

Amazon's Quiet Overhaul of the Trademark System

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Abstract

Amazon's dominance as a platform is widely documented. But one aspect of that dominance has not received sufficient attention—the Amazon Brand Registry's sweeping influence on firm behavior, particularly in relation to the formal trademark system. Amazon's Brand Registry serves as a shadow trademark system that dramatically affects businesses' incentives to seek legal registration of their marks. The result has been a dramatic increase in the number of applications to register, which has swamped the U.S. Patent and Trademark Office and created delays for all applicants, even those that would have previously registered their marks. And the increased significance of registration has created an opportunity for trademark extortion by parties that identify unregistered marks that are in use by others on the Amazon platform.

Amazon's policies also create incentives for businesses to adopt different kinds of marks. Specifically, they are more likely to claim descriptive or generic terms, usually in stylized form or with accompanying images, and to game the scope limitations that would ordinarily attend registration of those marks. And the policies have given rise to the phenomenon of “nonsense marks”—strings of letters and numbers that are not recognizable as words or symbols. At the same time, Amazon has consolidated its own branding practices, focusing on a few core brands and expanding its use of those marks across a wide range of products. In combination, Amazon's business model and Brand Registry have overhauled the American trademark system, and they have done so with very little public recognition of the consequences of Amazon's business approach.

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

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Introduction

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

The Brand Registry is, first and foremost, a private dispute resolution system that allows mark owners to object to uses of their marks on Amazon without needing to invoke formal legal process.⁶ What makes Amazon's system different than other private dispute resolution systems is the extent to which it influences parties' behavior within the legal system itself.⁷ The Brand Registry not only gives parties a cheaper and more efficient way to resolve disputes that otherwise would need to be resolved in the judicial process, but it also creates incentives for parties to use the trademark system differently than they otherwise would and in ways that were not anticipated when that system was designed.

Most directly, the Brand Registry has changed the incentives to register trademarks. The American trademark system is use-based: trademark rights arise out of use, not registration, and registration in the U.S. Patent and Trademark Office (PTO) simply records those rights and provides certain enforcement benefits.⁸ Most significantly, registration usually entails broader geographic scope of rights, entitles the registrant to customs enforcement, and enables registrants to more easily extend their rights internationally.⁹ But because unregistered marks have long been

¹ *E.g.*, Rebecca Haw Allensworth, *Antitrust's High-Tech Exceptionalism*, 130 YALE L.J. F. 588, 603-04 (2021); Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 985 (2019) [hereinafter Khan, *Separation of Platforms and Commerce*]; John B. Kirkwood, *Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy*, 69 U. MIAMI L. REV. 1, 4 (2014); Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 712-17 (2017) [hereinafter Khan, *Amazon's Antitrust Paradox*].

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

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

⁴ *See, e.g.*, sources cited *supra* note 1.

⁵ By "shadow trademark system," we mean a system existing outside the realm of the traditional system established by law, as with shadow banking. Patrick M. Corrigan, *Shining a Light on Shadow Banks*, 49 J. CORP. L. 1 (2023); Note, *Danger Lurking in the Shadows: Why Regulators Lack the Authority to Effectively Fight Contagion in the Shadow Banking System*, 127 HARV. L. REV. 729 (2013). We do not mean to use the term to suggest an ominousness as in "valley of the shadow of death" or "shadow of one's former self."

⁶ *Infra* section II.B.

⁷ *Infra* section IV.A.2.

⁸ *Infra* section I.B.

⁹ *Infra* section I.B.

enforceable under federal law on largely the same terms as registered marks,¹⁰ unregistered rights have long been perfectly adequate for the many smaller businesses whose sales were regional in nature and did not expect international expansion. Indeed, the availability of those unregistered rights has long been seen as a benefit of the American system for small and medium-sized businesses.¹¹

Amazon's setup has shifted that calculus because parties can participate in the Brand Registry to do business in the United States only if their mark is federally registered (and, as of very recently, also if their application to register is pending).¹² Given Amazon's dominance as an online shopping platform, small and medium-sized businesses feel compelled to be on the platform, and participation in the Brand Registry has real value, both in terms of ease of enforcement and more favorable treatment in Amazon's search rankings.¹³ Businesses therefore have strong incentive to register marks when they previously would have relied on unregistered rights.¹⁴ Amazon even sweetens the deal by making relatively low-cost legal services available to parties who take advantage of the Amazon Intellectual Property Accelerator, through which parties can contract directly with participating law firms that have agreed to Amazon's fixed-rate pricing.¹⁵

The result has been a dramatic increase in the number of applications to register, which has swamped the PTO and created delays for all applicants, even those that would have previously registered their marks.¹⁶ Our data show that annual PTO applications estimated to originate with small businesses have approximately doubled since Amazon's Brand Registry began, from about 100,000 to 200,000, increasing the proportion of filings from these entities from about 30% to about 40% annually.¹⁷ In response to the delays that Amazon's policies helped create, Amazon has recently started qualifying parties for the Brand Registry based only on a pending application¹⁸—a move that enables parties to privately enforce marks that might ultimately be rejected by the PTO and is likely to create yet further PTO delays by increasing applications even more.

The increased significance of registration has created an opportunity for trademark extortionists who identify unregistered marks that are in use on the Amazon platform.¹⁹ Like old-fashioned cybersquatters, these pirates apply to register others' marks in their own names and then seek to extort the true owners of the marks by threatening exclusion from Amazon's platform. The fraudulent nature of those applications is hard for the PTO to detect on the face of the application, which is typically accompanied by a specimen that consists of a screenshot of the true owner's product but purports to depict the applicant's "use" of the mark in commerce. That opportunity for extortion is especially valuable when parties can qualify for the

¹⁰ *Infra* section I.C.

¹¹ Jeanne C. Fromer & Mark P. McKenna, *Claiming Design*, 167 U. PA. L. REV. 123 (2018) (describing the benefits of unregistered rights); *infra* section I.B.

¹² *Infra* section II.B.

¹³ *Infra* section II.B.

¹⁴ *Infra* section III.A.

¹⁵ *Infra* section II.B.

¹⁶ *Infra* section III.A.

¹⁷ *Infra* section III.A.

¹⁸ *Infra* section II.B.

¹⁹ *Infra* section III.B.

Brand Registry with only a pending application, because the true owners would at least have a chance to oppose registration if they were aware of the fraudulent applications.²⁰

Not only does the Brand Registry increase incentives to register marks for which the owners would previously have relied on unregistered rights, but it also creates incentives for businesses to adopt different kinds of marks. Descriptive terms (like NATIONAL CAR RENTAL for nationwide car rental services) and generic terms (such as APPLE for apples) are particularly more valuable.²¹ Descriptive words are normally not protectable or registrable without evidence that consumers actually associate the term with a single source (what trademark law calls “secondary meaning”), and that additional proof requirement is supposed to be a deterrent to claiming descriptive terms.²² Generic terms are categorically excluded even if they have secondary meaning.²³ There has always been some incentive to claim those terms as trademarks despite the legal rules, because control over descriptive and generic terms can provide meaningful competitive benefits.²⁴ But with Amazon, there is an overwhelming incentive to control these terms because consumers search—often using descriptive or generic terms—to buy on Amazon.

The structure of the Brand Registry also enables parties to game the trademark registration system and effectively get the full benefits of exclusive rights in descriptive and maybe even generic terms.²⁵ Of particular relevance, parties can avoid descriptiveness and genericness rejections in the PTO by applying to register those terms in stylized format (such as a particular font) or with an accompanying image, even disclaiming rights in the descriptive or generic word(s). In those cases, trademark law supposedly restricts the scope of rights accorded to the registered mark, such that the rights are limited by the stylization or accompanying image.²⁶ But Amazon only matches text in its Brand Registry; it does not rely on or attempt to match stylization or accompanying images.²⁷ That means a highly descriptive, and maybe even generic, term might be deemed registrable in the PTO because of its stylization, but once the registered mark is part of Amazon’s Brand Registry, it can effectively be enforced within Amazon as if it were a registration of the unprotectable word mark itself. This is not just a hypothetical concern. Some businesses have been applying to register descriptive and generic terms, likely for the purpose of

²⁰ All applications are published for opposition by third parties before the applied-for mark can be registered, so if Amazon’s policy required registration, it would include only registered marks the registration of which could have been opposed by the true owners. *See* 15 U.S.C. §§ 1062-1063.

²¹ *Infra* section III.C.

²² *Infra* section II.A.

²³ *Infra* section II.A.

²⁴ Christopher Buccafusco, Jonathan Masur & Mark P. McKenna, *Competition and Congestion in Trademark Law*, 102 TEX. L. REV. (forthcoming 2024); Jeanne C. Fromer, *Against Secondary Meaning*, 98 NOTRE DAME L. REV. 211 (2022).

²⁵ *Infra* section III.C.

²⁶ Barton Beebe & Jeanne C. Fromer, *Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion*, 131 HARV. L. REV. 945, 984-85 & 985 n.162 (2018). There are, of course, good reasons to doubt that trademark law effectively enforces that scope, but at least the scope restrictions are supposed to follow. Mark A. Lemley & Mark P. McKenna, *Scope*, 57 WM. & MARY L. REV. 2197 (2016).

²⁷ *Infra* sections II.B, III.C.

monopolizing Amazon search and perhaps preventing others from using those terms.²⁸ For example, the German unicorn SellerX, which buys up smaller Amazon businesses, has sought to register marks for electronics parts using the parts' generic identifiers, such as IRF520.²⁹ That gaming disrupts the balance that the formal legal system tries to strike between, on the one hand, recognition of the source-identifying capacity of design features, and on the other hand, the need for competitive access to descriptive and generic terms, ignoring the reasons why those marks get any protection at all.³⁰

The Brand Registry also creates greater incentive to claim so-called nonsense marks—strings of letters or numbers that are not comprehensible as words or potentially source-indicating, such as ELXXROONM, SUJIOWJNP, XUFFBV, and LXCJZY, all marks parties have recently applied to register in the PTO.³¹ Indeed, the PTO data suggest a tremendous increase in filings for nonsense marks in the past few years, from almost none to over 20,000 applications annually (0.5% of annual filings to approximately 4.5%).³²

Nonsense marks are currently easy to register as trademarks because they appear not to provide any information about the goods or services with which they are used, making them inherently distinctive and thus protectable.³³ But those “marks” pose significant conceptual problems for trademark law, which presumes that parties are claiming terms that will have some meaning to consumers.³⁴ Even coined terms like KODAK are presumed to be understandable as words, if only as words in relation to the particular goods or services with which they are used. Marks that are not understandable or pronounceable flout the basic premise of distinctiveness.

Nonsense marks pose equally difficult problems in determining whether a sign is being used as a trademark. That determination is typically contextual: the PTO generally focuses on whether a particular sign functions as a mark as it is shown in a particular specimen of use.³⁵ For that reason, courts and the PTO have focused primarily on the location of a claimed mark—compare a polo player stitched onto the breast pocket of a Ralph Lauren polo shirt with a sentence like “I love you” splayed across a t-shirt³⁶—and not the intrinsic nature of that claimed mark.³⁷ Nonsense marks probably do not function as marks, but not because of the location of their use or other context. The reason is that incomprehensible strings of letters or numbers are not likely to be understood by consumers as carrying any meaning, let alone source-related meaning. Even the likelihood-of-confusion analysis, used to evaluate trademark infringement, is complicated with nonsense marks: trademark law does not have a good way to assess similarity when one of the things being compared is

²⁸ *Infra* section III.C.

²⁹ *Infra* section III.C.

³⁰ *Infra* section I.A.

³¹ *Infra* section III.D.

³² *Infra* section III.D.

³³ *Infra* sections I.A, III.D.

³⁴ *Infra* section I.A.

³⁵ *Infra* section III.C.

³⁶ *Infra* section I.B.

³⁷ Mark A. Lemley & Mark P. McKenna, *Trademark Spaces and Trademark Law's Secret Step Zero*, 75 STAN. L. REV. 1 (2023).

not comprehensible as a word or capable of being regarded as visual matter. Similarity is usually assessed in terms of sight, sound, and meaning, and only sight is even possibly relevant for nonsense marks.³⁸

There was never previously much incentive to use nonsense marks because a claimed mark has to actually work as a mark. If the name you choose is not pronounceable or memorable, then it does not much matter that you can protect it or even register it; it is not going to provide real commercial benefits because consumers are not likely to attach any meaning to the mark. But being in Amazon's Brand Registry does not just help a business enforce its mark—it gives the business preference in Amazon's algorithm for displaying search results.³⁹ Compared to other online contexts, Amazon's business model de-emphasizes memorable branding by third-party sellers because many Amazon shoppers search by product type or rely more heavily on consumer reviews than they would in other shopping contexts.⁴⁰ When search and purchase are not necessarily done by people who need to remember a brand name, businesses just need something to make the algorithm prefer them. Nonsense will do.⁴¹

Critics of excessive branding might rejoice about that de-centering and potential democratization of the online marketplace. But there is irony here: Amazon's de-centering of third-party branding likely has the ultimate effect of amplifying Amazon's own power by making its search function and its algorithm even more important in finding products. And it certainly enhances the value of Amazon's own branding strategies, as reflected in the massive expansion of products sold under the Amazon Basics and Amazon Essentials brands.⁴² Amazon controls the platform and can preference its own products in search results based on product descriptor keywords, making its house brand more important than product line brands. To take just one example, a search for "Hanes tshirt" returns an Amazon Essentials t-shirt as the first result, followed by several Hanes results.⁴³

In all of these ways, Amazon's business model and Brand Registry have overhauled central aspects of the trademark system in ways that are very troublesome. They have increased incentives for registration generally and to register different types of marks, putting pressure on several substantive validity doctrines and forcing the PTO to deal with a huge influx of applications that examiners cannot manage in a timely way. We present evidence of these increased incentives playing out and having a major impact on the trademark system. Moreover, this legal overhaul has happened with very little public recognition of the consequences of Amazon's business approach.⁴⁴

³⁸ *Infra* section III.D.

³⁹ *Infra* section II.B.

⁴⁰ *Infra* section III.D.

⁴¹ *Infra* sections I.A, III.D.

⁴² *Infra* section III.E.

⁴³ *Infra* section III.E.

⁴⁴ Even when there has been any recognition of the consequences, it has generally been of a single aspect, typically the phenomenon of nonsense marks, rather than a comprehensive sense of Amazon's impact on the trademark system. See John Herrman, *All Your Favorite Brands, from BSTOEM to ZGGCD*, N.Y. TIMES, Feb. 11, 2020, <https://www.nytimes.com/2020/02/11/style/amazon-trademark-copyright.html> (highlighting the nonsense marks on Amazon); Note, *Fanciful Failures: Keeping Nonsense*

We do not claim that Amazon specifically intended to affect the trademark system in any of the ways we describe, or even that Amazon has fully understood the extent of its impact. It seems very likely that Amazon adopted policies that it thought sensible for its business success, and that those policies have had unintended (but not necessarily unforeseeable) consequences for the U.S. trademark system. It also seems likely that the Brand Registry was, at least in part, intended to address actual societal concerns, such as counterfeit goods and products liability, while not incidentally avoiding regulation like Congress's proposed SHOP SAFE Act.⁴⁵ Our goal here is to describe the substantial effect Amazon's deliberately-adopted practices are having on the trademark system and to consider the plausibility and desirability of responses by the PTO, by Amazon, or by other actors.

Amazon's business model and Brand Registry raise profound questions for trademark law, and for law more generally. There have been powerful players before, and other situations in which private dispute resolution procedures have meaningfully affected parties' behavior. But Amazon's effect on the legal system is truly unprecedented. One set of questions is institutional and structural. What does (and should) it mean that one private party can so significantly affect a legal system? Do we want the legal system to have to continually adapt to Amazon's rules? If not, how can the law disable Amazon from having such a profound impact?

Another set of questions focuses more specifically on the overall effects of Amazon's policies on competition, and how those effects should relate to trademark law's normative commitments. As we describe, Amazon's model and its policies likely increase its own power vis-à-vis third party brands and de-center branding more generally. Whether one sees that shift as good or bad depends on how one weighs the potential search simplification and price reduction for consumers and the ease of marketplace entry for third-party sellers against Amazon's power over third-party sellers, including the discrepancy in branding power between them. Likewise, whether a more general de-centering of branding is good or bad depends on whether the alternative search tools (particularly algorithms that focus on product information and consumer reviews) do a better job of conveying important information to consumers—and that question depends on how much one values different kinds of information provided by marks. The ultimate questions of whether and how we should respond to Amazon's effects on the trademark system depends on whether we want the trademark system to reify marks on the same assumptions that have informed development of that system, or whether instead the facts on the ground have rendered those assumptions extraneous.

Part I describes the trademark system's aim and design. Part II turns to Amazon's business model and Brand Registry. Part III builds on these two parts by investigating how Amazon's practices have provoked the businesses selling wares there to change how they think about registering marks and the marks they choose, plus the trademark extortionists that have arisen in response to this ecosystem. After unpacking the trademark and other legal harms provoked by Amazon's practices, Part IV discusses whether and how to address this overhaul of the trademark system within trademark law, other areas of law, or Amazon. It also addresses what Amazon's practices might mean for the future of trademark law and competition more broadly.

Marks off the Trademark Register, 134 HARV. L. REV. 1804 (2021) (thinking through how the trademark system should handle nonsense marks) [hereinafter *Fanciful Failures*].

⁴⁵ *Infra* section II.B.

I. The Conventional Trademark System

Scholars have long debated whose interests trademark law primarily serves. On one account, trademark law aims to protect businesses against illegitimate uses of their marks that would divert customers or at least cause consumer confusion about the relationship between multiple businesses using the same or a similar mark.⁴⁶ Other accounts, particularly in modern commentary, make consumer interests primary. Trademark law makes misleading uses of trademarks actionable so that consumers are not defrauded and can rely on marks to select goods from the sellers they wish to patronize.⁴⁷

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

[T]rademark law, by preventing others from copying a source-identifying mark, reduces the customer's costs of shopping and making purchasing decisions ... for it quickly and easily assures a potential customer that this item—the item with this mark—is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past. At the same time, the law helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product.⁴⁸

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

⁴⁶ A number of older Supreme Court cases are consistent with this view. *See, e.g., Canal Co. v. Clark*, 80 U.S. 311, 322–23 (1871) (“[I]n all cases where rights to the exclusive use of a trademark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another; and that it is only when this false representation is directly or indirectly made that the party who appeals to the court of equity can have relief. This is the doctrine of all the authorities.”).

⁴⁷ Here is a classic account from William Landes and Richard Posner:

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

WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 167 (6th ed. 2003) (footnote omitted).

⁴⁸ *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164–64 (1995) (citations and internal quotations marks omitted).

Given that focus on source indication, it is no surprise that modern doctrine defines trademark subject matter fundamentally in terms of capacity to indicate source. According to the Lanham Act, a trademark is “any word, name, symbol, or device, or any combination thereof” that is used “to identify and distinguish his or her goods ... from those manufactured or sold by others and to indicate the source of the goods.”⁴⁹ Because “human beings might use as a ‘symbol’ or ‘device’ almost anything at all that is capable of carrying meaning,” as the Supreme Court notes, trademark subject matter is broad and capacious, including colors, product packaging, and even the design of products, to the extent they identify source.⁵⁰

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

A. The Distinctiveness Requirement

Trademark law calls source designation “distinctiveness,” and it is the foundation of protectability.⁵¹ Protectability turns on distinctiveness for a cluster of related reasons. First, consumers are unlikely to be confused about the source of a product or service—the kind of confusion the Supreme Court has called trademark law’s “bête noir”⁵²—if they do not recognize a particular designation as source-indicating in the first place.⁵³ Relatedly, consumers can reduce their search costs—the costs of identifying goods or services with the characteristics they want—only if they know that the term or symbol associated with them is a source designator.⁵⁴ Moreover, from a business’s perspective, if consumers know that a term or symbol identifies the business as the source of goods or services, the business will be encouraged to invest in the consistent quality of its goods or services, an important goal of trademark law.⁵⁵ In addition to the benefits of recognizing distinctive marks, there is cost to granting trademark rights for marks that are not distinctive. The principal worry is that trademark rights in such a case would inefficiently prevent other businesses from using competitively useful terms or symbols.⁵⁶

The framework to assess distinctiveness and thus protectability in trademark law is set out most famously in *Abercrombie & Fitch Co. v. Hunting World, Inc.*, a 1976

⁴⁹ 15 U.S.C. § 1127; *see also* 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 3:1 (5th ed. 2017).

⁵⁰ *Qualitex*, 514 U.S. at 162 (finding color protectable with secondary meaning); *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 209-16 (2000) (finding product packaging capable of being inherently distinctive and product design protectable with secondary meaning). Sounds and scents have also been recognized as trademarks in some cases. *See, e.g.*, *In re Clarke*, 17 U.S.P.Q.2d 1238 (T.T.A.B. 1990) (ruling that the scent of yarn is protectable with secondary meaning).

⁵¹ *Fromer*, *supra* note 24. American trademark law requires use in commerce, which is discussed in the next section in the context of the trademark registration process.

⁵² *Jack Daniel’s Props., Inc. v. VIP Products, Inc.*, 599 U.S. 140, 147 (2023).

⁵³ Graeme B. Dinwoodie, *Reconceptualizing the Inherent Distinctiveness of Product Design Trade Dress*, 75 N.C. L. REV. 471, 483 (1997).

⁵⁴ Mark P. McKenna, *Teaching Trademark Theory Through the Lens of Distinctiveness*, 52 ST. LOUIS U. L.J. 843, 850 (2008).

⁵⁵ *Id.* at 851.

⁵⁶ William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 288 (1987).

Second Circuit decision authored by Judge Friendly,⁵⁷ and on which other courts—including the Supreme Court—rely.⁵⁸ *Abercrombie* identified five categories into which a claimed word mark might be classified—generic, descriptive, suggestive, arbitrary, and fanciful—and the classification determines protectability.⁵⁹ As explained by the court, a term is categorized based on the amount of information it supplies about the goods or services with which the term is being used.⁶⁰

As per *Abercrombie*, a generic term “refers, or has come to be understood as referring, to the genus of which the particular product is a species.”⁶¹ So, for example, the Second Circuit—employing references that might seem somewhat dated now—said that IVORY would be generic for products made from elephant tusks (now principally illegal to import into or sell in the United States⁶²) but not soap (a less iconic brand now than in the 1970s⁶³).⁶⁴ Generic terms are never protectable as trademarks, even if they accrue secondary meaning.⁶⁵ As courts routinely say, competitors ought to have the absolute right to call their goods or services by their category name; if they could not, they would be unable to compete effectively and consumers would ultimately be hurt by confusion and illegitimate restriction of competition.⁶⁶

Descriptive terms are presumptively unprotectable, but they can earn their way into trademark status. As the Second Circuit has explained, a descriptive term “describe[s] a product or its attributes”⁶⁷—these are terms like HOLIDAY INN for inns in which people stay while on holiday, ALL BRAN for all-bran cereal, and AMERICAN GIRL for American girl dolls.⁶⁸ To the Seventh Circuit, “[a] descriptive mark is not a complete description, ... but it picks out a product characteristic that figures prominently in the consumer’s decision whether to buy the product or service in question.”⁶⁹ Similar to generic terms, the fear with protecting descriptive marks is that competitors might want to use a term because it describes their product too, and

⁵⁷ 537 F.2d 4, 7, 9-11 (2d Cir. 1976).

⁵⁸ *Wal-Mart*, 529 U.S. at 210-12 (citing *Abercrombie*, 537 F.2d at 10-11); *Qualitex*, 514 U.S. at 162-63 (citing *Abercrombie*, 537 F.2d at 9-10).

⁵⁹ *Abercrombie*, 537 F.2d at 9.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See Sofia G. de la Rocha, Note, *Tusk Tusk: A Comparative Analysis into the Effects of Ivory Trade Regulation and the International Art Market*, 49 CAL. W. INT’L L.J. 425, 432-40 (2019) (surveying the state of U.S. law on ivory trade).

⁶³ See Judy Kirpich, *Ivory Soap Dope: A Brand Evolution*, GRAFIK, <https://grafik.agency/insight/ivory-soap-dope> Jane L. Levere, *Ivory Soap Refreshes Its Ads and Its Look, but Is Resolutely Simple*, N.Y. TIMES (Nov. 7, 2011), <https://www.ny-times.com/2011/11/08/business/media/ivory-soap-refreshes-its-ads-and-its-look.html>.

⁶⁴ *Abercrombie*, 537 F.2d at 9 n.6.

⁶⁵ *Id.* at 9.

⁶⁶ *Id.*

⁶⁷ *TCPIP Holding Co. v. Haar Commc'ns Inc.*, 244 F.3d 88, 93 (2d Cir. 2001); accord 2 MCCARTHY, *supra* note 49, at § 11:16 (discussing what makes a mark descriptive, including to whom it must be descriptive and as to which aspects of a product, including ingredients, size, function, and provider).

⁶⁸ *Custom Vehicles, Inc. v. Forest River, Inc.*, 476 F.3d 481, 483 (7th Cir. 2007).

⁶⁹ *Id.*

those competitors would be unfairly disadvantaged if one business in the competitive landscape has exclusive rights in such a term.⁷⁰

Descriptive terms are not inherently distinctive because they give direct information about the nature or characteristics of the goods or services they are used with and therefore do not readily signify source.⁷¹ Trademark law nonetheless allows descriptive marks to be protected if they acquire secondary meaning.⁷² The implication of this rule is that descriptive terms cannot be protected immediately upon use; they only become trademarks when this secondary meaning has developed.⁷³ As Judge Friendly explained in *Abercrombie*, in allowing protection for descriptive marks that have acquired secondary meaning, trademark law “strikes the balance ... between the hardships to a competitor in hampering the use of an appropriate word and those to the owner who, having invested money and energy to endow a word with the good will adhering to his enterprise, would be deprived of the fruits of his efforts.”⁷⁴

However, trademark law recognizes that competitors might need to use descriptive terms not as marks but to describe their goods, and it declares those uses non-infringing fair uses. The descriptive fair use defense permits a business to use a competitor’s protected descriptive mark so long as this use is “in good faith only to describe the [business’s] goods or services,” rather than as a mark.⁷⁵ For example, if a mark is used to describe another’s goods or services rather than indicate source, such as if Delta Airlines described itself patriotically as “an American airline,” that might be permissible as a descriptive fair use of the AMERICAN AIRLINES mark. Although defendants can prevail in an infringement claim with this defense,⁷⁶ the defense is narrow because it does not allow the defendant to use the term as a mark—including a domain name or slogan—even if it describes the defendant’s goods or services.⁷⁷ Lisa Ramsey documents that the defense is murky, and “[r]elevant factors for determining whether a use is a trademark or descriptive use include the size, style, location, and prominence of the descriptive term in comparison to the defendant’s

⁷⁰ *Id.*

⁷¹ *TCPIP Holding Co.*, 244 F.3d at 93.

⁷² 15 U.S.C. §§ 1052(e)(1), (f); *Abercrombie*, 537 F.2d at 10; *Custom Vehicles*, 476 F.3d at 483; *TCPIP Holding Co.*, 244 F.3d at 94. Secondary meaning can be shown through direct or circumstantial evidence, and courts weigh this evidence using a multifactor test to assess whether there is a “mental association by a substantial segment of consumers and potential consumers ‘between the alleged mark and a single source of the product.’” *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1354 (9th Cir. 1985) (quoting 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 15:2, 15:11 (2d ed. 1984)).

⁷³ Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2029 (2005); Dinwoodie, *supra* note 53, at 487-88.

⁷⁴ *Abercrombie*, 537 F.2d at 10.

⁷⁵ 15 U.S.C. § 1115(b)(4) (2018); *see also* *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 124 (2004) (holding that a defendant raising such a defense need not demonstrate that consumers will not be confused by the use).

⁷⁶ Deborah R. Gerhardt, *A Masterclass in Trademark’s Descriptive Fair Use Defense*, 52 AKRON L. REV. 739 (2018).

⁷⁷ Lisa P. Ramsey, *Descriptive Trademarks and the First Amendment*, 70 TENN. L. REV. 1095, 1167-68 (2003) (citing cases); *see also* Stephen L. Carter, *The Trouble with Trademark*, 99 YALE L.J. 759, 771 (1990); Rebecca Tushnet, *Fixing Incontestability: The Next Frontier?*, 23 B.U. J. SCI. & TECH. L. 434, 436 (2017).

use of its own trademark or other descriptive matter in advertising or product packaging.”⁷⁸

All other marks—suggestive, arbitrary, and fanciful terms—are protectable without proof of secondary meaning as inherently distinctive.⁷⁹ As explained by the Fifth Circuit, a suggestive mark “suggests, rather than describes, some particular characteristic of the goods or services to which it applies and requires the consumer to exercise the imagination in order to draw a conclusion as to the nature of the goods and services.”⁸⁰ Courts have found to be suggestive SWAP for a watch with interchangeable parts,⁸¹ 5 HR ENERGY for an energy drink,⁸² and GLASS DOCTOR for glass installation and repair services.⁸³ Arbitrary marks are preexisting words that are used in a way that is conceptually unrelated to the category of goods or services at hand.⁸⁴ Examples of marks courts have classified as arbitrary are STARBUCKS for coffee,⁸⁵ VEUVÉ (meaning “widow” in French) for champagne,⁸⁶ and KIRBY for vacuum cleaners.⁸⁷ Fanciful marks, as per *Abercrombie*, are terms (typically words) “invented solely for their use as trademarks.”⁸⁸ Courts have deemed to be fanciful CARSONITE for highway markers⁸⁹ and LUMAR for fabric softener.⁹⁰ The law understands these three categories of terms to be easily protectable because, as the Second Circuit put it, they do not “depriv[e] others of a means of describing their products to the market.”⁹¹

B. Use as a Mark

Eligibility for trademark status depends not only on a sign’s capacity to identify source, but also on evidence that the claimant has actually used that sign in a source-designating way.⁹² “Use” in this sense has special meaning—it not only has a quantitative dimension (some, rather than none), but it connotes particular

⁷⁸ Ramsey, *supra* note 77, at 1168. She concludes that “[w]ith such a limited and uncertain fair use defense, competitors will likely self-censor their commercial expression rather than risk the cost and inconvenience of having to defend a trademark infringement action.” *Id.* at 1169. See also William McGeeveran, *The Trademark Fair Use Reform Act*, 90 B.U. L. REV. 2267 (2010). Rebecca Tushnet additionally worries that the defense “can be burdensome to prove and often requires at least extensive discovery.” Tushnet, *supra* note 77, at 436.

⁷⁹ *Abercrombie*, 537 F.2d at 11.

⁸⁰ *Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 791 (5th Cir. 1983).

⁸¹ *Swatch AG v. Beehive Wholesale, LLC*, 739 F.3d 150, 157-58 (4th Cir. 2014).

⁸² *Innovation Ventures, LLC v. N.V.E., Inc.*, 694 F.3d 723, 730 (6th Cir. 2012).

⁸³ *Synergistic Int’l, LLC v. Korman*, 470 F.3d 162, 172 (4th Cir. 2006).

⁸⁴ *Abercrombie*, 537 F.2d at 11.

⁸⁵ *Starbucks Corp. v. Wolfe’s Borough Coffee, Inc.*, 736 F.3d 198, 212 (2d Cir. 2013).

⁸⁶ *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1372 (Fed. Cir. 2005).

⁸⁷ *Scott Fetzer Co. v. House of Vacuums Inc.*, 381 F.3d 477, 485 (5th Cir. 2004).

⁸⁸ *Abercrombie*, 537 F.2d at 11 n.12.

⁸⁹ *Carson Mfg. Co. v. Carsonite Int’l Corp.*, 686 F.2d 665, 670 (9th Cir. 1981).

⁹⁰ *Luzier Inc. v. Marlyn Chem. Co.*, 442 F.2d 973, 974 (C.C.P.A. 1971).

⁹¹ *Landscape Forms, Inc. v. Columbia Cascade Co.*, 113 F.3d 373, 380 (2d Cir. 1997). Trademark scope also turns on the categorization of a claimed term: all else equal, terms classified as further along on the *Abercrombie* distinctiveness spectrum get broader protection. Fromer, *supra* note 24, at 227-29.

⁹² See Alexandra J. Roberts, *Trademark Failure to Function*, 104 IOWA L. REV. 1977, 1981 (2019); 1 MCCARTHY, *supra* note 49, at § 3:1.

functional characteristics, namely that the sign as used has the effect of identifying source.⁹³ As the Supreme Court recently said, a trademark “identifies a product’s source (this is a Nike) and distinguishes that source from others (not any other sneaker brand).”⁹⁴ Indeed, to the Court, “whatever else it may do, a trademark is not a trademark unless it” performs a source-identifying function by “tell[ing] the public who is responsible for a product.”⁹⁵

It is easy enough to state the principle that a sign must be used as a trademark; it is much harder in practice to say what that means. In theory, the ultimate issue is whether consumers regard the mark as used as identifying source, which suggests that trademark use is an empirical question.⁹⁶ But in fact, courts have long used proxies to make that judgment—so, for example, courts look at the prominence and location of a use; the consistency of presentation of the sign, stylization, and coloration; and the presence or absence of other identifying signs.⁹⁷ For example, a court recently found that Jaymo’s use of “Awesome” for food sauces, as shown in Figure 1, did not qualify as trademark use, despite the consistency of Jaymo’s use, because “Awesome blends into a smattering of text on the label style used on most of Jaymo’s sauces ... [P]lacement and emphasis on other terms coupled with the comparatively small, plain font of the term fail to adequately demonstrate it is being used as a source indicator on the bottle labels.”⁹⁸



Figure 1: Jaymo food sauces

The PTO evaluates whether a sign functions as a mark when considering its registrability, though in that context the rule operates in the negative, prohibiting registration when the claimed mark *fails* to function as a mark. The PTO’s Trademark Manual of Examining Procedure describes a purported mark’s failure to function primarily by reference to other functions performed by the claimed matter. A claimed mark might fail to function as a mark, for example, “because it is merely

⁹³ 1 MCCARTHY, *supra* note 49, at § 3:4.

⁹⁴ Jack Daniel’s Props., Inc. v. VIP Prods. LLC, 599 U.S. 140, 146 (2023).

⁹⁵ *Id.*

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

⁹⁷ 1 MCCARTHY, *supra* note 49, at § 3:4; *see also, e.g.*, In re Lululemon Athletica Canada Inc., 105 U.S.P.Q.2d 1684 (Trademark Tr. & App. Bd. 2013); In re Greater Anchorage, Inc., Serial No. 77561929, 2011 WL 810198, at *2 (Trademark Tr. & App. Bd. Feb. 14, 2011).

⁹⁸ Jaymo’s Sauces LLC v. Wendy’s Company, No. 1:19-cv-01026, 2021 WL 4712685, *4 (C.D. Ill. Oct. 8, 2021).

ornamentation,”⁹⁹ “informational matter,”¹⁰⁰ or a “model or grade designation.”¹⁰¹ Especially when evaluating whether a claimed mark is merely ornamentation, the Trademark Office puts significant weight on the location of the claimed mark, as shown in the specimen, presuming that signs in “trademark spaces” function as marks.¹⁰² To illustrate, the PTO rejected an application for the “Shorebilly” and design mark shown in Figure 2 when the applicant submitted a specimen showing use of that claimed mark in large format in the center of a t-shirt.¹⁰³



Figure 2: Shorebilly and design on t-shirt

But the applicant was able to register that same mark when it submitted a substitute specimen using the mark, as shown in Figure 3, “in the Polo and Izod fashion that the examiner had told him was illustrative of proper trademark use.”¹⁰⁴



Figure 3: Revised t-shirt design

⁹⁹ U.S. PATENT & TRADEMARK OFFICE, TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1202.03 (Nov. 2023) [hereinafter TMEP].

¹⁰⁰ *Id.* § 1202.04.

¹⁰¹ *Id.* § 1202.16(a).

¹⁰² TMEP, *supra* note 99, at § 1202.16(b)(i)(C) (“The display of a proposed mark in a prominent location on the goods themselves ... is a factor that may contribute to finding that it serves as a trademark.”). For a description of trademark spaces and their effect, see Lemley & McKenna, *supra* note 37.

¹⁰³ Teal Bay Alliances, LLC v. Southbound One, Inc., No. CIV.A. MJG-13-2180, 2015 WL 401251, at *3 (D. Md. Jan. 26, 2015).

¹⁰⁴ *Id.* at *3-*4.

C. Trademark Registration

Signs that satisfy trademark law's legal requirements, including distinctiveness and use as a mark, are eligible to be registered with the PTO.¹⁰⁵ But registration is not central to American trademark law, or at least historically it has not been.¹⁰⁶ Unlike most other countries in the world, trademark rights in the United States arise through use rather than registration,¹⁰⁷ and unregistered marks are enforceable under federal law on substantially the same terms as registered marks.¹⁰⁸

That is not to say that registration is irrelevant, because registration has several important legal benefits. For one thing, registration confers nationwide priority as of the date of application, subject to uses that predate the registrant's use or application to register.¹⁰⁹ Unregistered marks, by contrast, are protected only in the geographic areas in which they were in use prior to the allegedly infringing use.¹¹⁰ Registered marks are also presumed valid,¹¹¹ and those presumptions can become irrebuttable if the registration becomes incontestable.¹¹² Moreover, registered marks are subject to customs enforcement,¹¹³ and certain enhanced remedies are only available for registered marks.¹¹⁴ Under the Lanham Act, then, registration serves as a carrot rather than a stick.

Some of these legal incentives are more significant for certain types of businesses. There are meaningful incentives to register if you anticipate significant geographic expansion—nationwide constructive use effectively secures rights across the country and likely in advance of actual use in many places.¹¹⁵ Incontestability is particularly valuable for marks—like descriptive terms, geographic terms, surnames, and product design—that owe their existence to secondary meaning,¹¹⁶ because

¹⁰⁵ 15 U.S.C. § 1052.

¹⁰⁶ *E.g.*, In re Deister Concentrator Co., 289 F.2d 496, 501 (C.C.P.A. 1961). Mere registration of a trademark does not in itself confer any greater rights than existed at common law without registration. U.S. Jaycees v. S.F. Junior Chamber of Com., 354 F. Supp. 61 (N.D. Cal. 1972).

¹⁰⁷ 2 MCCARTHY, *supra* note 49, at § 16:18. As originally passed, the Lanham Act required use of a mark as a condition of application to register. The statute now allows parties to apply to register based on a bona fide intent to use, but intent-to-use applications do not mature into registration unless and until the applicant can prove that it has made use. 15 U.S.C. §§ 1051(b), (d).

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

¹⁰⁹ 15 U.S.C. §§ 1057(c), 1072, 1127.

¹¹⁰ *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90 (1918); see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 30 cmt. a (AM. L. INST. 1995).

¹¹¹ 15 U.S.C. §§ 1057(b), 1115(a).

¹¹² *Id.* § 1065.

¹¹³ To qualify for customs enforcement of a registered trademark, the mark owner must record the mark with the Customs Service. 19 C.F.R. Part 133.

¹¹⁴ 15 U.S.C. §§ 1117(b), 1127.

¹¹⁵ Deborah R. Gerhardt & Jon J. Lee, *A Tale of Four Decades: Lessons from USPTO Trademark Prosecution Data*, 112 TRADEMARK REP. 865, 873-74 (2022).

¹¹⁶ *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 205 (1985) (applying this principle for descriptive terms); *Tonka Corp. v. Tonka Phone Inc.*, 229 U.S.P.Q. 747 (D. Minn. 1985), *aff'd*, 805 F.2d 793 (8th Cir. 1986) (applying this principle to geographically-descriptive terms); 2 MCCARTHY, *supra* note 49, at § 13:36 (applying this principle to surnames).

incontestable marks cannot be challenged for lack of secondary meaning.¹¹⁷ Customs enforcement is valuable for parties that sell on a scale that is likely to attract widespread copying. Registration can also be extremely helpful for parties with international aspirations because various treaty provisions make it easier to secure foreign trademark rights when a party has registered in the United States.¹¹⁸

Beyond these legal encouragements, practical considerations also might counsel in favor of registration. Registered marks are more easily findable by others—particularly in the PTO’s publicly-available register—which helps avoid conflict, particularly when it prompts third parties to avoid using a similar mark.¹¹⁹ It also enables the PTO to refuse third-party trademark applications for confusingly-similar marks.¹²⁰ Citing these legal and practical benefits, the PTO itself has recently advocated that women- and minority-owned businesses, as well as small businesses, register their marks.¹²¹

At the same time, there are also advantages to unregistered rights. Most obviously, they are free—the rights attach naturally as soon as the party starts using the mark to indicate the source of its goods. That means that less-resourced parties can develop rights without having to spend time or money filing trademark applications.¹²² Registration favors large, sophisticated companies, which generally are familiar with the registration system and have the resources to seek registration

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

¹¹⁸ Section 44 of the Lanham Act, for example, allows a foreign trademark owner to file a U.S. trademark application and claim priority based on a foreign trademark registration that was filed within six months prior to the U.S. application. 15 U.S.C. § 1126. That treatment is available only to applicants whose country of origin is a party to a convention or treaty that provides reciprocal rights to U.S. nationals. *Id.* § 1126(b). U.S. nationals seeking registration in any country granting such reciprocity therefore benefit from the U.S. filing date.

¹¹⁹ Gerhardt & Lee, *supra* note 115, at 874-75.

¹²⁰ *Id.* The statute empowers the PTO to deny registration to any mark that is likely to cause confusion with any mark previously registered *or in use*, 15 U.S.C. § 1052(d), but the PTO proactively searches only registered marks. TMEP, *supra* note 99, at § 1207.01. Owners of marks previously in use must establish their priority in an opposition proceeding.

¹²¹ U.S. PAT. & TRADEMARK OFF., *Statement of Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office Kathi Vidal before the United States House of Representatives*, Apr. 27, 2023, <https://www.uspto.gov/about-us/news-updates/statement-under-secretary-commerce-intellectual-property-and-director-united>. Nonprofit organizations, such as Buy from a Black Woman, have also been promoting trademark registrations by these groups. Samantha Handler, *Black Women’s Business Network Helps Smash Trademark Hurdles*, BLOOMBERG L., Feb. 11, 2022, <https://news.bloomberglaw.com/ip-law/black-womens-business-network-helps-smash-trademark-hurdles>.

¹²² PTO trademark application filing fees range from \$250-\$750 per class of goods and services, with additional fees in the three figures for special circumstances per class. U.S. PAT. & TRADEMARK OFF., *USPTO Fee Schedule*, <https://www.uspto.gov/learning-and-resources/fees-and-payment/uspto-fee-schedule> (last visited Feb. 8, 2024). In a run-of-the-mill case, legal representation for trademark registration runs in the three figures on the low end but often to four figures or more. *Trademark Cost Guidebook*, COUNSEL FOR CREATORS, May 5, 2022, <https://counselforcreators.com/log/trademark-cost>.

for each new potential trademark.¹²³ Given the lack of expense associated with unregistered rights and the ability to enforce those rights under federal law on substantially the same terms, for many trademark owners, unregistered rights are perfectly adequate, and maybe even superior.¹²⁴ Even sophisticated parties might have reason to prefer unregistered rights for marks that are less likely to be durable branding elements over time. A party that goes to the expense of registering a mark has some incentive to stick with that mark over longer periods of time, whereas unregistered rights are better suited to marks that might be adapted or used in connection with different goods or services over time.¹²⁵

With this background on relevant trademark law, we now turn to the details of Amazon's Brand Registry.

II. Amazon's Business Model and Brand Registry

Since Amazon launched, it has not only grown what is perhaps the most vibrant online commerce platform, with 9.7 million third-party businesses selling goods on Amazon,¹²⁶ but it has also created a brand that is valued at over \$468 billion.¹²⁷ Section A provides background on Amazon's business model and evolution, and section B turns to Amazon's Brand Registry and how it fits in with Amazon's business model.

A. Amazon's Business Model and Evolution

Since Amazon was founded in 1995 as an online bookseller, it has evolved into a pervasive ecommerce platform and then some.¹²⁸ Indeed, a recent in-depth cultural study of Amazon describes it as the most ubiquitous company in history: "the 'everything' brand for 'everyone.'"¹²⁹ It is the biggest online retailer in the United

¹²³ Jessica M. Kiser, *To Bully or Not to Bully: Understanding the Role of Uncertainty in Trademark Enforcement Decisions*, 37 COLUM. J.L. & ARTS 211, 221–23 (2014); Gideon Parchomovsky & Alex Stein, *The Relational Contingency of Rights*, 98 VA. L. REV. 1313, 1350 (2012).

¹²⁴ Indeed, many (perhaps most) trademarks are not registered. Beebe & Fromer, *supra* note 26, at 961–62.

¹²⁵ Cf. Fromer & McKenna, *supra* note 11, at 171 (observing that early claims made to a design, such as is made in a registration system, "force businesses to think through their designs and how they intend to commercialize and market those designs," as well as "an incentive to articulate claims that correspond to their market intentions, which they might not otherwise have thought through as thoroughly at that stage").

¹²⁶ *Must-Know Amazon Seller Statistics*, GITNEX, <https://blog.gitnux.com/amazon-seller-statistics> (last visited Feb. 8, 2024).

¹²⁷ *Amazon's Global Brand Value from 2006 to 2023*, STATISTA, <https://www.statista.com/statistics/326086/amazon-brand-value> (last visited Feb. 8, 2024).

¹²⁸ Amazon now provides cloud services, a streaming service for movies and other programming, Ring doorbell services, Twitch videogame streaming services, the Whole Foods supermarket chain, and much more. See generally BRAD STONE, *AMAZON UNBOUND: JEFF BEZOS AND THE INVENTION OF A GLOBAL EMPIRE* (2022).

¹²⁹ EMILY WEST, *BUY NOW: HOW AMAZON BRANDED CONVENIENCE AND NORMALIZED MONOPOLY* 3, 14–15 (2022) (exploring "Amazon's market dominance and our increasing dependence on its convenient services in relation to the resulting costs—on product sellers, market diversity, labor, and the environment, and on our own power as consumers").

States, controlling an estimated half of online retail sales.¹³⁰ Not only is it omnipresent in the United States, but it also serves customers in about 200 countries.¹³¹

From the start, Amazon has had grand ambitions, as evidenced by early marketing materials drawing on its trademark¹³²: “Amazon.com’s name pays homage to the Amazon River. Just as the Amazon River is more than six times the size of the next largest river in the world, Amazon.com’s catalog is more than six times the size of the largest conventional bookstore.”¹³³ Even with these aspirations, founder Jeff Bezos never intended for Amazon to be merely the largest online bookstore. He began selling books only after considering twenty product categories, with the books as the entry point to, as communications scholar Emily West puts it, ultimately “build[ing] a mammoth ecommerce website.”¹³⁴ As Bezos himself stated, “we’re not trying to be a book company or trying to be a music company—we’re trying to be a customer company.”¹³⁵

Amazon’s business strategies have generally been in service of this overarching goal of attracting loyal customers and distributing to them, rather than just selling books. In particular, it has priced books and other products very low as loss leaders to attract customers (which has also led to accusations of predatory pricing).¹³⁶ In doing so, Amazon has demonstrated its willingness to delay profits to build up its customer base, all the while drawing consumers away from its competitors.¹³⁷ Indeed, Amazon became consistently profitable only in 2015.¹³⁸ More generally, especially in its early years, Amazon did not spend much on traditional advertising and marketing but instead deployed that money to improve the platform’s customer experience,

¹³⁰ *Id.* at 3, 197.

¹³¹ *Id.* at 197. Even as Amazon is available nearly globally, it has had to share .amazon top-level internet domain rights with South American countries where the Amazon River basin is located as a compromise to getting many of those domain rights. *Id.* at 171-72.

¹³² The company considered several other names, including Cadabra, Awake.com, Bookmall.com, Aard.com, and Relentless.com, the last of which still redirects to Amazon’s website. BRAD STONE, *THE EVERYTHING STORE: JEFF BEZOS AND THE AGE OF AMAZON* 31 (2013).

¹³³ WEST, *supra* note 129, at 172. Though those early ambitions were trained on books and Amazon has since expanded to sell just about everything, books are still Amazon’s largest product category (sixteen percent of items sold). *Id.* at 83. Moreover, Amazon is the largest retailer by far of physical books and ebooks in the United States. *Id.*

¹³⁴ *Id.* at 87.

¹³⁵ *Id.* at 6; *cf.* STONE, *supra* note 132, at 24 (referring to Jeff Bezos’s 1994 plans with David Shaw for an “everything store”).

¹³⁶ WEST, *supra* note 129, at 87-88; *cf.* Khan, *Amazon’s Antitrust Paradox*, *supra* note 1, at 753 (“The fact that Amazon has been willing to forego profits for growth undercuts a central premise of contemporary predatory pricing doctrine, which assumes that predation is irrational precisely because firms prioritize profits over growth. In this way, Amazon’s strategy has enabled it to use predatory pricing tactics without triggering the scrutiny of predatory pricing laws.”).

¹³⁷ WEST, *supra* note 129, at 35, 88.

¹³⁸ *Id.* at 35.

including its unprecedented fast, free shipping that ultimately became the central feature of its popular Prime membership service.¹³⁹

To broaden its product base and attract yet more customers, since 1999, Amazon has sold not just its own products but has also offered its platform for other retailers to sell their wares—there now being almost ten million third-party sellers there¹⁴⁰—thereby creating network effects to lure consumers, which in turn attracts more sellers, ad infinitum.¹⁴¹ Amazon’s offering of one-click ordering (and the resulting patent it obtained on it) typifies how the platform has sought to provide extreme convenience for consumers.¹⁴² Since the year of Amazon’s launch, it has also aimed to garner consumer trust by collecting and sharing consumer reviews of the products it sells, something competitors and experts at the time scoffed at as counterproductive, assuming consumers would at least sometimes leave bad reviews.¹⁴³ But Amazon seems to have won that bet—its reviews, the world’s largest collection, earned Amazon consumers’ trust, both fostering a reputation economy and underscoring Amazon’s market dominance.¹⁴⁴ Amazon also collects reams of data about consumer behavior to develop predictive models that it can use to continually adapt its platform and product offerings as a way to keep consumers using Amazon.¹⁴⁵

All of these strategies are reflected in the logo that Amazon redesigned in 2000.¹⁴⁶



The logo has an arrow going from the ‘a’ to ‘z’ in AMAZON, to suggest that all products from A-Z can be found and bought on the platform.¹⁴⁷ And the arrow also suggests that Amazon brings products from all locations and sellers to consumers’ homes.¹⁴⁸

Amazon’s business model has been a smashing success (for it, at least), and the company has achieved market dominance.¹⁴⁹ After Walmart, Amazon is the second

¹³⁹ *Id.* at 16, 58-59. Now that Amazon has achieved the dominance it has, it does engage in more traditional advertising. *Id.* at 16-17.

¹⁴⁰ *Supra* text accompanying note 126.

¹⁴¹ WEST, *supra* note 129, at 9, 34. Relatedly, Amazon began to extract higher margins from the third-party transactions done on its platform than from its own sales. *Id.* at 10.

¹⁴² *Id.* at 45-46.

¹⁴³ *Id.* at 91.

¹⁴⁴ *Id.* at 91-93.

¹⁴⁵ *Id.* at 12.

¹⁴⁶ *Id.* at 19-20.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 10.

largest retailer in the United States, with \$352.7 billion in sales in 2022.¹⁵⁰ And it is by far the largest online retailer in the United States, controlling about half of that market.¹⁵¹

Third-party sales have become a critical part of Amazon's business model. Indeed, the money Amazon makes from charging third parties to use its platform—such as listing fees—represents 23% of Amazon's revenues in 2022 (\$117.7 billion), second only to the 43% of Amazon's revenues generated in first-party sales that year (\$220 billion).¹⁵² Amazon is essential to these third-party sellers. As one seller pointed out, "You can't really be a high-volume seller online without being on Amazon."¹⁵³

As to the value of Amazon's brand, Amazon is at or near the top of the list of most-loved brands in the United States.¹⁵⁴ In fact, one recent poll done by Georgetown University found Amazon to be the number-two institution in which Americans have the greatest confidence, putting the platform behind only the military and ahead of all other parts of the U.S. government, universities, non-profit institutions, and other major businesses.¹⁵⁵ And Amazon is also one of the world's most market-capitalized companies.¹⁵⁶

B. The Brand Registry as Business Tool

As Amazon sought to advance its overall business model, it encountered concerns from the third-party sellers and consumers that it aimed to attract to and keep on its platform, as well as from the government. Third-party sellers—potential and actual—wanted Amazon to do more to prevent counterfeit versions of their goods from being on its platform.¹⁵⁷ Those sellers expressed unwillingness to sell their genuine goods on Amazon unless Amazon took further action to excise counterfeits.¹⁵⁸ Customers were similarly unhappy when they would purchase a

¹⁵⁰ STATISTA, *Worldwide Retail Sales of the Leading U.S. Retailers in 2022*, <https://www.statista.com/statistics/196002/worldwide-retail-sales-by-the-top-50-retailers> (last visited Feb. 8, 2024).

¹⁵¹ WEST, *supra* note 129, at 10. Even with Walmart ahead of Amazon in overall retail sales, analysts appreciate Amazon's advantages as the dominant online platform because it can be yet more efficient in distribution than Walmart given its digital edge. *Id.* at 48.

¹⁵² Tony Owusu, *Here's How Much Amazon Takes from Every Third-Party Sale*, THE STREET, Feb. 14, 2023, <https://www.thestreet.com/investing/heres-how-much-amazon-takes-from-every-third-party-sale>.

¹⁵³ Angus Loten & Adam Janofsky, *Sellers Need Amazon, but at What Cost?*, WALL ST. J., Jan. 14, 2015, <https://www.wsj.com/articles/sellers-need-amazon-but-at-what-cost-1421278220> (quoting Todd Bairstow).

¹⁵⁴ WEST, *supra* note 129, at 20.

¹⁵⁵ *Id.* at 20-21.

¹⁵⁶ *Id.* at 3, 35.

¹⁵⁷ Some of these sellers would also like to control which businesses sell their respective products and for how much, but Amazon does not offer them that power. Robyn Johnson, *How Amazon's New Brand Registry Helps Protect Your Brand*, SEARCH ENGINE J., June 16, 2017, <https://www.searchenginejournal.com/amazon-brand-registry-2/201570>.

¹⁵⁸ Amazon has adopted an anti-counterfeiting policy. AMAZON, *Amazon Anti-Counterfeiting Policy*,

knockoff when they were trying to buy the genuine item.¹⁵⁹ As complaints mounted, Congress held hearings on counterfeit goods being sold on online platforms like Amazon.¹⁶⁰ Several legislators introduced the SHOP SAFE Act, which would make online platforms “liable for infringement of a registered trademark by a third-party seller of goods that implicate health and safety unless the platform takes certain actions.”¹⁶¹

This anxiety on the part of sellers, consumers, and the government has threatened Amazon’s goals of market dominance.¹⁶² To neutralize these concerns, Amazon launched the first version of its Brand Registry in 2015.¹⁶³ Fairly limited, that program allowed businesses to better control their own listings and to contest listings on copyright grounds.¹⁶⁴ Yet this filing process was cumbersome and slow¹⁶⁵ and did little to address counterfeit goods, which are principally targeted through trademark claims, not copyright claims.¹⁶⁶

In 2017, Amazon launched the second version of its Brand Registry. In addition to providing enhanced branding capabilities for businesses’ listings, Amazon sought to make it easier for businesses to get listings of counterfeit goods removed.¹⁶⁷ In particular, businesses selling on Amazon in the United States could qualify for the Brand Registry so long as they have a trademark registered in the PTO on the Principal Register that they were using on their products or packaging.¹⁶⁸ The registry is available only for trademarks that contain alphanumeric characters (even if they also contain an image or the characters are stylized).¹⁶⁹ A qualifying business can register the word(s) in its PTO-registered trademark with Amazon as long as the word(s) identically match the spelling, spacing, and punctuation found in the U.S.

https://sellercentral.amazon.com/help/hub/reference/G201165970?ref=efph_G201165970_cont_ZUQ6GBBXQVHQKF2&locale=en-US (last visited Feb. 8, 2024).

¹⁵⁹ Brittney Myers, *Some Shoppers Are Fleeing Amazon Because of Counterfeit Goods*, ASCENT, Jan. 17, 2023, <https://www.fool.com/the-ascent/personal-finance/articles/some-shoppers-are-fleeing-amazon-because-of-counterfeit-goods>.

¹⁶⁰ *E.g.*, The SHOP SAFE Act: Stemming the Rising Tide of Unsafe Counterfeit Products Online: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet, 117 Cong. 25 (2021).

¹⁶¹ SHOP SAFE Act of 2021, S. 1843, 117th Cong. (2021); SHOP SAFE Act, H.R. 5374, 117th Cong. (2021). That legislation has not yet passed.

¹⁶² *Supra* section A.

¹⁶³ AJ Kelley, *A Seller’s Guide to Amazon Brand Registry*, VIRAL LAUNCH, Aug. 24, 2018, <https://blog.viral-launch.com/news-updates/amazon-news-updates/amazon-brand-registry-guide=>.

¹⁶⁴ Johnson, *supra* note 157; Kelley, *supra* note 163.

¹⁶⁵ Kelley, *supra* note 163.

¹⁶⁶ *E.g.*, PTO, *U.S. Customs and Border Protection Services for Trademark Owners*, <https://www.uspto.gov/trademarks/protect/customs-and-border-protection> (last visited Feb. 8, 2024).

¹⁶⁷ Kelley, *supra* note 163.

¹⁶⁸ AMAZON, *Brand Registry FAQ*, <https://brandservices.amazon.com/brandregistry/faq> (last visited Feb. 8, 2024); Kelley, *supra* note 163.

¹⁶⁹ Kelley, *supra* note 163.

trademark registration.¹⁷⁰ With the launch of the second version of the Brand Registry, Amazon put in place a 300-person customer service team dedicated to addressing reports of trademark (and copyright) infringement from Brand Registry members.¹⁷¹ It now promises round-the-clock service to address these reports, 24 hours a day, 7 days a week.¹⁷² Rather than taking days to address such seller claims, the team would resolve these claims within a few hours and without a court order.¹⁷³ The Brand Registry also made it easier for registered businesses to locate potential infringement claims by providing search tools—including reverse-image search technology—to locate other products using the same name or packaging as the registrant.¹⁷⁴ It also employs predictive protections to prevent improper listings from third parties in the first place.¹⁷⁵ Moreover, the Brand Registry has been attractive to third-party sellers because it offers them higher visibility in consumer search results on Amazon, brand analytic tools, and the ability to give one’s products to credible buyers for Amazon reviews.¹⁷⁶

In 2019, Amazon launched the Intellectual Property Accelerator, which is a curated network of intellectual property law firms providing trademark registration services at pre-negotiated rates.¹⁷⁷ Amazon explained that it “created [the] Accelerator specifically with small and medium businesses in mind,” so as to help them “more quickly obtain intellectual property ... rights and brand protection in Amazon’s stores.”¹⁷⁸ Businesses participating in the accelerator get charged only by the law firm they are using, not Amazon.¹⁷⁹

Businesses that use the accelerator program get “accelerated access to brand protection” on Amazon.¹⁸⁰ Rather than waiting for registration for Brand Registry

¹⁷⁰ *Id.*

¹⁷¹ *Id.* Amazon explains how it addresses claims of intellectual property infringement at AMAZON, *Intellectual Property Policy for Sellers*, <https://sellercentral.amazon.com/help/hub/reference/G201361070> (last visited Feb. 8, 2024), and of trademark infringement in more detail at AMAZON, *Intellectual Property Policy for Sellers—FAQ about Trademarks*, <https://sellercentral.amazon.com/help/hub/reference/GZUQ6GBBXQVHQKF2> (last visited Feb. 8, 2024) [hereinafter *Amazon Trademark FAQ*].

¹⁷² AMAZON, *Amazon Brand Registry*, <https://brandservices.amazon.com/brandregistry> (last visited Feb. 8, 2024). A business that is not a part of the Brand Registry can still report trademark infringement to Amazon, but it is not assured such a dedicated and quick response. *Id.*

¹⁷³ Kelley, *supra* note 163.

¹⁷⁴ Johnson, *supra* note 157.

¹⁷⁵ AMAZON, *supra* note 172.

¹⁷⁶ Kelley, *supra* note 163; Maria Navolykina, *How to Register a Brand on Amazon—A Succinct Guide on Enrollment*, SELLERLABS, Jan. 21, 2022, <https://www.sellerlabs.com/blog/getting-started-with-amazon-brand-registry>.

¹⁷⁷ Dharmesh Mehta, AMAZON, *Amazon Intellectual Property Accelerator*, Oct. 1, 2019, <https://www.aboutamazon.com/news/policy-news-views/amazon-intellectual-property-accelerator>.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

access to kick in, Amazon provides accelerated access as soon as a business has filed a trademark registration with the PTO,¹⁸¹ because as per Amazon, “the participating law firms have been thoroughly vetted” and “they will [thus] be strong candidates for registration.”¹⁸² Though the precise accelerated access that participating businesses get before PTO registration is not fully publicly available, Amazon has indicated that it includes “automated brand protections, which proactively block bad listings from Amazon’s stores, increased authority over product data in our store, and access to our Report a Violation tool, a powerful tool to search for and report bad listings that have made it past our automated protections.”¹⁸³

More recently in 2023, Amazon made all sellers (not just those using the accelerator program) eligible for its Brand Registry as soon as they have a pending application to register a trademark with the PTO.¹⁸⁴

Amazon boasts of the successes of the Brand Registry and the accelerator program in promoting participants and removing infringing listings.¹⁸⁵ For example, it touts over ten billion suspicious listings being taken down since 2017.¹⁸⁶ In 2021, there were more than 700,000 active marks enrolled in the Brand Registry worldwide, a 40% increase over the previous year.¹⁸⁷ In 2022, more than 16,000 trademarks were the subject of the accelerator program.¹⁸⁸

Consistent with these statistics, businesses and business writers tout how self-evidently advantageous it is that businesses selling on Amazon are part of the Brand Registry.¹⁸⁹ This is true for both small businesses and mega companies like Nike.¹⁹⁰ Nike began selling on Amazon only after the introduction of the Brand Registry as a way to stop counterfeits, though it exited selling directly on the platform when it

¹⁸¹ AMAZON, *supra* note 172. Amazon also cryptically suggests that the “Brand Registry is also accepting brands that have a trademark pending registration in a subset of trademark offices,” but it does not publicly spell out whether it allows applications pending in the PTO to qualify. *Id.*

¹⁸² Mehta, *supra* note 177.

¹⁸³ *Id.*

¹⁸⁴ AMAZON, *Enrollment Guidelines for the US*, <https://brandregistry.amazon.com/help/hub/reference/GFRFWRGWCYU55F4D> (last visited Feb. 8, 2024).

¹⁸⁵ Daisy Quaker, AMAZON, *Amazon Stats: Growth, Sales, and More*, Mar. 31, 2022, <https://sell.amazon.com/blog/amazon-stats>.

¹⁸⁶ *Id.*

¹⁸⁷ AMAZON, BRAND PROTECTION REPORT 2 (June 2022), <https://assets.aboutamazon.com/68/b7/27c5eeee4121971b3d330fd6c16c/amazon-brand-protection-report-2022.pdf>.

¹⁸⁸ AMAZON, BRAND PROTECTION REPORT 11 (Apr. 2023), <https://www.amazon-brand-registry.com/brand-protection-report-23-en>.

¹⁸⁹ *E.g.*, Navolykina, *supra* note 176; Bradley Sutton, *Why You Need Amazon Brand Registry and How I Got it in 10 Days!*, HELIUM10, June 27, 2022, https://www.helium10.com/blog/amazon-brand-registry-fast; Brand Registry—Worth It?, REDDIT, https://www.reddit.com/r/FulfillmentByAmazon/comments/p7i0w3/brand_registry_worth_it (last visited Feb. 8, 2024).

¹⁹⁰ WEST, *supra* note 129, at 38-39.

thought Amazon was still not sufficiently controlling counterfeit sales.¹⁹¹ As Emily West put it, “Nike had confidence in the power of its brand to leave Amazon, but as one industry analyst put it, ‘I don’t think as many brands can be as selective as Nike.’”¹⁹² Because most businesses very much need to sell on Amazon, the Brand Registry is essential for them.

All in all, Amazon’s Brand Registry undergirds the platform’s business model by helping to keep overwhelming numbers of third-party businesses comfortable and motivated to sell their wares on Amazon, which in turn keeps customers hooked into using the platform. The registry does so by providing sellers with enhanced abilities to have other sellers improperly using their registered trademarks removed expeditiously from the site, as well as priority in consumer search results, among other things. In turn, seller and consumer satisfaction removes some of the ongoing pressures for the government to regulate Amazon in this regard, such as through the SHOP SAFE Act, which would expose Amazon to significantly greater liability for selling counterfeit goods.¹⁹³

III. Amazon’s Overhaul of the Trademark System

The widespread adoption of Amazon’s Brand Registry by third-party sellers has not only promoted Amazon’s business model. As this Part addresses, it has also put significant hydraulic pressure on the U.S. trademark system, in effect overhauling it.¹⁹⁴ By free-riding on the government’s trademark system as the bedrock of its Brand Registry, Amazon’s Brand Registry—together with its overarching business model—has encouraged businesses to adopt very different practices with regard to registering and selecting trademarks. Though there are many variations to these changed practices, in this Part, we detail some of the most prominent examples: small businesses’ use of the trademark register, trademark extortion, registration of descriptive and generic marks, and registration of nonsense marks. We also discuss how Amazon’s use of its own internal house brands fits into this story. These changes

¹⁹¹ *Id.*

¹⁹² *Id.* at 39.

¹⁹³ *Supra* text accompanying note 161.

¹⁹⁴ We focus on the U.S. trademark system. Even though there are parallel versions of Amazon’s Brand Registry in other countries, AMAZON, *Brand Registry Eligibility*, <https://brandservices.amazon.com/brandregistry/eligibility> (last visited Feb. 8, 2024), the effects of each registry are principally domestic. That is because a third-party seller needs trademark rights in a particular country to take advantage of the Brand Registry’s features to sell to customers in that country. *Id.* Moreover, trademark systems in other countries are different (such as with regard to the requirement of use in commerce), *e.g.*, Barton Beebe & Jeanne C. Fromer, *The Future of Trademarks in a Global Multilingual Economy: Evidence and Lessons from the European Union*, 112 TRADEMARK REP. 902, 916-29 (2022), so it makes sense to analyze the effects of the Brand Registry on a country-by-country basis. By comparison, it might be more sensible to evaluate other platforms’ shadow legal systems globally. For example, in reaching its decisions, the Meta Oversight Board has applied more globally-relevant human-rights frameworks over the U.S.-centered First Amendment. Evelyn Douek, *The Meta Oversight Board’s First Term* (unpublished manuscript).

have happened relatively quietly without too much notice of them, but they have materially overhauled the trademark system.

Even though Amazon's Brand Registry might be seen as a shadow trademark system, this is not a story like those that other legal scholars have told about businesses or communities that rely primarily on norms rather than formal legal rules in areas ranging from the fashion industry to cuisine, stand-up comedy, roller derby, tattoos, and magic.¹⁹⁵ Those scenarios are often known as "intellectual production without intellectual property" (or "IP without IP") or a "negative space."¹⁹⁶ Amazon's Brand Registry is different because it is having a profound effect on the formal trademark system; indeed, the story here is more like "IP plus IP" or an "exponential space."

A. Small Businesses' Approach to PTO Registration

As noted above, American trademark law has long protected unregistered marks on largely the same terms as registered marks, making registration a set of advantages rather than a requirement.¹⁹⁷ For many small and mid-sized businesses, those advantages were not significant enough to justify the time and expense of registration, which means that registration has traditionally been more the province of larger, established companies. Amazon is changing that dynamic. Because the Brand Registry requires PTO registration (or, now, at least a pending application to register),¹⁹⁸ the incentives for small and medium-sized businesses are a lot different. Because most of those businesses want to be on Amazon and in the Brand Registry, they are much more likely to register than they once were.

¹⁹⁵ On fashion, see Jonathan Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381 (2005); C. Scott Hemphill & Jeannie C. Suk, *The Fashion Originators' Guild of America: Self-Help At The Edge Of IP And Antitrust*, in INTELLECTUAL PROPERTY AT THE EDGE (Rochelle Dreyfuss & Jane Ginsburg eds., 2014); C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147 (2009); Kal Raustiala & Christopher Jon Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006); Kal Raustiala & Christopher Jon Sprigman, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201 (2009). On cuisine, see Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L. J. 1121 (2007); Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187 (2008). On stand-up comedy, see Dotan Oliar & Christopher Jon Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008). On roller derby, see David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093 (2012). On tattoos, see Aaron Perzanowski, *Tattoos and IP Norms*, 98 MINN. L. REV. 511 (2013). On magic, see Jacob Loshin, *Secrets Revealed: Protecting Magicians' Intellectual Property Without Law*, in LAW AND MAGIC: A COLLECTION OF ESSAYS 123 (Christine Corcos ed., 2010).

¹⁹⁶ JEANNE C. FROMER & CHRISTOPHER JON SPRIGMAN, COPYRIGHT LAW: CASES AND MATERIALS v5.0, at 10 (2023).

¹⁹⁷ *Supra* section I.C.

¹⁹⁸ *Supra* section II.B.

The growing incentives to register are borne out in the data.¹⁹⁹ Specifically, as shown in Figure 4, the proportion of new applications filed by single filers (meaning entities that have not filed other trademark applications) has risen significantly since about 2015, and even more sharply since 2019, from about 30% to about 40% annually.²⁰⁰ (By comparison, as the figure shows, the proportion of new applications filed by businesses that have filed applications to register ten or more marks (likely, bigger companies) has correspondingly declined during this time.) Moreover, as seen in Figure 5, though the gross number of applications by single filers was increasing slowly from the 1980s through the early 2010s, the number has doubled since 2015, from about 100,000 to 200,000.

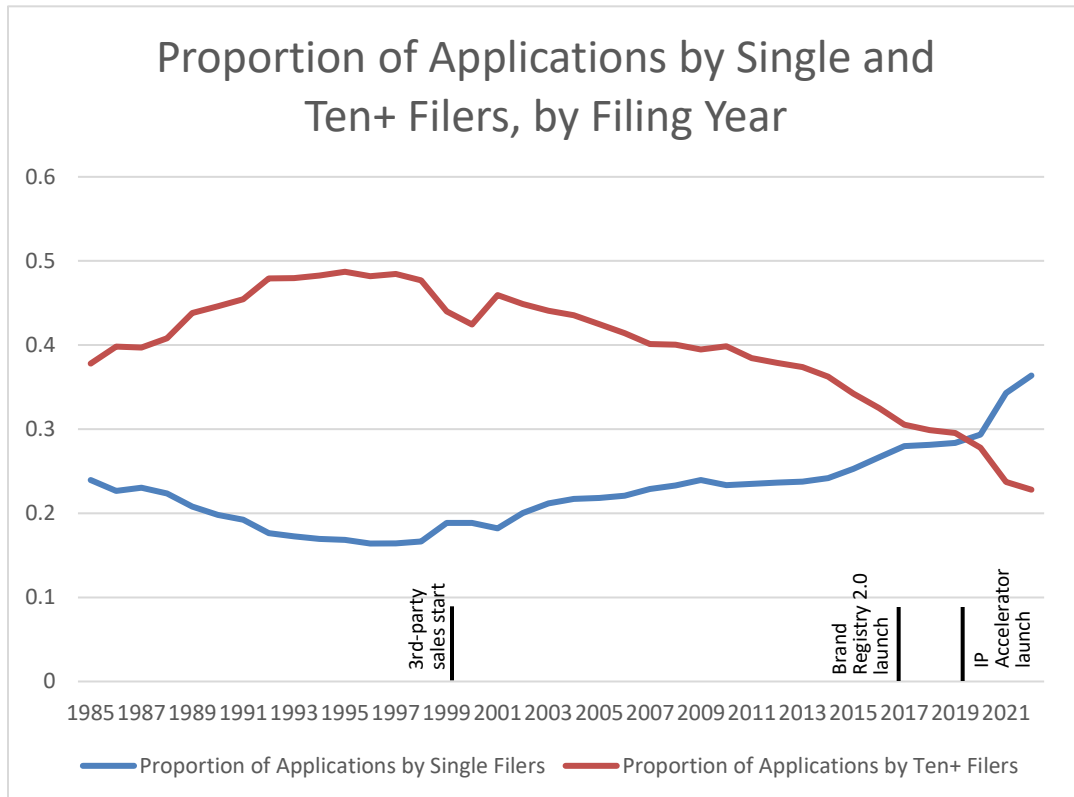


Figure 4: Proportion of applications by single and ten+ filers, by filing year

¹⁹⁹ For all empirical data provided in this Article, we use the PTO's Trademark Case Files Dataset, which the PTO made publicly available in 2012 and has since updated annually. *Trademark Case Files Dataset*, U.S. PATENT & TRADEMARK OFFICE (2022), <https://www.uspto.gov/learning-and-resources/electronic-data-products/trademark-case-files-dataset-0>; see also STUART GRAHAM ET AL., U.S. PATENT & TRADEMARK OFFICE, THE USPTO TRADEMARK CASE FILES DATASET: DESCRIPTIONS, LESSONS, AND INSIGHTS 3, 35 (2013), https://www.uspto.gov/sites/default/files/ip/officechiefecon/Trademark_Case_File_Data_Documentation_31January2013_final.pdf (describing the dataset and surveying trends in trademark applications and registrations).

²⁰⁰ This data includes applications filed based on an intent to use the mark rather than just on current use of the mark. Applications based on an intent to use the mark require that a statement of actual use be filed before the registration will issue. 15 U.S.C. § 1051(d). Approximately 10% of the annual filings by single filers are based on an intent to use the mark rather than based on current use of it.

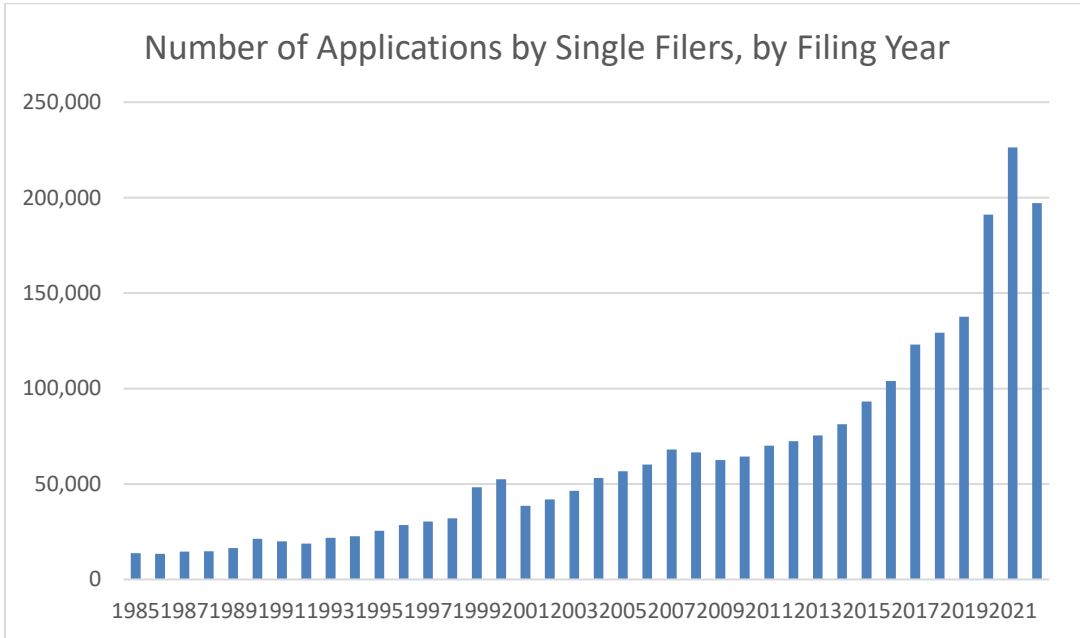


Figure 5: Number of applications by single filers, by filing year

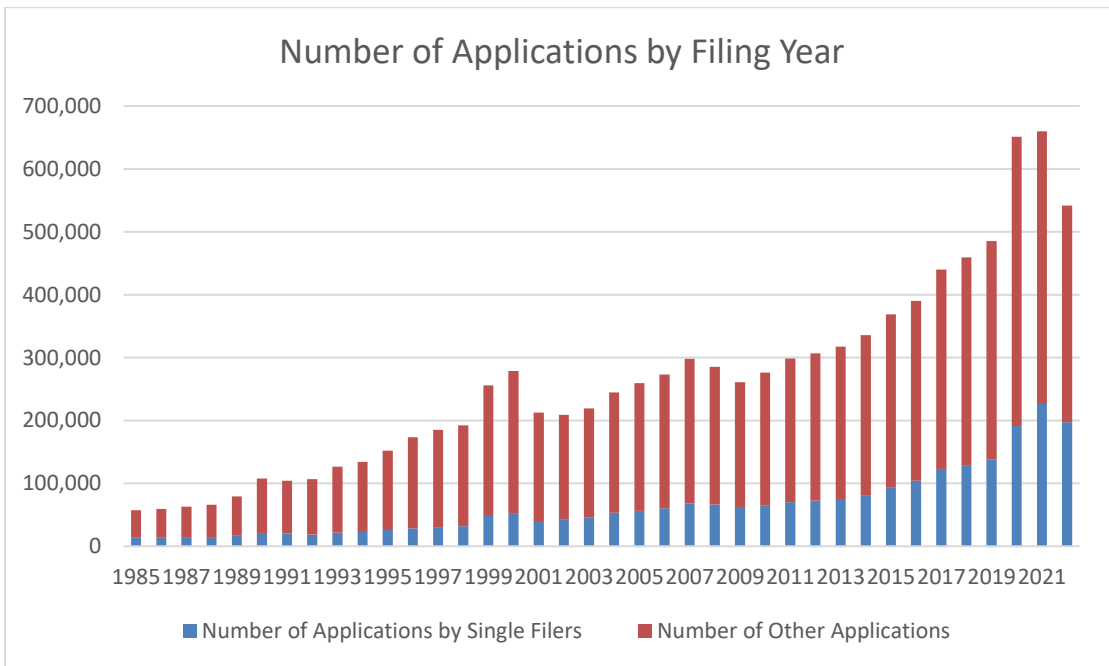


Figure 6: Number of applications by filing year

As Figure 6 indicates, these changes have pushed the total number of applications up dramatically, to more than 600,000 per year in two of the last three

years. Amazon’s policies are important drivers of that increase.²⁰¹ There are now just under ten million third-party businesses selling on Amazon,²⁰² and there were over 700,000 brands in the Brand Registry in 2021.²⁰³ Many of those brands were probably not registered in the PTO before their entry into the Brand Registry, either because the brands are new or because the businesses using them had made the rational pre-Amazon Brand Registry choice not to register.²⁰⁴ In fact, 16,000 new brands enrolled in Amazon’s accelerator program in 2022—the trademark applications filed by those brands represent the ones least likely to have been filed but for the desire to be part of Amazon’s Brand Registry.²⁰⁵

It is true that Amazon has enabled many more small and medium-sized businesses to engage in interstate commerce, so some might regard the increase in registration as a good thing. Precisely because they are now engaged in broader commerce, more of these companies benefit from registration.²⁰⁶ But whatever level of registration is in the interests of these businesses, it is undeniable that many more of them are seeking registration than would be absent Amazon’s policies. Indeed, the jump in small-business filings reflected in Figures 4-6 is most marked after the launch of Amazon’s second version of the Brand Registry in 2017, not after it enables third-party sales in 1999.

The increase in applications in the PTO has significantly increased examiner workload and lengthened pendency of applications. The PTO now reports an average total application pendency of 14.6 months, compared to 9.6 months in the first quarter of 2021 (similar to prior years).²⁰⁷ The average time to receive a first office action is 8.2 months, up from less than 5 months in the first quarter of 2021 (also similar to prior years).²⁰⁸ As one expert recently said about the costs of the PTO’s delay:

Until recently, the average time until a first office action ... allowed business owners to file trademark applications for new products or

²⁰¹ Other contributing factors to the increase in trademark filings might also include the PTO’s push to encourage women- and minority-owned businesses to register their marks, *supra* text accompanying note 121, and an increase in fraudulent trademark filings, often from China, *infra* text accompanying notes 225-229.

²⁰² *Supra* text accompanying note 126.

²⁰³ *Supra* text accompanying note 187.

²⁰⁴ *Supra* section I.C.

²⁰⁵ *Supra* text accompanying note 188.

²⁰⁶ We thank Deborah Gerhardt and Rochelle Dreyfuss for encouraging us to consider this point.

²⁰⁷ U.S. PATENT & TRADEMARK OFFICE, *Trademarks Data Q1 2024 at a Glance*, <https://www.uspto.gov/dashboard/trademarks> (last visited Feb. 8, 2024); U.S. DEP’T OF COMMERCE, *USPTO—Trademark Average Total Pendency (Months)*, <https://performance.commerce.gov/KPI-USPTO/USPTO-Trademark-average-total-pendency-months-/c2xn-w3ui> (last visited Feb. 8, 2024).

²⁰⁸ U.S. PATENT & TRADEMARK OFFICE, *supra* note 207; U.S. DEP’T OF COMMERCE, *USPTO—Trademark Average First Action Pendency (Months)*, <https://performance.commerce.gov/KPI-USPTO/USPTO-Trademark-average-first-action-pendency-mont/u4d2-gq5s> (last visited Feb. 8, 2024).

ventures, and to obtain feedback and a 'read' on the position of the PTO before the trademark was placed in commercial use. Now, the longer wait time before examination has been 'too long to wait', and has forced many businesses to move forward with commercial introductions without this initial feedback, and with more uncertainty about their trademark rights.²⁰⁹

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

B. Trademark Extortion

Not only has Amazon's Brand Registry created incentives for legitimate small businesses to register marks they might not have felt the need to register in the past, but it has also created incentives for parties to seek registration of trademarks used by others on Amazon when the legitimate users have not already done so. Why? Because if that registration is successful (and now, perhaps, as long as the application is pending), the registrant can threaten to invoke the Brand Registry against the legitimate user and thereby extract payments to avoid getting their businesses taken down by Amazon.

A trademark extortion scheme of this nature was recently at issue in a case in the Eastern District of New York. In that case, the district court granted a preliminary injunction, ruling that a New York-based plaintiff was likely to succeed in its claim seeking the cancellation of the China-based defendant's U.S. trademark registration because the defendant fraudulently used a photograph of the plaintiff's product as its specimen of use.²¹⁰ The plaintiff had been selling home furniture and organizers on Amazon for many years using the mark SAGANIZER, but it had never attempted to register that mark.²¹¹ The defendant seized the opportunity, filing an application to register SAGANIZER and submitting a photo of one of the plaintiff's products as its specimen of use.²¹² On the basis of the fraudulent specimen, the PTO registered the mark in the name of the defendant.²¹³ The defendant then relied on its registration to complain to Amazon about the plaintiff's use of the SAGANIZER mark, and Amazon delisted some of the plaintiff's products.²¹⁴ Given the number of complaints by the defendant against the plaintiff's products on Amazon, the plaintiff was at imminent

²⁰⁹ Tim Lince, "On the Right Path"—Gooder Expands on USPTO's Ambitious Trademark Pendency Reduction Plan, *WORLD TRADEMARK REV.*, Dec. 11, 2023, <https://www.worldtrademarkreview.com/article/the-right-path-gooder-expands-usptos-ambitious-trademark-pendency-reduction-plan> (quoting Joseph Lewis).

²¹⁰ *Home It, Inc. v. Wen*, No. 19-CV-7070 (MKB) (VMS), 2020 WL 353098, at *6 (E.D.N.Y. Jan. 21, 2020).

²¹¹ *Id.* at *1.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at *2.

risk of being suspended on Amazon altogether.²¹⁵ The plaintiff alleged that this would destroy its business, given how focused its model was on Amazon sales,²¹⁶ as many small businesses are.

This is not an isolated example of this form of trademark extortion. In recent months, Amazon—presumably with the goal of maintaining the legitimacy of its Brand Registry—has filed multiple lawsuits against entities that were operating under the same model as the SAGANIZER registrant.²¹⁷ According to Amazon, these entities fraudulently obtained PTO registrations of marks owned and used by businesses operating on Amazon and then used those registrations to join the Brand Registry.²¹⁸ The fraudulent registrants “then created fake, disposable websites, with product images scraped from the Amazon store, to use as false evidence when making thousands of claims that selling partners were violating their [intellectual property].”²¹⁹ Amazon alleged that one of the three entities filed almost 4,000 takedown requests over a few months.²²⁰ Amazon ultimately detected this behavior, shut down these entities’ accounts, and sued them.²²¹

In response to incidents like these, Amazon has announced it is working with the PTO to prevent trademark fraud.²²² It claims to “directly receive[] and act[] upon information from the []PTO regarding registration status and parties that have been subject to []PTO sanctions” for fraudulent filings, which it uses to remove the fraudulent registrants from its Brand Registry.²²³ Amazon claims to have removed 5,000 false brands from its platform in this way.²²⁴

In recent years, as Barton Beebe and one of us have demonstrated empirically, fraudulent trademark filings using fake specimens of use have become a significant problem at the PTO.²²⁵ This work estimates that “with respect to use-based applications originating in China that were filed at the ... PTO[] in 2017 solely in Class 25 (apparel goods), ... 66.9% of such applications included fraudulent specimens. Yet 59.8% of these fraudulent applications proceeded to publication, and 38.9% then proceeded to registration.”²²⁶ The extent of this fraud led Congress to pass the

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Amazon Targets Multiple Bad Actors in Novel Lawsuit, Further Protecting Selling Partners from Fraud*, AMAZON, Mar. 30, 2023, <https://www.aboutamazon.com/news/policy-news-views/amazon-targets-multiple-bad-actors-in-novel-lawsuit-further-protecting-selling-partners-from-fraud>.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Mitchell Clark, *Amazon Sues Sellers for Issuing Bogus Takedown Requests on Competitors*, VERGE, Mar. 30, 2023, <https://www.theverge.com/2023/3/30/23663339/amazon-sues-sellers-copyright-takedown-competitors>.

²²¹ *Id.*

²²² AMAZON, *supra* note 188, at 10.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Barton Beebe & Jeanne C. Fromer, *Fake Trademark Specimens: An Empirical Analysis*, 120 COLUM. L. REV. F. 217 (2020).

²²⁶ *Id.* at 218.

Trademark Modernization Act in 2020, which, among other things, provided for new reexamination and expungement procedures to remove fraudulent marks from the trademark register.²²⁷

There are many reasons for the substantial (and increasing) number of fraudulent trademark filings. Until now, those investigating the issue have suspected that a major reason for this fraud—often coming from applications originating in China—is that some regional Chinese governments are offering their citizens a financial subsidy for each U.S. trademark registration secured.²²⁸ The thinking goes that this subsidy encourages these citizens to file PTO trademark applications without incurring the costs of operating a business.²²⁹

But Amazon’s business model and Brand Registry also have contributed to the rise in fraudulent applications at the PTO: shrewd operators have an opportunity to take advantage of legitimate businesses operating on Amazon that have not registered their marks by instead fraudulently registering those marks and even using real specimens of use from the legitimate businesses and extorting the legitimate businesses.²³⁰

C. Descriptive and Generic Terms

For the reasons described in the previous section, Amazon’s Brand Registry increases businesses incentives to seek PTO registration. Here we describe several ways in which the Brand Registry affects the types of marks for which parties seek registration. In particular, Amazon’s policies significantly increase incentives to register descriptive and generic terms. Recall that trademark law categorically refuses protection (and registration) of generic terms like “apple” for a company selling apples to prevent businesses from monopolizing those terms to the detriment of competition.²³¹ And descriptive terms like AMERICAN AIRLINES for an American airline are protectable only if they have acquired distinctiveness via sufficient consumer association of the mark with the goods or services.²³²

As discussed by one of us in prior work, businesses have long had an incentive to choose a descriptive or generic term as a mark when they think that “consumers will rely on [the term] to seek out their products even though consumers do not associate that term with them as a source.”²³³ Once upon a time, a business might have chosen a generic term in the hope that a telephone operator would direct business to them

²²⁷ Pub. L. No. 116-260, 134 Stat. 1182 (2020).

²²⁸ Beebe & Fromer, *supra* note 225, at 225-26.

²²⁹ *Id.*

²³⁰ One possibly positive effect of these schemes is to make it more expensive for white-label sellers operating on Amazon who sell essentially indistinguishable products under various brand names. To the extent the extortion schemes target these sellers, one might conclude that they decrease the noise on Amazon by reducing the number of products that differ only in terms of their artificial brand diversification.

²³¹ *Supra* section I.A.

²³² *Supra* section I.A.

²³³ Fromer, *supra* note 24, at 248.

when a consumer would call and ask for a particular category of goods or services.²³⁴ But the value of that strategy has likely increased sharply in the search engine era, because businesses can capitalize on consumers using descriptive or generic terms as search terms in Google or Amazon's search engine, even when those consumers are not specifically looking for any particular provider of the goods or services they are seeking.²³⁵ Indeed, courts have sometimes recognized the competitive advantage conferred by highly descriptive marks like 24 HOUR FITNESS for a gym that is always open,²³⁶ 1-800 CONTACTS for contact lenses,²³⁷ HOME-MARKET.COM for referral services for homeowners including to real estate agents and insurance companies,²³⁸ and BOOKING.COM for travel booking services.²³⁹

But there are also disadvantages to choosing a descriptive or generic term for businesses that want consumers to learn to associate their mark with their goods or services.²⁴⁰ Those businesses understand that they cannot obtain exclusive rights in a generic term, nor can they prevent other businesses from using that term in the course of competition.²⁴¹ Likewise, businesses have incentives not to choose descriptive terms as their marks because they have to deal with the cost, and especially the uncertainty, of developing secondary meaning, and because they cannot use any exclusive rights they have in the mark to prevent competitors from using the term in its descriptive sense.²⁴²

Amazon's business model, combined with its Brand Registry, disrupts this traditional calculus by increasing the benefits of using and even seeking to register descriptive or generic terms. A business might reasonably conclude that it wants to use a descriptive or generic term as a mark for its Amazon-sold goods to improve the odds of prominent placement in search results for consumers searching on Amazon to buy goods using that term. Companies have already been adopting names like "Thai Food Near Me" or "Plumber Near Me" to promote themselves in Google search results for those exact terms.²⁴³ The incentive to use descriptive or generic terms is likely even greater for goods sold on Amazon because Amazon's search results put consumers directly into a position to buy listed goods. As one recent academic analysis of Amazon puts it, "Although in theory Amazon's digital shelf space is limitless, in practice the first few results—especially those on the first page of the

²³⁴ *Id.* at 248 n.221.

²³⁵ *Id.* at 248.

²³⁶ 24 Hour Fitness USA, Inc. v. 24/7 Tribeca Fitness, LLC, 277 F. Supp. 2d 356, 366 (S.D.N.Y. 2003).

²³⁷ 1-800 Contacts, Inc. v. Lens.com, Inc., 755 F. Supp. 2d 1151, 1179 (D. Utah 2010).

²³⁸ Shade's Landing, Inc. v. Williams, 76 F. Supp. 2d 983, 989-90 (D. Minn. 1999).

²³⁹ U.S. Pat. & Trademark Off. v. Booking.com B.V., 140 S. Ct. 2298, 2308 (2020).

²⁴⁰ Fromer, *supra* note 24, at 245-49.

²⁴¹ *Supra* section I.A.

²⁴² *Supra* section I.A.

²⁴³ Mia Sato, *The Restaurant Nearest Google*, VERGE, Oct. 26, 2023, <https://www.theverge.com/2023/10/26/23931825/google-search-local-seo-thai-food-near-me-maps> (noting, however, that this strategy does not necessarily boost these businesses' prominence in search results).

smartphone screen—are tremendously important. According to industry research, more than two-thirds of product clicks happen on the first page of Amazon’s search results, with half of those focused on the first two rows of products that appear.”²⁴⁴

Importantly, the search-related benefits are amplified for any mark in the Brand Registry because of the search result preference entailed in that program.²⁴⁵ That means there is extra incentive not just to use those marks, but to try to register them. The PTO might erroneously register the mark, and even if it does not, the applicant can now get the benefits of the Brand Registry for at least the time during which the application is pending, even if the registration never issues. Though pending applications previously had something of a notice function, making a party’s claim of ownership visible, never before has a pending trademark application had practical significance.²⁴⁶ Additionally, participation in the Brand Registry makes it more likely that the business can prevent others from selling their competing goods with the same descriptive or generic term.²⁴⁷ The net benefits of that approach are significantly greater when a party plans to enforce primarily within Amazon’s system: the owner of such a mark would face trademark invalidation if it tried to enforce its rights in court, but that is not a risk (at least directly) when enforcing on Amazon.

Of course, none of those benefits would be available if trademark law effectively screened out or disincentivized use or registration of descriptive or generic terms. Indeed, there are rules that attempt to do just that: as we noted, descriptive marks are not protectable or registrable without secondary meaning, and generic marks are not at all protectable or registrable.

Even so, some businesses have found pathways or loopholes in the trademark system to have it both ways. For one thing, the bar to establishing secondary meaning to render descriptive marks protectable is often considered to be somewhat low, so a business might be able to clear that bar to obtain a registration.²⁴⁸ For another thing, a business can often get a registration for a mark whose words are all descriptive or generic—especially if there are other mark elements such as an accompanying

²⁴⁴ WEST, *supra* note 129, at 38.

²⁴⁵ *Supra* section II.B; cf. Moira Weigel, *Amazon’s Trickle-Down Monopoly: Third-Party Sellers and the Transformation of Small Business*, DATA & SOC’Y 6 (Jan. 2023) (“[Amazon’s] dominance of online search and global logistics has given rise to a new kind of small business optimized for Amazon.”).

²⁴⁶ Cf. Greg Reilly, *Misleading Patent Signals* (unpublished manuscript) (arguing that marking a product as “patent pending” is a misleading signal because it does not have legal significance even though many see it is an important market signal).

²⁴⁷ *Supra* section II.B. Moreover, Amazon admittedly accepts generic words used as brand names. AMAZON, *Amazon Brand Name Policy*, <https://sellercentral.amazon.com/help/hub/reference/G2N3GKE5SGSHWYRZ> (last visited Feb. 8, 2024). Amazon claims to honor something akin to nominative and descriptive fair uses, meaning that Amazon says its enforcement “[t]ypically” allows for uses of marks referring to another’s actual product and to a word in “its ordinary dictionary meaning.” *Amazon Trademark FAQ*, *supra* note 171. But it is unclear (to us, at least) whether Amazon permits a full range of descriptive fair use, *supra* text accompanying notes 75-78, and how those who make descriptive uses are treated in search rankings and other aspects of the Brand Registry.

²⁴⁸ Buccafusco, Masur & McKenna, *supra* note 24; Fromer, *supra* note 24.

image—by disclaiming rights to the word component as unprotectable.²⁴⁹ According to the Lanham Act, the PTO “may require the applicant to disclaim an unregistrable component of a mark otherwise registrable. An applicant may voluntarily disclaim a component of a mark sought to be registered.”²⁵⁰ Indeed, 26.9% of applications filed from 1985 through 2016 contained disclaimed matter.²⁵¹



Figure 7: Trademark registration for MUSTACHES

On Amazon, those disclaimers mean nothing.²⁵² Consider the following example, depicted in Figure 7, albeit for a niche product. In 2017, a business applied to register

²⁴⁹ See, e.g., *In re Miller Brewing Co.*, 226 U.S.P.Q. 666 (T.T.A.B. 1985) (allowing registration of stylized mark **Lite**, disclaiming the generic term “lite”); *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560 (Fed. Cir. 1987) (finding stylized mark **sweats dd** protectable despite genericness of “sweats” for active sportswear); see also Brandon Meyer, *What Happens if I Can't Get Away with It?: Disclaimer Law and Practice*, 19 J. CONTEMP. LEGAL ISSUES 125, 125-29 (2010).

²⁵⁰ 15 U.S.C. § 1056(a). Nonetheless, a disclaimer does not prejudice an applicant's common law rights or any future rights that might arise as to disclaimed words. *Id.* § 1056(b). Furthermore, disclaimed language still might be protectable, because courts evaluate it together with nondisclaimed language in assessing trademark infringement. *E.g.*, *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1341 (Fed. Cir. 2015); *Shen Mfg. Co. v. Ritz Hotel, Ltd.*, 393 F.3d 1238, 1243 (Fed. Cir. 2004).

²⁵¹ Beebe & Fromer, *supra* note 26, at 985 n.162.

²⁵² There is another way the Brand Registry potentially gives trademark registrations greater scope than trademark law would. Marks are registered for particular goods or services, in recognition of the fact that trademark rights are not rights in gross. Fromer & McKenna, *supra* note 11, at 147. It is unclear (to us) whether the Brand Registry enforces the goods and services restriction. There is nothing in Amazon's publicly-available information that clearly limits enforcement to the goods or services for which a mark is registered. If enforcement is not limited that way, then parties might be able to game registration by registering for one set of goods or services but enforce that mark against other goods or services for which they could

a mark that contained a single word, MUSTACHES, for fake mustaches.²⁵³ As is self-evident, this term is generic for mustaches. Yet the business was able to obtain a registration for this application because the word was part of an image, as shown below, and because the applicant disclaimed “the exclusive right to use ‘mustaches’ apart from the mark as shown.”²⁵⁴

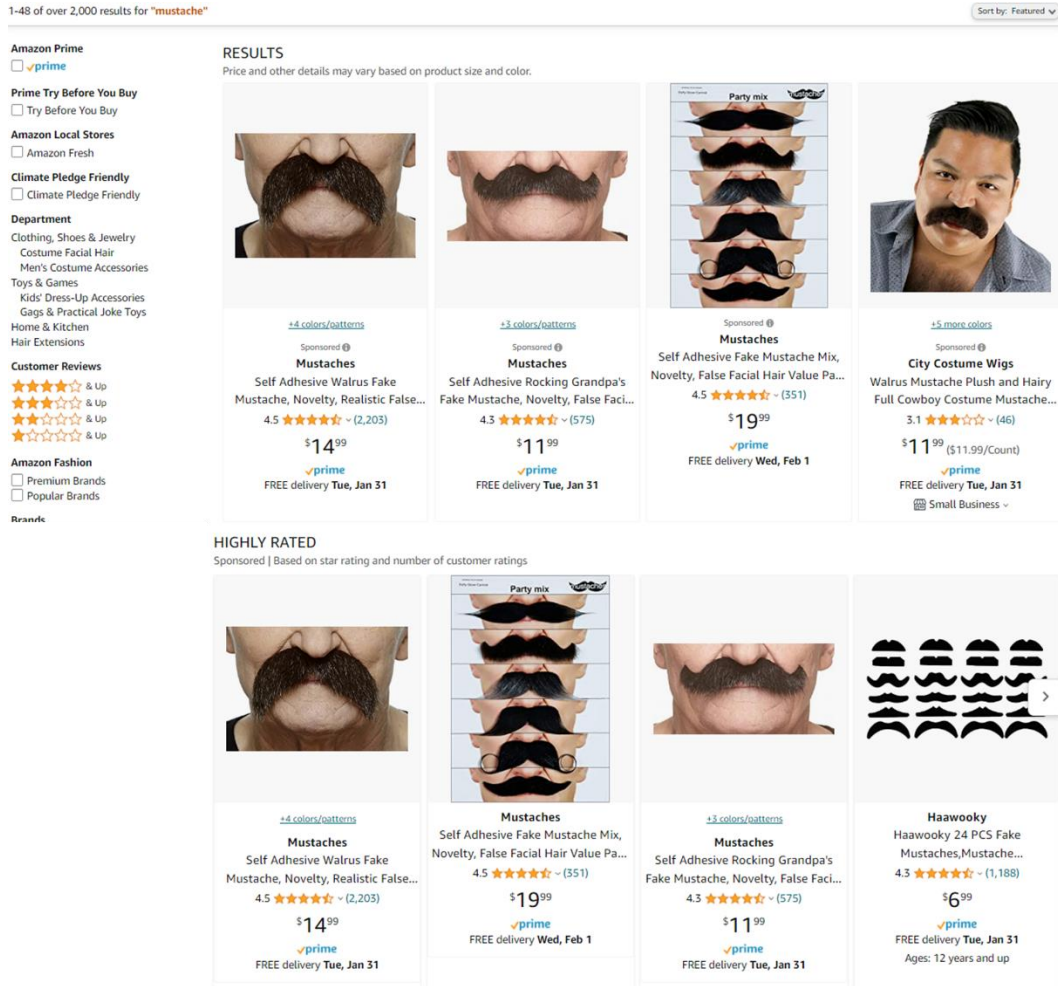


Figure 8: Amazon search results for "mustache"

Armed with this registration and despite having disclaimed rights to the word MUSTACHES for mustaches, the business can now take part in Amazon’s Brand Registry claiming, as per Amazon’s rules, the exact wording in its trademark registration: MUSTACHES.²⁵⁵ The business can now have prioritized search results—results depicted below in Figure 8—and can call upon Amazon to prevent other fake-mustache sellers from using the term MUSTACHES. (There is no evidence from

not have gotten a registration (because, among other things, the registered mark would have been generic or descriptive as applied to those goods or services).

²⁵³ U.S. Trademark Application Serial No. 87/488784 (filed June 14, 2017).

²⁵⁴ MUSTACHES, Registration No. 5,426,365 (Mar. 20, 2018).

²⁵⁵ *Supra* section II.B (describing this Brand Registry requirement).

Amazon’s public rules for the registry that it follows trademark law’s allowance of descriptive (or rather, generic) fair use to allow competitors to use the term at least as a mark.²⁵⁶ And thus, the business has bootstrapped its trademark registration disclaiming protection for a generic term into protection—at least on Amazon—of that generic term.

As another more technologically-focused example, consider German business MXP Prime (operating as SellerX), which buys up small Amazon businesses and has received the rare unicorn valuation.²⁵⁷ It recently sought to register over thirty marks for different electronics parts using the parts’ generic identifiers, such as IRF520, ATMEGA328, and DHT11 (with the letters representing their maker and the number being the part identifier).²⁵⁸ The PTO trademark examiner on these applications, likely wondering if these symbols are generic—and therefore unprotectable—based on the odd alphanumeric combinations, responded with office actions asking the applicant to explain the significance of the symbols in the industry, if any.²⁵⁹ While the applicant subsequently abandoned these applications in the face of the office actions, it could have used the MUSTACHE trick and resubmitted the same term with a drawing of anything—a sun, a clown, a hat—accompanying the word to get the trademark registration and admission of these generic terms to the Amazon Brand Registry.

In all, Amazon’s business model and Brand Registry has bulked up the incentive to seek registration of descriptive and generic terms, often using loopholes to get the benefits of both trademark registration and admission to the Amazon Brand Registry.

D. Nonsense Marks

Another way Amazon’s policies have influenced the content of the marks for which parties seek registration is reflected in the new phenomenon of nonsense marks—marks that are comprised of random strings of letter or numbers that are not

²⁵⁶ *Supra* note 247.

²⁵⁷ SELLERX, *SellerX Raises \$500 Million in Additional Financing, Reaching Unicorn Valuation*, Dec. 9, 2021, <https://sellerx.com/sellerx-raises-500-million-in-additional-financing-acquires-kw-commerce>.

²⁵⁸ *E.g.*, U.S. Trademark Application Serial No. 90/633051 (filed Apr. 8, 2021) (IRF520); U.S. Trademark Application Serial No. 90/633110 (filed Apr. 8, 2021) (ATMEGA328); U.S. Trademark Application Serial No. 90/633066 (filed Apr. 8, 2021) (DHT11). For an explanation of these naming conventions, see *List of IC Manufacturer Codes*, ULTRA LIBRARIAN, Sept. 15, 2020, <https://www.ultralibrarian.com/2020/09/15/list-of-ic-manufacturer-codes-ulg>. For a database of these parts, see OCTOPART, <https://octopart.com> (last visited Feb. 8, 2024).

²⁵⁹ *E.g.*, U.S. PAT. & TRADEMARK OFFICE, U.S. DEP’T OF COMMERCE, U.S. Trademark Application Serial No. 90/633051, OFFICE ACTION (Dec. 8, 2021), <https://tsdr.uspto.gov/documentviewer?caseId=sn90633051&docId=OOA20211208174824&linkId=3#docIndex=2&page=1>; U.S. PAT. & TRADEMARK OFFICE, U.S. DEP’T OF COMMERCE, U.S. Trademark Application Serial No. 90/633110, OFFICE ACTION (Dec. 8, 2021), <https://tsdr.uspto.gov/documentviewer?caseId=sn90633141&docId=OOA20211208173734&linkId=6#docIndex=5&page=1>; U.S. PAT. & TRADEMARK OFFICE, U.S. DEP’T OF COMMERCE, U.S. Trademark Application Serial No. 90/633066, OFFICE ACTION (Dec. 8, 2021), <https://tsdr.uspto.gov/documentviewer?caseId=sn90633066&docId=OOA20211208174957&linkId=4#docIndex=3&page=1>.

comprehensible as words or as symbols with any meaning.²⁶⁰ As Grace McLaughlin has noted, those marks pose serious conceptual problems for trademark law. Most obviously, they confound distinctiveness determinations because those marks probably have to be classified as fanciful in relation to any goods or services: they do not provide any information about the goods or services and they do not have any other ordinary meaning.²⁶¹ But fanciful marks are generally considered especially strong trademarks because they are assumed to be understood only as trademarks.²⁶² Nonsense marks flout that assumption because they are not comprehensible as trademarks or, for that matter, as anything at all.

Those marks pose equally difficult problems in determining use as a mark. Failure-to-function determinations are typically contextual: the PTO generally focuses on whether a particular sign functions as a mark as it is shown in a particular specimen of use.²⁶³ That is why that doctrine has primarily focused on the location of a claimed mark and not its intrinsic nature.²⁶⁴ Nonsense marks likely do not function as marks, but the reason is that they are not comprehensible as words or symbols, not because of their presentation.²⁶⁵ Even likelihood of confusion is complicated with nonsense marks: trademark law does not have a good way to assess similarity when one of the things being compared is not comprehensible as a word or capable of being regarded as visual matter. Similarity is usually assessed in terms of sight, sound, and meaning, and only sight is even possibly relevant for nonsense marks.²⁶⁶ Is NXLYP confusingly similar to NYLPX, or for that matter to PTXWA? Maybe, maybe not, but either way, trademark law has no good framework to evaluate such confusion.²⁶⁷ Perhaps just as troubling is that a nonsense mark might be seen as confusingly similar to a more traditional mark (such as McLaughlin's examples of MAJCF and MAJI, and JANRSTIC and JANSTICK), preventing the more traditional mark applicant from being able to register their mark in the face of the already-registered nonsense mark.²⁶⁸

Precisely because nonsense marks are not comprehensible, they are extremely unlikely to be memorable as marks. For that reason, there was never previously much incentive to use nonsense marks.²⁶⁹ Regardless of the availability of legal protection,

²⁶⁰ *Fanciful Failures*, *supra* note 44 (using as examples of nonsense marks LJXOAIEU for hair clips, QIANDLEE for apparel, JANRSTIC for headphones, and AEZLHJYA for jewelry).

²⁶¹ *Id.* at 1811.

²⁶² Fromer, *supra* note 24, at 225-26.

²⁶³ See generally Roberts, *supra* note 92.

²⁶⁴ Lemley & McKenna, *supra* note 37.

²⁶⁵ Cf. *Fanciful Failures*, *supra* note 44, at 1821 (positing that failure to function as a mark means something different in other contexts, but that “concerns animating failure to function doctrine apply to nonsense marks, and trademark examiners should extend the doctrine to them, asking whether they perform the source-indicating function trademarks are meant to and denying registration to those that do not”).

²⁶⁶ 2 MCCARTHY, *supra* note 49, at § 23:21 (discussing the “sight, sound, and meaning trilogy”).

²⁶⁷ *Fanciful Failures*, *supra* note 44, at 1816.

²⁶⁸ *Id.* at 1814.

²⁶⁹ The possible exceptions are the few now-archaic names (like A AAAAA BCALVY for fire and water carpet-damage specialists) that were chosen so that the owner would appear first in alphabetically-ordered Yellow Pages business listings. ‘A *Alphabetical Advantage*’ Helps

a mark is first and foremost a marketing tool. If the mark a business chooses is not memorable, it will not provide real commercial benefits because consumers are not likely to attach any meaning to it.

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

Indeed, the forgettability of nonsense marks might be precisely their point. Owners of nonsense marks can collect product reviews. If they are positive, they can rely on the search algorithm to deliver them more customers. If the reviews are negative, they can easily relaunch under another (forgettable) nonsense mark and avoid the reputational consequences of those reviews. In that way, nonsense marks undermine the very function of trademarks—to allow consumers an easy way to attach reputation to the right party.²⁷³

Finally, the current substantive requirements for PTO registration make nonsense marks attractive to businesses selling on Amazon that simply want a registration to participate in the Brand Registry. Nonsense marks are likely to be treated as fanciful and therefore inherently distinctive; they are likely to be seen as

Businesses Listed in Yellow Pages, CHI. TRIB., Nov. 8, 1992, <https://www.chicagotribune.com/1992/11/08/a-alphabetical-advantage-helps-businesses-listed-in-yellow-pages>.

²⁷⁰ *Supra* section II.B.

²⁷¹ As Emily West elaborates, “[s]ince 2015, products that perform well on price, customer reviews, return rate, and availability to ship immediately via Prime have the chance to be highlighted as ‘Amazon’s Choice’ (although the exact formula remains a mystery, even to companies whose products are chosen).” WEST, *supra* note 129, at 37. Additionally, since 2012, businesses can pay to be sponsored search results, appearing near the top, or at the top, of search results. *Id.*

²⁷² WEST, *supra* note 129, at 37 (“[S]trong retail brands like Sears, Walmart, or Amazon can erode the value of product brands. Retailers [otherwise] generally carry particular product brands that bring consumers into their stores.”); *id.* (“Amazon’s platform characteristics and relationship with consumers position it particularly well to erode the value of well-known product brands. The ability to sort product searches by price, the availability of customer reviews, and advantageous placement in searches (at a cost) can all level the playing field across brands.”).

²⁷³ *Supra* Part I.

functioning as marks despite being gibberish; and they are unlikely to be confusingly similar to other marks given their composition. For these reasons, nonsense marks are relatively easy to register and to bootstrap into the benefits of the Amazon Brand Registry.

The PTO data bear this out. To approximate the rate of nonsense marks in trademark applications and publications,²⁷⁴ we counted the number of them with a word mark that is greater than four characters, comprises only one word, is not one of the 100,000 most frequently used words in American English,²⁷⁵ and either has four consonants in a row or three vowels in a row.²⁷⁶ To illustrate, it (properly) counts as nonsense marks ELXXROONM, SUJIOWJNP, XUFFBV, and LXCJZY. To be sure, this measure is both somewhat overinclusive and underinclusive. It counts OLDSMOBILE and SHIRTCRAFT as nonsense marks when it should not, but it does not include EARKOHA as a nonsense mark when it likely should. Even with these mistakes, we think counting marks using a metric like this one can reveal trends in nonsense marks over time, especially when there is no reason to think it undercounts or overcounts marks at different rates out of proportion to true nonsense marks over time.

As Figure 9 shows, we find that the proportion of applications with a one-word nonsense mark has risen sharply in just the past few years. For decades, applications for nonsense marks accounted for only about 0.5% of applications; that proportion is now approximately 4.5%. As the number of applications has risen steadily over time, we also find—as depicted in Figures 10 and 11—that the absolute number of applications comprised of a nonsense mark (almost none for decades) has risen to over 20,000 annually in the past few years.

²⁷⁴ If the PTO determines that the trademark application satisfies all requirements for registration, it will approve the mark for publication in the Official Gazette. 15 U.S.C. § 1062(a). Third parties then have thirty days from the date of publication to oppose the registration. *Id.* § 1063(a). Unless there is a successful opposition, a use-based application (an application based on the applicant's current use of the mark) will automatically proceed to registration. *Id.* § 1063(b). Applications based on an intent to use the mark require that a statement of actual use be filed before the registration will issue. *Id.* § 1051(d). We focus on publication rates rather than registration rates because many intent-to-use applications succeed to publication, but then are not registered because the applicant fails to file a statement of use. Barton Beebe, *Is the Trademark Office a Rubber Stamp?*, 48 HOUS. L. REV. 751, 773, 774 tbl. 9 (2011).

²⁷⁵ We use the Corpus of Contemporary American English (COCA) rank order of the 100,000 most frequently used words in American English. See *Word Frequency Data: Based on 450 Million Word COCA Corpus*, WORD FREQUENCY DATA, <https://www.wordfrequency.info/100k.asp>; see also Mark Davies, *The Corpus of Contemporary American English as the First Reliable Monitor Corpus of English*, 25 LITERARY & LINGUISTIC COMPUTING 447 (2010). The data is available on a proprietary basis from Professor Mark Davies. We downloaded the data on November 4, 2014. COCA is the largest structured corpus of American English. Davies, *supra*. For more on COCA and its use for research in law, linguistics, computational linguistics, psychology, and marketing, see Beebe & Fromer, *supra* note 26, at 974-75, 974 n.134.

²⁷⁶ We count three vowels in a row when a 'y' is the second or third vowel in the sequence, but not the first.

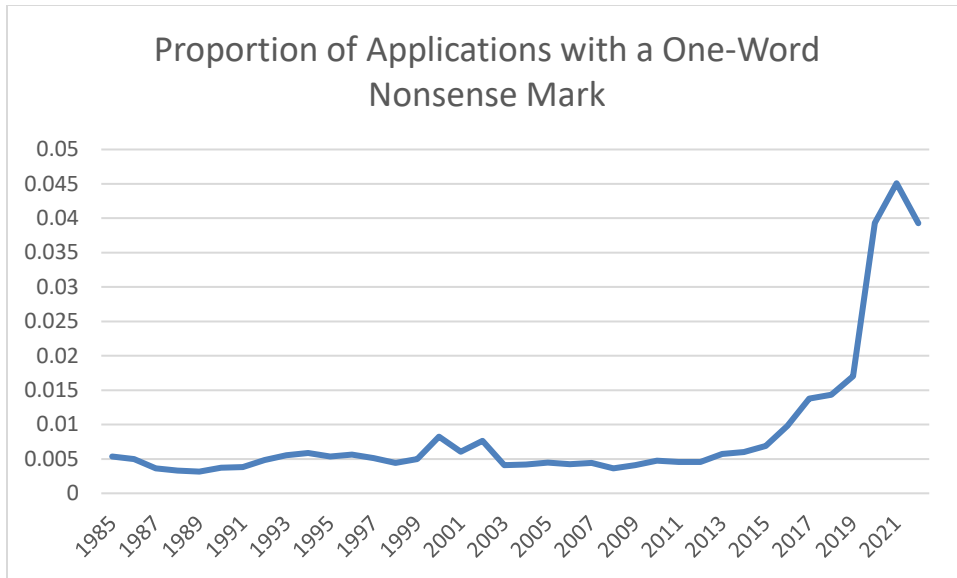


Figure 9: Proportion of applications with a one-word nonsense mark

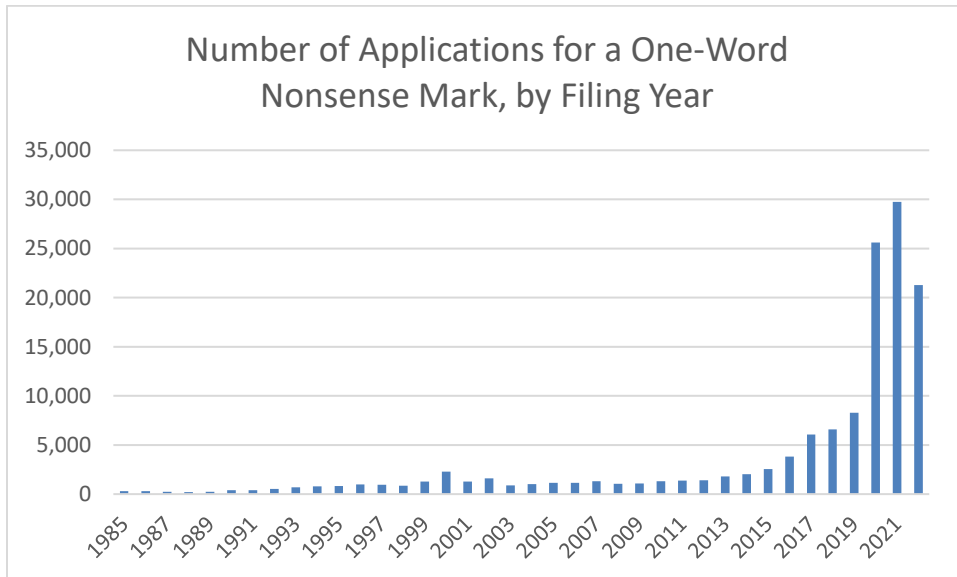


Figure 10: Number of applications for a one-word nonsense mark, by filing year

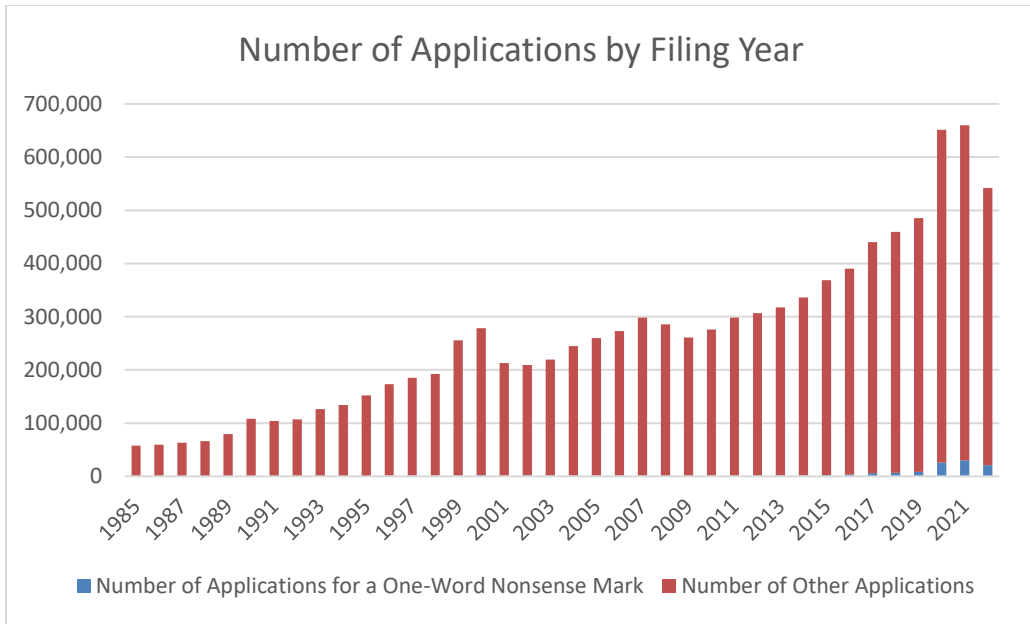


Figure 11: Number of applications by filing year

As Figure 12 demonstrates, nonsense marks are published at roughly the same rate as all other (non-nonsense) marks. Thus, the number of applications that have proceeded to publication in recent years reflects the substantial increase in filing of new applications to register nonsense marks. As Figure 13 shows, over 25,000 nonsense marks proceeded to publication in 2021, the most recent year for which we are likely to have nearly complete rates of publication, as compared to nearly zero such marks annually going back decades except in recent years.

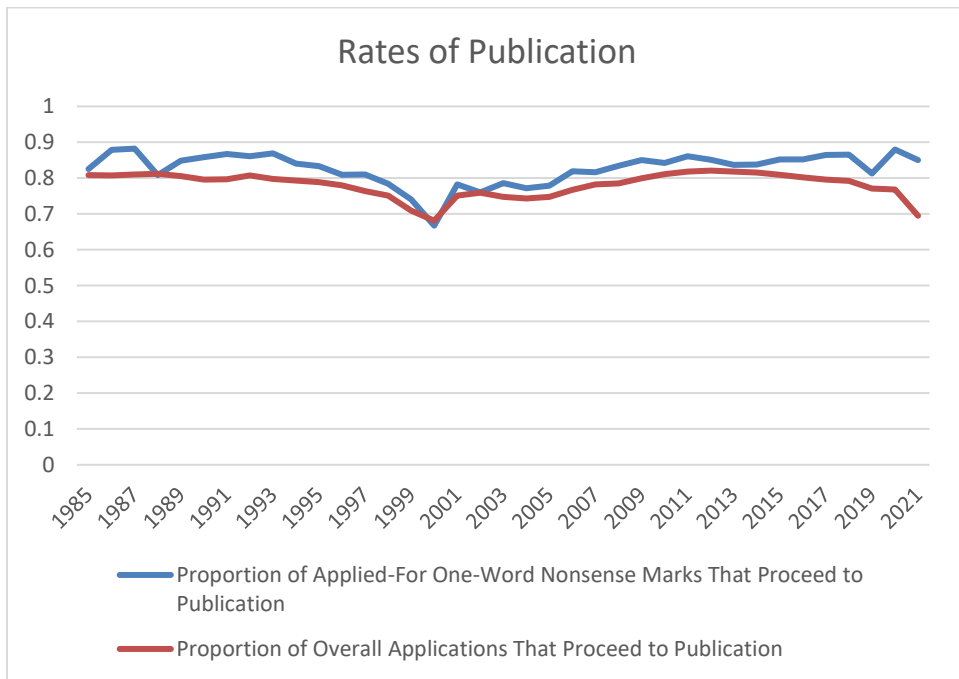


Figure 12: Rates of publication for nonsense marks and all marks

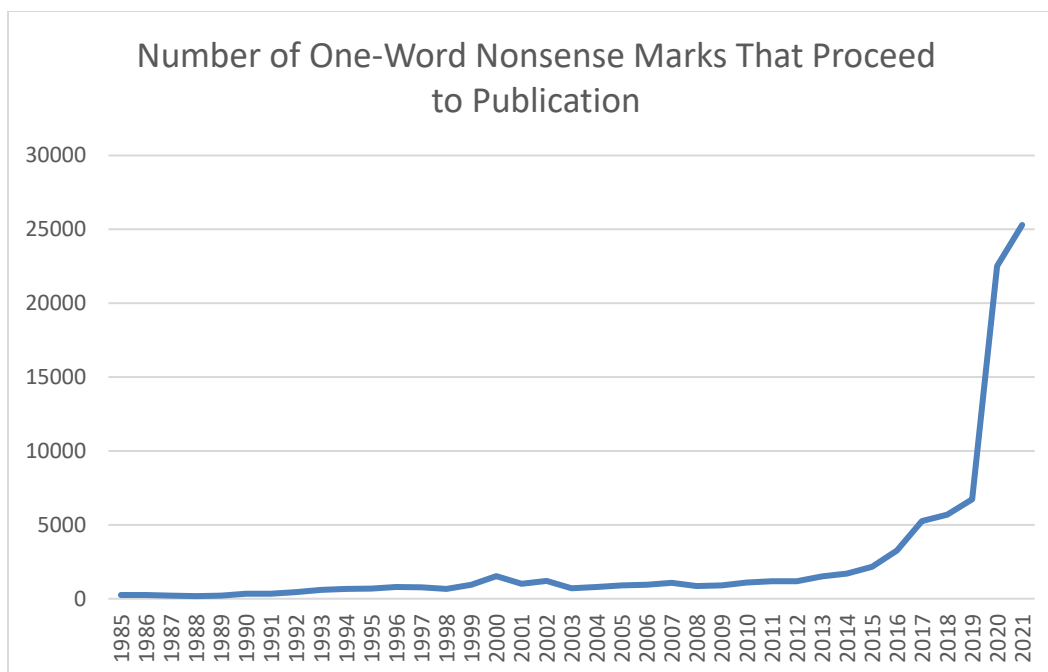


Figure 13: Number of one-word nonsense marks that proceed to publication

E. Amazon’s House Brands

A final important piece of the picture of how Amazon’s business model and Brand Registry have shifted the trademark system—and competition more broadly—comes through a focus on Amazon’s first-party sales rather than the third-party sales explored thus far. Recall that when Amazon launched, it engaged exclusively in first-party sales.²⁷⁷ While its business model has shifted toward substantial numbers of third-party sales, Amazon still engages heavily in first-party sales, and those sales generate the largest parts of its revenues.²⁷⁸

In recent years, Amazon’s first-party sales practices have garnered substantial attention, particularly its practice of launching products under Amazon brands in product categories where third-party sellers are doing well. As Eric Johnson describes it, “[t]hanks to the massive amounts of data that [Amazon is] able to collect about what is sold through [its] site, [it] can cherry-pick the bestselling items from third-party retailers and then enter as a retailer, grabbing most of the sales volume.”²⁷⁹

²⁷⁷ *Supra* section II.A.

²⁷⁸ *Supra* section II.A. Its first-party sales can either be of products made by others sold with a third-party mark (such as ADVIL pain relief tablets), or products sold under an Amazon brand—whether made by Amazon or by others. This section focuses on sales under an Amazon brand, which Amazon has said account for 1% of its total retail sales. Dana Mattioli, *Amazon Cuts Dozens of House Brands as It Battles Costs, Regulators*, WALL ST. J., Aug. 10, 2023, <https://www.wsj.com/articles/amazon-cuts-dozens-of-house-brands-as-it-battles-costs-regulators-3f6ad56d>.

²⁷⁹ Eric E. Johnson, *An Intellectual Property Fix for Platform Salesjacking*, 116 NW. U. L. REV. ONLINE 306, 307 (2022); accord Khan, *Amazon’s Antitrust Paradox*, *supra* note 1, at 780-83; Khan, *Separation of Platforms and Commerce*, *supra* note 1, at 992-94.

Indeed, there are many stories of third-party sellers that lose half of their sales or more when Amazon enters the space, undercuts the price of the third-party sellers, and gives itself prominent search-result placement.²⁸⁰ (A ProPublica study found that Amazon gave the products it sells under its own brands better search-result placement approximately 75% of the time, even when other sellers' prices for these products are lower.²⁸¹)

Feng Zhu and Qihong Liu provide more systematic evidence of Amazon's approach, finding that over the course of ten months, Amazon began directly competing against 3% of over 160,000 products offered by third-party sellers across twenty-two product spaces.²⁸² The spaces Amazon entered had higher sales and better product reviews, whereas the spaces they did not enter tended to be those requiring greater seller effort for growth.²⁸³ Amazon is in a unique position when it decides to sell in a product category because it is not only a platform participant like third-party sellers, it is also the platform provider.²⁸⁴ By leveraging the massive amount of sales data it collects in its platform provider role, Amazon can outcompete the third-party sellers on which it relies for its platform's success.²⁸⁵

Scholars and regulators have expressed a range of views on Amazon's first-party sales practices. Some view them as worrisome: Lina Khan calls it "anticompetitive" for Amazon to use its dominance to exploit its customers—third-party sellers—as competitors,²⁸⁶ and Eric Johnson calls Amazon's practice "salesjacking" and often suppressive of third-party innovation.²⁸⁷ Indeed, the House of Representatives subcommittee led a 16-month investigation into Amazon on these and other

²⁸⁰ Johnson, *supra* note 279, at 307; Khan, *Amazon's Antitrust Paradox*, *supra* note 1, at 781-82; *cf.* Rory Van Loo & Nikita Aggarwal, *Amazon's Pricing Paradox*, 37 HARV. J.L. & TECH. (forthcoming 2024) (presenting "evidence that Amazon's search results systematically bury the lowest priced items even if they have equal or better ratings"). Amazon also prioritizes its first-party products in sponsored placements and limits third-party sellers in such placements. Khan, *Separation of Platforms and Commerce*, *supra* note 1, at 988-89 (citing AMAZON: BY PRIORITIZING ITS OWN FASHION LABEL BRANDS IN PRODUCT PLACEMENT ON ITS INCREASINGLY DOMINANT PLATFORM, AMAZON RISKS ANTITRUST ENFORCEMENT BY A TRUMP ADMINISTRATION, THE CAPITOL FORUM (Dec. 13, 2016), <https://thecapitolforum.com/wpcontent/uploads/2016/07/Amazon-2016.12.13.pdf>).

²⁸¹ Julia Angwin & Surya Mattu, *Amazon Says It Puts Customers First. But Its Pricing Algorithm Doesn't*, PROPUBLICA, Sept. 20, 2016, <https://www.propublica.org/article/amazon-says-it-puts-customers-first-but-its-pricing-algorithm-doesnt>.

²⁸² Feng Zhu & Qihong Liu, *Competing with Complementors: An Empirical Look at Amazon.com*, 39 STRATEGIC MGMT. J. 2618, 2620, 2627 (2018). *But cf.* Van Loo & Aggarwal, *supra* note 280 (finding that "only 5% of relevant items at the top of the search results in [thei]r dataset were Amazon brands," and speculating that "Amazon may have scaled back this ... form of self-preferencing, perhaps in response to criticism").

²⁸³ Zhu & Liu, *supra* note 282, at 2620, 2627.

²⁸⁴ Johnson, *supra* note 279, at 309.

²⁸⁵ *Id.*

²⁸⁶ Khan, *Amazon's Antitrust Paradox*, *supra* note 1, at 782-83; *accord* Khan, *Separation of Platforms and Commerce*, *supra* note 1, at 1065-90.

²⁸⁷ Johnson, *supra* note 279, at 307-09, 317-21.

practices,²⁸⁸ and the FTC, under Khan’s leadership, recently sued Amazon for unfair competition for related practices.²⁸⁹ By contrast, Daniel Francis views Amazon’s self-preferencing more benignly as part and parcel of competition in a vertically integrated entity.²⁹⁰ Others have even suggested it might be procompetitive because consumers get more competitors offering products, often at better prices.²⁹¹

Whether or not Amazon’s self-preferencing is problematic from an antitrust perspective, it has important consequences within the trademark system. When Amazon sells its own goods, it does so under its own mark, whether that mark is an Amazon sub-brand that contains the term AMAZON (most commonly AMAZON BASICS or AMAZON ESSENTIALS) or is a separate house brand like GOODTHREADS appeal or RIVET furniture.²⁹² As of 2020, Amazon’s private-label business had 243,000 products across 45 different house brands.²⁹³ For cost-cutting reasons and perhaps out of fear of government regulation, Amazon recently eliminated a number of its house brands, winnowing them down to fewer than twenty.²⁹⁴ For example, Amazon dropped 27 of its 30 clothing brands, leaving just AMAZON ESSENTIALS, AMAZON COLLECTION, and AMAZON AWARE.²⁹⁵ Amazon also opted to focus on its AMAZON BASICS brands for a range of home goods and technology accessories.²⁹⁶ Amazon’s vice president of private brands explained to the *Wall Street Journal* that “[w]e always make decisions based on what our customers want, and we’ve learned that customers seek out our biggest brands—like Amazon Basics and Amazon Essentials—for great value with high quality products at great price points.”²⁹⁷ In all,

²⁸⁸ Palmer, *supra* note 2.

²⁸⁹ Complaint, *FTC v. Amazon.com, Inc.*, No. 2:23-cv-01495-JHC (W.D. Wash. Nov. 2, 2023). A formal investigation by the European Commission led to Amazon committing “not to use non-public data relating to, or derived from, [third-party] sellers’ activities on [Amazon’s] marketplace, for its retail business” and “not to use such data for the purposes of selling branded goods as well as its private label products.” EUROPEAN COMM’N, *Antitrust: Commission Accepts Commitments by Amazon Barring It from Using Marketplace Seller Data, and Ensuring Equal Access to Buy Box and Prime*, Dec. 20, 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777. Amazon’s business therefore looks different in EU countries than in the United States.

²⁹⁰ Daniel Francis, *Making Sense of Monopolization*, 84 ANTITRUST L.J. 779, 828-31 (2022); accord Angelos Vlazakis & Angeliki Varela, *Amazon’s Antitrust Fair Play, a Transatlantic Evaluation*, 41 N. ILL. U. L. REV. 64 (2020).

²⁹¹ Ben Bloodstein, Note, *Amazon and Platform Antitrust*, 88 FORDHAM L. REV. 187, 221-26 (2019).

²⁹² Palmer, *supra* note 2.

²⁹³ Mattioli, *supra* note 278.

²⁹⁴ Palmer, *supra* note 2. Before the FTC sued Amazon, Amazon apparently discussed ceasing house-brand sales as a concession to the FTC were the company to be sued. Mattioli, *supra* note 278. It is unclear if Amazon has since offered the FTC to follow through. *Id.* And Amazon previously stated that not only was it not seriously considering stopping these sales, but that it was going to continue to focus on them. *Id.*

²⁹⁵ Mattioli, *supra* note 278.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

it seems that Amazon has both consolidated most of its house brands to those containing the AMAZON mark and cut tens of thousands of products.²⁹⁸

PTO data give a sense of the range of goods (and services) for which AMAZON BASICS and AMAZON marks are used. Between 2009 and 2022, Amazon filed 38 trademark applications to register AMAZON BASICS. Twenty-four of those applications proceeded to publication; the remainder (all filed since the beginning of 2022) have not yet proceeded yet to publication or been abandoned. Like the fictional ACME mark used in the Looney Tunes cartoons for just about every possible item—including rubber bands, anvils, cars, nitroglycerin, artificial rocks, and superhero suits²⁹⁹—Amazon’s applications collectively are for goods in 24 of the 34 Nice classes of goods—ranging from apparel to paints to cosmetics, tools, software, furniture, and textiles—and 1 of the 11 Nice classes of services.³⁰⁰ Between 2007 and 2022, Amazon filed 55 applications to register AMAZON; 52 of those applications proceeded to publication, while the one application filed in 2022 has neither proceeded yet to publication nor been abandoned. These applications are for goods and services in 15 of the 34 Nice classes of goods and 9 of the 11 Nice classes of services.³⁰¹

Amazon has two mutually reinforcing trademark-related advantages in selling its private goods with a house mark. First, it controls its search algorithm and preferences its own goods in product search results.³⁰² This aspect is trademark-related because it gives increased prominence and emphasis to the Amazon house marks over third-party marks, thereby further advancing the marks’ strength. Even when consumers search on Amazon for third-party branded products, Amazon often gives prominent search-result placement to its own Amazon-branded products over the third-party products for which the consumers were explicitly searching. Consider this striking example, shown in Figure 14, of the Amazon search result for “Hanes t-

²⁹⁸ *Id.*

²⁹⁹ *Acme Corporation*, LOONEY TUNES WIKI, https://originallylooneytunes.fandom.com/wiki/Acme_Corporation (last visited Feb. 8, 2024); *List of ACME Products*, LOONEY TUNES WIKI, https://looneytunes.fandom.com/wiki/List_of_ACME_Products (last visited Feb. 8, 2024).

³⁰⁰ A trademark applicant must specify the goods and services in connection with which the applicant claims the exclusive right to use the mark. 15 U.S.C. § 1051(a)(2). The applicant must do so in the form of a written description of the goods and services and also by reference to one or more of the forty-five categories of goods and services contained in the International Classification of Goods and Services for the Purposes of the Registration of Marks, otherwise known as the “Nice Classification” after the French city where it was established in 1957. TMEP, *supra* note 99, at § 1401.03; *List of Classes with Explanatory Notes*, WORLD INTELL. PROP. ORG., https://www.wipo.int/classifications/nice/nclpub/en/fr/?explanatory_notes. The Nice classes in which Amazon has applied for the AMAZON BASICS mark are 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, and 35.

³⁰¹ The Nice classes in which Amazon has applied for the AMAZON mark are 2, 3, 5, 7, 8, 9, 10, 11, 14, 16, 18, 20, 21, 25, 28, 35, 36, 37, 38, 39, 40, 41, 42, and 45.

³⁰² Angwin & Mattu, *supra* note 262; Khan, *Amazon’s Antitrust Paradox*, *supra* note 1, at 781; Leon Yin & Adrienne Jeffries, *How We Analyzed Amazon’s Treatment of Its “Brands” in Search Results*, MARKUP, Oct. 14, 2021, <https://themarkup.org/amazons-advantage/2021/10/14/how-we-analyzed-amazons-treatment-of-its-brands-in-search-results>.

shirt,” a search query made in February 2023. Amazon’s first result is its own Amazon Essentials crewneck t-shirt, followed only then by Hanes-branded t-shirts. (In fact, Hanes might very well have to pay Amazon for its own t-shirts to appear this prominently in response to searches for Hanes t-shirts.³⁰³) These results translate into increased sales for Amazon’s house brands: 70% of Amazon consumers never look beyond the first page of search results, and 35% of them click on the first result.³⁰⁴

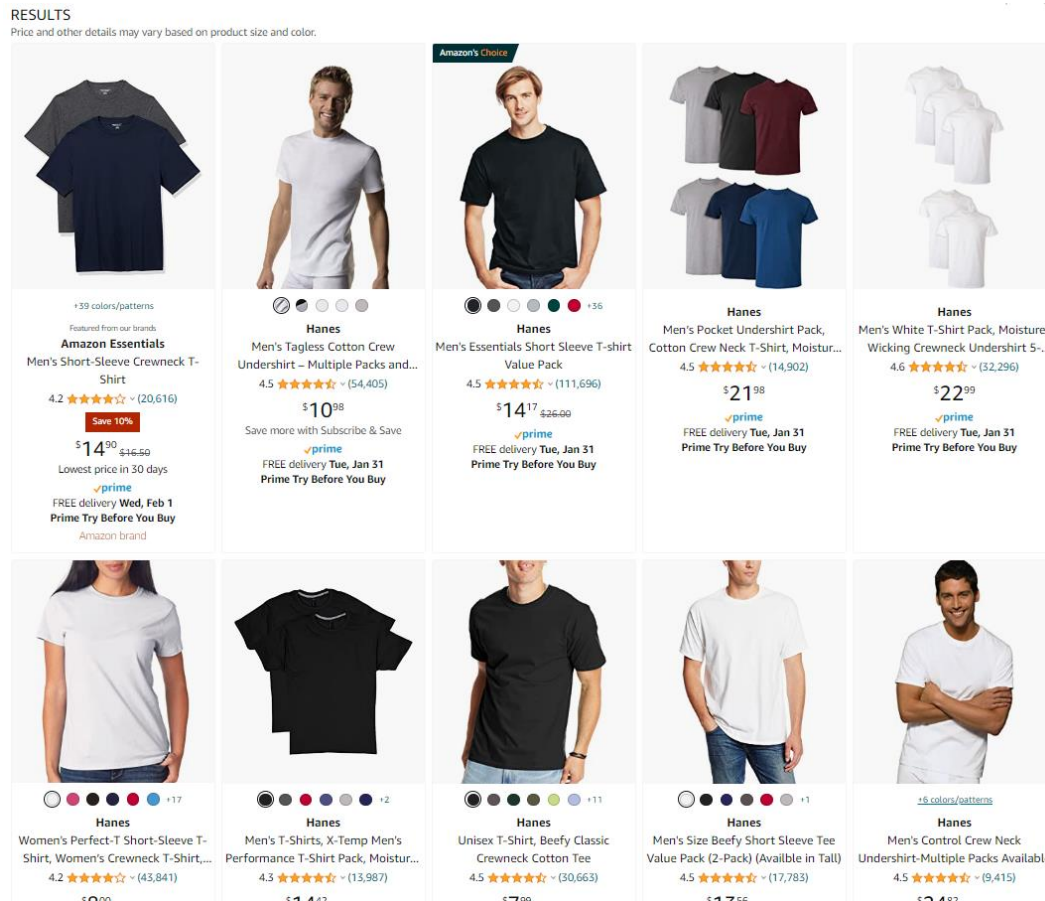


Figure 14: Amazon search results for "Hanes t-shirt"

The second trademark-related advantage for Amazon in selling under its own brands—particularly those containing the AMAZON mark, such as AMAZON BASICS or AMAZON ESSENTIALS—is that Amazon is a beloved, trusted, and widely

³⁰³ See WEST, *supra* note 129, at 38 (“Even a well-known name like the luggage brand Samsonite finds it has to pay Amazon to appear in searches for its own brand name. At the same time, it’s competing against Amazon’s own branded products that, according to both consumer observation and investigative reporting, are increasingly advantaged by Amazon’s search algorithm.”).

³⁰⁴ Mohammad Y., *10+ Amazon Search Statistics and Trends 2023 (Latest Data)*, ONLINEDASHER, Sept. 21, 2023, <https://www.onlinedasher.com/amazon-search-statistics>.

recognized mark.³⁰⁵ Indeed, communications scholar Emily West emphasizes that “Amazon has normalized its own ubiquity[, which] should be viewed as an accomplishment borne of branding, public relations, and relationship marketing.”³⁰⁶ Consumers that shop on Amazon are very likely to be drawn to Amazon-branded products. In that vein, West observes that “Amazon has ... leveraged the trust that consumers have in its brand to launch sub-brands [like] AMAZON BASICS ... and ... AMAZON ESSENTIALS.”³⁰⁷ Furthermore, Amazon’s de-centering of third-party branding—the same de-centering that leads many businesses to opt for nonsense marks³⁰⁸—likely has the ultimate effect of amplifying Amazon’s own branding strategies. The fact that Amazon is consolidating its house brands under the AMAZON BASICS, AMAZON ESSENTIALS, and related house brands containing the AMAZON mark, while discarding unrelated house marks, suggests that Amazon recognizes the power of its AMAZON-centered marks.

While Amazon’s branding practices have not had as profound an impact on the total number of trademark applications as have the incentives for small business registration and for adoption of nonsense marks, its practices are part of a larger story of the increasing importance of Amazon’s marks in the Amazon marketplace and the decreasing prominence of third-party sellers’ marks, even as PTO registration of those third-party marks has become increasingly important. We consider the implications for the trademark system and competition writ large in the next Part.

IV. Implications

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

A. Precursors

In our view, Amazon’s effect on the trademark system is unprecedented in scale. Here we consider two possible precursors: the Sears mail-order catalog in the late nineteenth and early twentieth centuries and the Network Solutions dispute resolution policy for internet domain names in the early years of this century. Sears is the most analogous in terms of its power as a commercial platform—even if not a digital one—and the Network Solutions policy is most analogous in terms of the relationship between a private dispute resolution system and parties’ use of the formal legal system.

³⁰⁵ *Supra* section II.A.

³⁰⁶ WEST, *supra* note 129, at 13. She elaborates: “Amazon’s brand can stretch like taffy because its focus is not the things it sells so much as the service relationship it cultivates with consumers.” *Id.* at 37.

³⁰⁷ *Id.* at 37.

³⁰⁸ *Supra* section D.

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

1. Sears Catalog

Though the technologies involved were more rudimentary than those that Amazon uses, there are many parallels between Amazon’s success as an ecommerce platform and the Sears mail-order catalog. Both Amazon and Sears brought easier shopping experiences to consumers, offering a wide range of low-priced products that would be shipped to the consumer.³⁰⁹ Yet Sears provided a quite different retail experience.

Richard Sears launched his mail-order business in 1886, in an attempt to lower retail prices.³¹⁰ Sears acted as a mass distributor, selling the goods of small manufacturers, thereby competing with large manufacturers.³¹¹ Sears launched his business at a time when the United States was expanding and the railroad and postal systems were being built out, so existing in-person shopping opportunities were limited by geography and transportation.³¹² When Sears began his business, he was therefore focused on selling mainly to rural customers.³¹³ He started by selling watches, but his catalog of offerings quickly expanded to a wide range of products, including jewelry, silverware, clocks, sewing machines, dishes, clothing, harnesses, saddles, firearms, wagons, buggies, bicycles, shoes, baby carriages, and musical instruments.³¹⁴ A few years into the business, Sears’ catalogs were hundreds of pages long.³¹⁵ Sears would generally choose which categories of goods he wanted to sell—such as sewing machines and bicycles in earlier years—and would create a market for these products.³¹⁶

As the business grew, it offered an alternative retail option not just to rural consumers—who typically had no significant retail stores nearby in which to shop—

³⁰⁹ Cf. STONE, *supra* note 132, at 44 (recording Jeff Bezos as seeking to build “the next Sears” with Amazon); WEST, *supra* note 129, at 29 (“From the Sears catalogue as a tool for broadening the reach of not just consumer goods but also consumer desires, to Walmart’s mastery of logistics, to the United States Postal Service’s historic role as the primary distributor of printed material and packages, to UPS as a privately held but ubiquitous delivery brand, the historic importance of distribution brands to both the economics and culture of the United States cannot be underestimated.”); Weigel, *supra* note 245, at 11-12 (“When they started, Amazon marketplace functioned mostly like a catalog—an online version of the Sears Roebuck catalog from the 1890s, or of Stewart Brand’s Whole Earth Catalog ... Like manufacturers and brands that sold through older catalogs, sellers paid a modest fee to sign up to list goods on Amazon.com and for Amazon to handle the transaction.”).

³¹⁰ BORIS EMMET & JOHN E. JEUCK, CATALOGUES AND COUNTERS: A HISTORY OF SEARS, ROEBUCK AND COMPANY 2-3 (1950).

³¹¹ *Id.* at 4.

³¹² *Id.* at 9-15.

³¹³ GARY CROSS, AN ALL-CONSUMING CENTURY: WHY COMMERCIALISM WON IN MODERN AMERICA 28 (2000); EMMET & JEUCK, *supra* note 310, at 35.

³¹⁴ EMMET & JEUCK, *supra* note 310, at 35-36.

³¹⁵ *Id.* at 37.

³¹⁶ *Id.* at 119-22, 219, 240.

but to all consumers, including those located near independent retail merchants.³¹⁷ Feeling hostility from these merchants, Sears focused his catalog advertising on magazines targeted to a rural audience.³¹⁸

Sears faced several challenges in getting small manufacturers to make and supply goods for Sears to sell by mail order. For one thing, the small manufacturers feared boycotts from the independent retailers that were threatened by the Sears model.³¹⁹ Sears also had to find manufacturers that would provide goods at the low prices it would pay.³²⁰ Finally, Sears had to overcome manufacturers' reluctance to commit all of their product to Sears because of their fear of the chokehold the distributors would have on them.³²¹ Sears solved these problems in two ways: first, by locating manufacturers that wanted to work with Sears and providing capital for them if necessary, and second, by making goods in house if outside manufacturers could not be located.³²² Sears generally sold all of these goods without branding other than the Sears name or house brands that Sears chose.³²³

Starting around 1925, Sears began marrying its mail-order business to urban retail stores that it launched.³²⁴ With this combination of urban retail and rural mail order, Sears became the largest U.S. retailer of general merchandise in the mid-twentieth century.³²⁵

Julie Cohen has observed that Sears' mail-order catalog business can be understood as a proto-platform.³²⁶ As she explains, "[i]nclusion of a product in the Sears, Roebuck catalog gave its manufacturer access to a marketing juggernaut with the ability to reach consumers nationwide, the range to offer concert grand pianos and engraved shotguns, and the power to undercut the prices charged by local 'five-and-ten-cent stores' for everyday essentials."³²⁷ In that sense, it bears more than a passing resemblance to Amazon's business model.³²⁸

But Amazon's model differs from Sears' in that just about any third-party business can partner with Amazon to sell any of its wares on Amazon's platform.³²⁹ By contrast, Sears would internally determine which products it wanted to sell and then solicit particular third-party businesses to manufacture those items. And

³¹⁷ *Id.* at 59-60.

³¹⁸ *Id.*

³¹⁹ *Id.* at 117-18. The independent retailers went even further, using racist attacks, advertising boycotts, and editorial assaults to fight Sears. *Id.* at 150-63. They also fought in Congress against the parcel post system to diminish Sears' business, but they lost that battle when Congress enacted the system into law in 1912. *Id.* at 187-95.

³²⁰ *Id.*

³²¹ *Id.* at 118.

³²² *Id.* at 118-19.

³²³ *Id.* at 414-20.

³²⁴ CROSS, *supra* note 313, at 28; EMMET & JEUCK, *supra* note 310, at 313.

³²⁵ *Id.* at 3.

³²⁶ Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 137-39 (2017).

³²⁷ *Id.* at 137.

³²⁸ *Supra* Part II.

³²⁹ *Supra* Part II.

Amazon also has considerably more power vis-à-vis small businesses, because businesses in Sears' heyday could still thrive without Sears by engaging in local commerce, which was then more prominent.³³⁰ Sears therefore did not have the grip that Amazon has on third-party business practices, which one recent report has termed Amazon's "trickle-down monopoly."³³¹

These two differences in combination make Amazon's operation unlike Sears'. As Emily West puts it, even though distributors like Sears have network effects and economies of scale in common with Amazon, "the logics of *digital* capitalism have launched Amazon into a sphere of market dominance and expansion into horizontal and vertical integrations that are unprecedented relative to" other distributors.³³²

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

2. Domain Names and Online Businesses

As the commercial internet took off in the 1990s, everyone and their dog³³³ rushed to claim internet domain names. Whereas in 1992, there were 15,000 registered domain names,³³⁴ by 2000, there were over thirty million registered domain names.³³⁵ (By comparison, by 2024, there were 350.5 million.³³⁶)

Many businesses wanted to (and still want to) register their brand name as domain name in the .com top-level domain.³³⁷ Some businesses readily claimed a .com domain that matched their trademark, as Cisco did with cisco.com and Apple did with apple.com.³³⁸ But one problem quickly became apparent: domain names are, by their very nature, exclusive, but it is common for multiple different companies to use the

³³⁰ Cohen, *supra* note 326, at 139.

³³¹ Weigel, *supra* note 245.

³³² WEST, *supra* note 129, at 30; *accord id.* at 49-50.

³³³ Peter Steiner, *On the Internet, Nobody Knows You're a Dog*, NEW YORKER, July 5, 1993, <https://www.newyorker.com/culture/culture-desk/slide-show-animal-cartoons-in-the-new-yorker>.

³³⁴ 35+ *Must-Know Domain Name Statistics (2024)*, DOMAIN WHEEL, <https://domainwheel.com/domain-name-statistics> (last visited Feb. 8, 2024).

³³⁵ Linda Harrison, *Domain Names Set to Double to 60M by 2002*, REGISTER, Oct. 14, 2000, https://www.theregister.com/2000/10/14/domain_names_set_to_double.

³³⁶ VERISIGN, *Verisign Domain Name Industry Brief: 350.4 Million Domain Name Registrations in the Fourth Quarter of 2022*, Mar. 9, 2023, <https://blog.verisign.com/domain-names/verisign-q4-2022-the-domain-name-industry-brief>.

³³⁷ See, e.g., Frank Schilling, *The House Always Wins—SEM Arbitrage and Keyword Domain Names*, SEVEN MILE (Mar. 23, 2007, 5:41 PM), http://frankschilling.typepad.com/my_weblog/2007/03/the_house_alway.html.

³³⁸ *List of the Oldest Currently Registered Internet Domain Names*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_the_oldest_currently_registered_Internet_domain_names (last visited Feb. 8, 2024).

same or very similar marks for different goods or services. So, for example, Delta Airlines coexists with Delta Financial and Delta Faucets because the uses are different enough that consumers are unlikely to be confused by the concurrent uses.³³⁹ But as the domain system is set up, there can only be one owner of delta.com.³⁴⁰

Sometimes, businesses in this situation amicably worked out allocation, as with delta.com, which was originally claimed by DeltaComm Internet Services, which then transferred it to Delta Financial, which subsequently transferred it Delta Airlines, the current registrant of that domain name.³⁴¹ But multiple potentially-legitimate claims to a domain name often led to conflict, such as when Nissan Motor Company sued Nissan Computer Corporation, alleging that the latter's registration and use of nissan.com constituted trademark infringement.³⁴²

Those conflicts had a different character when they involved domain name registrants with no prior trademark interest in the names corresponding to the domain names they registered. Because domain name registration was initially a gold rush, many of those opportunists rushed to claim domain names for already-existing businesses that had not yet claimed them, often turning around and trying to sell them to owners of the corresponding marks. One individual registered 200 domain names in 1995, including for fashion apparel business Eddie Bauer and airline Lufthansa, and then attempted to sell them to their respective namesakes.³⁴³ Yet others raced to claim domain names they thought might be lucrative because they corresponded to generic category names, such as cars.com and insurance.com.³⁴⁴

This domain name activity spilled over into the trademark system to a large extent, with businesses racing to the PTO to apply to register domain names as trademarks.³⁴⁵ By 1995, the PTO announced a policy that it would register domain names so long as they were used as trademarks.³⁴⁶ Indeed, empirical data representing trends in trademark applications and registrations over time tend to have spikes in the data in 1999-2000, principally due to the accompanying internet boom.³⁴⁷

³³⁹ See Beebe & Fromer, *supra* note 26, at 1012.

³⁴⁰ Michael Karanicolas, *The New Cybersquatters: The Evolution of Trademark Enforcement in the Domain Name Space*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 399, 411 (2020).

³⁴¹ Jacqueline D. Lipton, *A Winning Solution for YouTube and UTube? Corresponding Trademarks and Domain Name Sharing*, 21 HARV. J.L. & TECH. 509, 516 (2008).

³⁴² Nissan Motor Co. v. Nissan Comp. Corp., 89 F. Supp. 2d 1154 (C.D. Cal.), *aff'd*, 246 F.3d 675 (9th Cir. 2000).

³⁴³ Panavision Int'l, LP v. Toeppen, 141 F.3d 1316, 1319 (9th Cir. 1998).

³⁴⁴ Ben Howard, *The Top 10 Most Expensive Domains Ever Sold*, NAME.COM, Dec. 20, 2022, <https://www.name.com/blog/the-top-10-most-expensive-domains-ever-sold>.

³⁴⁵ Joan Meadows, Comment, *Trademark Protection for Trademarks Used as Internet Domain Names*, 65 U. CIN. L. REV. 1323, 1340 (1997).

³⁴⁶ Gary W. Hamilton, *Trademarks on the Internet: Confusion, Collusion, or Dilution?*, 4 TEX. INTELL. PROP. L.J. 1, 5 n.10 (1995) (citing INTA, SPECIAL BULLETIN: REGISTRATION OF INTERNET DOMAIN NAMES IN THE USPTO (1995)). See generally *supra* section I.B.

³⁴⁷ Beebe & Fromer, *supra* note 26, at 972; *supra* sections III.A, D.

Trademark registration practice during this time period was shaped by policies outside the trademark system regarding domain name registration and dispute resolution. In the 1990s, the private company Network Solutions held a U.S. government-sanctioned monopoly on registration of domain names.³⁴⁸ Beginning in 1995, Network Solutions adopted a series of policies under which it could suspend a challenged domain name on the complaint of the owner of a registered trademark that exactly matched the domain name (minus the top-level domain, like .com). It would suspend the domain name even though the domain name registrant might have its own relevant trademark, if the complainant could show that it registered its trademark before the domain name holder activated its domain or registered its trademark.³⁴⁹ Trademark registrations in any country qualified under the Network Solutions policies.³⁵⁰

Network Solutions' policy did not align with domestic trademark law in important ways. In particular, Network Solutions would suspend a domain name based on the complaint of the owner of a foreign trademark registration that predated the domain name registrant's use even though American trademark law would give priority to the first user in the United States.³⁵¹ Relatedly, even if there were two parties holding concurrent trademark registrations for unrelated geographic areas, the first to register a domain name with Network Solutions would win any challenge.³⁵² At the same time, trademark owners sometimes felt compelled to challenge domain name registrations because of their concern that acquiescence in a competing use would weaken their mark's strength and limit the scope of their rights.³⁵³

Perhaps most significantly for current purposes, Network Solutions' policy encouraged businesses to apply to register their trademarks when they might otherwise not have done so, because they needed registrations to be able to challenge

³⁴⁸ David S. Hilzenrath, *Holding the Keys to Internet Addresses*, WASH. POST, July 22, 1996, <https://www.washingtonpost.com/archive/business/1996/07/22/holding-the-keys-to-internet-addresses/9f8d7e88-d404-49eb-b89d-31c5cb5d22f5>.

³⁴⁹ Andre Brunel & May Liang, *Trademark Troubles with Internet Domain Names and Commercial Online Service Screen Names: Roadrunning Right into the Frying Pan*, 5 INT'L J. L. & INFO. TECH. 1 (1997); Alexander Gigante, "Domain-ia": *The Growing Tension Between the Domain Name System and Trademark Law*, in COORDINATING THE INTERNET 154 (Brian Kahin & James H. Keller eds., 1997); Carl Oppedahl, *Trademark Disputes in the Assignment of Domain Names*, in COORDINATING THE INTERNET 154 (Brian Kahin & James H. Keller, eds. 1997). This rule was in spite of the past practice of many trademark lawyers to include ".com" in their PTO trademark registrations. Brunel & Liang, *supra*.

³⁵⁰ Stephen Moccaldi, *Do Any Viable Solutions Exist to Prevent the Exploitation of Trademarks Used as Internet Domain Names?*, 21 SUFFOLK TRANSNAT'L L. REV. 179 (1997).

³⁵¹ Gigante, *supra* note 349.

³⁵² Michael B. Landau, *Problems Arising Out of the Use of www.trademark.com: The Application of Principles of Trademark Law to Internet Domain Name Disputes*, 13 GA. ST. U. L. REV. 455 (1997).

³⁵³ *Id.*

domain names with Network Solutions.³⁵⁴ And because Network Solutions gave priority to any registration that issued before a domain name was registered, those businesses had strong incentive to seek registration wherever it was fastest. That turned out to be Tunisia, which would register an applied-for mark in a matter of days, rather than the year or so it took at the time in the U.S. PTO.³⁵⁵ Indeed, so many domain name registrants and challengers registered in Tunisia that Network Solutions eventually amended its policies to erase the impact of the Tunisian registrations.³⁵⁶

The effects of the Network Solutions policy turned out to be relatively short-lived because domain name dispute resolution came to be governed overwhelmingly by the Uniform Dispute Resolution Policy (UDRP) adopted by the Internet Corporation for Assigned Names and Numbers (ICANN) in 1999.³⁵⁷ The UDRP established procedures that were grounded in recommendations by a United Nations World Intellectual Property Organization study.³⁵⁸ Under the UDRP, which all domain name registrants must accept as a condition of registration, trademark owners can object to any identical or confusingly-similar domain name on the ground that the domain-name registrant has no rights or legitimate interest in the domain name and that the domain name has been registered and used in bad faith.³⁵⁹ Complaints are resolved under the UDRP through ICANN-accredited dispute resolution service providers via arbitration.³⁶⁰

The UDRP effectively eliminated the effect of the Network Solutions' policy and generally diminished the effect of domain name registration on trademark registration practice. In one of the most cited decisions under the UDRP, one involving the domain name *madonna.com*, the panel ruled that a Tunisian trademark registration by a business not located in Tunisia did not reflect a legitimate interest in the disputed name and, in fact, might reflect the registrant's bad faith.³⁶¹ Decisions like that significantly decreased interest in Tunisian trademark registration among non-Tunisian businesses and pushed domain name dispute resolution policy more in the direction of substantive trademark law.

³⁵⁴ At the time, Carl Oppedahl speculated that tens of thousands of trademark registration applications would be filed in the PTO that would not otherwise have been filed. Oppedahl, *supra* note 349.

³⁵⁵ Brunel & Liang, *supra* note 349; Oppedahl, *supra* note 349; Adrian Wolff, *Pursuing Domain Name Pirates into Uncharted Waters: Internet Domain Names That Conflict with Corporate Trademarks*, 34 SAN DIEGO L. REV. 1463, 1481 (1997).

³⁵⁶ Michael Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, 27 BROOK. J. INT'L L. 903, 915 (2002).

³⁵⁷ ICANN was founded as a nonprofit corporation to, among other things, manage domain name policy that would be responsive to global interests through a multi-stakeholder model. Karanicolas, *supra* note 340, at 402-04.

³⁵⁸ *Id.* at 417-18.

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 419.

³⁶¹ *Madonna Ciccone v. Dan Parisi & "Madonna.com"*, WIPO Case No. D2000-0847 (WIPO Arbitration & Mediation Ctr. Oct. 12, 2000), <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0847.html>.

Congress also enacted the Anticybersquatting Consumer Protection Act (ACPA) in 1999. That statute prohibits “the act of registering with the bad faith intent to profit, a domain name that is confusingly similar to a registered or unregistered mark or dilutive of a famous mark,” as well as “squatting” on a personal name.³⁶² The ACPA provided a more effective legal framework for resolution of trademark disputes relating to domain names. Together with the UDRP and the general cooling of the internet boom, the ACPA decreased the number of PTO applications to register rights in domain names.³⁶³

The effect of the Network Solutions policy and the domain name system generally was short-lived, and it paled in comparison to Amazon’s effect in terms of its magnitude. Figure 15 shows the small and brief bump in applications filed during the internet boom of the early aughts as compared with the larger increase in filings in recent years. In scale and in duration, Amazon’s effect on the formal trademark system is truly unprecedented. The Sears experience helps demonstrate why—Amazon’s influence as a platform is orders of magnitude larger than any conceivably analogous predecessor.

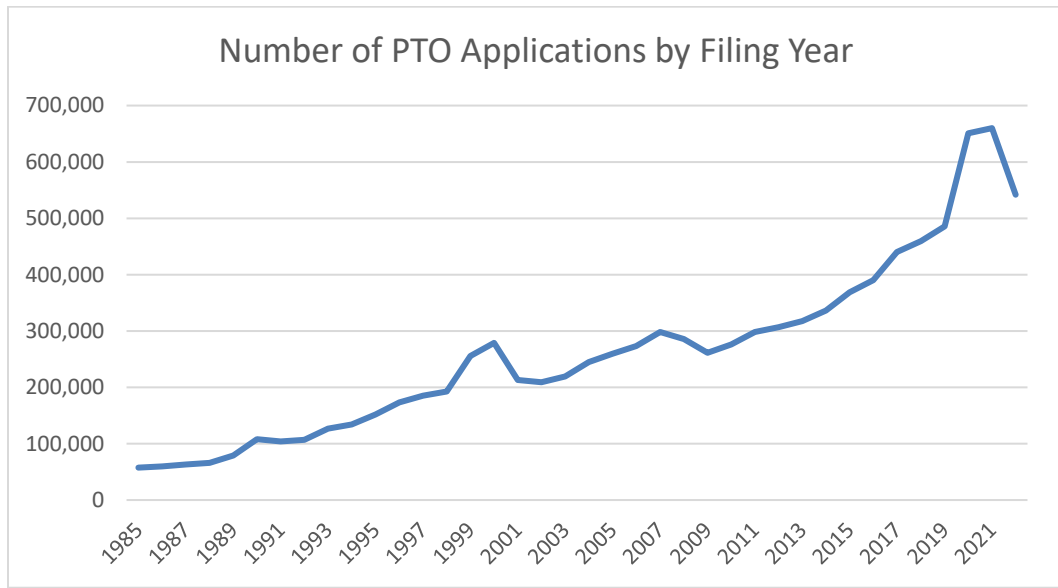


Figure 15: Number of PTO applications, by filing year

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

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

³⁶³ *Infra* fig. 15.

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

Amazon's recent and ongoing impact on the shape of the trademark system is staggering. Its Brand Registry and business model are largely responsible for a huge increase in trademark applications from small businesses that might never have otherwise filed for a registration. It has provoked trademark extortionists to file fraudulent applications, increased the incentive to apply for marks in descriptive and generic terms, and led to large numbers of applications for nonsense marks. All of those effects will no doubt be amplified further now that Amazon has recently allowed businesses with pending trademark registration applications to join its Brand Registry—an irony, given that this change seems to have been motivated by longer pendency of trademark applications in the PTO, to which Amazon surely contributed. And if Amazon alters its business model in other ways or makes different changes to the Brand Registry qualification rules and advantages, it would be likely that Amazon would shape-shift the trademark system in other unforeseen ways.

A recent *Data and Society* report describes and analyzes the “trickle-down monopoly” that Amazon has imposed on its third-party sellers. In particular, the report suggests that “[b]y platformizing such a huge swath of retail, Amazon has enrolled countless [third-party] sellers in expanding the company’s influence. But it has also projected [its] own logics of monopoly onto these small-to-mid-sized scale sellers, who stockpile inventory in their own homes, sell at losses to try to corner niche markets, and diligently guard all information about their businesses.”³⁶⁴ For similar reasons, its capture of the market has also trickled across to and seized the PTO.

Amazon's impact on the trademark system is perhaps not so surprising when considering the role that trademarks play for many third-party businesses selling on the Amazon platform.³⁶⁵ As Sonia Katyal and Leah Grinvald explain, “the platform economy facilitates the emergence of ... ‘macrobrands’—the rise of platform economies whose sole source of capital inheres in the value of the brand itself—the Airbnbs, Ubers, and eBays of the world.”³⁶⁶ There is also the “parallel emergence of the ‘microbrand’—the rise of discrete, small enterprises made up of individual businesses.”³⁶⁷

In many ways, consumers are attracted to Amazon because they trust it, because of its network effects, and because of its consumer-focused model.³⁶⁸ They are drawn to Amazon's macrobrand, much like consumers are drawn to a franchise brand regardless of its operators.³⁶⁹ The third-parties that sell their wares on Amazon are

³⁶⁴ Weigel, *supra* note 245, at 1.

³⁶⁵ *Supra* sections III.C-E.

³⁶⁶ Sonia K. Katyal & Leah Chan Grinvald, *Platform Law and the Brand Enterprise*, 32 BERKELEY TECH. L.J. 101, 105 (2018).

³⁶⁷ *Id.* at 106.

³⁶⁸ *Supra* section II.A.

³⁶⁹ *Cf.* Weigel, *supra* note 245, at 8 (“Amazon sellers more closely resemble franchisees. Amazon sellers resemble ... franchisees in that they assume forms of risk and responsibility that entrepreneurship entails, while relinquishing much of the freedom it has historically

attracted to the platform for similar reason.³⁷⁰ Much like franchisees, third-party sellers realize that any microbrands they use might not matter as much to consumers as they would in other contexts.³⁷¹ Still, those sellers are likely to recognize the value of registering (or applying to register) marks that will benefit them in terms of search result placement and qualify them for the Brand Registry. That is why sellers are picking nonsense marks and descriptive or generic terms as marks when they would be much less likely to do so if they were not selling on Amazon’s platform. Whereas Katyal and Grinvald suggest that microbrands “have a strong interest in utilizing the basic principles of branding and trademark protection,”³⁷² at least some of Amazon’s third-party sellers are throwing these basic principles out the window to maximize their impact on Amazon. The increased importance of Amazon’s macrobrand (and the decreased importance of third-party sellers’ brands) explains why Amazon is tripling down on its AMAZON-centered trademarks like Amazon Basics.

Much has been made in legal scholarship of the ways that the law might have to adjust to regulate platforms³⁷³—such as whether to treat Uber drivers as employees—and in the trademark context, of how to assess trademark liability for platforms.³⁷⁴ These thinkers, as exemplified by Julie Cohen, all recognize that the platform is “the core organizational form of the emerging informational economy”³⁷⁵ and has become the locus for barter and exchange instead of the more traditional marketplace.³⁷⁶

We extend this literature by demonstrating how a dominant platform like Amazon can spearhead an overhaul of a legal system singlehandedly (or at least with the assistance of its third-party sellers). In many ways, this insight is a bookend to Lina Khan’s influential work making the case that Amazon runs afoul of antitrust laws (and the recent antitrust lawsuit brought against Amazon by the Federal Trade Commission under Khan’s leadership³⁷⁷). Khan seeks to reorient antitrust law for the platform era (arguing it is a return to antitrust’s founding principles) by proposing that antitrust analysis focus on “the underlying structure and dynamics of markets” rather than consumer welfare measured through “short-term effects on price and output.”³⁷⁸ In particular, with regard to Amazon, she argues that even though consumers generally love Amazon, its low prices, and broad availability of products,

provided. Insofar as sellers give Amazon, on average, 34% of each sale that they make through the platform, they also facilitate the transfer of loans and other resources that the state has designated to support small businesses—including minority-owned businesses—to one of the largest corporations in the world.”).

³⁷⁰ *Supra* section II.A.

³⁷¹ Michael Grynberg, *AI and the “Death of Trademark”*, 108 KY. L.J. 199, 226, 231 (2019-20).

³⁷² Katyal & Grinvald, *supra* note 366, at 106.

³⁷³ *E.g.*, Cohen, *supra* note 326; Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87 (2016).

³⁷⁴ Katyal & Grinvald, *supra* note 366.

³⁷⁵ Cohen, *supra* note 326, at 135.

³⁷⁶ *Id.* at 136-37; *accord* Katyal & Grinvald, *supra* note 366, at 104-06; Lobel, *supra* note 373, at 91, 106.

³⁷⁷ David McCabe, *U.S. Accuses Amazon of Illegally Protecting Monopoly in Online Retail*, N.Y. TIMES, Sept. 26, 2023, <https://www.nytimes.com/2023/09/26/technology/ftc-amazon.html>.

³⁷⁸ Khan, *Amazon’s Antitrust Paradox*, *supra* note 1, at 716-17.

its “willingness to sustain losses and invest aggressively at the expense of profits, and integration across multiple business lines” is problematic as a matter of antitrust.³⁷⁹ Khan suggests that these features have caused numerous problems for competition, including in the e-book market and the delivery sector.³⁸⁰ As discussed above with regard to Amazon’s house brands, she also argues that Amazon is problematic for being “in direct competition with some of the businesses that depend on them, creating a conflict of interest that [it] can exploit to further entrench [its] dominance, thwart competition, and stifle innovation.”³⁸¹

Without wading into the merits of Khan’s antitrust analysis or the contrary positions taken by others,³⁸² we think it is clear that Amazon’s dominant position in internet commerce both creates potential issues for competition and can reshape the operation of an area of law that intersects with Amazon’s business practices. Because of Amazon’s dominance, its business model and Brand Registry have so substantially changed private parties’ use of the trademark system as to have effectively overhauled that system.

Indeed, Amazon’s singular impact on the trademark system might suggest that it is too powerful. In that respect, Amazon’s dominance might be problematic whatever one thinks of the antitrust issues. Specifically, it forces us to reflect on whether we should be comfortable with a single company setting internal rules for its own benefit when the effect is to reconfigure a legal system that was not developed with such a powerful actor in mind. Amazon is leveraging the existing trademark system, outsourcing decisions about trademark validity to resolve conflicts on its platform and protect its business model. Importantly, it is seeking to ward off prospective regulation that would expose the company to products liability claims and liability for counterfeits sold on its platform.³⁸³ Amazon may very well be doing that by piggybacking on the U.S. trademark system rather than building an independent brand verification system from scratch because Amazon can show regulators that it is using their own gold-standard system, making government regulation unwarranted.³⁸⁴ But Amazon’s practices have profoundly affected the trademark system in ways that impact everyone.

In addition to the impact Amazon has on the trademark system because of its business model and Brand Registry, the company also has an arguably outsized role in further setting trademark policy by having one of its trademark lawyers occupy

³⁷⁹ *Id.* at 746-47.

³⁸⁰ *Id.* at 754-90.

³⁸¹ Khan, *Separation of Platforms and Commerce*, *supra* note 1, at 977; *see supra* section III.E.

³⁸² *E.g.*, Francis, *supra* note 290; Vlazakis & Varela, *supra* note 290.

³⁸³ *Supra* section II.B; *see also* Catherine M. Sharkey, *Products Liability in the Digital Age: Online Platforms as “Cheapest Cost Avoiders”*, 73 HASTINGS L.J. 1327 (2022).

³⁸⁴ It is also likely significantly cheaper to incorporate the U.S. trademark system at the base of the Brand Registry rather than create a fully-independent system. That is surely attractive to Amazon, a notoriously frugal company. *See generally* KRISTI COULTER, EXIT INTERVIEW: THE LIFE AND DEATH OF MY AMBITIOUS CAREER (2023).

one of the nine seats on the PTO's Trademark Public Advisory Committee.³⁸⁵ In this role, Amazon's lawyer might provide helpful insight into its role in shaping the trademark system—or other trademark issues it faces, including fraud and counterfeit goods. But it also further enlarges Amazon's outsized influence on the trademark system.

Should trademark law adjust to the effects of Amazon's practices? It seems both ridiculous for trademark law to keep adapting to the consequences of Amazon's internal business decisions and ridiculous for it not to.

C. Adjusting the Trademark System?

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

1. Amazon's Indirect Capture of the Trademark System

Amazon's considerable impact on the trademark system raises important rule-of-law questions: the practices of a single company have hijacked the legal system without the requisite legislative or regulatory legitimacy.³⁸⁶ Several scholars have explored the related, but analytically distinct, issue of platforms' role as private sovereign,³⁸⁷ engaging in rulemaking or adjudicatory acts.³⁸⁸ For example, Rory Van Loo has considered corporations' development of large-scale dispute resolution systems for customers.³⁸⁹ He analyzes how these forms of dispute resolution offer some things that courts offer or are idealized to offer (such as access to redress,

³⁸⁵ U.S. PATENT & TRADEMARK OFFICE, *Trademark Public Advisory Committee Members Biographical Information*, <https://www.uspto.gov/about-us/organizational-offices/public-advisory-committees/trademark-public-advisory-committee-0> (last visited Feb. 8, 2024).

³⁸⁶ See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006) (analyzing the ways that federal government might implement a rule of law through the lens of party competition).

³⁸⁷ Cf. Cohen, *supra* note 326, at 199 (characterizing how platforms' "role in the international legal order increasingly resembles that of sovereign states"); K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1632 (2018) (observing that "corporations [have] exercised quasi-sovereign authority and influence over ... the economy and society as a whole, absent the kinds of checks and balances that accompany the exercise of public power in republican governance"); Rory Van Loo, *Federal Rules of Platform Procedure*, 88 U. CHI. L. REV. 829, 832 (2021) [hereinafter Van Loo, *Federal Rules*] ("[P]latforms such as Twitter, Facebook, Google, and Amazon exert quasi-sovereign influence over commerce, speech, elections, and myriad other spheres of activity").

³⁸⁸ See also Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526 (2022); Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418 (2020); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018).

³⁸⁹ Van Loo, *Federal Rules*, *supra* note 387, at 837-40; Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. REG. 547, 551 (2016) [hereinafter Van Loo, *Corporation as Courthouse*].

accountability, truth, and justice) but lack other judicial features (such as transparency, procedural equality, and aggregation mechanisms).³⁹⁰ Van Loo has generally recommended both governmental oversight of these private systems and procedural rules similar to those used in courts, to promote due process and transparency.³⁹¹ Similarly, Hannah Bloch-Wehba analyzes how platforms act as regulators and “are performing quintessentially administrative functions.”³⁹² She therefore proposes that “platform governance [be] accountable to the public.”³⁹³

Even though we could tell a similar story about Amazon creating a private trademark dispute resolution system parallel to the government’s,³⁹⁴ our focus is different and is on the extent to which Amazon’s “system” influences parties’ behavior within the legal system itself.³⁹⁵ Though this is not a story of Amazon overtly seeking to capture the trademark system, it is perhaps a story of indirect capture, with Amazon having taken over the PTO—even without realizing as much—by shaping third parties’ trademark registration behavior.³⁹⁶ The worry here is that Amazon’s model is materially affecting the trademark system as a result of maximizing its own interests, which might diverge from public welfare, including the trademark system’s aims.³⁹⁷ As Rachel Barkow points out in generally thinking through agency capture, “one person’s political pressure is another person’s democratic accountability. What policy makers who seek insulation want to avoid are particular pitfalls of politicization, such as pressures that prioritize narrow short-term interests at the expense of long-term public welfare.”³⁹⁸ This concern suggests taking a hard look at the substantive ways in which the trademark system’s operation has changed to

³⁹⁰ Van Loo, *Corporation as Courthouse*, *supra* note 389, at 571-84.

³⁹¹ *Id.* at 584-94 (recommending more agency oversight, class action availability, and “visibility into businesses’ internal operations” in the face of failures of corporate courthouses); Van Loo, *Federal Rules*, *supra* note 387 (proposing procedures to govern platform adjudication systems to advance public values, including due process and transparency).

³⁹² Hannah Bloch-Wehba, *Global Platform Governance: Private Power in the Shadow of the State*, 72 SMU L. REV. 27, 29 (2019).

³⁹³ *Id.* at 28.

³⁹⁴ *Supra* text accompanying notes 5-7.

³⁹⁵ Others analyze the flipped issue of how to think of due process with regard to government use of technology, automation, or big data. *See, e.g.*, Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1255 (2008) (exploring how “automation undermines several pivotal assumptions at the heart of twentieth-century administrative law”); Kate Crawford & Jason Schultz, *Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms*, 55 B.C. L. REV. 93 (2014) (proposing a right to “procedural data due process” to address predictive privacy harms that can come from using data in an adjudicatory process).

³⁹⁶ On capture, see generally Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337 (2013); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

³⁹⁷ *Cf.* Van Loo, *Federal Rules*, *supra* note 387, at 849 (“Unlike federal courts’ procedural rules, however, platforms’ rules are influenced by an economic analysis that prioritizes profit.”).

³⁹⁸ Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 19 (2010).

explore whether any are out of line with the way the trademark system ought to operate.³⁹⁹ We return to that constellation of issues shortly in discussing trademark-specific harms provoked by Amazon.

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

Another general concern with capture is the instability it can foster when there are future political changes in elected offices like Congress or the presidency.⁴⁰⁰ Amazon's de facto capture here brings potential instability in a different sense: To the extent Amazon decides further to adjust its practices in ways that affect third-party seller behavior vis-à-vis the trademark system, the trademark system could repeatedly experience massive and relatively abrupt legal shifts in whichever direction Amazon's winds blow.⁴⁰¹

To be sure, market and social conditions often shift, create demands, or subvert existing regulatory premises, and government actors routinely adapt to those changes. When cars became mainstream, we suddenly needed a Department of Motor Vehicles and driver's licenses. New voter identification requirements increase the demand—perhaps substantially—for driver's licenses. The advent of the internet opened the floodgates of businesses rushing to register domain names as trademarks.⁴⁰² Amazon's overhaul of the trademark system is different. For one thing, Amazon's effects are different in scale. For another, those effects are attributable to the policies of one company and its market dominance rather than being the result of more diffuse background conditions. The singularity of Amazon's influence creates challenges—given that Amazon can unilaterally provoke massive legal shifts—and opportunities—because Amazon might be amenable to helpful changes, and if not, more easily regulable. For similar reasons, it may very well be the case that dominant platforms will provoke shifts in other areas of the law (such as Uber with insurance and employment laws or Facebook with privacy law). In that way, these rule-of-law concerns are not Amazon-specific or trademark-specific.

Yet Amazon's policies have also inflicted several trademark-specific harms. For one thing, trademark law assumes that businesses will use the trademark system in certain ways. Amazon has upended many of those assumptions, leaving the PTO and

³⁹⁹ Cf. Van Loo, *Corporation as Courthouse*, *supra* note 389, at 594 (“[P]ublic intervention should rely on the economic incentives of firms as much as possible. This reliance would mean defaulting whenever possible to private ordering and its mainstays”).

⁴⁰⁰ Barkow, *supra* note 398, at 24-25.

⁴⁰¹ Trademark law too has to grapple with gradual concerns, such as growing rates of trademark depletion and congestion, where it is hard to detect a crisis point. Beebe & Fromer, *supra* note 26, at 1023-24.

⁴⁰² Cf. *supra* section A.2.

other legal actors ill-equipped to deal with the kinds of applications many businesses now file. For example, consider applications for descriptive or generic terms that businesses operating on Amazon might be tempted to seek.⁴⁰³ For well-considered reasons, the trademark system makes it harder, if not impossible, to obtain protection for rights in these terms than others given the impact that protection can have on fair competition.⁴⁰⁴ Given the limitations the trademark system has imposed to protect fair competition, it is much easier to register such a term if it is stylized or accompanied by an image.⁴⁰⁵ Indeed, the PTO might very well require an applicant to disclaim rights in the descriptive or generic term itself.⁴⁰⁶

If a business were to succeed in registering a descriptive or generic term because of its stylization or accompanying image and then to use the mark in the expected sense—not on Amazon but elsewhere in commerce—and were it subsequently to seek enforcement of its rights in court, a court would be sensitive to the aspects of the mark that are not protectable—or at least are weak—by virtue of them being descriptive or generic. For example, the Second Circuit found no likelihood of confusion between EXCEDRIN PM and TYLENOL PM trade dress after weighing all aspects of the two marks and in part because the PM component was descriptive and lacked secondary meaning and therefore could not on its own form the basis for infringement.⁴⁰⁷ Yet Amazon’s brand registry rules are not similarly sensitive because Amazon ignores stylization and accompanying images to focus just on the text of a mark, meaning it will allow a descriptive or generic term to be the basis for protection and preferential treatment.⁴⁰⁸ That means that, in terms of its application to the commercial world of Amazon, trademark law has a different character than assumed by the registration system—Amazon lacks the ability to meter scope in the way that justifies registration of these terms in the first place.

More broadly, Amazon’s policies result in behavior that tends to undermine the trademark system’s core assumptions. In particular, that happens when third-party sellers pick descriptive, generic, or nonsense terms to use on Amazon. Use of those marks contravenes trademark law’s central premise that marks serve as source indicator and as shorthand for the constellation of qualities associated with the source’s particular goods or services.⁴⁰⁹ The reasons are assorted yet related. By their nature, these third-party marks are unlikely to be memorable to consumers, let alone associated with a particular source. But because of Amazon’s model, consumers on that platform are likely to rely on product searches, product reviews, and the pull of

⁴⁰³ *Supra* section III.C,

⁴⁰⁴ *Supra* sections I.A, III.C. *But cf.* Buccafusco, Masur & McKenna, *supra* note 24 (arguing for changes in these rules because they are not protective enough of competition); Fromer, *supra* note 24 (arguing for other changes in these rules for similar reasons).

⁴⁰⁵ *Supra* section III.C.

⁴⁰⁶ *Supra* section III.C.

⁴⁰⁷ *See, e.g.*, Bristol-Myers Squibb Co., 973 F.2d 1033, 1039-47 (2d Cir. 1992).

⁴⁰⁸ *Supra* sections II.B, III.C.

⁴⁰⁹ *Supra* Part I.

Amazon as a brand to find and buy products bearing these non-source-designating marks.⁴¹⁰

Many will regard this as an important trademark harm. If the premises of the trademark system are sound—if there are good reasons to insist on rules that focus on source designation—then we should resist developments that threaten to undermine that focus. And our data suggest Amazon’s policies have already had significant effect along these lines—an effect that is growing. But as we have noted, it is at least worth considering whether instead we ought to rethink those premises. If the informational function of trademarks can effectively be served in other ways, and specifically if platform algorithms and consumer reviews can provide that information more directly than can trademarks, then the net effect of reifying the traditional conception of marks may be to prop up brand value without the informational gain.

A third trademark-specific harm is the clutter of the PTO’s trademark register. The increasing number of applications, perhaps particularly for marks that do not function as trademarks, imposes costs on the PTO, other businesses, and consumers. Increased registrations lead to a so-called “trademark thicket.”⁴¹¹ A thicket makes it harder for trademark examiners and businesses to search the register to ascertain whether there are existing registrations that are potentially confusingly similar, a difficult cost to impose particularly when many of these registrations are undermining trademark’s core assumptions. The clutter also makes it harder for businesses that want to choose a new mark—particularly one that is used in a traditional trademark sense—to settle on one that is not confusingly-similar to

⁴¹⁰ For these reasons, the mark is not much different than a UPC code to uniquely identify the goods at hand. A related harm is that many of these businesses, particularly the ones registering nonsense marks, are primed to rebrand with a new (nonsense) mark if they get sufficiently negative product reviews on Amazon. Such rebranding would give them an opportunity to resurface on Amazon with the same product but with a clean slate. And it is not as if consumers remembered the mark anyhow. While such rebranding might also see to contravene trademark’s core values, trademark law does not stand in the way of businesses rebranding, as can happen when a business wants to escape scandal, as with ValuJet Airlines becoming AirTran Airways after a plane crash; an association with a negative term, such as ISIS mobile banking app becoming Softcard; or a dated symbol, as with American Telephone & Telegraph becoming primarily known as AT&T. Roy Baharad & Gideon Parchomovsky, *Cainmarks* (unpublished manuscript); Sonia K. Katyal, *A Trademark Theory of Rebranding* (unpublished manuscript).

⁴¹¹ As one of us describes in previous work, “[a] trademark thicket is analogous in some ways to the patent thicket, a crowded area of patent rights, in which rights to the many patents comprising the thicket must be secured for freedom of operation in the space, which can raise cost issues and anticompetitive concerns.” Beebe & Fromer, *supra* note 26, at 1024 n.237 (citing Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1614-15, 1627, 1694-95 (2003); Rochelle Cooper Dreyfuss, *Giving the Federal Circuit a Run for Its Money: Challenging Patents in the PTAB*, 91 NOTRE DAME L. REV. 235, 235-39 (2015); Katherine J. Strandburg, Gábor Csárdi, Jan Tobochnik, Péter Érdi & László Zalányi, *Law and the Science of Networks: An Overview and an Application to the “Patent Explosion”*, 21 BERKELEY TECH. L.J. 1293, 1322, 1346-48 (2006)).

existing registrations.⁴¹² Even when a business finds a mark that it can clear through this thicket, moreover, that mark might be less useful in the sense that it is less distinctive of source than it would otherwise be.⁴¹³ Relatedly, a thicket can also harm consumers by making it harder for them to distinguish between the crowd of marks.⁴¹⁴

To be sure, this cluster of harms is less sharp—and perhaps not a harm at all—when it comes to those third-party sellers that are registering source-designating marks that they would have used yet not registered but for Amazon’s business model and Brand Registry.⁴¹⁵ Their marks serve trademark’s core function and would have been used, just not registered. Indeed, this category of contribution to the PTO register’s cluster might be welcomed for making the PTO trademark register more comprehensive, thereby making it easier for third parties and the PTO to locate these marks and giving these businesses the benefits of registration.⁴¹⁶ On the flip side, it might be seen as wasteful papering of rights.

But the increase in number of applications itself causes a fourth trademark harm, specifically the delay in getting federal registrations—a harm that exists even if the marks would otherwise have been used.⁴¹⁷ This backlog of so many months is harmful to businesses that want to use the trademark system for its core purposes because they have to wait that much longer to get registration’s benefits and live in some legal uncertainty during this time. It also might undermine the quality of trademark examination because examiners are juggling more applications at a time and are waiting longer periods before being able to return to an application on which they already have begun working.

A fifth harm to the trademark system is the fraud committed on the PTO by trademark extortion. The fraud harms legitimate businesses whose marks have been commandeered, as they are the true source designation of those marks. All the while, it consumes scarce PTO resources.

Finally, third-party sellers’ increased use of descriptive and generic terms as marks might be problematic for competing sellers on Amazon whose products get ranked lower in search results by virtue of the descriptive or generic term being claimed on the Brand Registry. Moreover, these competing sellers might also be accused of infringing the Brand Registry-protected mark for using it in their search listings. Even if Amazon ultimately clears them, the costs of investigation and

⁴¹² *Cf.* Beebe & Fromer, *supra* note 26, at 1021 (“[A]s [trademark] depletion worsens, entrants face higher costs than incumbents had faced earlier when devising a mark that is both competitively effective and also not confusingly similar to an already-registered mark.”).

⁴¹³ *Cf. id.* at 1026 (“Even when they do not confuse consumers as to source, parallel uses of the same mark diminish the mark’s distinctiveness of source. They do so in the sense that parallel uses blur the link between the mark and any one source.”).

⁴¹⁴ *Cf. id.* (“Upon exposure to the mark, consumers who are aware that the same mark comes from multiple sources must at the very least think for a moment before linking the mark with one of those multiple sources.” (internal quotation marks omitted)).

⁴¹⁵ *Supra* section III.A.

⁴¹⁶ *Supra* section I.C.

⁴¹⁷ *Supra* section III.A.

possibility of suspension can be pernicious. By contrast, trademark law has developed tools to make it hard or impossible to protect these terms in the first place.⁴¹⁸ Moreover, when the law does allow protection, it has developed defenses of fair use to enable competitors to use such terms descriptively and otherwise in ways that do not put them at a disadvantage to compete fairly.⁴¹⁹

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

2. PTO Adjustments

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

One of the biggest immediate problems the PTO faces is its backlog of applications and the accompanying delays in registration. The PTO has expressed sensitivity to this backlog. It recently announced that it plans to hire 86 more trademark examiners before the end of 2023 and up to 60 more in 2024, as well as put in place incentives to encourage speedier examination.⁴²⁰ The PTO is currently targeting an average total application pendency of 8.5 months and 5 months to an initial office action, targets that will likely take two to three years to achieve.⁴²¹ While these are good moves, the PTO ought to be cautious in trading off speed for careful examination—especially because some of the effects of Amazon's policies have been to encourage fraudulent applications. PTO Trademark Commissioner David Gooder concedes as much, by stating that in a world with fraudulent and different sorts of applications, trademark examiners will need to proceed slower and with more caution.⁴²²

The PTO has also already begun to address the issues it is facing with fraudulent filing, including from trademark extortionists capitalizing on Amazon's system as well as other fraudulent filings (many of which originate from China for other reasons).⁴²³ In particular, the PTO has announced that it will seek to identify scams and other

⁴¹⁸ *Supra* section I.A.

⁴¹⁹ *Supra* section I.A.

⁴²⁰ Lince, *supra* note 209.

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ Beebe & Fromer, *supra* note 225; *supra* section III.B.

untoward filings and shuttle them to its newly-created Register Protection Unit.⁴²⁴ It also is working cooperatively with Amazon to identify fraudulent filings.⁴²⁵

Beyond fraud wrought by trademark extortionists, the PTO ought to confront the other substantive issues raised by the filing shifts for different types of marks. Prominently, it ought to consider whether and how to apply different, but more appropriate, rules for determining the protectability of nonsense marks. It should first grapple with what qualifies as a nonsense mark. It should then assess whether to continue to classify such marks as fanciful and thus inherently distinctive.⁴²⁶ While these terms are indeed coined, they are quite distinct from “conventional” fanciful marks like KODAK, EXXON, and PEPSI, which also have no existing meaning but are pronounceable in English and are more easily memorable because they can be assimilated as words.⁴²⁷ Indeed, nonsense marks do not sit easily within any of the *Abercrombie* distinctiveness categories. They are more like generic terms or descriptive terms that do not have secondary meaning in the sense that they do not identify source; but they are unlike generic or descriptive terms in that they do not have any alternate meaning. Nonsense marks also probably fail to function as marks.⁴²⁸ There is thus a strong argument on both distinctiveness and use grounds not to allow the registration of nonsense marks.⁴²⁹ Even if registration is allowed, the PTO should devise what makes a nonsense mark confusingly-similar to another mark. Given that they cannot be compared by sound or meaning and just on sight, perhaps all nonsense marks are confusingly-similar to one another as a mere jumble of letters.

The PTO should also reconsider the practice of registering generic or descriptive terms because of their stylization or accompanying images. As we noted, the justification for those registrations is that the scope can be limited to reflect the source-indicating value of the stylization or images.⁴³⁰ But when those marks can effectively be enforced without the scope limitations, there is additional reason to be concerned about their registration even if the generic or descriptive terms are disclaimed.⁴³¹

⁴²⁴ Lince, *supra* note 209.

⁴²⁵ *Supra* section III.B.

⁴²⁶ *Supra* section I.A.

⁴²⁷ *Supra* section III.D.

⁴²⁸ *Supra* sections I.B, III.D.

⁴²⁹ *Cf. Fanciful Failures*, *supra* note 44 (proposing to keep nonsense marks off the trademark register using failure-to-function doctrine).

⁴³⁰ *Supra* text accompanying notes 403-408.

⁴³¹ Even with such restrictions, we worry about registration of such terms because the bar to establishing secondary meaning is set so low—making it too easy to register descriptive terms as such—and because of the competitive harm that protection and registration of such terms can inflict on fair competition. Buccafusco, Masur & McKenna, *supra* note 24 (recommending that the bar to establishing secondary meaning be raised); Fromer, *supra* note 24 (proposing instead that a term not be protectable when the conceptual relatedness of the term’s primary meaning to the goods or services for which it is used is too high).

3. Amazon Adjustments

The PTO cannot fully address Amazon's impact on the trademark system alone. Ideally, Amazon would play a role too.⁴³² Indeed, it might want to play such a role. Much of Amazon's effect on the trademark system has come about because Amazon is seeking to avoid government regulation for products liability and counterfeits.⁴³³ Indeed, Amazon has been piggybacking on the U.S. trademark system as a way to signal to regulators that it is taking the government's concerns with fraudulent goods in its marketplace seriously.⁴³⁴ Instead of building its own fully functioning trademark system, Amazon is using the U.S. trademark system and the certifications it makes of businesses' marks by registering them as the core of its Brand Registry. In this regard, Amazon should not be shocked that its sanctification of the U.S. trademark system in its massive business has reverberated back into the U.S. trademark system itself. With great power comes great responsibility, and Amazon does bear moral responsibility to support the U.S. trademark system in return for its piggybacking on it.

Beyond moral obligation, Amazon might be motivated by self-interest to cooperate more robustly with the PTO to smooth out the trademark system. In recent years, Amazon has been accused of anticompetitive behavior from multiple angles, most recently in an FTC lawsuit and congressional investigations.⁴³⁵ If only for the upshot of public relations, Amazon might emphasize how it wants to help third-party sellers compete fairly on its platform. To that end, it could ramp up its cooperation with the PTO—which it is already doing to fight trademark extortion—to improve its Brand Registry rules more broadly in ways that promote the operation of the trademark system.

Most fittingly, it could help rein in the ways in which it is enabling the unfettered protection of descriptive and generic terms. It could change its rules to allow for participation in the Brand Registry only when the corresponding mark is registered in plain text, without stylization or accompanying images.⁴³⁶ In this way, third-party sellers would not be able to acquire rights to descriptive or generic terms in Amazon's Brand Registry without clearing them as such through the PTO. In most cases, given trademark's distinctiveness rules, they would not be able to get a PTO registration unless they have a descriptive term that has developed secondary meaning.⁴³⁷ In this vein, Amazon also should clarify its rules on descriptive fair use⁴³⁸ to ensure that even when a third-party seller secures a PTO registration for a descriptive term, Amazon

⁴³² The changes we suggest could be adopted by Amazon voluntarily, or they might be imposed on Amazon as government regulation. We take no position at this juncture on whether that regulation is necessary given the many systemic changes suggested herein that might be made first and evaluated.

⁴³³ *Supra* section II.B.

⁴³⁴ *Supra* section B.

⁴³⁵ *Supra* text accompanying notes 2-4.

⁴³⁶ Amazon might apply this rule to all marks sought to be registered in its Brand Registry or only to those that are descriptive or generic. We thank Rebecca Tushnet for this suggestion.

⁴³⁷ *Supra* section I.A. That is, the PTO is applying its rules in this regard properly and the distortion to the trademark system happens only because of Amazon's Brand Registry rules, so the focus ought to be on adjusting Amazon's rules.

⁴³⁸ *Supra* section I.A.

would not give that third-party seller priority in results displayed when consumers search for that descriptive term and would allow other third-party sellers to use that term descriptively in its listings without fear of repercussion by Amazon. By making these changes, Amazon might very well tamp down third-party sellers' incentive to seek registrations of descriptive and generic terms.

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

More generally, Amazon ought to be encouraged to be more transparent about the ways in which it advantages Brand Registry participants and the rules of qualification, many aspects of which are not publicly clear. Transparency would promote the ability of the PTO and watchdogs to respond, when appropriate, to the ways in which these rules encourage third-party sellers to seek to register marks or adopt particular types of marks.⁴³⁹

With regard to the delays in the PTO provoked by the Brand Registry's requirement that a seller obtain a PTO registration (and now merely have a pending application, which will likely aggravate delays yet further), perhaps Amazon ought to bear some of the cost of the delays it has caused in the PTO.⁴⁴⁰ There are many forms that such a tax could take, but it might be a tax that corresponds to the number of applications filed annually that are then registered in the Brand Registry. Alternatively, the PTO could consider changes to the fee structure that would specifically target the kinds of applications most likely attributable to Amazon policies.

D. The Future of Trademarks and Competition

The previous sections focus on ways in which Amazon's policies, and especially the Brand Registry, warp existing trademark law, and they offer suggestions about how to change either PTO rules or Amazon policies to better approximate the pre-Amazon balance in the system. But it is worth considering broader questions about Amazon's impact on branding practice, and what that might mean about the role of trademark law in the future.

As we noted, Amazon's model is largely responsible for the rise of nonsense marks and has provided incentive to claim descriptive and generic terms as marks.⁴⁴¹

⁴³⁹ Cf. Kate Crawford & Jason Schultz, *AI Systems as State Actors*, 119 COLUM. L. REV. 1941 (2019) (making the case that third-party vendors of algorithms used by governments be held accountable in court); Vincent M. Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Legal System*, 80 MD. L. REV. 487 (2021) (proposing rules to oversee algorithmic tools used in the criminal legal system).

⁴⁴⁰ These delays are costly both to the PTO, which must hire new examiners and institute new systems to improve them, and to the businesses waiting for registrations.

⁴⁴¹ *Supra* sections III.C-D.

Because consumers search for products on Amazon using product categories, descriptive and generic terms, or consumer reviews, and because search results use that kind of information as much or more than brand information, Amazon sellers have diminished incentive to select a memorable brand name that consumers use to search. They need some mark that they can register in the PTO, but nonsense or descriptive or generic terms will do. At the same time, Amazon's own branding practices, and particularly its increasing emphasis on AMAZON-centered brands (such as AMAZON BASICS and AMAZON ESSENTIALS), and its preferencing of its own products in search results, has the effect of diminishing the importance of third-party brands in favor of the Amazon brand.

On the one hand, these features have positive value for many smaller third-party sellers, whose brands cannot effectively compete against large, better-known brands. Indeed, there is an important sense in which Amazon's practices de-center brands altogether. Whereas search-costs theory has always maintained that the value of a trademark is in its ability to decrease search costs by enabling consumers to use marks as a shorthand for product information,⁴⁴² Amazon's model makes that product information more directly available and the basis for algorithmic search.⁴⁴³ The result is a more democratic marketplace, less dominated by big brands. For the many critics of expansive trademark protection and its contribution to an overly-brand-focused economy,⁴⁴⁴ that should sound like a win.⁴⁴⁵ Of course, Amazon de-centers third-party brands in large part to center its own brand. In that respect, the effects are hardly democratic, as they further entrench the power of a dominant platform.

In terms of the net effects on competition, then, Amazon's practices are a mixed bag: Amazon to some extent enables third-party businesses, especially as against

⁴⁴² See, e.g., Landes & Posner, *supra* note 56, at 269–70; Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 786–87 (2004).

⁴⁴³ Cf. Christine Haight Farley, *Trademarks in an Algorithmic World*, 98 WASH. L. REV. 1123 (2023) (making the case that the growing surveillance capitalism that is intertwined with developments in artificial intelligence may well render trademark's informational function obsolete); Lisa Larrimore Ouellette, *Does Running Out of (Some) Trademarks Matter?*, 131 HARV. L. REV. F. 116, 123 (2018) ("If consumers have trouble keeping track of the exploding number of craft beers, they can keep track of favorites with the Untappd app—including by scanning barcodes rather than searching by name. Consumers can scan barcodes or take pictures of other products to see reviews and prices with shopping tools such as the Amazon app."). Cf. generally ITAMAR SIMONSON & EMANUEL ROSEN, *ABSOLUTE VALUE: WHAT REALLY INFLUENCES CONSUMERS IN THE AGE OF (NEARLY) PERFECT INFORMATION* (2014) (arguing that branding is losing its value now that consumers can turn to expert opinions, customer reviews, price comparison apps, and more).

⁴⁴⁴ Beebe, *supra* note 73, at 2069–72; Jeanne C. Fromer, *The Role of Creativity in Trademark Law*, 86 NOTRE DAME L. REV. 1885, 1916–20 (2011); Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137, 179 (2010); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1721–25 (1999); Mark P. McKenna, *Testing Modern Trademark Law's Theory of Harm*, 95 IOWA L. REV. 63, 67–68 (2009).

⁴⁴⁵ To be sure, Amazon has outsourced to the PTO the kinds of decisions that need judgment, even while creating conditions that pervert those judgments, in service of making its own system algorithmically administrable.

entrenched brands, but it does so in a structure that primarily benefits Amazon and may ultimately promote Amazon over all others.⁴⁴⁶ In some ways, this is a long-term response to the rise of brands and their ascendancy vis-à-vis retailers, in which powerful brands wrested value away from retailers by reaching over the shoulders of the retailers and creating direct relationships with consumers who would demand those brands specifically.⁴⁴⁷ Amazon reverses those trends, reasserting the dominance of the platform over the third-party brands sold on its site. In that respect, one's views of Amazon's competitive effects are like a Rorschach test about Amazon: the combined effects of its policies is likely to be more Amazon, however one perceives the platform.

Perhaps more radically, we might see some of the de-centering of brands as evidence that Amazon is merely emblematic of a decreasing significance of the brand, with signs becoming what Barton Beebe and one of us characterize in a different context as "indistinguishable ambient noise."⁴⁴⁸ That would be welcome news for those persuaded by Naomi Klein's *No Logo*, which puts some of the blame for the costs of globalization on brands.⁴⁴⁹

If the emergence of nonsense marks—not to mention increased incentive to register descriptive and generic terms—reflects a broader de-centering of brands, then Amazon's practices go to the very core of trademark law's justification. Trademarks have long been understood to have an important informational function: they are the shorthand for information about the qualities or characteristics of goods.⁴⁵⁰ Critics have long observed that brands also (and maybe even primarily) create artificial product differentiation, allowing brand owners to extract value from consumers based on brand values that have little to do with underlying product quality.⁴⁵¹ To the extent those two functions are in conflict, the current settlement seems to accept enablement of pure brand building as a necessary byproduct of protecting the informational function that most see as central to trademark law. In Barton Beebe's language, we have allowed mark owners to increase their ability to persuade so that they can assume consumers' search costs.⁴⁵²

⁴⁴⁶ Cf. Van Loo & Aggarwal, *supra* note 280 (arguing for an integration of antitrust and consumer protection).

⁴⁴⁷ See, e.g., GARY CROSS, *AN ALL-CONSUMING CENTURY: WHY COMMERCIALISM WON IN MODERN AMERICA* (2000); SUSAN STRASSER, *SATISFACTION GUARANTEED: THE MAKING OF THE AMERICAN MASS MARKET* (2004).

⁴⁴⁸ Beebe & Fromer, *supra* note 194, at 990.

⁴⁴⁹ NAOMI KLEIN, *NO LOGO: TAKING AIM AT THE BRAND BULLIES* (1999).

⁴⁵⁰ *Supra* Part I.

⁴⁵¹ E.g., Stefan Bechtold & Christopher Jon Sprigman, *Intellectual Property and the Manufacture of Aura*, 36 HARV. J.L. & TECH. 291 (2023); Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809 (2010); Litman, *supra* note 444. See generally Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165 (1948) (describing the debate whether trademark law promotes such artificial differentiation).

⁴⁵² Beebe, *supra* note 73, at 2068 ("The story of American trademark law is a story in which producers have been encouraged to bring ever more information to the marketplace, inside of which is persuasion, and consumers have been allowed to bring ever less, inside of which might have been persuasion sophistication.").

That balance may well need rethinking. If Amazon’s algorithm and consumer reviews are as good or better at conveying information about products, then the informational function of brands is less important. In that respect, branding critics might celebrate the emergence of nonsense marks because they have the effect of de-centering brands and thereby reducing their ability to create artificial differentiation. In that sense, nonsense marks might seem like a partial antidote to trademark law’s decades-long promotion of brand value, with ever-expanding protections across a range of trademark doctrines.⁴⁵³

It has long been true that, despite (largely) the same formal legal rules applying to all marks, in practice the trademark system is really two different systems: one for famous brands like CHANEL, and one for the workaday brands. Many of trademark law’s expansions over the last several decades have deepened that difference and worked primarily to benefit the famous brands.⁴⁵⁴ Amazon’s practices seem likely to shift the balance even more radically in favor of certain well-known brands, and especially Amazon’s own brands. It is notable here that the truly rarified brands—the luxury brands—are largely unaffected by the changes we have described. Those brands have never really trafficked in the informational function of brands, at least not in the sense of information about the tangible characteristics of those products (the kinds of information that might be replaced by algorithms and consumer reviews). They have instead primarily benefitted from their aura.⁴⁵⁵ Perhaps unsurprisingly, those brands do not sell on Amazon—they sell through their own stores and a highly curated group of retailers.⁴⁵⁶

In the longer term, it remains to be seen whether there are countermoves available to brands that might shift the balance back in their direction, perhaps through more use of direct-to-consumer approaches via other platforms, especially social media.⁴⁵⁷ That might ultimately effect a shift from product-based competition to platform-based competition, and the competitive effects will depend on the overall value of that kind of competition.⁴⁵⁸

Conclusion

Amazon’s market dominance has frequently drawn the attention of scholars and regulators. But one aspect of its dominance has mostly escaped attention—the impact Amazon’s policies, and especially its Brand Registry, has had on the trademark system. Because sellers need to be on Amazon, and because being a part of the Brand

⁴⁵³ See sources cited *supra* note 444.

⁴⁵⁴ See sources cited *supra* note 444.

⁴⁵⁵ Bechtold & Sprigman, *supra* note 451; Beebe, *supra* note 451.

⁴⁵⁶ Renata Geraldo, *In Luxury Market, Being Amazon Is Still a Burden*, WALL ST. J., Oct. 31, 2020, <https://www.wsj.com/articles/in-luxury-market-being-amazon-is-still-a-burden-11604136601>.

⁴⁵⁷ Michael Southworth, *Amazon vs. D2C: The Pros and Cons for E-Commerce Brands*, FORBES, Oct. 7, 2020, <https://www.forbes.com/sites/forbesbusinesscouncil/2020/10/07/amazon-vs-d2c-the-pros-and-cons-for-e-commerce-brands>; Thales S. Teixeira, *Case Study: Should a Direct-to-Consumer Company Start Selling on Amazon?*, HARV. BUS. REV., Mar.-Apr. 2019, <https://hbr.org/2019/03/case-study-should-a-direct-to-consumer-company-start-selling-on-amazon>.

⁴⁵⁸ We thank Chris Sprigman for this observation.

Registry provides enforcement benefits on the platform and preferential treatment in search results, those sellers have substantially increased incentive to apply to register their marks—application to register being the ticket to inclusion in the Brand Registry. Many small businesses that previously would have relied on unregistered rights now feel compelled to register. The result has been an explosion in number of applications and a growing backlog at the PTO leading to longer pendency for all applications. Amazon’s policies have also affected the content of those applications. Sellers on Amazon have stronger incentive to claim descriptive and generic terms, especially in stylized format or with accompanying images, and to game the scope limitations registrations of those terms would ordinarily have. They have increased—and really, created new—incentive to claim nonsense marks. And they have more opportunities to extort legitimate Amazon sellers with fraudulent applications.

These effects may not have been intended by Amazon, but as our data show, they have had a profound impact on trademark registration practice. Some of the effects are quite problematic from a trademark perspective, and there are broader rule-of-law concerns about the fact that a single company’s policies can so dramatically change the legal landscape. The overall effect of those policies on competition is potentially more mixed. On one hand, the collective effect of Amazon’s policies, combined with Amazon’s own concentration of its branding practices for goods its sells directly, has been to deemphasize third-party brands on the platform. In some ways, that is a democratizing effect, enabling smaller parties to compete better with established brands. On the other hand, third-party brands are deemphasized to the benefit of Amazon, whose algorithm substitutes for brand information and whose own brands take on more significance. In that respect, the diminished significance of third-party brands is likely to further entrench Amazon and make it even more dominant.