

# The Fame Monster

The Influence of Social Media on Trademark Genericide

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# The Fame Monster<sup>1</sup>: The Influence of Social Media on Trademark Genericide

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## Chapter 1. Introduction

“Media. I think I have heard of her. Isn't she the one who killed her children?”

- Neil Gaiman, *American Gods*<sup>2</sup>

In Greek mythology, Medea was the scorned wife of Jason, who sought revenge for her husband's betrayal by murdering their two children. Neil Gaiman's pun on “Media/Medea” may be interpreted as a commentary on how the media can birth icons, but at the same time be the one that kills these same icons it created. The thrust of this paper is to explore the role of social media in making and breaking a brand – how it makes a trademark famous, so much so that it leads to its death – much like Medea's filicide. The goal is to divine an answer to this question: What, if any, is the impact of social media on the generification of trademarks, particularly those of computer applications?

In June 2006, the word “google” was added, as a verb, to the Oxford English Dictionary, one of the more authoritative dictionaries in the English language.<sup>3</sup> A month later, Merriam-Webster, another respected publisher of dictionaries, followed suit.<sup>4</sup> Currently, the internet is replete with news items and blog entries that use “google” as a verb, in various conjugations, and in combination with other words or phrases for an intended

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<sup>1</sup> “The Fame Monster” is the title of an extended play (EP) musical record by American musician Lady Gaga.

<sup>2</sup> Neil Gaiman, *American Gods* (HarperCollins Publishers 2001).

<sup>3</sup> Stephen Foley, ‘To google or not to google? It's a legal question’ *The Independent* (London, 13 August 2006) <<http://www.independent.co.uk/news/business/news/to-google-or-not-to-google-its-a-legal-question-411600.html>> accessed 19 June 2013.

<sup>4</sup> Frank Ahrens, ‘So Google Is No Brand X, but What Is ‘Genericide’?’ *Washington Post* (Washington, 05 August 2006) <<http://www.washingtonpost.com/wp-dyn/content/article/2006/08/04/AR2006080401536.html>> accessed 19 June 2013.

effect. It may also be noted that in everyday spoken language, usage of “google” as a verb is no longer limited in everyday colloquial situations but also in more formal or professional settings, and in various levels of society, for example, in speeches of some politicians such as Michelle Bachmann<sup>5</sup> and Sarah Palin<sup>6</sup>.

Corporate response to this development is extensively documented online. There are news reports of actions taken by Google, Inc. to stop this, such as sending cease-and-desist letters to journalists and bloggers, and posting notices online explaining the proper usage of the word “Google”.

These actions by Google are efforts to arrest what may appear to be an inevitable generification of the “Google” trademark. As time progresses, Google, the trademark with a capital letter “G”, increasingly becomes a permanent presence in the minds of ordinary internet users due to the wide usage of its various products. The brand becomes absorbed into the language and is fast becoming merely “google” with a small “g”. On 21 May 2012, a complaint was filed against Google, Inc., with the claim that the word “google” has become generified.<sup>7</sup>

A similar development may also be observed with some other computer applications or information and communication technology (ICT) brands, such as Skype and Adobe Photoshop. These brands are being used in ways similar to that which Google is actively fighting against.

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<sup>5</sup> See Chris Cillizza, ‘Afternoon Fix: Bachmann wishes she’d Googled Rollins’ *Washington Post* (Washington, 18 October 2011) <[http://www.washingtonpost.com/blogs/the-fix/post/afternoon-fix-bachmann-wishes-shed-googled-rollins/2011/10/18/gIQAswzEvL\\_blog.html](http://www.washingtonpost.com/blogs/the-fix/post/afternoon-fix-bachmann-wishes-shed-googled-rollins/2011/10/18/gIQAswzEvL_blog.html)> accessed 19 June 2013.

<sup>6</sup> See ‘Bristol Googled the economy for me’: Sarah Palin asks daughter to trawl internet before speech’ *The Daily Mail* (London, 21 February 2011) <<http://www.dailymail.co.uk/news/article-1359068/Bristol-Googled-economy-Sarah-Palin-asks-daughter-trawl-internet-crucial-speech.html>> accessed 19 June 2013.

<sup>7</sup> *Elliott v Google, Inc.*, CV-12-1072-PHX-MHB, United States District Court, District of Arizona.

Due to the inherent novelty of these applications, and the intrinsic characteristic of some of these applications that they be used with the internet, it can be theorized that the trademarks of these applications are more susceptible to genericide than to non-ICT brands.

Trademark genericide is inextricably linked to the linguistic process by which a word is created. This paper will thus showcase a mix of legal and linguistic themes, because it will examine how the internet, particularly through social media and websites with user-generated content, initiates and accelerates the process by which ICT brands become generic, by creating a neologism and thereafter legitimizing it through mass usage.

Much of the research about trademark genericide has focused on trademarks of consumer goods such as medicine, food and other household products. Due to its relative novelty, there is still a limited amount of research pertaining to the internet's impacts on the generification process. Also, the process may be different when it concerns computer applications due to some of its intrinsic features.

Understanding the process through which IT trademarks are generified could prove valuable to combating genericide. It could help in the formulation of strategies by which companies can take care of their brand to minimize the risk of trademark genericide. This could also provide suggestions as to balancing legitimate corporate interests and the freedom of speech.

The research for this paper will be conducted using the traditional or doctrinal legal research method. The materials to be used are court cases on trademarks from the United

States, several legal and non-legal journal articles and online articles. While reference may be made to literature from outside America to illustrate the globalizing effect of the internet on trademarks, the scope of this paper will mainly be limited to United States law and jurisprudence, because the trademarks to be discussed herein are registered mostly to American companies, and there is also the added matter of English being the language to be examined as it pertains to the linguistic factors affecting genericide.

This paper will first discuss the definition of trademarks, as well as give brief background on the legal concepts of trademarks and genericide, (Chapter 2), followed by an explanation regarding the relationship of trademarks to social media and language, with particular attention to how words become words, and how brands become common words and thus, may be generified. Also, comparisons will be made between the generification process in ICT trademarks and non-ICT trademarks (Chapter 3). After this follows a few suggestions on how the relationship explained in Chapter 3 may be exploited to provide solutions to the genericide problem (Chapter 4). Finally, the previous chapters will be summed up in the conclusion (Chapter 5).

## Chapter 2. Trademarks and Ex-Trademarks: The Problem of Genericide

“Words are pale shadows of forgotten names.  
As names have power, words have power.  
Words can light fires in the minds of men.  
Words can wring tears from the hardest hearts.”  
-Patrick Rothfuss, *The Name of the Wind*<sup>8</sup>

### 2.1 First Things First: A Brief Review of the Concept of Trademarks

Trademarks have been in use since around 3500 years ago when ancient potters used these marks to indicate the source of their goods.<sup>9</sup> It is also claimed that the first reported trademark case in the Anglo-American legal environment was dated as early as 1584, in what is called “Sandforth’s Case”, a suit brought about by a cloth maker against another cloth maker who used his marks.<sup>10</sup>

The fact that the concept of trademarks began in a bygone past and yet has endured to the present time indicates that there is a great measure of importance attached to this legal concept. But to begin with, what is a trademark?

In Black’s Law Dictionary, the definition of the term “trademark” is listed as “a word, phrase, logo, or other graphic symbol used by a manufacturer or seller to distinguish its product or products from those of others.”<sup>11</sup>

The Lanham Trade-Mark Act of 1946, also referred to as the Lanham Act, which is the primary trademark law in the United States of America, provides the following definition:

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<sup>8</sup> Patrick Rothfuss, *The Name of the Wind* (DAW Books 2007).

<sup>9</sup> Sung In, ‘Death of a Trademark’ (2002) 21 Review of Litigation 159, 162.

<sup>10</sup> Keith M Stolte, ‘How Early Did Anglo-American Trademark Law Begin? An Answer to Schechter’s Conundrum’ (1997) 8 Fordham Intellectual Property, Media and Entertainment Law Journal 505.

<sup>11</sup> Bryan A. Garner (ed), *Black’s Law Dictionary* (8<sup>th</sup> edn, West 2004).

The term "trademark" includes any word, name, symbol, or device, or any combination thereof--

(1) used by a person, or

(2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this Act, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.<sup>12</sup>

The esteemed American Supreme Court Judge Learned Hand beautifully expounded on a merchant's trademark, as follows:

His mark is his authentic seal; by it he vouches for the goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owner's reputation, whose quality no longer lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask.<sup>13</sup>

The trademark has three main purposes. The first is "to designate the source of goods or services. In effect, the trademark is the commercial substitute for one's signature."<sup>14</sup> The trademark becomes the symbol by which a manufacturer or merchant's goods are identified by the consumer. This mark enables consumers to differentiate between products coming from various sources. In the American context, this is often referred to as the "origin function".<sup>15</sup> In Europe, this is called "the essential function".<sup>16</sup>

A merchant's trademark "identifies the excellence of his work."<sup>17</sup> Relevant to this is the second main function of trademarks, which is to enable consumers to identify the goods

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<sup>12</sup> 15 United States Code Annotated § 1127, Lanham Trade-Mark Act of 1946, 50 Stat 427 (5 July 1946), *codified, as amended, at 15 U.S.C. 1051 et seq.*

<sup>13</sup> *Yale Electric Corporation v Robertson*, 26 F 2d 972 (2d Cir 1928).

<sup>14</sup> Garner (n 11).

<sup>15</sup> Ilanah Simon, 'The Functions of Trade Marks and their Role in Parallel Importation Cases-- What Can the EU and Japan Learn from Each Other's Experiences?' (*Institute of Intellectual Property IIP Bulletin 2007*) <[http://www.iip.or.jp/e/e\\_summary/pdf/detail2006/e18\\_16.pdf](http://www.iip.or.jp/e/e_summary/pdf/detail2006/e18_16.pdf)> accessed 27 September 2013.

<sup>16</sup> Guy Tritton (ed), *Intellectual Property in Europe* (3<sup>rd</sup> edn, Sweet & Maxwell 2008).

<sup>17</sup> Jacqueline Stern, 'Genericide: Cancellation of a Registered Trademark' (1983) 51 *Fordham Law Review* 666, 673.

for the purpose of associating the mark with the quality of the goods. Later on, the consumers' purchasing decisions will be made based on the satisfaction they have experienced in previous purchases of goods sold under that identifiable trademark. On the flipside, when a merchant sells goods of poor quality, the consumer will know in the future not to repeat purchasing goods from that merchant. One author wrote that trademarks were developed "to trace responsibility for shoddy workmanship".<sup>18</sup> This is called the "quality guarantee function" in American literature.<sup>19</sup> In the European context, it may fall under the ambit of the "essential function" of trademarks, because the main concept of the origin function and the quality guarantee function is enabling the consumer to differentiate between goods from different producers.

The third important function of trademark is that it confers exclusive rights on the owner of the trademark to market the goods, giving him an incentive to promote the mark, and the goods traded under such mark, with the expectation that others will not be able to profit from or take advantage of the reputation attached to the mark.<sup>20</sup> In Europe, this right to market is termed the "specific object" of the trademark.<sup>21</sup> In the American legal context, scholars call this third main function "the advertising function".<sup>22</sup> This is "where marks are used in advertising, an image can be built up around them, separate from the physical nature of the goods themselves, which will be evoked whenever consumers are subsequently exposed to the mark."<sup>23</sup> This function can arguably be lumped with what Europeans call the "specific object", as advertising may be included under the right to market the goods, but it is

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<sup>18</sup> *ibid* 666, citing Rogers, 'The Lanham Act and the Social Function of Trade-marks', (1949) 14 *Law and Contemp. Probs.* 173, 173-174.

<sup>19</sup> Simon (n 15).

<sup>20</sup> Tritton (n 16).

<sup>21</sup> *ibid*.

<sup>22</sup> Simon (n 15).

<sup>23</sup> *ibid*. Simon notes that in Thomas D Dresner's description in 'The Transformation and Evolution of the Trademarks – From Signals to Symbols to Myth' 82 *TMR* 301, 329, it was explained "how advertising can 'obsess' a trade mark...placing the mark within the context of whatever mythical unit has been chosen for it'."

important to note the advertising function in the context of this paper, since the advertising facet of trademark and brand management is one of the central themes of this paper to be discussed subsequently.

Regardless of how many functions trademarks have in different jurisdictions, the main functions of the trademark are in reality not separable from each other. These functions are “two sides of a same coin”<sup>24</sup>: by making goods identifiable by consumers and traceable to a merchant, the merchant is encouraged to make high-quality products, because doing so enhances the reputation of the merchant who is identified by the trademark under which he markets his goods. If the merchant gains a good reputation for making good products, consumers are more likely to buy his product, or even try his new products, which consumers are able to identify as the merchant’s product through his trademark. As noted by the Advocate-General in the European Court of Justice case *SA CNL-Sucal NV v HAG G.F. A.G.*:

Trade marks ...act as a guarantee, to the consumer, that all goods bearing a particular mark have been produced by, or under the control of, the same manufacturer and are therefore likely to be of similar quality. The guarantee of quality offered by a trade mark is not of course absolute, for the manufacturer is at liberty to vary the quality; however, he does so at his own risk and he - not his competitors - will suffer the consequences if he allows the quality to decline. Thus, although trade marks do not provide any form of legal guarantee of quality - the absence of which may have misled some to underestimate their significance - they do in economic terms provide such a guarantee, which is acted upon daily by consumers.

A trade mark can only fulfil that role if it is exclusive. Once the proprietor is forced to share the mark with a competitor, he loses control over the goodwill associated with the mark. The reputation of his own goods will be harmed if the competitor sells inferior goods. From the consumer’s point of view, equally undesirable consequences will ensue, because the clarity of the signal transmitted by the trade mark will be impaired. The consumer will be confused and misled.<sup>25</sup>

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<sup>24</sup> Tritton (n 16), 226.

<sup>25</sup> Case C-10/89 *SA CNL-Sucal NV v HAG G.F. A.G.* [1990] E.C.R. I-3711; [1990] 3 C.M.L.R. 571, Jacobs A.G.’s Opinion, paras. 18-19, cited in Tritton (n 16) 225-226.

This “two-sided-coin” duality of the trademark has the double function of protecting both public and private interests: the consumers’ and the manufacturer’s interests. As stated by the Congressional Committee that sponsored the Lanham Act<sup>26</sup>, which is the primary law governing trademarks in the United States:

The purpose underlying any trade-mark statute is twofold. One is to protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get. Secondly, where the owner of a trade-mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats. This is the well-established rule of law protecting both the public and the trade-mark owner.<sup>27</sup>

Simply put, the two objectives of trademark law are: “protecting consumers’ ability to identify and distinguish among the products of various manufacturers; and protecting the business goodwill which a mark symbolizes.”<sup>28</sup>

The underlying principle for trademarks is maximizing economic efficiency.<sup>29</sup> By allowing consumers to save time and costs in choosing products because goods in the market are readily identifiable by trademarks with the attached goodwill that was earned through the manufacturer’s investment in promoting his products, efficiency is maximized.<sup>30</sup> Sung In states that trademarks cannot be separated from the good will that they symbolize, and, “without goodwill, marks have no meaning, and the law has traditionally treated meaningless marks as unworthy of protection.”<sup>31</sup>

In the United States, “the courts have traditionally divided the universe of potential

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<sup>26</sup> 15 United States Code, chapter 22 (1946).

<sup>27</sup> United States Congressional Committee, Rep. No. 1333, 79th Cong., 2d Sess., 3 (1946).

<sup>28</sup> John Dwight Ingram, ‘The Genericide of Trademarks’ (2004) 2 Buffalo Intellectual Property Law Journal 154, 156, citing *Inwood Labs, Inc v Ives Labs, Inc*, 456 US 844, 854-855 note 14 (1982).

<sup>29</sup> In (n 9) 167.

<sup>30</sup> *ibid*.

<sup>31</sup> *ibid* citing Stephen L Carter, ‘The Trouble with Trademark’ (1990) 99 Yale Law Journal 759, 762.

trade names into various categories of legal protectability.”<sup>32</sup> In the case of *Abercrombie & Fitch Co. v. Hunting World, Inc.*, the United States Court of Appeals defined the spectrum of classes of trademarks and matching degree of protection afforded to these classes, in the following order, from not protected at all, to highly protected: (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful.<sup>33</sup>

Generic terms refer to the common name of the product, or the genus or class to which the product in question is merely a species. For example, the word “cookie” is a generic term to which the products “Oreo” or “Chips Ahoy” belong. The word “cookie” by itself does not identify the source of the product and as such cannot be registered as a trademark. This is so because “no matter how much money and effort the user of a generic term has poured into promoting the sale of its merchandise and what success it has achieved in securing public identification, it cannot deprive competing manufacturers of the product of the right to call an article by its name.”<sup>34</sup>

Descriptive terms “convey a description of the nature, or an important aspect of, the product”.<sup>35</sup> A descriptive term, which “identifies a characteristic or quality of the article or service and, though ordinarily not protectable, may become a valid trade name if it acquires a secondary meaning.”<sup>36</sup> The descriptive term may be considered to have “acquired distinctiveness” and would then be accorded trademark protection. The term in question in the case of *Vision Center v. Opticks, Inc.* was “vision center”, the term under which the plaintiff “The Vision Center” was operating. Opticks, Inc., the defendant, had a business called “Pearle Vision Center”, which included the term in issue. The court decided that “vision center” was merely a term descriptive of “a clinic providing optical goods and services”, thus cannot be

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<sup>32</sup> *Vision Center v Opticks, Inc.*, 596 F 2d 111 (1979).

<sup>33</sup> *Abercrombie & Fitch Co v Hunting World, Inc.*, 537 F 2d 4 (1976).

<sup>34</sup> *ibid* fn 12, citing *J. Kohnstam, Ltd. v. Louis Marx and Company*, 280 F 2d 437, 440, 47 CCPA 1080 (1960).

<sup>35</sup> *Ingram* (n 28) 155.

<sup>36</sup> *Vision Center* (n 32).

used as a trademark.<sup>37</sup>

Suggestive terms indicate “a characteristic of the goods or services and requires an effort of the imagination by the consumer in order to be understood as descriptive.”<sup>38</sup> An example of a suggestive term is “Inferno”, to market a box of incendiary devices such as matches. The difference between a descriptive term and a suggestive term is that “a consumer must make a mental leap to understand the relationship between a suggestive mark and the product” because the suggestive term merely suggests, without describing, the characteristics of the product.<sup>39</sup>

Arbitrary or fanciful terms are those terms that are completely unrelated to the product. Arbitrary terms “are those whose commonly understood meaning bears little or no relationship to the products to which they are applied” while fanciful terms are those composed of coined or made-up words.<sup>40</sup> Some examples of arbitrary terms are the word “apple”, which is cannot be trademarked for marketing fruit, but can be, and is a trademark for a computer company; and the word “macintosh”, a raincoat, for Apple’s line of computers. For fanciful terms, a few examples are NERF, a brand for a toy gun, and its manufacturer Hasbro, coined from the original name of the company “Hassenfeld Brothers”<sup>41</sup>.

The danger of genericide is when arbitrary, fanciful, suggestive or descriptive terms that have been previously given trademarked status devolve into generic terms, which the laws do not protect.

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<sup>37</sup> *ibid.*

<sup>38</sup> *ibid.*, citing *General Shoe Corp. v. Rosen*, 111 F.2d 95, 98 (4th Cir. 1940).

<sup>39</sup> Edward J Heath and John M Tanski, ‘Drawing the Line Between Descriptive and Suggestive Trademarks’ (2010) *Commercial & Business Litigation*, Volume 12, Number 1.

<sup>40</sup> Ingram (n 28) 155.

<sup>41</sup> See ‘Hasbro Investor Fact Sheet, July 2013’ (*Hasbro* 2013) <<http://files.shareholder.com/downloads/HAS/2706166477x0x457186/6F718E15-8AEA-48D0-9702-5AFD7F3C70AD/FactSheet.pdf>> accessed 28 September 2013.

## 2.2 The Trademark as Identity

A trademark is an identity. To illustrate by way of analogy, for human beings:

Identity is who you are as an individual and how you want to be seen by others, so it has an internal and external element. The internal element can be described as how human beings acquire a sense of self. The external element relates to social interaction with others.<sup>42</sup>

One of the primary parts of a person's identity is a person's name. The right to a name is one of the most fundamental human rights<sup>43</sup> because it is the way to present oneself to others, and a way to define the self. For example, when a person is asked to introduce himself or herself, he or she always starts with his or her name before saying anything else. A person might say, "I am Anna. I make and sell clothes. I care about the environment and I only use plant-based textiles and paints." She will be referred to by others as Anna, and based on her actions, people might agree that "Anna cares about the environment." The name is the label with which a person is known. Applying the analogy, in the same manner, a company operating under its trademarked trade name "Buttercrumby and Witch" formalizes its identity with a trademark. It would be able to present this identity through its trademark, and say, "We are Buttercrumby and Witch. We make and sell clothes. We care about the environment and we only use plant-based textiles and paints." Depending on its actions and its products, the company Buttercrumby and Witch may be known as an eco-friendly company that makes eco-friendly clothes, or a company that lies about being eco-friendly. If it sues or it gets sued, the suit will state "Buttercrumby and Witch v. Company X" or vice versa. With a trademark, a merchant acquires a vessel through which it completes its existence, an identity around which a trademark's personality is created.

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<sup>42</sup> Arnold Roosendaal, 'We Are All Connected to Facebook...by Facebook!' in Serge Gutwirth, Ronald Leenes, Paul De Hert and Yves Pouillet (eds), in *European Data Protection: In Good Health?* (Springer 2012).

<sup>43</sup> 'The right to a name and a nationality' (UNICEF) <<http://www.unicef.org/pon96/coname.htm>> accessed 3 October 2013.

What lawyers refer to as “trademark” is referred to by marketing professionals as “brand”. A brand is affixed to a material product, the quality of which, in part, defines what personality the brand would initially take.

Take for example a pair of Nike basketball shoes. It may at first be only evaluated by the purchaser based on the quality of the product, that is, how the wearer’s feet are cushioned from impact by the shoes’ rubber soles, the breathability of its special insoles, how the outsole is non-marking, et cetera. Later on, as Nike advertises its basketball shoes with famous basketball players like Michael Jordan or Kobe Bryant, or use child labor in third world sweatshops, Nike, as a brand, may take on the personality trait as cool or unethical. According to Webb Keane, “part of the power of material objects in society consists of their openness to ‘external’ events” and that “[t]he openness of [material] things to further consequences perpetually threatens to destabilize existing semiotic ideologies”.<sup>44</sup>

As a result of these external events that attach an additional value to a material product, over time, a brand becomes more than just the quality of its products. A brand may acquire additional characteristics or traits separate from the materiality of its products. All these combined become a brand’s personality. This is what is called in the business world as “corporate image”, which is defined as the:

mental picture that springs up at the mention of a firm’s name. It is a composite psychological impression that continually changes with the firm’s circumstances, media coverage, performance, pronouncements, etc. Similar to a firm’s reputation or goodwill, it is the public perception of the firm rather than a reflection of its actual state or position.<sup>45</sup>

Robert E. Moore, an anthropologist and linguist, treats brands as “centered

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<sup>44</sup> Robert E Moore, ‘From genericide to viral marketing: on “brand”’ (2003) 23 *Language & Communication* 331, 334, citing Webb Keane, ‘Semiotics and the social analysis of material things’ (2003), *Language and Communication* (xref: S0271530903000107).

<sup>45</sup> ‘Corporate image’, (*BusinessDictionary.com*) <<http://www.businessdictionary.com/definition/corporate-image.html>> accessed 25 October 2013.

semiotically upon a composite object, or more accurately, an unstable conjunction of a product (prototypically at least a material, tangible object), and a mark, logo, or brand name.”<sup>46</sup> The brand is the result of the material product being subject to external factors such as post-manufacture labor, like advertising, market research and corporate strategy.<sup>47</sup> Often, it is the success of this combination that spurs the popularity of a product – a good product coupled with clever marketing is a pathway to brand success. However, it is often an excess of this success that leads to a trademark getting killed off by genericide.

### 2.3 Genericide: Definitions and Reasons

In Black’s Law Dictionary, genericide is defined as:

The loss or cancellation of a trademark that no longer distinguishes the owner’s product from others’ products. Genericide occurs when a trademark becomes such a household name that the consuming public begins to think of the mark not as a brand name but as a synonym for the product itself. Examples of trademarks that have been “killed” by genericide include *aspirin* and *escalator*.<sup>48</sup>

Similar to the way that killing a person (a *Homo sapiens*) is called “homicide”, and killing oneself is called “suicide” (*sui* is a Latin word that refers to “self”<sup>49</sup>), genericide refers to when a trademark is “killed” by its transition into becoming a generic term. Robert E. Moore has remarked that genericide is “a blend of ‘generic’ and ‘suicide’<sup>50</sup>, and this is particularly apt when one considers that genericide commonly occurs due to the actions of the owner of the trademark, say, for example, launching an effective marketing campaign that makes the trademark so popular that the public equates the trademark of the goods with the class of the goods. This author is keen to introduce a coined term, similar to how persons on

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<sup>46</sup> Robert E Moore, ‘From genericide to viral marketing: on “brand”’ (2003) 23 *Language & Communication* 331, 335.

<sup>47</sup> *ibid.*

<sup>48</sup> Garner (n 11).

<sup>49</sup> ‘Sui’, ([Tufts University Latin Word Study Tool](http://www.perseus.tufts.edu/hopper/morph?l=sui&la=la&can=sui0)) <<http://www.perseus.tufts.edu/hopper/morph?l=sui&la=la&can=sui0>> accessed 3 October 2013.

<sup>50</sup> Moore (n 44) 344.

the verge of committing suicide are called “suicidal”, or how persons threatening or intending to commit homicide as “homicidal”, the coined term “genericidal” may refer to trademarks on the verge of falling victim to genericide.

From one point of view, if one of your company’s trade marks passes into use as a generic term, then this can be seen as an unambiguous sign of success. It is thus paradoxical that this process is referred to in the trade as ‘genericide’, because a brand name is deemed to be ‘murdered’ by becoming a generic name. Large corporations spend large quantities of time and money preventing, tracking down, scolding, and occasionally punishing generic uses of trademarks. A slogan used by a well-known photocopier equipment firm was once apparently ‘Use our name as the good law intended’, thereby indicating the seriousness with which such matters are taken.

Since genericide can, by definition, occur only to very well-known names, it might seem that the phenomenon would be merely a trapping of success. The negative consequences however are not psychological but legal. A name that becomes genericised can be declared public property and no longer the exclusive property of the creators of the name.<sup>51</sup>

What is the rationale for genericide? Why does the law even allow trademarks to die off through this process? Considering that trademarks exist to make distinctions between products from different sources, doesn’t killing off a trademark go against the goal of the concept of trademark itself?

At first glance, genericide appears to run counter to trademark law’s goal, but it does not require a lot of analysis to see that in fact, genericide promotes economic efficiency. Sung In writes that “[t]he most obvious rationale for not protecting generic trademarks is the preservation of a level playing field for all producers.”<sup>52</sup> If a trademark is upheld in spite of becoming generic, competitors marketing products in the same class are disadvantaged because they cannot market a product under the generic name that the public already uses to refer to the product. As Zoe Argento explains:

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<sup>51</sup> Tim Valentine, Tim Brennen and Serge Brdart, *The Cognitive Psychology of Proper Names: On the Importance of Being Ernest* (Routledge 1996).

<sup>52</sup> In (n 9).

This is because modern trademark rights have traditionally been rooted in a competition-promotion rationale. The reasoning proceeds as follows: manufacturers have no incentive to build a good product unless consumers can match a particular product to a particular manufacturer. Consumers reward manufacturers who create high-quality products by buying more from those manufacturers. As a result, when a trademark no longer serves to identify the source of the product, no justification remains for its existence. The process by which trademarks come to indicate the *product itself*, rather than the source of the product, is known as genericide.<sup>53</sup>

When a trademark comes to refer to, in the mind of consumers, the class of the goods, instead of indicating a particular good from a specific source, the trademark is considered generified. In the case of *Coca-Cola Co. v. Overland, Inc.*, it was stated that: “An originally non-generic, valid trademark becomes generic and invalid when the *principal* significance of the word to the public becomes the indication of the nature or class of an article, rather than the indication of the articles’ origin.”<sup>54</sup>

The test for determining whether a trademark has become a generic term is known as “the Primary Significance Test”, because the determinative factor in evaluating genericness is the primary significance of the mark in the public perception. This test was first used in the case of *Bayer Co. v. United Drug Co.*, in which Judge Learned Hand wrote:

What do the buyers understand by the word for whose use the parties are contending? If they understand by it only the kind of goods sold, then, I take it, it makes no difference whatever what efforts the plaintiff has made to get them to understand more. He has failed, and he cannot say that, when the defendant uses the word, he is taking away customers who wanted to deal with him, however closely disguised he may be allowed to keep his identity.<sup>55</sup>

The foregoing passage is quoted from a case brought to court by Bayer against United Drug for infringement of its trademark “Aspirin”. Bayer had been selling the drug “acetyl

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<sup>53</sup> Zoe Argento, ‘Applying Genericide to the Right of Publicity’ (2008) 10 Vanderbilt Journal of Entertainment and Technology Law 321, 333.

<sup>54</sup> *Coca-Cola Co v Overland, Inc*, 692 F 2d 1250, 1254 n.10 (9<sup>th</sup> Cir 1982) (citing *Helene Curtis Indus v Church and Dwight Co*, 560 F 2d 1325, 1332 (7<sup>th</sup> Cir1977)).

<sup>55</sup> *Bayer Co v United Drug Co*, 272 F 505 (SDNY 1921).

salicylic acid” under the name “Aspirin” with the requisite notification that “the word ‘Aspirin’ identifies it as the manufacture of” Bayer or its German parent company. However, the sales were initially only made to chemists, doctors, and drug retailers, who in turn sold them to the general public not as “acetyl salicylic acid” but only as “Aspirin”. The sale of Aspirin grew as the drug industry began to sell the product in tablet form, with the mark of the chemist that manufactured the tablets, without indicating that the powder used came from Bayer. Thus, the general public’s only name for this drug as “Aspirin” because it was never exposed to the “acetyl salicylic acid” name. Later on, United Drug started to manufacture the same drug and sold it with “U.D. Co. Aspirin” on the label, arousing the ire of Bayer. The court ruled against upholding the trademark of Bayer, although Judge Learned Hand did state that “each party has won, and each has lost”, for the reason that:

If the defendant is allowed to continue the use of the word of the first class, certainly without any condition, there is a chance that it may get customers away from the plaintiff by deception. On the other hand, if the plaintiff is allowed a monopoly of the word as against consumers, it will deprive the defendant, and the trade in general, of the right effectually to dispose of the drug by the only description which will be understood.<sup>56</sup>

The moment a trademark becomes generic is the moment that it becomes less efficient to protect the trademark than killing the trademark off.<sup>57</sup> Considering the power of trademarks to minimize consumer search costs, allowing a generifed mark to still have trademark protection unfairly deprives competitors from using generic terms that effectively states the class of product being marketed.<sup>58</sup>

## 2.4 Some Examples of Generifed Trademarks

To echo the epigraph at the beginning of this chapter, “Words are pale shadows of forgotten names”, writes Patrick Rothfuss in *The Name of the Wind*. While the quote is from

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<sup>56</sup> *ibid.*

<sup>57</sup> *In* (n 9).

<sup>58</sup> *Ibid* 170.

a fantasy novel, the statement reflects what *is* the case in real life. Many things we know today started out as trademarked names of commercial products. To name a few, the word escalator was previously the proper name for a mechanized staircase. The word trampoline previously was a former trademark for a “jumping apparatus supported by springs” or a “flat springy surface on which to bounce”, and rollerblades used to be sold by the company Rollerblade, marketed under the generic name “in-line skates”.<sup>59</sup> Laser, linoleum, heroin, gramophone, and kerosene were also once proper names for the classes of goods they now refer to.<sup>60</sup> The objects they refer to belong to very different kinds of consumer goods, but the names they once had all became generic over time. Whether the genericide occurred through neglect on the part of the trademark owner, or through too much success and popularity, they all have one thing in common: they have fallen victim to the doom of genericide.

## 2.5 How Genericide Happens

How does a trademark become generic in the minds of the public? It could happen that the trademark is already generic in the mind of the general public from the very start, as may be seen from the previous example of Aspirin in the Bayer case. While it is true that Bayer acted prudently by advertising in technical magazines and stating on the labels of its product that “Aspirin” is its trademark, the audience of these efforts were the doctors, chemists and retail druggists to whom Bayer directly sold its product, and none of these advertising campaigns were aimed directly at the final consumers.<sup>61</sup> The court later chastised Bayer, saying that:

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<sup>59</sup> Candi Hinton, ‘When Good Marks Go Bao: The Evils of Genericide-When a Trademark Becomes a Generic Term-Are Many, but That’s Nothing Compared with What Happens When Foreign Translations Distort a Trademark’s Meaning.’ (2002) 24 American Journalism Review Issue 7.

<sup>60</sup> Max Sutherland, ‘Google: \$ Billion Brand in Peril?’ (*Sutherland Survey*) <[http://www.sutherlandsurvey.com/Columns\\_Papers/Google-%20\\$%20Billion%20Brand%20in%20Peril.pdf](http://www.sutherlandsurvey.com/Columns_Papers/Google-%20$%20Billion%20Brand%20in%20Peril.pdf)> accessed 26 October 2013.

<sup>61</sup> *Bayer* (n 55)

Nothing would have been easier than to insist that the tablet makers should market the drug in small tin boxes bearing the plaintiff's name, or to take over the sale just as it did later. Instead of this, they allowed the manufacturing chemists to build up this part of the demand without regard to the trade-mark. Having made that bed, they must be content to lie in it.<sup>62</sup>

There may also be cases in which the trademark owner did expend efforts to arrest the spread of the generic use of its trademark. One such example may be observed in the case of *King-Seeley Thermos Co. v. Aladdin Industries, Inc.*<sup>63</sup>, a dispute over the word "Thermos" owned and used by King-Seeley to market its vacuum sealed bottles. Aladdin alleged that the word "thermos" became generic due to King-Seeley's wide dissemination of the word in issue, and that it was used synonymously and as an adjectival-noun for "vacuum-insulated".<sup>64</sup> Aladdin also alleged that King-Seeley failed to exhibit diligence in asserting and protecting its rights over the word in issue. The court disagreed, and decided that King-Seeley exerted substantial effort to preserve the trademark over "Thermos", such as introducing other products that are not directly related to the vacuum sealed bottle. King-Seeley's predecessor, the American Thermos Bottle Company, even changed its name to The American Thermos Products Company.<sup>65</sup> There were also efforts to police the use of the word in trade and non-trade publications. In spite of all these efforts, the word still became generic in the public's mind. "The generic use of "thermos" had become so firmly impressed as a part of the everyday language of the American public that plaintiff's extraordinary efforts... came too late to keep "thermos" from falling into the public domain."<sup>66</sup>

Based on the foregoing cases, it can be observed that trademarks or brands can become generic through various ways. The common thread connecting them is the change

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<sup>62</sup> *ibid.*

<sup>63</sup> *King-Seeley Thermos Co v Aladdin Industries, Inc*, 321 F 2d 577 (1963).

<sup>64</sup> *ibid.*

<sup>65</sup> *ibid.*

<sup>66</sup> *ibid.*

that occurs in the trademarks' meaning, or a semantic change in the jargon of linguistics. This leads us to the study of language as a factor in the concept of trademarks, which will be explored in the immediately succeeding chapter.

## Chapter 3. Relationships between Language, Trademarks and Social Media

“You do anything in the world to gain a reputation.  
As soon as you have one, you seem to want to throw it away. It is silly of you,  
for there is only one thing in the world worse than being talked about,  
and that is not being talked about.”  
- Oscar Wilde, *The Picture of Dorian Gray*<sup>67</sup>

### 3.1 Trademarks and Language: A Symbiotic Relationship

Trademarks are similar to language in that they are both used to communicate a certain meaning in a particular context. More than that, it is through language that trademarks are expressed. The subject of the trademark, the branded product, as Robert E. Moore states, is “partly a thing and partly language.”<sup>68</sup>

Daniel Everett, a linguist, provides a definition of language relevant to the discussion. He expresses the definition of language in the following formula:

**COGNITION + CULTURE + COMMUNICATION = LANGUAGE**<sup>69</sup>

He proceeds to explain that the meaning of this formula is “that each normal human being has a brain, belongs to a community with values, and needs to communicate, and the confluence of these states results in language.” The main idea of his book “*Language: The Cultural Tool*” is that language came about as a solution to the problem of wanting to communicate something, the brain solving this problem, with the solution coming not from just one individual’s brain, but by a community forming a language. The community-based aspect of language formation is why language varies from culture to culture, because the members of that community create words that express the ideas needed for the functioning of

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<sup>67</sup> Oscar Wilde, *The Picture of Dorian Gray* (1890).

<sup>68</sup> Moore (n 44) 334.

<sup>69</sup> Daniel Everett, *Language: The Cultural Tool* (Profile Books 2013), 35.

their society: for example, there are more than 50 Eskimo words for “snow”<sup>70</sup>, while in the tropical country of the Philippines, there is only one word for “snow”, and it was even borrowed from the language of the country’s Spanish colonizers. In the creation of a trademark, there is also a culture-specific aspect identical to language formation, because after all, a trademark uses language in its formation. When a product is created, the manufacturer encounters the problem of what to call his product. The solution requires a word or a phrase, both components of language. The manufacturer, or his marketing team, then takes either an already existing word from a language familiar to him to create a name for the product, which could then be considered as a descriptive, suggestive or arbitrary mark. He could also coin a fanciful term but the pool of words, letters, and phonemes<sup>71</sup> that he will use will be limited to those familiar to him. If the manufacturer is smart at naming his product, he will use words, letters and phonemes familiar to his target market, as it would be difficult for consumers to pronounce a word with unfamiliar components, and it would entail additional costs to educate his target market about a new letter, sound or word.

Once a brand is launched to the public, it contributes right away to the language by enriching the language with new words, or attaching new meanings to existing words. For example, the word “apple”, in today’s language, is no longer just a fruit, but also a proper noun denoting the brand “Apple” for computer devices and software sold by Apple, Inc. The creation of fanciful trademarks also adds new words to the language, specifically nouns, or words that serve as the name of a person, place, animal, thing, action or idea. Nouns comprise the majority of words in the English language,<sup>72</sup> and may either be a proper noun or a

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<sup>70</sup> David Robson, “There really are 50 Eskimo words for ‘snow’” *The Washington Post* (Washington, 14 January 2013) <[http://articles.washingtonpost.com/2013-01-14/national/36344037\\_1\\_eskimo-words-snow-inuit](http://articles.washingtonpost.com/2013-01-14/national/36344037_1_eskimo-words-snow-inuit)> accessed 25 October 2013.

<sup>71</sup> In Hadumod Bussman, *Routledge Dictionary of Language and Linguistics* (Routledge 1996), phonemes are defined as the smallest sound units of speech.

<sup>72</sup> *ibid.*

common noun. Proper nouns name a specific item, and always begin with a capital letter<sup>73</sup> while common nouns usually refer to the general class of items. For a fanciful trademark to be effective, the merchant usually has to market the product using the coined name in conjunction with the generic name of the class the product belongs to, thus, with a proper noun and a common noun or nouns, for example, “Dreft dishwashing liquid”, with “Dreft” as the proper noun, and “dishwashing liquid” as the common noun phrase. A trademarked product becomes even more enriching to the language when the product is an entirely new invention that there exists no readily available term for it in the language. The clever merchant would have to make up a common noun to go with the product’s proper name, thus adding to the language’s vocabulary.

Sung In, in rationalizing trademarks, writes about the good effects of trademarks to language, and, citing Landes and Posner, states that there are three ways that trademarks improve the English language:

They increase the stock of names of things, thus economizing on communication and information costs... They create new generic words – words that denote entire products, not just individual brands... And they enrich the language, by creating words or phrases that people value for their intrinsic pleasingness as well as their information value.<sup>74</sup>

Sung In adds that while the contribution of trademarks to the English language may provide only minimal benefits to the consumer in terms of efficiency, the fact is that trademarks add terms to the English language by aiding efficiency in communication, giving people alternative words to use in their interactions with other people.<sup>75</sup>

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<sup>73</sup> Robin L Simmons, ‘The Proper Noun’ <<http://www.chompchomp.com/terms/propernoun.htm>> accessed 25 October 2013.

<sup>74</sup> In (n 9) 169-170, citing William M Landes and Richard A Posner, ‘The Economics of Trademark Law’ (1988) 78 Trademark Rep. 267, 273.

<sup>75</sup> *ibid* 170.

A fanciful term or coined term used as a trademark is, in linguistics, a *neologism*. The word neologism is derived from the Greek words *néos* and *logos*, meaning “new” and “expression”, respectively.<sup>76</sup> A neologism is a:

Newly formed linguistic expression (word or phrase) that is recognized by at least part if not all of a language community as the way to denote a new object or state of affairs, be it in technology, industry, politics, culture, or science. Formally, a distinction is drawn between (a) the formation of new expressions on the basis of already available morphological means and word formation rules (e.g. *user-friendly*, *data bank*, *decriminalize*), (b) semantic transfer (e.g. *computer virus*), (c) loans from other languages (*sauté*, *mesa*); these three sources cannot always be separated exactly (cf. *academic milieu*); and (d) expressions with a constituent used metaphorically (e.g. *child’s play*).<sup>77</sup>

Applying this definition to newly coined trademarks, the new trademark starts out as unknown but to the people involved in the development of the products. Prior to a product’s launch in public, the language community does not yet recognize the names that refer to the products, or the signifiers. As the product becomes more known in the market, through circulation, advertising, or word of mouth, the signifier of the successful product becomes the neologism, the word that people use to denote the object, herein the trademarked product. This application of the definition of neologism brings back to mind Everett’s formula for language, with the components of cognition, culture and communication observable in the rise of a trademark. From start to finish, the indispensability of language in trademark coinage is undeniable, leading to the conclusion that language is an inseparable part of trademark. On the other hand, it was also demonstrated that trademarks contribute to language by the creation of new words and phrases and the assignment of new meanings to existing words that add to the language. Thus, trademark and language have a symbiotic relationship in that language serves as a tool for the creation, development and circulation of trademarks, and trademarks enrich the language in return.

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<sup>76</sup> Bussman (n 71).

<sup>77</sup> *ibid.*

While trademark and language work hand in hand to enrich each other, it can also be said that trademarks and language also have a parasitic relationship, with language leeching the life out of a trademark. This can be obviously seen through the phenomenon of genericide.

What begins as a mutually beneficial relationship could result in a tragic end that is almost ironic. As explained earlier, a trademark begins its life as a name - a word attached to a merchant's product. As more and more people consume the product, or at least become aware of it through various ways, like advertising, or word of mouth, both of which use language as a medium to communicate the message about this new product, the words associated with the product spreads in the community. It may either be that the product is so novel that the consuming public will know no other terms to refer to the product. It may also be that the merchant was remiss to introduce the product to the market with insufficient general signifiers, that is, with no generic name accompanying the brand. It could also be that the product is so successful that the product's name becomes synonymous to the product's generic class. Whichever of these situations occur, the result is that the trademarked name begins to mean something to the consuming public other than what the merchant originally intended the name to mean, which is to function as a designator of the source of the product, accompanied by whatever personality traits the merchant wanted to associate with his trademark through its corporate image.

When a trademark dies by genericide, the language is enriched. On the other hand, if a trademark that has already become generic in the minds of the public is still upheld in spite

of the change in its primary significance, it would end up causing a “language monopoly”<sup>78</sup>, in which “the available market language would be impoverished. This dearth would lead later entrants to develop other ways of informing the consumer of the identity, quality, and features of their products.”<sup>79</sup>

### 3.2 Semantic Change: Words, Thoughts and Meanings

Brands are not merely “rigid designators” of source or producer of a thing, but also grants “rich sociocultural and ideological ‘captioning’ for the object (including by ‘keying’ it to definable activities”<sup>80</sup>, due to the fact that brands are built with language, and as such, are highly susceptible to factors that cause semantic change.

In the case of *Union National Bank v. Union National Bank*, the Court has remarked that “The English language, more than most, is in a constant state of flux. A word which is today fanciful may tomorrow become descriptive or generic.”<sup>81</sup> The nature of language being highly dynamic, with word meanings shifting at a moment’s notice, it is not surprising that brands, built on language, are likewise susceptible to changes in meaning.

Due to the fact that the courts determine whether a trademark has become generic based on the primary meaning of the word in the public’s perception, it is worth examining how a semantic shift works in the world of linguistics.

The term “semantic change” is defined as:

Changes in the meaning of linguistic expressions, seen from a historical perspective, where semantic change refers both to changes in the relation between linguistic signs

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<sup>78</sup> In (n 9) 171, citing Stephen L Carter, ‘The Trouble with Trademark’ (1990) 99 Yale Law Journal 759, 773.

<sup>79</sup> *ibid.*

<sup>80</sup> Moore (n 44) 334.

<sup>81</sup> *Union National Bank v Union National Bank*, 909 F 2d 839, 846 (1990).

and extralinguistic reality and to changes in the relations between signs.<sup>82</sup>

Transposing this to the subject at hand, the trademark is the linguistic sign, and the extralinguistic reality is the large universe in which the material product (the trademarked good) interacts with the world – including the public, culture, the passage of time, et cetera. It is in this extralinguistic reality that the shift occurs, due to the world's interaction with the material product.

In their book *The Meaning of Meaning*, language scholars C. K. Ogden and I. A. Richards came up with a model to bridge the gap between words and facts. M. Bréal was quoted in the book, remarking that:

Substantives are signs attached to things, they contain exactly that amount of truth which can be contained by a name, an amount which is of necessity small in proportion to the reality of the object. That which is most adequate to its object is the abstract noun, since it represents a simple operation of the mind. When I use the two words *compressibility*, *immortality*, all that is to be found in the idea is to be found also in the word. But if I take a real entity, an object existing in nature, it will be impossible for language to introduce into the word all the ideas which this entity or object awakens in the mind. Language is therefore compelled to choose. Out of all the ideas it can choose one only, it thus creates a name which is not long in becoming a mere sign.

For this name to be accepted it must, no doubt, originally possess some true and striking characteristic on one side or another, it must satisfy the minds of those to whom it is first submitted. But this condition is imperative only at the outset. Once accepted, it rids itself rapidly of its etymological signification, otherwise this signification might become an embarrassment. Many objects are inaccurately named, whether through the ignorance of the original authors, or by some intervening change which disturbs the harmony between the sign and the thing signified. Nevertheless, words answer the same purpose as though they were of faultless accuracy. No one dreams of revising them. They are accepted by a tacit consent of which we are not even conscious.<sup>83</sup>

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<sup>82</sup> Bussman (n 71).

<sup>83</sup> C K Ogden and I A Richards, *The Meaning of Meaning: A Study of the Influence of Language Upon Thought and of the Science of Symbolism* (Harcourt, Brace & World, Inc. 1923), 3, citing Bréal's *Semantics*, pp 171-2.

Ogden and Richards clarify that words “mean nothing by themselves... It is only when a thinker makes use of them that they stand for anything, or, in one sense, have “meaning”.”<sup>84</sup> Due to the need for a theory to connect words to ideas, and ideas to things, Ogden and Richards created a diagram<sup>85</sup>, using the three factors involved in communication:

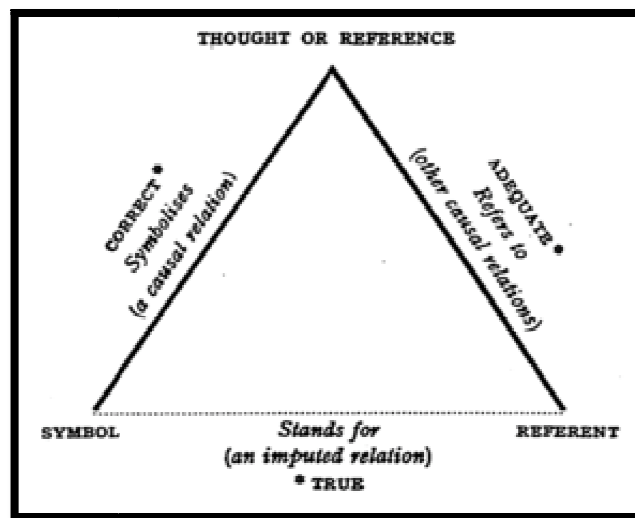


Figure 1. Ogden and Richards's Semantic Triangle

The diagram shows the relationship between symbol (sign or word), thought (meaning) and referent (the object). When a person is exposed to a symbol, it triggers behavior that causes performance of an act of reference, as when a thought pops into the person’s mind. The relationship between thought and referent may be direct, as when a material object is perceived; or an indirect connection, like for abstract ideas like love and immortality; and causes a thought or reference in one’s mind. The connection between a symbol and the referent is not direct, because it is always dependent on the thought or reference – the meaning. This idea that there is no direct connection between the symbol and the referent, and that the “linguistic expressions relate to the real world only through their meaning” may be seen in the works of the philosopher Parmenides, as early as 540-470

<sup>84</sup> C K Ogden and I A Richards, *The Meaning of Meaning: A Study of the Influence of Language Upon Thought and of the Science of Symbolism* (Harcourt, Brace & World, Inc. 1923), 9-10.

<sup>85</sup> *ibid* 11.

B.C.<sup>86</sup>

With this framework that shows a disconnect between the word and the object, and the necessity of meaning to connect the two, it is easy to divine an explanation of why genericide occurs. There is no direct connection between the trademark and the physical or material good being sold under that trademark. The connection, flimsy as it is, is fully dependent on the meaning assigned to it by the minds of the relevant public, and mutually agreed upon by the members of that relevant public.

A finding of genericness, then, takes account of a change that has already taken place in the use of the contested term by the relevant public: it now circulates within the community of users of language in a different way than a brand name, and has acquired a new primary significance.<sup>87</sup>

### 3.3 The Effect of the Internet and Social Media on Language

Technology has made leaps and bounds of progress, and along with it, the means of human communication have also evolved. The internet, in particular, has globalized communication in an unprecedented fashion, affecting virtually all facets of human life, especially language.

One such pervasive effect is that any given language community is spread exponentially by the internet. Specifically for English language community, statistics show that as of 2013, 26.8% of all internet users in the world use English.<sup>88</sup> This does not mean that non-English languages are not represented on the internet. In fact, Chinese is closely behind English in terms of number of online users of the language, at 24.2%.<sup>89</sup> Non-English

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<sup>86</sup> Bussman (n 71).

<sup>87</sup> Moore (n 44) 344.

<sup>88</sup> 'Internet World Users by Language', (*Internet World Stats*) (10 September 2013) <<http://www.internetworldstats.com/stats7.htm>> accessed 26 October 2013.

<sup>89</sup> *ibid.*

languages continue to flourish on the internet side by side with English, because internet users are increasingly becoming bilingual, with English as a second language. At present, there are already more speakers of English as a second language than native English speakers, “[a]nd increasingly they use it to communicate with other non-native speakers, particularly on the internet where less attention is paid to grammar and spelling and users don’t have to worry about their accent.”<sup>90</sup>

While the continued usage of non-English languages online must be acknowledged, for a globalized medium to be able to have a wider reach, a common communication tool is required, resulting in a lingua franca, which at the moment is English. Web content providers adapt to this need by providing an English interface for their websites.

Due to social interactions online being not limited to a particular geographical location, internet users from all over the world who speak English have a power to effect linguistic changes. English stopped being just the language of the United Kingdom, United States of America, Australia, and other territories with English as the native tongue. English has become the language of the internet. Because of this, this language is no longer bound within one particular language community. This also means, however, that English itself is changing. Non-native speakers adopt English, and in the process, adapt this language to their needs and make it their own. Jane O’Brien writes that:

Users of Facebook already socialize in a number of different “Englishes” including Indian English, or Hinglish, Spanglish (Spanish English) and Konglish (Korean English). While these variations have long existed within individual cultures, they’re now expanding and comingling online.<sup>91</sup>

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<sup>90</sup> Jane O’Brien, ‘Learn English online: How the internet is changing language’, *BBC News Magazine* (14 December 2012) <<http://www.bbc.co.uk/news/magazine-20332763>> accessed 26 October 2013.

<sup>91</sup> *ibid.*

These transformed “Englishes” are also simultaneously sent out into the world, as these speakers of Hinglish, Spanglish, Konglish, et cetera, also send out communications using these languages online. In this process, rapid mass changes or variations in the relationships between symbols, references and referents are created, because the change in the language community can change one of these components and the whole chain is changed, while they remain technically still English.

There are numerous other ways that the internet changes language. Social media and social network sites have a major part in this language evolution. The pervasive effect of linguistic changes caused by the internet is magnified by observing the effect that social media and social network sites have on language. Pappafotis and Fishcher write that the term social media has existed since the mid-1990’s or the early 2000’s, and they define the term as:

In the macro sense, social media refers to websites and internet applications where the core component is user-generated content that can be updated in real-time. Another key characteristic is that most social media platforms allow users to choose unique identifiers or screen names to identify themselves to other users. The username usually appears as some part of a subdomain in the URL for each user's page.<sup>92</sup>

To state this briefly, social media is user-generated content, usually traceable to a particular online persona. These online personas are usually made on social network sites. Communications scholars danah m. boyd and Nicole B. Ellison provide a definition:

Social network sites as web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system. The nature and nomenclature of these connections may vary from site to site.<sup>93</sup>

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<sup>92</sup> Joseph M Pappafotis and Matthew E Fishcher, ‘Brand Protection in the Social Media Frontier’ (2010) 43 Maryland Bar Journal 4.

<sup>93</sup> danah m boyd and Nicole B Ellison, ‘Social Network Sites: Definition, History, and Scholarship’ (2008) 13 Journal of Computer Mediated Communication 210, 211.

Social network sites allow users to create an online profile, which serves as the ID with which a user can find other people, and be found by other people. Through these sites, users can communicate with other people in their network by means of words, images, sounds, creating social media.

It may be argued that a large part of the internet is potentially convertible to social media, through linking methods made possible by social network sites. As of this writing, among the more popular social network sites are Facebook, Twitter, Google Plus, Instagram and LinkedIn. Many of these popular sites tie up with internet content providers, for example through social network share buttons or social plug-ins, for example the “Like” and “Share” buttons for Facebook, “Follow” or “Tweet” buttons for Twitter, and the “Pin It!” button for Pinterest. These buttons are displayed on third-party websites, and when clicked, will post it on the corresponding social network profile of the user. This makes the shared content become visible on the social network site. Due to the relative ease of sharing through the mere clicking of a button, social network users have quickly adopted this method of sharing content, abandoning the old method of typing or copying and pasting a complete web address. Thus, it can be said that at least for these connected third-party websites, their content became social, or at the very least, “socialized” media. This creates a somewhat homogenized culture, an online culture, not limited to geographical or national boundaries.

“[S]ocial media is playing an important role not only in introducing new terms into the dictionary but also in accelerating the rate at which new terms reach critical mass in the culture.”<sup>94</sup> One such illustration of this statement is how Collins Dictionary launched a

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<sup>94</sup> Alex Brown, ‘How Social Media Is Changing the English Language (and Why It Matters to Marketers)’ (*MarketingProfs.com*, 12 September 2013) <<http://www.marketingprofs.com/articles/2012/8889/how-social->

crowdsourcing campaign for words to add in CollinsDictionary.com, in which Collins invited people from all over the globe to send in their contributions of words that they think should be included in the dictionary.<sup>95</sup> The fact that the campaign was done online democratized the process, because words could be submitted by anyone online, from ordinary citizens to movie stars, and not just members of the world’s intellectual elite.<sup>96</sup> Social media also sped up the process of language evolution by allowing marketers to keep up with the changing pace of the marketplace through real-time feedback, and contributions that reflect the pop culture at that time.<sup>97</sup> Evidence of this are coined words like “tweeps”, “cyberstalking”, “YOLO” and “photobombing”, among many others.<sup>98</sup> Many of these neologisms are also technology-themed due to the rapid development of popular technologies that need words to signify them. Jonathon Keats, who writes the Jargon Watch column for Wired magazine has compiled many of these new words in a book published by Oxford University Press<sup>99</sup>, but it takes longer for these words to become “official” words such that the lexicographers of, say, the Oxford Dictionary, would include it in such respected reference volumes. Neologisms such as those mentioned earlier are often catalogued online, on websites such as WordSpy.com and UrbanDictionary.com. The latter is notably made with user-generated content. The former is run by website owner Paul McFedries and only introduces new terms when the term has appeared in at least three citations from three different publications and three different writers.<sup>100</sup> While these new words do not make it right away into the more established, hard copy dictionaries such as Merriam-Webster or Oxford Dictionaries, online users are highly

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[media-is-changing-the-english-language-and-why-it-matters-to-marketers#ixzz2iumb8qVq>](#) accessed 27 October 2013.

<sup>95</sup> *ibid.*

<sup>96</sup> *ibid.*

<sup>97</sup> *ibid.*

<sup>98</sup> *ibid.*

<sup>99</sup> Jonathon Keats, *Virtual Words: Language on the Edge of Science and Technology* (Oxford University Press 2011).

<sup>100</sup> Elaine Czach, ‘Turning Trademarks into Slang: Journalists Have a Lot of Impact on Trademarks Becoming Part of Everyday Vocabulary. This “Genericide” Can Strip a Company Trademark of Its Meaning and Value’ (2004) 28 *American Journalism Review* No. 2.

likely to consult these “less official” online dictionaries for everyday use, which in turn validates the neologism in the public perception, and thereafter circulated through use in colloquial speech and writing, including interactions on social networks.

The disadvantageous effect of social media on the language is that traditional rules of syntax, grammar and spelling are often sacrificed for the sake of efficiency, especially considering that the current drive for online communications is for brevity and speed. For instance, Twitter has a 140-character limit for tweets. Public shaming occurs against people who post extremely long wall posts or status updates on Facebook and other social network sites that allow the posting of longer content. Websites like BuzzFeed.com and Mashable.com, sites that monitor and compile current trending topics online have taken to presenting their materials in list form to adapt to the rapidly shortening attention span of internet users. In fact, BuzzFeed.com even labels long-form trending materials as “long-form”, either as an invitation for patrons of longer articles or as a warning for people who have no patience to read material not reduced into a few key sentences. To adjust to this trend of cutting corners when it comes to communication, many internet users have taken to shortcuts on text, as long as the message is carried across, such as writing “U2” instead of “you too”, or “YOLO” for “you only live once”. Users also get creative and come up with new words, neologisms that express their idea in as few words as possible, such as “selfie”, a which UrbanDictionary.com defines quite lengthily as “A strange phenomenon in which the photographer is also the subject of the photograph, in a subversive twist on the traditional understanding of the photograph. Usually conducted because the subject cannot locate a suitable photographer to take the photo, like a friend.”<sup>101</sup>

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<sup>101</sup> ‘Selfie’, (*UrbanDictionary.com*) <<http://www.urbandictionary.com/define.php?term=selfie>> accessed 27 October 2013.

When a word catches on over the internet, the opinion of the lexicographers who decide which words go into the dictionary ceases to matter. The neologism spreads like wildfire and becomes ingrained as a real word in the public perception.

“The internet is creating a... language evolution” at a dizzying pace.<sup>102</sup> Taking all these good and bad effects of the internet to language together, it is inevitable that social network sites and social media will have an influence on trademarks, being inseparable from its language component.

### 3.4 The Effect of Social Media and Social Network Sites on Trademarks

While trademarks are “inherently territorial and it exists in each country solely according to that particular country's statutory scheme”<sup>103</sup>, due to the internet, the factors contributing to genericide may come from various sources outside the territory in which the trademark is valid. One such factor is language, which, as discussed in the immediately preceding section, is deeply affected by the advent of social media and social network sites. In this era’s wired world, even if the legal jurisdiction in which the trademark operates stays the same, the language community is expanded.

With a common language of communication, coupled with an increasingly common body of pop culture references resulting from a homogenized media, it becomes easier for a trademark owner to unleash his brand out there into the wired world. In particular, advertising became so much easier with the advent of the internet. One such example of an internet advertising success story is Hotmail, which increased its audience from zero to 12 million members within a mere 18 months,

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<sup>102</sup> O’Brien (n 90).

<sup>103</sup> *Federal Treasury Enterprise Sojuzplodoimport v Spirits Intern NV*, 425 F Supp 2d 458 (SDNY 2006).

more rapidly than any company in any media in the history of the world... it did so with an advertising budget of \$50,000 – enough for some college newspaper ads and a billboard... From an epidemiological perspective, it was as if Zeus sneezed over the planet.<sup>104</sup>

Merchants who want to advertise their goods garner a large audience on the internet. Also, the internet allows these merchants to have a closer interaction with the public, allowing a two-way relationship in which the brand encourage consumers to “join them in creating meaning and being part of the process.”<sup>105</sup> “Advertisements... provide richly textualized, often narrative, representations of branded products in a wide range of imagine contexts and universes.”<sup>106</sup> These contexts and universes are exponentially increased through the use of social media and social network sites.

With social network sites, merchants can use “targeted advertising”, which displays an advertisement on an internet user’s screen, showing goods or services based on the preferences chosen by the social network site member, e.g. liked pages and profiles, or websites visited. Not only that, through the share buttons discussed earlier, users themselves can be advertisers of things that they like. This is how viral marketing works.

Viral marketing amounts to little more than ‘network-enhanced word-of-mouth’. Word of mouth is one of the oldest and most effective of all branding and marketing strategies (see Rosen, 2000). The beauty of ‘viral marketing’ in the Internet economy was that it turned every user into ‘an involuntary salesperson’.<sup>107</sup>

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<sup>104</sup> Moore (n 44) 350, quoting Steve Jurvetson, ‘What is viral marketing?’ (1998) available at <<http://news.com.com/2010-1076-28138.html?legacy=cnet>>.

<sup>105</sup> Moore (n 44) 350, quoting Chris Hodder, ‘God and Gap: What has *Asda* got to do with Jerusalem? Branding and being a Christian in the 21<sup>st</sup> century – some reflections’ (2002) available at <[http://www.instituteforbrandleadership.org/Chris\\_HodderBrands\\_and\\_Theology.htm](http://www.instituteforbrandleadership.org/Chris_HodderBrands_and_Theology.htm)>.

<sup>106</sup> Moore (n 44) 334.

<sup>107</sup> *ibid* 349-350.

The effectivity of viral marketing is largely dependent on “passonability”<sup>108</sup> or “shareability”. Moore explains that:

If brands can involve people in playful ways which are passed on and disseminated organically, they are far more likely to be successful... Brands which are perceived to enhance our relationships and be worth sharing with friends are the ones which will prosper.<sup>109</sup>

Merchants have taken notice of this internet phenomenon that has taken the advertising world by storm. Companies are increasingly becoming aware of the potential of digital advertising, particularly on social networks. In the job market, companies are creating positions for social media savvy persons with job titles such as “digital communications professional”, “multi-media communications specialist” and “director of social marketing and brand communications”.<sup>110</sup> Some of these employees are being paid to make and maintain a profile for the brand on social network sites. Information technology professionals have come up with ways to make targeted advertising through social media more effective, such as with the use of cookies that track and gather online browsing activity into a data set connectable to a user profile on social networks.<sup>111</sup> With this new digital advertising method, social network site users are encouraged to share content about goods that are often the subject of trademarks, without sufficient knowledge or guidance regarding the proper usage of communicating this content to other people.

This is particularly dangerous with regard to trademark, because in the case of viral marketing, these online word-of-mouth, or shall we say, word-of-mouse advertisements don’t observe, or don’t have to observe, the standards of proper usage of the word protected by

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<sup>108</sup> *ibid* 350.

<sup>109</sup> Moore (n 105).

<sup>110</sup> Alison Doyle, ‘Social Media Job Titles’ (*About.Com*) <<http://jobsearch.about.com/od/job-title-samples/a/social-media-job-titles.htm>> accessed 27 October 2013.

<sup>111</sup> See, for example, Arnold Roosendaal (n 42).

trademark, because these involuntary advertisers have no pecuniary or other interest to use the trademarked word in a proper manner. As discussed in the previous section, a growing part of the social media population does not really pay attention to traditional rules of English language usage, and they would care even less about capitalizing the “g” to refer to the trademark of “Google”, or worry about using it as a proper noun.

However, not only ordinary internet users commit these mistakes in the usage of trademarks online. In an article by Elaine Czach, she recognizes that journalists have a major role on the devolution of a trademark into a generic word. She mentions the inclusion of Merriam-Webster’s Collegiate Dictionary of the word “McJob” in its 11<sup>th</sup> edition, defining the word as “a low-paying job that requires little skill and provides little opportunity for advancement” in spite of the objections of McDonald’s Corporation.<sup>112</sup> Merriam-Webster’s defense was that:

For more than 17 years, McJob has been used as we are defining it in a broad range of publications, including The New York Times, U.S. News & World Report, Publishers Weekly, Rolling Stone, The Times (London), The Boston Globe, Ms., Harper’s, The New Republic, Utne Reader, and The Vancouver Sun.<sup>113</sup>

As in the above example, and the example of WordSpy.com mentioned in the earlier section, journalists have a great influence on making a trademark fall victim to genericide. With the news and publishing industries increasingly moving to online business models, if not entirely abandoning their paper-based businesses, writers for these organizations adjust their writing style to a more accessible level of language, often using eye-catching buzzwords like “McJobs” to garner the attention of readers in a competitive online market. It is logical how neologisms like these crop up online, with little respect for the rigid rules for trademarks. And with social network sites, it has become easier to share material, including

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<sup>112</sup> Czach (n 100).

<sup>113</sup> *ibid.*

those that display the offending newly coined words. Regardless of whether the source of a neologism is an ordinary person using the internet, or members of organizations perceived as more credible sources of information, such as the online arm of newspapers, journals, news channels, universities and the like, social network sites and social media have increased the ease of disseminating material that contains this new word, in spite of spelling, capitalization or usage inaccuracies.

The very same reasons that afforded a previously unimaginable breadth and depth of reach that make it possible for merchants to launch advertising campaigns to a large audience with high expectations at a low cost have also made semantic shifts inevitable. While the “relevant public” in the legal context continues to be the relevant sector of the population in the specific jurisdiction in which the trademark is valid, the members of this relevant public are exposed through social network sites and social media to the ideas of the larger language community. Referring back to Ogden and Richards’s semantic triangle, the online community affects the thought or reference attached to words, even if the referent remains the same. To recall, in deciding whether a trademark has become generic, “the test is not what is available as an alternative to the public, but what the public’s understanding is of the word that it uses.”<sup>114</sup>

Tying these together, a model of the relationships between language, social media and trademarks is possible, like so:

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<sup>114</sup> *King-Seeley Thermos Co* (n 63).

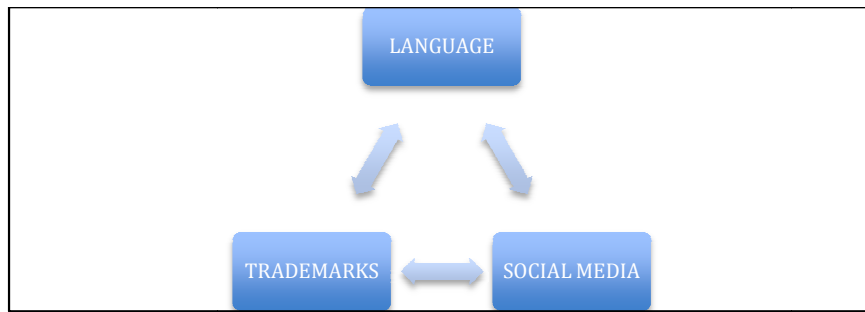


Figure 2. Relationship of Language, Trademarks, and Social Media

Language is at the top because it is the basic medium that makes possible the existence and operation of both trademarks and social media. However, all the arrows go both ways because of the effect that each component has on the others. Trademarks and social media enrich the language by the introduction of new words or signs, new meanings or thoughts, and new objects or referents. Trademarks affect social media by creating shareable content, while social media gives rise to trademark popularity through exposure and dissemination. It can be gleaned from this diagram that the generification of trademarks may be caused, or at the very least, hastened by the rapid changes that bombard it from two sides or two components, both of which are essential to a trademark’s existence and success in the modern world.

### 3.5 New Technologies, New Rules?

An analysis was made of the general effect that language, social media, and trademarks have on each other. However, with the introduction of new technologies, can this model keep up?

Carl Rogers has said that “[t]he very essence of the creative is its novelty and hence we have no standard by which to judge it.”<sup>115</sup> True enough, when new technologies are invented, the inventor has to start from scratch when it comes to coining a good name for his

<sup>115</sup> Carl R Rogers, *On Becoming a Person: A Therapist’s View of Psychotherapy* (Houghton Mifflin Company 1961) 351.

newly-invented product. However, as S. B. Master, the founder and owner of Master-McNeil, Inc., Creative & Strategic Naming Services has said, it has become more challenging to come up with names yourself, as “[t]here are too many names and it’s difficult to find one that’s protectable.”<sup>116</sup>

As technology evolves, companies are hard-pressed to find new names that will be easily remembered but also culturally appropriate. International businesses have taken to hiring nomenclature professionals, such as S. B. Master, to assist them in coining strategically sound brand names. Master has also remarked that “[a] name is an ownable asset and in many cases an incredibly valuable one.”<sup>117</sup>

When an inventor or a merchant of a new invention does come up with a new name, this is still insufficient. He also has to come up with a generic descriptor for his newfangled product. This generic descriptor has to be an effective one, otherwise, the consumers might refer to the trademarked name if it is shorter or simpler, or easier to remember.

Coining trademarks is especially difficult for ICT brands, particularly software, because they already have a generic descriptor, classified as software. Narrowing the category down further, it explodes into multitudes of generic descriptors into kinds of software, depending on their function. When these software programs have entirely new functions with generic descriptors, they are often too long or too complicated to use or to remember, or if not too long or too complicated, the alternative, which is proper name, is often simpler to use or recall. For example, Google, a software, is classified as a search

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<sup>116</sup> Scott Winokur, ‘The name of the game is the name’ (*SFGate.Com*, 21 February 1995) <<http://www.sfgate.com/news/article/The-name-of-the-game-is-the-name-3150358.php>> accessed 27 October 2013.

<sup>117</sup> *ibid.*

engine. It is easier to use “google” than “search engine” in everyday language, for example, saying “I’m going to google Lady Gaga” is easier than “I’m going to use the Google search engine to look for information about Lady Gaga.”

The difficulty of generic descriptor usage is compounded when the software is released under two names: the trade name of the maker, and the trademarked name of the software, for instance, Microsoft created Word, Excel, PowerPoint, and Outlook as part of the Microsoft Office Suite. It is easier to refer to these programs by their trademark, rather than their generic descriptors: word processing software, spreadsheet software, slide presentation software, and email and calendar software, respectively. This author even had to google (!) the generic descriptors for all of those software programs except for Microsoft Word.

Even more troublesome is when the producer of the software program does not come up with a generic descriptor at all, aside from the word “software”, but sells a product displaying three different trademarks! This is the case with Adobe with some of its programs like Adobe® Acrobat® eBook Reader™, with the appropriate generic term “software”.<sup>118</sup> One of the examples of proper usage as shown on the website of Adobe reads as “We were able to finalize the layout with our San Francisco office using Adobe® Studio™ online collaboration tools.”<sup>119</sup>

While the ® and ™ symbols do appear on online content generated by the owners of these registered and unregistered trademarks, these symbols do not commonly appear in

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<sup>118</sup> ‘Appropriate Generic Terms for Use with Adobe Trademarks’ (*Adobe.com*) <<http://www.images.adobe.com/www.adobe.com/content/dam/Adobe/en/legal/licenses-terms/pdf/terms.pdf>> accessed 27 October 2013.

<sup>119</sup> *ibid.*

social media, either due to inconvenience or message length issues, or that some people may be unaware of what these symbols stand for, or that some people are not at all aware that a certain word is a trademarked term.

These issues plaguing ICT trademarks are further compounded by the fact that many of these new trademarks are birthed straight into a wired world. The existence and success of the products they represent are more or less dependent on the internet and are immediately exposed in social media, which is akin to a baby being born in a grave. Many ICT brands are inherently internet-based and their online and offline existence are inseparable. Google, Inc. cannot exist without the internet because its products operate in the online landscape. Facebook and Twitter cannot exist without social media because they *are* social media, or at the very least, definitive versions of social network sites through which social media is generated. These brands are born into an online world that is preconditioned to prefer shortcuts. This is very likely putting these trademarks in high risk of inappropriate usage.

Will these problems cause these trademarks to become genericidal? The answer will be discussed in the succeeding chapter.

## Chapter 4. Language is the Problem, Language is the Solution

Like computer memory, science and technology have a tendency to overwrite their past. Theories are disproven. Machines break down. Words capture ideas in time, but meanings are fugitive. Here some representative terminology from a moment in history is fixed. Today is

January 1, 2010. Or day zero for the lexical archaeologists.

- Jonathon Keats, *Virtual Worlds*<sup>120</sup>

### 4.1 A Brief Examination of Google as a Generic Term

Jeremy Bentham has said that “Error is never so difficult to be destroyed as when it has its roots in Language.”<sup>121</sup> This statement aptly summarizes the root of the problem of genericide. Often, the cause of a trademark’s genericidal troubles is a problem with the linguistic essence of the trademarked term itself. A fitting example of this in real life is Google, Inc.’s trademark “Google”.

As of 11 September 2013, a search on Facebook.com for Facebook pages with the word “googling” yields six relevant results<sup>122</sup>, with the following page names faithfully reproduced hereafter, with additional information:

1. Googling things to check it’s spelling.  
- A community page with 4,266 likes
2. Googling Words You Cant Spell So You Dont Look Stupid In A Conversation  
- A community page with 34,668 likes
3. Googling a word to make sure it’s spelled right  
- A community page with 5,156 likes
4. Googling  
- An interest page with 18,861 likes
5. Googling how to make a sandwich cos there are no women in the house  
- A community page with 2,420 likes
6. Googling everything  
- An interest page with 4,408 likes

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<sup>120</sup> Keats (n 99).

<sup>121</sup> Cited in Ogden and Richards (n 84).

<sup>122</sup> ‘Pages named “Googling”’, (*Facebook.com*) <<https://www.facebook.com/search/str/googling/pages-named>> accessed 11 September 2013.

At mere thousands, these figures are inconclusive considering the entire user population of Facebook, which, as of 2012 was reportedly numbering at around 1 billion<sup>123</sup>, with a daily average of active users pegged at 699 million based on Facebook's own quarterly report for the second quarter of 2013.<sup>124</sup> However, the numbers above are indicative of the fact that the use the converted forms of "Google" is not an isolated incident. Similar results appear for the search of the word "googler".

When conducting a search with Google's search engine, in many instances, the search results page displays, in addition to the search results itself, additional information such as the following: an approximate number of search results, the time it took for the search to yield results, related searches, and the page numbers of the search results, if there is more than one search results page. In such cases, on top of the search results page number, the word "Google" is displayed. This word is lengthened by adding more letter o's, stretching out over the search results page numbers, depending on how many search results pages there are. Thus a search yielding two search pages of results would have "Google" (two o's) stretched out on top of the page numbers, "Goooogle" for four pages of search results, "Goooooooooogle >" for ten search results pages or more.

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<sup>123</sup> Ashlee Vance, 'Facebook: The Making of 1 Billion Users' *Bloomberg BusinessWeek* (New York, 4 October 2012) <<http://www.businessweek.com/articles/2012-10-04/facebook-the-making-of-1-billion-users#p1>> accessed 12 September 2013.

<sup>124</sup> 'Facebook Reports Second Quarter 2013 Results' (*Facebook.com*) <<http://investor.fb.com/releasedetail.cfm?ReleaseID=780093>> accessed 28 October 2013.

In many instances, on the right side of the first page of the search results, a box containing a summary of information from Wikipedia.com about the term being searched is displayed.

A search for the word “googling” on Google.com itself yields around 9,700,000 results,<sup>125</sup> displaying ten o’s. Also, the information box displays:

**Google**

Verb

The transitive verb to google means using the Google search engine to obtain information on something or somebody on the World Wide Web. Wikipedia<sup>126</sup>

With these results, Google, Inc. may be said to be an example of a trademark owner being the one perpetrating the misuse of its trademark. Even though the summarized information came from Wikipedia.com, Google, Inc.’s product, its Google search engine, itself displays information that the word “Google” is a verb. While this may be lauded as a show of impartiality or objectivity, both good qualities for a search engine, by not acting in a self-serving manner and deleting the potentially deleterious use of its trademark, Google, Inc. may be argued to be passive in protecting its trademark.

Another example that demonstrates how Google, Inc. may be acting against its own interests may be seen by its actions on the social network Twitter.com.

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<sup>125</sup> As of 11 September 2013.

<sup>126</sup> Google search results for ‘googling’ (*Google.nl*) <[https://www.google.nl/?gws\\_rd=cr&ei=IeEwUoeoEc\\_HtAbb-oCIAg#q=googling](https://www.google.nl/?gws_rd=cr&ei=IeEwUoeoEc_HtAbb-oCIAg#q=googling)> accessed 12 September 2013.

On Twitter, when a user posts messages or micro-blogs (“tweets”), the tweet is attributed to the user by displaying the name of the person or entity, and the Twitter user name (the word preceded by the @ sign). Twitter encourages users to write their real name on their profile, stating under the “name” field when filling up a Twitter profile “Enter your real name, so people you know can recognize you.”<sup>127</sup> On this platform, Google has a verified account, with the Twitter username @google. It also has the name “A Googler”.<sup>128</sup>

On 9 October 1999, in a message board for an online group (“e-group”) for “Google-Friends”, Larry Page, the co-founder of Google (Sergey Brin being the other co-founder), wrote a message about the new features of Google. He wrote, “This list is an announcement list for the Google search engine which is available at <http://google.stanford.edu/>.”<sup>129</sup> He goes on to refer to the search engine as just “Google” after that sentence, and he ended the message with “Have fun and keep googling!”<sup>130</sup>

It is no wonder that a complaint was filed against Google, Inc. on 21 May 2012 in the United States District Court in Arizona, with the prayer that the term “GOOGLE” be declared a generic term.<sup>131</sup> The case was filed by David Elliott, who claimed that he was the third-party beneficiary of the registration of domain names that included what he claimed was the *generic verb* “GOOGLE” in them.<sup>132</sup> Elliott alleges that the word “GOOGLE” is “now used as a common transitive verb meaning “to search the internet” or to “search the internet using any search engine”, and that this word has been identified in many different forms across a

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<sup>127</sup> Available at <<https://twitter.com/settings/profile>> but the website requires the visitor to create an account or log-in to an existing account.

<sup>128</sup> ‘A Googler (google) on Twitter’ (*Twitter.com*) <<https://twitter.com/google>> accessed 11 September 2013.

<sup>129</sup> Internet Archive Wayback Machine <<http://web.archive.org/web/19991009052012/http://www.egroups.com/group/google-friends/3.html>> accessed 12 September 2013.

<sup>130</sup> *ibid.*

<sup>131</sup> *Elliott v Google, Inc* (n 7), Complaint.

<sup>132</sup> *ibid.*, pars. 8 and 11.

lot of non-English languages all over the globe.<sup>133</sup> One of Elliott's causes of action is for the cancellation of the trademark registration for the term "Google" for the reason that the term is no longer able "to serve as a proper indicator of origin, due to its genericness".<sup>134</sup> He also claims that there are no other synonyms for the verb "google" to denote the act of searching on the internet.<sup>135</sup>

Access to the subsequent court documents in this case was limited, thus defendant's Answer to the allegations was not available for study. However, it must also be noted that a Settlement Conference was scheduled for 21 February 2013 for this case.<sup>136</sup> Upon further research, there has been no news of what occurred after this Settlement Conference, or if it even took place. However, for the purpose of this paper, it is not completely necessary to find out how the court decided on this case. The relevance of this case is that the fact that a claim of Google's genericity was even filed, signaling that it is a trademark at risk of being considered as generic.

As a purely academic exercise, to posit a guess on which direction the court would go on this matter, the primary significance test must be reviewed. In the case of *King-Seeley Thermos Co. v. Aladdin Industries, Inc.*, the court has decreed that:

a mark is not generic merely because it has *some* significance to the public as an indication of the nature or class of an article. \* \* \* In order to become generic the *principal* significance of the word must be its indication of the nature or class of an article, rather than an indication of its origin.<sup>137</sup>

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<sup>133</sup> *ibid*, par. 25.

<sup>134</sup> *ibid*, par. 56

<sup>135</sup> *ibid*, par. 62.

<sup>136</sup> 'Elliott, et al. v. Google Incorporated' (*The Recap Archive*) <<http://archive.recapthelaw.org/azd/703133/>> accessed 28 October 2013. This website is unaffiliated to the US Supreme Court, but is a project of Princeton University's Center for Information Technology Policy. The website for the United States District Court – District of Arizona <<http://www.azd.uscourts.gov/search/node/CV-12-1072>> yielded no search results for the instant case.

<sup>137</sup> *King-Seeley Thermos Co* (n 63), citing *Feathercombs, Inc v Solo Products Corp*, 306 F 2d 251, 256 (2 Cir).

However, it may be argued that the primary significance of “Google”, even in spite of its usage as a verb, is the search engine Google, made by Google, Inc. So when a person says “I’m going to google Lady Gaga”, there is a higher likelihood that this person actually means that he is going to use the Google search engine to find information about Lady Gaga, instead of using Yahoo, Bing, or other search engines. This argument may be supported by current statistics on search engine market shares. In the global arena, as of September 2013, the distribution of market share for search engines is:

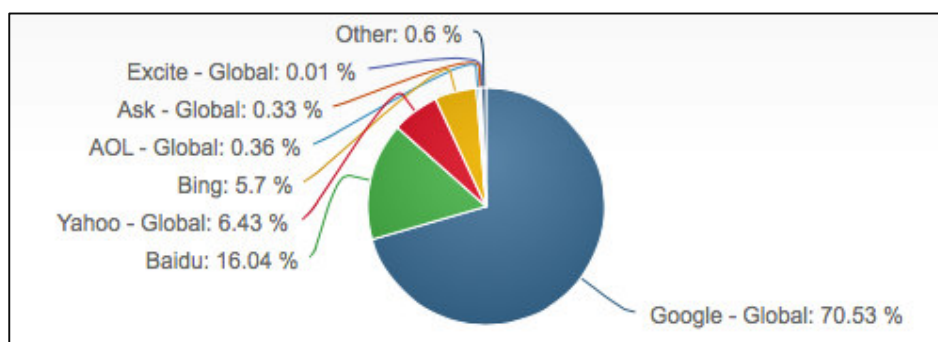


Figure 3. Desktop Search Engine Market Share<sup>138</sup>

For the American search engine market, the figure for Google’s market share is similar, pegged at 66.9%, also as of September 2013.<sup>139</sup> Thus, in spite of Google’s various verb incarnations as “google, googles, googled, googling”, these may still be used to refer to the act of searching online with Google, indicative of Google, Inc. as the source. Thus, the primary significance for the word “google” is still likely to be Google, Inc.’s Google search engine. As long as Google keeps its strong hold over its market share and maintain its high level, it can be used as a ground for the argument that when people say google, they actually mean to use “Google”.

<sup>138</sup> Statistics and graphic image from ‘Realtime Web Analytics with No Sampling: Desktop Search Engine Market Share’, (Netmarketshare.com) <<http://www.netmarketshare.com/search-engine-market-share.aspx?qprid=4&qpcustomd=0>> accessed 28 October 2013.

<sup>139</sup> Nathalie Tadena, ‘ComScore: Google Maintains Search Engine Market Lead in September’ *The Wall Street Journal* (16 October 2013) <<http://online.wsj.com/article/BT-CO-20131016-704867.html>> accessed 28 October 2013.

Another argument may arise based on the possibility that the word “google” functions both as a source indicator and a generic descriptor for all search engines. Thus, “google” may be considered as a “a dual functioning trademark, which both identifies the class of product as well as its source”<sup>140</sup> In the *King-Seeley Thermos* case, the court considered that even if the word “thermos” may have a dual function as indication of both class and source, this duality may be disregarded if the majority of the public are unaware of the trademark significance of the disputed word, thus denying King-Seeley’s claim to monopolize the word “thermos” as trademark.<sup>141</sup> However, as argued above, in Google’s case, the majority of the public more likely uses the term “google” as a source indicator rather than as a name for the general class of search engines.

#### 4.2 Language as the Source of Google’s Genericial Troubles

The predilection of users of social network sites and social media in language usages is to be as short as possible but still get a message across. It is no surprise then that new words are coined to denote ideas that used to be referred to with much longer words or phrases.

There is an entire science of how words become words. In one experiment conducted by linguist Jean Berko Gleason in 1958, she presented English-speaking pre-school children with a picture of an unfamiliar creature and said, “Here is a wug. Now there are two of them. There are two \_\_\_\_.”<sup>142</sup> Prior to this challenge, none of these preschoolers were taught the word “wugs”, nor were they rewarded for saying the word “wugs”.<sup>143</sup> Children who were

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<sup>140</sup> *King-Seeley Thermos Co* (n 63).

<sup>141</sup> *ibid.*

<sup>142</sup> Steven Pinker, *The Language Instinct: How the Mind Creates Language* (Harper Perennial 1994), 120.

<sup>143</sup> *ibid.*

already familiar with the plural morpheme sound “-s” will respond with “wugs”.<sup>144</sup> Some linguists believe that there is a natural human instinct that allows formation of words like this without regard for any formal rules. Steven Pinker believes that the human mind is similar to a kind of computer program called “artificial neural networks” that operates based on analogy, thus making it possible for the mind to convert “wug” to “wugged”, due to its similarity to “hug” that transforms to “hugged”.<sup>145</sup> He remarks how easy it becomes to transform an English word to a multitude of other forms through derivational morphology, through which new words are made by adding derivational suffixes such as -able, -age, -ify, -er, -ize, -y, and -ish, among many others.<sup>146</sup>

Google gained exposure as a proper noun, but it is a word susceptible to derivational transformation because of its sound that is easy to associate with other verb sounds like “ogle”, “haggle”, “boggle”, and “mangle”, to name a few.

Adobe’s Photoshop trademark has it even worse, because it is a compound word made up of existing English words, and the ending word is the verb “shop”, thereby making susceptible to all the derivational transformations frequently used with this verb, for example, Photoshopped, Photoshopping, Photoshopper, et cetera. In social media, people do not even bother with capitalizing Photoshop’s first letter.

Twitter may also encounter similar problems because its trademarks “Twitter” and “Tweet” are both nouns and verbs that have been in the English lexicon for a long time, denoting actions or sounds from made by a little bird, thus, even with efforts from Twitter to get people to capitalize Twitter and Tweet, plus a handful of other guidelines for usage of the

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<sup>144</sup> *ibid.*

<sup>145</sup> *ibid* 125.

<sup>146</sup> *ibid* 122.

Twitter and Tweet trademarks<sup>147</sup>, the uncapitalized versions get more usage due to familiarity.

One source of problem specific to application software programs is that it is easier to convert these trademarks into transitive verbs, because of their inherent function of being applications or processes that has an object, meaning, they are used to do something, rather than being just a mere object of use. This is more convenient and easier to write, and in speech, more natural sounding, rather than use the full trademark as a noun that is the object of a verb. Here is a comparison:

*Strictly proper trademark usage:*

I am using the Adobe Photoshop image editing software to edit the picture.  
V1 O1 V2 O2

*Improper trademark usage:*

I am photoshopping the picture.  
V1 O1

In the first example, the sentence required two transitive verbs (V1 and V2) and two objects (O1 and O2) to communicate the message. In the second example, in which the trademark was converted into a transitive verb, the message was expressed in less than half the length of the first message. The brevity that is afforded by skirting the rules of proper trademark usage is a trait desirable to many of social media users. The first sentence would have deducted 74 characters from the 140-character allotment of Twitter, while the second sentence only took 31 characters, and even less if the Tweeter typed “Im photoshopping d pic”.

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<sup>147</sup> See ‘Twitter Trademark and Content Display Policy’ (*Twitter.com*) <<https://twitter.com/logo>> accessed 28 October 2013.

If the trademarks for these software programs continue to be used improperly in language, as ordinary people are wont to do, even with a large chunk of the market share, these trademarks may become generic, because the essence of language is that it is ever-changing and would adapt to the needs of the people speaking it. Over time and with widespread use, a trademarked word becomes a mere ghost of a name.

### 4.3 Internet-Based Solutions to Combat Genericide

Before going into the linguistic aspect of combating genericide, it is also useful to mention some general strategies to employ when trying to avoid this tragedy. In the same manner that the internet can be potentially a destructive force resulting in the demise of a trademark, the internet's power can also be harnessed to solve this problem.

Michael G. Walsh, a business law professor lists the following suggestions to exploit the power of the internet to protect a trademark, and these are particularly useful for trademark owners that use social media:

Track advertisers who are bidding on your terms and slogans; Discover advertisers using your brands and slogans in display; Find phishing sites, spyware, and parked domains using sub-domains to hijack brands...; Identify mentions of your brand or your competitor's brand on websites, blogs and news; Provide daily email alerts enabling your company to find out quickly when there are trademark violations or brand mentions across the Web; and Search for screengrabs that violate your trademark.<sup>148</sup>

Another legal professional suggested conducting searches on trademark search websites, like the service provider tm.biz, which provide an overview of the protection of trademarks at over 500 social media sites.<sup>149</sup>

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<sup>148</sup> Michael G Walsh, 'Protecting your brand against the heartbreak of genericide', (2013) 56 Business Horizons 159, 165.

<sup>149</sup> Lisa M Brownlee, *Assets & Finance: Audits and Valuation of Intellectual Property, Internal Controls, Materiality, and Investment* § 5:69 (Thomson Reuters, database updated May 2012).

Sung In also suggests the use of online polling to find out if a mark has become genericidal.<sup>150</sup> This is especially effective with social network sites and social media because it is cheaper to conduct, and it is easier to limit an online poll to a certain audience, like grouping based on age, gender, or industry, than if a poll is conducted offline.

Sung In also points out that with the internet, trademark owners can launch campaigns for preemptive education to prevent genericide.<sup>151</sup> She mentions the use of pop-up informational windows and forced hyperlinks when visiting certain websites in order to educate the online population about the non-generic nature of their trademarks.<sup>152</sup> This might be an effective addition to the method of publishing pamphlets online about proper usage of a trademark, as ordinary online users would not go out of their way to access these pamphlets, much less read them, except perhaps writers and legal professionals in the trade of trademarks.

These methods, along with many others suggested by legal scholars and advertising mavens, are methods to be used after a trademark has already been coined. However, to address the root of the problem, which is language, the best solution would also come from language, meaning, the best way to avoid genericide is to come up with a genericide-proof or genericide-resistant name.

#### **4.4 Language-Based Suggestions for Coining Effective Trademarks**

Rochelle Cooper Dreyfuss has observed that successful trademarked words share certain traits:

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<sup>150</sup> In (n 9) 187.

<sup>151</sup> *ibid* 188.

<sup>152</sup> *ibid*.

They are made up of sound clusters that are euphonious, readily pronounced, easily inflected, and accommodate well to grammatical rules. Either because there are a large number of initial users or because the phonemes contain internal cues, the meaning of successful words are quickly grasped. They are introduced by prestigious speakers whom others wish to emulate, or by speakers who are mobile enough to spread the new word efficiently. Not every group of phonemes meets the first set of requirements; finding ones that do can be expensive, especially if the word is to enter more than one language. Added to this is the cost of educating the right seed group so that the new word and its meaning spread to others.<sup>153</sup>

In a similar fashion, S. B. Master operates by the mantra: “Pronounceable, culturally acceptable and legally registrable worldwide”.<sup>154</sup>

In addition to these suggested guidelines, taking into consideration the issues that stem from the relationships of language and social media to trademarks, here are a few tips to consider when coining a term to be trademarked, especially for novel goods like software applications:

Use verbs with caution. A trademark made with a verb is easy to bastardize by conjugation. A cautionary tale is the example of “Photoshop”, a compound word made with “photo”, a noun, plus “shop”, a verb. Since taken as a whole, “Photoshop” is a completely new word, it is easy to attach new meanings to it. However, with its verb ending, this new word comes with the conjugability of the word “shop” while not being anchored by the meaning of the word “shop”. A success story involving verb usage would be “Microsoft Excel”. While “excel” is a verb, it is used as a stand-alone word, that has a definition completely unrelated to the function of the software application, which is a spreadsheet program. Verbs in the trademark may be possible if this verb has a primary meaning as a

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<sup>153</sup> Rochelle Cooper Dreyfuss, ‘Expressive Genericity: Trademarks as Language in the Pepsi Generation’ (1990) 65 Notre Dame Law Review 397, 416.

<sup>154</sup> Winokur (n 116).

noun, for example, “Facebook”, both “face” and “book” are verbs, but they are verbs that derive their meaning from the nouns they are primarily used as.

If a verb must be used at all, reserve it for the software program’s generic descriptor, and preferably to describe what the program does. This is so that the program’s users will deem it more convenient to conjugate the generic term, instead of putting the trademark in danger of being transformed.

For coined terms, avoid creating words that rhyme with common verb endings, case in point, “Google”. Using adjectives might make the trademark less susceptible to transformation, for instance, “Microsoft”, “General Electric”, or “Safeway”.

Suggestive and arbitrary terms may also be less likely to be transformed, because the two functions of the words, which are the original meaning, and as a brand name, are unlikely to merge with one another. A few examples are “Apple” and “Oracle” for computer hardware and software, and “Liberty Global”, a cable company.

Acronyms are also a good solution, because it is difficult to use acronyms in language in an improper way. Successful examples are “IBM” and “AT&T”.

A rule common to all kinds of trademarks is that they must always be accompanied by a generic descriptor, and this generic descriptor must be easily pronounced, understood, and remembered. Otherwise, with no alternative name, or with a difficult generic name to call a product, the consumers would just use the trademark.

A balance must be made between the goal to popularize a trademark, and the goal to maintain a trademark. A hip brand name that yields to the caprices of social media might be good initially, but in the long run, if it risks the protected status of the brand as a trademark, too much popularity may become counterintuitive.

A trademark made with these linguistic considerations in mind, coupled with good business sense, social media savvy and sound legal strategies, would have little reason to fear that a trademark, along with all the goodwill earned with it, would become a victim of genericide.

## Chapter 5. Conclusion

“All life therefore comes back to the question of our speech.”  
- Henry James, *The Question of Our Speech*<sup>155</sup>

In a speech addressed to the graduating class of Bryn Mawr College on 8 June 1905, Henry James said that:

All life therefore comes back to the question of our speech, the medium through which we communicate with each other; for all life comes back to the question of our relations with each other. These relations are made possible, are registered, are verily constituted, by our speech, and are successful (to repeat my word) in proportion as our speech is worthy of its great human and social function; is developed, delicate, flexible, rich — an adequate accomplished fact. The more it suggests and expresses the more we live by it — the more it promotes and enhances life.

This excerpt captures the main idea sought to be expressed in this paper. While this author began to approach the problem of trademark genericide from what was thought to be an unrelated concept that is social media, during the course of writing this paper, tight connections between the two came to light. The reason for this is that the concepts of trademark and social media are both anchored by language, and in return, language is augmented by these concepts. This answers the central question posed in the introduction.

All social interactions require communication. People communicate through language. As technology advances, our methods of communication undergo changes that transform many aspects of living, including social interactions, which may have legal implications. As language evolves, social media evolves along with it, and vice versa. The same mutuality applies to trademarks.

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<sup>155</sup> Henry James, *The question of our speech; The lesson of Balzac; two lectures* (Boston, Houghton, Mifflin 1905).

As social media blurs linguistic borders, trademark owners have to evolve to keep up with the times. Particular attention and care must be paid by owners of ICT trademarks because of these trademarks' susceptibility to genericide due to their inherent novelty and the high level of exposure of these brands in social media. If trademark owners do otherwise, they run the risk of losing something so essential to their business – the very names that denote their products. A popular name has its perks, but trademark owners must not forget that great fame has a price they might not be willing to pay.

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