
2 The semiotic account of trademark doctrine and trademark culture

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I. Introduction

Semiotics is the study of signs and sign systems. While linguistics concerns itself specifically with human speech, semiotics investigates “the processes and effects of the production and reproduction, reception and circulation of meaning in all forms, used by all kinds of agent[s] of communication.”¹ Semiotic thought developed into its own distinctive field of inquiry in the late-nineteenth and early-twentieth centuries at a time strangely coincident with the development of modern trademark doctrine.² It was during this period that the Swiss linguist Ferdinand de Saussure projected a bold extension of his research in structural linguistics: “A science that studies the life of signs within society is conceivable . . . I shall call it semiology (from Greek *semeion* ‘sign’). Semiology would show what constitutes signs, what laws govern them.”³ Since Saussure’s time, semiotics (or semiology) has developed into a sophisticated systems-theoretical field of knowledge of enormous reach and ambition. The semiotic tradition forms the foundation of the past century’s structuralist and poststructuralist thought across the humanities.⁴

In this short chapter, I will seek to show how semiotic concepts can be applied to clarify and ameliorate fundamental areas of trademark doctrine and policy. Elsewhere I have set forth at length a semiotic analysis of trademark law.⁵ My purpose here is not to reprise that account, nor is it simply to celebrate, as a matter of intellectual history, the parallel development of, and many

¹ ROBERT HODGE & GUNTHER KRESS, *SOCIAL SEMIOTICS* 261 (1988).

² See generally JOHN DEELY, *INTRODUCING SEMIOTIC: ITS HISTORY AND DOCTRINE* (1982); WINFRIED NÖTH, *HANDBOOK OF SEMIOTICS* (1990).

³ FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 16 (Charles Bally & Albert Sechehaye eds., Wade Baskin trans, 1959) (1916) [hereinafter SAUSSURE (Baskin)].

⁴ See generally JONATHAN CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* (1982); JONATHAN CULLER, *STRUCTURALIST POETICS: STRUCTURALISM, LINGUISTICS AND THE STUDY OF LITERATURE* (1975).

⁵ See generally Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 *UCLA L. REV.* 621 (2004) [hereinafter Beebe, *Semiotic Analysis*].

striking homologies between, semiotic thought and trademark doctrine. Nor do I seek to suggest that the law should simply defer to the authority of the semiotic—rather than the economic—tradition. Instead, my purpose is more pragmatic. It is to demonstrate that the semiotic account of trademark law is worthwhile because, as a descriptive matter, it explains many areas of trademark doctrine better than other accounts and because, as a normative matter, it recommends practical and sensible improvements in the doctrine that other accounts are unable—or unwilling—to recommend.⁶ To demonstrate this, I will set forth here only the most basic of semiotic concepts because that is all that is needed to achieve this goal.

Readers familiar with trademark scholarship and the trademark case law may already wonder about the value of this enterprise. After all, it is generally thought, at least in the United States, that we already have a “theory” of trademark law that explains everything. To be sure, the economic account of trademark law, if not of commercial semiosis more generally, is a powerful one.⁷ Its expositors have applied the rhetoric of what is “optimal” to explain many aspects of trademark doctrine, and in their positivism, they will likely have little patience in what follows for the fuzzy abstraction of much of semiotic thought. Nevertheless, when the economic account turns to certain foundational concepts in trademark doctrine, such as trademark “distinctiveness” or trademark “dilution,” the account either fails to persuade or, more often, is simply no longer a positive economic account—indeed, it begins to sound like semiotics, and quite rudimentary semiotics at that. The point, then, of this chapter is not to argue that the semiotic account should *replace* the economic account. On the contrary, I accept, at least for the purposes of this chapter, the key descriptive (and prescriptive) insight of the economic account, that trademarks and trademark law function primarily—though not entirely—to minimize consumer search costs. The purpose of this chapter is simply to argue that the semiotic account is a necessary supplement to the economic account,

⁶ Graeme Dinwoodie is altogether justified in questioning the extent to which the descriptive and prescriptive can be separated in any discussion of trademark law, and particularly in this one, which employs a body of thought whose “descriptive” claims about language and culture seem so often to comport, at least superficially, with the political agenda of the Left. Still, the semiotic account may at least be employed as a counterweight in this regard to the economic account. See Graeme B. Dinwoodie, *What Linguistics Can Do For Trademark Law*, in *TRADE MARKS AND BRANDS: AN INTERDISCIPLINARY CRITIQUE* (Lionel Bently, Jennifer Davis & Jane Ginsburg eds., 2007) (“[L]inguistic understanding of key terms of art in trademark law illustrates the inevitable prescriptive content of supposedly descriptive assessments of trademark claims.”).

⁷ See, e.g., William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 *J.L. & ECON.* 265 (1987).

if only because it furthers the very purpose—a more “efficient” legal regime—that the economic account seeks to achieve.⁸

To defend this claim, I will proceed as follows. First, I will set forth and defend the utility of a structural model of the trademark. I will then invoke various semiotic concepts to clarify the meaning of trademark “distinctiveness” and consider the implications of this clarification for trademark doctrine. Finally, I will briefly survey the semiotic account of the role of trademarks and trademark law in culture.

II. The internal structure of the trademark

Semiotics’ fundamental object and instrument of analysis is the “sign,” which Charles Sanders Peirce defined quite broadly as “something which stands to somebody for something in some respect or capacity.”⁹ To explain how signs and sign systems operate, semiotic inquiry typically proceeds from a theory of the internal structure of the sign. This theoretical emphasis on intrasign structure is crucial. It is what has made semiotic inquiry possible. A variety of conceptual problems continue to confound trademark law because it has yet fully to appreciate that the trademark, like the sign, also possesses an internal structure. As with the sign’s structure, each element of the trademark’s structure performs a specific role in preserving the stability of the structure and must be kept separate from the others lest the structure of the trademark, if not of trademark doctrine more generally, collapse in on itself. In this part, I seek to show how a semiotically-informed awareness of the trademark’s internal structure helps to resolve or at least clarify various doctrinal conundrums in trademark law. To begin, I turn first to a brief discussion of semiotic theories of intrasign structure.

A. *Semiotic sign structurations*

Semiotic thinking typically subscribes to one or the other of two leading structural models of the sign.¹⁰ The triadic model of the sign holds that the sign consists of three subsign elements: a “signifier” (the perceptible form of the sign, *e.g.*, the sound of the word “book” or “*Buch*” or “*livre*”), a “signified” (the meaning to which that perceptible form refers, *e.g.*, the idea of a book), and a “referent” (*e.g.*, a tangible book itself).¹¹ The dyadic model holds that

⁸ See generally Giovanni B. Ramello, *What’s in a Sign? Trademark Law and Economic Theory*, 20 J. ECON. SURVEYS 547 (2006) (assessing trademark law from an economic and semiotic perspective).

⁹ 2 CHARLES SANDERS PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PEIRCE ¶ 228 (Charles Hartshorne & Paul Weiss eds., 1934).

¹⁰ See NÖTH, *supra* note 2, at 83–91.

¹¹ See, *e.g.*, PEIRCE, *supra* note 9, at ¶ 228 (setting forth a triadic model of the sign).

the sign consists of two subsign elements: the signifier and the signified.¹² For various reasons that need not detain us, the dyadic model “brackets” or excludes the referent.¹³

One aspect of semiotics’ effort to model intrasign structure will be relevant to our discussion below. In speaking of the internal structure of the sign, semiotic thought has long struggled with the ambiguity of the term “sign.”¹⁴ In semiotic thinking, the sign consists of and the term “sign” refers to more than simply a signifier. The sign is a relational system, only one element of which is the perceptible form of the sign. Each element of this system is mutually constitutive of and interdependent with the others. To refer to the signifier as the sign, as is common in everyday language, is to mistake the part for the whole and to suggest that the part, the signifier, can exist separate from the whole, the sign. It is like using the term “water” to refer only to hydrogen.¹⁵ Nevertheless, semiotic thinkers have long recognized that everyday language, if not everyday thought, has damaged beyond repair the distinction between “sign” as signifier and “sign” as relational system and often fails to honor the distinction themselves.¹⁶

B. The triadic structure of the trademark

Though perhaps not altogether consciously, trademark commentary has traditionally conceived of the trademark as a three-legged stool, consisting of a signifier (the perceptible form of the mark), a signified (the semantic content of the mark, such as the goodwill or affect to which the signifier refers), and a referent (the product or service with to which the mark refers).¹⁷ Consider, for example, J. Thomas McCarthy’s description of the requirements that a trademark must meet to qualify for protection:

¹² See, e.g., SAUSSURE, *supra* note 3, at 67 (explaining that “the sign is the whole that results from the associating of the signifier with the signified”).

¹³ For a sophisticated analysis of Saussure’s exclusion of the referent, see PAUL J. THIBAUT, *RE-READING SAUSSURE: THE DYNAMICS OF SIGNS IN SOCIAL LIFE* (1997).

¹⁴ See NÖTH, *supra* note 2, at 79.

¹⁵ Cf. SAUSSURE, *supra* note 3, at 103. Saussure writes:

The two-sided linguistic unit has often been compared with the human person, made up of the body and the soul. The comparison is hardly satisfactory. A better choice would be a chemical compound like water, a combination of hydrogen and oxygen; taken separately, neither element has any of the properties of water.

¹⁶ See *id.* at 67.

¹⁷ Cf. Jason Bosland, *The Culture of Trade Marks: An Alternative Cultural Theory Perspective* (working paper on file with the author) (applying Roland Barthes’ theory of the sign to the trademark).

The requirements for qualification of a word or symbol as a trademark can be broken down into three elements: (1) the tangible symbol: a word, name, symbol or device or any combination of these; (2) type of use: actual adoption and use of the symbol as a mark by a manufacturer or seller of goods or services; (3) the function: to identify and distinguish the seller's goods from goods made or sold by others.¹⁸

Here, the triadic structure of the mark becomes apparent. First, the trademark must take the form of a "tangible symbol." When courts speak of the trademark as, in the Third Circuit's lexicon, a "signifier of origin"¹⁹ or, in the Seventh Circuit's, a "signifier[] of source,"²⁰ they mean by the term "signifier" to refer specifically to the perceptible form of the mark. Some courts use the more general term "symbol."²¹ Second, the trademark must be used in commerce to refer to goods or services. These goods or services constitute the trademark's referent, as when Judge Zobel explained that "a descriptive mark describes a property or ingredient of its referent."²² Third and finally, the trademark must "identify and distinguish" its referent. Typically, the trademark's signifier does so by identifying the referent with a specific source and that source's goodwill.²³ This source and its goodwill constitute the trademark's signified.²⁴

The triadic structure is also apparent in the syntax of trademark talk, which

¹⁸ 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 3.01 (4th ed. 2002).

¹⁹ *A & H Sportswear, Inc. v Victoria's Secret Stores, Inc.*, 237 F.3d 198, 222 (3d Cir. 2000).

²⁰ *Publ'ns Int'l, Ltd. v Landoll, Inc.*, 164 F.3d 337, 343 (7th Cir. 1998).

²¹ *See, e.g.*, *Warner Bros., Inc. v Gay Toys, Inc.* 724 F.2d 327, 332 (2d Cir. 1983); *Boston Prof'l Hockey Ass'n, Inc. v Dallas Cap & Emblem Mfg.*, 510 F.2d 1004, 1011 (5th Cir. 1975).

²² *Diversified Funding Inc. v Diversified Mortgage Co.*, 1994 WL 129602, at *1 (D. Mass., March 29, 1994); *see also In re DC Comics, Inc.*, 689 F.2d 1042, 1044 (C.C.P.A. 1982).

²³ The question of whether the trademark's signifier should be understood to refer specifically to the trademark's referent or to the trademark's signified raises the question, in semiotic terms, of intrasign "mediation." This issue is dealt with in detail in Beebe, *Semiotic Analysis*, *supra* note 5, at 651–3.

²⁴ At least two trademark commentators have previously conceived of the trademark in structuralist terms. In his work on trade dress, Tom Bell has outlined a structural model of the trademark that takes into account the distinction between the signifier and the referent within the trademark structure. Specifically, Bell invokes Gottlob Frege's division of sense and reference to criticize the legal protection of the new "virtual trade dress," which "merg[es] sense and reference completely." Tom W. Bell, *Virtual Trade Dress: A Very Real Problem*, 56 MD. L. REV. 384, 413 (1997). Per Mollerup has also developed a highly sophisticated triadic model of the mark. *See generally* PER MOLLERUP, MARKS OF EXCELLENCE: THE HISTORY AND TAXONOMY OF TRADEMARKS (1999).

tends to refer to a signifier x for a referent y (e.g., the trademark “FORD for cars” or the trademark “ACE for hardware, but not for bandages”) and, in doing so, implies the existence of a third, unmentioned variable, z , the source of the product and the goodwill associated with that source. As such, the triadic structure underlies the law’s simple two-dimensional model of trademark infringement, which conceives of any given trademark as forming a point in a two-dimensional features space consisting of a signifier dimension and a referent dimension. The closer the point formed by the defendant’s signifier-referent combination is to the point formed by the plaintiff’s signifier-referent combination, the greater is the likelihood that consumers will assume that both points refer to the same source, z .²⁵

One implication of this structural model must be emphasized from the outset. A trademark consists of more than simply its signifier. It is more than simply the term “NIKE” or “APPLE.” Rather, a trademark, like a sign, is a relational system consisting of a signifier, a signified, and a referent, and of the three relations among these interdependent elements.²⁶ This bears emphasis because the term “trademark” suffers from the same ambiguity as the term “sign.” Trademark lawyers and scholars, myself included, tend to use the term “trademark” to refer either to the trademark’s signifier specifically, to the “brand name,” or to the overall relational system, to the “brand.” For example, we invoke the first meaning of the term (“trademark” as signifier) when we speak of the various forms of word, image, or shape that a trademark may take, of the similarities of sound, sight, and meaning among trademarks, or of the literal meaning or functionality of a trademark. We invoke the second meaning of the term (“trademark” as relational system) when we speak of trademark rights or trademark infringement, or more recently in the internet context, of “trademark use.”²⁷ By trademark rights, for example, we do not mean the exclusive right to use a signifier in itself. Rather, we mean the exclusive right to use a signifier in connection with a specific signified goodwill and referenced good or service. We mean, in other words, the exclusive right to use a relational system of meaning, a sign. The ambiguity of the term “trademark”

²⁵ See Beebe, *Semiotic Analysis*, *supra* note 5, at 653–6.

²⁶ Cf. 2 MCCARTHY, *supra* note 18, at § 18:2 (“Good will and its trademark symbol are as inseparable as Siamese Twins who cannot be separated without death to both.”).

²⁷ See generally Margreth Barrett, *Internet Trademark Suits and the Demise of “Trademark Use.”* 39 U.C. DAVIS L. REV. 371 (2005); Stacey L. Dogan & Mark A. Lemley, *Trademark and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777 (2004); Uli Widmaier, *Use, Liability and the Structure of Trademark Law*, 33 HOFSTRA L. REV. 603 (2004); Graeme B. Dinwoodie & Mark D. Janis, *Confusion Over Use: Contextualism in Trademark Law*, 92 IOWA L. REV. 1597 (2007).

has long caused a great deal of trouble in the doctrine. To expand the scope of their property rights, trademark owners have sought to define their property right as an exclusive right to the signifier in itself. This is nowhere more evident than in recent internet contextual advertising case law.²⁸ The ambiguity of the term “trademark” invites this slippage in the doctrine towards “in gross” rights.

It should also be emphasized that the economic account of trademark law assumes, though not explicitly, that the trademark (as relational system) is triadic in structure. According to the economic account, the primary functions of the trademark and of trademark protection are to promote efficient markets by minimizing consumer search costs and to promote consumer welfare by enabling producers to capture the reputation-related rewards of investments in quality.²⁹ Quite obviously, consumer search costs are minimized only to the extent that the trademark (as signifier) actually refers to a product or source for which the consumer is searching. Similarly, product quality is enhanced only to the extent that the owner of a trademark attaches that trademark (as signifier) to products whose quality it actually controls. Both the semiotic and economic accounts of trademark law are concerned with the informational efficiency and integrity of the trademark system, and both assume that the sign must be intact for this efficiency and integrity to obtain.

C. The breakdown of the triadic structure of the trademark

We are in a position now to recognize that much of trademark doctrine is designed to preserve the traditional triadic structure of the mark, specifically,

²⁸ See, e.g., *Edina Realty, Inc. v TheMLSOnline.com*, No. Civ. 04-4371, 2006 WL 737064 (D. Minn. Mar. 20, 2006); *GEICO v Google, Inc.*, 330 F. Supp. 2d 700 (E.D. Va. 2004). In such cases, the plaintiff asserts that the defendant is using the plaintiff’s “trademark,” the defendant asserts that it is not using the plaintiff’s “trademark,” and both parties are correct—though, of course, they mean different things by the term “trademark.” As Dinwoodie and Janis have recently explained, see Dinwoodie & Janis, *supra* note 27, at 1662, the likelihood of consumer confusion rather than any “formal notion of trademark use” should guide the court’s analysis of such cases. Indeed, to the extent that consumers are confused as to source by the defendant’s use of the plaintiff’s trademark, then we can conclude that the defendant was making use of the trademark “as a mark,” *i.e.*, as a relational system. But to the extent that consumers are not confused, we can conclude that the defendant’s use was merely nominative. That is, the defendant was not perceived to have applied a signifier to a referent in such a way that improperly associated that signifier and referent with the plaintiff’s signified. See *1-800Contacts, Inc. v WhenU.com*, 414 F.3d 400, 409 (2d Cir. 2005) (explaining that the defendant’s “conduct simply does not violate the Lanham Act, which is concerned with the use of trademarks in connection with the sale of goods or services in a manner likely to lead to consumer confusion as to the source of such goods or services”).

²⁹ See, e.g., *Qualitex Co. v Jacobson Prods. Co.*, 514 U.S. 159, 164 (1995).

to preserve both the linkages among the three elements of the mark's structure and the separations among these elements. The doctrine seeks to preserve the triadic structure in an effort to further the basic informational purposes of the trademark and trademark protection. We can see, furthermore, that recent developments in the doctrine should be resisted to the extent that they threaten to break down the mark's traditional triadic structure. Here, the synergy between the semiotic and economic accounts should be apparent. A breakdown in the semiotic structure of the mark signals a breakdown also in the basic economic functions of the mark—just as a breakdown in the grammar of a language tends to signal a breakdown in the communicative capacity of the language itself.

1. Trademark use doctrine Consider, for example, the various rules that make up the doctrine of trademark use. These rules are intended to preserve each of the three linkages among the trademark's elements. In recent times, however, they have increasingly failed to do so. First, the linkage between the signifier (the perceptible form of the mark) and the signified (the source and goodwill of the mark) is regulated by assignment doctrine. Traditionally, trademark law will deny protection to a trademark that has been assigned “in gross,” separate from the ongoing business that is the source of the mark's goodwill.³⁰ Yet, as several commentators have noted, the rule against assignment in gross is now a rule more honored in the breach.³¹ Second, the linkage between the signified (the source and goodwill of the mark) and the referent (the product to which the mark is attached) is regulated by licensing doctrine and, specifically, by the rule against “naked licensing.”³² Traditionally, if the source represented by the signifier fails to control the quality of the goods to which the signifier is attached, the trademark will be deemed abandoned. Yet here also, enforcement of the naked licensing rule is now practically non-existent.³³ Third, the linkage between the signifier and the referent is regulated by the affixation and use in commerce requirements.³⁴ A trademark will not receive protection unless it is affixed to a good or service offered in

³⁰ See, e.g., *Green River Bottling Co. v Green River Corp.*, 997 F.2d 359, 362 (7th Cir. 1993).

³¹ See generally, Pamela S. Chestek, *Who Owns the Mark? A Single Framework for Resolving Trademark Ownership Disputes*, 96 TRADEMARK REP. 681 (2006).

³² See, e.g., *Société Comptoir de L'Industrie Cotonnière Etablissements Boussac v Alexander's Dep't Stores, Inc.*, 299 F.2d 33 (2d Cir. 1962).

³³ See Kevin Parks, “Naked” is Not a Four-Letter Word: *Debunking the Myth of the “Quality Control Requirement” in Trademark Licensing*, 82 TRADEMARK REP. 531 (1992).

³⁴ See generally 2 MCCARTHY, *supra* note 18, at § 16.

commerce. Nevertheless, the case law has substantially liberalized both requirements, most notably in the context of internet contextual advertising.³⁵

The trademark, in short, is falling apart. In the process, it is less and less able to accomplish what the economic account claims to be its primary functions. Consumer search costs are not minimized when the mark no longer refers to the source for which consumers are searching, and quality is not fostered by a regime in which the licensor of a mark need not control the quality of the goods to which the licensee affixes it.

2. *Merchandising doctrine and Dastar* Other areas of trademark doctrine are designed to prevent the *merger* of intramark elements, and these areas too are under attack. Functionality doctrine has largely failed to prevent the merger of the signifier and the referent, while merchandising doctrine has yielded to the merger of the signified and the referent. In both situations, in acquiring the exclusive right to use the trademark, the trademark owner also acquires the exclusive right to produce the “actual benefit that the consumer wishes to purchase.”³⁶ I consider here in more detail the current condition of merchandising doctrine.

Two assumptions underpin the traditional triadic structure of the mark. The first is that consumers consume things rather than signs, tangible goods or services rather than the intangible meanings of those goods or services. The second and related assumption is that trademark law merely protects the means of consumption rather than the ends of consumption. Trademark law only protects signs, the economic value of which is exhausted once the thing to be consumed is found, while the protection of consumable things themselves—the “actual benefit the consumer wishes to purchase”—is left to patent or perhaps to copyright law. These strangely materialist assumptions came to the fore quite recently in the Supreme Court opinion in *Dastar Corp. v Twentieth Century Fox Film Corp.*³⁷ The *Dastar* Court stated that a trademark refers to “the producer of the *tangible* product sold in the marketplace”³⁸ or possibly to the “trademark owner who commissioned or assumed responsi-

³⁵ See David J. Kera & Theodore H. Davis, *The Fifty-Second Year of Administration of the Lanham Trademark Act of 1946*, 90 TRADEMARK REP. 1, 68–70 (2000) (discussing cases liberalizing trademark use and affixation requirements); *The United States Trademark Association Trademark Review Commission Report and Recommendations to USTA President and Board of Directors*, 77 TRADEMARK REP. 375, 396 (1987) (“There is already considerable relaxation of the affixation requirement in Section 45 . . .”).

³⁶ *Int’l Order of Job’s Daughters v Lindeburg & Co.*, 633 F.2d 912, 917 (9th Cir. 1980).

³⁷ 539 U.S. 23 (2003).

³⁸ *Id.* at 31 (emphasis added).

bility for . . . production of the *physical* product.”³⁹ The trademark does not, however, signify the origin of the “ideas or communications that ‘goods’ embody or contain.”⁴⁰

In recent decades, trademark producers have made a mockery of the assumptions that underpin the trademark’s triadic structure and the Court’s reasoning in *Dastar*. Producers have discovered in the trademark a remarkably productive tool for the commodification of “ideas [and] communications.” For such producers, the “mark *is* the product.”⁴¹ This is clearly the case, for example, when one buys a shirt bearing the ARSENAL or BATMAN logo at three times the price of a shirt without the logo. In such a situation, the “physical product,” of whose source the consumer is ostensibly being informed by the trademark, is reduced to a nullity. The trademark’s goodwill is commodified and sold as its own product. In effect, we are left with a purely linguistic, purely textual trademark, a dyadic relational system of meaning consisting only of a signifier and a signified.

The law thus grants exclusive rights in the ends of consumption under the guise of granting exclusive rights in the means of consumption. In the past, conscientious judges have recognized this problem and sought to deal with it in a variety of ways.⁴² More recently, important scholarship has explained why, as an economic matter, merchandising rights impair competition.⁴³ This scholarship has proposed that disclaimers be the sole or at least the leading remedy available to plaintiffs in merchandising cases.⁴⁴ The problem is that we currently have no reliable method of distinguishing between merchandising fact-patterns and non-merchandising fact-patterns.⁴⁵ This is because all

³⁹ *Id.* at 32 (emphasis added).

⁴⁰ *Id.*

⁴¹ Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory of Fait Accompli?*, 54 EMORY L.J. 461, 472 (2005).

⁴² See Beebe, *Semiotic Analysis*, *supra* note 5, at 657–61.

⁴³ Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099 (2004). See Dogan & Lemley, *supra* note 41.

⁴⁴ See Bone, *supra* note 43, at 2182–3; Dogan & Lemley, *supra* note 41, at 489.

⁴⁵ Perhaps I should be allowed to sell unlicensed ARSENAL merchandise if I state prominently on the merchandise that it is not “officially licensed,” *cf.* Arsenal Football Club plc v Reed, [2003] R.P.C. 696 (C.A.), but may I do the same with merchandise bearing such trademarks as FERRARI (in support of the racing team if not also the automobile) or RED BULL (in support of the soccer team if not also the “utility drink”)? And what, then, about unofficial merchandise bearing prominent disclaimers under such marks as BATMAN or even CHANEL? All of these are essentially nominative uses. All of them enable consumers to avail themselves of the goodwill, the “ideas [and] communications,” the “surplus meaning,” that the trademark embodies. On “surplus meaning” in trademark law, see Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397 (1990).

trademark uses are now essentially merchandising uses. They are all celebrity endorsements of one stripe or another. Contrary to the quite outdated views of the *Dastar* Court, trademarks do not signify the origin of the goods to which they are affixed so much as they signify the origin of themselves, of the “ideas [and] communications” that they embody. To profit from their ownership, the owners of trademarks will confer these “ideas [and] communications” on suitable goods. Ultimately, then, the modern trademark does not function to identify the true origin of goods. It functions to obscure that origin, to cover it over with a *myth* of origin.⁴⁶ The modern trademark facilitates the fetishism of commodities by suggesting that brands, rather than actual human beings, produce commodities.⁴⁷ In other words, the modern trademark encourages the belief that both the tangible and intangible things that we consume all come from one “anonymous source”⁴⁸ or another.

III. The semiotic account of trademark “distinctiveness”

The concept of distinctiveness is the hinge on which trademark law turns. Yet for all of its importance—or perhaps precisely because of its importance—distinctiveness has never been adequately theorized. Traditional notions of “inherent” and “acquired” distinctiveness tend to confuse more than they clarify. This part argues that trademark law should reconceptualize trademark distinctiveness as consisting of *source distinctiveness* and *differential distinctiveness*. Corresponding to the semiotic relation of “signification,” source distinctiveness describes the extent to which a trademark’s signifier is distinctive *of* its signified. Corresponding to the semiotic relation of “value,” differential distinctiveness describes the extent to which a trademark’s signifier is distinctive *from* other signifiers in the trademark system. This reconceptualization recommends, among other things, an altered approach to trademark infringement analysis and a revised theory of trademark dilution. To explain why such a reconceptualization is worthwhile, I turn first to a discussion of the Saussurean concepts of “signification” and “value.”

A. *Signification and value*

At the core of Saussure’s structural linguistics is the distinction between signification and value. In brief, signification describes the vertical, intrasign rela-

⁴⁶ See Jessica Silbey, *Origin Stories and Other Tales: Mythical Beginnings of Intellectual Property* (working paper on file with the author).

⁴⁷ Cf. *Dastar Corp. v Twentieth Century Fox Film Corp*, 539 U.S. 23, 36 (2003) (“We do not think the Lanham Act requires this search for the source of the Nile and all its tributaries.”).

⁴⁸ On the anonymous source theory, see 1 MCCARTHY, *supra* note 18, at § 3.9.

tions between signifier and signified.⁴⁹ Value describes the horizontal, inter-sign relations among signifiers, signifieds, and signs generally across the system of values, of “reciprocal delimitation[s],”⁵⁰ of “articulations,”⁵¹ that constitute a language system. Whereas signification refers to the positive meaning of the sign, value refers to the negative difference or distinctiveness of the sign as against all other signs. Signification is one-dimensional equivalence; value is n-dimensional difference. To the extent that “differences carry signification,”⁵² value is that by virtue of which signification occurs. Signification, in other words, cannot obtain without value; identity cannot obtain without difference.

Signification would appear to be an easily understood concept. The meaning of signification is ultimately based on the meaning of value, however, and value is probably the most obscure and unstable concept in all of Saussurean semiotics. It is also the most important (and of utmost importance to an understanding of the concept of distinctiveness in modern trademark doctrine). In general terms, value is a consummately structuralist notion. It conceives of identity not as something intrinsic, but rather as something dependent entirely on extrinsic, oppositional relations, that is, on relations of differential value to other identities in a system. “A language is a system of interdependent elements in which the value of any one element depends on the simultaneous coexistence of all the others.”⁵³ Value describes place-value, context, and situation: “Signs function . . . not through their intrinsic value but through their relative position.”⁵⁴ Intersign relations of value are necessary to perfect signification by delimiting it, by placing it within everything that is outside of and different from it: “[W]hatever distinguishes one sign from [another] constitutes it.”⁵⁵ Value is thus not intrinsic to the sign but issues from the values of all other signs. “[E]verywhere and always there is the same complex equilibrium of terms that mutually condition each other.”⁵⁶

⁴⁹ See ROLAND BARTHES, *ELEMENTS OF SEMIOLOGY* 48 (Annette Lavers & Colin Smith trans., 1967) (1964) (noting that “*signification* can be conceived as a process; it is the act which binds the signifier and the signified, an act whose product is the sign”).

⁵⁰ FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 110 (Charles Bally & Albert Sechehaye eds., Roy Harris trans., 1990) (1916) [hereinafter SAUSSURE (Harris)].

⁵¹ SAUSSURE (Baskin), *supra* note 3, at 112.

⁵² SAUSSURE (Harris), *supra* note 50, at 118.

⁵³ *Id.* at 159.

⁵⁴ SAUSSURE (Baskin), *supra* note 3, at 118.

⁵⁵ *Id.* at 121.

⁵⁶ *Id.* at 122.

B. Source distinctiveness and differential distinctiveness

For too long, trademark law has improperly conflated its analysis of the *subject matter* of trademark protection with its analysis of the *scope* of trademark protection. The law has conflated, in other words, its analysis of eligibility with its analysis of strength, as when Judge Friendly, in his highly influential opinion in *Abercrombie & Fitch v Hunting World*,⁵⁷ analyzed at once the mark's "eligibility to trademark status and degree of protection accorded."⁵⁸ The law has made this mistake because it has failed to appreciate the difference between the semiotic relation of signification and the semiotic relation of value. The question of subject matter, of eligibility, is a binary question that considers whether or not a sufficient proportion of relevant consumers perceive a relation of signification between the trademark's signifier and signified. It is a simple matter: a trademark qualifies as protectable subject matter if the trademark's signifier is perceived as distinctive of its signified source and does not if the trademark's signifier is not perceived as distinctive of its signified source. To suggest, as the *Abercrombie* opinion does, that one trademark is "more eligible" for trademark protection than another because it is "more distinctive of source" than another makes no more sense than to suggest that one trademark (say, NIKE) is "more of a trademark" than another (say, ADIDAS). The question of scope, in contrast, is more complicated. It is a continuous question which considers the differential value of the mark, the degree to which it is distinctive, to which it stands out, to which it is salient, as against the multitude of other trademarks in the trademark system. Consumers are more likely to be confused by the appearance of a new mark which is similar to a preexisting mark that is highly distinctive in this manner. Here, it is appropriate to conclude that one trademark (*e.g.*, COKE) may deserve a wider scope of protection than another trademark (*e.g.*, IGOR) because it is stronger and more distinctive as against other marks.

The root of the problem is that trademark doctrine's understanding of semiosis, of the operation of sign systems, fails to recognize the interdependence of signs. It has always given priority to the semiotic relation of signification and considered the semiotic relation of value as an afterthought, if at all. It assumes, in short, that identity precedes difference. This is reflected in the common belief that "distinctiveness" simply refers to source distinctiveness. But a mark's distinctiveness of source is only made possible by its distinctiveness from other marks. Relations of value, that is, facilitate relations of signification. Indeed, relations of value are what make relations of signification possible. There is no identity without difference, no source distinctiveness

⁵⁷ 537 F.2d 4 (2d Cir. 1976).

⁵⁸ *Id.* at 9.

without differential distinctiveness. The binary distinction of kind, between marks which are and are not source distinctive, is properly understood as merely the first in a continuum of distinctions of degree, along which are arrayed marks of more or less differential distinctiveness. Put in terms that any trademark lawyer will understand, if a mark is strong, it is necessarily eligible for trademark protection, but if a mark is eligible for trademark protection, it is not necessarily strong.

Consider the problem of the relation between the concepts of “secondary meaning” and strength. Students of trademark law often question whether there is any difference between these concepts. Though courts and commentary often use the terms interchangeably,⁵⁹ I suggest that there is a difference between them. Secondary meaning goes to the question of eligibility: does the non-inherently distinctive mark possess secondary meaning as a designation of source? But it makes little sense to then ask for purposes of scope analysis, to what *extent* does the mark possess secondary meaning? This is like asking to what extent your name refers to you. Perhaps your name may refer to other people as well, but to determine if this is the case, we must look to the context in which the sign used as your name appears. We must compare the sign to other signs around it, both syntactically and in its “sign field.” We must, in other words, gauge the “value” of the sign to understand the nature of its signification. The analysis of trademark strength is ultimately an analysis of the extent of difference, of distinctiveness *from*, while the analysis of secondary meaning is an analysis of the existence of identity or reference, of distinctiveness *of*. The former analysis necessarily incorporates the latter analysis. Differential distinctiveness necessarily incorporates source distinctiveness.

Consider also the *Abercrombie* spectrum of marks. Empirical evidence suggests that most U.S. courts no longer rely on this regrettable area of trademark doctrine.⁶⁰ The semiotic account encourages us to abandon it entirely. For purposes of determining a trademark’s eligibility for protection, it should not matter whether a mark is fanciful, arbitrary, suggestive, or descriptive. Nor does it necessarily matter whether the mark’s distinctiveness of source is inherent or acquired.⁶¹ All that matters is whether, for a sufficient proportion

⁵⁹ *But see* 2 MCCARTHY, *supra* note 18, at § 11.82 (emphasizing that the terms “secondary meaning” and “strength” are not interchangeable).

⁶⁰ *See* Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 95 CAL. L. REV. 1581, 1634–40 (2006) (reporting that of 331 district court opinions sampled applying the multifactor test for consumer confusion, only 193 or 58% made some use of the *Abercrombie* spectrum).

⁶¹ To be sure, as a policy matter, courts may wish to give a broader scope of protection to marks that are inherently distinctive in order to encourage the adoption of inherently distinctive marks rather than those that are not inherently distinctive. But if

of the relevant consumer population, the mark is or is not distinctive of source. For these consumers, does the relation of signification obtain? If the mark is inherently distinctive, we can rely on an irrefutable presumption that this relation does obtain; if the mark is not inherently distinctive, then the owner must present evidence of the existence of the relation. For purposes of determining the scope of protection, the *Abercrombie* spectrum is also of little help. The question here is not whether the mark is distinctive of source, but to what extent it is distinctive from other marks. *Abercrombie* analyzes the nature of the intramark relation of signification, but our concern here is with the intermark relation of value. A signifier may be fanciful or arbitrarily related to its signified or referent in such a way that consumers perceive the signifier as a designation of source, but this usually tells us little about the degree to which the mark actually stands out from the noise of the marketplace as against other designations of source. More important by far is the degree of the mark's actual acquired distinctiveness in the marketplace, which will, in any event, necessarily incorporate any effect of the mark's inherent distinctiveness. Again, empirical evidence suggests that, in practice, most U.S. courts already recognize this; in their confusion analysis, courts' assessment of a mark's actual strength almost invariably trumps their assessment of a mark's inherent strength.⁶²

C. The infringement of source distinctiveness and the dilution of differential distinctiveness

1. Trademark infringement The semiotic distinction between the relation of signification and the relation of value, and the corresponding legal distinction between source distinctiveness and differential distinctiveness, is recapitulated in the difference between the prohibition against trademark infringement and the prohibition against trademark dilution. The former prohi-

this is the course that they are pursuing, then courts should say so explicitly, perhaps by separating the issue from their assessment of the mark's strength and establishing it as a completely independent factor in the multifactor analysis for the likelihood of confusion. At present, when courts give an added bonus to inherently distinctive marks in their assessment of those marks' strength, they allow policy goals, however worthy, improperly to skew what they otherwise claim to be a strictly empirical assessment of the strength of the mark.

⁶² See *id.* at 1636 (reporting that of twenty-three opinions in which courts found the mark to be inherently weak but commercially strong under the strength factor of the multifactor test for consumer confusion, twenty-two found that the strength factor favored a finding of confusion, and that of the twenty-seven opinions in which courts found the mark to be inherently strong but commercially weak, twenty-four found that the strength factor disfavored a finding of confusion).

bition is a prohibition against interference in the intramark relation of signification between a trademark's signifier and its signified. Notwithstanding its name, trademark infringement is not infringement of a "trademark," if by trademark we mean simply the trademark's perceptible form, its signifier. Rather, trademark infringement is a trespass on goodwill, one which is accomplished by means of a confusingly similar signifier (and referent). The engrafting onto trademark doctrine of the syntax of copyright law has long confused this matter. The mere "reproduction, counterfeit, copy, or colorable imitation" of a trademark's signifier is not in itself trademark infringement,⁶³ nor, in fact, is the mere creation of confusion, mistake, or even deception. These are highly probative tests of whether trademark infringement has occurred, but they are not bases for relief. Copyright law prohibits the infringement of the signifier. Trademark law, in contrast, prohibits the infringement of the signified. Anti-infringement protection ultimately seeks to protect exclusive rights in the idea, not the expression.

To determine whether a defendant has infringed a plaintiff's trademark, a court should thus proceed in two steps. First, the court should determine whether or not the plaintiff's trademark is distinctive of source and thus eligible for trademark protection. Underlying this inquiry is the assumption that if the plaintiff's signifier-referent combination is not itself distinctive of the plaintiff's signified, then no similar signifier-referent combination will also be distinctive of, and thus trespass upon, that signified. The eligibility determination is not difficult to make. An eligible mark is either inherently source distinctive or acquires its source distinctiveness. Either form of distinctiveness will do; neither is privileged. Having determined that the plaintiff's signifier-referent combination is itself distinctive of the plaintiff's signified, the court should then determine whether the defendant's signifier-referent combination is sufficiently similar to the plaintiff's as also to be distinctive of the plaintiff's signified. Here, the court should consider not the source distinctiveness of the plaintiff's mark, but its differential distinctiveness, the distance between it and the nearest, most similar marks, other than the defendant's, in trademark features space. Consumer confusion surveys, as opposed to secondary meaning surveys, test for precisely this form of distinctiveness. Such surveys are essentially tests of comparative similarity. In the absence of reliable survey evidence, the most important factor in estimating the differential distinctiveness of the plaintiff's signifier is its acquired distinctiveness, in other words, its fame, renown, or salience.

⁶³ *Quality Inns Int'l v McDonald's Corp.*, 695 F. Supp. 198, 218 (D. Md. 1988) ("Unlike a copyright, mere reproduction of a trademark is not an infringement.")

2. *Trademark dilution* Dilution is as difficult a concept to understand in trademark law as value is in semiotic thought. This is not surprising. The law's recognition of the phenomenon of dilution is essentially the law's recognition of the semiotic relation of value. While trademark infringement involves the infringement of source distinctiveness, trademark dilution involves the dilution of differential distinctiveness, of a trademark signifier's set of relations of difference with all other signifiers in the trademark system. Antidilution protection entails a commitment to global, systemic, and absolute protection of those relations of difference. As Frank Schechter recognized, it entails a commitment to the "uniqueness" of the mark, to protecting the degree to which the mark is, as Schechter put it, "actually unique and different *from other marks*."⁶⁴

Trademark dilution occurs when, because two signifiers are similar, they lessen each other's differential distinctiveness. (We conventionally say that the junior signifier dilutes the distinctiveness of the senior signifier, though, strictly speaking, dilution occurs as to both signifiers; they are engaged in a zero-sum struggle.) In the typical dilution situation, the plaintiff's and the defendant's signifiers are very near, if not identical, to each other on the signifier dimension, but because their referents are sufficiently different, consumers are not confused as to source, with the result that no infringement action will lie. In this sense, trademark dilution constitutes not a trespass on the plaintiff's signified, but rather a kind of nontrespassory nuisance as to the plaintiff's signifier. The action for trademark dilution is designed to prevent such nuisances and, in doing so, to preserve the differential distinctiveness of the plaintiff's signifier, regardless of to what referent it is affixed. The prohibition against dilution is thus a prohibition against interference in intermark relations of value between the plaintiff's signifier and all other signifiers in the trademark system. If protection from trademark infringement prohibits synonyms (two different signifiers pointing to the same signified), protection from trademark dilution prohibits homonyms (two closely similar signifiers pointing each to its own signified). Antidilution protection ultimately seeks to protect exclusive rights in the expression, not the idea.

The semiotic account asserts, controversially, that dilution is not "blurring." The blurring theory of dilution put forward by the economic account is quite easily understood, which may account for its success as doctrine. Blurring occurs when consumers are aware that similar or identical marks refer to different sources, as in BASS for ale and BASS for leather goods. In such a situation, the link between the signifier BASS and the particular signified to

⁶⁴ Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 831 (1927).

which it refers is blurred by the existence of an alternative link to an alternative signified.⁶⁵ The form of distinctiveness that is blurred is the mark's distinctiveness *of source*. The economic harm thus takes the form of an increase in search costs. As Judge Posner has explained, "[a] trademark seeks to economize on information costs by providing a compact, memorable and unambiguous identifier of a product or service. The economy is less when, because the trademark has other associations, a person seeing it must think for a moment before recognizing it as the mark of the product or service."⁶⁶ Conceived of as it is here as an impairment of the immediacy of the relation of signification between the signifier and the signified, dilution is essentially an inverted theory of trademark infringement. Where anti-infringement protection is a shield that prevents consumer confusion as to source, antiblurring protection is a sword that promotes consumer identification as to source. The blurring theory of dilution seeks to give the consumer better than twenty-twenty vision.

The most significant problem with the blurring theory of dilution is that it fails to comprehend, as a semiotic matter, what antiblurring protection fully entails and thus presents antidilution protection as no less benign than simple anti-infringement protection. Here again, conventional trademark doctrine is semiotically quite naive. The blurring theory of dilution conceives of the trademark as simply the union of a certain signifier with a certain source. In doing so, it isolates the trademark from the trademark system. But to protect relations of signification, one must protect relations of value. Distinctiveness *of source* requires distinctiveness *from other marks*, and while the first form of distinctiveness is by its nature limited to relations within the mark, the second form of distinctiveness is not. Thus, to prevent blurring, the law must preserve the differential distinctiveness of the mark as against all other marks. This means absolute, in gross protection that impacts the whole of the trademark system. Stated differently, blurring is a symptom of dilution, but it is not dilution itself. It is merely one effect of the dilution of the uniqueness of the mark as against all other marks. To prevent blurring, therefore, one must prevent dilution, and to prevent dilution, one must grant the owner of the mark absolute property rights, against the world, in that mark.

IV. The semiotic account of trademark culture

Trademark policy is, among other things, cultural policy. Trademarks utterly

⁶⁵ See Michael Pulos, *A Semiotic Solution to the Propertization Problem of Trademark*, 53 UCLA L. REV. 833, 854 (2006) (discussing dilution as "delay in signification").

⁶⁶ Richard Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 75 (1992).

dominate the lived experience of modern commercial culture. They fill that culture with their particular brand of distinctiveness. This is regrettable. To the extent that trademark law countenances at once the breaking apart of the trademark and the merging together of its various elements, it only facilitates the emptying out of meaning of the most pervasive signs around us and the production of the superficiality of “floating signifiers.” The world in which we live and which constructs us as consumers and citizens is the lesser for it. Lacking the tools to confront them, the economic theory of trademark law is simply dismissive of such concerns. The semiotic account, in contrast, considers such concerns to be of crucial importance. I briefly survey here certain semiotic concepts that may help to clarify the cultural implications of the modern trademark and modern trademark law.

A. *The floating signifier and the hypermark*

Saussure himself would not likely have accepted the proposition, but Saussurean semiotics has since his time explored the possibility that while signification cannot obtain without value, value can nevertheless obtain without signification. From this follows the radical hypothesis that a signifier can be articulated, can achieve form, without being connected to any particular signified. Such an “empty” or “floating signifier” may refer to, or at least imply, a signified, but that signified is so indefinite or contested as to constitute an “empty category.”⁶⁷ In such a situation, a sign “only means that it means.”⁶⁸

The phenomenon of the floating signifier is most readily identifiable in the context of nonrepresentational art and modernist literary texts (or indeed in ideological categories such as race,⁶⁹ democracy,⁷⁰ “1968,”⁷¹ or “post-

⁶⁷ JOHN LECHTE, *FIFTY KEY CONTEMPORARY THINKERS: FROM STRUCTURALISM TO POSTMODERNITY* 64 (1994). See also Graeme B. Dinwoodie, *The Death of Ontology: A Teleological Approach to Trademark Law*, 84 IOWA L. REV. 611, 653 n. 174 (1999) (discussing the strategy of “weak advertising” by which “producers deliberately use ‘weak’ advertising texts that by their openness invite a ‘strong’ reading on the part of the recipient,” and “by which producers hope consumers will project their own positive meanings on to the producer’s goods”).

⁶⁸ ROBERT GOLDMAN & STEPHEN PAPSON, *SIGN WARS: THE CLUTTERED LANDSCAPE OF ADVERTISING* 81 (1996).

⁶⁹ See Videotape: Race, the Floating Signifier (Media Education Foundation 1996).

⁷⁰ See Ernesto Laclau, *Politics and the Limits of Modernity*, in *POSTMODERNISM: A READER* 329, 334–5 (Thomas Docherty ed., 1993) (discussing “democracy” as a floating signifier).

⁷¹ See Terry Eagleton, *12 Great Thinkers of Our Time—Jacques Derrida*, *NEW STATESMAN*, July 14, 2003, at 31, 32 (“Nineteen sixty-eight lives on in a fantasy of the floating signifier, but not as political possibility.”).

modernity”). It is also increasingly identifiable in modern visual culture, particularly in the rapid succession of provocative, obscurely meaningful images that characterizes music video and some motion pictures, and in modern celebrity culture. As Jean Baudrillard has written, the increasingly common condition of Disney-like hyperreality, in which reality itself is constructed of simulations of imagined realities that themselves never existed, is especially conducive to the “floatation” of the signifier and the liberation of value from signification, of difference from identity:

Referential value is annihilated, giving the structural play of value the upper hand. The structural dimension becomes autonomous by excluding the referential dimension, and is instituted upon the death of reference The emancipation of the sign: remove this archaic obligation to designate something and it finally becomes free, indifferent and totally indeterminate, in the structural or combinatory play which succeeds the previous rule of determinate equivalence. . . . The floatation of money and signs, the floatation of needs and ends of production, the floatation of labor itself. . . . the real has died of the shock of value acquiring this fantastic autonomy.⁷²

In a condition of hyperreality, in other words, differences are not built upon designation, upon the equivalence of signifier and signified. There is only distinctiveness *from*, not *of*. This involves more than simply the “bracketing of the referent.” It involves the bracketing of reference altogether, of any intrasign relation among subsign elements.

In theory, trademark law will not tolerate the semiotic condition that Baudrillard describes. The law still insists on reference, on source, however “anonymous.” But in recent decades, there has emerged a truly radical structure of the mark, what might be termed the monadic structure. In such a structure, the trademark signifier has broken free from its moorings in a signified or referent. It signifies still, but signifies nothing. Such hypermarks—and Times Square is filled with them—are not designations of source, but commodified *simulations* of such designations. They are commodified fictions masquerading as trademarks and protected as trademarks. Mass-produced, nonrepresentational canvases of great value, they invest the products, if any, to which they are affixed with pure unarticulated distinctiveness—distinctiveness of nothing, distinctiveness from everything. They represent the total collapse—the “implosion,” Baudrillard might say—of the triadic structure.

B. Sign value

What is the purpose of such marks? Their purpose is to convey “sign value.”

⁷² JEAN BAUDRILLARD, *SYMBOLIC EXCHANGE AND DEATH* 6–7 (Ian Hamilton Grant trans., Sage Publ’ns 1993).

The concept of “sign value” is distinct from but based upon the Saussurean concept of “value.” In everyday speech, the term “sign value” is typically used to refer to the capacity of status goods to signal high status, their “expression and mark of style, prestige, luxury, power, and so on.”⁷³ Thus, it is said that the BMW has sign value and the DODGE does not. This definition of sign value descends from our notions of use value and exchange value, both of which draw upon essentially utilitarian conceptions of the term “value” (“worth in usefulness or importance to the possessor”⁷⁴ or “[m]onetary or material worth”⁷⁵), rather than upon, say, a painterly conception of “value” (“the relative darkness or lightness of a color,” “the relation of one part or detail in a picture to another with respect to lightness and darkness”⁷⁶). In this utilitarian sense, sign value is understood as a special form of use value—a commodity may have various use values, one of which may be that it signals high status.

This is not the definition of sign value that I want to apply to trademark doctrine, where it will yield few nonobvious insights. Rather, I want to establish here the concept’s more technical meaning, particularly as it is set forth in the early work of Jean Baudrillard. To develop the concept of sign value, Baudrillard works not from the classical economic notions of use value and exchange value, but from the linguistic, Saussurean notion of value, that is, value as relational difference. In Baudrillard’s social-semiotic theory, sign value describes a commodity’s differential value as against all other commodities, and thus the commodity’s capacity to differentiate its consumer. Sign value does not necessarily involve the conspicuous display of prestige or wealth or of scarce positional goods. Rather, it involves something more essential: the conspicuous display of distinctions, of “marginal differences.”⁷⁷ Sign value is Saussurean structural value made explicit, signaled, displayed. It is formal, differential value performed. It is the abstract essence of what Justice Frankfurter called a trademark’s “commercial magnetism,”⁷⁸ and it is exactly what Frank Schechter had in mind when he spoke of the need to

⁷³ Douglas Kellner, *Introduction: Jean Baudrillard in the Fin-de-Millennium*, in BAUDRILLARD: A CRITICAL READER 4 (Douglas Kellner ed., 1994).

⁷⁴ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1972 (3d ed. 1992).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See JEAN BAUDRILLARD, THE CONSUMER SOCIETY: MYTHS AND STRUCTURES 90 (Chris Turner trans., Sage Publ’ns 1998) (1970) [hereinafter BAUDRILLARD, CONSUMER SOCIETY].

⁷⁸ *Mishawaka Rubber & Woolen Mfg. Co. v S.S. Kresge Co.*, 316 U.S. 203, 205 (1942).

protect the mark's "arresting uniqueness,"⁷⁹ its "singularity"⁸⁰ and "identity."⁸¹ To be sure, connotations of prestige may and often do issue from difference, but such connotations are merely an effect of sign value; they are not sign value itself. Such connotations merely give content to the differential form.

Placing this in more concrete terms, it is marketing orthodoxy that a trademark's most important quality is not the "esteem" in which it is held by consumers or its "relevance" to the lives of consumers, nor is it the "knowledge" consumers have of what the mark stands for. Rather, strong brands are characterized above all by "differentiation."⁸² Distinction is their lifeblood and arguably the primary characteristic they offer for consumption. As Schechter recognized, it is their distinction that generates "selling power." This is the lesson of *BusinessWeek*⁸³ as much as it is of Baudrillard.⁸⁴

C. Sign value and consumer culture

In a modern industrialized mass society, particularly a wealthy one, perhaps the most pressing scarcity that the individual faces is the scarcity of distinction—distinction not in the sense of prestige, but in the sense simply of difference that conduces to identity. Trademarks provide this difference and they do so through their sign value. It has long been a cliché, of social theory as much as of advertising practice, that consumers communicate with each other by the objects they consume. Of late, however, commodity culture has begun to unburden itself of the object language of material commodities. The trademark system has developed as an alternative language of consumption, and its development has been rapid indeed. No other language in history, and certainly no other language of distinction, has experienced such explosive growth, both extensively and intensively, in so short a time. The trademark system's classificatory scheme now orders culture as much as the market—and, in doing so, evidences the degree to which the two fields have merged. To be sure, it is not the only such classificatory system, but none exercises its classifying function so exoterically, in terms so easily and widely understood. Where other systems of distinction are opaque, even unknowable except to those whom they privilege, the power of the trademark scheme resides in its emphatic transparency.

⁷⁹ Schechter, *supra* note 64, at 830.

⁸⁰ *Id.* at 831.

⁸¹ *Id.* at 827.

⁸² See DAVID A. AAKER, BUILDING STRONG BRANDS 304 (1996).

⁸³ See Gerry Khermouch, *The Best Global Brands*, BUS. WK., Aug. 6, 2001, at 50.

⁸⁴ See BAUDRILLARD, CONSUMER SOCIETY, *supra* note 77, at 88 (discussing "the industrial production of differences").

While the semiotic analysis—or the economic analysis, for that matter—may go far towards explaining how the trademark system has evolved as it has, it will not ultimately explain why. Underlying the semiotic logic of the trademark system and of trademark law is a more profound logic, what Baudrillard has termed the “social logic of differentiation.”⁸⁵ This logic meets “an objective social demand for signs and differences,”⁸⁶ for “the distinguishing processes of class or caste which are fundamental to the social structure and are given free rein in ‘democratic’ society.”⁸⁷ The trademark system is ultimately both an agent and an object of “classification struggle”:⁸⁸ an agent in its own struggle to establish itself as the preeminent system of classification, and an object in the struggle by producers and consumers within the trademark system to bend its classificatory scheme to their own economic or cultural ends. The culture industries—and what industries aren’t?—have long sold trademarks as commodities in their own right. Entire areas of trademark doctrine cannot be understood except as systems of rules designed to facilitate the commodification—indeed, the “industrial production”⁸⁹—of social distinction.

V. Conclusion

For all of our efforts to reform trademark law, it is unlikely that any reform of the law itself will alter its underlying social logic. Perhaps we can fortify the defense of fair use or expand the functionality bar to protection. Perhaps we can persuade courts that consumers do not so easily confuse two similar, but not identical marks and thus bring about a limiting of the scope of anti-infringement protection. Perhaps we can somehow even cabin the notion of trademark dilution. But none of these reforms will stem the cultural, “semiur-gic” tide. More likely, the further rationalization of the law will only quicken it. Consumers will continue to demand signs, distinctions, differences. As presently conceived, the goal of trademark law is to meet that demand as efficiently as possible. Whether we can conceive of a different goal for trademark law remains an open question. This is not a question of law or economics, however, but ultimately one of aesthetics and politics.⁹⁰

⁸⁵ See *id.* at 74.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* 479–81 (1984).

⁸⁹ See BAUDRILLARD, *CONSUMER SOCIETY*, *supra* note 77, at 88.

⁹⁰ See, e.g., Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. L. REV. 489 (2006); Llewellyn Joseph Gibbons, *Semiotics of the Scandalous and the Immoral and the Disparaging: Section 2(A) Trademark Law After Lawrence v. Texas*, 9 MARQ. INTELL. PROP. L. REV.