ARTICLES

Trademark Law Pluralism

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In recent years, trademark scholars have come to recognize that the supply of words, sounds, and symbols available to designate new goods and services is an exhaustible resource. In certain sectors, the most common English words and syllables and the most common U.S. surnames are almost all claimed as marks. Some firms have responded by resorting to ever-more-unusual brand names so as to avoid trademark disputes. Scholars have proposed solutions ranging from raising registration fees to narrowing the scope of trademark rights.

In this Article, we frame trademark law's governance of "linguistic space" as a balancing act between what we term proximity costs and distance costs. Proximity costs, the conventional focus of trademark doctrine, occur when different firms use marks that are close in linguistic space—think Zantac (for heartburn) versus Xanax (for anxiety). Distance costs arise when firms use marks that are difficult to remember because of their length or their far remove from the core of semantic signifiers familiar to most consumers—staying in the medicine cabinet, think Valsartan (for high blood pressure) or Namzaric (for memory loss). Although conceptually different, proximity costs and distance costs both create similar practical problems. Both make it more difficult for consumers to purchase and communicate about brands, and both make it harder for new entrants to establish and defend their market share.

Our proximity-distance framing has conceptual payoffs for trademark law. We explain why responses to the crowding of linguistic space internal to trademark law cannot escape some tradeoff between proximity costs and distance costs. Allowing mark holders to control a larger swath of linguistic space reduces proximity costs, but at the expense of pushing other firms to the periphery of linguistic space, increasing distance costs. Similarly, weakening trademark protection to allow more firms to locate their marks in the linguistic core reduces distance costs, but with some increase in proximity costs. Our framing thus shows how the policy problems of trademark law parallel the challenges of managing scarcity in real property. As we draw inspiration from solutions to urban congestion and sprawl, we suggest how non-trademark interventions can lead to more efficient use of linguistic space, promoting

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product identification without raising proximity or distance costs. Our approach thus points to the possibility of using a plurality of legal and policy tools to address the proximity-distance dilemma at trademark law's heart. And by relieving some of the pressure on trademark law to resolve the proximity-distance dilemma on its own, our approach frees trademark law to pursue a wider range of goals and to vindicate a broader variety of values.

INTRODUCTION

Scholars and judges of trademark law have come to recognize in recent years that the pool of words, sounds, and symbols that are readily available to signify new goods and services is not unlimited. As Professors Barton Beebe and Jeanne Fromer demonstrate in an impressive empirical study, the supply of frequently used English words, pronounceable neologisms, and common U.S surnames available for trademark registration is dwindling.[1] Earlier arrivals already have devoured the most memorable marks, leaving slim pickings for latecomers. The resulting pressure is pushing trademarks into regions once considered part of the "linguistic commons"—most recently, in a 2020 Supreme Court decision that a generic name with ".com" appended to it, like "Booking.com," was potentially eligible for federal trademark registration.[2] This pressure is also causing firms to select

[1] Barton Beebe & Jeanne C. Fromer, *Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion*, 131 HARV. L. REV. 945, 951 (2018); *see also* 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:85 (5th ed. 2017).

[2] U.S. Pat. & Trademark Off. v. Booking.com B.V., 140 S. Ct. 2298, 2301 (2020). In dissent, Justice Stephen Breyer criticized the majority for allowing trademarks to encroach upon the "linguistic commons." *Id.* at 2309 (Breyer, J., dissenting). For earlier uses of that phrase, see, for example, *America Online, Inc. v. AT&T Corp.*, 243 F.3d 812, 821

marks in the farther reaches of linguistic space—for example, "Nanamica" for a fashion brand instead of, say, "Old Navy."[3]

This crowding of linguistic space potentially imposes what this Article terms "proximity costs" and "distance costs" on society. Proximity costs are all the social costs that arise when different firms use similar marks for similar products—the focus of trademark law's familiar "likelihood of confusion" analysis.[4] Consider, for example, the costs of confusing GlaxoSmithKline's heartburn medication Zantac with Pfizer's anxiety treatment Xanax.[5] Distance costs, on the other hand, occur when firms use newfangled or non-English names that consumers struggle to recognize and recall. Trademark law has yet to develop a framework for evaluating distance costs, but the congestion and depletion highlighted by Beebe and Fromer are concerning only to the extent that less memorable signifiers impose real burdens on consumers and firms.[6] Consider, for example, Valsartan, a drug for high blood

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(4th Cir. 2001); Jason K. Levine, *Contesting the Incontestable: Reforming Trademark's Descriptive Mark Protection Scheme*, 41 GONZ. L. REV. 29, 48 (2005); Lisa P. Ramsey, *Descriptive Trademarks and the First Amendment*, 70 TENN. L. REV. 1095, 1099 (2003); and Steven Wilf, *Who Authors Trademarks?*, 17 CARDOZO ARTS & ENT. L.J. 1, 36 (1999). *See also* Graeme B. Dinwoodie, *The Death of Ontology: A Teleological Approach to Trademark Law*, 84 IOWA L. REV. 611, 633 (1999) ("lexical commons"). While we use the term "linguistic commons" to align with the bulk of prior scholarship characterizing the supply of trademarks in spatial terms, we emphasize that products can be described by marks that are neither words nor sounds. *See* Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 162 (1995) (noting that the Lanham Act permits registration of "any word, name, symbol, or device," and that "human beings might use as a 'symbol' or 'device' almost anything at all that is capable of carrying meaning," including a color (quoting 15 U.S.C. § 1127)); *see also, e.g.*, The mark comprises a stylized design of an ankh-like symbol, Registration No. 1,822,461 (service mark registered by The Artist Formerly Known as Prince).

3 The founder of Nanamica initially sought, unsuccessfully, to register "Seven Seas." That led him to *nanamika*—Japanese for "houses of seven seas"—and ultimately to "Nanamica." According to a recent article on naming practices in the fashion industry, the name Nanamica "confused even Japanese shoppers," but the "word's exclusivity" has allowed him to register the trademark, URL, and Instagram handle @nanamica. Jacob Gallagher, *Why Fashion Brands Today Have Such Strange Names*, WALL ST. J. (Jan. 13, 2020), https://www.wsj.com/articles/why-fashion-brands-today-have-such-strange-names-11578934264.

4 *See* 4 MCCARTHY, *supra* note 1, § 23:1.

5 *See* Theresa Brown, *One Drug, Two Names, Many Problems*, N.Y. TIMES: OPINIONATOR (Nov. 30, 2013), https://perma.cc/2M9N-ZCM4.

6 For some of the costs imposed on both firms and consumers when trademark depletion forces firms to adopt more distant marks, see Beebe & Fromer, *supra* note 1, at 1021–28. The closest doctrinal concept for a mark's distance in linguistic space is its "inherent distinctiveness," although this is an imperfect proxy for cognitive distance. *See infra* notes 71–74 and accompanying text. For discussions of the tradeoffs firms face in choosing a descriptive mark that is more likely to be confused with nearby brands versus a more distinctive mark that requires greater communicative effort, see Laura A. Heymann,

pressure, or Namzaric, which (ironically) is used to treat memory loss. If those two names don't seem so difficult to keep in mind, wait until the end of this Introduction and see if you still can recall—and spell—both.

Conceptually, proximity costs and distance costs are quite different. Proximity costs arise when the names of similar products are too close to each other in linguistic space; distance costs occur when product names are too long or far from the core of semantic signifiers familiar to ordinary consumers. Practically, however, proximity costs and distance costs may be nearly identical in their consequences. Whether it is because the patient confuses Zantac and Xanax or because the patient cannot conjure up the name Valsartan or Namzaric from the recesses of her memory, the result is that the patient cannot communicate as effectively with her physician, pharmacist, and others about her medication.

The social costs of proximity and distance do not affect only consumers. For firms entering a new market, proximity costs and distance costs likewise have similar practical effects. An upstart microbrewery may choose a beer name proximate to market incumbents—in the same linguistic region, say, as Hopalicious, Hoptastic, Hopscotch, and the like. Or it may follow the path of Jester King Brewery in Austin, Texas, some of whose beer names—"Gotlandsdricka," "Örter i Mörker," "分 桃"[7]—baffle all but the most polyglottic of drinkers. Whether because consumers confuse the firm's mark with marks of competitors or because consumers simply cannot remember the name of the firm's product, a new entrant may face difficulty establishing, growing, and defending market share.[8]

To facilitate product identification and differentiation,[9] trademark law seeks to strike a balance between proximity costs

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Naming, Identity, and Trademark Law, 86 IND. L.J. 381, 389 (2011); Jake Linford, *The False Dichotomy Between Suggestive and Descriptive Trademarks*, 76 OHIO ST. L.J. 1367, 1419–20 (2015).

7 *See Jester King Brewery*, BEERADVOCATE, https://perma.cc/6LK9-EGDU.

8 Further research is needed to document how entry costs are affected by the crowding of linguistic space. *See* Lisa Larrimore Ouellette, Response, *Does Running Out of (Some) Trademarks Matter?*, 131 HARV. L. REV. F. 116, 120–21 (2018).

9 *See* Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1695 (1999) ("We give protection to trademarks for one basic reason: to enable the public to identify easily a particular product from a particular source."). The view that trademark law exists to "mak[e] products and producers easier to identify in the marketplace" (and thereby to encourage investments in product quality) had become so

and distance costs, although the balance is not conventionally framed in these terms. Stronger trademark protection allows mark holders to occupy a larger swath of linguistic space, thus reducing proximity costs. But a law that allows a mark holder to claim a larger swath of desirable linguistic space for herself necessarily pushes other firms to the periphery. Symmetrically, weakening trademark protection—allowing more firms to use marks that are linguistically similar to the marks held by incumbents—reduces distance costs by allowing more firms to locate their marks closer to the core of words and phrases with which consumers are familiar. But the flip side of a reduction in distance costs is at least some increase in proximity costs—more firms using similar marks that confuse consumers through their linguistic overlap.

To be sure, proximity and distance costs do not always arise when firms use marks that are linguistically close to one another or far from the core of words, sounds, and symbols to which consumers have grown accustomed. On the proximity side, Chinese restaurants across the United States name themselves "Golden Dragon" or "Hunan Garden"—not to distinguish themselves or to mislead consumers into believing that they are under common ownership but to signal that they offer up a particular cuisine and experience familiar to U.S. diners.[10] And on the distance side, Jester King Brewery calls its aged wild ale "分 桃" (*fēn táo*, or "the shared peach") not because it could not find an easier-to-remember name, but precisely because it wanted a name that could communicate a specific message to a subset of its drinkers.[11] But in many

dominant in trademark law doctrine and scholarship by the beginning of the twenty-first century that Beebe would write: "No alternative account of trademark doctrine currently exists." Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 623–24 (2004). Professor Mark McKenna—while acknowledging that the consumer-confusion rationale for trademark law is "rampant in the literature" and "widely embraced by courts"—has argued that, historically, trademark law instead focused on protecting *producers* from unfair competition by conferring on them a property right. Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1841, 1845–46 (2007). For a third normative framework developing and applying a theory of trademark law rooted in contractualist moral philosophy, see Jeremy N. Sheff, *Marks, Morals, and Markets*, 65 STAN. L. REV. 761, 797–801 (2013).

[10] On the overlap of Chinese restaurant names, see Roberto A. Ferdman & Christopher Ingraham, *We Analyzed the Names of Almost Every Chinese Restaurant in America. This Is What We Learned*, WASH. POST (Apr. 8, 2016), https://perma.cc/K8RC-Z4EQ.

[11] Jester King's in-house artist, Josh Cockrell, explains that the phrase *fen tao* 分 桃 has become "a Chinese byword for homosexuality, born out of a time, prior to Western influence, when homosexuality was accepted as a normal facet of life." The label is intended to serve as "allied encouragement" and a representation of support for the LGBTQ

other cases, proximity and distance impose real social costs. For example, confusion over pharmaceutical names has been estimated to account for thousands of medication errors each year.[12]

Understanding trademark law's balancing act between proximity and distance yields important conceptual payoffs for the field. For one, it highlights the commonalities between this branch of intellectual property law and a much older body of real property and land use law. To be sure, linguistic space—unlike land—is theoretically infinite. With twenty-six English letters and ten Arabic numerals to work with, we quickly get to more than 2.8 trillion possible eight-character combinations, or more than 360 possible product names per living human being on the planet. There is no particular reason, moreover, to limit to eight-character combinations or to English letters and Arabic numerals—longer character strings, other alphabets, symbols, capitalization distinctions, etc., can further expand trademark law's domain. But on longer reflection, the theoretical infinitude of linguistic space is not so dissimilar to land. Nearly 97% of the United States is rural;[13] open space is not, in itself, scarce. Quarter-acre lots close to Midtown Manhattan or the Financial District of San Francisco are, however, quite scarce—and therefore quite costly. In much the same way, while open marks are plentiful, open marks *close to the linguistic core but still spaced out from one another* are scarce. The fact that "Y9scD4nQ" remains unclaimed does little for the pharmaceutical firm searching for a name for a new drug or for the brewery seeking a memorable moniker for its summer pale ale.[14]

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community. *Introducing Jester King 分桃 (Pronounced Fēn Táo)*, FULL PINT (Aug. 27, 2014), https://perma.cc/SK2Q-BJU7.

12 *See* INST. OF MED., PREVENTING MEDICATION ERRORS 275 (Philip Aspden et al. eds., 2007).

13 *See* U.S. CENSUS BUREAU, PERCENT URBAN AND RURAL IN 2010 BY STATE, https://www2.census.gov/geo/docs/reference/ua/PctUrbanRural_State.xls (last updated Dec. 2, 2019).

14 Note also that, like in linguistic space, proximity and distance in physical space are not always *costly*. The burgeoning subfield of "agglomeration economics" emphasizes "the benefits that come when firms and people locate near one another together in cities and industrial clusters." *See* Edward L. Glaeser, *Introduction*, *in* AGGLOMERATION ECONOMICS 1, 1 (Edward L. Glaeser ed., 2010). So too with distance: the virtues of solitude have been celebrated across the centuries. *See, e.g.*, HENRY DAVID THOREAU, *Walden*, *in* WALDEN AND OTHER WRITINGS 1, 1 (Brooks Atkinson ed., 1992) (1854). Naming conventions among Chinese restaurants in the United States might be understood as the linguistic correlate to an agglomeration economy. *See supra* note 10 and accompanying text. And Jester King Brewery, by choosing linguistically distant marks for its beers, is arguably doing something analogous to firms that commodify geographic remoteness. *See, e.g.*,

Linguistic space, in addition to its theoretical infinitude, is also many-faceted. Proximity and distance can denote similarities and differences of spelling or sound or shape or color. And they can refer to similarities and dissimilarities of marks alone or of mark-product combinations. Trademark law does not protect marks in the abstract; it protects them as signifiers for particular products or services, such that use of the same mark for different product categories is often permissible.[15] "Apple Corps," the record company owned by the Beatles, and "Apple," the computer company, have orthographically and phonetically similar marks, but they refer to different mark-product combinations—or, at least, they did before the computer company Apple entered the music business.[16] Here, too, one can draw analogies to real property and land use. Real property and land use law are about more than surface area—parties assert conflicting claims with respect to underground and overhead rights, noise pollution, smells, sightlines, and more. Linguistic space is similarly multidimensional and multisensory—a fact that leads to new possibilities for mark differentiation as well as mark overlap.

Not only does our proximity-distance framing shed light on commonalities between trademark law and other areas of law, but it also underscores conflicts within trademark law. Proposed reforms internal to trademark law often involve a balancing act between proximity costs on the one side and distance costs on the other. This balancing act does not mean that there are no gains to be had within trademark law. It does, though, motivate a search for alternatives that can transcend the proximity-distance tradeoff.

Consider proposals to impose stricter geographic limits on trademark protection. Beebe and Fromer note that eliminating nationwide priority for registered marks would mitigate the problem with "running out of trademarks,"[17] and earlier, Professor

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Elaine Glusac, *The New Escapism: Isolationist Travel*, N.Y. TIMES (June 24, 2020), https://perma.cc/X3TF-C26Y.

15 *See* 15 U.S.C. § 1051(a)(2) (requiring registrations to specify "the goods in connection with which the mark is used"); Therma-Scan, Inc. v. Thermoscan, Inc., 295 F.3d 623, 632 (6th Cir. 2002) ("[I]f the goods or services are totally unrelated, confusion is unlikely." (quoting Daddy's Junky Music Stores, Inc. v. Big Daddy's Fam. Music Ctr., 109 F.3d 275, 282 (6th Cir. 1997))).

16 On the Apple versus Apple dispute, see generally *Apple Corps Ltd. v. Apple Computer, Inc.* [2006] EWHC (Ch) 996, [2006] Info. TLR 9 (Eng.).

17 Beebe & Fromer, *supra* note 1, at 1037. They conclude, however, that this reform "is unlikely to result in net benefits to the trademark system." *Id.*

Stephen Carter advocated for a regional registration system for similar reasons.[18] Geographic limits—e.g., restricting the scope of a microbrewery's trademark rights to a single state or region—reduce distance costs in other states and regions, because far-flung microbreweries now face a larger menu of memorable and pronounceable mark options. Starting a brewery in Texas? Under a regional system, the mark "Hopalicious"—currently registered by the Ale Asylum brewery in Madison, Wisconsin—might be available. But when the Wisconsin-based brewery controls the rights to the mark "Hopalicious" only in the Upper Midwest, consumers who travel from Wisconsin to Texas and see a Hopalicious beer from another brewery may confuse the Texas version with the Ale Asylum original. Proximity costs rise when distance costs fall.

Or consider proposals to prune marks from the federal trademark registry that have fallen into disuse, or that were never used in the first place.[19] For example, a brewery in Maryland sought to register the mark "Hopallelujah" in 2015[20] but appears to have never marketed a beer under that name. Pruning "Hopallelujah" from the registry would enable another brewery to register that mark instead of something less memorable. In that respect, pruning reduces distance costs. But opening up "Hopallelujah" for registration also raises proximity costs in light of the similarity between "Hopallelujah" and "Hopalicious." In this case, the potential for a mix-up is not so strong as to amount to a likelihood of confusion by trademark law's lights, but it is probably greater than zero.[21]

Again, the analogy to land use is apparent. Stricter zoning laws reduce proximity costs at the center of cities but increase distance costs by forcing more households and enterprises to relocate to suburbs and exurbs. Urban growth boundaries, by contrast, alleviate the problem of sprawl but raise the costs of overlapping and sometimes-incompatible uses of space near the urban

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18 Stephen L. Carter, *The Trouble with Trademark*, 99 YALE L.J. 759, 796–98 (1990).

19 *See, e.g.*, Beebe & Fromer, *supra* note 1, at 1033–35; Rebecca Tushnet, *Registering Disagreement: Registration in Modern American Trademark Law*, 130 HARV. L. REV. 867, 918 (2017); *Counterfeits and Cluttering: Emerging Threats to the Integrity of the Trademark System and the Impact on American Consumers and Businesses: Hearing Before the Subcomm. on Cts., Intell. Prop. & the Internet of the H. Comm. on the Judiciary*, 116th Cong. 18–22 (2019) (statement of Barton Beebe and Jeanne Fromer, Professors, New York University School of Law).

20 U.S. Trademark Application Serial No. 86/636,072 (filed May 20, 2015).

21 The applicant, DuClaw Brewery, LLC, abandoned the mark prior to registration in December 2016. *Id.*, Notice of Abandonment (Dec. 5, 2016).

core. Proximity costs—the costs of confusion between similar marks—are the linguistic correlate to urban congestion. Distance costs—the costs of remembering newfangled, non-English, and other hard-to-recall marks—are the linguistic correlate to long suburb-to-city commutes. Trademarks that are easier to obtain or broader in scope create the linguistic version of San Francisco: a heavily zoned city where limits on residential space have pushed residents into California's Central Valley. Weaker trademark protection is the linguistic version of Seoul, South Korea, the densest city in a high-income country, with twice as many people packed into each square mile as New York.[22]

Like land use law, trademark law must also evaluate when valuable rights should be held in common. One way to increase the supply of quarter-acre lots in Manhattan would be to sell off Central Park, which would produce around three thousand new lots. But New York City planners have (sensibly) determined that this land generates greater social value as green space open to the nearly ten million unique visitors the park receives each year.[23] Similarly, trademark law prevents breweries from claiming property rights in the very heart of beer-related linguistic space, including terms like "beer" or "lager" and product features like particular flavors. These signifiers are part of the linguistic commons, the trademark public domain that is free for any brewery to use.[24] But courts are often asked to grapple with the issue of how far outward from the center of linguistic space this commons should stretch. The proximity-distance framing does not resolve these sorts of cases, but it clarifies the stakes.

Consider again the Supreme Court's recent decision regarding the eligibility of "Booking.com" for trademark registration.[25] In general, generic terms are part of the public domain—one cannot claim exclusive trademark rights to "apple" for selling apples, or "booking" for travel reservation services, because of the limits such rights would place on competition and free expression.[26] In

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[22] *See* Dana Schulz, *Maps Compare NYC's Footprint to Other Cities Around the World*, 6SQFT (Apr. 24, 2015), https://perma.cc/M6SQ-BAEV.

[23] *See* CENT. PARK CONSERVANCY, REPORT ON THE PUBLIC USE OF CENTRAL PARK tbl.7A.1 (2011).

[24] On the protection of this commons through trademark law and First Amendment law, see generally Lisa P. Ramsey, *Free Speech Challenges to Trademark Law After* Matal v. Tam, 56 HOUS. L. REV. 401 (2018).

[25] *Booking.com*, 140 S. Ct. 2298; *see also supra* note 2 and accompanying text.

[26] *See* Ramsey, *supra* note 2, at 1098–99.

United States Patent & Trademark Office v. Booking.com,[27] however, the Supreme Court held that the combination of a generic term with ".com"—as in "Booking.com"—can be registered and protected under federal trademark law.[28] Though the opinions did not use the terms "proximity" and "distance," the issue in the case is difficult to understand without consideration of both concepts.

The primary reason for allowing Booking.com to register its mark is to reduce proximity costs arising from other firms using close variants. The primary reason for *not* allowing Booking.com to register its mark is because of the distance costs that registration might generate for others. As Justice Stephen Breyer noted in his dissent, names like Booking.com are "easy to remember."[29] If other firms cannot use names like "eBooking.com" for travel sites, then they may be pushed further out into the linguistic periphery, making it more difficult for them to compete.[30] Justice Breyer's suggested solution was to keep these "generic.com" names within the public domain, effectively available for anyone to use without trademark law limiting them.[31] Whether or not he is right, the tension that Justice Breyer sees between proximity and distance costs is the same tradeoff that underlies many disputes about trademark registrability and the scope of mark holders' rights.[32]

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27 140 S. Ct. 2298 (2020).

28 *Id.* at 2308.

29 *Id.* at 2314 (Breyer, J., dissenting).

30 *See id.* at 2314–15.

31 *See id.* at 2311–12. Justice Breyer allowed for the possibility of a different rule involving new domain names like ".guru," ".club," and ".vip," as well as "rare cases where the top-level domain interacts with the generic second-level domain in such a way as to produce meaning distinct from that of the terms taken individually." *Id.* An example of the last category could be "tennis.net." *Id.* at 2305 n.4 (majority opinion).

32 Registration does not necessarily mean that Booking.com would win an infringement case against eBooking.com—such an infringement case would depend on whether Booking.com is viewed as creating a broad enough scope of protection that there is a likelihood of confusion with eBooking.com. On the benefits and limits of registration, see Tushnet, *supra* note 19, at 899–906. As Justice Breyer notes, the advantages of registration in actions against users of similar marks helps to explain Booking.com's rationale for seeking registration in the first place:

> Indeed, why would a firm want to register its domain name as a trademark unless it wished to extend its area of exclusivity beyond the domain name itself? The domain name system, after all, already ensures that competitors cannot appropriate a business's actual domain name. And unfair-competition law will often separately protect businesses from passing off and false advertising.

Booking.com, 140 S. Ct. at 2315 (Breyer, J., dissenting).

None of this is to suggest that trademark law reform (or zoning reform) is a fool's errand. Some configurations of rights will strike *better* balances between proximity costs and distance costs than others, and some reforms will reduce proximity costs much more than they increase distance costs, or vice versa. Moreover, there is wide room for welfare-enhancing reforms that address a range of problems plaguing the larger trademark system, including high litigation costs and anticompetitive practices. Professor Rebecca Tushnet's proposal for a "[s]ubstantive [t]urn" in trademark registration—whereby the U.S. Patent and Trademark Office (USPTO) would resolve more questions at the registration stage and leave less for courts to sort out—is one prominent and promising example.[33] Just as land registry laws can rationalize the world of real property,[34] trademark registration reforms can serve to order linguistic space. Land registries do not change the amount of space at the center of the city, nor do they cut commute times to the suburbs. But they do reduce the costs of resolving competing claims and the costs of uncertainty over ownership.[35]

This Article introduces the proximity-distance balance as a new framework for evaluating various trademark law reforms. It also—and more ambitiously—seeks to transcend the tension between proximity and distance costs by looking beyond trademark law for solutions to linguistic congestion. Our conclusions are both pessimistic and optimistic. We are pessimistic concerning the capacity of trademark law to efficiently govern the increasing crowding of linguistic space on its own. We are optimistic about the ability of nontrademark interventions to promote product identification without raising proximity costs or distance costs.

We focus here on three general categories of responses to the crowding of linguistic space. First, we consider whether the "market" can solve the problems of proximity and distance on its own—much like Professor Ronald Coase suggested that market transactions could reduce the social costs arising from incompatible uses of land.[36] We place "market" inside quotation marks because

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[33] *See* Tushnet, *supra* note 19, at 932–40.

[34] *See generally* Benito Arruñada & Nuno Garoupa, *The Choice of Titling System in Land*, 48 J.L. & ECON. 709 (2005) (emphasizing the benefits associated with land registration laws).

[35] For a famous argument regarding the importance of land titling, see HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 231–35 (2000).

[36] *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2–8 (1960).

the ability of the private sector to address proximity and distance costs is highly dependent on the state. A second set of strategies seeks to reduce the cognitive costs of proximity and distance. The land use analogy for proximity is to streetcars and buses, which alleviate congestion in the city center, and for distance is to bullet trains and eight-lane highways, which make it easier for individuals to travel over land between the center and the periphery. A third category of responses reaches beyond plain language for alternative systems of product identification. The land use analogy is to Boston's Big Dig—which created a network of underground arteries that effectively adds a third dimension to the metropolis.

The payoffs from our project are both practical and theoretical. On a practical level, we identify a number of interventions that we think governments should seriously consider and other policies that our analysis casts in a new light. Our analysis of strategies to reduce the cognitive costs of distance also offers a fresh perspective on policies related to advertising, including the historically favorable federal tax treatment of advertising expenditures. And we bring new attention to third-dimension strategies—such as the privately managed Universal Product Code (UPC) system and the government-generated National Drug Code (NDC) system—that have largely lain outside the purview of trademark law scholarship until now. We explain how these third-dimension approaches—the linguistic correlate to Boston's Big Dig—can alleviate some of trademark law's tensions, and we articulate whether, when, why, and how public law ought to intervene in the operation of these systems.

On the theoretical plane, our aim is somewhat different. Scholars of intellectual property regimes other than trademark—namely, patent and copyright—have come to recognize that intellectual property is only one among a number of tools that can be used to address the problems with which these regimes contend.[37] Prizes, grants, intramural agency research, and tax

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[37] *See, e.g.*, Michael Abramowicz, *Prize and Reward Alternatives to Intellectual Property*, *in* 2 RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW 350, 353 (Ben Depoorter et al. eds., 2019); Daniel J. Hemel & Lisa Larrimore Ouellette, *Innovation Policy Pluralism*, 128 YALE L.J. 544, 593–612 (2019) [hereinafter Hemel & Ouellette, *Innovation Policy Pluralism*]; Daniel J. Hemel & Lisa Larrimore Ouellette, *Beyond the Patents–Prizes Debate*, 92 TEX. L. REV. 303, 326–67 (2013); Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970, 1006–21 (2012); Ted Sichelman, *Patents, Prizes, and Property*, 30 HARV. J.L. & TECH. 279, 294–97 (2017).

credits can incentivize innovation and creativity without giving rise to monopoly power over knowledge goods. We and other scholars have sought to reimagine patent and copyright as elements of—but not the entirety of—innovation policy and to redefine the scholarly endeavor around the problem (producing and allocating knowledge goods) rather than a particular and partial solution (patent or copyright). Our objective here is to begin to do the same for trademark: to recast trademark law as one institution that mediates conflicts in linguistic space, but not the only such institution, and thus to open the door to comparative institutional analysis and a wider range of potential policy solutions.

Part I describes proximity costs and distance costs in more detail and explains why reforms internal to trademark law cannot escape the proximity-distance tradeoff: any decrease in proximity costs will cause at least some increase in distance costs, and vice versa. Part II describes three approaches to the management of linguistic space that seek to transcend the proximity-distance conflict: relying on the market to make more efficient use of existing linguistic space, reducing the cognitive costs of proximity and distance for consumers, and creating alternatives to plain language for identifying products and services. Finally, Part III considers how a more pluralistic approach illuminates new possibilities for legal reform in this area. Trademark law is not the only way to address consumer confusion in the marketplace, and consumer confusion is only one of many problems that trademark law potentially addresses. A pluralistic perspective allows us to identify instances in which nontrademark tools can advance trademark law's traditional objectives and in which trademark law can be used as a tool in service of aims not typically understood as within its ambit.

I. GOVERNING LINGUISTIC SPACE WITH TRADEMARK LAW

In his *Second Treatise of Government*, John Locke wrote that man may legitimately remove resources from the commons for his own private use by "mix[ing]" his labor with them, "at least where there is enough, and as good left in common for others."[38] What exactly Locke meant by his "enough and as good" proviso is a

[38] JOHN LOCKE, *The Second Treatise of Government*, *in* TWO TREATISES OF GOVERNMENT 265, § 27, at 287–88 (Peter Laslett ed., Cambridge Univ. Press 2008) (1690).

subject of much debate among philosophers,[39] but it seems doubtful that, even in 1690, Locke could have believed that the pool of natural resources available for human exploitation was infinite. And whether or not the infinite pool assumption ever formed the basis of an argument for private property rights in natural resources, few property rights defenders rely on that assumption today. Instead, modern justifications for a robust private property regime tend to emphasize the role of property as a strategy for encouraging effort and investment and for managing externalities across space and time.[40]

While debates over property rights with respect to natural resources moved on from the infinite pool assumption long ago, only in the past few decades have scholars begun to consider whether linguistic space might also defy Locke's "enough and as good" assumption. By "linguistic space," we refer to the supply of words, sounds, and symbols that can be used to describe tangible and intangible items—and, in particular, to describe products, services, and their sources. Through the 1980s, legal scholarship continued to reflect the idea of infinite linguistic space, which in turn served to justify strong legal protection for trademark rights.[41] Judicial opinions still sometimes reflect this assumption.[42] But starting with Carter's influential 1990 essay *The Trouble with Trademark*,[43] a number of scholars have seriously scrutinized the claim that the supply of "good" marks is effectively infinite. Most recently, Beebe and Fromer have demonstrated in an impressive empirical study that the supply of frequently used English words, short neologisms that are pronounceable by

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39 *See generally, e.g.*, Jeremy Waldron, *Enough and as Good Left for Others*, 29 PHIL. Q. 319 (1979).

40 *See, e.g.*, Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 356–57 (1967).

41 *See, e.g.*, William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 274 (1987) ("[W]ords that will serve as a suitable trademark are as a practical matter infinite.").

42 *See, e.g.*, Guthrie Healthcare Sys. v. ContextMedia, Inc., 826 F.3d 27, 42 (2d Cir. 2016) ("One seller's monopolization of a particular term does not deprive competitors of anything of value because the number of arbitrary or fanciful marks available for use is infinite."); Ent. One UK Ltd. v. 2012Shiliang, 384 F. Supp. 3d 941, 952 (N.D. Ill. 2019) (finding bad faith where the junior user chose "a confusingly similar mark, out of the infinite number of marks in the world" (quoting Sands, Taylor & Wood Co. v. Quaker Oats Co., 978 F.2d 947, 963 (7th Cir. 1992))).

43 Carter, *supra* note 18.

English speakers, and common U.S. surnames available for federal trademark registration is dwindling.[44]

Beebe and Fromer analyze trademark registrations at the USPTO along two dimensions: "trademark depletion," which they define as "the process by which a decreasing number of potential trademarks remain unclaimed by any trademark owner," and "trademark congestion," or "the process by which an already-claimed mark is claimed by an increasing number of different trademark owners."[45] They find, for example, that all 1,000 of the most frequently used nouns and adjectives in American English were claimed in an active trademark registration in 2014, with the average word being claimed by 745 distinct registrants.[46] This does not mean that a new mark seeker is necessarily out of luck: the fact that Apple Computer has registered the "Apple" mark for a wide range of electronics will not bar everyone else from using the word "Apple" anywhere in their name (AppleLove pet food supplements, Bluapple ethylene gas absorber, Big Apple Pizza, and so on). But even when Beebe and Fromer narrow their analysis to each of the 45 classes of goods or services used to categorize trademark registrations, they find evidence of substantial congestion and depletion[47]—phenomena that lead to both proximity costs and distance costs.

A. Proximity Costs Versus Distance Costs

As introduced above, proximity costs are created when the use of similar marks for similar products sold by different firms causes consumers to face greater difficulty in distinguishing among products. Existing research demonstrates that some consumers struggle to distinguish name-brand products from proximate knockoffs, at least in laboratory settings. One study, for example, found that 10% of consumers believed that the knockoff Fortini vermouth was the brand name Martini after exposure to Fortini for a second.[48] And while it is unclear how these results

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[44] Beebe & Fromer, *supra* note 1, at 951. Registration is not required for U.S. trademark protection, but it confers numerous procedural advantages. *See* 15 U.S.C. § 1125(a) (creating a federal cause of action for infringement of unregistered marks). *See generally* Tushnet, *supra* note 19 (discussing the role of registration in U.S. trademark law).

[45] Beebe & Fromer, *supra* note 1, at 950–51.

[46] *Id.* at 1016 & fig.24.

[47] *Id.* at 984 fig.4, 990 fig.7, 993 fig.8, 994 fig.9, 997 fig.10.

[48] Jean-Noël Kapferer, *Brand Confusion: Empirical Study of a Legal Concept*, 12 PSYCH. & MKTG. 551, 558–59 & tbl.1 (1995).

translate to real-world marketplaces,[49] there is at least anecdotal support for proximity-cost concerns. For example, video game enthusiasts report confusion between the marks "The Outer Worlds" and "Outer Wilds," which are used for two different first-person, open-world spacefaring video games.[50] The owners of Redemption Alewerks in Indianapolis report regular confusion of their beers with those of Redemption Brewing in London, four thousand miles away.[51] Many if not all of us can draw examples from our own lives as consumers in which we have struggled to distinguish two similarly named products—picking out Nature Valley Oats 'n Honey crunchy granola bars instead of Nature's Path Honey Oat Crunch crunchy granola bars,[52] putting Stoned Wheat Thins (from Red Oval Farms) on a shopping list and having the shopper acquire Wheat Thins (from Nabisco) instead, confusing the soft drink brands Dr. Brown's and Dr. Pepper, and so on. Aside from the increase in consumer search costs, the corresponding decline in product differentiation may dull the incentives for firms to invest in quality maintenance and innovation: Why develop a product that is top-notch and cutting-edge if consumers will not be able to distinguish it from the competitor?

Distance costs, in contrast, are created as the supply of memorable and pronounceable marks dries up. Firms then will increasingly resort to distant marks—i.e., marks that are far away from the items they signify and potentially outside the

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[49] *See* Ouellette, *supra* note 8, at 119–23. For critiques of a related method of measuring consumer confusion from similar marks—delays in response time for matching a mark with associated products or attributes (e.g., "Godiva" and "chocolates" or "rich taste") after viewing an allegedly diluting ad (e.g., "Dogiva dog biscuits")—see Barton Beebe, Roy Germano, Christopher Jon Sprigman & Joel H. Steckel, *Testing for Trademark Dilution in Court and the Lab*, 86 U. CHI. L. REV. 611, 636–39 (2019); Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 521–22 (2008).

[50] *See* Michael McWhertor, *The Difference Between* The Outer Worlds *and* Outer Wilds, POLYGON (Oct. 25, 2019) (alteration in original), https://www.polygon.com/2019/10/25/20932030/outer-worlds-vs-outer-wilds-games:

> Every video game-focused podcast I listen to and many stories I read about *The Outer Worlds* and *Outer Wilds* are tinged with some sort of confusion, with writers and gaming personalities carefully reciting the name of each title when discussing them, double-checking that they've said the right thing. Each game's respective Wikipedia entry even starts with the line "Not to be confused with [the other game name]."

[51] *See* Mark E. Lasbury, *Doubling Up on Indiana Brewery Names – Twin Children of Different Mothers*, IND. ON TAP (Nov. 1, 2017), https://perma.cc/2FUK-MMLZ.

[52] *See* Tami Dunn, *Nature's Path Honey Oat Crunch vs Nature Valley Oats 'n Honey Blind Taste Test*, YOUTUBE (Sept. 25, 2016), https://www.youtube.com/watch?v=Ve86pNEJ1_o.

constellation of words and sounds with which English speakers are familiar. While distance is, in some senses, antonymous to proximity, distance *costs* are quite similar to proximity costs in their consequences: the use of difficult-to-remember marks imposes cognitive costs on consumers, and firms face weaker incentives to invest in quality maintenance and innovation if consumers cannot readily recognize and recall those firms' marks. We are not aware of studies evaluating the cognitive costs of distance, but again, anecdotes abound. For example, a recent *New York Times* feature on "[h]ow Amazon is causing us to drown in trademarks" notes that a search for the term "winter gloves" yields many brands "you've never heard of" and "that evoke nothing in particular," like "SHSTFD, Joyoldelf, VBIGER and Bizzliz."[53] Entire books advise pharmacology students on how to master difficult-to-remember drug names.[54]

Proximity costs and distance costs do not only affect product users; they may also raise entry costs for new firms and for existing firms seeking to enter new markets. These entry costs may include the costs of searching for a mark that does not conflict with marks that are already in use and the costs of using a less effective mark.[55] For example, Beebe and Fromer point to anecdotes such as the entrepreneur who struggled to name his new firm: "Every name we liked, either somebody already had it or it wasn't trademarkable or it meant something pornographic in another language."[56]

To illustrate these concepts,

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[53] John Herrman, *All Your Favorite Brands, from BSTOEM to ZGGCD*, N.Y. TIMES (Feb. 11, 2020), https://perma.cc/6FYX-M3QX.

[54] *See generally, e.g.*, TONY GUERRA, MEMORIZING PHARMACOLOGY: A RELAXED APPROACH (2016).

[55] *See* Beebe & Fromer, *supra* note 1, at 1021–22.

[56] *Id.* at 949 (quoting Justin Fox, *We're Going to Run Out of Company Names*, BLOOMBERG VIEW (Jan. 13, 2017), https://www.bloomberg.com/opinion/articles/2017-01-13/we-re-going-to-run-out-of-company-names).

Figure 1 flattens the multi-dimensional linguistic space into a two-dimensional slice focused on beer brands, an area in which the crowding of linguistic space seems particularly acute.[57] Proximity costs are created when different beer producers use similar terms to market their brews, such as Miller, Molson, and Mill Street. These costs are the focus of trademark law's prohibition on confusingly similar marks, for which the similarity of the marks by sound, sight, and meaning is the most important factor.[58] But we suspect these marks are attractive in part because they are within the core of signifiers familiar to U.S. beer consumers. Distance costs arise when producers choose signifiers that are more difficult for the average U.S. beer drinker to recall—we expect that "Festina Pêche" and "分 桃" fall in this category. Trademark law provides incentives for producers to reach for more linguistically distant brands. Distant marks are more likely to be classified as "inherently distinctive" and thus entitled to protection without providing evidence that the term has acquired "secondary meaning."[59] Distant marks are also less likely to infringe existing marks due to their lack of similarity.[60] But distant marks can impose cognitive costs on consumers and entry costs for new brands in the same way that proximate marks can.

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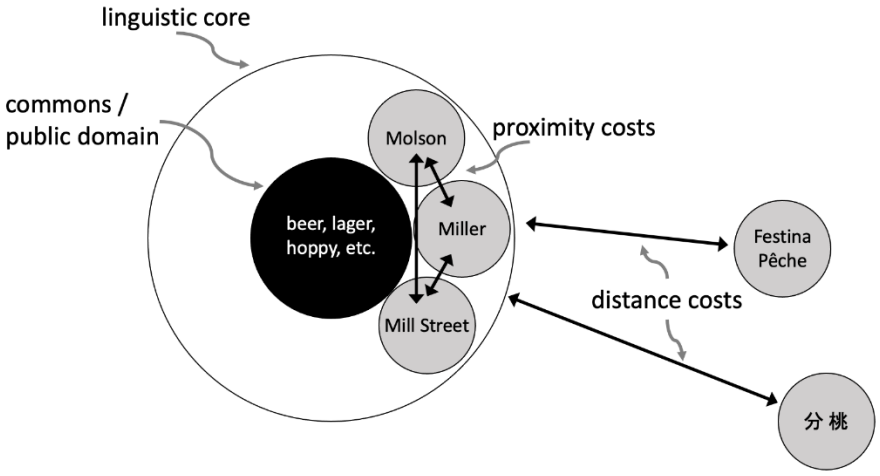
[57] On trademark and other forms of intellectual property in the craft beer industry, see generally Zahr K. Said, *Craft Beer and the Rising Tide Effect: An Empirical Study of Sharing and Collaboration Among Seattle's Craft Breweries*, 23 LEWIS & CLARK L. REV. 355 (2019). For example, one of Professor Said's interviewees complained: "All of these people trying to name beers with usually hop puns in the name. Every hop pun in the world is done now. They're all taken. Trust me. . . . So from a trademark perspective, like, somethin's gotta give." *Id.* at 387 n.171 (alteration in original).

[58] *See* 4 MCCARTHY, *supra* note 1, § 23:1, 23:21; Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581, 1623 (2006) ("The data clearly show that the similarity of the marks factor is by far the most important factor in the multifactor test.").

[59] Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 767 (1992). Word marks that are classified as fanciful (coined terms like "Zappos"), arbitrary (having no connection to the product they signify, such as "Apple" computers), or suggestive (requiring imagination to link them to the product, such as "Coppertone" suntan lotion) are deemed inherently distinctive and thus qualify for protection without a showing of acquired distinctiveness (also known as "secondary meaning"). *See id.* at 768–69; 2 MCCARTHY, *supra* note 1, § 11:4.

[60] *See supra* note 53 and accompanying text.

FIGURE 1: PROXIMITY VERSUS DISTANCE COSTS IN LINGUISTIC SPACE FOR BEER BRANDS



We have illustrated proximity and distance in two-dimensional space for conceptual simplicity, building on Beebe's spatial model of trademark scope.[61] In reality, linguistic space is multidimensional, and it stretches to nonlinguistic marks.[62] Proximity encompasses all those factors that might cause consumers to confuse one mark for another—the classic "sight, sound, meaning" trilogy of trademark law as well as the similarity of the products and of the channels through which those products are bought, sold, or traded.[63] For example, Hopalicious for beer is more proximate to Hopalicious for a (hypothetical) hoppy cider than to Hopalicious for a hopscotch park.[64] Weiner King for a hot dog stand on New Jersey's Long Beach Island is more proximate to Weiner King for a hot dog stand elsewhere on the eighteen-mile

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61 Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 655 fig.5 (2004).

62 For examples of the wide variety of product features that can be claimed as a mark, see Lisa P. Ramsey, *Non-Traditional Trademarks and Inherently Valuable Expression*, *in* THE PROTECTION OF NON-TRADITIONAL TRADEMARKS: CRITICAL PERSPECTIVES 337, 358–60 (Irene Calboli & Martin Senftleben eds., 2018).

63 *See* 4 MCCARTHY, *supra* note 1, § 23:19–:30.

64 The Hopalicious hopscotch park is, unfortunately, hypothetical too, though the hopscotch-park idea is not entirely fanciful. *See, e.g.*, Amanda del Castillo, *'Let's Make the Best of It': South Bay Community Creates Hopscotch Chalk Challenges to Keep Busy During COVID-19*, ABC7 NEWS (Apr. 16, 2020), https://perma.cc/HB7R-ND23; Jamie McKenzie, *Giant Hopscotch Game Runs 'About 200 Yards' up Edinburgh Street as Community Keeps 'Adding Squares' Before It Rains*, EDINBURGH EVENING NEWS (Apr. 18, 2020), https://perma.cc/V28N-GJRQ.

island than to Weiner King for hot dogs across state lines in Pennsylvania.[65] The degree to which trademark law's doctrinal test for likelihood of confusion in fact captures the real social costs of proximity is the subject of frequent discussion among trademark scholars.[66] Understanding how the social costs of proximity scale with increasing crowding is also an important avenue for future work.

Distance, too, is a multifaceted phenomenon. We have hypothesized that "Festina Pêche" and "分 桃" are distant marks for beer brands, but there is surprisingly little evidence on what aspects of difficult-to-remember marks create social costs. Beebe and Fromer suggest that common English words are more effective than coined words, that shorter marks are more effective than longer ones, and that an effective mark is "relatively easy to pronounce, hear, read, and remember."[67] These suggestions all seem plausible, though they all could benefit from further empirical study.[68] Trademark protection, moreover, applies not to a mark in the abstract but to the relationship between a mark and a particular product,[69] and thus the relationship between mark and product likely affects distance too. It is probably easier for consumers to associate "Bank of America" with a depository institution than, say, with apples, and likewise easier for consumers to associate "Honeycrisp" with apples[70] than with banks.[71]

Because trademark scholars have begun to grapple with the depletion of the linguistic commons only quite recently, we are still far away from understanding all the factors that make a mark easier or harder to associate with a particular product.

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65 *See* Weiner King, Inc. v. Wiener King Corp., 615 F.2d 512, 522–24 (C.C.P.A. 1980).

66 *See, e.g.*, Robert G. Bone, *Taking the Confusion out of "Likelihood of Confusion": Toward a More Sensible Approach to Trademark Infringement*, 106 NW. U. L. REV. 1307, 1336–48 (2012); Thomas R. Lee, Glenn L. Christensen & Eric D. DeRosia, *Trademarks, Consumer Psychology, and the Sophisticated Consumer*, 57 EMORY L.J. 575, 642–43 (2008); William McGeveran & Mark P. McKenna, *Confusion Isn't Everything*, 89 NOTRE DAME L. REV. 253, 277 (2013); Alfred C. Yen, *The Constructive Role of Confusion in Trademark*, 93 N.C. L. REV. 77, 100–04 (2014).

67 Beebe & Fromer, *supra* note 1, at 965–67. Of course, in a non-English-speaking country, the semantic core would be populated by a different set of possible marks, though the concepts of proximity and distance still would apply.

68 *See* Ouellette, *supra* note 8, at 121–22.

69 *See supra* note 15 and accompanying text.

70 On trademarks in the apple industry, see generally Dan Charles, *Want to Grow These Apples? You'll Have to Join the Club*, NPR (Nov. 10, 2014), https://perma.cc/9JZ4-W4N4.

71 Apple Bank for Savings has nonetheless survived the test of time. *See History & Vision*, APPLE BANK FOR SAV., https://perma.cc/D9V9-6WG5.

Professor Jake Linford's work on fanciful marks provides one illuminating perspective.[72] Surveying the literature on sound symbolism, Linford notes that listeners are more likely to associate certain sounds than others with particular product attributes.[73] For example, back vowels (such as the "u" in "put" and the "o" in "home") appear to be more easily associated with darkness than front vowels (such as the "ee" in "bee" and the "i" in "hit").[74] Thus, for example, "Godan" appears to evoke dark beer more easily than "Gidan."[75] Neither "Godan" nor "Gidan" would likely qualify as a "good" mark for dark beer by Beebe and Fromer's definition,[76] but while both "Godan" and "Gidan" are far from the linguistic core, "Gidan" for dark beer appears to be even more distant than "Godan."

For present purposes, our argument does not depend on a rigorous mapping of the dimensions of distance, but rather on the simpler claim that some marks are more easily associated with particular products than other marks are. Thus, as more and more marks near the linguistic core are claimed, new entrants will be forced to find marks farther afield—marks that are harder for consumers to associate with their corresponding products. Likewise, if holders of marks near the linguistic core are allowed to reserve a larger swath of space for themselves so as to ward off consumer confusion, then the advantage of reducing proximity costs will be at least partly offset by the disadvantage of raising distance costs.

To emphasize once more: the *relative* magnitude of proximity costs and distance costs still matters. The better we understand the causes and effects of proximity and distance, the better we can balance the double-edged consequences of trademark law reform—and again, empirical work will play an important part in improving our understanding.[77] The conceptual point we underscore here is that reducing proximity costs—along whatever measures of proximity turn out to be most important in the

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72 *See generally* Jake Linford, *Are Trademarks Ever Fanciful?*, 105 GEO. L.J. 731 (2017).

73 *See id.* at 750–54.

74 *See* Richard Klink, *Creating Brand Names with Meaning: The Use of Sound Symbolism*, 11 MKTG. LETTERS 5, 8–10 (2000). "Front" and "back" refer to the highest position of the tongue during the pronunciation of the sound. *Id.* at 8.

75 Linford, *supra* note 72, at 753; *see also* Klink, *supra* note 74, at 12 tbl.2.

76 *See* Beebe & Fromer, *supra* note 1, at 964–70.

77 *See* Ouellette, *supra* note 8, at 120.

marketplace—almost always increases distance costs, and vice versa. Trademark law confronts this challenge, but it cannot escape the tradeoff.

B. Reforms Internal to Trademark Law

The intuitive and anecdotal bases for concern regarding linguistic crowding are sufficiently strong to have spurred several scholars to consider potential policy responses. Notably, almost all such proposals are internal to trademark law. Though many of these proposals improve upon the proximity-distance balance that trademark law strikes, they still must confront the tension between these two types of costs.

For example, Carter has suggested that the USPTO should encourage applicants to limit the geographic area in which they claim protection and should impose penalties on firms that fail to use marks that they register.[78] Beebe and Fromer, for their part, suggest higher fees for application, maintenance, and renewal of trademarks; more rigorous enforcement of the use requirement; and a more demanding threshold for showing secondary meaning before registering a descriptive mark.[79] In a thoughtful analysis of the role that registration plays in serving the goals of trademark law, Tushnet has similarly suggested raising the barriers for registration and making it easier to cancel existing registrations for unused marks.[80]

It is worth noting—and emphasizing—the distinction in trademark law between protection and registration. The holder of an unregistered mark still may invoke common law remedies for infringement, and registration does not necessarily mean that a mark holder will prevail in an infringement action.[81] But the substantive issues confronting the USPTO's choice of whether to register a mark are similar to those faced by a court in determining whether a mark is valid, and the USPTO's refusal to register can

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78 Carter, *supra* note 18, at 796–99.

79 Beebe & Fromer, *supra* note 1, at 1029–37. Words that describe some characteristic of the product or service they signify (such as "American" airlines or "Sharp" televisions) cannot be protected as trademarks without a showing that consumers have come to associate the descriptive term with a single source, which is known as having "secondary meaning" or "acquired distinctiveness." *Two Pesos*, 505 U.S. at 769; *see also* 2 MCCARTHY, *supra* note 1, § 15:1.

80 Tushnet, *supra* note 19, at 918, 921–24.

81 *See* 3 MCCARTHY, *supra* note 1, § 19:3; 6 MCCARTHY, *supra* note 1, § 32:155.

have preclusive effect.[82] For purposes of this analysis, we are focused on substantive protection, so when we analyze proposals to raise barriers to registration or prune the registry, we assume that this entails a loss of substantive protection. For readers who view registration as more procedural,[83] our references to limits on registration should be read as limits on protection.

The proposals noted above typically have the effect of reducing distance costs. If unused marks are removed from the registry, or if marks are harder to obtain or are more limited in scope or geographic reach, then more space will become available in the linguistic core—the region of pronounceable and memorable marks that is most desirable for new brands. Firms will thus not need to resort to more distant marks to signify new goods and services. But this decrease in distance costs will be accompanied by some increase in proximity costs: consumers will be more likely to confuse the new marks in the linguistic core with both the marks that survived the stricter test as well as the ones that were weeded out.

Consider proposals to make trademark registration more costly. Higher fees for application, maintenance, and renewal of trademarks will reduce the stock of registered marks, thus lowering distance costs because firms looking for new marks will no longer need to resort to the linguistic periphery.[84] Similarly, reforms that would make it harder for firms to qualify for trademark protection through higher legal standards, such as conditioning registration on a stronger showing of use,[85] would reduce distance costs by making it

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[82] *See* B & B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 141–42 (2015).

[83] *Cf.* Beebe & Fromer, *supra* note 1, at 962 n.77 (discussing "the important question whether marks that are refused registration might nonetheless be protected as unregistered marks"); Tushnet, *supra* note 19, at 929–40 (arguing that registration should either be more procedural or more substantive).

[84] These higher fees would function as entry costs for new firms and as continuity costs for small businesses seeking to hold on to their marks. Some firms might forgo registration and rely on protection for unregistered marks through Lanham Act § 43(a), 15 U.S.C. § 1125(a), although this would raise entry costs for other firms by increasing the cost of conducting a trademark search.

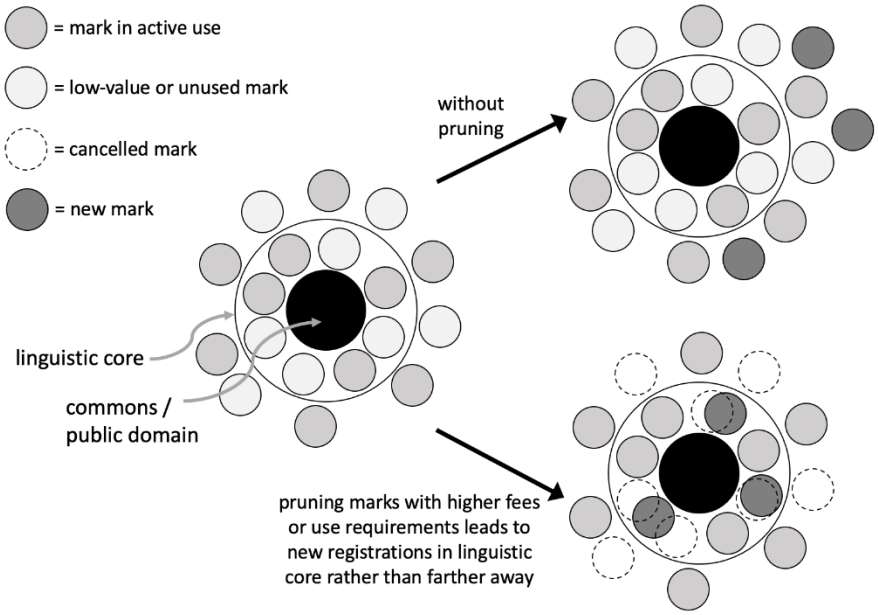
[85] *See* Beebe & Fromer, *supra* note 1, at 1033 ("[T]he use requirement in trademark law [ ] should be tightened and more strictly enforced."); Tushnet, *supra* note 19, at 919 (arguing that "the standard for use or continuing use is low and not very well policed, suggesting that, of the over 250,000 marks registered or renewed each year, a substantial number do not reflect real use"); Alexandra J. Roberts, *Trademark Failure to Function*, 104 IOWA L. REV. 1977, 2039–43 (2019) (arguing that registration should require a stronger showing that a mark is used *as a mark*); Lisa P. Ramsey, *Using Failure to Function Doctrine to Protect Free Speech and Competition in Trademark Law*, 104 IOWA L. REV.

easier for firms to find an unclaimed mark that consumers can readily remember. As illustrated in

ONLINE 70, 92 (2020) (arguing that the Lanham Act should be revised to allow challenges to registered marks for failure to function or lack of distinctiveness even after a mark has become incontestable). Firms may file intent-to-use trademark applications before commencing use, but U.S. registration depends on actual use. *See* 3 MCCARTHY, *supra* note 1, § 19:1.25.

Figure 2, however, as low-value or unused marks that had been crowding the linguistic core are replaced by active marks, there will be some increase in proximity costs with marks already in the linguistic core. (As in Figure 1, the black circle in the center of the linguistic core represents the linguistic commons—the portion of linguistic space representing generic terms and other signifiers that may not be claimed as trademarks.) The unused marks consuming space in the linguistic core effectively act as vacant lots that reduce congestion in their vicinity. Expunging unused winter glove marks may allow firms to choose more memorable brands than "SHSTFD" or "VBIGER"—perhaps a word that evokes a day on the slopes. But this decrease in distance costs comes at the risk of increased confusion with, for example, gloves already named after slope features (Mountain, Ridge, Treeline Ridge), specific mountains (Denali, Tumalo Mountain), and types of skiing (Heli, Randonee).

FIGURE 2: PRUNING MARKS IN THE LINGUISTIC CORE WITH FEES OR STRONGER USE REQUIREMENTS

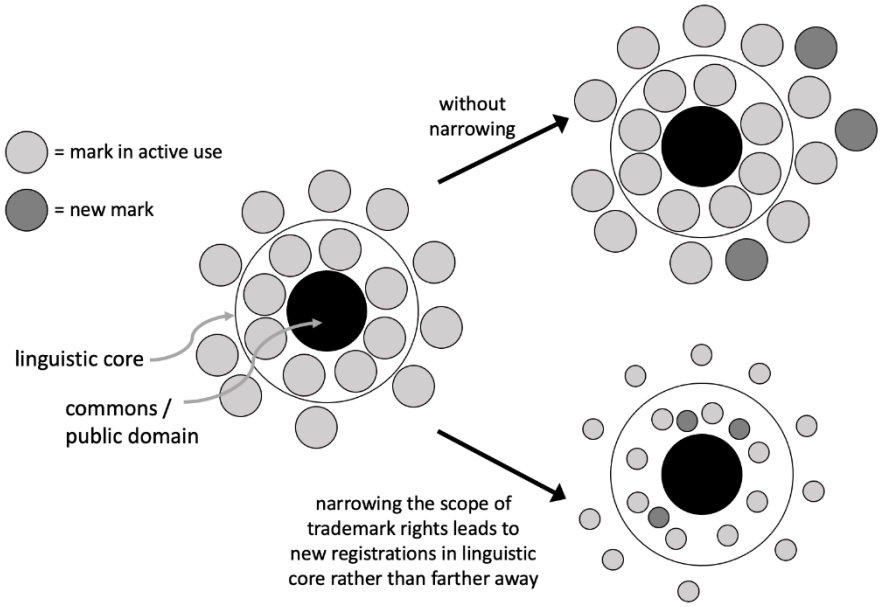


The same effect is true for proposals to narrow the scope of trademark rights, such as by making it harder for rights holders to prevent uses across geographic regions or product categories, or by raising the threshold for finding that two marks are sufficiently similar to create a likelihood of confusion.[86] As illustrated in

Figure 3, narrowing the scope of trademark rights allows more producers to choose marks in the linguistic core rather than farther away in linguistic space. This lowers distance costs, but at the expense of increased proximity costs. Again, the net effect on cognitive costs for consumers and entry costs for new brands may be salutary, but the tradeoff remains.

[86] On the doctrines trademark law uses to define the scope of rights, see Mark A. Lemley & Mark P. McKenna, *Scope*, 57 WM. & MARY L. REV. 2197, 2243–59 (2016).

FIGURE 3: NARROWING THE SCOPE OF TRADEMARK RIGHTS



Proposals for geographic limits present the same challenge. Restricting the territorial scope of marks leads to greater availability of memorable and pronounceable marks in certain regions, thus lowering distance costs. Currently, common law trademark rights have geographic limits: local businesses can operate in the same state or sometimes even the same city without creating a likelihood of trademark confusion.[87] Thus, the Red Hen restaurant in Washington, D.C., operates at the same time as unaffiliated Red Hen restaurants across the country, including in Virginia, New Jersey, Connecticut, and Vermont. These independent eateries were able to use "Red Hen" rather than a less pronounceable or memorable moniker.[88] But this decrease in distance costs comes at the expense of higher proximity costs. Consumers who see a Red Hen in one city may confuse it with another—especially if one gains national publicity, as when then–White House press

87 *See* 5 MCCARTHY, *supra* note 1, § 26:29.

88 The only federal trademark registration of "Red Hen" for restaurant services was filed in 2014 by 42 Chicken LLC, located in New York City. *See* RED HEN, Registration No. 4,638,588. Federal registration generally establishes nationwide protection, but earlier users of a mark have priority in the area in which they have established rights. *See* 5 MCCARTHY, *supra* note 1, §§ 26:31, 26:53. The only Red Hen restaurants we found in New York are now closed.

secretary Sarah Huckabee Sanders was kicked out of the Virginia Red Hen, causing President Donald Trump to criticize "The Red Hen Restaurant" on Twitter without specifying which one.[89] The publicity caused at least ten unaffiliated Red Hen restaurants to receive complaints and harassment,[90] and trademark advisors have suggested that the episode illustrates the importance of choosing unique marks.[91] But given the crowding of linguistic space, it is hard to choose a unique mark that does not increase distance costs. Any of the Red Hens could have chosen to call themselves the "Coquelicot Cockerel"; it is easy to understand why they did not.

For yet another example, consider again the Supreme Court's 2020 decision in *Booking.com*. In dissent, Justice Breyer worried about the anticompetitive effect the Court's ruling will have: "Under the majority's reasoning, many businesses could obtain a trademark by adding '.com' to the generic name of their product."[92] These "generic.com" registrants could threaten lawsuits against similarly named competitors, Justice Breyer warned, envisioning claims against "Bookings.com," "eBooking.com," "Booker.com," and "Bookit.com."[93]

Justice Breyer is likely right that the registration of "generic.com" names may result in lawsuit threats against other firms with proximate names. At the same time, opening up "generic.com" names for registration adds to the supply of potentially "good" marks that new entrants can claim. Which of these two effects will have the larger impact on competition is uncertain. The more significant the competitive consequences of

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89 Donald J. Trump (@realDonaldTrump), TWITTER (June 25, 2018), https://twitter.com/realdonaldtrump/status/1011212766487728133 (archived at TRUMP TWITTER ARCHIVE V2 (June 25, 2018), https://perma.cc/3TAD-DGXP).

90 *See* Adi Robertson & Makena Kelly, *Red Hen Restaurants Around the World Are Getting Blamed for Kicking Out Sarah Sanders*, THE VERGE (June 26, 2018), https://www.theverge.com/2018/6/26/17501460/red-hen-sarah-sanders-wrong-restaurant-harassment-reviews; Ryan Broderick, *People Are Harassing the Wrong "Red Hen" Restaurant After Another with the Same Name Refused to Serve Sarah Sanders*, BUZZFEED (June 25, 2018), https://perma.cc/XMN2-EPC5 ("The harassment has been intense [ ] with many people refusing to imagine a world where two unrelated restaurants could have the same name.").

91 Julia Huston, *Enforce Your Trademarks Now or You Might Be the Next Red Hen*, MONDAQ (July 4, 2018), https://perma.cc/4YZJ-ZDD8; *see also* Brad Walz, *Red Hen Protest Shows the Importance of Selecting Unique Marks*, BOB (June 26, 2018), https://perma.cc/K53A-8PH3.

92 *Booking.com*, 140 S. Ct. at 2314–15 (Breyer, J., dissenting).

93 *Id.* at 2314.

distance, the more valuable it may be to open up new trademark "real estate" near the linguistic core.

None of this is to suggest that reforms internal to trademark law are misguided. As we have noted, proposed reforms may decrease distance costs much more than they increase proximity cost, or vice versa, and a number of trademark law solutions proposed by Carter, Beebe and Fromer, Tushnet, and other scholars strike us as quite sensible. But management of linguistic space is not a task for trademark law alone. Just as courts and legislators have long supplemented real property law with a range of other strategies for managing land, policymakers should—we believe—look beyond trademark law's confines to manage the challenges that crowding of linguistic space presents.

II. BEYOND THE PROXIMITY-DISTANCE TRADEOFF

While interventions that expand or contract the scope of trademark protection might still be desirable under certain circumstances, effective management of linguistic space will likely depend on other governance strategies. We focus here on three general types of approaches: (1) strategies aimed at encouraging more efficient use of existing linguistic space, (2) strategies aimed at expanding usable linguistic space by reducing the cognitive costs of distant word marks for consumers, and (3) strategies aimed at expanding linguistic space through product identification systems that can serve as effective alternatives to plain language.

A. Using Linguistic Space Efficiently

In an enormously influential 1960 paper, the economist and future Nobel laureate Ronald Coase posited that, in the absence of transaction costs, bargaining will lead to efficient allocations of scarce resources regardless of the initial allocation of property rights.[94] That is, frictionless trade will ensure that every resource is put to its highest and best use. As Coase himself noted, this theorem applies to intangible property as much as to land and

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[94] *See* Coase, *supra* note 36, at 16. Coase did not define the term "efficiency" in his seminal paper, though subsequent scholarship understands Coase to be referring to Pareto efficiency (i.e., an allocation of resources from which there is no reallocation that would make at least one individual better off and no individual worse off). *See* Joseph Farrell, *Information and the Coase Theorem*, J. ECON. PERSP., Fall 1987, at 113, 113.

chattels.[95] The committed Coasean might wonder, then, why the linguistic status quo does not gravitate toward efficiency through iterated exchanges. If an incumbent owns a mark over which a new entrant could make better use, why doesn't the new entrant buy the relevant right from the incumbent?

For the committed Coasean, the apparently inefficient allocation of property rights in linguistic space does not represent a challenge to the theorem's foundations as much as an indication that transaction costs are high. Two aspects of the linguistic market suggest that frictions meaningfully interfere with bargaining. First, trademark law's "assignment in gross" and "naked licensing" doctrines—which limit the extent to which mark owners can sell or license their marks—deter bargaining between incumbents and new entrants. Second, even when mutually beneficial transactions between incumbents and new entrants do occur, these transactions may generate negative externalities borne by sellers and consumers far away—or far in the future—that the parties to the bilateral bargain are unlikely to internalize.

This Section examines both of these aspects of the linguistic market, while acknowledging that these are not the only reforms that might allow parties to use linguistic space more efficiently.[96] We reach three conclusions. First, doctrinal reform has the potential to reduce transaction costs and promote more efficient uses of linguistic space. Second, Pigouvian taxes on trademark transactions—taxes to account for the harm that the transactions impose on society—are often considered to be an *alternative* to Coasean solutions,[97] but we think they have the potential to *complement* Coasean approaches in this context. Finally, approaches focused on lowering transaction costs encounter limitations, highlighting the importance of interventions that expand linguistic space rather than those that merely reallocate already-occupied regions.

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[95] Indeed, Coase wrote that he developed the argument in his study of radio and television frequencies. Coase, *supra* note 36, at 1 n.1.

[96] One additional problem is the failure of trademark law to provide clear notice of protected rights and their legal scope, as discussed by Robert G. Bone, *Notice Failure and Defenses in Trademark Law*, 96 B.U. L. REV. 1245, 1252–56 (2016), and Lemley & McKenna, *supra* note 86, at 2219–25.

[97] *See* Coase, *supra* note 36, at 28–42 (contrasting his views with Pigou's). On the Coase-Pigou controversy, see generally Brian Simpson's defense of the Pigouvian position, A.W. Brian Simpson, Coase v. Pigou *Reexamined*, 25 J. LEGAL STUD. 53 (1996), and Coase's own response, R.H. Coase, *Law and Economics and A. W. Brian Simpson*, 25 J. LEGAL STUD. 103 (1996).

1. Assignments in Gross and Naked Licensing

Trademark law limits the ability of mark holders to sell or rent out their rights in two principal ways. The first is the assignment in gross doctrine. Under that doctrine—which is rooted in common law[98] and codified under § 10 of the Lanham Act[99]—a trademark cannot be assigned from one party to another without also transferring the goodwill that it symbolizes.[100] For a trademark assignment to be valid, there must be a "demonstrable, genuine intent" to continue the mark's "identity and meaning."[101] Otherwise, the transfer of the mark is an invalid assignment in gross, and the effective abandonment of the mark by the assignor can lead to the mark's cancellation.[102]

Scholars have justified the assignment in gross doctrine as a device designed to prevent consumer confusion. Carter views the rule's rationale as "obvious": "When a firm assigns its mark and subsequently leaves the market, the mark no longer signifies what it previously did, and, in consequence, the mark ought to be deemed abandoned; its transfer to a new 'owner' should carry no legal effect."[103] Professor William Kratzke argues that assignment in gross "works a fraud upon the purchasing public" by tricking consumers into believing that a product manufactured by the assignee bears the attributes and qualities of a product previously manufactured by the assignor, even though the only connection between the assignor and the assignee is the bare assignment of the mark.[104] Professor Mark Lemley concurs:

> It is hard to see how the goals of preventing consumer confusion and encouraging investments in product quality would be furthered by allowing a company to sell the rights to a mark to another who will not make the same products. If

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98 *See* A. Bourjois & Co. v. Katzel, 260 U.S. 689, 692 (1923).

99 Pub. L. No. 79–489, 60 Stat. at 431–32 (codified in scattered sections of 15 U.S.C.).

100 15 U.S.C. § 1060(a)(1); *see also* 3 MCCARTHY, *supra* note 1, § 18:2.

101 Michael Cavendish, *Avoiding Illegal Trademark Transfers: Introducing the Assignment-in-Gross*, 74 FLA. BAR J. 68, 69–70 (2000).

102 *See* Irene Calboli, *What If, After All, Trademarks Were "Traded in Gross"?*, 2008 MICH. ST. L. REV. 345, 348. For a criticism of the expanding definition of "goodwill" such that a valid assignment no longer needs to include a transfer of the underlying business, see Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367, 410–16 (1999).

103 Carter, *supra* note 18, at 785.

104 William P. Kratzke, *Normative Economic Analysis of Trademark Law*, 21 MEM. ST. U. L. REV. 199, 248 (1991).

> anything, assignments in gross are vehicles for *adding to* consumer confusion, not reducing it.[105]

Carter, Kratzke, Lemley, and other defenders of the doctrine against assignments in gross are right that assignments separate from a transfer of goodwill can contribute to consumer confusion. Assignments in gross create proximity costs: consumers may have trouble distinguishing two different products denominated with the same mark at different times. Left out of this analysis, though, is the way assignments in gross reduce distance costs. This reduction in distance costs does not mean that allowing assignments in gross will necessarily improve efficiency; the corresponding increase in proximity costs may swamp this gain. Our point is simply that the effect on linguistic depletion and congestion should be part of the analysis of this doctrine.[106]

To illustrate: Imagine that the manufacturer of Hopalicious pale ale—Ale Asylum of Madison, Wisconsin—comes to realize that its core clientele is no longer interested in highly hoppy beers.[107] Halfway across the country in Texas, however, an upstart brewery (which, for lack of creativity, we will call Upstart Brewery[108]) with a different customer base is looking to tap into the hops craze and is searching for a suitable name. Upstart would be willing to buy the Hopalicious mark from Ale Asylum at a price well above the value of the mark to the holder. Upstart, however, is not terribly interested in acquiring Ale Asylum's recipe or other goodwill, nor is Ale Asylum especially interested in selling anything other than the mark to Upstart.[109]

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[105] *See* Lemley, *supra* note 9, at 1709 (emphasis in original).

[106] In a footnote, Beebe and Fromer note that, "[t]o facilitate a market in trademarks, trademark law could become more permissive about allowing trademark assignments in gross." Beebe & Fromer, *supra* note 1, at 1040 n.319. The analysis here fleshes out that suggestion and also highlights the limits of doctrinal reform.

[107] On the hops backlash, see Adrienne So, *Against Hoppy Beer*, SLATE (May 16, 2013), https://perma.cc/37SH-T6HW.

[108] Note, though, that Upstart Brewery may have to worry about trademark infringement claims from owners of breweries or beers including UPSIDE, Registration No. 5,088,064; UPWARD BREWING, Registration No. 5,322,058; UPDRAFT, Registration No. 5,674,935; UPRISING, Registration No. 5,210,018; UPROAR BREWING, Registration No. 5,200,610; UPLAND, Registration No. 4,378,860; and possibly U.S. Trademark Application Serial No. 88/800,258 (filed Feb. 17, 2020) ("UPSCALE"); and U.S. Trademark Application Serial No. 88/692,571 (filed Nov. 14, 2019) ("UpFlow").

[109] To avoid an invalid assignment in gross, Ale Asylum would not need to sell tangible assets, but the firms would need to ensure similarity or continuity between Ale Asylum's Hopalicious and Upstart's brew under the same mark. *See* 3 MCCARTHY, *supra* note 1, § 18:23–:24.

Upstart's inability to acquire the Hopalicious mark—at least without waiting for Ale Asylum to legally abandon the mark[110]—will cause it to choose a different name for its new high-hop brew. Due to the well-documented depletion of beer-related marks, Upstart is likely to look toward the periphery of linguistic space for a suitable name. This will prevent Upstart customers from potentially confusing the beer they have at that brewery from the Ale Asylum brew of the same name, but the new name also will be harder for them to remember.

Will the net effect be an increase or a decrease in consumer search costs? The answer is not obvious. Product confusion occurs both when we cannot easily distinguish a product from another product whose name we know and when we cannot easily identify a product whose name has slipped our mind. As emphasized above, legal doctrines that reduce consumer search costs along one dimension may increase search costs along another.

Trademark law's rule against naked licensing poses a similar dilemma. Naked licensing refers to trademark licensing arrangements in which the trademark owner fails to exercise reasonable control over the use of her mark by a licensee.[111] In one well-known case, *Barcamerica International USA Trust v. Tyfield Importers, Inc.*,[112] the California-based Barcamerica licensed the rights to its "Da Vinci" mark for wines to Renaissance Vineyards, also in California. Barcamerica's principal apparently tasted Renaissance's Da Vinci wines occasionally and relied on the international renown of Renaissance's winemaker, but the licensing agreements imposed no quality standards on Renaissance. Several years after the Barcamerica-Renaissance relationship began, an Italian winemaker sought to import a wine bearing the "Leonardo Da Vinci" mark into the United States. Litigation ensued, with Barcamerica arguing that the Italian winemaker was infringing its mark and the Italian winemaker arguing that Barcamerica had abandoned its mark through naked licensing.[113]

The Ninth Circuit sided with the Italian winemaker in a ruling that resulted in the cancellation of Barcamerica's mark. The court rejected Barcamerica's argument that, "because Renaissance makes good wine, the public is not deceived by Renaissance's use

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110 For more on this possibility, see *infra* note 126 and accompanying text.

111 *See* 3 MCCARTHY, *supra* note 1, § 18:48.

112 289 F.3d 589 (9th Cir. 2002).

113 *See id.* at 592–93.

of the 'Da Vinci' mark."[114] According to the court, "[w]hether Renaissance's wine was objectively 'good' or 'bad' is simply irrelevant" to the question of abandonment.[115] "What matters," in the court's view, "is that Barcamerica played no meaningful role in holding the wine to a standard of quality—good, bad, or otherwise."[116] The court suggested that Barcamerica's principal or a "designated wine connoisseur" ought to have sampled "some adequate number of . . . Renaissance wines" each year "to ensure that they were of sufficient quality to be called 'Da Vinci.'"[117]

This naked licensing doctrine has been the target of much criticism from Coasean-influenced law-and-economics scholars. Coase's onetime colleague Judge Richard Posner argues that the doctrine poses "a threat to the ability of the market to allocate intellectual property to those who value it the most."[118] Professor Daniel Klerman concurs that barring naked licensing "causes real harm by preventing socially beneficial licensing agreements."[119] The potential for harm is easy to see. Consider the recent litigation between the band Guns N' Roses and the Colorado-based brewery Oskar Blues over the brewery's use of the band's name on a rosé-style American pale ale (predictably, "Guns 'N' Rosé").[120] The litigation resulted in Oskar Blues renaming the beer "Rosé for Daze."[121] In the absence of the naked licensing doctrine, a mutually beneficial settlement might have been possible (e.g., Oskar Blues giving a share of Guns 'N' Rosé profits to band members in exchange for the right to use the band's mark). But with cases like *Barcamerica* in the background, the Los Angeles–based band was understandably reluctant to risk its trademark by entering into a licensing agreement with a brewery one thousand miles away, over which Guns N' Roses could exercise limited oversight.[122]

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[114] *Id.* at 597.

[115] *Id.* at 597–98.

[116] *Id.* at 598.

[117] *Barcamerica*, 289 F.3d at 598.

[118] Richard A. Posner, *Transaction Costs and Antitrust Concerns in the Licensing of Intellectual Property*, 4 J. MARSHALL REV. INTELL. PROP. L. 325, 327 (2005).

[119] Daniel M. Klerman, *Trademark Dilution, Search Costs, and Naked Licensing*, 74 FORDHAM L. REV. 1759, 1768 (2006).

[120] *See* Complaint at 6, Guns N' Roses v. Canarchy Craft Brewery Collective LLC, No. 19-cv-04052 (C.D. Cal. May 5, 2019).

[121] *See Oskar Blues Brewery's Rosé for Daze Goes National for Summertime*, OSKAR BLUES BREWERY (July 25, 2019), https://perma.cc/Z6LW-XBZU.

[122] We cannot be sure, of course, that Guns N' Roses would have entered this licensing agreement in the absence of the naked licensing doctrine. The band may have concluded, for example, that the potential harm to its mark outweighed the licensing revenue. Our

Granted, the band potentially could have designated an ale connoisseur to taste some adequate number of Guns 'N' Rosé kegs and cans each year, but the transaction costs entailed in such an arrangement (and the lingering legal uncertainty generated by the Ninth Circuit's less-than-crystal-clear standard) may have been sufficiently large to overwhelm any gains from trade. The result is that Guns N' Roses loses out on licensing revenue, Oskar Blues is stuck using a distinctly inferior name for its beer, and consumers face the additional cognitive and communicative costs of using the less memorable "Rosé for Daze" moniker rather than "Guns 'N' Rosé."[123]

The previous paragraph lays out a case against the naked licensing doctrine, but the normative implications of the doctrine are more nuanced. One problem is that the naked licensor and naked licensee do not necessarily internalize all the social costs of their transaction. To continue with the Guns N' Roses example, allowing a naked license of the Guns N' Roses trademark to the Colorado brewery may cause consumers to believe—when they see any band's name on a beer—that the band has exercised no quality control over the final product. But some bands—such as the Chicago-based post-metal quartet Pelican—do exercise significant oversight over beers bearing their marks.[124] Guns N' Roses' (hypothetical) hands-off license to Oskar Blues might dull the signal of a band like Pelican's conscious decision to link its reputation to a particular brew. A similar argument applies to assignments in gross: assignments in gross may dull the signal sent by assignments with goodwill attached, and the parties to an assignment in gross are unlikely to internalize that cost. (We refer to these uninternalized costs as the "informational externalities" of assignments in gross and naked licenses.)[125]

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point is simply that the naked licensing doctrine prevents some agreements that would otherwise take place.

[123] Concededly, remembering the name "Rosé for Daze" is not *too* hard, at least for consumers who are still sober.

[124] *See* Philip Montoro, *Three Floyds and Pelican Team Up Again, This Time for the Black IPA Immutable Dusk*, CHI. READER (Nov. 11, 2013), https://perma.cc/4LYB-4C4H.

[125] This observation runs parallel to an argument that Professors Thomas Merrill and Henry Smith make with regard to property forms. *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 26, 31 n.121 (2000) (discussing "informational externalities"). The doctrine against assignments in gross might be understood as a type of numerus clausus in trademark law—that is, as a limit on customizability justifiable on the ground that customization imposes costs on nonparties. *But cf.* Christina Mulligan, *A Numerus Clausus Principle for Intellectual Property*, 80 TENN. L. REV. 235, 249 (2013) ("Curiously, the numerus

Opening the door to assignments in gross and naked licenses also has the potential to exacerbate the congestion of linguistic space. Consider again the Hopalicious example at the outset of this Section. If assignments in gross and naked licenses are prohibited, then Ale Asylum may decide to abandon its Hopalicious mark as it regears its beers to serve a less hop-enthusiastic customer base. That abandonment eventually would return the mark to the public domain,[126] from which Upstart Brewing could claim it.[127] But if the doctrines against assignments in gross and naked licenses did not exist, Ale Asylum would have an incentive to continue to brew enough of its Hopalicious beer to maintain the mark,[128] thus preserving it for a future assignment or lucrative license. By encouraging mark holders to keep their marks alive, relaxation of the rules against assignments in gross and naked licenses may slow the return of trademarks to the public domain. Or worse, it may incentivize firms to pull more marks out of the public domain, squatting on them through limited commercial use in the hope of earning profits through sales and licenses.[129]

Ultimately, what to do about the assignment in gross and naked licensing doctrines depends on difficult-to-measure empirical inputs. Removing doctrinal barriers to trade may lead to more productive uses of linguistic space, but it is possible that the opposite could be the case.[130] Our analysis again highlights the tradeoff between proximity costs and distance costs that is implicit in the design of trademark doctrine. Allowing assignments in gross and naked licenses would potentially reduce distance costs by enabling entrants to purchase or license marks near the

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clausus principle is almost entirely absent from intellectual property law. Intellectual property can be held and conveyed without the limitation of forms . . . .").

126 *See* 15 U.S.C. § 1127 ("Nonuse for 3 consecutive years shall be prima facie evidence of abandonment.").

127 *But cf.* Stacey L. Dogan & Mark A. Lemley, *A Search-Costs Theory of Limiting Doctrines in Trademark Law*, 97 TRADEMARK REP. 1223, 1249–50 (2007) (suggesting that no one should be allowed to use an abandoned mark that still carries goodwill); Robert G. Bone, *Of Trolls, Orphans, and Abandoned Marks: What's Wrong with Not Using Intellectual Property?*, 42 COLUM. J.L. & ARTS 1, 50 (2018) (same).

128 Ale Asylum would need to engage in more than "token use" of the mark. 3 MCCARTHY, *supra* note 1, § 17:21.

129 This kind of opportunistic behavior is already a concern for international registrations, particularly because registration in most countries does not depend on use. *See* Kitsuron Sangsuvan, *Trademark Squatting*, 31 WIS. INT'L L.J. 252, 261–64 (2013).

130 More nuanced reforms are also possible. *See, e.g.*, Jake Linford, *Valuing Residual Goodwill After Trademark Forfeiture*, 93 NOTRE DAME L. REV. 811, 856–68 (2017) (proposing an auction system for abandoned marks, with a preference for bidders that take steps to meet consumer expectations).

linguistic core, but when more marks near the linguistic core are in high use, proximity costs increase. This tension adds to the impetus for nontrademark solutions to the problems of linguistic space governance—solutions that, potentially, can reduce the costs of proximity without raising the costs of distance, or vice versa.

2. Pigouvian Taxes on Trademark Transactions

The discussion of informational externalities in the previous Section underscores the ambiguous welfare effects of interventions aimed at promoting trademark exchanges. To be sure, the problem of informational externalities—like all problems of social costs—could conceivably be addressed through sufficiently wide and thick markets. Imagine, for example, that the band Pelican and its partner brewery Three Floyds were given an entitlement allowing them to block other bands from nakedly licensing their marks to breweries. If the benefit to Guns N' Roses and Oskar Blues of their Guns 'N' Rosé naked licensing arrangement exceeded the informational externality borne by Pelican and Three Floyds (and their customers), then presumably Guns N' Roses and Oskar Blues would purchase the naked licensing entitlement from Pelican and Three Floyds in a mutually beneficial exchange. The example is concededly contrived, and the number of parties potentially affected by naked-licensing and assignment-in-gross transactions is likely far too vast—including large numbers of consumers—for Coasean bargaining to resolve all informational-externality issues. The key point for our purposes is that, while entirely frictionless bargaining among all affected parties could conceivably produce an efficient allocation of rights in linguistic space, marginally more bargaining among a subset of affected parties will not necessarily yield efficiency-enhancing consequences.

The problem of widely dispersed externalities is not, of course, a new one. A standard solution to such problems in the law and economics toolkit is Pigouvian taxation: imposing a tax to compensate for the external harm caused by a transaction.[131] A Pigouvian approach to assignments in gross and naked licenses would require assignees and licensors (i.e., the mark holders) to pay a tax equal to the informational externality that their

[131] *See generally* Jonathan S. Masur & Eric A. Posner, *Toward a Pigouvian State*, 164 U. PA. L. REV. 93 (2015).

transactions generate. Guns N' Roses then would nakedly license its mark to Oskar Blues only if the amount it could charge the brewery for the rights to "Guns 'N' Rosé" exceeded the cost borne by Pelican, Three Floyds, and all other parties to licensing arrangements with quality control provisions (what we might call "fully clothed" licenses).

Pigouvian taxes are easier to propose than to implement. Our brief discussion will not strive to resolve all details of a Pigouvian tax on assignments in gross and naked licenses, but rather to illustrate the potential utility of coupling nontrademark interventions with trademark reforms. We believe, though, that the implementation challenges are not as daunting as first glance might suggest.

The first question in designing a Pigouvian tax on assignments in gross and naked licenses is to determine which transactions will be subject to the tax. The problem is made more difficult by the fact that assignments in gross and naked licenses are not self-announcing. Lawyers have spent many thousands of hours arguing about whether or not particular assignments of trademarks are assignments in gross (i.e., without goodwill) and whether particular licensing arrangements are naked or clothed. The relevant lines are blurry, and taxes that depend on blurry distinctions generate inefficiencies of their own.[132]

We suggest a simple solution: Payment of the Pigouvian tax should serve as a complete defense to claims of trademark invalidity based on the assignment in gross and naked licensing doctrines. Assignees and licensors would then self-select into payment of the tax using their own assessment of their mark's vulnerability to invalidation on those grounds. Administration of the tax would thus be straightforward: the tax authority's only roles would be to collect and record payments. Enforcement would occur entirely through trademark litigation in cases of nonpayment. The amount of litigation over the assignment in gross and naked licensing doctrines, moreover, would likely be less than under the status quo, as a subset of cases in which those doctrines otherwise would apply will be removed from contention by the complete defense.

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[132] For the canonical treatment of the efficiency consequences of blurry-lined tax doctrines, see generally David A. Weisbach, *Line Drawing, Doctrine, and Efficiency in the Tax Law*, 84 CORNELL L. REV. 1627 (1999).

A harder question than *which* transactions should be subject to the tax is *how much* the tax should be. Here, we have no easy solution. The optimal Pigouvian tax is generally equal to the corresponding negative externality,[133] but accurately calculating the size of the externality is challenging. Externalities likely vary across contexts. The magnitude of consumer confusion arising from Guns N' Roses' (hypothetical) naked license of its mark to a Colorado brewery is almost certainly less than that which would arise from Guns N' Roses' (also hypothetical) naked license of its mark to another Los Angeles–based hard rock band. The magnitude of the externality also may vary depending on the number of other assignments in gross and naked licenses. At some point, consumers may become so accustomed to these arrangements that they know not to put any stock in trademarks without further investigation, at which point the incremental cost of an additional assignment in gross or naked license would be zero.

The best we can hope for is a sort of rough justice (or rough efficiency), and here—as always—there is a risk that Pigouvian taxes will overshoot by so much that the net effect on social welfare is negative. Importantly, though, this is the same for almost every other Pigouvian tax (and for virtually all other taxes too). No one is sure precisely how large the negative externality is from an additional ton of carbon dioxide emissions: different versions of the same "DICE 2013R" model with different but plausible discount rate assumptions generate estimates ranging from $12 to $73 per ton.[134] Setting an optimal carbon tax is therefore an uncertain enterprise. Likewise, no one is sure precisely what the optimal tax rate on top incomes is. One oft-cited paper estimates that it is somewhere between 57% and 83%, not exactly a narrow range.[135] Uncertainty about the optimal rate is not an insuperable barrier to a carbon tax or an income tax—or to a tax on trademark transactions. It is, though, an invitation for further analysis.

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133 *See* Louis Kaplow, *A Unified Perspective on Efficiency, Redistribution, and Public Policy*, 73 NAT'L TAX J. 429, 448–49 (2020).

134 William Nordhaus, *Estimates of the Social Cost of Carbon: Concepts and Results from the DICE-2013R Model and Alternative Approaches*, 1 J. ASS'N ENV'T & RES. ECONOMISTS 273, 296 tbl.3 (2014). Figures are in 2005 dollars.

135 Thomas Piketty, Emmanuel Saez & Stefanie Stantcheva, *Optimal Taxation of Top Labor Incomes: A Tale of Three Elasticities*, 6 AM. ECON. J.: ECON. POL'Y 230, 267 tbl.5 (2014).

B. Reducing the Cognitive Costs of Proximity and Distance

Reducing barriers to trade and taxing negative externalities may promote more efficient use of existing linguistic space, but they are not the only strategies for addressing the costs of proximity and distance. Again, analogies from the world of real property shed light on additional approaches that policymakers can pursue. Public actors often address the twin problems of congestion and sprawl through investments in transportation infrastructure that make it easier for residents to move around the urban core (think streetcars and buses) and to access the suburban/exurban periphery (think bullet trains and eight-lane highways).

Consider first the possibility of connecting distant pieces of linguistic space so that they are as easy to access as the linguistic core.[136] The supply of easy-to-remember words, like the supply of urban land, is not fixed. It bears tragic notice that one of the most frequently used words in the United States today is a word that did not exist in any language before 2020 ("COVID-19").[137] Pandemics aside, one (noncatastrophic) way to expand the supply of easy-to-remember words is to learn a second language. "Au Bon Pain" ("At the Good Bread") and "Pret A Manger" ("Ready to Eat"), for example, are relatively easy-to-remember marks if one is familiar with French. This is not the only or the main reason why more people should learn foreign languages,[138] but one side benefit of public investment in foreign language learning would be an expansion of the set of possible marks that U.S. consumers could recognize at relatively low marginal cognitive cost.

We mention the foreign language point primarily to underscore the elasticity of the linguistic core—we are not, of course, proposing a national Rosetta Stone campaign simply to address

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[136] This connection can be thought of as building a bullet train between the distant space and the semantic core, or, alternatively, as moving that space closer to the core—perhaps the equivalent of Boston's creation of over five thousand acres of human-made land. *See* Betsy Mason, *How Boston Made Itself Bigger*, NAT'L GEOGRAPHIC (June 13, 2017), https://perma.cc/NY5T-QWDP.

[137] On the flood of COVID-19-related trademark applications, see Ronald D. White, *COVID Couture. Covidiot. Coronavirus Trademark Hopefuls Flood Patent Office*, L.A. TIMES (June 17, 2020), https://www.latimes.com/business/story/2020-06-17/coronavirus-outbreak-trademark-applications.

[138] *See* Bénédicte de Montlaur, Opinion, *Do You Speak My Language? You Should*, N.Y. TIMES (Mar. 26, 2019), https://perma.cc/N3CJ-7GEN.

the costs of proximity and distance.[139] For one thing, expanding the field of registrable trademarks via foreign language learning would require amendment to trademark law itself. Under the doctrine of foreign equivalents, foreign language marks are generally translated into English to determine their registrability.[140] Thus, *sombrero* would be considered generic for hats (and thus unregistrable), and *delicioso* would be considered descriptive for food products (and thus registrable only upon a showing of secondary meaning). To be sure, trademark law is changeable—and even current doctrine does not entirely rule out registration of foreign equivalents in all circumstances.[141] But there is at least arguable logic to the doctrine in its traditional form. One can imagine bilingual English/French or English/Spanish speakers confusing a hypothetical "Pomme" or "Manzana" electronics brand with Apple Computers precisely because they do know two languages and can translate effortlessly from one to another.[142] Or to put the same point in the proximity-distance terminology of this Article: foreign language learning potentially makes available to U.S. consumers a new set of not-too-distant marks, but at the cost of creating more cases of proximity.[143]

Fortunately, public investment in learning French is not the only way to reduce the distance costs of marks like "Au Bon Pain" and "Pret A Manger"—these brands can also achieve the same

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[139] Rosetta Stone, the education technology software company best known for its foreign language learning tools, is also—incidentally—well known in the trademark world for its legal battle with Google. *See generally* Rosetta Stone Ltd. v. Google, Inc., 676 F.3d 144 (4th Cir. 2012). Rosetta Stone sued Google for trademark infringement and dilution arising out of Google's AdWords program, which allowed competing software firms to pay to display sponsored advertisements for their products when consumers entered "Rosetta Stone" into the search engine. The parties ultimately settled on undisclosed terms. *See* Joe Mullin, *Google Settles Rosetta Stone Lawsuit, Its Last Major Dispute over AdWords*, ARS TECHNICA (Nov. 1, 2012), https://perma.cc/UHG9-4GB4.

[140] *See* 2 MCCARTHY, *supra* note 1, § 11:34. Beebe and Fromer note a similar "reverse Babel problem" in European trademark law, "in which the registration of a word mark in one language may effectively block registrations of translationally-equivalent words in multiple other languages." Barton Beebe & Jeanne C. Fromer, *The Possible Futures of Trademark Law in a Global Multilingual Economy: A Case Study* 1 (2021) (unpublished manuscript) (on file with authors).

[141] Foreign equivalents of unregistrable English marks may be registrable when it is unlikely that the "ordinary American consumer would stop and translate the mark into English." *In re* Spirits Int'l, N.V., 563 F.3d 1347, 1351 (Fed. Cir. 2009); *see also* Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772, 396 F.3d 1369, 1377 (Fed. Cir. 2005) ("When it is unlikely that an American buyer will translate the foreign mark and will take it as it is, then the doctrine of foreign equivalents will not be applied.").

[142] *Pomme* is French for apple; *manzana* is Spanish for apple.

[143] We thank Rebecca Tushnet for this point.

end through advertising. And advertising can reduce the costs of congestion (proximity) as well as sprawl (distance). Because of advertising by mark owners, most of us can readily distinguish superficially similar brand names (e.g., Bank of America versus U.S. Bank, FOX versus FX television networks, Honda versus Hyundai automobiles, Lee versus Levi's jeans). Advertising has reduced the cognitive cost of proximity. Likewise, most of us have no trouble recalling many heavily advertised brand names that are quite distant from the core of standard English words, short neologisms, and common U.S. surnames (e.g., Häagen-Dazs, lululemon, Pepto-Bismol, Tylenol). The location of these marks on the linguistic periphery has the (perhaps unintended) consequence of leaving more room for others near the linguistic core. Because Norwich Pharmaceutical Company chose the name Pepto-Bismol,[144] subsequent makers of heartburn relief treatments could choose easier-to-remember marks (e.g., TUMS[145]). Because McNeil Laboratories chose Tylenol,[146] Aleve remained available for a later comer.[147]

Advertising, by reducing the cognitive costs of proximity and distance, arguably generates a positive externality of sorts.[148] Federal Express, by reminding us that it is the brand to use "[w]hen it absolutely, positively has to be there overnight,"[149] helps us distinguish its own courier services from the proximately named American Express's financial services, thus conferring a benefit on both firms (and possibly their customers too). Advertising by holders of distant marks reduces confusion costs less directly. Absent its advertising, Häagen-Dazs was not terribly likely to be confused for anything else—cofounder Reuben Mattus said that he made up a "totally fictitious Danish name" to honor the Nordic nation's rescue of its Jewish population during

144 On the history of Pepto-Bismol, see *The History of Pepto-Bismol*, PEPTO-BISMOL, https://perma.cc/2E5C-P4M5.

145 *See TUMS® – America's #1 Heartburn Medicine*, TUMS,https://perma.cc/P8GE-A4YR.

146 On the history of Tylenol, see *Our Story*, TYLENOL, https://perma.cc/YF3T-CC5M.

147 *See* Mark E. Parry & Katie Fehskens, The Aleve Launch (a) 8–9 (2009) (Darden Case No. UVA-M-0554), https://perma.cc/56XX-5Q5F.

148 To be sure, advertising can generate negative externalities as well. On negative effects of advertising in the trademark context, see Stacey Dogan, *Bounded Rationality, Paternalism, and Trademark Law*, 56 HOUS. L. REV. 269, 277–86 (2018), and Jeremy N. Sheff, *Biasing Brands*, 32 CARDOZO L. REV. 1245, 1277–95 (2011). On positive and negative effects of advertising related to opioid addiction, see Daniel J. Hemel & Lisa Larrimore Ouellette, *Innovation Institutions and the Opioid Crisis*, 7 J.L. & BIOSCIENCES 1, 16–20 (2020).

149 On the branding of FedEx, see Evelyn Starr, *It Absolutely, Positively Had to Happen Overnight*, E. STARR ASSOCS. (July 13, 2012), https://perma.cc/2TKW-KGNJ.

World War II,[150] though the Danish language does not use umlauts,[151] so even the risk of confusion with actual Danish names is low. But by choosing a distant mark, and then investing in advertising to build consumers' familiarity with that mark, Mattus and his spouse, Häagen-Dazs cofounder Rose Mattus, arguably conferred a benefit on later entrants like Cold Stone Creamery who were then left with more space in the linguistic core.[152]

Trademark law provides some encouragement for firms to choose distant marks like "Häagen-Dazs." Distant marks are more likely to qualify as inherently distinctive, and thus protectable, without an evidentiary showing that buyers have come to view them as distinctive of a unique source.[153] Additionally, more distant marks are less likely to be viewed as infringing existing marks by creating a likelihood of confusion or dilution.[154] But while the choice of a distant mark potentially economizes on trademark litigation costs, it often requires significant advertising expenditures in order to succeed in the consumer marketplace.[155] Trademark law also encourages firms to invest in advertising their marks by using advertising spending as a proxy for the strength and fame of a mark.[156]

While trademark law indirectly encourages advertising expenditures, other areas of law do so much more directly. Most notably, the allowance of an immediate deduction from federal income tax for advertising expenditures is often understood as a "subsidy" for advertising.[157] Investments that yield significant

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[150] Joan Nathan, *Ice Cream's Jewish Innovators*, TABLET (Aug. 2, 2012), https://perma.cc/YB55-YSSJ.

[151] *See* ANNE COOPER FUNDERBURG, CHOCOLATE, STRAWBERRY, AND VANILLA: A HISTORY OF AMERICAN ICE CREAM 155 (1995).

[152] *See* George James, *A Bold, New Player in the Ice Cream Wars*, N.Y. TIMES (June 12, 2005), https://perma.cc/8BZ7-F6RM.

[153] *See supra* note 59 and accompanying text.

[154] *See supra* note 58 and accompanying text.

[155] Häagen-Dazs, for its part, is no stranger to trademark litigation. It once sued another ice cream producer and distributor, Frusen Glädjé, claiming that Frusen Glädjé was copying its strategy of using "Scandinavian flair" to sell ice cream in the United States. A federal district court roundly rejected Häagen-Dazs's claims. *See* Häagen-Dazs, Inc. v. Frusen Glädjé Ltd., 493 F. Supp. 73, 75 (S.D.N.Y. 1980).

[156] *See* 15 U.S.C. § 1125 (listing "[t]he duration, extent, and geographic reach of advertising and publicity of the mark" as the first of four factors to be considered in determining whether a mark is famous); 2 MCCARTHY, *supra* note 1, § 11:81 (listing the "amount and type of advertising and promotion which draws attention to the mark" as one of the five most common types of evidence used to establish trademark strength).

[157] *See* Mona L. Hymel, *Consumerism, Advertising, and the Role of Tax Policy*, 20 VA. TAX REV. 347, 414–43, 447 (2000); Kendrin R. Sonneville et al., *BMI and Healthcare Cost*

benefits beyond the current taxable year generally must be capitalized rather than immediately deducted.[158] For example, a company that invests $1 million in a new office building would not be able to write off the $1 million expense immediately. Instead, under the capitalization and depreciation rules for nonresidential real estate, the company would claim a depreciation deduction of $25,641 per year for each of the next thirty-nine years ($25,641 is one thirty-ninth of $1 million, and thirty-nine years is the recovery period for nonresidential real property under federal income tax law).[159] By contrast, the IRS has long allowed taxpayers to claim an immediate deduction for advertising expenditures, even though advertisements often yield benefits well beyond the current taxable year. Because of the time value of money, the ability of firms to deduct advertising expenses immediately confers a substantial tax benefit relative to the alternative in which advertising expenses must be capitalized and then deducted incrementally. According to the Joint Committee on Taxation, a bipartisan 2013 proposal to eliminate the subsidy would have raised $169 billion in tax revenue over a decade.[160]

To be clear, the analysis here is not intended as a normative justification for the status quo tax treatment of advertising. Insofar as current law provides an advertising subsidy,[161] the subsidy is quite poorly targeted. Brands that do nothing to expand the universe of useable marks (e.g., Blue Bunny Ice Cream and Blue Bell Creameries) receive the same subsidy for their advertisements as

Impact of Eliminating Tax Subsidy for Advertising Unhealthy Food to Youth, 49 AM. J. PREVENTIVE MED. 124, 125 (2015).

158 *See* INDOPCO, Inc. v. Comm'r, 503 U.S. 79, 87 (1992) ("Although the mere presence of an incidental future benefit—'*some* future aspect'—may not warrant capitalization, a taxpayer's realization of benefits beyond the year in which the expenditure is incurred is undeniably important in determining whether the appropriate tax treatment is immediate deduction or capitalization." (emphasis in original)).

159 I.R.C. § 168(c).

160 *See* Ana Radelat, *It's Official: Camp's Tax Proposal Would Limit Expensing of Ad Costs*, AD AGE (Feb. 26, 2014), https://perma.cc/5UZ2-Y6AL.

161 From September 2017 until the end of 2022, taxpayers can claim an immediate deduction for many expenditures that would have been capitalized under previous law. *See* I.R.C. § 168(k)(6). Thus, for the moment, the preferential treatment historically afforded to advertising is available to a wide range of other expense categories. Under current law, however, most of the nonadvertising preferences are set to phase out between the beginning of 2023 and the end of 2027, I.R.C. § 168(k)(6), after which the tax code's favorable treatment of advertising will once again be stark.

brands like Häagen-Dazs, Humphry Slocombe,[162] and Tillamook.[163] A firm advertising counterfeit products receives the same deduction as a firm advertising to distinguish its trademarked products from knockoffs.[164]

What the analysis here emphasizes is that advertising is a variable that affects the cognitive costs of proximity and distance—and a variable that is itself influenced by trademark and nontrademark policies. But while advertising can be understood as a tool that *reduces* the costs of proximity and distance, it also can be understood *as* a cost of proximity and distance. Advertising is a real resource cost: not only do advertisements cost billions of dollars each year to produce, but they also occupy hours and hours of consumers' time. By one estimate, a typical cable subscriber spends about 160 hours each year watching TV ads (and that does not take into account advertisements via other mediums).[165] To be sure, not all of these costs can be attributed to product differentiation—advertisements also provide us with information (and sometimes disinformation) about product attributes. The very high costs of advertising nonetheless serve to motivate the search for alternative approaches to product differentiation within linguistic space.

C. Alternatives to Plain Language

The strategies outlined in the previous two Sections seek to reduce the cognitive costs of proximity and distance within existing linguistic space. These costs also can be addressed through a third set of strategies: adding entirely new dimensions to linguistic space. As a land use analogy, Boston's Big Dig—which replaced the city's aboveground Central Artery with a vast underground roadway network—increased connectivity of neighborhoods near the city center while also (on some accounts) making it easier to travel in and out of the city, albeit at a $24 billion price tag that made it the most expensive urban highway

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[162] *See* Elizabeth Weil, *I'll Take a Scoop of Prosciutto, Please*, N.Y. TIMES MAG. (June 30, 2010), https://perma.cc/73DF-6D9Y (discussing the origins of the Humphry Slocombe ice cream brand).

[163] *See* Stuart Elliott, *Love That Cheese, the Burger Declares*, N.Y. TIMES (May 2, 2011), https://perma.cc/J3ZM-BTFN (discussing the branding efforts of the Tillamook County Creamers Association, an Oregon farmers' cooperative with a popular ice cream line).

[164] On advertising and counterfeiting, see generally *Rosetta Stone*, 676 F.3d 144.

[165] *See* Stephen Lovely, *Netflix Saves Its Subscribers from 160 Hours of Commercials per Year*, CORDCUTTING (Feb. 8, 2019), https://perma.cc/7YQZ-SENE.

project in U.S. history.[166] Similarly, private and public actors can invest in the development of alternative product search and identification systems that relieve some of the pressure on plain language. Trademarks are one way for producers to efficiently convey information about the quality of their products to consumers.[167] But they are not the only way. New systems for finding and distinguishing goods and services in the marketplace can reduce the informational importance of trademarks and thus simultaneously reduce entry, proximity, and distance costs. By adding a new dimension to linguistic space, alternative systems for providing consumers with marketplace information escape the proximity-distance tradeoff.

One example is the UPC system, which is the source of the barcodes on product packages now familiar to most consumers. While the UPC system is used primarily by manufacturers, wholesalers, and retailers, it also is amenable to various consumer-facing applications.[168] For example, the Amazon app allows consumers to purchase an item through Amazon by scanning the UPC barcode, reducing the importance of identifying the particular brand name.[169] Similarly, the Untappd app allows beer lovers to keep track of their favorite ales and lagers by scanning UPC barcodes with their smartphones.[170]

Consider our hypothetical Texas-based Upstart Brewery searching for a mark for its hoppy new brew. As we have discussed, allowing it to use an existing (or recently abandoned) mark from a far-flung microbrewery like "Hopalicious" may lead to proximity costs for consumers who encounter both brands. But

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166 On neighborhood connectivity benefits, see *The Big Dig: Boston, Massachusetts*, CONG. FOR NEW URBANISM, https://perma.cc/7BL9-TB98. On travel time improvements, see MASS. OF DEP'T TRANSP., THE BIG DIG: PROJECT BACKGROUND, https://perma.cc/8MXL-E8GP. On cost, see Anthony Flint, *10 Years Later, Did the Big Dig Deliver?*, BOS. GLOBE (Dec. 29, 2015), https://www.bostonglobe.com/magazine/2015/12/29/years-later-did-big-dig-deliver/tSb8PIMS4QJUETsMpA7SpI/story.html. The $24 billion figure includes interest.

167 *See* PETER S. MENELL, MARK A. LEMLEY & ROBERT P. MERGES, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2019, at 873 (2019) ("[T]rademarks are widely viewed as devices that help to reduce information and transaction costs by allowing customers to estimate the nature and quality of goods before purchase.").

168 Barcode scanning apps have proliferated for a variety of uses. *See* Michael Archambault, *The 8 Best Barcode Scanner Apps for Android and iPhone*, LIFEWIRE (Dec. 5, 2019), https://perma.cc/KJR9-UT5N.

169 *See* Brian Burgess, *Use the Amazon Barcode Scanner to Purchase Products from Your Phone*, GROOVYPOST (Feb. 6, 2018), https://perma.cc/JD62-L85L.

170 *See* Billy Steele, *Beer-Tracking App Untappd Gets Barcode Scanning, Hails an Uber*, ENGADGET (Feb. 9, 2016), https://perma.cc/QR6R-MBHM.

requiring Upstart to find a novel beer name that avoids these proximity costs will likely lead to a less memorable brand, with the resulting distance costs. Policy solutions internal to trademark law may reduce either proximity or distance costs, but at the expense of increasing the other. Untappd, however, reduces proximity and distance costs simultaneously. If consumers rely on UPC barcodes to keep track of beer purchases and their favorite brands, they are less likely to confuse a Hopalicious produced by Upstart with the Ale Asylum original. And Untappd can also help consumers remember more obscure names like "Festina Pêche" or oppressively long ones like "Olde Peninsula Blueberry Maple Walnut Java Peanut Butter Ghost of Stout Chocula Junior."[171]

Brands also have turned to standardized barcode systems beyond UPCs, such as two-dimensional QR codes, to help consumers learn about and purchase products without relying on trademarks.[172] QR codes were developed by a Japanese firm in 1994 to aid with automotive manufacturing and were standardized internationally in 2000.[173] Just as trademarks are used to convey information not only about the identity of a product but also about the nature and quality of that product,[174] QR codes are used not only for product identification but also to provide consumers with relevant information such as nutritional content, the existence of bioengineered ingredients, or product demonstrations.[175] When consumers can use QR codes on product packaging to obtain the information relevant to their purchasing choices, the brands for

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171 Yes, this is a real name for a beer. *See Blueberry Maple Walnut Java Peanut Butter Ghost of Stout Chocula Junior, Olde Peninsula Brewpub*, UNTAPPD, https://perma.cc/MS9C-PFVG.

172 *See, e.g.*, Brandon Gutman, *L'Oréal CMO Shares Results from Mobile Taxi Shops Initiative*, FORBES (Mar. 22, 2012), https://perma.cc/8W5U-GYVG (describing a program through which taxi passengers could use QR codes "to instantly buy Lancôme and Yves Saint Laurent beauty products while riding through Manhattan").

173 Mark Turner, *QR Codes Explained*, TECHSPOT (Sept. 3, 2018), https://perma.cc/ZUS2-TRS7.

174 *See* 1 MCCARTHY, *supra* note 1, § 3:11.

175 *See* National Bioengineered Food Disclosure Standard, 83 Fed. Reg. 65,814, 65,828 (Dec. 21, 2018) (to be codified at 7 C.F.R. pt. 66) (stating that QR codes are one way food producers can satisfy new disclosure requirements for bioengineered ingredients); Tongzhe Li & Kent D. Messer, *To Scan or Not to Scan: The Question of Consumer Behavior and QR Codes on Food Packages*, 44 J. AGRIC. & RES. ECON. 311, 323 (2019) (reporting that over half of field experiment participants provided with a QR-scanning smartphone accessed oyster labeling information and changed their preferences accordingly); Nick Ponesse, *6 Places Consumers Are Engaging with QR Codes*, SCANLIFE (May 15, 2018), https://perma.cc/ZJQ2-BML2 (noting that stores such as Home Depot and Best Buy use QR codes to direct customers "to a demonstration on how to use" a product).

those products become less important—lowering the costs both from confusing one brand for another or struggling to recognize an unfamiliar name.

Intellectual-property scholar Margaret Chon has observed that QR codes and other mobile-enabled labels are increasingly used to convey information about sourcing and corporate social responsibility.[176] For example, rather than relying on brands like Kind and Whole Foods that have marketed their ethical sourcing practices,[177] a consumer concerned about sustainability can scan a QR code on food packaging to learn about the environmental impact of its production. Chon argues that trademark valuation should do more to recognize how brands can carry similar information.[178] But we think it is also important to explore how these alternative identification systems can reduce the significance of trademarks for conveying information to consumers.

In addition to developing alternative product identifiers, the private sector has developed robust nontrademark means for consumers to search for products of interest. For example, online shopping also allows consumers to base purchasing decisions on product attributes such as price, customer reviews, and popularity, without the need to pay attention to a brand name. The Amazon glove shopper mentioned above need not make her decision based on unfamiliar brand names such as SHSTFD, Joyoldelf, VBIGER, and Bizzliz.[179] Instead, she will likely search using a generic term like "gloves" and then look for a product with a reasonable price, positive customer reviews, and high placement from Amazon's search algorithm.[180] Similarly, prospective wine purchasers need not remember the wide variety of regions, grapes, wineries, and vintages—they can rely on expert or amateur ratings and tasting notes.[181]

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176 Margaret Chon, *Trademark Goodwill as a Public Good: Brands and Innovations in Corporate Social Responsibility*, 21 LEWIS & CLARK L. REV. 277, 280–82 (2017).

177 *Id.* at 304–05.

178 *Id.* at 313–15.

179 *See supra* note 53 and accompanying text.

180 *See* Herrman, *supra* note 5353 ("Numerous smaller brands, including WuBeFine and UGBDER, are clearing six figures in monthly sales, driven by high search placement and customer reviews.").

181 *See* Carlos D. Ramirez, *Do Tasting Notes Add Value? Evidence from Napa Wines*, 5 J. WINE ECON. 143, 156–59 (2010); Mark Schatzker & Richard Bazinet, *Why Amateur Wine Scores Are Every Bit as Good as Professionals'*, VOX (May 25, 2018), https://www.vox.com/2016/12/15/13892364/wine-scores-critics-amateurs.

Systems developed and managed by the private sector for product identification and differentiation fall within our rubric of governing linguistic space even though the government's presence is sometimes difficult to detect. Here, we see linguistic analogues to systems of physical commons governance that—as Professor Elinor Ostrom documented in detail—are neither exclusively public nor exclusively private but instead reflect "rich mixtures of 'private-like' and 'public-like' institutions defying classification in a sterile dichotomy."[182] Consider the UPC system. The technology for barcoding has existed since the 1940s—invented by a pair of graduate students at the Drexel Institute of Technology in Philadelphia on a challenge from a local retailing chain.[183] But it took efforts by an industry trade group, the National Association of Food Chains, among others, to bring barcodes into widespread use.[184] Today, the UPC system is managed by a nongovernmental standard-setting organization called GS1,[185] a federation of 114 national business bodies.[186] GS1's board comprises representatives from the for-profit and nonprofit sectors,[187] with no formal role for any nation-state. But governments continue to play an important role in the code's adoption. For example, the U.S. Department of Agriculture now requires states to use a national UPC database to determine which products are eligible for purchase within the Special Supplemental Nutrition Program for Women, Infants, and Children (more commonly known as "WIC").[188]

The public sector sometimes plays a more direct role in the development of alternative product identifiers. This is particularly so when the costs of proximity and distance are imposed on third parties and when private parties are unable to coordinate on a standard. An important example is in the pharmaceutical sector, where proximity and distance costs can result in serious medication errors or miscommunication among patients, doctors,

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182 ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 14 (1990).

183 *See* Alistair Milne, *The Rise and Success of the Barcode: Some Lessons for Financial Services*, 14 J. BANKING REG. 241, 242–43 (2013).

184 *See id.* at 243.

185 *See Our Mission and History*, GS1 US, https://perma.cc/B5QU-HKBE.

186 Press Release, GS1, *GS1 Grows by Adding Two New Member Organisations* (May 24, 2019), https://perma.cc/R39B-ADVS.

187 *See GS1 Management Board*, GS1, https://perma.cc/Y9VY-YRF6.

188 Food Delivery Methods, 7 C.F.R. § 246.12(cc); *see also* NAT'L ACADS. OF SCIS., ENG'G & MED., REVIEW OF WIC FOOD PACKAGES: PROPOSED FRAMEWORK FOR REVISIONS: INTERIM REPORT 70 (2016) (discussing challenges of keeping database up to date).

and pharmacists. Proximity costs are created when different drugs have similar names—for example, Xanax, Zantac, Zyrtec, and Zerit are all on the lengthy list of confused drug names maintained by the Institute for Safe Medication Practices.[189] These proximity costs could be reduced by forcing firms to choose less similar names for new drugs, but the result would be an increase in distance costs: drug names that are even more challenging for consumers to recognize and recall. Do you still remember the two examples from the Introduction? Lists of best-selling drugs read like a diabolical memory test: Revlimid, Imbruvica, Eliquis, Genvoya, Xarelto.[190]

Given the potential public health consequences of medication errors, the U.S. Food and Drug Administration (FDA) has intervened to help get patients to the right drug product.[191] One of the more effective interventions so far does not rely on brand names at all: at the behest of Congress, the FDA has developed the NDC system, which assigns a unique ten-digit numerical identifier to most drugs distributed commercially in the United States.[192] NDCs are used in electronic medical records maintained by medical systems and pharmacies to help reduce medication errors.[193] Thus, rather than relying on each participant in the drug distribution chain to avoid mistaking the fast-acting insulin Novolog with the slower-acting (and not interchangeable) insulin Novolin,[194] a doctor can associate a Novolog prescription with the NDC value 0169-7501-11,[195] and electronic records and barcode scanning can be used to help get the right medication to the patient.

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189 *List of Confused Drug Names*, INST. FOR SAFE MEDICATION PRACS. (Feb. 28, 2019), https://perma.cc/22UF-SNBM.

190 To help pharmacy students with this daunting task, there are websites and instructional videos dedicated to techniques for memorizing drug names. *See, e.g.*, Tony Guerra, *How to Memorize the Top 200 Drugs*, PHARMACY TIMES (Aug. 29, 2016), https://perma.cc/F4V7-NXU6.

191 *See* U.S. FOOD & DRUG ADMIN., WORKING TO REDUCE MEDICATION ERRORS (last updated Aug. 23, 2019).

192 *See* U.S. FOOD & DRUG ADMIN., NATIONAL DRUG CODE DATABASE BACKGROUND INFORMATION (last updated Mar. 20, 2017).

193 *See, e.g.*, David S. Bach, Kenneth R. Risko, Frank K. Zaran, Margo S. Farber & Gregory J. Polk, *A Pharmacy Blueprint for Electronic Medical Record Implementation Success*, 50 HOSP. PHARMACY 484, 488–89 (2015).

194 *See Novolin vs. Novolog*, CANADIAN INSULIN (Sept. 5, 2017), https://perma.cc/KSX8-EKYP.

195 *NDC 0169-7501-11 NOVOLOG*, NAT'L DRUG CODES LIST, https://perma.cc/7GP5-YLN5.

While the NDC is largely a success story, it is not entirely so: variations across manufacturers and health care providers in their rendering of NDCs remain a cause of confusion and potential medical error.[196] For example, many computer systems and the Health Insurance Portability and Accountability Act (HIPAA) use an eleven-digit format, and variation in how codes are converted between ten and eleven digits has led to confusion.[197] The failure of private parties to coordinate around a single standard may be a reason for the FDA to intervene again and enforce uniformity. Indeed, in 2018 the agency held a public hearing to consider four different options for the future of the NDC system.[198]

Our goal here is not to advocate for a particular alternative product identification system or governance structure. The optimal system will depend on contingent social facts about how consumers interact with goods and services and the comparative efficiency of government and market systems. For example, when the COVID-19 pandemic rapidly accelerated the shift to online shopping,[199] consumers became less interested in the ability to obtain sourcing information by scanning an in-store QR code and more interested in the ability to search a grocery website for products meeting certain characteristics. Consumers avoiding the high-risk indoor bar scene might find less use for the Untappd app,[200] but they can use a beer subscription service to choose a selection of craft beers from a broad category, like "a mix of Belgian and sour ales."[201] Yet again, one can draw analogies to real property

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196 *See, e.g.*, Ajit A. Dhavle, Stacy Ward-Charlerie, Michael T. Rupp, Vishal P. Amin & Joshua Ruiz, *Analysis of National Drug Code Identifiers in Ambulatory E-Prescribing*, 21 J. MANAGED CARE & SPECIALTY PHARMACY 1025, 1025–26 (2015) (analyzing nearly fifty thousand NDCs in electronic prescriptions and finding that about one-third did not follow the industry standard of a "representative" number "that is intended to represent a category of medication irrespective of the package size and the manufacturer or labeler," and more than 0.2% "contained a free-text drug description that pointed to a completely different drug concept than that associated with its NDC value").

197 *See* NATIONAL DRUG CODE DATABASE BACKGROUND INFORMATION, *supra* note 192.

198 *See* U.S. FOOD & DRUG ADMIN., PUBLIC HEARING: FUTURE FORMAT OF THE NATIONAL DRUG CODE (Nov. 5, 2018); *see also* Future Format of the National Drug Code; Public Hearing; Request for Comments, 83 Fed. Reg. 38,666, 38,667–68 (Aug. 7, 2018) (to be codified at 21 C.F.R. pt. 15).

199 *See* Suzanne Kapner & Sarah Nassauer, *Coronavirus Finishes the Retail Reckoning That Amazon Started*, WALL ST. J. (May 14, 2020), https://www.wsj.com/articles/coronavirus-finishes-the-retail-reckoning-that-amazon-started-11589459920.

200 On the risk of bars during the pandemic, see Tara Parker-Pope, *A Virus Walks into a Bar . . .*, N.Y. TIMES (June 25, 2020), https://perma.cc/9A9G-FD6D.

201 Joshua M. Bernstein, *The Best Beer Delivery Services for Every Type of Beer Drinker*, FORBES (June 30, 2020), https://perma.cc/WG3E-E27E.

and land use. For years, Boston residents have advocated a Big Dig–scale investment in rail systems,[202] but the long-term impacts of COVID-19 on public transportation remain to be seen.[203] However demand develops in either linguistic space or the physical world, our point is that new dimensions can often be added to simultaneously reduce the costs of proximity and distance.

III. TOWARD TRADEMARK POLICY PLURALISM

So far, we have argued that, in its efforts to facilitate communication of source-identifying product information and prevent unfair competition, trademark law entails a balancing of proximity costs and distance costs in linguistic space—a balancing act that is, in many ways, analogous to the proximity-distance tradeoffs struck by real property and land use law in physical space. We also have suggested ways that law and policy can break free from the proximity-distance tradeoff, though in all of these cases we must incorporate nontrademark tools such as Pigouvian taxes, advertising subsidies, and efforts to create and improve product identification systems that do not rely on plain language. We conclude by situating our project within the broader context of pluralism in intellectual property law.[204]

In earlier work, we argued that "innovation policy pluralism"—which we defined as "the combination of IP and non-IP policies, or different types of non-IP policies"—provides a more normatively attractive and descriptively accurate picture of innovation policy than the dominant patent- and copyright-focused accounts.[205] Patent and copyright, we acknowledged, are often useful instruments for incentivizing innovation,[206] and they are sometimes helpful tools for allocating access to knowledge goods.[207] But when policymakers rely purely on patent and copyright to incentivize innovation and allocate access to knowledge goods, they run into a dilemma. Efforts to boost innovation

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[202] *See, e.g.*, James Aloisi & Stanley Rosenberg, *No More Incrementalism, It's Time for Big Rail*, COMMONWEALTH (Oct. 12, 2019), https://perma.cc/ZHV2-7NMS.

[203] *See* Skip Descant, *As Transit Reopens, Long-Term Impacts of COVID-19 Unknown*, GOV'T TECH. (June 10, 2020), https://perma.cc/F9F5-3KV7.

[204] *See* Hemel & Ouellette, *Innovation Policy Pluralism*, *supra* note 37, at 549. For perspectives on intellectual property pluralism, see generally IS INTELLECTUAL PROPERTY PLURALISM FUNCTIONAL? (Susy Frankel ed., 2019).

[205] *See* Hemel & Ouellette, *Innovation Policy Pluralism*, *supra* note 37, at 549, 593.

[206] *See id.* at 557, 601–07 (patents and copyright, respectively).

[207] *See id.* at 567–73.

incentives by strengthening patent and copyright protection have the unfortunate effect of reducing access to knowledge goods. Efforts to expand access to knowledge goods by weakening patent and copyright protection have the unfortunate effect of diluting innovation incentives.[208] We can have our cake and eat it too—we can offer rich innovation incentives while ensuring broad access to knowledge goods—but to do so, our cake cannot consist entirely of IP.

The situation with respect to trademark law is similar, though the goals generally are different. Trademark law can be a useful tool for governing linguistic space, but it entails inevitable and often unenviable tradeoffs. We can reduce proximity costs by allowing trademark holders to claim broader protection, but doing so will increase distance costs. Or we can reduce distance costs by making available more marks near the linguistic core, but doing so will increase proximity costs. The most we can do using trademark law as our only tool is to select the configuration of doctrines that best balances proximity and distance costs. Once we move beyond trademark law, though, we encounter opportunities to improve product identification and differentiation that do not require us to make a proximity-distance tradeoff.

This insight will be familiar from other fields of law. Doctrines take their current forms for all sorts of historically contingent and path-dependent reasons, and it would be rather magical if any one area of doctrine evolved such that it was the only tool needed to solve a complex policy problem. Thus, scholars of tort law now generally accept that safety regulations and Pigouvian taxation can complement (or even substitute for) liability rules in reducing the costs of accidents.[209] Scholars of free speech understand that government subsidies for certain types of high-value speech can complement constitutional doctrines in fostering a vibrant marketplace of ideas.[210] It would be surprising if common law judging and sporadic legislative interventions had spawned a complete regime for managing linguistic space. Our analysis suggests that they have not.

Our argument is pluralist in the sense that it embraces a multiplicity of tools for linguistic space governance. But it is

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[208] *See id.* at 547–48.

[209] *See, e.g.*, Susan Rose-Ackerman, *Regulation and the Law of Torts*, 81 AM. ECON. REV. 54, 55–57 (1991).

[210] *See, e.g.*, Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 959–60 (1995).

pluralist in another way as well. Once scholars and policymakers understand that trademark law is simply one among a bevy of tools that society can use to manage proximity and distance costs in linguistic space, the pressure on trademark law to pursue this objective to the exclusion of others may fade. In other words, if trademark law is not the only tool in our kit for linguistic space management, then we potentially gain the luxury of using trademark tools to advance other goals as well. Pluralism about the tools we use to achieve one objective also allows us to use those same tools to pursue a plurality of ends.[211]

Consider the suggestion that trademark law could be used to supplement other IP and non-IP innovation incentives.[212] A firm that invents a new product—or a product distinct from and superior to its predecessors—and then brands the product with a memorable trademark can potentially earn both a time-limited patent monopoly over the product and a perpetual monopoly over the mark. Examples range from "AstroTurf" to "Ziploc." Occasionally, though, a once-valid trademark will be appropriated by the public as a name for an entire class of goods or services. In those cases, courts will hold the mark to be invalid under the genericide doctrine. Oft-cited examples include "Escalator,"[213] "Murphy bed,"[214] and "Thermos."[215]

The rationale for the genericide doctrine is rooted in trademark law's linguistic governance function. As Judge Posner explained:

> The problem is not that language is so impoverished that no other words could be used to denote these products, but that if no other words *have* emerged as synonyms it may be difficult

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211 For example, multiple tools could be used to serve the "non-confusion interests" described in McGeveran & McKenna, *supra* note 66, at 257, such as the values of free expression emphasized in Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 SMU L. REV. 381, 447–57 (2008).

212 *See* Michael Abramowicz & John F. Duffy, *Intellectual Property for Market Experimentation*, 83 N.Y.U. L. REV. 337, 382–89 (2008); Gideon Parchomovsky & Peter Siegelman, *Towards an Integrated Theory of Intellectual Property*, 88 VA. L. REV. 1455, 1473 (2002). For an argument in favor of a pluralist approach to policies shaping the pace and direction of sequential innovation—including trademark law—see Christopher Buccafusco, Stefan Bechtold & Christopher Jon Sprigman, *The Nature of Sequential Innovation*, 59 WM. & MARY L. REV. 1, 31 (2017).

213 *See* Haughton Elevator Co. v. Seeberger, 85 U.S.P.Q. 80, 81 (Dec. Comm'r Pat. 1950).

214 *See* Murphy Door Bed Co. v. Interior Sleep Sys., Inc., 874 F.2d 95, 104 (2d Cir. 1989).

215 *See* King-Seeley Thermos Co. v. Aladdin Indus., Inc., 321 F.2d 577, 581 (2d Cir. 1963).

> for a seller forbidden to use one of the trademarked words or phrases to communicate effectively with consumers.[216]

Genericide thus allows a wider range of individuals and firms to use the now-generic mark to communicate about their products. But as Judge Posner also noted, the genericide doctrine comes with costs. Among other consequences, it penalizes firms that create products so distinct that they become etched into the English language.[217] In this regard, the doctrine potentially weakens innovation incentives since it reduces the expected reward associated with inventing a truly new and widely used product.

Trademark law pluralism potentially counsels in favor of a higher bar for genericide so as to preserve innovation incentives. For example, innovation could be one factor weighing against invalidation of borderline marks like Emeco's nearly indestructible "Navy chair" or Dominique Ansel's "Cronut."[218] To be sure, a higher bar for genericide means that fewer marks will rejoin the linguistic commons of unclaimed marks. But in a world of ubiquitous QR codes and non-plain-text identifiers, the cost to rival sellers of losing the use of one or a handful of words is smaller since those sellers can communicate with potential customers in myriad ways that do not require using a particular word. The impetus, then, to conclude that a particular mark is generic would be weaker.[219]

Or perhaps consideration of innovation incentives would point to a lower bar for genericide. For example, Professors Kal Raustiala and Christopher Sprigman argue that greater copying in industries like cuisine and fashion leads to more innovation,[220] and there is some evidence that the enactment of stronger

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[216] Ty Inc. v. Softbelly's, Inc., 353 F.3d 528, 532 (7th Cir. 2003) (emphasis in original).

[217] *Id.* at 531 (noting that genericide "penalizes the trademark's owner for his success in making the trademark a household name and forces him to scramble to find a new trademark").

[218] For arguments against protecting these marks, see Kal Raustiala & Christopher Jon Sprigman, *Can Restoration Hardware Legally Knock Off the Navy Chair?*, SLATE (Nov. 26, 2012), https://perma.cc/RT8M-SVCY; Kal Raustiala & Chris Sprigman, *Why Are There Cronut Scalpers?*, FREAKONOMICS (June 13, 2013), https://perma.cc/FY4Q-3X7K.

[219] On the other hand, the competitive advantage arising from the exclusive right to use the memorable name "Cronut" will be smaller if consumers can identify other hybrid pastries more easily. Thus, the same factor that reduces the social cost of protecting a generic mark also dilutes the innovation incentive. We thank Rebecca Tushnet for this point.

[220] KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, THE KNOCKOFF ECONOMY 21, 58–59, 90 (2012).

trademark protection for famous marks resulted in reduced innovation by owners of already-famous marks.[221] The net effect of any given trademark doctrine on innovation incentives is an empirical question, but our point is that the case for using trademark law to boost innovation incentives thus becomes stronger when we know that we can achieve our objectives of product identification and differentiation using nontrademark tools.

As another example of how trademark law pluralism does not always push in a trademark-expansive direction, we turn again to the beer market. Consider the clash between the Czech state-owned brewery Budweiser Budvar and the United States–based Anheuser-Busch (now part of the Brazilian-Belgian conglomerate AB InBev). For many in the Czech Republic, the country's claim to the "Budweiser" mark is a "symbol of national pride"[222]—local breweries in the German merchants' colony of Budweis, now the Czech city of České Budějovice, have been making beer from a mixture of artesian water, Moravian barley, and Saaz hops since the thirteenth century.[223] But the state-owned brewery's attempt to use the "Budweiser" mark collides with Anheuser-Busch's trademark claim, resulting in a bitter, decades-long trademark dispute that spans several continents.[224] In the United States and Canada, the Czech Budweiser is sold as "Czechvar," leaving "Budweiser" to Anheuser-Busch. In the European Union, "Budweiser" belongs to the Czech brewery, and Anheuser-Busch markets its beer simply as "Bud." Neither side appears to be entirely satisfied with the outcome.[225]

One can understand why parallel use of the "Budweiser" mark on two different pale lagers would create a likelihood of confusion, at least insofar as consumers rely on brand names and product packaging to identify and differentiate products. (Not only are the names identical, but the font and packaging of the U.S. and Czech Budweisers are quite similar.)[226] But as Part II.C

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221 *See* Davidson Heath & Christopher Mace, *The Strategic Effects of Trademark Protection*, 33 REV. FIN. STUD. 1848, 1865–66 (2020).

222 Manu Remakant, *What's in a Name? Don't Ask Bud Lovers That*, NEWS18 (July 30, 2017), https://perma.cc/UU7H-4LVV.

223 *See Ingredients*, CZECHVAR, https://perma.cc/GN7R-9R47.

224 *See* Benjamin Cunningham, *Where a Budweiser Isn't Allowed to Be a Budweiser*, TIME (Jan. 27, 2014), https://perma.cc/NNY3-7K7T.

225 *See* Ashlie Hughes, *This Bud's for Who? The Battle for 'Budweiser' Spans Centuries, Countries, and Courthouses*, VINEPAIR (Apr. 12, 2020), https://perma.cc/M8GX-F8AE.

226 *See* Mark Stock, *The Other Bud: What to Know About the Budweiser Budvar Brewery*, THE MANUAL (Nov. 13, 2019), https://perma.cc/3Q7W-24TT.

emphasizes, we have other mechanisms for product identification and differentiation at our disposal. Imagine that beer lovers become even more reliant on apps like Untappd that use UPC barcodes to identify products. A beer buyer would scan her iPhone over the barcode for Budweiser and be reminded that she had last had that particular beer in Prague (or perhaps, if it were the U.S. Budweiser, at a college football tailgate). Because the non-plain-text identifier had reduced the likelihood of confusion, trademark law would be freer to honor both breweries' proud claims to the Budweiser mantle. Both breweries could potentially use the "Budweiser" mark worldwide, and the Untappd app would manage proximity costs.

A future in which consumers can rely entirely on barcodes, and not on plain text, to identify and differentiate products may seem worlds away, though everything from the moon landing to the smartphone would have seemed worlds away at some point too. Non-plain-text identification systems will take years, if not decades, to perfect—perhaps as long as the fifteen years it took to complete the Big Dig. The magnitude of the task is one reason why trademark law pluralism will likely require government support and involvement. A payoff from the project is that it will make it easier for the remaining law of trademarks to vindicate a wider range of values without consumer confusion as a collateral consequence.

Trademark law pluralism, however, does not require a great technological leap forward in order for it to come to fruition. To some extent, it already has: non-plain-text identification systems do exist, after all, sometimes with a government boost. Nontrademark tools for managing linguistic space are, to be sure, not yet as robust as trademark law pluralism envisions. Providing a theoretical framework through which to understand the connection between trademark and nontrademark tools is, if not a first step, an important step in a project that seeks to transcend the proximity-distance tradeoff in trademark law. And once trademark law can rely on aid from other tools to govern linguistic space—once it ceases to be our only or even our primary mechanism for managing the costs of proximity and distance—it will be freer to set its sights on new frontiers.