

A POETICS OF TRADEMARK LAW

Alexandra J. Roberts[†]

ABSTRACT

Poetry and trademarks have a lot in common. Both use language to persuade. Both aspire to say much with little. Both deal in ambiguity, though perhaps only poetry is content to reside in it permanently. While poetry is associated with education and erudition, trademarks are considered a lingua franca, readily understood by all. But reading a trademark remains, in the words of Laura Heymann, “at heart, an interpretive exercise.” Poetic devices like rhyme and alliteration play a role in what trademarks mean and how readers of trademarks can locate and articulate that meaning, but their use and interpretation have received little attention in doctrine or scholarship. While applicants and litigants sometimes allege that their marks incorporate poetic devices in support of a claim of distinctiveness, unitariness, or similarity, and factfinders sometimes grant credence to those arguments, both groups tend to use literary terms imprecisely. And that imprecision matters.

This Article explores the poetics of trademarks. It calls upon several overlapping senses of the word “poetics”: a study of rhetorical devices; a strategy for interpretation; and a structuring principle undergirding trademark law itself. It defines a number of commonly used poetic devices, offers examples from both poetry and trademarks, and discusses federal court and USPTO decisions that consider their effects on protectability or infringement. Poetic devices have the potential to guide factfinders to deeper insight about word marks. The devices discussed offer ways to articulate what and how a mark means—its denotations, connotations, rhythm, music—specifically and precisely. By treating a trademark as a tiny poem, we make space to honor its complexity.

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I. INTRODUCTION

Poetry and trademarks have a lot in common. Both make abundant use of figures of speech, and both use language to persuade.¹ Both aspire to say much with little. Both deal in ambiguity, though perhaps only poetry is content to reside in it permanently. And readers bring their own experiences and

1. JONATHAN CULLER, LITERARY THEORY: A VERY SHORT INTRODUCTION 69 (1997) (“Poetry is language that makes abundant use of figures of speech and language that aims to be powerfully persuasive.”).

associations with words to both poetry and trademarks, making it impossible to articulate a single, objectively “true” reading of either.²

While poetry is associated with education and erudition, trademarks are considered a “lingua franca,”³ known and readily understood by all. Even those readers—or, in the dominant discourse of trademark law, “consumers”⁴—who don’t read or speak the relevant language often learn to recognize trademarks through extra-textual features like color, font, and graphics.⁵

Reading a trademark is, in the words of Laura Heymann, “at heart, an interpretive exercise.”⁶ This Article explores the poetics of trademarks. Poetic devices have the potential to guide readers to deeper insight. The devices explored below offer ways to articulate what and how a mark means—its denotations, connotations, rhythm, music—specifically and precisely. By treating a trademark as a tiny poem,⁷ we make space to honor its complexity.⁸

2. Laura A. Heymann, *The Reasonable Person in Trademark Law*, 52 ST. LOUIS U. L.J. 781, 782 (2008) (“[A]s reader-response theory tells us, there is no reason to prefer any particular interpretation of a text over any other . . . [T]o ignore the fact that each consumer will engage with a trademark in his or her own way—regardless of what trademark law deems legally cognizable—is to ignore the realities of the market with which trademark law is supposed to engage.”).

3. Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks As Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 397–98 (1990).

4. Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251, 1257–61 (2014). See generally Dustin Marlan, *Rethinking Trademark Law’s Consumer Label*, 55 GONZ. L. REV. 421 (2019) and Dustin Marlan, *Is the Word “Consumer” Biasing Trademark Law*, 8 TEX. A&M L. REV. 367 (2021) (summarizing and problematizing the role of the that term in trademark case law, scholarship, and statutory history).

5. Heymann, *supra* note 2, at 791 (“For example, functionally illiterate consumers may not treat a word mark as a word but rather as a pictorial image, recognizable in subsequent encounters only if the mark appears in the same color and font as in the previous encounter.”).

6. Heymann, *supra* note 2, at 782.

7. See JAMES BOYD WHITE, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, in HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 107, 122–23 (1985) (“[T]his is not a metaphorical claim: there is an important sense in which the law is literature, and can properly be understood and taught and practiced only when that fact is fully recognized.”).

8. Mark Yakich recounts that William Carlos Williams “called poems ‘little machines,’ as he treated them as mechanical, human-engineered, and precise.” Mark Yakich, *What Is a Poem?*, THE ATLANTIC (Nov. 25, 2013), <https://www.theatlantic.com/entertainment/archive/2013/11/what-is-a-poem/281835/> [<https://perma.cc/DM7E-N7H7>]; see also Laura A. Heymann, *A Name I Call Myself: Creativity and Naming*, 2 UC IRVINE L. REV. 585, 596 (2012), calling the act of naming something an “act[] of microcreativity.”

Many find a point of entry into a poem by actively locating rhetorical devices⁹ and embedded patterns. Seeking out, naming, and interpreting devices, from alliteration to zeugma, can lead readers to uncover layers of meaning that are not plainly apparent. Such devices also enable readers to articulate their impressions about a poem and support their assertions about different aspects, from the poem's narrative to its speaker to its emotional undercurrent.

Poetic devices likewise play a role in what trademarks mean and how readers of trademarks can locate and articulate that meaning. In marketing, as in poetry, such devices may increase both engagement and pleasure.¹⁰ Trademarks have several audiences, each with its own agenda. USPTO examining attorneys, judges, and jurors may be charged with formally interpreting a trademark and comparing one mark to another to support predictions about consumer perception and likelihood of confusion or dilution. Applicants and litigants take on the task of persuading those factfinders of their preferred interpretation based on evidence and legal precedent. Consumers rely on trademarks as indicators of consistency and aids to commerce. And readers—an audience that can include but is not limited to consumers—engage with trademarks as miniature texts and incorporate them into language and culture.¹¹

9. CULLER, *supra* note 1, at 70 (“A rhetorical figure has generally been defined as an alteration or swerve from ‘ordinary’ usage.”); *see also* EDWARD P.J. CORBETT, *CLASSICAL RHETORIC FOR THE MODERN STUDENT* 143 (3d. ed. 1990) (defining a rhetorical figure as an “artful deviation”).

10. Edward F. McQuarrie & David Glen Mick, *Visual Rhetoric in Advertising: Text-Interpretive, Experimental, and Reader-Response Analyses*, 26 J. CONSUMER RSCH. 37, 39 (1999) (“[R]hetorical figures, in whatever form, can be expected to have two primary effects on consumer response. The first is increased elaboration and the second is a greater degree of pleasure.”); “[E]laboration indicates the amount, complexity, or range of cognitive activity occasioned by a stimulus.” *Id.* at 39; *see also* Irina D. Manta, *Hedonic Trademarks*, 74 OHIO ST. L.J. 241, 244 (2013) (“Consumers can gain a variety of hedonic enjoyments from using goods with a specific brand, including experiencing emotions tied to the mental associations that arise from . . . the marketing of the brand.”).

11. For example, UBER is a trademark for a ride-sharing service. Long before the company launched its services, many readers already had “uber” in their vocabularies as a prefix meaning “very.” As Uber the company and UBER the trademark gained market share, the trademark became part of our everyday language. Consumers use the term “uber” to reference the service or the company, while still separately using the prefix as before—“my kid turned 6 yesterday so we got a giant uber-pizza to feed all her friends.” Consumers who use the ride-share service regularly began to use the mark not just as an adjective to modify the service, but as a free-standing noun, verb, or some other part of speech: “I’ll get you an Uber”; “I Ubered home from the bar”; “this new food delivery service is supposed to be like Uber for food”; “her car had kind of an Uber-y smell to it,” and so on. Some even use “uber” as a generic noun or verb for any rideshare, “I’ll call you an Uber” where “Uber” means “Lyft.”

When factfinders assess the protectability of a trademark, they typically begin by analyzing distinctiveness.¹² An applicant whose mark is categorized as merely descriptive may dispute the categorization by emphasizing aspects of the mark that it claims elevate the mark beyond mere descriptiveness, including the mark's use of poetic devices.¹³ USPTO examining attorneys also often assess whether a mark is unitary—"whether it creates a commercial impression separate and apart from any unregistrable components."¹⁴ Here too, applicants may emphasize their use of poetic devices to avoid having to disclaim portions of their marks as generic or descriptive. Meanwhile, when factfinders assess infringement, they focus on the likelihood of confusion between two similar marks, usually relying on a multi-factor test.¹⁵ In every jurisdiction, the two marks' similarity is a key factor.¹⁶ In adjudging similarity, factfinders often consider "sight, sound, and meaning."¹⁷ Similarity also plays a key role in dilution analyses.

12. An inherent distinctiveness analysis requires classifying the mark as generic, descriptive, suggestive, arbitrary, or fanciful for the goods or services with which it's used. 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:2 (5th ed. 2022).

13. Elsewhere I have argued that "fact finders often focus unduly on mark selection, fixing on the employment of double entendre, incongruity, rhyme, metaphor, alliteration, or other rhetorical device as evidence that a mark is distinctive." Alexandra J. Roberts, *How to Do Things with Word Marks: A Speech-Act Theory of Distinctiveness*, 65 ALA. L. REV. 1035, 1048 (2014). I continue to maintain that use of rhetorical or poetic devices does not necessarily or automatically elevate a word or phrase from descriptive to inherently distinctive. But I think there is some utility in considering those devices and their effect on consumer perception.

14. Trademark Manual of Examining Procedure (TMEP) § 1213.05 (July 2022 ver.).

15. Likelihood of confusion analyses arise in two contexts. First, factfinders (usually the USPTO) may be tasked with assessing whether an application to register a mark should be refused or an existing registration canceled because it creates a likelihood of confusion with a registered mark under Lanham Act § 2(d). Second, factfinders (usually federal courts) may be tasked with assessing whether a junior user's mark creates a likelihood of confusion with a senior user's mark in an infringement cause of action under Lanham Act § 34 or § 43. These inquiries are very similar but not identical. See generally Lorelei D. Ritchie, *What Is Likely to be Confusing? About Trademark Law: Reconsidering the Disparity Between Registration and Use*, 70 AM. U. L. REV. 1331 (2021) (discussing the role of evidence of real-world use in likelihood of confusion analyses).

16. *In re Lonely Hearts Club Ltd.*, No. 79174419, 2017 WL 6033943, at *1 (T.T.A.B. Nov. 15, 2017) (citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 U.S.P.Q. 24, 29 (C.C.P.A. 1976)) ("In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods."); see also Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581, 1591, 1610 (2006) (noting all 13 circuits include similarity of the marks among their likelihood of confusion factors and "a finding that the similarity factor favors a likelihood of confusion is necessary but not sufficient to trigger an overall finding of a likelihood of confusion.").

17. *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979).

When factfinders focus on protectability and likelihood of confusion, they approach trademarks from a perspective that is narrow and outcome driven. Probably they must. Courts, scholars, and expert witnesses have brought to bear a variety of tools to help inform decisions about whether a mark is distinctive and whether a pair of marks is similar. Those tools include dictionary definitions;¹⁸ evidence of popular¹⁹ and competitor usage;²⁰ linguistics;²¹ market research;²² consumer surveys;²³ consumer²⁴ or dealer²⁵ testimony; mark owners' intent;²⁶ visual and aural comparison;²⁷ judicial

18. See, e.g., *Snyder's Lance, Inc. v. Frito-Lay N. Am., Inc.*, 542 F. Supp. 3d 371, 383 (W.D.N.C. 2021); *Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 792 (5th Cir. 1983).

19. See, e.g., *Snyder's Lance*, 542 F. Supp. 3d at 400.

20. See Alexandra J. Roberts, *Mark Talk*, 39 CARDOZO ARTS & ENT. L.J. 1001, 1010 (2021) ("It makes sense that exclusive rights in language that will be desirable and useful to competitors should only be granted upon an impressive showing that consumer perception has shifted, and that, therefore, if competitors make use of identical or very similar matter, their use may deceive consumers.").

21. See, e.g., Quentin Ullrich, *Corpora in the Courts: Using Textual Data to Gauge Genericness and Trademark Validity*, 108 TRADEMARK REP. 991, 1031 (2018); Roger W. Shuy, *Using Linguistics in Trademark Cases*, in HANDBOOK ON FORENSIC LINGUISTICS 8 (2011), <http://www.rogershuy.com/pdf/TrademarkLinguistics.pdf>; *McKee Baking Co. v. Interstate Brands Corp.*, 738 F. Supp. 1272, 1275 (E.D. Mo. 1990); *J & J Snack Foods Corp. v. Nestle U.S.A., Inc.*, 149 F. Supp. 2d 136, 148 (D.N.J. 2001).

22. See, e.g., *Snyder's Lance*, 542 F. Supp. 3d at 400; *USPTO v. Booking.com B.V.*, 140 S. Ct. 2298, 2313–15 (2020).

23. *Id.* at 2307 n.6; *Snyder's Lance*, *supra* note 18, at 397–98; see generally Robert Thornburg, *Trademark Surveys: Development of Computer-Based Survey Methods*, 4 J. MARSHALL REV. INTELL. PROP. L. 91 (2005); Jake Linford, *Democratizing Access to Survey Evidence of Distinctiveness*, in RESEARCH HANDBOOK ON TRADEMARK LAW REFORM 225 (Graeme B. Dinwoodie & Mark D. Janis eds., 2021); Barton Beebe, Roy Germano, Christopher Jon Sprigman & Joel Steckel, *The Role of Consumer Uncertainty in Trademark Law: An Experimental and Theoretical Investigation* (NYU Law and Economics Research Paper No. 21-13, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3854730.

24. MCCARTHY, *supra* note 12, § 15:41.

25. MCCARTHY, *supra* note 12, § 15:39.

26. Alexandra J. Roberts, *How to Do Things with Word Marks: A Speech-Act Theory of Distinctiveness*, 65 ALA. L. REV. 1035, 1076–77 (2014) (citing *Unleashed Doggie Day Care, LLC v. Petco Animal Supplies Stores, Inc.*, 828 F. Supp. 2d 384, 391 (D. Mass. 2010)); *Devcon Corp. v. Woodhill Chem. Sales Corp.*, 455 F.2d 830, 832 (1st Cir. 1972); *Water Pik, Inc. v. Med-Sys., Inc.*, 848 F. Supp. 2d 1262, 1277 (D. Colo. 2012); *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1256 (Fed. Cir. 2012); *Firefly Digital Inc. v. Google Inc.*, 817 F. Supp. 2d 846, 862 (W.D. La. 2011).

27. See, e.g., *Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 875 F.2d 1026, 1030 (2d Cir. 1989).

intuition;²⁸ and personal experience.²⁹ That toolbox should also include poetics. Applicants and litigants sometimes allege that their marks incorporate devices like rhyme, alliteration, or double entendre in support of a claim of distinctiveness, unitariness, or similarity (or a lack thereof), and factfinders may grant credence to those arguments. But both groups often use those terms imprecisely.

What does it look like when factfinders take poetic devices into account? When the Trademark Trial and Appeal Board (TTAB) held LIGHT ‘N LIVELY unitary and distinctive for reduced calorie mayonnaise, it credited the mark’s “alliterative lilting cadence.”³⁰ When it found PISSTERINE for a novelty mouthwash created a likelihood of confusion with LISTERINE, it pointed to rhyme as an element of their similarity.³¹ The USPTO granted registration of the clipped NILLA for cookies without requiring secondary meaning or disclaimer,³² whereas “vanilla” surely would have needed both or been deemed unregistrable. And a district court in an infringement case comparing LETTUCE ENTERTAIN YOU and LETTUCE MIX, both for restaurant services, granted a preliminary injunction in part because both parties used “lettuce” to pun on “let us,” a pun the court presumed consumers would view as the “salient feature” of both marks.³³

28. Roberts, *supra* note 26, at 1056 (“[J]udges have repeatedly acknowledged that intuition plays a large role in evaluating distinctiveness . . .”) (citing *Lahoti v. VeriCheck, Inc.*, 586 F.3d 1190, 1197–98 (9th Cir. 2009)); *Dranoff-Perlstein Assocs. V. Sklar*, 967 F.2d 852, 858 (3d Cir. 1992); *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1528 (4th Cir. 1984); *Educ. Dev. Corp. v. Econ. Co.*, 562 F.2d 26, 29 (10th Cir. 1977); *Anheuser-Busch, Inc. v. Holt*, 92 U.S.P.Q.2d 1101, 2009 WL 3078027, at *5 (T.T.A.B. Sept. 16, 2009) (“[t]he distinction, furthermore, is often made on an intuitive basis rather than as a result of precisely logical analysis susceptible of articulation.”).

29. Heymann, *supra* note 2, at 788.

30. *In re Kraft, Inc.*, 218 U.S.P.Q. (BNA) 571, 573 (T.T.A.B. 1983).

31. *Johnson & Johnson v. Pissterine*, No. 91254670, 2022 WL 190986, at *16 (T.T.A.B. Jan. 18, 2022).

32. NILLA, Registration No. 859,776.

33. *Lettuce Entertain You Enters., Inc. v. Leila Sophia AR, LLC*, 703 F. Supp. 2d 777, 785 (N.D. Ill. 2010); *see also Westwood One, Inc. v. Natl. Broad. Co., Inc.*, No. 82-976 (C.D. Cal. Apr. 9, 1982), 1982 WL 52140, at *2, *on reconsideration sub nom.* *Westwood One, Inc. v. NBC, Inc.*, CV 82-976 (C.D. Cal. May 24, 1982), 1982 WL 63789 (holding that marks’ use of the same pun contributed to their similarity: “While their literal meanings are opposites, their almost identical puns appear to be a much more important component of their value.”); *LTTB LLC v. Redbubble, Inc.*, 840 F. App’x 148, 152 (9th Cir. 2021) (holding plaintiff’s uses of its registered trademarks that featured the pun LETTUCE TURNIP THE BEET were functional, not source-identifying).

Poetic devices appear in trademarks not merely as *ars gratia artis*.³⁴ They're usually intended to contribute to the marks' effectiveness.³⁵ Some explain the use of rhetorical devices in marketing as violating conventions of language and thought.³⁶ When a convention is violated, speakers work to make the violation intelligible.³⁷ As empirical research by marketing scholars McQuarrie and Mick confirms that "artful deviation" has positive effects on attention, recall, and emotional response; the authors conclude that "all rhetorical figures can be expected to confer these advantages to some extent."³⁸

A mark that employs rhyme, like OODLES OF NOODLES, may be more memorable to consumers. A mark with assonance, like FROZEN ROSÉ, may be catchier and more enjoyable to say.³⁹ If true, those features contribute to a mark's—and potentially, in turn, a business'—success and value in real and measurable ways.⁴⁰ A mark that consumers find appealing may lead them to choose the goods and services that bear it. A catchy or memorable mark may be primed to acquire secondary meaning quickly and become protectable even if its primary resonance is descriptive. If consumers remember a mark in a

34. Latin for "art for the sake of art."

35. See Bruce Vanden Bergh, Keith Adler, & Lauren Oliver, *Linguistic Distinction Among Top Brand Names*, J. ADVERT. RSCH. 39, 40, 42 (Aug/Sept 1987) (tallying the frequency of occurrence of 22 linguistic devices, many among those discussed below, in an annual listing of the top 200 brand names from 1971 to 1985, and finding 71% of the 479 unique trademarks considered employed one or more such device); see also Tina M. Lowrey, L. J. Shrum, and Tony M. Dubitsky, *The Relation Between Brand-Name Linguistic Characteristics and Brand-Name Memory*, 32 J. ADVERTISING 7, 9 (2003) (finding links between linguistic variables and brand name memory); David Luna, Marina Carnevale & Dawn Lerman, *Does brand spelling influence memory? The case of auditorily presented brand names*, 23 J. CONSUMER PSYCH. 36 (2013) (testing how spelling-related characteristics of brand names and the context in which they are presented make the brands more or less memorable); Edward F. McQuarrie & David Glen Mick, *Figures of Rhetoric in Advertising Language*, 22 J. CONSUMER RSCH. 424, 424 ("[W]hen persuasion is the overriding goal, the rhetorical perspective suggests that the manner in which a statement is expressed may be more important than its propositional content.").

36. *Id.* at 425 ("Words are generally used to convey one of the lead meanings given in their dictionary entry. However, a metaphor violates that convention, as in this headline for . . . Band-Aids: 'say hello to your child's new bodyguards.'").

37. *Id.* at 426 (citing Dan Sperber & Deidre Wilson, RELEVANCE: COMMUNICATION & COGNITION (1986)).

38. *Id.* at 427.

39. See generally Richard R. Klink & Lan Wu, *The role of position, type, and combination of sound symbolism imbeds in brand names*, 25 MARKETING LETTERS 13, 14 (Mar. 2014); Ruth Pogacar, Emily Plant, Laura Felton Rosulek & Michal Kouril, *Sounds good: Phonetic Sound Patterns in Top Brand Names*, 26 MKTG. LETTERS 549 (2015).

40. Researchers have determined that advertisements that employ incongruity and figurative speech attract attention and offer readers additional rewards from processing them. McQuarrie & Mick, *supra* note 35, at 427 (citing Daniel Berlyne, AESTHETICS AND PSYCHOBIOLOGY (1971)).

positive way, it may help distinguish the mark owner's goods and decrease the likelihood of confusion with a prior mark that doesn't make use of poetic devices in the same way. Because trademarks also serve as marketing, those selecting them often pour tremendous resources into maximizing their appeal.⁴¹ Companies that can afford it hire consultants to find and focus group the perfect brand name. Small business owners, entrepreneurs, and lay people have strong intuitions about what marks "work" and don't work,⁴² and appealing marks are often those that employ poetic devices.

Before we go further, the use of "poetics" warrants further explication. Poetics in its most specific sense denotes simply a theory of poetry,⁴³ an "attempt[] to define the nature of poetry, its kinds and forms, its resources of device and structure, the principles that govern it, the functions that distinguish it from other arts, the conditions under which it can exist, and its effects on readers or auditors."⁴⁴ So one way to understand poetics is as the study of linguistic techniques and conventions in the written word.⁴⁵ This Article endeavors to study linguistic techniques and conventions in trademarks and explore how the legal doctrines that are applied to them account for those devices: hence, a poetics of trademark law.

The second relevant definition, overlapping but distinct, defines poetics in opposition to hermeneutics.⁴⁶ In that sense, poetics begins by observing a work's perceived effects and then traces them backward to the conventions that created them. With perceived meaning as "point of departure," the task of poetics "is to account for whatever effects we can attest to."⁴⁷ Hermeneutics, conversely, "starts with texts and asks what they mean, seeking

41. See, e.g., Laura Stampler, *Here's How Much Money The World's Biggest Brands Spent Designing Their Logos*, BUSINESS INSIDER (Aug. 14, 2012), <https://www.businessinsider.com/heres-how-much-money-the-worlds-biggest-brands-spent-designing-their-logos-2012-8> [<https://perma.cc/98SQ-LSMT>] (BP spending 211 million dollars to redesign its logo and devise its new tagline, "beyond petroleum.").

42. See, e.g., the anonymous gentleman who insisted to his girlfriend that the company he dreamed up to create a network of pipes that deliver soup into people's homes on demand "MUST be called soup tube, not soup pipe, tube just zings better." Relationships.txt (@Redditships), Twitter (July 8, 2020, 2:22 PM), <https://twitter.com/redditships/status/1280975449485651969>. While it's entirely possible this story is apocryphal, I include it not for the fact of the matter asserted but for the lay intuition about "soup tubes."

43. *Poetics*, THE PRINCETON ENCYCLOPEDIA OF POETRY & POETICS 930 (1993).

44. *Id.*

45. CULLER, LITERARY THEORY: A VERY SHORT INTRODUCTION 63 (2nd ed. 2011) ("[A] crucial part of poetics is an account of how readers . . . go about interpreting literary works—what are the conventions that enable them to make sense of works as they do.").

46. *Id.* at 62 ("Taking meanings or effects as the point of departure (poetics) is fundamentally different from seeking to discover meaning (hermeneutics).").

47. *Id.* at 62–63.

to discover new and better interpretations.”⁴⁸ If we believe that a factfinder begins with a trademark and looks to the techniques and devices it employs (along with other clues and cues) to lead them to the best assessment of the mark and application of the law to it, that sounds like hermeneutics. If, on the other hand—as many of the examples that follow seem to indicate—we suspect that a factfinder begins by observing that a mark is inherently distinctive, or confusingly similar to another mark, and then turns to the techniques and devices the mark employs to justify that conclusion, that sounds more like poetics. Hermeneutic models are stereotypically associated with legal interpretation.⁴⁹ But legal realism offers a more cynical gloss, with critics characterizing its premise as the theory that judges decide cases according to their own tastes or intuitions and then work backward to locate a legal rule that justifies their conclusion.⁵⁰

It will be apparent throughout the ensuing discussion and examples that: (1) many trademarks incorporate poetic devices; (2) owners and applicants sometimes point to those devices to support a legal argument about the correct interpretation or status of a mark; and (3) factfinders sometimes take into consideration those devices in justifying determinations about marks. The question of whether poetic devices in trademarks enable factfinders to start with texts—here, trademarks—and ask what they mean or whether factfinders use poetic devices to account for those effects they have already identified is a circular one.⁵¹ It cannot be definitively answered by simply reviewing decisions, but it provides an interesting jumping-off point from which to explore the cases.

One more definition of “poetics” is worth mention. Applied to the work of a single author, genre, or category of text, it can mean simply “structuring

48. *Id.* at 62.

49. *Id.* (“[H]ermeneutic models come from the fields of law and religion, where people seek to interpret an authoritative legal or sacred text in order to decide how to act.”).

50. See Ronald Dworkin, *TAKING RIGHTS SERIOUSLY* 86 (1977); see also Timothy J. Capurso, *How Judges Judge: Theories on Judicial Decision Making*, 29.1 U. BALT. L.F. 5, 5 (1998) (“Realists stipulate that judges determine the outcome of a lawsuit before deciding whether the conclusion is, in fact, based on an established legal principle.”) (citation omitted); Adam Liptak, *An Exit Interview With Richard Posner, Judicial Provocateur*, N.Y. TIMES (Sept. 11, 2017) (“I pay very little attention to legal rules, statutes, constitutional provisions A case is just a dispute. The first thing you do is ask yourself—forget about the law—what is a sensible resolution of this dispute?”).

51. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815 (1935). (“The circularity of legal reasoning in the whole field of unfair competition”).

principles.”⁵² To the extent that trademark law is law that applies to words and phrases used as symbols,⁵³ and a primary goal of their creators is to lead consumers to remember them and associate them with a specific source, the rhetorical devices that render many marks memorable can be seen as undergirding and lending order to the entire field of trademark law. The study of poetic devices in trademarks and trademark doctrines, then, may be just one more arrow in a factfinder’s quiver, or it may be more—it may be read to propose a structuring principle for the doctrines discussed here.

The remainder of this Article proceeds as follows. Part II briefly summarizes the three doctrines in which poetic devices in trademarks are most frequently considered:⁵⁴ distinctiveness, unitariness, and similarity. Part III defines several common poetic devices, offers examples of those devices in poetry and trademarks, and discusses federal court and USPTO decisions that consider them. Part IV concludes.

II. CONTEXTS

A. DISTINCTIVENESS

Trademark law protects distinctive matter used to indicate source in connection with specific goods and services. A word mark may be inherently distinctive and afforded protection from its first use in commerce, or it may be merely descriptive and only merit protection once it acquires distinctiveness based on consumers’ exposure to it.

In assessing inherent distinctiveness, the USPTO and courts typically place word marks into one of five categories. A fanciful mark is one that is created for the purpose of serving as a trademark, like SWIFFER for mops or HAAGEN DASZ for ice cream. An arbitrary mark is an existing term used in connection with goods and services to which it bears no logical connection, like PENGUIN for book publishing services or STRAWBERRY for a clothing store. A suggestive mark subtly suggests some attribute of the goods or services, like GREYHOUND for bus services or OCEAN SPRAY for cranberry juice. Fanciful, arbitrary, and suggestive marks are all treated as inherently distinctive—trademark law presumes that consumers will recognize

52. THE PRINCETON ENCYCLOPEDIA OF POETRY & POETICS, *supra* note 43, at 929 (“Applied to the works of authors . . . [poetics] means something like ‘implicit principles’”).

53. Or at least, the law of word marks, which this paper takes as its object of study.

54. Of course, those are not the only contexts in which poetic devices in trademarks are relevant. *See, e.g., In re Dillard Dep’t Stores Inc.*, 33 U.S.P.Q.2d 1058, 1058 (Com’r Pat. & Trademarks 1994) (considering the role of alliteration in declining to amend the registration of COPPER KEY CLOTHING COMPANY for clothing to simply COPPER KEY).

them as trademarks immediately and grants them protection upon use without any further showing of goodwill.

Descriptive marks, meanwhile, are less subtle than suggestive marks. A descriptive mark directly provides information about some aspect of the goods or services, whether it be taste, ingredient, size, use, appearance, smell, geographic origin, owner, or target audience. A mark in that category is deemed “merely descriptive” and does not receive protection unless its owner can demonstrate that it has acquired distinctiveness, i.e., that it has come to serve as a trademark to members of the public based on use.⁵⁵ Finally, a generic term or phrase is one that indicates a category of goods or services, like SHOE WAREHOUSE for a warehouse-style shoe store or HOT CHOCOLATE for cocoa mix. Generic terms or phrases are incapable of trademark protection, even if they manage to acquire secondary meaning.⁵⁶

Marks in every distinctiveness category may incorporate, intentionally or unintentionally, poetic devices. Poetic devices in the distinctiveness context typically go unremarked upon unless factfinders, applicants, or litigants are tussling over whether a mark is rightfully characterized as descriptive, distinctive,⁵⁷ or generic. When an USPTO examining attorney issues a preliminary refusal to register a mark based on its mere descriptiveness, an applicant often fights back by emphasizing even the most minimally creative aspect of their mark, drawing attention to any flourish that arguably renders it more than descriptive.⁵⁸ Many jurisdictions rely heavily on the “imagination test,” under which a trademark is suggestive if it requires thought, imagination, or perception to glean the relationship between the mark and a characteristic

55. Courts consider several factors as capable of evidencing acquired distinctiveness, which is also known as secondary meaning. Those include prior registrations; five years of exclusive use; or other factors such as length of use, number of sales, profits, third-party publicity, exclusivity, marketing expenditures, and extent of marketing efforts. *See Roberts, supra* note 20, at 1004; TMEP § 1202, at 27–28.

56. *See Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111, 116 (1938); *Blinded Veterans Ass'n v. Blinded Am. Veterans Found.*, 872 F.2d 1035, 1043 (D.C. Cir. 1989). *But see USPTO v. Booking.com B.V.*, 140 S. Ct. 2298, 2306 (2020) (“whether a term is generic depends on its meaning to consumers”).

57. *Roberts, supra* note 26, at 1038 (“the incorporation of a rhetorical device, such as incongruity, musicality, or double entendre, is often treated as a proxy for distinctiveness.”).

58. *See, e.g., In re* *Midwestern Pet Foods, Inc.*, No. 78876346, 2009 WL 273246, at *2 (T.T.A.B. Jan. 30, 2009) (arguing unsuccessfully that CHED ‘R’ WEDGES for pet food and treats is inherently distinctive because it uses pun, incongruity, an “alliterative, lilting cadence,” and a “growling” onomatopoeia); *In re* *Erik M. Pelton & Assocs., Plc.*, No. 85817818, 2015 WL 2412168, at *2 (T.T.A.B. Apr. 29, 2015) (arguing unsuccessfully that TUESDAY TRADEMARK TIP “is unitary and hence not merely descriptive because it ‘employs a unique alliterative and trochaic sound pattern that creates a distinctive commercial impression beyond that of its individual elements.’”).

or quality of the goods;⁵⁹ if that connection is too obvious to require any imagination, the mark is merely descriptive. I have elsewhere described as a “creativity fallacy” the position implicitly taken by mark owners and sometimes courts that the more effort and inventiveness that went into choosing a mark, the more distinctive it is,⁶⁰ and I am skeptical of arguments that the presence of a rhetorical device automatically elevates a mark from descriptive to distinctive. But some applicants find those arguments serve them well in persuading factfinders their marks are worthy of protection.

Factfinders grapple with the issue of inherent distinctiveness most often at the registration stage. In that context, USPTO examining attorneys make distinctiveness and other registrability determinations; applicants can challenge adverse decisions to the TTAB and, after that, to federal court.⁶¹ And examining attorneys’ decisions about particular trademarks do not bind peer examiners.⁶² A mark might be deemed merely descriptive for a set of goods by one examining attorney and inherently distinctive for the same or similar goods by another.⁶³ Examiners are bound to apply the same rules, such as “a mark that directly describes some feature of the product with which it’s used is merely descriptive,” but each combination of mark and product presents a slightly different set of facts.⁶⁴ Context and meaning also change over time.

59. See Dustin Marlan, *Visual Metaphor and Trademark Distinctiveness*, 93 WASH. L. REV. 767, 767 (2018) (discussing the imagination test and arguing that its “visual metaphor provides a figurative, cognition-based vehicle by which to extend trademark law’s imagination test of inherent distinctiveness from words to images.”).

60. Roberts, *supra* note 26, at 1065–67.

61. TTAB decisions are most often appealed to the Court of Appeals for the Federal Circuit but appeals to other district courts are also permitted.

62. TMEP § 702.03(a)(iii) (“the USPTO is not bound by the decisions of the examining attorneys who examined the applications for the applicant’s previously registered marks, based on different records.”); *In re Beck*, 114 U.S.P.Q.2d 1048, 2015 WL 1458229, at *7 (T.T.A.B. 2015) (citing *In re Nett Designs, Inc.*, 57 U.S.P.Q. 1564, 1566 (Fed. Cir. 2001)); U.S. Trademark Application Serial No. 87,331,440, Office Action (“Applicant relies heavily on the examination history of the cited mark but trademark examining attorneys are not bound by the actions of past examining attorneys in prior registrations, even if the registrations have some characteristics similar to the application at issue; each case is decided on its own merits.”). Unlike decisions by examining attorneys, TTAB decisions may have precedential effect. See *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 160 (2015) (holding that federal courts are precluded from overturning a likelihood of confusion determination made by the TTAB if the other elements of issue preclusion are met and the uses adjudicated by the TTAB are materially the same).

63. See *In re Scholastic Testing Serv., Inc.*, 196 U.S.P.Q. (BNA) 517, 519 (T.T.A.B. 1977) (holding that an applied-for mark that is merely descriptive does not become registrable just because other similar marks were successfully registered); TMEP § 1209.03(a).

64. Occasionally, the facts are not different at all. For example, one examining attorney deemed HEEB disparaging, while another allowed registration of the same mark by the same

CLOUT, for example, is a registered trademark for clothing⁶⁵ because its archaic English meaning—“clothing”—is lost to time. As the Trademark Manual of Examining Procedure (TMEP) counsels, “Trademark rights are not static, and eligibility for registration must be determined on the basis of the facts and evidence of record that exist at the time registration is sought.”⁶⁶

Distinctiveness can also be part of a threshold validity analysis in infringement or dilution litigation, especially when a lawsuit is based on common law rights. And distinctiveness, under the name of conceptual strength or inherent strength, is part of the strength equation that factors into every jurisdiction’s likelihood of confusion analysis.⁶⁷ Distinctiveness disputes are compelling because they call for closer scrutiny of marks than we are usually treated to. Factfinders delve more deeply, holding the mark up to the light, pulling the pieces apart and examining them to get at some truth about the mark’s viability.

B. UNITARINESS

During the registration process, an applicant may be asked to disclaim any unregistrable components of an otherwise registrable mark.⁶⁸ For example, someone who uses and applies to register the trademark UNICORN DRY CLEANING for dry cleaning services would be required to disclaim “dry cleaning,” because that phrase is generic for the services specified and therefore ineligible for protection. With the disclaimer, the owner disclaims the unregistrable portion of the mark standing alone, but still asserts rights in the composite mark—not just UNICORN, but UNICORN DRY CLEANING—as a whole.⁶⁹ If the mark is determined to be unitary, though, disclaimer is not required. A mark is deemed unitary if “the elements of a mark are so integrated or merged together that they cannot be regarded as

applicant for different goods or services. In those examples, the specific services do not matter, because the (now-defunct) bar on disparaging marks focused only on the mark and not the relationship between the mark and the goods or services. *Compare* Heeb Media’s Registration No. 2,858,011 (HEEB for publication of magazines) (No Office Actions issued), *with* U.S. Trademark Application Serial No. 78,558,043 (HEEB for apparel and entertainment services) (Mar. 23, 2007 Office Action refused registration based on bar on registration of disparaging marks), and U.S. Trademark Application Serial No. 78,949,735 (HEEB for news and website services) (Jan. 16, 2007 Office Action refused registration based on bar on registration of immoral or scandalous marks).

65. CLOUT, Registration No. 2,298,718.

66. TMEP § 1216.01.

67. Acquired distinctiveness (or “commercial strength”) is the other component of the strength factor in most jurisdictions.

68. 15 U.S.C. § 1056.

69. TMEP § 1213 (quoting *Sprague Electric Co. v. Erie Resistor Corp.*, 101 U.S.P.Q. (BNA) 486, 486–87 (Comm’r Pats. 1954)).

separable.”⁷⁰ If the applicant instead chose DRYCLEANICORN, for example, it likely wouldn’t need to disclaim “dry clean” because the generic phrase is inextricably embedded into the single-word mark. Disclaimers can affect the breadth of rights and therefore enforcement—a three-word mark registered without disclaimers provides more robust rights than a registration for the same mark in which two of the words are disclaimed, at least in theory.

The TMEP specifies a number of types of marks that are or are likely to be unitary and for which disclaimer is therefore not required; some map onto poetic and literary devices neatly and others, less so. Categories include telescoped words, like VITAMINSURANCE or TRAVELOCITY;⁷¹ compound terms formed by joining words together, like PULSAIR;⁷² and distinctive slogans, like (according to the TMEP) QUALITY THROUGH CRAFTSMANSHIP.⁷³ Using verbs can also transform a phrase into a unitary mark: the USPTO would require disclaimer of the word “boats” in the mark FUN BOATS in connection with the sale of boats, but would not require disclaimer of “boats” in the mark BOATS ARE FUN for the same goods.⁷⁴ Likewise, prepositional phrases often render a mark unitary, as in TALES OF THE COCKTAIL for conducting seminars in mixology or MANGOES FOR THE EARTH for fresh mangoes.⁷⁵

Simply adding punctuation is another way to make a mark unitary: the TMEP suggests an applicant would need to disclaim the word “nails” in CREATIVE NAILS for nail salon services, but wouldn’t need to disclaim it if the mark ended in a question mark, as in CREATIVE NAILS?. Incongruity⁷⁶

70. TMEP § 1213.05.

71. Telescoped terms join two words together into a portmanteau without sacrificing any component letters of either. For example, combining “vitamin” plus “insurance” to make “vitaminsurance” enables both words to maintain their integrity by sharing the middle letters “i-n” but merges them inextricably, as compared to portmanteaux like “cronut,” which drops letters from both “croissant” and donut,” or “softchews,” which eliminates the space between “soft” and “chews” without changing them. *See* Novartis Consumer Health, Inc. v. McNeil-PPC, Inc., 53 U.S.P.Q.2d (BNA) 1406 (D.N.J. 1999) (holding “softchews” generic for a soft and chewable medication tablet); S.S. White Dental Mfg. Co. v. MacDonald, 285 F. 1005, 1005 (D.C. Cir. 1923) (calling WHITEETH for toothpaste a telescoped mark).

72. Compound terms drop letters from or alter the spelling of their component terms.

73. TMEP § 1213.05(b)(i).

74. *Id.* § 1213.05(b)(ii)(A).

75. *Id.* § 1213.05(b)(ii)(B); *see also* ANNE GILSON LALONDE & JEROME GILSON, GILSON ON TRADEMARKS app. 9-389 (2012).

76. *Id.* § 1213.05(d) (“If two or more terms are combined in a mark to create an incongruity (e.g., URBAN SAFARI, MR. MICROWAVE, and DR. GRAMMAR), the mark is unitary and no disclaimer of nondistinctive individual elements is necessary.”); *see also* Roberts, *supra* note 26, at 1064 (“A conclusion that a mark is incongruous may result from the unusual combination of two or more words together, in the form of ‘internally incongruous’

and so-called double entendre⁷⁷ also render a mark unitary. Compound words joined with punctuation, like RIB*TYPE or RIB/TYPE,⁷⁸ and unitary phrases with normal spacing⁷⁹ may or may not require disclaimer of unregistrable components. Sound patterns and use of possessives can also factor into evaluation of unitariness.⁸⁰ Generally, courts and the USPTO require that a unitary mark has a distinct meaning of its own independent of the meaning of its constituent elements.⁸¹

All things being equal, owners prefer a registration without any disclaimers to one that makes disclaimer of a term part of the record; they view it as stronger and broader. Unsurprisingly, then, applicants resisting an instruction to disclaim components of their marks often point to rhetorical devices in those marks to bolster their assertions of unitariness.⁸²

C. SIMILARITY

The most common form of federal trademark litigation is infringement. While every jurisdiction has devised its own multifactor test to determine the likelihood of confusion between two marks, each of those tests considers the similarity between the marks as a key predictor of consumer confusion.⁸³ The more similar the marks in sight, sound, and meaning, the more likely members

marks like REBEL DEBUTANTE for clothing or CORPORATE FUEL for business consulting services. Alternatively, it may result from the use of a term or phrase that is unexpected given the goods in question, ‘contextually incongruous’ marks like CRAZY GOOD for toaster pastries or SNO-RAKE for a tool for removing snow. Fact finders have identified incongruity based merely on the use of descriptive terms in an unexpected order; the Second Circuit held SEASON-ALL inherently distinctive for aluminum storm windows despite acknowledging that ALL-SEASON would be merely descriptive.” (citations omitted).

77. Discussed *infra* Section III(c)(iv) as paronomasia.

78. TMEP § 1213.05(a)(ii).

79. *Id.* § 1213.05(b).

80. *Id.* § 1213.05(e), (b)(ii)(D).

81. *In re DDMB, Inc.*, 681 F. App’x 919, 923 (Fed. Cir. 2017) (citation omitted).

82. *See* Application of Colonial Stores, Inc., 394 F.2d 549, 552 (C.C.P.A. 1968) (holding that the mark SUGAR ‘N SPICE for bakery products is unitary thanks in part to its allusion to the famous nursery rhyme about what little girls are made of); *In re Kraft, Inc.*, 218 U.S.P.Q. (BNA) 571, 573 (T.T.A.B. 1983) (holding that LIGHT ‘N LIVELY was a unitary mark for mayonnaise and dairy products based on “an alliterative lilting cadence”); *see also In re Summit Cos. Inc.*, No. 87219974, 2018 WL 3105237, at *2 (T.T.A.B. June 8, 2018) (arguing unsuccessfully that ELEVATED ENTERTAINMENT is a unitary mark for bowling alleys due to its double meaning, cadence, and assonance).

83. Some of the most common likelihood of confusion factors across jurisdictions include: strength of the plaintiff’s mark; degree of similarity between the two marks; consumers’ degree of care or sophistication; overlap in channels of sale and/or advertising; proximity of goods or services; evidence of actual confusion. DINWOODIE & JANIS, TRADEMARKS & UNFAIR COMPETITION: LAW & POLICY 521–23 fig. 7-1 (4th ed. 2014).

of the public could be led to presume some association between them. While infringement cases in federal court receive the most publicity, the TTAB also adjudicates conflicts involving likelihood of confusion. And trademark examining attorneys regularly assess the similarity between registered and applied-for marks in determining whether registration is barred under § 2(d). Similarity may also be assessed as part of a trademark dilution analysis and sometimes becomes relevant in determining whether a defendant's allegedly infringing or diluting use qualifies as a fair use.

Poetic devices may be relevant to each of the three aspects of similarity—sight, sound, and meaning. “Sight” typically refers to what a word mark looks like, including spelling, stylized font, logo, and color;⁸⁴ “sound” to the way the mark sounds when heard, sung, or spoken; and “meaning,” to denotations and connotations. Poetic devices play a more complicated role in likelihood of confusion analyses than they do in distinctiveness or unitariness assessments. Applicants or litigants emphasizing poetic devices in the latter contexts only argue in one direction: that the use of the device makes the mark *more* protectable and *more* likely to be perceived as an integrated mark.⁸⁵ The role of devices in similarity assessments is more haphazard.⁸⁶ Litigants or parties in *inter partes* proceedings may argue that the senior or junior user's use of poetic devices makes the marks less similar and therefore less likely to create confusion. Alternatively, the senior user may argue that use of the same device—where both marks alliterate with the same letter or allude to the same historical figure,⁸⁷ for example—increases their similarity and in turn increases

84. This Article focuses on word marks, but trademark protection is also available for logos, product packaging, and two- and three-dimensional designs, as well as motion, sound, and scent marks.

85. See Jonathan Masur, *Patent Inflation*, 121 YALE L.J. 470, 472–75 (2011) (arguing that the patent prosecution process creates an asymmetric incentive for the USPTO to grant rather than refuse applications to minimize appeals and reversals).

86. Of course, poetic devices in marks may be relevant to other likelihood of confusion factors as well, especially the strength of plaintiff's mark, which has two components: inherent distinctiveness and commercial strength. This Section focuses on the similarity factor because distinctiveness is discussed elsewhere in the Article.

87. For example, a court considering whether there was a likelihood of confusion between FIRST FRANKLIN and FRANKLIN FIRST for baking-related services noted the shared allusion to Benjamin Franklin, a common reference point within the industry. *First Franklin Fin. Corp. v. Franklin First Fin., Ltd.*, 356 F. Supp. 2d 1048, 1054 (N.D. Cal. 2005) (“Considering how many other banks and financial companies have chosen trade names with allusions to Benjamin Franklin, defendant's selection of Franklin First Financial Ltd. might have been perfectly innocent.”). Another court assessing the likelihood of confusion between plaintiff's GIDEON mark for Christian ministries and bible distribution and defendant's GIDEON 300 MINISTRIES mark for similar charitable services noted the allusion to the biblical figure by both parties. *Gideons Int'l, Inc. v. Gideon 300 Ministries, Inc.*, 94 F. Supp.

the likelihood of confusion. Lastly, the senior user may point to poetic devices to highlight marks' similarity to each other, as when the two marks rhyme or alliterate not internally but with one another.⁸⁸

III. DEVICES

This Section identifies and defines a number of poetic devices and provides examples of poems and trademarks that employ them. It also discusses registrability decisions and federal and TTAB cases involving those devices where available.

Devices are loosely organized into three groups, corresponding to courts' considerations in assessing the similarity of allegedly confusing marks: (1) sight, (2) sound, and (3) meaning. Of course, most of the devices cut across categories, affecting how consumers perceive a mark visually and aurally as well as what it means to them and how they interpret it.

A. SIGHT

1. *Aphaeresis, Apocope, & Elision*

The first three devices in this Section are forms of clipping: shortening a word or phrase by dropping a syllable or portion of a word from its beginning, end, or middle.⁸⁹

2d 566, 578, 580 (E.D. Pa. 1999) (finding plaintiff's mark suggestive and enjoining defendant's use).

88. See *EBSCO Indus., Inc. v. LMN Enterprises, Inc.*, 89 F. Supp. 2d 1248, 1253 (N.D. Ala. 2000); *Londontown Mfg. Co. v. Cable Raincoat Co.*, 371 F. Supp. 1114, 1117 (S.D.N.Y. 1974); *Tisket-A-Tasket Grp. Inc. v. H.S. Craft Mfg. Co.*, No. F, 1999 WL 1327617, at *1–2 (S.D. Ind. Oct. 12, 1999); *W.L. Gore & Assocs. v. Johnson & Johnson*, 882 F. Supp. 1454, 1458 (D. Del. 1995), *aff'd sub nom. W.L. Gore & Assocs., Inc. v. Johnson & Johnson, Inc.*, 77 F.3d 465 (3d Cir. 1996); *Knowles-Carter v. Feyonce, Inc.*, 347 F. Supp. 3d 217, 226 (S.D.N.Y. 2018). This phenomenon is particularly common in dilution cases. See, e.g., *VIP Prod. LLC v. Jack Daniel's Properties, Inc.*, 953 F.3d 1170, 1176 (9th Cir. 2020); *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 260 (4th Cir. 2007).

89. Some experts have also used “clip” to refer to dropping a word from a trademark, as when consumers refer to “Discount Tires” as simply “Discount” (e.g., “[I] . . . did a little research, then called the boys at Discount, told them what I needed”). Expert Report of Ronald R. Butters, Ph.D. at 38, *Reinalt-Thomas Corp. v. Mavis Tire Supply LLC*, No. 1:18-cv-05877, 2019 WL 4096819, at *53 (N.D. Ga. Mar. 4, 2019); see also Expert Report of Ronald R. Butters, Ph.D., *TY Inc., v. Softbelly's Inc.*, No. 1:00-cv-05230, 2006 WL 1651347, at *7 (N.D. Ill. Mar. 4, 2019) (“[B]eanie has a] well recognized meaning, as a shortening or CLIPPED FORM of the trademark *Beanie Babies*, which refers (as does *Beanie*) to the plush, bean- or pellet-filled dolls and toys marketed by Ty Inc.”); Deposition of Alan S. Kaye, *V&S Vin & Sprit Aktiebolag v. Cracovia Brands, Inc.*, at 21, No. 01 C 9923, 2003 WL 24277225, at *21–25 (N.D. Ill. Sept. 3, 2003) (opining on which syllables of a trademark consumers would be most likely to drop or clip based on linguistic principles of clipping).

Metropolitan Life); and COKE (from COCA-COLA, itself purportedly apocope from the words coca[ine] and cola).

While aphaeresis clips from the beginning and apocope from the end, **ELISION** [ell-IH-zhun] leaves out internal letters or syllables from the middle of a word to shorten it (see also **SYNCOPE** [SINK-a-pee], usually defined as omitting a vowel sound). Sounds are typically elided from the middle of a word, as in TOYS ‘R’ US, LAND O LAKES, PEP-O-MINT, CUP-A-SOUP, SQUEEZE N’ SERVE,⁹³ and the plethora of CHICK’N and GRAB ‘N GO marks. Apocope overlaps with elision when clipped syllables from the beginning or end of a word become clipped syllables from the middle of a phrase, as with BOLOCO, NABISCO, and MANUGISTICS cited above. People who select trademarks often gravitate toward the shortest, punchiest, most concise version of a word, making clipping a convenient strategy.

The omissions in aphaeresis, apocope, and elision can lead factfinders to find words and phrases unitary. NILLA for wafer cookies;⁹⁴ MANUGISTICS for computer software that manages manufacturing logistics;⁹⁵ ACCENTURE for business consulting software and services;⁹⁶ INSTAGRAM for a social media platform for sharing photo and video content;⁹⁷ WINE-A-RITA for wine;⁹⁸ PIÑA RITA for alcoholic beverages;⁹⁹ and GRAB N’ GO! for gas stations¹⁰⁰ are all registered without disclaimer,¹⁰¹ as are CUP-A-SOUP,¹⁰² SOFI¹⁰³ (so[cial] + fi[nance]), DOCUSIGN (docu[ment] + sign),¹⁰⁴

93. *In re Serv-A-Portion, Inc.*, 1 U.S.P.Q.2d 1915, 1986 WL 83345, at *2, (T.T.A.B. Sept. 26, 1986) (holding that the mark is merely descriptive for single-serving ketchup packets).

94. NILLA, Registration No. 859,776.

95. MANUGISTICS, Registration No. 1,749,141.

96. ACCENTURE, Registration No. 3,091,811.

97. INSTAGRAM, Registration No. 4,146,057.

98. WINE-A-RITA, Registration No. 3,350,731 (canceled).

99. PIÑA RITA, Registration No. 1,905,850 (canceled).

100. GRAB N’ GO!, Registration No. 4,439,065; *see also* GRAB ‘N GO, Registration No. 4,619,335 (registering GRAB ‘N GO for chocolate milk) and GRAB’N’GO, Registration No. 3,077,344 (registering GRAB’N’GO for refrigerator compartments) (also registered without disclaimer or evidence of secondary meaning).

101. All were also registered as inherently distinctive.

102. CUP-A-SOUP, Registration No. 1,438,216.

103. SOFI, Registration No. 4,345,122.

104. DOCUSIGN, Registration No. 2,845,169.

NABISCO,¹⁰⁵ BOLOCO,¹⁰⁶ THERAFLU,¹⁰⁷ FEDEX,¹⁰⁸ CHEVY,¹⁰⁹ METLIFE,¹¹⁰ and COKE.¹¹¹

Clipped marks are typically also treated as distinctive: they ostensibly satisfy the “imagination test” that factfinders often consider in determining a mark’s suggestiveness. Both the USPTO and WIPO treated CBDISTILLERY as inherently distinctive for online retail store services featuring products distilled from CBD, perhaps in part because of the elided “D.”¹¹² In a dispute between two users of the mark VALMOR, the junior user alleged on appeal that the district court had “accorded undue scope to the trademark, which, as an elision of ‘value’ and ‘more,’ [is] a weak, self-laudatory [mark] deserving of, at most, narrow protection.”¹¹³ The First Circuit acknowledged the mark was “self-laudatory” but nonetheless deemed it inherently distinctive because it was “suggestive of quality.”¹¹⁴ Likewise, in a dispute between the owners of the mark ARTYPE for acetate sheets with letter transfers and ART-TYPE for printing and reproduction services, the Second Circuit deemed ARTYPE inherently distinctive, reversing the district court’s determination that it was unprotectable.¹¹⁵

Not all clipped terms are deemed unitary and distinctive, though. NETFLIX as a trademark for video rental and streaming services¹¹⁶ and PEP O MINT for mint candy¹¹⁷ were both initially refused as merely descriptive and only registered after the applicants submitted evidence of secondary

105. NABISCO, Registration No. 4,236,368.

106. BOLOCO, Registration No. 3,102,322.

107. THERAFLU, Registration No. 1,452,879.

108. FEDEX, Registration No. 1,311,503.

109. CHEVY, Registration No. 1,494,385.

110. METLIFE, Registration No. 1,541,862.

111. COKE, Registration No. 415,755.

112. CBDISTILLERY, Registration No. 6,406,909; *Balanced Health Botanicals, LLC v. Privacy Serv., Provided By Withheld For Privacy Ehf/sander Cry*, No. D2021-1988, 2021 WL 4427104, at *4(UDRP-ARB. Sept. 9, 2021).

113. *Valmor Prod. Co. v. Standard Prod. Corp.*, 464 F.2d 200, 201 (1st Cir. 1972).

114. *Valmor Prod. Co. v. Standard Prod. Corp.*, 464 F.2d 200, 201 (1st Cir. 1972).

115. *Artype, Inc. v. Zappulla*, 228 F.2d 695, 698 (2d Cir. 1956), *rev’g* *Artype, Inc. v. Zappulla*, 127 F. Supp. 33, 36 (S.D.N.Y. 1954) (“Compounding the words, and dropping the letter ‘t’ does not render the word suggestive in the sense that ‘the imaginativeness involved in the suggestion . . . is so remote and subtle that it is fanciful and not needed by other merchants of similar goods.’”) (citation omitted); *see also* *In Adolph J. Mainzer, Inc., v. Gruberth*, 260 N.Y.S. 694, 695, (N.Y. App. Div. 1932), *aff’d sub nom.* *Adolph J. Mainzer, Inc., v. Gruberth*, 262 N.Y. 484, 188 N.E. 30 (N.Y. App. Div. 1933) (holding APRICOATING inherently distinctive for “a product for use by bakers as a covering over fruit tarts”).

116. NETFLIX, Registration No. 3,299,362.

117. PEP O MINT, Registration No. 3,380,319.

meaning. The trademark SQUEEZE N'SERV for ketchup¹¹⁸ was abandoned after a final refusal for mere descriptiveness. LOBSTER GRAM for mail-order seafood¹¹⁹ was registered with a disclaimer of "lobster," VIVA LA RITA for a special event at a restaurant chain¹²⁰ with a disclaimer of "Rita," and TOYS "R" US for children's toys¹²¹ with a disclaimer of "toys." The USPTO also required a disclaimer for the term "taco" in CHOCO TACO, a mark that might have benefited from being one word rather than two.¹²²

The TTAB has also considered the likelihood of confusion when an applicant's mark appears to be an elision of two of opposer's existing marks. Where an applicant sought to register DEXSPAN for pharmaceutical products and the opposer owned registrations for DEXADRINE, DEXAMYL, and SPANSULE, the Board dismissed the opposition on the grounds of the opposer's "elision theory of relief," pointing to the descriptiveness and ubiquitousness of the dex- prefix and -span suffix as weighing against a likelihood of confusion.¹²³

In general, courts assessing likelihood of confusion tend to deemphasize non-traditional spellings,¹²⁴ which often include clipped marks. Courts have pointed out that there's no substantial difference between, for example, BABY AND ME and BABY 'N ME.¹²⁵ At a minimum, though, elided letters and

118. SQUEEZE N'SERV, Serial No. 73,498,205.

119. LOBSTER GRAM, Registration No. 3,148,000.

120. VIVA LA RITA, Registration No. 5,035,241.

121. TOYS "R" US!, Registration No. 902,125.

122. The registration for stylized mark CHOCO TACO includes a disclaimer for "taco." CHOCO TACO, Registration No. 1,355,681. The registration for the plain-text word mark, however, does not include a disclaimer. That appears to be because the original application was for the unitary mark CHOC-O-TACO; a subsequent amendment to CHOCO TACO enabled the applicant to skirt the disclaimer requirement. *See* CHOCO TACO, Registration No. 1,304,008; Application to Amend Registration ("Fax incoming," Nov. 2, 2004).

123. *Smith Kline & French Lab'ys v. USV Pharm. Corp.*, 175 U.S.P.Q. (BNA) 666 (T.T.A.B. Sept. 20, 1972). The Board noted "dex" was short for dextroamphetamine, *id.* at 668. The Board also noted that "'SPAN' had long been used in the pharmaceutical trade in multi-syllable marks to indicate the offered products are time release capsules that dissolve 'in a span of time,'" *id.* at 671.

124. *In re McCrane, Inc.*, No. 85276221, 2013 WL 3129904, at *1 (T.T.A.B. Mar. 5, 2013) ("It is well established that a slight misspelling of a word will not turn a descriptive word into a non-descriptive mark if it will be perceived by consumers as the equivalent of the descriptive term." (citing *In re ING Direct Bancorp*, 100 U.S.P.Q.2d 1681, 1690 (T.T.A.B. 2011) (PERSON2PERSON PAYMENT generic)); *In re Carlson*, 91 U.S.P.Q.2d 1198, 1203 (T.T.A.B. 2009) (URBANHOUSING merely descriptive); *In re Ginc UK Ltd.*, 90 U.S.P.Q.2d 1472, 1475 (T.T.A.B. 2007) (TOGGS generic); *In re Hubbard Milling Co.*, 6 U.S.P.Q.2d 1239 (T.T.A.B. 1987) (MINERAL-LYX generic).

125. *In re Kohls Illinois, Inc.*, No. 76149873, 2004 WL 390935, at *1 (T.T.A.B. Feb. 26, 2004); *see also In re Columbia Ribbon & Carbon Mfg. Co., Inc.*, 122 U.S.P.Q. (BNA) 299, 299

sounds suggest to consumers that a user is trying to do something trademark-like rather than merely using descriptive terms in their descriptive sense. This impression makes marks that feature elision or any kind of clipping more likely to be recognized as marks and less likely to fail to function.¹²⁶

2. *Tmesis*

Perhaps the opposite of clipping is a device that's even more visually and aurally striking, **TMESIS** [t'MEE-sis]. Though "tmesis" comes from the Greek "to cut," the device is more additive than subtractive. It refers to the practice of inserting a word into the middle of another word or phrase. Examples span from Shakespeare in *Richard III*: "If on the first, *how heinous e'er* it be, To win thy after-love I pardon thee," to Wayne Newton's "ri-goddamn-diculous," to the catchphrase "Legen—*wait for it*—dary" of television's *How I Met Your Mother*.¹²⁷

Modern examples of tmesis in every language involve inserting curse words into commonplace ones; trademark examples are not much different. The Federal Register includes examples such as FAN-FRICKIN'-TASTIC¹²⁸ and FUN-FRICKIN'-TASTIC,¹²⁹ registered for restaurant and bar services; ABSO FUKU LUTELY for shirts;¹³⁰ GOOD MUHF#@KIN HAIR! for apparel;¹³¹ and ABSOSUCKINGLUTELY for drinking straws;¹³² as well as a pending application for ABSO-FOAMING-LUTELY! for mops¹³³ and the ultimately abandoned applications to register Well La-Di Frickin-Da¹³⁴ and

(T.T.A.B. 1959) (affirming refusal to register CARBNPAD for carbon paper, "on the ground that the word 'CARBNPAD' being the phonetic equivalent of 'carbon' and 'pad' and denoting that applicant's carbon paper is sold in pad form, is merely descriptive as applied to the goods."); *In re Sealol, Inc.*, 168 U.S.P.Q. (BNA) 320, 320 (T.T.A.B. 1970) (finding GASKETAPE merely descriptive for gasket tape) ("A mere misspelling of the name of a product does not give the term such a quality as to create distinguishability and this is especially true where a repetitive consonant is elided."); *In re McCrane, Inc.*, No. 85276221, 2013 WL 3129904, at *3–4 (T.T.A.B. Mar. 5, 2013) (finding SOF merely descriptive for soft dumbbells despite elision of final letter "t").

126. See generally Alexandra J. Roberts, *Trademark Failure to Function*, 104 IOWA L. REV. 1977 (2019).

127. The mark owner cites all three examples in its brief to the TTAB. Applicant's Appeal Brief in Support of Registration, *In re Buffalo Wild Wings, Inc.*, 2011 WL 8881232, at *12 (T.T.A.B. Mar. 21, 2011).

128. FAN-FRICKIN'-TASTIC, Registration No. 4,841,691.

129. FUN-FRICKIN'-TASTIC, Registration No. 4,841,692.

130. ABSO FUKU LUTELY, Registration No. 5,281,561.

131. GOOD MUHF#@KIN HAIR!, Registration No. 6,489,813 (words plus design).

132. ABSOSUCKINGLUTELY, Registration No. 4,645,817.

133. U.S. Trademark Application Serial No. 90,151,538 (filed Sept. 1, 2022).

134. U.S. Trademark Application Serial No. 87,268,488 (filed Dec. 14, 2016).

Yee-Friggin'-Haw¹³⁵ for clothing and It's Like A Whole 'Nother Internet! for web services.¹³⁶ While the insertions don't add much of substance, they may be enough to make a trademark more than descriptive or render a phrase unitary—FAN-FRICKIN'-TASTIC, ABSO FUKU LUTELY, ABSOSUCKINGLUTELY, and GOOD MUHF#@KIN HAIR! were all registered without disclaimer and treated as inherently distinctive.¹³⁷ In the wake of the Supreme Court striking down the bar on registration of scandalous and immoral marks in *Brunetti*,¹³⁸ we can expect to see more marks that incorporate tmesis. Justice Breyer in that case acknowledged that marks containing expletives “attract more attention and are harder to forget”; Breyer focused on such marks' potential to disrupt commerce, but his words also imply their effectiveness as trademarks.¹³⁹

Applicants rarely call explicit attention to their use of tmesis. But when the USPTO refused to register BUFFALO WILD WINGS for franchise services without any disclaimer of “buffalo” and “wings,”¹⁴⁰ the applicant appealed the refusal. It argued that the mark was unitary because it employed tmesis by inserting “wild” in the middle of the descriptive phrase, which “places a new intensification on the entire term and lends a new unitary interpretation.”¹⁴¹ The Board was not swayed, concluding that the inclusion of “wild” would not lead consumers to perceive the phrase as unitary.¹⁴²

Examples of tmesis in likelihood of confusion analyses are rare. Extrapolating from patterns in courts' treatment of rhyme and paronomasia,

135. U.S. Trademark Application Serial No. 85,252,711 (filed Feb. 26, 2011).

136. U.S. Trademark Application Serial No. 78,963,427 (filed Aug. 30, 2006).

137. ABSO-FOAMING-LUTELY was also treated as inherently distinctive and published without disclaimers; it is currently awaiting a statement of use. U.S. Trademark Application Serial No. 90,151,538 (filed Sept. 1, 2020).

138. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2296 (2019).

139. “[S]cientific evidence suggests that certain highly vulgar words have a physiological and emotional impact that makes them different in kind from most other words . . . These attention-grabbing words, though financially valuable to some businesses that seek to attract interest in their products, threaten to distract consumers and disrupt commerce.” *Id.* at 2307 (citing M. MOHR, *HOLY S***: A BRIEF HISTORY OF SWEARING* 252 (2013); Timothy Jay, Catherine Caldwell-Harris & Krista King, *Recalling, Taboo and Nontaboo Words*, 121 AM. J. PSYCH. 83, 83–86 (2008)).

140. *In re Buffalo Wild Wings, Inc.*, No. 77654679, 2011 WL 7005530, at *1 (T.T.A.B. Dec. 21, 2011).

141. Applicant's Appeal Brief in Support of Registration at 13, *In re Buffalo Wild Wings, Inc.*, No. 77654679, 2011 WL 8881232 (T.T.A.B. Mar. 21, 2011).

142. *In re Buffalo Wild Wings*, No. 77654679, 2011 WL 7005530, at *4 (T.T.A.B. Dec. 21, 2011). The Board noted that it found “particularly unconvincing applicant's comparison of its mark BUFFALO WILD WINGS to Shakespeare's use of tmesis in the [quoted] passage from ‘Richard III.’” *Id.* at *4 n.6.

discussed further below, we might expect that use of tmesis in either an infringement plaintiff's or defendant's mark might render a pair of marks less similar, while use of tmesis in both—ABSOFUCKINGLUTELY and ABSOSUCKINGLUTELY, both for drinking straws, for example—might render the marks more similar.

3. Punctuation

PUNCTUATION is not traditionally included in lists of poetic devices, but scholars have spilled a great deal of ink discussing its deliberate use in poetry to great effect. Poets like Emily Dickinson and E. E. Cummings are known for their creative use of punctuation and other typographical symbols to create ambiguity and play with meaning.¹⁴³ See, for example, E. E. Cummings' use of parentheses, colons, semicolons, and enjambment to alter meaning and add visual effects in stanzas like:

(i who have died am alive again today,
and this is the sun's birthday;this is the birth
day of life and of love and wings:and of the gay
great happening illimitably earth).¹⁴⁴

Trademarks also play with punctuation for emphasis, as in YAHOO! for websites and other internet services¹⁴⁵ or DOT.BOOM! for speakers.¹⁴⁶ Producers can use punctuation to create a compound word like CHEEZ-IT for crackers;¹⁴⁷ BAND-AID for bandages;¹⁴⁸ or POCKET.WATCH for entertainment brand consulting services.¹⁴⁹ They may also incorporate nontraditional characters to make a mark visually interesting, like DELIA*s for clothing;¹⁵⁰ (RED) for charitable services;¹⁵¹ and RO*TEL for canned food.¹⁵² Other times, the punctuation stands in for an equivalent word: DISNEY+ for a video streaming service;¹⁵³ &PIZZA for pizza restaurants;¹⁵⁴

143. See, e.g., Roi Tartakovsky, *E. E. Cummings's Parentheses: Punctuation as Poetic Device*, 43 *STYLE*, Summer 2009, at 215–47.

144. E. E. CUMMINGS, *i thank You God for most this amazing*, in *XAIPE* 65 (W.W. Norton & Co, 1997).

145. YAHOO!, Registration No. 2,040,222.

146. DOT.BOOM!, Registration No. 5,763,630.

147. CHEEZ-IT, Registration No. 151,785; CHEEZ-IT, Registration No. 4,624,992.

148. BAND-AID, Registration No. 194,123.

149. POCKET.WATCH, Registration No. 6,393,369.

150. DELIA*S, Registration No. 4,678,702.

151. (RED), Registration No. 3,726,784.

152. RO*TEL, Registration No. 5,049,852.

153. DISNEY+, Registration No. 6,351,110.

154. &PIZZA, Registration No. 5,834,696.

FOLDING@HOME for computer software.¹⁵⁵ Punctuation can also create double meaning, the way the period in I.CONIC sets the “P” apart from the complete word “iconic.”¹⁵⁶

Use of punctuation often results in treatment of marks as unitary and distinctive—every mark listed above was registered without disclaimer or proof of secondary meaning. But when a mark is clearly descriptive or contains descriptive or generic terms, the use of punctuation won’t necessarily enable it to overcome those issues: marks may be treated as merely descriptive, like “FOR WALKING” for shoes¹⁵⁷ or (RED) for wine,¹⁵⁸ or registered with disclaimers, like THE F*CK IT DIET for diet and lifestyle books¹⁵⁹ and FISH SH!T ORGANIC SOIL CONDITIONER SOIL WEEKLY for soil conditioner.¹⁶⁰

Courts considering punctuation have generally held slight differences in punctuation or capitalization insufficient to defeat a finding that two marks are similar.¹⁶¹ Specifically, courts have held “iTan” and “i.tan,”¹⁶² MIRACLE GRO and MIRACLE-GRO,¹⁶³ SUN-EARTH and SUNEARTH,¹⁶⁴ SPIGA and S.P.I.G.A.,¹⁶⁵ and CONTACT and CON-TACT¹⁶⁶ similar enough to weigh toward a likelihood of confusion. The *Miracle-Gro* court noted that:

155. FOLDING@HOME, Registration No. 3,250,544.

156. I.CONIC, Registration No. 6,575,615 (showing the trademarked name of the I.CONIC clothing brand).

157. U.S. Trademark Application Serial No. 90,277,796 (filed Oct. 26, 2020). Applicant requested reconsideration of a finding of mere descriptiveness to the TTAB, which remanded to the examiner based on request for reconsideration.

158. When the examining attorney found (RED) merely descriptive for wine, the applicant dropped “wine” from its list of goods and services. (RED), Registration No. 3,726,784.

159. THE F*CK IT DIET, Registration No. 6,125,614; *see also* F*CK YO PODCAST, Registration No. 6,298,048 (disclaiming “podcast”); F*CK THE SMALL TALK, Registration No. 6,523,785 (showing trademark for card game with no disclaimer).

160. FISH SH!T ORGANIC SOIL CONDITIONER SOIL WEEKLY, Registration No. 6,757,113 (disclaiming “fish shit,” “soil,” and “organic soil conditioner”).

161. *See, e.g.*, USA Visionary Concepts, LLC v. MR Int’l, LLC, No. 4:09-cv-00874, 2009 WL 10672094, at *4 (W.D. Mo. Nov. 17, 2009).

162. *Id.*

163. Stern’s Miracle-Gro Prods., Inc. v. Shark Prods., Inc., 823 F. Supp. 1077, 1086 (S.D.N.Y. 1993) (calling the marks “virtually identical”).

164. SunEarth, Inc. v. Sun Earth Solar Power Co., 846 F. Supp. 2d 1063, 1077–78 (N.D. Cal. 2012).

165. Pastificio Spiga Societa Per Azioni v. De Martini Macaroni Co., 200 F.2d 325, 326 (2d Cir. 1952) (holding that the marks “carried an essentially identical significance to a buyer.”).

166. Stix Prods., Inc. v. United Merchs. & Mfrs., Inc., 295 F. Supp. 479, 486 (S.D.N.Y. 1968).

The fact that [plaintiff] uses a hyphen in its mark, while [defendant] does not, is too minor a difference to be classified as significant by the Court. It is extremely unlikely that such a minor difference would be noticed by consumers and it is undetectable when the two marks are spoken.¹⁶⁷

Multiple courts have also found sufficient similarity for successful cybersquatting claims where defendants only changed the marks for their domain names by removing a hyphen from plaintiffs' marks and domain names.¹⁶⁸ On the other hand, a court dismissed a trademark counterfeiting claim by finding the two marks in question non-identical, including because defendant's use of "playmotion!" differed from plaintiff's WII PLAY MOTION in the defendant's use of lowercase, omitted space, and exclamation point.¹⁶⁹

4. *Personification*

While clipping devices alter a mark's appearance, other types of poetic devices call upon the power of "sight" by leading consumers to envision something beyond the mark before them. **PERSONIFICATION** [per-SON-if-ih-kay-shun] refers to assigning human qualities to something that isn't human, as Sylvia Plath does in "The Mirror":

I am silver and exact. I have no preconceptions.
 Whatever I see I swallow immediately
 Just as it is, unmisted by love or dislike.
 I am not cruel, only truthful,
 The eye of a little god, four-cornered.

Personification dominates certain categories of trademarks—think of all the mascots from sports to cereal;¹⁷⁰ the "mister" marks;¹⁷¹ the logos that feature

167. *Stern's Miracle-Gro Prod., Inc.*, 823 F. Supp. at 1086.

168. *Agri-Supply Co. v. Agrisupply.Com*, 457 F. Supp. 2d 660, 663 (E.D. Va. 2006) (noting that the cybersquatter-owned domain "Agrisupply.com" was confusingly similar to plaintiff's domain name "Agri-Supply.com"); *Bioclin BV v. Multygyn USA, LLC*, 72 F. Supp. 3d 1288, 1296 (M.D. Fla. 2014) (holding that defendant's use of multigyn.com violated the Anticybersquatting Consumer Protection Act based on its similarity to plaintiff's MULTI-GYN mark and domain names).

169. *Playvision Labs, Inc. v. Nintendo of Am., Inc.*, No. C14-05365, 2015 WL 12941892, at *1 (N.D. Cal. May 18, 2015).

170. *See, e.g., Ollie v. Domino's Pizza, Inc.*, No. 95CIV10333, 1997 WL 529049, at *1 (S.D.N.Y. Aug. 25, 1997) (regarding Donny Domino, the anthropomorphized domino of Domino's Pizza).

171. *See, e.g., In re Lombardo*, No. 74/468,937, 1999 WL 590699, at *4 (F.T.A.B. July 30, 1999) (affirming refusal for one anthropomorphic MR. PITA mark based on likelihood of confusion with another anthropomorphic MR. PITA mark); *In re Kiriakos Christoforakis*, No.

oranges or baseballs with arms and legs and human expressions; the animals of every stripe speaking, wearing clothes, or communicating judgment. Owners of design marks¹⁷² and trade dress¹⁷³ often cite their marks' resemblance to human forms to bolster their claims of distinctiveness.

But personification is not limited to visual trademarks. Marketers have long recognized the value of using the "pathetic fallacy" to "ascribe human emotional characteristics to products," as in the upbeat CHEERIOS for breakfast cereal.¹⁷⁴ Word marks that assign human emotions, moods, attributes, or actions to inanimate objects are plentiful. For example, the Principal Register contains registrations for SURLY for bicycles;¹⁷⁵ SINGING SUN for coffee shops;¹⁷⁶ CHEERFUL CHOCOLATE for baking mixes;¹⁷⁷ CREATIVE COW for software;¹⁷⁸ and THE FRIENDLY TOAST for restaurant services.¹⁷⁹ And those represent just a tiny sample. Many companies have sought to turn widely-recognized personifications into trademarks, as

86599436, 2018 WL 1871444, at *6 (T.T.A.B. Apr. 5, 2018) (affirming refusal for anthropomorphic MR. PIZZAS mark based on likelihood of confusion with anthropomorphic MR. PIZZA mark); *In re* William Bonofiglio, No. 86733206, 2017 WL 1684174 (T.T.A.B. Mar. 28, 2017) (affirming refusal for anthropomorphic MR. TACO mark based on likelihood of confusion with anthropomorphic MR. TACO mark) ("We . . . find the connotation and commercial impression of both marks to be quite similar, if not identical. The use of the title MISTER/MR. with the word TACO, along with the design elements in each mark create the impression of a taco-related character or personification.").

172. *Donut Joe's, Inc. v. Interveston Food Servs., LLC*, 101 F. Supp. 3d 1172, 1181–82 (N.D. Ala. 2015) (reasoning that elements of the DONUT JOE'S LOGO, such as "the anthropomorphized donut character . . . do not make the connection between the mark and the store's goods any less straightforward; if anything, adding those elements makes it even more clearly descriptive of the store's goods.").

173. *See, e.g., In re* Compagnie Gervais Danone, No. 75/621,184, 2001 WL 1313588, at *4 n.13 (T.T.A.B. Oct. 22, 2001) ("In regard to the asserted anthropomorphism of the [bottle] design, applicant states the design 'may suggest the appearance of a creature, such as a snowman or one of the roly-poly animals featured in Applicant's advertising and labeling.'"); *In re* Saey N.V., No. 75826909, 2005 WL 2451652, at *3 (T.T.A.B. Sept. 21, 2005) (rejecting applicant's "creative" claim that the ventilation holes on its grill will be perceived by consumers as eyes and a mouth).

174. Vanden Bergh et al., *supra* note 35, at 39–40.

175. SURLY, Registration No. 2,594,176.

176. SINGING SUN, Registration No. 5,940,124.

177. CHEERFUL CHOCOLATE, Registration No. 4,524,661 (disclaiming "chocolate").

178. CREATIVE COW, Registration No. 3,411,445.

179. THE FRIENDLY TOAST, Registration No. 4,845,512.

with LADY LUCK¹⁸⁰ for casinos, and BLIND JUSTICE for wine,¹⁸¹ capitalizing on the phrases' preexisting cultural resonance. The marks listed above were registered without disclaimer, including compound marks like THE FRIENDLY TOAST. But NAUGHTY PINE BREWING CO.,¹⁸² DAYDREAMING BREWING COMPANY,¹⁸³ ANGRY FISH BREWING CO.,¹⁸⁴ DEPLORABLE BREWING CO.,¹⁸⁵ LEADER BREWING,¹⁸⁶ REVOLUTION BREWING,¹⁸⁷ and BLOOD BROTHERS BREWING,¹⁸⁸ all registered for coffee, beer, or brewery services, each disclaim "brewing" in their registrations, suggesting the use of personification won't render a mark unitary when it contains clearly generic terms.

Applicants and mark owners have also pointed to personification in their word marks to support assertions of distinctiveness, to varying degrees of success.¹⁸⁹ In one dispute, a junior user argued that the senior user's mark GUZZLER for "vehicle-mounted vacuum loading, transporting and dumping machines" was suggestive at best and thus not entitled to as broad a scope of protection as a fanciful or arbitrary mark; the examining attorney cited dictionary evidence and "counter[ed] with the observation that 'applicant's machinery cannot "drink greedily" or "consume to excess," thus, the term

180. *Isle of Capri Casinos, Inc. v. Flynt*, No. 2:16-cv-06148, 2016 WL 6495380, at *4 (C.D. Cal. Nov. 1, 2016) (deeming LADY LUCK for casino, restaurant, hotel, bar, and related services and LUCKY LADY for slot machine games inherently distinctive but nonetheless weak marks and denying plaintiff's application for a preliminary injunction against defendant's use of "Larry Flynt's Lucky Lady Casino" as the name of a casino).

181. BLIND JUSTICE, Registration No. 3,326,534.

182. NAUGHTY PINE BREWING CO., Registration No. 6,668,000.

183. DAYDREAMING BREWING COMPANY, Registration No. 6,281,053.

184. ANGRY FISH BREWING CO., Registration No. 5,840,899.

185. DEPLORABLE BREWING CO., Registration No. 6,484,724.

186. LEADER BREWING, Registration No. 6,768,843.

187. REVOLUTION BREWING, Registration No. 6,819,049.

188. BLOOD BROTHERS BREWING, Registration No. 6,715,278.

189. *Coach Servs., Inc. v. Triumph Learning LLC*, 96 U.S.P.Q.2d 1600, 2010 WL 3798519, at *18 (T.T.A.B. Sept. 17, 2010), *aff'd*, *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1378 (Fed. Cir. 2012) ("While the word 'Coach' is a personification of the act of instructing or tutoring for an examination, it is not sufficiently metaphorical to be suggestive."); *In re Ziff-Davis Inc.*, No. 75/178,551, 2000 WL 132545, at *1–2 (T.T.A.B. Jan. 28, 2000) (affirming refusal to register SOFTWARE BUYER as a mark for computer-related products based on mere descriptiveness despite applicant's argument that the use of "buyer" constitutes personification and renders the mark suggestive); *In re Chesebrough-Ponds's Inc.*, 163 U.S.P.Q. (BNA) 244, 245 (T.T.A.B. 1969) (holding MANICURIST BY CUTEX suggestive for nail polish because it indicated professional results achievable—those a manicurist would achieve—rather than describing purchasers); *In re Coca-Cola Bottling Co. of Los Angeles*, 49 F.2d 838, 839 (C.C.P.A. 1931) (holding that JACK FROST, "defined . . . as 'the personification of wintry weather,'" was suggestive for extracts and syrups).

‘GUZZLER,’ when applied to the identified goods, is fanciful, invoking vividly personified visualizations of greedy eating machines gobbling up earth and mud.”¹⁹⁰

Courts have occasionally found personification or anthropomorphism to weigh toward a finding of similarity and likelihood of confusion when both parties use marks that personify their products in the same way, as when two beverage companies used oranges with faces;¹⁹¹ two producers of cardboard play structures used “color me” marks, “ascribing an anthropomorphic quality to the cardboard product”;¹⁹² two toymakers used BRAINY BLOCKS and MR. BRAIN BUILDER;¹⁹³ and a maker of lingerie and a shoe company each chose a version of “lonely” to modify its bras and shoes.¹⁹⁴ In other cases,

190. *In re Tibban*, No. 76639252, 2007 WL 2972198, at *2–3 (T.T.A.B. Sept. 14, 2007) (the Board affirmed the refusal to register, noting “[w]e are not persuaded that the term GUZZLER when used in connection with the goods involved in this appeal should be accorded a reduced level of protection so as to allow the registration of applicant’s mark.”).

191. *See, e.g., Home Juice Co. v. Runglin Cos.*, 231 U.S.P.Q. 897, 1986 WL 83744, at *3–4 (T.T.A.B. Oct. 3, 1986) (granting petition to cancel registration based on similarity of two anthropomorphic orange designs used for beverages).

192. *Color Me House, Inc. v. Discovery Commc’ns, Inc.*, No. C12-5935 RJB, 2013 WL 1283806, at *6 (W.D. Wash. Mar. 27, 2013) (granting preliminary injunctive relief for plaintiff and finding “[the similarity] factor favors [plaintiff].”). In a case assessing whether defendant’s use of DISCOVERY KIDS COLOR ME PLAYHOUSE and DISCOVERY KIDS COLOR ME ROCKETSHIP for cardboard play structures infringed plaintiff’s marks COLOR ME HOUSE and COLOR ME ROCKET for similar goods, the court found the similarity factor weighed toward a likelihood of confusion. It emphasized that “‘COLOR ME’ is the unique feature of [plaintiff’s] trademarks, ascribing an anthropomorphic quality to the cardboard product. Use of ‘Color Me’ by [defendant] appropriates that quality.” *Id.* The court seems to imply that since the defendant’s use of the same phrase personifies the products in the same way—such that the products themselves are urging children to color them—it renders the uses more similar than some more straightforward shared use of the verb “color” might have.

193. *Or Da Indus., Ltd. v. Leisure Learning Prod., Inc.*, 479 F. Supp. 710, 717–18 (S.D.N.Y. 1979). Likewise, in a case comparing senior user’s BRAINY BLOCKS with alleged infringer’s MR. BRAIN BUILDER, both for toys and games, the court points out that “[b]oth marks used the word ‘brain’ and in neither case does it describe the product.” *Id.* at 717. The court also notes both marks’ alliteration of “B,” consonance of “L,” and focus on construction in finding the marks similar. *Id.*

194. *In re Lonely Hearts Club Ltd.*, No. 79174419, 2017 WL 6033943, at *6 (T.T.A.B. Nov. 15, 2017) (affirming refusal to register under 2(d)). Similarly, an applicant seeking to register LONELY as a stylized word mark for lingerie tried to rebut the USPTO’s refusal based on a likelihood of confusion with LONELYSHOES for shoes, arguing that “the combined term LONELYSHOES has an anthropomorphizing effect that is absent from Applicant’s mark LONELY LONELYSHOES suggests the idea of shoes that are unhappy because they are alone; while LONELY applied to lingerie suggests a person, the wearer, who is unhappy and alone.” *Id.* at *5. The TTAB resisted that characterization because the emotional state of being “lonely” personifies shoes, lingerie, or their wearers equally and so does not increase the likelihood consumers will distinguish between the marks: “Both marks

though, factfinders have found no likelihood of confusion in disputes in which both parties' visual or verbal marks employ personification in the same way.¹⁹⁵ Personification has even come up in the context of the now-defunct bar on registration of scandalous or immoral marks.¹⁹⁶ When one mark employs verbal or visual personification or anthropomorphism and the other does not, parties may argue that such a discrepancy weighs against a finding of similarity; courts and the Board sometimes agree¹⁹⁷ and sometimes disagree.¹⁹⁸

The poetic devices discussed in this Section—aphaeresis, apocope, elision, tmesis, punctuation, and personification—represent just some of the ways that producers create or select a visually striking mark. Whether that carefully (or

at issue are susceptible to both of the possible interpretations proposed by Applicant. That is, in both marks the term LONELY . . . could be perceived as saying something about the product or about the wearer of the product.” *Id.* at * 5.

195. *Kellogg Co. v. Green Turtle Bay Vitamin Co., Inc.*, No. 113,043, 2002 WL 976447, at *3 (T.T.A.B. May 10, 2002) (finding no likelihood of confusion between two differently-depicted personified sun logos); *Kansas City Royals Baseball Corp. v. Anschutz Manchester Hockey LLC*, No. 91163833, 2008 WL 5256409, at *16 (T.T.A.B. Dec. 9, 2008) (finding lion mascots “create different overall commercial impressions in that Sluggerrr, because of his ‘Royals’ jersey and baseball uniform, would be perceived to be a mascot for a baseball team named the ‘Royals,’ while Max, because of the ‘M’ on his jersey, would be perceived to be a mascot of a sports team for which the letter “M” has some significance.”).

196. *In re Bad Frog Brewery, Inc.*, Nos. 74/701,058, 75/018,931, 1999 WL 149819, at *1 (T.T.A.B. Mar. 16, 1999) (discussing at length whether a frog in a design mark would be perceived by consumers as “giving the finger” and, if so, whether that renders it scandalous).

197. *See, e.g., Instant Media, Inc. v. Microsoft Corp.*, No. C 07-02639, 2007 WL 2318948, at *9 (N.D. Cal. Aug. 13, 2007) (“While both marks make use of the letters I and M, Microsoft’s mark uses them in lower-case, is a particular shade of blue-green, and uses especially stylized font designed to make the ‘i’ appear anthropomorphic. Further, the apostrophe used by the Microsoft mark suggests a speech balloon,” setting the marks apart); *Steve’s Ice Cream v. Steve’s Famous Hot Dogs*, 3 U.S.P.Q.2d 1477, 1987 WL 124289, at *2 (T.T.A.B. 1987) (highly stylized design portion of applicant’s mark featuring “humanized frankfurters, prancing arm in arm to musical notes, creates a distinctive commercial impression” that helps distinguish it from opposer’s mark).

198. *See, e.g., In re Bruce M. Ackerman*, No. 86469261, 2016 WL 3566138, at *2 (T.T.A.B. June 1, 2016) (Applicant “asserts that the prominent design in his mark of an anthropomorphic figure depicting a ‘pizza cone’ refers to Applicant’s specific type of pizza parlor services; and that as a consequence, the word CONEHEADS ‘clearly and unequivocally conveys the impression of . . . a ‘pizza cone’ figure with a large head.’ . . . Applicant’s arguments are unpersuasive.”); *Fetching Designs LLC DBA Smart Cookie v. The Smartcookee Co. LLC*, No. 85849852, 2015 WL 7273028, at *10 (T.T.A.B. Oct. 26, 2015) (“The design of a stylized anthropomorphic dog wearing a bow tie and glasses reinforces the wording SMART COOKEE” and thus does not distinguish applicant’s design mark from opposer’s word mark; “both marks suggest treats for clever dogs.”); *In re Munky Bars USA, Inc.*, No. 78506899, 2007 WL 1697341, at *3–4 (T.T.A.B. Jun. 7, 2007) (affirming refusal to register design mark featuring “the words MUNKY BARS split by a caricature of an anthropomorphized banana on a stick” based on a likelihood of confusion with MONKEY BARS for similar novelty desserts).

not so carefully) cultivated “sight” impression translates to consumers in a way that makes the mark more likely to be distinctive and unitary and whether it impacts a similarity analysis seems to vary case-by-case and device-by-device but may provide useful fodder for owners and advocates.

B. SOUND

In trademarks, as in poetry, sound matters—how a word or phrase is pronounced, how it sounds to the ear, how it scans. The following devices particularly affect mark sounds and consumers’ perception of them. The first set—alliteration, assonance, and consonance—employs repetitions of letters or letter sounds. The second, anaphora and epizeuxis, repeat entire words for effect. And onomatopoeia and rhyme, each well-known and widely-used, stand alone.

1. *Repetition of Sounds: Alliteration, Assonance, & Consonance*

ALLITERATION [uh-LIT-er-ay-shun] refers to the use of the same letter sound at the start of successive words. Alliteration is ubiquitous in trademarks, slogans, and marketing language. It draws attention to the words themselves, sometimes using sound symbolism or onomatopoeia to add meaning to a phrase. Alliteration can render a phrase catchier, more memorable, and more pleasing to read and say. Many idiomatic expressions (“dull as dirt”; “baby boomer”)¹⁹⁹ rely on alliteration, as do trademarks like BURT’S BEES,²⁰⁰ TATER TOTS,²⁰¹ MEOW MIX,²⁰² and PAYPAL.²⁰³ “Alliteration” is often used as a catch-all by applicants, litigants, and factfinders who note some recurring sounds or letters²⁰⁴ when the more precise term might be “assonance,” “consonance,” or in some cases none of the above.

ASSONANCE and CONSONANCE [ASS-a-nince and CONS-a-nince] are similar to—and often confused with—alliteration, but they refer to the use of repeating vowel sounds and consonant sounds, respectively. While alliteration involves the repetition of letters or sounds at the beginning of each word in a phrase, assonance and consonance include repetition *within* words or phrases as well. Poets often use a mix of alliteration, assonance, and

199. Examples drawn from John McDaniel, *Reasons We Use Alliteration*, PEN & THE PAD, (July 29, 2022), <https://penandthepad.com/reasons-use-alliteration-22227.html>.

200. BURT’S BEES, Registration No. 2,171,302.

201. TATER TOTS, Registration No. 0,668,762.

202. MEOW MIX, Registration No. 1,995,276.

203. PAYPAL, Registration No. 2,959,971.

204. *See, e.g.*, *Safe-T Pac. Co. v. Nabisco, Inc.*, 204 U.S.P.Q. (BNA) 307, 316 (T.T.A.B. 1979) (Board characterizes mark KRAZY GLAZY as alliterative).

consonance to create a particular effect—in the opening stanzas of Donna Masini’s “Slowly,” the repeated “s’s” also employ onomatopoeia:

I watched a snake once, swallow a rabbit.
Fourth grade, the reptile zoo
the rabbit stiff, nose in, bits of litter stuck to its fur,

its head clenched in the wide
jaws of the snake, the snake
sucking it down its long throat.

All throat that snake—I couldn’t tell
where the throat ended, the body
began. I remember the glass

case, the way that snake
took its time

The devices also tend to overlap in trademarks. While the marks FAST FEATURE PLATFORM²⁰⁵ and TEN TON TITMOUSE employ alliteration, each demonstrates consonance as well—the “f” that begins “fast” and “feature” reappears in the middle of “platform,” and the “t” that starts each separate word in “ten ton titmouse” is doubled in “titmouse”—such that those letters dominate the marks even more than might be apparent at first glance. The two components of BREAK & BAKE alliterate, sharing their opening letter “b,” but the consonance of “k” at the end of each further contributes to the mark’s catchiness.²⁰⁶ And the owner of FROZEN ROSÉ for wine succeeded in registering its mark without disclaimer, asserting in an office action response that “[b]ecause of the repetitive phonetic sound ‘OZE’ (with a long ‘o’) in both FROZEN and ROSÉ, the expression has an ‘alliterative lilting cadence,’ as did the mark” LIGHT N’ LIVELY for reduce calorie mayonnaise in *Kraft*.²⁰⁷

The TTAB and courts have discussed the effect of alliteration in marks in many cases adjudicating unitariness, distinctiveness, and similarity. In response to an argument that alliteration rendered LEAN LINE for low calorie foods unitary, the Board noted “there is nothing in the record to suggest that the

205. *In re* Siemens Stromberg-Carlson, No. 75/048,293, 1999 WL 1062812, at *1 (T.T.A.B. Nov. 19, 1999).

206. *J & J Snack Foods Corp. v. Nestle USA, Inc.*, 149 F. Supp. 2d 136, 151 (D.N.J. 2001) (holding BREAK & BAKE descriptive, but not generic, for scored raw cookie dough).

207. U.S. Trademark Application Serial No. 77,071,957 (filed Dec. 27, 2006), Response to Office Action (Oct. 25, 2007); *In re* Kraft, Inc., 218 U.S.P.Q. (BNA) 571, 571 (T.T.A.B. 1983); see also *In re* Pecan Ridge Vineyards, LLC, 2009 WL 4073496 at *3 (T.T.A.B. May 13, 2009) (holding “the mark is not merely descriptive due to its double entendre”).

mere fact that both words which form the mark begin with the letter ‘L’ would cause purchasers to miss the merely descriptive significance of the term ‘LEAN’ or consider the entire mark to be a unitary expression.”²⁰⁸ Likewise, alliteration did not render WOODY WHEAT unitary for beer; the Board acknowledged that while “[i]n rare cases, alliterative marks . . . can encourage persons encountering the mark to perceive the mark as a whole . . . alliteration in and of itself does not render a mark unitary.”²⁰⁹ Those cases stand in contrast to the oft-cited “alliterative, lilting cadence” that rendered LIGHT ‘N LIVELY unitary and distinctive to the Board.

Alliteration is also frequently offered by applicants to support a finding that a mark is not merely descriptive or generic but is in fact inherently distinctive. While that argument may be helpful in persuading an examining attorney to publish the mark, applicants who appeal refusals to the TTAB rarely succeed based on alliteration alone. The Board has held merely descriptive or generic marks including WASHWAX for a product that washes and waxes a vehicle;²¹⁰ KAMO KIDS for camouflage-patterned diapers;²¹¹ TUESDAY TRADEMARK TIP for weekly tips from a trademark attorney;²¹² SOUP SINGLES for single-serving soups;²¹³ TINY TEDDY TEES for stuffed animal clothing;²¹⁴ and SOLID SELECT for wood products.²¹⁵ The applicant in the last case emphasized not only the mark’s alliteration but its

208. *In re Lean Line, Inc.*, 229 U.S.P.Q. (BNA) 781, 782 (T.T.A.B. 1986).

209. *In re Austin Bros.’ Beer Co., LLC*, No. 86545695, 2016 WL 7646391, at *3 (T.T.A.B. Dec. 13, 2016) (non-precedential) (quotations omitted).

210. *Turtle Wax, Inc. v. Blue Coral, Inc.*, 2 U.S.P.Q.2d 1534,1536 (T.T.A.B.1987).

211. *In re Keith Stonebraker*, No. 77613568, 2011 WL 4090440, at *3 (T.T.A.B. Sept. 2, 2011) (“we find that the alliteration is not sufficient to create a distinct commercial impression separate from the descriptive meanings.”).

212. *In re Erik M. Pelton & Assocs., Plc*, No. 85817818, 2015 WL 2412168, at *4 (T.T.A.B. Apr. 29, 2015).

213. *In re Somerset Soup Works, Inc.*, No. 85034559, 2014 WL 1827012, at *4 (T.T.A.B. Apr. 22, 2014) (affirming refusal to register the mark based on descriptiveness and failure to disclaim soup).

214. *In re Shirts Illustrated, LLC*, No. 75/708,751, 2003 WL 21371594, at *2 (T.T.A.B. Jun. 10, 2003) (“The words TINY TEDDY TEES do not lose their descriptive significance because of the alliteration of the ‘T’s’ and the assonance of the ‘EE’s’”).

215. *In re Tenon Ltd.*, No. 86218698, 2015 WL 8966269, at *4 (T.T.A.B. Nov. 23, 2015); *see also, e.g., In re Lumera Corp.*, No. 78564687, 2007 WL 3336392, at *5 (T.T.A.B. Oct. 11, 2007) (PROTEOMICPROCESSOR, composed of the descriptive terms “proteomic” and “processor,” for surface plasmon resonance instruments); *In re Siemens Stromberg-Carlson*, No. 75/048,293, 1999 WL 1062812, at *2 (T.T.A.B. Nov. 19, 1999) (FAST FEATURE PLATFORM for telecommunications software and hardware); *In re Kikkoman Sales USA, Inc.*, 2013 WL 3090447, at *3 (T.T.A.B. Apr. 29, 2013) (SOYSALT for seasonings).

incongruity, “rhythmic . . . quality,” and the “matched, balance closed syllable structures” of the two words, to no avail.²¹⁶

Federal courts, likewise, have held merely descriptive the alliterative BEEF & BREW for restaurant services;²¹⁷ BREAK & BAKE for scored raw cookie dough;²¹⁸ and KUF ‘N KOLAR for stain spray.²¹⁹ The Federal Circuit enthusiastically reversed the TTAB in one case, deeming SNAP SIMPLY SAFER merely descriptive for medical syringes and ordering cancellation of the registration. It handily dismissed the argument that the mark’s alliteration served as evidence it was more than descriptive. Instead, the court maintained “[t]he record . . . contains no evidence indicating that a consumer would focus on the alliteration formed by SNAP, SIMPLY, and SAFER, or that such alliteration would require a consumer to take the inferential step that the Board described.”²²⁰ Of course, those cases represent the exception more than the rule—where many applicants successfully register alliterative marks as inherently distinctive or unitary without much fanfare, only those whose applications were unsuccessful challenge the refusal to the TTAB.

Alliteration has factored into likelihood of confusion analyses as well. One district court comparing CASUAL CORNER and CORNER CASUALS for retail store services opined that “the phonetic similarity, the cadence and the alliteration leads me to conclude that the likelihood of consumer confusion is virtually inevitable.”²²¹ The TTAB, comparing challenger’s mark TITMOUSE with respondent’s mark TEN TON TITMOUSE for different goods in a cancellation proceeding, pointed to the latter’s alliteration as helping distinguish the marks from one another: “The presence of TEN TON in

216. *In re Tenon Ltd.*, 2015 WL 8966269, at *4.

217. *Beef & brew, inc. v. Beef & Brew, Inc.*, 389 F. Supp. 179, 184 (D. Or. 1974) (“A name that tells the diner what his dinner will be is descriptive.”).

218. *See J & J Snack Foods Corp. v. Nestle USA, Inc.*, 149 F. Supp. 2d 136, 151 (D.N.J. 2001) (finding the mark descriptive because “it inform[ed] the consumer about the functional characteristics of the refrigerated cookie dough, without requiring any significant mental gymnastics.”).

219. *Norsan Prod., Inc. v. R. F. Schuele Corp.*, 286 F. Supp. 12, 14 (E.D. Wis. 1968) (finding the mark descriptive with secondary meaning and enjoining defendant’s use of CUFF & COLLAR CLEANER for a similar product).

220. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1255 (Fed. Cir. 2012).

221. *Casual Corner Assocs. v. Weinel*, 309 F. Supp. 705, 707 (S.D. Fla. 1970) (ultimately ruling in favor of the defendant despite the strong language finding the marks confusingly similar).

Respondent's mark creates a three-word alliteration and incongruence not present in Petitioner's one-word mark."²²²

Trademark owners sometimes struggle to articulate the patterns they identify in trademarks, mixing up the names of devices or dismissing an argument because it labels a device incorrectly. For example, when the owner of PLATFORM EQUINIX for co-location services asserted the mark was unitary due to its "alliterative lilting cadence . . ." The Board made short work of that argument, noting "[t]his term is clearly not 'alliterative' and we find nothing 'lilting' about it."²²³ Likewise, when Kohr sought to register KOHR BROS. ORIGINAL ORANGEADE SUPREME and KOHR BROS ORIGINAL ORANGE CRÈME for "frozen custard shakes," the USPTO required disclaimers of all terms besides "Kohr," and the TTAB affirmed.²²⁴ The Board was not swayed by Kohr's argument that both marks incorporated "alliteration and rhythmic sounds." Kohr was likely, albeit clumsily, attempting to draw the Board's attention to the repeated Rs in every word of both marks as well as the assonance of O-sounds in nearly every word. And of course, the two work in tandem, such that most of the words in each mark repeat the sound "or"—*Kohr*, *original*, *orangeade* or *orange*—creating internal rhyme. But the Board did not acknowledge those patterns, perhaps because of the awkward way Kohr characterized them. The same misarticulation occurred when an applicant sought to convince the Board that WETTECHNOLOGIES as a trademark for machines and machine tools constituted a unitary, suggestive mark, citing its "rhyming pattern" and "use of alliteration."²²⁵ The Board acknowledged the repeated "t" but dismissed the applicant's mischaracterization of the mark's devices.²²⁶

Of course, courts and the TTAB—and not just the trademark owners who come before them—also have a history of using "alliteration" broadly to include internal consonance or assonance. A district court found a likelihood of confusion between PORTASHADE and PLAY-N-SHADE, both for

222. *Titmouse, Inc. v. Andrew Dickerson*, No. 92066512, 2019 WL 2188739, at *7–8 (T.T.A.B. May 16, 2019) (ultimately concluding that the similarity of the marks factor weighed toward a likelihood of confusion but declining to cancel TEN TON TITMOUSE).

223. *In re Equinix, Inc.*, No. 85123800, 2012 WL 2588571, at *3 (T.T.A.B. June 5, 2012).

224. *In re Kohr Bros., Inc.*, No. 78954996, 2008 WL 4877064, at *1 (T.T.A.B. Nov. 4, 2008).

225. *In re Wet Techs., Inc.*, No. 77135323, 2012 WL 3224708, at *12 (T.T.A.B. July 20, 2012). The mark also incorporated a design element.

226. *Id.* at *13 ("While we must take account of differing pronunciations of trademarks, we do not see any possible way to vocalize WETTECHNOLOGIES so that it rhymes or alliterates; the words neither end in the same sound (rhyme), nor do they begin with the same sound (alliterate) In short, there is nothing about the appearance or sound of WETTECHNOLOGIES that changes its descriptive meaning.").

portable shade structures,²²⁷ noting PORTASHADE “has a similar alliterative sound as” PLAY-N-SHADE, “exacerbat[ing] . . . the potential for confusion” between the two.²²⁸ Of course, neither mark alliterates. And in holding SPORTSWEAR FOR EVERYWEAR inherently distinctive for suits and dresses, the TTAB notes the mark’s “alliteration,” presumably referring to the repeated “w” in the middle of each word (consonance) if not “wear” in its entirety, and perhaps also the echoed vowel sounds that link *sportswear* with *for* to parallel the wear/wear match (assonance).²²⁹ The Board also characterized KRAZY GLAZY, which uses rhyme and assonance, as alliterative,²³⁰ which it is not.

2. *Repetition of Words: Anaphora, Epistrophe, & Epizeuxis*

The repetition of a word or phrase at the beginning of successive clauses or sentences is called **ANAPHORA** [uh-NAH-for-a]. See, for example, the opening lines of Allen Ginsberg’s “America”:

America I’ve given you all and now I’m nothing.
 America two dollars and twentyseven cents January 17, 1956.
 I can’t stand my own mind.
 America when will we end the human war?
 Go fuck yourself with your atom bomb.
 I don’t feel good don’t bother me.
 I won’t write my poem till I’m in my right mind.
 America when will you be angelic?
 When will you take off your clothes?
 When will you look at yourself through the grave?
 When will you be worthy of your million Trotskyites?
 America why are your libraries full of tears?
 America when will you send your eggs to India?
 I’m sick of your insane demands.
 When can I go into the supermarket and buy what I need with my
 good looks?
 America after all it is you and I who are perfect not the next
 world.²³¹

227. *Gale Grp. Inc. v. King City Indus. Co.*, 23 U.S.P.Q.2D 1208, 1992 WL 163595, at *4 (M.D. Fla. 1992).

228. Perhaps the court meant to highlight the fact that the two marks both begin with the letter P, which makes them at least a little similar. It seems equally plausible that the court’s use of the phrase “alliterative sound” here is a stand-in for other similarities in sound and meaning.

229. *In re David Crystal, Inc.*, 145 U.S.P.Q. (BNA) 95, 95 (T.T.A.B. 1965).

230. *Safe-T Pac. Co. v. Nabisco, Inc.*, 204 U.S.P.Q. (BNA) 307, 316 (T.T.A.B. 1979).

231. ALLEN GINSBERG, *America*, in *COLLECTED POEMS, 1947-1980*, at 146, 146 (1984).

Anaphora is particularly common in slogans, such as SOMETIMES YOU FEEL LIKE A NUT . . . SOMETIMES YOU DON'T . . . for sister candy bars Mounds and Almond Joy;²³² MAYBE SHE'S BORN WITH IT. MAYBE IT'S MAYBELLINE. for makeup;²³³ and DOUBLE YOUR PLEASURE, DOUBLE YOUR FUN for Doublemint gum.²³⁴ Some marks even triple up, like CAKE FOR ME, CAKE FOR YOU, CAKE FOR TWO! for cakes;²³⁵ BETTER CARE BETTER HEALTH BETTER LIFE for diabetes app Glucolyf;²³⁶ or ALL MORNING OR ALL NIGHT. ALL YEAR LONG. for utility services.²³⁷ The vast majority of marks that employ anaphora seem to be treated as both inherently distinctive and unitary, i.e., they are registered without either disclaimer of descriptive terms or any office action alleging mere descriptiveness.²³⁸

While anaphora is rarely named in litigation, it did come up in an opposition proceeding between luxury watchmaker Rolex and Swatch subsidiary Montres Jaquet Droz SA. Rolex opposed the application to register SOME WATCHES TELL TIME . . . SOME TELL A STORY based on a likelihood of confusion with its alleged common law trademark, IT DOESN'T JUST TELL TIME. IT TELLS HISTORY, both for watches. In its brief, Rolex emphasized the similar structure and meaning of the two marks, arguing:

[t]here is little doubt that [the marks] are substantially similar in appearance, sound, connotation and commercial impression

232. SOMETIMES YOU FEEL LIKE A NUT. . .SOMETIMES YOU DON'T. . . , Registration No. 1,611,447.

233. MAYBE SHE'S BORN WITH IT. MAYBE IT'S MAYBELLINE, Registration No. 1,936,468.

234. DOUBLE YOUR PLEASURE, DOUBLE YOUR FUN, Registration No. 4,795,220; *see also, e.g.*, BRING OUT THE HELLMANN'S. . .BRING OUT THE BEST!, Registration No. 1,462,104 (canceled) (for mayonnaise); HAVE A BREAK, HAVE A KIT KAT, Registration No. 5,433,714 (for chocolate bars); KIDS GET SICK. MOMS GET TRIAMINIC, Registration No. 2,958,355 (canceled) (for cough syrup).

235. CAKE FOR ME, CAKE FOR YOU, CAKE FOR TWO!, Registration No. 3,796,944 (canceled).

236. BETTER CARE BETTER HEALTH BETTER LIFE, Registration No. 6,211,640; *see also*, GLUCOLYF BETTER CARE BETTER HEALTH BETTER LIFE, Registration No. 6,211,641 and BETTER CARE. BETTER LIFE. BETTER CHOICE., Registration No. 3,824,967 for the same mark by the same registrant for different goods and services.

237. ALL MORNING OR ALL NIGHT. ALL YEAR LONG., Registration No. 4,501,427 (canceled); *see also, e.g.*, NO NEEDLES.NO WAITING.NO KIDDING, Registration No. 3,205,122 (for cosmetics); REAL PEOPLE, REAL BROKERS, REAL ESTATE, Registration No. 6,421,651 (for real estate management services).

238. I draw that conclusion based on review of the filewrappers available at TESS, the USPTO's electronic search site. Occasionally some file components are omitted, especially for older registrations.

Both marks consist of two phrases with emphasis on identical or virtually identical words appearing in the same place. ‘TELL TIME’ appears at the end of both marks’ first sentence and a similar phrase appears at the end of the second sentence TELLS HISTORY/TELL A STORY. Both marks use a two sentence structure with a similar cadence and are an anaphora . . . thereby making a phrase easier to remember through repetition, which in this case is the repetition of the word TELL.²³⁹

Rolex goes on to define “anaphora” in its brief²⁴⁰ and append a Wikipedia definition, driving home the importance of the rhetorical device to the company’s argument.²⁴¹ The Board, unfortunately, did not address either the mark’s distinctiveness or the likelihood of confusion between the two, finding instead that Rolex neither properly pled nor adequately proved priority.²⁴²

While Anaphora repeats a word at the beginning of each clause, **EPISTROPHE** [eh-PIS-truh-fee] repeats a word at the end of successive clauses or sentences. Consider, for example, the slogan “You’re not fully clean unless you’re Zestfully clean” for ZEST soap²⁴³ or the Skittles campaign that takes its registered slogan, TASTE THE RAINBOW,²⁴⁴ and adds other verbs: “Harvest the Rainbow, Taste the Rainbow”; “Mob the Rainbow. Taste the Rainbow.”; “Believe the Rainbow, Taste the Rainbow.”²⁴⁵ Epistrophe is visible in registered marks like IT’S A LIFESTYLE, IT’S A LOVESTYLE for dog training services²⁴⁶ and STEEP IT. SPIKE IT. RUN WITH IT.²⁴⁷ for beverages, both registered as inherently distinctive without disclaimers.

A cousin to anaphora and epistrophe, **EPIZEUXIS** [eh-pih-ZOOX-is] describes emphatic repetition of a word. In poetry the repeated words may be separated by other words, like the suffering pig in Philip Levine’s “Animals are Passing From Our Lives”:

239. Brief on Merits for Plaintiff at 25, *Rolex Watch U.S.A., Inc. v. Montres Jaquet Droz SA*, No. 91242189, 2020 WL 3272954 (T.T.A.B. June 17, 2020).

240. *Id.*

241. Opposer’s Fourth Notice of Reliance at Exhibit D, *Rolex Watch U.S.A., Inc. v. Montres Jaquet Droz SA*, No. 91242189 (T.T.A.B. Mar. 17, 2020).

242. *Rolex Watch U.S.A., Inc.*, No. 91242189, 2020 WL 7861237, at *11 (T.T.A.B. Dec. 7, 2020).

243. *Top of Form Bottom of Form Top of Form Bottom of Form Favorite Commercials From Television and Radio in the Eighties, Products Beginning with Z*, IN THE 80S, <http://www.inthe80s.com/tvcommercials/z.shtml> [<https://perma.cc/93JK-S5PC>] (last visited July 26, 2021).

244. TASTE THE RAINBOW, Registration No. 5,073,429.

245. Ivy Decker, *Taste the Rainbow with Skittles: Marketing Campaign Review*, ATA (Apr. 9, 2020), <https://blog.anthonythomas.com/ata-blog/taste-the-rainbow-with-skittles-marketing-campaign-review> [<https://perma.cc/9MQG-4CK5>].

246. IT’S A LIFESTYLE, IT’S A LOVESTYLE, Registration No. 5,758,364.

247. STEEP IT. SPIKE IT. RUN WITH IT., Registration No. 6,176,768.

“In my dreams
 the snouts drool on the marble,
 suffering children, suffering flies,

 suffering the consumers
 who won’t meet their steady eyes
 for fear they could see.”²⁴⁸

Or they may be repeated in a string, as in the closing line of Sylvia Plath’s “Daddy”: “Daddy, daddy, you bastard, I’m through.”²⁴⁹

Trademarks that employ epizeuxis are easy to come by: think of marks like PIZZA!PIZZA! for restaurant services, PETPET for devices for scratching pets,²⁵⁰ CANDY’S CANDIES for candy; DUM DUMS and CHUPA CHUPS for lollipops; and ROCK & ROCK for tile.²⁵¹ In fact, the owner of the first and likely most famous of these marks, Little Caesar’s, owns registrations for that and more than fifteen other marks that employ epizeuxis,²⁵² from MEATSA!MEATSA!²⁵³ to PICNIC!PICNIC!²⁵⁴ The repeated words need not sit back-to-back: trademark phrases like SHOWER TO SHOWER and HOUR AFTER HOUR²⁵⁵ also qualify.

Experts argue that devices like epizeuxis increase engagement with a slogan²⁵⁶ or mark. Factfinders vary when they consider the effect of epizeuxis

248. PHILIP LEVINE, *Animals Are Passing from our Lives*, in NOT THIS PIG: POEMS, 79, 79 (1968).

249. SYLVIA PLATH, *Daddy*, in COLLECTED POEMS, 222, 224 (1981).

250. Note that the term “pet” plays two roles here—it can be read as a verb follow by a noun, as in “pet [your] pet.”

251. See CAFFE CAFFE, Registration No. 2,252,077 (canceled) for ready-to-drink coffee; BOOKBOOK, Registration No. 3,846,580 for laptop carrying cases; JOYJOY, Registration No. 4,736,397 (canceled) for watches.

252. *E.g.*, BABY PAN!PAN!, Registration No. 1,594,459; CRAZY!CRAZY! COMBO, Registration No. 2,941,513; EXTRA!EXTRA!, Registration No. 3,678,190; PARTY!PARTY! PACK, Registration No. 1,594,701; PARTY!PARTY!, Registration No. 2,026,218; PEPPERONI!PEPPERONI!, Registration No.; SLICE!SLICE!, Registration No. 4,344,357 (Supplemental Register); THANK YOU! THANK YOU!, Registration No. 2,348,053; VALUE!VALUE!, Registration No. 2,502,119; VEGGIE!VEGGIE!, Registration No. 1,828,443; PEPPERONI!PEPPERONI!, Registration No. 1,813,907.

253. MEATSA!MEATSA!, Registration No. 1,801,643.

254. PICNIC!PICNIC!, Registration No. 1,757,061. Little Caesar’s asserted that its epizeuxis marks constituted a family of marks, but the TTAB did not agree. *In re Lc Trademarks, Inc.*, 121 U.S.P.Q.2d 1197, 1204–05 (T.T.A.B. 2016).

255. *Johnson & Johnson v. Colgate-Palmolive Co.*, 345 F. Supp. 1216, 1222 (D.N.J. 1972) (finding no likelihood of confusion between SHOWER TO SHOWER for aerosol deodorant and HOUR AFTER HOUR for talcum powder).

256. Edward F. McQuarrie & David Glen Mick, *Visual Rhetoric in Advertising: Text-Interpretive, Experimental, and Reader-Response Analyses*, 26 J. CONSUMER RSCH. 38–39 (1999).

on a mark's distinctiveness. The TTAB reversed a refusal to register the mark SPORTSWEAR FOR EVERYWEAR for dresses and suits, finding the mark inherently distinctive and noting the double meaning created by the misspelling of "everywhere" to match the "wear" in "sportswear."²⁵⁷ And the USPTO granted registrations for DUM DUMS for suckers,²⁵⁸ PETPET for pet scratchers,²⁵⁹ SHOWER TO SHOWER for talcum powder,²⁶⁰ and ROCK & ROCK for tile,²⁶¹ apparently treating all as inherently distinctive and unitary.²⁶² On the other hand, Little Caesar's was required to disclaim "pizza" when it registered PIZZA!PIZZA! for pizza²⁶³ and the owner of stylized CANDY'S CANDIES, "candies."²⁶⁴ The TTAB affirmed refusals to register CAESAR! CAESAR!²⁶⁵ for salad dressing and DJDJ for disc jockey services as merely descriptive, noting in the latter case that the repetition did nothing to elevate the term from descriptive to distinctive:

We do not believe that DJDJ is rendered any less descriptive by repeating the letters At best, on seeing DJDJ, it would occur to a viewer that the letters are repeated for emphasis. There is nothing in the composite which changes the meaning of the letters in any manner which would give them a different meaning. If one were to express the view that milk was "creamy creamy" or that a red bicycle was "red red" or that a razor was "sharp sharp," the repetition of the words "creamy," "red" and "sharp" would be understood as emphasis and the combinations of these words would not, simply because of their repetition, be rendered something more than descriptive. Nothing new or different is imparted by the simple repetition of the descriptive expression DJ. Thus, the composite expression is, in our view, equally descriptive as used in connection with the identified services.²⁶⁶

257. *In re* David Crystal, Inc., 145 U.S.P.Q. (BNA) 95, 95 (T.T.A.B. 1965).

258. DUM DUMS, Registration No. 4,131,184.

259. PETPET, Registration No. 5,657,506.

260. SHOWER TO SHOWER, Registration No. 0,956,222.

261. ROCK & ROCK, Registration No. 3,251,553.

262. DUM DUMS was registered in 1973, so its filewrapper is not fully digitized. When the same owner registered DUM DUM POPS for candy suckers, it disclaimed "pops." Registration No. 1,184,039.

263. PIZZA!PIZZA!, Registration No. 1,399,730. The USPTO shows no record of descriptiveness refusal, but the PIZZA!PIZZA! registration cites a prior registration for PIZZA PIZZA, which Little Caesar's acquired from a different owner in 1982.

264. CANDY'S CANDIES, Registration No. 5,269,931.

265. *In re* Litehouse Inc., 82 U.S.P.Q.2d 1471, 1474 (T.T.A.B. 2007) (CAESAR! CAESAR! for salad dressing merely descriptive and not unitary).

266. *In re* Disc Jockeys Inc., 23 U.S.P.Q.2d 1715, 1717 (T.T.A.B. 1992); *see also In re* LC Trademarks, Inc., 121 U.S.P.Q.2d 1197, 1197 (T.T.A.B. 2016) (affirming refusal of DEEP!DEEP! DISH PIZZA for pizza); *In re* Tires, Tires, Tires, 94 U.S.P.Q.2d 1153, 1157

In the likelihood of confusion context, epizeuxis may not be enough to render two otherwise similar marks dissimilar. In one case, the Board affirmed the refusal to register TOP-TOP'S for corn chips based on a likelihood of confusion with TOPS for potato chips and crackers. While the owner of TOP-TOPS highlighted the mark's "fanciful . . . alliteration," the Board found the marks "quite similar with each being comprised *only* of variations on the term 'tops.'"²⁶⁷

The Second Circuit, reversing a lower court's finding of fair use, differed from the Board in considering the effect of repetition on distinctiveness:

While "Swing" is descriptive, "Swing Swing Swing" is not necessarily so. The explanation that the word describing the action must be repeated three times to describe the three actors shown hitting golf shots is tenuous when the ordinary term for their action involves the single word "swing," "hit," "stroke," or "shot." Spalding hopes individual consumers will "swing" its irons, presumably after having "bought" them, not "swing swing swing" its irons. The argument that the phrase as a whole describes the genre of music in the soundtrack is patently incorrect, as it is "swing" music, not "swing swing swing" music.²⁶⁸

While the posture is admittedly very different in the Second Circuit case, the quoted text suggests different readers might find repetition to play a greater or smaller role in altering meaning depending on the case.

3. *Onomatopoeia*

A more direct way that trademarks play with sound is by using **ONOMATOPOEIA** [ON-uh-mat-uh-PEE-a]: mimicking the sound of an object or action to evoke it. Edgar Allen Poe combines onomatopoeia with devices from the previous section, including alliteration, assonance, epizeuxis, and anaphora, in the first part of "The Bells":

Hear the sledges with the bells—
Silver bells!
What a world of merriment their melody foretells!
How they tinkle, tinkle, tinkle,

(T.T.A.B. 2009) (TIRES TIRES TIRES generic for retail tire store services); *In re* Jonathan Drew Inc., 97 U.S.P.Q.2d 1640, 1644 (T.T.A.B. 2011) (repetition in KUBA KUBA does not alter its geographic descriptiveness).

267. *In re* Totis of Texas, LLC, No. 85067330, 2012 WL 3875738, at *2–3 (T.T.A.B. Aug. 17, 2012).

268. *EMI Catalogue P'ship v. Hill, Holliday, Connors, Cosmopulos Inc.*, 228 F.3d 56, 65 (2d Cir. 2000) (reversing summary judgment for defendant its use of "swing, swing, swing" in an advertisement for golf clubs constituted a fair use of plaintiff's mark SING SING SING).

In the icy air of night!
 While the stars that oversprinkle
 All the heavens seem to twinkle
 With a crystalline delight;
 Keeping time, time, time,
 In a sort of Runic rhyme,
 To the tintinnabulation that so musically wells
 From the bells, bells, bells, bells,
 Bells, bells, bells—
 From the jingling and the tinkling of the bells.

Onomatopoeia is a common inspiration for trademarks, whether the sound describes something associated with the product directly—like ACHOOZ for nasal wipes;²⁶⁹ ZOOM-ZOOM for cars;²⁷⁰ BAA-BAA-Q’S for dog treats made of lamb;²⁷¹ or SLURPEE for frozen beverages²⁷²—or its intended consumer, like PURR-FECT²⁷³ for cat litter or MEOW MIX for cat food.²⁷⁴ The onomatopoeia might also be further removed, as in BZZAGENT for a marketing service designed to generate “buzz”²⁷⁵ or AHHHH. for winter outerwear meant to offer wearers relief from cold weather.²⁷⁶ It also features prominently in some memorable advertising slogans, like SNAP! CRACKLE! POP!²⁷⁷ for rice cereal that makes those sounds when submerged in milk, or PLOP PLOP FIZZ FIZZ for Alka Seltzer, which makes those noises when dropped into a glass of water.²⁷⁸ While all of those marks were ultimately registered as inherently distinctive and without disclaimers, PURR-FECT BLEND for cat food²⁷⁹ disclaims “blend” and was initially issued an office

269. ACHOOZ, Registration No. 3,848,597.

270. ZOOM-ZOOM, Registration No. 2,749,519.

271. BAA-BAA-Q’S, Registration No. 1,861,440 (canceled).

272. SLURPEE, Registration No. 0,829,177.

273. PURR-FECT, Registration No. 1,028,846.

274. MEOW MIX, Registration No. 1,995,276.

275. *See* Bzzagent, Inc. v. Bzzagen.com C/o Nameview Inc. Whois Identity Shield/vertical Axis, No. D2010-1188, 2010 WL 4264657, at *4 (URDP-Arb. Sept. 10, 2010) (“The Panel observes that the Complainant’s trademark BZZAGENT comprises the onomatopoeia ‘bzz’ and the descriptive word ‘agent.’”).

276. U.S. Trademark Application Serial No. 90,511,233 (filed Feb. 4, 2021).

277. SNAP! CRACKLE! POP!, Registration No. 3,222,184; *see also* SNAP CRACKLE POP, Registration Nos. 0,563,358, 1,143,592, 1,659,058, 2,338,123, 4,342,876; SNAP, CRACKLE, POP, Registration No. 1,038,909.

278. Alka Seltzer tablets are meant to be dropped into water (plop, plop) and then bubble (fizz, fizz) before the consumer swallows the whole combination.

279. PURR-FECT BLEND, Registration No. 2,963,941 (canceled), *cited in In re* Midwestern Pet Foods, Inc., No. 78876346, 2009 WL 273246, at *2 (T.T.A.B. Jan. 30, 2009) among examples of mark that “do suggest a dog’s growl or a cat’s purr by either repeating the

action for mere descriptiveness. The owner overcame the refusal after arguing, among other things, that the “purr” in “PURR-FECT” created a double entendre and thus made the mark more than merely descriptive.²⁸⁰

Despite the plethora of onomatopoeic marks, few cases and TTAB decisions actually reference the device itself.²⁸¹ When they do, onomatopoeia is sometimes credited with elevating the mark’s status, even though describing the sound the products, ingredients, or users make might seem like textbook descriptiveness.²⁸² Factfinders have deemed GOBBLE-GOBBLE suggestive for turkey meat products²⁸³ and STEAK-UMM suggestive for frozen steak

‘R’ several times or combining ‘purr’ with other elements” (the other examples cited were GRRRAVY, Registration No. 1,486,380 and PURRLICIOUS, Registration No. 2,800,874).

280. Registration No. 2,963,941 Office Action response (Nov. 1, 2004) at 6–7. Applicant also cites other PURR-formative marks including CATS’ PURRREFERRED; PURRSUASIONS; PURR ‘N SIMPLE; PURR-FECTLY REMARKABLE; and GEE-PURRS!. *Id.* at 2–3.

281. *But see* Jules Montener, Inc. v. Rissan Co., 110 U.S.P.Q. (BNA) 60, 61 (Com’r Pat. & Trademarks 1956) (finding no likelihood of confusion between POOF! for anti-perspirant and deodorant products and TOOF for an athlete’s foot treatment; acknowledging the onomatopoeia of POOF! for the function of the plastic squeeze bottle); *In re* Midwestern Pet Foods, Inc., No. 78876346, 2009 WL 273246, at *2 (T.T.A.B. 2009) (affirming refusal to register CHED ‘R’ WEDGES as merely descriptive for pet food and pet treats and dismissing applicant’s argument that the ‘R’ in the mark constituted onomatopoeia, in the form of “growling sound elements’ that may call to mind a growling dog.”).

282. The onomatopoeia discussed in this Section is the literal kind, so it should rightfully be treated as descriptive or suggestive when it conjures a widely-recognized sound effect, like “vroom” or “shhh” or “cockadoodledo” (of course, such widely-recognized onomatopoeia could theoretically also be used as arbitrary marks—VROOM for ice cream or COCKADOODLEDOO for pencils). Marketing and trademark scholars have also explored the broader related topic of sound symbolism, “the direct linkage between sound and meaning.” Jake Linford, *Are Trademarks Ever Fanciful?*, 105 GEO. L.J. 731, 734 (2017) (quoting Leanne Hinton, Johanna Nichols & John J. Ohala, *Introduction: Sound-Symbolic Processes*, in *SOUND SYMBOLISM* 1, 1 (Leanne Hinton, Johanna Nichols & John J. Ohala, eds., 1994)). According to Linford, numerous empirical studies across fields have determined that “vowel and consonant sounds convey concepts like big/small, fast/slow, thin/thick, light/heavy, cold/warm, bitter/sweet, more/less friendly, or feminine/masculine, even when the word itself is nonsense. For example, when asked to distinguish two imaginary pieces of furniture, approximately 80% of respondents say the one named Mal is larger than the one named Mil.” Linford, *supra*, at 734. In other words, even those letters and syllables that don’t constitute onomatopoeia because they don’t sound like anything we know still bear consistent connotations for readers, which often factors into producers’ choice of trademarks and slogans. “Unlike courts and legal scholars, marketers have been aware of the benefits of sound symbolism for some time now, and they seek competitive advantage by utilizing the communicative and attractive function of sound symbols when coining a fanciful trademark.” *Id.* at 750.

283. *Louis Rich, Inc. v. Horace W. Longacre, Inc.*, 423 F. Supp. 1327 (E.D. Pa. 1976).

products.²⁸⁴ The court said GOBBLE-GOBBLE “describes the sound made by a turkey, but it does not describe turkey meat products . . . The term could suggest any of a variety of products having some connection with a turkey, for example, a turkey itself, or a stuffed or rubber toy in the shape of a turkey, or a device used to imitate the sound of a turkey, or some product made from turkey meat.”²⁸⁵ Likewise, STEAK-UMM is suggestive because “The word ‘Steak’ suggests a food product and the word ‘Umm’ sounds like ‘mmm,’ a suggestion that the product tastes good. The consumer . . . must draw his own conclusions about the identity of the product.”²⁸⁶ And while a court characterized BOCBOC as likely descriptive for fried chicken,²⁸⁷ it noted that a reasonable juror could find BOCBOC either descriptive or suggestive.²⁸⁸

4. *Rhyme*

RHYME [rime]: when two words match each other in terminal sound, typically including both vowels and consonants. See, for example, Langston Hughes’ “Harlem” in its entirety:

What happens to a dream deferred?
 Does it dry up
 like a raisin in the sun?
 Or fester like a sore—
 And then run?
 Does it stink like rotten meat?
 Or crust and sugar over—
 like a syrupy sweet?

Maybe it just sags
 like a heavy load.

284. *Steak Umm Co., LLC v. Steak ‘Em Up, Inc.*, 868 F. Supp. 2d 415, 422–23 (E.D. Pa. 2012).

285. *Louis Rich, Inc.*, 423 F. Supp. at 1337.

286. *Steak Umm Co., LLC*, 868 F. Supp. 2d at 422–23.

287. *BBC Grp. NV LLC v. Island Life Rest. Grp. LLC*, 413 F. Supp. 3d 1032, 1043 (W.D. Wash. 2019) (“BOCBOC” is onomatopoeia for the sound a chicken makes and is therefore descriptive of the product sold—i.e., fried chicken.”), *reconsideration denied*, 2019 WL 4917060 (W.D. Wash. Oct. 4, 2019), and *reconsideration denied*, 2019 WL 4991533 (W.D. Wash. Oct. 8, 2019).

288. *BBC Grp.*, 413 F. Supp. 3d at 1047. Based on the Island Life’s senior rights in BOK A BOK, the court in that set of cases enjoined BBC’s use of BOK BOK “and any variation or derivative of that spelling,” but declined to enjoin BBC from “any name that includes the sound a chicken makes, including ‘BOC BOC’ and ‘BOQ BOQ,’” as requested. *BBC GROUP NV LLC v. Island Life Rest. Grp. LLC*, No. C18-1011, 2019 WL 6683510, at *4 (W.D. Wash. Dec. 6, 2019). BBC’s CFO had previously inquired whether Island Life “would allow them to use ‘Boq Boq Chicken’ or ‘Boc Boc Chicken.’” *BBC Grp. NV LLC v. Island Life Rest. Grp. LLC*, 413 F. Supp. 3d 1032, 1039. (W.D. Wash. 2019).

*Or does it explode?*²⁸⁹

Examples of rhyming marks abound, from products like MELLO YELLO²⁹⁰ soda and SHAKE 'N BAKE²⁹¹ breading to slogans like L'EGGO MY EGGO²⁹² for waffles and IT TAKES A LICKING AND KEEPS ON TICKING²⁹³ for watches (all registered as unitary and inherently distinctive). When a trademark possesses internal rhyme—when the mark is or includes a rhyming phrase—that rhyme can shape distinctiveness and unitariness assessments; it can also factor into the analysis of similarity between one mark and another. Two marks in an infringement dispute might rhyme with each other rather than (or in addition to) rhyming internally, leading factfinders in some cases to find the two marks more similar and thus less likely able to coexist without sowing confusion.

Applicants whose marks are refused registration as merely descriptive often emphasize the rhyming nature of the marks but are not always able to persuade the TTAB that the rhyme elevates the mark from descriptive to distinctive. The Board affirmed descriptiveness refusals for BREAK & BAKE for premade cookie dough²⁹⁴ and BREADSPRED for jellies and jams.²⁹⁵ The BREAK & BAKE applicant emphasized the mark's consonance and rhyme, but the Board was unpersuaded, noting “[t]hat these two common words contain the ‘B’ and ‘K’ sounds and rhyme is of diminished significance when these same words happen to be the best descriptors of the product itself.”²⁹⁶ The Board also affirmed refusal of an ITU application to register CALIFORNIA GREEN CLEAN for cleaning services, holding that the rhyme did not counteract the fact that “green” and “clean” describe the services and “California” describes their geographic origin.²⁹⁷ On the other hand, it reversed a refusal to register THE UNDERWEAR AFFAIR for charitable fundraising based on mere descriptiveness, pointing out that the rhyming of “underwear” and “affair” “highlight[ed] the fanciful nature of the

289. Langston Hughes, *Harlem*, in THE COLLECTED POEMS OF LANGSTON HUGHES 426, 426 (Arnold Rampersad ed., 1995).

290. MELLO YELLO, Registration No. 3,799,512.

291. SHAKE 'N BAKE, Registration No. 1,024,269.

292. L'EGGO MY EGGO, Registration No. 3,419,042.

293. IT TAKES A LICKING AND KEEPS ON TICKING, Registration No. 1,585,550.

294. J & J Snack Foods Corp. v. Nestle USA, Inc., 149 F. Supp. 2d 136, 151 (D.N.J. 2001).

295. *In re Orleans Wines, Ltd.*, 196 U.S.P.Q. 516, 517 (T.T.A.B. 1977).

296. J & J Snack Foods Corp. v. Nestle USA, Inc., 149 F. Supp. 2d 136, 151 (D.N.J. 2001).

297. *In re California Green Clean Dev. Co., LLC*, No. 77342688, 2011 WL 1399236, at *3 (T.T.A.B. Mar. 21, 2011). It's worth noting the tremendous number of marks and applications to register marks that include both “clean” and “green.”

phrase.”²⁹⁸ Here again, though, TTAB decisions are likely unrepresentative, as many owners of rhyming marks may have successfully persuaded an examining attorney of the marks’ distinctiveness at the application phase.

Some mark owners also assert that their marks’ internal rhyme renders the marks unitary. In denying a petition to cancel the mark KRAZY GLAZY for toaster pastries, the TTAB deemed it unitary, citing the mark’s rhyme in support of that conclusion.²⁹⁹ In reversing a refusal to register SKINWITHIN,³⁰⁰ the Board cited that mark’s internal rhyme and classified it as unitary too. Likewise, the Board held that the mark SEARS BLUE SERVICE CREW for retail store services was registrable without disclaimer of the descriptive terms “service crew,” noting “[c]onsumers will not break the mark SEARS BLUE SERVICE CREW into its component parts but will regard it as a unitary mark, in part, because the mark rhymes.”³⁰¹ And plenty of rhyming marks containing descriptive terms have been registered without either a showing of acquired distinctiveness or any disclaimer of the descriptive terms, such as CLEAN IT LIKE YOU MEAN IT for pre-moistened towelettes for cleaning;³⁰² YOU’RE IN LUCK WITH THE BIG ORANGE TRUCK! for HVAC contractor services;³⁰³ TOES ON THE GO for podiatry services;³⁰⁴ DON’T FEAR THE BEER for beer;³⁰⁵ WOW NO COW! for non-dairy food products;³⁰⁶ and LEGAL EAGLES for software related to law practice.³⁰⁷

298. *In re Causeforce, Inc.*, No. 78625097, 2008 WL 885925 at *3 (T.T.A.B Feb. 15, 2008).

299. *Safe-T Pac. Co. v. Nabisco, Inc.*, 204 U.S.P.Q. (BNA) 307, 316 (T.T.A.B. 1979). The Board also incorrectly cites the mark’s “alliteration.” *Id.*

300. *In re Skin Within Servs., Ltd.*, No. 78122490, 2004 WL 2202266, at *4 (T.T.A.B. Sept. 10, 2004) (reversing refusal to register SKINWITHIN for cosmetics based on likelihood of confusion for WITHIN, also for cosmetics). While the published but non-precedential Westlaw opinion spells the mark as two words, SKIN WITHIN, the file wrapper reveals that the mark is actually SKINWITHIN. *See* SKINWITHIN, Registration No. 2,981,670 (canceled).

301. *In re Sears Brands, LLC*, No. 77558337, 2010 WL 5522986, at *6 (T.T.A.B. Dec. 20, 2010).

302. CLEAN IT LIKE YOU MEAN IT, Registration No. 4,096,244.

303. YOU’RE IN LUCK WITH THE BIG ORANGE TRUCK!, Registration No. 4,695,703 (canceled).

304. TOES ON THE GO, Registration No. 5,316,205.

305. DON’T FEAR THE BEER, Registration No. 4,487,274.

306. WOW NO COW!, Registration No. 5,043,246.

307. LEGAL EAGLES, Registration No. 4,862,107. *But see* LEGAL EAGLES, Registration No. 3,911,159 for directory of lawyers (disclaiming “legal”).

But the Board held a number of other rhyming or allegedly rhyming marks were not unitary, including ZOGGS TOGGS for swimsuits and shirts;³⁰⁸ TAI CHI E for tai chi kits;³⁰⁹ and VERY BERRY for bird suet cakes with berries. In the case of VERY BERRY, the TTAB held the rhyme did not render the mark so integrated that its components were inseparable: “While the rhyming pattern employed in Applicant’s mark may assist consumers’ perception of the mark as a combination of both terms rather than just focusing on one, we find no separate distinct overall commercial impression as a result The two words rhyme, but the rhyming quality imparts no new or different meaning to BERRY apart from its use to describe an ingredient.”³¹⁰ Many other rhyming marks have been registered only on condition of disclaimer of descriptive terms, including ROSÉ ALL DAY for wine;³¹¹ OODLES OF NOODLES for soup mix;³¹² LAFFY TAFFY for candy;³¹³ LITE BRITE for beer;³¹⁴ THE CAR BAR for bartending services;³¹⁵ SNACK SHACK for candy and snacks;³¹⁶ and BRAIN STRAINS for dietary supplements.³¹⁷

Internal rhyme can also play a role in likelihood of confusion analyses when the TTAB and courts assess the similarity of two different marks. In comparing applicant’s mark SKINWITHIN for cosmetics to senior user’s mark WITHIN for similar goods and reversing the refusal to register the former, the Board noted, “the fact that SKIN WITHIN rhymes internally also adds a certain phonetic distinction that WITHIN does not have. This rhyming effect also emphasizes the presence of the word SKIN,” helping differentiate the two marks.³¹⁸ In an older case, the Court of Customs and Patent Appeals (CCPA) affirmed the TTAB’s finding that COCO LOCO for coconut flavors sold to soft drink makers, a mark ostensibly selected because it “rhymed” and

308. *In re Ginc UK Ltd.*, 90 U.S.P.Q.2d 1472 (T.T.A.B. 2007) (affirming disclaimer requirement of TOGGS in the mark ZOGGS TOGGS and a Section 2(d) refusal based on likely confusion with the registered mark ZOG and design for overlapping goods).

309. *In re Yongxin Li*, No. 87750167, 2019 WL 646097, at *5 (T.T.A.B. Jan. 18, 2019) (affirming refusal to register based on a likelihood of confusion with stylized E mark for fitness-related goods).

310. *In re Nunn Milling Co., Inc.*, No. 86596764, 2017 WL 3773111, at *3–4 (T.T.A.B. July 24, 2017).

311. ROSÉ ALL DAY, Registration No. 5,324,810 (disclaiming “rosé”).

312. OODLES OF NOODLES, Registration No. 1,068,223 (expired) (disclaiming “noodles”).

313. LAFFY TAFFY, Registration No. 1,925,704 (disclaiming “taffy”).

314. LITE BRITE, Registration No. 5,459,755 (disclaiming “lite”).

315. THE CAR BAR, Registration No. 5,431,314 (disclaiming “bar”).

316. SNACK SHACK, Registration No. 4,176,733 (disclaiming “snack”).

317. BRAIN STRAINS, Registration No. 6,014,579 (disclaiming “brain”).

318. *In re Skin Within Servs. Ltd.*, No. 78122490, 2004 WL 2202266, at *4 (T.T.A.B. Sept. 10, 2004).

“seemed to match,” did not create a likelihood of confusion with COCA-COLA for soft drinks.³¹⁹

But in a number of other cases involving related goods, factfinders did determine junior users’ rhyming marks created a likelihood of confusion with senior users’ marks. Examples include MISEL DIESEL with DIESEL, both for shaving-related products;³²⁰ LAMMY JAMMYS with LAMIES, both for apparel;³²¹ VANITY INSANITY with VANITY FAIR, both for clothing;³²² REC TEC GRILLS with TEC, both for grills and accessories;³²³ and REVIVE WITH THI with THI, the former for lotion and the latter for cosmetics and false eyelashes.³²⁴

The greatest proportion of published opinions discussing rhyme assess whether a junior user’s mark creates a likelihood of confusion when it rhymes with a senior user’s mark, as when Ernest & Julio Gallo, owners of the well-known GALLO brand for wine, sued a foreign applicant that applied to register RALLO for wine in the US.³²⁵ Courts and the TTAB seem more likely to find marks that rhyme with each other³²⁶ to be similar, weighting the overall analysis toward a likelihood of confusion. Examples include GARANIMAL

319. *Coca-Cola Co. v. Essential Prod. Co.*, 421 F.2d 1374, 1375 (C.C.P.A. 1970).

320. *Diesel S.p.A. v. Misel Disel, LLC*, No. 91225389 (T.T.A.B. Nov. 5, 2018) (not precedential).

321. *In re Lisa Council Gonzalez*, No. 78363598, 2005 WL 2543638, at *2 (T.T.A.B. Sept. 30, 2005) (acknowledging that “applicant’s mark does have a lyrical, rhyming, quality to it” but nonetheless finding consumers would perceive “Lammys” as the dominant portion of the mark given the descriptive nature of “Jammys”).

322. *Vanity Fair, Inc. v. Hainline*, No.’s 91163354, 91166973 & 91166975, 2008 WL 853839, at *5–7 (T.T.A.B. Jan. 15, 2008) (sustaining opposition to register VANITY INSANITY, VANITY & SANITY, and VANITY N SANITY).

323. *Thermal Eng’g Corp. v. Rec Tec Indus., LLC*, No. 91225798, 2019 WL 646100 (T.T.A.B. Jan. 9, 2019) (sustaining opposition to register REC TEC GRILLS in 2 International Classes covering grills and accessories based on a likelihood of confusion with TEC for grills, accessories, and radiant burner units, but dismissing the opposition as to wood pellets).

324. *In re Daniel T. Phuoc*, No. 77356068, 2009 WL 1228530, at *3 (T.T.A.B. Apr. 29, 2009).

325. *E. & J. Gallo Winery v. Cantine Rallo, S.p.A.*, 430 F. Supp. 2d 1064, 1068–71 (E.D. Cal. 2005).

326. In almost every case, the Board or court recites the rule that there is no single “correct” pronunciation of a mark; whether or not all consumers would pronounce the marks in a rhyming way, it’s always possible that some would. *See, e.g.*, *Chanel, Inc. v. Mauriello*, No. 2004, 2010 WL 3873650, at *9 (T.T.A.B. Sept. 20, 2010) (“It is well established that there is no correct pronunciation of a trademark”). *But see* *Procter & Gamble Co. v. A. E. Staley Mfg. Co.*, 342 F.2d 476, 480 (C.C.P.A. 1965) (quoting appellee’s brief) (“[W]hen we say that the trademark ‘OXYTROL’ is pronounced differently from the mark ‘OXYDOL,’ it is for a very logical reason and well supported by the evidence in this case.”).

and MANIMAL, both for apparel;³²⁷ LISTERINE and PISSTERINE, both for mouthwash;³²⁸ HUGGIES and DOUGIES, both for disposable diapers;³²⁹ MEGO and LEGO, both for toys and games;³³⁰ ISOCURE and ISOPURE, both for dietary supplements;³³¹ WING KING and WING-DINGS, both for poultry products;³³² WHOSHERE and WHONEAR, both for social proximity networking applications;³³³ ROCKE and JOCKEY, both for hosiery;³³⁴ and IKON and NIKON, both for cameras.³³⁵ The same appears

327. *Garan, Inc. v. Manimal, LLC*, No. 20-cv-00623, 2022 WL 225060, at *6 (D. Or., Jan. 25, 2022) (reversing TTAB's denial of Plaintiff's opposition to the registration of MANIMALS and ordering registration canceled) (“[T]he fact that the TTAB could articulate some rational explanation for the difference between GARANIMAL and MANIMAL does not vitiate the fact that the marks ‘sound much alike and actually rhyme.’”).

328. *Johnson & Johnson v. Pisterine, LLC*, No. 91254670, 2022 WL 190986 at *3–8 (T.T.A.B. Jan. 18, 2022).

329. *Kimberly-Clark Corp. v. H. Douglas Enters.*, 774 F.2d 1144 (Fed. Cir. 1985).

330. *Interlego Ag v. Abrams/gentile Ent. Inc.*, 63 U.S.P.Q.2d 1862 (T.T.A.B. 2002).

331. *The Isopure Co. v. Essen Nutrition Corp.*, No. 86170550, 2016 WL 7385774, at *7 (T.T.A.B. Nov. 23, 2016).

332. *Hester Indus., Inc. v. Wing King, Inc.*, No. 91-CV-2644-RHH, 1992 WL 200129, at *1, *4 (N.D. Ga. Mar. 26, 1992), (granting preliminary injunction based on likelihood of confusion with plaintiff's registered marks WING-DINGS and WING-ZINGS), *aff'd sub nom. Hester Indus. V. Wing King*, 979 F.2d 1539 (11th Cir. 1992).

333. *Whoshere, Inc. v. Orun*, No. 13-CV-00526, 2014 WL 12767818, at *4–5 (E.D. Va. Sept. 8, 2014) (granting preliminary injunction because of high likelihood of confusion).

334. *Coopers, Inc. v. Rocky Mountain Textile, Inc.*, 180 F. Supp. 230, 232 (D. Colo. 1959) (finding infringement and cancelling registration of ROCKE for hosiery based on likelihood of confusion with JOCKEY for the same goods).

335. *Nikon, Inc. v. Ikon Corp.*, 803 F. Supp. 910, 916–17 (S.D.N.Y. 1992) (noting the marks “rhyme, which increases the association between the words.”); *see also In re Peter Wood, Geoffrey Dean-Smith, and Tasha Mudd*, No. 87022288, 2017 WL 5885620, at *6–7 (T.T.A.B. Oct. 25, 2017) (SINFUL ZINFANDEL and ZINFUL for wine); *Nokia Corp. v. Somasundaram Ramkumar*, No. 91238114, 2020 WL 3250316, at *8 (T.T.A.B. May 22, 2020) (sustaining opposition to register JIOKIA for email services based on likelihood of confusion with NOKIA for electronics); *Tisket-A-Tasket Grp. Inc. v. H.S. Craft Mfg. Co.*, 53 U.S.P.Q.2d 1283, at *2 (S.D. Ind. 1999) (holding FRIGHTSICLE violates an earlier injunction against defendant's use of LIGHTSICLE because it is confusingly similar to LIGHT * CICLES for lights shaped like icicles); *Londontown Mfg. Co. v. Cable Raincoat Co.*, 371 F. Supp. 1114, 1117 (S.D.N.Y. 1974) (SMOG and LONDON FOG for coats); *Chanel, Inc. v. Frank Mauriello* No. 2004, 2010 WL 3873650, at *9 (T.T.A.B. Sept. 20, 2010) (sustaining opposition to register ENELLE and EE logo for handbags and accessories based on a likelihood of confusion with CHANEL and CC logo for “identical goods”); *Tyr Sport, Inc.*, No. No. 91120414, 2004 WL 474682, at *3–4 (T.T.A.B. Mar. 9, 2004) (sustaining opposition to register ZYR based on likelihood of confusion with TYR, both for sports apparel; noting consumers would likely view both marks as arbitrary letter strings only one letter apart from one another); *Rsch. in Motion Ltd. v. Defining Presence Mktg. Grp., Inc.*, 102 U.S.P.Q.2d 1187, 1198 (T.T.A.B. 2012) (“we find that there is a high degree of similarity between applicants' mark [CRACKBERRY] and opposer's famous mark [BLACKBERRY].”); *Russell Chem. Co. v. Wyandotte Chem. Corp.*, 143 U.S.P.Q. 252 (C.C.P.A. 1964) (SENTOL and SEN-TROL);

true when defendant's mark rhymes both internally and with plaintiff's mark, as when courts found a likelihood of confusion between LOLLY JOLLY for candy and HOLLY JOLLY for fruit-based snacks³³⁶ and between MISTER TWISTER and WEST SISTER TWISTER, both for fishing lures.³³⁷ In the former case, the Board noted the role of rhyme in the similarity assessment: "we find the overall commercial impressions of the two marks are substantially similar because the difference in meaning of the first word in the parties' marks is overshadowed by the visual and phonetic similarities, particularly the similar rhyming qualities of two words within each of the respective marks."³³⁸

Given the similarity of goods in so many of these rhyming cases,³³⁹ courts may chalk up the junior user's choice of rhyming mark to bad faith. The court comparing LONDON FOG to SMOG, for example, points out "the question still remains why the defendant should go to such lengths to vindicate its right to 'Smog' if it is simply another word like 'Smug' and is not an attempt to trade on the plaintiff's good will."³⁴⁰ Likewise, when the owner of SPOTIFY for music streaming services opposed registration of POTIFY for software and location services related to medical marijuana, alleging likelihood of confusion and dilution, the Board refused to believe that the rhyme was a coincidence, instead concluding that the applicant intended to create an association between the two marks.³⁴¹

Atlas Supply Co. v. The Dayton Rubber Co., 125 U.S.P.Q (BNA) 529 (T.T.A.B. 1960) (PLYCRON and NYCRON).

336. *St. Nicholas Music Inc. v. Lolly-Jolly, Inc.*, No. 91155371, 2005 WL 2093243 (T.T.A.B. Aug. 24, 2005) (Section 2(d) opposition to registration of the mark LOLLY-JOLLY for candy).

337. *Mister Twister, Inc. v. JenEm Corp.*, 710 F. Supp. 202, 204 (S.D. Ohio 1989) (enjoining defendants' use of WEST SISTER TWISTER).

338. *St. Nicholas Music*, 2005 WL 2093243, at *3 (T.T.A.B. Aug. 24, 2005).

339. "[W]hen marks appear on identical goods . . . the degree of similarity between the marks necessary to support a finding of likely confusion declines." *Cards Against Humanity, LLC v. Vampire Squid Cards, LLC*, No. 91225576, 2019 WL 1491525, at *10 (T.T.A.B. Feb. 28, 2019) (citing *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 U.S.P.Q.2d. 1797, 1801 (Fed. Cir. 2018); *Century 21 Real Estate v. Century Life*, 970 F.2d 874 (Fed. Cir. 1992)).

340. *Londontown Mfg. Co. v. Cable Raincoat Co.*, 371 F. Supp. 1114, 1118 (S.D.N.Y. 1974).

341. *Spotify AB v. US Software Inc.*, Nos. 91243297 and 91248487, 2022 WL 110251, at *34 (T.T.A.B. Jan. 10, 2022) ("Applicant represents that its decision to adopt the POTIFY mark had nothing to do with . . . the SPOTIFY mark. This is hard to believe . . . It defies logic and common sense."). Having concluded that POTIFY would dilute SPOTIFY by blurring, the Board did not conduct a likelihood of confusion analysis. *Id.* at 37 n.19. *But see Johnson & Johnson v. Pisterine, LLC*, No. 91254670, 2022 WL 190986, at *21 (T.T.A.B. Jan. 18, 2022) ("[W]e do not find that Applicant's intent to create a parody with its PISSTERINE mark, by itself, evidences an intention to trade on the goodwill of Opposer's LISTERINE mark(s) [that constitutes bad faith].").

Of course, some infringement cases regarding marks that rhyme with each other may still result in a finding of no likelihood of confusion. (As Potify’s lawyer points out, Spotify successfully enjoined the use of POTIFY even while CLOTIFY, PLOTIFY, VOTIFY, and NOTIFY remain registered without objection.)³⁴² In a case asserting that Johnson & Johnson’s use of EASY SLIDE for dental floss would create a likelihood of confusion with senior user Gore’s mark GLIDE for dental floss, Gore contended the fact that the marks not only rhymed and covered identical goods, their key terms were also synonyms, rendering them “virtually identical.” But Johnson & Johnson emphasized the extra word “easy” and its dominant use of its company name as features that distinguished the two marks, and the court found no likelihood of success on the merits.³⁴³ Likewise, one court held OXYTROL for industrial starches did not create a likelihood of confusion with OXYDOL for cleansers and detergent;³⁴⁴ another found defendant’s mark HOUR AFTER HOUR for aerosol deodorant would not create a likelihood of confusion with plaintiff’s mark SHOWER TO SHOWER for body powder despite their rhyming nature and related uses.³⁴⁵

Meanwhile, defendants asserting parody defenses in infringement or dilution cases that involve rhyming marks—BAD SPANIELS for JACK DANIELS;³⁴⁶ CHEWY VUITON for LOUIS VUITTON;³⁴⁷ TIMMY HOLEDIGGER for TOMMY HILFIGER;³⁴⁸ PETLEY FLEA HOUSE for TETLEY TEA HOUSE³⁴⁹—are more likely to find the rhyme works in their favor. The rhyme is often construed to help meet the definition of parody the Fourth Circuit described: “While a parody intentionally creates an association

342. Hailey Konnath, *Spotify Prevails Over ‘Potify’ Weed Software At TTAB*, LAW360 (Jan. 11, 2022), <https://www.law360.com/articles/1454472/spotify-prevails-over-potify-weed-software-at-ttab?copied=1Law360>.

343. *W.L. Gore & Assocs. v. Johnson & Johnson*, 882 F. Supp. 1454, 1458 (D. Del. 1995), *aff’d sub nom. W.L. Gore & Assocs., Inc. v. Johnson & Johnson, Inc.*, 77 F.3d 465 (3d Cir. 1996).

344. *Procter & Gamble Co. v. A. E. Staley Mfg. Co.*, 342 F.2d 476, 479–80 (C.C.P.A. 1965).

345. *Johnson & Johnson v. Colgate-Palmolive Co.*, 345 F. Supp. 1216, 1222 (D.N.J. 1972).

346. *VIP Prod. LLC v. Jack Daniel’s Properties, Inc.*, 953 F.3d 1170 (9th Cir. 2020).

347. *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007).

348. *Tommy Hilfiger Licensing, Inc. v. Nat. Labs, LLC*, 221 F. Supp. 2d 410 (S.D.N.Y. 2002).

349. *Tetley, Inc. v. Topps Chewing Gum, Inc.*, 556 F. Supp. 785, 794 (E.D.N.Y. 1983) (denying preliminary injunction and finding no likelihood of success on infringement and dilution claims where defendant’s use was on collectable stickers sold in “wacky packs” with other stickers, all of which “satirically depict the retail packages of various mass-marketed commercial products.”).

with the famous mark in order to be a parody, it also intentionally communicates, if it is successful, that it is not the famous mark, but rather a satire of the famous mark.”³⁵⁰ In cases where the parodic mark is itself being used as a trademark,³⁵¹ though, the rhyme won’t save it—see, for example, CRACKBERRY for BLACKBERRY,³⁵² THIS MOLD HOUSE for THIS OLD HOUSE,³⁵³ THE HOUSE THAT JUICE BUILT for THE HOUSE THAT RUTH BUILT,³⁵⁴ PISSTERINE for LISTERINE,³⁵⁵ and the barely-rhyming CRABS ADJUST HUMIDITY for CARDS AGAINST HUMANITY,³⁵⁶ all ultimately refused registration based on their similarity to an opposer’s prior mark.³⁵⁷ As the applicant in the latter case acknowledged, it chose CRABS ADJUST HUMIDITY as the name of its expansion pack designed to complement CARDS AGAINST HUMANITY for a reason: “By Applicant’s own admission, this similarity is no coincidence as one of the factors going into Applicant’s thought process in adopting its mark was that the mark ‘would evoke [Opposer’s mark] by rhyming with it.’”³⁵⁸

As with many other devices discussed, mark owners and factfinders have been known to identify rhyme where it doesn’t seem to exist or deny it where it does. In urging its case that TOBY’S TURKEY DINNER qualified as

350. *Louis Vuitton Malletier S.A.*, 507 F.3d at 267.

351. While parody is explicitly included as a defense to a claim of dilution under a statutory “fair use” exclusion in Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c)(3)(A), the statute makes explicit that the safe harbor includes only terms used “other than as a designation of source for the person’s own goods or services.” Since the four cases listed here address marks for which their owners sought application, they clearly involve words and phrases used as source designators, precluding them from the safe harbor.

352. *Rsch. in Motion Ltd. v. Defining Presence Mktg. Grp., Inc.*, 102 U.S.P.Q.2d 1187, 1200 (T.T.A.B. 2012) (sustaining three oppositions to register CRACKBERRY on the basis of likelihood of confusion and all four oppositions on the basis of dilution).

353. *This Old House Ventures, Inc. v. Restoration Servs., Inc.*, No. 91152820, 2005 WL 1822545, at *7 (T.T.A.B. July 25, 2005) (sustaining opposition to register THIS MOLD HOUSE for educational services in the field of mold remediation training based on likelihood of confusion with THIS OLD HOUSE for a wide variety of educational and entertainment services related to home improvement and design).

354. *New York Yankees P’ship v. Iet Prod. & Servs., Inc.*, 114 U.S.P.Q.2d 1497 (T.T.A.B. May 8, 2015).

355. *Johnson & Johnson v. Pissterine, LLC*, No. 91254670, 2022 WL 190986 (T.T.A.B. Jan. 18, 2022).

356. *Cards Against Humanity, LLC v. Vampire Squid Cards, LLC*, No. 91225576, 2019 WL 1491525 (Feb. 28, 2019).

357. *But see Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 955 F. Supp. 605, 622 (E.D. Va. 1997) (finding Utah’s tourism slogan THE GREATEST SNOW ON EARTH did not dilute the Circus’ famous mark THE GREATEST SHOW ON EARTH despite rhyming with it), *aff’d*, 170 F.3d 449 (4th Cir. 1999).

358. *Cards Against Humanity, LLC v. Vampire Squid Cards, LLC*, No. 91225576, 2019 WL 1491525, at *11 (T.T.A.B. Feb. 28, 2019).

unitary, the applicant relied on what it called “the rhyming of ‘TOBY’ and ‘TURKEY’” to support its case; while the closing vowel sounds are the same, most would not consider those two words to rhyme.³⁵⁹ In the case of SNAP SIMPLY SAFER, the Board described the rhetorical device in play as rhyme, not alliteration.³⁶⁰ And the Board denied the existence of the rhyme in REVIVE WITH THI, stating “We do not agree with applicant that there is any rhyme or internal rhythm to the mark as a whole that is likely to be perceived by prospective purchasers.”³⁶¹

The devices discussed in the “sound” section, including alliteration, assonance, consonance, anaphora, epistrophe, epizeuxis, onomatopoeia, and rhyme, illustrate some of the many ways producers choose or design marks to catch consumers’ ears. Marks that use devices in this category seem particularly likely to trip up factfinders and litigants in their articulation of what makes marks more or less distinctive, unitary, or similar. And they can and should play a role in USPTO and judicial determinations about marks.

C. MEANING

1. *Adynaton*

ADYNATON [a-DIN-a-tin] is the use of hyperbolic metaphor suggesting something impossible. See, for example, poet W.H. Auden:

‘I’ll love you, dear, I’ll love you
Till China and Africa meet,
And the river jumps over the mountain
And the salmon sing in the street,

‘I’ll love you till the ocean
Is folded and hung up to dry
And the seven stars go squawking
Like geese about the sky.’³⁶²

359. *In re* *Midwestern Pet Foods, Inc.*, No. 85501978, 2013 WL 5498166, at *4 (T.T.A.B. Sept. 26, 2013) (affirming refusal to register TOBY’S TURKEY DINNER without disclaimer of “turkey” and the alliterative PEPPER’S POT ROAST without disclaimer of “pot roast”).

360. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1255 (Fed. Cir. 2012) (“[T]he combination of the terms SIMPLY and SAFER creates a rhyming pattern that results in a distinctive impression separable from the word ‘Snap’”) (internal citation omitted).

361. *In re* *Phuoc*, No. 77356068, 2009 WL 1228530, at *3 (T.T.A.B. Apr. 29, 2009).

362. W.H. AUDEN, *As I Walked Out One Evening*, reprinted in *COLLECTED POEMS* (Edward Mendelson ed., 1976).

Trademark examples include registrations of WHEN PIGS FLY for bread, jam, dog training services, and more;³⁶³ IMPOSSIBLE BURGER for vegetarian meat products designed to taste like real meat;³⁶⁴ HELL FREEZES OVER for entertainment services;³⁶⁵ 12TH OF NEVER for beer;³⁶⁶ MONSTER MILK for a muscle-building beverage;³⁶⁷ and 600 MILLION YEARS YOUNG for skin care products.³⁶⁸ Each of those marks appears to have been registered as inherently distinctive, and the USPTO only required a disclaimer for one term among them—the “burger” in IMPOSSIBLE BURGER. Trademark law treats superlative components of marks, like TASTY for ice cream or BEST for beer, as merely descriptive and incapable of protection without a showing of secondary meaning. But marks that employ adynaton evoke the more subtle superlative state of goods or services that are so excellent or so elusive that they are nigh well impossible. Factfinders rarely³⁶⁹ discuss marks’ employment of this device explicitly, but it stands to reason that marks that employ adynaton are more likely to be found inherently distinctive,³⁷⁰ as these were, and many will likely be deemed unitary as well.³⁷¹

363. WHEN PIGS FLY, Registration No. 6,002,443 (for bakery products) (apparently registered as inherently distinctive); WHEN PIGS FLY, Registration No. 3,523,461 (for jams and jellies); WHEN PIGS FLY, Registration No. 3,523,460 (for retail store services featuring bakery products) (apparently registered as inherently distinctive); WHEN PIGS FLY DOG TRAINING, Registration No. 4,070,260 (for “Educational services, namely, training dogs and providing instruction to people on how to train dogs; conducting dog shows and dog trials,” registered as inherently distinctive, but disclaiming “dog training”); *see also* FLYING PIG, Registration No. 5,970,846 (for furniture and transportation logistics services) (apparently registered as inherently distinctive); FLYING PIG, Registration No. 5,226,315 (for cages, bathtubs, sinks, and hair dryers, all for pets) (apparently registered as inherently distinctive); FLYING PIG, Registration No. 4,470,492 (for beer) (apparently registered as inherently distinctive); THREE PIGS FLYING, Registration No. 6,265,066 (for plastic food storage bags).

364. IMPOSSIBLE BURGER, Registration No. 6,211,591 (disclaiming burger).

365. HELL FREEZES OVER, Registration No. 5,761,992.

366. 12TH OF NEVER, Registration No. 5,106,686.

367. MONSTER MILK, Registration No. 3,971,667.

368. 600 MILLION YEARS YOUNG, Registration No. 3,711,062.

369. A Westlaw search finds no record of “adynaton” in any trademark-related decisions.

370. *See, e.g.,* Cobra Cap. LLC v. LaSalle Bank Corp., 455 F. Supp. 2d 815, 821 (N.D. Ill. 2006) (denying defendant’s motion for summary judgment based on lack of protectability of plaintiff’s mark MAKING IMPOSSIBLE POSSIBLE for baking services and noting “[t]he mark at issue here does not appear to be descriptive of the banking or lease financing industry.”).

371. *See* TMEP § 1213.05(b) (“A phrase qualifies as unitary in the trademark sense only if the whole is something more than the sum of its parts.”) (quoting *ex parte* Mooresville Mills, Inc., 102 U.S.P.Q. 440, 441 (Comm’r Pats. 1954) (a unitary phrase “will have ‘some degree of ingenuity in its phraseology as used in connection with the goods; or [say] something a little different from what might be expected to be said about the product; or [say] an expected thing

Similarity analyses of marks that use adynaton, meanwhile, are difficult to come by. As with paronomasia, we might expect that a pair of marks employing the same idea—like WHEN PIGS FLY and NOT UNTIL PIGS FLY—might lead factfinders toward a finding of similarity. While trademarks in this category may blend in with other well-known and lesser-known expressions and catchphrases of various kinds, they build on a rich literary tradition by evoking a counterfactual state that theoretically cannot be achieved.

2. *Allusion*

ALLUSION [ah-LOO-zhin] is a reference to a well-known literary or musical work, story, concept, person, or thing. Randall Jarrell checks a number of those boxes in the first three stanzas of “The Player Piano,” rooting the poem and its characters in their shared spaces, sounds, and cultural iconography:

I ate pancakes one night in a Pancake House
Run by a lady my age. She was gay.
When I told her that I came from Pasadena
She laughed and said, “I lived in Pasadena
When Fatty Arbuckle drove the El Molino bus.”

I felt that I had met someone from home.
No, not Pasadena, Fatty Arbuckle.
Who’s that? Oh, something that we had in common
Like—like—the false armistice. Piano rolls.
She told me her house was the first Pancake House

East of the Mississippi, and I showed her
A picture of my grandson. Going home—
Home to the hotel—I began to hum,
“Smile a while, I bid you sad adieu,
When the clouds roll back I’ll come to you.”³⁷²

Allusion is a rhetorical device that evokes the reader’s cultural knowledge, and it’s economical—it can bring to mind a shared touchpoint in just a word or two. Those qualities make it a perfect fit for trademarks, which endeavor to do a lot of work in a small space while simultaneously situating themselves

in an unexpected way.”); *Id.* § 1213.05(b)(i) (“A slogan is a type of phrase and is defined as ‘a brief attention-getting phrase used in advertising or promotion’ and ‘a catch phrase used to advertise a product.’ [S]logans, by their attention-getting nature, are treated as unitary matter and must not be broken up for purposes of requiring a disclaimer.”) (citations omitted).

372. Randall Jarrell, *The Player Piano*, in *THE MADE THING: AN ANTHOLOGY OF CONTEMPORARY SOUTHERN POETRY* 124 (Leon Stokesbury ed. 1987).

within popular culture.³⁷³ Perhaps the most-cited example is SUGAR ‘N SPICE for baking goods, a reference to a well-known rhyme about the social construction of gender.³⁷⁴ In another case from the same era, POLY PITCHER was held to allude to then-well-known character Molly Pitcher.³⁷⁵ The owners of ASK JEEVES!³⁷⁶ named their search engine after a resourceful butler in the stories of P.G. Wodehouse. SHAKE SCATTER & GROW is a trademark for flower seeds that alludes to the Elvis song “Shake, Rattle & Roll.”³⁷⁷ Athletic apparel manufacturer TYR is named for a deity in Nordic mythology.³⁷⁸ ROBINHOOD for financial services endows the finance app with the attributes of the famous figure.³⁷⁹ Uncle Sam marks are extremely popular, pairing the patriotic human image with products as diverse as beer, clothing, engine oils, bail bond services, furniture, hunting gear, insurance, and insulation.³⁸⁰ And the trademark ASICS for sneakers is both allusion and acronym—in standing for “*anima sana in corpore sano*,” Latin for “a healthy

373. Courts and the USPTO also sometimes use the term “allusion” broadly to refer to any kind of suggestive term, in that a suggestive mark links the goods or services to a concept. *N. Am. Graphics, Inc. v. N. Am. Graphics of U.S., Inc.*, No. 97-CIV-3448, 1997 WL 316599, at *3 (S.D.N.Y. June 10, 1997) (“A suggestive mark indirectly or metaphorically alludes to the nature of the product”) (quotation and citation omitted). According to one district court, allusion is a factor to consider in assessing whether a mark is suggestive or merely descriptive: it affects “the likelihood that the mark will conjure up other purely arbitrary connotations separate from what the mark conveys about the product.” *J & J Snack Foods Corp. v. Nestle USA, Inc.*, 149 F. Supp. 2d 136, 147 (D.N.J. 2001). In that case, the court held, “no such likelihood exists—unlike the pleasant association with the old nursery rhyme that arose from the use of the mark ‘Sugar & Spice.’” *Id.*; *see also AOP Ventures, Inc. v. Steam Distrib., LLC*, No. EDCV-151586-VAPKXX, 2016 WL 7336730, at *7 (C.D. Cal. Oct. 11, 2016) (plaintiff’s and defendant’s MILKMAN marks for electronic cigarette liquid “serve as allusions to the products’ milk-like flavor.”), *order vacated on reconsideration*, 2016 WL 10586307 (C.D. Cal. Dec. 27, 2016).

374. *Application of Colonial Stores, Inc.*, 394 F.2d 549, 552–53 (C.C.P.A. 1968) (“The immediate impression evoked by the mark may well be to stimulate an association of ‘sugar and spice’ with ‘everything nice.’ As such, on the record below, the mark, along with the favorable suggestion which it may evoke, seems to us clearly to function in the trademark sense and not as a term merely descriptive of goods.”)

375. *Blisscraft of Hollywood v. United Plastics Co.*, 294 F.2d 694, 700 (2d Cir. 1961).

376. *ASK JEEVES!*, Registration No. 2,275,474 (canceled); *see also ASK JEEVES*, Registration No. 2,385,161 (also canceled).

377. *In re White Swan Ltd.*, 8 U.S.P.Q.2d 1534 (T.T.A.B. 1988) (affirming refusal to register SHAKE SCATTER & GROW for flower seeds based on likelihood of confusion with SHAKE-N-GROW for grass seeds).

378. *Tyr Sport, Inc. v. Datamation, LLC*, No. 91120414, 2004 WL 474682, at *3 (T.T.A.B. Mar. 9, 2004).

379. *ROBINHOOD*, Registration No. 4,761,666.

380. *In re Uncle Sam GmbH*, No. 79187215, 2019 WL 4034453, at *1–3 (T.T.A.B. July 31, 2019).

mind in a healthy body,” its allusion to the famous phrase is recognizable only to those who are in on the secret of the mark’s origin.

ASK JEEVES!,³⁸¹ SHAKE SCATTER & GROW,³⁸² ASICS,³⁸³ TYR,³⁸⁴ and ROBINHOOD³⁸⁵ were registered as inherently distinctive, with no disclaimer required. POLY PITCHER was initially deemed descriptive, as “poly” refers to polyethylene, but the Second Circuit reversed that finding, holding the mark inherently distinctive in part because of its allusion to the character.³⁸⁶ Likewise, the USPTO refused registration of SUGAR ‘N SPICE for baking goods as merely descriptive and the Board affirmed, but the CCPA reversed their decision. In so doing, it acknowledged that both terms were descriptive or generic for baking ingredients, but due to the mark’s allusion to the well-known nursery rhyme, “[t]he immediate impression evoked by the mark may well be to stimulate an association of ‘sugar and spice’ with ‘everything nice.’ As such . . . the mark, along with the favorable suggestion which it may evoke, seems to us clearly to function in the trademark sense and not as a term merely descriptive of goods.”³⁸⁷

Few infringement cases explicitly discuss allusive marks. In a dispute between the owners of FIRST FRANKLIN and FRANKLIN FIRST, both for financial services, the defendant highlighted the crowded field of marks incorporating the word “Franklin” for banking or financial services, many of which also used “depictions of Benjamin Franklin to evoke an impression of being financially prudent,” as did the defendant.³⁸⁸ The court acknowledged that the allusion was a common one, finding both the plaintiff’s mark strength and defendant’s bad faith factors neutral in part for that reason and ultimately denying the injunction.³⁸⁹

381. ASK JEEVES!, Registration No. 2,275,474 (canceled); *see also* ASK JEEVES, Registration No. 2,385,161.

382. SHAKE SCATTER & GROW, Registration No. 1,770,315 (canceled).

383. ASICS, Registration No. 3,305,197.

384. TYR, Registration No. 1,458,467.

385. ROBINHOOD, Registration No. 4,761,666.

386. *Blisscraft of Hollywood v. United Plastics Co.*, 294 F.2d 694, 700 (2d Cir. 1961).

387. *Application of Colonial Stores, Inc.*, 394 F.2d 549, 552–53 (C.C.P.A. 1968).

388. *First Franklin Fin. Corp. v. Franklin First Fin., Ltd.*, 356 F. Supp. 2d 1048, 1053 (N.D. Cal. 2005) (plaintiff’s evidence insufficient to establish that FIRST FRANKLIN “is either inherently distinctive or ha[s] acquired sufficient secondary meaning to be considered strong.”).

389. *Id.* at 1054.

3. *Anthimeria*

ANTHIMERIA [an-thi-MER-ee-ah] refers to the practice of using words as different parts of speech, such as a noun for a verb.³⁹⁰ Writers do this often, using the incongruity to render familiar words new, as in Shakespeare’s “the thunder would not *peace* at my bidding [emphasis added].”³⁹¹

Anthimeria shows up in trademarks³⁹² like IT’S WHAT HAPPY TASTES LIKE for ice cream and restaurant services;³⁹³ RETHINK POSSIBLE for telephone services;³⁹⁴ and THINK DIFFERENT for computers.³⁹⁵ All three appear to have been registered as inherently distinctive, without disclaimers.

There are no published infringement decisions that use the word anthimeria. Factfinders and mark owners don’t use the term anthimeria in assessing distinctiveness either, but the idea occasionally comes into play in their analyses. In challenging the USPTO’s refusal to register SOLID SELECT for processed timber products and lumber, the applicant acknowledged that “select” has a well-known meaning in the trade: it’s a grade used by the National Hardwood Lumber Association to designate boards that measure at least 4”x6” with at least 83% usable material or a high-quality piece of lumber.³⁹⁶ But the applicant went on to argue that the term “select” could alternatively be understood by consumers to mean “selection”—consumers could interpret the mark as suggesting “a sound purchasing decision.”³⁹⁷ With that argument, the applicant creates (or hopes to create) some ambiguity as to whether “select” is functioning as an adjective, noun, or verb. Mark owners who claim incongruity may be employing anthimeria. And when the TMEP offers WHERE SNACKS LOVE TO DIP! for dips as an example of a unitary mark, anthimeria seems to be doing some work.³⁹⁸

390. Ben Yagoda, *Parts of Speech*, N.Y. TIMES (July 9, 2006), https://www.nytimes.com/2006/07/09/magazine/09wwln_safire.html [<https://perma.cc/K6AW-NSW7>].

391. WILLIAM SHAKESPEARE, KING LEAR act 4, sc. 6, l. 101.

392. While it is a truism that a trademark should always be used as an adjective to maintain protection, Laura Heymann points out that anthimeria “dates back at least as far as Shakespeare” and trademarks are often used as nouns and even as verbs, usually without threatening their source-indicating ability. Laura A. Heymann, *The Grammar of Trademarks*, 14 LEWIS & CLARK L. REV. 1313, 1344 (2010).

393. IT’S WHAT HAPPY TASTES LIKE, Registration No. 2,895,682; IT’S WHAT HAPPY TASTES LIKE, Registration No. 3,011,145.

394. RETHINK POSSIBLE, Registration No. 3,865,791 (canceled).

395. THINK DIFFERENT, Registration No. 3,803,176.

396. *In re Tenon Ltd.*, No. 86218698, 2015 WL 8966269, at *2 (T.T.A.B. Nov. 23, 2015).

397. *Id.* at *4.

398. TMEP § 1213.05(b)(ii)(C).

4. *Paronomasia*

PARONOMASIA [par-ah-no-MAY-zee-uh] is a Greek term for a play on words. It exploits the confusion or double meaning created when words have similar sounds but different meanings, including but not limited to homophones, homonyms, and visual puns.³⁹⁹

The pun, often called a “double entendre” in the trademark context, is one of the most commonly used poetic devices in trademark law and perhaps the one most likely to affect outcomes.⁴⁰⁰ Where factfinders see wordplay in a mark, they often conclude that the mark is suggestive rather than merely descriptive;⁴⁰¹ it can also lead the USPTO to characterize the mark as unitary.⁴⁰² The use of paronomasia can affect likelihood of confusion analyses in a variety of ways.

The TTAB has often found marks to be inherently distinctive rather than merely descriptive based on their wordplay:⁴⁰³ SHEER ELEGANCE for pantyhose;⁴⁰⁴ NAPSACK for a baby carrier with straps;⁴⁰⁵ MUFFUNS for mini-muffins;⁴⁰⁶ and L’EGGS for pantyhose sold in egg-shaped containers⁴⁰⁷

399. See Derek Attridge, *Unpacking the Portmanteau, or Who’s Afraid of Finnegans Wake*, ON PUNS: THE FOUNDATION OF LETTERS, 140–155 (1988) (“The pun is the product of a context deliberately constructed to *enforce* an ambiguity, to render impossible the choice between meanings, to leave the reader or hearer endlessly oscillating in semantic space.”).

400. While applicants often point to double entendre to support arguments that a mark is distinctive and unitary, it may also increase the likelihood of a failure to function refusal. See, e.g., LTTB LLC v. Redbubble, Inc., 840 F. App’x 148, 152 (9th Cir. 2021).

401. Roberts, *supra* note 26, at 1062–63; 3 LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES § 18:15 n.13 (4th ed. 2011); TMEP § 1213.05(c) (“[A] mark that comprises [a] ‘double entendre’ will not be refused registration as merely descriptive if one of its meanings is not merely descriptive in relation to the goods or services.”). See, e.g., *In re Computer Bus. Sys. Grp.*, 229 U.S.P.Q. 859 (T.T.A.B. 1985).

402. TMEP § 1213.05(c) (“A true ‘double entendre’ is unitary by definition. An expression that is a ‘double entendre’ should not be broken up for purposes of requiring a disclaimer.”).

403. Paronomasia may also support a finding that a mark is not generic, but at least descriptive. See, e.g., *Benzicron v. Ledesma*, No. 2:13-cv-04537, 2014 WL 4060257, at *5 (C.D. Cal. Aug. 11, 2014) (“[T]he name ‘The Sweat Shoppe’ is a double entendre, punning off the normal definition of sweatshop together with exercised-induced perspiration. As a double entendre, ‘The Sweat Shoppe,’ is, by definition, not generic because plaintiff is not using the term sweatshop in its ordinary sense.”).

404. *No Nonsense Fashions, Inc. v. Consol. Foods Corp.*, 226 U.S.P.Q. 502, 506 (T.T.A.B. 1985) (“Sheer Elegance” for pantyhose suggestive because it describes the texture and also suggests the “ultimate in elegance”).

405. *In re Happy Baby Carrier Co.*, 179 U.S.P.Q. 864 (T.T.A.B. 1973).

406. *In re Grand Metro. Foodserv. Inc.*, 30 U.S.P.Q.2d 1974, 1975 (T.T.A.B. 1994).

407. *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 465 (4th Cir. 1996).

are just a few examples.⁴⁰⁸ Federal courts have also been swayed by the use of paronomasia, deeming suggestive CHOICE for a health care plan;⁴⁰⁹ OFF THE RECORD for radio and television segments on the music industry;⁴¹⁰ HALLOWINE for a spiced, autumnal wine;⁴¹¹ HASSELL FREE PLUMBING for the services of a plumber named Hassell;⁴¹² and POLY PITCHER for a pitcher made of polyethylene.⁴¹³ Of course, the double entendre argument fails perhaps nearly as often as it succeeds.⁴¹⁴ Reviewing this line of cases might lead a skeptical reader to wonder how often lawyers manufacture from whole cloth double entendres that the trademarks' owners never actually intended or even noticed.⁴¹⁵ In trying to persuade the court that BREAK & BAKE was not merely descriptive for pre-sectioned cookie dough, for example, the mark owner argued "the phrase is also a double entendre, requiring the consumer connect the word 'break' with 'taking a break' and then

408. *See, e.g.*, *Henry Siegel Co. v. M&R Int'l Mfg. Co.*, 4 U.S.P.Q.2d 1154, 1159 (T.T.A.B. 1987) (CHIC for jeans); *In re Siemens Stromberg-Carlson*, No. 75/048,293, 1999 WL 1062812, at *2 (T.T.A.B. Nov. 19, 1999) (FAST FEATURE PLATFORM for software and hardware).

409. *Aetna Health Care Sys., Inc. v. Health Care Choice, Inc.*, No. 84-C-642-E, 1986 WL 84362, at *16 (N.D. Okla. May 15, 1986) (noting CHOICE constituted a double entendre and thus was either inherently distinctive or, in the alternative, had acquired secondary meaning).

410. *Westwood One, Inc. v. Natl. Broad. Co.*, No. CV 82-976, 1982 WL 52140, at *1 (C.D. Cal. Apr. 9, 1982) ("The mark's punning reference to the record industry . . . serves to remove it from the merely descriptive category.").

411. *C&N Corp. v. Kane*, 142 F.Supp.3d 783, 785 (E.D. Wis. 2015).

412. *Hassell Free Plumbing, LLC v. Wheeler*, 2021 WL 1139424, at *4 (N.D. Tex. Mar. 25, 2021).

413. *Blisscraft of Hollywood v. United Plastics Co.*, 294 F.2d 694, 700 (2d Cir. 1961) (mark qualified as a pun because it was "reminiscent or suggestive of Molly Pitcher of Revolutionary time").

414. *See, e.g.*, *In re Tenon* at *4 (Nov. 23, 2015); *In re Wells Fargo & Co.*, 231 U.S.P.Q. 95, 99 (T.T.A.B. 1986) (holding EXPRESSERVICE merely descriptive for banking services, in spite of applicant's assertion that the mark also connotes the Pony Express); *In re Ethnic Home Lifestyles Corp.*, 70 U.S.P.Q.2d 1156, 1158 (T.T.A.B. 2003) (holding ETHNIC ACCENTS merely descriptive of "entertainment in the nature of television programs in the field of home décor," in spite of applicant's argument that the pun also suggests a person who speaks with a foreign accent); *In re the Coleman Co., Inc.*, No. 85980011, 2013 WL 6664931, at *4-5 (T.T.A.B. Dec. 4, 2013) (THE COOLER COMPANY merely descriptive for coolers in spite of applicant's argument that "cooler" is a "play on the relative hipness of applicant and or applicant's thermal products").

415. *See, e.g.*, *In re Mayer-Beaton Corp.*, 223 U.S.P.Q. 1347, 1348 (T.T.A.B. 1984) (arguing unsuccessfully that BIKINEEZ for pantyhose with bikini briefs built in conveys two separate ideas, "bikini" and "ease"); *In re Somerset Soup Works, Inc.*, No. 85034559, 2014 WL 1827012, at *4 (T.T.A.B. Apr. 22, 2014) (arguing unsuccessfully that SOUP SINGLES for single-serving soups also conveys that the soup is for single, i.e., unmarried, people).

imagining how pleasant it might be to take a break with this new type of ‘BREAK & BAKE’ cookie dough.”⁴¹⁶

The TTAB has also found unitariness and declined to require disclaimer where the marks employed paronomasia, as in THE HARD LINE for mattresses and bed springs;⁴¹⁷ DARK OF THE COVENANT for beer;⁴¹⁸ and NO BONES ABOUT IT for fresh pre-cooked ham.⁴¹⁹ In some cases, the presence of pun sufficed for a finding of both unitariness and suggestiveness, as in SUGAR & SPICE for baked goods;⁴²⁰ THE FARMACY for retail store services featuring dietary supplements;⁴²¹ HAY DOLLY for a dolly for transporting hay;⁴²² and THE SOFT PUNCH for noncarbonated soft drinks.⁴²³ Infringement litigants have also argued that their use of double entendre rendered a mark unitary.⁴²⁴

In a number of infringement cases, factfinders have noted that the junior mark’s use of pun or parody makes the marks distinguishable and weighs against a likelihood of confusion. The Southern District of New York has opined that “a play on words . . . could dispel consumer confusion that might otherwise arise due to [the] facial similarity” of two marks;⁴²⁵ it cited the Seventh Circuit in deeming “the ultimate question” in the case at hand “whether the pun was sufficient to dispel confusion among the consuming public.”⁴²⁶ Courts and the TTAB followed this same logic in comparing junior user’s FEYONCÈ for apparel with famous musician BEYONCE;⁴²⁷ TIMMY

416. J & J Snack Foods Corp. v. Nestle USA, Inc., 149 F. Supp. 2d 136, 148 (D.N.J. 2001).

417. *In re Simmons Co.*, 189 U.S.P.Q. 352, 353 (T.T.A.B. 1976).

418. *In re Congregation Ale H. (Azusa Chapter) LLC*, No. 85744747, 2014 WL 5281074, at *6–7 (T.T.A.B. 2014).

419. *In re National Tea Co.*, 144 U.S.P.Q. 286, 287 (T.T.A.B. 1965).

420. *In re Colonial Stores Inc.*, 394 F.2d 549, 552 (C.C.P.A. 1968), *cited in* TMEP § 1213.05(c) (9th ed. Oct. 2013).

421. *In re Tea and Sympathy, Inc.*, 88 U.S.P.Q.2d 1062, 1064 (T.T.A.B. 2008), *cited in* TMEP § 1213.05(c) (9th ed. Oct. 2013).

422. *In re Priefert Mfg. Co., Inc.*, 222 U.S.P.Q. 731, 733 (T.T.A.B. 1984).

423. *In re Del. Punch Co.*, 186 U.S.P.Q. 63, 64 (T.T.A.B. 1975) (mark “possesses a degree of ingenuity in its phraseology which is evident in the double entendre that it projects,”), *cited in* TMEP § 1213.05(c) (9th ed. Oct. 2013).

424. *Todd Christopher Int’l v. Samy Salon Sys.*, No. 06-CV-2315, 2007 WL 843009, at *3 (M.D. Fla. Mar. 16, 2007) (“The defendants responded that the term FAT HAIR ‘0’ CALORIES should be viewed as a unitary expression, and that ‘0 CALORIES’ in conjunction with ‘FAT HAIR’ created double entendre and humor because the consumer would view fat in association with calories.”).

425. *Knowles-Carter v. Feyonce, Inc.*, 347 F. Supp. 3d 217, 225 (S.D.N.Y. 2018).

426. *Id.* at 226 (citing *Nike Inc. v. Just Did It Enters.*, 6 F.3d 1225, 1228 (7th Cir. 1993)).

427. *Knowles-Carter*, 347 F. Supp. 3d at 221 (“A rational jury might or might not conclude that the pun here is sufficient to dispel any confusion among the purchasing public.”).

HOLEDIGGER for pet perfume with TOMMY HILFIGER for human apparel and perfume;⁴²⁸ NEW YORK \$LOT EXCHANGE for casino services with NEW YORK STOCK EXCHANGE for a securities exchange;⁴²⁹ WORLD BEAT for a music-related news segment with WORLD BEAT for a record label;⁴³⁰ and DARK OF THE COVENANT for beer with COVENANT for wine,⁴³¹ finding that the junior users' readily identifiable puns weighed against a likelihood of confusion. Some but not all of those cases could be described as parody—the junior user's mark takes up and plays on the senior user's widely-recognized mark for comedy or commentary, thereby making it clear that the junior user's mark isn't owned by the senior user. In several other cases, where the junior mark's wordplay was based on reference to the senior user's mark, courts found that reference weighed toward a likelihood of confusion—as in CLOTHES ENCOUNTERS for clothes (too close to CLOSE ENCOUNTERS OF THE THIRD KIND for shirts and CLOSE ENCOUNTERS for perfume);⁴³² A.2 for steak sauce (playing on the better-known A1 for the same);⁴³³ and THINKER TOY (too similar to TINKERTOY, both for toys).⁴³⁴

Factfinders have also compared marks that make the same or different puns as one another. In one case, the TTAB held that use of the same pun contributed to two marks' similarity, upholding an opposition to register AMAIZEING CORN MAZE for corn maze entertainment services based on the opposer's registration for THE AMAZING MAIZE MAZE for the same services.⁴³⁵ The Board articulated its reasoning as follows:

[W]e find that the commercial impressions of the two marks are highly similar because the marks employ the same device or pun, i.e., a conflation of the words “maize,” “maze” and “amazing.” Even though the pun is constructed slightly differently in the two marks, it is the pun itself that purchasers who encounter the two marks at

428. *Tommy Hilfiger Licensing, Inc. v. Nat. Labs, LLC*, 221 F. Supp. 2d 410, 420 (S.D.N.Y. 2002).

429. *N.Y. Stock Exch., Inc. v. N.Y., N.Y. Hotel LLC*, 293 F.3d 550, 555 (2d Cir. 2002).

430. *Richards v. CNN, Inc.*, 15 F. Supp. 2d 683, 691 (E.D. Pa. 1998).

431. *In re Congregation Ale H. (Azusa Chapter) LLC*, No. 85744747, 2014 WL 5281074 (T.T.A.B. Sept. 9, 2014).

432. *Columbia Pictures Indus., Inc. v. Miller*, 211 U.S.P.Q. (BNA) 816, 820 (T.T.A.B. 1981) (affirming refusal to register mark for clothing: “Although the marks have different literal meanings, they conjure up the same thing since one is an obvious play on the other.”).

433. *Nabisco Brands, Inc. v. Kaye*, 760 F. Supp. 25 (D. Conn. 1991).

434. *CBS Inc. v. Morrow*, 708 F.2d 1579 (Fed. Cir. 1983) (reversing dismissal of opposition).

435. *Am. Maze Co. v. Shady Brook Farm, Inc.*, No. 110278, 2001 WL 403241, at *3 (T.T.A.B. Apr. 19, 2001).

different times are likely to recall, rather than any slight difference in construction of the pun. The presence of the pun in both marks contributes to the confusing similarity of the marks. For all of these reasons, we find that applicant's mark and opposer's mark, when viewed in their entireties, are similar rather than dissimilar.⁴³⁶

A district court in an infringement case between the owner of LETTUCE ENTERTAIN YOU and a related family of "lettuce" marks for catering and restaurant services and a defendant using LETTUCE MIX for a salad bar restaurant relied on similar reasoning, granting a preliminary injunction based in part because both parties used "lettuce" to pun on "let us," a pun that consumers would view as the "salient feature" of both plaintiff's and defendant's marks.⁴³⁷ Conversely, the TTAB reversed a refusal to register KNOTTY BRUNETTE for beer based on likelihood of confusion with NUTTY BREWNETTE, also for beer.⁴³⁸ The Board seemed to relish peeling back the layers of wordplay, where "nutty" referenced the flavor of the beer but the phrase is "also a double entendre for 'nutty brunette' to denote a dark-haired female with a 'nutty' or 'silly, strange, or foolish' personality," while "brewnette" also plays on "brew."⁴³⁹ Meanwhile, "knotty" is a homophone for "naughty," which the Board found "conveys the meaning of 'relating to or suggesting sex in usually a playful way.'"⁴⁴⁰ Because "the marks have their own unique humorous play on words that project separate meanings and distinct commercial impressions," confusion was unlikely to ensue.

5. *Zeugma*

Every alphabetical list of poetic devices seems to end with **ZEUGMA** [zoog-ma]: one word, usually a verb, does double-duty in a phrase, conveying two different meanings at the same time. Oft-cited examples from popular culture include Charles Dickens' "She looked at the object with suspicion and a magnifying glass" and Alanis Morissette's "You held your breath and the door for me." Zeugma is present in trademarks like BREAK HUNGER NOT

436. *Id.*

437. Lettuce Entertain You Enters., Inc. v. Leila Sophia AR, LLC, 703 F. Supp. 2d 777, 785 (N.D. Ill. 2010); *see also* Westwood One, Inc. v. Natl. Broad. Co., No. CV 82-976, 1982 WL 52140, at *2 (C.D. Cal. Apr. 9, 1982) (marks' use of the same pun contributed to their similarity: "[w]hile their literal meanings are opposites, their almost identical puns appear to be a much more important component of their value."); LTTB LLC v. Redbubble, Inc., 840 F. App'x 148, 152 (9th Cir. 2021) (holding plaintiff's uses of its registered trademarks that featured the pun LETTUCE TURNIP THE BEET were functional, not source-identifying.).

438. *In re* Twin Rest. IP LLC, No. 85934428, 2015 WL 4269975 (T.T.A.B. June 24, 2015).

439. *Id.* at *3-4.

440. *Id.* at *4.

PLATES for restaurant services;⁴⁴¹ HOLD BABIES NOT GRUDGES for clothing;⁴⁴² and BREAK DANCE NOT HEARTS for clothing.⁴⁴³ While explicit discussions of zeugma are rare, and none appear in infringement cases, all three of those applications were apparently treated as inherently distinctive and registered without disclaimers.⁴⁴⁴

The devices included in the “meaning” section—adynaton, allusion, anthimeria, paronomasia, zeugma—only scratch the surface when it comes to the many ways that trademarks build on cultural knowledge and generate new associations and goodwill. This section can perhaps be of use to advocates and factfinders as they peel back marks’ layers of meaning in order to assess distinctiveness, unitariness, and similarity and make predictions about consumer perception.

IV. CONCLUSION

This Article has compared trademarks to poems, and in so doing it has allowed trademarks to borrow the halo of art. Trademarks and poems are vessels for meaning: the words that comprise them have literal definitions, but readers also bring their own experiences, associations, and worldview to bear on a text.⁴⁴⁵ And there can be playfulness,⁴⁴⁶ creativity,⁴⁴⁷ even joy, in the

441. BREAK HUNGER NOT PLATES, Registration No. 5,857,565.

442. HOLD BABIES NOT GRUDGES, Registration No. 6,271,453.

443. BREAK DANCE NOT HEARTS, Serial No. 78,738,766 (abandoned on Apr. 13, 2009).

444. The intent-to-use-based application for the third mark, BREAK DANCE NOT HEARTS, was abandoned after publication and before registration.

445. Zahr K. Said, *A Transactional Theory of the Reader in Copyright Law*, 102 IOWA L. REV. 605, 626 (2017) (“Reader response theories shifted focus from the text to its impact on readers. At a minimum, readers were to be considered equally as important as the texts themselves. In some cases, the readers trumped the text.”). Said’s theory of the reader in copyright law draws heavily on the work of literary theorist Louise Rosenblatt, for whom “the reader is as important as the text in understanding how the text comes to produce meaning or exist in the world beyond its author.” *Id.* at 628.

446. For an example of that playfulness in the advertising context, see the discussion of the Honda ad in Linda M. Scott, *The Bridge from Text to Mind: Adapting Reader-Response Theory to Consumer Research*, 21 J. CONSUMER RSCH. 461, 471 (1994) (“I would argue that people attend to this Honda commercial largely for the fun that they have come to expect from the campaign, and, if they find out there is a big sale on Hondas, so much the better. But if we expect that people attend to the Honda commercials in order to find out pricing information on cars, and the fun of the commercial works only incidentally to form a positive attitude, then we have missed something fundamental about the motives for entering into textual experience.”).

447. Laura Heymann describes this sensation in relation to “naming” more generally, whether for a child, a pet, a product, or one’s social media handle: “Indeed, the act of naming may feel, to some, as if it involves much the same sort of creative process that, for others,

process and outcome of mark creation or selection. In the words of James Boyd White, “a poetic language . . . works by association and connotation, by allusion and reference, by the way words are put together to make a whole.”⁴⁴⁸ Our interpretation—of poems, of law, of trademarks—should be “rooted in the sense that meaning is complex, not unitary; that meaning is acquired partly from the language, partly from the text; and that meaning is not restatable in other terms . . . but must be reestablished whenever we talk.”⁴⁴⁹

But comparing trademarks to poems is in some ways a false equivalence. A poem is a form of expression, of high art; its creators use poetic devices in service of that art, to make the familiar new and forge genuine connection. Trademarks use devices not in service of art, but of commerce.⁴⁵⁰ In that way we might think of trademarks as fallen or debased poetry.

It is perhaps ironic, then, that the process by which factfinders consider poetic devices in trademark analyses seems to be primarily one of poetics, not hermeneutics. According to the typology set forth in Part I, engaging in poetics means starting from intuition and then seeking out evidence within a text to justify that initial impression. The preceding discussion has demonstrated that judges, examining attorneys, and mark owners seem more inclined to reason backward from the outcome they desire or deem intuitively correct and highlight poetic devices in support of that outcome than to begin from a neutral position and reason through the devices to the conclusion. In that respect, the poetics of trademark law is not just a discussion of devices but an illustration of legal realism in action.

attends writing a poem or composing a song: thoughtfulness about the message that the choice of name will communicate; the incorporation of cultural and other references; decisions about rhythm, meter, spelling, and other prosodic elements; and the purposeful claiming of that act of creation as one’s own.” Laura A. Heymann, *A Name I Call Myself: Creativity and Naming*, 2 U.C. IRVINE L. REV. 585, 588–89 (2012).

448. JAMES BOYD WHITE, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, in HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 123 (1985).

449. WHITE, *supra* note 448, at 127.

450. See *In re Trade-Mark Cases*, 100 U.S. 82, 93–94 (1879). Psychological research has “highlighted emotional responses to rhyme and better memory recall as a result of alliteration.” Awel Vaughan-Evans, Robat Trefor, Llion Jones, Peredur Lynch, Manon W. Jones & Guillaume Thierry, *Implicit Detection of Poetic Harmony by the Naïve Brain*, 7 FRONT. PSYCHOLOGY 1859, 1859 (citing Christian Obermeier, Winfried Menninghaus, Martin von Koppenfels, Tim Raettig, Maren Schmidt-Kassow, Sascha Otterbein & Sonja A. Kotz, *Aesthetic and Emotional Effects of Meter and Rhyme in Poetry*, 4 FRONTIER PSYCH. 10, 10 (2013); David Ian Hanauer, *The Task of Poetry Reading and Second Language Learning*, 22 APPLIED LINGUISTICS, 295 (2001); R. Brooke Lea, David N. Rapp, Andrew Elfenbein, Aaron D. Mitchel & Russell Swinburne Romine, *Sweet Silent Thought: Alliteration and Resonance in Poetry Comprehension*, 19 PSYCH. SCI. 709 (2008).).

Every word mark incorporates rhetorical devices or strategies to a greater or lesser extent. Not every mark is a rhyming MELLO YELLO or an alliterative TEN TON TITMOUSE, but even the blandest marks—GENERAL MOTORS, ALL-BRAN, AMALGAMATED BANK—reflect rhetorical choices that shape consumer perception. That rhetorical structure is how trademarks function: they conjure up and serve as a repository for associations, connotations, and ideas; they represent and stand in for a product or a company. The trope in which one attribute or idea stands in for another,⁴⁵¹ like “the White House” for the presidency or “suits” for businesspeople, is called **METONYMY** [meh-TOH-nih-mee].⁴⁵² Metonymy is not just one more poetic device to add to the list; instead, it encapsulates precisely what trademarks do.⁴⁵³ Enabling readers to understand one concept in terms of another by providing a single term or symbol that stands in for a whole set of associations is trademarks’ *raison d’être*. Poetic devices can lend us the vocabulary to articulate how marks do what they do—even if a trademark is something more insidious than a tiny poem.

451. Bernard Dupriez, *Metonymy*, in *A DICTIONARY OF LITERARY DEVICES: GRADUS A-Z* 280–284 (Albert Halsall trans., Univ. of Toronto Press 1991).

452. *See, e.g.*, Warner Bros. Co. v. Jantzen, Inc., 150 F. Supp. 531, 533 (S.D.N.Y. 1956) (“Although there was abundant evidence at the trial showing that the women’s garment trade and its advertising agencies make extensive use of the literary device of metonymy to transfer to the product being purveyed the qualities which it is hoped will be engendered or improved in the wearer, utilization of this literary device cannot act to make descriptive a word which itself is not.”), *aff’d*, 249 F.2d 353 (2d Cir. 1957); *In re Expand Beyond Corp.*, No. 76189419, at *7 (T.T.A.B. May 28, 2004) (“Applicant argues that COMMAND CENTER is not merely descriptive of the goods [computer software] because it is a ‘metonymy,’ a figure of speech wherein one thing is used to represent another.”).

453. Heymann, *supra* note 392, at 1346–47 (“Trademarks are . . . used as a substitute for the corporation itself . . . such as the use of ‘Budweiser’ as a substitute for ‘the beer made by the Anheuser-Busch company’ (as in ‘I’d like a Budweiser, please’)”); *see also* McQuarrie & Mick, *supra* note 35, at 433 (offering Buick’s use of “the imports are getting nervous” as an example of metonym in advertising). Dustin Marlan makes a similar argument, characterizing all inherently distinctive trademarks as metaphors. Marlan, *supra* note 59, at 770–71 (“Under the imagination test, a word mark is considered *inherently* distinctive if the mark is a *verbal* metaphor (i.e., a figure of speech) that suggests qualities, values, or aesthetics relating to its associated product or service Because marks are symbols—and the *sine qua non* of a symbol is its figurative quality—trademark law properly uses a figure of speech as its doctrinal trigger in evaluating the distinctiveness of word marks.”). Robert Frost, meanwhile, has argued that “[poetry] is metaphor, saying one thing and meaning another, saying one thing in terms of another Poetry is simply made of metaphor.” Robert Frost, *The Constant Symbol, prefatory essay in THE POEMS OF ROBERT FROST* (1946). Other scholars have posited that metonymy and metaphor are not limited to the worlds of literature and language, but instead correspond to “a fundamental mode of thought characterized as understanding one concept ‘in terms of another.’” GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 5 (1980) (cited in Marlan, *supra* note 59, at 772).

