

Spring 2019

Reclaiming the Primary Significance Test: Dictionaries, Corpus Linguistics, and Trademark Genericide

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Recommended Citation

Neal A. Hoopes, *Reclaiming the Primary Significance Test: Dictionaries, Corpus Linguistics, and Trademark Genericide*, 54 Tulsa L. Rev. 407 (2019).

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RECLAIMING THE PRIMARY SIGNIFICANCE TEST: DICTIONARIES, CORPUS LINGUISTICS, AND TRADEMARK GENERICIDE

Neal A. Hoopes¹

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Companies spend billions to promote their brand. But with increased trademark recognition comes the possibility of losing exclusive rights to use that trademark through a process called genericide. In determining whether a trademark has become generic, courts have often turned to linguistic evidence such as dictionaries and media usage. These courts suggest that linguistic tools reflect a trademark's meaning. These tools are not the

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objective indicators that courts have assumed, however. This Paper discusses why using dictionaries and media usage to prove genericide is a mistake and then turns to evaluating another interpretive tool, corpus linguistics. Corpus linguistics, unlike other linguistic tools, may prove beneficial for companies seeking to protect their trademarks. Ultimately, however, linguistic tools—including dictionaries, media usage, and corpus linguistics—cannot prove genericism because linguistic data may, at best, prove a term’s majority usage. This is because the Lanham Act requires a showing of primary significance. This Paper contends that courts should maintain majority usage and primary significance as distinct concepts and, in this way, should reclaim the primary significance test.

I. INTRODUCTION

A trademark’s value does not commonly appear on a corporate balance sheet, but it often remains among a company’s most valuable assets. Generally, the more recognizable a trademark becomes, the more valuable the brand. When consumers purchase an Apple computer, their purchasing decision is driven in part by both emotional and logical factors drawn from their expectations about Apple products generally. A trademark’s value, then, embodies the goodwill that companies have developed over time. Since many consumers have a favorable impression of Apple, for instance, the value of the company’s trademark stands at an estimated \$170 billion.² Google and Microsoft would suffer losses of \$101.8 billion and \$87 billion, respectively, if they were to lose complete control over their brand names.³ And since Forbes recently estimated that the ten most valuable trademarks are worth a combined \$706.3 billion, it is unsurprising that some companies spend billions of dollars a year promoting and protecting their brand names.⁴

But with increased trademark recognition comes the increased chance that a company loses control of its trademark through genericide, a process by which the mark becomes the commonly used word for a general product or service. For instance, when Google filed for its initial public offering, some wondered whether the term *Google* would someday become synonymous with performing an online search—“resulting in both a loss of trademark protection and reduced brand value.”⁵ These fears were not without foundation. Google has indeed been forced to fend off genericism claims in order to protect its trademark rights.⁶ If Google loses its trademark protection because the public

2. Kurt Badenhausen, *Apple Heads the World’s Most Valuable Brands of 2017 at \$170 Billion*, FORBES (May 27, 2017), <https://www.forbes.com/sites/kurtbadenhausen/2017/05/23/apple-heads-the-worlds-most-valuable-brands-of-2017-at-170-billion>.

3. *Id.*

4. *Id.*

5. Sean Stonefield, *The 10 Most Valuable Trademarks*, FORBES (June 15, 2011), <http://www.forbes.com/sites/seanstonefield/2011/06/15/the-10-most-valuable-trademarks>. Forbes recently acknowledged that Google’s parent company, Alphabet, is vigorously defending the mark from genericide and noted its optimism that Google will continue as a distinctive trademark: “To ‘google’ is synonymous for search, but the Alphabet subsidiary is still fighting to protect its brand. A federal appeals court affirmed the Google trademark this month, ruling the brand name was worth protecting in a case from 2012 involving cybersquatting of 763 domain names with the word ‘google’ in them. The value of Google is surging, and it will not go the way of aspirin, elevator, thermos and other brands that faced ‘genericide.’” Badenhausen, *supra* note 2.

6. See *Elliot v. Google Inc.*, 45 F. Supp. 3d 1156 (D. Ariz. 2014). Google need not worry about genericide in the short term as the Ninth Circuit recently affirmed a district court decision that recognized Google’s distinctiveness as a mark. Judge Richard Tallman wrote that “[t]he mere fact that the public sometimes uses a

expropriates the term *Google* to mean “conduct an online search,” the trademark will join a long list of other marks that have suffered the same fate, including *Murphy Bed*, *Thermos*, *Trampoline*, *Escalator*, and *Aspirin*. Moreover, once a term has become generic, a company cannot salvage its trademark from the public domain without overcoming the colossal burden of proving that the generic usage has become nearly obsolete.⁷ Given the magnitude of a court’s decision to declare a trademark generic, a decision Judge Richard Posner described as “a fateful step,”⁸ courts ought to carefully scrutinize the types of evidence they find persuasive in proving genericism.

All too often, they have not. The legal test for genericide requires the challenging party to show that, in the minds of the consuming public, the “primary significance” of the mark describes a class of products rather than a particular product made by the trademark holder.⁹ For example, the public began to regard the term “Trampoline”—the name of the product’s manufacturer—as the name of the product itself and the common name of all rebound tumblers manufactured by Trampoline’s competitors.

In applying this test, courts frequently turn to linguistic tools to determine whether the generic sense of a mark has supplanted its trademarked meaning. For instance, the Second Circuit, in declaring the term *Murphy Bed* generic for “wall bed”—and allowing a competitor to use the term freely—relied almost entirely on dictionary entries and uses of the term in newspapers and magazines.¹⁰ More recently, the Seventh Circuit credited evidence showing generic uses of the term *Beanie* in newspapers, and a federal district court found dictionary entries compelling in proving *Google*’s continued distinctiveness.¹¹

Courts have not paused to consider the wisdom of relying on this kind of linguistic data, however, holding merely that these tools “are influential because they reflect the general public’s perception of a mark’s meaning and implication.”¹² Instead, courts depend on dictionaries and media usage to find the true meaning of trademarks, reverencing dictionaries especially as a sort of “linguistic Bible.”¹³ And, because scholars have not critically evaluated linguistic tools in proving a mark’s status, courts continue to credit linguistic evidence for establishing facts that linguistic tools are not capable of proving.

Dictionaries, for one, cannot prove that a well-known trademark has become generic. A dictionary cannot and does not claim to reveal the primary significance of a word in the minds of consumers. Dictionaries are useful only to determine the range of possible meanings of a trademark. Thus, a dictionary may reasonably demonstrate that

trademark as the name for a unique product does not immediately render the mark generic.” *Elliott v. Google Inc.*, 860 F.3d 1151, 1156 (9th Cir. 2017).

7. *In re Minnetonka, Inc.*, 212 U.S.P.Q. 772, *9 (T.T.A.B. 1981).

8. *Ty Inc. v. Softbelly’s, Inc.*, 353 F.3d 528, 531 (7th Cir. 2003) (Judge Richard Posner noted that “[t]o determine that a trademark is generic and thus pitch it into the public domain is a fateful step.”).

9. *See* 15 U.S.C. § 1064(3); *Colt Def. LLC v. Bushmaster Firearms, Inc.*, 486 F.3d 701, 705 (1st Cir. 2007).

10. *Murphy Door Bed Co. v. Interior Sleep Sys., Inc.*, 874 F.2d 95, 101 (2d Cir. 1989).

11. *Ty Inc.*, 353 F.3d at 532 (determining whether “Beanie,” as in “Beanie Baby,” had become generic); *Elliott*, 45 F. Supp. 3d at 1170–71.

12. *Murphy Door Bed*, 874 F.2d at 101.

13. RANDOLPH QUIRK, *STYLE AND COMMUNICATION IN THE ENGLISH LANGUAGE* 86 (1982); Stephen C. Mouritsen, *The Dictionary is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 BYU L. REV. 1915, 1915–16 (2010) [hereinafter *Definitional Fallacies*] (“[J]udges cannot escape the reverence with which society regards its dictionaries—a reverence that often borders on the devotional.”).

some segment of the public uses the mark generically in *some* circumstances. But using dictionaries to prove broader claims, such as the primary significance of a term, gravely misunderstands how dictionaries are compiled and organized.

Using examples of the term in newspapers and magazines proves only slightly more useful than dictionaries. Presented with this evidence, courts may view actual instances of media usage—without having to rely on the value judgments of the lexicographers who compile dictionaries. But this type of analysis is methodologically unsound. Without a randomized sample of these instances, courts cannot reliably confirm that the public’s use of the term is predominately generic. In the end, isolated media uses verify only that a generic sense to a trademarked term is linguistically possible—that *some* writers or editors use the term generically *some* of the time. That a generic sense is linguistically permissible, however, does not prove that the generic sense has supplanted the term’s trademarked meaning as the majority usage of a term.

A third tool, corpus linguistics, offers a promising alternative to these tools. This method uses a computer database (a corpus) composed of naturally occurring words in context. In this respect, a corpus, like the Corpus of Contemporary American English (COCA) with more than 530 million words, is, as one commentator noted, “like Lexis on steroids.”¹⁴ Corpus linguistic data avoids many of the problems inherent in other linguistic tools, such as dictionaries and isolated media uses, because a corpus analysis provides an empirical approach to determine majority usage.¹⁵

This Paper evaluates the utility of corpus linguistics in genericide disputes and concludes that, although the tool provides a useful alternative to dictionaries and media examples and is capable of rebutting allegations of genericism.

Corpus linguistics, however, suffers from the same fatal flaw as the other linguistic tools when employed to *prove* genericism. Linguistic data can show, at best, majority usage, the way most consumers use the term most of the time. When courts rely on linguistic data, therefore, they are using majority use a proxy for primary significance, the actual legal standard. A proxy, however, is suitable only as far as it accurately shadows the concept it purports to predict. Majority usage of a mark in speech and writing, often expressed in casual, non-purchasing situations, does not accurately reflect how the public perceives the mark—as either a source-identifying feature of a specific product or the

14. Ben Zimmer, *The Corpus in the Courts*, ATLANTIC (Mar. 4, 2011), <https://www.theatlantic.com/national/archive/2011/03/the-corpus-in-the-court-like-lexis-on-steroids/72054/>. Zimmer introduces corpus linguistics by noting that “[c]ourts, long dependent on the vagaries of language, have new quantitative tools they can use to precisely pin down how words are used.” *Id.*

15. The use of corpus data in legal disputes is a developing field, and courts have begun using corpus data to determine the ordinary meaning of words in statutory texts. *See* *State v. Rasabout*, 356 P.3d 1258, 1271 (Utah 2015) (Lee, J., concurring); *People v. Harris*, 885 N.W.2d 832, 849 (Mich. 2016); *In re Baby E.Z.*, 266 P.3d 702, 724 n.21 (Utah 2011) (Lee, J., concurring). For instance, judges have started to view “computer-aided searches of online databases” as an effective tool “to assemble a greater number of examples than [judges] can summon by memory on [their] own.” *Rasabout*, 356 P.3d at 1271 (Lee, J., concurring). Unsurprisingly, trademark litigators are also becoming aware of this new linguistic tool. In a recent court battle between Apple and Microsoft, the two companies hired competing linguists as expert witnesses who employed the COCA to analyze whether the term “App Store” had become generic. *See* Expert Report of Robert A. Leonard in support of Apple, Inc., *Microsoft Corp. v. Apple, Inc.* (Opp. No. 91195582) (T.T.A.B. 2007); Expert Report of Ronald R. Butters in support of Microsoft, *Microsoft Corp. v. Apple, Inc.* (Opp. No. 91195582) (T.T.A.B. 2007). Apple also used the COCA in a similar suit against Amazon. Reply in Support of Motion for Preliminary Injunction, *Apple, Inc. v. Amazon.com, Inc.*, No. CV11-01327-PJH 2011 WL 2461075 (N.D. Cal. June 8, 2011).

common name of a general product. Because serious conceptual problems arise when courts use majority usage as a proxy for primary significance, courts should give little weight to linguistic tools when used to prove genericide, thereby reclaiming the primary significance test.

Part II of this Paper introduces trademarks and genericide, briefly explaining the policy rationales behind genericide. Part III lays out how litigants and courts have traditionally proven genericide—including the use of dictionaries, magazines, and newspapers—and proceeds to point out the flaws unique to these methods. Part III introduces corpus linguistics and shows how its use may resolve many of the issues inherent in other methods. Part IV demonstrates the use of corpus linguistics by analyzing COCA searches for Xerox, Crock-Pot, Band-Aid, and Kleenex, trademarks that have recently flirted with genericide. The Part continues by analyzing the data and showing that corpus data may help to combat allegations of genericide (defensive use) but not to prove genericide (offensive use). Shifting to linguistic evidence generally, Part V will examine how linguistic data—including dictionaries, media usage, and corpus linguistics—cannot prove genericide because the ultimate inquiry rests on how consumers perceive a particular trademark.

II. TRADEMARKS AND GENERICIDE

A. *Scope of Trademark Law*

Trademark law governs parties' use of devices to distinguish their goods or services from those of others. These devices generally consist of words, phrases, or symbols, though the Lanham Act's definition of "trademark" functions as a broad umbrella that may, under certain circumstances, shelter indicators as broad as colors and scents.¹⁶ For instance, McDonald's Corporation receives trademark protection for its name, the golden arches, Ronald McDonald, its slogan, and many other devices that serve to distinguish the fast food chain from other companies. Despite the broad nature of trademark protection, this Paper focuses entirely on trademarks comprising words or phrases because, first, genericide befalls word marks almost exclusively, and second, the benefits and limits of corpus linguistics apply only to word marks.¹⁷

Trademark law, in its true form, seeks to protect both the producer and the consumer. In enacting the Lanham Act, Congress set out in a committee report at least two purposes behind trademark protection. The first purpose was to "protect the public so it may be

16. 15 U.S.C. § 1127 ("The term 'trademark' includes any word, name, symbol, or device, or any combination thereof."). A person or company does not automatically receive a trademark if it falls within this definition. To register a trademark, the owner must also prove to the United State Patent and Trademark Office (PTO) that the "person has a bona fide intention to use in commerce . . . 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." *Id.*; see also *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116 (Fed. Cir. 1985) (holding that the company could register the color pink for its residential insulation because the public associated the color with the manufacturer's product); *In re Clark*, 17 U.S.P.Q. 2d 1238 (T.T.A.B. 1990) (overturning an examiner's refusal to register the floral scent of sewing thread because fragrance could serve a source-identifying function).

17. It should be noted that it is conceptually possible for other marks, such as symbols or colors, to undergo genericide. However, the genericide process would almost certainly come because a mark owner ceased to police its mark rather than because the public appropriated the mark by using it generically.

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.”¹⁸ Second, Congress wished to ensure that, “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.”¹⁹ Trademarks, therefore, protect both consumers and producers by preserving companies’ goodwill, usually built over time and with significant investment.

Beyond Congress’s stated purposes, additional policy rationales undergird trademark law—often based in economic efficiency. One such benefit lies in reduced consumer search costs. “Easily identified trademarks reduce the costs consumers incur in searching for what they desire, and the lower the costs of search the more competitive the market.”²⁰ When consumers recognize trademarks, it signals to them a familiar product they may rely on, thus reducing the consumer’s search costs in determining which product to purchase. Consumers also benefit because trademarks encourage producers to maintain a consistently high-quality product line because trademarks evoke in the consumer reflections of the producer’s reputation for quality.²¹ “If the seller provides an inconsistent level of quality, or reduces quality below what consumers expect from earlier experience, that reduces the value of the trademark.”²²

Not all marks, however, receive protection. Trademark protection only follows distinctive marks, meaning marks that are capable of identifying to consumers a specific source rather than a category of products. Thus, a camera box labeled “Canon” would indicate to consumers the specific producer but a similar box labeled “digital camera” would not. A company receives no protection for its use of “digital camera” because the term does not serve a source-identifying function.

Marks generally fall into one of five categories—generic, descriptive, suggestive, arbitrary, and fanciful—along a scale, traditionally termed the *Abercrombie* spectrum.²³ A generic mark is one often used as the name for a type of good. A producer may not claim trademark protection for the words “apple” or “fruit” if selling apples. Thus, a generic term either identifies the name of a good (apple) or “the *genus* of which a particular merchant’s

18. S. REP. NO. 79-1333, at 3 (1946).

19. *Id.*

20. *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1429 (7th Cir. 1985) (noting also that “[b]y identifying the source of the goods, [trademarks] convey valuable information to consumers at lower costs . . . A trademark also may induce the supplier of goods to make higher quality products and to adhere to a consistent level of quality”).

21. *See id.* at 1430 (“The value of a trademark is in a sense a ‘hostage’ of consumers; if the seller disappoints the consumers, they respond by devaluing the trademark. The existence of this hostage gives the seller another incentive to afford consumers the quality of goods they prefer and expect.”(footnote omitted)).

22. *Id.*

23. *See Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (1976). Judge Friendly is credited with cogently explaining the different types of possible terms. He wrote that “Arrayed in an ascending order which roughly reflects their eligibility to trademark status and the degree of protection accorded, these classes are (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful.” *Id.* But Judge Friendly also noted that “[t]he lines of demarcation, however, are not always bright . . . the difficulties are compounded because a term that is in one category for a particular product may be in quite a different one for another, because a term may shift from one category to another in light of differences in usage through time, because a term may have one meaning to one group of users and a different one to others, and because the same term may be put to different uses with respect to a single product.” *Id.* (footnotes omitted).

product is a *species*” (fruit).²⁴ Producers cannot receive trademark protection for generic terms because allowing one producer exclusive rights over a generic term would essentially eliminate from the market a term competitors need to sell their own goods, effectively creating a monopoly.

Descriptive marks prove more distinctive than generic ones, though they merely describe the product or some feature of it. “A term is descriptive if it forthwith conveys an immediate idea of the ingredients, qualities or characteristics of the goods.”²⁵ One court noted that a descriptive mark—such as After-Tan, for post-tanning lotion; 5-Minute Glue, for quick acting glue; and Yellow Pages, for a telephone directory—simply describes “a function, use, characteristic, size, or intended purpose of the product.”²⁶ Since descriptive marks are not inherently distinctive, failing to immediately serve a source-identifying function, a descriptive mark may not receive immediate trademark protection.²⁷ A party seeking trademark protection must show secondary meaning—that the mark has, “by long use with a particular product, come to be known by the public as specifically designating that product.”²⁸ Thus, by requiring producers with descriptive marks to prove a level of public familiarity with the mark before seeking protection, the secondary meaning doctrine serves the policies of trademark law generally by protecting only marks whose “primary significance . . . in the minds of the consuming public is not the product but the producer.”²⁹

The final three categories of marks are deemed inherently distinctive—protection attaches immediately without a showing of secondary meaning. The first, a suggestive mark, resembles a descriptive mark but suggests rather than describes the product or its characteristics.³⁰ A suggestive mark “indirectly conveys an impression” of the product and requires a certain amount of imagination to deduce the exact nature of the goods.³¹ Oft-cited examples include “Penguin” for refrigerators and “Roach Motel” for insect traps.³² Although suggestive terms are descriptive in the sense that “they are meant to project a favorable or idealistic image with which a prospective user might identify,” they are suggestive because “a person without actual knowledge would have difficulty in

24. DONALD S. CHISUM ET AL., UNDERSTANDING INTELLECTUAL PROPERTY LAW 516 (2015).

25. *Abercrombie*, 537 F.2d at 11 (quoting *Stix Products, Inc. v. United Merchants & Manufacturers, Inc.*, 295 F. Supp. 479, 488 (S.D.N.Y. 1968)).

26. *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 464 (4th Cir. 1996).

27. 15 U.S.C. § 1052(e).

28. *Volkswagenwerk Aktiengesellschaft v. Richkard*, 492 F.2d 474, 477 (5th Cir. 1974). In Subsection (f), the Lanham Act codifies the necessity of showing secondary meaning for descriptive marks. “[N]othing in this chapter shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant’s goods in commerce.” 15 U.S.C. § 1052(f).

29. *Kellogg Co. v. Nat’l Biscuit Co.*, 305 U.S. 111, 118 (1938).

30. CHISUM ET AL., *supra* note 24, at 513–14. Suggestive marks were not originally recognized at common law. Courts developed the doctrine because, at early common law, descriptive marks were not capable of receiving trademark protection and courts thought some descriptive marks warranted protection. “In order to avoiding denying trademark protection to marks that were only somewhat descriptive, courts categorized these marks as suggestive rather than descriptive.” *Id.* at 513; see *Abercrombie*, 537 F.2d at 10.

31. CHISUM ET AL., *supra* note 24, at 513–14; *Induct-O-Matic Corp. v. Inductotherm Corp.*, 747 F.2d 358, 362 (6th Cir. 1984).

32. *Union Nat’l Bank of TX v. Union Nat’l Bank of TX*, 909 F.2d 839, 845 (5th Cir. 1990) (explaining the *Abercrombie* spectrum and giving examples); *Am. Home Prods. Corp. v. Johnson Chem. Co.*, 589 F.2d 103, 106 (2d Cir. 1976).

ascertaining the nature of the products that the marks represent.”³³

Arbitrary and fanciful marks, the final two categories and the strongest marks in terms of distinctiveness, often get lumped together. However, the two categories are easily distinguishable, and the distinction can have legal consequences.³⁴ Arbitrary marks use common words with dictionary definitions that in no way relate to the product. “Apple” denotes a pomaceous fruit and the name of a multinational technology company. Apple Inc.’s trademark remains inherently distinctive because the company’s products have no relation to genuine fruit products. Alternatively, fanciful marks consist of newly coined words that have no ordinary meaning beyond that of a source identifier. Common examples include Xerox, Polaroid, and Exxon.³⁵

When a company holds a valid trademark, which necessarily falls within one of the protectable categories, it may police its trademark to ensure no one appropriates the mark—freeriding on the trademark’s success or diluting the mark through negative association.³⁶ If a court finds trademark infringement or dilution, the court will enjoin the infringing party from further use of the mark and may hold them responsible to pay damages. Since trademarks prove tremendously valuable to companies, potentially including the goodwill created by billions of dollars of advertising, many companies vigorously police their trademarks to protect their name, reputation, and market share.

Yet, an enforceable trademark will not always maintain its protected status because some terms do not remain source indicative. As Judge Friendly explained in *Abercrombie & Fitch Co. v. Hunting World, Inc.*, “a term may shift from one [distinctiveness] category to another in light of differences in usage through time.”³⁷ A mark may lose its trademark status by shifting from being protectable—being descriptive (with secondary meaning), suggestive, arbitrary, or fanciful—to being generic, a process called genericide. Genericide primarily occurs under two circumstances: a product comes on the market that has no generic name, such as cellophane, which began as a trademark for transparent sheets made of regenerated cellulose, owned by Dupont Cellophane Company; or a trademark becomes so well known (usually as the leader in the industry) that the public begins to substitute the trademark name for the generic name, as happened with aspirin and escalator.³⁸ Thus, the public becomes unaware that the name refers to a specific product

33. *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 464 (4th Cir. 1996). While the Fourth Circuit’s explanation of suggestive marks implies a higher standard than most courts would require, it nonetheless illustrates the concept of suggestive marks.

34. Apple is arbitrary for computers but generic for fruit. Thus, in the rare event that the owner of an arbitrary mark expanded into a product market where the mark was generic, trademark protection would not extend to products sold in that market.

35. *Kellogg Co. v. Toucan Golf, Inc.*, 337 F.3d 616, 624 (6th Cir. 2003).

36. 15 U.S.C. § 1125. While any owner of a valid trademark may sue to enjoin the use of a confusingly similar mark, only widely recognized marks have a cause of action for dilution under 15 U.S.C. § 1125(c).

37. 537 F.2d 4, 9 (1976).

38. *See Dupont Cellophane Co. v. Waxed Prods. Co.*, 85 F.2d 75 (2d Cir. 1936); *Bayer Co. v. United Drug Co.*, 272 F. 505 (S.D.N.Y. 1921). In holding Aspirin to be generic, Judge Learned Hand acknowledged the difficulty of the question before him:

If the defendant is allowed to continue the use of the word of the first class [Aspirin], 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

or company and begins to use the trademark generically to refer to a broader class of goods or services.

B. *Genericide*

Generic terms belong in the public domain and receive no trademark protection regardless of whether a mark began as a generic term, never receiving trademark protection, or a once-distinctive mark slowly became a generic term. Once a term enters the public domain, it can never serve as a protectable trademark.³⁹ However, the Patent and Trademark Office refusing to register a generic mark differs from a court declaring a popular brand name generic. The former prohibits a producer from enforcing its mark from the outset, often before much expenditure, but the latter potentially negates billions of dollars of advertising and the goodwill associated with a deliberately crafted reputation. As Judge Posner reasoned, “To determine that a trademark is generic and thus pitch it into the public domain is a fateful step. It penalizes the trademark’s owner for his success in making the trademark a household name.”⁴⁰ Additionally, discarding a once-strong trademark “may confuse consumers who continue to associate the trademark with the owner’s brand when they encounter what they thought a brand name on another seller’s brand.”⁴¹

However, when a trademark truly becomes generic, powerful policy considerations favoring genericide outweigh a producer’s interest in maintaining its mark. For instance, a trademark must yield when “sellers of competing brands cannot compete effectively without using the name to designate the products they are selling.”⁴² Sellers would find it extremely difficult to market an escalator, a thermos, or a yo-yo without using those terms.⁴³ Judge Posner has accurately noted that our language is not “so impoverished that no other words could be used to denote these products, but . . . if no other words *have* emerged as synonyms it may be difficult for a seller forbidden to use [a trademark] to communicate effectively with consumers.”⁴⁴ While some courts may imprudently cancel a trademark prematurely, most scholars would agree that genericide has its place when protecting a generic mark would amount to conferring a monopoly on one producer, most

description which will be understood.
Bayer Co., 272 F. at 513–14.

39. *See* *Miller’s Ale House, Inc. v. Boynton Carolina Ale House, LLC*, 702 F.3d 1312, 1317 (11th Cir. 2012) (“In general, a generic term cannot be appropriated from the public domain and thus cannot receive trademark protection.”); *Henri’s Food Prods Co., Inc. v. Tasty Snacks, Inc.*, 817 F.2d 1303, 1305 (7th Cir. 1987) (“[A] generic name . . . is irretrievably in the public domain, and the preservation of competition precludes its protection.”).

40. *Ty Inc. v. Softbelly’s, Inc.*, 353 F.3d 528, 531 (7th Cir. 2003).

41. *Id.* (asserting that if even ten percent of consumers continued to associate the trademark with a specific source it could lead to serious consumer confusion). One salient example of Judge Posner’s argument is the term “Webster’s,” as in *Webster’s Dictionary*. The successors to Noah Webster produced the most recognized dictionary for decades, but in the late 1800s and early 1900s, the term Webster’s entered the public domain because the public began to associate the term with dictionaries generally. However, consumers still, a century later, are confused about the issue, assuming that one Webster’s exists, when in actuality any dictionary maker may use the term and the successor to the original Webster’s Dictionary is now called Merriam-Webster’s.

42. *Id.*

43. *See id.* at 532–33.

44. *Id.* at 532.

often the most well-known seller.⁴⁵ Since Congress never designed trademarks to be as broad as property rights, avoiding monopolies and other policy considerations require trademark owners to lose protection when their marks become generic.⁴⁶

III. TRADITIONAL LINGUISTIC TOOLS FOR PROVING GENERICIDE

Parties challenging a trademark as generic have often relied on linguistic materials to establish genericness, including dictionary entries and print sources such as newspapers and magazines. Courts have found these sources persuasive because they reflect public usage or are themselves actual examples of usage. However, dictionaries and media usage are not the objective indicators that courts have at times assumed.

A. Dictionaries

Courts routinely look to dictionaries to determine whether a term has become generic and reason that “[w]hile dictionary definitions are not conclusive proof of a mark’s generic nature, they are influential because they reflect the general public’s perception of a mark’s meaning and implication.”⁴⁷ In *Murphy Bed*, the court found that Mr. Murphy’s trademark had become generic because, in part, “the term Murphy bed is included in many dictionaries as a standard description of a wall-bed.”⁴⁸ The court considered this significant evidence in favor of the term’s genericness.⁴⁹

Courts find dictionary evidence persuasive because they consider lexicographers who write dictionary entries the authorities on a word’s meaning.⁵⁰ For instance, one scholar has explained that the allure of dictionaries stems from their objectivity: “When dictionary makers find, in the *objective data* of everyday speech and published writing, widespread use of well-known brand names in a fashion that has technical earmarks of

45. See Vincent N. Palladino, *Genericism Rationalized: Another View*, 90 TRADEMARK REP. 469, 471 (2000) (arguing that trademark law needs more stringent standards to protect against unwarranted genericide but also conceding that “the genericness doctrine prohibits exclusive appropriation by one party of a term that others need to use in order to compete in a market for goods or services, irrespective of what purpose trademarks once served, now serve or may someday come to serve”); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 191 (2003) (“The monopoly resulting from the appropriation of a generic name would be described as a product monopoly but is more accurately a language monopoly. Unless the owner of the generic name were the lowest-cost producer . . . he would license the use of the name to competitors and receive rents in the form of licensing fees.”); J. THOMAS MCCARTHY, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* § 12:2 (4th ed.) (“To grant an exclusive right to one firm of use of the generic name of a product would be equivalent to creating a monopoly in that particular product, something that the trademark laws were never intended to accomplish.”).

46. LANDES & POSNER, *supra* note 45, at 193–94 (“The negative effect on the supply of trademarks from denying protection to generic terms is slight and almost certainly outweighed by the benefits from pitching a trademark into the public domain when it becomes generic. For this reduces the costs of communication by making it cheaper for competitors of the (former) trademark owner to inform the consumer that they are selling the same product.”).

47. *Murphy Door Bed Co. v. Interior Sleep Sys., Inc.*, 874 F.2d 95, 101 (2d Cir. 1989).

48. *Id.*

49. Courts often cite to the influential treatise on trademarks, MCCARTHY ON TRADEMARKS, for the proposition that dictionary entries are persuasive evidence that a term is generic. See MCCARTHY, *supra* note 45, at § 12:13.

50. *Trademarks in Dictionaries*, 59 TRADEMARK REP. 735, 744 (1969) [hereinafter “*Trademarks in Dictionaries*”].

genericness, they may incorporate their findings in their dictionary entries.”⁵¹ Thus, many in the legal profession trust that, given dictionaries’ reliance on objective sources, dictionaries “usually reflect the public’s perception of a word’s meaning and its contemporary usage.”⁵²

Despite the idyllic nature of this account, the narrative does not accurately portray the pitfalls inherent in using dictionary definitions to prove genericide.⁵³ Although lawyers and judges regard dictionaries in high esteem, even with “a reverence that often borders on the devotional,” these tools “are often inadequate objects of our devotion, [since] their compilation is a decidedly human endeavor.”⁵⁴ As Professor Lawrence Solan has observed, “We commonly ignore the fact that someone sat there and wrote the dictionary, and we speak as though there were only one dictionary, whose lexicographer got all the definitions ‘right’ in some sense that defies analysis.”⁵⁵ Thus, dictionary users should note, as has the Third Circuit, that “[d]ictionary entries also reflect lexicographical judgment and editing which may distort a word’s meaning or importance.”⁵⁶

Additionally, several considerations should cause a court to hesitate before resorting to the dictionary to prove the primary significance of a term in the minds of the public. First, the materials that lexicographers use to compile dictionaries come from outside the editorial offices, supplied by people “who have a feeling for the language, people who are able to read rapidly and pick out new words or new shades of meanings.”⁵⁷ This creates a potential problem because readers “tend to notice unusual occurrences more than typical occurrences.”⁵⁸ Professional linguists, potentially because of their fondness for language,

51. Ronald R. Butters, *A Linguistic Look at Trademark Dilution*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 507, 511–12 (2007) (emphasis added).

52. *Harley-Davidson, Inc. v. Grottanelli*, 164 F.3d 806, 810 (2d Cir. 1999).

53. This Paper does not address the use of dictionaries to show that the term is generic prior to the use of a mark, only the use of dictionaries to show that by its own influence a well-known mark turned generic. While many of the same arguments against the use of dictionaries could be shown, using dictionaries to show that a mark has always been generic stands on firmer ground than using them to show that a mark’s “primary significance in the minds of consumers” is the generic sense because the primary significance test does not apply to inherently generic trademarks. *See* *Christian Sci. Bd. Dirs. of the First Church of Christ, Scientist v. Evans*, 520 A.2d 1347, 1355 (1987) (“The [1984] legislation recognized that there are two types of generic words or terms: those that are inherently generic, and those that originated as trademarks but through usage suffered the loss of their distinctive sense, characteristic, or meaning. . . . The [1984] Lanham Act amendments dealt only with the latter.”).

54. Mouritsen, *Definitional Fallacies*, *supra* note 13, at 1915; Lawrence Solan, *When Judges Use the Dictionary*, 68 AM. SPEECH 50, 50 (1993) (“[O]ur society’s reverence for dictionaries is not driven by the latest discoveries in psycholinguistic research. Rather, it is deeply embedded in our culture.”) [hereinafter *When Judges Use the Dictionary*]. For a more general critique of the use of dictionaries in legal analysis, see also Craig Hoffman, *Parse the Sentence First: Curbing the Urge to Resort to the Dictionary When Interpreting Legal Texts*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 401 (2003); Jason Weinstein, *Against Dictionaries: Using Analogical Reasoning to Achieve a More Restrained Textualism*, 38 U. MICH. J. L. REFORM 649, 663 (2005).

55. Solan, *When Judges Use the Dictionary*, *supra* note 54, at 50.

56. *Berner Int’l Corp. v. Mars Sales Co.*, 987 F.2d 975, 983 (3d Cir. 1993) (“A Court accepting a dictionary entry at face value is in effect adopting the lexicographical judgment as its own, even though such a judgment might be based on printed matter which, if offered in evidence, would not be controlling.”) (citation omitted).

57. *Trademarks in Dictionaries*, *supra* note 50, at 738 (remarks by a lexicographer regarding how his team creates a dictionary).

58. DOUGLAS BIBER, SUSAN CONRAD & RANDI REPPEN, *CORPUS LINGUISTICS: INVESTIGATING LANGUAGE STRUCTURE AND USE* 3 (1998).

also tend to observe unique usages of a word more frequently than common ones.⁵⁹ This could cause an overrepresentation of rare senses in the materials lexicographers have at their disposal, which could cause dictionaries to include a word sense that, in fact, has little significance to the general public.

Second, the dubious inclusion of unique word senses in one dictionary could proliferate and spread through multiple dictionaries. Dictionary editors work mainly from their own sources, but as one experienced lexicographer explained, “naturally we must keep an eye on the competition. . . . We tend to look at competing dictionaries to make sure that we cover roughly what they cover.”⁶⁰ While the lexicographer accurately noted that “it is a poor dictionary editor who has to get his material from other dictionaries, a practice which is actionable and unethical,” if a competing dictionary has material another dictionary does not, “this is a signal that we had better hunt around, that we omitted to look at something.”⁶¹ Thus, the Second Circuit’s reasoning, that “the term Murphy bed is included in many dictionaries,” does not necessarily mean that all these dictionaries were entirely independent in deciding to include a generic sense.⁶²

Moreover, courts often employ dictionary entries to represent much broader principles than a dictionary, by its nature, may reliably represent. In the context of a genericism analysis, the *Murphy Bed* court contended, as near-conclusive proof, that since dictionaries included definitions of “Murphy Bed” as “a wall-bed,” the Lanham Act test was met—that “the primary significance of the term [Murphy Bed] in the minds of the consuming public” was the product not the producer.⁶³ Dictionaries, however, make no such claim.⁶⁴ An entry for “Murphy Bed” may include two distinct senses of the phrase, one depicting the trademark sense and another the generic sense, but most dictionaries make no claim as to which definition predominates. Dictionaries, and the lexicographers who edit the entries, “often fail to distinguish between common usages and usages that, although fitting within the literal definition, fail to capture the ordinary sense of the term.”⁶⁵ In other words, dictionaries put the most common definition of a term side-by-side with the most atypical sense of the word, and the reader must deduce which is which through intuition.

Indeed, the Webster’s Third New International Dictionary, often cited by the

59. J. Charles Alderson, *Judging the Frequency of English Words*, 28 APPLIED LINGUISTICS 383, 383 (2007) (noting, after empirically testing the frequency judgments of professional linguists, that “judgments by professional linguistics do not correlate highly with [objective measures of word frequency]”).

60. *Trademarks in Dictionaries*, *supra* note 50, at 738.

61. *Id.*

62. *Murphy Door Bed Co. v. Interior Sleep Sys., Inc.*, 874 F.2d 95, 101 (2d Cir. 1989).

63. *Id.* While the *Murphy Bed* court gave lip service to the mantra that “dictionary definitions are not conclusive proof of a mark’s generic nature,” the opinion’s reasoning, or lack thereof, strongly suggests that the court gave the dictionary entries near-conclusive effect. The primary significance test first appeared in *Kellogg Co.*, 305 U.S. at 118. The Lanham Act of 1946 (as amended in 1984) codified the *Kellogg* formulation of the test in 15 U.S.C. § 1064(3) (“The primary significance of the registered mark to the relevant public rather than purchaser motivation shall be the test for determining whether the registered mark has become the generic name of goods or services on or in connection with which it has been used.”).

64. One lexicographer who spent his career editing dictionaries noted: “It is true that dictionaries are considered authorities. I think we shrink from this designation. We do not feel that we should always be considered authorities.” *Trademarks in Dictionaries*, *supra* note 50, at 743.

65. *The Supreme Court 1997 Term Leading Cases*, 112 HARV. L. REV. 355, 361 (1998).

Supreme Court and relied upon in *Murphy Bed*, expressly disavows any reliance on its dictionary to determine a word's predominate meaning. The dictionary's introductory material states that it does not "evaluate senses" and that the numbering of definitions exists only as a "lexical convenience" that does not "establish an enduring hierarchy of importance" among definitions.⁶⁶ Webster's, like other well-known dictionaries such as the Oxford English Dictionary (OED), orders its senses historically. Even with those dictionaries that claim to order word senses by statistical frequency—the most frequently used senses ranking at or near the top—the rankings are not particularly accurate.⁶⁷ This makes it nearly impossible to tell from a dictionary definition which sense has "primary significance in the minds of the consuming public"—precisely the function courts suggest dictionaries can perform.

Dictionaries prove a useful tool only for a much simpler purpose. This does not suggest that they are useless to the genericism analysis; for individual entries may show whether the public employs a trademarked term generically. As Professors Hart and Sacks comment, "Unabridged dictionaries are historical records . . . of the meanings with which words have in fact been used by writers of good repute. They are often useful in answering hard questions of whether, in an appropriate context, a particular meaning is *linguistically permissible*."⁶⁸ A court should welcome dictionary evidence to determine if a generic sense of a trademark term is linguistically permissible, but beyond this function the dictionary cannot yield reliable results.⁶⁹

Yet, courts must do more than determine the linguistic permissibility of a generic sense. As Justice Scalia noted in a case involving statutory interpretation, "The Court does not appear to grasp the distinction between how a word *can be* used and how it *ordinarily is* used."⁷⁰ In a similar case, Justice Scalia argued that the Court's job "is not to scavenge the world of English usage to discover whether there is any possible meaning."⁷¹ A court's job "is to determine . . . the *ordinary meaning*."⁷² Similarly, a court facing a trademark dispute must determine more than how a word can be used. It must decide the primary significance of a trademarked term. And consulting dictionaries, while probative of

66. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 17a (1971).

67. See Mouritsen, *supra* note 13, at 1935–37 ("For example, by the most commonly employed sense of the word deal is that sense which suggests a particular amount: i.e., a great deal or good deal. This is true both in spoken English and in written texts. Thus, if the Random House [Dictionary] ranks its senses by statistical frequency as it claims, we would expect to find this sense listed first. In fact, this sense is listed twenty-first.")

68. *Id.* at 1922.

69. It seems reasonable that a generic dictionary definition is fairly reliable evidence that at least some subset of the population uses the trademarked term in a generic sense. However, the opposite is not true. The absence of a generic definition is not conclusive evidence that a trademarked term is never used generically. See *Door Sys., Inc. v. Pro-Line Door Sys., Inc.*, 83 F.3d 169, 171 (7th Cir. 1996) ("No dictionary is complete or completely up to date, or tracks the language of the marketplace perfectly. A number of generic terms are not found in dictionaries."). Additionally, since dictionary publishers frequently receive complaint letters from trademark owners, the lack of a generic sense could only signify the publisher's unwillingness to provoke a mark owner. See SIDNEY LANDAU, *DICTIONARIES: THE ART AND CRAFT OF LEXICOGRAPHY* 406–09 (2d ed. 2001).

70. *Smith v. United States*, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting) (determining whether the exchange of a firearm for narcotics constituted "use" of a firearm "during and in relation to" a drug trafficking crime).

71. *Chisom v. Roemer*, 501 U.S. 380, 410 (1991) (Scalia, J., dissenting) (deciding whether the 1982 amendment to the Voting Rights Act applied to judicial elections).

72. *Id.*

permissible meanings, gets a court no further than “scaveng[ing] the world of English usage” for any possible meaning.⁷³

B. *Media Usage*

In addition to dictionary definitions, courts have often relied on other linguistic materials, namely examples of usage from newspapers, magazines, and, occasionally, trade journals (media usage).⁷⁴ Parties challenging the distinctiveness of a trademarked term may introduce examples of print materials with the term used generically. The Second Circuit has gone so far as to declare that media usage—specifically newspaper and magazine usage—proves a “strong indication of the general public’s perception” that the term has become generic.⁷⁵ Presented with “numerous examples of newspaper and magazine uses of the [generic] phrase,” the *Murphy Bed* court concluded that, paired with dictionary evidence, the primary significance of the term was necessarily generic.⁷⁶

Although evidence of genericism may certainly come from newspapers and other print sources, the way parties present this evidence to courts is methodologically unsound.⁷⁷ Courts must determine the primary significance of a term, but isolated examples, even “numerous examples” from newspapers and magazines, cannot prove much more than dictionary definitions—that the trademarked term has a genuine generic sense. It is a non-sequitur to conclude that since isolated generic usages exist, they must comprise the majority of uses. Nothing short of empirical evidence can establish that one usage appears more frequently than another, and in the absence of such empirical data, courts will be left solely to their own intuition to declare the victor.

Leaving the primary significance determination to human intuition is an inequitable result, both to the losing party and to trademark policy. This is due to the unreliable nature of human intuition when determining the semantic sense other individuals use more commonly.⁷⁸ As Professors McEnery and Wilson have explained, “Human beings have only the vaguest notion of the frequency of a construct or a word . . . [t]here are certain types of language data which can only be gathered accurately from a corpus.”⁷⁹ Thus, since frequency information “is not susceptible to recovery via introspection,” courts, when presented with isolated examples of generic uses in newspapers and magazines, have no reasoned way of determining whether these examples represent a fringe usage or the primary significance.⁸⁰ These empirical findings may only be achieved through direct evidence or empirical methods.

73. *See id.* (noting that when parties “labor mightily” they can find a definition of a word that includes meanings that are not the ordinary meaning. But that is not the courts’ job).

74. *See, e.g.,* *Loctite Corp. v. Nat’l Starch and Chem. Corp.*, 516 F. Supp. 190 (S.D.N.Y. 1981) (using uses of a term in newspaper articles to establish the genericness of a particular word); *Birtcher Electro Med. Sys., Inc. v. Beacon Labs, Inc.*, 738 F. Supp. 417, 421 (D. Colo. 1990) (analyzing entries from “articles from scientific journals that used the terms generically”).

75. *Murphy Door Bed Co. v. Interior Sleep Sys., Inc.*, 874 F.2d 95, 101 (2d Cir. 1989).

76. *Id.*

77. *See infra* Part IV.

78. *See* Mouritsen, *Definitional Fallacies*, *supra* note 13, at 1936 (“[H]uman intuition about the frequency of lexical items is often unreliable.”).

79. TONY MCENERY & ANDREW WILSON, *CORPUS LINGUISTICS: AN INTRODUCTION* 15 (2d ed. 2003).

80. *Id.*

IV. CORPUS LINGUISTICS

Unlike the qualitative methods of consulting dictionary definitions and analyzing isolated print sources, which merely offer proof of linguistic permissibility, the primary significance determination may, under certain circumstances, be enhanced by a quantitative analysis through a linguistic methodology called corpus linguistics.⁸¹ In general terms, corpus linguistics, through the review of collections of written and spoken language, facilitates the study of language function and use.⁸² The words in the corpus, an electronic database, occur naturally, meaning that they come from everyday uses of words in contexts such as literary fiction, newspapers, magazines, and academic journals. This gives insight into how the public actually uses language.⁸³

This Paper uses the Corpus of Contemporary American English (COCA) to illustrate the utility of corpus analysis because it “is the largest freely-available corpus of English, and the only large and balanced corpus of American English.”⁸⁴ The COCA documents roughly four million words used each year from 1990 to 2015 in each of five categories—spoken, fiction, magazine, newspaper, and academic—for a total of nearly 534 million words.⁸⁵ While the COCA may not appropriately represent the consuming public if consumers consist of a specialized group—perhaps professional buyers—courts traditionally assume that the consuming public includes the general public, reliably represented in the COCA.⁸⁶

The COCA contains diverse tools for varying linguistic analyses, though this Section focuses on only a few features that assist in determining majority usage.⁸⁷ First, the corpus

81. Corpus linguistics is quantitative in nature in the sense that it allows the researcher to find a random sampling of a particular usage, find the most frequent collocates, and test for frequency. However, as discussed below, corpus linguistic data involves a qualitative component since much of the data must be qualitatively analyzed.

82. DOUGLAS BIBER, *Corpus-based and Corpus-driven Analysis of Language Variation and Use*, in THE OXFORD HANDBOOK OF LINGUISTIC ANALYSIS 159 (Bernd Heine & Heiko Narrog eds., 2009).

83. See Stephen C. Mouritsen, *Hard Cases and Hard Data: Assessing Corpus Linguistics As an Empirical Path to Plain Meaning*, 13 COLUM. SCI. & TECH. L. REV. 156, 159 (2011) [hereinafter *Hard Cases*].

84. See CORPUS OF CONTEMPORARY AMERICAN ENGLISH (COCA), <http://corpus.byu.edu/coca>. The COCA was created by Mark Davies, a professor of linguistics at Brigham Young University. BYU also maintains the Corpus of Historical American English (COHA) and the News on the Web Corpus (NOW), a continually updating database with nearly four billion words. Each of these corpora could potentially be useful in analyzing trademark issues.

85. *Id.*

86. See, e.g., *Burger King Corp. v. Pilgrim’s Pride Corp.*, 705 F. Supp. 1522 (S.D. Fla. 1988). See also, MCCARTHY, *supra* note 45, at § 12:4 (“For ordinary consumer goods . . . it is a term’s meaning to consumers, not to professionals in the trade, that is the test of genericness and descriptiveness.”).

87. Stephen Mouritsen provides a thorough overview of COCA in his article on corpus linguistics in statutory interpretation. See Mouritsen, *Definitional Fallacies*, *supra* note 13, at 1956–98. Corpus linguistic analysis, in the context of a genericness determination, is similar to how some scholars and judge have begun to use corpus data in statutory interpretation. Scholars and judges have posited that corpus linguistics may be helpful to determine the ordinary meaning of statutory words because we can assume, in most cases, that “Congress uses common words in their popular meaning, as used in the common speech of men.” See Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 527 (1947); Mouritsen, *Definitional Fallacies*, *supra* note 13; Lawrence M. Solan, *The New Textualists’ New Text*, 38 LOY. L.A. L. REV. 2027 (2005) [hereinafter “New Text”]; Mouritsen, *Hard Cases*, *supra* note 83. See also *FCC v. AT&T Inc.*, 562 U.S. 397 (2011); *State v. Rasabout*, 356 P.3d 1258, 1271 (Utah 2015) (“I would interpret the terms of the statute by looking for real-world examples of its key words in actual written language in its native context.”); *In re Baby E.Z.*, 266 P.3d 702, 724 n.21 (Utah 2011); *People v. Harris*, 885 N.W.2d 832, 838 (Mich. 2016); (“We apply a tool that

returns a random sampling of a particular word, avoiding claims of cherry-picking favorable examples from newspapers or magazines.⁸⁸ The COCA contains 1197 instances of Xerox, and, by selecting this option, the corpus will display one hundred, two hundred, five hundred, or one thousand randomized instances of the word. Second, words in the corpus are tagged for grammatical content, which allows the user to search for and compare, for example, instances of Google, Skype, or Fed-Ex used as a verb versus a noun. While most genericide cases will analyze the uses of the trademarked term in all grammatical contexts, this feature may potentially be useful under specialized circumstances.⁸⁹

Third, labels identifying each entry's year and category make it possible to compare a word's use in print versus spoken media or to compare how a word's use has changed over a certain span of time. Thus, if a party claims that a term has only been generic for the last ten years, results from years previous could be excluded to test the claim.⁹⁰ This type of analysis would require more than skimming the corpus results, but the corpus data provides the springboard for a more comprehensive analysis.

Fourth, a corpus search is arranged in concordance lines (also known as Key Word in Context (KWIC)), which allows the researcher to see each individual result in the context of its original sentence. The corpus also permits for an expanded view that lets the user read the surrounding 150 words to determine more accurately the term's usage. This allows one to code the distinct usages of a trademarked term, distinguishing between generic senses and trademarked senses, such as “[It all occurred] in a crockpot of fact, faux history, and science fiction” (generic) and “[T]here was always the electric slow cooker, like the Crock-Pot” (trademarked).

Fifth, the COCA includes a simple tool to search for collocates, words most typically used with a particular term.⁹¹ Collocation shows “the tendency of certain words to be used in the same semantic environment as other words,” thus, assisting in finding associations between words.⁹² To do this, the corpus “counts the instances of all words occurring within a particular span, for example, four words to the left of the node word and four words to the right” and lists each collocate according to frequency.⁹³ Unlike with concordance lines, the COCA reviews every instance of the target word to create a collocation list. A collocation list “is therefore ‘something of a short-cut to the information that could be obtained from concordance lines,’ and may be used to confirm the data already extracted from the corpus.”⁹⁴ In the trademark context, collocations may prove useful in comparing

can aid in the discovery of ‘how particular words or phrases are actually used in written or spoken English.’”) (citation omitted). In similar fashion, corpus linguistics may assist in determining how the consuming public uses trademarked terms.

88. The links to each COCA search may be easily saved and shared, so parties may verify the accuracy of the results and the interpretation of individual entries.

89. See, e.g., *Elliott v. Google Inc.*, 860 F.3d 1151, 1156 (9th Cir. 2017) (rejecting an argument that Google is generic because it is often used as a verb).

90. Though the corpus contains this feature, if the scope is too limited (for example, limiting the relevant period to five or ten years), the corpus may not contain enough examples to be helpful.

91. Mouritsen, *Definitional Fallacies*, *supra* note 13, at 1962.

92. *Id.*

93. SUSAN HUNSTON, *CORPORA IN APPLIED LINGUISTICS* 69 (2002).

94. Mouritsen, *Definitional Fallacies*, *supra* note 13, at 1963 (“Collocation statistics ‘can be helpful to the

what words co-occur with the trademarked term versus the recognized generic term (e.g. Crock-Pot versus slow cooker) to confirm or reject that the terms are near synonyms and are often used in a similar manner.

Sixth, the COCA allows a user to see the overall frequency of a word in the corpus. In other words, the corpus shows how frequently the word appears per one million words.⁹⁵ While this indicator holds no significant meaning for other corpus analyses, since it often only matters how frequently a particular sense appears rather than how frequently the general word appears, in a genericide inquiry, it proves potentially relevant. For instance, the relative frequency of a trademarked term and its generic counterpart might evidence the public's awareness and usage of the generic word. While the test for genericide does not rely on the availability of alternative words to describe a product, if the public uses "medical swab" or "cotton-tipped applicator" more frequently than it uses the term Q-Tip, it might be probative that the trademark retains its distinctiveness.⁹⁶ Such evidence could not alone prove genericness, but, like collocations, it could be a shortcut to "confirm data already extracted from the corpus."⁹⁷

Through these tools, trademark owners and challengers alike may offer more robust arguments about how the consuming public uses the disputed term because corpus analysis "essentially tells us what a language is like, and . . . is a more reliable guide to language use than native speaker intuition."⁹⁸ As Professor Lawrence Solan, one of the foremost scholars at the intersection of law and linguistics, has noted, "Access to computers now makes it relatively simple to see how words are used in commerce and in common parlance."⁹⁹ He continues that corpus linguistics "allows judges to easily become their own lexicographers. If they perform that task seriously, they stand to learn more about how words are ordinarily used, than by today's method of fighting over which dictionary is the

corpus user in summarizing some of the information to be found in concordance lines, thereby allowing more instances of a word to be considered.' . . . Put simply, the collocation data will show the words that are most commonly used with the [target word].") (citation omitted).

95. The relative frequency is determined by dividing the total number of words in the corpus, currently 533,788,932, by 1,000,000 (533.788932). Then, the total number of instances of the target word is divided by 533.788932. The output is how frequently the word appears per million words in the corpus.

96. *See* *Q-Tips, Inc. v. Johnson & Johnson*, 108 F. Supp. 845, 863 (D.N.J. 1952) (since the public still used other generic terms such as medical swab and cotton-tipped applicator, the term had "not come to mean to the consumer the product double tipped applicator as distinguished from a certain brand applicator"); *Dupont Cellophane Co. v. Waxed Prods. Co.*, 85 F.2d 75, 75 (2d Cir. 1936); (the availability of a generic name did not prevent "cellophane" from being generic); *Bayer Co. v. United Drug Co.*, 272 F. 505, 505 (S.D.N.Y. 1921) (consumers knew the product only by the name "aspirin," without knowing the generic term "acetyl salicylic acid").

97. *See* Mouritsen, *Definitional Fallacies*, *supra* note 13, at 1963.

98. HUNSTON, *supra* note 93, at 20. Professor Hunston notes, "Although a native speaker has experience of very much more language than is contained in even the largest corpus, much of that experience remains hidden from introspection." *Id.* While the claim that native speakers have more language experience than the largest corpus may no longer be accurate (since some corpora now have billions of words), her observation that corpus linguistics is more reliable than intuition remains true.

99. *New Text*, *supra* note 87, at 2060. Professor Solan calls the use of quantitative methods like corpus linguistics in statutory interpretation the "New Textualist's New Text." He writes that "[t]he new textualist methodology relies heavily on a vision of language that itself contains an enriched vision of context. In particular, it has replaced the plain meaning, dictionary approach to word meaning, with the ordinary meaning, probabilistic approach. The result is that it is possible to rely on language judgments alone for a great deal of context-sensitive analysis of statutes." *Id.*

most authoritative.”¹⁰⁰ Thus, a corpus may aid in quantitatively determining how the consuming public predominately uses a trademarked term and whether the public has appropriated the trademark to refer generically to the product itself.

A. *Corpus Searches and Results*

This Section provides four examples of trademarks that have flirted with genericism. The COCA searches show that corpus linguistics may prove probative for some marks—providing significant evidence of trademarked usage for Xerox and Crock-Pot—but being almost neutral as to Band-Aid and Kleenex. This data, along with the theoretical discussion presented in Part IV, shows corpus linguistics’ potential strengths and weaknesses in defending against and proving genericide. More specifically, the data shows that trademark owners could use corpus linguistics effectively to combat allegations of genericide. However, corpus data alone cannot prove genericide because, in many cases, trademarked and generic usages are indistinguishable. Additionally, a corpus analysis yields only examples of usage—at most proving majority usage—but cannot effectively prove the primary significance of a trademarked term in the minds of the consuming public.

As noted in this Section, classifying uses of a term proves a difficult undertaking, so I offer some details on how I coded the individual instances into the categories of trademarked, generic, or ambiguous. While I make no claim to a generalized theory of how corpus data should be classified, I suggest a few general points on coding the data.

First, capitalization does not necessarily indicate a specific classification. In standard English grammar, capital letters denote specific entities rather than common nouns,¹⁰¹ but this test does not hold true for trademarked terms. Although one expert witness in a trademark case attempted to classify trademarked uses in just such a way, explaining that “[w]riters use initial capital letters with names they associate with a particular entity, demonstrating that the name directly refers to or is proprietary to that entity,”¹⁰² that assertion in the trademark context is demonstrably false. In an age of automatic spell checkers that correct non-capitalized uses of recognized trademarks¹⁰³—added to the fact that many publishers have style guides requiring authors to capitalize registered trademarks—trademark uses often resist traditional linguistic reasoning.

Second, figurative senses are always generic uses of the term. A figurative sense is one that is not intended to be understood literally, deriving its metaphorical sense from an analogous word or phrase. Figurative uses of the term “Band-Aid” were especially prevalent, referencing, for instance, “Band-Aid approaches” to problems. While the speaker may plausibly be aware that Johnson & Johnson produces the Band-Aid adhesive bandage, the references were necessarily to a metaphorical bandage and not to one

100. *Id.*

101. See RODNEY HUDDLESTON & GEOFFREY K. PULLUM, *THE CAMBRIDGE GRAMMAR OF THE ENGLISH LANGUAGE* 1757–59 (2002).

102. Leonard, *supra* note 15.

103. See Butters, *supra* note 51, at 512 n.19 (“The use of a mark as a verb, on the other hand, would appear to be far more robust linguistic evidence that the user does not think of the term as a brand name but rather as a generic, even if (in this era of automatic spell-checks) the user capitalizes the term (e.g., *Please Xerox this letter for me!*).”).

produced by Johnson & Johnson.¹⁰⁴ Corpus data cannot prove subjective intent, focusing entirely on measuring a term's actual usage. In other words, an author who writes about a "Band-Aid solution" may appreciate the term's trademarked sense, but since figurative uses are generic, corpus data cannot capture the writer's understanding. The fact that a corpus contains only usage, as discussed in Section IV, creates both the benefits and the limits of using corpus data in genericide cases.

Third, in the face of two plausible interpretations, one generic and the other ambiguous, I conservatively coded the instance as generic. Similarly, only clearly trademarked senses were categorized as trademarked. For instance, I coded as generic "The Xerox machines, the photocopy machines, are churning up here"—because the clause "the photocopy machines" seems to be a clarifying appositive, signifying the speaker's intention to use the term generically—despite the existence of alternative interpretations that could render the sentence ambiguous. Conservatively coding the data in this way supports the Paper's contention that even where many generic uses and few trademarked ones appear, corpus data alone cannot prove genericide.

1. Xerox®

Xerox Corporation, a Fortune 500 company best known for inventing the photocopy machine and laser printer, sells business services and document technology products.¹⁰⁵ In 2015, Xerox had \$18 billion in revenue,¹⁰⁶ which helps explain how the name Xerox has, in some quarters, become synonymous with photocopying. For example, the OED, after acknowledging the proprietary sense of the word, defines Xerox as "To reproduce by xerography; to photocopy."¹⁰⁷ As discussed above, this generic dictionary definition demonstrates fairly conclusively that the generic sense of Xerox remains linguistically possible; in other words, at least some members of the public use the term generically to refer to a photocopy or to the act of photocopying. However, the corpus data shows that Xerox leads as the strongest of the four marks discussed in this Section. Xerox has not legally genericized; meaning, the primary significance of Xerox in the minds of the consuming public remains the trademarked sense.

From the 1197 instances of Xerox in the COCA, I analyzed a random sample of one hundred examples. In seven instances, there are strong indications of Xerox's generic use. For example, one sample sentence reads, "Leon checks the address against the Xerox of the purchase contract." Although the writer capitalized Xerox, the speaker referenced a photocopy—the output of a Xerox product—rather than a Xerox photocopy machine or printer.

104. See *Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111, 118 (1938) (reasoning that a term is trademarked when consumers use the term to refer "not [to] the product but [to] the producer).

105. Xerox's first major product was its model 914 copier, released in 1959. See EVA HEMMUNGS WRITEN, NO TRESPASSING: AUTHORSHIP, INTELLECTUAL PROPERTY RIGHTS, AND THE BOUNDARIES OF GLOBALIZATION 61 (2004). Since that time it has become one of the leading companies for copiers and related products.

106. Letter from Ursula M. Burns, CEO, Chairman and Chief Executive Officer, to Shareholders, <https://www.xerox.com/annual-report-2015/shareholder-letter.html>.

107. *Xerox*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/231014?rskey=p6q9Qs&result=2&isAdvanced=false#eid> (last visited June 9, 2018).

Although seven percent of the sampled instances were generic, seventy-five percent, were specific to Xerox Corporation. In other words, the reference invoked the specific producer, Xerox, rather than a product genus. For instance, “The kicker for Xerox is that in today’s office, such structures mediate the flow of information—and that’s where Xerox makes its living,” demonstrates a source-specific reference. Xerox receives a leg-up in this regard because, unlike many marks, the trademark doubles as the name of the corporation; accordingly, many media mentions involve direct references to the corporation. While this cannot save all trademarks, in this case references to Xerox Corporation and Xerox-manufactured equipment show that seventy-five percent of the time the public encounters a reference to Xerox, the usage refers to its trademarked sense.

The remaining eighteen percent of instances were ambiguous. Sentences such as, “He walked in and had a twenty-minute conversation over the Xerox machine,” could not be coded. This example could mean either: 1) he had a conversation over the Xerox-manufactured copy machine or 2) he had a conversation over the (generic) photocopier. Without additional evidence about whether Xerox in fact made the machine, it is nearly impossible to say for certain which of the two meanings is correct. This is similar to deconstructing what a person means when saying, “Go google it.”¹⁰⁸ A recent court opinion astutely observed that the reference could mean “a verb referring to the act of searching on the internet using the Google search engine” or “a verb referring to the act of searching on the internet using *any* search engine.”¹⁰⁹ The court was highly skeptical that examples such as “Go google it,” although having some indications of genericness, were truly generic. In these cases, linguistic data alone cannot deconstruct the writer’s intended usage.

2. Crock-Pot®

Crock-Pot is the original and most successful brand of slow cookers. Indeed, Crock-Pot’s slogan speaks for itself: “If it doesn’t say Crock-Pot, it’s not the original.” In 1970, The Rival Company acquired a little-known company that manufactured the Bean Pot, and in 1971, Rival reintroduced the product as the Crock-Pot.¹¹⁰ Currently, the trademark is owned by Newell Brands, which also owns other successful brands such as Coleman, Rubbermaid, Graco, and Yankee Candle. In 2014, the company sold 4.4 million Crock-Pots,¹¹¹ and the brand accounts for as much as eighty percent of the slow cooker market.¹¹²

After reviewing the concordance lines or KWIC, I found that twenty instances of Crock-Pot, or 20 percent, were clearly in its trademarked sense. Sentences such as, “In recent weeks, I have used my Crock-Pot (it’s a Rival, as are about 80 percent of the slow cookers owned in the United States),” demonstrate an awareness of the particular brand.

108. See *Elliot v. Google Inc.*, 45 F. Supp. 3d 1156, 1165 (D. Ariz. 2014).

109. *Id.* at 1173–74 (The court found for Google, remarking that “the fact that a majority of the public understands a trademark as an indiscriminate verb is not dispositive on whether the mark is generic”).

110. Funding Universe, *The Rival Company History*, <http://www.fundinguniverse.com/company-histories/the-rival-company-history/>.

111. Sam Sifton, *The Slow Cooker, Redeemed*, N.Y. TIMES (Feb. 13, 2015), <https://www.nytimes.com/2015/02/18/dining/the-slow-cooker-redeemed.html>.

112. Mark Bittman, *Slow and Low is the Way to Go*, N.Y. TIMES (Jan. 28, 2003), <https://www.nytimes.com/2003/01/29/dining/slow-and-low-is-the-way-to-go.html>.

Only four instances were sufficiently suggestive of genericness to warrant coding as a generic sense. For example, “Dad made a Crock-Pot and we watched the Ravens on TV,” an instance of metonymy, references the cuisine rather than the slow cooker that prepared it.

Finally, a full seventy six percent of instances were ambiguous; namely, the examples do not indicate whether the person meant a Crock-Pot slow cooker or referenced Crock-Pot merely as a generic label for slow cooker. For instance, “In the morning before she went to work, Sophia would put supper in the Crock-Pot” is ambiguous. There is no indication that the person meant an original Crock-Pot, but given that a sizable majority of slow cookers in the United States are the original, it is just as likely that the slow cooker was in fact a Crock-Pot and the speaker specifically invoked the brand.

The collocation list, reproduced in Figure 1, suggests some intriguing patterns. First, the most common collocates for Crock-Pot are “slow” and “cooker”—its generic name. This confirms the findings in the concordance lines and the dictionary definition¹¹³ that Crock-Pot and slow cooker are closely related synonyms. Second, slow cooker is used more frequently in careful writing such as recipes (giving instructions about the size of slow cooker to use and directing how to cook the food), while Crock-Pot is used more frequently in conversational contexts in both speech and writing (“made,” “lid,” “carry,” and “supper”).¹¹⁴ Crock-Pot is also used more frequently to refer to specific types of slow cookers (“smart,” “programmable,” and “warmer”).

Fig. 1

Crock-Pot Collocates	Slow Cooker Collocates
(1) Slow	(1) Cook
(2) Cooker	(2) 6-Quart
(3) Smart	(3) Cover
(3) Made	(4) Larger
(5) Lid	(5) 4-Quart
(6) Chicken	(6) Combine
(7) Carry	(7) Lightly
(8) Programmable	(8) Greased
(9) Warmer	(9) Add
(10) Supper	(10) Stir
	(22) Crock-Pot

113. *Crock-Pot*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/44653?redirectedFrom=crock-pot#eid7825720> (last visited June 9, 2018). “[A] proprietary name for) a lidded pot with an integral electrical heating element, for cooking food at low temperatures for long periods; a slow cooker.” *Id.*

114. Although the terms’ collocates suggest that Crock-Pot could be more prevalent in speech and slow cooker more prevalent in writing, the data did not show any significant difference between speech and writing.

Another telling data point is the relative frequency of the words Crock-Pot and its generic counterpart, slow cooker. Crock-Pot occurs in the corpus at a frequency of .2 words per one million while slow cooker occurs at .78 words per one million, almost four times more often. While this data alone does not preclude a finding of genericism¹¹⁵ (since the Lanham Act sanctions only the primary significance test), the finding reveals that Crock-Pot, by its popularity, has not replaced its generic name.¹¹⁶ Consumers seem either to be aware of the Crock-Pot brand or to use slow cooker synonymously with but much more frequently than the trademarked name.

3. Band-Aid®

Band-Aid is a registered trademark of Johnson & Johnson, one of the largest companies in the United States. While the company retains its trademark, the public has long used Band-Aid to refer to an adhesive bandage generally or even figuratively to refer to patching up a problem. The OED acknowledges the proprietary sense of the word but also defines it as, “A temporary or makeshift solution to a problem.”¹¹⁷ A review of the COCA confirms that Band-Aid is indeed used generically more often than either Xerox or Crock-Pot.

Only three instances of Band-Aid were clearly used in the trademarked sense. These referred to specific types of Band-Aids such as “Sport Strips,” itself a registered trademark, or “plastic strips.” However, fifteen percent of occurrences are clearly generic usages, usually figurative. Examples include, “Shelters are an emergency band-aid that doesn’t do anything except give people a night under a roof” and “Our federal government is suggesting some band-aid approaches to bail out these lenders.” The remaining 82 percent of occurrences were ambiguous, being unclear whether the references indicated a Band-Aid brand bandage or another brand of adhesive bandage. For instance, “A small trickle of blood seeps from under his Band-Aid” could signify either sense of the word.

The collocates for Band-Aid confirm the results from the concordance lines. The top collocate for Band-Aid is “approaches,” occurring twenty-six times, and each instance of “Band-Aid approach” follows the OED’s figurative definition. Indeed, five of Band-Aid’s top ten collocates denote the figurative sense of the word, including (1) “approach,” (4)

115. Some scholars have argued that the test for genericism should be tied to the effects on competition. *See, e.g.,* John F. Coverdale, *Trademarks and Generic Words: An Effect-on-Competition Test*, 51 U. CHI. L. REV. 868 (1984). While the effects-on-competition test is not currently the legal standard—and the arguments for and against such a test are outside the scope of this Paper—corpus linguistics could prove effective in applying this test because corpus data could confirm the public’s continued use of a separate generic term, such as slow cooker for Crock-Pot.

116. The Lanham Act allows only for the primary significance test, but this does not make the existence of alternative words irrelevant. Since the dominant justification for trademark rights is reduced search costs, the fact that competitors have alternative words to describe their products is likely significant to many courts. *See* Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 75 (2012) (“[I]t would be nearly impossible to overstate the extent to which the search costs theory now dominates as the theoretical justification of trademark law.”) (emphasis added). Stacey L. Dogan & Mark A. Lemley, *A Search-Costs Theory of Limiting Doctrines in Trademark Law*, 97 TRADEMARK REP. 1223 (2007) (remarking that courts and scholars generally endorse the search-costs theory and noting that search-cost justifications often limit trademark rights in underappreciated ways).

117. *Band-Aid*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/15126?rkey=AtIRTB&result=1&isAdvanced=false#eid> (last visited June 9, 2018).

“problem,” (5) “solution,” (6) “solutions” and (9) “problems.” When combining the results for the singular and plural (e.g. solution + solutions), the figurative results are even more salient, as represented in Figure 2.

Fig. 2

Band-Aid Collocates	Bandage ¹¹⁸ Collocates
(1) Approach(es)	(1) Wrapped
(2) Wound	(2) Around
(3) Problem(s)	(3) Head
(3) Solution(s)	(4) Ace
(5) Bandage(s)	(5) Gauze
(6) Box(es)	(6) Hand
(7) Surgery	(7) Wound(s)
(8) Strips	(8) Adhesive
(9) Cut	(9) Covered
(10) Forehead	(10) Elastic

First, the collocates suggest that the term has a generic meaning because the word Band-Aid often occurs with words implying a figurative sense. Second, the remaining collocates indicate that “Band-Aid” and “bandage” are related synonyms, even though speakers use bandage in more contexts than Band-Aid. Both terms occur regularly in the context of dressing wounds with various types of coverings.

The relative frequency of the two terms also provides insight into how consumers may use Band-Aid and bandage. Band-Aid occurs 567 times in the COCA, which is a frequency of 1.06 words per one million. Bandage occurs in 1160 instances, or 2.17 words per one million, more than double Band-Aid’s rate. This data alone cannot establish a trademark’s distinctiveness (especially since bandage is used in additional contexts and is therefore likely to occur more frequently), but the data suggests that Band-Aid has not replaced the word bandage in public usage. Consumers seem to be aware that Band-Aid is a brand or to use bandage synonymously with the trademarked name.

4. Kleenex®

Kimberly-Clark Corporation introduced Kleenex brand facial tissue nearly a century ago as a cold cream remover, but it quickly became a disposable substitute for the handkerchief.¹¹⁹ It has remained the dominant brand of facial tissues and accounts for

118. Since “Band-Aid” is nearly always used as a noun in the concordance lines, to effectively compare the two words, only collocates of “bandage” as a noun are shown here.

119. Andrew Adam Newman, *Researching the Sneeze and How to Handle It*, N.Y. TIMES (Sept. 27, 2011), <http://www.nytimes.com/2011/09/28/business/media/researching-the-sneeze-and-how-to-handle-it.html>.

almost fifty percent of the facial tissue market.¹²⁰

A review of the COCA concordance lines shows that Kleenex is the weakest brand, in the sense that the data rarely clearly shows the term being used as a protected trademark. Merely six instances (six percent) were unambiguously trademarked uses. One sentence read, for example, “Thanks to Kleenex for joining our Wildest Dreams team.” But, of the four trademarks in this Section, Kleenex also had the fewest instances of plainly generic uses—two percent. One generic use reads, “The Panamanian people have sometimes referred to the Kleenex presidency, something used and quickly disposed of.” The overwhelming majority of occurrences, 90 percent, were ambiguous. Examples such as “She wiped the ice cream off his face with a Kleenex” could refer to a facial tissue generally or to a Kleenex brand tissue. The remaining two instances of Kleenex were not related to facial tissue (one referencing a start-up band called Kleenex), and are not relevant to the genericism inquiry.

B. *Analysis of Corpus Data*

Overall, the corpus data adds support to the theory that linguistic evidence alone cannot prove genericide. However, corpus linguistics, unlike dictionaries and isolated newspaper usage, may perform an important task—proving distinctiveness. In other words, corpus linguistics may provide an effective tool for companies with distinctive marks in combatting genericide claims. But, corpus data alone cannot prove genericide for two reasons: First, in practical terms, for some marks that have generic senses, it is nearly impossible to decipher the correct usage sense without additional extratextual evidence, something lacking in corpus data. Second, as discussed below, even where significant evidence of genericism exists, linguistic data only proves usage, not perception.¹²¹

The results from Band-Aid and Kleenex strongly suggest that corpus data cannot always prove effective because classification issues plague the inquiry. Some examples exhibit signs of genericness, but since the generic word often appears in the same context—“I need a Kleenex” versus “I need a tissue”—it is impossible to prove that the speaker in the first example is not asking for and expecting a genuine Kleenex. Thus, coding difficulties suggest that corpus data may not always demonstrate the genericness of a term, even when the public primarily uses the term generically.

Yet, corpus linguistics is a promising tool for some marks that are used in contexts where the trademarked sense is easily identified. From the data, Xerox, for one, undoubtedly remains a trademark because a majority of the uses unambiguously referred to a source rather than a general product.¹²² During litigation, the trademark challenger would certainly produce dictionaries, like the OED, that demonstrate that Xerox has a generic sense. The challengers would also likely produce cherry-picked examples from newspapers and magazines from across the country that use Xerox generically. However, corpus data would show that Xerox is used in its trademarked sense 75 percent of the time.

120. *Id.*

121. *See infra* Part V.

122. The fact that Xerox is the name of the corporation—and many references refer directly or indirectly to the corporation rather than a specific product—does not change the analysis. The corpus data still shows that at least 75% of the time consumers come across the word Xerox, it is in the trademark sense.

Additionally, the corpus data would reveal only a limited number of instances where Xerox is unmistakably used generically. Xerox Corporation could persuasively refute its challenger's linguistic evidence with a more objective linguistic tool.

Similar themes emerge from a review of Crock-Pot, where there is a consequential, though not overwhelming, showing of trademarked uses but an almost non-existent showing of generic uses. Corpus data may not prove that Crock-Pot remains distinctive to the same degree as with Xerox, but the lack of clearly generic uses could effectively rebut any dictionary evidence to the contrary.

Additionally, corpus linguistics may demonstrate the primary significance of a trademarked term when used defensively. As discussed in Part V, primary significance and majority usage are distinct concepts, and, when used to affirmatively prove a term's genericness, corpus data cannot prove primary significance because corpus data only tracks usage. However, when a term is used in its trademarked sense, majority usage and primary significance are not entirely distinctive concepts. Persons may use Xerox generically—referring to a Xerox copy of a contract—but remain firmly aware of its trademarked significance. But the same person cannot use a term in its trademarked sense without being fully aware of its proprietary meaning. Thus, courts may use corpus data that supports trademarked usage because, unlike generic usage, such data is probative of the ultimate question of primary significance.

V. MAJORITY USAGE VERSUS PRIMARY SIGNIFICANCE

Since many uses of trademarked terms are ambiguous, attempting to show the most frequent use of a term—majority usage—may prove difficult as a practical matter. Additionally, as a legal matter, corpus data alone can never prove genericide because majority usage is not the legal test. Even if the corpus data unambiguously showed that the public uses “Band-Aid” predominately in its generic sense, Congress has not tied the genericism analysis to usage. The Lanham Act expressly codifies the primary significance test.¹²³ Since courts may not deem a mark generic unless the source fails to be “the primary significance,” linguistic data alone—including dictionary definitions, newspaper and magazine examples, and corpus linguistic data—cannot conclusively show how the public perceives a mark. This is so because linguistic data reflects usage. The legal test requires a showing of significance or perception. The primary significance test requires more than the public's vague awareness that a trademarked term refers to a specific producer, but the genericide doctrine also makes clear that consumers may view the trademark in more than one way—and use the mark accordingly. Otherwise, the primary significance test would shift to an *absolute* significance test.

The history of the test for genericide bears out this distinction. In 1938, prior to the passage of the Lanham Act, the Supreme Court announced its test for genericide. In

123. 15 U.S.C § 1064(3) (“If the registered mark becomes the generic name for less than all of the goods or services for which it is registered, a petition to cancel the registration for only those goods or services may be filed. A registered mark shall not be deemed to be the generic name of goods or services solely because such mark is also used as a name of or to identify a unique product or service. The primary significance of the registered mark to the relevant public rather than purchaser motivation shall be the test for determining whether the registered mark has become the generic name of goods or services on or in connection with which it has been used.”).

Kellogg Co. v. National Biscuit Co., the Court wrote that parties seeking to establish that its trademark retains distinctiveness “must show that the primary significance of the term *in the minds of the consuming public* is not the product but the producer.”¹²⁴ When Congress passed the Lanham Act in 1946, it did not expressly sanction a genericide test and most courts continued to apply the primary significance test.¹²⁵ However, in the early 1980s, some courts substituted the primary significance test for a “consumer motivation” test.¹²⁶ This test was sharply criticized,¹²⁷ and Congress acted quickly. In 1984 Congress amended the Lanham Act, codifying the primary significance test.¹²⁸

Although the Lanham Act does not contain the clarifying phrase “in the minds of the consuming public,” the 1984 amendment codified the *Kellogg* approach. The Lanham Act now reads, “The primary significance of the registered mark to the relevant public rather than purchaser motivation shall be the test for determining whether the registered mark has become the generic name of goods or services on or in connection with which it has been used.”¹²⁹ Since the 1984 amendment, courts have recognized *Kellogg* as the controlling precedent, noting, “The ‘primary significance test’ is the law of the land; it was adopted by the Supreme Court in *Kellogg Co. v. National Biscuit Co.* and subsequently codified by Congress”¹³⁰

The shift from the “consumer motivation test” to the “primary significance test” has not totally clarified the standard, however. Courts and commentators often refer to “majority usage” and “primary significance” synonymously, despite the two terms being inherently distinct concepts. Professor McCarthy, for instance, writes in his tremendously influential treatise that “majority use controls.” He uses the term “majority use” inadvisably, however. Despite his pronouncement that majority usage satisfies the Lanham Act test, McCarthy also acknowledges that majority usage and primary significance are distinct concepts. He writes that “casual, non-purchasing uses of terms are not evidence of generic usage.” The point of analysis occurs at sale, thus precluding as evidence generic uses in other contexts.¹³¹ A person may understand a term as a trademark but “may

124. *Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111, 118–19 (1938) (holding that National Biscuit Company had no rights in the name Shredded Wheat because the term had become generic for “pillow-shaped biscuits”) (emphasis added).

125. MCCARTHY, *supra* note 45, at § 12:7 (calling 1980s departures from the primary significance test “bizarre and aberrational” and “outside the mainstream of trademark law”).

126. See *Anti-Monopoly, Inc. v. Gen. Mills Fun Grp., Inc.*, 684 F.2d 1316, 1326 (9th Cir. 1982). In *Anti-Monopoly*, the Ninth Circuit sanctioned a survey that focused on the motivation of the consumer. It gave as an example at survey about Tide, where consumers were asked “[w]ould you buy Tide primarily because you like Procter and Gamble’s products, or primarily because you like Tide detergent?” *Id.* at 1326. The court noted that “about 68% indicated the latter reason We suspect that these results tend to show that the general public regards ‘Tide’ as the name of a particular detergent, having particular qualities, rather than as one producer’s brand name for the same detergent which is available from a variety of sources.” *Id.* at 1326.

127. See Arthur J. Greenbaum, Jane C. Ginsburg & Steven M. Weinberg, *A Proposal for Evaluating Genericism after Anti-Monopoly*, 73 TRADEMARK REP. 101 (1983); Lester L. Hewitt & Paul E. Krieger, *Anti-Monopoly: An Autopsy for Trademarks*, 11 A.P.L.A. Q.J. 151 (1983).

128. MCCARTHY, *supra* note 47, at § 12:7 (“It took an Act of Congress to put an end to the Ninth Circuit’s purchaser motivation test for genericness. In 1984, the Lanham Act was amended to codify the primary significance test as the one and only test of genericness.”).

129. 15 U.S.C. § 1064(3).

130. *Genesee Brewing Co. v. Stroh Brewing Co.*, 124 F.3d 137, 144 (2d Cir. 1997) (internal citations omitted).

131. MCCARTHY, *supra* note 45, at § 12:8.

nevertheless employ it in a generic sense in casual conversation. It is the use and understanding of the term in the context of purchasing decisions, however, that determines the primary significance of a designation.”¹³² But linguistic data from dictionaries, newspapers, magazines, and corpora usually provide just that—evidence of non-purchasing, sometimes casual usage.

Indeed, individuals may fully recognize a term’s trademark significance and, occasionally and under certain circumstances, use the term generically. This fact is evidenced in the Patent and Trademark Office’s decision to cancel escalator’s trademark.¹³³ In *Haughton Elevator Company v. Seeberger*, the PTO cancelled Otis Elevator’s trademark on the term escalator because the term “ha[d] become a descriptive name to both the general public and to engineers and architects”¹³⁴ The Commissioner’s main evidence was that Otis Elevator had used the term generically on occasion in its internal documents and advertising. The Commissioner noted that Otis used the term escalator in the same manner as it did elevator, a generic term, in advertising “Otis elevators Otis escalators.”¹³⁵ The PTO failed to recognize that usage and significance are distinct terms and took Otis’ own usage as dispositive evidence that the term elevator was generic.

But this case highlights the problems with considering usage and perception as parallel concepts. Otis Elevators might have used the term generically in its own internal documents and advertising, but the company certainly recognized the term as identifying a particular brand—its own. In other words, Otis employees who wrote the advertising material undoubtedly would have identified the trademarked sense of the term escalator as their primary association, despite their own usage. And facing a purchasing decision, Otis employees surely would have distinguished between an Otis escalator and a competing product.

Granted, escalator might have become a generic term by that point.¹³⁶ But the PTO should not have relied on usage from actors that certainly distinguished its brand from others as dispositive evidence on the matter. Doing so only shows that it did not understand

132. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 15 cmt. c (AM. LAW. INST. 1995); MCCARTHY, *supra* note 45, at § 15:8 (“Buyers or users of a product may sometimes use a trademark in a generic sense in casual conversation even though when questioned, those persons are fully aware of the trademark significance of the term. For example, persons may use Xerox or Kleenex in a generic sense . . . even though when going to purchase a photocopying machine or a box of tissues, they know that Xerox and Kleenex identify the commercial source of those products. Such casual, non-purchasing uses of terms are not evidence of generic usage.”).

133. *See Haughton Elevator, Co. v. Seeberger*, 85 U.S.P.Q. 80, 1950 WL 4178, *1. The decision is lamentable because the opinion is almost devoid of any evidence of genericism beyond the owner’s own usage. This evidence should clearly fail the primary significance test, but the Commissioner of Patents nevertheless cancelled Otis Elevator Company’s trademark registration.

134. *Id.*

135. *Id.*

136. *Id.*, at *2 (The Commissioner noted that “[i]t also appears that the Otis Elevator Company had two responsible representatives on the committee which prepared the ‘Standard Safety Code for Elevators, Dumbwaiters and Escalators.’ In this model code, ‘escalator’ is defined as a moving inclined continuous stairway or runway used for raising or lowering passengers. Throughout, the word ‘escalator’ is used descriptively without any indication that it designates origin of the type of device under consideration. It does not appear that any protest was made by the Otis Elevator Company or their representatives on the committee to the generic and descriptive use of the word ‘escalator’. Thus the course of conduct of the Respondent was such as to cause the mark of ‘escalator’ to lose its significance as an indication of origin”).

the distinction between usage and significance. If usage in any circumstance could show nothing about the primary significance of the term in the minds of the users, it was the evidence the PTO credited in this case. While the facts of this case likely occur rarely, it plainly shows how, logically, the concepts of majority usage and primary significance exist as distinct concepts. As such, courts should treat them as distinct concepts.

Moreover, Congress recognized that the primary significance test would allow some marks to serve a “dual function.”¹³⁷ As one court noted, “It cannot be understated that a mark is not rendered generic merely because the mark serves a synecdochian ‘dual function’ of identifying a particular species of [good or] service while at the same time indicating the genus of [goods or] services to which the species belongs.”¹³⁸ In *Elliott v. Google*, the court reasoned that the word Google, when used as a verb, could refer to using the Google search engine to perform an internet search or to using any search engine. The dual-function doctrine, however, suggests that it could mean both to the same person, depending on the circumstances. The inquiry remains which sense—the trademarked or the generic—is the consumer’s primary association.

The linguistic principles of semantic shift and semantic broadening confirm the dual-function argument. The notion of semantic shift provides the foundation for the genericide doctrine. Words do not always retain their original meaning, adding new meanings and shedding archaic ones, resulting in the meaning of a word shifting so that its meaning differs from its original semantic sense.¹³⁹ Thus, a trademarked term may undergo a shift from indicating a source to referring to a category of products, losing its original sense in the process.

However, a word meaning may change without losing its original sense, a process called semantic broadening. As Professor Fromkin has noted, “When the meaning of a word becomes broader, it means everything it used to mean and more.”¹⁴⁰ Simply because a trademarked term brings on a broader generic sense does not mean it loses its relevance to speakers of the language. The generic sense may overtake the trademarked one in the minds of the consumers, resulting in a loss of trademark rights, or the term could remain with two senses indefinitely. In this circumstance, the court must determine which sense predominates.

Since a trademark may serve a dual function, courts should not look to linguistic data to prove the primary significance to consumers since a speaker may actively use a trademarked term generically while continuing to associate the term primarily with the trademark owner. In other words, courts should not confuse majority usage and primary significance. Relying solely on evidence of majority usage amount to an abandonment of the primary significance test. Similar to the Commissioner’s error in *Otis*

137. See S. REP. NO. 98-627, 5 (1984), as reprinted in U.S.C.C.A.N. 5718, 5722.

138. *Elliott v. Google Inc.*, 45 F. Supp. 3d 1156, 1162 (D. Ariz. 2014) (relying on statements from the Senate Report).

139. VICTORIA FROMKIN, ROBERT RODMAN & NINA HYAMS, AN INTRODUCTION TO LANGUAGE 478 (8th ed. 2007).

140. *Id.* at 477; Ronald R. Butters & Jennifer Westerhaus, *Linguistic Change in Words one owns: How Trademarks Become “Generic,”* in STUDIES IN THE HISTORY OF THE ENGLISH LANGUAGE II: UNFOLDING CONVERSATIONS (Anne Curzan & Kimberly Emmons eds. 2004) (“Genericide can be viewed as a subcategory of broadening, similar therefore to the process that has affected scores of English words—for example, *dog*, which at one time referred to a specific kind of *canis familiaris* rather than to dogs in general.”).

Elevator Co., when a court ties consumer perception to usage, it fails to take into account a mark's potential dual function. Thus, courts ought to be careful not to credit usage as establishing more than it is capable of proving.

This is enhanced by the fact that when courts fail to distinguish between majority usage and primary significance, courts are often subverting the very policy goals upon which trademark law is built. In other words, if a majority of the public uses a trademarked term generically in non-purchasing decisions but recognizes a trademark's source-identifying function at the point of purchase, the policy rationales set forth by Congress and the academic literature would disfavor a finding of genericism. That is, the policy rationales for trademarks generally are in full force when the majority usage is generic but the primary significance of the term is the specific trademarked brand.

This is illustrated by the policies Congress explained when it passed the Lanham Act. The legislative body noted its desire 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."¹⁴¹ Trademark law was supposed to help distinguish products from one another. Consumers could rely, for instance, on getting genuine Kleenex brand tissues when the box includes the term Kleenex.

But when competing companies are allowed to use the same term to identify their products, consumers who are unaware that the mark no longer performs a source-identifying function likely will not "get the product which [they] ask for and want[] to get."¹⁴² As Judge Posner noted, discarding trademark as generic "may confuse consumers who continue to associate the trademark with the owner's brand when they encounter what they thought a brand name on another seller's brand."¹⁴³

Further, Congress wished to ensure that, "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."¹⁴⁴ Congress did not wish competitors to take advantage of another company's advertising efforts by stripping the trademark owner of its rights when the mark reached the level of being a household name. If consumers still identify the mark with the brand and distinguish between the trademarked product and others at the point of the purchase, stripping trademark protection simply because the generic sense is the majority *usage* would only "penalize[] the trademark's owner for his success in making the trademark a household name."¹⁴⁵

This is valid especially with trademarks that gain enough popularity that the public

141. S. REP. NO. 79-1333, at 3 (1946).

142. *See id.*

143. *Ty Inc. v. Softbelly's Inc.*, 353 F.3d 528, 531 (7th Cir. 2003) (asserting that if even ten percent of consumers continued to associate the trademark with a specific source it could lead to serious consumer confusion). As noted above, one example of Judge Posner's argument is the term "Webster's," as in Webster's Dictionary. The successors to Noah Webster produced the most recognized dictionary for decades, but in the late 1800s and early 1900s, the term Webster's entered the public domain because the public began to associate the term with dictionaries generally. However, consumers still, a century later, are confused about the issue, assuming that one Webster's exists, when in actuality any dictionary maker may use the term and the successor to the original Webster's Dictionary is now called Merriam-Webster's.

144. S. REP. NO. 79-1333, *supra* note 18, at 3.

145. *Ty Inc.*, 353 F.3d at 531. Judge Posner held that declaring a trademark generic should only occur when a "trademark has gone so far toward becoming the exclusive descriptor of the product that sellers of competing brands cannot compete effectively without using the name to designate the product they are selling." *Id.*

begins to expropriate the trademark as the generic name. These companies often have spent years developing their brands and their product has become the most popular either because the trademark owner created the product or simply because the trademark owner created the best product. And for these efforts they should retain trademark protection for as long as consumers still identify the trademark with a specific product.

And the policy rationales identified by courts and academics are similarly supported when trademarks are protected when consumers continue to recognize a trademark's brand-identifying function—despite majority usage being generic. First, when consumers still recognize the significance of a trademark, there is a reduction in consumer search costs. As Judge Easterbrook noted, “Easily identified trademarks reduce the costs consumers incur in searching for what they desire, and the lower the costs of search the more competitive the market.”¹⁴⁶ Thus stripping trademark protection when consumers continue to rely on the mark—even when those same consumers use the term generically in non-purchasing scenarios—increases the transaction costs associated with buying a product. The signals consumers use to reduce their search costs (in deciding which product to purchase) will be absent because more than one product may bear the previously trademarked term.

Second, a finding of genericism can disadvantage consumers because trademark owners will no longer have the same incentive to maintain a consistently high-quality product. Since trademarks identify a brand and encourage brand loyalty, which incentivizes the trademark owner to produce a consistent quality product, the trademark is a reflection of the producer's reputation for quality.¹⁴⁷ But when other products can carry the same trademark that consumers once regarded as a mark of a certain quality, the producer no longer has the same incentives.¹⁴⁸ Majority usage does not get to this problem. Only primary significance does.

This policy rationale has no significance if consumers genuinely do not understand that a trademark functions as a source-identifying mark (because consumers are not crediting the trademark owner's reputation for quality if the consumer does not recognize the mark as identifying a single producer). But if consumers do associate a mark with its producer—the trademark owner being consumers' primary association, even if consumers use the term generically in non-purchasing situations—then stripping the protections trademarks enjoy can hurt consumers. This is because without trademark protection, the former trademark owner's incentives for high quality are lessened because competitors

146. *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1429 (7th Cir. 1985) (noting also that “[b]y identifying the source of the goods, [trademarks] convey valuable information to consumers at lower costs. . . . A trademark also may induce the supplier of goods to make higher quality products and to adhere to a consistent level of quality”). Judge Easterbrook also noted that “[t]he value of a trademark is in a sense a ‘hostage’ of consumers; if the seller disappoints the consumers, they respond by devaluing the trademark. The existence of this hostage gives the seller another incentive to afford consumers the quality of goods they prefer and expect.” *Id.* at 1430 (footnote omitted). But if other sellers disappoint consumers who associate a trademark with the original trademark owner, then the trademark is no longer hostage to the consumer and the incentives for high quality dissipate.

147. *See id.* (“If the seller provides an inconsistent level of quality, or reduces quality below what consumers expect from earlier experience, that reduces the value of the trademark.”).

148. Granted, a company could recoup those losses and regain consumer loyalty if it can adequately distinguish itself from its competition. But this likely takes time, and in the interim that company's product is just another brand among various others that seem to be the same quality and bearing the same previously-trademarked term.

can produce a lower-quality product cheaper but still trade on the former trademark owner's good name and reputation.

In addition, the policy goals behind the genericism doctrine are not supported when courts credit majority usage and ignore primary significance, except in a narrow circumstance. The policy undergirding the genericide doctrine is usually framed as an issue of competition. When the public no longer associates a trademark with a specific brand, then it would have anticompetitive effects on the market for one company to monopolize the market simply because it is the only company that can use the trademarked term. As Judge Posner has noted, "if no other words have emerged as synonyms it may be difficult for a seller forbidden to use [a trademark] to communicate effectively with consumers."¹⁴⁹ In other words, as most scholars will concede, canceling a trademark because of genericism certainly has its place.¹⁵⁰ And that place is when consumers genuinely no longer understand the source-identifying function a trademark performs.

But unless there is no alternative generic form of the trademarked term, protecting a trademark does not confer a monopoly when consumers generally use the term generically in some circumstances but continue to recognize the mark as their primary association. And most trademarks have an additional generic form that competitors may use: Google (perform an online search), Kleenex (tissue), Xerox (photocopy), Crock-pot (slow cooker), and Band-Aid (bandage). Thus, when a court credits majority usage as controlling without ensuring that the primary significance of the term has also become generic, in each of the examples in this paper, the court would be stripping the trademark owner of protection without equal competitive benefits advancing the market generally.

Granted, critics of distinguishing between majority usage and primary significance argue that majority usage is the only accurate proxy for actual knowledge. One scholar has acknowledged the possibility that "even though [a person] calls all copiers 'xeroxes,' she knows deep down that Xerox is a particular brand of copier."¹⁵¹ But the problem with differentiating between knowledge and usage, argues Professor Greene, "is a general one with subjective tests in various areas of the law; how can we ever really know what someone's level of knowledge is, or what the contents of their brain are?"¹⁵² He continues that "[i]n general, use is a good proxy for knowledge in large part because people in most contexts will not be 'lying' about how to properly use a particular term."¹⁵³

While Professor Greene's critique has merit, because subjective intent is difficult to

149. *Ty Inc.*, 353 F.3d at 533 (emphasis deleted).

150. See Vincent N. Palladino, *Genericism Rationalized: Another View*, 90 TRADEMARK REP. 469 (2000) (arguing that trademark law needs more stringent standards to protect against unwarranted genericide but also conceding that "the genericness doctrine prohibits exclusive appropriation by one party of a term that others need to use in order to compete in a market for goods or services, irrespective of what purpose trademarks once served, now serve or may someday come to serve"); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 191 (2003) ("The monopoly resulting from the appropriation of a generic name would be described as a product monopoly but is more accurately a language monopoly. Unless the owner of the generic name were the lowest-cost producer . . . he would license the use of the name to competitors and receive rents in the form of licensing fees."); MCCARTHY, *supra* note 45, AT § 12:2 (4th ed.) ("To grant an exclusive right to one firm of use of the generic name of a product would be equivalent to creating a monopoly in that particular product, something that the trademark laws were never intended to accomplish.").

151. Timothy Greene, *Trademark Hybridity and Brand Protection*, 46 LOY. U. CHI. L.J. 75, 103 (2014).

152. *Id.*

153. *Id.*

prove in any context, his argument misses the point for two reasons. First, courts should not discount usage as a means to proving primary significance because people might lie about how they use a particular term. Courts should not rely on majority usage because usage does not necessarily track knowledge. In other words, a proxy remains a useful concept only as far as it accurately reflects the concept it purports to predict. And majority usage has the potential to greatly underestimate the level of trademarked significance.

Professor Greene's critique misses its mark because the issue is not that a consumer might use a trademarked term generically but "knows in her heart of hearts" that the term also refers to a brand.¹⁵⁴ The Lanham Act requires more than mere awareness of the brand. The primary significance test is the statutory test precisely because consumers likely use a term generically, at least under certain circumstance, even when they associate the term predominately with a particular brand. Linguistic data cannot distinguish between those two instances. We do not expect people to lie. But we also do not expect people to always use a term consistently with their conception of the term's primary significance.

Second, precisely because we expect that "people in most contexts will not be 'lying' about how to properly use a particular term,"¹⁵⁵ there are ways to determine primary significance without resorting to usage data. For instance, in *Elliott*, evidence from various surveys were introduced, and each survey gave consumers the chance to respond to how they ordinarily use Google as a verb, either to search for information using the Google search engine or using any search engine.¹⁵⁶ The subjective intent problem is circumvented by allowing consumers to voice their perception of a term. While some proxy evidence may aid in showing the public's predominate conception of a term, the proxy indicator must accurately predict the primary significance. Since linguistic evidence comes well equipped to determine majority usage but ill equipped to determine the significance of a term to the consuming public, majority usage proves a poor proxy.

VI. CONCLUSION

Linguistic tools have the air of objectivity, and for this reason courts have often employed them to demonstrate that a once-recognized trademark has become generic. Dictionary entries especially are revered by some courts as the epitome of objectivity, allowing courts to take pulse of the public's perception of a trademarked term. Examples taken from newspapers and magazines have also persuaded courts that a term has lost its distinctiveness as a source-identifying mark. While courts ought to employ these linguistic tools to establish that the generic sense of a term is linguistically permissible, courts should not, as courts have previously done, use dictionary definitions and media usage to prove more than a word's range of possible meanings.

Corpus linguistics, however, may prove more beneficial, especially to companies seeking to protect their trademarks. Trademark owners may show that in a random sample of naturally occurring language, the majority of the uses indicate the trademark's proprietary sense. In this way, companies may show, despite the fact that dictionary definitions and media usage prove that the trademark has a generic sense, the primary

154. *See id.*

155. *Id.*

156. *Elliot v. Google Inc.*, 45 F. Supp. 3d 1156, 1166–70 (D. Ariz. 2014).

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significance of a term references the producer rather than a general product.

Yet, despite corpus linguistics' empirical methods, it cannot conclusively prove a term's genericness because linguistic data only includes examples of usage. The Lanham Act, however, requires a showing of primary significance. Courts should maintain majority usage and primary significance as distinct concepts and, in this way, should reclaim the primary significance test.