

The Arbitrary Myth

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Trademark law exalts the “arbitrary” mark—common words used in unfamiliar contexts, like Apple for computers or Amazon for retail—as inherently strong and deserving of heightened protection. Doctrinally grouped near the fanciful apex of the Abercrombie spectrum, arbitrary marks are presumed to be nearly as distinctive as entirely invented terms like Kodak or Xerox. But this Article challenges that premise, contending that the privileged status of arbitrary marks is based less on empirical or linguistic reality than a conceptual sleight of hand.

Rather than functioning like fanciful marks, arbitrary marks operate through the rhetorical device of catachresis: a metaphorical displacement of language that imbues familiar terms with new, often symbolic meaning—which requires consumers to make a conceptual leap. Once this metaphorical structure is acknowledged, the sharp doctrinal boundary between arbitrary marks and suggestive marks begins to collapse. Compounding this rhetorical reappraisal is empirical evidence: arbitrary marks have been found to underperform in consumer recall, recognition, and association relative to descriptive, suggestive, and fanciful marks. These findings destabilize the long-held assumption that arbitrary marks are presumptively strong as source identifiers.

Bridging linguistic theory, semiotics, and marketing science, this Article calls for a recalibration: either reclassifying arbitrary marks as doctrinally closer to suggestive marks or at least encouraging more nuanced, fact-sensitive inquiries into their actual distinctiveness on a case-by-case basis. More broadly, it questions the internal coherence of the Abercrombie spectrum itself, arguing that trademark law’s most relied-upon taxonomy may be as arbitrary as the marks it purports to elevate.