

The Arbitrary Myth: Challenging Trademark Law’s Elevation of Arbitrary Marks

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ABSTRACT

Under its Abercrombie spectrum, trademark law grants “arbitrary” marks—like APPLE for computers or AMAZON for retail—its highest form of protection, treating them as equivalent to fanciful marks such as KODAK or EXXON. This Article challenges that foundational assumption. Unlike fanciful marks, which are invented and enjoy strong source-identifying capacity due to their novelty, arbitrary marks draw on existing language through catachresis: a rhetorical move that repurposes a common word in novel commercial context. In doing so, arbitrary marks generate layered metaphoric meanings that more closely resemble the associative leaps of suggestive marks, rather than the invented distinctiveness of fanciful ones.

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Empirical research supports this reframing. Studies show that arbitrary marks underperform in measures of consumer recognition and brand clarity, casting doubt on their presumed strength. Yet despite these shortcomings, they remain doctrinally privileged—largely, this Article argues, because the trademark system needs them. With trademark depletion and congestion accelerating, arbitrary marks offer a convenient legal loophole, allowing brand owners to appropriate familiar language without the evidentiary burden of proving secondary meaning. As a result, brand owners are incentivized to choose arbitrary marks for their high protectability grades, often to their own market detriment.

This dynamic also carries broader cultural costs. When ordinary words like AMAZON or APPLE become proprietary, they displace shared meanings, subordinating public language to private branding. Trademark law, in this way, channels cultural symbols into commercial use to keep pace with semiotic demand. This Article argues for a doctrinal recalibration: arbitrary marks should be treated as presumptively weaker than fanciful ones—at or around the level of suggestive marks. More broadly, this inquiry exposes the conceptual fragility of the Abercrombie spectrum itself, and calls for a more honest reckoning with the values trademark law protects—and those it displaces.

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I.

INTRODUCTION

*It need hardly be added that fanciful or arbitrary terms enjoy all the rights accorded to suggestive terms as marks—without the need of debating whether the term is “merely descriptive” and with ease of establishing infringement.*¹

Lawyers, judges, and scholars love taxonomies. We build elaborate frameworks—like trademark law’s *Abercrombie* spectrum—to impose order on legal chaos. But what happens when the categories we rely on begin to unravel? This Article explores that question through a critical examination of the so-called “arbitrary mark,” whose privileged place in trademark law may rest more on legal myth than linguistic, commercial, or cultural reality.

The *Abercrombie* spectrum ranks marks by their inherent distinctiveness—that is, their ability to identify source without proof of secondary meaning.² At the top are fanciful marks like KODAK or EXXON: coined terms with no prior meaning.³ Treated doctrinally as their near equals are arbitrary marks, like APPLE for computers or CAMEL for cigarettes—real words used in contexts deemed unrelated to their common meanings.⁴ Below them lie suggestive marks, such as COPPERTONE (sunscreen) or GREYHOUND (bus service), which require a metaphorical or conceptual leap from word to product.⁵ Though all three categories are presumed inherently distinctive, courts often treat arbitrary marks as among the very strongest, placing them alongside fanciful marks at the apex of trademark strength.⁶

1. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 11 (2d Cir. 1976).

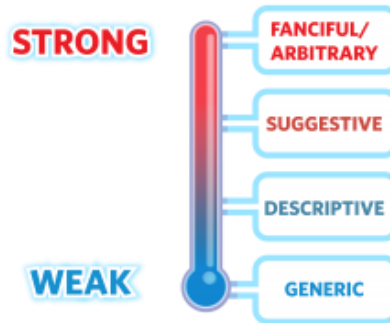
2. *Id.* at 4; *infra* Part II.

3. *Abercrombie*, 537 F.2d at 11; *but see* Jake Linford, *Are Trademarks Ever Fanciful?*, 105 GEO. L.J. 731, 735 (2017) [hereinafter *Fanciful?*] (finding that many fanciful marks are not truly coined because they employ sound meaning).

4. *Abercrombie*, 537 F.2d at 11; *see also* Shivam Adarsh, Elliot Ash, Stefan Bechtold, Barton Beebe & Jeanne Fromer, *Automating Abercrombie: Machine-Learning Trademark Distinctiveness*, J. EMPIRICAL LEGAL STUD. 826, 830 (2024) (“Arbitrary and fanciful marks are understood to be the most highly inherently distinctive with suggestive marks understood to be less inherently distinctive.”).

5. *Abercrombie*, 537 F.2d at 10; *but see* Jake Linford, *The False Dichotomy Between Suggestive and Descriptive Trademarks*, 76 OHIO ST. L.J. 1367, 1409 (2015) [hereinafter *Dichotomy*] (explaining that suggestive marks have descriptive qualities given linguistic evidence).

6. *Strong Trademarks*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trademarks/basics/strong-trademarks> (last visited Mar. 19, 2026) (“Strong trademarks are typically creative or unique, setting you apart from your competitors.”); Jeanne Fromer, *Against Secondary Meaning*, 98 NOTRE DAME L. REV. 211, 228 (2022) (“Conceptual strength is based on where a valid mark falls on the *Abercrombie* spectrum: arbitrary and fanciful marks are the strongest, followed by suggestive marks, with descriptive marks as the weakest.”).

Figure 1: Guide to the Strength of Trademark Terms⁷

But should they be?

This Article contends that the legal treatment of arbitrary marks as equivalent to fanciful marks is—ironically—arbitrary. Unlike fanciful marks, which draw their strength from pure novelty (and often sound symbolism),⁸ arbitrary marks function through a rhetorical device known as *catachresis*: the metaphorical displacement of a familiar word into an unfamiliar commercial context.⁹ In doing so, they are not empty vessels, but instead generate associative or symbolic meaning.¹⁰ In this way, arbitrary marks more closely resemble suggestive marks, which also operate via conceptual metaphor—a cognitive process where meaning is generated by mapping characteristics from one domain (the “source”) onto another (the “target”).¹¹ Once we acknowledge the layered meanings in marks like AMAZON (vast, wild, overflowing),¹² NIKE (victory,

7. *Strong Trademarks*, *supra* note 6.

8. Linford, *Fanciful?*, *supra* note 3.

9. *Infra* Section III.A.

10. Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 671 (2004) [hereinafter *Semiotic Analysis*]; Dustin J. Marlan, *Visual Metaphor and Trademark Distinctiveness*, 93 WASH. L. REV. 767, 797 (2018) [hereinafter *Visual Metaphor*].

11. Marlan, *Visual Metaphor*, *supra* note 10, at 772 (citing GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 5 (1980)); CHARLES FORCEVILLE, *PICTORIAL METAPHOR IN ADVERTISEMENTS* 4–6 (1990) (additional citations omitted); see *Coach Servs., Inc. v. Triumph Learning LLC*, 96 U.S.P.Q.2d 1600, at *18 (T.T.A.B. 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.”).

12. Compare Steve Harvey, *Metaphor Brand Names: The Pros and Cons of Metaphorical Business Names*, FABRIK BRANDS (Feb. 15, 2023), <https://fabrikbrands.com/branding-matters/brand-naming/metaphor-brand-names-metaphorical-business-names/> (“Amazon is the moniker for the world’s largest and most popular online marketplace. The name connects to the ‘Amazon’ river, one of the biggest in the world, which helps to highlight the sheer size and diversity of the platform. With this moniker, Amazon tells its customers they can find a wide range of items for a huge selection of different needs.”), with Harald Sioli, *The Amazon and Its Main Affluents: Hydrography, Morphology of the River Courses, and River Types*, in *THE AMAZON* 127, 127 (Harald Sioli ed., 1984) (“The geological history of Amazonia . . . resulted in the formation of the greatest river system on earth.”).

triumph, aspiration),¹³ or CADILLAC (a French explorer and mythic origin of Detroit), the sharp boundary between “arbitrary” and “suggestive” begins to blur.

Empirical research complicates the traditional hierarchy further. Fanciful marks tend to benefit from high consumer recognition due to their uniqueness and sound structure.¹⁴ Arbitrary marks, by contrast, frequently underperform on consumer measures of distinctiveness and brand association relative to other marks on the spectrum.¹⁵ Their catachrestic qualities may obscure, rather than clarify, source.¹⁶ Indeed, the meaning arbitrary marks carry is typically cultural rather than product-relevant—and as branding research confirms, “meaningful and suggestive words—which communicate directly relevant product characteristics—achieve better consumer recall of advertised product characteristics.”¹⁷ These findings directly challenge the long-standing assumption that arbitrary marks are inherently strong.

And yet trademark law continues to elevate them. Why? In part, because it believes it must. As empirical research has demonstrated, we are running out of trademarks, especially in the suggestive and descriptive range, where communicative accuracy and commercial appeal reside.¹⁸ Arbitrary marks offer

13. Compare Colleen Ryan, *Brand Metaphors Are Powerful, Marketers Need to Treat Them as Such*, THE RESEARCH AGENCY (Oct. 15, 2024), <https://www.theresearchagency.com/insights/brand-metaphors-need-terms-and-conditions> (“Then there’s Nike, a brand named after the Greek Goddess of victory. The name is a metaphor for success and achievement, denoting feelings of athletic success to a primed audience of activewear fans.”), with Megan Mayfield, *The Winged Victory: Nike in Ancient Greece*, 20 STUDIA ANTIQUA 47, 47 (2021) (“Often seen in association with gods such as Zeus or Athena . . . Nike is an immensely important character in the story of Greek history, religion, and cultural thought.”).

14. Richard R. Klink, *Creating Meaningful New Brand Names: A Study of Semantics and Sound Symbolism*, 9 J. MKTG. THEORY & PRAC. 27, 27 (2001) [hereinafter *Creating Meaningful*] (indicating that products with brand names using sound symbolism to convey product-related information are liked better by consumers and positioned more strongly in their minds); Richard R. Klink, *Creating Brand Names With Meaning: The Use of Sound Symbolism*, 11 MKTG. LETTERS 5, 5 (2000) [hereinafter *Creating Brand Names*] (“If brand sounds can convey meaning, marketers will have a powerful set of tools, i.e. brand sounds, to better distinguish their products in an overcrowded marketplace.”).

15. Chiranjeev S. Kohli & Rajneesh Suri, *Brand Names That Work: A Study of the Effectiveness of Different Types of Brand Names*, 10 MARKET. MGMT. J. 112, 119 (2000) [hereinafter *Brand Names*] (“Recognition was high for descriptive, suggestive, and coined names. It was low for arbitrary names.”).

16. *Infra* Part IV.

17. Carsten Fink, Christian Helmers, Julian Kolev & Andrew A. Toole, *On your Marks! Trademark Races and their Impact on Product Introductions* (U.S. Pat. & Trademark Off., Economic Working Paper No. 2024-6, 2024), at 6; see Chiranjeev S. Kohli, Katrin R. Harich & Lance Leuthesser, *Creating Brand Identity: A Study of Evaluation of New Brand Names*, 58 J. BUS. RSCH. 1506, 1507 (2005) (“A meaningful name is one that conveys relevant information about the product, or an important product attribute, or establishes a connection between the product and the product category. Marketing practice, as well as theoretical and empirical research, has suggested that meaningful brand names are easier to remember and recall than non-meaningful brand names, and also that meaningful brand names are generally preferred over non-meaningful brand names” (citations omitted)); Kevin Lane Keller, Susan E. Heckler & Michael J. Houston, *The Effects of Brand Name Suggestiveness on Advertising Recall*, 62 J. MKTG. 48, 49 (1998) (“[O]ne key consideration in choosing a brand name is the extent to which it conveys descriptive or persuasive information.”).

18. Compare Barton Beebe & Jeanne C. Fromer, *Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion*, 131 HARV. L. REV. 945, 951 (2018)

a convenient doctrinal workaround: familiar words repurposed without the burden of proving secondary meaning, offering a faster path to protection. This incentivizes mark owners, especially startups, to choose arbitrary marks not because they are clearer or better, but because they are legally efficient. In an overcrowded semiotic marketplace, arbitrary marks become linguistic filler. Brands may thus choose arbitrary marks to their economic detriment.

This workaround carries cultural cost as well. When NIKE no longer evokes a goddess of victory but simply a swoosh, or AMAZON no longer suggests a river but a shipping empire, something is lost. Arbitrary marks do more than designate source; they overwrite symbolic and archetypal meaning.¹⁹ In doing so, trademark law privatizes public language, transforming shared cultural references into exclusive commercial property.²⁰ This process, which this Article calls *cultural catachresis*,²¹ reflects a deeper tension between trademark protection and the symbolic commons.²²

Drawing on linguistics, semiotics, and empirical brand research, this Article argues that arbitrary marks should be doctrinally recontextualized as presumptively weaker, more akin to suggestive marks than fanciful ones. Whether through categorical recalibration, adjustments to the strength analysis in infringement litigation, or conditioning apex-level protection on secondary meaning, such a shift would better reflect how arbitrary marks actually function

[hereinafter *Running Out of Trademarks*] (“The supply of word marks that are at least reasonably competitively effective as trademarks is finite and exhaustible. This supply is already severely depleted.”) and Fink et al., *On Your Marks!*, *supra* note 17, at 1 (“While the supply of new letter combinations and hence word marks is theoretically unbounded, the supply of ‘competitively effective’ marks is not.”), with Kohli & Suri, *Brand Names*, *supra* note 15, at 5 (“An examination of brand names registered with the PTO indicates that a vast majority of brand names are either descriptive or suggestive. Fewer brand names are arbitrary or coined.”).

19. Katya Assaf, *The Dilution of Culture and the Law of Trademarks*, 49 IDEA 1, 17 (2008) [hereinafter *Dilution of Culture*] (“Because of their symbolic power, cultural icons are especially susceptible to use in advertising . . . the very act that strengthens the advertising message weakens the power of the employed cultural sign.”); see Sut Jhally, *Advertising at the Edge of the Apocalypse [Transcript]*, MEDIA EDUC. FOUND. (2017), <https://www.mediaed.org/transcripts/Advertising-at-the-Edge-of-the-Apocalypse-Transcript.pdf> (“[T]he consumer mindset that advertising celebrates is feeding an endlessly accelerating cycle of consumption that is literally pushing the planet to the brink of collapse.”).

20. Assaf, *Dilution of Culture*, *supra* note 19, at 3 (“[I]t is apparent that creating meaningful cultural signs out of commercial trademarks intensifies our culture’s urge toward consumption and materialism.”).

21. Cf. BILL ASHCROFT, GARETH GRIFFITHS & HELEN TIFFIN, *POSTCOLONIAL STUDIES: THE KEY CONCEPTS* 51 (4th ed. 2025) (discussing how in postcolonial theory, catachresis “is the process by which the colonized take and reinscribe something that exists traditionally as a feature of imperial culture, such as parliamentary democracy” and transform it in relation to their own culture or worldview).

22. See Rosemary J. Coombe & Jonathan Cohen, *The Law and Late Modern Culture: Reflections on Between Facts and Norms from the Perspective of Critical Cultural Legal Studies*, 76 DENV. L. REV. 1029, 1049 (explaining that trademark, like other IP regimes, “creat[es] the incentives for the mass dissemination of symbolic forms which ensures their ubiquity in daily life.”).

in language, commerce, and culture. They are surely distinctive trade symbols, but not the *very strong* marks trademark law currently imagines.²³

More broadly, this Article joins a growing body of scholarship questioning the internal coherence of the *Abercrombie* spectrum.²⁴ Alongside prior critiques of the spectrum's other categories—generic,²⁵ descriptive/suggestive,²⁶ and fanciful²⁷—this Article takes up the final category, arbitrary marks, to round out that line of inquiry. The taxonomy that trademark law depends on is itself a kind of legal fiction no less arbitrary than the marks it purports to classify.

This Article proceeds as follows.

Part II surveys the *Abercrombie* spectrum and its legacy. It lays the groundwork by describing the spectrum's doctrinal evolution and conceptual foundations, before turning to a review of relevant trademark theory and scholarly commentary on trademark strength and distinctiveness. Through its literature review, this Part frames the under-theorized nature of arbitrary marks and introduces the Article's broader critique that the *Abercrombie* framework embeds unexamined assumptions about the strength of linguistic categories.

Part III scrutinizes the category of arbitrary marks from rhetorical, empirical, and cultural perspectives. Rhetorically, it shows how arbitrary marks operate through catachresis—the figurative repurposing of familiar words—and therefore carry layered meanings that function more like suggestive marks than the semantically empty fanciful marks with which doctrine often aligns them. Empirically, Part III draws on consumer research demonstrating that arbitrary marks underperform on measures of recall, recognition, and likeability, trailing not only fanciful marks but also suggestive and even descriptive ones. Culturally, Part III demonstrates how the doctrinal preference for arbitrary marks incentivizes the privatization of shared cultural symbols—e.g., gods, rivers, myths, tribes, and geographic signifiers—converting public meaning into

23. Marlan, *Visual Metaphor*, *supra* note 10, at 771 (citing 4 RUDOLF CALLMANN, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES 17:1) (“Because marks are symbols—and the sine qua non of a symbol is its figurative quality—trademark law properly uses [metaphor] as its doctrinal trigger in evaluating the distinctiveness of word marks.”).

24. See, e.g., Linford, *Fanciful?*, *supra* note 3; Linford, *Dichotomy*, *supra* note 55; Jake Linford, *A Linguistic Justification for Protecting “Generic” Trademarks*, 17 YALE J.L. & TECH 110 (2015) [hereinafter *Generic*]; Thomas R. Lee, Eric D. DeRosia & Glenn L. Christensen, *An Empirical and Consumer Psychology Analysis of Trademark Distinctiveness*, 41 ARIZ. ST. L. J. 1033, 1038 (2009) (demonstrating that “descriptive marks are no less source-indicating than suggestive, arbitrary, and fanciful marks” and “that it is the non-lexical cues of typical trademark use (e.g., the location and size of the mark) that cause consumers to find descriptive marks to be source-indicating.”); Joseph S. Miller, *Abercrombie 2.0—Can We Get There from Here? Thoughts on “Suggestive Fair Use,”* 77 OHIO ST. L.J. FURTHERMORE 1 (2016); Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020 (2005); Timothy Denny Greene & Jeff Wilkerson, *Understanding Trademark Strength*, 16 STAN. TECH. L. REV. 535 (2013); Thomas Y. Lu, *Categorization of Word-Mark Distinctiveness: Poor Reasoning in United States Federal Courts*, 14 N.Y.U. J. INTELL. PROP. & ENT. L. 132 (2025).

25. See generally Linford, *Generic*, *supra* note 24.

26. See generally Linford, *Dichotomy*, *supra* note 5.

27. See generally Linford, *Fanciful?*, *supra* note 3.

commercial property and imposing underexamined costs on the symbolic commons.

Part IV argues for a doctrinal recalibration of the *Abercrombie* spectrum's upper tiers. Drawing on the rhetorical, empirical, and cultural analysis of Part III, it contends that fanciful marks are categorically stronger than arbitrary ones, which belong at or near the suggestive tier. This Part then identifies the most practical doctrinal vehicles for that recalibration: adjusting how courts assess conceptual strength within the likelihood-of-confusion analysis, and conditioning apex-level protection on demonstrated secondary meaning while preserving accessible baseline registrability. Finally, this Part situates the critique of arbitrary marks within a broader challenge to the *Abercrombie* framework itself, arguing that the spectrum is less a map of linguistic reality than a legal fiction—one whose instability is thrown into sharp relief by the emerging practice of outsourcing distinctiveness judgments to generative AI.

II.

THE *ABERCROMBIE* FRAMEWORK AND ITS LEGACY

This Part sets the stage by introducing the *Abercrombie* spectrum, the dominant taxonomy for assessing trademark distinctiveness. While the spectrum purports to reflect a linear scale of conceptual strength, it rests on a series of unproven assumptions. In particular, the placement of arbitrary marks near the top of the scale assumes a kind of strength that lacks theoretical and empirical support. This Part introduces the doctrinal foundation of the spectrum and reviews scholarly attempts to grapple with its implications, highlighting how its other categories—generic, descriptive, suggestive, and fanciful—have already been subject to critical scrutiny.

A. *The Abercrombie Spectrum*

A trademark is a word, name, symbol, or device used to identify and distinguish the goods or services of one party from those of others.²⁸ While trademarks often include visual elements (such as Nike's iconic swoosh), this Article's analysis focuses on word marks, like NIKE, which are the most common form of trademark.²⁹ When consumers encounter the word NIKE on athletic apparel, they immediately associate it with a particular source. This source-identifying function lies at the heart of trademark law. In doing so,

28. See 15 U.S.C. § 1127; *In re Trade-Mark Cases*, 100 U.S. 82, 92 (1879); 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 3:1 (5th ed., 2024); see also Deborah R. Gerhardt & Jon P. McClanahan, *Do Trademark Lawyers Matter?*, 16 STAN. TECH. L. REV. 583, 584 (2013) ("Trademarks are the symbols that embody the story of an organization.").

29. Rebecca Tushnet, *Looking at the Lanham Act: Images in Trademark and Advertising Law*, 48 Hous. L. Rev. 861, 862 (2011) ("Words are the prototypical regulatory subjects for trademark and advertising law, despite our increasingly audiovisual economy."). There are likely applications of this thesis to non-verbal marks—trade dress, colors, and logo/designs—though these must be left to other works due to time and space constraints.

trademarks signal more than marketplace origin.³⁰ They also communicate messages about quality, reliability, and brand identity, given that “consumers make substantial cognitive and economic investments in marks.”³¹

From an economic perspective, trademarks help reduce search costs and lessen consumer confusion.³² It is easier for consumers to distinguish NIKE from REEBOK when each brand is tied to a distinctive and recognizable mark. But trademarks serve more than an efficiency-based function. They also carry symbolic and emotional value.³³ NIKE, for example, invokes not only a company, but the Greek goddess of victory—connoting strength, athleticism, and excellence.³⁴ These intangible associations add value beyond the product or service itself.

To preserve the communicative and economic function of trademarks, the law grants exclusive rights to those marks that are sufficiently *distinctive*.³⁵ A trademark must distinguish the source of a product from others in the marketplace to qualify for protection. That distinctiveness can be either inherent (i.e., based on the nature of the mark itself) or acquired (i.e., based on how the public comes to perceive the mark over time).³⁶

This Article focuses on *inherent distinctiveness*, which enables trademark protection without the evidentiary showing of acquired distinctiveness (secondary meaning).³⁷ The more closely a word aligns with the goods or services it denotes, the less likely it is to be considered inherently distinctive.³⁸ Such marks must then earn protectability through acquired distinctiveness, a

30. ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 174 (1998) (“The legal basis for the claim that [a trademark] is a form of property is the old mercantile notion of goodwill The positive value of one’s trade is congealed in the exchange value of the sign.”).

31. Deborah R. Gerhardt, *Consumer Investment in Trademarks*, 88 N.C. L. REV. 427, 432 (2010).

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

33. Marlan, *Visual Metaphor*, *supra* note 10, at 789–94 (discussing the symbolic nature of trademarks); see Beebe, *Semiotic Analysis*, *supra* note 10, at 680.

34. *Supra* note 13 and accompanying discussion; *infra* notes 176–179.

35. 15 U.S.C. § 1052(f) (“[N]othing in this chapter shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant’s goods in commerce.”); *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 207 (2000) (evaluating whether a mark “is distinctive, and therefore protectable.”).

36. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 769 (1992) (“The general rule regarding distinctiveness is clear: An identifying mark is distinctive and capable of being protected if it *either* (1) is inherently distinctive *or* (2) has acquired distinctiveness through secondary meaning.”) (citing Restatement (Third) of Unfair Competition § 13).

37. *Wal-Mart Stores*, 529 U.S. at 210 (quoting *Two Pesos*, 505 U.S. at 768).

38. Barton Beebe & C. Scott Hemphill, *The Scope of Strong Marks: Should Trademark Law Protect the Strong More than the Weak?*, 92 N.Y.U. L. REV. 1339, 1346 (2017) (“In general, a mark is inherently distinctive in inverse proportion to the degree to which it describes the product with which it is used.”).

slow and costly process.³⁹ In contrast, marks with greater conceptual distance from the product they name are presumed stronger from the outset.⁴⁰ Inherent distinctiveness, then, is a gatekeeping concept, shaping both registration and enforcement outcomes.⁴¹ While acquired distinctiveness remains important and will be touched on in later Parts, it falls largely outside the scope of this Article's core analysis.⁴²

The primary doctrinal framework for evaluating the inherent distinctiveness of a verbal trademark is the *Abercrombie* spectrum. This controversial spectrum was introduced by Judge Henry Friendly a half century ago in *Abercrombie & Fitch Co. v. Hunting World, Inc.* and is now foundational to U.S. trademark jurisprudence.⁴³ The spectrum is used to determine both a word mark's "eligibility to trademark status" (i.e., inherent distinctiveness or validity) as well as "the degree of protection accorded" (i.e., the mark's conceptual strength, or scope).⁴⁴ Judge Friendly stated: "The cases, and in some instances the Lanham Act, identify four different categories of terms with respect to trademark protection. Arrayed in an ascending order . . . these classes are (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful."⁴⁵

As Barton Beebe describes it, Friendly's spectrum represents a "hierarchy of figurativeness,"⁴⁶ sorting marks into categories based on their relationship to the underlying product. These categories range from unprotectable (generic) to presumptively protectable (arbitrary, fanciful).⁴⁷ But as Judge Friendly cautioned in *Abercrombie*, the boundaries between these categories are far from rigid:

The lines of demarcation . . . are not always bright. Moreover, the difficulties are compounded because a term that is in one category for a particular product may be in quite a different one for another, because a term may shift from one category to another in light of differences in

39. See Dustin Marlan, *Servicing Trade Dress: Demystifying the Tertium Quid*, 58 U.C. DAVIS L. REV. 1513, 1516 (2025); Mark A. Lemley & Mark P. McKenna, *Trademark Spaces and Trademark Law's Secret Step Zero*, 75 STAN. L. REV. 1, 4 (2023).

40. Beebe & Hemphill, *supra* note 38.

41. See *Two Pesos*, 505 U.S. at 769 ("Marks which are merely descriptive of a product are not inherently distinctive . . . However, descriptive marks may acquire the distinctiveness which will allow them to be protected under the [Lanham] Act.").

42. For an overview and critical analysis of the doctrine, see Fromer, *Against Secondary Meaning*, *supra* note 6.

43. *Abercrombie*, 537 F.2d at 9; see Mark McKenna, *Teaching Trademark Theory Through the Lens of Distinctiveness*, 52 ST. LOUIS UNIV. L.J. 843, 846 (2008) ("The concept of distinctiveness . . . overlaps significantly with that of trademark strength.").

44. *Abercrombie*, 537 F.2d at 9 (emphasis added).

45. *Id.*

46. Beebe, *Semiotic Analysis*, *supra* note 10, at 670.

47. Lu, *supra* note 24, at 134 ("[T]he arbitrary mark possesses the highest level of distinctiveness while the generic mark has no distinctiveness and thus merits no protection under trademark law.").

usage through time, because a term may have one meaning to one group of users and a different one to others, and because the same term may be put to different uses with respect to a single product.⁴⁸

Indeed, Friendly envisioned the spectrum as a flexible diagnostic tool, not a rigid taxonomy. Yet over time, courts and the U.S. Patent & Trademark Office (USPTO) have largely concretized the *Abercrombie* spectrum, treating its categories as fixed and hierarchical.⁴⁹ This doctrinal reification obscures the spectrum's original intent and the fluidity of how language operates in branding.

At the spectrum's most protectable end lie, together, fanciful and arbitrary marks.⁵⁰ Once upon a time, "fanciful and arbitrary" were thought of as a singular category and used in tandem to mean marks unrelated to a product or service. The two categories now have discrete meanings.⁵¹ A fanciful mark is a coined term with no preexisting meaning (e.g., KODAK, EXXON). An arbitrary mark, by contrast, consists of a familiar word applied in an unrelated context (e.g., APPLE for computers, SHELL for oil, CAMEL for cigarettes, AMAZON for a digital marketplace).⁵² As the McCarthy treatise explains:

Arbitrary means that the ordinary meaning of the word mark as applied to these goods i[s] used in an arbitrary and non-descriptive sense. For example, IVORY soap is not made of ivory, OLD CROW whiskey is not distilled from old crows, and ROYAL baking powder is not used exclusively by royalty.⁵³

48. *Abercrombie*, 537 F.2d at 9.

49. Lee et al., *supra* note 24, at 1040 ("In each of the Supreme Court's recent forays into the Lanham Act, the Court has embraced the *Abercrombie* categories as settled points of doctrinal orthodoxy."); see *supra* note 6.

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

51. See, e.g., *Saxlehner v. Eisner & Mendleson Co.*, 179 U.S. 19, 30 (1900) (determining that the mark "Hunyadi," in reference to a Hungarian hero, was "being neither descriptive nor geographical, but purely arbitrary and fanciful as applied to medicinal waters, was the proper subject of a trademark."); *Q-Tips, Inc. v. Johnson & Johnson*, 206 F.2d 144, 146–47 (3d Cir. 1953) (finding "Q" to be "purely arbitrary and fanciful" and that the word "tips" is somewhat descriptive, but used in an "unusual way."); *Stork Restaurant v. Sahati*, 166 F.2d 348, 355 (9th Cir. 1948) ("The Stork Club" is a trade name that, in the language of the books, might well be described as 'odd,' 'fanciful,' 'strange', and 'truly arbitrary'. It is in no way descriptive of the [plaintiff's] night club, for in its primary significance it would denote a club for storks."); *Maternally Yours v. Your Maternity Shop*, 234 F.2d 538, 544 (2d Cir. 1956) (finding mark MATERNALLY YOURS to be "arbitrary and fanciful," "even though it suggested to some extent the line of business.").

52. See, e.g., *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 1340 (Fed. Cir. 2004) (defining an arbitrary mark as "a known word used in an unexpected or uncommon way."); Linford, *Fanciful?*, *supra* note 3, at 749–50 n.117 ("[A]n arbitrary mark is not a new lexical unit, merely a new meaning for an existing word.") (citing Beebe, *Semiotic Analysis*, *supra* note 10, at 674).

53. 3 MCCARTHY, *supra* note 28, § 11:11 ("What are arbitrary word marks?").

Although a minority of courts and trademark professionals suggest fanciful marks may enjoy marginally greater strength,⁵⁴ the prevailing view treats arbitrary and fanciful marks as doctrinally equivalent.⁵⁵ Both are presumed to be inherently distinctive, and both are afforded the broadest protection against infringement.⁵⁶ Under the common rationale for this equivalence, arbitrary marks are considered “similar to fanciful marks in that they neither suggest any mental image of the associated product nor describe it in any way.”⁵⁷ This Article’s following Parts take issue with that claim. But first, some more background on the other *Abercrombie* categories will be useful.

Moving down the spectrum, suggestive marks (e.g., COPPERTONE for sunscreen) metaphorically hint at product qualities and remain inherently distinctive, though they typically receive narrower protection because they are thought of as lower in strength.⁵⁸ Descriptive marks (e.g., TOTAL MOISTURE for hair conditioner) are not protectable unless they acquire secondary meaning in the marketplace.⁵⁹ Even then, their scope of protection is relatively weak.⁶⁰

54. See, e.g., *Amstar Corp. v. Domino’s Pizza, Inc.*, 615 F.2d 252, 260 (5th Cir. 1980) (“‘Domino’ is not a coined word, is not purely fanciful, and while its application to sugar may be arbitrary, it is still not to be accorded the same degree of protection given such coined and fanciful terms as ‘Kodak’ or ‘Xerox.’”).

55. See, e.g., *Two Pesos*, 505 U.S. at 768; *Bliss Collection, LLC v. Latham Companies, LLC*, 82 F.4th 499, 510 (6th Cir. 2023) (stating that “fanciful and arbitrary marks are considered the strongest or most distinctive marks.”); *OBX-Stock, Inc. v. Bicast, Inc.*, 558 F.3d 334, 340 (4th Cir. 2009) (explaining that arbitrary and fanciful marks are together the strongest marks because they “clearly do not threaten the linguistic commons”); *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 464 (4th Cir. 1996) (grouping fanciful and arbitrary together under policy rationales); *Lodestar Anstalt v. Bacardi & Co. Ltd.*, 31 F.4th 1228, 1258 (9th Cir. 2022) (stating that either an arbitrary or fanciful mark “trigger[s] the highest degree of trademark protection”).

56. *Star Indus. v. Bacardi & Co.*, 412 F.3d 373, 385 (2d Cir. 2005) (“Among marks relying solely on inherent distinctiveness for their protectability, arbitrary or fanciful ones are the strongest.”); *Mobil Oil Corp. v. Pegasus Petroleum Corp.*, 818 F.2d 254, 257 (2d Cir. 1987) (holding that as an arbitrary mark, the flying horse “symbol deserves the most protection the Lanham Act can provide.”). However, it is noteworthy that “even within the category of arbitrary or fanciful marks, there is still a substantial range of distinctiveness. Some marks may qualify as arbitrary because they have no logical relationship to the product, but nonetheless have a low level of distinctiveness because they are common.” *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 216 (2d Cir. 1999).

57. *Sara Lee*, 81 F.3d at 464.

58. *WE Media, Inc. v. Cablevision Sys. Corp.*, 94 F. App’x. 29 at *31 (2d Cir. 2004) (“Suggestive marks are more distinctive than descriptive marks . . . [but] because they seek to suggest qualities of the product, they possess a low level of distinctiveness and are given less protection than is reserved for more distinctive marks—those that are ‘arbitrary’ or ‘fanciful.’”); cf. Linford, *Dichotomy*, *supra* note 5, at 1413 (“A suggestive mark is less likely to be perceived as a source signifier from the consumer’s first exposure, because the metaphoric connection between mark and product has a stronger effect than the law currently recognizes.”).

59. See, e.g., *In re Aid Lab’ys, Inc.*, 223 U.S.P.Q. 357, 357 (T.T.A.B. 1984) (holding “BUG MIST” merely descriptive for an insecticide); *Application of Reynolds Metals Co.*, 480 F.2d 902, 904 (C.C.P.A. 1973) (reversing T.T.A.B. and holding “Brown-in-Bag” for a see-through bag you can cook in to be suggestive rather than descriptive because “browning is not the sole purpose or function of the bags . . .”).

60. *TCPIP Holding Co., Inc. v. Haar Communications, Inc.*, 244 F.3d 88, 101 (2d Cir. 2001) (noting that once a descriptive trademark “has achieved consumer recognition, it is not denied the

The line between descriptive and suggestive trademarks is not always bright, with courts designing various tests to differentiate between the two.⁶¹ Finally, a generic term (like “book store” or “bottled water”) is “so highly descriptive that no quantum of evidence of acquired distinctiveness is sufficient to qualify it for registration.”⁶²

Judge Friendly’s opinion in *Abercrombie* helped cement this framework, including through one particularly influential line.⁶³ “[F]anciful or arbitrary terms,” he wrote, “enjoy all the rights accorded to suggestive terms as marks—without the need of debating whether the term is ‘merely descriptive’ and with ease of establishing infringement.”⁶⁴ Whether this passage reflects careful analysis or a sweeping generalization is open to debate. *Abercrombie* was, after all, primarily a case about whether SAFARI was a generic term for hunting garb.⁶⁵ Naturally then, the opinion devotes far more attention to the line between generic and descriptive or suggestive terms than to parsing the elevated nature of arbitrary (or fanciful) marks. Yet that brief sentence on arbitrary and fanciful marks has become doctrinal bedrock, with modern trademark law largely following Friendly’s lead in giving arbitrary and fanciful marks a broad scope of protection in both the registration and infringement contexts.⁶⁶

B. Trademark Theory and the Strength of Marks

Trademark law’s conventional wisdom holds that arbitrary marks, because they bear no descriptive or suggestive relationship to the product, are semantically neutral, and therefore maximally strong.⁶⁷ Their *distance* from the

protection of the trademark law, but it commands a lesser degree of protection than arbitrary, fanciful marks.”); *see also* *Little Caesar Enters., Inc. v. Pizza Caesar, Inc.*, 834 F.2d 568, 571 (6th Cir. 1987) (holding that with regard to weaker marks, such as suggestive or descriptive, there is less of a chance of confusion between the marks).

61. *See Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 792–93 (5th Cir. 1983) (outlining the imagination test, competitor-need test, and dictionary test); Marlan, *Visual Metaphor*, *supra* note 10, at 799–802 (discussing the three tests and noting the imagination test to be the most prominent and conceptually meaningful).

62. *In re Minnetonka, Inc.*, 212 U.S.P.Q. 772, 782 (T.T.A.B. 1981); *see* Restatement (Third) of Unfair Competition §15, cmt. B (2007) (“[T]he public interest in maintaining access to generic terms precludes the recognition of trademark rights”); *but see* Linford, *Generic*, *supra* note 24, at 115 (“[T]he doctrine of trademark incapacity requires courts to ignore evidence that so-called generic terms have acquired source significance in the minds of consumers.”).

63. Mark P. McKenna, *Property and Equity in Trademark Law*, 23 MARQ. INTELL. PROP. L. REV. 117, 124 (2019) (noting that the *Abercrombie* spectrum is “the most black-letter of all the black-letter trademark law.”).

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

65. *Abercrombie*, 537 F.2d at 8.

66. Courts prior to *Abercrombie* did not view trademark validity along a spectrum of distinctiveness (strength), but rather a binary—either descriptive or distinct. *See* Laura A. Heymann, *The Grammar of Trademarks*, 14 LEWIS & CLARK L. REV. 1313, 1334 (2010); *see also* Beebe, *Semiotic Analysis*, *supra* note 10, at 670 (“Through the course of the last century, the law developed a taxonomy of trademarks more refined than this simple inherent/non-inherent dichotomy.”).

67. *Star Indus. v. Bacardi & Co.*, 412 F.3d 373, 385 (2d Cir. 2005) (“Arbitrary or fanciful marks are ones that do not communicate any information about the product either directly or by suggestion.”).

underlying good (or service) is presumed to signal distinctiveness, exclusivity, and low competitive risk.⁶⁸ But this assumption deserves closer scrutiny. It rests on the conceptual fiction that arbitrary marks function as empty containers, devoid of meaning outside their trademark use.⁶⁹ In reality, arbitrary marks are not context-free. They carry rich semantic and cultural associations, which they borrow from the public domain of culture, even when deployed in unrelated conceptual domains. Further, empirical research shows that arbitrary marks often underperform on key consumer metrics such as brand recall, recognition, and source attribution.⁷⁰ Yet trademark law has yet to reckon with these striking empirical findings.

That is not to say that the *Abercrombie* spectrum, more generally, has escaped criticism. Far from it. As early as 1986, trademark pioneer Beverly Pattishall referred to *Abercrombie*'s "artificial and regrettable 'four pigeon hole' rule" as "[o]ne of the worst blights" on trademark law, having "spread from the Second Circuit into others."⁷¹ Since then, scholars have empirically critiqued the concept of inherent distinctiveness as a whole,⁷² as well as analyzed the spectrum's other categories (besides arbitrary) through an interdisciplinary lens. Specifically, in an influential trilogy of articles, Jake Linford has demonstrated that generic marks can retain residual source meaning through semantic shift;⁷³ that the line between descriptive and suggestive marks is conceptually unstable and inconsistently applied;⁷⁴ and that many fanciful marks may not be as semantically empty as assumed.⁷⁵ Drawing on cognitive linguistics, marketing science, and theories of semantic shift, Linford's pathbreaking analyses challenge the doctrinal coherence of these classifications and their relationship

68. See, e.g., *OBX-Stock, Inc. v. Bicast, Inc.*, 558 F.3d 334, 340 (4th Cir. 2009) (stating that an arbitrary mark is "based on existing words used in ways unconnected with their common meaning").

69. See, e.g., *Ashley Furniture Indus., Inc. v. SanGiacomo N.A. Ltd.*, 187 F.3d 363, 369 (4th Cir. 1999); *Virgin Enterprises Ltd. v. Nawab*, 335 F.3d 141, 147 (2d Cir. 2003); *O'Keefe v. Ogilvy & Mather Worldwide, Inc.*, 590 F. Supp. 2d 500, 520 (S.D.N.Y. 2008); *Lodestar Anstalt v. Bacardi & Co. Ltd.*, 31 F.4th 1228, 1259 (9th Cir. 2022).

70. *Infra* Part IV.

71. Beverly W. Pattishall, *The Lanham Trademark Act—Its Impact over Four Decades*, 76 TRADEMARK REP. 193, 220 (1986).

72. See generally Lee et al., *supra* note 24.

73. Linford, *Generic*, *supra* note 24, at 112 n.2 (citing ELIZABETH CLOSS TRAUGOTT & RICHARD B. DASHER, REGULARITY IN SEMANTIC CHANGE 1 (2002) (defining semantic change as a shift "from one linguistically coded meaning to another.")).

74. Linford, *Dichotomy*, *supra* note 5, at 1409 ("[T]rademark law mistakenly exaggerates the difference between suggestive and descriptive marks. Semantic shift research indicates that a metaphoric polyseme like a suggestive trademark enhances the connection between mark and product through processing advantages similar to those provided by a metonymic polyseme like a descriptive mark."); see also Miller, *supra* note 24, at 4 ("Suggestive words, straddling descriptive and arbitrary words as they do, occupy an inherently unstable space in trademark."); *Q-Tips*, 206 F.2d at 146 ("There must be some description in almost any suggestion or the suggesting process will not take place. So what we have in any trade-mark case is a matter of judgment as to what side of the line the question mark falls upon.").

75. See generally Linford, *Fanciful?*, *supra* note 3.

to actual consumer perception. While focusing largely on *Abercrombie*'s other four categories, his scholarship provides a valuable foundation for this Article's core argument that the preferential treatment of arbitrary marks lacks empirical and linguistic justification.

In *Are Trademarks Ever Fanciful?*, Linford challenges the conventional assumption that fanciful trademarks are inherently coined and devoid of semantic content.⁷⁶ Drawing on linguistic and marketing research, he argues that many fanciful marks are crafted with sound symbolism in mind—the phenomenon by which “[t]he sounds that comprise a word can also convey meaning.”⁷⁷ Consumers often perceive meaningful links between a fanciful mark's sounds and the nature of the underlying product, and marketers routinely exploit this by coining marks that subtly suggest product attributes.⁷⁸ Linford explains that “[i]f the building blocks of words convey meaning, then the presumption that fanciful marks communicate no product-relevant information will be inaccurate in many cases.”⁷⁹ Yet courts continue to treat fanciful marks as “empty vessel[s],” granting them immediate and expansive protection on the presumption of linguistic arbitrariness.⁸⁰ Linford contends that this disconnect between legal doctrine and linguistic reality leads to doctrinal overreach. That is, when fanciful marks benefit from sound-symbolic associations (and thus are more like suggestive or even descriptive marks), broad protection may unjustly burden competitors who independently coin marks with similar sound patterns to signal comparable goods.⁸¹ He therefore calls for a more nuanced doctrinal approach—one that accounts for the meaning-making potential of sound, even in seemingly “nonsense” words.⁸²

In a related critique of trademark doctrine's classificatory assumptions, *The False Dichotomy Between Suggestive and Descriptive Trademarks*, Linford

76. *Id.*; Beebe & Fromer, *Running Out of Trademarks*, *supra* note 18, at 967 (“A variety of sound-symbolism research supports the proposition that sounds convey a range of properties, including weight, speed, rigidity, activity, width, size, femininity, friendliness, and sharpness.”).

77. Linford, *Fanciful?*, *supra* note 3, at 748, 750 (“[L]inguistic and psychological research has detected significant connections between word form and word meaning by way of sound symbolism. ‘Sound symbolism is the direct linkage between sound and meaning.’”) (quoting Leanne Hinton, Johanna Nichols & John Ohala, *Introduction: Sound-Symbolic Processes*, in *SOUND SYMBOLISM* 1, 1 (Leanne Hinton et al. eds., 1994)).

78. Linford, *Fanciful?*, *supra* note 3, at 753 (citing Neal Gabler, *The Weird Science of Naming New Products*, N.Y. TIMES MAG. (Jan. 15, 2015), <https://www.nytimes.com/2015/01/18/magazine/the-weird-science-of-naming-new-products.html> [http://perma.cc/4KJZ-BCRD])). Linford provides as examples, the ‘S’ of Swiffer, a mark for a mop with a disposable head, sounds fast and easy, whereas the ‘D’ in Dasani, for bottled water, sounds heavier and thus relaxing rather than refreshing.

79. Linford, *Fanciful?*, *supra* note 3, at 735.

80. *Id.* at 747 (“According to the theory of linguistic arbitrariness, there is no inherent relationship between the sound and image of a word, or the signifier, and the concept or thing represented by the word, known as the signified.”); see Beebe, *Semiotic Analysis*, *supra* note 10, at 671 (As a semiotician might say, the “ordinary meaning [of a given mark] could not reasonably be understood to describe or suggest any characteristic of its referent.”).

81. Linford, *Fanciful?*, *supra* note 3, at 758.

82. *Id.* at 748.

questions the sharp doctrinal divide between descriptive and suggestive marks.⁸³ While suggestive marks receive immediate protection without proof of secondary meaning, descriptive marks are denied such protection unless and until they acquire source significance.⁸⁴ Linford argues that this distinction in treatment overstates the functional and cognitive differences between the two categories. Drawing on cognitive linguistics and historical theories of semantic shift, he demonstrates that both types of marks often rely on similar mechanisms of indirect meaning-making and associative inference.⁸⁵ From a consumer perspective, the distinction is murky at best, given that both suggestive and descriptive categories of marks “provide processing advantages that reduce cognitive workload compared to other categories of trademarks.”⁸⁶ Linford thus contends that the line trademark law draws between these categories is doctrinally rigid and linguistically incoherent.⁸⁷ Therefore, he proposes a more consistent approach: requiring both suggestive and descriptive marks to demonstrate acquired distinctiveness before receiving protection, thus aligning legal treatment with linguistic and cognitive reality.⁸⁸

Finally, in his critique of the doctrine of trademark incapacity, *A Linguistic Justification for Protecting “Generic” Trademarks*, Linford targets the categorical rule that generic terms can never be reclaimed as trademarks, even if consumers come to perceive them as source indicators.⁸⁹ Drawing on the linguistic concept of semantic shift, Linford challenges the assumption that genericness is permanent.⁹⁰ He highlights the phenomenon of restriction, where a word “undergoes a shift in meaning from a broad designator for all members within a category to a prototypical member of the category.”⁹¹ Far from rare, this process occurs frequently across languages and historical contexts. Linford argues that if the touchstone of trademark law is consumer perception, courts should abandon the inflexible incapacity rule in favor of a unified primary significance test. That is, “[i]f there is evidence that the majority of consumers have come to see the term as source-signifying rather than merely product-designating, the term should be protectable like any other trademark.”⁹² His work reframes the incapacity doctrine as both linguistically flawed and inconsistent

83. See Linford, *Dichotomy*, *supra* note 5, at 1372.

84. *Supra* note 58–62 and accompanying discussion.

85. Linford, *Dichotomy*, *supra* note 5, at 1373.

86. *Id.*

87. *Id.* (“[T]he legal distinction between suggestive and descriptive marks ignores the similarities between metonymic and metaphoric polysemy.”).

88. *Id.* at 1420 (“[S]uggestive marks . . . should be classified with descriptive marks and denied protection until there is evidence of source significance.”).

89. See generally Linford, *Generic*, *supra* note 24.

90. *Id.* at 115–16.

91. *Id.* at 115 (citing DIRK GEERAERTS, THEORIES OF LEXICAL SEMANTICS 26–27 (2010)).

92. Linford, *Generic*, *supra* note 24, at 162–63.

with “the consumer protection and competition concerns at the heart of the trademark system.”⁹³

Taken together, Linford’s scholarship demonstrates the instability of *Abercrombie*’s core linguistic assumptions. Across fanciful, suggestive, descriptive, and generic marks, without broaching arbitrary, he shows how doctrinal classifications frequently disregard how language actually works—how meaning is perceived, created, and transformed by consumers. His insights directly support this Article’s broader claim that the *Abercrombie* spectrum reflects formalistic convenience more than conceptual precision. In doing so, Linford provides targeted critiques of all the spectrum’s other categories, finding each to be flawed. If fanciful marks are not truly “meaningless,” if suggestive and descriptive marks are not meaningfully distinguishable, and if even generic terms can shift in meaning over time, then arbitrary marks—situated awkwardly at the intersection of linguistic familiarity and legal fiction—deserve more skeptical scrutiny than they currently receive. This Article seeks to supply that scrutiny.

In sum, Linford and others reveal a system fraught with classification error costs.⁹⁴ As Greene and Wilkerson have aptly summarized, “[t]he doctrine of trademark strength is broken.”⁹⁵ Perhaps *Abercrombie*’s last domino to fall, arbitrary marks have escaped individualized scrutiny—until now.

III.

THE TROUBLE WITH ARBITRARY

This Part interrogates the assumption that arbitrary marks are conceptually strong by examining how they operate in language, the marketplace, and in cultural contexts. It shows that many arbitrary marks—like suggestive marks—function through metaphor, that they often underperform in terms of consumer perception, and that their operation as catachrestic metaphors reveals deeper economic and cultural tensions. Indeed, far from empty vessels, arbitrary marks borrow from displaced meanings in ways that commodify and exploit underlying cultural referents.

A. *Arbitrary Marks as Metaphor*

Trademark law treats “arbitrary” marks as strongly distinctive based on a deceptively simple premise: that a familiar word, when used in a novel and

93. *Id.* at 170

94. In addition to Linford’s work, see, for example, Alexandra J. Roberts, *How to Do Things with Word Marks: A Speech-Act Theory of Distinctiveness*, 65 ALA. L. REV. 1035 (2014); Lee et al., *supra* note 24; Beebe, *Semiotic Analysis*, *supra* note 10; Beebe, *Search and Persuasion*, *supra* note 24; Tushnet, *supra* note 29; Marlan, *Visual Metaphor*, *supra* note 10; Miller, *supra* note 24.

95. See Greene & Wilkerson, *supra* note 24, at 536.

seemingly unrelated commercial context, becomes a semantic blank slate.⁹⁶ As one court puts it: “If a mark is arbitrary . . . consumers who see the mark on different objects offered in the marketplace will be likely to assume, because of the arbitrariness of the choice of mark, that they all come from the same source.”⁹⁷ Taking this view, marks like APPLE for computers or AMAZON for an online marketplace are deemed automatically protectable and at the apex of trademark strength because they neither describe nor suggest the products and services they name.⁹⁸ The logic is circular, but intuitive. According to this traditional view, if a word has no descriptive connection to the goods or services, then it must be a brand indicator. Certainly, that fact signals that the mark is not “merely descriptive.” But the deeper assumption—that an obviously *non-descriptive mark* is inherently a *highly distinctive* one—rests on a flawed understanding of language. It presumes that an arbitrary mark is semantically neutral, as if the prior meaning of APPLE (fruit) or AMAZON (river) vanishes in the trademark context, leaving a pure brand signifier comparable in strength to a coined (fanciful) term.

Jake Linford offers a particularly clear account of this doctrinal logic, analogizing arbitrary marks to homonyms, i.e., “words that look and/or sound the same, but have multiple unrelated meanings.”⁹⁹ On this view, APPLE for computers is no more connected to fruit than *bank* (financial institution) is to *bank* (river’s edge). This framework, consistent with law-and-economics theory,¹⁰⁰ explains why trademark doctrine treats brand meaning as analytically separable from dictionary meaning. While this account is coherent in examining the basic relationship between an arbitrary mark and its goods or services, it does not fully capture how consumers encounter arbitrary marks in practice.¹⁰¹ In bracketing prior meanings, the homonym analogy reflects trademark law’s assumption of semantic neutrality, but consumers do not experience such signs

96. Linford, *Fanciful?*, *supra* note 3, at 739 (“Arbitrary marks . . . use a pre-existing word to sell a product unrelated to that word. Courts presume this lack of connection causes an arbitrary mark to stand out as a source signifier, which leads courts to conclude that arbitrary marks are not only inherently distinctive, but also entitled to relatively broad protection.”).

97. *Virgin Enters.*, 335 F.3d at 148.

98. 3 MCCARTHY, *supra* note 28, § 11:11 (“What are arbitrary word marks?”).

99. Linford, *Dichotomy*, *supra* note 5, at 1402 (“[A]rbitrary marks . . . are unrelated (or homonymous in relation) to the good or service designated.”); *see also* Linford, *Generic*, *supra* note 24, at 136; Jake Linford & Kyra Nelson, *Trademark Fame and Corpus Linguistics*, 45 COLUM. J.L. & ARTS 171, 172 n.1 (2022).

100. Compare Landes & Posner, *supra* note 32, at 274–75 (providing the now dominant economic justification for trademarks), with Linford, *Dichotomy*, *supra* note 5, at 1374 (“This Article presumes, without deciding, that the dominant economic justification provides a proper normative basis for trademark law . . . [and the] suggestive-descriptive line.”).

101. See Dustin Marlan, *Is the Word “Consumer” Biasing Trademark Law?*, 8 TEX. A&M L. REV. 367, 400 (2021); Dustin Marlan, *Rethinking Trademark Law’s “Consumer” Label*, 55 GONZ. L. REV. 421, 435 (2019) (emphasizing the role of the active citizen rather than the passive consumer); Margaret Chon, *Slow Logo: Brand Citizenship in Global Value Networks*, 47 U.C. DAVIS. L. REV. 935, 945 (2013) (discussing shift from consumer to prosumer).

as empty vessels. Rather, they encounter them as culturally saturated symbols whose prior meanings continue to shape perception, memory, and association.

Indeed, arbitrary marks are rarely interpreted in isolation. Consumers process them through preexisting cognitive and cultural frameworks. As one branding agency notes: “Metaphors make great names because they paint a simple, strong image in customers’ minds. When you hear the name *Amazon*, you think big, impressive river. And you remember that river.”¹⁰² Such associations are not incidental. They are often the very reason the mark is memorable and commercially effective. Their memorability often depends precisely on the residual meanings that trademark doctrine attempts to bracket away. In this way, what trademark doctrine calls “arbitrary” frequently operates through metaphor and cultural resonance—mechanisms more commonly associated with suggestive marks than with fanciful ones.¹⁰³

Such symbolism matters because inherent distinctiveness is supposed to measure a sign’s capacity to indicate a source.¹⁰⁴ Fanciful, arbitrary, and suggestive marks are presumed to have this capacity; descriptive marks must acquire it through secondary meaning; generic marks never can.¹⁰⁵ Yet the real dividing line between protectable and unprotectable signs is often not novelty alone, but figurative resonance—especially metaphor. Laura Heymann observes that “the concept of metaphor is fundamental to how most trademarks work. Except for words invented to serve as trademarks . . . all trademarks . . . operate on a level other than a literal one.”¹⁰⁶ Advertising literature likewise emphasizes that memorable marks typically function figuratively, connecting meaning across domains and enhancing recall.¹⁰⁷

Conceptual metaphor theory, developed by George Lakoff and Mark Johnson, explains why. Metaphors are not mere ornamentation; they are fundamental cognitive structures.¹⁰⁸ They allow us to understand one domain of

102. Gabriele Zamora, *Why Metaphors Make Powerful Brand Names*, SIEGEL + GALE (July 2018), <https://www.siegelgale.com/metaphors-make-powerful-brand-names/> [<https://perma.cc/TLU2-2DMJ>].

103. Beebe, *Semiotic Analysis*, *supra* note 10, at 671 (calling suggestive marks like ATLAS for moving services or ROACH MOTEL for insect traps “textbook metaphors”); Marlan, *Visual Metaphor*, *supra* note 10, at 797 (stating the same).

104. See *supra* notes 35–41 and accompanying discussion.

105. *Supra* notes 50–62.

106. Heymann, *supra* note 66, at 1330 (2010); see also Tom W. Bell, *Virtual Trade Dress: A Very Real Problem*, 56 MD. L. REV. 384, 412 (1997) (“At root, the Abercrombie scale measures the metaphorical distance between the ‘sense’ of a mark or trade dress and its ‘reference.’”); Marlan, *Visual Metaphor*, *supra* note 10, at 798 (“[I]nherently distinctive word marks—suggestive, arbitrary, and even many fanciful designations—are metaphorical in that they contain both denotative (literal) and connotative (figurative) dimensions of meaning.”).

107. See generally Edward F. McQuarrie & David Glen Mick, *Figures of Rhetoric in Advertising Language*, 22 J. CONSUMER RSCH. 424 (1996); Richard Jackson Harris & Noah Jacob Mosier, *Memory for Metaphors and Similes in Discourse*, 28 DISCOURSE PROCESSES 257 (1999).

108. LAKOFF & JOHNSON, *supra* note 11, at 5 (“The essence of metaphor is understanding and experiencing one kind of thing in terms of another.”) (emphasis omitted).

meaning in terms of another, e.g., *time is money*, *emotion is heat*, or in the trademark context, a product is a culturally resonant concept.¹⁰⁹ For instance, COPPERTONE (sunscreen), JAGUAR (cars), or GREYHOUND (buses) operate this way, prompting consumers to infer qualities of the product based on metaphorical association.¹¹⁰ Arbitrary marks work similarly but less directly: they repurpose familiar words—STARBUCKS, CAMEL, SHELL, ORACLE, CADILLAC—to evoke tone, reference, or myth. Their distinctiveness does not come from an emptiness of rhetoric, but from redirecting existing meanings toward new ends.¹¹¹

This process aligns with the rhetorical figure of catachresis: the extreme or “improper” use of a word when no literal term exists. Originating in classical rhetoric and later developed by theorists like Paul de Man,¹¹² Jacques Derrida,¹¹³ and Patricia Parker,¹¹⁴ catachresis highlights the instability and creativity of language. Examples of these strained metaphors in the poetic setting include *mow* the beard; *shave* the grass, *pin* the plank, *nail* my sleeve.¹¹⁵ As Barton Beebe observes: “In arbitrary marks such as APPLE for computers or SHELL for gasoline, the figurative relation is not so much metaphorical as it is catachrestic.”¹¹⁶ Here, Beebe treats metaphor and catachresis as distinct figures of speech. In traditional rhetoric, however, “catachresis is generally understood as a *metaphor*—albeit a forced and excessive one—lacking its literal

109. See George Lakoff, *The Contemporary Theory of Metaphor*, in METAPHOR AND THOUGHT 202, 206 (Andrew Ortony ed., 1993); Robin Coulter & Gerald Zaltman, *The Power of Metaphor*, in THE WHY OF CONSUMPTION: CONTEMPORARY PERSPECTIVES ON CONSUMER MOTIVES, GOALS, AND DESIRES 259, 262 (S. Ratneshwar, David Glen Mick & Cynthia Huffman eds., 2000).

110. See Edward F. McQuarrie & Barbara J. Phillips, *Indirect Persuasion in Advertising: How Consumers Process Metaphors Presented in Pictures and Words*, 34 J. ADVERT. 7, 8, 9 (2005) (“The rhetorical figure of metaphor, specifically, invites a comparison of two objects by suggesting that one object is like another, even though they come from different domains.”).

111. For a thorough overview of the myriad ways trademark law relies on figurative devices in the word mark context, see generally Alexandra J. Roberts, *A Poetics of Trademark Law*, 38 BERKELEY TECH. L. J. 52 (2023).

112. Paul de Man, *The Epistemology of Metaphor*, 5 CRITICAL INQUIRY 13, 21 (1978) (explaining that catachresis is a trope which can “dismember the texture of reality and reassemble it in the most capricious of ways”).

113. Jacques Derrida & F. C. T. Moore, *White Mythology: Metaphor in the Text of Philosophy*, 6 NEW LITERARY HIST. 5, 57 (1974) (“Catachresis, in general, consists in this, that a sign already assigned to a first idea should be assigned also to a new idea which has no other sign at all, or no longer has a sign as its proper expression.”).

114. Patricia Parker, *Metaphor and Catachresis*, in THE ENDS OF RHETORIC: HISTORY, THEORY, PRACTICE 60 (John Bender & David E. Wellbery eds., 1990) (“[C]atachresis is a transfer of terms from one place to another employed when no proper word exists, while metaphor is a transfer or substitution employed when a proper term does already exist and is displaced by a term transferred from another place to a place not its own.”); cf. LISA FREINKEL, *READING SHAKESPEARE’S WILL: THE THEOLOGY OF FIGURE FROM AUGUSTINE TO THE SONNETS* 333 (2002) (acknowledging “the ultimately catachrestic structure of all metaphor.”).

115. ALEXANDER POPE, *THE ART OF SINKING IN POETRY* 42 (1728).

116. Beebe, *Semiotic Analysis*, *supra* note 10, at 671.

referent.”¹¹⁷ It involves semantic dislocation, i.e., a word used where its literal sense fails, generating meaning through necessity or displacement.¹¹⁸ Alan Singer’s notion of “catachrestic metaphor” captures this for trademarks: arbitrary marks, chosen for rhetorical effect rather than literal description, evoke values or aesthetics in a way that departs from conventional use.¹¹⁹

Seen this way, arbitrary marks are not blank slates, even when the choice of word itself may have been largely arbitrary. APPLE evokes nature, simplicity, knowledge, even rebellion (Edenic temptation); STARBUCKS (from *Moby-Dick*) conjures maritime adventure;¹²⁰ CAMEL suggests exoticism and ruggedness;¹²¹ SHELL implies nature and trade;¹²² ORACLE signals foresight;¹²³ CADILLAC recalls the French explorer who lent myth to Detroit. As the Fifth Circuit has noted, “even within the category of arbitrary terms, some words are ‘better’ than others, perhaps because they are evocative of characteristics or images appropriate to the business.”¹²⁴

Once those evocative qualities are taken seriously, the boundary between arbitrary and suggestive begins to dissolve. NIKE, classified as arbitrary for athletic wear, evokes victory, triumph and competitive excellence. These associations map onto the aspirations of the product’s consumers, even if not onto the product itself. The mark occupies a middle ground: less directly suggestive than GREYHOUND, whose connotations describe the service, but far from the semantic emptiness the arbitrary classification implies. The difference may be one of cultural register rather than categorical kind. Hence, these marks are not divorced from their non-commercial meanings. Rather than erasing meaning, they overwrite it, overlaying new meanings on old ones. This

117. Enikő Bollobás & Zoltán Kövecses, *Catachresis as Metaphoric and Metonymic Meaning Extension: The Case of Poetic, Prophetic, and Political Discourse* (2016), https://www.researchgate.net/publication/310897783_Catachresis_as_Metaphoric_and_Metonymic_Meaning_Extension_The_Case_of_Poetic_Prophetic_and_Political_Discourse.

118. See ALAN SINGER, *A METAPHORICS OF FICTION: DISCONTINUITY AND DISCOURSE IN THE MODERN NOVEL* 58 (1984) (defining “catachrestic metaphor” as “a trope that strayed beyond the field of contextual determinations warranting its usage.”).

119. *Id.*; see also Marlan, *Visual Metaphor*, *supra* note 10, at 797 (“[W]hile not often recognized as such, arbitrary marks . . . [i]n evoking values or aesthetics associated with a product or service . . . are *catachrestic* metaphors.”).

120. Glynda Alves, *Did You Know Starbucks Got Its Name from Moby Dick?*, *ECONOMIC TIMES* (Oct. 25, 2018), <https://economictimes.indiatimes.com/magazines/panache/did-you-know-starbucks-got-its-name-from-moby-dick/articleshow/66357305.cms?from=mdr>.

121. *Historical Advertising Review and Creative Evolution*, CAMEL, https://tobacco-imag.stanford.edu/wp-content/uploads/2020/03/06212512/camel_creativehistory.pdf.

122. *Our Brand History*, SHELL, <https://www.shell.com/who-we-are/our-history/our-brand-history.html> (“The origin of the Shell name can be traced back to the seashells that Marcus Samuel senior [founder] imported from the Far East during the late 19th Century.”).

123. *About Oracle*, ORACLE, <https://www.oracle.com/corporate/> (“Our mission is to help people see data in new ways, discover insights, unlock endless possibilities.”).

124. *Union Nat’l Bank of Tex., Laredo, Tex. v. Union Nat’l Bank of Austin, Tex.*, 909 F.2d 839, 847, n.18 (5th Cir. 1990).

creates what can be analogized to a *palimpsest*: a surface inscribed with multiple, partially erased texts.¹²⁵

Trademark doctrine's refusal to acknowledge this layered structure distorts its strength hierarchy. Arbitrary marks are treated as categorically distinctive—and often presumptively strong—simply because they lack descriptive content. But in reality, they require interpretive work to reconcile old and new meanings. Like suggestive marks, arbitrary marks depend on familiarity and cultural resonance. And those same qualities can invite ambiguity or semantic “slippage.” For example, consumers encounter *Apple* in both brand and non-brand contexts. Its meanings are never fully severed from the fruit, the myth, or the metaphor. As Linford has shown for fanciful marks,¹²⁶ arbitrary marks, too, are not truly empty vessels; they are saturated with prior associations.

This account should not be misunderstood as turning on the subjective intentions of brand creators. A company may select a word for largely contingent reasons. Indeed, founders often report choosing names casually or even randomly. But the semiotic effects of that choice do not depend on the chooser's intent. Once a particular word is selected, it inevitably carries with it the cultural, linguistic, and cognitive associations that predate the trademark. The point, therefore, is not that companies deliberately select words for specific symbolic meanings—though they sometimes do—but rather that any familiar word inevitably arrives with semantic residue. Consumers encounter the mark not as a newly minted homonym divorced from its prior use, but as an existing sign displaced into a new commercial context.

The arbitrary mark, then, is rarely semantically empty (i.e., homonymic). Catachresis captures the rhetorical deployment of a familiar term whose meaning remains available, even if imperfectly or unpredictably, to shape perception.¹²⁷ At a minimum, arbitrary marks are closer to suggestive marks than to fanciful ones as a linguistic matter. Recognizing this similarity reframes the category and raises a doctrinal challenge. That is, if these marks are not semantically empty, their conceptual strength may be more fragile than assumed. As the next Part shows, empirical evidence suggests that arbitrary marks often underperform in recall, recognition, and communicative clarification. Their supposed superiority may itself be the product of an arbitrariness embedded at the heart of the *Abercrombie* spectrum.

125. GERARD GENETTE, *PALIMPESTS: LITERATURE IN THE SECOND DEGREE* back cover (1997) (defining a palimpsest as “a written document, usually on vellum or parchment, that has been written upon several times, often with remnants of erased writing still visible.”); see Derrida & Moore, *White Mythology*, supra note 113, at 8–11 (using the analogy of the palimpsest to critique how Western philosophy uses and conceals the metaphysical nature of its own language).

126. *Supra* notes 77–83 and accompanying discussion.

127. See STEVE FULLER & JAMES H. COLLIER, *PHILOSOPHY, RHETORIC, AND THE END OF KNOWLEDGE: A NEW BEGINNING FOR SCIENCE AND TECHNOLOGY STUDIES* 198 (2d ed. 2004) (noting that “the classical trope of *catachresis*, or the misuse of names” can be used to describe things “in alternative ways so as to motivate alternative courses of action”).

B. Arbitrary Mark(et) Reality

Reframing arbitrary marks as *catachrestic* metaphors—terms that operate through dislocation—unsettles their traditional doctrinal kinship with fanciful marks. Instead, the reframing tightens their association with suggestive ones, which likewise function through figures of speech. The analysis in the previous section reveals that their distinctiveness is achieved through layers of imaginative labor on the part of the consumer. This reframing also prompts a further question: if arbitrary marks function rhetorically more like strained metaphors than as blank slates, how do they actually perform in the marketplace?

According to the branding literature, the answer is not particularly well; it has been shown empirically “that arbitrary names are more difficult to recognize than names in all other [*Abercrombie*] categories.”¹²⁸ In fact, despite their elevated legal status, arbitrary marks appear to underperform as source identifiers in real-world brand environments. As one foundational marketing study put it, “[m]arketing practice, as well as theoretical and empirical research, has suggested that meaningful [i.e., those that convey directly relevant product characteristics] brand names are easier to remember and recall than non-meaningful brand names, and also that meaningful brand names are generally preferred over non-meaningful brand names.”¹²⁹

The key is that the branding literature’s “meaningful” denotes product-relevant meaning, not meaning *per se*. Arbitrary marks are meaning-laden in the *catachrestic* sense—culturally rich, symbolically dense—but their associations are typically orthogonal to the actual products or services they designate. AMAZON evokes a river and a rainforest, though nothing about e-commerce. ORACLE evokes prophecy and ancient wisdom, but nothing about database software. Arbitrary marks thus present challenges, as consumers often struggle to recall them, connect them to the goods or services they designate, or find them likable.¹³⁰

Results vary,¹³¹ of course, but the brand literature consensus is that arbitrary marks are harder to remember and less well-liked than other types of names, even while trademark law considers them highly distinctive.¹³² In *Brand Names That Work*, Chiranjeet Kohli and Rajneesh Suri compare consumer

128. Kohli & Suri, *Brand Names*, *supra* note 15, at 2.

129. Kohli et al., *Creating Brand Identity*, *supra* note 17, at 1507 (first citing Klink, *Creating Meaningful*, *supra* note 14; then Kohli & Suri, *Brand Names*, *supra* note 15).

130. See generally Kohli & Suri, *Brand Names*, *supra* note 15, at 117 (laying out results of empirical study).

131. See George M. Zinkhan & Claude R. Martin, Jr., *New Brand Names and Inferential Beliefs: Some Insights on Naming New Products*, 15 J. BUS. RSCH. 157, 169 (1987) (explaining that although an atypical (arbitrary) brand name requires more advertising and marketing to generate the new customer association, it has the “potential for truly independent consumer attitudes” and can “establish a more unique position within the product class”).

132. See *infra* note 139 and accompanying discussion.

reactions to descriptive, suggestive, arbitrary, and coined (fanciful) marks.¹³³ The authors find that arbitrary names consistently performed the worst overall across key dimensions of likability, recall, and recognition.¹³⁴ The researchers had hypothesized that arbitrary and fanciful names would fare similarly, given their shared conceptual distance from the products they signify. But “contrary to the hypothesis, arbitrary names were more difficult to recognize than all other [descriptive, suggestive, and coined] types of names,” a pattern that was “remarkably consistent across . . . product categories.”¹³⁵ Arbitrary marks had “the lowest recall” and “performed worse than coined names on recall.”¹³⁶ While recognition was “high for descriptive, suggestive, and coined names,” it was “low for arbitrary names.”¹³⁷

The study’s recommendation was blunt:

When recognition is important, for companies with small promotional budgets, descriptive names are most appropriate because of their superior performance on overall liking in contrast to suggestive names, and comparable performance with suggestive names on recognition. For companies with high promotional budgets, arbitrary names can be avoided in favor of coined words because of the relatively weak performance of the former.¹³⁸

Other studies reinforce these findings. The branding literature consistently confirms that names conveying directly relevant product characteristics achieve stronger consumer recall of advertised product characteristics than names whose associations point away from the product.¹³⁹

Additionally, a widely cited study in the trademark literature, *An Empirical and Consumer Psychology Analysis of Trademark Distinctiveness* by Thomas Lee and his coauthors, is best known for its broader (and perhaps too broad)¹⁴⁰ claim that “there is no basis for any continuing distinction between the ‘inherently distinctive’ (suggestive, arbitrary, and fanciful) and the ‘non-

133. Kohli & Suri, *Brand Names*, *supra* note 15.

134. *Id.* at 117.

135. *Id.*

136. *Id.* at 118.

137. *Id.* at 119.

138. *Id.*

139. Fink et al., *supra* note 17, at 6 (“[M]eaningful and suggestive words—which communicate directly relevant product characteristics—achieve better consumer recall of advertised product characteristics.”); Kohli et al., *Creating Brand Identity*, *supra* note 17, at 1513 (finding that “non-meaningful brand names may be evaluated less favorably than meaningful brand names even after repeated exposure to the names”); Keller et al., *supra* note 17, at 50, 55 (discussing the advantages of a “suggestive brand name,” defined here as “a brand name that conveys relevant attribute or benefit information in a particular product context,” given that a “nonsuggestive brand name, conversely, will not provide the same semantic cue”).

140. Linford, *Dichotomy*, *supra* note 5, at 1420 (“While the *Abercrombie* spectrum has recently come under attack, semantic research justifies a limited defense for the spectrum.”).

inherently distinctive’ (descriptive).”¹⁴¹ However, the study also found a significant difference between arbitrary and fanciful marks in their ability to function as a source indicator. Specifically, it reported that across the experiments conducted, arbitrary marks served as a source indicator 76.7% of the time, while fanciful marks did so 100% of the time—a statistically significant difference.¹⁴²

So why do arbitrary marks consistently lag behind on these metrics? Their catachrestic nature offers a compelling explanation. Again, arbitrary marks are not empty vessels, as trademark law presumes they are. But because they lack intuitive or analogical ties to the product, they require consumers to forge novel associations between a displaced signifier and an unfamiliar referent.¹⁴³ This imposes semiotic friction. Like suggestive marks, arbitrary ones demand interpretive labor, but without the aid of metaphorical scaffolding. Arbitrary marks are, in such a sense, metaphors without analogy. For consumers, they function like suggestive marks but lack any descriptive aspect to anchor them to a product or service. Hence, they demand a highly imaginative leap that many consumers are initially unwilling or unable to make. At least prior to acquiring secondary meaning, arbitrary marks may be more disorienting than evocative for consumers, thus demanding greater cognitive effort with less immediate semiotic payoff. Advertising can close this gap, but doing so requires significant time, investment, and resources that are typically available only to larger brands and companies.¹⁴⁴

In effect, arbitrary marks’ catachrestic nature demands interpretative labor and marketplace conditioning. Their elevated distinctiveness is not self-evident or automatic. It is instead earned through repeated exposure. Trademark law’s inherent distinctiveness doctrine, therefore, appears to operate on the mistaken assumption that the further a term departs from literal description, the stronger the mark becomes. Because descriptive marks outperform generic ones, and suggestive marks outperform descriptive ones, it is assumed that fanciful and arbitrary marks must be more distinctive still. That is, inherent distinctiveness is believed to follow a sort of exponential figurative curve, hence the *Abercrombie* spectrum as “hierarchy of figurativeness.”¹⁴⁵

But that assumed correlation—that the higher the degree of a mark’s figurativeness, the more consumers will recognize it—is likely wrong. Language and meaning do not behave linearly, and neither do consumers. If they did, the recent proliferation of Amazon-affiliated nonsense marks on the USPTO trademark registry—like LJXOAIEU for hair clips and AEZLHJYA for

141. Lee et al., *supra* note 24, at 1099.

142. *Id.* at 1091.

143. See Beebe, *Semiotic Analysis*, *supra* note 10, at 625.

144. See Marlan, *Servicing Trade Dress*, *supra* note 39, at 1581–82.

145. Beebe, *Semiotic Analysis*, *supra* note 10, at 670; see also Bell, *supra* note 106, at 412 (“At root, the *Abercrombie* scale measures the metaphorical distance between the ‘sense’ of a mark or trade dress and its ‘reference.’”).

jewelry—would be the most distinctive (i.e., strongest) of source identifiers.¹⁴⁶ They are not, of course.¹⁴⁷ In reality, there may be a sweet spot—a happy medium—where the relationship between signifier and signified is figurative enough to spark recognition, yet still literal enough to aid memory and association. Push too far into catachresis and the mark may lose the cognitive and emotional hooks that help consumers relate to it as a brand identifier. Figurative excess can thus weaken a trade symbol’s communicative strength rather than enhance it. As Carsten Fink and co-authors summarize, “[t]his [branding] literature suggests that firms should select brand names that are easily recognized and recalled, and that elicit positive affect. In practice, this means that trademarks consisting of shorter, common words that are meaningful or suggestive tend to work inherently better with consumers.”¹⁴⁸

Therefore, the assumed strength of arbitrary marks may work on a legal fiction, albeit a useful one. Given the routine market preference for meaningful marks (particularly suggestive and descriptive ones) and the underwhelming market reaction to arbitrary marks, why does trademark law nonetheless elevate arbitrary marks to the highest echelon of protectability? In other words, why treat them as highly distinctive when there is little evidence they function that way in practice and longstanding interdisciplinary evidence to the contrary? The answer may lie not in semiotics, but in scarcity.

Legal doctrine privileges arbitrary marks in part because it *needs* to. Because competitors need to use common descriptive and suggestive terms to identify their own goods and services, which limits the availability of such marks as protectable trademarks, the law must incentivize firms to pursue marks from a not-yet-depleted linguistic, semiotic, and conceptual category. Indeed, most of the sought-after marks are in the suggestive or descriptive range.¹⁴⁹ As Barton Beebe and Jeanne Fromer have shown, there has been “significant depletion of the supply of competitively effective trademarks over time, leading to congestion in the trademark register.”¹⁵⁰ This depletion, they note, reflects “the tendency for firms to pursue the same or similar competitively effective marks.”¹⁵¹ The branding literature “strongly supports the proposition that the supply of good,

146. See John Herrman, *All Your Favorite Brands, From BSTOEM to ZGGCD: How Amazon is Causing Us to Drown in Trademarks*, N.Y. TIMES (Feb. 11, 2020), <https://nyti.ms/38uhKvi> [<https://perma.cc/QFM7-R3M2>].

147. Note, *Fanciful Failures: Keeping Nonsense Marks off the Trademark Register*, 134 HARV. L. REV. 1804, 1815 (2021) (“[I]n spite of their relative uselessness as traditional source signifiers, nonsense marks on the Register have the potential to chill producers . . . to prompt costly litigation, and even to be weaponized by bad faith actors . . .”).

148. Fink et al., *supra* note 17, at 1.

149. Kohli & Suri, *Brand Names*, *supra* note 15, at 115 (“An examination of brand names registered with the PTO indicates that a vast majority of brand names are either descriptive or suggestive.”).

150. Fink et al., *supra* note 17, at 1 (citing Beebe & Fromer, *Running Out of Trademarks*, *supra* note 18).

151. *Id.*

competitively effective trademarks is not just finite, but far more limited than might generally be appreciated.”¹⁵²

“Meaningful” marks—those that convey directly relevant product characteristics—are empirically stronger.¹⁵³ But because descriptive and suggestive marks are either scarce, subject to legal penalty or constraint, or needed by competitors, firms must instead rely on incentivized alternatives. Arbitrary marks fill this vacuum, not because they are stronger, but because they are legally available and plentiful in linguistic nature. Their appeal, then, lies not in their (overrated) market performance, but in their doctrinal utility. Arbitrary marks offer a form of semiotic excess that can suffice even as the pool of commercially effective descriptive terms dries up. Thus, their status at the pinnacle of the strength hierarchy is a helpful (i.e., efficient) legal fiction. But this doctrinal accommodation carries underappreciated costs—economic ones addressed in the remainder of this Section, and cultural ones, explored in the next.

Within the U.S. trademark regime, arbitrary marks—those bearing no descriptive or suggestive relation to the products they signify—occupy a privileged position, receiving protection near the apex of the distinctiveness hierarchy. Their formal legal strength derives not from their communicative clarity, but from their supposed semantic emptiness. Precisely because arbitrary marks have no obvious inherent connection to the products they name, trademark law presumes them unlikely to constrain competitors or monopolize language essential to commerce. As a result, arbitrary marks receive strong protection and are widely promoted by trademark attorneys, branding professionals, the USPTO, and organizations like the International Trademark Association (INTA) as “trademark gold”—ideal for registration, exclusivity, and enforcement.¹⁵⁴ As Jeanne Fromer notes, the *Abercrombie* “spectrum would seem to encourage businesses to adopt fanciful or arbitrary marks more than other types because they can be easily adopted without a need to establish secondary meaning.”¹⁵⁵

Moreover, as the Fifth Circuit has explained, the law limits protection for generic and highly descriptive terms to avoid granting “an effective monopoly on the use of a term common to all in the industry and that . . . would represent unfair competition.”¹⁵⁶ By contrast, arbitrary and fanciful terms pose no such risk, which “create[s] an incentive for choosing an arbitrary or fanciful mark,

152. Beebe & Fromer, *Running Out of Trademarks*, *supra* note 18, at 970.

153. Kohli & Suri, *Brand Names*, *supra* note 15, at 118.

154. *Trademark Strength*, INT’L TRADEMARK ASS’N (INTA), <https://www.inta.org/factsheets/trademark-strength/> (last updated Dec. 13, 2023) (“To avoid expensive and time-consuming proceedings, it is helpful to choose a strong trademark (from the first two categories [arbitrary and fanciful]).”); *Strong Trademarks*, *supra* note 6 (“You want your trademark to be strong or ‘hot,’ as opposed to weak or ‘cold.’”).

155. Fromer, *Against Secondary Meaning*, *supra* note 6, at 227.

156. *Union Nat’l Bank*, 909 F.2d at 847 n.18.

since they are more likely to be eligible for protection.”¹⁵⁷ Thus, arbitrary marks do not carry the same anti-competitive effects of protection as descriptive marks. Nonetheless, this doctrinal elevation carries hidden costs.

In practice, arbitrary marks are often semiotically weak: they typically fail to function as strong source identifiers without significant advertising investment to create associations in consumers’ minds. This reliance on marketing disproportionately burdens small businesses and entrepreneurs, who may be encouraged to select marks that are legally strong but commercially obscure. The legal incentive to adopt arbitrary marks—marks that “by definition . . . carry *no* information about the product or service”¹⁵⁸—cuts against trademark law’s foundational concern with consumer understanding.

C. *The Cultural Costs of Catachresis*

Arbitrary marks are drawn, by definition, from language that already belongs to someone else—or to everyone. Beyond their market inefficiencies, then, arbitrary marks also carry underexamined cultural costs. The Trademark Manual of Examining Procedure (TMEP) illustrates the concept aptly, when it states: “[o]ften, names of mountains or rivers are arbitrary for goods because no commercial activity is performed there. For example, ‘Colorado River’ for candy bars or ‘Mount Rushmore’ for automobiles would be arbitrary.”¹⁵⁹ Courts have likewise treated terms like ANTARCTICA, MILKY WAY, and GALAPAGOS as legally arbitrary.¹⁶⁰ But while such terms may be commercially unrelated to their assigned goods, they are hardly devoid of meaning. On the contrary, arbitrary marks draw from deep wells of symbolic, geographic, mythological, religious, and historical significance.¹⁶¹ Indeed, these marks are semantically repurposed (catachrestic).¹⁶²

157. *Id.*

158. *Id.*

159. U.S. PAT. & TRADEMARK OFF., TRADEMARK MANUAL OF EXAMINING PROC. § 1210.04(d) (Nov. 2025) [hereinafter TMEP].

160. *Id.*

161. Assaf, *Dilution of Culture*, *supra* note 19, at 83; *see also* Luminita Olteanu, *Riding on the Coat-Tails of Traditional Cultural Expressions*, 34 INT’L J. SEMIOTICS L. 861, 862 (2021) (analyzing trademark law’s power to diminish traditional cultural expression, especially with regard to folkloric symbols and Greek mythology); Sari Sharoni, *The Mark of a Culture: The Efficiency and Propriety of Using Trademark Law to Deter Cultural Appropriation*, 26 FED. CIR. BAR J. 401, 415 (2017) (exploring how when the “dominant” culture begins to use a cultural symbol in a certain way, “the public may begin to perceive the cultural product in a way that exclusively conforms with the dominant culture’s new meaning”); *The Intersection of Trademark Law and Cultural Heritage*, HFG LAW & INTELL. PROP. (Sept. 9, 2024), <https://hfgip.com/news/intersection-trademark-law-and-cultural-heritage> (conveying how “[w]hen businesses use culturally significant symbols, motifs, or phrases as trademarks without proper authorization or respect for their cultural significance, it can lead to cultural appropriation,” in turn leading to “the commercialization of cultural elements in ways that may strip them of their original meaning or reduce their significance to mere commodities”); *cf.* Zaneta M. Robinson, *Trademark Law as an Accessory to Language Death*, 77 RUTGERS L. REV. 743, 802 (2025) (arguing that trademark registration provides “a potential pathway to preserving language and culture”).

162. *See supra* Section III.A.

Consider NIKE, named for the Greek goddess of victory. Once part of a living mythos, the name is now globally synonymous with sneakers and athletic wear. The shift is more than clever branding; it is a privatization of meaning—an enclosure of cultural signification into corporate identity. As Katya Assaf writes:

Consider the trademark “Nike.” The initial significance of the cultural sign “Nike” was as the name of the Greek Goddess of Victory. The sign was chosen to serve as a trademark for its ability to convey the message of success, overcoming adversity and victory, stated succinctly by the phrase “Just Do It.” The trademark grew so strong that it turned into the sign’s primary meaning while its original significance grew weaker and became a kind of secondary meaning. The word “Cadillac” underwent a similar process. Cadillac’s initial cultural significance was as the name of an early 18th century French explorer who founded the city of Detroit. The advent of the Cadillac automobile, however, imbued the name with a strong significance as a trademark, and the meaning connected to the explorer was relegated to an ancillary role. Another example is the word “Ajax,” which today primarily denotes both cleaning products of the Colgate-Palmolive Company and a computer program offered by Microsoft, but not the original meaning as a hero of Greek myth.¹⁶³

Other examples abound. APOLLO, the god of sunlight, music, and poetry, has become a private equity firm.¹⁶⁴ AMAZON now refers less to a river, rainforest, or tribe of warrior women than to a global e-commerce and fast-shipping company.¹⁶⁵ TROJAN, a people and a tragedy of betrayal, is synonymous with condoms.¹⁶⁶ The Native American tribe CHEROKEE is an automobile.¹⁶⁷ In 2007, the USPTO even granted registration of the word JESUS to Jesus Jeans, an Italian company, giving it presumptive nationwide rights in the name of the Christian prophet.¹⁶⁸ Morell International owns the trademark GOD for computer software.¹⁶⁹ These are not edge cases; they are emblematic of a systemic semiotic shift where, quite literally, trademark law sells out culture and meaning.

163. Assaf, *Dilution of Culture*, *supra* note 19, at 11–12.

164. See APOLLO, <https://www.apollo.com/> (last visited Mar. 21, 2026).

165. See AMAZON, <https://www.amazon.com/> (last visited Mar. 21, 2026).

166. See TROJAN, <https://www.trojanbrands.com/en/products/condoms/> (last visited Mar. 21, 2026).

167. See JEEP, <https://www.jeep.com/cherokee.html> (last visited Mar. 21, 2026).

168. Ankita Aseri, *Commercializing Religion via Trademarking God*, 23 J. WORLD INTELL. PROP. 75, 80 (2020).

169. See *id.* at 79 (“There is no inherent or statutory bar for a symbol that has acquired religious connotations and spiritual meaning to a group of believers to be protected as a commercial trademark, provided that certain legal conditions are met.”).

Trademark law, by elevating arbitrary marks, facilitates this shift. It rewards appropriation from religion, mythology, geography, and other symbolic domains far removed from the ordinary course of commerce. The result is what this Article calls *cultural catachresis*: a market-driven misapplication of language that gradually redefines public symbols as private property. Jacques Derrida famously described catachresis as “the *violent, forced, abusive* inscription of a sign, the imposition of a sign upon a meaning which did not yet have its own proper sign in language.”¹⁷⁰ Applied here, catachresis refers to the process by which a mark like PANDORA, once the mythic figure whose curiosity unleashed chaos, now primarily evokes jewelry or music streaming.¹⁷¹ MARS is no longer the god of war but a fusion of caramel and nougat.¹⁷² HERMES, messenger of the gods, becomes a luxury leather goods brand.¹⁷³ ORACLE, once a sacred seer, now conjures enterprise software.¹⁷⁴

Certainly, trademark law does not bar the public from speaking of these symbols. One is still legally free to refer to the goddess Nike or to explore the myth of Pandora. But the cultural effect of this sort of trademark appropriation is not censorship. Instead, it is semantic crowding, a more amorphous mental shift. As branded meanings dominate, older meanings are displaced. The public domain remains formally intact but symbolically diminished through the commodification of the semiotic commons by way of market application of metaphor.¹⁷⁵

A striking example of this tension occurred when Nike, Inc. attempted to seize control of the domain name *nike.dev*, arguing that no “believable or realistic reason” existed for someone else to own the domain name.¹⁷⁶ The registrant defended the name by explaining that it referred to the Greek goddess, even though the site was “largely undeveloped,” featuring only a photo of the goddess’s statue.¹⁷⁷ The domain owner cited Sanskrit and mythological

170. JACQUES DERRIDA, MARGINS OF PHILOSOPHY 255 (Alan Bass trans., 1982) (emphasis added); see also J. Hillis Miller, *The Figure in the Carpet* 1 POETICS TODAY 107, 111 (1980) (“Catachresis is the name for that . . . *abusive* transfer, something else for which there is no literal name . . .”) (emphasis added).

171. Compare PANDORA, <https://www.pandora.com> (last visited Mar. 21, 2026), and PANDORA, <https://us.pandora.net> (last visited Mar. 21, 2025), with Jane E. Harrison, *Pandora’s Box*, 20 J. HELLENIC STUD. 99 (1900) (“Pandora is the first woman, the beautiful mischief: she opens the forbidden box, out comes every evil that flesh is heir to; hope only remains.”).

172. MARS, <https://www.mars.com/> (last visited Mar. 21, 2026).

173. See *Hermès Leather*, HERMÈS, <https://www.hermes.com/us/en/content/151446-leather-care/> (last visited Mar. 21, 2026).

174. See ORACLE, <https://www.oracle.com/> (last visited Mar. 21, 2026).

175. See Dustin Marlan, *The Nightmare of Dream Advertising*, 65 WM. & MARY L. REV. 259, 305 (2023) (discussing the cultural harms of commodifying symbolic realms of meaning).

176. Nike Innovate C.V. v. Contact Privacy, Inc. Customer 1243971962/Ladinu, No. D2020-3067, 2021 WL 679013, at *2 (WIPO Arb. Feb. 16, 2021).

177. *Id.*; see also Patrick H.J. Hughes, *Nike Can’t Get Internet Domain Named After Greek Goddess of Victory*, WESTLAW INTELL. PROP. DAILY BRIEFING (Feb. 25, 2021).

associations.¹⁷⁸ Ultimately, the panel found that although the domain name was confusingly similar to the NIKE brand, the registrant had not acted in bad faith.¹⁷⁹ Still, the case illustrates how corporate ownership of arbitrary marks increasingly forecloses the imaginative and symbolic uses of language, even where no legal infringement occurs.¹⁸⁰

To be clear, the cultural problem with arbitrary marks is not primarily a “fair use” problem, though other critics have rightly explored that angle with trademark appropriation more broadly.¹⁸¹ Instead, it is one of symbolic capture. The issue is not whether people can legally invoke myth or history outside brand contexts (they usually can under trademark law, if no attempted procurement occurs). The issue is that when arbitrary marks become dominant, they overwrite shared stories with commercial scripts. As advertising becomes a primary mode of public storytelling,¹⁸² the symbolic commons is carved up and fed into the machinery of marketing. Semiotic demand drives commercial appropriation, and trademark law, with its strength hierarchy, helps meet that demand by design. As Sut Jhally puts it, “advertising has come to literally colonize the culture, taking up more and more physical space, creeping into virtually every nook and cranny of the visual and audio landscape, driving out other possible ways of thinking and being as it competes for our attention non-stop.”¹⁸³ As a facet of advertising, trademarks are no exception.¹⁸⁴

Some may find this commercial semiotic shift exhilarating. Perhaps the marketplace of symbols is more fun, more alive, more imaginative. Maybe consumers benefit from a kind of “magical thinking,” “hedonic enjoyment,” or even “material, beneficial spillover effects.”¹⁸⁵ But even if these effects are *real*

178. *Nike Innovate C.V.*, 2021 WL 679013, at *3.

179. *Id.* at *4–5.

180. While the conventional view that arbitrary marks “clearly do not threaten the linguistic commons,” *OBX-Stock, Inc.*, 558 F.3d at 340, may be accurate, the same cannot be said about the semiotic commons.

181. See, e.g., Keith Aoki, *How the World Dreams Itself to Be American: Reflections on the Relationship Between the Expanding Scope of Trademark Protection and Free Speech Norms*, 17 LOY. L.A. ENT. L. REV. 523, 545 (1997); Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489, 491 (2006); Madhavi Sunder, *IP*³, 59 STAN. L. REV. 257, 269 (2006) (“Intellectual property is increasingly understood as a legal vehicle for facilitating (or thwarting) recognition of diverse contributors to cultural . . . discourse.”).

182. Jhally, *supra* note 19, at 1; see MARK BARTHOLOMEW, *ADCREEP: THE CASE AGAINST MODERN MARKETING 2* (2017) (“Like the air we breathe, modern marketing inescapably infuses our environment.”).

183. Jhally, *supra* note 19, at 2.

184. See Pamela K. Morris & Jennifer A. Waldman, *Culture and Metaphors in Advertising: France, Germany, Italy, the Netherlands, and the United States*, 5 INT’L J. COMMUN. 942, 943 (2011) (“Within a culture, advertising is considered both a communication and a social process that is used to influence its audience.”).

185. Jake Linford, *Placebo Marks*, 47 PEPP. L. REV. 45, 49 (2019) (“Recent evidence . . . suggests that the ability of trademarks to influence consumer perception provides material, beneficial spillover effects.”); 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 history or the marketing of the brand[.]”);

in some sense, they lie outside the proper domain of trademark law, which is not tasked with reinforcing persuasive or poetic meaning.¹⁸⁶ Trademark law's function is to promote clarity, reduce consumer confusion, and prevent unfair competition—not to incentivize cultural enclosure and appropriation.¹⁸⁷ Yet that is precisely what the legal structure surrounding arbitrary marks does. Rather than focusing on conceptual clarity, it promotes a strategy based on the lack of competitors' need—i.e., the competitor's need test for descriptiveness asks whether competitors *need* the mark at issue to describe their products or services.¹⁸⁸ Competitors' needs are typically of no concern in the context of arbitrary marks. In this way, arbitrary marks encourage a myth repurposed into merchandise.

Catachresis has been theorized by postcolonial thinkers as a tool of resistance—an “abuse” of dominant metaphors by marginalized voices.¹⁸⁹ In trademark selection, we see the reverse. Corporations, not marginalized speakers, deploy the catachresis.¹⁹⁰ They reframe religion, mythology, and identity not to resist power, but to consolidate it through ownership of meaning.¹⁹¹ What emerges is what Jean Baudrillard referred to as a simulacrum,

but see Katya Assaf, *Magical Thinking in Trademark Law*, 37 L. & SOC. INQUIRY 595, 595 (pointing out, darkly, that famous trademarks are legally treated as magical objects and trademark law thus amounts to endorsing a totemic religion of brands); see also Katya Assaf, *Brand Fetishism*, 43 CONN. L. REV. 83, 148 (2010) (“The legal system should refrain from supporting ungrounded beliefs about trademarks.”); Mark Bartholomew, *Advertising and the Transformation of Trademark Law*, 38 N.M. L. REV. 1, 47 (2008) (“Recent research in cognitive psychology demonstrates that, even without legal protection, advertising does leave impressions in the human mind that can be extremely difficult to shake.”).

186. Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L. J. 1165, 1182 (1948) (“The classical economists who enthroned the consumer never dreamed that he would make his decisions under a bombardment of stupefying symbols.”); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717 (1999) (updating Brown’s argument for a new generation of advertising where children have “[b]reakfast with Batman” cereal); cf. Beebe, *Search and Persuasion*, *supra* note 24, at 2069 (“[A]re we searching for trademarks or are trademarks searching for us? Is trademark law dedicated to the minimization of their search costs or ours?”).

187. See generally Assaf, *Magical Thinking in Trademark Law*, *supra* note 185.

188. See, e.g., *Rodeo Collection, Ltd. v. W. W. Seventh*, 812 F.2d 1215, 1218 (9th Cir. 1987).

189. ASHCROFT ET AL., *supra* note 21.

190. But the non-reversal might be said to occur too as marginalized groups reappropriate the trademarks of luxury brands. See, e.g., Elizabeth L. Rosenblatt, *Legendary Houses: Trademarks, Transformation, and Ballroom Culture*, 58 AKRON L. REV. 475 (2025). And more broadly, as Margaret Chon acknowledges, “[g]lobal consumers are increasingly activist, playful, skeptical, and sophisticated regarding marks’ linguistic functions . . .” Chon, *supra* note 101, at 967.

191. There is a rather robust literature focusing on the appropriation of religious terms; however, this cultural catachresis does not include only religious marks. See, e.g., David A. Simon, *Register Trademarks and Keep the Faith: Trademarks, Religion and Identity*, 49 IDEA 233 (2009); Agnes Beatrice Gambill, *Trademark Holy Wars: The 2nd Circuit’s Attempt to Genericide God*, 48 AIPLA Q.J. 225 (2020); Steven John Olsen, *Protecting Religious Identity with American Trademark Law*, 12 CHI-KENT J. INTELL. PROP. 129 (2013).

something that replaces a facet of reality with its ersatz representation¹⁹²—a goddess turned into a sneaker, a river into a fulfillment center.

Judge Friendly may not have intended his *Abercrombie* spectrum to serve as a vehicle of cultural enclosure. But its elevation of arbitrary marks makes it function precisely that way. By granting arbitrary marks protection equivalent to its fanciful apex, the distinctiveness doctrine rewards the conversion of meaning into capital, and of story into slogan. The result is a slow-burning cultural dilution, a kind of semiotic privatization operating under a banner of legal neutrality. And in that process, the symbolic commons—what we collectively reference, remember, and revere—is quietly, but profoundly, transformed as arbitrary marks draw metaphorically from domains far removed from the goods and services of commerce.

IV.

RECALIBRATING THE SPECTRUM

Building on the research in the previous Part, this final Part casts serious doubt on the *Abercrombie* spectrum's elevation of arbitrary marks, particularly in comparison to fanciful marks, which prove stronger in practice and less culturally harmful. In doing so, it challenges the coherence of the spectrum's upper tiers and opens the door to a more realistic—and culturally sensitive—understanding of trademark strength. Ultimately, this Part argues that the *Abercrombie* spectrum is itself arbitrary, a foundational weakness now further complicated by the emerging practice of outsourcing distinctiveness judgments to generative AI.

A. *Fanciful > Arbitrary ≈ Suggestive*

The *Abercrombie* spectrum places fanciful and arbitrary marks side by side near the top of the hierarchy of inherent distinctiveness, treating the two categories as doctrinal peers. Yet the resemblance is largely superficial. Fanciful marks achieve distinctiveness through linguistic invention; arbitrary marks achieve it through semantic displacement. One creates language where none previously existed, while the other repurposes culturally meaningful words for new commercial contexts. Collapsing these mechanisms into a single tier obscures important differences in communicative power, competitive effects, and cultural impact. Once those differences are recognized, fanciful marks emerge as categorically stronger than arbitrary ones.

Equality between fanciful and arbitrary marks appears to be a historical artifact. Before *Abercrombie*, trademark law often treated “arbitrary and fanciful” marks together, describing both as inherently distinctive when used in

192. Jean Baudrillard, *Simulacra and Simulations*, in JEAN BAUDRILLARD, SELECTED WRITINGS 166 (Mark Poster ed., 1988) (“Simulation is no longer that of a territory, a referential being or a substance. It is the generation by models of a real without origin or reality: a hyperreal.”).

clearly non-descriptive ways.¹⁹³ Thus, a mark such as STORK CLUB for a New York nightclub was labeled “arbitrary and fanciful” because it bore no relationship to the service offered.¹⁹⁴ Over time, the two categories became conceptually distinct, yet they remain doctrinal equals in many courts’ eyes, together perched atop the strength hierarchy.¹⁹⁵ Another view, however, treats fanciful marks as stronger.¹⁹⁶

That view gained modest traction following the Supreme Court’s recitation of the *Abercrombie* spectrum in *Two Pesos v. Taco Cabana*, which listed the categories in order of “generally increasing distinctiveness” and placed fanciful above arbitrary.¹⁹⁷ Although *Two Pesos* primarily addressed trade dress distinctiveness—and has itself generated considerable doctrinal confusion¹⁹⁸—its sequencing may nonetheless reflect a more defensible hierarchy than the *Abercrombie* approach that places fanciful and arbitrary marks “on roughly equal footing.”¹⁹⁹

The case for Fanciful > Arbitrary rests on a fundamental difference in how the two categories generate distinctiveness. A fanciful mark is a neologism—a term coined specifically for use as a mark, with no prior lexical existence.²⁰⁰ Its distinctiveness is intrinsic: because the term did not exist before, it can only mean the brand. Arbitrary marks function differently. Rather than inventing language,

193. *Saxlehner*, *supra* note 51 and accompanying discussion.

194. *Id.*

195. *See, e.g., Bliss Collection*, 82 F.4th at 510 (stating that “fanciful and arbitrary marks are considered the strongest or most distinctive marks”); *Surgicenters of Am., Inc. v. Med. Dental Surgeries, Co.*, 601 F.2d 1011, 1014 (9th Cir. 1979); *Exxon Corp. v. XOIL Energy Res., Inc.*, 552 F. Supp. 1008, 1014 (S.D.N.Y. 1981); *McGregor-Doniger Inc. v. Drizzle Inc.*, 599 F.2d 1126, 1131 (2d Cir. 1979); *Winner Int’l LLC v. Omori Enters., Inc.*, 60 F. Supp. 2d 62, 67 (E.D.N.Y. 1999); *Paddington Corp. v. Atiki Imps. & Distribs., Inc.*, 996 F.2d 577, 583 (2d Cir. 1993).

196. *See, e.g., Amstar Corp.*, 615 F.2d at 260 (“‘Domino’ is not a coined word, is not purely fanciful, and while its application to sugar may be arbitrary, it is still not to be accorded the same degree of protection given such coined and fanciful terms as ‘Kodak’ or ‘Xerox.’”); *Blacks in Gov’t v. Nat’l Ass’n of Blacks within Gov’t*, 601 F. Supp. 225, 227 (D.D.C. 1983) (explaining that while an arbitrary mark is also “accorded preferential treatment,” a fanciful mark is “[t]he strongest type of mark meriting legal protection”); *Fortune Dynamic, Inc. v. Victoria’s Secret Stores Brand Mgmt., Inc.* 618 F.3d 1025, 1032 (9th Cir. 2010); *Med. Depot, Inc. v. Med Way US, Inc.*, 774 F. Supp. 3d 554, 567 (E.D.N.Y. 2025); *State Permits, Inc. v. Fieldvine, Inc.*, No. 92075095, 2024 WL 3825297, at *11 (T.T.A.B. Aug. 15, 2024); *Iron Balls Int’l Ltd. v. Bull Creek Brewing, LLC*, No. 92079099, 2024 WL 2844425, at *13 (T.T.A.B. June 4, 2024); *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023); *accord* Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581, 1637 (2006) (finding that fanciful marks are offered a broader scope of protection than arbitrary ones); Linford, *Fanciful?*, *supra* note 3, at 734 (finding that “fanciful marks receive broader protection than other marks”).

197. *Two Pesos*, 505 U.S. at 768 (citing *Abercrombie*, 537 F.2d at 9) (“Marks are often classified in categories of *generally increasing distinctiveness*; following the classic formulation set out by Judge Friendly, they may be (1) generic; (2) descriptive; (3) suggestive; (4) *arbitrary*; or (5) *fanciful*.”) (emphasis added).

198. *See* Marlan, *Servicing Trade Dress*, *supra* note 39, at 1534 (“[I]n treating all forms of trade dress as conceptually alike, the *Two Pesos* opinion was ripe for controversy.”).

199. Fromer, *Against Secondary Meaning*, *supra* note 6, at 225 n.89.

200. Linford, *Fanciful?*, *supra* note 3.

they operate through catachrestic displacement, repurposing existing words for unrelated products.²⁰¹ Consider APPLE for computers. Its conceptual strength does not arise because “apple” is an inherently distinctive sequence of phonemes. Rather, it emerges from the wide semantic gap between fruit and computers, which prevents descriptive confusion while allowing the word’s cultural resonances—nature, knowledge, simplicity, rebellion—to perform branding work. That catachrestic mechanism differs categorically from coinedness, which is what gives marks like KODAK or EXXON their distinctiveness.

To be sure, as Jake Linford has shown, fanciful marks are not perfectly empty vessels.²⁰² Linguistic research on symbolism demonstrates that certain phoneme clusters carry implicit associations that marketers exploit when crafting brand names. Even invented terms like KODAK or XEROX may convey faint product-relevant impressions. Yet this observation does not collapse the distinction between fanciful and arbitrary marks. The differences between the two lie in the type of meaning involved.

Sound symbolism operates at a sub-lexical level, producing diffuse and often unconscious impressions that are weakly held and unattached to any prior cultural referent.²⁰³ No community “owned” the phoneme cluster in KODAK before Eastman coined it, and no shared culture was enclosed when EXXON became a petroleum brand. The symbolic commons lost nothing. Arbitrary marks, by contrast, appropriate meaning that already exists in culturally dense form—gods, animals, geographic symbols, myths, or institutions—and redeploy that meaning for private commercial identity. Thus, even when fanciful marks draw on sound symbolism, they generate new associations, whereas arbitrary marks extract preexisting ones—a distinction that carries both linguistic and cultural consequences.

The brand literature further supports differentiating the categories. Marketing studies find that sound symbolism can enhance brand recognition and communicative clarity, reinforcing the conceptual strength of well-designed fanciful marks.²⁰⁴ Arbitrary marks, by contrast, frequently require substantial advertising investment to achieve comparable recognition. Indeed, as Section III.B demonstrates, consumer recall studies suggest that arbitrary marks often

201. *Supra* Section II.A.

202. Linford, *Fanciful?*, *supra* note 3, at 754–55.

203. *See id.* at 750–62; Klink, *Creating Brand Names*, *supra* note 14, at 6–7.

204. Sound symbolism creates a tension in assessing trademark strength. On one hand, it can serve as a powerful source of distinctiveness; on the other, it implicates concerns about competitors’ need to use similar expressive tools, a tension this Article resolves, if tentatively, in favor of apex placement given sound symbolism’s demonstrated communicative benefits. *Compare* Linford, *Fanciful?*, *supra* note 3, at 762 (advocating for “[d]iscounting the use of similar sound symbols by the alleged infringer”), *with* Klink, *Creating Meaningful*, *supra* note 14, at 27 (finding that products with brand names using sound symbolism to convey product-related information are liked better by consumers and positioned more strongly in their minds).

underperform suggestive ones in terms of memorability and immediate comprehension.²⁰⁵

For these reasons, arbitrary marks should not enjoy the same doctrinal status as fanciful marks at the highest echelon of trademark protection. They deserve recognition as inherently distinctive because they are not competitively necessary and can support branding through metaphorical association. But their legal privileges should reflect both their weaker communicative performance and their potential social costs. Whether ranked slightly above or alongside suggestive marks, arbitrary marks should occupy at least one tier below fanciful marks in the strength hierarchy.

One might object that parsing the distinction between arbitrary and suggestive is largely academic. Thomas McCarthy observed:

“Arbitrary” marks are sometimes difficult to distinguish from “suggestive” marks. However, for legal purposes, there is little, if any, reason to make the distinction, and the cases hardly ever bother to do so. “Arbitrary” and “suggestive” marks fall within the same legal pigeon hole of classification in that neither category requires proof of secondary meaning for legal protection and registration. For example, it could be argued that a mark like GREYHOUND for a bus line is arbitrary. On the other hand, it could be argued with equal force that GREYHOUND suggests speed and sleekness. But the classification need not be made, for in either case, proof of secondary meaning is unnecessary.²⁰⁶

McCarthy is correct on the narrow doctrinal point that at the moment of PTO examination, suggestive, arbitrary, and fanciful marks are all treated as inherently distinctive and registrable without proof of secondary meaning.²⁰⁷ But it does not follow that the classification is inconsequential at the registration stage. On the contrary, this is where its consequences may be greatest. As Part III demonstrated, the *Abercrombie* spectrum shapes mark selection before any application is filed. Trademark attorneys, branding consultants, the USPTO, and organizations like INTA promote arbitrary marks strongly due to their elevated categorical status. And firms respond to that signal. The classification thus operates upstream of examination, steering businesses (particularly startups) toward marks that are legally privileged but commercially underperforming or culturally extractive. A perverse incentive of this kind does not appear in any individual prosecution file, which may explain why the cases “hardly ever bother” with the distinction.²⁰⁸ But its aggregate effects on the composition of

205. *Supra* Section III.B.

206. MCCARTHY, *supra* note 53, at § 11:12.

207. TMEP, *supra* note 159 § 1209.01(a) (“Suggestive marks, like fanciful and arbitrary marks, are registrable on the Principal Register without proof of secondary meaning.”).

208. MCCARTHY, *supra* note 53, at § 11:12.

the trademark register—and on the language and symbols drawn into it—are substantial. The distinction McCarthy dismisses as unnecessary is, in fact, doing quiet but significant work at the very stage he identifies.

The boundary between arbitrary and suggestive is, as McCarthy notes, frequently blurry in practice.²⁰⁹ Yet that very ambiguity supports the argument advanced here. Indeed, many marks labeled “arbitrary” function linguistically much closer to suggestive marks than to fanciful ones. GREYHOUND, for instance, likely falls on the suggestive side because its connotations of speed and sleekness are intuitively apparent. The same could be said of JAGUAR, whose associations with grace, elegance, and speed make its metaphorical appeal obvious. But even marks commonly labeled arbitrary, such as CADILLAC (named after the French explorer associated with Detroit), reveal layers of meaning once their historical or symbolic references are considered. Many purportedly arbitrary marks are better understood as metaphorically suggestive upon closer inspection.

Nor does the absence of a bright line render the distinction irrelevant beyond registration. Distinctiveness may function as a binary threshold for protection, but strength operates along a spectrum, and that spectrum influences outcomes in litigation.²¹⁰ Classification informs courts’ assessments of conceptual strength, the scope of protection a mark receives, and the likelihood-of-confusion analysis in infringement disputes. Inherent strength remains a key factor among most circuits.²¹¹ To be sure, in litigation the classification will prove outcome-determinative in only a minority of cases—those close enough that the starting presumption of conceptual strength tips the balance. But those cases are material. Borderline infringement disputes are where zones of exclusivity are drawn, where courts decide whether a competitor must rebrand

209. *Id.*

210. *Kohler Co. v. Bold Int’l FZCO*, 422 F. Supp. 3d 681, 700 (E.D.N.Y. 2018); *see supra* note 66.

211. Circuits differ in how they weigh conceptual versus mark strength. The Federal Circuit and Trademark Trial and Appeal Board (TTAB) weighs conceptual strength more heavily than commercial strength in measuring mark strength for purposes of the likelihood of confusion analysis. *See Spireon*, 71 F.4th at 1362; *Iron Balls Int’l*, 2024 WL 2844425, at *29. The Third, Sixth, and Seventh Circuits take both conceptual and commercial strength into relatively equal regard. *See A & H Sportswear, Inc. v. Victoria’s Secret Stores, Inc.*, 237 F.3d 198, 224 (3d Cir. 2000); *Daddy’s Junky Music Stores, Inc. v. Big Daddy’s Family Music Ctr.*, 109 F.3d 275, 281–82 (6th Cir. 1997); *CAE, Inc. v. Clean Air Eng’g, Inc.*, 267 F.3d 660, 684 (7th Cir. 2001). The Second, Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits consider both conceptual and commercial strength, though prioritizing to some degree commercial strength. *See RiseandShine Corp. v. PepsiCo, Inc.*, No. 23-1176-cv, 2024 WL 5165388, at *2 (2d Cir. Dec. 19, 2024); *Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F.3d 651, 663 (4th Cir. 2018); *Springboards to Educ., Inc. v. Houston Indep. Sch. Dist.*, 912 F.3d 805, 814 (5th Cir. 2019); *Lovely Skin, Inc. v. Ishtar Skin Care Prods., LLC.*, 745 F.3d 877, 888 (8th Cir. 2014); *Rearden LLC v. Rearden Com. Inc.*, 683 F.3d 1190, 1211 (9th Cir. 2012); *Water Pik, Inc. v. Med-Sys., Inc.*, 726 F.3d 1136, 1153 (10th Cir. 2013); *Fla. Int’l Univ. Bd. v. Fla. Nat’l Univ.*, 830 F.3d 1242, 1258–59 (11th Cir. 2016). The First Circuit focuses almost exclusively on commercial strength to the exclusion of conceptual strength. *See WEX Inc. v. HP Inc.*, No. 2:24-cv-00121-JAW, 2024 WL 3358651, at *28–30 (D. Me. July 9, 2024), *appeal dismissed*, No. 24-1729, 2024 WL 5379024 (1st Cir. Oct. 28, 2024).

or coexist, and where the boundary between trademark owners' rights and the public's linguistic freedom is actually contested. A doctrine that systematically overweighs arbitrary marks in exactly those cases can shift the balance between mark owners, competitors, and the public one close case at a time.²¹²

More fundamentally, McCarthy's observation proves more than he acknowledges. If arbitrary and suggestive marks are so difficult to distinguish that "the cases hardly ever bother," and if both occupy "the same legal pigeon hole" at registration, the natural conclusion is that the equivalence should extend to the strength determination in infringement litigation as well.²¹³ If arbitrary marks operate through catachrestic metaphor, they are linguistically and semantically closer to suggestive marks, which also operate metaphorically. Recognizing this should prompt a downward shift in arbitrary marks' position within the *Abercrombie* spectrum or, at minimum, a more restrained, context-sensitive approach to the strength and scope of protection they receive.

B. Recalibration in Practice

If arbitrary marks belong at or near the suggestive tier, the question becomes how to get them there. The most practical vehicle for such recalibration is not legislative reform but the likelihood-of-confusion analysis that courts already apply in infringement cases. Because the multifactor tests used across circuits are largely judge-made law, courts retain the flexibility to adjust how conceptual strength is assessed without statutory change, making this the most tractable path toward recalibration.

The strength-of-the-mark factor provides the most direct entry point.²¹⁴ Mark strength is viewed by many courts as among the "most significant" factors.²¹⁵ Most circuits already distinguish between a mark's conceptual

212. For an extensive analysis of this balance between trademark owners, competitors, and the public, see generally Dustin Marlan, *The Trademark Bargain: Registration as Disclosure*, 75 AM. U. L. REV. 101 (2026).

213. MCCARTHY, *supra* note 53, at § 11:12.

214. Other likelihood-of-confusion factors may warrant recalibration when the mark at issue is arbitrary. The intent factor, for instance, asks whether the defendant adopted its mark to trade on the plaintiff's goodwill. A more nuanced application might distinguish between intent to exploit brand identity and intent to invoke the mark's pre-commercial cultural referent. A defendant adopting MARATHON for a running event, or APOLLO for a theater company invoking the classical god of music and the arts, is drawing on a cultural referent rather than attempting to trade on the goodwill of an existing brand. Similarly, where a cultural use of a term has coexisted with the brand over time without generating documented consumer confusion, that coexistence may suggest that consumers perceive the cultural referent and the brand as occupying distinct conceptual space—evidence that likelihood-of-confusion doctrine currently underweights. And the likelihood of expansion factor, recognized in some circuits, might be applied with greater skepticism where the mark holder's asserted zone of exclusivity rests primarily on the mark's categorical classification as "arbitrary" rather than on demonstrated commercial strength or market presence.

215. See, e.g., *Mobil Oil Corp. v. Pegasus Petroleum Corp.*, 818 F.2d 254, 258 (2d Cir. 1987) (identifying the first three Polaroid factors—strength, similarity, and competitive proximity—as "perhaps the most significant").

strength—its inherent distinctiveness based on categorical placement—and its commercial strength, acquired through marketplace exposure and advertising investment.²¹⁶ Courts tend to treat arbitrary and fanciful marks as presumptively strong, and suggestive and descriptive marks as presumptively weak. As the Ninth Circuit has observed, “unlike arbitrary or fanciful marks *which are typically strong*, suggestive marks are presumptively weak.”²¹⁷ Notice that this formulation groups arbitrary and fanciful together and contrasts them with suggestive—precisely the equivalence this Article argues should be disrupted. Suggestive marks are presumptively weak relative to the upper tier of the distinctiveness hierarchy. And as the foregoing analysis shows, arbitrary marks are linguistically and commercially closer to suggestive marks than to fanciful ones. It follows that arbitrary marks should share more of suggestive marks’ presumptive weakness than current doctrine allows. A finding of lower conceptual strength does not preclude a finding of infringement, but it would adjust the starting presumption in a way that reflects how these marks actually function.

A secondary meaning conditioning proposal follows naturally from this analysis. If arbitrary marks derive their communicative force through catachresis—achieving full semiotic power only after substantial marketplace exposure—then conditioning the presumption of highest conceptual strength on demonstrated secondary meaning aligns legal doctrine with the functional reality of how these marks work. Arbitrary marks could begin as inherently distinctive at or near the level of suggestiveness, with apex-level strength available upon a showing of acquired consumer recognition.

The most ambitious version of this argument points toward a more fundamental restructuring. If the *Abercrombie* spectrum is conceptually unstable across its tiers,²¹⁸ then the logical endpoint may be to abandon the conceptual distinctiveness hierarchy altogether in favor of greater emphasis on commercial strength in likelihood-of-confusion determinations. The First Circuit already moves in this direction, and several other circuits give substantial weight to marketplace recognition rather than inherent linguistic categorization.²¹⁹

This Article stops short of that endpoint, however, because commercial strength cannot do all the work of inherent distinctiveness. Unlike the subjective and intuitive inherent distinctiveness judgment, “[p]roof of secondary meaning entails vigorous evidentiary requirements.”²²⁰ Demonstrating marketplace

216. *Supra* note 210; *see, e.g.*, *Nutri/Sys., Inc. v. Con-Stan Indus.*, 809 F.2d 601, 605 (9th Cir. 1987) (“Arbitrary or fanciful marks (*i.e.*, Kodak) are called ‘strong’ marks, whereas descriptive or suggestive marks are ‘weak.’”).

217. *Brookfield Commc’ns, Inc. v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1058 (9th Cir. 1999) (emphasis added).

218. *Infra* Section IV.C.

219. *Supra* note 210.

220. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 125 (4th Cir. 1990) (quoting *Thompson Med. Co., Inc. v. Pfizer Inc.*, 753 F.2d 208, 217 (2d Cir. 1985)).

recognition is therefore expensive—e.g., consumer surveys, longitudinal sales and advertising data, documentation of consumer perception—and that evidentiary burden is not distributed evenly across the marketplace. As Jeanne Fromer notes, “[b]usinesses with deeper pockets could then more readily establish secondary meaning By contrast, new entrants and other businesses with fewer resources could not as easily establish secondary meaning for their marks.”²²¹ The conditioning proposal advanced above is calibrated to avoid this problem. Arbitrary marks should retain inherent distinctiveness and immediate registrability at a suggestive-level presumption of strength, with secondary meaning operating only as the gateway to apex-level protection. Baseline protection remains accessible to all, while the broadest scope of exclusivity must be earned.

In sum, the traditional conflation of fanciful and arbitrary marks is an artifact best left behind. Truly fanciful marks deserve their top-tier status for being inherently distinctive, purely source-identifying, and non-extractive. But they are relatively rare.²²² The larger and more ambiguous category of arbitrary marks demands a more nuanced doctrinal treatment—one that recognizes their legal distinctiveness while acknowledging their linguistic ambiguity, commercial inefficiency, and cultural costs. Realigning the position of arbitrary marks within the hierarchy would better serve trademark law’s twin goals of promoting fair competition and preventing consumer confusion, while also preserving the shared symbolic resources that constitute the cultural public domain.

C. *The Arbitrariness of Abercrombie*

Arbitrary marks are, in an important sense, a fiction. Rather than semantically empty signs, as trademark doctrine typically assumes, they are metaphorical constructs repurposed to evoke, resonate, and persuade.²²³ Words such as APPLE, AMAZON, or JAGUAR arise not from linguistic neutrality but from cultural familiarity and imaginative extension.²²⁴ These marks succeed, if

221. Fromer, *supra* note 6, at 235–36. In her comprehensive analysis, Fromer points out several other problems with enshrining secondary meaning in the context of word marks, including (1) that well-resourced firms can too easily establish secondary meaning even for marks whose protection undermines trademark law’s goals, *id.* at 214; (2) that marks “retain their primary meaning” even after acquiring secondary meaning, such that protection may still impair competition, *id.* at 215—an observation consistent with this Article’s account of arbitrary marks as palimpsests, *see supra* Section III.A; and (3) that “businesses have strong incentives external to trademark law to develop secondary meaning” regardless of doctrinal reward, Fromer, *supra* note 6, at 215. The narrower proposal here—employing secondary meaning solely as the gateway between suggestive-level and apex-level strength for arbitrary marks, while preserving inherent distinctiveness as the accessible baseline—is calibrated with Fromer’s fair competition and consumer protection concerns in mind.

222. Chiranjeev Kohli & Mrugank Thakor, *Branding Consumer Goods: Insights from Theory and Practice*, 14 J. CONSUMER MKTG. 206, 209 (1997) (“Coined names gained acceptance in the mid-1980s. Ever since, their popularity has been waning.”).

223. *Supra* Section III.A.

224. *Id.*; *supra* Section III.C.

at all, not because of a lack of meaning altogether but instead because their meanings can be productively displaced into new commercial contexts. Once this mechanism is recognized, the conceptual strength that trademark law attributes to arbitrary marks appears overstated.²²⁵ That overstatement carries serious economic and cultural costs, privileging marks that rely on preexisting symbolic capital and encouraging branding strategies that appropriate cultural language, rather than creating new commercial signs.²²⁶

But the fiction runs deeper still. The problem is not merely that arbitrary marks are less “arbitrary” than the law claims. It is that the entire distinctiveness spectrum—the conceptual framework Judge Friendly articulated in *Abercrombie*—rests on similarly unstable foundations. Every category on that spectrum leaks. Fanciful marks echo familiar sounds through sound symbolism; arbitrary marks import symbolic meaning through catachresis; suggestive and descriptive marks blur at their boundaries; and even the supposed bright line between descriptive and generic terms bends under the pressure of semantic shifts.²²⁷ In fact, what trademark law presents as a clear taxonomy is, in practice, a set of porous borders attempting to contain the unruly forces of language and consumer perception.

Yet trademark law continues to rely on the *Abercrombie* spectrum because it is useful. Indeed, the spectrum offers courts and examiners a manageable heuristic for sorting marks and allocating evidentiary burdens. But usefulness should not be confused with truth. Recognizing the semiotic complexity of so-called arbitrary marks only confirms what has long been implicit. That is, the distinctiveness spectrum is less a map of linguistic reality or consumer psychology than a tool of legal convenience. If the framework is to persist (and perhaps some version of it must), we should at least acknowledge its character as a legal fiction rather than treat it as a natural taxonomy of language. Judge Friendly himself recognized as much, describing the categories as flexible guideposts rather than rigid doctrinal compartments.²²⁸

The risks of mistaking this heuristic for a natural classification grow sharper as scholars and regulators explore the possibility of “Automating *Abercrombie*.”²²⁹ Barton Beebe, Jeanne Fromer, and co-authors demonstrate that machine-learning models trained on over 1.5 million trademark applications and over two million USPTO office actions can predict examining attorneys’ determinations of inherent distinctiveness with approximately 86% accuracy.²³⁰ Using explainable AI techniques, the researchers also identify the semantic features that drive those predictions, raising the prospect of decision-support

225. *Supra* Section III.B.

226. *Supra* Section III.C.

227. *Supra* Section II.B.

228. *See supra* note 48 and accompanying discussion.

229. Adarsh et al., *Automating Abercrombie*, *supra* note 4, at 828 (using generative AI to analyze “how words are connected, thereby aiming at a semantic understanding of trademark applications”).

230. *Id.*

tools or even a “robot trademark clerk” capable of assisting or partially replacing human examination.²³¹

In the specific context of arbitrariness, such models can learn to identify “terms that are in the dictionary yet [are] semantically orthogonal to the product attributes”²³² By analyzing relationships among the mark drawing, the product identification, and the relevant international classification, the system can approximate the reasoning that leads examiners to categorize marks as arbitrary.²³³

These technological achievements are impressive. But they do not validate the conceptual coherence of the *Abercrombie* spectrum. If anything, they illuminate its limits. As the authors themselves note, their work “not only paves the road toward decision-support systems in trademark law,” but also “shed[s] light on the limitations of the *Abercrombie* spectrum and the normative challenges resulting from these limitations.”²³⁴ When machine learning can replicate distinctiveness determinations at scale, even when accurate, the classifications it reproduces may reflect institutional habit more than rigorous linguistic analysis.²³⁵

Automation promises efficiency, but it risks ossifying the very arbitrariness embedded in the existing framework. Training algorithms to replicate trademark judgments presupposes that the underlying distinctions are meaningful, trainable, and normatively justifiable.²³⁶ Yet the problems explored throughout this Article suggest otherwise. Automating *Abercrombie* does not resolve the conceptual instability of the distinctiveness spectrum; it merely encodes that instability into new technological systems. As the researchers acknowledge, the results “raised doubts whether the *Abercrombie* spectrum should be the guiding principle for trademark registrability when trademark distinctiveness is uncertain”²³⁷

Generative AI, in other words, cannot save trademark law from the arbitrariness of arbitrary marks—or from the broader instability of Judge Friendly’s spectrum. On the contrary, it may deepen the legal system’s dependence on inherited heuristics at precisely the moment when those heuristics deserve renewed scrutiny. The real challenge, therefore, is not to train machines to sort marks more efficiently. It is to confront the legal and cultural

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 852.

235. *See id.*

236. *Id.* at 857 (explaining that the AI model “performs poorly on . . . middle-ground trademarks, and we expect that this mimics the low confidence that human trademark experts have when deciding such cases”); Cf. Lisa Larrimore Ouellette, *The Google Shortcut to Trademark Law*, 102 CALIF. L. REV. 351, 406 (2014) (“Even if search results can never perfectly capture public perception (just as no survey results could), the goals of Google are still aligned with the goal in trademark law of understanding mark distinctiveness.”).

237. Adarsh et al., *Automating Abercrombie*, *supra* note 4, at 857.

consequences of a doctrine that mistakes metaphor for conceptual strength and convenience for conceptual coherence. Even an advanced, machine-driven application of flawed categories cannot correct that underlying error. Thus, while arbitrary marks are not actually arbitrary in practice, the *Abercrombie* spectrum is.

V.

CONCLUSION

This Article has challenged the long-held assumption that arbitrary marks are inherently strong. Far from being empty vessels, arbitrary marks operate through the literary mechanism of catachrestic metaphor, drawing meaning from displaced or repurposed language. In this respect, they function less like fanciful marks—the coined neologisms with which doctrine aligns them—and more like suggestive marks, which also rely on figurative associations to convey meaning. Yet empirical evidence shows that arbitrary marks do not deliver the conceptual advantages attributed to them. In measures of consumer recall, recognition, and likeability, they trail behind fanciful, suggestive, and descriptive marks.

The doctrinal elevation of arbitrary marks, this Article has argued, is therefore not a principled conclusion about inherent strength. Instead, it is a structural accommodation—trademark law’s response to semiotic scarcity. As the supply of communicatively effective descriptive and suggestive terms becomes depleted by congestion on the register, arbitrary marks fill the vacuum, offering registrability without the evidentiary burden of secondary meaning. Their ascent to the apex of the *Abercrombie* spectrum is less a reflection of their inherent strength than a reflection of the system’s need for them. But that elevation carries hidden costs.

Commercially, privileging arbitrary marks rewards branding strategies that depend on substantial advertising investment to achieve the recognition that other mark types generate more naturally. In doing so, it disadvantages small businesses and startups, which often depend on marks that identify source efficiently from the outset. Culturally, the doctrine encourages the appropriation of shared symbols—myths, geographies, deities, tribes, and traditions—by converting elements of the symbolic commons into private property through a legal framework that has normalized such conversions so thoroughly that they rarely register as a choice. This Article thus argues for a doctrinal recalibration: arbitrary marks should be treated as presumptively weaker than fanciful ones—at or around the level of suggestive marks.

And in challenging the elevation of arbitrary marks, this Article has advanced a broader critique. The arbitrary mark is the final domino in a spectrum already destabilized by sustained scholarly pressure. Generic terms retain residual source significance through semantic shift. The boundary between descriptive and suggestive marks remains conceptually unstable and inconsistently applied. Fanciful marks, often presumed to be semantically empty,

carry implicit meaning through sound symbolism. And arbitrary marks import culturally dense symbolic meaning while receiving some of the strongest protection trademark law affords. At every level, the *Abercrombie* spectrum rests on simplistic assumptions about language that collapse under scrutiny. Thus, if the arbitrary mark is indeed the spectrum's final myth, its unraveling invites a broader reconsideration of the classificatory system that has shaped trademark law for half a century.