

ARTICLE

LOOKING AT THE LANHAM ACT: IMAGES IN TRADEMARK AND ADVERTISING LAW

*Rebecca Tushnet**

TABLE OF CONTENTS

I. INTRODUCTION.....862

II. TRADEMARK865

 A. *Formal Word Primacy and the Incoherence of the Abercrombie Spectrum*.....865

 B. *On Knowing It When You See It: Visuality and Infringement*.....874

 C. *Verbal Overshadowing*.....878

 D. *Words in Trade Dress Cases*883

 E. *Images and Expressive Uses*891

III. ADVERTISING GENERALLY895

 A. *What Marketers Know*.....897

 1. *The Power of Images*897

 2. *The Relation Between Images and Rational Decisionmaking Models*901

 B. *Law*.....905

 C. *Cigarettes and Environmental Marketing: Case Studies of Image-Based Regulation*911

IV. TENTATIVE CONCLUSIONS916

* Professor, Georgetown Law. Thanks to participants at WIPIP at Boston University, Brett Frischmann, Wendy Gordon, Deborah Halbert, Irina Manta, Mark McKenna, Laura Heymann, Greg Lastowka, Lisa Ramsey, Pam Samuelson, Jessica Silbey, Greg Vetter, Felix Wu, and other participants at the Houston IP Scholars Conference and the UCLA Entertainment, Media & IP Workshop, and to Cardozo IP and Information Law Colloquium, as well as to Raffi Melanson for research assistance.

I. INTRODUCTION

Words are the prototypical regulatory subjects for trademark and advertising law, despite our increasingly audiovisual economy. This word-focused baseline means that the Lanham Act often misconceives its object, resulting in confusion and incoherence. This Article explores some of the ways courts have attempted to fit images into a word-centric model, while not fully recognizing the particular ways in which images make meaning.

As I have explored in other work, images have a complex relationship to truth, reality, and deception, especially in the law.¹ Western culture associates images with truth, but also with emotion and, therefore, with dangerous subjectivity.² The law often regards words as relatively more stable: however ambiguous language may be, images are worse.³ This oscillation between special access to truth and special danger of distracting from rational judgment leads law to treat images inconsistently.

I will focus throughout this Article on representational images because those are what the relevant cases are about, and because this allows fruitful comparisons between the treatment of words and images, both of which are generally taken to stand

1. See Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright Law*, 125 HARV. L. REV. (forthcoming Jan. 2012) (manuscript at 4–18), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911352 (exploring the use of images in law and the interplay between the truth value of images, the relationship of images to reality, and images' ability to deceive).

2. See, e.g., Costas Douzinas & Lynda Nead, *Introduction, in LAW AND THE IMAGE: THE AUTHORITY OF ART AND THE AESTHETICS OF LAW* 1, 7 (Costas Douzinas & Lynda Nead eds., 1999) (“The history of law’s attitude toward images follows this tortuous dialectic, the deeply paradoxical combination of truth and falsity, of blindness and insight. The claim that image is truth implicates the theme of resemblance, similarity, or mimesis, a key metaphysical concept of Western philosophy. . . . But image is also false. . . . Images are sensual and fleshy; they address the labile elements of the self, they speak to the emotions, and they organize the unconscious. They have the power to short-circuit reason and enter the soul without the interpolation or intervention of language or interpretation.”); Christopher J. Buccafusco, *Gaining/Losing Perspective on the Law, or Keeping Visual Evidence in Perspective*, 58 U. MIAMI L. REV. 609, 616 (2004) (“[A]ttitudes toward [vision and visuality] have rarely been unambiguous. . . . Statements such as ‘Seeing is believing,’ and ‘A picture is worth a thousand words’ indicate the value our culture places on vision, but there also exists a distinct countervailing notion that images can be deceptive and misleading. These concerns are particularly strong in the legal culture, where certainty and reliability are paramount.” (footnotes omitted)).

3. See, e.g., *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1135 (2009) (stating that nontextual monuments are less susceptible to stable interpretation than monuments using words); *Kaplan v. California*, 413 U.S. 115, 119 (1973) (“A book seems to have a different and preferred place in our hierarchy of values [than an image], and so it should be.”).

for (represent) some idea, entity, or the like. Only that which is representational can misrepresent and thus become a subject of advertising law's concern for truthfulness. In the case of trademark law in particular, only when an image is or becomes representational—acquires secondary meaning in the language of trademark—can it be protected as a mark; by definition, a trademark is an indicator of source.⁴ In this sense, even colors can be representational, as when people associate a certain shade of blue with the jeweler Tiffany. Color can represent other things as well, as this Article will discuss with respect to cigarettes.

By surveying both trademark and general advertising law, I hope to show that images present deep challenges both to the definition of protected rights under the Lanham Act (mostly a concern of its trademark side) and to the determination of when a defendant has violated the law (where false advertising law focuses most of its energy).

Two points are worth making at the outset. First, the argument here is mainly critical. It's standard in legal scholarship to offer proposals to improve whatever legal defect one has identified, but some problems are very hard to solve. I would no more claim to have the answer to the problem of images in law than I would claim to resolve the rules versus standards debate. In identifying patterns, calling out inconsistencies, and finding dilemmas that will likely always remain difficult, I aim instead to encourage reflection, epistemic humility, and the creative use of images themselves to deal with problems caused by images. Sometimes we simply need to remind ourselves that a problem hasn't been solved, or that it's not the same problem as one we thought solved.

Second, this Article deals with trademark and general advertising law together because the two are, in concept and in history, fundamentally linked. Trademark claimants often prefer that we forget this and have in recent years been quite successful in convincing courts to ignore the link.⁵ Nonetheless, trademark

4. 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 3:1-3:3, at 3-2 to -8, § 15:1, at 15-5 (4th ed. 2011).

5. See generally Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. 1305, 1312-13 (2011) (arguing for a return to convergence between the two branches of the Lanham Act); see also *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1021 (3d Cir. 2008) (refusing to apply the same legal standards for infringement and false advertising because doing so would "muddle the two separate bodies of law that have developed" under the Lanham Act); Ethan Horwitz & Benjamin Levi, *Fifty Years of the Lanham Act: A Retrospective of Section 43(a)*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 59, 69-70 (1996) (discussing how the recognition of false advertising laws as distinct under the

infringement—confusion over source—is a kind of false advertising. It's a false representation about a product attribute, in this case its source or sponsorship.⁶ Other kinds of false representations in commerce are known more generally as false advertising.⁷

The Lanham Act recognizes this basic connection in the core language of section 1125, which bars the use of “any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact,” which either “is likely to cause confusion . . . as to the affiliation, connection, or association of [the defendant] with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities” (trademark) or “misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities” (false advertising generally).⁸ State unfair competition statutes generally have similar scope.⁹ Thus, to understand trademark, it's useful to pay attention to the rest of false advertising law, and vice versa. Unfortunately, much of the relevant literature treats “intellectual property” as a separate topic instead of looking at the Lanham Act as a whole.¹⁰ This property frame distracts legal analysis from the actual language of the governing statute and from the history of trademark infringement as a wrong done by one competitor to another.¹¹

The legal congruence between trademark and other forms of advertising law has its basis in nonlegal reality: trademarks

Lanham Act provides claimants with protection that extends beyond trademark infringement).

6. Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 445 (2010).

7. *Id.* at 444.

8. 15 U.S.C. § 1125(a) (2006).

9. See Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 170–72 (2011) (summarizing the varieties of uniform and model statutes, adopted by numerous states, which cover trademark infringement specifically, along with other specified types of false advertising, or which bar all deceptive commercial practices in general).

10. See, e.g., Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. REV. 807, 809 (1999) (“Litigation under [the Lanham Act] differs significantly from intellectual property and antitrust cases”); Tushnet, *supra* note 5, at 1309–13 (proposing the reunification of trademark law and false advertising law due to their “fundamental similarities as regulations of how advertisers communicate messages to consumers”).

11. See generally Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1844–48 (2007) (recounting the conventional wisdom of trademark law and describing its purpose as “protect[ing] producers from illegitimate attempts to divert their trade”).

identify and promote products and services. Trademarks are, like other kinds of marketing, ultimately a way of getting consumers to buy things. Dilution law, which is supposed to protect the “selling power” of a mark,¹² is the most naked legal recognition of this marketing function, but ordinary protection and infringement rulings are ultimately about the ways in which trademark owners, and other people, will be allowed to sell their products. Lawyers may treat trademark as a unique category of marketing communications (at the same time as they assert that trademark protection applies to every possible form of such marketing), but marketers don’t, nor should they rationally do so if the goal is, as they tell us, to improve sales and “brand value.”¹³

To the extent that trademark law creates value that exists only because of legal protection or encourages trademark owners to make legal claims that don’t reflect marketplace realities, trademark law is distorting markets rather than facilitating them. Thus, in trademark cases, we should remember the ultimate advertising function of trademarks and draw on what marketers know, rather than continuing to allow trademark to metastasize in isolation from the rest of advertising law.

I can offer no easy solutions to the problems identified in this Article because images are—despite our hopes—protean. I urge judges and lawyers to be careful when thinking about images so that we do not too easily move between treating images as perfectly transparent and understandable to treating images as opaque and ungovernable, as it suits our immediate purposes.

II. TRADEMARK

A. *Formal Word Primacy and the Incoherence of the Abercrombie Spectrum*

Trademark law has, since its inception, covered both words and images. But as trademark doctrine emerged from general

12. See, e.g., RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 25 cmt. c (1995) (explaining the “selling power” theory of dilution).

13. Legal scholars are beginning to explore the ways in which trademark law overlaps with brand theory in some ways and misses the mark in others. See, e.g., Laura R. Bradford, *Emotion, Dilution, and the Trademark Consumer*, 23 BERKELEY TECH. L.J. 1227, 1240–43, 1271–72, 1278 (2008) (discussing the informational purposes of both trademark law and brands and the relationship between trademark dilution law and brand value); Deven R. Desai & Spencer Waller, *Brands, Competition, and the Law*, 2010 BYU L. REV. 1425, 1435–40 (arguing that “[t]rademark law is quite naïve or at best myopic in how it accounts for the way in which brands function,” and as a result, “the law must understand brands better”).

unfair competition law and became more doctrinally complex through the twentieth century, it took words as its prototypes, perhaps because judges are familiar with words and comfortable with analyzing them legally.¹⁴ That trademark's model is words is most apparent in what is known as the "*Abercrombie* spectrum," a system for categorizing words to figure out if, and under what circumstances, they can be protected as trademarks.¹⁵ Generic words define a class of things (e.g., the fruits known as apples) and cannot be protected as marks for those things at all.¹⁶ Descriptive words are just that (e.g., tasty apples), conveying an immediate idea of the ingredients, qualities or characteristics of the things described. Descriptive terms can only be protected as marks if consumers come to associate them with a particular source (e.g., American Airlines).¹⁷ Suggestive terms require more imagination and thought than descriptive terms to figure out the relationship between the thing being sold and the word (e.g., Penguin for freezers). Suggestive, arbitrary (no obvious relation to the thing at all), and fanciful (made up) terms can all be protected as trademarks as soon as the user adopts them for its goods or services; there is no need to wait for secondary meaning.¹⁸

Trademark law has struggled to fit nonword marks into the *Abercrombie* spectrum and has failed to offer any particularly well-formed alternatives to the spectrum for images or other nonverbal symbols that might indicate source,¹⁹ with the partial exception of product packaging trade dress.²⁰ Courts have

14. See McKenna, *supra* note 11, at 1849–53, 1899–1915 (providing a detailed account of the history of trademark law).

15. See *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9–11 (2d Cir. 1976) (describing four categories of terms for purposes of determining the level of trademark protection afforded to the term); Jay Dratler, Jr., *Trade Dress Protection for Product Configurations: Is There a Conflict with Patent Policy?*, 24 AIPLA Q.J. 427, 476–77 (1996) (discussing the *Abercrombie* test's applicability in the context of trade dress).

16. 2 MCCARTHY, *supra* note 4, § 12:1, at 12-4 to -5.

17. *Id.* § 11:15, at 11-23 to -24, § 15:1, at 15-5 to -7.

18. *Id.* § 11:4, § 15:1.50, at 15-9.

19. See *Abraham v. Alpha Chi Omega*, 79 Fed. R. Serv. 3d (West) 384, 394–96, 399–400, 403–07 (N.D. Tex. 2011) ("Courts and commentators have held . . . that the *Abercrombie* test was developed and applied in reference to word marks, and that in many cases it may not apply to other marks consisting of color schemes, symbols, or geometric shapes."); 2 MCCARTHY, *supra* note 4, § 11:2, at 11-7 ("Use of the spectrum of descriptive, suggestive, arbitrary and fanciful is largely confined to word marks. It is usually not suitable for nonword designations such as shapes and images making up trade dress. Whether trade dress is inherently distinctive or not must be judged by other guidelines.").

20. See 1 MCCARTHY, *supra* note 4, § 8:13, at 8-58.7 to -58.12 (explaining that several different tests "ha[ve] been used to determine whether packaging trade dress [is] inherently distinctive"). An inherently distinctive product package must be "unique, unusual, or unexpected in this market [such] that one can assume without proof that it

generally been willing to hold that images that illustrate some aspect of the products with which they are associated are descriptive, but without much use for *Abercrombie's* other categories.²¹ When they decide that an image is not descriptive and is therefore inherently distinctive, they tend to use the terms arbitrary, fanciful, and suggestive interchangeably, thus, in practice applying a binary rule that images are either descriptive or inherently distinctive.²²

Why does trademark have a well-developed system for categorizing words compared to images? Perhaps words are simply easier for lawyers to think about in multiple, finely differentiated categories, abstracted from messy reality. Thus, for example, realistic images of naked bodies or body parts may be deemed scandalous and refused registration as marks.²³ By contrast, the Patent and Trademark Office (PTO) is likely to deem the ordinary words for describing those same body parts to be acceptable, and only highly vulgar synonyms will be denied registration.²⁴ Words can be more distanced from reality and less revealing or threatening than an image of a body part, so the PTO is more likely to conclude that the latter is inherently likely to offend.

In the case of the *Abercrombie* spectrum, the relative distance of words from the real makes them more available to

will automatically be perceived by consumers as an indicator of origin.” *Fiji Water Co. v. Fiji Mineral Water USA, LLC*, 741 F. Supp. 2d 1165, 1176 (C.D. Cal. 2010) (internal quotation marks omitted). In making this determination, courts consider:

[(1)] whether [the design is] a “common” basic shape or design, [(2)] whether it [is] unique or unusual in a particular field, [(3)] whether it [is] a mere refinement of a commonly-adopted and well-known form of ornamentation for a particular class of goods viewed by the public as a dress or ornamentation for the goods, or [(4)] whether it [is] capable of creating a commercial impression distinct from the accompanying words.

Seabrook Foods, Inc. v. Bar-Well Foods Ltd., 568 F.2d 1342, 1344 (C.C.P.A. 1977) (footnotes omitted). Interestingly, *Seabrook*, though generally applied in trade dress cases, is itself about a design mark that combines words and images. *Id.* at 1343–44.

21. See 1 MCCARTHY, *supra* note 4, § 7:36, at 7-92 to -93 (discussing various cases in which pictures were held to fall within *Abercrombie's* descriptive classification if the pictures conveyed what the product was, showed results from product use, or illustrated product use).

22. See 1 MCCARTHY, *supra* note 4, § 7:36, at 7-92 to -95 (discussing various cases and examples in order to contrast descriptive designs, symbols, and pictures with arbitrary, fanciful, and suggestive designs, symbols, and pictures).

23. Anne Gilson LaLonde & Jerome Gilson, *Trademarks Laid Bare: Marks that May Be Scandalous or Immoral*, 101 TRADEMARK REP. 1476, 1516 (2011).

24. See *id.* at 1514–15 (discussing registrations of “Libido,” “Weekend Sex,” “Happy Penis,” “On the Wrong End of the Penis,” “Bountiful Breast,” and “Home of the Bigger Breast” in contrast to rejections for “Bubby Trap,” “The Bearded Clam,” “Pussy,” “Twatty Girl,” and others).

appropriation for private ownership.²⁵ The law treats suggestive, arbitrary, and fanciful terms as interchangeable: not tied particularly tightly to the things they are used to identify.²⁶ Competitors thus lose nothing in particular if barred from using those words. And yet, outside the thesaurus, that is hardly to be expected. Connotations can be as or more powerful than denotations: think of Coppertone for suntan oil, Wrangler for Western-style clothing and boots, or Gung-Ho for action dolls.²⁷

A suggestive (or arbitrary or fanciful) mark gets more legal protection than a descriptive mark in a variety of ways: it is immediately protectable against competitors (and perhaps others), while a descriptive mark is free for competitors to use unless the claimant shows secondary meaning.²⁸ A descriptive mark, even if protected as a trademark, is also fair game for “descriptive fair use,” meaning that the owner of the trademark for Tasty Apples can’t prevent competitors from describing their apples as tasty.²⁹ Many courts also hold that the fact that a mark is suggestive gives it greater “conceptual strength,” a factor that favors a plaintiff in a confusion case.³⁰ Imagination is the key line between the descriptive and the suggestive, arbitrary, or fanciful.³¹

So much for the doctrine. But does it make sense of the way that consumers actually perceive things? One way of looking at

25. See *supra* notes 17–18 and accompanying text.

26. See *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 11 (2d Cir. 1976) (describing suggestive marks as requiring imagination to identify the associated goods and stating that fanciful and arbitrary marks have all the same legal rights as suggestive marks).

27. See 2 MCCARTHY, *supra* note 4, § 11:72, at 11-195 to -204 (listing various marks deemed suggestive).

28. *Id.* § 11:25, at 11-64 to -67, § 15:1.50, at 15-9 to -10.

29. See, e.g., *Henri’s Food Prods. Co. v. Tasty Snacks, Inc.*, 817 F.2d 1303, 1306–07 (7th Cir. 1987) (noting that even when a descriptive mark, such as “tasty” salad dressing, has acquired secondary meaning and is thus registerable as a trademark, a competitor can use the description “[tasty] in a purely descriptive manner or in its primary sense”).

30. See, e.g., *A & H Sportswear, Inc. v. Victoria’s Secret Stores, Inc.*, 237 F.3d 198, 221–22 (3d Cir. 2000) (explaining that a mark’s classification is a useful way to measure its conceptual strength); *Brookfield Commc’ns v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1058 (9th Cir. 1999) (stating that one determinant of strength is placement along the distinctiveness spectrum).

31. See, e.g., *George & Co., LLC v. Imagination Entm’t Ltd.*, 575 F.3d 383, 394 (4th Cir. 2009) (“Distinguishing between a suggestive mark and descriptive mark can be difficult. However, if the mark imparts information directly, it is descriptive, but [i]f it stands for an idea which requires some operation of the imagination to connect it with the goods, it is suggestive.” (alteration in original) (citations omitted) (internal quotation marks omitted)); *Gift of Learning Found., Inc. v. TGC, Inc.*, 329 F.3d 792, 797–98 (11th Cir. 2003) (defining suggestive marks as “requir[ing] an effort of the imagination by the consumer in order to be understood as descriptive”).

the question is to ask how advertising researchers think about imagination (recall that imagination is the dividing line between descriptive and suggestive terms and, thus, between immediately protectable and possibly unprotectable terms). It turns out that advertising experts think about vividness instead of descriptiveness and suggestiveness.³² Vivid ads are better than bland ones when consumers are not highly motivated to make analytical decisions, which is most of the time. Vividness can be produced not just by images, but also by vivid and concrete language, which can stimulate consumers to create their own imagery.³³ Secondary meaning may provide an independent source of vividness, triggering our memories of Coca-Cola-enhanced picnics and the like, but descriptive terms without secondary meaning (e.g., “juicy” for orange juice) play a substantial role in the general advertising literature about vividness, and that literature has nothing like the *Abercrombie* spectrum.

Advertising researchers tend to define vivid language as language that is “emotionally interesting, . . . concrete and imagery-provoking, and . . . proximate in a sensory, temporal, or spatial way.”³⁴ If anything, the vividness literature suggests,

32. See, e.g., RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 45 (1980) (stating that vivid information excites the imagination); Laurie A. Babin & Alvin C. Burns, *Effects of Print Ad Pictures and Copy Containing Instructions to Imagine on Mental Imagery That Mediates Attitudes*, 26 J. ADVERT. 33, 36–37 (1997) (studying vividness by giving subjects imagine-instructions and measuring the clarity of the image the subject imagined); Ann L. McGill & Punam Anand, *The Effect of Vivid Attributes on the Evaluation of Alternatives: The Role of Differential Attention and Cognitive Elaboration*, 16 J. CONSUMER RES. 188, 188, 190 (1989) (equating “imageability” to vividness).

33. See Elizabeth Cowley & Eunika Janus, *Not Necessarily Better, but Certainly Different: A Limit to the Advertising Misinformation Effect on Memory*, 31 J. CONSUMER RES. 229, 230 (2004) (describing a study in which vivid advertising language instructing consumers to imagine the product “create[d] memories at least as vivid as memory for an actual experience”); Daniel I. Padberg, *Non-Use Benefits of Mandatory Consumer Information Programs*, 1 J. CONSUMER POL’Y 5, 6–11 (1977) (discussing how increased product information availability did not have a large effect on consumers’ purchase decisions, and discussing how consumers did not use the new product information provided to them); Petia K. Petrova & Robert B. Cialdini, *Fluency of Consumption Imagery and the Backfire Effects of Imagery Appeals*, 32 J. CONSUMER RES. 442, 443 (2005) (“[T]he vividness of the product attributes had an impact on product evaluations when participants relied on their imagination in making the choice but not when they used an analytical strategy.”).

34. Petrova & Cialdini, *supra* note 33, at 443 (quoting NISBETT & ROSS, *supra* note 32, at 45). Some studies define vividness implicitly. For example, in one study, the vivid language spoke of a car’s “sporty yet elegant” styling and “high tech” interior design, while the nonvivid language included “below average” dealer service. McGill & Anand, *supra* note 32, at 190–91. Vividness has also been measured by asking consumers how easy it was to visualize the thing described by the language at issue. *Id.* at 190; Babin & Burns, *supra* note 32, at 36–37.

unfamiliar fanciful words are likely to be unhelpful as marks if they don't trigger any imagery in consumers' minds.³⁵ The *Abercrombie* theory is that fanciful words work really well as indicators of source.³⁶ But if you have no reason to connect the terms Mxyzptlk or Xalatan to anything in particular, you'll probably just forget them. A term a consumer can't remember is by definition not doing a good job as an indicator of source and, thus, can't serve the functions we attribute to trademarks of protecting consumers from confusion and incentivizing producers to maintain quality.³⁷ Sufficiently meaningless terms might not even be recognized the next time the consumer sees them, at least not until the producer teaches the consumer their meaning.

One could argue that consumers are likely to recognize that they've seen even a meaningless (fanciful) mark before in connection with goods or services, and—more significantly for trademark's purposes—that they might be confused by a sufficiently similar term that was also meaningless to them. This would justify granting immediate protection to fanciful terms and possibly even to arbitrary terms, though it would do little to justify the descriptive/suggestive divide. It's true that, in some cases, mere exposure can improve consumers' attitudes towards a brand,³⁸ suggesting some subconscious learning, but the mere exposure research involves contexts where subjects were paying at least some attention, not trying to avoid ads as we so often do.³⁹

Given that significant numbers of ads make no mental impression whatsoever, according to scans of consumers' brains,⁴⁰

35. See Deborah J. MacInnis & Linda L. Price, *The Role of Imagery in Information Processing: Review and Extensions*, 13 J. CONSUMER RES. 473, 479 (1987) (finding that familiarity with a brand is used by consumers to "fill in missing information" when the consumer is processing imagery as part of a product selection decision).

36. Antonio L. Sequeira, Note, *Wal-Mart Stores, Inc. v. Samara Bros.*, 16 BERKELEY TECH. L.J. 251, 254 (2001).

37. 1 MCCARTHY, *supra* note 4, § 2:2, at 2-4, § 2:3, at 2-5.

38. Bradford, *supra* note 13, at 1265-67; see also Jeremy N. Sheff, *Biasing Brands*, 32 CARDOZO L. REV. 1245, 1278-80 (2011) (explaining the importance of familiarity and repetition of exposure in developing brand awareness).

39. See Robert F. Bornstein, *Exposure and Affect: Overview and Meta-Analysis of Research, 1968-1987*, 106 PSYCHOL. BULL. 265, 265-67 (1989) (describing laboratory-based mere exposure studies).

40. See Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 547 (2008) ("[N]ew neuroscience studies provide evidence for advertisers' long-held belief that much advertising is completely useless. In MRI studies, 'a third to a half of commercials do not generate any brain reaction at all.'" (quoting Kenneth Chang, *Enlisting Science's Lessons to Entice More Shoppers to Spend More*, N.Y. TIMES, Sept. 19, 2006, at F3)).

we should not assume that exposure alone is enough to create meaning worth protecting. Moreover, the mere exposure research does not test whether such subconsciously familiar consumers have the same positive reaction to a similar-but-not-the-same meaningless term—again, the usual relevant inquiry in a trademark case.⁴¹ Nor does the research reveal whether consumers seeing a similar mark will be confused, since having a positive reaction to something that seems familiar is not the same thing as being confused any more than having a positive reaction to a laudatory descriptive term is being confused.⁴² As Mark McKenna has argued, the harm stories trademark owners tell have been encoded into law far beyond their actual empirical plausibility in any particular case.⁴³ If interrogated, rather than recited, such harm stories would find it hard to survive current evidentiary standards for proving causation,⁴⁴ and this is equally true when potential harm is theorized as a reason for granting protection to a mark without evidence of secondary meaning.

The *Abercrombie* spectrum is just not that helpful as a heuristic for when consumers are likely to recognize an indication of source. Indeed, empirical research has found that consumers react much more strongly to visual cues for word marks—how they're placed on a product to signal that they *are* marks—than to the supposed differences between arbitrary, fanciful, suggestive, and descriptive words.⁴⁵ Likewise, careful advertisers can manipulate the *Abercrombie* spectrum to couple use of existing meaning with a legal categorization of inherent distinctiveness. Consider Viagra: with its suggestions of virility, viability, and Niagara Falls (a classic sexual image),⁴⁶ this

41. Cf. Bornstein, *supra* note 39, at 265–68 (chronicling more than two decades of mere exposure research involving the self reporting of the effects of various stimuli on test subjects).

42. Cf. *id.*

43. See Mark P. McKenna, *Testing Modern Trademark Law's Theory of Harm*, 95 IOWA L. REV. 63, 83 (2009) (“[R]ecent research casts serious doubt on a number of the assumptions on which the arguments [regarding the harm of confusion] were based.”).

44. See *id.* at 84–92, 97–115 (explaining that justifications for trademark protection have been accepted by courts and commentators even though the justifications were based on untested assumptions and current studies do not support them).

45. Thomas R. Lee, Eric D. DeRosia & Glenn L. Christensen, *An Empirical and Consumer Psychology Analysis of Trademark Distinctiveness*, 41 ARIZ. ST. L.J. 1033, 1078–80, 1090–91, 1095–99 (2009).

46. See, e.g., JOHN EMSLEY, VANITY, VITALITY, AND VIRILITY: THE SCIENCE BEHIND THE PRODUCTS YOU LOVE TO BUY 88 (2004) (“Clearly, the drug needed to be marketed under a sexy name and the result was Viagra, instantly memorable and, no doubt, its rhyming association with Niagara helped.”); *A Weird Science Used in Naming Drugs*, CHI. TRIB., Jan. 21, 2008 (“Viagra evokes the power of Niagara Falls. ‘I think Viagra really hits the bull's-eye on virility,’ [a marketing expert] said.”).

ostensibly fanciful mark⁴⁷ started out primed to generate extremely useful imagery for a drug designed to give men erections. Drug makers, like other advertisers, strongly prefer terms that are easier to remember and that means words that already have or suggest a meaning to consumers, jump-starting their secondary meaning.⁴⁸

Why are marketing knowledge and legal doctrine so far apart? Why spend so much energy on words, only to create artificial categories for them? Again, it may be important that words *seem* easier to categorize than other forms of communication, even when the categories lack empirical foundation. Ann Bartow has pointed out that, from an *ex ante* perspective, words can seem more predictable and manageable for the average trademark owner.⁴⁹ Even those who register trademarks in colors or other nontraditional marks almost invariably use word marks prominently as well.⁵⁰ As I'll discuss further with respect to trade dress in Part II.D, words can give a trademark owner more confidence about what, exactly, it owns.

Having categories of inherently distinctive words is particularly useful because advertisers can be sure they have exclusive rights to such marks without waiting to see whether secondary meaning develops among the public.⁵¹ The United States has even adopted an intent-to-use system that allows registration of inherently distinctive marks before use, further enhancing commercial predictability.⁵²

47. See *Pfizer Inc. v. Sachs*, 652 F. Supp. 2d 512, 520 (S.D.N.Y. 2009).

48. *A Weird Science Used in Naming Drugs*, *supra* note 46.

49. See Ann Bartow, *The True Colors of Trademark Law: Greenlighting a Red Tide of Anti Competition Blues*, 97 KY. L.J. 263, 265 (2009) (explaining that trademark owners can transmit and recreate words "with a high degree of faithfulness").

50. See *id.* at 267 ("Mark holders typically use word marks in tandem with colors because language facilitates certainty in ways that are useful for commerce. Color marks are secondary and generally play supporting roles to dominant textual marks.").

51. See 2 MCCARTHY, *supra* note 4, § 15:1.50, at 15-9 ("Inherently distinctive marks . . . are irrebuttably presumed to have achieved customer recognition and association immediately upon adoption and use.").

52. See *In re Rogers*, 53 U.S.P.Q.2d 1741, 1744-45 (T.T.A.B. 1999) (explaining the requirements to transfer a mark's previously acquired distinctiveness as to certain goods or services to the goods or services in the intent-to-use application). An intent-to-use application (ITU) can only be approved for registration if the mark is distinctive for the goods and services. *Id.* at 1744. Since an ITU by definition doesn't require use, it's generally inappropriate for terms that would require secondary meaning developed through use in commerce to function as marks. See U.S. PATENT & TRADEMARK OFFICE, TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1212.09(a), at 1200-336 (7th ed. Rev. 1, Oct. 2010) [hereinafter TMEP] ("A claim of distinctiveness . . . is normally not filed in a[n] [ITU] application before the applicant files an amendment to allege use or a statement of use, because a claim of acquired distinctiveness, by definition, requires prior use."); Amy B. Cohen, *Intent to Use: A Failed Experiment?*, 35 U.S.F. L. REV. 683, 691 (2001) (noting

Images enter into this legal system, not exactly as an afterthought, but as a category in need of discipline through words. Registration for trademarks, unlike that for copyrights, involves entry into a detailed classification scheme and, therefore, requires all marks to be described in words, at least in part.⁵³ Thus, the PTO's Trademark Design Search Code Manual classifies images according to various and often haphazard categories: one class for images of men includes images of "merchants, other store clerks and men in aprons, excluding butchers, chefs and bakers wearing aprons."⁵⁴ This attempt to discipline all visual perception through words is funny, in part because of its obvious insufficiency. (The similarity to Borges's categories of animals is doubtless unintentional, but real.)⁵⁵ The PTO's Manual might help identify some marks that are similar to each other, but it will miss plenty of others; its searchability will always be limited as long as it translates images into words. But the PTO uses words because the law uses words and because search engines are not yet good enough to understand how people see similarities without making use of the words people have associated with those images.

All this prompts the question: should the *Abercrombie* spectrum be abandoned? We do need mechanisms for determining when we should be reluctant to protect certain terms because

that ITU applications "allow[] a party to apply for federal [trademark] registration without having demonstrated use"). Thus, an ITU ordinarily must be inherently distinctive, although the PTO has developed a limited exception for cases in which the applicant shows that existing secondary meaning would transfer to the use described in the ITU. *In re Rogers*, 53 U.S.P.Q.2d at 1744–45; see also TMEP, *supra* (noting that ITUs generally can't be registered on grounds of acquired distinctiveness because they don't have any, absent the special exception for transfer of distinctiveness).

53. Compare Donna K. Hopkins, *Searching for Graphic Content in USPTO Trademark Databases*, 25 WORLD PAT. INFO. 107, 107–08 (2003) (describing the trademark classification system that categorizes marks by design codes, which is searchable by words describing the mark), with *The Copyright Card Catalog and the Online Files of the Copyright Office*, U.S. COPYRIGHT OFF. 1–2 (Nov. 2010), <http://www.copyright.gov/circs/circ23.pdf> (describing the copyright registration system, which indexes copyrights by only "five key elements that establish the history of any original registration," such as title and date of publication).

54. U.S. PATENT & TRADEMARK OFFICE, U.S. TRADEMARK DESIGN SEARCH CODE MANUAL, § 02.01.38, http://tess2.uspto.gov/tmdb/dscm/dsc_02.htm#020138 (last visited Sept. 4, 2011) (formatting altered for better readability).

55. See JORGE LUIS BORGES, *THE ANALYTICAL LANGUAGE OF JOHN WILKINS* (1942), reprinted in *OTHER INQUISITIONS: 1937–1952*, at 101, 103 (Ruth L. C. Simms trans., 1964) (describing a Chinese encyclopedia that supposedly divided animals into "(a) those that belong to the Emperor, (b) embalmed ones, (c) those that are trained, (d) suckling pigs, (e) mermaids, (f) fabulous ones, (g) stray dogs, (h) those that are included in this classification, (i) those that tremble as if they were mad, (j) innumerable ones, (k) those drawn with a very fine camel's hair brush, (l) others, (m) those that have just broken a flower vase, [and] (n) those that resemble flies from a distance").

competitors or others need to use them. We could justify some conceptual divisions in protection based on other producers' interests,⁵⁶ but the current justification courts give for using the *Abercrombie* spectrum—that consumers are predisposed to recognize some words as marks and not others⁵⁷—lacks empirical foundation and works instead as a just-so story. A branch of law supposedly founded on what consumers think deserves better.

Perhaps we should leave off the fine distinctions for words as well as images and simply divide words into generic terms, terms that are protectable with secondary meaning, and terms that are inherently distinctive, with the presumption being that secondary meaning ought to be required in cases of doubt (a solution similar to that which the Supreme Court has already approved in the case of trade dress).⁵⁸ The *Abercrombie* category of suggestive marks, in particular, invites lawyerly manipulation and inconsistent results and might ideally be abandoned.⁵⁹ In any event, our decisions should be based on assessing competitors' needs and consumers' interests with a real appreciation for how consumers make meaning, rather than on a schema developed by judges decades before much relevant empirical work was done.

B. *On Knowing It When You See It: Visuality and Infringement*

Depending on how the law defines trademark infringement and dilution, rights in one image can cover multiple levels of abstraction. The reason for this is that trademark generally operates by what Jeanne Fromer calls “central claiming by exemplar”: the trademark owner offers its mark as it is used in commerce, which defines the core of what the trademark owner

56. Note that whether a term is descriptive as applied to the *trademark owner's* products or services may not be an accurate guide to whether noncompetitors need to use the term to describe their own goods or services. Plenty of sellers of fruit-related products have a competitive need to use the term “apple”; thus, the fact that Apple is arbitrary as applied to computers isn't necessarily relevant. *See* *Car-Freshner Corp. v. S.C. Johnson & Son, Inc.*, 70 F.3d 267, 269–70 (2d Cir. 1995) (holding that “[defendant's] use of the pine-tree shape [was] clearly descriptive” where defendant's product was a pine-scented, holiday-themed air freshener).

57. *See, e.g., Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 212–13 (2000) (asserting that consumers are predisposed to see nondescriptive terms as marks and not predisposed to see descriptive terms as marks).

58. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 776 (1992) (holding that inherently distinctive trade dress is protectable under the Lanham Act without a showing of secondary meaning).

59. *Cf. Procter & Gamble Co. v. Johnson & Johnson Inc.*, 485 F. Supp. 1185, 1210–11 (S.D.N.Y. 1979) (arguing that trademark law too readily accepts terms as suggestive and that the standard for inherent distinctiveness should be higher).

owns.⁶⁰ Then, in cases of alleged infringement, a fact finder determines whether the defendant has gotten too close to the plaintiff's mark.⁶¹ This can be contrasted to utility patent law, which largely depends on peripheral claiming by characteristic: the patent is defined through its claims, not through any particular embodiment, and an alleged infringement must include all the patent's claims to be infringing.⁶² Confusing similarity, in terms of consumer perception of the patented product or process, is not part of the patent infringement test.⁶³

Central claiming means that even a very clearly defined image mark may have protection beyond what is depicted in an image of the mark. Its boundaries are not self-evident. Instead, they depend on how consumers are likely to react to variations on the image. Thus, Adidas has trademark rights in three stripes for shoes, but it successfully won a multimillion-dollar judgment against Payless for selling confusingly similar two-stripe and four-stripe shoes.⁶⁴

One can claim words centrally by exemplar as readily as one can claim images.⁶⁵ Trademark law has, therefore, expanded greatly with respect to words, along with everything else, as courts have adopted broader concepts of actionable confusion.⁶⁶ But visual trademarks invite particular overconfidence in courts' infringement judgments.

Trademark law considers differences in form when assessing whether a particular use is infringing. Though similarity is

60. Jeanne C. Fromer, *Claiming Intellectual Property*, 76 U. CHI. L. REV. 719 (2009) (discussing central claiming by exemplar in the context of copyright and patent law).

61. See *id.* at 795–96 & n.388 (discussing trademark infringement).

62. See *TDM Am., LLC v. United States*, 92 Fed. Cl. 761, 768 (2010) (outlining the “all elements’ rule” and the duty of the court to determine “whether all of the claim limitations are present”); Dan L. Burk & Mark A. Lemley, *Fence Posts or Sign Posts? Rethinking Patent Claim Construction*, 157 U. PA. L. REV. 1743, 1748–49 (2009) (explaining the “theoretical” peripheral claiming process from application to alleged infringement).

63. See *Unette Corp. v. Unit Pack Co.*, 785 F.2d 1026, 1029 (Fed. Cir. 1986) (concluding that a likelihood of confusion finding in a product packaging design patent case was a misapplication of the trademark test for infringement to patent law).

64. *Adidas-Am., Inc. v. Payless Shoesource, Inc.*, 546 F. Supp. 2d 1029, 1083 (D. Or. 2008); see also *Adidas-Am., Inc. v. Payless Shoesource, Inc.*, No. CV 01-1655-KI, 2008 WL 4279812, at *1, *14 (D. Or. Sept. 12, 2008) (awarding Adidas \$30,610,179 in reasonable royalty damages and \$19.7 million in Payless's profits).

65. See, e.g., *Sabinsa Corp. v. Creative Compounds, LLC*, 609 F.3d 175, 189 (3d Cir. 2010) (holding that the marks “Forslean” and “Forsthin” were “similar in appearance and meaning” and therefore “Forslean [was] entitled to broad protection because it [was] a strong mark both conceptually and commercially”).

66. See, e.g., Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099, 2120, 2145, 2153 (2009) (discussing expansions in actionable confusion beyond sponsorships or the point of purchase to “post-sale confusion”).

generally assessed in terms of “sight, sound, and meaning,”⁶⁷ that test was developed for word marks. When there are no words or representational images involved, the Trademark Trial and Appeal Board applies instead an “eyeball” test.⁶⁸ The leading treatise explains:

Because a picture is worth a thousand words, there is little in the way of guidelines to determine that degree of visual similarity which will cause a likelihood of confusion of buyers. Obviously, for picture and design marks (as opposed to word marks), similarity of appearance is controlling. There is no point in launching into a long analysis of the judicial pros and cons regarding visual similarity of marks. Regarding visual similarity, all one can say is “I know it when I see it.”⁶⁹

“I know it when I see it,” of course, is taken from Justice Potter Stewart’s notorious statement about the law’s inability to define obscenity in words.⁷⁰ This is a statement about power: it is infringement when the fact finder sees infringement. It’s also, therefore, necessarily a statement about unpredictability. Judges expect other people to see the same things they do. In reality, however, perception often depends on a variety of factors, including demographics and other things to which a person has recently been exposed. For example, Dan Kahan and his colleagues showed that different people responded to a videotape of a police chase in very different ways, some seeing perfectly acceptable police behavior and others seeing reckless endangerment; gender and education were important factors in sorting those responses.⁷¹ Even setting politicized categories aside, advertisers have long understood that juxtaposition matters. A person who sees one product at the store can react

67. *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 351 (9th Cir. 1979), *abrogated on other grounds by* *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003).

68. *Retail Royalty Co. v. S.A.S.C.O. Trading Inc.*, Opposition No. 91173803, at 9–10 (T.T.A.B. 2009) (not precedential).

69. 4 MCCARTHY, *supra* note 4, § 23.25, at 23-153 to -54 (footnote omitted); *see also id.* § 23.25, at 23-153 (“Similarity of appearance between marks is really nothing more than a subjective ‘eyeball’ test.”); *GoTo.Com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1206 (9th Cir. 2000) (“With a single glance at the two images, one is immediately struck by their similarity.”); *Vertos Med., Inc. v. Globus Med., Inc.*, No. C 09-1411 PJH, 2009 WL 3740709, at *6 (N.D. Cal. Nov. 6, 2009) (echoing previous courts’ discussion of the eyeball test); *Nabisco, Inc. v. PF Brands, Inc.*, 50 F. Supp. 2d 188, 211 (S.D.N.Y. 1999) (applying the eyeball test).

70. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I know [obscenity] when I see it.”).

71. Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 868 tbl.1, 870 (2009).

differently to the next one, simply because of the ways in which her perceptions have been primed.⁷²

Judge Posner, one of the preeminent jurists of the past few decades, exemplifies how judicial confidence in assessing infringement persists despite its lack of empirical support. He advises advocates to include pictures whenever possible, and recounts an anecdote involving litigation between the Indianapolis Colts and the Baltimore CFL Colts, a franchise opened by the Canadian Football League in Baltimore after the American football team formerly in that city left for Indianapolis under contentious circumstances. Judge Posner said that the plaintiff Indianapolis Colts won its case the moment it showed the court two baseball caps produced by the parties, because the caps were identical.⁷³ But the names were already identical. The CFL Colts argued that, among other things, the Indianapolis Colts had abandoned the Baltimore Colts mark with the city and that public knowledge of the very well-known split protected against confusion.⁷⁴ The image overwhelmed the legal argument.

Similarly, in a case involving brooms, Judge Posner was equally confident of his ability to evaluate visual appearance to determine whether ordinary broom consumers were likely to be confused.⁷⁵ The ways in which visual meanings are made are unfamiliar to judges and, thus, often invisible. Judges occasionally admit expert testimony from linguists,⁷⁶ but visual design experts are rare because the ways in which images make meaning are so familiar as to seem transparent—easily understandable—even when they work in ways that ordinary observers don't expect.⁷⁷

72. See Tushnet, *supra* note 40, at 547–48, 548 nn.192–93 (examining advertisers' "long-held belief" that the "ad clutter" present in the marketplace diminishes the effectiveness of certain forms of advertising).

73. Richard A. Posner, *Effective Appellate Brief Writing*, AM. B. ASS'N, http://apps.americanbar.org/litigation/litigationnews/trial_skills/appellate-brief-writing-posner.html (last visited Oct. 22, 2011); *Indianapolis Colts, Inc. v. Metro. Balt. Football Club Ltd.*, 34 F.3d 410, 411 (7th Cir. 1994).

74. *Indianapolis Colts*, 34 F.3d at 411–12.

75. *Libman Co. v. Vining Indus., Inc.*, 69 F.3d 1360, 1362–63 (7th Cir. 1995) (making his own assessment of visual similarity).

76. See *State v. Williams*, 388 A.2d 500, 505 (Me. 1978) (concluding that the lower court's admission of expert voice identification testimony was not error); 4 MCCARTHY, *supra* note 4, § 23:92.75, at 23-33 to -34 (noting that the Trademark Board "give[s] little, if any, weight to the expert testimony of linguists"); ROGER SHUY, *LINGUISTIC BATTLES IN TRADEMARK DISPUTES* 14 (2002) (advocating for the use of linguists in trademark litigation).

77. See *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 1582–83 (Fed. Cir. 1988) (discussing the lower court's reluctance to admit expert testimony on acquired

Indeterminacy and judicial overconfidence in determining meaning are, of course, common in every area of the law. Is there any reason to think matters are worse when images are involved? As the next section explains, I think there is.

C. Verbal Overshadowing

One problem that may be occurring at the decisional level involves a phenomenon known as verbal overshadowing.⁷⁸ Lawyers, judges, and jurors focus on definitions and verbal arguments, which can distort their memories and perceptions of the nonverbal subjects of litigation.⁷⁹ Such alterations in perception are particularly important for Lanham Act cases, where questions of deception or infringement are supposed to be judged from the perspective of an ordinary observer.⁸⁰ Because verbal overshadowing changes how fact finders see the world, it makes them less likely to reach the same results as an ordinary observer exposed only to the trademarks (or ads) would.

The essence of verbal overshadowing is that producing verbal descriptions decreases the accuracy of a memory of a

distinctiveness with regards to the shape of guitar heads and the lower court's ultimate decision to accord the experts only modest weight).

78. See, e.g., Christian A. Meissner, John C. Brigham & Colleen M. Kelley, *The Influence of Retrieval Processes in Verbal Overshadowing*, 29 *MEMORY & COGNITION* 176, 176, 185 (2001) (describing verbal overshadowing, an effect where "verbal description can have deleterious effects on later identification of a target face," and the results of a study on the influence of forcing participants to generate misinformation). One important caveat: Though many have replicated these results, the magnitude of the effect may be less than initially reported. Jonah Lehrer, *The Truth Wears Off*, *NEW YORKER*, Dec. 13, 2010, at 52, 52–53 (noting that Jonathan Schooler's attempts to replicate his results produced declining effects over time; Schooler coined the term "verbal overshadowing"); see also Chad S. Dodson, Marcia K. Johnson & Jonathan W. Schooler, *The Verbal Overshadowing Effect: Why Descriptions Impair Face Recognition*, 25 *MEMORY & COGNITION* 129, 136 (1997) (finding that "face recognition suffers when subjects generate a description of a face they have seen"); Marte Fallshore & Jonathan W. Schooler, *Verbal Vulnerability of Perceptual Expertise*, 21 *J. EXPERIMENTAL PSYCHOL.: LEARNING MEMORY & COGNITION* 1608, 1618 (1995) (finding that "verbalization can disrupt people's ability to apply their perceptual expertise," particularly in the context of recognizing faces outside a person's own race); Meissner, Brigham & Kelley, *supra*, at 176 (explaining that Schooler's verbal overshadowing findings have been replicated "within the facial memory paradigm . . . and have been extended to other domains involving perceptual expertise").

79. See Deanne L. Westerman & Janet D. Larsen, *Verbal-Overshadowing Effect: Evidence for a General Shift in Processing*, 110 *AM. J. PSYCHOL.* 417, 421–22, 425 (1997) (relaying the results of an experiment showing that verbally biased descriptions lead to recognition impairment).

80. See Burk & Lemley, *supra* note 62, at 1775 (outlining trademark law's analysis of whether "an allegedly infringing mark would be considered sufficiently similar to be confusing to an ordinary observer").

nonverbal stimulus.⁸¹ Crucially, verbal overshadowing affects not just memory but qualitative evaluations. One study showed that verbalizing perceptions of a face's attractiveness shifted subjects' ratings towards extremes: a better-than-average face became beautiful, and a below-average face became ugly.⁸² As the study's authors explained, when participants attempt to articulate "the reasons for their perceptions their thoughts about the perception are disrupted. A shift occurs from a normal cognitive process to a more analytical procedure and thus affects the outcome."⁸³ Perhaps because images gain their persuasive power from operating on consumers' opinions and decisions without being directly translated into words, the translated image actually conveys a different message to the observer.

But the problem is worse than that: *Other people's* descriptions can change subjects' memories and even their sensory perceptions.⁸⁴

81. See Maria A. Brandimonte, Jonathan W. Schooler & Patrizia Gabbino, *Attenuating Verbal Overshadowing Through Color Retrieval Cues*, 23 J. EXPERIMENTAL PSYCHOL.: LEARNING MEMORY & COGNITION 915, 927 (1997) (showing the verbal overshadowing effect on a person's memory of an abstract image); Joseph M. Melcher & Jonathan W. Schooler, *The Misremembrance of Wines Past: Verbal and Perceptual Expertise Differentially Mediate Verbal Overshadowing of Taste Memory*, 35 J. MEMORY & LANGUAGE 231, 238–39 (1996) (finding that a person's memories relating to taste can "be disrupted by attempts at committing it to words"); Helen F. Mitchell & Raymond A. R. MacDonald, *Linguistic Limitations of Describing Sound: Is Talking About Music Like Dancing About Architecture?*, in PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM ON PERFORMANCE SCIENCE 2009, at 45, 47–49 (Aaron Williamon et al. eds., 2009) (reporting the negative effect that a verbal description has on a person attempting to correctly identify a target voice during a line-up); Wendy V. Parr, David Heatherbell & K. Geoffrey White, *Demystifying Wine Expertise: Olfactory Threshold, Perceptual Skill and Semantic Memory in Expert and Novice Wine Judges*, 27 CHEMICAL SENSES 747, 754 (2002) (asserting that forced naming of a "perceived odour" may interfere with wine recognition performance); Jonathan W. Schooler & Tonya Y. Engstler-Schooler, *Verbal Overshadowing of Visual Memories: Some Things Are Better Left Unsaid*, 22 COGNITIVE PSYCHOL. 36, 51–52 (1990) (revealing the results of a study where "recognition of [an] initial color was impaired when [the] subjects described the color"). But see Westerman & Larsen, *supra* note 79, at 422–24 (showing no effect for verbal description of an image of a car).

82. Bretton H. Talbot et al., *The Verbal Overshadowing Effect: Influence on Perception*, 4 INTUITION 12, 12–15 (2008); See also Toby J. Lloyd-Jones, Charity Brown & Simon Clarke, *Verbal Overshadowing of Perceptual Discrimination*, 13 PSYCHONOMIC BULL. & REV. 269, 272–73 (2006) (finding that verbal descriptions of faces interfered with subjects' subsequent ability to distinguish different faces from nonfaces).

83. Talbot et al., *supra* note 82, at 15 (emphasis added).

84. See GERALD ZALTMAN, HOW CUSTOMERS THINK 12–13, 166–67, 180–83 (2003) (citing studies and experiments demonstrating advertising's ability to "infiltrate memory" and even to create memories of events that never occurred, usually through verbal descriptions); Gregory S. Berns et al., *Neurobiological Correlates of Social Conformity and Independence During Mental Rotation*, 58 BIOLOGICAL PSYCHIATRY 245, 251 (2005) (discussing an experiment where subjects' ability to judge whether three-dimensional objects were identical or different decreased when the subject was exposed to other participants' wrong answers); Kathryn A. Braun & Elizabeth F. Loftus, *Advertising's Misinformation Effect*, 12 APPLIED COGNITIVE PSYCHOL. 569, 586 (1998) ("[M]isinformation

That is, verbal overshadowing from an external source is also extremely powerful. One possibility is that consumers suffer failures of source attribution: people are much better at remembering first-order information (the jam was tasty) than at remembering the source of that information (*the ad said* the jam was tasty), so they conflate direct experience with statements about the experience, even when they have tasted the jam themselves.⁸⁵

Experts in a field, who are used to producing verbal descriptions, can resist verbal overshadowing when they are tested later on their memories, but nonexperts cannot, basically because they're better at perceiving than at talking about what they're perceiving.⁸⁶ This might suggest that trademark specialists can avoid these problems, but the fact finders *receiving* the descriptions are extremely unlikely to be trademark specialists and will, therefore, be at risk for these distortions. As a result, how the witnesses and lawyers talk about the images at issue and direct a fact finder's attention to specific features will quite literally change how the fact finder sees the images.⁸⁷ In the case of trademark specifically, preliminary

received following a direct experience with a product altered the recollections respondents made about that product.”); Kathryn A. Braun, Rhiannon Ellis & Elizabeth F. Loftus, *Make My Memory: How Advertising Can Change Our Memories of the Past*, 19 PSYCHOL. & MARKETING 1, 17–18 (2002) (discussing research finding that “featuring impossible events in autobiographical advertising can cause people to believe they had experienced the events”); Kathryn A. Braun, *Postexperience Advertising Effects on Consumer Memory*, 25 J. CONSUMER RES. 319, 332 (1999) (finding that advertising making verbal claims about good taste can induce consumers to change taste judgments from negative to positive); Kathryn A. Braun-LaTour et al., *How and When Advertising Can Influence Memory for Consumer Experience*, 33 J. ADVERT. 7, 19 (2004) (observing that ads changed memories to be consistent with the advertised claims, inducing people to believe they had personally met Bugs Bunny at a Disney theme park); Matthew J. Salganik, Peter Sheridan Dodds & Duncan J. Watts, *Experimental Study of Inequality and Unpredictability in an Artificial Cultural Market*, 311 SCIENCE 854, 854–55 (2006) (discovering that knowledge of others' music ratings affects listeners' own ratings); Bruce F. Hall, *A New Model for Measuring Advertising Effectiveness*, J. ADVERT. RES., Mar.–Apr. 2002, at 23, 26 (“From an advertising and marketing perspective, this is a major breakthrough: the work showed that exposure to advertising can transform ‘objective’ sensory information, such as taste, in a consumer’s memory, prior to the judgment process, and after the consumer had tasted the product.”); Melanie Wells, *In Search of the Buy Button*, FORBES, Sept. 1, 2003, at 62, 65–66 (summarizing evidence that ad claims can change consumers' own perceptions and judgments).

85. See Dario L.M. Sacchi, Franca Agnoli & Elizabeth F. Loftus, *Changing History: Doctored Photographs Affect Memory for Past Public Events*, 21 APPLIED COGNITIVE PSYCHOL. 1005, 1007–08, 1019 (2007) (suggesting that doctored photographs can “[lead] to the creation of false memories”).

86. See Melcher & Schooler, *supra* note 81, at 233, 239–40, 242–43 (“The present study also provides further support for the hypothesis that the nature of one’s expertise in a domain is a critical determinant of susceptibility to verbal overshadowing.”).

87. See CHARLES SEIFE, PROOFINESS: THE DARK ARTS OF MATHEMATICAL DECEPTION 57 (2010) (explaining how supposedly expert guidance can induce people to see patterns in randomness).

research by Lionel Bently and his co-investigators suggests that trademark law's multifactor test for infringement—a classic example of a word-based frame—interferes with people's judgments of marks.⁸⁸

In one sense, this is what we expect lawyers to do: spin a case to make their side's account of the facts seem more persuasive. And Lanham Act disputes, at least those over nonexpressive uses, often involve well-funded businesses on both sides, making equity concerns less salient.⁸⁹ But the verbal overshadowing evidence suggests that this phenomenon has particularly negative consequences when the legal inquiry is supposed to be what a reasonable consumer would think about an image, because the process inherently distorts fact finders' perceptions.⁹⁰ One driver behind ridiculous outcomes, such as judicial findings that a parody ad for "Michelob Oily" was likely to cause confusion with authorized "Michelob" products,⁹¹ may be the way both consumer surveys seeking evidence of confusion and the multifactor confusion test create verbal frames that encourage respondents and judges to think differently about what they're seeing.

Of course, the adversarial system is going to remain in place, but that doesn't mean that we should ignore systematic distortions

Drawing a line or curve through a clot of data is a very powerful method of shaping the way people interpret it. The line is a symbol of order; it shows that a pattern has been found within the raw scattershot chaos of points in the graph. Even if our eyes are unable to see the pattern directly, the line tells us what we *should* be seeing—even when it's not there.

Id.; see also GISELE FREUND, PHOTOGRAPHY & SOCIETY 149 (1980) ("Few people realize that the meaning of a photograph can be changed completely by the accompanying caption, by its juxtaposition with other photographs, or by the manner in which people and events are photographed.").

88. This information was gained through the Author's personal communication with Lionel Bently. Other academic work has made a similar point. See Michael Grynberg, *The Judicial Role in Trademark Law*, 52 B.C. L. REV. 1283, 1304 ("The use of multifactor tests produces any number of problems, including the possibility that they *compromise* the accuracy of outcomes.").

89. See Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1700–01 & nn.62–76 (1999) (listing product configuration trademark disputes between a number of well-funded companies, including Taco Cabana, Topps, Sunbeam Products, and others).

90. See, e.g., SEIFE, *supra* note 87, at 56 ("If you take any random collection of data and squint hard enough, you'll see a pattern of some sort. If you're clever, you can get other people to see the pattern too."); Tjaco Walvis, *Avoiding Advertising Research Disaster: Advertising and the Uncertainty Principle*, 10 J. BRAND MGMT. 403, 405 (2003) (arguing that the design of a focus group can influence the responses to the point that "[i]f the research design is changed, the answers change").

91. See *Anheuser-Busch, Inc. v. Balducci Publ'ns*, 28 F.3d 769, 772, 775 (8th Cir. 1994).

produced by our present ways of thinking about advertising. If material confusion over source and other materially false claims harm consumers—and I believe they do—then we should worry about a process that does a bad job of identifying true deception.

Certain interventions designed to direct fact finders away from analysis might limit these effects,⁹² but they would likely run contrary to courts' desire to fence in fact finders and review their decisions, and would certainly lead to further complaints about the unpredictability of infringement cases. If "visual perception depends not only on what something looks like, but also on what it means,"⁹³ then we should demand more rigor in judicial definitions of what infringement (and false advertising) means.

What should be done? Experts in the field might be given more weight not because they react like average consumers but because they can produce less-distorted descriptions of a mark. We might also rely more heavily on marketing experts in general, rather than on litigation-specific consumer surveys.

Another possibility would be to minimize guidance: just ask fact finders whether the junior mark is likely to be confusing, rather than offer a multifactor test. Barton Beebe's empirical research suggests that many of the factors are often unimportant in any event, serving as a distraction or at best as a way of articulating justifications for conclusions a court has already reached.⁹⁴ Given the well-documented doctrinal and practical troubles with the substantial similarity test in copyright,⁹⁵ which purports to give fact finders a general directive very much like instructions just to look for confusing similarity, it's hard to hope that removing standards would be successful in trademark. It would also be extremely difficult to convince courts of appeals to adopt this approach to the Lanham Act, given that they already often resist deference to trial courts' fact finding in trademark

92. See Christian A. Meissner & Amina Memon, *Verbal Overshadowing: A Special Issue Exploring Theoretical and Applied Issues*, 16 APPLIED COGNITIVE PSYCHOL. 869, 870 (2002) (suggesting that the nature of the instructions is important to the extent of verbal overshadowing; meta-analysis shows that overshadowing is more likely when subjects are given an elaborative instruction instead of a free recall instruction (citing Christian A. Meissner & John C. Brigham, *A Meta-Analysis of the Verbal Overshadowing Effect in Face Identification*, 15 APPLIED COGNITIVE PSYCHOL. 603, 613 (2001))).

93. Gary Lupyan & Michael J. Spivey, *Perceptual Processing Is Facilitated by Ascribing Meaning to Novel Stimuli*, 18 CURRENT BIOLOGY R410, R412 (2008).

94. Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 95 CALIF. L. REV. 1581, 1614–15 (2006).

95. *E.g.*, Tushnet, *supra* note 1, at 40 & n.180; Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719, 722–24 (1987).

and advertising cases.⁹⁶ Like most people, appellate judges are pretty sure *they* know how to interpret what they're seeing, but they worry about everybody else missing the obvious.

In the end, increasing awareness of the problem and encouraging courts to make more use of general social science and marketing evidence, rather than easily manipulated case-specific surveys, may be the best we can do.

D. Words in Trade Dress Cases

In property law generally, Carol Rose has argued that the visual is key for signaling the boundaries of ownership. Without pictures, judges flail about in their attempts to explain property disputes.⁹⁷ In fact, some modern forms of property regulation, such as zoning regulations specifying aesthetic characteristics, regularly rely on pictures—a somewhat unusual situation for the law.⁹⁸

96. See *Smith Fiberglass Prods., Inc. v. Ameron, Inc.*, 7 F.3d 1327, 1329–31 (7th Cir. 1993) (applying a “clearly erroneous” standard but nonetheless scrutinizing the facts of the case based on each of seven separate factors applied by the district court). In practice, appellate panels are likely to act like Judge Posner by reevaluating the evidence according to their own assessment of likely confusion even where, as in the Seventh Circuit, the formal standard requires deference unless the trial court’s assessment was “clearly erroneous.” *Id.*; see also *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 153, 160–61 (2d Cir. 2007) (reversing district court’s determination in a false advertising case based on its own view of the ads), *abrogated on other grounds by EBay, Inc. v. Mercexchange, LLC*, 547 U.S. 388 (2006). A few courts have been somewhat more open about their willingness to revisit trial court outcomes by characterizing the ultimate question of likely confusion as a mixed question of law and fact, though they still claim to defer to the district court’s factual findings. See, e.g., *Champions Golf Club, Inc. v. The Champions Golf Club, Inc.*, 78 F.3d 1111, 1116 (6th Cir. 1996) (“Whether there is a likelihood of confusion is a mixed question of fact and law. We apply a clearly erroneous standard to the district court’s findings of fact supporting the likelihood of confusion factors, but review de novo the legal question of whether those foundational facts constitute a ‘likelihood of confusion.’” (citation omitted)); *Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc.*, 973 F.2d 1033, 1043–44 (2d Cir. 1992) (applying a de novo standard of review when “balancing . . . factors to determine the likelihood of confusion”).

97. CAROL M. ROSE, *Seeing Property*, in *PROPERTY AND PERSUASION* 267, 276 (1994) (“One can get a sense of the awkwardness of verbal descriptions from the examples that appear all too frequently in the legal literature of property. Judicial opinions often describe disputed properties, usually in the first few paragraphs, and in so doing they illustrate the ways that mere words can leave the chagrined readers scratching their heads.”).

98.

As in some other areas of property law, the law of historic preservation makes pictures essential for laying out the features that conform to a given historic style. Though a verbal description might be concocted, a picture is far more comprehensible

Why do the specifications for historic properties seem to call for an illustration rather than a verbal depiction? Why will words not do so well? Some might claim that words alone will not “do” for *any* form of knowledge and that all

In trademark, too, an image can form the boundaries of what a trademark owner owns. While many marks are registered as character marks—meaning the trademark owner claims the word in any form—design marks are also standard, and the visual design establishes the scope of the trademark owner’s initial claim.⁹⁹ Even for words claimed as words, establishing infringement ostensibly requires looking at the mark as it’s actually used, including its font and any surrounding visual elements.¹⁰⁰

At the same time, trademark doctrine, in places, formally equates words and images—the term Blue Dog will be considered highly similar to a drawing of a blue dog for purposes of assessing whether the two marks are likely to cause confusion.¹⁰¹ Justice Breyer, writing for a unanimous Supreme Court, held that trademark law does not make ontological distinctions. Anything can be a trademark, whether it’s a color, a sound, or even a smell, as long as it serves as an indicator of source.¹⁰²

But that’s not the end of the story. Legal distrust of images has encouraged resort to words where words weren’t part of the trademark. The same Supreme Court that rejected ontological distinctions in holding that color alone could serve as a trademark quickly followed that case with another, *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*,¹⁰³ unanimously holding that only some types of

knowledge is essentially perceptual (and sight the most privileged perception), but one need not subscribe to such visual imperialism to discern sight’s significance in property. Property, even understood as a set of claims against other persons, often revolves about access to some resource that exists in space and extension, and for that reason vision may be the first sense to be called upon in apprehending property.

Id. at 274 (footnotes omitted).

99. See U.S. PATENT & TRADEMARK OFFICE, BASIC FACTS ABOUT TRADEMARKS 6 (2010), available at http://www.uspto.gov/trademarks/basics/BasicFacts_with_correct_links.pdf (explaining that character marks are not limited to “a specific font, style, size, or color and therefore give[] [the owner] broader protection than a special form drawing”); *Gruner + Jahr USA Publ’g. Co. v. Meredith Corp.*, 991 F.2d 1072, 1077–78 (2d Cir. 1993) (“[T]he trademark registration of the title PARENTS in its distinctive typeface did not confer an exclusive right to plaintiff on variations of the word ‘parent,’ such term being more generic than descriptive.”).

100. See, e.g., *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1206, 1211 (9th Cir. 2000) (holding that plaintiff’s “GoTo” website logo was infringed by the defendant’s “Go Network” logo where both logos consisted of white capital letters in an almost identical sans serif font rendered on a green circle matted by a yellow square background).

101. See *Mobil Oil Corp. v. Pegasus Petrol. Corp.*, 818 F.2d 254, 257 (2d Cir. 1987) (equating the term “Pegasus” with the symbol of the flying horse “Pegasus” as synonymous).

102. *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 162–63 (1995) (holding that no rule bars color alone from use as a trademark).

103. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 211–12 (2000).

marks can be inherently distinctive.¹⁰⁴ The Court ruled that product design trade dress can only be deemed to serve as a mark if the claimant shows secondary meaning—recognition by consumers that this particular configuration (for example, the shape of a Volkswagen Beetle) signifies source, even though most product configurations (for example, the shape of a standard car) don't do so.¹⁰⁵ Inherent distinctiveness was a concept developed for certain categories of words, and the Court deemed it a bad fit for product design, as well as for color.¹⁰⁶ So much for ontological neutrality.

The Court's conclusion in *Wal-Mart* depended both on concerns about protecting freedom to compete on product features and on the generalization that, while consumers often expect words to be trademarks, they are unlikely to expect that even an unusual product shape is a mark indicating source as opposed to a striking product feature.¹⁰⁷ Because there are good reasons to use product designs even without trademark significance, the marketer has to teach consumers that a particular shape indicates a particular source, generating secondary meaning. Other nonverbal marks, such as ordinary sounds and all smells, are treated the same way by the PTO.¹⁰⁸ The social meaning of many nonverbal forms of communication differs enough from the social meaning of words to justify

104. See *id.* at 210–11, 216 (“[A] mark is inherently distinctive if ‘[its] intrinsic nature serves to identify a particular source.’” (second alteration in original) (quoting *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992))).

105. *Id.* at 215–16.

106. *Id.* at 210–13.

107. *Id.* at 212–13 (“The attribution of inherent distinctiveness to certain categories of word marks and product packaging derives from the fact that the very purpose of attaching a particular word to a product, or encasing it in a distinctive packaging, is most often to identify the source of the product. . . . Consumers are therefore predisposed to regard those symbols as indication of the producer, which is why such symbols ‘almost automatically tell a customer that they refer to a brand,’ and ‘immediately . . . signal a brand or a product source.’” (citations omitted) (quoting *Qualitex*, 514 U.S. at 162–63) (internal quotation marks omitted)).

108. *In re Vertex Grp., LLC*, Serial Nos. 76601697, 78940163, 2009 WL 625562, at *6–7 (T.T.A.B. Feb. 13, 2009) (reiterating the rule that “commonplace sounds, or those which individuals may have been exposed to under other circumstances . . . must be shown to have acquired distinctiveness,” and adding that “for goods that make the sound in their normal course of operation, registration is available only on a showing of acquired distinctiveness”); Amanda E. Compton, *Acquiring a Flavor for Trademarks: There's No Common Taste in the World*, 8 NW. J. TECH. & INTELL. PROP. 340, 345–47 (2010) (discussing the Trademark Trial and Appeal Board's decision in *In re N.V. Organon*, 79 U.S.P.Q.2d (BNA) 1639 (T.T.A.B. 2006), to uphold the refusal of registration of a flavor as a trademark for prescription medicine and discussing the difficulties with protecting flavor as a trademark); see also *Qualitex*, 514 U.S. at 162 (reasoning that, because the “universe of things that can qualify as a trademark” is set forth in “the broadest of terms” by the Lanham Act, shapes, sounds, and scents can all qualify for registration).

separate treatment as a matter of trademark law.¹⁰⁹ Another way to say this: product design, according to the Court, has intrinsic value to consumers apart from source-indicating value.¹¹⁰ (Except that the same is true of words, which is why outside of Hot Topic we see few clothing or makeup colors described as bile yellow or vomit green. Marketers strive to give even completely invented product names a euphonious sound that resonates with the characteristics they want consumers to associate with the product.¹¹¹ Again, think Viagra.)

Protection for trade dress—the overall packaging or configuration of a product—is one of trademark’s most active areas, as advertisers take advantage of the power of nonverbal communication to strengthen their brands.¹¹² Trade dress litigation has correspondingly boomed in the past few decades. Yet, it is always vital to define the claimed trade dress, to know exactly what features the plaintiff is trying to protect. When trade dress is unregistered (since registration already involves detailed description, including words¹¹³), courts have regularly required descriptions of the plaintiff’s claimed trade dress to be

109. See *Wal-Mart*, 529 U.S. at 212–15 (commenting that product packaging design can also be inherently distinctive, according to the Court, though such packaging generally includes words; at a minimum, nonverbal designs have to be fairly complex before they can be inherently distinctive, whereas a single word (including a made-up word) can be inherently distinctive).

110. See *id.* at 213 (attributing the main goal of most product designs as “render[ing] the product itself more useful,” rather than “identify[ing] the source”). We could call this aesthetic value, crossing the line into aesthetic functionality in many cases. See *Qualitex*, 514 U.S. at 169–70 (quoting the Restatement for the proposition that a “design’s ‘aesthetic value’ lies in its ability to ‘confe[r] a significant benefit that cannot practically be duplicated by the use of alternative designs’” and defining the test for aesthetic functionality as “whether the recognition of trademark rights would significantly hinder competition” (alteration in original) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 17 cmt. c (1993))).

111. See Eric Yorkston & Geeta Menon, *A Sound Idea: Phonetic Effects of Brand Names on Consumer Judgments*, 31 J. CONSUMER RES. 43, 50 (2004) (“Creating a successful brand name depends not only upon the creation of a name that is congruent with the product category, but one that phonetically fits the positioning of the brand within that product category.”).

112. See *Wal-Mart*, 529 U.S. at 209, 212–13 (defining trade dress and discussing it as “symbols [that] ‘almost automatically tell a customer that they refer to a brand,’ and ‘immediately . . . signal a brand or a product source’” (citations omitted) (quoting *Qualitex*, 514 U.S. at 162–63) (internal quotation marks omitted)); Daniel J. Gifford, *The Interplay of Product Definition, Design and Trade Dress*, 75 MINN. L. REV. 769, 779 (1991) (“Trade dress protection has existed for decades, recent years, however, have seen an exponential growth in trade dress case law.” (footnote omitted)).

113. See TMEP, *supra* note 52, § 1202.02(c)(i)–(ii), at 1200-67 to -69 (providing that applications to register trade dress must clearly identify the portions of the overall dress claimed as a mark and that a sufficient verbal description of the mark must also be submitted).

in words.¹¹⁴ Otherwise, they worry, different jurors might focus on different elements of the overall image.¹¹⁵

This distrust of the image—the worry that different people might see different things in the pictures, whereas words will have a more stable meaning¹¹⁶—is part of a broader fear that pictures will be taken as facts substituting for the exercise of legal judgment. For example, Hampton Dellinger, attacking the use of images in Supreme Court opinions, argues that images should be avoided by courts because they *feel* so true but *are* deceptive and overly emotional.¹¹⁷ Likewise, Jennifer Mnookin documents the early judicial treatment of photographic evidence, which combined hope that photographs would provide unimpeachable evidence with fear of the same power as a substitute for legal judgment.¹¹⁸ To put the concern in modern

114. See, e.g., *Heller Inc. v. Design Within Reach, Inc.*, No. 09 Civ. 1909 (JGK), 2009 WL 2486054, at *6 (S.D.N.Y. Aug. 14, 2009) (“The plaintiff alleges that because ‘a picture is worth a thousand words,’ the images ‘without a doubt provide the most precise definition of the protected trade dress possible.’ However, images alone do not satisfy the plaintiff’s obligation to articulate the distinctive features of the trade dress.” (citing *Nat’l Lighting Co. v. Bridge Metal Indus., LLC*, 601 F. Supp. 2d 556, 562–63 (S.D.N.Y. 2009) (holding that the court could not “be expected to distill from a set of images those elements that are common to a line of products and both distinctive and non-functional”)); 1 MCCARTHY, *supra* note 4, § 8:3, at 8-11 to -12 (“Whatever may be claimed as the combination of elements making up the product or its packaging and presentation, in the author’s opinion, it will not do to solely identify in litigation such a combination as ‘the trade dress.’ Rather, the discrete elements which make up that combination should be separated out and identified in a list. Only then can the court and the parties coherently define exactly what the trade dress consists of and determine whether that trade dress is valid and if what the accused is doing is an infringement.” (footnote omitted)). *But see* *Dayco Prods., LLC v. Dorman Prods, Inc.*, No. 09-cv-13139, 2010 WL 3855221, at *4, *6 (E.D. Mich. Sept. 28, 2010) (allowing plaintiff to “provide the requisite factual allegations in pictorial form” when alleging distinctive trade dress, at least for purposes of surviving a motion to dismiss); *Gasser Chair Co. v. Infanti Chair Mfg. Corp.*, 47 U.S.P.Q.2d (BNA) 1208, 1209–11 (Fed. Cir. 1998) (holding that district court sufficiently defined protected trade dress by dividing relevant designs into three groups and providing a description and pictures for each group).

115. See *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 116–17 (2d Cir. 2001) (addressing the concern that ill-defined trade dress could mean “the verdict may be based on inconsistent findings”).

116. So, for example, when the Supreme Court reassured citizens that a religious monument was not a government endorsement of religion, it commented that while monuments using words are often susceptible to multiple interpretations, the communicative effects of purely visual monuments are likely to be “even more variable.” See *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1134–35 (2009).

117. See Hampton Dellinger, *Words Are Enough: The Troublesome Use of Photographs, Maps, and Other Images in Supreme Court Opinions*, 110 HARV. L. REV. 1704, 1706–08 (1997) (“Yet the unique attributes of these attachments pose special dangers. Because their neutrality and accuracy are so readily assumed, attachments elude the skepticism with which written opinions are generally reviewed.”).

118. Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J.L. & HUMAN. 1, 18–20, 58 (1998).

terms: images, which are processed extremely quickly and holistically in our minds, may disarm our critical functions, and, thus, a fact finder might not analyze them properly.¹¹⁹

This anxiety about the power of images is consistent with the demands for word-based definitions in the area of trade dress, though the explicit concern for emotionality (which finds its echo in modern marketing theories that emphasize that most of trademarks' value comes from consumers' emotional commitments) has been replaced with concern for undisclosed variation among fact finders.¹²⁰ Note that the relevance of the distance between words and reality that helped explain the *Abercrombie* spectrum, discussed in section A, is now reversed. We need words to make sure that everyone agrees on the protectable elements of a design, because the images might be *too* full of meaning, too close to the design itself—a map the same size as the underlying territory.

The verbal description requirements for trade dress help narrow the breadth of a plaintiff's ownership claims, but they also relate to the scope of infringement law. That is, infringement used to be about whether consumers would think that the defendant's product came from the plaintiff.¹²¹ Now, plaintiffs often claim not that anyone would think that they made the defendant's product, but rather that some consumers are likely to think that they approved, licensed, or sponsored the defendant's product—a much more amorphous inquiry.¹²² If the question were only “when you look at *X*, do you think it is *Y*?” then it would be

119. See NEAL FEIGENSON & CHRISTINA SPIESEL, *LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT* 7 (2009) (comparing a viewer's instant understanding of an image to a reader's gradual grasp of the written words' subject matter).

120. See ZALTMAN, *supra* note 84, at 19 (describing the emotional benefits of a Nestlé Crunch Bar and the failure of a marketing campaign that “focused . . . on just the sensory benefits of the candy bar”); Bradford, *supra* note 13, at 1240 (“Any relevant information about the underlying good, including advertising claims, community reputation, and the individual's previous experience with that product becomes associated with the trademark and is easily accessible to the consumer upon encountering the mark in commerce.”); Buccafusco, *supra* note 2, at 616–18, 628, 650 (concluding that the average juror's “failure of analysis undermines the status of [an image] as representative of a witness's testimony”).

121. See McKenna, *supra* note 11, at 1848 (describing the traditional function of trademark law as protecting “against competitors that dishonestly marked their products and passed them off as those of the mark owner”).

122. See *id.* at 1911 (“Traditional trademark law focused narrowly on whether consumers would regard the use of [a logo] on a hat as an indication of the actual origin of the hat. . . . Modern law, by contrast, condemns any use by a third party that is likely to cause confusion as to a mark owner's sponsorship of or affiliation with a third party's use, whether or not any such relationship is material to consumers' purchasing decisions.”).

much easier to avoid defining *X*. With the question “when you look at *X*, do you associate it with *Y*?” there is a greater premium on knowing exactly what *X* is—how far something can deviate from *X* before it no longer reminds consumers of *X*.¹²³ With registered marks, the registration process serves some definitional function since the PTO will only register what it can define,¹²⁴ but for unregistered trade dress courts have attempted to cabin the scope of claims through forcing tighter definitions of what is protected. However, this is a difficult and inconsistent rearguard action against the real problem of overexpansion of a trademark’s scope.¹²⁵

While requiring a verbal description of trade dress constrains the scope of trademark protection at the intake stage, it raises obvious problems of verbal overshadowing: the definition of the trade dress may then take over from the actual products at issue. Any plaintiff who survives this process may thus end up with a fact finder who is comparing the defendant’s trade dress to the plaintiff’s words rather than the plaintiff’s trade dress. It is unclear who, if anyone, will be helped, though the process by which pointing out similarities makes it easier to see those similarities may ultimately favor the plaintiff.

If the law’s interest were in getting a real understanding of plaintiff’s trade dress, words would be a bad way to do it because, at best, they will approximate what the trade dress is like, and, more likely, they will change the ways in which the fact finders see the trade dress, distorting their reactions to the parties’ goods. If the law’s interest in imposing a word-based description requirement is in screening out a lot of claimed trade dresses because of the risks to competition, however, then it might do an acceptable job.¹²⁶

123. I thank Mark McKenna for this point.

124. See, e.g., *In re Lorillard Licensing Co.*, 99 U.S.P.Q.2d (BNA) 1312, 1316, 1322–23 (T.T.A.B. 2011) (refusing to register claimed combination of orange text on green background for cigarettes, where specimen showed something far more specific than that).

125. See, e.g., Lemley & McKenna, *supra* note 6, at 423–27 (identifying and critiquing this overexpansion).

126. See, e.g., *Landscape Forms, Inc. v. Columbia Cascade Co.*, 113 F.3d 373, 380–81 (2d Cir. 1997) (“While trademarking a generic term would create a monopoly in a necessary word or phrase, granting trade dress protection to an ordinary product design would create a monopoly in the goods themselves. . . . [A] plaintiff’s inability to explain to a court exactly which aspects of its product design[s] merit protection may indicate that its claim is pitched at an improper level of generality, i.e., the claimant seeks protection for an unprotectable style, theme or idea.”); *Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc.*, 58 F.3d 27, 32–33 (2d Cir. 1995) (suggesting that an overly generalized description of trade dress “may indicate that that dress is no more than a concept or idea to be applied to particular products” and as a result constitutes an overextension of trade dress protection).

This latter motivation, a general reluctance to protect trade dress, has solid justifications. But being able to describe a trade dress in words doesn't actually tell a court anything about whether competitors need that trade dress to compete, whether that trade dress is aesthetically or mechanically functional, or even whether consumers are likely to perceive it as indicating source. A verbal description requirement is therefore ill-suited for identifying trade dress that should actually be protected.¹²⁷ On the other side, because the verbal description requirement is becoming a prerequisite for protection even before a court analyzes functionality or secondary meaning, it is positioned to make just the wrong distinctions: a nonfunctional trade dress with secondary meaning might not be reducible to words.¹²⁸ This under- and over-inclusiveness of a verbal description requirement suggests that a different means of limiting protection for trade dress ought to be sought, whether that's a souped-up burden of proof (clear and convincing evidence) for showing nonfunctionality and secondary meaning,¹²⁹ a refusal to protect the look of product "lines," or a complete rejection of the concept of product design trade dress. As with the *Abercrombie* spectrum, greater honesty about our reasons for adopting a screen of some sort could produce greater coherence and predictability in our results.

When a court expresses a worry that different jurors will see the same pictures differently unless they're sufficiently guided by words,¹³⁰ we should evaluate that justification for a verbal description requirement on its merits. Courts apparently don't trust jurors to come to reasonable conclusions about trade dress on their own. Notably, courts don't seem to have the same anxiety that individual jurors will interpret the multifactor confusion test differently and, thus, reach an apparently unified result for very different individual reasons.

Right now, distrust of images has helped limit the scope of trade dress by making it harder for plaintiffs to plead that they

127. See *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, No. 08 Civ. 4810 (THK), 2011 WL 4035751, at *40 (S.D.N.Y. Sept. 12, 2011) (noting that it is the trade dress, and not the verbal description of it, that must ultimately be evaluated for whether it deserves trademark protection).

128. See 1 MCCARTHY, *supra* note 4, § 8:3, at 8-11 & n.150 (citing recent case law emphasizing the need for plaintiffs to provide a precise list of discrete elements that make up their trade dress as an initial step in infringement suits).

129. See 15 U.S.C. § 1125(a)(3) (2006) (putting the burden on the plaintiff in a trade dress action to "prov[e] that the matter sought to be protected is not functional"). We would of course still need to know what the features were to determine whether they were nonfunctional, but pictures might be able to define the features, especially if the plaintiff presented images of competing designs to show that the features it claimed weren't functionally required.

130. See *supra* note 115 and accompanying text.

have a protectable mark. But we should consider whether verbal description requirements, with their distorting effects, are the best tools for the job. As the next section suggests, discomfort with images may limit trademark in trade dress cases, but it can contribute to trademark expansionism elsewhere.

E. Images and Expressive Uses

Outside the core of trademark's protection against confusing uses on competing products, images have proved particularly troublesome. There has been much litigation about when "expressive" uses can proceed without trademark owners' permission. In one notable case, the Ninth Circuit adapted a test it had used for word marks to cover images as well. Mattel sued an artist who had created Food Chain Barbie, a series of photographs of Barbie dolls interacting with kitchen appliances and food.¹³¹ The governing test for allowing unauthorized "nominative" fair uses required that the defendant must (1) need to use the mark (here, the overall shape of the Barbie doll) to identify the trademarked product; (2) use no more of the mark than necessary (a requirement that in the past had been interpreted to mean that block-letter replication of a mark was acceptable, but copying a distinctive font was not); and (3) do nothing else to indicate source or sponsorship.¹³²



131. *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 796–97 (9th Cir. 2003).

132. *Id.* at 810; *New Kids on the Block v. News Am. Publ'g., Inc.*, 971 F.2d 302, 308 (9th Cir. 1992).

The artist apparently had a problem with (2): it would be possible, indeed easy, to refer to Barbie without using her entire body. Siding with the artist, however, the court of appeals reinterpreted nominative fair use to allow replication of a visual image when the mark at issue was itself visual,¹³³ despite the initial grounding of factor (2) in a word/presentation distinction. This move is sensible and eminently correct in the context of artistic uses of Barbie, but it also reveals a fundamental instability in the concept of what is “necessary” in terms of a reference to a mark. The idea that Coca-Cola will always mean the same thing as *Coca-Cola* is reassuring, but wrong.¹³⁴ The whole point of reserving that special font for Coca-Cola is that the mark in the font has extra meaning to which competitors are denied access, and there might well be an artistic or other legitimate reason to invoke that extra meaning. This instability in nominative fair use is a particularly disturbing result given that there is now a trend for courts to find that an arguably nominative fair use that flunks the three-part test is infringing,¹³⁵ without engaging in further analysis of whether confusion over source is actually likely.

After *Mattel*, the nominative fair use test both acknowledges

133. *Mattel*, 353 F.3d at 810–11.

134. See John R. Doyle & Paul A. Bottomley, *The Massage in the Medium: Transfer of Connotative Meaning from Typeface to Names and Products*, 23 APPLIED COGNITIVE PSYCHOL. 396, 398, 403, 407 (2009) (“[T]ypeface conveys connotations of its own.”). The connotations of the Coca-Cola font in particular, of course, have been built up by decades of targeted advertising. Logos also are important for nonliterate populations. See, e.g., Eric E. Johnson, *Intellectual Property’s Need for a Disability Perspective*, 20 GEO. MASON U. C.R. L.J. 181, 194 (2010) (“Judge Kozinski makes a favorable determination for the newspapers because ‘they do not use the New Kids’ distinctive logo or anything else that isn’t needed to make the announcements intelligible to readers.’ . . . Judge Kozinski—probably entirely unaware of what he was doing—removes many developmentally disabled members of society from the class of persons who could benefit from the nominative fair use doctrine.” (footnote omitted) (quoting *New Kids on the Block*, 971 F.2d at 308)); Madhubalan Viswanathan, José Antonio Rosa & James Edwin Harris, *Decision Making and Coping of Functionally Illiterate Consumers and Some Implications for Marketing Management*, 69 J. MARKETING 15, 21 (2005) (describing the reliance of functionally illiterate consumers on pictographic product information, including logos, font style, and color).

135. See, e.g., *Autodesk, Inc. v. Dassault Systèmes SolidWorks Corp.*, 685 F. Supp. 2d 1001, 1016–17 (N.D. Cal. 2009) (granting summary judgment with respect to defendant’s need to use the mark but denying summary judgment for amount of the mark used and confusion of source or sponsorship); *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1181 (9th Cir. 2010) (stating that using more of a mark than necessary “might” cause confusion, a lower standard than the ordinary “likely” confusion standard, and yet seemingly presuming that flunking the nominative fair use test would make confusion likely). The Third Circuit’s version of nominative fair use doesn’t seem to have this flaw, though it has others. See William McGeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49, 92–93 (2008) (stating that the Third Circuit’s approach requires a defendant to litigate the whole likelihood of confusion issue before addressing any nominative fair use questions).

the power of the image in certain special cases—allowing artists to use Barbie’s face, not just her name—and hides it, using block-lettered words as the model of acceptable nominative fair uses, deviations from which need explanation.¹³⁶ Recognizing the artist’s need to depict Barbie, the law nonetheless puts words at the center of the analysis, treating nontextual material as, in the ordinary case, unnecessary.

Dilution law also offers examples of struggles to deal with the power of images. In the influential Second Circuit case, *Deere & Co. v. MTD Products, Inc.*, the issue was whether MTD’s comparative ad constituted dilution under New York state law.¹³⁷ The problem was that, instead of just saying “MTD’s products are better than Deere’s,” the ad also showed a caricature of John Deere’s deer logo, animating it and having it run humorously away from a small, nonthreatening dog.¹³⁸ The court found dilution despite the strong protections for comparative advertising ordinarily provided by dilution law.¹³⁹ The court did not require Deere to show any evidence of consumer reaction: it was simply obvious that the visual mockery of the logo was likely to tarnish the brand.¹⁴⁰



136. *Mattel*, 353 F.3d at 810 (acknowledging that use of the Barbie figure “conjure[s] up associations of Mattel”); *Century 21 Real Estate Corp. v. LendingTree, Inc.*, 425 F.3d 211, 230 (3d Cir. 2005) (identifying a defendant’s use of block letters instead of using a plaintiff’s distinctive lettering as an important consideration in nominative fair use cases).

137. *Deere & Co. v. MTD Prods., Inc.*, 41 F.3d 39, 40 (2d Cir. 1994).

138. *Id.* at 41.

139. *Id.* at 45. Federal dilution law explicitly exempts comparative advertising. *See* 15 U.S.C. § 1125(c)(3)(A)(i) (2006); *see also* CAL. BUS. & PROF. CODE § 14247(b)(1)(A) (West 2008) (containing the same exemption). State laws often don’t explicitly provide for comparative advertising, but courts still tend to interpret state dilution statutes as if they were just like the federal law (except that some states extend dilution protection to nonfamous marks). *See, e.g.*, *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1324 (9th Cir. 1998) (applying the same analysis to a state law dilution claim under California’s antidilution statute as a federal dilution claim under the Federal Trademark Dilution Act); *World Wrestling Fed’n Entm’t, Inc. v. Big Dog Holdings, Inc.*, 280 F. Supp. 2d 413, 443 (W.D. Pa. 2003) (finding that state and federal dilution inquiry was the same except for fame).

140. *Deere*, 41 F.3d at 42, 45.

The court concluded that:

The commercial takes a static image of a graceful, full-size deer—symbolizing Deere’s substance and strength—and portrays, in an animated version, a deer that appears smaller than a small dog and scampers away from the dog and a lawn tractor, looking over its shoulder in apparent fear. Alterations of that sort, accomplished for the sole purpose of promoting a competing product, are properly found to be within New York’s concept of dilution because they risk the possibility that consumers will come to attribute unfavorable characteristics to a mark and ultimately associate the mark with inferior goods and services.¹⁴¹

In essence, the ad made the trademark *look* bad. While John Deere is allowed—indeed, encouraged—by trademark law to develop emotional connections with its logo, MTD can’t attack the emotional meaning of the mark. Consider, by contrast, an instance in which the mark was pronounced with contempt by an ad’s narrator (as a political opponent’s name is in a standard political ad). It is difficult to imagine a court finding such a use dilutive—not only would it easily fall within the standard exemption for comparative advertising,¹⁴² it would seem to offend the First Amendment to allow truthful, nondeceptive commercial speech to be suppressed simply because it was likely to generate a negative emotional reaction in consumers. Deere didn’t argue that MTD made false claims actionable under false advertising law, but the use of the image created a remedy in trademark.¹⁴³ This is particularly troubling insofar as trademarks with positive emotional values are likely to be owned by dominant or well-established companies; those companies can leverage the emotional power of their brands against new competitors, but new competitors can’t fight back on the emotional level.

As we will see in the next Part, however, when the plaintiff has no property interest to assert, images can more easily be used to make nonactionable, yet false, claims. Where the *Deere*

141. *Id.* at 45.

142. Courts applying the same New York law as in *Deere* have found verbal comparative advertising nondiluting as a matter of law. *See Diversified Mktg., Inc. v. Estee Lauder, Inc.*, 705 F. Supp. 128, 130, 133 (S.D.N.Y. 1988) (refusing to enjoin “If You Like ESTEE LAUDER . . . You’ll Love BEAUTY USA”); *Cumberland Packing Corp. v. Monsanto Co.*, 32 F. Supp. 2d 561, 581 (E.D.N.Y. 1999) (distinguishing *Deere*, in a federal dilution case involving comparative advertising, because *Deere* evaluated a logo instead of a word mark).

143. *Deere*, 41 F.3d at 42.

court allowed dilution to bar an ad because it might change consumers' affective responses to Deere's mark, advertising law regularly allows such images—even when they go beyond affect to false implications.

III. ADVERTISING GENERALLY

Advertising theorists are well aware that images can make the same claims as text, only better. Images are better both because they are more persuasive than words and because the law governing advertising has not recognized this difference.¹⁴⁴ As a result, images can often make visual claims that would be unsubstantiated and, thus, unlawful if made in words.¹⁴⁵ Though the law will uphold falsity claims against images in extreme circumstances,¹⁴⁶ the mechanisms through which images

144. See, e.g., *R.J. Ants, Inc. v. Marinelli Enters., LLC*, 771 F. Supp. 2d 475, 490–91 (E.D. Pa. 2011) (applying a likelihood of confusion analysis to both the image and word elements of competing marks and finding the marks dissimilar). This is particularly true in “low-involvement” situations, when consumers aren’t motivated to pay much attention to ads. When consumers are highly involved, images provide a starting point—still very important—but when involvement is low, pictures can be determinative of consumers’ beliefs about products. See James Shanteau, *Consumer Impression Formation: The Integration of Visual and Verbal Information*, in *NONVERBAL COMMUNICATION IN ADVERTISING* 43, 55 (Sidney Hecker & David W. Stewart eds., 1988) (suggesting that “visual information provides the starting point in the consumer’s impression of an ad” and positing that “if there is little or no subsequent processing, then visual information will dominate the final impression as well [but] [i]f, on the other hand, there is subsequent processing, then visual material provides a starting point which is gradually eclipsed by later text information”).

145. See, e.g., DAVID M. BOUSH, MARIAN FRIESTAD & PETER WRIGHT, *DECEPTION IN THE MARKETPLACE: THE PSYCHOLOGY OF DECEPTIVE PERSUASION AND CONSUMER SELF-PROTECTION* 74 (2009) (“Pictorial metaphors may suppress counterarguing and deception-protection thinking by spreading consumers’ attention along multiple inferential pathways, and because people simply cannot counterargue pictures, thus causing inferences favorable to brand that could not be legally stated without substantiation.”); FEIGENSON & SPIESEL, *supra* note 119, at 13 (“Things can be ‘said’ in pictures that cannot, for a variety of reasons, be named with words, and people often exploit those interstices between saying and showing to talk about the world.”); David Vaver, *Brand Culture: Trade Marks, Marketing and Consumption—Responding Legally to Professor Schroeder’s Paper*, in *TRADE MARKS AND BRANDS: AN INTERDISCIPLINARY CRITIQUE* 177, 185–86 (Lionel Bently et al. eds., 2008) (“[A]dvertisers use images rather than words to convey . . . messages [that would be inane if stated in words]: images do not actually ‘tell’ lies. The viewer discerns the message subconsciously. A picture here really is worth a thousand words, but what exactly those words are or mean cannot accurately be pinned down as if they were words in a contract or conveyance. In short, it is easier to lie through pictures than through words; it is also easier to get away with it legally.”).

146. See, e.g., *Rhone-Poulenc Rorer Pharm., Inc. v. Marion Merrell Dow, Inc.*, 93 F.3d 511, 516 (8th Cir. 1996) (finding images of two identical gas pumps or airline tickets with different prices literally false because the ad claimed through its visuals that, like the pumps or tickets, the drug being advertised was completely equivalent to the more expensive competing drug); *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 317–18 (2d Cir. 1982) (finding image of an orange being squeezed directly into a carton literally

communicate often make it difficult to pin down an image-based falsehood in order to regulate it.

Advertising, compared to other forms of communication, is particularly image-based and has become more so over the past century.¹⁴⁷ Ralph Sharp Brown, Jr. wrote the classic condemnation of modern advertising from a trademark perspective, arguing that producers had gone into the business of selling image with no intrinsic value, and that this was not a goal worthy of legal protection.¹⁴⁸ “Image” is in fact sold mainly with images, with assists from music and words reinforcing the visuals.¹⁴⁹ As a result, proposals to regulate the nonfactual content of ads, which is characterized as manipulating and distorting consumers’ decisions by disabling them from responding rationally to the claims made, regularly focus on visual elements.¹⁵⁰

false where the oranges were subjected to pasteurization and occasionally freezing before being packaged), *abrogated on other grounds* by FED. R. CIV. P. 52(a), *as recognized* in *Johnson & Johnson v. GAC Int’l, Inc.*, 862 F.2d 975, 979 (2d Cir. 1988); *Warner-Lambert Co. v. Schering-Plough Corp.*, No. 91 Civ. 5079 (MGC), 1991 U.S. Dist. LEXIS 14620, at *3–4 (S.D.N.Y. Oct. 15, 1991) (images of people sleeping in situations where they would normally be awake overwhelmed spoken words in television ad to create misleading impression that competitor’s allergy drug put all or almost all of its users to sleep, and images were likely to cause viewers to infer that advertiser’s allergy drug did not cause drowsiness). *But see* *Nikkal Indus., Ltd. v. Salton, Inc.*, 735 F. Supp. 1227, 1235–37 (S.D.N.Y. 1990) (refusing to find an advertisement deceptive when a deceptive image was used without any supporting deceptive text).

147. Barbara J. Phillips & Edward F. McQuarrie, *Beyond Visual Metaphor: A New Typology of Visual Rhetoric in Advertising*, 4 *MARKETING THEORY* 113, 113, 115 (2004).

148. Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 *YALE L.J.* 1165, 1168–69 (1948), *reprinted in* 108 *YALE L.J.* 1619, 1622–23 (1999).

149. *See, e.g.*, MARITA STURKEN & LISA CARTWRIGHT, *PRACTICES OF LOOKING: AN INTRODUCTION TO VISUAL CULTURE* 33 (2d ed. 2009) (“It is important to the indexical meaning of most advertisements that they use photographs to construct their messages. In that photographs always carry with them the connotation of photographic truth yet are also a primary source of fantasy, they provide important dual meanings in many advertisements. However, text functions in ads to shape the commodity signs of the image, to rein in and limit the meaning of the image in some way.”); David Huron, *Music in Advertising: An Analytic Paradigm*, 73 *MUSICAL Q.* 557, 561 (1989) (describing the importance of music in creating structural continuity between sequences of visual images).

150. *See, e.g.*, Rebecca Arbogast, *A Proposal to Regulate the Manner of Tobacco Advertising*, 11 *J. HEALTH POL. POLY & L.* 393, 397 (1986) (proposing a ban on photographs, drawings, or graphics in tobacco advertising other than those that convey factual information about company, brand name, and potential health concerns); Yoav Hammer, *Expressions Which Preclude Rational Processing: The Case for Regulating Non-Informational Advertisements*, 27 *WHITTIER L. REV.* 435, 437 (2005) (“[M]odern advertisements hardly convey information or clear arguments. Instead, they focus on an attempt to create a positive emotion within the viewers. The messages come in mostly visual and non verbal form, and viewers are hardly aware of the fact that messages have been conveyed. These characteristics of modern advertisements are the result of advertisers’ conclusion on the basis of many psychological studies, that emotional and

The following sections detail current research on images and how advertising regulation does not conform to the state of the art. Using the example of cigarette regulation, I also explore the potential for regulating images on their own terms and of fighting fire with fire: using images to disclose required information.

A. *What Marketers Know*

1. *The Power of Images.* Images have a number of advantages for marketers. Pictures are generally processed more quickly in the brain, contributing to their utility for advertisers who have at most a fraction of a second to catch a consumer's attention.¹⁵¹ Pictures may also "prime" consumers to believe ads and lead to comparatively less in the way of conscious, thoughtful processing than words.¹⁵² As discussed in the previous Part, vivid ads work better than nonvivid ads, and vividness can readily be produced by pictures,¹⁵³ which are especially effective under the conditions of distraction or limited attention under which consumers commonly experience ads.¹⁵⁴ Ads that are emotionally

experiential advertisements, rather than informational ones, are much more successful in causing viewers to internalize the advertising messages. The state of affairs where advertisers influence the decisions, values, and identity of viewers by means of a non cognitive process is problematic. It conflicts with our idea of man as an autonomous creature whose values, identity, and decisions reflect a conscious choice.").

151. See FEIGENSON & SPIESEL, *supra* note 119, at 7 ("While our eyes and brains can process either verbal or visual information faster than the conscious mind is capable of noticing (as evidenced by the efficacy of both verbal and visual stimuli in subconscious priming studies), we can get the gist of a visual display in a single fixation lasting less than a third of a second.").

152. See Braun-LaTour et al., *supra* note 84, at 17, 19 (finding that pictures are more effective than text at introducing "post-experience" information into consumer recollections).

153. See Punam Anand Keller & Lauren G. Block, *Vividness Effects: A Resource-Matching Perspective*, 24 J. CONSUMER RES. 295, 299, 301 (1997) (finding that vivid messages are more effective when individuals use limited mental resources to process the message); Jolita Kisielius & Brian Sternthal, *Detecting and Explaining Vividness Effects in Attitudinal Judgments*, 21 J. MARKETING RES. 54, 61-62 (1984) ("[N]o medium is necessarily superior when the aim is to enhance information availability. The impact of a pictorial stimulus . . . can be approximated by using instructions to image or concrete verbal information when advertising is transmitted by, say, radio."); John R. Rossiter & Larry Percy, *Attitude Change Through Visual Imagery in Advertising*, 9 J. ADVERT. 10, 15 (1980) ("[V]isual content in advertising is just as capable of increasing the consumer's product attitude as is verbal content.").

154. See Anthony G. Greenwald & Clark Leavitt, *Audience Involvement in Advertising: Four Levels*, 11 J. CONSUMER RES. 581, 583 (1984) (suggesting that the concepts of arousal and capacity allocation are suitable for advertising because advertising "consists of messages received in . . . complex or noisy environment[s]"); Joan Meyers-Levy, *Elaborating on Elaboration: The Distinction Between Relational and Item-Specific Elaboration*, 18 J. CONSUMER RES. 358, 361-62, 364 (1991) (finding that pictorial cues assisted consumers in processing relationships between claims made in advertisements); Richard L. Oliver, Thomas S. Robertson & Deborah J. Mitchell, *Imaging and Analyzing in Response to New Product Advertising*, 22 J. ADVERT. 35, 35, 47 (1993) ("[S]timulating imagery-based [(i.e., nonverbal)] processing in advertising is advantageous.").

engaging are more effective, and pictures can quickly and reliably evoke emotions;¹⁵⁵ ads that show pictures of a product in use are also more effective than the alternatives.¹⁵⁶

Pictures dominate over words: when the two conflict, audiences are more likely to rely on the pictures.¹⁵⁷ Using pictures emphasizing one side of a balanced news report, for example, biases readers' perceptions of contested issues in favor of the pictured side, even though they have generally poor conscious recall of the content of the images.¹⁵⁸ And images can distract from legally required disclosures and disclaimers, preventing them from influencing customers.¹⁵⁹ But when false words and images appear together, they reinforce each other.¹⁶⁰

Pictures have a persistent influence: they are easier to remember than (roughly equivalent denotational) words and

155. FEIGENSON & SPIESEL, *supra* note 119, at 7–8.

156. See David A. Aaker & Douglas M. Stayman, *Implementing the Concept of Transformational Advertising*, 9 PSYCHOL. & MARKETING 237, 239–40 (1992) (discussing the effectiveness of images in “transformational” advertising that “creates, alters, or intensifies feelings that occur with the brand use experience”); Gregory W. Boller, *The Vicissitudes of Product Experience: “Songs of Our Consuming Selves” in Drama Ads*, 17 ADVANCES IN CONSUMER RES. 621, 624–25 (1990) (finding that “viewers exposed to drama ads engaged in a highly self-focused and self-participatory mode of processing” and tended to adopt the perspective of ad characters); Braun-LaTour et al., *supra* note 84, at 9 (“[D]rama ads that show the product in use have been linked to transformational effects, and ads with high affective content have been linked to this process as well.” (citations omitted)); William D. Wells, *Three Useful Ideas*, 13 ADVANCES IN CONSUMER RES. 9, 9 (1986) (discussing information “encoded” in visual ads and its effects on consumers when they come into contact with the advertised product).

157. Braun-LaTour et al., *supra* note 84, at 9 (citing Ruth Ann Smith, *The Effects of Visual and Verbal Advertising Information on Consumers' Inferences*, 20 J. ADVERT. 13, 20–22 (1991)).

158. See Dolf Zillmann, Rhonda Gibson & Stephanie L. Sargent, *Effects of Photographs in News-Magazine Reports on Issue Perception*, 1 MEDIA PSYCHOL. 207, 223–24 (1999) (finding that a pictorially depicted news bias was retained longer than balanced text and suggesting that poor recall of the image supports the theory that it is not the image itself being recalled but “interconnected information that was encoded and [was] stored alongside the image”).

159. See, e.g., *In re Kraft, Inc.*, 114 F.T.C. 40, 123–24 (1991) (holding that Kraft's attempts to add disclosures to an advertisement were insufficient because “[g]enerally recognized marketing principles suggest that, given the distracting visual and audio elements . . . of the commercial, it is unlikely that the visual disclosure is effective”); FED. TRADE COMM'N, DOT COM DISCLOSURES: INFORMATION ABOUT ONLINE ADVERTISING 13 (2000), available at <http://www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus41.pdf> (suggesting that combinations of elements in online advertisements, including graphics, can undermine the requirement that disclosures be “clear and conspicuous” because they “may result in consumers not noticing, reading or listening to the disclosure”).

160. See Braun-LaTour et al., *supra* note 84, at 19 (“When received only as a headline and within the longer text, the false words were more likely to be detected as ‘false,’ and less likely to be processed and integrated into consumers' memory than the pictorial information. When the false picture and words appeared together, however, they formed a stronger memory trace, influencing both implicit and explicit tests of memory. Having both modalities of misinformation may have made the false information seem more plausible.”).

improve memory for information compared to words alone.¹⁶¹ Beyond recognition, pictures increase the consumer's sense of familiarity,¹⁶² which as Laura Bradford has explained in detail, is a key determinant of brand power.¹⁶³ Rich imagery can improve positive attitudes towards products and brands; the mechanisms for this are debated in the marketing literature, but the effect is well-established.¹⁶⁴

Indeed, ad images can even alter consumers' memories.¹⁶⁵ Pictures are more likely than words to convince us that we've

161. See, e.g., Terry L. Childers & Michael J. Houston, *Conditions for a Picture-Superiority Effect on Consumer Memory*, 11 J. CONSUMER RES. 643, 652 (1984) (finding that delayed recall of pictorial ads was stronger than verbal-only ads); Julie A. Edell, *Nonverbal Effects in Ads: A Review and Synthesis*, in NONVERBAL COMMUNICATION IN ADVERTISING, *supra* note 144, at 11, 13 (stating that research shows that "pictorial stimuli frequently were remembered better than were their verbal equivalents"); Kathy A. Lutz & Richard J. Lutz, *Effects of Interactive Imagery on Learning: Application to Advertising*, 62 J. APPLIED PSYCHOL. 493, 497 (1977) (suggesting that interactive images that create an association between ad elements are more memorable than a mere picture); John T. E. Richardson, *Concreteness, Imagery, and Semantic Categorization*, 4 J. MENTAL IMAGERY 51, 56 (1980) (stating that abstract words that have multiple dictionary meanings are generally more difficult to recall); Dolf Zillmann, Silvia Knobloch & Hong-Sik Yu, *Effects of Photographs on the Selective Reading of News Reports*, 3 MEDIA PSYCHOL. 301, 321 (2001) (finding that the presence of photos substantially increased attention to, and information acquired from, the accompanying text, arguably because of greater emotional resonance).

162. Braun-LaTour et al., *supra* note 84, at 9, 11 (citing Elizabeth C. Hirschman, *The Effect of Verbal and Pictorial Advertising Stimuli on Aesthetic, Utilitarian and Familiarity Perceptions*, 15 J. ADVERT. 27, 33 (1986)).

163. Bradford, *supra* note 13, at 1234–35, 1255–57; see also Scott A. Hawkins & Stephen J. Hoch, *Low-Involvement Learning: Memory Without Evaluation*, 19 J. CONSUMER RES. 212, 223 (1992) (describing a link between a consumer's exposure and familiarity with a product and their level of belief in that product); Scott A. Hawkins, Stephen J. Hoch & Joan Meyers-Levy, *Low-Involvement Learning: Repetition and Coherence in Familiarity and Belief*, 11 J. CONSUMER PSYCHOL. 1, 2 (2001) (explaining that participants of an experiment indicated a higher belief rating in a message when they were repeatedly exposed to that message).

164. See, e.g., Babin & Burns, *supra* note 32, at 33–34 (suggesting that the positive nature of consumer ads positively affects the consumer); Alvin C. Burns, Abhijit Biswas & Laurie A. Babin, *The Operation of Visual Imagery as a Mediator of Advertising Effects*, 22 J. ADVERT. 71, 83 (1993) (finding a link between a consumer's attitude toward an ad and the vividness of the image); H. Rao Unnava, Sanjeev Agarwal & Curtis P. Haugtvedt, *Interactive Effects of Presentation Modality and Message-Generated Imagery on Recall of Advertising Information*, 23 J. CONSUMER RES. 81, 82 (1996) (describing several ways in which imagery affects attitude).

165. See Priyali Rajagopal & Nicole Votolato Montgomery, *I Imagine, I Experience, I Like: The False Experience Effect*, 38 J. CONSUMER RES. 578, 578, 586 (2011). Rajagopal and Montgomery tested low-imagery print ads (product logo plus relatively abstract copy) versus high-imagery print ads (photo of product being enjoyed plus relatively elaborate copy) and found that the latter led more people to believe, when later asked, that they had actually experienced the product. The effect was stronger when the test product was supposedly a brand extension of a familiar brand than when the test was an entirely made-up brand. The authors discuss "imagery" as a characteristic of text that leads readers to create mental images for themselves, but the example ads included in the paper make clear that the high-imagery ads included pictures as well as text. *Id.*

personally experienced a situation depicted in an ad, whereas people detect more discrepancies in ads depicting historical impossibilities in words.¹⁶⁶ And when consumers do have experience with a product, pictures can change what consumers think that experience was: when consumers ate a chocolate bar with a green wrapper, and then were exposed to an ad showing the bar in a blue wrapper, they remembered the bar they ate as having a blue or greenish-blue wrapper.¹⁶⁷ The power of such false memories is striking:

[F]alse beliefs about past events that arise through exposure to [high-imagery] advertising may produce attitudes that are as strong as actual product experience. This finding is important because stronger attitudes have been shown to be more accessible in memory, more predictive of behavior, more resistant to counter persuasion, and more persistent over time. Further, research has demonstrated that strong positive attitudes increase the likelihood that consumers will include the brand in their consideration sets and subsequently purchase the brand.¹⁶⁸

You might think that more central aspects of a consumption experience would not be subject to ad-based alteration, but you'd be wrong. Many consumer choices are based on general attitudes—including favorable attitudes towards a brand and its imagery.¹⁶⁹ It's therefore possible to use ads to change memories of central features of a product. As noted in Part II.C, consumers simply have trouble distinguishing between ads and actual experience as the source of imagery.¹⁷⁰

It is important to remember, however, that imagery can often be self-generated in response to evocative words.¹⁷¹ These results do not suggest an absolute divide between words and images. In addition, there are plenty of limits on what ads can do, with substantial individual variation as well as context-specific effects on memory for true versus false experiences.¹⁷²

166. See Braun-LaTour et al., *supra* note 84, at 13–14 (finding, among other things, that people shown word-based ads were less likely to develop false memories about a childhood experience at Disney World than a person shown an image-based ad).

167. Braun & Loftus, *supra* note 84, at 571–77.

168. Rajagopal & Montgomery, *supra* note 165, at 589 (citations omitted).

169. Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137, 160 (2010).

170. Arun Lakshmanan & H. Shanker Krishnan, *How Does Imagery in Interactive Consumption Lead to False Memory? A Reconstructive Memory Perspective*, 19 J. CONSUMER PSYCHOL. 451, 451 (2009).

171. See *id.* at 460 (explaining that a consumer's exposure to printed words that contradict what that consumer originally believed can result in false memory).

172. *Id.* at 452–53, 456.

My point is not that pictorial ads brainwash us, but that advertisers have powerful tools, images prominent among them, for shaping our preferences and even our actual experiences and memories. “Advertising helps consumers interpret [their] experiences. It suggests what should be noticed. It provides cues and clues to help consumers understand and appreciate their feelings. And in this way it can change the nature of the response.”¹⁷³ As another group of researchers concludes:

One of the unifying aspects of the . . . findings is the agreement that consumers are generally unaware of the influence advertising has had on the interpretation of their experience, whether as a memory or as a perception. This means that more traditional self-report measures of advertising usage may be grossly underestimating the impact of advertising.¹⁷⁴

Images in particular are so successful because we don’t notice how they’re affecting us.

2. The Relation Between Images and Rational Decisionmaking Models. False memories created by ads are problematic because, by definition, consumers don’t know their beliefs about the state of the world are now false. Ads may have other powerful effects that consumers don’t recognize, with implications for both moral and efficiency accounts of advertising and its regulation.

As images gain prominence relative to words, the informational content of ads apparently drops—or is replaced by new kinds of “information” detached from any particular product function or benefit, so that the product’s supposed qualities (coolness, sexiness, etc.) wouldn’t exist if they weren’t advertised.¹⁷⁵ Information of the kind a modern advertiser or trademark owner wants to convey may be best conveyed in images, or images supported by words.¹⁷⁶ That is, the advertiser is likely to promote a set of vague ideas about a product’s superiority that the consumer will fill in with her own specific ideas about the facts, and this process works best with images. For the same reasons, image-based ads are consistent with the

173. Wells, *supra* note 156, at 9.

174. Braun-LaTour et al., *supra* note 84, at 20.

175. See Hammer, *supra* note 150, at 442–43 (referring to a “decrease in the quantity of information” provided by ads over time, though also arguing that the new ads contain powerful and significant messages).

176. See *id.* at 442–44, 449–50 (explaining that modern advertising messages are conveyed in a more emotional, covert manner that results in moral significance to the viewer).

rise of the brand that spans multiple products, where the brand's aura or ethos is more important than specific defined functions.¹⁷⁷

Ads whose factual claims require conscious deliberation may be more effective when consumers already intend to buy—when they're shopping for a loan, for example. But the kinds of ads we see all over, all the time, are more likely to trigger “peripheral processing”—a nearly automatic mental reaction involving less attention and less logical evaluation.¹⁷⁸ Peripheral processing does not resemble the careful decisionmaking of the ideal consumer of classical economic models. In such peripheral processing cases, images of beautiful people consuming the product work better than careful arguments.¹⁷⁹

However, even when specific information is present and consumers are confronting decisions that would seem to require conscious deliberation, the intuitive, effortless perception driven by images is extremely powerful. Marianne Bertrand and her colleagues tested mailers offering a consumer loan; the offers varied in both substance and presentation. A photo of a smiling, attractive woman in the bottom right-hand corner of the offer produced an increased response rate for men equivalent to dropping the monthly interest rate by 200 basis points, or approximately 25% of the total rate, a substantial percentage.¹⁸⁰

It may be cliché that pretty people can be used to sell products, but the effects of visuals go far beyond using sex to sell. Even camera angle can influence consumer perceptions of product characteristics. Products seemed relatively strong or potent when shot from low, upward-looking angles, and relatively weak and inferior when shot from high, downward-looking angles.¹⁸¹

177. See Desai & Waller, *supra* note 13, at 1443–45 (explaining that brands create product differentiation by linking the brand to consumer values).

178. See Marianne Bertrand et al., *What's Advertising Content Worth? Evidence from a Consumer Credit Marketing Field Experiment*, 125 Q.J. ECON. 263, 280 (2010) (explaining that “peripheral processing” may be more affective in ads that require a consumer's basic intuition).

179. *Id.*

180. *Id.* at 266–68; see also Naomi Mandel & Eric J. Johnson, *When Web Pages Influence Choice: Effects of Visual Primes on Experts and Novices*, 29 J. CONSUMER RES. 235, 237–38 (2002) (showing that background images affect choices in a simulated internet shopping task).

181. Joan Meyers-Levy & Laura A. Peracchio, *Getting an Angle in Advertising: The Effect of Camera Angle on Product Evaluations*, 29 J. MARKETING RES. 454, 455 (1992). This effect emerged in conditions of low involvement, which are common when consumers are exposed to ads, and did not happen as much when consumers were engaged in extensive information processing. *Id.* at 457–60. But see Laura A. Peracchio & Joan Meyers-Levy, *Using Stylistic Properties of Ad Pictures to Communicate with Consumers*, 32 J. CONSUMER RES. 29, 38 (2005) (arguing that, in some cases, consumers may need to be sensitized by ad copy before stylistic cues of this type

Consumers thought they were evaluating the product, but they were really evaluating the camera angle. (Thus, the *Deere* court may well have been right about the emotional effects of MTD's animated deer. The problem is the unfair advantage Deere gains by protecting the emotional resonance of its brand.)

One use of images is of particular relevance to the regulation of factual claims: metaphors, especially visual metaphors, draw consumers' attention better than straightforward claims. The flexibility of the image invites more positive associations.¹⁸² The predictable variation in consumer reactions doesn't make the image meaningless; indeed, it makes it useful. So, for example, an image of a laundry detergent juxtaposed with a grenade can convey that the product is a powerful stain remover, has "explosive" cleaning power, can "attack" stains, or even that it is more powerful than the competition. This last inference is particularly useful to the advertiser, since it couldn't make that explicit claim without being subject to a potential false advertising challenge by competitors.¹⁸³ Even better for the advertiser, an image-supported inference is more persuasive: "Consumers are less likely to argue against associations they came up with themselves, and more likely to remember and act on them."¹⁸⁴

In studies of visual versus verbal claims, consumers took the same basic message from ads shown as straightforward claims, verbal metaphors, and visual metaphors. Both visual and verbal metaphors prompted more positive thoughts about the product, though, and visual metaphors beat verbal metaphors both in the amount and in the speed of positive reactions; consumers exposed to verbal metaphors required prompting from the researchers before they gave their positive reactions. The researchers concluded that "[v]isual metaphors may be more effective at

affect perception).

182. Barbara J. Phillips, *Thinking into It: Consumer Interpretation of Complex Advertising Images*, 26 J. ADVERT. 77, 79 (1997) ("[C]onsumers tend to look for positive rather than negative meanings in ads. Pictorial metaphors are likely to be interpreted in the same way; because consumers know that the purpose of an ad is to promote a product, they may look only for positive or favorable dimensions of similarity between the images in an ad.").

183. See Edward F. McQuarrie & Barbara J. Phillips, *Indirect Persuasion in Advertising: How Consumers Process Metaphors Presented in Pictures and Words*, ASS'N FOR CONSUMER RES. (2005), <http://www.acrwebsite.org/topic.asp?artid=291> (explaining that advertisers use metaphors instead of explicit claims in order to avoid illegal claims that could mislead consumers).

184. *Id.*; see also Phillips, *supra* note 182, at 80 (explaining that consumers often interpret their own metaphors from an ad's visual images); Tushnet, *supra* note 5, at 1321–23 (describing how consumers develop their own beliefs about ads by drawing their own inferences).

influencing consumers' thoughts than verbal metaphors in the real world, because busy consumers are not usually prompted to think about ads.¹⁸⁵ Thus, consumers receive factual claims without being aware they've done so.

One implication of this evidence is that images are more likely to harm consumers' autonomy than words are because images aren't received as truth claims and, therefore, slide under viewers' defenses, even as they retain persuasive power.¹⁸⁶ Autonomy here assumes conscious choice. Consumers routinely deny that they're influenced by ads or images, yet, the studies clearly and consistently show that they are.¹⁸⁷ When a consumer thinks that an ad element is not relevant to her decision, then we can raise autonomy concerns: consumers are deeply misled, in the aggregate, about the sources of their decisions.

If questioned, consumers give explanations for their behavior that sound plausible, but are not borne out by the evidence—and, of course, we are highly motivated to provide such explanations. What self-respecting borrower would believe he'd accepted a substantially higher interest rate because of a woman's picture on the loan offer?¹⁸⁸

The conclusion from some critics of modern advertising is that truthful, legitimate ads should be almost exclusively words.¹⁸⁹ American law has, however, taken an alternate

185. McQuarrie & Phillips, *supra* note 183.

186. See Hammer, *supra* note 150, at 457–59 (elaborating on the autonomy concern with a number of examples of ways in which visuals can persuade without being noticed as arguments, including subliminal messages, messages conveyed by the presence or absence of black people in ads, and messages about gender equality conveyed by pornography); McQuarrie & Phillips, *supra* note 183 (“The most important implication of this study is that advertisers may use metaphors in ads, especially visual metaphors, to encourage consumers to think positive thoughts about a product that could not be stated outright in a straightforward claim. The fact that these positive thoughts occur as soon as consumers view the ad means that it is difficult for consumers to guard themselves against these ‘extra’ positive thoughts.”).

187. Braun-LaTour et al., *supra* note 84, at 10; see also Hammer, *supra* note 150, at 461 (explaining that because viewers are hardly aware that advertisements convey multiple, indirect messages, the viewer has little power to prevent the influence of those messages).

188. See Hall, *supra* note 84, at 24 (“‘Rational’ cognitive processes are not the primary drivers of purchase behavior through which advertising operates. They are in fact outcomes of a complex process of perception, experience, and memory—a process that is driven primarily by emotions and feelings.”). In tests of recall and tests of what messages were communicated by an ad, “respondents supply extensive information about their reactions to copy, but the scores are only relevant to the rational decisionmaking processes supplied by the brain’s interpreter, not to the actual decision processes that drive target audience behavior.” *Id.* at 30.

189. See Hammer, *supra* note 150, at 477 (“[L]aw should restrict advertisers to information-only advertisements. . . . In addition, my suggestion is that advertisements

approach, cabining the regulation of truthfulness so that images are only rarely and contradictorily governed.

B. Law

In contrast to trademark law, where problems with images can roughly be divided into scope (under what circumstances will trademark law protect images?) and infringement (when does one image so greatly resemble another that infringement or dilution takes place?), false advertising law asks one basic question: when is an ad false?¹⁹⁰ This does require answering questions of scope—identifying claims that are falsifiable, analogous to identifying the kinds of signifiers that are protectable as marks. But because of the absence of a property claimant on one side of a false advertising dispute, scope, or falsifiability, tends to get folded into falsity. As this section discusses, figuring out whether an image makes a falsifiable claim or is mere puffing has proved difficult.

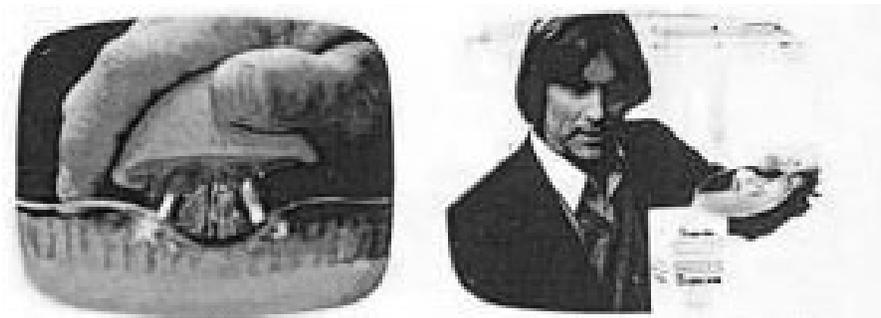
One example of a visually misleading ad barred by the Lanham Act featured images of two identical gas pumps or airline tickets with varying prices accompanied by the slogan “Which one would you choose?” This comparison was literally false because it made a claim that, like the gas and the tickets, the advertised drug was completely equivalent to the competitor.¹⁹¹ The Second Circuit also found that an image of Bruce Jenner squeezing an orange directly into a carton, accompanied by the phrase “pure pasteurized juice as it comes from the orange,” was literally false because the juice in fact

might contain pictures of the product, but no other visual representations. Messages which set a non-rational process into motion are visual and should therefore be limited. For example, a recommendation of the product by a well liked and popular personality or even the mere exhibiting of the product together with such a personality without any words, constitute a dissemination of a covert message. On the other hand, a picture of the product is informational, which assists consumers in making rational decisions. However, only pictures of the product itself should be permitted. Pictures of the product against a certain background would allow for messages to be conveyed in a problematic manner and should not therefore be permitted. In addition, the law should limit the usage of auditory medium for the purpose of conveying messages and influencing people in non-cognitive ways. The suggested regulation should prohibit the use of pleasant music in advertisements. Furthermore, advertisers should be prohibited from using the voice of well known personalities to advertise their products.”); Thomas W. Merrill, *The Constitution and the Cathedral: Prohibiting, Purchasing, and Possibly Condemning Tobacco Advertising*, 93 NW. U. L. REV. 1143, 1183 (1999) (questioning the argument by some that “without vivid imagery, it may be more difficult for tobacco companies to draw attention to important hard information”).

190. See Tushnet, *supra* note 5, at 1318–27, 1344–45 (describing the ways in which courts evaluate advertisements under false advertising law).

191. Rhone-Poulenc Rorer Pharm., Inc. v. Marion Merrell Dow, Inc., 93 F.3d 511, 516 (8th Cir. 1996).

first underwent pasteurization and might also have been frozen.¹⁹²



193

Replicating the confidence found in many trademark cases, courts often proceed with complete certainty that (certain) images speak clearly. In one case, *S.C. Johnson & Son, Inc. v. Clorox Co.*,¹⁹⁴ the defendant's humorous ads showed two animated goldfish suspended in upside-down plastic storage bags, one safe and sound in its Glad-Lock bag and the other threatened by a leaky Ziploc.¹⁹⁵ The plaintiff's tests revealed that 37% of Ziploc bags tested under similar conditions didn't leak at all, and only 10% leaked at the rate depicted in the TV commercials (several drops over the course of a 15- or 30-second ad).¹⁹⁶ The court thus found the ads false, including print ads that did not show any leakage rate because they only showed a drop of water forming from the Ziploc.¹⁹⁷ Because the Ziploc bag in each ad was leaking, the court of appeals found a false representation that upside-down Ziploc bags filled with water always leak.¹⁹⁸ This is a leap—the image itself, being a static image of a single bag, could not make any representation about frequency of leaks. The court made similar findings about a revised television ad that, in its judgment, by not mentioning leakage rates or risks, but simply presenting an image of a drop forming and falling, was explicitly false about those rates and risks.¹⁹⁹ As far as the court's

192. *Coca-Cola Co. v. Tropicana Prods. Inc.*, 690 F.2d 312, 318 (2d Cir. 1982), abrogated on other grounds by FED. R. CIV. P. 52(a), as recognized in *Johnson & Johnson v. GAC Int'l, Inc.*, 862 F.2d 975, 979 (2d Cir. 1988).

193. Excerpt from Tropicana ad, MCA Advertising (on file with author).

194. *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232 (2d Cir. 2001).

195. *Id.* at 234.

196. *Id.* at 235.

197. *Id.* at 239.

198. *Id.* at 240.

199. *Id.* at 237, 239; *S.C. Johnson & Son v. Clorox Co.*, No. 99 CIV. 11079 (TPG), 2000 WL 423534, at *2 (S.D.N.Y. Apr. 19, 2000) ("There is nothing shown except one image and that is an image of a big drop of water falling out of the bag. There is nothing to indicate that this kind of leakage occurs in only some particular percentage of bags, and there is nothing to

2011]

LOOKING AT THE LANHAM ACT

907

opinion indicates, the plaintiff never rebutted the comparative superiority claim at the heart of the ad: Glad bags were less likely to leak than Ziploc bags.



200

A few years later, the same court reversed a finding that certain comparative ads for DirecTV's HDTV service were false. According to the court, images showing an incredibly distorted image representing cable's image quality, compared to that of DirecTV, were merely puffery.²⁰¹

The classic definition of puffery assumes a claim made in words, such as "the best ever!"²⁰² Puffery is vague and exaggerated, or subjective and nonfalsifiable, and is, therefore, nonactionable because no reasonable consumer would rely on it.²⁰³ In theory, puffery cannot distort consumer decisions, while factual claims can. The Second Circuit set aside prior definitions of puffery in order to create a new rule for images.²⁰⁴ Images, unlike words, "cannot be

indicate the degree of risk of such leakage. There is only one image, and that is of a big drop falling out."). The court refused to treat the ad as occurring in real time. *See id.* (explaining that no evidence was provided to indicate the rate at which the bags leaked).

200. Ad on file with author.

201. *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 159–60 (2d Cir. 2007), *abrogated on other grounds by* *EBay, Inc. v. Mercexchange, LLC*, 547 U.S. 388 (2006).

202. *See* David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1400 (2006) (explaining that puffery is conclusively presumed not to mislead consumers).

203. *Id.* at 1397; Owen Weaver, *Everything You Will Ever Want To Know About Puffery and How the Second Circuit Wrongly Applied It in Time Warner Cable, Inc. v. DIRECTV, Inc.*, 43 NEW ENG. L. REV. 357, 363 (2009).

204. *See Time Warner*, 497 F.3d at 159–60 (recognizing definitions of puffery as

vague or broad,” are generally “‘specific and measurable,’ and can therefore ‘be proven either true or false.’”²⁰⁵ Images, in this account, once again have a closer connection to the truth or reality of the world than words do.²⁰⁶ This conclusion is particularly notable because the court had so recently found that *cartoon fish*—which indisputably did not exist—conveyed a false message.²⁰⁷

Nonetheless, because images were supposedly so specific and measurable, under the standard definitions they could not be puffery. But the Second Circuit was convinced that some images, including the ones before it, needed to be defined as nonactionable puffery. A visual depiction of a product can be “so grossly exaggerated that no reasonable buyer would take it at face value.”²⁰⁸ Its unreality, its defiance of ordinary rules of representation, would simply be apparent. In the case at bar, no reasonable consumer could mistake the defendant’s heavily pixilated image for a real representation about cable’s image quality. The court, relying on its own assessment of the image, therefore reversed the district court’s grant of injunctive relief as to the ads featuring these images.²⁰⁹



“[s]ubjective claims about products, which cannot be proven either true or false” and “an exaggeration or overstatement expressed in broad, vague, and commendatory language” (alteration in original) (internal quotation marks omitted).

205. *Id.* (citations omitted); see also *Clorox Co. P.R. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 37–38 (1st Cir. 2000) (explaining that there is a “fundamental difference between a slogan on a can label that communicates its meaning to consumers solely through the printed text, and a tag line shown on the screen at the end of a television commercial that communicates its message to consumers through a combination of audio-visual and textual media,” but not explaining what that fundamental difference was such that, as the court concluded, the former could not be false but the latter could be).

206. See Tushnet, *supra* note 1, at 6–7, 9.

207. See *supra* text accompanying notes 194–203.

208. *Time Warner*, 497 F.3d at 159.

209. *Id.* at 160–61.

But why would consumers have such defined expectations about a then-new technology? What was different about *images* that made them so incredible that reasonable consumers wouldn't rely on them—for that is what the puffery designation means—as opposed to *words* accusing cable of poor quality, as to which the court upheld the district court's injunction?²¹⁰ The Second Circuit's new rule ensured differential treatment of words and images but provided little guidance for the next set of images to come along. But the court was unconcerned for the resulting uncertainty, perhaps because of the underlying assumption that all viewers will generally interpret a picture in the same way, allowing the court to confidently slot the category of the meaningless image (puffery) alongside the category of the exaggerated but especially persuasive image (falsity).²¹¹

As with trademark, verbal overshadowing is likely to be a problem in such cases, helping to account for the unpredictable classification of images as puffery or as falsifiable. The research on verbal overshadowing suggests that how people talk about an ad will affect their perceptions of the ad itself.²¹² Lanham Act false advertising law is particularly vulnerable to this problem because it has adopted an unrealistically rigid distinction between false claims and misleading claims.²¹³ False claims may be prohibited without extrinsic evidence of consumer reaction,

210. *Id.* at 154, 158.

211. *See* Weaver, *supra* note 203, at 372 (“[I]t is hard to rationalize why the same false statement would have a higher propensity to deceive consumers when expressed through words rather than when expressed through images. In essence, DIRECTV used two different forms of advertising to convey the same message to consumers that its HD picture quality is superior to cable’s HD picture quality. The Second Circuit found DIRECTV’s claim to be literally false and deceptive when expressed through words in a television commercial, yet when the same message was expressed through an exaggerated image the Second Circuit determined that it was unlikely to deceive consumers. This decision in effect creates a dichotomy between statements expressed through words and statements expressed through images, with the latter avoiding liability under section 43(a). As a result, advertisers are now encouraged to produce outrageous visual advertisements because under that format they can avoid section 43(a) liability.” (footnotes omitted)).

212. This effect of overshadowing is most obvious with nonword-based ads, where the medium shift increases the cognitive demands on fact finders trying to think about images or sounds, but the research suggests that the same phenomenon may occur even with word-based ads because the presentation surrounding those works may “prime” respondents to think in certain ways. *See, e.g.*, H. Shanker Krishnan & Dipankar Chakravarti, *Memory Measures for Pretesting Advertisements: An Integrative Conceptual Framework and a Diagnostic Template*, 8 J. CONSUMER PSYCHOL. 1, 10–15 (1999) (explaining and testing priming effects).

213. *See* Tushnet, *supra* note 5, at 1337–44 (discussing the “rigid distinction” courts have created between cases of implicit falsity and those of explicit falsity, and the problems it has created for plaintiffs).

but misleading claims require such evidence, usually in the form of an expensive consumer survey.²¹⁴ In order to figure out whether an image is false or only potentially misleading, a court has to determine what the image says: it has to put the image into words and figure out if there's only one way to understand the claim (which makes the claim either true or false) or multiple ways (which may make the claim misleading if some of those ways are false and if the evidence shows that a substantial number of consumers receive a false message).²¹⁵

Carrying out this classification process, the verbal overshadowing literature suggests, is likely to change a fact finder's perception of what claims the ad makes, to the detriment of the law's goals of protecting consumers in actual purchasing decisions.²¹⁶ Moreover, the step of translating images into words is likely to produce multiple alternative wordings, as with the stain-grenade example in the previous section, making it especially likely that images will be found only potentially misleading even when consumers are in fact being deceived.²¹⁷ Likewise, ads with specific meanings to reasonable consumers may be deemed puffery because some verbal translations of the ads are insufficiently specific.²¹⁸

At a minimum, courts should go beyond their often conflicting intuitions about images and give reasons related to

214. *Id.* at 1320–21.

215. *See, e.g.*, *Gillette Co. v. Wilkinson Sword, Inc.*, No. 89 CV 3586 (KMW), 1992 WL 30938, at *2 (S.D.N.Y. Feb. 3, 1992) (accepting survey evidence of deception where images interacted with words to make consumers believe that the ad promised more than the literal meaning of the words); *Warner-Lambert Co. v. Schering-Plough Corp.*, No. 91 Civ. 5079 (MGC), 1991 WL 221107, at *1 (S.D.N.Y. Oct. 15, 1991) (finding that an ad with images of consumers falling asleep in unlikely places after using plaintiff's product was ambiguous and converting potential meanings into words).

216. *See* Brandimonte, Schooler & Gabbino, *supra* note 81, at 915–16 (cataloguing the various theories of how verbalization interferes with visual perception); McKenna, *supra* note 11, at 1844 (noting that one of trademark law's primary goals is to protect consumers "from being deceived into buying products they do not want").

217. *See* Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 WIS. L. REV. 221, 245–46 (describing the detached nature of artistic communication); Walvis, *supra* note 90, at 403–08 (discussing the design of consumer product and advertising focus groups, revealing that "the design of the study (respondent selection, the questions asked, how they are phrased, how they are posed, in what setting, by whom, and so on) influences the answers obtained from respondents," and citing several examples of consumer advertising studies that produced responses clearly contrary to real-world reactions).

218. *See* *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 391–94 (8th Cir. 2004) (finding that although 93% of consumers surveyed thought the phrase "America's Favorite Pasta" meant that the brand in question was America's "number one brand" and 50% of consumers thought the phrase meant that the brand was a "national brand," the phrase was insufficiently specific and unquantifiable so as to constitute puffery).

the specific images at issue, as well as reasons related to visual perception if those reasons are founded in actual evidence. Courts should hesitate to find that images are puffery given how much we know about images' power to persuade without consumers' conscious awareness that they believe or are affected by the images. An obvious animation may be understood as humorous, especially if it features Homer Simpson or the like,²¹⁹ but it also can easily be understood by consumers to represent something real. People are used to seeing stylized representations of real phenomena in ads and elsewhere, especially when processes (cell growth, pharmaceutical activity, tornado movement, and so on) can't be seen with the unaided eye.²²⁰ When advertisers deliberately choose images, they intend to convey *some* meaning, and that meaning may often be factual. If courts start to take images more seriously as conveyors of meaning, they can build up a body of case law that will provide more useful guidance.²²¹

C. *Cigarettes and Environmental Marketing: Case Studies of Image-Based Regulation*

The importance of images to advertising law can be seen in the example of cigarettes, where it is increasingly evident that regulating the words used by cigarette manufacturers is insufficient to constrain misleading messages sent by various cigarette brands. Brand messages—conveyed by colors, design, font, and brand names—have powerful influences on consumers' sensory experiences of cigarettes.²²² More specifically, cigarette manufacturers use light colors and white space in package design

219. See Phillips, *supra* note 182, at 78 (“Advertising knowledge may enable consumers to process information in genre-specific ways. For example, implicatures drawn from a print ad may differ from those suggested by a painting or a cartoon.” (citations omitted)).

220. See, e.g., Schick Mfg., Inc. v. Gillette Co., 372 F. Supp. 2d 273, 285–86 (D. Conn. 2005) (“Clearly, a cartoon will not exactly depict a real-life situation, here, e.g., the actual uneven surface of a hair or the details of a hair plug. However, a party may not distort an inherent quality of its product in either graphics or animation. Gillette acknowledges that the magnitude of beard hair extension in the animation is false. The court finds, therefore, that any claims with respect to changes in angle and the animated portion of Gillette’s current advertisement are literally false.”); LORRAINE DASTON & PETER GALISON, OBJECTIVITY 348–55 (2007) (discussing situations in which various types of representation are understood to represent reality, including images that unaided human eyes could not see).

221. See Jessica Silbey, *Cross Examining Film*, 8 U. MD. L.J. RACE RELIGION GENDER & CLASS 17, 22, 45–46 (2008) (setting out standard questions lawyers and courts could ask about film as evidence).

222. Melanie Wakefield et al., *The Cigarette Pack As Image: New Evidence from Tobacco Industry Documents*, 11 TOBACCO CONTROL i73, i75 (2002).

to make their cigarettes seem healthier.²²³ This “sensation transfer” or halo effect of product packaging is an important factor in making cigarettes seem lower in tar.²²⁴ Pictures of a filter also increase the illusion of lower tar and lower health risks.²²⁵ Smokers are more likely than nonsmokers to respond to such graphic cues, and smokers of light or mild brands are even more likely to do so, perhaps as a way of reducing cognitive dissonance: smoking light cigarettes seems less dangerous.²²⁶ While many countries ban the terms “light,” “mild,” and “low tar” as misleading, manufacturers can convey the same messages using white and other light colors.²²⁷ In essence, color makes misleading factual representations (what in trademark would be called secondary meaning, though here that meaning is not source-related but content-related).²²⁸

Although cigarette trade dress does not make factual claims in words, it does make claims that consumers interpret as factual and, thus, constitutes misleading commercial speech under U.S. law.²²⁹ Unfortunately, cigarette companies have successfully

223. Sam F. Halabi, *The Family Smoking Prevention and Tobacco Control Act: Regulatory Successes and Market Failures*, UPDATE, May/June 2011, at 16, 18–19; see David Hammond & Carla Parkinson, *The Impact of Cigarette Package Design on Perceptions of Risk*, 31 J. PUB. HEALTH 345, 346, 349 (2009) (stating that lighter shades and white represent less tar, smoother taste, and lower health risk); Wakefield et al., *supra* note 222, at i76 (reporting that “[c]ompanies discovered that lighter colours on the pack appeared to promote perceptions of lower cigarette strength” and that consumers rated identical cigarettes as milder in a blue pack and stronger and harsher in a red pack); TNS OPINION & SOCIAL, EUROPEAN COMM’N, EUROBAROMETER 72.3: TOBACCO 87–88 (2010), available at http://ec.europa.eu/health/tobacco/docs/ebs332_en.pdf (“As with the specific cigarette taste, one in ten people believe that the colour of the cigarette pack is indicative of one brand being less harmful than another.”).

224. Wakefield et al., *supra* note 222, at i75–i77; see also Hammond & Parkinson, *supra* note 223, at 346 (“Several internal industry studies have demonstrated that the color and design of the package are effective to the point where they influence sensory perceptions from smoking a cigarette . . .”).

225. Hammond & Parkinson, *supra* note 223, at 350.

226. *Id.* at 350–51.

227. *Id.* at 351; Ben Goldacre, *Why Cigarette Packs Matter*, BAD SCI. (March 12, 2011), <http://www.badsience.net/2011/03/why-cigarette-packs-matter/>.

228. Furthermore, without mandatory counterimaging, cigarette manufacturers can circumvent advertising bans, since cigarette packs themselves can be used to make displays, pyramids, patterns and other designs to attract the eye. Wakefield et al., *supra* note 222, at i78.

229. Federal law defines prohibited false advertising as “an advertisement, other than labeling, which is misleading in a material respect.” 15 U.S.C. § 55(a)(1) (2006).

[I]n determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations . . .

Id. It seems that many elements of cigarette trade dress fit squarely within this definition.

challenged color- and image-related bans using the First Amendment. In *Commonwealth Brands, Inc. v. United States*, the court concluded that such bans were not narrowly tailored to the goal of reducing youth smoking.²³⁰ This is in part a failure to offer the right evidence: color and images are misleading to adults as well, and U.S. regulators should emphasize that, if trade dress is speech, it is deceptive speech.

Similar problems of misleading without words can arise with “environmentally friendly” claims. Though the Federal Trade Commission (FTC) has recognized that various types of “green” marketing can convey false or misleading messages,²³¹ it has focused on words, though green imagery may be equally or even more vague in claiming a general environmental benefit a product can’t actually deliver. Thus, while the FTC discourages the unqualified use of the terms “green” or “environmentally friendly” because it is unlikely that a product is actually environmentally friendly across the wide array of axes that consumers expect from such a general term,²³² the FTC has not extended that default condemnation to the use of the color green or other environmental symbols. Though the FTC provides extensive explanations and examples of the appropriate use of specific words, it provides very little with respect to regulating images.²³³

Likewise, California’s Environmental Marketing Claims Act (EMCA) regulates a number of specific “environmentally friendly” phrases, then uses the phrase “any other like term” to describe unenumerated but still regulated claims.²³⁴ Thus, if an

230. *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512, 526–27 (W.D. Ky. 2010).

231. 16 C.F.R. § 260.2(a) (2011) (stating that the Green Guides apply to environmental claims “whether asserted directly or by implication, through words, symbols, emblems, logos, depictions, product brand names, or through any other means”); see also *Reporter Resources: The FTC’s Green Guides*, FED. TRADE COMMISSION, <http://www.ftc.gov/opa/reporter/greengds.shtm> (calling 16 C.F.R. § 260 the “Green Guides”) (last modified June 24, 2011).

232. 16 C.F.R. § 260.7(a) (2011) (“Unqualified general claims of environmental benefit are difficult to interpret, and depending on their context, may convey a wide range of meanings to consumers. In many cases, such claims may convey that the product, package or service has specific and far-reaching environmental benefits. . . . [E]very express and material implied claim that the general assertion conveys to reasonable consumers about an objective quality, feature or attribute of a product or service must be substantiated. Unless this substantiation duty can be met, broad environmental claims should either be avoided or qualified, as necessary, to prevent deception about the specific nature of the environmental benefit being asserted.”).

233. See 16 C.F.R. § 260.7(a) & ex. 5 (2011) (warning that “an environmental seal, either in the form of a globe icon, or a globe icon with only the text ‘Earth Smart’ around it” is likely to make a general environmental benefit claim).

234. CAL. BUS. & PROF. CODE §§ 17580–17581 (West 2008).

image conveys the same “environmentally friendly” message to consumers as one of the regulated phrases, the advertiser need not comply with EMCA’s extensive provisions for requiring documentation of the substantiation for the environmental claims and for any offsetting environmental harms caused by the product.²³⁵ This allows advertisers a chance to arbitrage their claims: converting to images avoids much troublesome regulation.²³⁶

With cigarettes, regulators are beginning to propose image-based interventions of their own. The World Health Organization Framework Convention on Tobacco Control has recommended that half or more of a pack be covered with graphic warnings.²³⁷ The Food and Drug Administration has recently released its proposed image warnings showing various health consequences of smoking.²³⁸ On-package graphics, now in use in Canada, may be the best way to combat the visual appeal of the

235. Section 17580 provides as follows:

(a) Any person who represents in advertising or on the label or container of a consumer good that the consumer good that it manufactures or distributes is not harmful to, or is beneficial to, the natural environment, through the use of such terms as “environmental choice,” “ecologically friendly,” “earth friendly,” “environmentally friendly,” “ecologically sound,” “environmentally sound,” “environmentally safe,” “ecologically safe,” “environmentally lite,” “green product,” or any other like term, shall maintain in written form in its records the following information and documentation supporting the validity of the representation:

- (1) The reasons why the person believes the representation to be true.
- (2) Any significant adverse environmental impacts directly associated with the production, distribution, use, and disposal of the consumer good.
- (3) Any measures that are taken by the person to reduce the environmental impacts directly associated with the production, distribution, and disposal of the consumer good.
- (4) Violations of any federal, state, or local permits directly associated with the production or distribution of the consumer good.
- (5) Whether or not, if applicable, the consumer good conforms with the uniform standards contained in the Federal Trade Commission Guidelines for Environmental Marketing Claims for the use of the terms “recycled,” “recyclable,” “biodegradable,” “photodegradable,” or “ozone friendly.”

CAL. BUS. & PROF. CODE § 17580(a)(1)–(5) (West 2008). Section 17580.5 adds a ban on “any untruthful, deceptive, or misleading environmental marketing claim, whether explicit or implied,” so images would be covered there if shown to be false or misleading, but without the specific documentation requirements in the previous section. CAL. BUS. & PROF. CODE § 17580.5(a) (West 2008).

236. See *Hill v. Roll Int’l Corp.*, 128 Cal. Rptr. 3d 109, 116 (Cal. Ct. App. 2011) (refusing to interpret the image of a green drop on a bottle of water as a general environmental benefit claim).

237. WORLD HEALTH ORG., WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL 53 (2011), available at http://whqlibdoc.who.int/publications/2011/9789241501316_eng.pdf.

238. See *Cigarette Health Warnings*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/TobaccoProducts/Labeling/CigaretteWarningLabels/default.htm> (last updated Oct. 21, 2011).

cigarette pack itself.²³⁹ Using colors and graphics to guide consumers' understandings of nutrition labels has proved more effective than words alone,²⁴⁰ providing reason to hope for greater success with cigarettes as well.

Unfortunately, however, a district court recently ruled the FDA's proposed requirement of including warning images on cigarette packs unconstitutional, holding among other things that the images were so graphic that they exploited fear rather than conveying rational risk information the way words do.²⁴¹ Once again, judicial treatment of images favors the advertiser over challengers, just as in *Deere* and in many false advertising cases. Marlboro can exploit our emotions, but Uncle Sam can't, even though emotions are critical to judgment, not opposed to it.²⁴² Ironically, the judge who struck down the regulation was impassioned—using multiple exclamation points in the opinion, even—but apparently didn't think that his own emotions interfered with his reasoning.²⁴³

M. Ryan Calo has offered a more general, positive regulatory lesson based on what we know about how images work differently than words.²⁴⁴ Given that regulators often want consumers to know more information—indeed, given that in the United States the First Amendment may prevent any other remedy for certain kinds of misleading ad content—we should consider making required disclosures visual or otherwise visceral, rather than textual. Word-based, and often quite wordy, disclosures tend to work very badly. Consumers simply ignore or

239. See Halabi, *supra* note 223, at 18 (“The pictorial warnings proposed by the FDA provide arguably the most important contribution to consumer decision-making”); Wakefield et al., *supra* note 222, at 178 (discussing the “unappealing images now used on cigarette packs in Canada”).

240. See, e.g., CAROLYN L. ENGELHARD, ARTHUR GARSON, JR. & STAN DORN, REDUCING OBESITY: POLICY STRATEGIES FROM THE TOBACCO WARS 34–38 (2009), available at http://www.urban.org/uploadedpdf/411926_reducing_obesity.pdf; Bridget Kelly et al., *Consumer Testing of the Acceptability and Effectiveness of Front-of-Pack Food Labeling Systems for the Australian Grocery Market*, 24 HEALTH PROMOTION INT'L 120, 125 (2009), available at http://www.foodpolitics.com/wp-content/uploads/australia_label_09.pdf (finding that consumers were five times as likely to correctly identify healthy food when they were exposed to green, yellow, and red traffic light labels, rather than black and white, nongraphic numerical boxes).

241. *R.J. Reynolds Tobacco Co. v. FDA*, No. 11-1482 (RJL), 2011 WL 5307391, at *5–6 (D.D.C. Nov. 7, 2011) (condemning “emotion-provoking images” and the “subjective vision of the horrors of tobacco addiction”).

242. See generally David J. Arkush, *Situating Emotion: A Critical Realist View of Emotion and Nonconscious Cognitive Processes for Law and Legal Theory*, 2008 BYU L. REV. 1275 (clarifying legal thinking about emotion in decisionmaking).

243. See *R.J. Reynolds*, 2011 WL 5307391, at *7, *8 n.28.

244. M. Ryan Calo, *Against Notice Skepticism in Privacy (and Elsewhere)*, 87 NOTRE DAME L. REV. (forthcoming 2012) (manuscript).

misunderstand them.²⁴⁵ Nonverbal disclosures could do a better job. For example, since images of eyes or human-like avatars make people feel like they're being observed, privacy disclosures might be much more noticeable and effective if conveyed via such methods.²⁴⁶ Even changes in the formality and color of websites can noticeably change behavior related to disclosure of private information.²⁴⁷ If we want people to worry about what they are disclosing online, then interventions into format may be far more effective than requirements that websites offer detailed privacy policies.²⁴⁸ In trademark, similarly, a better understanding of image-based disclaimers would build a firmer foundation for protecting products that imitate a national brand's trade dress. A house brand's distinctive logo (such as that of Safeway or Target) is likely to cue consumers to notice the differences between the products, averting confusion.

IV. TENTATIVE CONCLUSIONS

The most sweeping conclusion I am willing to reach is that the field of case law under the Lanham Act is very far from anything approaching coherence with respect to its treatment of images. One strand of trademark law prioritizes words, reluctantly allowing images along for the ride. This can be seen in courts' attempts to reduce trade dress to words, along with the PTO's requirement that all trademarks be converted into words for purposes of classification.²⁴⁹ In this version of trademark,

245. See Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 671–73, 711–13 (2011) (revealing that consumers usually ignore boilerplate license agreements, infrequently consult food nutrition labels, and often do not understand disclosures due to illiteracy or lack of knowledge).

246. See Calo, *supra* note 244 (manuscript at 30–31) (“It turns out we are hardwired to react to anthropomorphic design as though a person were really there. We know intellectually that what we are seeing is not a real person, but for many purposes our brains are incapable of shutting off these psychological reactions to the perceived presence of another. Among these reactions is the feeling of being observed and evaluated. In one study, people paid more often for coffee on the honor system when a picture of a pair of eyes was present. In another, people skipped sensitive questions on an online questionnaire and engaged in more self-promotion when the interface appeared like a person.” (footnotes omitted)).

247. See *id.* (manuscript at 39) (stating that a study at Carnegie Mellon “found that subjects responded to personal questions more honestly where the interface was casual than in the control or formal condition”).

248. See *id.* (manuscript at 31–32).

249. Under European law, trademarks must be described in ways that can be textually represented, even if that means using Pantone color numbers or musical notation rather than a true copy of the mark as it exists in the market. OFFICE FOR HARMONIZATION IN THE INTERNAL MKT. (TRADE MARKS AND DESIGNS), GUIDELINES CONCERNING PROCEEDINGS BEFORE THE OFFICE FOR HARMONIZATION IN THE INTERNAL

words are just more likely to work as trademarks, or at least more likely to be amenable to legal classification and governance. To the extent that the latter motivation is the true justification, courts should admit as much and stop saying unproven (and often disproven) things about how consumers think.

Another strand elevates the power of the image over other forms of communication—both as trademarks and in deciding trademark cases. Images are immediately intelligible and easily judged, as Judge Posner instructs lawyers. We know it when we see it and we all see the same thing.

Meanwhile, in false advertising law, the difficulty of pinning down an image's meaning in order to determine whether that image makes a false claim has also led courts to state, rather than explain, their conclusions. Each field seems to reach its own set of compromises, picking and choosing from attitudes towards visual representation without harmonizing types of cases or rationales. It may well be that ideas about fair competition and predictability can explain the differences, but that work has yet to be done in a convincing way.

Images can make claims, just as words do. Among other things, this means that advertising images can be false or misleading, and, therefore, subject to regulation. Courts understand that images regularly make meanings specific enough to mislead in trademark law; they should carry that conclusion over to advertising law generally. This might also allow more effective regulation on an industry-wide basis: using images to improve disclosure requirements or to avoid types of communications that are particularly likely to deceive. Truly integrating images into our advertising law would allow regulation to leverage the power of images and not just fight a rearguard action against that power.

MARKET 10 (2008), available at http://oami.europa.eu/ows/rw/resource/documents/CTM/guidelines/examination_en.pdf; see also Bartow, *supra* note 49, at 265 (arguing that words, which are easily transmitted to others, are “better suited to serving as simultaneously effective and distinctive trademarks” than colors or sounds). It's probably not accidental that Europe's more aggressive requirements coincide with the preeminence European trademark law gives to registration over use; words are easier to catalog and search than nonverbal marks.