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EXTRA-LEGAL USES OF TM

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Theoretical accounts of trademark law suggest that trademarks serve multiple marketplace functions, including protecting consumers and producers from unfair dealing, reducing consumer search costs, and incentivizing higher quality products. Producers of goods and services often use the “TM” symbol to signal their assertion of legal rights in a mark, arguably helping advance these goals.

But recently, an interesting phenomenon has arisen in which individuals not engaged in typical commercial activities have been using the TM signifier in ways that do not strictly correspond to the symbol’s legal function. These so-called “extra-legal” uses of the TM symbol can offer insights into how ordinary people understand trademarks; there is also a question of what the appropriation means, if anything, for the efficient functioning of trademark law.

To better understand these extra-legal uses of the TM symbol, we collected data from various social media and text messaging platforms, online discussion boards, and real-world uses. We found that speakers invoking the TM symbol often leveraged the linguistic, cultural, and legal connotations of the symbol to achieve a variety of expressive and creative ends. Overall, we observed that speakers using the TM symbol in expressive speech had a surprisingly sophisticated understanding of the

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linguistic and semantic functions of the symbol. This understanding and leveraging of the interrelated meanings of the TM symbol allowed for a flourishing of creativity and a level of sophisticated and nuanced discourse that otherwise might be difficult to achieve in an online format.

The widespread adoption of the TM symbol as a vehicle for expression is not entirely without risks, however. We draw analogies to existing trademark law and doctrines to explore these potential harms, including the risk that consumers and producers will be confused by these expressive uses and the risk that the legal significance of the mark will be “diluted” by competing uses. Though we find these concerns have some merit, we conclude that they are outweighed by the social benefits that flow from allowing speakers to use the TM symbol in expressive ways. This conclusion informs how trademark law should handle these uses going forward.

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INTRODUCTION

Recently, NBA basketball star and fashion guru Jordan Clarkson posted a series of photos of himself on Instagram.¹ Those photos included a selfie, a still shot of his phone playing an interview with him, a photo with friends in the ocean, and several others capturing him in various NBA settings (e.g., entering an arena, playing in an NBA game, signing autographs, and lifting weights).² The post itself wasn't unusual—celebrities make similar posts all the time.³ Rather, it was the post's caption, which simply read “TM,” that stood out. Why would Clarkson use that symbol, borrowed from trademark law, as the sole caption in a social media post?⁴

Typically, trademark owners use the TM symbol to notify others that they claim legal rights in an associated trademark.⁵ Those legal rights consist of the ability to prevent others from using the same or a similar mark in association with their own goods and services.⁶ Trademarks thus help identify the source of goods and services and, according to predominant trademark theories, thereby help

¹ Clarkson has been described by some as the best-dressed athlete in the NBA, with some recent sponsorships to back up that claim. See Mike Destefano, *Jordan Clarkson on Being the Best-Dressed Player in the NBA, the Utah Jazz Offseason Moves, and More*, COMPLEX (Sept. 19, 2022), <https://www.complex.com/style/a/mike-destefano/jordan-clarkson-utah-jazz-nba-best-dressed-interview> [<https://perma.cc/76P6-QR8A>] (describing Clarkson's fashion profile and some of his recent sponsorships).

² Jordan Clarkson (@jordanclarksons), INSTAGRAM (Mar. 26, 2023), <https://www.instagram.com/p/CqRMRfCuFwg/> [perma.cc/SS6P-7BF3].

³ See, e.g., *10 Most 'Selfie' Obsessed Celebrities REVEALED!*, HEART, <https://www.heart.co.uk/showbiz/10-most-selfie-obsessed-celebrities-revealed/> [<https://perma.cc/5LGK-PURY>] (last visited Sept. 22, 2024) (providing a number of examples of celebrity selfies).

⁴ To be clear, social media users do sometimes use the TM symbol in posts. But typically, those uses still pertain to regular legal use of the symbol, i.e., to lay claim to rights in an associated trademark that signifies the source of goods and services. See *Use of Trademarks in #SocialNetworks*, ABG INTELLECTUAL PROPERTY, <https://abg-ip.com/use-of-trademarks-in-social-networks/> [<https://perma.cc/KRJ4-JH59>] (describing uses of trademark symbols in connection with social media).

⁵ *What Is a Trademark?*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trademarks/basics/what-trademark> [<https://perma.cc/2DY4-NCEL>] (last visited Sept. 22, 2024) (“Every time you use your trademark, you can use a symbol with it. The symbol lets consumers and competitors know you're claiming the trademark as yours.”).

⁶ See 15 U.S.C. § 1125 (2012) (providing mark users a cause of action against others who use confusingly similar marks as to the source of their goods or services; or who misrepresent their goods and services; or who dilute a mark through blurring or tarnishment).

reduce consumer information costs, stave off unfair competition, and incentivize the production of consistent and high-quality products.⁷

In Clarkson’s case, it seems unlikely that Clarkson was using the TM symbol for any of these typical purposes. His use of the symbol does not seem to be an assertion of legal rights in a particular mark as the signifier of the source of specific goods and services. If it were, it’s unclear what the “mark” in this situation is and which goods and services the mark is associated with. Even if Clarkson intended to use the TM symbol as a means of branding himself,⁸ it remains the case that his use seems primarily expressive (in some form or another) rather than an actual assertion of legal rights. It seems dubious, after all, that Clarkson’s use of the symbol was intended to fend off competitors from adopting a similar persona in a basketball setting.

Clarkson’s use is not an isolated example. Increasingly, we see others using the TM symbol in a variety of ways that depart from the symbol’s traditional legal functions.⁹ Some uses seem intended as humorous or ironic, while others seem to function as a way of indicating legitimacy.¹⁰ Such uses of the TM symbol have sprung up not only on social media and online conversations, but also in journalism, interpersonal texting, and even in-person interactions. In fact, the TM symbol has even earned its own emoji.¹¹

These types of uses of the TM symbol raise a number of important questions for trademark law. First, what are parties who use the symbol in these atypical ways

⁷ BARTON BEEBE, *TRADEMARK LAW: AN OPEN-SOURCE CASEBOOK* 23–27 (11th ed. 2024) (summarizing these rationales behind trademarks). *See also* William M. Landes & Richard A. Posner, *The Economics of Trademark Law*, 78 *TRADEMARK REP.* 267, 271–72 (1988) (indicating that trademarks help reduce consumer information costs while also incentivizing producers to develop consistent levels of product quality in an effort to build valuable goodwill).

⁸ As we discuss later, the symbol might be particularly helpful in self-branding because the symbol provides a sense of authority and officialness. *See* Goldie Chan, *10 Golden Rules of Personal Branding*, *FORBES* (Nov. 8, 2018), <https://www.forbes.com/sites/goldiechan/2018/11/08/10-golden-rules-personal-branding/sh=2bbcb12658a7> [perma.cc/3LX4-H9M8] (“Creating a personal brand can be a daunting, mythical task.”).

⁹ LaReina Hingson et al., *Trademark™: A Usage-Based Theory of the Trademark Sign*, 208 *J. PRAGMATICS* 3, 3–16 (2023) (providing examples of the ways in which the unregulated use of the TM sign has fostered its creative uses).

¹⁰ *Id.* at 11–15 (providing linguistic interpretations of various uses).

¹¹ *Trade Mark*, *EMOJIPEDIA*, <https://emojipedia.org/trade-mark> [https://perma.cc/4Y3Q-VNHW] (last visited Sept. 16, 2024) (indicating that the TM emoji was added to Emoji 1.0 in 2015).

trying to achieve? Was Clarkson trying to convey something about his particular style or way of living to his nearly two million Instagram followers? Was he trying to claim legal rights? Second, what does this expression indicate about these individuals' understanding (or lack thereof) of trademark law? Why did Clarkson choose to use the TM symbol in expressing himself in the way that he did? And finally, what are the implications of these uses, if any, for trademark law and policy? For instance, does Clarkson's use (and others like his) alter the symbol's meaning or effectiveness in more traditional legal settings?

Scholars in other disciplines have begun to examine the use of the TM symbol in these atypical settings. Linguistic scholars, for instance, have sought to categorize uses of the TM symbol based on the linguistic content of the associated messages.¹² Law scholars have also examined some linguistic aspects of trademark law more generally.¹³ However, up until now, legal scholars have not assessed the use of the TM symbol in these types of atypical settings specifically. This Article does so.

To get a better handle on the questions that Clarkson' and others' uses of the TM symbol raise, we collected data on these atypical trademark uses. Data sources ranged from social media platforms like Facebook and Instagram, to text messaging platforms like Discord, to online journalism, to traditional phone-based text messaging, to real-world uses. In total, we collected around two hundred

¹² Elin McCready, *Unnatural Kinds*, 40 J. PRAGMATICS 1817, 1817 (2008); Hingson et al., *supra* note 9.

¹³ See, e.g., Ronald R. Butters, *A Linguistic Look at Trademark Dilution*, 24 SANTA CLARA COMPUT. & HIGH TECH. L.J. 507, 515 (2008) (discussing how linguistics can help practitioners formulate trademark dilution causes of action); Graeme B. Dinwoodie, *What Linguistics Can Do for Trademark Law*, in TRADEMARKS AND BRANDS (Lionel Bently et al. eds., Cambridge U. Press 2010) (discussing the importance of linguistics in understanding trademarks); Laura A. Heymann, *The Grammar of Trademarks*, 14 LEWIS & CLARK L. REV. 1313, 1319–21 (2010) (discussing incorporating linguistic theory more directly into trademark law); Jake Linford, *Are Trademarks Ever Fanciful?*, 105 GEO. L.J. 731, 731 (2017) (pointing to linguistic research that supports the contention that even fanciful marks may describe their associated products through sound symbolism); Jake Linford, *A Linguistic Justification for 'Generic' Trademarks*, 17 YALE J. L. & TECH. 110, 116 (2015) (relying on linguistic research to support the argument that generic marks can acquire source significance); Roger W. Shuy, *Using Linguistics in Trademark Cases*, in THE OXFORD HANDBOOK OF LANGUAGE AND LAW (Lawrence M. Solan & Peter M. Tiersma eds., 2012) (discussing the use of linguistics in trademark litigation); ROGER M. SHUY, *Using Linguistic Tools and Thinking in Trademark Cases*, in LINGUISTIC BATTLES IN TRADEMARK DISPUTES (2002) (discussing linguistic challenges in trademark litigation).

screenshots or recordings of the TM symbol. We then examined these uses to evaluate their semantic content.

Our findings reveal a range of atypical ways in which individuals use the TM symbol. The primary purpose of the use seems to be expressive: speakers use the TM to communicate something beyond the symbol's legal function. But what are these speakers trying to communicate, and how does it relate to the legal purpose of TM? The answers to these questions vary with the use, but speakers tend to use the symbol, often humorously or ironically, in ways that invoke either the legal function of the symbol or concepts related to it. For example, the symbol is often used to emphasize the "officiality" or "legitimacy" of a word or concept; it is also used to reference the representative or stereotypical nature of a word or concept; and at times, the corporate aspects of a concept. Some speakers use the symbol to comment on or parody existing marks or products; others use it in service of the creative exercise of inventing or branding hypothetical and humorous products (or their own persona, in the case of Clarkson). Yet others invoke the TM symbol humorously in a knowingly (or perhaps unknowingly) futile attempt to have their own speech or ideas protected.

These uses can tell us something about how laypeople understand trademarks and the TM symbol. As mentioned above, the uses discovered in our analysis seemingly intended to invoke a number of interrelated meanings. These meanings are extra-legal in the sense that they are not intended to do what trademarks do: identify the source of a good or service so that a producer can build up valuable goodwill.¹⁴ Yet they do gesture, more or less explicitly, to both the legal and linguistic nature of the TM symbol. This suggests that laypeople have a general idea of what the TM symbol "does"; and further, that those who choose to use it are leveraging these functions for their own expressive ends.

Specifically, speakers seem to be harnessing the linguistic and semantic "powers" of the TM symbol to convey expressive and creative messages: to communicate with each other and engage in discourse; to create community; to comment on society; and to engage in creative exercises and humor. Further, the specific ends to which these speakers appear to be aiming would be quite difficult

¹⁴ Jeanne C. Fromer, *The Role of Creativity in Trademark Law*, 86 NOTRE DAME L. REV. 1885, 1890–92 (2011) (discussing the main theoretical purposes behind trademarks, which include these rationales).

to arrive at in the absence of the TM symbol—the symbol and meanings associated with it allow for the communication of metadiscourse, irony, community building, and other sophisticated forms of communication that are inherently challenging in an online format. The TM symbol, along with a shared understanding of what it represents, thus seems to be acting as a “shortcut” to achieving these ends. In this way, we found the symbol to have surprising value in facilitating digital expression.

But these atypical uses of TM also have implications for trademark law and policy. In particular, the appropriation of TM by parties using it in extra-legal ways could hamper the ability of the TM symbol to function effectively as a legal operator.¹⁵ For instance, the unprincipled use of the TM symbol could lead to various forms of public and consumer confusion. Though many of the uses revealed in our data were likely intended to be humorous, they could conceivably lead to public confusion about whether the speaker in a specific instance was attempting to claim legal rights through use of the symbol.

This confusion could undermine the legal uses of the trademark symbol in several ways. First, it could lead to chilling effects. For example, a party interested in adopting a particular device as a trademark might inaccurately believe a person using the TM symbol expressively in conjunction with that same device is claiming rights in the device. The party might then be dissuaded from using the mark in commerce and developing trademark rights in a mark that is otherwise available. This chilling effect might be particularly troublesome as some empirical evidence suggests that the number of marks available for adoption continues to shrink.¹⁶ Ironically, those initial expressive uses could also chill other expressive uses to the extent that other users interpret the expressive uses as legal in nature.

Second, the expressive use of the TM symbol in conjunction with a word, phrase, or other device might be confusing to the consuming public in various ways that could undermine the legal function of trademarks. For example, consumers might erroneously believe that someone using the symbol in an expressive way is offering a product or service. This confusion could interfere with the efficient

¹⁵ See *U.S. Pat. & Trademark Off. v. Booking.com B. V.*, 591 U.S. 549, 560–61 (2020) (identifying consumer perception as the focus of the federal Lanham Act).

¹⁶ Barton Beebe & Jeanne C. Fromer, *Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion*, 131 HARV. L. REV. 945, 977–1020 (2018) (empirically showing substantial word mark depletion and congestion).

functioning of commerce trademark law is meant to facilitate.¹⁷ More generally, the widespread adoption of the TM symbol as an expressive device might confuse the public about what the symbol means or how it is supposed to be used. This confusion about the legal function of the trademark symbol could undermine the notice function the symbol helps advance.¹⁸

Third, even if the public is not confused in many instances, the TM symbol itself, through these various expressive uses, could be hampered in its ability to function as a legal object. The public, upon encountering the TM, might be deprived of the unique legal meaning of the symbol and might thus have to undertake additional mental steps to try to determine the way in which the TM symbol is being used. Ultimately, this could lead to the public discounting the TM symbol and paying it less heed. In the extreme case, the symbol might lose its legal meaning altogether and no longer be able to function as a legal operator.

We don't wish to exaggerate these potential harms, however. In most cases in our sample, the humorous or expressive purpose of the use seems unlikely to confuse consumers or harm trademark owners in ways that trademark law recognizes. And though there is a real risk that in some cases consumers might be confused by expressive uses—or at least have to think twice about what a TM operator is doing in that instance (i.e., whether it is serving a legal or expressive purpose), we think the surprising expressive benefits of extra-legal uses of the symbol outweigh these risks.

Given this conclusion, how should trademark law respond? In many cases, no action is required. Several of the uses we encountered do not implicate trademark law directly because they do not cause legally cognizable harm to producers or consumers. In cases where there is arguably such harm, existing trademark law doctrines like trademark fair use might protect expressive users.¹⁹ Free speech

¹⁷ Stephen L. Carter, *The Trouble with Trademark*, 99 YALE L.J. 759, 759 (1989) (“[Trademarks] lower consumer search costs, thus promoting the efficient functioning of the market.”).

¹⁸ *Trademark Symbols*, INT’L TRADEMARK ASS’N, <https://www.inta.org/fact-sheets/trademark-symbols/> [<https://perma.cc/X44N-BTSE>] (last visited Sept. 16, 2024) (“The TM symbol ... is usually used in connection with an unregistered mark—a term, slogan, logo, or other indicator—to provide notice to potential infringers that common law rights in the mark are claimed.”).

¹⁹ See generally William McGeeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49, 54–56 (2008) (discussing trademark fair use in general and discussing some possible reforms to it).

principles might cover others.²⁰ However, in cases where current trademark law does not protect extra-legal uses of the TM symbol, we may wish to reform trademark law doctrines to allow for them because of the social benefits in facilitating online expression these uses advance. We discuss these issues in greater depth throughout the remainder of the Article.

We proceed as follows. Part I discusses some basics of trademark law and the traditional purpose of the trademark symbol. Part II lays out our empirical findings on extra-legal, social uses of the TM symbol. Part III concludes by exploring in greater depth some of the possible ramifications of those uses.

I TM'S LEGAL FUNCTION

Here we provide a brief overview of trademark law, predominant trademark law theories, and the TM symbol's role in all of it. Volumes could be (and have been) written about trademark law and the theories behind it—our purpose here is not to recount those accounts in full, but instead to provide a snapshot as context for the remainder of this Article.

A. *Trademarks and Trademark Theory*

Trademarks are a ubiquitous feature of commerce and marketing in the United States and globally.²¹ According to U.S. law, a trademark is a “word, name, symbol, or device, or any combination thereof” that a person uses in commerce to “identify and distinguish his or her goods” from those made or sold by others and “to indicate the source of the goods.”²² Service marks are the same as trademarks, except that they designate the source of particular services rather than goods.²³ Certification and collective marks are each a species of trademarks with their own sets of rules.²⁴ In this study, because these distinctions are irrelevant for our purposes, we will use

²⁰ See generally Pratheepan Gulasekaram, *Policing the Border between Trademarks and Free Speech: Protecting Unauthorized Trademark Use in Expressive Works*, 80 WASH. L. REV. 887 (2005) (discussing some of the ways in which free speech principles protect users of other trademarks for speech activities).

²¹ In fact, trademarks are so ubiquitous that we may be running out of options. See Beebe & Fromer, *supra* note 16.

²² See 15 U.S.C. § 1127 (2006) (defining a trademark as “includ[ing] any word, name, symbol, or device . . . used by a person . . . to identify and distinguish his or her goods”).

²³ *Id.* (defining a “service mark”).

²⁴ *Id.* (defining “collective” and “certification” marks).

the term “trademark” or “mark” for all these different types of marks for ease of reference.

A trademark owner “has the exclusive right to prevent unauthorized third parties from using the same or similar mark on goods and services where such use is likely to cause confusion among consumers as to the source of the goods and services.”²⁵ Hence, one of the main purposes of trademark law is to protect consumer expectations regarding the source of goods and services.²⁶ Or as many scholars have put it, a primary theoretical justification for trademarks is that they help reduce consumer information costs.²⁷ Trademarks help consumers efficiently navigate the marketplace by providing a recognizable mark for a preferred source of goods and services.²⁸ Essentially, a mark helps consumers find what they are looking for without wasted effort.²⁹

Trademarks have also been understood to help prevent unfair competition.³⁰ Indeed, according to some scholars, unfair competition principles lie at the historical heart of trademark law and help explain many of trademark law’s present-day doctrines.³¹ By preventing competitors from using the same or confusingly similar marks, trademarks allow their owners to reap the financial rewards of whatever goodwill they’ve been able to build in the marketplace.³² By inhibiting

²⁵ Stuart Graham et al., *The USPTO Trademark Case Files Dataset: Descriptions, Lessons, and Insights*, U.S. PAT. & TRADEMARK OFF. 669, 672 (2013).

²⁶ Michael S. Mireles, Jr., *Towards Recognizing and Reconciling the Multiplicity of Values and Interests in Trademark Law*, 44 IND. L. REV. 427, 433 n.37 (2011) (reviewing these trademark theories).

²⁷ Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1844 (2007) (“It would be difficult to overstate the level of consensus among commentators that the goal of trademark law is—and always has been—to improve the quality of information in the marketplace and thereby reduce consumer search costs.”); Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 73 (2012) (“According to the dominant theoretical account, trademark law operates to enable consumers to rely on trademarks as repositories of information about the source and quality of products, thereby reducing the costs of searching for goods that satisfy their preferences.”).

²⁸ McKenna, *The Normative Foundations*, *supra* note 27, at 1844.

²⁹ *Id.*

³⁰ *Id.* at 1848.

³¹ *Id.* (arguing that, in reality, trademark has historically been rooted in protecting producers against unfair competition); *see also* 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:12 (5th ed. 2024) (reviewing courts’ rejection of the premise that trademark rights are anti-competitive).

³² MCCARTHY, *supra* note 31; *Qualitex Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159, 164 (1995) (“At the same time, the law helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product.”).

copycats, trademark rights also enable trademark owners to build up that goodwill in the first place.³³ In serving these ends, trademarks may thus incentivize their owners to invest in developing consistent levels of quality in their goods and services.³⁴ They may also incentivize their owners to aim for higher levels of quality.³⁵

Users of trademarks begin to accrue rights in their marks as soon as they start using them in connection with goods and services in the marketplace.³⁶ Those rights often sound in state common or statutory law.³⁷ But even under federal law, users of marks can acquire rights merely by using the mark in commerce.³⁸ For instance, under the federal Lanham Act, mark users have a cause of action against others who use confusingly similar marks as to the source of their goods or services or who misrepresent their goods and services, regardless of whether the mark is federally registered.³⁹ Furthermore, all states provide for state registration of trademarks.⁴⁰

Consumer perception plays a key role in trademark law and policy generally.⁴¹ For example, the touchstone of trademark liability is likelihood of consumer confusion—if a competing mark is likely to confuse consumers as to the source of the associated good, legal liability becomes more likely.⁴² The more recently

³³ Jennifer E. Rothman, *Navigating the Identity Thicket: Trademark's Lost Theory of Personality, the Right of Publicity, and Preemption*, 135 HARV. L. REV. 1271, 1289–92 (2022) (reviewing this and related rationales behind trademark rights).

³⁴ *Id.* at 1289; see also *Qualitex*, 514 U.S. at 164 (“The law thereby ‘encourage[s] the production of quality products,’ and simultaneously discourages those who hope to sell inferior products by capitalizing on a consumer’s inability quickly to evaluate the quality of an item offered for sale.” (citation omitted)).

³⁵ *Qualitex*, 514 U.S. at 164.

³⁶ Shontavia Johnson, *Trademark Territoriality in Cyberspace: An Internet Framework for Common-Law Trademarks*, 29 BERKELEY TECH. L.J. 1253, 1257–59 (2014) (discussing the rule of first use and common law rights that arise through first use).

³⁷ See *id.*

³⁸ 15 U.S.C. § 1127 (2012).

³⁹ *Id.*

⁴⁰ However, as others note, state registration provides little value beyond common law protection obtained through use in commerce. See 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 22:1 (5th ed. 2024).

⁴¹ U.S. Pat. & Trademark Off. v. Booking.com B. V., 591 U.S. 549, 560–61 (identifying consumer perception as the focus of the federal Lanham Act).

⁴² Ann Bartow, *Likelihood of Confusion*, 41 SAN DIEGO L. REV. 721, 722 (2004) (“Confusion among consumers is the grave iniquity against which trademark laws and jurisprudence are intended to guard.”).

added dilution cause of action also considers how use of a mark by a third party might diminish or otherwise affect consumer perceptions of the mark.⁴³ And many other trademark doctrines are concerned with how consumers will interpret various aspects of devices intended to be used as trademarks.⁴⁴ The efficient functioning of the trademark system thus depends to a large extent on policymakers and judges correctly intuiting how consumers will respond to particular marks.⁴⁵ One can argue that the system also depends on consumers' understanding of trademark law itself; perhaps not the nitty gritty details, but at least a general sense of what it means for a symbol or other device to function as a trademark.⁴⁶

B. *The Role of Trademark Symbols in Trademark Law*

Equally crucial to trademarks achieving their intended purposes is the element of notice.⁴⁷ For trademarks to function optimally, competitors should ideally have notice of an entity's assertion of rights in a mark.⁴⁸ Notice discourages competitors from adopting a mark already claimed by another party, which helps prevent

⁴³ Laura R. Bradford, *Emotion, Dilution, and the Trademark Consumer*, 23 BERKELEY TECH. L.J. 1227, 1242–43 (2008) (identifying the harms of dilution as forcing consumers “to work harder” in identifying preferred brands).

⁴⁴ Katherine J. Strandburg, *Rounding the Corner on Trade Dress*, 29 YALE J. ON REG. 387, 391–92 (2012) (“The tension between product design’s potential role as a source identifier and its inherent value to consumers has been recognized for more than one hundred years and underlies the requirement of ‘non-functionality.’”); Thomas R. Lee, Eric D. DeRosia & Glenn L. Christensen, *An Empirical and Consumer Psychology Analysis of Trademark Distinctiveness*, 41 ARIZ. ST. L.J. 1033 (2009) (discussing the role of consumer perception in determining a trademark’s level of distinctiveness); *Booking.com*, 591 U.S. at 560–61 (holding that a term intended to be a trademark “is a generic name for a class of goods and services only if the term has that meaning to consumers.”).

⁴⁵ Michael Grynberg, *The Judicial Role in Trademark Law*, 52 B.C. L. REV. 1283, 1283 (2011) (discussing the need to consider the role of judges in assessing trademark law).

⁴⁶ According to the Supreme Court, consumer perception is part of whether a trademark is protectable at all. So though consumers may not understand all of trademark law and its purposes, some sense of how consumers understand trademarks to work is relevant. See Ned T. Himmelrich, *Consumer Perception of Trademarks is Key to Supreme Court Ruling on Booking.com*, GORDON FEINBLATT LLC (July 2, 2020), <https://www.gfrlaw.com/what-we-do/insights/consumer-perception-trademarks-key-supreme-court-ruling-bookingcom> [https://perma.cc/4364-7JPG]. See also Dustin Marlan, *Is the Word “Consumer” Biasing Trademark Law?*, 8 TEX. A&M L. REV. 367, 373 (2021) (critiquing the concept of “consumer” in trademark law more generally).

⁴⁷ Robert G. Bone, *Notice Failure and Defenses in Trademark Law*, 96 B.U. L. REV. 1245, 1252–56 (2016) (discussing the importance of notice in trademark law and some of the more prominent notice failures).

⁴⁸ *Id.*

consumer confusion, enables a company to build up goodwill in a mark, and staves off unnecessary litigation.⁴⁹

Notice is arguably most present for trademarks registered under the federal Lanham Act with the U.S. Patent and Trademark Office (USPTO).⁵⁰ Registered marks enter a searchable database, which allows businesses to check for conflicts before adopting a mark.⁵¹ Registered mark owners also gain the privilege of using the ® symbol in conjunction with their mark.⁵² The ® signifies that a claim to legal rights has been vetted by the USPTO and puts competitors on notice of an assertion of rights.⁵³ Federal registration comes with a number of other benefits as well.⁵⁴

But federal registration is not required for trademark protection in the United States.⁵⁵ As mentioned above, businesses can claim common law rights in a mark even without going through the registration process—use in commerce alone is enough to accrue some rights.⁵⁶ Most states offer their own state-level iterations of trademark protection.⁵⁷ And as stated, the federal Lanham Act itself offers protections for unregistered marks.⁵⁸ For businesses relying on common law or state rights, or for those whose marks are not yet federally registered, the “TM”

⁴⁹ *Id.*; see also Peter Karol, *Affixing the Service Mark: Reconsidering the Rise of an Oxymoron*, 31 CARDOZO ARTS & ENT. L.J. 357, 401–02 (2013) (discussing the importance of notice in trademark law in achieving trademark law’s purposes).

⁵⁰ *The Ultimate Guide to Trademark Registration*, GERBEN INTELL. PROP., <https://www.gerbenlaw.com/trademark-registration/> [<https://perma.cc/84Y9-6SL7>] (discussing the many advantages of federal registration of a trademark, which include a number of notice-related benefits).

⁵¹ *Protecting Your Trademark: Enhancing Your Rights Through Federal Registration*, U.S. PAT. & TRADEMARK OFF. 11–13 (2015), https://www.uspto.gov/sites/default/files/BasicFacts_0.pdf [<https://perma.cc/7R2E-T5UR>] (discussing the mechanics of federal trademark registration and the benefits thereof).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*; Angela Peterson, *Overdue Notice: Using Virtual Marking to Modernize Trademark Notice Requirements*, 25 STAN. TECH. L. REV. 247, 247 (2022) (discussing some of the remedial advantages of registering a trademark).

⁵⁵ Brian L. Berlandi, *What State Am I In?: Common Law Trademarks on the Internet*, 4 MICH. TELECOMM. & TECH. L. REV. 105, 106 (1998) (discussing how common law rights arise based on use, even if federal registration provides some additional benefits).

⁵⁶ *Id.*

⁵⁷ See *State Trademark Information Links*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trademarks/basics/state-trademark-information-links> [<https://perma.cc/2SWC-P6K5>] (Mar. 24, 2021) (providing links to state trademark offices).

⁵⁸ 15 U.S.C. § 1125 (providing federal causes of actions for uses of unregistered marks).

symbol offers an alternative way to put competitors on notice of a claim to trademark rights.⁵⁹

Given the importance of notice in trademark law, the trademark symbols ® and TM play a potentially vital role in trademark law and the theories behind it. And yet, use of these symbols by mark owners is optional. A trademark owner who has registered their mark under the Lanham Act need not use the ® symbol to indicate that their mark is registered⁶⁰ though doing so comes with a number of advantages, including providing both consumers and competitors notice of the mark's registration status.⁶¹ That notice, in turn, provides trademark owners with a greater likelihood of being able to recover profits and damages in an infringement suit.⁶² But technically, the mark owner need not use the symbol if they prefer not to—the trademark owner may still have rights, and may still be able to recover damages, simply by virtue of using their mark in commerce.⁶³

The same is true of the TM symbol. Though trademark owners often use the TM symbol to indicate that they are using an unregistered mark as a trademark, they need not do so.⁶⁴ Under federal, state, and common law, use of an unregistered mark in commerce can still result in trademark rights, with or without use of the symbol.⁶⁵ Indeed, trademarks may not absolutely *need* the actual symbol to play the theoretical roles described above—consumers might associate marks or symbols with producers of goods and a certain level of quality with or without the

⁵⁹ See *Protecting Your Trademark*, *supra* note 51, at 9–10.

⁶⁰ William Borchard, *When the Symbols ® and ™ Should and Should Not Be Used*, COWAN, LIEBOWITZ & LATMAN, P.C. (Nov. 18, 2014), https://www.cll.com/OnMyMindBlog/When_the_symbols_and_should_and_should_not_be_used [<https://perma.cc/5GVH-2MS4>] (“A registration symbol is optional.”).

⁶¹ *Id.*

⁶² 15 U.S.C. § 1111 (indicating that a registered trademark owner who fails to include a registration notice with their mark may only recover profits and damages from someone who infringes their rights upon proof of actual notice of the registration).

⁶³ Jake Linford, *Trademark Owner as Adverse Possessor: Productive Use and Property Acquisition*, 63 CASE W. RES. L. REV. 703, 706 (2013) (“[A]cquiring a trademark requires productive use of a given word, symbol, or other identifier as a trademark—a source signifier.”).

⁶⁴ Michael Kondoudis, *Trademark Symbols TM, SM, ® – An Easy Guide*, THE L. OFF. OF MICHAEL E. KONDOUDIS, PC, <https://www.mekiplaw.com/trademark-symbols-explained/#:~:text=No%2C%20there%20is%20no%20legal,Trademark%20Symbol%20with%20your%20trademarks> [<https://perma.cc/K9NM-3F4K>] (“[T]here is no legal requirement to use a Trademark Symbol. The use of a Trademark Symbol is entirely optional. You do not need to use a Trademark Symbol, and not using a Trademark Symbol will not invalidate your trademark rights.”) (last visited Nov. 26, 2024).

⁶⁵ *Id.*

TM symbol (or the ® symbol, in the case of federally registered marks).⁶⁶ And because producers of goods can have trademark rights in marks without use of the symbol, those producers may still successfully use their marks to stave off unfair competition in the symbol's absence.⁶⁷

But though not required, the symbols may still play vital functions in the marketplace.⁶⁸ And those functions are related to the theoretical purposes behind trademarks discussed above. First, use of the symbols provides clearer notice of the owner's trademark claim—that the trademark user is asserting legal rights in the associated mark and the goodwill that it generates.⁶⁹ For fear of legal liability, that notice might thus help deter would-be competitors from adopting the same or a similar mark.⁷⁰ That deterrence may be particularly relevant because the notice sometimes means that damages resulting from a successful lawsuit are more likely to be higher than they otherwise would be.⁷¹ In these ways, use of the symbols may bolster trademark owners' rights in ways that help fend off unfair dealing and incentivize trademark owners to develop high-quality, consistent products.⁷²

⁶⁶ Andrew Griffiths, *Trade Marks and the Consumer Society*, 15 SCRIPTED 209, 219, 225 (Oct. 2018), <https://script-ed.org/article/trade-marks-and-the-consumer-society/> [https://perma.cc/W3WZ-EPKP] (discussing strategies that firms use to leverage trademarks in their branding efforts, all in an effort to attract consumers to their goods and services).

⁶⁷ See generally Robert G. Bone, *Rights and Remedies in Trademark Law: The Curious Distinction Between Trademark Infringement and Unfair Competition*, 98 TEX. L. REV. 1187 (2020) (discussing the role of preventing unfair competition in trademark law and how courts differentiate between unfair competition and trademark infringement).

⁶⁸ Lindsay D. Molnar, *Protection of Product Configurations as Trade Dress in Light of Stuart Spector Designs, Ltd.*, 3 LANDSLIDE 36, 38 (2011) (discussing the importance of trademark notice in determining trademark infringement).

⁶⁹ U.S. PAT. & TRADEMARK OFF., *supra* note 5.

⁷⁰ *Id.*

⁷¹ Deborah M. Lodge, *More About Using the ® and ™ Symbols on Your Trademarks – a U.S. Perspective*, LEXOLOGY: GLOB. BUS. & TECH. BLOG (Apr. 12, 2019), <https://www.lexology.com/library/detail.aspx?g=8c90c1a9-bf9a-4187-8dd7-c57c22606f2c> [https://perma.cc/E7VV-3WUA] (“[I]n the absence of a registration notice (e.g., failure to use the ® symbol or other notice), monetary damages may be awarded for infringement of a registered mark only for infringements occurring after the infringer had actual notice of the trademark registration.”).

⁷² *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U.S. 665, 674 (1901), *abrogated by* *Hurn v. Oursler*, 289 U.S. 238 (1933) (“[P]rotection is accorded against unfair dealing, whether there be a technical trademark or not. The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another.”).

For consumers, a trademark symbol might increase the chances that they purchase marked products because the symbol may help alleviate concerns about the products being knock-offs or otherwise illegitimate.⁷³ In other words, an indication of legal status may reassure at least some consumers that the product they are purchasing is what it purports to be.⁷⁴ Per predominant trademark law theory, then, the symbol may help consumers navigate the marketplace with greater confidence and thereby help achieve trademark law's purpose of instilling marketplace integrity from both the consumer' and producer's perspectives.⁷⁵

Producers may also use the symbols in conjunction with their trademarks as a more effective means of advertising their goods and services.⁷⁶ In other intellectual property contexts, use of patent markings may increase the chance that consumers and potential investors will be drawn to the goods and services so advertised.⁷⁷ The idea is that the markings, at least in the minds of consumers, indicate a higher technical quality or an element of government acceptance and ratification than products without these indicators.⁷⁸ Similarly in the trademark context, use of the TM or ® symbol may make it more likely that consumers are drawn to those

⁷³ Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165, 1182 (1948) ("The classical economists who enthroned the consumer never dreamed that he would make his decisions under a bombardment of stupefying symbols.").

⁷⁴ *Id.*

⁷⁵ Peter S. Menell & Michael J. Meurer, *Notice Failure and Notice Externalities*, 5 J. LEGAL ANALYSIS 1, 26 ("Trademarks function primarily to promote integrity of the marketplace by enhancing consumer decision-making and encouraging firms to supply quality products and services by protecting means of designating source.").

⁷⁶ See, e.g., Lisa P. Ramsey, *Intellectual Property Rights in Advertising*, 12 MICH. TELECOMM. & TECH. L. REV. 189, 196 ("Trademark law does not protect slogans that are generic or descriptive without secondary meaning, but firms still attempt to stake a claim in such common phrases by using the trademark symbol (™) with the slogan in advertising.").

⁷⁷ Christopher A. Cotropia, *Patents as Signals of Quality in Crowdfunding*, 2021 U. ILL. L. REV. 193, 195 (indicating that labeling projects as patented or patent-pending increased the likelihood of a crowdfunding project drawing interest); Jamal E. Azzam, David H. Henard, & Stephane Salgado, "Patent Marking" as a Signaling Strategy: Impacts on Perceived Product Innovativeness and Innovation Adoption, 109 DECISIONS MKTG. 141 (2023) (indicating that consumers believe patent markings signal innovativeness and increase their likelihood of purchasing the marked products). *But see also* Alexander Billy & Neel U. Sukhatme, *Patent Salience: What do Patents Signal to Consumers?*, SSRN (June 6, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4471087 [<https://perma.cc/4H9F-C6XQ>] (finding that consumers made aware of a product's patented status believe these products to be more innovative and of higher quality than other products, but that consumers, despite that understanding, do not appear to be more likely to buy patented products than non-patented products).

⁷⁸ See Billy & Sukhatme, *id.* at 4, 12, 14.

products bearing indications of a particular legal status—consumers may often view these symbols as indicators of higher quality products or as products that have been socially ratified and accepted through the process of advertising and seeking trademark rights.⁷⁹ In this way, producers can use the symbol as a means of signaling quality and acceptance, and consumers may rely on it accordingly.

This point is somewhat different from what predominant trademark law theory teaches us about trademarks. That theory suggests that trademarks (and their associated symbols) are helpful indicators of source upon which consumers and producers rely in navigating the marketplace and preventing unfair competition.⁸⁰ Using TM symbols as advertising mechanisms has less to do with helping consumers find the particular sources they're looking for and more to do with drawing them in in the first place. However, to the extent the symbol plays the role of influencing initial consumer decisions, it can subsequently play the role of confirming the legitimacy of the product in later transactions.

Hence, though not absolutely required, the TM signifier plays an important role in helping trademarks achieve their theoretical purposes.⁸¹ By helping instill greater confidence in both consumers and producers, TM symbols can facilitate more efficient marketplace transactions and the development of high-quality goods in ways that promote healthy competition.⁸²

⁷⁹ See Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1690 (1999) (discussing the signaling effect of trademarks in advertising, which may boil down to something like, “we advertise, and therefore we must sell a good of sufficiently high quality that we can afford this high-cost expenditure.”); 1 MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 3:13 (5th ed.) (“In addition to serving as indicators of source and quality, trademarks act as a prime element in advertising”).

⁸⁰ Menell & Meurer, *supra* note 75, at 26.

⁸¹ GREGORY J. BATTERSBY & CHARLES W. GRIMES, LAW OF MERCHANDISE AND CHARACTER LICENSING § 8:17 (2022) (“Appropriate trademark . . . notices should appear on all goods bearing a merchandising property and, in all advertising promotional pieces, and packaging for the goods that bear the merchandising property . . . The importance of such trademark . . . notices cannot be overstated.”).

⁸² See, e.g., *American Steel Foundries v. Robertson*, 269 U.S. 372, 380 (1926) (“The law of trade-marks is but a part of the broader law of unfair competition.”). For a discussion of the scope of what constitutes “unfair competition,” see Christine Haight Farley, *The Lost Unfair Competition Law*, 110 TRADEMARK REP. 739 (2020).

II EXTRA-LEGAL USES OF TM

The TM symbol uses discussed above are primarily *legal* uses of the symbol. That is, they are meant to signify legal rights in the associated trademark. Even when producers use the TM symbol as a form of advertising, such uses still have a legal element in that the claimed legal status of the mark is an integral part of convincing consumers of the wisdom of their purchase.

In this Part, we discuss the rise of *extra-legal* uses of the TM symbol. In the examples we examine below, the TM symbol's use is typically expressive in some way or another. It is not primarily (or seriously) meant to claim legal rights in the associated marks. In Part III, we discuss the implications of these extra-legal uses for trademark law and society more generally.

In the Introduction, we discussed the case of Jordan Clarkson, who posted a series of photos of himself on Instagram with the caption “TM.” Although we are not privy to Clarkson's motivations in including this caption, we can only assume that he was not seriously attempting to claim legal rights in any product or service—mainly because he had no product or service to offer. He is a professional basketball player, so the product or service he provides is, essentially, himself. But people themselves are not branded with trademarks, even when they provide a good or service in the marketplace.⁸³ Hence, Clarkson's use of the symbol seems to have been expressive—he was trying to communicate something with the use of the TM symbol (though exactly what he was trying to communicate is not immediately clear to us).

Clarkson is not alone in using the TM symbol in an expressive way. It has become an increasingly common occurrence to encounter the TM symbol being used expressively—primarily on social media but also in journalism and in everyday digital or in-person communications.

For this Article, we collected data on approximately 200 instances of these expressive uses of the TM symbol. We used a convenience sampling method,

⁸³ Vic Lin, *Can You Trademark a Person's Name?*, PATENTTRADEMARKBLOG, <https://www.patenttrademarkblog.com/person-name-trademark/> [<https://perma.cc/H8LS-NWNZ>] (discussing the requirements of trademarking a personal name, one of which being that the applicant must specify the goods or services associated with the trademark).

which included online searches on various platforms and organic encounters with the symbol through everyday conversations and internet and social media use. Data sources ultimately included social media platforms Facebook, Instagram, and Twitter; text messaging platform Discord; online discussion board Reddit; online journalism; traditional phone-based text messaging; and real-world uses. Data collection continued until theoretical saturation was reached. We then examined these uses to evaluate their semantic content—i.e., how the speakers were using the symbol and what they might be trying to communicate.

We found that the expressive uses of TM we identified could be loosely grouped into one of several categories. We identify these categories (with examples) below and explain how these categories may be related to some of the legal and linguistic meanings of the trademark symbol. We then discuss some broader themes brought to light by these uses.

Before proceeding, we emphasize that in constructing these categories, we are not suggesting that we fully comprehend the purpose behind the use of the TM symbol in any given situation. In many and perhaps most cases, it is difficult to decipher precisely what the speaker intends to convey through inclusion of the TM symbol in their message. This is the case in the Clarkson example in the Introduction and the rest of the examples we encountered (many of which we discuss below). In some cases, the speaker themselves may not fully understand their purpose in using the TM symbol.

Nonetheless, it seems clear that all of the uses we surveyed are extra-legal and expressive in some form or another. While these uses have a connection to the symbol's traditional legal function, they seem to go beyond that function in a variety of ways. Our categories in the following sections are thus based on our best estimations of the speakers' intent given the context. This exercise, we believe, helps inform our implications for trademark law in Part III. But we acknowledge that any given speaker using the TM symbol may have had a different expressive purpose in mind than the one we assign to them in the following sections.

A. *Categorizing Extra-Legal Uses of the TM Symbol*

1. *Identifying or Creating a “Stock Phrase”*

When the TM symbol occurs in connection with a trademark that is in commercial use, it is often recognized as a ‘legal’ or ‘genuine’ use by the public.⁸⁴ These uses of the TM symbol are described as those in which a new sense of the phrase is created, meaning that the word or phrase no longer has the dictionary meaning it would otherwise have.⁸⁵ Instead, a new meaning is created, which refers in some way to the entity claiming legal rights in the trademark.

Take the example of “CrossFit™.” The two words “cross” and “fit” have their own meanings in English. For “cross,” the meaning is something akin to “intersecting.” For “fit,” the meaning is along the lines of “in good shape for an activity.” Together, these two words could mean “intersecting workouts that cause one to be in good shape for various activities.” The addition of the TM symbol, however, makes it unambiguous that the user is not referring to any collection of workouts, but to a specific brand of workouts that is provided by a specific entity—CrossFit. The new spelling of these two words, “cross” and “fit,” into a single word without spacing and with capitalization, CrossFit, strengthens the visual representation of the trademark as a new word with a new meaning. In creating these new meanings, such uses might be characterized as “legal” uses of the TM symbol because the symbol functions as shorthand for a claim to trademark rights.

This new meaning carries with it a sense of legitimacy: the mark helps give the word a new meaning and, in doing so, provides assurances that the associated trademark is a legitimate indicator of the source of the goods and services so marked.⁸⁶

⁸⁴ See generally, McCready, *supra* note 12; John December, *Characteristics of Oral Culture in Discourse on the Net*, 12TH ANNUAL PENN STATE CONFERENCE ON RHETORIC AND COMPOSITION (1993), <http://www.december.com/john/papers/psrc93.txt> [<https://perma.cc/3DAA-RZGA>]; Gregory N. Carlson, *Reference to Kinds in English* (1977) (Doctrinal Dissertation, University of Massachusetts at Amherst), in *OUTSTANDING DISSERTATIONS IN LINGUISTICS* 1, 1 (Jorge Hankamer ed., 1980); Emily A. E. Williams, *Pragmatic Extension in Computer-Mediated Communication: The Case of ‘#’ and ‘™’*, 181 *J. PRAGMATICS*, 165 (2021).

⁸⁵ See McCready, *supra* note 12, at 1818.

⁸⁶ Hingson et al., *supra* note 9, at 11.

The ability of the TM symbol, in conjunction with elements like spacing and capitalization, to transform a series of words with individual meanings into something new has been recognized and leveraged by those using the symbol in extra-legal ways. Indeed, one of the primary ways we observed the TM symbol being used was to signal or emphasize that a phrase was a so-called “stock phrase”—a group of words that has developed a particular meaning through cultural use⁸⁷ Well-known examples of stock phrases include “thinking outside the box” or “last but not least.”⁸⁸ Like trademarked words or phrases, stock phrases have a meaning that transcends the ordinary meaning of the words that make up that phrase. But in the case of stock phrases, that meaning is purely cultural rather than legal.

Some of those we observed using the TM symbol to emphasize a stock phrase did so with phrases that are relatively well known in popular culture. For example, one social media user asked her followers whether any of them, like her, enjoyed re-reading or re-watching “JUST THE PARTS of a movie/show/fanfic that give them The Feels™” while skipping over other, less interesting parts of these media.⁸⁹ In this case, the speaker appears to be using the TM symbol (as well as capitalization) to emphasize the stock nature of the concept of “the feels,” defined by Urban Dictionary as a “wave of emotion that hits you like a truck.”⁹⁰ In another case, an X (formerly Twitter) user declared that she knew she had “had a Day™” at work because “complete and utter silence” afterwards brought her joy.⁹¹ In this case, the speaker is apparently signaling that she is using the phrase “having a day,” in its stock sense, which is to indicate that one is having a difficult day.⁹²

⁸⁷ *Stock Phrase*, THE FREE DICTIONARY, <https://idioms.thefreedictionary.com/stock+phrase> [<https://perma.cc/3RKT-VTV9>].

⁸⁸ *Id.*

⁸⁹ Falling-Pixie Creations (@falling-pixie), TUMBLR (Mar. 5, 2021, 4:30 PM), <https://www.tumblr.com/falling-pixie/642985611249254400/does-anyone-else-reread-or-rewatch-just-the-parts> [<https://perma.cc/9CDT-97U5>].

⁹⁰ *The Feels*, URBAN DICTIONARY, <https://www.urbandictionary.com/define.php?term=the%20feels> [<https://perma.cc/8DG3-6KVL>]; see Hingson et al., *supra* note 9, at 10 (describing “TheFeels™” as an example of a “phrase that represents a concept others can relate to or identify with”).

⁹¹ lindsay (@Boltronn), X (Oct. 22, 2019), <https://x.com/Boltronn/status/1186786491957166080> [<https://perma.cc/2VUU-VLNM>].

⁹² As one Medium user explains, the reason she uses the phrase “having a day” is because she “refuse[s] to call any day a bad day.” Nicole Perez, MEDIUM (Apr. 20, 2018), <https://medium.com/@nperez226/im-having-a-day-today-and-the-reason-i-call-it-a-day-is-because-i-refuse-to-call-any-day-a-bad-317e1e03128d>

Others who used the TM symbol in conjunction with stock phrases did so not to emphasize the accepted cultural meaning of the phrase, but instead to attach a new, often humorous, meaning to the phrase. For example, one Instagram user of Chinese descent included the phrase “Made in China™” in her biography.⁹³ In this case, the speaker is apparently using the stock phrase “made in China” to humorously describe herself—a new and surprising use of the phrase. In another case, a user urged their followers to “Just Say No™” to free software because that is how “they” (presumably the purveyors of such software) “get you hooked.”⁹⁴ In this case the speaker is referencing the stock phrase “just say no to drugs” to humorously warn against another perceived danger.⁹⁵

In yet other instances, speakers used the TM symbol in an attempt to “create” a stock phrase that had not yet attained widespread cultural recognition. Instead of using the TM symbol to validate the known meaning of a stock phrase or attempting to imbue a well-known stock phrase with a new meaning, these examples made use of the TM symbol to both create the stock phrase and define its meaning.

For example, in one instance an Instagram user expressed that she “love[s] it” when she is the “SoloGirl™” in a public place.⁹⁶ Recognizing that this was not yet an accepted stock phrase, she then went on to explain the meaning she was trying to convey with the phrase: “[w]hen you’re in a public place and you’re by yourself surrounded by people with huge groups of friends or couples and you’re the mysterious powerful solo girl ... main character traits!”⁹⁷ In this case, the speaker is apparently using the TM symbol (and associated capitalization and lack of spacing) to create a phrase that conveys a particular social and cultural meaning.

[<https://perma.cc/9PC4-T9GW>]; see Hingson et al., *supra* note 9, at 10 (describing “having a day” as an example of a “stock phrase”).

⁹³ Taylor Shennett (@taylorshennett), INSTAGRAM, <https://www.instagram.com/taylorshennett/?hl=en> [<https://perma.cc/4QXT-N8FF>] (last visited Oct. 10, 2024).

⁹⁴ Subsequent to our discovering this post, the specific Reddit user and post are no longer found on Reddit. A copy of the post is on file with the authors.

⁹⁵ The stock phrase “just say no to drugs” originates from a 1980s advertising campaign that urged children to avoid recreational drug use by “just saying no.” *Just Say No*. WIKIPEDIA, https://en.wikipedia.org/wiki/Just_Say_No [<https://perma.cc/4L3V-T42D>].

⁹⁶ Via (@lovergirl), TUMBLR, (Oct. 5, 2021), <https://lovergirl.tumblr.com/post/644233337194577920/i-love-it-when-im-the-solo-girl-like-u-know> [<https://perma.cc/H8DK-QVW2>].

⁹⁷ *Id.*

The use of the TM symbol in conjunction with stock phrases often seemed to be serving the larger purpose of signaling the speaker's community affiliation.⁹⁸ Using a stock phrase in a conversation signals that one is familiar with the phrase and is an active part of a continuing discussion where the phrase has been previously used.⁹⁹ The stock phrase also often represents a concept others in the community can identify with or relate to.¹⁰⁰ The addition of the TM symbol to the stock phrases amplifies these aspects and introduces an element of metadiscourse by signaling (without overtly stating) that all those who use or have used the phrase are included in the community.¹⁰¹ For example, in one texting conversation, a speaker referred to themselves as a "certified Gay Disaster™."¹⁰² The friend to whom they were speaking responded "I love your certified Gay Disaster™ness."¹⁰³ By picking up on the stock phrase used by the first speaker, the friend is able to convey a sense of solidarity while also communicating that they are attuned to the conversation and the particular words and phrases being used.

2. *Emphasizing (Often Humorously or Ironically) the Official Aspects, Importance, or Legitimacy of a Phrase or Concept*

As mentioned, the ability of the TM symbol to imbue a word or phrase with new meaning also conveys a sense of legitimacy: by transforming a word or phrase into a trademark, the TM symbol communicates to the consuming public that the trademark is a legitimate indicator of the source of the associated goods and services.¹⁰⁴ When a consumer sees the TM symbol or ® in association with a good or service, they can assume that it is the "official" version of the good or service and not a knock-off.¹⁰⁵ For example, when a consumer sees the logo Nintendo

⁹⁸ Hingson et al., *supra* note 9, at 10; *see also* *Stock Phrase*, YOUR DICTIONARY, <https://www.yourdictionary.com/stock-phrase> [<https://perma.cc/BL8N-RWBX>] (defining a stock phrase as "a phrase frequently or habitually used by a person or group and thus associated with them.").

⁹⁹ Hingson et al., *supra* note 9, at 10.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 11.

¹⁰⁵ *How to Use Trademark Symbols Correctly*, TAILOR BRANDS <https://www.tailorbrands.com/blog/trademarksymbols#:~:text=A%20trademark%20symbol%20is%20a,of%20your%20product%20or%20service> [<https://perma.cc/9E7Y-UX2U>] ("Trademark symbols accomplish 3 essential jobs. They exist to provide "public notice" and deter sub-standard imitations of your product or service.").

Switch™, the TM symbol helps convey the message that this is a game console provided and endorsed by the Nintendo gaming company.¹⁰⁶ Although a purveyor of goods or services need not seek government permission to use the TM symbol (unlike the ® symbol, which requires federal registration), consumers may also see the TM symbol as a signal of legitimacy.¹⁰⁷ As such, the symbol carries with it a sense of authority and the message that the associated word or phrase has been ratified and accepted as a distinct concept.¹⁰⁸

Those using the TM symbol in extra-legal ways have recognized the sense of authority and legitimacy the symbol carries, and have used it to expressive advantage to emphasize (often humorously or with an ironic sense of exaggeration) the official, important, or legitimate nature of something. For example, one social media user communicated that they had “Important™” information about a “talented actor” from the Harry Potter film series.¹⁰⁹ They then provided screenshots from a Wiki Fandom article about Crackerjack the cat, who played Crookshanks in the film *Harry Potter and the Prisoner of Azkaban*. The article explains how Crackerjack’s trainers saved his shed fur, rolled it into balls, and clipped it back onto him as a means of creating the “mangy appearance” necessary for the role.¹¹⁰ In this case, the speaker is apparently using the TM symbol (along with capitalization) to ironically emphasize the weighty nature of some humorous trivia about a cat actor.

In another instance, a speaker sent their friend a song over text message, with the commentary that it was a “certified BOP™” (bop being a slang term for a good song).¹¹¹ In this case, the speaker seems to be using the TM symbol (along with a word—certified—that also gestures to concepts of legitimacy and authority) to

¹⁰⁶ Kondoudis, *supra* note 64 (“Trademark symbols help consumers recognize your trademarks. Trademark symbols identify the visual cues (e.g., names and logos) that you want your customers to seek out.”).

¹⁰⁷ Hingson et al., *supra* note 9, at 11.

¹⁰⁸ *Id.*

¹⁰⁹ OBVIOUSLY (@severusish), TUMBLR (Feb. 6, 2022, 2:03 PM), <https://www.tumblr.com/severusish/675465616381149184/important-info-about-the-talented-actor-who> [<https://perma.cc/QC98-A9FP>].

¹¹⁰ *Crackerjack*, FANDOM: HARRY POTTER WIKI, <https://harrypotter.fandom.com/wiki/Crackerjack> [<https://perma.cc/Z226-C2AY>].

¹¹¹ *Bop*, URBAN DICTIONARY, <https://www.urbandictionary.com/define.php?term=bop> [<https://perma.cc/69AW-QJBZ>]. See also Jack Edwards (@jackbenedwards), X (Oct 26, 2020, 1:01 PM), <https://x.com/jackbenedwards/status/1320772451727511554> [<https://perma.cc/C6VP-HKHA>]. A copy of the text is on file with the authors.

express (probably in a somewhat tongue-in-cheek way) that their personal opinion of a song is ratified and broadly accepted by a wider community.

In yet another instance, a social media user jokingly claimed that a famous content creator named PearlescentMoon, who focuses her content on the online game Minecraft,¹¹² had created a new game piece, by stating: “PearlescentMoon light block. Its [sic] official™.”¹¹³ The speaker included a humorous picture of this so-called new light block, but then clarified in the hashtags below that it was a “#haha joke.”¹¹⁴ In this case, the speaker is apparently using the TM symbol (in conjunction with the word “official”) to ironically claim that something is an accepted and official good or service when it clearly is not.

In all of these cases, we see speakers leveraging the concepts of legitimacy and officialness the TM symbol invokes to humorously or ironically emphasize these qualities in various objects—a piece of information, an opinion about a song, and a joke product.

3. *Stereotyping or Caricaturing a Word or Phrase*

We also encountered uses of the TM symbol in connection with a speaker’s invoked caricature or consciously stereotyped meaning of common words or phrases. In these cases, speakers seemed to rely on the function of the TM symbol already discussed—the ability of the symbol to transform a series of words with individual meanings into a phrase that represents a specific product or category (like CrossFit™).¹¹⁵

For instance, in one Reddit post, a woman claimed she was “not like other girls™.”¹¹⁶ In the rest of the post, she described a number of things that such girls (also referred to as “Basic Bi#@!\$%™”) regularly do, but which she typically avoids. These activities included going to the mall, adopting current fashions,

¹¹² See PearlescentMoon, TWITCH, <https://www.twitch.tv/pearlescentmoon> [<https://perma.cc/26BU-8E9W>] (last visited Oct. 16, 2024).

¹¹³ HumanEO (@humaneO), TUMBLR (Jan. 6, 2022, 4:58 PM), <https://www.tumblr.com/humaneO/672668109796229120/pearlescentmoon-light-block-its-official> [<https://perma.cc/WDY3-YREB>].

¹¹⁴ *Id.*

¹¹⁵ Dr. Jimmy Yam (@JimmyJoeYam), X (Sept. 15, 2023, 7:57 PM), <https://x.com/JimmyJoeYam/status/1702864313470329162> [<https://perma.cc/S2Q4-T6SK>].

¹¹⁶ Subsequent to our discovering this post, the specific Reddit post is no longer found on Reddit. A copy of the post is on file with the authors.

and looking to social media influencers for life guidance. She lamented having undertaken such activities recently (including listening to a few social media influencers), while still asserting her difference from these “Other Girls(TM).” Here, the speaker appears to use the TM symbol to help her create and communicate a stereotyped and caricatured category—that of “Other Girls(TM).”

Other speakers seemed to use the TM symbol for similar expressive purposes. For instance, users on Tumblr relied on the symbol to distinguish between more common meanings of certain nouns and those users’ caricatures of the meaning of those same nouns. In one case, the Tumblr user indicated that the definition of “feminist” was “I believe in equality for everything between the sexes.”¹¹⁷ That definition of “feminist” omitted the TM symbol. However, the user’s definition of “Feminist™” read: “ALL MEN ARE A##HOLES AND SHOULD DIE! WE DON’T NEED ANY OF THEM ANYWAYS AND THEY NEVER DO ANYTHING GOOD FOR US!”¹¹⁸ In another case, the user defined “Christian” in a more or less traditional manner (i.e., as a believer in God and Jesus Christ), but defined a “Christian™” as a stereotyped religious zealot who strictly and literally adhered to every word of the Bible and viewed anyone that deviated from that path as a spawn of Satan.¹¹⁹

As a final example, one Instagram user, in a post about “types as high schoolers,” provided an entry about “The Popular Kid TM.”¹²⁰ The poster defined “The Popular Kid TM” as one who bullies introverts/shy kids, dates whoever they’d like (including, secretly, members of the sports team), and, in general, is having the time of their lives.

In these examples, the speakers appear to rely on the TM symbol to help caricature certain concepts or groups or reference a stereotypical meaning of a word or phrase. The TM symbol helps communicate that they are in fact referencing the stereotyped meaning and not the more realistic, nuanced meaning of the term or phrase.

¹¹⁷ lilkittynellie, TUMBLR (April 5, 2017), <https://thecheesyllama.tumblr.com/post/159217040796/seereethepagan-lilkittynellie> [<https://perma.cc/R9FZ-8WLM>].

¹¹⁸ *Id.*

¹¹⁹ @seereethepagan, TUMBLR (April 5, 2017), <https://thecheesyllama.tumblr.com/post/159217040796/seereethepagan-lilkittynellie> [<https://perma.cc/R9FZ-8WLM>].

¹²⁰ Subsequent to our discovering this post, the specific Instagram post is no longer found on Instagram. A copy of the post is on file with the authors.

4. *Ownership*

As discussed in Part I, a provider of goods and services who uses a trademark in commerce acquires certain legal rights in that mark. Specifically, they gain the exclusive right to prevent others from using the same or similar mark in commerce in ways that would confuse the consuming public about the source of goods or services.¹²¹ Those who use trademarks that become famous also have a right to prevent others from using the mark in ways that would diminish or harm the reputation of their mark, subject to certain limits.¹²²

Trademark scholars would be quick to point out, however, that having these rights in a trademark does not mean that the mark owner has property rights or so-called “rights in gross” in the mark itself, which would allow them to control or prevent all unauthorized uses of the mark.¹²³ For example, trademark law recognizes that there are significant free speech concerns implicated by granting legal rights in language and other means of expression, and it therefore attempts to limit mark owners’ rights in ways that give due consideration to these concerns.¹²⁴

Nevertheless, the association of trademark rights with the concept of ownership is one that seems to have entered the public consciousness.¹²⁵ Mark users are often said to “own” the mark, despite whatever limitations apply to that ownership.¹²⁶ In fact, the TM symbol plays an important role in advancing this narrative by suggesting to the public that the associated trademark is owned by a particular entity. As one practitioner put it: “The primary benefit of the trademark

¹²¹ Graham et al., *supra* note 25, at 672 (specifying the rights of trademark owners).

¹²² Bradford, *supra* note 43, at 1243 (discussing a trademark cause of action for dilution by blurring and tarnishment).

¹²³ See, e.g., *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97 (1918) (stating that “supposing that a trade-mark right is a right in gross or at large, like a statutory copyright or a patent for an invention” is a “fundamental error”).

¹²⁴ See generally, e.g., Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 SMU L. REV. 381 (2008) (discussing first amendment limitations on trademark law).

¹²⁵ See, for instance, the titles of the following articles: Pamela S. Chestek, *Who Owns the Open Source Project Name?*, 103 TRADEMARK REP. 1240 (2013); Pamela S. Chestek, *Who Owns the Mark? A Single Framework for Resolving Trademark Ownership Disputes*, 96 TRADEMARK REP. 681 (2006); Matthew A. Alsberg, *I’ll Be Your Mirror: Broadening the Concept of Trademark Joint Ownership to Reflect the Developing Collaborative Economy*, 44 SW. L. REV. 59 (2014). These and others point to ownership of marks rather than rights in marks.

¹²⁶ Alexandra J. Roberts, *Trademark Failure to Function*, 104 IOWA L. REV. 1977, 1984 n.28 (2019) (indicating that “[o]wnership of a valid trademark is a prerequisite for a trademark infringement action”).

notice ... is that it puts the public on notice that you are claiming rights to the mark. Using TM ... is an effective way to tell the world that the mark is yours.”¹²⁷

Consistent with this, we observed several speakers using the TM symbol to gesture to the concept of ownership. In some cases, it appeared that these uses of the TM symbol were intended to be humorous or tongue-in-cheek. For example, one social media user, apparently frustrated with having her words posted on social media by others without credit, complained about it as follows: “when u say something to someone in DMs and then they post it public without credit is like ok i’m going to talk like this nowTM (Copyright Hannah Capstellium 2021, All Rights Reserved).”¹²⁸ In this case, the speaker is apparently joking that she might need to resort to legal means (including trademark and copyright law) to control the uncredited use of her speech.¹²⁹

It is unclear here what level of understanding the speaker has of trademark or copyright law or whether she seriously thinks that using these symbols could protect against future unauthorized use of her speech (though the authors doubt that).¹³⁰ But in many ways the answers to these questions are irrelevant because her invocation of the TM symbol functions as a *cultural* rather than a *legal* assertion of rights. The speaker is publicly asserting that she does not want her speech copied without credit, and the TM symbol, with its cultural association of ownership over speech, adds rhetorical weight to this assertion.¹³¹

In other cases, social media users unaffiliated with a company or product placed the TM symbol directly after their social media handle.¹³² While we can’t divine the user’s purpose in doing so in any given case, one reasonable interpretation is that in many of these instances, the user is attempting to claim some ownership rights in their handle through use of the TM symbol. Again, these types of uses do not seem like legal assertions, at least insofar as trademark law is concerned. Names can be used as trademarks, but they must be used in connection

¹²⁷ *Why Use Notice of Trademark or Copyright?*, DUNNER LAW (July 14, 2011), <https://dunnerlaw.com/why-use-notice-of-trademark-or-copyright/> [<https://perma.cc/T7Q2-8VAJ>].

¹²⁸ Hingson et al., *supra* note 9, at 10.

¹²⁹ *Id.*

¹³⁰ *Id.* at 13.

¹³¹ *Id.*

¹³² *See, e.g.*, Catturd TM (catturd2), X, <https://x.com/catturd2> [<https://perma.cc/J5AJ-T7MF>] (last visited Nov. 6, 2024).

with a good or service offered in commerce.¹³³ It's possible that in some of these instances, the user is attempting to claim legal rights in their handle as a trademark that designates the source of their goods and services (perhaps as an influencer, as we discuss in the category below). But in many of the more casual examples that we observed, it seems more likely that the user is trying to use the TM symbol to assert *cultural* ownership in their unique social handle.

5. *Branding*

Product branding

If there's one function of a trademark most laypeople seem to understand, it's the traditional branding function.¹³⁴ Providers of goods and services use trademarks to “build a brand”—i.e., to develop a positive reputation and consumer goodwill for their goods and services and their company as a whole.¹³⁵ They do this not only by providing quality goods and services associated with the trademark, with the hope that consumers will appreciate this quality and come away with a positive feeling about the brand, but also through marketing and advertising campaigns specifically geared at enhancing the brand's reputation.¹³⁶

Those we observed using the TM symbol in extra-legal ways often seemed to do so with the branding function of trademarks in mind. Many times this use was humorous, and the humor took one of several different creative forms. In one instance, a TikTok user wondered what it might be like to brand a simple food product consumers don't generally associate with a particular company—an egg.¹³⁷ Using the concept of eggTM, she developed a humorous video where she used elaborate lighting, music, and camera shots to create a “commercial” for

¹³³ Laura A. Heymann, *Naming, Identity, and Trademark Law*, 86 *IND. L.J.* 381, 386 (2011) (discussing how personal names can sometimes function as trademarks when they play a commercial role).

¹³⁴ Katya Assaf, *Brand Fetishism*, 43 *CONN. L. REV.* 83, 89 (2010) (discussing how firms primarily use trademarks to brand themselves and how that purpose may differ from trademark law's goal of providing consumers with marketplace information).

¹³⁵ See, e.g., Alexander Krasnikov, Saurabh Mishra & David Orozco, *Evaluating the Financial Impact of Branding Using Trademarks: A Framework and Empirical Evidence*, 73 *J. MKTG.* 154, 156 (2009) (using trademarks as measures of firms' branding efforts).

¹³⁶ Manel Khedher, *Personal Branding Phenomenon*, 6 *INT'L L.J. BUS. MGMT.* 29, 37 (2014) (discussing these strategies).

¹³⁷ Grace Wells (@gracewellsphoto), *TikTok* (Feb. 13, 2022), https://www.tiktok.com/@gracewellsphoto/video/7064287460494167302?_t=8qbox4iVjl0&_r=1 [<https://perma.cc/KAP8-SP9A>].

an egg similar to the sophisticated advertising campaigns consumers are used to seeing in other contexts.¹³⁸ In this case, in addition to being quite fun and creative, the egg™ clip is also arguably acting as a satire or commentary on modern advertising techniques.

In other instances, speakers used the TM symbol not to comment on advertising generally, but to poke fun at or parody specific products. For example, one Reddit user posted a picture of a dimly-lit and intimidating-looking piece of exercise equipment with various straps, ropes, bars, and pulleys. The caption for this image was “Allow me to introduce . . . the FrankenRack (TM).”¹³⁹ In this case, the speaker is apparently using the branding function of the TM symbol to make fun of a product that, in their view, bears a closer resemblance to an apparatus from a horror story than the exercise machine it was intended to be.

In yet other instances, social media users took advantage of the branding function of the TM symbol to engage in the creative exercise of imagining new or fantastical goods and services. One long social media thread involved several users weighing in on an imaginary soap product based on the character Severus Snape from the Harry Potter series (a Severus Snape soap).¹⁴⁰ One social media user coined the term “Severus Snoap™” for the fantastical product and opined on possible combinations and scents for the soap (“lemon and verbena, bergamot, mandarin orange, cypress, coriander, tarragon and sage” was one option).¹⁴¹ In this case, the branding function of the TM symbol is apparently acting to bring together Harry Potter fans in the fun and creative exercise of imagining new products based on their favorite characters. In a similar vein, social media users created a fictional band called “the Pigz (tm)” based on a photo of guinea pigs “posing” in a manner that uncannily resembled a rock band’s promotional picture.¹⁴²

¹³⁸ *Id.*

¹³⁹ Subsequent to our discovering this post, the specific Reddit user and post are no longer found on Reddit. A copy of the post is on file with the authors.

¹⁴⁰ OBVIOUSLY (@severusish), TUMBLR (April 30, 2022, 7:00 PM), <https://www.tumblr.com/delsdelights/683000087257939968/new-soap-softly-simmering> [<https://perma.cc/PC7L-LKSV>].

¹⁴¹ *Id.*; see also Delirium’s Delights (@delsdelights), TUMBLR (Feb. 20, 2022, 1:42 PM), <https://www.tumblr.com/severusish/675283114996678656/answering-for-a-you-but-also-a-me-here-are> [<https://perma.cc/5NS8-XN6B>].

¹⁴² Subsequent to our finding this example, Reddit suspended the user for unidentified violations of its terms of service. The original post was found here: https://www.reddit.com/r/guineapigs/comments/psh9l0/the_pigz_tm_about_to_drop_their_hottest_album_yet/. A copy of the original post is on file with the authors.

Self-branding

In the age of social media and influencers, a concept that has entered the public consciousness is that of “people as brands.” Celebrities or influencers don’t market one specific product—rather, they market themselves or their lifestyles as a way of attracting audiences, garnering views on social media (for which they often receive compensation from the social media platforms) and attracting lucrative sponsorship or endorsement deals from various companies.¹⁴³ In addition to speakers using the TM symbol extra-legally to invoke the traditional branding function of trademarks in the context of goods and services (whether real or imagined), we also observed several speakers using the TM symbol in an attempt (whether humorous or serious was not always clear) to brand themselves.

Take, for instance, the example of Jordan Clarkson discussed above—the professional basketball player who posted a series of photos of himself on Instagram with the caption “TM.”¹⁴⁴ In this case, there is no product or service beyond Clarkson himself. But perhaps this is exactly what Clarkson was trying to communicate—that he himself is a brand. Although the concept of “people as brands” is not recognized by trademark law—there is no legal protection under trademark law absent use in commerce of a mark in association with a particular good or service—it does seem to be an idea that has some purchase in the social media world.¹⁴⁵

As discussed above, we also came across many examples where parties used the TM symbol in association with the speaker’s social media name or “handle.” For example, one X user had the handle “Hot Girl MessTM”;¹⁴⁶ another on

¹⁴³ Hingson et al., *supra* note 9, at 14; Alexandra J. Roberts, *False Influencing*, 109 GEO L.J. 81, 84 (2020) (discussing this phenomenon while arguing that many may run afoul of the law when failing to disclose endorsement deals); Janet Balis, *How the Best Brand-Influencer Partnerships Reach Gen Z*, HARV. BUS. REV. (June 21, 2023), <https://hbr.org/2023/06/how-the-best-brand-influencer-partnerships-reach-gen-z> [<https://perma.cc/BV4B-NBMM>] (discussing some of the tactics that social media influencers use to brand themselves and how traditional firms can learn from them in their own branding efforts).

¹⁴⁴ Clarkson, *supra* note 2.

¹⁴⁵ TMEP (May 2024) §§ 813-.01(c), 1206.04 (2022) (indicating the requirements for personal names to be registered as trademarks, which include that they be used in connection with goods or services).

¹⁴⁶ Hot Girl MessTM (@olarvia), X, <https://x.com/olarvia> [<https://perma.cc/Q6HD-ARWU>] (last visited October 8, 2024).

Instagram called himself “Ygrene™.”¹⁴⁷ In these cases, as discussed, the speakers may simply be attempting to assert cultural ownership over their handles and thereby ward off others from using a similar handle or name. But alternatively and relatedly, they may be attempting to go a step further and “brand” their online personas through use of the TM symbol. Even if that use does not enable them to enforce rights in their online persona, they may be attempting to communicate to the public that they are the “official” account associated with a particular name or handle.¹⁴⁸ By providing notice to others that they consider their online personas to be a proprietary brand, social media users may be able to build their reputations in much the same way that traditional providers of goods and services build their reputations through legally enforceable trademarks.

6. *Emphasizing or Commenting on the Commercial Aspects of a Concept, Product, or Society*

As discussed in Part I, legally enforceable trademarks come into being when a provider of goods or services uses them in commerce in association with the provision of those goods or services.¹⁴⁹ The commercial nature of a trademark is thus an inextricable part of its function—legally enforceable trademarks don’t exist without use in commerce.¹⁵⁰

The association between trademarks and commerce was not lost on the speakers we observed using the TM symbol extra-legally; in fact, many of these speakers leveraged this aspect of trademarks to call out or emphasize the commercial or corporate nature of a concept, product, or society more broadly.

In one case, for example, an online article published by *New York Magazine* was discussing the rise of a new social media platform, called BeReal, which markets itself as more “authentic” than traditional platforms like Facebook and

¹⁴⁷ Subsequent to our discovering this user, they changed their Instagram username to “ygrene.fr.” ygrene_fr (@ygrene_fr), INSTAGRAM, https://www.instagram.com/ygrene_fr/ (last visited Nov. 5, 2024). The original screenshot showing use of the TM symbol in this manner is on file with the authors.

¹⁴⁸ See, e.g., Clown World™ 🤡 (ClownWorld_), X, https://x.com/ClownWorld_ [<https://perma.cc/CU33-S6VN>] (last visited Nov. 6, 2024) (indicating “Official #ClownWorld™ 🤡 #NoCaptionNeeded **DM us for removals/credit”).

¹⁴⁹ See *supra* Part I.

¹⁵⁰ Vic Lin, *What Is Trademark Use in Commerce?*, PATENTTRADEMARKBLOG, <https://www.patenttrademarkblog.com/trademark-use-in-commerce/> [<https://perma.cc/KE5T-36V2>] (describing the use in commerce requirement for acquiring trademark rights).

Instagram.¹⁵¹ According to the article, BeReal aims to achieve this goal by, among other things, encouraging their users to post unfiltered and uncurated photos and updates.¹⁵² The article sought the input of a commentator who believed that in the case BeReal, “authenticity has turned into just another product to sell.”¹⁵³ The article quoted the commentator who opined that “on social media, and I think even when we’re talking about someone being real, it’s not the *real* real, it’s the ‘New Real,’ which is more down-to-earth than what we put on, but it’s still not the actuality.”¹⁵⁴ The author of the article immediately followed up this quote with the summarizing statement: “It’s Real™.”¹⁵⁵ Here, it appears that the author of the article is using the TM symbol to emphasize the commercial nature of a concept—in this case, the promise of authenticity or “realness” being marketed by a social media platform. The TM symbol helps underscore in a new way the point being made by the author—that in the case of this new social media platform, authenticity is a “product” and (by implication) should be subject to the same cautions and caveats sophisticated consumers employ when evaluating more traditional offerings of goods and services.

In another case, we observed an X (formerly known as Twitter) user employing the TM symbol to comment on the commercial and capitalist nature of society more broadly. The speaker communicated the following vignette:

i laugh as elon musk beams a meme directly to my frontal cortex via NeuraLink™. omg epic win. i blink twice to NeuraLike™ it, then think very hard “thank you sir! please send bitcoin.” i open my eyes. it’s suddenly nighttime and i am strangling a union organizer.¹⁵⁶

In this case, the speaker imagines a dystopian future where consumers willingly buy products that give companies (and their leaders) direct access to their brains, unwittingly allowing these companies to control them for political and

¹⁵¹ Michelle Santiago Cortés, *The Anti-Instagram App Promising to Make Us Feel Good*, THE CUT (May 20, 2022), <https://www.thecut.com/2022/05/bereal-app-solve-social-media-problem.html#> [<https://perma.cc/MA8Z-7PMV>].

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ @MNateShyamalan, X (Nov. 30, 2022, 1:54 PM), <https://x.com/MNateShyamalan/status/1598027618917679105> [<https://perma.cc/PE54-JQ76>].

monetary gain. Although the speech is humorous, the speaker is also apparently making a serious point about capitalism and consumers' willingness to buy products and services that might—despite the fun and convenience they offer—also carry a risk of serious personal and societal harm. The TM symbol, used in conjunction with the parodized (but real) product NeuraLink and the imaginary concept of NeuraLike, helps underscore the fact that these (like many of the services we rely on every day) are commercial products, offered and backed by corporate entities that might have goals and agendas that differ greatly from our own.

B. Broader Themes

As discussed above, the extra-legal uses of the TM symbol we observed were primarily expressive, in the sense that those deploying the symbol were trying to communicate something by using it. In other words, speakers were choosing to use the TM symbol because the symbol added meaning to the words and phrases they used it in conjunction with.¹⁵⁷ But what were they trying to communicate, and what meaning were they trying to add to their speech by using the TM symbol?

Many of these uses seemed to have much in common with the expressive uses of the hashtag Professor Alexandra Roberts has documented. In her article *Tagmarks*, Roberts quotes a *New York Times* piece about hashtags, where author Julia Turner notes that a “hashtag gives the writer the opportunity to comment on his own emotional state, to sarcastically undercut his own tweet, to construct an extra layer of irony, to offer a flash of evocative imagery, or to deliver metaphors with striking economy.”¹⁵⁸

Many of these purposes seem to be in play with the extra-legal uses of the TM symbol we observed as well; especially peoples' use of the symbol to convey irony, sarcasm, or an element of metacommentary (i.e., a commentary on the commentary). Indeed, Emily Williams, in a study on the use of the hashtag and TM symbol on the discussion site Reddit, noted that the hashtag and the TM symbol

¹⁵⁷ See Emily A.E. Williams, *Pragmatic Extension in Computer-Mediated Communication: The Case of ‘#’ and ‘TM’*, 181 J. PRAGMATICS 165, 166 (2021) (discussing how the trademark symbol can be used to produce metadiscourse and add layers of meaning).

¹⁵⁸ Alexandra J. Roberts, *Tagmarks*, 105 CAL. L. REV. 599, 610 (2017) (quoting Julia Turner, *#InPraiseOfTheHashtag*, N.Y. TIMES MAG. (Nov. 4, 2012), <https://www.nytimes.com/2012/11/04/magazine/in-praise-of-the-hashtag.html> [<https://perma.cc/6W6G-2U7K>]).

were both often used to engage in metacommentary, including expressing sarcasm; to communicate affiliation with a particular group (for example, by using the same TM-ed or #-ed “inside joke”); and to express criticism and ridicule.¹⁵⁹

Williams refers to the hashtag and the TM symbol as “artificial operators.”¹⁶⁰ Artificial operators seem to be serving a particular purpose in online discourse by helping people on social media communicate in nuanced ways (metacommentary, sarcasm, irony, inside jokes) that might otherwise be quite difficult to achieve in dispersed communities and without the aid of other verbal and nonverbal cues such as tone, inflection, facial expression, and body language.¹⁶¹

But though the hashtag and TM symbol both facilitate online communication in these ways, the TM symbol is distinct in the sense that, unlike the hashtag, which originated on social media as a generic topic marker,¹⁶² the TM symbol has its origins in trademark law and has a distinct legal purpose and meaning. It appears that this meaning has not been lost on those who use it expressively; in fact, the speakers we observed using the symbol often leveraged various aspects of this legal meaning as a way to more effectively achieve their ends of criticism, humor, affiliation-signaling, sarcasm, irony, or metadiscourse.

Consistent with this, the website TV tropes, which catalogs tropes in popular culture,¹⁶³ has an entry on the extra-legal use of the TM symbol as a trope titled TradesnarkTM.¹⁶⁴ The entry on Tradesnark opines that

A humorous way to make ThingsTM stand out is to add Random Trademark Symbols® everywhere. May be used as a Social Commentary® on our increasingly homogenized, commercialized

¹⁵⁹ Williams, *supra* note 157, at 171–74.

¹⁶⁰ *Id.* at 166.

¹⁶¹ *Id.* at 165.

¹⁶² *Id.* at 167.

¹⁶³ The website defines a trope as “a storytelling device or convention, a shortcut for describing situations the storyteller can reasonably assume the audience will recognize. Tropes are the means by which a story is told by anyone who has a story to tell.” *Tropes*, TV TROPES, <https://tvtropes.org/pmwiki/pmwiki.php/Main/Tropes#:~:text=A%20trope%20is%20a%20storytelling,the%20same%20thing%20as%20cliches> [<https://perma.cc/W8K5-JG2K>]. It goes on to explain that “[t]ropes are not the same thing as cliches. They may be brand new but seem trite and hackneyed; they may be thousands of years old but seem fresh and new.”

¹⁶⁴ *Tradesnark*TM, TV TROPES, <https://tvtropes.org/pmwiki/pmwiki.php/Main/Tradesnark> [<https://perma.cc/P2N4-PXQW>].

World®), but more often than not, done just because of the Rule of FunnySM. They can also be used to point out how Cliche™ something is, or employed in Sarcasm Mode (perhaps in conjunction with Scare QuotesSM) to passive-aggressively imply that something exists only as a Concept™; for example, some people refer to global warming as “Global Warming™”. Another sarcastic variationSM is to sprinkle Trade Snark over your paraphrase of an opponent’s position to imply that he’s using the term in question as a meaningless buzzword®.¹⁶⁵

As this entry notes (and as we also found in our data analysis), when used expressively, the TM symbol is often employed as a commentary on commercialization, as a way to mark or emphasize something as a cliché or stock phrase, or to indicate the stereotypical or conceptual nature of something. As discussed above, these uses of the symbol all gesture back to one or more of the interrelated meanings of the TM symbol as a legal operator.

In this way, the TM symbol, with its built-in legal significance, seems to be acting as an efficient shortcut for those wishing to communicate in increasingly nuanced ways in online communities. The question for trademark scholars is whether this appropriation of the symbol poses any problems for its continued effectiveness as a legal device. We address this question in the next Part.

III IMPLICATIONS FOR TRADEMARK LAW

Extra-legal uses of the TM symbol raise a number of important implications for trademark law. In this Part, we discuss some of the more pertinent ones. In doing so, we draw analogies to trademark infringement doctrines to help conceptualize these issues. We then discuss which harms we believe are most likely to occur and conclude with a discussion of what, if anything, trademark law should do about any of it.

A. *Likelihood of Confusion*

The first doctrine that serves as a helpful analogy to the harms that might arise with extra-legal uses of the TM symbol is the likelihood of confusion doctrine. The primary test for trademark infringement is the likelihood of confusion analysis,

¹⁶⁵ *Id.*

which asks whether the public is likely to be confused by a competitor's use of a name or symbol similar to that being used by a trademark owner.¹⁶⁶ This test helps serve the policy goals of protecting consumers from being confused about the true source of a good or service, while also protecting producers trying to build up goodwill in their offerings (which is made possible, in part, through correct source identification by the public).¹⁶⁷ But the unprincipled use of the TM symbol itself could lead to various forms of public and consumer confusion. We call this possible implication the “confusion implication.”

For example, extra-legal uses of the TM symbol may result in a significant amount of consumer confusion as consumers struggle to discern between legal and expressive uses of the symbol. Consumers may continue to associate the symbol primarily with an assertion of legal rights in a mark. And because of that continued association, expressive uses may sometimes, and perhaps even frequently, lead to consumers being confused as to whether the symbol is functioning legally or expressively in any given context.

This confusion could undermine the legal uses of the trademark symbol in a number of ways. First, it could lead to chilling effects. Interested parties might inaccurately believe a person using the TM symbol expressively is claiming rights in a mark. This could dissuade them from using what is actually an unclaimed mark in commerce and developing trademark rights in a mark that is available. This chilling effect might be particularly concerning in light of empirical evidence suggesting that the number of marks available for adoption is shrinking.¹⁶⁸

Ironically, those initial expressive uses could also chill other expressive uses if the public interprets the expressive uses as legal. Indeed, in our examples discussed above, we saw situations where people using the TM symbol expressively were arguably trying to claim some kind of legal rights, even though trademark law does not support legal rights in these contexts. For example, many social media users added a TM symbol to their social media handles, suggesting they were trying to

¹⁶⁶ Robert G. Bone, *Taking the Confusion Out of Likelihood of Confusion: Toward a More Sensible Approach to Trademark Infringement*, 106 Nw. UNIV. L. REV. 1307 (2012) (discussing this test and proposing reforms to it).

¹⁶⁷ 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:1 (5th ed. 2023) (explaining the purposes of trademark protection to be protecting both consumers and producers).

¹⁶⁸ Beebe & Fromer, *supra* note 16, at 947.

claim the exclusive right to use these handles. Other social media users might be deterred from using similar expression, although legally there is no basis for this deterrence.

Second, and perhaps more concerning, the expressive use of the TM symbol with words or phrases might be confusing to the consuming public in various ways that could undermine the ways trademarks are meant to help consumers. For example, consumers might wrongly believe that someone using the symbol in an expressive way is offering a product or service. They might, for instance, believe that the Severus Snape Soap (Severus SnoapTM) is a real product, and spend time and effort looking for it. This confusion could interfere with the efficient functioning of the marketplace by increasing consumer information costs, whose reduction, according to leading commentators, is a primary goal of trademark law.¹⁶⁹

More generally, the widespread adoption of the TM symbol for expressive purposes might confuse the public about what the symbol is for or how it is supposed to be used. This confusion about the proper legal function of the trademark symbol could undermine the notice function the symbol is meant to promote.

B. Dilution and Discounting

A second relevant trademark doctrine that could be used to conceptualize the potential harms of unprincipled use of the TM symbol is the infringement doctrine of trademark dilution.¹⁷⁰ A dilution cause of action prevents non-mark holders from using a protected, “famous” mark in ways that either damage the mark’s reputation or impair the ability of the mark to function as a source identifier.¹⁷¹ Although it is possible, in theory, that parties will be confused by extra-legal uses of the TM symbol to the extent that they are chilled from using the same mark

¹⁶⁹ Stacey Dogan, *A Search-Costs Theory of Limiting Doctrines in Trademark Law*, 97 TRADEMARK REP. 1223, 1223 (2007) (“Over the past two decades, the search costs theory of trademark law has attracted a substantial following among both commentators and courts.”).

¹⁷⁰ Michael Adams, *The Dilution Solution: The History and Evolution of Trademark Dilution*, 12 DEPAUL J. ART, TECH & INTEL. PROP. L. 143, 145 (2002) (discussing the historical development of the dilution cause of action in trademark law).

¹⁷¹ *Trademark Dilution (Intended for a Non-Legal Audience)*, INT’L TRADEMARK ASSOC. (Nov. 9, 2020), <https://www.inta.org/fact-sheets/trademark-dilution-intended-for-a-non-legal-audience/> [<https://perma.cc/H42Z-68L3>] (providing an overview of the dilution cause of action).

for expressive or commercial purposes, in many cases actual confusion may be unlikely. However, dilution theory is based on the premise that third-party use of a mark can hamper the ability of a mark to act as a source identifier even when consumers are not confused about the source of a good or service.¹⁷² Thus, for example, if (as Frank Schechter famously argued in his 1927 article advocating for a dilution cause of action) the term Kodak were to be used “for bath tubs and cakes, ‘Mazda’ for cameras and shoes, or ‘Ritz-Carlton’ for coffee,” these marks would lose the uniqueness that leads them to be good source identifiers and they would “inevitably be lost in the commonplace words of the language, despite the . . . vast expenditures in advertising them.”¹⁷³

Similarly, even if the public is not confused such that they mistakenly believe someone who is using the TM symbol expressively is trying to claim rights in a mark, the TM symbol itself, through these various expressive uses, could be hampered in its ability to function as a legal object. The public, upon encountering the TM, might be deprived of the unique legal meaning of the symbol and might have to undertake additional mental steps to try to determine the way in which the TM symbol is being used in any given instance.¹⁷⁴

Ultimately, this may result in many consumers discounting the symbol’s significance. That is, if consumers frequently have to exert mental effort to accurately discern the symbol’s meaning in any given scenario, then those consumers may eventually come to ignore the symbol altogether, or at least pay it less heed than otherwise. Hence, because extra-legal uses may, over time, erode the TM symbol’s legal meaning, many consumers may come to attach less weight to the TM symbol. We call this possibility the “discounting implication.”

But even if consumers do not discount the symbol’s significance, the fact that they have to undergo additional mental steps (or incur increased “imagination costs”) every time they encounter the symbol is a harm that trademark law has

¹⁷² Kathleen B. McCabe, *Dilution-by-Blurring: A Theory Caught in the Shadow of Trademark Infringement*, 68 *FORDHAM L. REV.* 1827, 1840–45 (2000) (discussing the development and theory behind anti-dilution law).

¹⁷³ Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 *HARV. L. REV.* 813, 830 (1927).

¹⁷⁴ Graeme W. Austin, *Tolerating Confusion About Confusion: Trademark Policies and Fair Use*, 50 *ARIZ. L. REV.* 157, 159 (2008) (describing “imagination costs” that consumers must undertake when others use similar marks as some of the costs that anti-dilution causes of action are meant to protect against).

recognized.¹⁷⁵ We therefore differentiate this situation and call it the “dilution implication.” Dilution may ultimately lead to discounting, but even if it does not, it may still exert a harm on the consuming public and also on the producers who rely on the symbol to effectively communicate legal notice.¹⁷⁶

The discounting implication has some similarities to both the confusion and dilution implications but is also different in important ways. The implications are similar because in all three situations consumers face difficulty discerning the symbol’s meaning in any given context. But with the discount implication, consumers discount the symbol’s legal significance over time—they attach less weight to the symbol because they simply don’t know what to make of it in any given context. Hence, with the discount implication, initial confusion or dilution ultimately leads to some or many consumers giving up on the symbol.

With the confusion and dilution implications, conversely, most consumers continue to attach legal significance to the symbol, even in situations where parties use the symbol expressively. In fact, that ongoing consumer reliance is a primary source of ongoing consumer confusion and increased imagination costs (rather than apathy, as with the discount implication). We discuss the importance of this difference below when we discuss the likelihood of these implications playing out.

¹⁷⁵ McCabe, *supra* note 172, at 1828 (discussing some of the possible harms that anti-dilution law is meant to protect against).

¹⁷⁶ Trademark law recognizes two forms of dilution: dilution by blurring and dilution by tarnishment. 15 U.S.C. § 1125 (c). With dilution by blurring, the harm is what Frank Schechter described: A mark loses the “uniqueness” that allows it to be a good source identifier through widespread and varied use. Schechter, *supra* note 173, at 30. With dilution by tarnishment, the harm is more specific: a mark’s reputation is “tarnished” by use in association with socially questionable subject matter like sex, drugs, or low quality goods or services. *See* 15 U.S.C. § 1125 (c)(2)(C). Here we focus on the possibility of a dilution-by-blurring-type harm for the TM symbol—the widespread use of the symbol in various extra-legal contexts might cause the symbol to lose its uniqueness as a legal operator and require the public to undertake additional mental steps on encountering the symbol to discern the way it is being used in any given instance. It is also possible that a dilution by tarnishment harm could occur through widespread extra-legal use—that use of the TM symbol in association with unsavory expressive speech could harm the “reputation” of the symbol as a legitimate legal operator that grants a sense of legitimacy to those using it. In our data collection, we didn’t encounter any instances where it seemed obvious that the use could impose a tarnishment harm on the symbol. But this is certainly a possibility.

C. *Genericide*

A third trademark doctrine that may serve as a helpful analogy in contemplating the harms of extra-legal uses of the TM symbol is the doctrine of genericide.¹⁷⁷ Marks that initially serve as good indicators of source—or are, in the language of trademark law, ‘distinctive’—can lose this source-identifying function over time through widespread, unauthorized, and unprincipled use.¹⁷⁸ For example, the term Thermos, once a reliable indicator that a product was being offered by the Thermos company, lost its source-identifying ability as the public began using the term widely to refer to any insulated beverage container.¹⁷⁹ By failing to prevent this shift in use and understanding, the Thermos company committed ‘genericide’ and lost its trademark rights in the term.¹⁸⁰

Similarly, widespread social appropriation of the TM symbol may ultimately mean that consumers simply fail to grasp the symbol’s legal significance altogether, regardless of context. In other words, the symbol’s extra-legal uses may become so widespread that the symbol becomes an ineffective means of signifying a claim to legal rights—even in clearly legal contexts. The TM symbol may become “generic” in the sense that consumers no longer typically associate it with its original purpose of signifying legal rights in a trademark. We call this final possible implication the “generic implication.”

The generic implication is similar to the discount implication in that in both scenarios the symbol ultimately loses a significant amount of its legal meaning. But they differ in that with the generic implication, the symbol loses its legal meaning entirely. With the discount implication, on the other hand, the symbol retains some of its legal significance. The difference between the two implications, then, is one of degree.

¹⁷⁷ Peter J. Brody, *Reprotection for Formerly Generic Trademarks*, 82 U. CHI. L. REV. 475, 475 (2015) (discussing the doctrine of genericide).

¹⁷⁸ *Id.*

¹⁷⁹ Mary Beth Quirk, *15 Product Trademarks That Have Become Victims of Genericization*, CONSUMER REPS. (July 19, 2014), <https://www.consumerreports.org/consumerist/15-product-trademarks-that-have-become-victims-of-genericization/> [<https://perma.cc/46NX-PNYT>] (providing a list of former trademarks that have undergone genericide, including “Thermos”).

¹⁸⁰ *Id.*

D. Which Harms Are Most Likely?

Which, if any, of these implications is most likely? For starters, for any of these implications to come about, broader social appropriation of the symbol than seems to be occurring at the moment would be required. This study was not structured to address the question of how broadly parties use the TM symbol in expressive ways—we encountered many extra-legal uses of the TM symbol, but we did not attempt to decipher how frequently those uses occur. So the claim that broader appropriation would be necessary is based on anecdotal observations that extra-legal uses of the TM symbol are not all that pervasive. Be that as it may, we feel fairly confident that current levels of extra-legal uses are not so pervasive that the average consumer faces difficulty in interpreting the TM symbol's significance in most contexts.

But that may well change over time. Many of the social uses we came across occurred on venues where younger generations predominate. To the extent that those rising generations increasingly make use of the TM symbol in expressive ways, those uses may, over time, result in any or all of the implications discussed above.

Yet we believe that the discount and generic implications are unlikely to come about for several reasons, even if extra-legal uses of the symbol rise. For starters, as discussed in Part II, the symbol's expressive purposes often depend on others understanding, at least in part, the symbol's legal significance. In humorous examples, for instance, the user's message would fall flat without the readers understanding both the symbol's typical legal significance and the humor to be found in using that symbol in the given context. In examples where a party uses the TM symbol to convey the legitimacy or authority of a concept, again, use of the symbol would be ineffective if interpreters of the message did not understand (at least in part) the typical legal sense of the symbol. This does not mean, of course, that lay people need to understand the nuanced ins-and-outs of trademark law for extra-legal uses of the symbol to work. But at some level, for expressive uses to serve their purposes, those interpreting the expressive uses must have some sense that use of the TM symbol typically indicates an assertion of legal rights in the associated mark.

The effectiveness of expressive uses of the TM symbol thus depends, in significant part, on the symbol remaining an effective legal tool. This does not

mean that consumers will never be confused about the symbol's legal significance or that they will never have to exert some mental effort to discern the way the symbol is being used as extra-legal uses of the TM symbol rise. But it does seem to mean that the TM symbol's legal significance is likely to remain mostly intact, since otherwise extra-legal uses of the symbol are likely to diminish (i.e., the attractiveness of using the symbol in an expressive way would diminish because that expression would lack meaning without the symbol's typical legal significance in the background). The expressive and legal uses of the TM symbol are thus likely to reach a natural equilibrium in their relationship to one another. And that equilibrium would likely prevent either the discount or generic implications.

Of course, the discount implication may be compatible with increasing extra-legal uses of the TM symbol in some respects. For instance, consumers may discount the symbol's legal significance even while understanding the symbol's historical legal roots. And that historical understanding may then inform their understanding of extra-legal uses of the symbol. But the point remains that to the extent that significant numbers of consumers discount the symbol's significance, that discounting makes extra-legal uses less likely because the symbol becomes a less meaningful expressive symbol.

The confusion and dilution implications are a different matter. These implications seem more likely than the other two for several reasons. First, as with the other two implications, the confusion and dilution implications become more likely as extra-legal uses of the symbol increase. Though only anecdotal, our observations suggest that extra-legal uses of the TM symbol are rising and will continue to rise. Digital media use, where the vast majority of these social uses happen, is unlikely to decrease.¹⁸¹ Instead, if anything, it's likely to continue increasing.¹⁸² Furthermore, younger generations are those that typically make social uses of the symbol, and those generations show no obvious signs of

¹⁸¹ See Kevin Westcott et al., *2022 Digital Media Trends, 16th Edition: Toward the Metaverse*, DELOITTE INSIGHTS (Mar. 28, 2022), <https://www2.deloitte.com/za/en/insights/industry/technology/digital-media-trends-consumption-habits-survey/summary.html> [https://perma.cc/DR9S-EML8] (discussing digital media usage trends with a focus on gaming).

¹⁸² See Dave Chaffey, *Global Social Media Statistics Research Summary May 2024*, SMART INSIGHTS (May 1, 2024), <https://www.smartinsights.com/social-media-marketing/social-media-strategy/new-global-social-media-research/> [https://perma.cc/6JPA-EL9Q] (highlighting research showing the growing worldwide usage of digital media).

discontinuing such uses. We know of no lawsuits surrounding such uses, for instance, which might deter at least some from using the symbol expressively. The rise of such expressive uses of the symbol thus makes at least some amount of confusion and dilution in the marketplace likely.

Second, unlike the other implications, the confusion and dilution implications depend on the symbol retaining much of its original legal meaning in the mind of the average consumer. If it were not so, because the symbol had lost much or all of its legal significance, consumers would be more likely to just ignore the symbol altogether—and, accordingly, those wishing to engage in various types of expressive speech might cease using it.

As discussed above, we think the symbol is likely to retain a significant portion of its legal significance, even as extra-legal uses rise. That is, because effective extra-legal uses depend on the symbol retaining a significant amount of legal significance, we think extra-legal and legal uses will reach a natural equilibrium that helps preserve a significant amount of the symbol's legal significance. Yet that natural equilibrium also makes the confusion and dilution implications more likely because, at least in some cases, consumers will face difficulty ascertaining whether a use is legal or expressive in nature. Thus, for the same reason we think the discount and generic implications are unlikely, we think the confusion and dilution implications are more likely to come about.

E. How Should Trademark Law Respond?

If that is all so, this brings us to another question: whether the law should change to better accommodate extra-legal uses of the TM symbol or, conversely, to discourage them. On the one hand, we might wish to ensure that the law clearly accommodates extra-legal uses of the symbol for their speech value—given the way the TM symbol appears to be used, one might reasonably argue that these extra-legal uses of the symbol serve legitimate speech purposes in enabling people to more effectively convey messages relating to important social and political matters.¹⁸³ Indeed, extra-legal uses of the TM symbol might be particularly

¹⁸³ See William McGeeveran, *Four Free Speech Goals for Trademark Law*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1205 (2008) (discussing various ways that trademark law might better accommodate speech interests).

valuable to traditionally marginalized groups of people who otherwise face difficulty in getting their points across in the marketplace of ideas.¹⁸⁴

On the other hand, one of trademark law's primary purposes is to help prevent consumer confusion in the marketplace by, for instance, helping curb consumer information costs.¹⁸⁵ Consumer information costs may rise as consumers struggle to decipher between legal and expressive uses of the symbol. To the extent that social uses of the TM symbol add to or create consumer confusion, we may wish to adjust trademark law to avoid that result.

To assess whether trademark law needs adjustments to accomplish one or both of these objectives, we must briefly reassess the legal status of the TM symbol. Remember, use of the symbol alone does not a trademark make.¹⁸⁶ Rather, use of the symbol in conjunction with a mark is an assertion of rights in the associated mark, not an actual indication of them.¹⁸⁷ The symbol, then, despite often performing a function related to legal rights, does not, in and of itself, create any rights. Instead, it is simply a way for trademark holders to signal to others in the marketplace that they wish to claim rights, acquired through use in commerce, in the associated trademark.

Consequently, extra-legal uses of the symbol, in the abstract, would not appear to violate any specific (current) doctrine of trademark law. The symbol is simply a signaling tool—and if the person sending the signal doesn't actually mean what people typically associate the symbol with, so be it. The law, as currently

¹⁸⁴ See Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 144 (2010) (discussing a “free speech as equality” conception of free speech that envisions extra free speech solicitude towards traditionally marginalized groups). See also Erica Goldberg, *First Amendment Cynicism and Redemption*, 88 U. CIN. L. REV. 959, 988 (2020) (discussing free speech rights as requiring the acceptance of speech from the disempowered).

¹⁸⁵ Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777 (2004) (articulating the rationale that trade symbols help consumers create a reliable identification shorthand for goods which reduces search costs).

¹⁸⁶ Patrick J. Concannon, *Proper Use of Trademarks and Trademark Symbols*, NUTTER IP LAW BULL. (Feb. 8, 2019), <https://www.nutter.com/ip-law-bulletin/proper-use-of-trademarks-and-trademark-symbols> [perma.cc/NJ85-PQZA] (“In fact, the TM and SM symbols do not have any legal significance, but instead are informal ways of telling the world that you are claiming ownership of trademark rights in a word, phrase, and/or logo.”).

¹⁸⁷ *Id.*

constructed, would not appear to have much to say with respect to extra-legal uses of the symbol in isolation.

But, as we observed, extra-legal uses of the symbol are usually used not in isolation, but in conjunction with a term, phrase, or even an existing trademark. And at least some of those uses may implicate current trademark law doctrines. The clearest example would be use of the symbol in connection with an existing trademark. For instance, if someone uses the TM symbol in connection with the fake product “Frankenrack” in a way that suggests some connection to the real trademark “Nordictrack,” that use might trigger a lawsuit from Nordictrack because of the possibility of consumer confusion.

Do we need to adjust trademark law to allow for—or discourage—such uses? Existing trademark doctrines such as fair use—which allows for uses of marks in a variety of contexts, including descriptively or as a means of commentary—may often provide legal cover for use of the symbol in these ways.¹⁸⁸ The example described above, for instance, would likely qualify as a parody because it appears to function as a humorous commentary on the Nordictrack brand.¹⁸⁹

In other contexts, greater uncertainty may exist. For instance, when someone uses the TM symbol in connection with a non-trademarked word or phrase as a means of humorously indicating legitimacy, that use would not seem to implicate current trademark law in the same way as the above example. With no accompanying trademark, after all, there is no question of fair use because the symbol’s user is not commenting on any existing trademark or its owner. If a word or phrase that is the same or similar to an existing mark is not used in commerce so as to potentially cause consumer confusion, there is no legal cause of action.¹⁹⁰

That use, then, probably takes us outside of current trademark law entirely. Use of the TM symbol, after all, is simply an assertion of legal rights, not an actual

¹⁸⁸ See generally William McGeeveran, *The Trademark Fair Use Reform Act*, 90 B.U. L. REV. 2267 (2010) (discussing trademark fair use and proposing several reforms to the concept to further protect expressive uses of trademarks).

¹⁸⁹ See J. David Mayberry, *Trademark Nominative Fair Use: Toward a Uniform Standard*, 102 TRADEMARK REP. 820, 821 (2012) (discussing nominative fair use and some possible adjustments to it to improve it).

¹⁹⁰ About Trademark Infringement, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/page/about-trademark-infringement> [<https://perma.cc/HWC2-WFVU>] (outlining trademark infringement and dilution).

indication of them.¹⁹¹ So when parties use the symbol in such expressive ways, there does not appear to be an immediate legal consequence for such a use.

But to the extent that we wish to encourage such extra-legal uses of the TM symbol because of their speech value—and from what we saw in our data collection, the TM symbol was extremely valuable in facilitating nuanced online discourse—explicitly clarifying the legal status of the TM symbol in the statute would be worthwhile. Legal doctrines outside of trademark law, for instance, could potentially be brought to bear against extra-legal users of the TM symbol in a way that discourages such uses. For instance, under Section 5 of the FTC Act, “deceptive and unfair trade practices” can be actionable.¹⁹² States also have similar state-level causes of action.¹⁹³ To avoid these and possibly other legal actions being brought against extra-legal users of the TM symbol, the statute could make clear that use of the TM symbol as anything other than an assertion of legal rights in an associated mark is a fair use of the symbol.

Doing so, of course, might then pave the way to the undesirable result of consumer confusion or dilution, as discussed above. After all, if any use of the symbol outside of its typical legal role is considered fair game, then expressive users may flood the marketplace with such uses in a way that confuses consumers or dilutes the meaning of a mark rather than conveying meaning to them.

But we think this is unlikely to happen. Our non-exhaustive survey of extra-legal uses suggests that consumers can navigate most such uses of the symbol without experiencing undue confusion. This is because the humor or expressive purpose in most extra-legal uses is either obvious or at least inferable. Although we do think the confusion and dilution implications are the most likely to occur, we don’t tend to think that extra-legal uses of the TM symbol will create undue levels of these harms. Rather, confusion and dilution are more likely to be the exception than the rule because too much confusion or dilution would typically undermine the user’s purpose in using the symbol. In other words, extra-legal uses of the symbol

¹⁹¹ Concannon, *supra* note 186.

¹⁹² Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 583 (2014) (discussing the evolution of the FTC’s enforcement of privacy policies through the authority to regulate unfair and deceptive trade practices).

¹⁹³ Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 173 (2011) (discussing state-level consumer protections and their similarities and differences from the FTC Act).

would become less attractive if those uses resulted in too much consumer confusion or dilution of the mark's meaning.

Further, and perhaps more importantly, we believe any social harms that arise from a limited amount of consumer confusion and dilution of the TM symbol are outweighed by the surprising and significant expressive value of the TM operator.

CONCLUSION

The TM symbol—a humble legal operator available to providers of goods and services to signal their claim to rights in a trademark—has developed a surprising following of social media users and digital conversants. These speakers have appropriated the symbol in their online and texting conversations to serve a variety of rhetorical ends. In most cases these ends are not ‘legal’ in the sense that they are not seriously attempting to communicate a claim to legal rights. But in almost all cases we documented (and we looked at about 200) the use of the symbol gestures to one or more interrelated “meanings” evoked by the symbol's traditional legal function. In this way, the TM symbol seems to be serving as an efficient shortcut for those wishing to communicate in increasingly nuanced ways in a digital format. It allows for the effective communication of irony, sarcasm, humor, and social commentary. It also contributes to community building and affiliation signaling. In some cases, its use was more directly related to its legal function, allowing speakers to put others on notice that they claimed “cultural” rights in a name, word, or phrase, even if legal rights were not available.

We believe this to be a positive development overall. Anything that facilitates expression and contributes to the ability of individuals to form communities and engage in robust and sophisticated discussion provides a social benefit, in our view.

But the extra-legal adoption of the TM symbol comes with potential costs that should be also considered. These mainly have to do with the risk that these uses will hamper the ability of the TM symbol to function as it was intended—as a legal operator. Consumers and competitors might be confused in various ways by these uses. Even if not confused, they might need to undertake additional mental steps to determine the way in which the TM symbol is being used in any given instance. Ironically, these are the very harms trademark law seeks to prevent or minimize, in an effort to ensure the smooth functioning of the marketplace. Over time, consumers and competitors might begin to pay less attention to the TM

symbol if it is not easy to discern its function. In the extreme case, the symbol might lose its legal meaning entirely.

Although we consider these harms and conclude that the widespread extra-legal use of the TM symbol might indeed lead to some level of confusion or the requirement of additional mental effort on the part of the public, we ultimately decide that these risks are worth the benefit. Indeed, we believe it would be helpful if the law clarified that these uses of the TM symbol are “fair” and thus not subject to legal liability.

In many ways, this is a developing story. The use of the TM symbol for extra-legal communication may become more widespread over time, or it may be a passing fad that peters out. The public may grow to become more sophisticated in discerning various uses of the symbol, or they may become more confused as use of the symbol proliferates. As the story develops, the recommendations in this Article may need to be revisited. But, for now, we applaud the creativity and ingenuity of those we witnessed using the symbol in novel ways and we recommend that the law support these uses.