names, in the form of trademarks, are signs of dialogue rather than signs with fixed meaning. Their intangible and elusive referent, a cultural representation beyond company or product, has itself become also a product.

The main marketing developments through which the transformation of prototypical names into brands bearing brand names became possible should be mentioned. Perhaps the most important development conceptually is that brand content has become transferrable, extending brand value from one set of products to another by transferring the credibility and

reputation of the brand and applying its characteristics and customer loyalty to a new range of products. For example, the *Virgin* brand is now attached to airlines, books, and casinos. By contrast trademarks, understood more narrowly as badges of origin, are unable to transfer consumer loyalty in this way because consumer loyalty in relation to trademarks as traditionally conceived attaches to the product mediated by the trademark rather than to the meaning or resonance conveyed by the trademark itself. Extension and transfer of brand value have also increasingly separated the idea of a brand from tangible production, locating it instead in intangible characteristics. This has not only allowed extension of one brand to many different kinds of products, but also made possible the use of different forms of branding in relation to the same product, such that an identical product appeals to different segments of an overall market for different reasons.

Wider adoption of the concept of brand as intangible value vested in meanings and associations conveyed by one or a cluster of trademarks also depends for its modern flexibility on developments of trademark protection. These permit a combination of distinctiveness, referential indeterminacy of the trademark signified “source”, and evocative power. The resulting irreducibility of the trademark source to a particular company, line of products, or mode of production and distribution has encouraged perception of brands as autonomous from products of any particular type. This shift makes brand an intangible component of what is purchased over and above whatever it is attached to. In turn, an increasingly popular kind of brand name has facilitated this conception: brand names which are abstract and not closely anchored in anything that sounds like a product, organization, or sector. An example here is the name *Facebook* being superseded by *Meta*.

Finally, and most strikingly, a brand, insofar as it approximates to a name, appears almost the linguistic inverse of a prototypical name, at least on the model of names introduced at the beginning of this chapter as signs denoting a specific referent but having no meaning. Brand names, in contrast, seek to be as “meaningful” or evocative as possible even though what they refer to is intangible, without clearly delineated content or boundaries. When names create or identify brands, they function more like “symbols”. “Symbol”, of course, can be understood in different ways, ranging from special written characters, mathematical signs, or icons through to signs laden with rich but vague cultural meaning, as in the case of a culture’s myths, traditions, rituals, or fashions. Like symbols in this latter sense, brands convey incomplete and perplexing concepts: “identities for things” not fully understandable but inviting personal affiliation and holding out a possibility of distinguishing different consumer tastes, signalling social group membership, and expressing consumer aspirations. The brand names themselves of “name brands” offer gratification by triggering selective and sometimes expensive consumption in response to their evocative capability outlined above; and the success of brands is supported by their names in ways that go far beyond serving as badges of commercial origin or identifying a unique or category referent.<sup>22</sup>

## 5. Conclusions

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This chapter has suggested that the field of “names used in commerce” consists in fact of a number of different but intersecting areas and concerns, which fit only awkwardly into any single scholarly framework. This is in part because modern use of commercial names has absorbed and proliferated name-like signs which go beyond customary or intuitive naming principles. Some of these kinds of “name” must conform to legal term-of-art specifications, as regards technical properties, use, and effects; others are symbolic signs capable of being highly affective and influential on cultural values and attitudes. Many, we have suggested, are arguably both. Understanding how the new symbolic rhetoric of such “names” works, including its relation to earlier orders of names, calls for cross-disciplinary dialogue.

In legal discussion of commercial names, analysis is compartmentalized within already given legal categories provided by legislation or developed in case law. Legal proceedings in a given area decide only disputes as presented to them, so issues are addressed largely in isolation; and legal reasoning must stay within terms and concepts of the applicable law in order to avoid falling into error. If on the other hand discussion begins more broadly, exploring how names work in general, parsing meanings and exploring affinities or contrasts with names in other contexts, wider questions are raised but with little connection to commercial or legal implications. For their part, marketers view commercial naming primarily as a creative professional activity and seek to maximize competitive advantage; their professional motivation is to exploit rather than analyse elasticity in names and what they make possible. To better understand these different perspectives, and the relations between them, interdisciplinary efforts are needed to understand the complex functioning of names used in commerce. A first aim of such work must be to identify differences of perspective, translating between and reflecting on divergent terminology and its consequences. Beyond questions of disciplinary aims and methods will then follow a greater challenge: relating names used in commerce to their social functions and effects, not narrowly just *as* names but as verbal devices which both create and regulate social relations and identities.

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<sup>1</sup> For a collection of brief primary sources in philosophy addressing questions of meaning and reference in relation to "names", broadly understood, see Moore (1993). A recent analysis of "singular expressions" including proper names, definite descriptions, and indexicals or demonstratives, presenting clear exposition of the positions of Mill, Russell, and Kripke alluded to here, is Bochner (2021).

<sup>2</sup> A wide-ranging and authoritative anthology of approaches in the onomastic study of names is Hough (2016).

<sup>3</sup> For an insider account of the work of naming consultancies, see Taylor (2007).

<sup>4</sup> In UK law, the Companies Act 2006, Part 5, chapters 1-6, set out the law with regard to company names. Similar arrangements pertain in other jurisdictions.

<sup>5</sup> Updated and extended requirements regarding the form and use of commercial names in the UK can be found in the Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015 (SI2015/17).

<sup>6</sup> The MHRA Guidelines for the Naming of Medicinal Products and Braille Requirements for Name on Label Rules (2019) govern the naming of medicines (and cosmetics) in the UK. Many medicines have multiple names to facilitate communication with general and specialist audiences: a general, descriptive name; a scientific name; and a sales name. The last of these is often invented.

<sup>7</sup> UK statutory instrument No.1499, the Food Labelling Regulations 1996, sections 6-10, prescribes rules governing legally required names, customary names, and, in the absence of either, the use of sufficiently precise descriptions for foodstuffs.

<sup>8</sup> The resulting montage of names, labelling, slogans, taglines, titles, and straplines typically consists of juxtaposed single words, phrases, and short sections of text. Such composite material prompts a range of conceptual and affective responses and can serve functions ranging from conventional advertising through product placement to sponsor referencing. "Naming" elements in the mix of commercial strategies are protected legally in different ways and potentially to different extents. For discussion in relation to copyright and trademarks, see Durant and Davis (2012).

<sup>9</sup> For discussion of the place of "commercial speech" in an overall framework of freedom of expression, see Barendt (2005).

<sup>10</sup> The EU's overall framework governing misleading advertising is the Misleading and Comparative Advertising Directive (2006/114/EC). As regards comparative advertising, an area considered a legitimate means of informing consumers in permitted circumstances rather than misleading them, but of concern because of the use of competitor names or trademarks, Directive 2006/114/EC updates the Comparative Advertising Directive (97/55/EC); the 2006 Directive is given effect in UK law by the Business Protection from Misleading Marketing Regulations 2008 (SI No. 1276). Art 3a of the 2006 Directive is closely followed in the UK Regulations, and lays down the main conditions for use of competitor names and marks. These include: that use should not create confusion between the advertiser's own trademarks, trade names, or other distinguishing marks and those of a competitor; that it should not discredit or denigrate a competitor's names or marks; and that it should not take unfair advantage of their reputation.

<sup>11</sup> Trademark protection is determined by a combination of national, regional and international legislation. Derived from the WTO (the World Trade Organization), the TRIPS Agreement on Trade-Related Aspects of Intellectual Property Rights (1994) sets out standards of minimum protection to be

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implemented in national or regional trademark protection, and incorporates provisions from the Paris Convention for the Protection of Industrial Property, 1883 (as amended 1979). In the EU (European Union), trademark law is governed by Directive 2015/2436, which approximates the laws of Member States. In the United States, trademark law is governed by a combination of the federal Lanham (Trademark) Act enacted in 1946, codified at 15 U.S.C. 1051 et seq. (15 U.S.C. ch. 22), along with laws passed by individual states. In this chapter examples are drawn from UK, European and US law. For detailed exposition, see Aplin and Davis (2022); Bently et al (2018).

<sup>12</sup> EU Trademark Directive 2015/2436, art 3 states that, “A trade mark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colours [sic], the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of: (a) distinguishing the goods or services of one undertaking from those of other undertakings; (b) being represented on the register in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.”

<sup>13</sup> On challenges associated with the legal concept of the “average consumer” as the basis for judging a sign’s distinctiveness, and hence its capacity to act as a badge of origin in relation to goods and services against which it is registered, see Davis (2015, 2005).

<sup>14</sup> “Absolute” grounds for refusal of registration are stated in EU Trademark Directive, 2015/2436, art. 4.

<sup>15</sup> “Relative” grounds for refusal of registration are stated in EU Trademark Directive 2015/2436, art. 5. Art 5(3)(a) protects trademarks with a reputation against injury from third parties.

<sup>16</sup> *Abercrombie & Fitch Co v. Hunting World Inc.*, 537 F.2d 4, 9–11 (2nd Cir. 1976).

<sup>17</sup> *The Proctor & Gamble Co v Office for Harmonisation in the Internal Market (OHIM)*. (C-383/99 P), EU:C:2001:461; [2001] ECR I-6251.

<sup>18</sup> EU Trademark Directive 2015/2436, art 4(c).

<sup>19</sup> US scholars Barton Beebe and Jeanne Fromer (2018) have presented detailed empirical evidence suggesting that a serious shortage of prospective trademarks is likely in future as regards suitable verbal signs.

<sup>20</sup> Several now recognized functions of a trademark extend beyond serving as a badge of origin; these include what are called communication, investment, and advertising functions. Damage to those functions, if the public associates a later sign with an earlier registered mark, is protected against infringement. “Dilution” results from blurring of a mark’s distinctiveness, such that it no longer creates the exclusive association for which it is registered and used in relation to particular goods. “Tarnishment” results from the goods on which an infringing sign is used creating unfavorable associations which lessen the protected mark’s attractiveness. “Free-riding” typically occurs where an infringing mark or sign takes unfair advantage of the distinctive character or repute of a registered trademark, exploiting that reputation in order to free-ride on the protected mark’s coat-tails. See Aplin and Davis (2022); Bently et al. (2018).

<sup>20</sup> An interdisciplinary collection of essays on connections, overlap, and differences between trademarks and brands is Bently, Davis, and Ginsburg (2008).

<sup>21</sup> Some trademark scholars, notably Jessica Litman, have influentially drawn attention to the active role of consumers, alongside producers who invest in their trade symbols, in creating the mystique and value of brands in modern commerce; see Litman (1999).