# Trademark Law's Theory of the Image: An Empirical Investigation

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We live in a world in which we are running out of competitively-effective word marks. There is both depletion and congestion. We also live in an ever increasingly visual world. For both of these reasons, businesses are turning more and more to image marks. Trademark doctrine and practice is unprepared for this turn to images for at least three critical reasons, which we explore through an empirical lens by studying U.S. trademark registration applications and registrations for images over time.

First, as we show, the rates of depletion and congestion of image marks generally and within classes are growing, raising significant concerns for trademark law and policy. Second, a trademark system with high numbers of image marks needs a good metric to assess visual similarity, so as to evaluate likelihood of consumer confusion. The trademark system lacks such a metric. The PTO relies on an elaborate system of design search codes to characterize the visual components of a mark and uses that to help suss out applications that are confusingly-similar to existing registration. While the search code system is a noble effort to make images searchable and comparable, it is highly formalistic, prone to error and abuse, and high maintenance. While courts do not rely on this search code system in assessing image mark similarity in the context of trademark infringement litigation, they also lack a robust method for assessing visual similarity. We think a better-developed framework for assessing visual similarity in both the PTO and courts is necessary. We explain why such a framework may be best achieved through the assistance of artificial intelligence tools to measure visual similarity, demonstrate how such tools may function, and consider how courts may assess their validity.

Third, to accurately assess protectability and scope, trademark law also needs a good framework for measuring distinctiveness. Trademark law's well-established approach to distinctiveness is centered on the Abercrombie spectrum, which developed in the context of word marks. It is perhaps not surprising that it has not been straightforward to port over and use for image marks. It is in that context that the Seabrook test for distinctiveness was developed. Yet Abercrombie and Seabrook are each grounded in different understandings of distinctiveness. Abercrombie relies on the semantic connection between text used in a mark and the type of good or service for which it signifies source, thereby measuring source distinctiveness. By contrast, Seabrook assesses how common an image is in the relevant category of goods and services, thereby measuring differential distinctiveness. We argue that the Seabrook test does not sufficiently measure source distinctiveness, which is critical to trademark protectability and scope. As with the assessment of visual similarity, we consider and demonstrate the extent to which artificial intelligence tools can assist in assessing the source distinctiveness of image marks.