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Is the Monopoly Theory of Trademarks Robust or a Bust?

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IS THE MONOPOLY THEORY OF TRADEMARKS ROBUST OR A BUST?

*Harold R. Weinberg**

TABLE OF CONTENTS

I.	INTRODUCTION	139
II.	POSTULATES ONE AND TWO: THE NATURE OF TRADEMARKS	140
A.	TRADEMARK MONOPOLIES	141
B.	ANTITRUST MONOPOLIES	146
C.	ANTICOMPETITIVE AND PROCOMPETITIVE TRADEMARK MODELS	147
D.	SUMMARY	151
III.	POSTULATE THREE: THE RELATIONSHIPS BETWEEN TRADEMARK LAW, ANTITRUST LAW, AND THE "COMPETITIVE MANDATE"	154
A.	HISTORY	155
B.	POLICY	156
C.	SUMMARY	157
IV.	POSTULATE FOUR: ECONOMIC METHODOLOGY IN TRADEMARK LAW AND ANTITRUST LAW	158
A.	TRADEMARK METHODOLOGY	159
B.	ANTITRUST METHODOLOGY	160
C.	SUMMARY	161
V.	POSTULATE FIVE: TRADEMARKS IN THE ANTITRUST DOCK	163
A.	MONOPOLIZATION	163
B.	TYING	166
C.	SUMMARY	169
VI.	POSTULATE SIX: "ANTITRUSTIZING" TRADEMARK LAW	170
A.	FUNCTIONALITY VARIATION	171

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B. GENERICITY AND INFRINGEMENT VARIATIONS	174
C. SUMMARY	176
VII. CONCLUSION	178

I. INTRODUCTION

The “monopoly theory of trademarks” would “antitrustize” trademark law by incorporating antitrust legal precedent, economics, policies, reasoning, and terminology. The theory is comprised of six interrelated postulates contained in trademark law and scholarship.¹ The postulates are (1) trademarks are monopolies;² (2) trademark monopolies are like illegal antitrust monopolies because both harm competition;³ (3) trademark law is like antitrust law because both value competition;⁴ (4) trademark law is like antitrust law because both apply economic methodology to product markets;⁵ (5) an antitrust lens can help one understand trademarks and trademark law;⁶ and (6) an antitrust lens can help one decide whether a trademark is functional, generic, or infringed. The sixth postulate “antitrustizes” important recurring trademark issues. It is advanced by numerous legal scholars,⁷ and has gained traction in the courts.⁸

¹ I use “trademark” to mean the full range of source identifiers from word marks to “trade dress.” Trade dress includes a product’s total image, overall appearance, size, shape, color, texture, graphics, configuration, design, look, or packaging. See *Two Pesos, Inc. v. Taco Cabana Int’l, Inc.*, 505 U.S. 763, 765 n.1, 23 U.S.P.Q.2d (BNA) 1081, 1082 n.1 (1992). “Trademark law” refers to the law applicable to trademark infringement. It is the chief focus of the monopoly theory of trademarks.

² See, e.g., Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367 (1999).

³ See, e.g., *id.* at 427-31 (employing antitrust precedent to illustrate how trademarks yield monopoly power).

⁴ For example, *Mktg. Displays, Inc. v. Traffix Devices, Inc.*, 200 F.3d 929, 940-41, 53 U.S.P.Q.2d (BNA) 1335, 1344 (6th Cir. 1999), states that “[a]s with intellectual property and competition law generally, the proper question is the overall effect on competition if a particular trade dress claim receives protection, not the prospects of any particular competitor when that protection is granted.” *Marketing Displays* was reversed by *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 58 U.S.P.Q.2d (BNA) 1001 (2001) (emphasizing competition, but not considering the relationship between trademark law and antitrust law).

⁵ See, e.g., *A & H Sportswear, Inc. v. Victoria’s Secret Stores, Inc.*, 237 F.3d 198, 213 n.7, 57 U.S.P.Q.2d (BNA) 1097, 1104 n.7 (3d Cir. 2000) (stating that antitrust law product market definitions track trademark determinations of when products compete). “Economic methodology” means economic terminology, evidence, reasoning, and mathematical tools; and “product markets” means markets for good or services.

⁶ See, e.g., Lunney, *supra* note 2, at 482. “Antitrust lens” means antitrust law and economics.

⁷ 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 7:65 (4th ed. 1996) (suggesting that an antitrust lens can help one decide whether a trademark is functional); 2 *id.* § 12:24 (suggesting that an antitrust lens can help one decide whether a trademark is generic); 4 *id.* § 24:23 (suggesting that an antitrust lens can help one decide whether a trademark is infringed); Anna F. Kingsbury, *Market Definition in Intellectual Property Law: Should Intellectual Property Courts Use an Antitrust Approach to Market Definition?*, 8 MARQ. INTELL. PROP. L. REV. 63, 66-75, 91 (2004) (suggesting that antitrust market definition be used in trademark law); Graeme B. Dinwoodie, *The Death of Ontology: A Teleological Approach to Trademark Law*, 84 IOWA L. REV. 611, 726-27 (1999) (stating that antitrust law can inform the question of whether a trademark is functional); M.A.

I examine each of the postulates to determine whether the monopoly theory of trademarks is robust, consistent with what we know about trademarks and their effects in product markets, and capable of enhancing our understanding of what currently is uncertain or unknown; or whether it is a bust, failing to meet these criteria. Parts II through VI of the Article evaluate the postulates. Part VII concludes that the monopoly theory is a bust.

II. POSTULATES ONE AND TWO: THE NATURE OF TRADEMARKS

Postulate One claims that trademarks are monopolies and Postulate Two claims that trademark monopolies are like illegal antitrust monopolies because both harm competition in product markets. One might intuit that these postulates are correct. Americans traditionally abhor monopoly, and monopoly's "bad odor" pervades both trademark law and antitrust law.⁹ American courts have for centuries referred to trademarks as monopolies.¹⁰ Congress made it

Cunningham, *Utilitarian Design Features and Antitrust Parallels: An Economic Approach to Understanding the Functionality Defense in Trademark Litigation*, 18 HASTINGS COMM. & ENT. L.J. 569, 582-89 (1996) (advocating the use of antitrust market definition in determining trademark functionality); Diana E. Pinover, *Aesthetic Functionality: The Need for a Foreclosure of Competition*, 83 TRADEMARK REP. 571 (1993) (arguing that antitrust market analysis can help decide whether a trademark is aesthetically functional); Christopher J. Kellner, Note, *Rethinking the Procedural Treatment of Functionality: Confronting the Inseparability of Useful, Aesthetically Pleasing, and Source-Identifying Features of Product Designs*, 46 EMORY L.J. 913, 955 (1997) (suggesting that antitrust law could help decide whether trade dress is aesthetically functional); John F. Coverdale, Note, *Trademarks and Generic Words: An Effect-on-Competition Test*, 51 U. CHI. L. REV. 868, 884-91 (1984) (suggesting that antitrust market definition can help one decide whether a trademark is generic).

⁸ See, e.g., *A & H Sportswear*, 237 F.3d at 213 n.7 (suggesting that the antitrust product market definition can help one decide whether a trademark is infringed); *Anti-Monopoly, Inc. v. Gen. Mills Fun Group*, 611 F.2d 296, 303 n.4, 204 U.S.P.Q.2d (BNA) 978, 983 n.4 (9th Cir.1979) (suggesting that cross-elasticity of demand can help one decide whether a trademark is generic); *Worthington Foods, Inc. v. Kellogg Co.*, 732 F. Supp. 1417, 1436-39, 14 U.S.P.Q.2d (BNA) 1577, 1590-93 (S.D. Ohio 1990) (applying antitrust product market analysis in a trademark infringement case and indicating willingness to consider cross-elasticity of demand); *Trak Inc. v. Benner Ski KG*, 475 F. Supp. 1076, 1079, 206 U.S.P.Q. (BNA) 226, 230 (D. Mass. 1979) (considering cross-elasticity of demand in deciding whether a trademark is generic). But see *A.J. Canfield Co. v. Honickman*, 808 F.2d 291, 303 n.18, 1 U.S.P.Q.2d (BNA) 1364, 1374 n.18 (3d Cir. 1986) (not endorsing an antitrust approach to trademark issues due to the lack of a method to apply it).

⁹ See *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 324 (1963) (stating that the Sherman Act "embodies perhaps the most basic economic policy of our society, basic and continuing: abhorrence of monopoly"); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 224 (1973) (referring to the "bad odor").

¹⁰ See, e.g., *Amoskeag Mfg. Co. v. Spear*, 2 Sand. 599 (N.Y. Sup. Ct. 1849) (stating that a trademark could "create a monopoly unjust to other manufacturers, and, of necessity, prejudicial to the public").

illegal to monopolize in the 1890 Sherman Antitrust Act.¹¹ It recognized that trademarks might be instruments of monopoly in the 1946 Lanham Act.¹² Legal scholars often refer to trademarks as monopolies and liken them to antitrust monopolies.¹³

Do Postulates One and Two enhance our understanding of trademarks and their effects in product markets? To decide, it is necessary to examine three issues. What is the nature of a trademark monopoly? Is it like an antitrust monopoly? And does the term “monopoly” fully capture the nature of trademarks and how they affect product markets?¹⁴

A. TRADEMARK MONOPOLIES

The leading trademark monopoly case is *Canal Co. v. Clark*.¹⁵ The primary issue before the Supreme Court was whether coal producers had the exclusive right to use the words “Lackawanna coal” for coal from Pennsylvania’s Lackawanna Valley.¹⁶ The producers did not coin the word “Lackawanna,” which was employed for many years as a description of that region and its coal deposits. The coal producers sought to enjoin a coal dealer from using the Lackawanna mark. The dealer’s coal also came from the Lackawanna Valley and was essentially identical to the producers’ coal.

The Court affirmed that the Lackawanna mark did not distinguish the producers’ coal and that they were not entitled to an injunction. Exclusive rights in the mark “would practically give [them] a *monopoly* in the sale of any goods other than those produced” by them with the result that “the public would be injured rather than protected, for competition would be destroyed.”¹⁷ If the producers could appropriate a geographical name, then the result would be

¹¹ See *infra* Parts III.A-B (discussing the history and policy of the Sherman Antitrust Act).

¹² See 15 U.S.C. § 1115(b)(7) (2000) (making available an antitrust misuse defense when an incontestable federally registered trademark is used to violate the antitrust laws).

¹³ See *supra* note 7. But see Beverly W. Pattishall, *Trade-Marks and the Monopoly Phobia*, 50 MICH. L. REV. 967, 970 (1952) (arguing that misconceptions underlie the idea that trademarks create monopolies).

¹⁴ Like the postulates, my discussion of trademark and antitrust monopolies focuses on product markets and ignores geographic markets.

¹⁵ 80 U.S. 311 (1871). The Court regarded *Canal Co.* as presenting its philosophy of trademark law, repeatedly quoting its discussion of trademark monopolies. See, e.g., *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 220 U.S. 446, 453-54 (1911) (quoting *Canal Co.* when discussing a descriptive mark).

¹⁶ *Canal Co.*, 80 U.S. at 320-22.

¹⁷ *Id.* at 323 (emphasis added).

“mischievous *monopolies*” that would “greatly embarrass trade, and secure exclusive rights to individuals in that which is the common right of many.”¹⁸

Canal Co. acknowledged that exclusive trademark rights would afford the coal producers considerably less than a complete monopoly that excluded all competitors from the Lackawanna coal market. However, it would “practically” be a monopoly that interferes with trade, even though it would not entirely eliminate competition. The Court employed the term “monopoly” as shorthand for legally-forbidden trademark rights, and to emphasize that some words belong in the public domain. The monopoly references were not necessary for the Court to conclude, as it ultimately did, that there was no express or implied false representation when competitors used the Lackawanna mark.¹⁹

The monopoly theory of trademarks typically follows a pattern of rise and then fall.²⁰ *Canal Co.* represented the zenith for the Supreme Court’s use of “monopoly” in reference to trademarks. It soon began to limit the scope of trademark rights without resorting to the “monopoly” label.²¹ It also acknowledged that trademarks do not confer a patent-like monopoly “in a proper sense,” but merely are a means to protect a producer’s good will.²² However, the Court occasionally repeated its concern that a trademark might afford monopoly rights.²³

The nadir for the Supreme Court’s portrayal of trademarks as monopolies came in *Park N Fly, Inc. v. Dollar Park and Fly, Inc.*²⁴ *Park N Fly* focused upon

¹⁸ *Id.* at 324 (emphasis added).

¹⁹ *Id.* at 328.

²⁰ See *infra* Part V (discussing antitrust litigation focusing upon trademarks).

²¹ See, e.g., *Prestonettes, Inc. v. Coty*, 264 U.S. 359 (1924) (limiting trademark rights without employing the term monopoly despite that term’s use in both parties’ briefs).

²² *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 98 (1918). See also *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 335-36, 39 U.S.P.Q. (BNA) 402, 409 (1938) (stating that trademark rights do not confer a monopoly on the use of words, but merely protect against the unfair use of the mark by a competitor); *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205, 53 U.S.P.Q. (BNA) 323, 325 (1942) (describing a trademark as a “merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants”).

²³ Between 1920 and 1985, the Court occasionally cautioned against enforcing trademark monopolies. See, e.g., *William R. Warner & Co. v. Eli Lilly & Co.*, 265 U.S. 526, 532 (1924) (“[T]he right to which respondent is entitled is that of being protected against unfair competition, not of having the aid of a decree to create or support, or assist in creating or supporting, a monopoly . . .”). See also *Steele v. Bulova Watch Co.*, 344 U.S. 280, 283, 95 U.S.P.Q. (BNA) 391, 392 (1952) (referring to the Lanham Act as “controversial” and citing law review articles discussing trademark monopolies).

²⁴ 469 U.S. 189, 224 U.S.P.Q. (BNA) 327 (1985). The Court had previously signaled in an antitrust case that the trademark-equals-monopoly equation was in decline. See *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377 (1956). It acknowledged the economic theory of

trademark incontestability under the Lanham Act, which provides that a federally registered trademark remains vulnerable to cancellation for five years upon any ground that would have prevented the mark's registration in the first place, including that the mark is merely descriptive.²⁵ If the registrant establishes to the satisfaction of the Patent and Trademark Office that it continuously used the mark for five consecutive years and meets certain other requirements, then the mark becomes incontestable. *Park 'N Fly* considered whether an infringement action brought by the holder of an incontestable trademark could be defended upon the grounds that the mark is merely descriptive. The trademark (the logo of an airplane and the words "Park 'N Fly") certainly described qualities or characteristics of the services provided under it (airport parking). However, eight Justices concluded that the defense was not available.

This majority observed that Congress intended for trademarks to receive strong national protection because they foster competition, promote the maintenance of product quality, and enable consumers to distinguish among competing producers.²⁶ The "Park 'N Fly" mark's incontestable status dictated that the Court could neither inquire into whether the mark lacked secondary meaning when registered, nor could it consider whether post-registration developments rendered the mark merely descriptive.²⁷ If the mark was merely descriptive and enabled the registrant to engage in "commercial monopolization" of descriptive language, then an alleged infringer's proper defense was that the plaintiff used the mark to violate the federal antitrust laws.²⁸ As we will see, this defense is not likely to succeed.²⁹

Park 'N Fly's majority opinion implicitly suggests that the term "monopoly" as applied to trademarks is meaningful only when it refers to an antitrust monopoly. In contrast, the dissent expressed concern that "monopoly privileges" should not go to the user of a descriptive mark lacking secondary meaning.³⁰ It

monopolistic competition that each producer of a trademarked nonstandardized product (e.g., Acura automobiles) has some power over the price of its product. *Id.* at 392-93. However, it stated that this theoretical power does not necessarily amount to illegal monopoly power for antitrust purposes.

²⁵ *Park 'N Fly*, 469 U.S. at 194-95. The Act's current language concerning incontestability is at 15 U.S.C. §§ 1064(3), 1065, 1115(b) (2000).

²⁶ *Park 'N Fly*, 469 U.S. at 193, 197-98.

²⁷ The Patent and Trademark Office initially denied the application for registration of the mark; subsequently, it granted registration without specifying whether secondary meaning had been established. *Id.* at 199 n.5. Justice Stevens's dissent was concerned that the registrant had not satisfied the secondary meaning requirement and that the record contained no evidence that the mark had ever acquired secondary meaning. *Id.* at 211.

²⁸ *Id.* at 201-02. This defense to incontestability resides at 15 U.S.C. § 1115(b)(7) (2000).

²⁹ See *infra* note 91 (discussing the misuse defense) and Part V.C (summarizing antitrust law's perspective on trademarks).

³⁰ *Park 'N Fly*, 469 U.S. at 216-18.

quoted from *Canal Co.* to support the conclusion that a mark's incontestable status does not preclude the defense that the mark is merely descriptive.³¹

Since *Park 'N Fly*, the Supreme Court has occasionally lapsed into trademark monopoly rhetoric.³² However, monopoly references were notably absent in *Wal-Mart Stores, Inc. v. Samara Bros., Inc.* and *TrafFix Devices, Inc. v. Marketing Displays, Inc.*³³ The Court recently held that a product design cannot be inherently distinctive and endorsed a functionality standard significantly limiting trademark protection for product designs. The two opinions evince the Court's strong desire to significantly limit trademark protection for trade dress.³⁴ However, they do not portray trademarks as monopolies. Nor do they echo the fusillade of monopoly and monopoly-power rhetoric discharged by briefs filed in the two cases.³⁵

That monopoly rhetoric reveals little of substance about trademarks is well illustrated by its lengthy and colorful usage in the lower courts. They describe trademarks as monopolies when considering the outer boundaries of enforceable trademark rights.³⁶ There are good trademark monopolies and there are bad

³¹ *Id.* at 216-20.

³² See, e.g., *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 165, 34 U.S.P.Q.2d (BNA) 1161, 1163 (1995) (referring to a monopoly in functional design features).

³³ Respectively, 529 U.S. 205, 54 U.S.P.Q.2d (BNA) 1065 (2000); and 532 U.S. 23, 58 U.S.P.Q.2d (BNA) 1001 (2001). Subsequent to *TrafFix*, the Supreme Court's only reference to trademark monopolies came as rhetorical flourish in *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 125 U.S. Ct. 542, 550, 72 U.S.P.Q.2d (BNA) 1833, 1838 (2004) (citing *Canal Co.* after stating that

[t]he common law's tolerance of a certain degree of confusion on the part of consumers [when fair use is a defense] followed from the very fact that . . . an originally descriptive term was selected to be used as a mark, not to mention the undesirability of allowing anyone to obtain a complete monopoly on use of a descriptive term simply by grabbing it first).

But cf. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33, 66 U.S.P.Q.2d (BNA) 1641, 1646 (2003) (referring to patent and copyright monopolies).

³⁴ Margreth Barrett, *Consolidating the Diffuse Paths to Trade Dress Functionality: Encountering TrafFix on the Way to Sears*, 61 WASH. & LEE L. REV. 79, 80-83 (2004) (characterizing the two cases as striking a blow against trademark protection for trade dress).

³⁵ See, e.g., Brief for the Petitioner at 45, *Wal-Mart Stores, Inc. v. Samara Bros., Inc.* 529 U.S. 205 (2000) (No. 99-150) (stating that trademark protection could create a perpetual monopoly); Brief for Private Label Manufacturers as Amicus Curiae in Support of Reversal of the Decision Below at 3, *Wal-Mart Stores, Inc.*, 529 U.S. 205 (No. 99-150) (stating that unfair competition law is not intended to grant monopoly power). A common theme in the briefs is that trademark law should not be employed to extend a patent "monopoly." See, e.g., Brief for the Petitioner at 3, 6, 11, 14, *TrafFix Devices*, 532 U.S. 23 (No. 99-1571). The proposition that a patent creates a monopoly is debatable. See generally Edmund W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 VAND. L. REV. 1727 (2000).

³⁶ See, e.g., *Car-Freshener Corp. v. S.C. Johnson & Son, Inc.*, 70 F.3d 267, 36 U.S.P.Q.2d (BNA) 1855 (2d Cir. 1995) (discussing fair use of trademarks).

trademark monopolies, a dichotomy reflecting judicial ambivalence towards trademarks and trademark law's historic ambivalence towards the competitive process.³⁷ Good trademark monopolies are beneficial or benign. The monopoly is merely the bundle of rights conferred by trademark law; most importantly, the right to bar infringement.³⁸ Of course, in that sense, all enforceable trademarks are good monopolies; they are "lawful monopolies" or legal "immunities from competition."³⁹ These monopolies are "partial" or "socially desirable."⁴⁰ Trademarks are bad monopolies when they are asserted in a manner contrary to trademark law or policy, or when a court determines that a mark should not be enforced.⁴¹ Then, the term "monopoly" is an antonym for socially beneficial competition.⁴² Courts emphasize that bad trademark monopolies are of potentially unlimited duration and apply a "choking hand" to competitors.⁴³ Bad trademark monopolies are targets of ridicule; they are belittled, epitaphs are hurled at them, and opprobrium is heaped upon them.⁴⁴

³⁷ See *infra* Part III.B (discussing trademark policies).

³⁸ See, e.g., *Standard Brands, Inc. v. Smidler*, 151 F.2d 34, 36, 66 U.S.P.Q. (BNA) 337, 339 (2d Cir. 1945) ("A trade-mark is not one in gross like a patent right but is a right of user in connection with a trade or business to designate the product to which the mark is applied in that trade or business.").

³⁹ *Eastern Wine Corp. v. Winslow-Warren, Ltd.*, 137 F.2d 955, 957, 57 U.S.P.Q. (BNA) 433, 435 (2d Cir. 1943) (indicating that trademark monopolies may be justified when they are appropriately limited in scope).

⁴⁰ *Standard Brands*, 151 F.2d at 42 (Frank, J., concurring). See, e.g., *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56-57, 43 U.S.P.Q.2d (BNA) 1161, 1165-66 (2d Cir. 1997) (stating that trademarks are non-exclusionary and do not confer a monopoly on goods or ideas); *Levi Strauss & Co. v. Blue Bell, Inc.*, 632 F.2d 817, 822 n.5, 208 U.S.P.Q. (BNA) 713, 717 n.5 (9th Cir. 1980) (junior user's argument that senior user is seeking a perpetual monopoly is "disingenuous" because the senior user has established secondary meaning and likelihood of confusion, and the senior's mark gives the public a reliable indication of source).

⁴¹ See, e.g., *TCPIP Holding Co. v. Haar Commc'ns, Inc.*, 244 F.3d 88, 100, 57 U.S.P.Q.2d (BNA) 1969, 1979 (2d Cir. 2001) (suggesting that enforceable trademark rights in a descriptive mark would confer a monopoly upon the mark's user); *Viacom, Inc. v. Ingram Enters., Inc.*, 141 F.3d 886, 890, 46 U.S.P.Q.2d (BNA) 1473, 1477 (8th Cir. 1998) (expressing concern that the senior user of a mark might obtain a complete monopoly in a common word with multiple meanings).

⁴² See, e.g., *Times Mirror Magazines, Inc. v. Las Vegas Sports News, L.L.C.*, 212 F.3d 157, 170, 54 U.S.P.Q.2d (BNA) 1577, 1586-89 (3d Cir. 2000) (Barry, J., dissenting) (discussing the need to strike an appropriate balance between free competition and the "virtual monopoly" rights that result from protecting trademarks against dilution).

⁴³ *Wilhelm Pudenz, GmbH v. Littlefuse, Inc.*, 177 F.3d 1204, 1207, 51 U.S.P.Q.2d (BNA) 1045, 1046-47 (11th Cir. 1999) (discussing the functionality doctrine).

⁴⁴ See, e.g., *Ambrosia Chocolate Co. v. Ambrosia Cake Bakery*, 165 F.2d 693, 697, 76 U.S.P.Q. (BNA) 157, 160 (4th Cir. 1947) ("[A] man of ordinary intelligence could easily devise a score of valid trade-marks in a short period of time."); *Cal. Fruit Growers Exch. v. Sunkist Baking Co.*, 166 F.2d 971, 973-75, 76 U.S.P.Q. (BNA) 85, 87-89 (7th Cir. 1947) (doubting that anyone who is intelligent would be confused by the junior user's use of the senior's mark, describing the senior's evidence

B. ANTITRUST MONOPOLIES

An illegal antitrust monopoly exists when a firm possesses monopoly power in a relevant market and acquired or retained that power through wrongful conduct.⁴⁵ It is not necessarily illegal for a firm to be the sole firm in a market, for it to have a large market share, or for it to price its output at a level that is both profitable and higher than the price that would prevail in a competitive market.⁴⁶

Monopoly power is difficult to identify and quantify, so the process of determining its presence is conducted with care. A rough proxy for a firm's monopoly power is its market share: the greater the market share, the greater the power, and vice versa.⁴⁷ Calculating a market share in itself raises a "plethora of uncertainties."⁴⁸ For example, reasonable minds may differ concerning whether a particular product should be included in the relevant product market (e.g., should canned iced tea be included in the soft drink market). Inclusion of the product may reduce the defendant's monopoly power; exclusion may overstate it.⁴⁹ Also, there are different ways to calculate market shares and the necessary information may be incomplete.⁵⁰ Elasticities of demand and supply also affect

concerning likelihood of confusion as "hocus-pocus," and stating that the senior's efforts to monopolize the food market were "unconscionable"). Antipathy towards the influential powers of advertising may underlie some monopoly references to trademarks. *See, e.g.,* Shredded Wheat Co. v. Humphrey Cornell Co., 250 F. 960, 962, 964 (2d Cir. 1918) (stating that "[t]he art of advertising spuriously reinforced a genuine demand [for the senior trademark user's product] by the power of reiterated suggestion" and cautioning against the creation of perpetual trademark monopolies).

⁴⁵ *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

⁴⁶ *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 405 (2004) (stating that monopoly power is not unlawful and may encourage risk taking). An illegal monopolist with monopoly power (like a legal one) can raise the price of its output to a profitable level that is higher than the price that would prevail in a competitive market. *See* HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* § 3.9 (2d ed. 1999) [hereinafter HOVENKAMP, *FEDERAL ANTITRUST POLICY*]. Government guidelines indicate that market power is the ability profitably to maintain prices above, or output below, competitive levels for a significant period of time. U.S. DEP'T JUSTICE & F.T.C. *GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY* § 2.2 (1995). Some formulations of illegal monopolization include an oft-criticized intent requirement. *See generally* 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATIONS* § 651a (rev. ed. 1996).

⁴⁷ *See* HOVENKAMP, *FEDERAL ANTITRUST POLICY*, *supra* note 46, §§ 3.1, 3.2. A producer with a large market share may be able to more effectively harm competition through exclusionary practices than a firm with a smaller market share. *See id.*

⁴⁸ *Id.* § 3.9.

⁴⁹ *See id.* § 6.2b.

⁵⁰ *See id.* §§ 3.7, 6.2b. Whether a firm's market share is rising or falling also may bear on its monopoly power. *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 n.11 (2d Cir.

monopoly power.⁵¹ There is a rule-of-thumb that the monopoly power requirement is satisfied when a firm has a market share in excess of 90%; it is “doubtful” that a 60 or 64% share satisfies it; and a 33% share is insufficient.⁵² The bare minimum market share necessary to establish monopoly power may be around 50%.⁵³

Antitrust courts are also circumspect when applying the conduct requirement for illegal monopolization. It can be very difficult to distinguish illegal conduct from acts furthering lawful competition.⁵⁴ Price cutting is a good example. It generally is commendable because lowering price is the essence of competition and benefits consumers. However, it is detrimental to the price cutter’s rivals if matching the low price harms their bottom lines or forces them out of business. Therefore, antitrust law provides a complex legal and economic regime for distinguishing between lawful price cutting and unlawful predatory pricing.⁵⁵

C. ANTICOMPETITIVE AND PROCOMPETITIVE TRADEMARK MODELS

Trademarks are both anticompetitive and procompetitive. I refer to models emphasizing trademarks’ anticompetitive qualities as “Anticompetitive TM Models.” Models emphasizing trademarks’ procompetitive qualities are “Procompetitive TM Models.”

Anticompetitive TM Models emphasize trademarks’ social costs.⁵⁶ They argue that a producer employs a trademark to differentiate its products to the detriment of competitors wishing to use the mark on identical products, but who are barred

1979) (stating that the jury could properly consider the defendant’s steep decline in market share). Monopoly power analysis may be especially challenging when differentiated products are involved. See ABA SECTION OF ANTITRUST LAW, MARKET POWER HANDBOOK 103 (2005). Differentiated products are typically focal points for the monopoly theory of trademarks. See *infra* Part II.C.

⁵¹ The former reflects the tendency of consumers to purchase less of a product as its price increases. The latter reflects the capability of competitors to sell to buyers who do not want to pay the monopolist’s price. See HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 46, §§ 1.1a, 3.1b.

⁵² See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424, 65 U.S.P.Q. (BNA) 6, 14 (2d Cir. 1945).

⁵³ See HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 46, § 6.2a. The Sherman Act offense of attempt to monopolize also inquires into a relevant product market. A plaintiff may have to show the defendant possesses a market share in excess of 50%. See *id.* § 6.5b2.

⁵⁴ See *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (discussing the risk of “false positives”).

⁵⁵ See *infra* Part IV.B (illustrating antitrust methodology with a predatory pricing case).

⁵⁶ See Lunney, *supra* note 2, at 480-81. Professor Lunney’s work provides an exhaustive summary of this scholarship and insights concerning possible costs of trademark usage. My discussion of Anticompetitive TM Models summarizes his. Readers interested in the underlying intellectual history should consult Professor Lunney’s extensive footnotes.

from doing so by the producer's trademark rights.⁵⁷ Lacking the producer's trademark, the competitors' products are perceived by consumers as inferior substitutes for the producer's. Reduced competition provides the producer with the power to elevate the price of its product above the price that would prevail if the competitors had legal access to the producer's trademark.⁵⁸ In effect, trademark-based product differentiation reduces the benefits associated with competition and yields monopoly power to the mark's user.⁵⁹ This power is said to be "unjustified and inappropriate."⁶⁰

Anticompetitive TM Models also emphasize that if enough monopoly power attaches to a product due to trademark-generated differentiation, then the product may define its own product market.⁶¹ The trademarked product's producer becomes the sole firm in the market. Trademark-generated product differentiation also can be anticompetitive due to "lock in" that occurs when a consumer enamored with a trademarked product is unwilling to expend the time or effort necessary to identify and evaluate substitute products.⁶² The consumer does not search for or experiment with substitutes because the cost of doing so would be wasted if the substitutes turn out to be inferior to the trademarked product.⁶³ Some trademarked products may be so ingrained that consumers do not consider switching to substitutes. A strongly-ingrained trademark is an entrance barrier if it bars competitors from entering the market for the trademarked product.⁶⁴

Anticompetitive TM Models further suggest that the producer of a trademark-differentiated product may enjoy monopoly power due to "network effects."⁶⁵ Network effects represent the increased benefit that a consumer derives from

⁵⁷ Lunney, *supra* note 2, at 368-86. "Differentiated" products are products that are not identical, but are sufficiently similar so that consumers view them as substitutes. A typical example is the numerous brands of ready-to-eat breakfast cereals. See JEFFREY CHURCH & ROGER WARE, INDUSTRIAL ORGANIZATION: A STRATEGIC APPROACH 367-69 (2000).

⁵⁸ Differentiation may increase the cost for competitors seeking to develop a substitute product that consumers will accept as equivalent to the differentiated product, and may make it impossible to develop such a substitute. Lunney, *supra* note 2, at 434-35, 437.

⁵⁹ *Id.* at 372-73, 421-22. It also may increase the cost of producing the product itself if the trademark is a feature of the product's design. See *infra* Parts IV.A, VI.A (discussing how the functionality doctrine addresses this problem).

⁶⁰ Lunney, *supra* note 2, at 424-26, 439, 480, 485-86.

⁶¹ *Id.* at 426-27.

⁶² *Id.* at 428.

⁶³ *Id.* at 427-29.

⁶⁴ *Id.* at 486. A prospective entrant may hesitate to finance entry if product promotion costs will be wasted if entry fails. E. THOMAS SULLIVAN AND HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE: CASES, MATERIALS, PROBLEMS 662 (5th ed. 2003).

⁶⁵ Lunney, *supra* note 2, at 429-30.

using a product when there is an increase in the number of other consumers using the same product.⁶⁶ For example, if a consumer likes to play board games, then the consumer benefits from choosing a strongly trademark-differentiated game such as Monopoly because it is easier to locate playing partners than for a less popular game.⁶⁷ In addition, the producer of a trademark-differentiated product may enjoy “economies of scale.”⁶⁸ They exist when trademark-generated product differentiation enables the producer to expand its output while its average costs increase less than proportionally with the increased output.⁶⁹ If a producer enjoys falling average costs to the extent that the market can support only that producer, then the producer has a “natural monopoly.”⁷⁰

Procompetitive TM Models paint a very different picture. They emphasize that trademarks generally confer little monopoly power, enhance allocative and productive efficiency, and benefit consumers.⁷¹ These benefits come about through multiple interrelated mechanisms.

Markets work better when consumers employ information-laden trademarks to identify “best bargains.”⁷² If a product with a strong trademark is more expensive than a weaker brand substitute, then the price difference is likely due to consumer willingness to pay more for the strong brand because it reduces search costs and provides quality assurances.⁷³ Consumer decisions to purchase (or not to purchase) a trademarked product serve as “feedback” to the product’s producer concerning consumer preferences, and enable the producer to produce what consumers actually desire.⁷⁴ A producer reaping the benefits of good will

⁶⁶ Fax machines provide an example. They became more useful as additional consumers purchased them. 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 671 (1998).

⁶⁷ “Monopoly” is a federally registered word trademark for a real estate trading game composed of a board and movable pieces. United States Patent and Trademark Office, <http://www.USPTO.gov/main/trademarks.htm> (follow “SEARCH trademarks”; then type “monopoly”).

⁶⁸ Lunney, *supra* note 2, at 430.

⁶⁹ See generally G. BANNOCK, R.E. BAXTER & R. REES, THE PENGUIN DICTIONARY OF ECONOMICS 135 (1972).

⁷⁰ Lunney, *supra* note 2, at 429-30, 461-62.

⁷¹ See WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 172-73, 374 (2003).

⁷² See generally Nicholas S. Economides, *The Economics of Trademarks*, 78 TRADEMARK REP. 523, 525 (1988) (stating that a consumer’s choice becomes clear if a trademark helps identify the unobservable qualities of a product); Ralph H. Folsom & Larry L. Teply, *Trademarked Generic Words*, 89 YALE L.J. 1323, 1334-36 (1980) (discussing how trademarks reduce consumer search costs and make it more likely that consumers will be informed about substitute products). The fact that a producer advertises a trademark might, in itself, signal that the producer’s product is of high quality. See Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1690 (1999).

⁷³ LANDES & POSNER, *supra* note 71, at 168.

⁷⁴ See Lunney, *supra* note 2, at 432. Information concerning consumer preferences flows up the

attached to its trademark may expand its output and achieve more efficient production and distribution of the trademarked product.⁷⁵ A new producer of a trademarked product may find it easier to enter a new market and thereby enhance the market's competitiveness.⁷⁶ Trademark protection also may facilitate the marketing of new products that are attractive to consumers.⁷⁷

Procompetitive TM Models also emphasize that trademark protection may cause the producer of a patented product to price the product lower during the patent's term. This is because trademark usage during the patent term enables the producer to maintain brand loyalty after the patent expires.⁷⁸ Procompetitive TM Models also indicate that trademarks enhance efficiency and that superior efficiency is not an entrance barrier.⁷⁹ Rather, a trademark that provides a

chain of sale and distribution from consumers to producers. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (stating that distributors are important sources of information assuring that products reach consumers "persuasively and efficiently").

⁷⁵ *See* LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 298 (2000). Trademarks also may facilitate national or international sales by a single producer and market entry through franchising. *See Lemley, supra* note 72, at 1690. *Cf. New Kids on the Block v. News Am. Publ'g. Inc.*, 971 F.2d 302, 306 n.3, 23 U.S.P.Q.2d (BNA) 1534, 1536 n.3 (9th Cir. 1992) (stating that trademark protection prevents the overuse of resources while providing producers with incentives to create new combinations of resources).

⁷⁶ *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 775, 23 U.S.P.Q.2d (BNA) 1081, 1086 (1992) (suggesting that a lack of trademark rights might create "particular burdens on the startup of small companies"). Competition also may be enhanced through trademark usage because collusion is more difficult in a market characterized by differentiated products. *See HOVENKAMP, FEDERAL ANTITRUST POLICY, supra* note 46, § 12.7a (stating that firms in product-differentiated market have difficulty agreeing upon a cartel price).

⁷⁷ *See, e.g., Eastern Wine Corp. v. Winslow-Warren, Ltd.*, 137 F.2d 955, 958, 57 U.S.P.Q.2d (BNA) 433, 435 (2d Cir. 1943) (suggesting that trademark protection may induce producers to bring new products to the market); *Hartford House Ltd. v. Hallmark Cards, Inc.*, 647 F. Supp. 1533, 1540, 1 U.S.P.Q.2d (BNA) 1030, 1034 (D. Colo. 1986) (stating that the use of trademarks may result in greater consumer choice and thereby stimulate competition), *aff'd*, 846 F.2d 1268 (10th Cir. 1988). *See generally* Daniel J. Gifford, *The Interplay of Product Definition, Design and Trade Dress*, 75 MINN. L. REV. 769, 774 (1991) (stating that trademarks motivate producers to devise product variations that are attractive to consumers). *But cf. Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 34, 58 U.S.P.Q.2d (BNA) 1001, 1007 (2001) (stating that the Lanham Act does not exist to reward manufacturers for their innovation in creating a particular device).

⁷⁸ The combination of trademark and patent protection enhances overall social welfare. *See Gideon Parchomovsky & Peter Siegelman, Towards an Integrated Theory of Intellectual Property*, 88 VA. L. REV. 1455, 1479-80, 1493 (2002).

⁷⁹ An entrance barrier permits a firm incumbent in a market to earn greater profits than it would earn if additional firms entered and competed in that market. Entry may not take place if potential entrants are less efficient than the incumbent, so superior efficiency may be characterized as an entrance barrier. However, superior efficiency arguably is not an entrance barrier because many firms are more efficient than their potential rivals, and superior efficiency is to be encouraged rather than condemned. Whether efficiency is considered to be an entrance barrier may depend upon the

producer with a superior means to convey information concerning product source, characteristics, or qualities is analytically indistinguishable from a more efficient means to produce a product or to transport it to consumers.

Finally, Procompetitive TM Models emphasize that trademarks embody “information capital.”⁸⁰ The value of this capital is lost (and the incentive to invest in trademarks is reduced) if the law does not prevent the unauthorized use of trademarks resulting in likely consumer confusion.⁸¹ However, exclusive trademark rights are appropriate only to the extent that they result in net social benefits. Thus, trademark law is economically sound when it refuses to protect undeserving marks, e.g., those that are functional or generic.⁸²

D. SUMMARY

Postulate One claims that trademarks are monopolies, and Postulate Two claims that trademarks are like illegal antitrust monopolies because both harm competition. Both claims are weak. The term “monopoly” has multiple diverse meanings.⁸³ As applied to trademarks, it has minimal useful content. “Monopoly” may be employed to evoke trademarks’ roots in medieval English trade guilds possessed of government monopoly privileges.⁸⁴ This usage is often intended to tar trademarks as modern legal privileges.⁸⁵ “Monopoly” also may be employed to suggest the necessity of balancing a trademark user’s rights against

definition of entrance barrier being employed. See HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 46, § 1.6 (discussing how scale economies are entrance barriers under one prominent economic definition, but not under another). A firm generally does not violate the antitrust laws merely by being incumbent in a market surrounded by an entrance barrier. See *id.* See generally Elizabeth Mensch & Alan Freeman, *Efficiency and Image: Advertising as an Antitrust Issue*, 1990 DUKE L.J. 321, 326-49 (1990) (discussing whether advertising is an entrance barrier).

⁸⁰ LANDES & POSNER, *supra* note 71, at 168.

⁸¹ A cause of action for trademark dilution also is justified in appropriate cases because it enables a mark’s owner to internalize its investment in creating the mark. *Id.* at 207-09.

⁸² *Id.* at 187-201.

⁸³ “Monopoly” has had different meanings at different times. One of the oldest (and probably the closest to the term’s contemporary trademark usage) is as a reference to political or governmental restrictions upon access to markets. “Monopoly” also means a total absence of competition or, alternatively, the opposite of a perfectly competitive market. See 3 ROBERT PALGRAVE, THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 538-41 (John Eatwell, Murray Milgate, & Peter K. Newman, eds., 1987). “Monopoly” also may be a “flexible term of disapproval reaching almost any trade practice against the public interest.” Amicus Brief Supporting Petitioner, Traffix Devices, Inc. Requesting Reversal at 18, Traffix Devices, Inc. v. Mktg. Displays, Inc., 532 U.S. 23, 580 U.S.P.Q.2d (BNA) 1001 (2001).

⁸⁴ FRANK I. SCHECHTER, THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADEMARKS 41-44 (1925).

⁸⁵ See *supra* Part II.A (discussing trademark monopolies).

a competitor's right to compete.⁸⁶ However, the label does not help one strike that balance. At best, as applied to trademarks, the term "monopoly" is vague and ambiguous; at worst, it is a canard.

If trademarks are monopolies, they certainly are not like illegal antitrust monopolies. That usage of "monopoly" is elaborated and nuanced because significant legal consequences turn on whether a defendant is an illegal monopoly. This determination follows a cautious process of defining the defendant's product market, calculating its share of that market, analyzing its conduct, and so forth.⁸⁷ In trademark law, the statement that a trademark is a monopoly typically is a bare assertion, sometimes accompanying or following discussion of a plaintiff's trademark rights.⁸⁸

One might argue that the monopoly label should be applied to trademarks because the sum of all the social costs portrayed by the Anticompetitive TM Models predominates over the sum of all the social benefits portrayed in the Procompetitive TM Models.⁸⁹ One also might argue that the social benefits predominate. Neither argument can be supported with comprehensive empirical data from a persuasive study or studies of trademark usage and its consequences.⁹⁰

What would a study designed to obtain this information look like? An empirical trademark investigator (ETI) would have to test for both social costs

⁸⁶ See *infra* Part III.B (discussing trademark policy).

⁸⁷ See *supra* Part II.B (discussing antitrust monopolies).

⁸⁸ See *supra* Part II.A (discussing trademark monopolies).

⁸⁹ See *supra* Part II.C (discussing the two models). This tension between trademark models is related to the tension between theories concerning advertising which is, of course, an important means to develop a trademark. See generally Mensch & Freeman, *supra* note 79, at 341-54; Gerry Khermouch, *The Best Global Brands*, BUS. WK., Aug. 5, 2002, at 94. Empirical evidence concerning advertising's effects is mixed. See Lemley, *supra* note 72, at 1689. They may be difficult to isolate because producers often employ a mix of advertising and other means to promote products (e.g., providing display allowances to retailers or reducing a product's wholesale price). See Warren S. Grimes, *Spiff, Polish, and Consumer Demand Quality: Vertical Price Restraints Revisited*, 80 CAL. L. REV. 817, 829-30, 839 (1992). Consumer reactions to advertising may be unrelated to producer intentions. See *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 875, 230 U.S.P.Q. (BNA) 831, 837 (2d Cir. 1986). Ultimately, the advertising debate may boil down to whether advertising should be viewed as a means of reducing consumer search costs and providing other benefits, as a wasteful means for manipulating consumer preferences, or as something in between. *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 603-04 (1967) ("[I]t is very difficult to discover at what point advertising ceases to be an aspect of healthy competition.") (Harlan, J., concurring); Mensch & Freeman, *supra* note 79, at 350-53.

⁹⁰ However, there is some evidence. For example, markups for nationally branded grocery products may be large when compared with comparable private-label products. See Robert B. Barsky, Mark A. Bergen, Shantanu Dutta, & Daniel Levy, *What Can the Price Gap between Branded and Private-Label Products Tell Us About Markups?*, 64 STUD. IN INCOME & WEALTH 165 (2003). On the other hand, the antitrust cases discussed *infra* Part V generally conclude that trademarks do not harm competition.

and social benefits; examine whether the costs and benefits flow from trademark usage or from other sources; assign weights to the costs and benefits; and determine which predominates.⁹¹ An ETI would also have to recognize that the costs and benefits of trademark usage are functions of both product type and the structure of the market in which a product is sold.⁹² These variables impact whether brand advertising is employed at all and, if it is, the nature of the advertising.

In addition, an ETI would have to comprehend that trademarks are but one among multiple means for differentiating products; that product differentiation may be present in some markets but not in others; that a producer may simultaneously or sequentially employ multiple means of product differentiation not limited to trademarks; and that differentiation notwithstanding, differentiated products frequently compete with each other.⁹³ An ETI would also have to

⁹¹ For example, it would be necessary for the ETI to demonstrate how a producer's trademark usage affects the producer's price or market share. See F.M. SCHERER, *INDUSTRIAL MARKET STRUCTURE & ECONOMIC PERFORMANCE* 328 (1970) (discussing the need to show a causal link between advertising and reduced production costs). The producer's price or output may be a function of other variables such as whether the producer limits intrabrand competition by selling through franchised dealers. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (considering the antitrust legality of vertical nonprice restraints). The problem of isolating a trademark's effects is exemplified by trademark misuse cases in which infringement defendants argue that the plaintiff misused its trademark to violate the antitrust laws. The defendants typically fail to show that the trademark was "the basic and fundamental" means employed to accomplish an alleged antitrust violation. The misuse cases, like the monopoly and tying cases discussed *infra* Part V.A-B, generally see trademarks as procompetitive or benign. See, e.g., *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss*, 298 F. Supp. 1309, 1315, 161 U.S.P.Q. (BNA) 414, 418 (S.D. N.Y. 1969). See generally 5 MCCARTHY, *supra* note 7, §§ 31.90–31.91. Another problem is that there may be no broadly acceptable calculus for weighing trademarks' social costs and benefits. See SCHERER at 325 (discussing the lack of a calculus for comparing the costs and benefits of product diversity resulting from product differentiation). The ETI would also find it difficult to net-out opposing economic effects. See generally HOVENKAMP, *FEDERAL ANTITRUST POLICY*, *supra* note 46, § 11.6a (discussing the problem of netting-out the effects of reduced intrabrand competition and increased interbrand competition).

⁹² See SCHERER, *supra* note 91, at 332–37 (discussing how market structure—e.g., atomistic or concentrated—affects product differentiation activities such as brand advertising and how trademarks may be unnecessary for products sold to industrial buyers).

⁹³ See James A. Keyte, *Market Definition and Differentiated Products: The Need for a Workable Standard*, 63 ANTITRUST L.J. 697 (1995) (discussing multiple means to differentiate products (e.g., via physical characteristics, quality, and sales methods); and the difficulty of defining a product market when differentiated products are involved). Trademark usage is not the only means available to signal consumers concerning product quality. See *SMS Sys. Maint. Servs. v. Digital Equip. Corp.*, 188 F.3d 11, 14 (1st Cir. 1999) (stating that a warranty signals a manufacturer's faith in the quality of its product and may boost sales). See generally Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 258–59 (2003) (stating that price discrimination normally taken to evidence market power is so ubiquitous that it would indicate that market power is ubiquitous).

account for the possibility that even as differentiation makes one product an imperfect substitute for another, it also may provide the opportunity for multiple producers to coexist.⁹⁴ And, an ETI would have to deal with the possibility that consumers are willing to pay more for a trademarked product because they value the information conveyed by the trademark or because the product actually is superior to or actually costs less than competing products.

Even in the absence of comprehensive empirical evidence developed by an ETI, trademark and antitrust law and scholarship provide considerable information concerning trademarks' beneficial and harmful effects. They support a strong presumption that the socially beneficial effects predominate.⁹⁵

III. POSTULATE THREE: THE RELATIONSHIPS BETWEEN TRADEMARK LAW, ANTITRUST LAW, AND THE "COMPETITIVE MANDATE"

Postulate Three claims that trademark law resembles antitrust law because both value competition. One might intuit this policy linkage because both bodies of law were significantly shaped by postbellum nineteenth and early twentieth century judges and legislators responding to important changes in the U.S. economy. They formulated law intertwined with the competitive process and animated by the "competitive mandate."⁹⁶ What are the relationships between trademark law, antitrust law, and competition policy?

⁹⁴ Producers may cater to consumers who demand variety for its own sake. See Thomas B. Leary, *The Significance of Variety in Antitrust Analysis*, 68 ANTITRUST L.J. 1007 (2001) (stating that current economic models do not provide a means to balance the benefits of increased product variety against higher product prices). Cf. Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U.L. REV. 212, 248-49 (2004) (stating that a subsequent market entrant's copyrighted work may compete on factors other than cost, making it possible for the entrant to survive despite the presence of cost disadvantages that would be insuperable if the works in the market were homogeneous).

⁹⁵ See *supra* Part II.A and *infra* Part V (discussing trademark monopoly cases that enforce trademark rights and antitrust law indicating that trademarks are procompetitive).

⁹⁶ Professor Paul Goldstein employed the phrase "competitive mandate" to describe how competitive principles are pervasive in American law. Paul Goldstein, *The Competitive Mandate: From Sears to Lear*, 59 CAL. L. REV. 873, 875-80 (1971). Trademark law is intended to secure the benefits of competitive markets while prohibiting certain forms of competitive conduct, and antitrust law is intended to maintain competitive markets by prohibiting various forms of anticompetitive conduct. See generally RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 9 cmt. c (1995) (stating that trademark law helps to secure the benefits of competitive markets by protecting producers' efforts to differentiate their products); I PHILLIP E. AREEDA & HERBERT HOVENKAMP, *supra* note 46, at 3 (stating that the goal of antitrust law is to promote competition).

A. HISTORY

Both trademark law and antitrust law were importantly shaped during a period beginning around the end of the Civil War and ending in the early twentieth century. Nationally-recognized brands evolved as increased output, resulting from new manufacturing and processing methods and improved transportation, stimulated the growth of consumer markets.⁹⁷ Intense competition included trademark infringement.⁹⁸ Consequently, trademark law grew from an “acorn” to a “mighty oak” as it adapted to the realities of a mass market economy.⁹⁹

During the same period, small producers lost their “geographic privilege.”¹⁰⁰ They were no longer sheltered from competitive pressures by the practical limits upon the information available to consumers and by the lack of transportation means available to potential competitors. As these impediments to competition declined, large producers increasingly dominated the country’s expanding multistate markets.¹⁰¹ This transition concerned farmers, business owners, and the general public.¹⁰² Congress responded in 1890 by enacting the Sherman Antitrust Act.¹⁰³ It reflected the core principle that the United States’ economy should be competitive, and it provided the federal government with broad powers to challenge private efforts to monopolize markets.¹⁰⁴

⁹⁷ Robert P. Merges, *One Hundred Years of Solitude: Intellectual Property Law, 1900-2000*, 88 CAL. L. REV. 2187, 2206-10 (2000).

⁹⁸ HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 67-8, 122 (1954); JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 75, 91 (1956).

⁹⁹ LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 226-27, 382-83 (1973). See SCHECHTER, *supra* note 84, at 167 (indicating that the number of reported trademark cases significantly increased during and after 1870). Courts played an important role in this process. See, e.g., *Cong. & Empire Spring Co. v. High Rock Cong. Spring Co.*, 45 N.Y. 291 (1871) (considering a trademark infringement claim involving medicinal water sold in America and Europe). So did Congress and state legislatures. See generally JAMES LOVE HOPKINS, *THE LAW OF TRADEMARKS, TRADENAMES, AND UNFAIR COMPETITION* 313-27, 332, 516-728 (1905) (discussing federal and state trademark legislation enacted during the nineteenth and early twentieth centuries).

¹⁰⁰ THORELLI, *supra* note 98, at 66. See generally WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* 53-70 (1965) (describing the public’s rising dislike for trusts leading to enactment of the Sherman Act).

¹⁰¹ Professor Horwitz describes as “astonishing” the changes in the economy’s structure and the creation of gigantic firms. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 33 (1992). By 1900, the country was committed to a “market-oriented way of life.” HURST, *supra* note 98, at 75.

¹⁰² See generally THORELLI, *supra* note 98, at 54-96; LETWIN, *supra* note 100, at 53-70; George J. Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUD. 1 (1985).

¹⁰³ Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890).

¹⁰⁴ See generally THORELLI, *supra* note 98, at 164-232; LETWIN, *supra* note 100, at 85-95.

B. POLICY

Trademark law has an ambivalent relationship with competition.¹⁰⁵ As trademarks increased in commercial importance, courts did not protect them because they promoted competition that in turn yielded social benefits. Rather, courts protected a trademark against unauthorized copying because it distinguished the trademarked product from others; secured to the trademark user profits owing to its reputation (i.e., its “good will”); and provided the public with assurances of product quality and the user’s integrity.¹⁰⁶ Consumers were entitled to rely on these assurances.¹⁰⁷ Absent trademark law, the unauthorized copying of a trademark for an unpatented product would be just as lawful as copying the product itself.¹⁰⁸ Trademark law’s limits upon competitive copying are counterbalanced by rules accommodating competitors’ needs for access to marks that are required to compete; for example, marks that are functional or generic.¹⁰⁹

Turning to antitrust law, the Sherman Act does not prohibit unfair competition.¹¹⁰ Rather, it seeks to maximize consumer welfare by insuring that producers compete.¹¹¹ Consumer welfare is enhanced in competitive markets

¹⁰⁵ See *supra* Part II.C (discussing the pro and anticompetitive aspects of trademarks).

¹⁰⁶ See, e.g., *Menendez v. Holt*, 128 U.S. 514, 522 (1888) (describing protected goodwill as “every positive advantage that has been acquired by [a] . . . firm in the progress of its business”); *Canal Co. v. Clark*, 80 U.S. 311, 323 (1871) (“The first appropriator of a [trademark] . . . is injured whenever another adopts the same [mark] . . . because such adoption is in effect representing falsely that the productions of the latter are those of the former.”). See generally RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 9 cmt. c (1995) (stating that evolving trademark law emphasized the unfairness of fraudulent divergence of trade, the need to remedy the unjust enrichment resulting from the appropriation of good will, and the importance of fair dealing in the market place).

¹⁰⁷ See, e.g., *Mfg. Co. v. Trainer*, 101 U.S. 51, 53 (1879) (stating that a trademark is “a sign to the public of the origin of the goods to which it is attached, and an assurance that they are the genuine article of the original producer”). See generally David S. Welkowitz, *The Supreme Court and Trademark Law in the New Millennium*, 30 WM. MITCHELL L. REV. 1659, 1660-87 (2004) (reviewing the Court’s trademark jurisprudence from 1870 to the present and describing trademark law’s traditional concerns with unfair competition, consumer protection, and deception).

¹⁰⁸ See *E. Wine Corp. v. Winslow-Warren, Ltd.*, 137 F.2d 955, 957-58, 57 U.S.P.Q. (BNA) 433, 435 (2d Cir. 1943) (describing trademark infringement as “competition” that conceivably might benefit consumers). A utility patent excluded others from, among other things, the unauthorized making or selling of the patented invention. 35 U.S.C. § 271 (2003).

¹⁰⁹ See *infra* Part V.A-B.

¹¹⁰ See, e.g., *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 137 (1998) (noting that unfair competition law rather than antitrust law provides remedies for conduct offensive to business morality); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (“Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition . . .”).

¹¹¹ The Supreme Court regards the Sherman Act as a “charter of freedom” that does not provide detailed definitions or particularization. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-

where consumers, motivated by their preferences and constrained by limited budgets, unilaterally seek “best bargains” as defined by price, quantity, and quality; and where sellers, motivated to earn a profit and constrained by limited resources, unilaterally vie to provide best bargains.¹¹² Antitrust law values competition because it yields a constellation of social benefits.¹¹³ Allocative efficiency is enhanced as producers strive to produce products in accordance with consumer demand.¹¹⁴ Productive efficiency is enhanced as producers produce products at the minimum possible cost per unit.¹¹⁵ Wealth transfers from consumers to producers are reduced because producers cannot extract monopoly profits by reducing output and increasing prices.¹¹⁶

C. SUMMARY

Trademark law and antitrust law emerged from the same social stew. However, they had different core purposes; and neither was intended to reinforce, complement, or augment the other. Trademark law primarily promoted fair conduct by producers and reduced consumer deception. Antitrust law’s dominant theme was supporting competitive markets.¹¹⁷ The central purposes of trademark

60 (1933). See HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 46, at 52 (discussing how the Sherman Act authorized a common law approach). Antitrust law has encouraged competition even as the meaning of the term “competition” changed. See E. THOMAS SULLIVAN, THE POLITICAL ECONOMY OF THE SHERMAN ACT: THE FIRST ONE HUNDRED YEARS VII-IX 161-80 (1991).

¹¹² See generally E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST LAW AND ITS ECONOMIC IMPLICATIONS 1-2, 9-27 (3d ed. 1998) (discussing the focus of antitrust law and economics); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1154 (1986) (“The competition process is the preferred governor of markets.”).

¹¹³ The goal is not perfect competition, but workable competition. See HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 46, § 2.1 (discussing antitrust policies). Interbrand competition is especially valued. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988).

¹¹⁴ See ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 91-104 (1978) (arguing that Congress intended the Sherman Act to serve a primary goal of advancing consumer welfare).

¹¹⁵ Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 88-96 (1982).

¹¹⁶ *Id.* at 92-96. Monopolies also produce a “dead weight” loss to consumers that does not benefit the monopolist or anyone else. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 46, § 3.1. Antitrust law also associates the competitive process with “populist” values including protecting small business enterprises. See TERRY CALVANI & JOHN SIEGFRIED, ECONOMIC ANALYSIS AND ANTITRUST LAW 9 (2d ed. 1988) (discussing protection of small business and other antitrust goals). Courts and commentators give varying degrees of emphasis to populist values. See HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 46, §§ 12.2a-12.2b.

¹¹⁷ See THORELLI, *supra* note 98, at 4-5, 12. Even “ruinous” competition is desirable. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940) (“[The Sherman Act has] . . . not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing

law and antitrust law differed even though conduct violating the antitrust laws may have been labeled “unfair,” and even though there was an abundance of unfair conduct prior to the enactment of the Sherman Act.¹¹⁸

Today, trademark law and antitrust law remain true to their respective cores. The impulse to assimilate trademark law and antitrust law because both serve competition results from a failure to sufficiently recognize that trademark law seeks to strike a balance between the pro and anticompetitive consequences of trademark usage. Trademark law protects a producer’s mark by enjoining competitors from what would otherwise be legal competitive copying of the mark. This protection preserves the producer’s good will and reduces consumer confusion. However, trademark protection is limited by trademark law permitting competitors to copy marks (e.g., the functional and generic trademark doctrines).¹¹⁹ In the name of competition, trademark law both enforces and limits trademark rights.

IV. POSTULATE FOUR: ECONOMIC METHODOLOGY IN TRADEMARK LAW AND ANTITRUST LAW

Postulate Four claims that trademark law resembles antitrust law because both apply economic methodology to product markets. “Economic methodology” means economic terminology, evidence, reasoning and mathematical tools. Mathematical tools include equations and graphs.¹²⁰ How similar are the economic methodologies of trademark law and antitrust law, and would the former benefit from application of the latter? To answer these questions, I illustrate the methodologies with opinions by two judges of notable economic acumen, Richard Posner and Frank Easterbrook.¹²¹

conspiracies.”).

¹¹⁸ See THORELLI, *supra* note 98, at 67-68.

¹¹⁹ See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmts. a., e. (1995). Functionality and genericity are discussed *infra* Part VI.A.

¹²⁰ Both are commonly employed to portray relationships between variables. See ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 12-16 (2000).

¹²¹ Judge Easterbrook has been a board member of the American Law and Economics Association and has published scholarly legal and economic works on intellectual property and antitrust law. Judge Posner is a renowned law and economics scholar who also has published in both areas. Both sit on the 7th Circuit. See The University of Chicago, The Law School, Faculty and Senior Lecturers, <http://www.law.uchicago.edu/faculty/index-faculty.html> (last visited on Sept. 29, 2004).

A. TRADEMARK METHODOLOGY

Judge Posner's opinion in *W.T. Rogers Co. v. Keene Manufacturing* reasons that trademarks generally benefit competition because they reduce consumers' information costs, a benefit that exceeds the costs of trademark protection.¹²² The net benefit results because the supply of distinctive words usable as trademarks is practically unlimited.¹²³ Competition is not impaired by enforcing exclusive rights in word marks (e.g., "Acura" for a brand of automobiles) because they generally are not scarce inputs into the production of a product.¹²⁴ The opinion also reasons that trademark protection becomes anticompetitive if it limits access to scarce inputs needed by competitors. Competition would be harmed if a producer could legally appropriate one of a few common words describing the producer's brand plus all competing brands (e.g., "car" for automobiles). That is why generic terms cannot be the subject of exclusive trademark rights.¹²⁵ Trademark law's functionality doctrine is analogous.¹²⁶ A product's trade dress such as a design feature (e.g., the product's exterior shape or color) can serve as a trademark only if competitors are not deprived of something needed to produce a competing brand of the same product.¹²⁷ The generic and functional trademark doctrines cut off trademark rights when their cost in impeding competition exceeds their informative value.

W.T. Rogers also framed jury instructions for deciding whether a design feature is functional. The issue turns on whether other producers of the same product need the feature to compete.¹²⁸ This and comparable standards of functionality require evidence of the costs to competition of employing a design feature as a trademark for the product incorporating the feature.¹²⁹

¹²² 778 F.2d 334, 338, 228 U.S.P.Q. (BNA) 145, 146 (7th Cir. 1985).

¹²³ This view is not unanimous. See *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 168, 34 U.S.P.Q.2d (BNA) 1161, 1165 (1995) ("When a color serves as a mark, normally alternative colors will likely be available for similar use by others."); Stephen L. Carter, *The Trouble with Trademark*, 99 YALE L.J. 759, 768-75 (1990) (arguing that some marks may not have a large number of substitutes, and that persons who market goods believe that some marks are better than others); Thomas F. Cotter, *Owning What Doesn't Exist, Where it Doesn't Exist: Rethinking Two Doctrines From the Common Law of Trademarks*, 1995 U. ILL. L. REV. 487, 503 n.93 (1995) (agreeing with Professor Carter, but suggesting that there is a lack of empirical evidence).

¹²⁴ *W.T. Rogers*, 778 F.2d at 339.

¹²⁵ See *infra* Part VI.B (discussing trademark genericity).

¹²⁶ *W.T. Rogers*, 778 F.2d at 340.

¹²⁷ According to Judge Posner, "a functional design feature is one which competitors would have to spend money not to copy but to design around . . ." *Id.* at 339.

¹²⁸ *Id.* at 346.

¹²⁹ See, e.g., *Valu Eng'g, Inc. v. Rexnord Corp.*, 278 F.3d 1268, 61 U.S.P.Q.2d (BNA) 1422 (Fed. Cir. 2002) (stating that functionality turns on whether the design feature has advantages, is so unique

B. ANTITRUST METHODOLOGY

Judge Easterbrook's opinion in *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.* considered antitrust claims against the defendant Rose Acre, an egg producer.¹³⁰ Its competitors alleged that Rose Acre priced eggs low to cripple or discipline them, and that Rose Acre planned to eventually recoup its losses via monopoly pricing detrimental to consumers.¹³¹ This strategy is a form of illegal monopoly conduct called predatory pricing. Predatory low pricing by a firm with a large market share can violate the Sherman Act's anti-monopoly prohibitions.¹³²

A.A. Poultry commenced with a paean to competition and its consumer benefits.¹³³ Antitrust law values competitive markets because sellers are numerous, are too small to affect market price, price close to their marginal costs, and grow by becoming more efficient.¹³⁴ The opinion then reviewed evidence concerning Rose Acre's pricing and market share and the concentration of sellers in the egg market. The evidence demonstrated that Rose Acre under-priced its competitors and that it grew rapidly at their expense. The plaintiffs' expert economist testified that Rose Acre's discounting moved the egg market toward oligopoly, significantly contributed to declining egg prices, and was predatory because it fell below Rose Acre's costs.¹³⁵ The plaintiffs also marshaled considerable evidence allegedly bearing upon Rose Acre's monopoly power.¹³⁶ It indicated that Rose Acre's market share exceeded 23 percent in one market, and that in another the four-firm concentration ratio was over 60 percent.¹³⁷

that competitors lack sufficient alternative designs, is comparatively inexpensive to manufacture, or is used in a competitively-significant application). This approach may conflict with *TraFFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 58 U.S.P.Q.2d (BNA) 1001 (2001). See *supra* Part VI.A.

¹³⁰ 881 F.2d 1396 (7th Cir. 1989).

¹³¹ *Id.* at 1399-1400.

¹³² *Id.* The plaintiffs alleged that Rose Acre violated the anti-price discrimination Robinson-Patman Act at 15 U.S.C. § 13(a). Judge Easterbrook noted that the plaintiffs' case was similar to a claim of predatory pricing in violation of the Sherman Act at 15 U.S.C. § 2 (prohibiting attempts to monopolize and monopolization). The plaintiffs litigated and appealed their case as a Sherman Act case, so Judge Easterbrook considered whether they succeeded under Sherman Act predatory pricing standards.

¹³³ *Id.* at 1397.

¹³⁴ See JACK HIRSHLEIFER & DAVID HIRSHLEIFER, PRICE THEORY AND APPLICATIONS 328 (6th ed. 1998). A marginal change is the increment or decrement in the amount of a variable such as cost. A firm that prices at marginal cost earns a normal profit, but not a larger monopoly profit.

¹³⁵ An oligopoly is a market with few sellers. *Id.* at 226. The court referred to average total and average variable costs which are standard measures of costs employed by economists. See *id.* at 49-59, 167-90.

¹³⁶ *A.A. Poultry*, 881 F.2d at 1398-99.

¹³⁷ A four-firm concentration ratio is the combined market share of the four largest firms in the market. E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND

The plaintiffs' evidence and legal and economic theories did not impress Judge Easterbrook. He noted that the record was insufficient to apply the Hirschmann-Hirschmann Index of market concentration.¹³⁸ And he declined to review whether Rose Acre's egg prices were predatory.¹³⁹ Instead, Judge Easterbrook looked at the "back end" of the alleged predatory strategy where Rose Acre would recoup its present losses with future monopoly profits. Rose Acre could not recoup, and consumers could only benefit from Rose Acre's low pricing, because the market was competitive, unconcentrated, and easy to enter.¹⁴⁰ No rational jury could find that Rose Acre had recouped or might do so in the future.¹⁴¹ The "back end" approach avoided "the imponderable questions that have made antitrust cases among the most drawnout and expensive types of litigation."¹⁴²

C. SUMMARY

Trademark law applies economic methodology to product markets. For example, courts deciding whether a trademark consisting of a product design feature is functional sometimes consider evidence of the quantity, quality, and availability of substitutes for the feature.¹⁴³ Courts also employ economic methodology to decide whether a defendant's allegedly infringing use of a trademark is likely to confuse consumers. They consider "market factors" including evidence of marketing methods, product qualities and prices, and the competitive proximity between products.¹⁴⁴ Trademark economic methodology may seem to resemble the economic methodology in antitrust cases addressing

PROCEDURE: CASES, MATERIALS, PROBLEMS 862 (5th ed. 2003).

¹³⁸ The index sums the squares of the market shares for each of the firms in the market. *Id.* at 862-64. See *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (1997) (referring to the Justice Department merger guidelines containing the index and looking to the guidelines for guidance).

¹³⁹ *A.A. Poultry*, 881 F.2d at 1400-02.

¹⁴⁰ *Id.* at 1403.

¹⁴¹ *Id.* at 1404.

¹⁴² *Id.* at 1401. *A.A. Poultry* had commenced about nine years earlier and contained voluminous documentary evidence and expert testimony from multiple experts. See *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 683 F. Supp. 680, 685-94 (S.D. Ind. 1988). See generally KEITH N. HYLTON, *ANTITRUST LAW: ECONOMIC THEORY & COMMON LAW EVOLUTION* 231 (2003) (discussing the "vast sums" spent in antitrust cases litigating issues of market definition).

¹⁴³ See *supra* Part IV.B. A broad range of economic evidence is admitted in functionality cases. See Harold R. Weinberg, *Trademark Law, Functional Design Features, and the Trouble with Traffix*, 9 J. INTEL. PROP. L. 1, 45-53 (2001) (discussing how a court may consider evidence that a design feature is important to persons who consume, purchase, produce, or are otherwise knowledgeable about the product incorporating the design feature).

¹⁴⁴ See *RESTATEMENT (THIRD) OF UNFAIR COMPETITION* § 21 (1995) (concerning market factors relevant to proving likelihood of confusion).

whether a producer has monopoly power. These cases also consider evidence of product characteristics, substitute products, and product markets.¹⁴⁵

However, the respective methodologies differ in important ways. On the trademark side, courts do not employ mathematical tools, and their use by legal scholars is a relatively recent development.¹⁴⁶ Courts considering trademark issues occasionally employ antitrust-like economic theory, terminology, or reasoning.¹⁴⁷ On the antitrust side, the law was joined with economic methodology from birth.¹⁴⁸ Modern antitrust scholars often employ economic methodology and make extensive use of mathematical tools.¹⁴⁹ Antitrust courts sometimes employ mathematical tools, and frequently communicate with economic terminology, reason with economic logic, and consider economic evidence.¹⁵⁰ This economic methodology is considerably more intensive and sophisticated than most trademark courts'.¹⁵¹

The differences between the economic methodologies of trademark law and antitrust law exist because the two laws have different purposes. For example, courts refuse to enforce functional trademarks in order to avoid conferring patent-like rights to exclude others from access to an invention.¹⁵² Giving patent

¹⁴⁵ See *supra* Part II.B (discussing antitrust monopolies).

¹⁴⁶ See William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 297-99 (1987) (developing mathematical economic models and containing graphic representations of relationships between variables). Relatively few trademark scholars employ mathematical tools. One exception is Cotter, *supra* note 123 (employing economic utility functions).

¹⁴⁷ For example, *W.T. Rogers Co. v. Keene Mfg.*, 778 F.2d 334, 343, 347-48, 228 U.S.P.Q. (BNA) 145, 153 (7th Cir. 1985) discussed *supra* Part IV.A, uses the term "substitute" when discussing whether there is a sufficiently large number of alternative design features to render a particular design feature nonfunctional. In antitrust economics and law, substitutes are commodities that perform a similar function so that an increase in the price of one leads to an increase in the demand for the other. See HIRSHLEIFER & HIRSHLEIFER, *supra* note 134, at 103-04. Another example: *W.T. Rogers* admonishes that if a market contains many competitors, then preventing one new competitor from entering the market is unlikely to have a significant anticompetitive effect. 778 F.2d at 341. The same principle appears in antitrust law. See generally RICHARD A. POSNER & FRANK H. EASTERBROOK, *ANTITRUST: CASES, ECONOMIC NOTES, AND OTHER MATERIALS*, 516-17, 531 (2d ed. 1981) (discussing the potential competition doctrine).

¹⁴⁸ See Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019, 1019-20 (1989).

¹⁴⁹ See generally SULLIVAN & HOVENKAMP, *supra* note 64, at xiv (explaining why it is essential for students studying antitrust law to be formally introduced to economic methodology including mathematical tools).

¹⁵⁰ See *supra* Parts II.B, IV.B (discussing antitrust monopolies and methodology).

¹⁵¹ See *supra* Parts II.A, IV.A (discussing trademark monopolies and methodology).

¹⁵² See *infra* Part VI.A (discussing Postulate Six's claim that an antitrust lens can help to decide whether a trademark is infringed). A patent provides, among other things, the right to exclude others from making, using, or selling an invention. 35 U.S.C. § 154(a)(1) (2005).

law a wide berth does not require economic rigor.¹⁵³ Nor is it required to decide whether there is a likelihood of consumer confusion.¹⁵⁴ Antitrust law, on the other hand, is concerned with the actual or probable detrimental effects of business practices on competition. Greater economic rigor is required because monopoly power is typically a necessary condition for antitrust illegality including illegal monopolization, and because it is important not to penalize or deter legitimate competitive conduct.¹⁵⁵

V. POSTULATE FIVE: TRADEMARKS IN THE ANTITRUST DOCK

Postulate Five claims that an antitrust lens can explain trademarks and trademark law. The antitrust critique of trademarks mostly resides in judicial opinions concerning monopolization and tying. These opinions contain findings concerning the competitive and anticompetitive effects of trademarks in product markets.¹⁵⁶ What do they teach about trademarks and trademark law?

A. MONOPOLIZATION

The monopoly theory of trademarks was tested when the Federal Trade Commission (FTC) charged Borden with maintaining monopoly power through the sale of its ReaLemon brand reconstituted lemon juice.¹⁵⁷ Borden allegedly monopolized, raised entry barriers, and deprived consumers of the benefits of

¹⁵³ See *infra* Part VI.A.

¹⁵⁴ See *infra* Part VI.B (discussing Postulate Six's claim that an antitrust lens can help to decide whether a trademark is functional).

¹⁵⁵ The antitrust laws provide for criminal, civil, quasi-public, and private enforcement. See HOVENKAMP, *FEDERAL ANTITRUST POLICY*, *supra* note 46, §§ 15.1a, 15.1b, 15.4, 16.1. Most antitrust violations require some degree of monopoly power. See *id.* § 3.1.

¹⁵⁶ Cf. *Cal. Dental Assoc. v. F.T.C.*, 526 U.S. 756, 779-82 (1999) (stating that "[w]hat is required [for antitrust analysis] . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint").

¹⁵⁷ *In re Borden, Inc.*, 92 F.T.C. 669 (1978), *aff'd*, 674 F.2d 498 (6th Cir. 1982), *vacated*, 461 U.S. 940 (1983), *remanded*, 711 F.2d 758 (1983), *order modified*, 102 F.T.C. 1147 (1983). Related cases failed around the same time. See, e.g., *In re General Foods Corp.*, 103 F.T.C. 204 (1984) (dismissing a monopolization case condemning extensive advertising, and stating that brand loyalty does not afford market power of concern to antitrust law). The FTC is authorized to enforce Section 5 of the FTC Act prohibiting unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. 15 U.S.C. § 45(a)(2) (2005). The FTC may employ Sherman Act monopolization precedent. See, e.g., *Borden, Inc. v. F.T.C.*, 674 F.2d at 506 (stating that because of the monopolistic nature of the case, the Sherman Act should be used for "guidance for the application of Section 5").

free competition.¹⁵⁸ The major stages in the ReaLemon litigation trace a steeply rising and then falling trajectory for the monopoly theory.¹⁵⁹

In the rising first stage, the FTC's administrative law judge (ALJ) determined that Borden had a dominant but declining 75% to 90% share of the U.S. market for processed lemon juice.¹⁶⁰ This was in itself sufficient to find that Borden had monopoly power.¹⁶¹ Its product, ReaLemon, was the only nationally distributed brand and commanded a significant price premium.¹⁶² ReaLemon's success did not result from inherent product superiority, but from a premium image and significant brand loyalty generated by many years of advertising and promotion.¹⁶³ The ReaLemon brand was "virtually the generic term for processed lemon juice."¹⁶⁴ ReaLemon sales yielded a rate of return far exceeding those in other food and industry groups.¹⁶⁵

ReaLemon's large market share and successful brand differentiation demonstrated to the ALJ that Borden possessed monopoly power in the processed lemon juice market.¹⁶⁶ Its "consumer franchise" enabled it to price its product higher than competitors' products; and by lowering its prices, Borden could drive down the price of competing products or force them off supermarket shelves.¹⁶⁷ The ALJ portrayed consumer preferences for ReaLemon as an entrance barrier because consumers mentally distinguished ReaLemon from other brands. These preferences enabled Borden to dominate the market and were very

¹⁵⁸ *In re Borden, Inc.*, 92 F.T.C. at 673.

¹⁵⁹ The case may be the judicial high-water mark for the anticompetitive trademark models discussed *supra* Part II.C. See generally Daniel M. McClure, *Trademarks and Competition: The Recent History*, 59 LAW & CONTEMP. PROBS. 13, 17, 22 (1996) (stating that the case was the ended of antitrust attacks on trademarks as inherently anticompetitive).

¹⁶⁰ Processed lemon juice was the relevant product market. *In re Borden, Inc.*, 92 F.T.C. at 675-702, 758-66. ReaLemon's market share measured in dollars was 88% to 91.8% over a period of about nineteen months and, measured in gallons, was 75.3% to 88.7% over a six-year period. ReaLemon's market share was declining due to increased competition in regional markets. *Id.* at 768. The processed lemon juice market was concentrated, with the four largest firms having a combined market share exceeding 90%. *Id.* at 702-08, 767.

¹⁶¹ *Id.* at 767.

¹⁶² There was no comparable price differential on any other food product anywhere in the industry. *Id.* at 708-09.

¹⁶³ The president of Borden's ReaLemon unit testified that "[p]rocessed lemon juice is processed lemon juice." *Id.* at 763. ReaLemon's premium price was also attributed to it being the first brand in the business. *Id.* at 709-11.

¹⁶⁴ *Id.* at 710.

¹⁶⁵ *Id.* at 712-18.

¹⁶⁶ *Id.* at 715-16, 767-68.

¹⁶⁷ An expert witness testified to a "ratchet down" effect. If a competitor chose to *lower* its price, Borden could drop ReaLemon's price. The competitor's market share would remain static or decline, and it might be forced out of business. *Id.* at 716.

costly for competitors to overcome.¹⁶⁸ Borden's use of the ReaLemon brand was also pertinent to the illegal conduct element of monopolization because Borden's brand advertising was part of its successful effort to maintain monopoly power.¹⁶⁹

The monopoly theory of trademarks reached its zenith upon Borden's appeal to the FTC. The Commission characterized the ALJ's decision as complete and cogent,¹⁷⁰ and virtually portrayed ReaLemon as the poster-brand for "spurious" product differentiation.¹⁷¹ The brand created "an almost imaginary superiority" in consumer minds enabling Borden to sell a product identical to its competitors' for a price significantly exceeding its competitors'.¹⁷²

The monopoly theory of trademarks began to plunge to its nadir in the Sixth Circuit. Two of three judges affirmed the FTC's decision, but characterized the ReaLemon case as a "unique situation" of a monopolist selling a product commanding a premium price giving it significant pricing leverage over competitors.¹⁷³ A dissenter could neither find a reason why a monopolist should be denied the opportunity to use consumer preferences to its competitive advantage, nor see how doing so was an unlawful exercise of monopoly power.¹⁷⁴ She reasoned that ReaLemon's price premium reflected preferences created by promoting the lawfully acquired ReaLemon trademark. Consumers rationally paid a premium for ReaLemon in order to avoid purchasing an inferior substitute. Borden was legally entitled to exploit ReaLemon's image advantage.

The monopoly theory of trademarks struck its nadir back in the FTC. The Commission settled with Borden because it did not want to discourage dominant firms from competing vigorously.¹⁷⁵ It reasoned that product differentiation

¹⁶⁸ *Id.* at 716-18.

¹⁶⁹ For example, Borden purchased radio commercials in contested markets and warned consumers that competitors might try to imitate ReaLemon. *Id.* at 719, 722-23, 726-27, 738-44, 768-73. Borden also employed selective price reductions or promotional allowances in contested markets. *Id.* at 732-58, 772-73, 775-78. See generally *supra* Part II.B (discussing antitrust monopolies).

¹⁷⁰ *In re Borden, Inc.* at 778. The Commission believed that brand differentiation was relevant to both the market power and the conduct elements of illegal monopolization. See *id.* at 780-81, 795-96.

¹⁷¹ *Id.* at 805.

¹⁷² *Id.* at 790, 793, 802.

¹⁷³ *Borden, Inc. v. F.T.C.*, 674 F.2d 498, 515 (6th Cir. 1982).

¹⁷⁴ *Id.* at 519-20.

¹⁷⁵ The case ultimately was settled by an order affecting only Borden's pricing practices. *In re Borden, Inc.*, [1983-1997 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 21,995 (Mar. 14, 1983). A dissenting commissioner characterized the settlement as "unseemly." *Id.* at 22,503. The FTC's change in position was influenced by *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58-59 (1977), that emphasized the importance of interbrand competition in holding that the rule of reason (and not a rule of per se illegality) applies to vertical territorial restraints. See *Borden, Inc.*, [1983-1997 Transfer Binder], ¶¶ 22,490, 22,493, 22,495. One commissioner suggested that the settlement of *Borden* was also due to a change in the composition of the FTC. *Id.* at 22,494-95.

enables a producer to compete against other brands. The producer of an established brand may have invested resources to inform consumers about the quality of its product, and the branded product's price premium may reflect goodwill resulting from strong consumer preferences.¹⁷⁶ Because product differentiation reduces consumers' costs of making informed choices, it is consistent with the purposes of antitrust law. The reduced costs outweigh any negative effects that differentiation might have on competitive entry into the market. According to the Commission, cost efficiencies enjoyed by consumers resulting from successful differentiation are similar to efficiencies achieved by reducing production or distribution costs.¹⁷⁷

B. TYING

The monopoly theory of trademarks has also been tested in antitrust tying agreement litigation. Tying agreements typically provide that a consumer wishing to purchase a tying product (e.g., hospital surgical services) must also purchase a separate tied product (e.g., anesthesiology services).¹⁷⁸ Tying agreements are subject to antitrust scrutiny for multiple reasons.¹⁷⁹ They can impair consumers' freedom to select the best bargain in the tied product market. They also can foreclose competitors from selling the tied product, and thereby provide the tying seller with monopoly power in the tied product market.

Tying agreements are per se illegal if it is probable that buyers are forced to buy the tied product from the tying seller and the tie forecloses other sellers from a substantial volume of commerce in the tied product market.¹⁸⁰ An antitrust

¹⁷⁶ The Commission also noted that the Lanham Act encourages that form of goodwill. Borden, Inc., [1983-1997 Transfer Binder] Trade Reg. Rep. (CCN) ¶ 22,495-96.

¹⁷⁷ *Id.* ¶ 22,493-95. In dissent, one commissioner admitted that while advertising may be beneficial, brand differentiation by a dominant firm can result in an entrance barrier permitting that firm to exploit its market power. *Id.* ¶ 22,501.

¹⁷⁸ See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) (considering allegedly illegal tying of anesthesia services to other hospital services). Antitrust law addresses tying agreements in § 1 of the Sherman Act, § 3 of the Clayton Act, and § 5 of the Federal Trade Commission Act. The substantive standards of illegality under these statutes may have coalesced. See IX AREEDA & HOVENKAMP, *supra* note 46, ¶¶ 1719b,c.

¹⁷⁹ *Jefferson Parish Hosp.*, 466 U.S. at 14-15, 35-37.

¹⁸⁰ *Id.* at 15-16. A per se rule avoids a burdensome inquiry into market conditions and the nature, purpose, and effects of a restraint of trade when the likelihood of anticompetitive conduct is great. See, e.g., *Ariz. v. Maricopa County Med. Soc'y*, 457 U.S. 332, 350-51 (1982). The per se tying rule's forcing requirement assimilates to a monopoly power requirement which makes it unlike "classic" antitrust per se rules lacking that requirement (e.g., the rule against horizontal price fixing). The per se tying rule also is atypical because it admits certain defenses. See IX AREEDA & HOVENKAMP, *supra* note 46, ¶ 1720a. Plaintiffs unable to establish a violation of the per se rule usually also fail to show that a tie is illegal under the rule of reason which does inquire into a tie's nature, purpose, effects,

plaintiff might seek to establish “forcing” by demonstrating that consumer preferences for a defendant’s trademarked tying product are so strong that the defendant can force consumers to purchase a separate tied product.¹⁸¹ The plaintiff may couch this argument in different ways. It may argue that trademark rights provide the mark’s owner with a monopoly in the tying product because it cannot be purchased from other sources.¹⁸² The plaintiff also may argue that consumers perceive the trademarked product as unique which enables its seller to force buyers to purchase a separate tied product.¹⁸³

Ultimately, a plaintiff claiming that a tie is per se illegal must establish that the seller has significant monopoly power in the tying product market.¹⁸⁴ The plaintiff may meet this burden through a process of market definition and market share analysis similar to that employed in monopolization cases.¹⁸⁵ The monopoly power attributable to the tying product must be “significant.”¹⁸⁶ If sufficient monopoly power is lacking, then the plaintiff may proceed under the rule of

and other circumstances. *See id.* ¶ 1728f. The rule of reason also may require proof of substantial market power in the market for the tying product. *See, e.g., Digital Equip. Co. v. Uniq Digital Techs.*, 73 F.3d 756, 761 (7th Cir. 1996).

¹⁸¹ The combination of a trademark and the trademarked product generally constitute a tying product for antitrust purposes. *See, e.g., Jack Walters & Sons Corp. v. Morton Bldg. Inc.*, 737 F.2d 698, 704-05 (7th Cir. 1984). Thus, the Mercedes Benz trademark and the automobiles to which it applies are properly characterized as a tying product. *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1346 (9th Cir. 1987). *See generally* X AREEDA & HOVENKAMP, *supra* note 46, ¶ 1749a.

¹⁸² *See Jefferson Parish Hosp.*, 466 U.S. at 15-17 (stating that if a seller has a patent or similar monopoly, one can presume that a buyer’s inability to buy the product elsewhere affords the seller monopoly power); *Indep. Ink, Inc. v. Ill. Tool Works, Inc.*, 396 F.3d 1342, 73 U.S.P.Q.2d (BNA) 1205 (Fed. Cir. 2005), *cert. granted*, 125 S. Ct. 2937 (2005) (holding that in a tying case a patent creates a presumption of monopoly power). *But see Jefferson Parish Hosp.*, 466 U.S. at 33 n.7 (O’Connor, J., concurring) (stating that a common misconception is that possession of a patent or copyright in itself demonstrates monopoly power). Federal antitrust guidelines do not presume that intellectual property confers monopoly power. However, they do not address the effects of product differentiation via the use of trademarks. *See* U.S. DEPT JUSTICE AND F.T.C. GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY §§ 1.0 n.2, 2.2 (1995).

¹⁸³ *See Jefferson Parish Hosp.*, 466 U.S. at 17.

¹⁸⁴ *See id.* at 17-18.

¹⁸⁵ *See, e.g., Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 86 (2d Cir. 2000) (“Where uniqueness is alleged, questions of market definition and market power will inevitably blend together because the relevant tying product market includes, by definition, only fungible products.”). *See generally* X AREEDA & HOVENKAMP, *supra* note 46, ¶¶ 1736a, 1737b, 1739a. The relevant product market in monopolization and tying cases may be defined in the same way. *See Queen City Pizza, Inc. v. Domino’s Pizza, Inc.*, 124 F.3d 430, 442 n.18 (3d Cir. 1997). The monopoly power requirement reduces the risk of an erroneous decision that lessens competition or harms consumer welfare. *See, e.g., Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673-74 (7th Cir. 1985).

¹⁸⁶ *See Jefferson Parish Hosp.*, 466 U.S. at 26, 27. In per se tying cases, a market share of 30%, or even 50% or 60%, may be insufficient. A “dominant” share may be sufficient. X AREEDA & HOVENKAMP, *supra* note 46, ¶¶ 1734c, 1736e1.

reason by demonstrating that the tying agreement restrains competition. It is necessary in all tying cases to establish that the alleged tying and tied products are separate products.

In the tying cases, judicial acceptance of the notion that trademarks confer significant monopoly power followed a trajectory similar to the monopolization theory in the *Borden ReaLemon* litigation.¹⁸⁷ Some courts initially took the position that a trademark creates a presumption of monopoly power.¹⁸⁸ However, these cases no longer provide reliable guidance.¹⁸⁹ Antitrust courts now generally agree that a trademark does not pose antitrust concerns by making a product unique or by disadvantaging competitors.¹⁹⁰ Even a prestigious trademark is not evidence of monopoly power because trademark law protects the mark, not the product sold under the mark, and monopoly power flows from the product.¹⁹¹ Producers lacking access to a mark typically can produce and sell competitive substitute products under different marks. Nor does a producer's trademark define an antitrust relevant product market in which the producer has a 100 percent market share.¹⁹² Mercedes-Benz automobiles compete with other brand passenger vehicles.

The tying cases also recognize that in a market characterized by product differentiation, consumers may perceive a particular branded product to be unique. This perception may enhance the market share of the product's producer.

¹⁸⁷ See *supra* Part V.A (discussing trademark monopoly litigation).

¹⁸⁸ See, e.g., *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 50, 171 U.S.P.Q. (BNA) 269, 274 (9th Cir. 1971) (stating that "the registered trade-mark presents a legal barrier against competition").

¹⁸⁹ See, e.g., *Valley Prods. Co. v. Landmark*, 128 F.3d 398, 405 (6th Cir. 1997) (stating that it is questionable whether *Chicken Delight* remains good law in the Ninth Circuit and that other courts have rejected it).

¹⁹⁰ See, e.g., *Town Sound & Custom Tops, Inc. v. Chrysler Motors, Inc.*, 959 F.2d 468, 479-80 (3d Cir. 1992). But see, e.g., *3 P.M., Inc. v. Basic Four Corp.*, 591 F. Supp. 1350, 1359-60, 1360 n.12 (E.D. Mich. 1984) (recognizing that generally a trademark does not confer monopoly power, but stating that the presence of a nationally preeminent and unusually attractive trademark could bear on whether a product is substantially similar to competing products).

¹⁹¹ *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1346 (9th Cir. 1987).

¹⁹² See, e.g., *Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2d Cir. 2001) (stating that dismissed cases often involve failed efforts to limit a product market to a single brand). Some courts conclude that it is senseless to punish a producer for asserting a monopoly in the sale of its own products. See, e.g., *Univ. Avionics Sys. Corp. v. Rockwell Int'l Corp.*, 184 F. Supp. 2d 947, 954 (Ariz. 2001) (alleging illegal tying agreement). Courts also do not limit their market power analysis to a particular brand because antitrust law historically is concerned with *interbrand* competition. See, e.g., *Metzler v. Bear Auto. Serv. Equip. Co.*, 19 F. Supp. 2d 1345, 1354-55 (S.D. Fla. 1998) (alleging illegal tying agreement). Additionally, courts reason that trademarks simply identify the origin of a product, so it is nonsensical to conclude that each brand is a separate product market. See, e.g., *Generac Corp. v. Caterpillar, Inc.*, 172 F.3d 971, 977, 50 U.S.P.Q.2d (BNA) 1367, 1371 (7th Cir. 1999) (alleging illegal agreement dividing market between competitors).

However, consumer preferences generally do not yield enough monopoly power to pose antitrust concerns.¹⁹³ Producers differentiate their products to compete for consumers with different needs or tastes; this practice is consistent with the competitive process, and is not a source of antitrust illegality.¹⁹⁴

Tying case law underpins the argument that trademarks are monopolies because product differentiation causes consumers to be “locked-in” to a preferred brand.¹⁹⁵ However, the conditions necessary for lock-in are “exceptional.”¹⁹⁶ Any lock-in attributable to trademarks almost certainly flies below antitrust’s radar.¹⁹⁷

C. SUMMARY

The Fifth Postulate claims that an antitrust lens can explain trademarks and trademark law. The lens discloses that trademarks rarely, if ever, confer monopoly power; and that trademark usage typically yields competitive benefits.¹⁹⁸ If trademarks are not antitrust monopolies, then how can an antitrust lens help?

The lens may be useful if one recognizes that it discloses that trademarks generally do not generate monopoly power of concern to antitrust law. This does

¹⁹³ See, e.g., *SMS Sys. Maint. Servs. v. Digital Equip. Corp.*, 188 F.3d 11, 17-18, 23 (1st Cir. 1999).

¹⁹⁴ *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 n.4 (7th Cir. 1985).

¹⁹⁵ See Lunney, *supra* note 2, at 427-28 (citing *Eastman Kodak Co. v. Image Tech. Serv., Inc.*, 504 U.S. 451 (1992) (considering a copier equipment manufacturer’s alleged tying of service (the tied product) to the sale of replacement parts (the tying product))).

¹⁹⁶ X AREEDA & HOVENKAMP, *supra* note 46, ¶ 1739. Courts generally refuse to base antitrust liability on lock-in. See, e.g., *Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207, 1219-24 (11th Cir. 2002) (distinguishing market power due to lock-in from “contract power”). See generally David A.J. Goldfine & Kenneth M. Vorrasi, *The Fall of the Kodak Aftermarket Doctrine: Dying a Slow Death in the Lower Courts*, 72 ANTITRUST L.J. 209 (2004) (stating that the lock-in theory rarely survives summary judgment). But see SULLIVAN & GRIMES, *supra* note 75, § 3.3c. (arguing that *Kodak* should apply where a producer has systematic or enduring market power due to product differentiation).

¹⁹⁷ But see *Ford Motor Co. v. United States*, 405 U.S. 562, 574 (1972) (reasoning that Ford’s acquisition of the manufacturer of Autolite sparkplugs might lessen competition in the sparkplug market because mechanics tended to replace worn out branded sparkplugs with the same brand). The case’s entry barrier theory has been criticized. See HOVENKAMP, *FEDERAL ANTITRUST POLICY*, *supra* note 46, § 9.4 (stating that the federal circuit courts are critical of *Ford*).

¹⁹⁸ See *supra* Part V.A, B. See generally I HERBERT HOVENKAMP, MARK D. JANIS, & MARK A. LEMLEY, *IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW* § 4.2e6(C) (2004) (stating that little basis exists for inferring monopoly power from a trademark); IIA PHILLIP E. AREEDA, HERBERT HOVENKAMP, & JOHN L. SOLOW, *ANTITRUST LAW* ¶ 523 (1995) (“[T]rademarks . . . do not themselves confer any market power.”); 1 MCCARTHY, *supra* note 7, §§ 2:10–2:13 (stating that trademarks are essential to the competitive process); SULLIVAN & GRIMES, *supra* note 75, §§ 6.3, 15.5 (stating that brand differentiation produces substantial benefits, but may harm interbrand competition); HOVENKAMP, *FEDERAL ANTITRUST POLICY*, *supra* note 46, § 10.3c (stating that trademarked products are generally sold in competitive markets).

not mean that trademarks never generate “subantitrust” monopoly power, or that subantitrust monopoly power should not be of concern to trademark law. A very tightly focused antitrust lens might disclose subantitrust monopoly power and mechanisms by which trademarks affect competition (e.g., by revealing that trademarks can be entry barriers).¹⁹⁹

Still, the Fifth Postulate is highly problematic. It may amount to a claim that trademark law does not sufficiently account for trade-mark generated monopoly power and, therefore, an antitrust-type determination of monopoly power should be incorporated into trademark law’s infringement legal machinery. However, this added element would be very costly.²⁰⁰ We have seen that it is difficult to identify and measure monopoly power that exceeds the antitrust threshold of concern, and that an antitrust “mistake” can chill legitimate competitive conduct.²⁰¹ It would be even more difficult to identify and measure monopoly power below the antitrust threshold, and there would be a danger of chilling legitimate trademark usage. Even if an antitrust lens can disclose subantitrust monopoly power, it may be incapable of discerning whether or to what degree the power flows from trademark usage versus other sources that contribute to the power, or that are the power’s primary or sole source.²⁰² If an antitrust lens can reveal that a trademark has competitive and anticompetitive consequences, it is unlikely to disclose which consequence predominates.²⁰³

VI. POSTULATE SIX: “ANTITRUSTIZING” TRADEMARK LAW

Postulate Six claims that an antitrust lens can help decide whether a trademark is functional, generic, or infringed. Employing the lens in trademark cases would be a significant departure, but not an unprecedented one.²⁰⁴ To evaluate the postulate, I start with the functionality variation. It is the most frequently argued of the three, and undoubtedly the most compelling, because a trademark right to the exclusive use of a product design feature (e.g., the shape of a football) can directly impact competition in the market for the product.²⁰⁵

¹⁹⁹ It is not news that trademarks might “foreclose” competitors. *See, e.g.,* Pope Automatic Merch. Co. v. McCrum Howell Co., 191 F. 979, 981 (7th Cir. 1911) (stating that trademark protection for a product design may reduce competition).

²⁰⁰ *See infra* Part VI (discussing “antitrustizing” trademark law).

²⁰¹ *See supra* Parts II.B & IV.B (discussing antitrust monopolies and methodology).

²⁰² *See supra* Part II.C (discussing the nature of trademarks).

²⁰³ *See id.*

²⁰⁴ *See supra* note 8.

²⁰⁵ *See supra* note 7.

A. FUNCTIONALITY VARIATION

The functionality doctrine traditionally limits trademark rights in product design features in order to insure effective competition in product markets.²⁰⁶ Advocates for Postulate Six's functionality variation claim that this policy is shared by antitrust law; therefore, it is appropriate to incorporate an antitrust lens into the functionality doctrine.²⁰⁷ They believe that the antitrust lens would result in an improved functionality doctrine comprised of case law that is more consistent, precise, and predictable; and that would yield results that are more empirically informed.²⁰⁸ Ascertaining a producer's product market, market share, and monopoly power would, they believe, yield important information concerning consumer product preferences and the competitive impact of enforcing trademark rights in design features.²⁰⁹

All this is very questionable. Trademark law and antitrust law are not animated by identical public policies.²¹⁰ It is true that the functionality doctrine benefits competitors by circumscribing trademark rights in design features. However, this does not mean that the doctrine is an antitrust-like tool for rooting out and extinguishing illegal monopoly power. Indeed, in many cases the functionality issue may no longer turn upon the competitive impact of trademark rights. The Supreme Court seems to have rejected a competition-calibrating functionality standard for useful product design features.²¹¹

Postulate Six's functionality variation is questionable for other reasons as well. The other central policy of the functionality doctrine is to insure that trademark rights do not encroach upon the legal realm preserved for patents.²¹² Contrary to

²⁰⁶ 1 MCCARTHY, *supra* note 7, § 7:63.

²⁰⁷ See, e.g., Kingsbury, *supra* note 7, at 66, 70, 74, 91.

²⁰⁸ See, e.g., *id.* at 70, 91.

²⁰⁹ See, e.g., *id.* at 68.

²¹⁰ See *supra* Part III.B (discussing the policies of trademark and antitrust law).

²¹¹ *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 32-33, 58 U.S.P.Q.2d (BNA) 1001, 1006 (2001) ("The Court of Appeals in the instant case seemed to [erroneously believe] . . . that a necessary test for functionality is 'whether the particular product configuration is a competitive necessity.'"). *But see* *Valu Eng'g v. Rexnord Corp.*, 278 F.3d 1268, 1276, 61 U.S.P.Q.2d (BNA) 1422, 1427 (Fed. Cir. 2002) (stating that *Traffix* "does not mean that the availability of alternative designs cannot be a legitimate source of evidence to determine whether a feature is functional . . .").

²¹² 1 MCCARTHY, *supra* note 7, § 7:63. Patent law protects novel, nonobvious, and useful inventions for a limited term of years, and provides exclusive rights: e.g., the rights to exclude others from making, using, or selling the invention. Trademark law protects for a potentially unlimited period a producer's use of a distinctive mark against copying likely to confuse consumers. See generally *id.* §§ 6:1-6:3. The Supreme Court has repeatedly cautioned against permitting trademark protection to encroach upon patent territory. E.g., *Traffix Devices*, 532 U.S. at 29 ("Trade dress protection must subsist with the recognition that in many instances there is no prohibition against copying goods and products.").

the functionality variation's claim, an antitrust lens is not necessary to cabin trademark law which already provides functionality standards that are up to that task. For example, a court wishing to avoid using trademark law to provide patent-like rights in a product design feature may simply require the producer asserting the rights to demonstrate that the feature does not affect the product's cost or quality. This standard raises a very high bar for trademark rights because many design features likely affect product cost or quality.²¹³

Even if one assumes that Postulate Six's antitrust lens would make the functionality doctrine more consistent, precise, and predictable; the lens is unlikely to provide these benefits in a cost-effective manner. The antitrust process for ascertaining the presence of monopoly power is fact intensive, often requires expert economic testimony, and is intensely contested.²¹⁴ Nor is an antitrust lens likely to add value to the functionality doctrine by empirically informing decisions. Courts considering whether a design feature is functional already admit evidence relating to a product's design, engineering, distribution, consumption, substitutes, commercial success, and so forth.²¹⁵

Advocates of Postulate Six's functionality variation also claim that the functionality doctrine would benefit by incorporating the antitrust economic concept of cross-elasticity of demand and the related formulaic expression "reasonably interchangeable."²¹⁶ This claim merits special attention because it is made for each of the Sixth Postulate's variations.

Antitrust law employs cross-elasticity of demand to help decide whether products are close substitutes and to measure a defendant's monopoly power.²¹⁷ If there is high cross-elasticity of demand between the defendant's product and

²¹³ See *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 1340, 213 U.S.P.Q. (BNA) 9, 15 (C.C.P.A. 1982) (stating that a functionality standard barring trademark protection for design features that affect a product's cost or quality is "so broad as to be meaningless, for every design 'affects' . . . the article in which it is embodied"). In *TrafFix Devices*, 532 U.S. at 33, the Court endorsed an "affects standard" ("a feature is also functional when . . . it affects the cost or quality of the device"). A high bar also results when courts require that for a design feature to be nonfunctional, it must have many substitutes. See, e.g., *Ideal Toy Corp. v. Plawner Toy Mfg. Corp.*, 685 F.2d 78, 81-82 (3d Cir. 1982) (stating that substitutes must be limited only by the imagination).

²¹⁴ See *supra* Parts II.B, IV (discussing antitrust monopolies and contrasting the economic methodologies of trademark law and antitrust law).

²¹⁵ See Weinberg, *supra* note 143, at 42-47 (discussing evidence of functionality admitted by courts).

²¹⁶ See, e.g., Cunningham, *supra* note 7, at 584-88.

²¹⁷ See generally HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 46, § 3.4. Cross-elasticity of demand is the proportionate change in the quantity demanded of one product (for example, pencils) in response to a proportionate change in the price of another product (for example, pens). A positive cross elasticity indicates that the products are substitutes. See HIRSHLEIFER & HIRSHLEIFER, *supra* note 134, at 139-40.

other producers' products, that is, if they are reasonably interchangeable, then all the products are close substitutes and belong in the same product market. This is the proper market in which to gauge the defendant's monopoly power. The presence of close substitutes for the defendant's product makes it less likely that the defendant can charge a supra-competitive price for its product. If it tried, consumers would switch to the close substitutes. Products lacking close substitutes are more susceptible to monopoly pricing because consumers will not readily switch to poor substitutes.

Postulate Six's functionality variation argues that cross-elasticity of demand should be applied to learn the competitive impact of enforcing a plaintiff's alleged trademark rights in a product design feature.²¹⁸ If the plaintiff's product incorporating the trademarked design feature (the "feature product") shares a properly defined market with reasonably interchangeable substitute products lacking the feature, then the anticompetitive impact of enforcing trademark rights in the feature product is reduced, and the feature is nonfunctional. The feature product's producer lacks monopoly power because if it raises the product's price, consumers will substitute away to competitors' products lacking the design feature. On the other hand, the producer of the feature product would have monopoly power if the feature is an input required to produce reasonably interchangeable substitute products. In that case, products lacking the feature would be poor substitutes.

The antitrust experience with cross-elasticity of demand strongly suggests that it would be unwise to graft it onto the functionality doctrine.²¹⁹ Cross-elasticity of demand is useful to establish that two products are reasonably interchangeable substitutes only when both products are sold at competitive prices equal or close to their respective marginal costs.²²⁰ Marginal cost data normally is unavailable, and a firm with monopoly power can appear to be competing even when it is exploiting its power. Therefore, to apply the cross elasticity concept properly, it is necessary to employ other means to determine whether the products being compared are sold at competitive prices. Relevant evidence includes evidence of market structure, input costs, and past price movements. Cross-elasticity of demand is a demanding concept to apply, and there are many antitrust examples of its incorrect application.²²¹

²¹⁸ See, e.g., Cunningham, *supra* note 7, at 584-88.

²¹⁹ See HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 46, §§ 3.4b., 3.4c.

²²⁰ Marginal cost is the cost increment or decrement of producing one additional unit of output. A firm that prices at marginal cost earns a normal profit and is a competitive firm. See HIRSHLEIFER & HIRSHLEIFER, *supra* note 134, at 49, 167-71.

²²¹ Postulate Six's advocates often cite *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956), as the antitrust source for the cross-elasticity concept. E.g., 2 MCCARTHY, *supra* note 7, § 12:24. The case is a classic example of how misusing the concept can define a product market too

B. GENERICITY AND INFRINGEMENT VARIATIONS

Postulate Six's other variations claim that an antitrust lens can help determine whether a trademark is generic or is infringed. They also emphasize cross-elasticity of demand and the "reasonably interchangeable" standard.

The generic trademark doctrine holds that a producer should not be permitted to enforce trademark rights in a word mark if the rights would deprive competitors of a word they need to describe their products.²²² A word is generic if it is commonly used to describe a product "genus."²²³ The question of whether a word mark is generic can be framed as whether the public understands the word to refer to a genus of which the producer's particular branded product is a species.²²⁴

Postulate Six's genericity variation claims that a court can employ cross-elasticity of demand to decide whether two products fall into the same genus.²²⁵ For example, a producer would not be permitted to claim trademark rights in the word "Safari" for its species of khaki-colored bush jackets with belts, buttoned shoulder loops, and patch pockets if the public understands that all such jackets are safari jackets.²²⁶ The word "Safari" refers not to a species, but to a genus. However, if jackets and boots are not reasonably interchangeable, then "Safari" is generic for jackets, but not for boots.²²⁷ The costs of applying cross-elasticity of demand are certain to exceed the benefits of introducing it into the "vexing" issue of what words mean to consumers.²²⁸

Similar costs would be imposed by Postulate Six's infringement variation. In a trademark infringement case, a plaintiff must demonstrate that the defendant's

broadly and understate a defendant's monopoly power. See HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 46, § 3.4b.

²²² See generally 2 MCCARTHY, *supra* note 7, § 12:2.

²²³ *Id.* § 12:23.

²²⁴ See *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194, 224 U.S.P.Q. (BNA) 327, 329 (1985).

²²⁵ *E.g.*, 2 MCCARTHY, *supra* note 7, § 12:24.

²²⁶ The example is based upon *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 11-12, 189 U.S.P.Q. (BNA) 759, 766-67 (2d Cir. 1976).

²²⁷ See *id.* at 12.

²²⁸ ROGER E. SCHECHTER & JOHN R. THOMAS, INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS, AND TRADEMARKS 593 (2003) ("[C]lassifying a word or phrase as the generic term for a product has proven vexing for the courts."). The costs are discussed *supra* Part VI.A. Advocates of Postulate Six's genericity variation acknowledge that an antitrust market will not always be the same as a trademark genus, but they do not specify when the antitrust approach will be helpful. 2 MCCARTHY, *supra* note 7, § 12:24. See also *A.J. Canfield Co. v. Honickman*, 808 F.2d 291, 303 n.18, 1 U.S.P.Q.2d (BNA) 1364, 1474 n.18 (3d Cir. 1986) (expressing concern that the cross-elasticity method is unsuited to the complexities of the genericness issue).

use of the plaintiff's mark is likely to confuse consumers.²²⁹ The consequences of confusion depend upon whether there is competition between the plaintiff's and the defendant's products. If the products compete (for example, beer v. beer) and there is a likelihood of consumer confusion, then the plaintiff is directly injured if a confused consumer purchases the defendant's product believing that it is the plaintiff's.²³⁰ The plaintiff loses a sale. If the products do not compete (for example, beer v. cheese) and there is a likelihood of consumer confusion, then the plaintiff's loss is more subtle. Its good will might be damaged if, for example, the confused consumer dislikes the defendant's product and believes that the defendant or its product is sponsored, affiliated, or connected with the plaintiff or its product.²³¹

Courts in noncompeting products cases employed market factors (e.g., whether the allegedly infringing defendant is likely to "bridge the gap" into the plaintiff's product market) not employed in cases involving competing products.²³² It became accepted that the market factors should not and could not be applied mechanically, and that a determination of likelihood of confusion in one case may not provide precedent for another.²³³ Rather, the factors frame evidence relevant to what ultimately is a psychological issue concerning mental state.²³⁴ They are employed with considerable discretion, and without mathematical precision.²³⁵ Dissatisfaction with this state of affairs underlies Postulate Six's claim that the reasonably interchangeable standard can help decide whether products compete or not.²³⁶ Similar dissatisfaction underlies Postulate Six's claim that an antitrust lens considering substitution effects and consumer

²²⁹ See 3 MCCARTHY, *supra* note 7, § 23:1.

²³⁰ See *id.* § 24:1.

²³¹ See *id.* § 24:6.

²³² See, e.g., *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495, 128 U.S.P.Q. (BNA) 411, 413 (2d Cir. 1961) (stating that where the allegedly infringed and infringing products are different, the plaintiff's chance of success is a function of the strength of its mark; the degree of similarity between the two marks; the proximity of the products; the likelihood that the plaintiff will bridge the gap; actual confusion; the defendant's bad faith in adopting its mark; the quality of the defendant's product; and the sophistication of buyers). Today some courts employ a multifactor analysis in both types of cases. See 3 MCCARTHY, *supra* note 7, § 24:2.

²³³ *Id.* § 24:29.

²³⁴ RICHARD L. KIRKPATRICK, *LIKELIHOOD OF CONFUSION IN TRADEMARK LAW* xx (2002).

²³⁵ See, e.g., *Barbecue Marx, Inc. v. 551 Ogden, Inc.*, 235 F.3d 1041, 1044, 57 U.S.P.Q.2d (BNA) 1307, 1309 (7th Cir. 2000) (stating that the likelihood of confusion test requires equitable balancing, that no single market factor is determinative, and that courts assign different weights to the factors depending upon the facts of the case).

²³⁶ See 3 MCCARTHY, *supra* note 7, § 24:23.

preferences can empirically inform the issue of whether there is a likelihood of confusion.²³⁷ However, implementing these claims would be costly.²³⁸

C. SUMMARY

The existing trademark law of functionality, genericity, and infringement developed over many years and is extensive.²³⁹ It is a substantial capital stock of knowledge concerning important recurring issues.²⁴⁰ Postulate Six claims that this law should be “antitrustized” to obtain enhanced information concerning product markets and how they are affected by trademarks. I suggest that the informational benefits of an antitrustized regime would fall well short of the sum of the costs of transiting to the regime and the regime’s heightened administrative costs.²⁴¹

The costs of regime change would be high.²⁴² Transition would proceed over time on a jurisdiction-by-jurisdiction basis. Many lawyers and courts would have to master using an antitrust lens in trademark litigation.²⁴³ Legal uncertainty during the transition could lead to more frequent trademark disputes and higher settlement and litigation costs.

The transition costs may eventually be sunk, unlike the antitrustized regime’s administrative costs which would accrue so long as the regime is employed. We have seen that the heightened costs of employing an antitrust lens would be

²³⁷ Kingsbury, *supra* note 7, at 70-75.

²³⁸ An example is provided by *Worthington Foods, Inc. v. Kellogg Co.*, 732 F. Supp. 1417, 1437-40, 14 U.S.P.Q.2d (BNA) 1577, 1591-93 (S.D. Ohio 1990). This trademark infringement case employs antitrust precedent, distinguishing between multiple submarkets within a product market. The submarket approach has been strongly criticized for introducing confusion into antitrust law. See HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 46, § 3.2(c) (noting the “general uselessness” of submarkets). *Worthington* also notes, but fails to carefully address, the ambiguity (discussed *supra* Part VI.A) inherent in employing cross-elasticity of demand to define a product market. 732 F. Supp. at 1436 n.76.

²³⁹ For example, the functionality doctrine is the product of over 100 years of litigation. See Weinberg, *supra* note 143, at 10-26. Professor McCarthy’s treatise discussion of the doctrine exceeds 100 pages. See 1 MCCARTHY, *supra* note 7, §§ 7:63-93.

²⁴⁰ See generally RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 20.1 (6th ed. 2003) (portraying a corpus of case precedent (including judicial glosses on statutes) as a capital stock of information concerning legal rights and responsibilities).

²⁴¹ It is socially desirable to minimize administrative costs. See POSNER, *supra* note 240, at 563-64.

²⁴² See generally *id.* § 20:4 (discussing the economics of stare decisis).

²⁴³ The Patent and Trademark Office would be similarly affected if it antitrustized its trademark precedent.

substantial.²⁴⁴ They alone would exceed the informational benefits obtained through the use of an antitrust lens.

Presumably, an antitrustized trademark regime would produce results that are different from those produced by existing law. Otherwise, why claim that regime change is desirable? Postulate Six emphasizes the need to know more about product markets and how they are affected by trademarks. It largely ignores other key variables in the trademark law calculus: protecting producer good will and reducing likely consumer confusion.²⁴⁵ Changing the value of one variable may affect the outcome of a trademark case. For example, the antitrustized regime might provide enhanced information concerning whether a trademark limits entry into a product market. Lacking this information, a court might hold that the mark is not functional or generic. Having it, a court might conclude the opposite. The antitrustized result makes the mark available to competitors whose use of the mark could, in turn, increase the likelihood of consumer confusion concerning product source or quality.²⁴⁶ In some cases, antitrustized law might yield closer to optimal results than existing law by trading likely consumer confusion for enhanced competitor access to a mark. In others, it may not. It is impossible to say which regime would yield more errors.²⁴⁷

Existing trademark law typically avoids the heightened costs of an antitrust lens by relying upon somewhat “rough cut” judgments concerning competition in product markets and how it is affected by trademarks.²⁴⁸ Existing law may not be ideal, but it is certainly less costly than an antitrustized trademark regime.²⁴⁹

²⁴⁴ See *supra* Parts VI.A, B (discussing Postulate Six’s three variations). “Administrative costs” means the public and private costs of employing an antitrust lens. See generally POSNER, *supra* note 240, at 563-64 (discussing the administrative costs of due process and the rules of evidence).

²⁴⁵ See *supra* Part III.B (discussing trademark policies).

²⁴⁶ Less enforcement of trademarks could also result in reduced producer incentive to maintain or enhance good will. See *supra* Part II.C and III.B (discussing the nature of trademarks and the policies of trademark law).

²⁴⁷ It is conceivable that an antitrust lens might bias courts in favor of trademarks. See *supra* Part V.C (stating that antitrust law regards trademarks as generally procompetitive or benign).

²⁴⁸ See, e.g., *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1148, 6 U.S.P.Q.2d (BNA) 1089, 1094 (2d Cir. 1987) (ordering that the functionality of the design for a one-piece undulating bicycle rack be determined by looking at alternative designs for bicycle racks in general). The heightened costs of a more refined inquiry may be another reason why courts employ functionality standards that deter litigating the functionality issue. See *supra* Part VI.A (discussing “affects” functionality standards). I borrowed the phrase “rough cut” from *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 496 (1992) (Scalia, J., dissenting), where it was employed to describe consumer decisions in product markets with high information costs.

²⁴⁹ See generally F. Scott Kieff & Troy A. Paredes, *The Basics Matter at the Periphery of Intellectual Property Law*, 73 GEO. WASH. L. REV. 174, 176-79, 181-83 (2004) (arguing that one should resolve intellectual property disputes by applying the core principles of intellectual property law).

VII. CONCLUSION

The monopoly theory of trademarks does not reflect all that we know about trademarks and their effects in product markets. Nor does the theory provide a cost-efficient means to improve our understanding of what currently is uncertain or unknown about trademarks. The monopoly theory may remind us that some trademarks may at some time have net anticompetitive effects in some product markets. However, it does not improve our ability to identify when this is the case. The monopoly theory of trademarks is a bust.