

# Amazon's Quiet Overhaul of the Trademark System

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Amazon's dominance as a platform is widely documented. But one aspect of that dominance has not received sufficient attention—the Amazon Brand Registry's sweeping influence on firm behavior, particularly in relation to the formal trademark system. Amazon's Brand Registry serves as a shadow trademark system that dramatically affects businesses' incentives to seek legal registration of their marks. The result has been a dramatic increase in the number of applications to register, which has swamped the U.S. Patent and Trademark Office and created delays for all applicants, even those that previously would have registered their marks. And the increased value of federal registration has drawn in bad actors who fraudulently register marks that are in use by others on the Amazon platform and use those registrations to extort the true owners.

Amazon's policies also create incentives for businesses to adopt different kinds of marks. Specifically, businesses are more likely to claim descriptive or generic terms, advantageously in stylized form or with accompanying images, and to game the scope limitations that would ordinarily attend registration of those marks. And the same Amazon policies have given rise to the phenomenon of “nonsense marks”—strings of letters and numbers that are not recognizable as words or symbols. In the midst of these systemic changes, Amazon has consolidated its own branding practices, focusing on a few core brands and expanding its use of those marks across a wide range of products. In combination, Amazon's business model and Brand Registry have overhauled the American trademark system, and they have done so with very little public recognition of the consequences of Amazon's business approach.

Amazon's impact raises profound questions for trademark law, and for law more generally. There have been powerful players before, and other situations in which private dispute resolution procedures have affected parties' behavior. But Amazon's effect on the legal system is unprecedented in scale and scope. What does (and should) it mean that one private party can so significantly affect a legal system? Do we want the trademark system to have to continually adapt to Amazon's rules? If not, how can the law disable Amazon from having such a profound impact? In this regard, we explore the ways in which Amazon's practices might both help and hurt competition, be harmful to the trademark system, and reshape how we think about trademark law at its foundation.

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## Introduction

Amazon's dominance as a platform is widely documented.<sup>1</sup> Congress held hearings focused on Amazon for more than a year,<sup>2</sup> the Federal Trade Commission (FTC) recently sued Amazon for unfair competition,<sup>3</sup> and scholars and commentators (including Amazon critic Lina Khan, now Chair of the FTC) debate the effects of this dominance on consumer welfare.<sup>4</sup> But one aspect of that dominance has not received sufficient attention—the Amazon Brand Registry's sweeping influence on firm behavior, particularly in relation to the formal trademark system. Amazon's Brand Registry serves as a shadow trademark system<sup>5</sup> that dramatically affects businesses' incentives to seek registration of their marks and to choose certain types of marks to designate their goods.

The Brand Registry is, first and foremost, a private dispute resolution system that allows mark owners to object to uses of their marks on Amazon without needing to invoke formal legal process.<sup>6</sup> What makes Amazon's system different than other private dispute resolution systems is the extent to which it influences parties' behavior within the legal system itself.<sup>7</sup> The Brand Registry not only gives parties a cheaper and more efficient way to resolve disputes that otherwise would need to be resolved through judicial process, but it also creates incentives for parties to use the trademark system differently than they otherwise would and in ways that were not anticipated when that system was designed.

Most directly, the Brand Registry has changed the incentives to register trademarks. The American trademark system is use-based: trademark rights arise out of use, not registration, and registration in the U.S. Patent and Trademark Office (PTO) simply records those rights and provides certain enforcement benefits.<sup>8</sup> Most significantly, registration usually entails broader geographic scope of rights, entitles the registrant to customs enforcement, and enables registrants to more easily extend their rights internationally.<sup>9</sup> But because unregistered marks have long been

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<sup>1</sup> *E.g.*, Rebecca Haw Allensworth, *Antitrust's High-Tech Exceptionalism*, 130 YALE L.J. F. 588, 603-04 (2021); Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 985 (2019) [hereinafter Khan, *Separation of Platforms and Commerce*]; John B. Kirkwood, *Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy*, 69 U. MIAMI. L. REV. 1, 4 (2014); Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 712-17 (2017) [hereinafter Khan, *Amazon's Antitrust Paradox*].

<sup>2</sup> Annie Palmer, *Amazon Axes Some Private-Label Brands as Part of Wider Cost Cuts*, CNBC, Aug. 10, 2023, <https://www.cnbc.com/2023/08/10/amazon-axes-some-private-label-brands-as-part-of-wider-cost-cuts.html>.

<sup>3</sup> Complaint, FTC v. Amazon.com, Inc., No. 2:23-cv-01495-JHC (W.D. Wash. Nov. 2, 2023).

<sup>4</sup> *See, e.g.*, sources cited *supra* note 1.

<sup>5</sup> By "shadow trademark system," we mean a system existing outside the realm of the traditional system established by law, as with shadow banking. Patrick M. Corrigan, *Shining a Light on Shadow Banks*, 49 J. CORP. L. 1 (2023); Note, *Danger Lurking in the Shadows: Why Regulators Lack the Authority to Effectively Fight Contagion in the Shadow Banking System*, 127 HARV. L. REV. 729 (2013). We do not mean to use the term to suggest an ominousness as in "valley of the shadow of death" or "shadow of one's former self."

<sup>6</sup> *Infra* section II.B.

<sup>7</sup> *Infra* section IV.A.2.

<sup>8</sup> *Infra* section I.B.

<sup>9</sup> *Infra* section I.B.

enforceable under federal law on largely the same terms as registered marks,<sup>10</sup> unregistered rights have often been perfectly adequate for the many smaller businesses whose sales were regional in nature and did not expect international expansion. Indeed, the availability of those unregistered rights has traditionally been seen as a benefit of the American system for small and medium-sized businesses.<sup>11</sup>

Amazon's setup has shifted that calculus because parties can participate in the Brand Registry to do business in the United States only if their mark is federally registered (or, as of very recently, if their application to register is pending).<sup>12</sup> Given Amazon's dominance as an online shopping platform, small and medium-sized businesses feel compelled to be on the platform, and participation in the Brand Registry has real value, both in terms of ease of enforcement and more favorable treatment in Amazon's search rankings.<sup>13</sup> Businesses therefore have strong incentive to register marks when they previously would have relied on unregistered rights.<sup>14</sup> Amazon even sweetens the deal by making relatively low-cost legal services available to parties who take advantage of the Amazon Intellectual Property Accelerator, through which parties can contract directly with participating law firms that have agreed to Amazon's fixed-rate pricing.<sup>15</sup>

The result has been a dramatic increase in the number of applications to register, which has swamped the PTO and created delays for all applicants, even those that would have previously registered their marks.<sup>16</sup> Our data show that annual PTO applications estimated to originate with small businesses have approximately doubled since Amazon's Brand Registry began, from about 100,000 to 200,000, increasing the proportion of filings from these entities from about 30% to about 40% annually.<sup>17</sup> In response to the delays that Amazon's policies helped create, Amazon has recently started qualifying parties for the Brand Registry based only on a pending application<sup>18</sup>—a move that enables parties to privately enforce marks that might ultimately be rejected by the PTO and is likely to create yet further PTO delays by increasing applications even more.

The increased significance of registration has created an opportunity for trademark extortionists who identify unregistered marks that are in use on the Amazon platform.<sup>19</sup> Like old-fashioned cybersquatters, these pirates apply to register others' marks in their own names and then seek to extort the true owners of the marks by threatening exclusion from Amazon's platform. The fraudulent nature of those applications is hard for the PTO to detect on the face of the application, which is accompanied by a specimen that might consist of a screenshot of the true owner's product but purports to depict the applicant's "use" of the mark in commerce. That opportunity for extortion is especially valuable when parties can qualify for the Brand

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<sup>10</sup> *Infra* section I.C.

<sup>11</sup> Jeanne C. Fromer & Mark P. McKenna, *Claiming Design*, 167 U. PA. L. REV. 123 (2018) (describing the benefits of unregistered rights); *infra* section I.B.

<sup>12</sup> *Infra* section II.B.

<sup>13</sup> *Infra* section II.B.

<sup>14</sup> *Infra* section III.A.

<sup>15</sup> *Infra* section II.B.

<sup>16</sup> *Infra* section III.A.

<sup>17</sup> *Infra* section III.A. We do not suggest that all of this increase is attributable to Amazon alone. As we discuss in section III.A, other factors may also have played a role.

<sup>18</sup> *Infra* section II.B.

<sup>19</sup> *Infra* section III.B.

Registry with only a pending application, because the true owners would at least have a chance to oppose registration if they were aware of the fraudulent applications.<sup>20</sup>

Not only does the Brand Registry increase incentives to register marks for which the owners would previously have relied on unregistered rights, but it also creates incentives for businesses to adopt different kinds of marks. Descriptive terms (like NATIONAL CAR RENTAL for nationwide car rental services) and generic terms (such as APPLE for apples) are particularly more valuable in light of Amazon's policies.<sup>21</sup> Descriptive words are normally not protectable or registrable without evidence that consumers actually associate the term with a single source (what trademark law calls "secondary meaning"), and that additional proof requirement is supposed to be a deterrent to claiming descriptive terms.<sup>22</sup> Generic terms are categorically excluded from protection, even if they have secondary meaning.<sup>23</sup> There has always been some incentive to claim descriptive and generic terms as trademarks despite the legal rules, because control over those terms can provide meaningful competitive benefits.<sup>24</sup> But with Amazon, there is an overwhelming incentive to control these terms because consumers search—often using descriptive or generic terms—to buy on Amazon.

The structure of the Brand Registry also enables parties to game the trademark registration system and effectively get the full benefits of exclusive rights in descriptive and maybe even generic terms.<sup>25</sup> Of particular relevance, parties can avoid descriptiveness and genericness rejections in the PTO by applying to register those terms in stylized format (such as a particular font) or with an accompanying image, even disclaiming rights in the descriptive or generic word(s) themselves. In those cases, trademark law supposedly restricts the scope of rights accorded to the registered mark, such that the rights are limited by the stylization or accompanying image.<sup>26</sup> But Amazon only matches text in its Brand Registry; it does not rely on or attempt to match stylization or accompanying images.<sup>27</sup> That means a highly descriptive, and maybe even generic, term might be deemed registrable in the PTO because of its stylization, but once the registered mark is part of Amazon's Brand Registry, it can effectively be enforced within Amazon as if it were a registration of the unprotectable word mark itself. This is not just a hypothetical concern. Some businesses have been applying to register descriptive and generic terms, likely for the purpose of monopolizing Amazon search and perhaps preventing others from using

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<sup>20</sup> All applications are published for opposition by third parties before the applied-for mark can be registered, so if Amazon's policy required registration, it would include only registered marks, the registration of which could have been opposed by the true owners. *See* 15 U.S.C. §§ 1062-1063.

<sup>21</sup> *Infra* section III.C.

<sup>22</sup> *Infra* section II.A.

<sup>23</sup> *Infra* section II.A.

<sup>24</sup> Christopher Buccafusco, Jonathan Masur & Mark P. McKenna, *Competition and Congestion in Trademark Law*, 102 TEX. L. REV. 437 (2024); Jeanne C. Fromer, *Against Secondary Meaning*, 98 NOTRE DAME L. REV. 211 (2022).

<sup>25</sup> *Infra* section III.C.

<sup>26</sup> Barton Beebe & Jeanne C. Fromer, *Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion*, 131 HARV. L. REV. 945, 984-85 & 985 n.162 (2018). There are, of course, good reasons to doubt that trademark law effectively enforces that scope, but at least the scope restrictions are supposed to follow. Mark A. Lemley & Mark P. McKenna, *Scope*, 57 WM. & MARY L. REV. 2197 (2016).

<sup>27</sup> *Infra* sections II.B, III.C.

those terms.<sup>28</sup> For example, the German unicorn SellerX, which buys up smaller Amazon businesses, has sought to register marks for electronics parts using the parts' generic identifiers, such as IRF520.<sup>29</sup> That gaming disrupts the balance that the formal legal system tries to strike between, on the one hand, recognition of the source-identifying capacity of design features, and on the other hand, the need for competitive access to descriptive and generic terms, ignoring the reasons why those marks get any protection at all.<sup>30</sup>

The Brand Registry also creates greater incentive to claim so-called nonsense marks—strings of letters or numbers that are not comprehensible as words, such as ELXXROONM, SUJIOWJNP, XUFFBV, and LXCJZY—all marks parties have recently applied to register in the PTO.<sup>31</sup> Indeed, the PTO data suggest a tremendous increase in filings for nonsense marks in the past few years, from almost none to over 20,000 applications annually (0.5% of annual filings to approximately 4.5%).<sup>32</sup>

Nonsense marks are currently easy to register as trademarks because they appear not to provide any information about the goods or services with which they are used, making them inherently distinctive and thus immediately protectable.<sup>33</sup> But those “marks” pose significant conceptual problems for trademark law, which presumes that parties are claiming terms that will have some meaning to consumers.<sup>34</sup> Even coined terms like KODAK are presumed to be understandable as words, if only as words in relation to the particular goods or services with which they are used. Because they are understandable as words, trademark law assumes consumers will attach source-related meaning to them. Signs that are not understandable or pronounceable flout the basic premise of distinctiveness because they are not vessels for any meaning.

Nonsense marks pose equally difficult problems in determining whether a sign is being used as a trademark. That determination is typically contextual: the PTO generally focuses on whether a particular sign functions as a mark as it is shown in a particular specimen of use.<sup>35</sup> For that reason, courts and the PTO have focused primarily on the location of a claimed mark—compare a polo player stitched onto the breast pocket of a Ralph Lauren polo shirt with a sentence like “I love you” splayed across a t-shirt<sup>36</sup>—and not the intrinsic nature of that claimed mark.<sup>37</sup> Nonsense marks probably do not function as marks, but not because of the location of their use or other context. They are unlikely to function as marks because incomprehensible strings of letters or numbers are not likely to be understood by consumers as carrying *any* meaning, let alone source-related meaning. Even the likelihood-of-confusion analysis, used to evaluate trademark infringement, is complicated with nonsense marks: trademark law does not have a good way to assess similarity when one of the

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<sup>28</sup> *Infra* section III.C.

<sup>29</sup> *Infra* section III.C.

<sup>30</sup> *Infra* section I.A.

<sup>31</sup> *Infra* section III.D.

<sup>32</sup> *Infra* section III.D.

<sup>33</sup> *Infra* sections I.A, III.D.

<sup>34</sup> *Infra* section I.A.

<sup>35</sup> *Infra* section III.C.

<sup>36</sup> *Infra* section I.B.

<sup>37</sup> Mark A. Lemley & Mark P. McKenna, *Trademark Spaces and Trademark Law's Secret Step Zero*, 75 STAN. L. REV. 1 (2023).

things being compared is not comprehensible as a word or capable of being regarded as visual matter. Similarity is usually assessed in terms of sight, sound, and meaning, and only sight is even possibly relevant for nonsense marks.<sup>38</sup>

There was never previously much incentive to use nonsense marks because a claimed mark has to actually work as a mark. If the name you choose is not pronounceable or memorable, then it does not much matter that you can protect it or even register it; it is not going to provide real commercial benefits because consumers are not likely to attach any meaning to the mark. But being in Amazon's Brand Registry does not just help a business enforce its mark—it gives the business preference in Amazon's algorithm for displaying search results.<sup>39</sup> Compared to other online contexts, Amazon's business model de-emphasizes memorable branding by third-party sellers because many Amazon shoppers search by product type or rely more heavily on consumer reviews than they would in other shopping contexts.<sup>40</sup> When search and purchase are not necessarily done by people who need to remember a brand name, businesses just need something to make the algorithm prefer them. Nonsense will do.<sup>41</sup>

Critics of excessive branding might rejoice about that de-centering and potential democratization of the online marketplace. But there is irony here: Amazon's de-centering of third-party branding likely has the ultimate effect of amplifying Amazon's own power by making its search function and its algorithm even more important in finding products. And it certainly enhances the value of Amazon's own branding strategies, as reflected in the massive expansion of products sold under the Amazon Basics and Amazon Essentials brands.<sup>42</sup> Amazon controls the platform and can preference its own products in search results based on product descriptor keywords, making its house brand more important than product line brands. To take just one example, a search for "Hanes tshirt" returns an Amazon Essentials t-shirt as the first result, followed by several Hanes results.<sup>43</sup>

In all of these ways, Amazon's business model and Brand Registry have overhauled central aspects of the trademark system in ways that are potentially troublesome. They have increased incentives for registration generally and to register different types of marks, putting pressure on several substantive validity doctrines and forcing the PTO to deal with a huge influx of applications that examiners cannot manage in a timely way. Moreover, this legal overhaul has happened with very little public recognition of the consequences of Amazon's business approach.<sup>44</sup>

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<sup>38</sup> *Infra* section III.D.

<sup>39</sup> *Infra* section II.B.

<sup>40</sup> *Infra* section III.D.

<sup>41</sup> *Infra* sections I.A, III.D.

<sup>42</sup> *Infra* section III.E.

<sup>43</sup> *Infra* section III.E.

<sup>44</sup> Even when there has been any recognition of the consequences, it has generally been of a single aspect, typically the phenomenon of nonsense marks, rather than a comprehensive sense of Amazon's impact on the trademark system. See John Herrman, *All Your Favorite Brands, from BSTOEM to ZGGCD*, N.Y. TIMES, Feb. 11, 2020, <https://www.nytimes.com/2020/02/11/style/amazon-trademark-copyright.html> (highlighting the nonsense marks on Amazon); Note, *Fanciful Failures: Keeping Nonsense Marks off the Trademark Register*, 134 HARV. L. REV. 1804 (2021) (thinking through how the trademark system should handle nonsense marks) [hereinafter *Fanciful Failures*].

We do not claim that Amazon specifically intended to affect the trademark system in any of the ways we describe, or even that Amazon has fully understood the extent of its impact. It seems very likely that Amazon adopted policies that it thought were sensible for its business, and specifically that it created the Brand Registry at least in part to address actual societal concerns, such as counterfeit goods and products liability, while not incidentally avoiding regulation like Congress's proposed SHOP SAFE Act.<sup>45</sup> And it may be that those policies and practices have simply had the unintended (but not necessarily unforeseeable) consequences that we describe.

But Amazon's business model and Brand Registry raise profound questions for trademark law, and for law more generally. While there have been powerful players before, and other situations in which private dispute resolution procedures have meaningfully affected parties' behavior, Amazon's effect on the legal system is unprecedented. One set of questions is institutional and structural. What does (and should) it mean that one private party can so significantly affect a legal system? Do we want the legal system to have to continually adapt to Amazon's rules? If not, how can the law disable Amazon from having such a profound impact?

Another set of questions focuses more specifically on the overall effects of Amazon's policies on competition, and how those effects should relate to trademark law's normative commitments. As we describe, Amazon's model and its policies likely increase its own power vis-à-vis third-party brands and de-center branding more generally. Whether one sees that shift as good or bad depends on how one weighs the potential search simplification and price reduction for consumers and the ease of marketplace entry for third-party sellers against Amazon's power over third-party sellers, including the discrepancy in branding power between them. Likewise, whether a more general de-centering of branding is good or bad depends on whether the alternative search tools (particularly algorithms that focus on product information and consumer reviews) do a better job of conveying important information to consumers than trademarks do—and that question depends on how much one values different kinds of information provided by marks. In the end, whether and how we should respond to Amazon's effects on the trademark system depend on the extent to which we want the trademark system to reify marks on the same assumptions that have informed development of that system, or whether instead the facts on the ground have undermined those assumptions.

Part I describes the trademark system's aim and design. Part II turns to Amazon's business model and Brand Registry. Part III builds on these two parts by investigating how Amazon's practices have provoked the businesses selling wares there to change how they think about registering marks and the marks they choose, plus the trademark extortionists that have arisen in response to this ecosystem. After unpacking the trademark and other legal harms provoked by Amazon's practices, Part IV discusses whether and how to address this overhaul of the trademark system within trademark law, other areas of law, or Amazon. It also addresses what Amazon's practices might mean for the future of trademark law and competition more broadly.

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<sup>45</sup> *Infra* section II.B.



## II. Amazon's Business Model and Brand Registry

Since Amazon launched, it has not only grown what is perhaps the most vibrant online commerce platform, with 9.7 million third-party businesses selling goods on Amazon,<sup>126</sup> but it has also created a brand that is valued at over \$468 billion.<sup>127</sup> Section A provides background on Amazon's business model and evolution, and section B turns to Amazon's Brand Registry and how it fits in with Amazon's business model.

### A. Amazon's Business Model and Evolution

Amazon was founded in 1995 as an online bookseller, and it has since evolved into a pervasive ecommerce platform and then some.<sup>128</sup> Indeed, a recent in-depth cultural study of Amazon describes it as the most ubiquitous company in history: "the 'everything' brand for 'everyone.'"<sup>129</sup> It is the biggest online retailer in the United States, controlling an estimated half of online retail sales.<sup>130</sup> And its reach is global—it serves customers in about 200 countries.<sup>131</sup>

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<sup>124</sup> Indeed, many (perhaps most) trademarks are not registered. Beebe & Fromer, *supra* note 26, at 961–62.

<sup>125</sup> Cf. Fromer & McKenna, *supra* note 11, at 171 (observing that early claims made to a design, such as is made in a registration system, "force businesses to think through their designs and how they intend to commercialize and market those designs," as well as "an incentive to articulate claims that correspond to their market intentions, which they might not otherwise have thought through as thoroughly at that stage").

<sup>126</sup> *Must-Know Amazon Seller Statistics*, GITNEX, <https://blog.gitnux.com/amazon-seller-statistics> (last visited Feb. 8, 2024).

<sup>127</sup> *Amazon's Global Brand Value from 2006 to 2023*, STATISTA, <https://www.statista.com/statistics/326086/amazon-brand-value> (last visited Feb. 8, 2024).

<sup>128</sup> Amazon now provides cloud services, a streaming service for movies and other programming, Ring doorbell services, Twitch videogame streaming services, the Whole Foods supermarket chain, and much more. See generally BRAD STONE, *AMAZON UNBOUND: JEFF BEZOS AND THE INVENTION OF A GLOBAL EMPIRE* (2022).

<sup>129</sup> EMILY WEST, *BUY NOW: HOW AMAZON BRANDED CONVENIENCE AND NORMALIZED MONOPOLY* 3, 14–15 (2022) (exploring "Amazon's market dominance and our increasing dependence on its convenient services in relation to the resulting costs—on product sellers, market diversity, labor, and the environment, and on our own power as consumers").

<sup>130</sup> *Id.* at 3, 197.

<sup>131</sup> *Id.* at 197. Even as Amazon is available nearly globally, it has had to share .amazon top-level internet domain rights with South American countries where the Amazon River basin is located as a compromise to getting many of those domain rights. *Id.* at 171–72.

From the start, Amazon has had grand ambitions, as evidenced by early marketing materials drawing on its trademark<sup>132</sup>: “Amazon.com’s name pays homage to the Amazon River. Just as the Amazon River is more than six times the size of the next largest river in the world, Amazon.com’s catalog is more than six times the size of the largest conventional bookstore.”<sup>133</sup> Even with these aspirations, founder Jeff Bezos always intended for Amazon to be much more than the largest online bookstore. He began selling books only after considering twenty product categories, with the books as the entry point to, as communications scholar Emily West puts it, ultimately “build[ing] a mammoth ecommerce website.”<sup>134</sup> According to Bezos himself, “we’re not trying to be a book company or trying to be a music company—we’re trying to be a customer company.”<sup>135</sup>

Amazon’s business strategies have generally been in service of this overarching goal of attracting loyal customers and distributing to them, rather than just selling books. In particular, it has sold books and other products at very low prices as loss leaders to attract customers (which has also led to accusations of predatory pricing).<sup>136</sup> In doing so, Amazon has demonstrated its willingness to delay profits to build up its customer base, all the while drawing consumers away from its competitors.<sup>137</sup> Indeed, Amazon became consistently profitable only in 2015.<sup>138</sup> More generally, especially in its early years, Amazon did not spend much on traditional advertising and marketing but instead spent its money improving the platform’s customer experience, including its unprecedented fast, free shipping that ultimately became the central feature of its popular Prime membership service.<sup>139</sup>

To broaden its product base and attract yet more customers, since 1999, Amazon has sold not just its own products but has also offered its platform for other retailers to sell their wares. Amazon now has almost ten million third-party sellers on its platform,<sup>140</sup> which has created network effects to lure consumers, which in turn

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<sup>132</sup> The company considered several other names, including Cadabra, Awake.com, Bookmall.com, Aard.com, and Relentless.com, the last of which still redirects to Amazon’s website. BRAD STONE, *THE EVERYTHING STORE: JEFF BEZOS AND THE AGE OF AMAZON* 31 (2013).

<sup>133</sup> WEST, *supra* note 129, at 172. Though those early ambitions were trained on books and Amazon has since expanded to sell just about everything, books are still Amazon’s largest product category (sixteen percent of items sold). *Id.* at 83. Moreover, Amazon is by far the largest retailer of physical books and ebooks in the United States. *Id.*

<sup>134</sup> *Id.* at 87.

<sup>135</sup> *Id.* at 6; *cf.* STONE, *supra* note 132, at 24 (referring to Jeff Bezos’s 1994 plans with David Shaw for an “everything store”).

<sup>136</sup> WEST, *supra* note 129, at 87-88; *cf.* Khan, *Amazon’s Antitrust Paradox*, *supra* note 1, at 753 (“The fact that Amazon has been willing to forego profits for growth undercuts a central premise of contemporary predatory pricing doctrine, which assumes that predation is irrational precisely because firms prioritize profits over growth. In this way, Amazon’s strategy has enabled it to use predatory pricing tactics without triggering the scrutiny of predatory pricing laws.”).

<sup>137</sup> WEST, *supra* note 129, at 35, 88.

<sup>138</sup> *Id.* at 35.

<sup>139</sup> *Id.* at 16, 58-59. Now that Amazon has achieved the dominance it has, it engages in more traditional advertising. *Id.* at 16-17.

<sup>140</sup> *Supra* text accompanying note 126.

attracts more sellers, ad infinitum.<sup>141</sup> Amazon's offering of one-click ordering (and the resulting patent it obtained on it) typifies how the platform has sought to provide extreme convenience for consumers.<sup>142</sup> Since the year of Amazon's launch, it has also aimed to garner consumer trust by collecting and sharing consumer reviews of the products it sells. Initially, competitors and experts scoffed that practice, calling it counterproductive because, they assumed, consumers would at least sometimes leave bad reviews.<sup>143</sup> But Amazon seems to have won that bet—its reviews, the world's largest collection, earned Amazon consumers' trust, both fostering a reputation economy and underscoring Amazon's market dominance.<sup>144</sup> Amazon also collects reams of data about consumer behavior to develop predictive models that it can use to continually adapt its platform and product offerings as a way to keep consumers using Amazon.<sup>145</sup>

All of these strategies are reflected in the logo that Amazon redesigned in 2000.<sup>146</sup>



The logo has an arrow going from the 'a' to 'z' in AMAZON, to suggest that all products from A-Z can be found and bought on the platform.<sup>147</sup> And the arrow also suggests that Amazon brings products from all locations and sellers to consumers' homes.<sup>148</sup>

Amazon's business model has been a smashing success (for it, at least), and the company has achieved market dominance.<sup>149</sup> After Walmart, Amazon is the second largest retailer in the United States, with \$352.7 billion in sales in 2022.<sup>150</sup> And it is by far the largest online retailer in the United States, controlling about half of that market.<sup>151</sup>

Third-party sales have become a critical part of Amazon's business model. Indeed, the money Amazon makes from charging third parties to use its platform—

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<sup>141</sup> WEST, *supra* note 129, at 9, 34. Relatedly, Amazon began to extract higher margins from the third-party transactions done on its platform than from its own sales. *Id.* at 10.

<sup>142</sup> *Id.* at 45-46.

<sup>143</sup> *Id.* at 91.

<sup>144</sup> *Id.* at 91-93.

<sup>145</sup> *Id.* at 12.

<sup>146</sup> *Id.* at 19-20.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 10.

<sup>150</sup> STATISTA, *Worldwide Retail Sales of the Leading U.S. Retailers in 2022*, <https://www.statista.com/statistics/196002/worldwide-retail-sales-by-the-top-50-retailers> (last visited Feb. 8, 2024).

<sup>151</sup> WEST, *supra* note 129, at 10. Even with Walmart ahead of Amazon in overall retail sales, analysts appreciate Amazon's advantages as the dominant online platform because it can be yet more efficient in distribution than Walmart given its digital edge. *Id.* at 48.

such as listing fees—represents 23% of Amazon’s revenues in 2022 (\$117.7 billion), second only to the 43% of Amazon’s revenues generated in first-party sales that year (\$220 billion).<sup>152</sup> As important as the third-party sellers are to Amazon, Amazon is even more essential to the third-party sellers. As one seller pointed out, “You can’t really be a high-volume seller online without being on Amazon.”<sup>153</sup>

As to the value of Amazon’s brand, Amazon is at or near the top of the list of most-loved brands in the United States.<sup>154</sup> In fact, one recent poll done by Georgetown University found Amazon to be the number-two institution in which Americans have the greatest confidence, putting the platform behind only the military and ahead of all other parts of the U.S. government, universities, non-profit institutions, and other major businesses.<sup>155</sup> And Amazon is also one of the world’s most market-capitalized companies.<sup>156</sup>

## **B. The Brand Registry as Business Tool**

As Amazon sought to advance its overall business model, it encountered concerns from the third-party sellers and consumers that it aimed to attract to and keep on its platform, as well as from the government. Third-party sellers—potential and actual—wanted Amazon to do more to prevent counterfeit versions of their goods from being on its platform.<sup>157</sup> Those sellers expressed unwillingness to sell their genuine goods on Amazon unless Amazon took further action to exclude counterfeits.<sup>158</sup> And consumers were unhappy when they accidentally purchased knockoffs instead of the genuine goods they were trying to buy.<sup>159</sup> As complaints mounted, Congress held hearings on counterfeit goods being sold on online platforms like Amazon.<sup>160</sup> Several legislators introduced the SHOP SAFE Act, which would make online platforms “liable for infringement of a registered trademark by a third-party

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<sup>152</sup> Tony Owusu, *Here’s How Much Amazon Takes from Every Third-Party Sale*, THESTREET, Feb. 14, 2023, <https://www.thestreet.com/investing/heres-how-much-amazon-takes-from-every-third-party-sale>.

<sup>153</sup> Angus Loten & Adam Janofsky, *Sellers Need Amazon, but at What Cost?*, WALL ST. J., Jan. 14, 2015, <https://www.wsj.com/articles/sellers-need-amazon-but-at-what-cost-1421278220> (quoting Todd Bairstow).

<sup>154</sup> WEST, *supra* note 129, at 20.

<sup>155</sup> *Id.* at 20-21.

<sup>156</sup> *Id.* at 3, 35.

<sup>157</sup> Some of these sellers would also like to control which businesses sell their respective products and for how much, but Amazon does not offer them that power. Robyn Johnson, *How Amazon’s New Brand Registry Helps Protect Your Brand*, SEARCH ENGINE J., June 16, 2017, <https://www.searchenginejournal.com/amazon-brand-registry-2/201570>.

<sup>158</sup> Amazon has adopted an anti-counterfeiting policy. AMAZON, *Amazon Anti-Counterfeiting Policy*, [https://sellercentral.amazon.com/help/hub/reference/G201165970?ref=efph\\_G201165970\\_cont\\_ZUQ6GBBXQVHQKF2&locale=en-US](https://sellercentral.amazon.com/help/hub/reference/G201165970?ref=efph_G201165970_cont_ZUQ6GBBXQVHQKF2&locale=en-US) (last visited Feb. 8, 2024).

<sup>159</sup> Brittney Myers, *Some Shoppers Are Fleeing Amazon Because of Counterfeit Goods*, ASCENT, Jan. 17, 2023, <https://www.fool.com/the-ascent/personal-finance/articles/some-shoppers-are-fleeing-amazon-because-of-counterfeit-goods>.

<sup>160</sup> *E.g.*, The SHOP SAFE Act: Stemming the Rising Tide of Unsafe Counterfeit Products Online: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet, 117 Cong. 25 (2021).

seller of goods that implicate health and safety unless the platform takes certain actions.”<sup>161</sup>

This anxiety on the part of sellers, consumers, and the government has threatened Amazon’s goals of market dominance.<sup>162</sup> To neutralize these concerns, Amazon launched the first version of its Brand Registry in 2015.<sup>163</sup> That fairly limited program allowed businesses to better control their own listings and to contest other listings on copyright grounds.<sup>164</sup> Yet the filing process under that program was cumbersome and slow<sup>165</sup> and it did little to address counterfeit goods, which are principally targeted through trademark claims, not copyright claims.<sup>166</sup>

In 2017, Amazon launched the second version of its Brand Registry. In addition to providing enhanced branding capabilities for businesses’ listings, Amazon sought to make it easier for businesses to get listings of counterfeit goods removed.<sup>167</sup> In particular, businesses selling on Amazon in the United States can qualify for the Brand Registry if they had a trademark registered in the PTO on the Principal Register that they were using on their products or packaging.<sup>168</sup> The Brand Registry is available only for trademarks that contain alphanumeric characters (even if they also contain an image or the characters are stylized).<sup>169</sup> A qualifying business can register the word(s) in its trademark with Amazon as long as the word(s) identically match the spelling, spacing, and punctuation found in the U.S. trademark registration.<sup>170</sup> With the launch of the second version of the Brand Registry, Amazon put in place a 300-person customer service team dedicated to addressing reports of trademark (and copyright) infringement from Brand Registry members.<sup>171</sup> It now promises round-the-clock service to address these reports, 24 hours a day, 7 days a week.<sup>172</sup> Rather than taking days to address such seller claims, the team would resolve these claims within a few hours and without a court order.<sup>173</sup> The Brand Registry made it easier

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<sup>161</sup> SHOP SAFE Act of 2021, S. 1843, 117th Cong. (2021); SHOP SAFE Act, H.R. 5374, 117th Cong. (2021). That legislation has not yet passed.

<sup>162</sup> *Supra* section A.

<sup>163</sup> AJ Kelley, *A Seller’s Guide to Amazon Brand Registry*, VIRAL LAUNCH, Aug. 24, 2018, <https://blog.viral-launch.com/news-updates/amazon-news-updates/amazon-brand-registry-guide=>.

<sup>164</sup> Johnson, *supra* note 157; Kelley, *supra* note 163.

<sup>165</sup> Kelley, *supra* note 163.

<sup>166</sup> *E.g.*, PTO, *U.S. Customs and Border Protection Services for Trademark Owners*, <https://www.uspto.gov/trademarks/protect/customs-and-border-protection> (last visited Feb. 8, 2024).

<sup>167</sup> Kelley, *supra* note 163.

<sup>168</sup> AMAZON, *Brand Registry FAQ*, <https://brandservices.amazon.com/brandregistry/faq> (last visited Feb. 8, 2024); Kelley, *supra* note 163.

<sup>169</sup> Kelley, *supra* note 163.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> AMAZON, *Amazon Brand Registry*, <https://brandservices.amazon.com/brandregistry> (last visited Feb. 8, 2024). A business that is not a part of the Brand Registry can still report trademark infringement to Amazon, but it is not assured such a dedicated and quick response. *Id.*

<sup>173</sup> Kelley, *supra* note 163.

for registered businesses to identify potential infringements by providing search tools—including reverse-image search technology—to locate other products using the same name or packaging as the registrant.<sup>174</sup> And the Registry enables mark owners to benefit from predictive protections that block improper listings from third parties in the first place.<sup>175</sup> The Brand Registry has also been attractive to third-party sellers because it offers them higher visibility in consumer search results on Amazon, brand analytic tools, and the ability to give one’s products to credible buyers for Amazon reviews.<sup>176</sup>

In 2019, Amazon launched the Intellectual Property Accelerator, which is a curated network of intellectual property law firms providing trademark registration services at pre-negotiated rates.<sup>177</sup> Amazon explained that it “created [the] Accelerator specifically with small and medium businesses in mind,” so as to help them “more quickly obtain intellectual property ... rights and brand protection in Amazon’s stores.”<sup>178</sup> Businesses participating in the accelerator get charged only by the law firm they are using, not Amazon.<sup>179</sup>

Businesses that use the Accelerator program get “accelerated access to brand protection” on Amazon.<sup>180</sup> Rather than having to wait for their trademark registration to issue, Amazon provides Accelerator participants access to the Brand Registry as soon as they have filed a trademark application with the PTO.<sup>181</sup> Amazon says that it provides that early access because “the participating law firms have been thoroughly vetted” and the marks Accelerator participants apply to register will therefore “be strong candidates for registration.”<sup>182</sup> Though Amazon does not make public all of the specific Brand Registry benefits that it provides on this accelerated basis, it has indicated that Accelerator participants get access to “automated brand protections, which proactively block bad listings from Amazon’s stores, increased authority over product data in our store, and access to our Report a Violation tool, a powerful tool to search for and report bad listings that have made it past our automated protections.”<sup>183</sup>

More recently, as of approximately 2023, Amazon made all sellers (not just those using the Accelerator program) eligible for its Brand Registry as soon as they have a

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<sup>174</sup> Johnson, *supra* note 157.

<sup>175</sup> AMAZON, *supra* note 172.

<sup>176</sup> Kelley, *supra* note 163; Maria Navolykina, *How to Register a Brand on Amazon—A Succinct Guide on Enrollment*, SELLERLABS, Jan. 21, 2022, <https://www.sellerlabs.com/blog/getting-started-with-amazon-brand-registry>.

<sup>177</sup> Dharmesh Mehta, AMAZON, *Amazon Intellectual Property Accelerator*, Oct. 1, 2019, <https://www.aboutamazon.com/news/policy-news-views/amazon-intellectual-property-accelerator>.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> AMAZON, *supra* note 172.

<sup>182</sup> Mehta, *supra* note 177.

<sup>183</sup> *Id.*

pending application to register a trademark with the PTO.<sup>184</sup> Amazon has not publicly explained its reasons for that expanded eligibility, but it certainly calls into question the previous claim that Accelerator participants warranted early access because the marks they applied to register were particularly likely to be registered.<sup>185</sup>

In 2021, there were more than 700,000 active marks enrolled in the Brand Registry worldwide, a 40% increase over the previous year.<sup>186</sup> In 2022, more than 16,000 trademarks were the subject of the Accelerator program.<sup>187</sup> Amazon advertises the successes of the Brand Registry and the Accelerator program in promoting its participants and removing infringing listings.<sup>188</sup> For example, Amazon boasts that it has taken down over ten billion suspicious listings since 2017.<sup>189</sup>

The growth and success of the Brand Registry have been noticed by businesses and business writers, who have written about the obvious advantages to being part of the Brand Registry.<sup>190</sup> Those advantages accrue to both small businesses and mega companies like Nike, even if differently-situated companies might value some aspects of the Brand Registry more than others.<sup>191</sup> Nike began selling on Amazon only after Amazon created the Brand Registry, believing the Registry would help stop counterfeiting. That faith turned out to be short-lived: Nike later stopped selling directly on the platform because it thought Amazon was still not sufficiently controlling counterfeit sales.<sup>192</sup> According to Emily West, “Nike had confidence in the power of its brand to leave Amazon, but as one industry analyst put it, ‘I don’t think as many brands can be as selective as Nike.’”<sup>193</sup> Because most businesses very much need to sell on Amazon, the Brand Registry is essential for them.

All in all, Amazon’s Brand Registry undergirds the platform’s business model by helping to keep overwhelming numbers of third-party businesses comfortable and

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<sup>184</sup> AMAZON, *supra* note 172; Jeremy Green Eche, *Amazon Brand Registry Now Accepts Pending Trademark Applications*, ASK A JEWISH LAWYER®, Feb. 7, 2024, <https://jpglegal.com/amazon-brand-registry-accepts-pending-trademarks>.

<sup>185</sup> As explained below, the most likely explanation for Amazon’s acceptance of pending applications is the longer pendency of applications at the PTO—pendency lengthened in significant part because of the volume of applications Amazon has played a substantial role in increasing. *Infra* section III.A.

<sup>186</sup> AMAZON, BRAND PROTECTION REPORT 2 (June 2022), <https://assets.aboutamazon.com/68/b7/27c5eeee4121971b3d330fd6c16c/amazon-brand-protection-report-2022.pdf>.

<sup>187</sup> AMAZON, BRAND PROTECTION REPORT 11 (Apr. 2023), <https://www.amazon-brand-registry.com/brand-protection-report-23-en>.

<sup>188</sup> Daisy Quaker, AMAZON, *Amazon Stats: Growth, Sales, and More*, Mar. 31, 2022, <https://sell.amazon.com/blog/amazon-stats>.

<sup>189</sup> *Id.*

<sup>190</sup> *E.g.*, Navolykina, *supra* note 176; Bradley Sutton, *Why You Need Amazon Brand Registry and How I Got it in 10 Days!*, HELIUM10, June 27, 2022, <https://www.helium10.com/blog/amazon-brand-registry-fast>; Brand Registry—Worth It?, REDDIT, [https://www.reddit.com/r/FulfillmentByAmazon/comments/p7i0w3/brand\\_registry\\_worth\\_it/](https://www.reddit.com/r/FulfillmentByAmazon/comments/p7i0w3/brand_registry_worth_it/) (last visited Feb. 8, 2024).

<sup>191</sup> WEST, *supra* note 129, at 38-39.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 39.

motivated to sell their wares on Amazon, which in turn keeps customers hooked into using the platform. The Registry does so by making it easier for registrants to have infringing sellers removed from the site expeditiously, and by giving registrants superior search optimization tools. The resulting seller and consumer satisfaction removes some of the ongoing pressures for the government to regulate Amazon in this regard, such as through the SHOP SAFE Act, which would expose Amazon to significantly greater liability for selling counterfeit goods.<sup>194</sup>

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<sup>194</sup> *Supra* text accompanying note 161.



#### IV. Implications

This Part addresses how, if at all, trademark law, the PTO, and Amazon should address the overhaul of the trademark system wrought by Amazon's business model and Brand Registry. After discussing some precursors to Amazon's pervasive effect on third-party business practices in section A, we turn to consider what it means for a single dominant company to have such an impact on the operation of a body of law in section B and how, if at all, trademark law should be adjusted in section C. Part D considers what Amazon's practices might mean for the future of trademark law and competition more broadly.

##### A. Precursors

In our view, Amazon's effect on the trademark system is unprecedented in scale and scope. Here we consider two possible precursors: the Sears mail-order catalog in the late nineteenth and early twentieth centuries and the Network Solutions dispute resolution policy for internet domain names in the early years of this century. Sears is the most analogous in terms of its power as a commercial platform—even if not a digital one—and the Network Solutions policy is most analogous in terms of the relationship between a private dispute resolution system and parties' use of the formal legal system.

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<sup>311</sup> *Supra* section II.A.

<sup>312</sup> WEST, *supra* note 129, at 13. She elaborates: "Amazon's brand can stretch like taffy because its focus is not the things it sells so much as the service relationship it cultivates with consumers." *Id.* at 37.

<sup>313</sup> *Id.* at 37.

<sup>314</sup> *Supra* section D.

Both caused a large number of businesses to change their practices and the law in turn adjusted to accommodate or constrain these practices. But, as we demonstrate, neither approaches the magnitude of Amazon's effect.

### 1. Sears Catalog

Though the technologies involved were more rudimentary than those that Amazon uses, there are many parallels between Amazon's success as an ecommerce platform and the Sears mail-order catalog. Both Amazon and Sears brought easier shopping experiences to consumers, offering a wide range of low-priced products that would be shipped to the consumer.<sup>315</sup> Yet Sears provided a quite different retail experience.

Richard Sears launched his mail-order business in 1886, in an attempt to lower retail prices.<sup>316</sup> Sears acted as a mass distributor, selling the goods of small manufacturers, thereby competing with large manufacturers.<sup>317</sup> Sears launched his business at a time when the United States was expanding and the railroad and postal systems were being built out, so existing in-person shopping opportunities were limited by geography and transportation.<sup>318</sup> When Sears began his business, he was therefore focused on selling mainly to rural customers.<sup>319</sup> He started by selling watches, but his catalog of offerings quickly expanded to a wide range of products, including jewelry, silverware, clocks, sewing machines, dishes, clothing, harnesses, saddles, firearms, wagons, buggies, bicycles, shoes, baby carriages, and musical instruments.<sup>320</sup> A few years into the business, Sears' catalogs were hundreds of pages long.<sup>321</sup> Sears would generally choose which categories of goods he wanted to sell—such as sewing machines and bicycles in earlier years—and would create a market for these products.<sup>322</sup>

As the business grew, it offered an alternative retail option not just to rural consumers—who typically had no significant retail stores nearby in which to shop—

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<sup>315</sup> Cf. STONE, *supra* note 132, at 44 (recording Jeff Bezos as seeking to build “the next Sears” with Amazon); WEST, *supra* note 129, at 29 (“From the Sears catalogue as a tool for broadening the reach of not just consumer goods but also consumer desires, to Walmart’s mastery of logistics, to the United States Postal Service’s historic role as the primary distributor of printed material and packages, to UPS as a privately held but ubiquitous delivery brand, the historic importance of distribution brands to both the economics and culture of the United States cannot be underestimated.”); Weigel, *supra* note 247, at 11-12 (“When they started, Amazon marketplace functioned mostly like a catalog—an online version of the Sears Roebuck catalog from the 1890s, or of Stewart Brand’s Whole Earth Catalog .... Like manufacturers and brands that sold through older catalogs, sellers paid a modest fee to sign up to list goods on Amazon.com and for Amazon to handle the transaction.”).

<sup>316</sup> BORIS EMMET & JOHN E. JEUCK, CATALOGUES AND COUNTERS: A HISTORY OF SEARS, ROEBUCK AND COMPANY 2-3 (1950).

<sup>317</sup> *Id.* at 4.

<sup>318</sup> *Id.* at 9-15.

<sup>319</sup> GARY CROSS, AN ALL-CONSUMING CENTURY: WHY COMMERCIALISM WON IN MODERN AMERICA 28 (2000); EMMET & JEUCK, *supra* note 316, at 35.

<sup>320</sup> EMMET & JEUCK, *supra* note 316, at 35-36.

<sup>321</sup> *Id.* at 37.

<sup>322</sup> *Id.* at 119-22, 219, 240.

but to all consumers, including those located near independent retail merchants.<sup>323</sup> Feeling hostility from these merchants, Sears decided to target a rural audience by placing advertising for his catalogs in magazines catering to that audience.<sup>324</sup>

Sears faced several challenges in getting small manufacturers to make and supply goods for Sears to sell by mail order. For one thing, the small manufacturers feared boycotts from the independent retailers that were threatened by the Sears model.<sup>325</sup> Sears also had to find manufacturers that would provide goods at the low prices Sears would pay.<sup>326</sup> Finally, Sears had to overcome manufacturers' reluctance to commit all of their product to Sears because of their fear of the chokehold the distributors would have on them.<sup>327</sup> Sears solved these problems in two ways: first, by locating manufacturers that wanted to work with Sears and providing capital for them if necessary, and second, by making goods in house if outside manufacturers could not be located.<sup>328</sup> Sears generally sold all of these goods without branding other than the Sears name or house brands that Sears chose.<sup>329</sup>

Starting around 1925, Sears began marrying its mail-order business to urban retail stores that it launched.<sup>330</sup> With this combination of urban retail and rural mail order, Sears became the largest U.S. retailer of general merchandise in the mid-twentieth century.<sup>331</sup>

Julie Cohen has observed that Sears' mail-order catalog business can be understood as a proto-platform.<sup>332</sup> As she explains, "[i]nclusion of a product in the Sears, Roebuck catalog gave its manufacturer access to a marketing juggernaut with the ability to reach consumers nationwide, the range to offer concert grand pianos and engraved shotguns, and the power to undercut the prices charged by local 'five-and-ten-cent stores' for everyday essentials."<sup>333</sup> In that sense, it bears more than a passing resemblance to Amazon's business model.<sup>334</sup>

But Amazon's model differs from Sears' in that just about any third-party business can partner with Amazon to sell any of its wares on Amazon's platform.<sup>335</sup> By contrast, Sears would internally determine which products it wanted to sell and then solicit particular third-party businesses to manufacture those items. And

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<sup>323</sup> *Id.* at 59-60.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at 117-18. The independent retailers went even further, using racist attacks, advertising boycotts, and editorial assaults to fight Sears. *Id.* at 150-63. They also fought in Congress against the parcel post system to diminish Sears' business, but they lost that battle when Congress enacted the system into law in 1912. *Id.* at 187-95.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 118.

<sup>328</sup> *Id.* at 118-19.

<sup>329</sup> *Id.* at 414-20.

<sup>330</sup> CROSS, *supra* note 319, at 28; EMMET & JEUCK, *supra* note 316, at 313.

<sup>331</sup> *Id.* at 3.

<sup>332</sup> Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 137-39 (2017).

<sup>333</sup> *Id.* at 137.

<sup>334</sup> *Supra* Part II.

<sup>335</sup> *Supra* Part II.

Amazon also has considerably more power vis-à-vis small businesses than Sears did, because businesses in Sears' heyday could still thrive without Sears by engaging in local commerce, which was then more prominent.<sup>336</sup> Sears therefore did not have the grip that Amazon has on third-party business practices, which one recent report has termed Amazon's "trickle-down monopoly."<sup>337</sup>

These two differences in combination make Amazon's operation unlike Sears'. As Emily West puts it, even though distributors like Sears have network effects and economies of scale in common with Amazon, "the logics of *digital* capitalism have launched Amazon into a sphere of market dominance and expansion into horizontal and vertical integrations that are unprecedented relative to" other distributors.<sup>338</sup>

Because of that dominance, Amazon's practices have a much more substantial impact on the U.S. trademark system. One important difference is that Sears used its own brand or internally branded the goods it sold via its mail-order catalogue, whereas Amazon has many third-party branded goods. Sears therefore was much less likely to impact third parties' trademark practices. The second precursor, to which we now turn, is more like Amazon in regard to its effect on the trademark system.

## 2. Domain Names and Online Businesses

As the commercial internet took off in the 1990s, everyone and their dog<sup>339</sup> rushed to claim internet domain names. Whereas in 1992 there were 15,000 registered domain names,<sup>340</sup> by 2000, there were over thirty million.<sup>341</sup> (By 2024 there were 350.5 million.<sup>342</sup>)

Many businesses wanted to (and still want to) register their brand name as domain name in the .com top-level domain.<sup>343</sup> Some businesses readily claimed a .com domain that matched their trademark, as Cisco did with cisco.com and Apple did with apple.com.<sup>344</sup> But one problem quickly became apparent: domain names are, by their very nature, exclusive, but it is common for multiple different companies to use the

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<sup>336</sup> Cohen, *supra* note 332, at 139.

<sup>337</sup> Weigel, *supra* note 247.

<sup>338</sup> WEST, *supra* note 129, at 30; *accord id.* at 49-50.

<sup>339</sup> Peter Steiner, *On the Internet, Nobody Knows You're a Dog*, NEW YORKER, July 5, 1993, <https://www.newyorker.com/culture/culture-desk/slide-show-animal-cartoons-in-the-new-yorker>.

<sup>340</sup> 35+ *Must-Know Domain Name Statistics (2024)*, DOMAIN WHEEL, <https://domainwheel.com/domain-name-statistics> (last visited Feb. 8, 2024).

<sup>341</sup> Linda Harrison, *Domain Names Set to Double to 60M by 2002*, REGISTER, Oct. 14, 2000, [https://www.theregister.com/2000/10/14/domain\\_names\\_set\\_to\\_double](https://www.theregister.com/2000/10/14/domain_names_set_to_double).

<sup>342</sup> VERISIGN, *Verisign Domain Name Industry Brief: 350.4 Million Domain Name Registrations in the Fourth Quarter of 2022*, Mar. 9, 2023, <https://blog.verisign.com/domain-names/verisign-q4-2022-the-domain-name-industry-brief>.

<sup>343</sup> See, e.g., Frank Schilling, *The House Always Wins—SEM Arbitrage and Keyword Domain Names*, SEVEN MILE (Mar. 23, 2007, 5:41 PM), [http://frankschilling.typepad.com/my\\_weblog/2007/03/the\\_house\\_alway.html](http://frankschilling.typepad.com/my_weblog/2007/03/the_house_alway.html).

<sup>344</sup> *List of the Oldest Currently Registered Internet Domain Names*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_the\\_oldest\\_currently\\_registered\\_Internet\\_domain\\_names](https://en.wikipedia.org/wiki/List_of_the_oldest_currently_registered_Internet_domain_names) (last visited Feb. 8, 2024).

same or very similar marks for different goods or services. So, for example, Delta Airlines coexists with Delta Financial and Delta Faucets because the uses are different enough that consumers are unlikely to be confused by the concurrent uses.<sup>345</sup> But as the domain system is set up, there can only be one owner of delta.com.<sup>346</sup>

Sometimes, businesses in this situation amicably worked out allocation, as with delta.com, which was originally claimed by DeltaComm Internet Services, then transferred to Delta Financial, which subsequently transferred it Delta Airlines, the current registrant of that domain name.<sup>347</sup> But multiple potentially-legitimate claims to a domain name often led to conflict, such as when Nissan Motor Company sued Nissan Computer Corporation, alleging that the latter's registration and use of nissan.com constituted trademark infringement.<sup>348</sup>

Those conflicts had a different character when they involved domain name registrants with no prior trademark interest in the names corresponding to the domain names they registered. Because domain name registration was initially a gold rush, many opportunists rushed to claim domain names corresponding to existing marks whose owners had not yet claimed the domains and then turned around and offered to sell them to the mark owners. One individual registered 200 domain names in 1995, including ones corresponding to the names of fashion apparel company Eddie Bauer and the airline Lufthansa, and then attempted to sell the domain names to their respective namesakes.<sup>349</sup> Yet others claimed domain names they thought might be lucrative because they corresponded to generic category names, such as cars.com and insurance.com.<sup>350</sup>

This domain name activity spilled over into the trademark system to a large extent, with businesses racing to the PTO to apply to register domain names as trademarks.<sup>351</sup> By 1995, the PTO announced a policy that it would register domain names so long as they were used as trademarks.<sup>352</sup> Indeed, empirical data on trends in trademark applications and registrations over time tend to have spikes in the data in 1999-2000, which are primarily attributable to this domain name activity.<sup>353</sup>

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<sup>345</sup> See Beebe & Fromer, *supra* note 26, at 1012.

<sup>346</sup> Michael Karanicolas, *The New Cybersquatters: The Evolution of Trademark Enforcement in the Domain Name Space*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 399, 411 (2020).

<sup>347</sup> Jacqueline D. Lipton, *A Winning Solution for YouTube and UTube? Corresponding Trademarks and Domain Name Sharing*, 21 HARV. J.L. & TECH. 509, 516 (2008).

<sup>348</sup> Nissan Motor Co. v. Nissan Comp. Corp., 89 F. Supp. 2d 1154 (C.D. Cal.), *aff'd*, 246 F.3d 675 (9th Cir. 2000).

<sup>349</sup> Panavision Int'l, LP v. Toeppen, 141 F.3d 1316, 1319 (9th Cir. 1998).

<sup>350</sup> Ben Howard, *The Top 10 Most Expensive Domains Ever Sold*, NAME.COM, Dec. 20, 2022, <https://www.name.com/blog/the-top-10-most-expensive-domains-ever-sold>.

<sup>351</sup> Joan Meadows, Comment, *Trademark Protection for Trademarks Used as Internet Domain Names*, 65 U. CIN. L. REV. 1323, 1340 (1997).

<sup>352</sup> Gary W. Hamilton, *Trademarks on the Internet: Confusion, Collusion, or Dilution?*, 4 TEX. INTELL. PROP. L.J. 1, 5 n.10 (1995) (citing INTA, SPECIAL BULLETIN: REGISTRATION OF INTERNET DOMAIN NAMES IN THE USPTO (1995)). See generally *supra* section I.B.

<sup>353</sup> Beebe & Fromer, *supra* note 26, at 972; *supra* sections III.A, D.

Trademark registration practice during this time period was shaped by policies outside the trademark system regarding domain name registration and dispute resolution. In the 1990s, the private company Network Solutions held a U.S. government-sanctioned monopoly on registration of domain names.<sup>354</sup> Beginning in 1995, Network Solutions adopted a series of policies under which it could suspend a challenged domain name on the complaint of the owner of a registered trademark that exactly matched the domain name (minus the top-level domain, like .com). It would suspend the domain name even though the domain name registrant might have its own relevant trademark, if the complainant could show that it registered its trademark before the domain name holder activated its domain or registered its trademark.<sup>355</sup> Trademark registrations in any country qualified under the Network Solutions policies.<sup>356</sup>

Network Solutions' policy did not align with domestic trademark law in important ways. In particular, Network Solutions would suspend a domain name based on the complaint of the owner of a foreign trademark registration that predated the domain name registrant's use, even though American trademark law would give priority to the first user in the United States.<sup>357</sup> Network Solutions also gave priority to the owner of a trademark registration even if the domain name registrant had use in the United States that predated the registration or application to register.<sup>358</sup> Relatedly, the first to register a domain name with Network Solutions would win any challenge even if there were two parties holding concurrent trademark registrations for unrelated geographic areas.<sup>359</sup> According to scholars writing at the time of the domain name rush, trademark owners sometimes felt compelled to challenge domain name registrations because of their concern that acquiescence in a competing use would weaken their mark's strength and limit the scope of their rights.<sup>360</sup>

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<sup>354</sup> David S. Hilzenrath, *Holding the Keys to Internet Addresses*, WASH. POST, July 22, 1996, <https://www.washingtonpost.com/archive/business/1996/07/22/holding-the-keys-to-internet-addresses/9f8d7e88-d404-49eb-b89d-31c5cb5d22f5>.

<sup>355</sup> Andre Brunel & May Liang, *Trademark Troubles with Internet Domain Names and Commercial Online Service Screen Names: Roadrunning Right into the Frying Pan*, 5 INT'L J. L. & INFO. TECH. 1 (1997); Alexander Gigante, *"Domain-ia": The Growing Tension Between the Domain Name System and Trademark Law*, in COORDINATING THE INTERNET 154 (Brian Kahin & James H. Keller eds., 1997); Carl Oppedahl, *Trademark Disputes in the Assignment of Domain Names*, in COORDINATING THE INTERNET 154 (Brian Kahin & James H. Keller, eds. 1997). This rule was in spite of the past practice of many trademark lawyers to include ".com" in their PTO trademark registrations. Brunel & Liang, *supra*.

<sup>356</sup> Stephen Moccaldi, *Do Any Viable Solutions Exist to Prevent the Exploitation of Trademarks Used as Internet Domain Names?*, 21 SUFFOLK TRANSNAT'L L. REV. 179 (1997).

<sup>357</sup> Gigante, *supra* note 355.

<sup>358</sup> Under the Lanham Act, the registrant's nationwide priority is subject to prior actual use, meaning that prior common law rights persist in the areas in which the earlier user made use predating the application to register. 15 U.S.C. § 1057(c).

<sup>359</sup> Michael B. Landau, *Problems Arising Out of the Use of www.trademark.com: The Application of Principles of Trademark Law to Internet Domain Name Disputes*, 13 GA. ST. U. L. REV. 455 (1997).

<sup>360</sup> *Id.*

Perhaps most significantly for current purposes, Network Solutions' policy encouraged businesses to apply to register their trademarks when they might otherwise not have done so, because those businesses needed trademark registrations to be able to challenge domain names with Network Solutions.<sup>361</sup> And because Network Solutions gave priority to any registration that issued before a domain name was registered, those businesses had strong incentive to seek registration wherever it was fastest. That turned out to be Tunisia, which would register an applied-for mark in a matter of days, rather than the year or so it took at the time in the U.S. PTO.<sup>362</sup> Indeed, so many domain name registrants and challengers registered in Tunisia that Network Solutions eventually amended its policies to erase the impact of the Tunisian registrations.<sup>363</sup>

The effects of the Network Solutions policy turned out to be relatively short-lived because domain name dispute resolution came to be governed overwhelmingly by the Uniform Dispute Resolution Policy (UDRP) adopted by the Internet Corporation for Assigned Names and Numbers (ICANN) in 1999.<sup>364</sup> The UDRP established procedures that were grounded in recommendations by a United Nations World Intellectual Property Organization study.<sup>365</sup> Under the UDRP, which all domain name registrants must accept as a condition of registration, trademark owners can object to any identical or confusingly-similar domain name on the ground that the domain-name registrant has no rights or legitimate interest in the domain name and that the domain name has been registered and used in bad faith.<sup>366</sup> Complaints are resolved under the UDRP through ICANN-accredited dispute resolution service providers via arbitration.<sup>367</sup>

The UDRP effectively eliminated the effect of the Network Solutions' policy and generally diminished the effect of domain name registration on trademark registration practice. In one of the most cited decisions under the UDRP, a case involving the domain name madonna.com, the panel ruled that a Tunisian trademark registration by a business not located in Tunisia did not reflect a legitimate interest in the disputed name and, in fact, might have reflected the registrant's bad faith.<sup>368</sup>

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<sup>361</sup> At the time, Carl Oppedahl speculated that tens of thousands of trademark registration applications would be filed in the PTO that would not otherwise have been filed. Oppedahl, *supra* note 355.

<sup>362</sup> Brunel & Liang, *supra* note 355; Oppedahl, *supra* note 355; Adrian Wolff, *Pursuing Domain Name Pirates into Uncharted Waters: Internet Domain Names That Conflict with Corporate Trademarks*, 34 SAN DIEGO L. REV. 1463, 1481 (1997).

<sup>363</sup> Michael Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, 27 BROOK. J. INT'L L. 903, 915 (2002).

<sup>364</sup> ICANN was founded as a nonprofit corporation to, among other things, manage domain name policy that would be responsive to global interests through a multi-stakeholder model. Karanicolas, *supra* note 346, at 402-04.

<sup>365</sup> *Id.* at 417-18.

<sup>366</sup> *Id.*

<sup>367</sup> *Id.* at 419.

<sup>368</sup> Madonna Ciccone v. Dan Parisi & "Madonna.com", WIPO Case No. D2000-0847 (WIPO Arbitration & Mediation Ctr. Oct. 12, 2000), <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0847.html>.

Decisions like that significantly decreased interest in Tunisian trademark registration among non-Tunisian businesses and pushed domain name dispute resolution policy more in the direction of substantive trademark law.

Congress also enacted the Anticybersquatting Consumer Protection Act (ACPA) in 1999. That statute prohibits “the act of registering with the bad faith intent to profit, a domain name that is confusingly similar to a registered or unregistered mark or dilutive of a famous mark,” as well as “squatting” on a personal name.<sup>369</sup> The ACPA provided a more effective legal framework for resolution of trademark disputes relating to domain names. Together with the UDRP and the general cooling of the internet boom, the ACPA decreased the number of applications to register domain names as trademarks.<sup>370</sup>

The effect of the Network Solutions policy and the domain name system paled in comparison to Amazon’s effect in terms of its magnitude. Figure 15 shows the small and brief bump in applications filed during the internet boom of the early aughts as compared with the larger increase in filings in recent years. In scale and in duration, Amazon’s effect on the formal trademark system is truly unprecedented. The Sears experience helps demonstrate why—Amazon’s influence as a platform is orders of magnitude larger than any conceivably analogous predecessor.

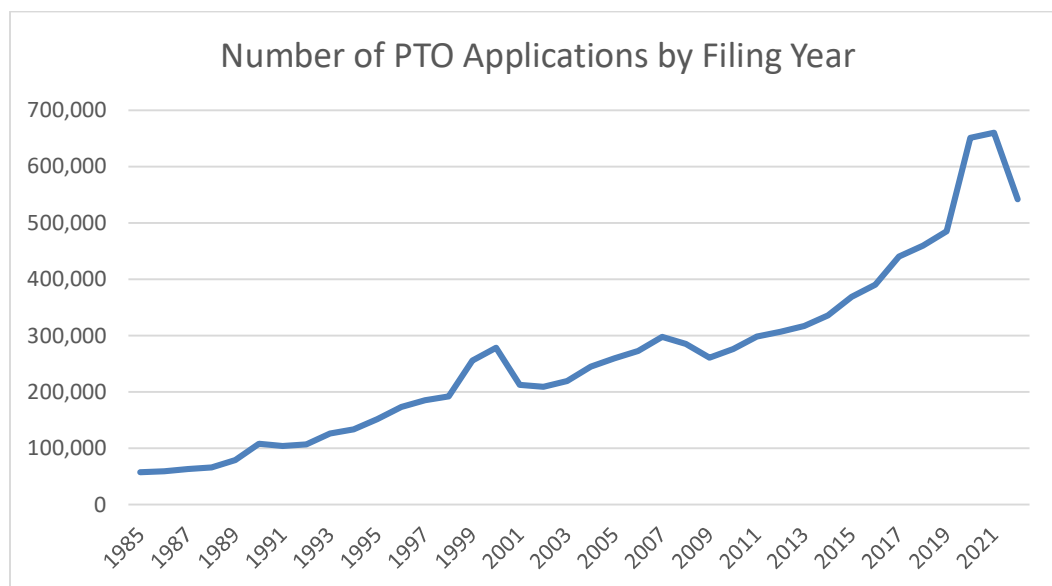


Figure 15: Number of PTO applications, by filing year

These two examples highlight the uniqueness of Amazon’s effects. Amazon is a market-dominant platform, and as a result, it has affected the trademark system on an unprecedented scale. Those effects are also qualitatively different in that they are traceable to the policies of a single company rather than more general economic conditions or changing technology generally.

<sup>369</sup> 15 U.S.C. § 1125(d) (yet providing defenses for certain fair uses).

<sup>370</sup> *Infra* fig. 15.



## B. When a Single Company Has Such an Impact on a Legal System

Amazon's recent and ongoing impact on the shape of the trademark system is staggering. Its Brand Registry and business model are largely responsible for a huge increase in trademark applications from small businesses that might never have otherwise filed for a registration. Its policies have provoked trademark extortionists to file fraudulent applications, increased the incentive to apply to register descriptive and generic terms, and driven up applications for nonsense marks. All of those effects will no doubt be amplified further now that Amazon has begun allowing businesses with pending trademark registration applications to join its Brand Registry. As we have noted, there is irony here, because the acceptance of pending applications seems to have been motivated by longer pendency of trademark applications in the PTO, to which Amazon surely contributed. Any other alterations in Amazon's business model or changes to the Brand Registry qualification rules and advantages are likely to shape-shift the trademark system in other unforeseen ways.

A recent *Data and Society* report describes and analyzes the "trickle-down monopoly" that Amazon has imposed on its third-party sellers. In particular, the report suggests that "[b]y platformizing such a huge swath of retail, Amazon has enrolled countless [third-party] sellers in expanding the company's influence. But it has also projected [its] own logics of monopoly onto these small-to-mid-sized scale sellers, who stockpile inventory in their own homes, sell at losses to try to corner niche markets, and diligently guard all information about their businesses."<sup>371</sup> For similar reasons, its capture of the market has also trickled across to and seized the PTO.

Amazon's impact on the trademark system is perhaps not so surprising when considering the role that trademarks play for many third-party businesses selling on the Amazon platform.<sup>372</sup> As Sonia Katyal and Leah Grinvald explain, "the platform economy facilitates the emergence of ... 'macrobrands'—the rise of platform economies whose sole source of capital inheres in the value of the brand itself—the Airbnbs, Ubers, and eBays of the world."<sup>373</sup> There is also the "parallel emergence of the 'microbrand'—the rise of discrete, small enterprises made up of individual businesses."<sup>374</sup>

In many ways, consumers are attracted to Amazon because they trust it, because of the platform's network effects, and because of the company's consumer-focused model.<sup>375</sup> They are drawn to Amazon's macrobrand, much like consumers are drawn to a franchise brand regardless of its operators.<sup>376</sup> The third-parties that sell their

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<sup>371</sup> Weigel, *supra* note 247, at 1.

<sup>372</sup> *Supra* sections III.C-E.

<sup>373</sup> Sonia K. Katyal & Leah Chan Grinvald, *Platform Law and the Brand Enterprise*, 32 BERKELEY TECH. L.J. 101, 105 (2018).

<sup>374</sup> *Id.* at 106.

<sup>375</sup> *Supra* section II.A.

<sup>376</sup> *Cf.* Weigel, *supra* note 247, at 8 ("Amazon sellers more closely resemble franchisees. Amazon sellers resemble ... franchisees in that they assume forms of risk and responsibility that entrepreneurship entails, while relinquishing much of the freedom it has historically

wares on Amazon are attracted to the platform for similar reasons.<sup>377</sup> Much like franchisees, third-party sellers realize that any microbrands they use might not matter as much to consumers as they would in other contexts.<sup>378</sup> Still, those sellers are likely to recognize the value of registering (or applying to register) marks that will benefit them in terms of search result placement and qualify them for the Brand Registry. That is why sellers are picking nonsense marks and descriptive or generic terms as marks when they would be much less likely to do so if they were not selling on Amazon's platform. Whereas Katyal and Grinvald suggest that microbrands "have a strong interest in utilizing the basic principles of branding and trademark protection,"<sup>379</sup> at least some of Amazon's third-party sellers are throwing these basic principles out the window to maximize their impact on Amazon. The increased importance of Amazon's macrobrand (and the decreased importance of third-party sellers' brands) explains why Amazon is tripling down on its AMAZON-centered trademarks like Amazon Basics.

Much has been made in legal scholarship of the ways that the law might have to adjust to regulate platforms<sup>380</sup>—such as whether to treat Uber drivers as employees—and in the trademark context, of how to assess trademark liability for platforms.<sup>381</sup> These thinkers, as exemplified by Julie Cohen, all recognize that the platform is "the core organizational form of the emerging informational economy"<sup>382</sup> and has become the locus for barter and exchange instead of the more traditional marketplace.<sup>383</sup>

We extend this literature by demonstrating how a dominant platform like Amazon can spearhead an overhaul of a legal system singlehandedly (or at least with the assistance of its third-party sellers). In many ways, this insight is a bookend to Lina Khan's influential work arguing that Amazon's conduct violates antitrust laws (and the recent antitrust lawsuit brought against Amazon by the Federal Trade Commission under Khan's leadership<sup>384</sup>). Khan seeks to reorient antitrust law for the platform era (suggesting that reorientation is actually a return to antitrust's founding principles) by proposing that antitrust analysis focus on "the underlying structure and dynamics of markets" rather than consumer welfare measured through "short-term effects on price and output."<sup>385</sup> In particular, with regard to Amazon, she argues

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provided. Insofar as sellers give Amazon, on average, 34% of each sale that they make through the platform, they also facilitate the transfer of loans and other resources that the state has designated to support small businesses—including minority-owned businesses—to one of the largest corporations in the world.").

<sup>377</sup> *Supra* section II.A.

<sup>378</sup> Michael Grynberg, *AI and the "Death of Trademark"*, 108 KY. L.J. 199, 226, 231 (2019-20).

<sup>379</sup> Katyal & Grinvald, *supra* note 373, at 106.

<sup>380</sup> *E.g.*, Cohen, *supra* note 332; Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87 (2016).

<sup>381</sup> Katyal & Grinvald, *supra* note 373.

<sup>382</sup> Cohen, *supra* note 332, at 135.

<sup>383</sup> *Id.* at 136-37; accord Katyal & Grinvald, *supra* note 373, at 104-06; Lobel, *supra* note 380, at 91, 106.

<sup>384</sup> David McCabe, *U.S. Accuses Amazon of Illegally Protecting Monopoly in Online Retail*, N.Y. TIMES, Sept. 26, 2023, <https://www.nytimes.com/2023/09/26/technology/ftc-amazon.html>.

<sup>385</sup> Khan, *Amazon's Antitrust Paradox*, *supra* note 1, at 716-17.

that even though consumers generally love Amazon, its low prices, and broad availability of products, Amazon's "willingness to sustain losses and invest aggressively at the expense of profits, and integration across multiple business lines" is problematic as a matter of antitrust.<sup>386</sup> Khan suggests that these features have caused numerous problems for competition, including in the e-book market and the delivery sector.<sup>387</sup> As discussed above with regard to Amazon's house brands, she also argues that Amazon is problematic for being "in direct competition with some of the businesses that depend on them, creating a conflict of interest that [it] can exploit to further entrench [its] dominance, thwart competition, and stifle innovation."<sup>388</sup>

Without wading into the merits of Khan's antitrust analysis or the contrary positions taken by others,<sup>389</sup> we think it is clear that Amazon's dominant position in internet commerce substantially affects the shape of competition and dramatically influences the operation of areas of law that intersect with Amazon's business practices. Because of Amazon's dominance, its business model and Brand Registry have changed private parties' use of the trademark system so much that it has effectively overhauled that system.

To some, Amazon's singular impact on the trademark system will suggest that the platform is simply too powerful, whatever one thinks of the antitrust issues. At the very least, the effects we have described here should force us to reflect on whether we are comfortable with a single company setting internal rules for its own benefit when the effect is to reconfigure a legal system that was not developed with such a powerful actor in mind. Amazon is leveraging the existing trademark system, outsourcing decisions about trademark validity to resolve conflicts on its platform and protect its business model. Importantly, it is seeking to ward off prospective regulation that would expose the company to products liability claims and liability for counterfeits sold on its platform.<sup>390</sup> Amazon's leveraging of the trademark system is not incidental to that goal: by piggybacking on the U.S. trademark system rather than building an independent brand verification system from scratch, Amazon is able to claim the high ground of the government's own gold-standard system, making government regulation unwarranted.<sup>391</sup> But Amazon's practices have profoundly affected the trademark system in ways that impact consumers and every other trademark applicant.<sup>392</sup>

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<sup>386</sup> *Id.* at 746-47.

<sup>387</sup> *Id.* at 754-90.

<sup>388</sup> Khan, *Separation of Platforms and Commerce*, *supra* note 1, at 977; *see supra* section III.E.

<sup>389</sup> *E.g.*, Francis, *supra* note 296; Vlazakis & Varela, *supra* note 296.

<sup>390</sup> *Supra* section II.B; *see also* Catherine M. Sharkey, *Products Liability in the Digital Age: Online Platforms as "Cheapest Cost Avoiders"*, 73 HASTINGS L.J. 1327 (2022).

<sup>391</sup> It is also likely significantly cheaper to incorporate the U.S. trademark system at the base of the Brand Registry rather than create a fully-independent system. That is surely attractive to Amazon, a notoriously frugal company. *See generally* KRISTI COULTER, EXIT INTERVIEW: THE LIFE AND DEATH OF MY AMBITIOUS CAREER (2023).

<sup>392</sup> In addition to the impact Amazon has on the trademark system because of its business model and Brand Registry, the company also has an arguably outsized role in further setting trademark policy by having one of its trademark lawyers occupy one of the nine seats on the

Should trademark law adjust to the effects of Amazon's practices? It seems both ridiculous for trademark law to keep adapting to the consequences of Amazon's internal business decisions and ridiculous for it not to.

### C. Adjusting the Trademark System?

After considering the various trademark and other legal harms at stake here, this section considers how the trademark system might be adjusted in light of Amazon's influence on it. It also considers how Amazon's influence might be used to restore aspects of the trademark system. Indeed, the combination of the trademark system and Amazon's business model might be used to advance the goals of trademark and competition.

#### 1. Amazon's Indirect Capture of the Trademark System

Amazon's considerable impact on the trademark system raises important rule-of-law questions: the practices of a single company have hijacked the legal system without the requisite legislative or regulatory legitimacy.<sup>393</sup> Several scholars have explored the related, but analytically distinct, issue of platforms' role as private sovereign,<sup>394</sup> engaging in rulemaking or adjudicatory acts.<sup>395</sup> For example, Rory Van Loo has considered corporations' development of large-scale dispute resolution systems for customers.<sup>396</sup> He analyzes how these forms of dispute resolution offer some things that courts offer or are idealized to offer (such as access to redress, accountability, truth, and justice) but lack other judicial features (such as

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PTO's Trademark Public Advisory Committee. U.S. PATENT & TRADEMARK OFFICE, *Trademark Public Advisory Committee Members Biographical Information*, <https://www.uspto.gov/about-us/organizational-offices/public-advisory-committees/trademark-public-advisory-committee-0> (last visited Feb. 8, 2024). In this role, Amazon's lawyer might provide helpful insight into its role in shaping the trademark system—or other trademark issues it faces, including fraud and counterfeit goods. But it also further enlarges Amazon's outsized influence on the trademark system.

<sup>393</sup> See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006) (analyzing the ways that federal government might implement a rule of law through the lens of party competition).

<sup>394</sup> Cf. Cohen, *supra* note 332, at 199 (characterizing how platforms' "role in the international legal order increasingly resembles that of sovereign states"); K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1632 (2018) (observing that "corporations [have] exercised quasi-sovereign authority and influence over ... the economy and society as a whole, absent the kinds of checks and balances that accompany the exercise of public power in republican governance"); Rory Van Loo, *Federal Rules of Platform Procedure*, 88 U. CHI. L. REV. 829, 832 (2021) [hereinafter Van Loo, *Federal Rules*] ("[P]latforms such as Twitter, Facebook, Google, and Amazon exert quasi-sovereign influence over commerce, speech, elections, and myriad other spheres of activity").

<sup>395</sup> See also Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526 (2022); Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418 (2020); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018).

<sup>396</sup> Van Loo, *Federal Rules*, *supra* note 394, at 837-40; Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. REG. 547, 551 (2016) [hereinafter Van Loo, *Corporation as Courthouse*].

transparency, procedural equality, and aggregation mechanisms).<sup>397</sup> Van Loo has generally recommended both governmental oversight of these private systems and procedural rules similar to those used in courts, in order to promote due process and transparency.<sup>398</sup> Similarly, Hannah Bloch-Wehba analyzes how platforms act as regulators and “are performing quintessentially administrative functions.”<sup>399</sup> She therefore proposes that “platform governance [be] accountable to the public.”<sup>400</sup>

Even though we could tell a similar story about Amazon creating a private trademark dispute resolution system parallel to the government’s,<sup>401</sup> our focus is different and is on the extent to which Amazon’s “system” influences parties’ behavior within the legal system itself.<sup>402</sup> Though this is not a story of Amazon overtly seeking to capture the trademark system, it is perhaps a story of indirect capture, with Amazon having taken over the PTO—even without realizing as much—by shaping third parties’ trademark registration behavior.<sup>403</sup> The worry here is that Amazon’s model is materially affecting the trademark system as an indirect result of the company’s pursuit of its own interests, which might diverge from the interests of the public, as reflected in trademark policy.<sup>404</sup> As Rachel Barkow points out in generally thinking through agency capture, “one person’s political pressure is another person’s democratic accountability. What policy makers who seek insulation want to avoid are particular pitfalls of politicization, such as pressures that prioritize narrow short-term interests at the expense of long-term public welfare.”<sup>405</sup> This concern suggests taking a hard look at the substantive ways in which the trademark system’s operation has changed and explore whether any of those changes are out of line with the way

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<sup>397</sup> Van Loo, *Corporation as Courthouse*, *supra* note 396, at 571-84.

<sup>398</sup> *Id.* at 584-94 (recommending more agency oversight, class action availability, and “visibility into businesses’ internal operations” in the face of failures of corporate courthouses); Van Loo, *Federal Rules*, *supra* note 394 (proposing procedures to govern platform adjudication systems to advance public values, including due process and transparency).

<sup>399</sup> Hannah Bloch-Wehba, *Global Platform Governance: Private Power in the Shadow of the State*, 72 SMU L. REV. 27, 29 (2019).

<sup>400</sup> *Id.* at 28.

<sup>401</sup> *Supra* text accompanying notes 5-7.

<sup>402</sup> Others analyze the flipped issue of how to think of due process with regard to government use of technology, automation, or big data. *See, e.g.*, Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1255 (2008) (exploring how “automation undermines several pivotal assumptions at the heart of twentieth-century administrative law”); Kate Crawford & Jason Schultz, *Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms*, 55 B.C. L. REV. 93 (2014) (proposing a right to “procedural data due process” to address predictive privacy harms that can come from using data in an adjudicatory process).

<sup>403</sup> On capture, see generally Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337 (2013); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

<sup>404</sup> *Cf.* Van Loo, *Federal Rules*, *supra* note 394, at 849 (“Unlike federal courts’ procedural rules, however, platforms’ rules are influenced by an economic analysis that prioritizes profit.”).

<sup>405</sup> Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 19 (2010).

the trademark system ought to operate.<sup>406</sup> We return to that constellation of issues shortly in discussing trademark-specific harms provoked by Amazon.

Moreover, the indirectness of this capture itself might be problematic because the effects materialized without the PTO or other actors in the trademark system being aware of the role of Amazon's policies or attempting to account for them. To the extent this hiddenness is worrisome, it can be addressed through sunlight provided by this and other scholarship and more self-reflection by the PTO on the changes it is experiencing, as well as an attempt to grapple with whether and how to respond to such changes.

Another general concern with capture is the instability it can foster when there are future political changes in elected offices like Congress or the presidency.<sup>407</sup> Amazon's de facto capture here brings potential instability in a different sense: To the extent Amazon decides further to adjust its practices in ways that affect third-party seller behavior vis-à-vis the trademark system, the trademark system could repeatedly experience massive and relatively abrupt legal shifts in whichever direction Amazon's winds blow.<sup>408</sup>

To be sure, market and social conditions often shift, create demands, or subvert existing regulatory premises, and government actors routinely adapt to those changes. When cars became mainstream, we suddenly needed a Department of Motor Vehicles and driver's licenses. New voter identification requirements increased the demand—perhaps substantially—for driver's licenses. The advent of the internet opened the floodgates of businesses rushing to register domain names as trademarks.<sup>409</sup> But Amazon's influence on the trademark system is different. For one thing, Amazon's effects are different in scale. For another, those effects are attributable to the policies of one company and its market dominance rather than being the result of more diffuse background conditions. The singularity of Amazon's influence creates challenges—given that Amazon can unilaterally provoke massive legal shifts—and opportunities—because Amazon might be amenable to helpful changes, and if not, more easily regulable.

It may be the case that Amazon's effect on the trademark system is a species of a broader problem, and that dominant platforms will provoke similar shifts in other areas of the law (such as Uber with insurance and employment laws or Facebook with privacy law). In that way, these rule-of-law concerns are not Amazon-specific or trademark-specific. Yet Amazon's policies have also inflicted several trademark-specific harms. Trademark law assumes that businesses will use the trademark system in certain ways. Amazon has upended many of those assumptions, leaving the

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<sup>406</sup> Cf. Van Loo, *Corporation as Courthouse*, *supra* note 396, at 594 (“[P]ublic intervention should rely on the economic incentives of firms as much as possible. This reliance would mean defaulting whenever possible to private ordering and its mainstays ....”).

<sup>407</sup> Barkow, *supra* note 405, at 24-25.

<sup>408</sup> Trademark law too has to grapple with gradual concerns, such as growing rates of trademark depletion and congestion, where it is hard to detect a crisis point. Beebe & Fromer, *supra* note 26, at 1023-24.

<sup>409</sup> Cf. *supra* section A.2.

PTO and other legal actors ill-equipped to deal with the kinds of applications many businesses now file. For example, consider applications for descriptive or generic terms that businesses operating on Amazon might be tempted to seek.<sup>410</sup> For well-considered reasons, the trademark system makes it harder, if not impossible, to obtain protection for rights in these terms, because of the impact that protection can have on fair competition.<sup>411</sup> It is much easier to register descriptive or generic terms if they are stylized or accompanied by an image.<sup>412</sup> Indeed, the PTO might very well require an applicant to disclaim rights in the descriptive or generic term itself.<sup>413</sup>

If a business were to succeed in registering a descriptive or generic term because of its stylization or accompanying image and then seek enforcement of its rights in court, a court would be sensitive to the aspects of the mark that are not protectable—or at least are weak—by virtue of them being descriptive or generic. For example, the Second Circuit found no likelihood of confusion between the PARENTS magazine and PARENT'S DIGEST magazine trademarks in part because the PARENTS registration “protect[ed] not the name or the word ‘parents,’” but rather the stylized logo of that name including the unusual form and shape of the letters comprising the word,” and thus did not prevent others’ use of the generic term ‘parent.’”<sup>414</sup> Yet Amazon’s brand registry rules are not similarly sensitive because Amazon ignores stylization and accompanying images, focusing only on the text of a registered mark. Functionally speaking, Amazon will allow a descriptive or generic term to be the basis for protection and preferential treatment,<sup>415</sup> which means that the as-applied trademark system has a different character on Amazon: Amazon lacks the ability to meter scope in the way that justifies registration of these terms in the first place.

More broadly, Amazon’s policies result in behavior that tends to undermine the trademark system’s core assumptions. In particular, that happens when third-party sellers pick descriptive, generic, or nonsense terms to use on Amazon. Use of those marks contravenes trademark law’s central premise that marks serve to identify the source of goods or services and as shorthand for their qualities and characteristics.<sup>416</sup> The reasons are assorted yet related. By their nature, those kinds of marks are unlikely to be memorable to consumers, let alone associated with a particular source. But those features are less important on Amazon, where consumers can rely on product searches, product reviews, and the pull of Amazon as a brand to find and buy

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<sup>410</sup> *Supra* section III.C,

<sup>411</sup> *Supra* sections I.A, III.C. *But cf.* Buccafusco, Masur & McKenna, *supra* note 24 (arguing for changes in these rules because they are not protective enough of competition); Fromer, *supra* note 24 (arguing for other changes in these rules for similar reasons).

<sup>412</sup> *Supra* section III.C.

<sup>413</sup> *Supra* section III.C.

<sup>414</sup> *Gruner + Jahr Printing & Pub. Co. v. Meredith Corp.*, 991 F.2d 1072, 1078 (2d Cir. 1993); *accord* *Fed’n Internationale De Football Ass’n v. Nike, Inc.*, 285 F. Supp. 2d 64 (D.D.C. 2003) (finding no likelihood of confusion between FIFA’s “USA 2003” mark and Nike’s use of the phrase “USA 03” in connection with the 2003 Women’s World Cup because FIFA’s mark was a composite logo and Nike’s use involved a dissimilar visual presentation).

<sup>415</sup> *Supra* sections II.B, III.C.

<sup>416</sup> *Supra* Part I.

products.<sup>417</sup> Some kind of mark is needed to be in the Brand Registry, but that mark does not need to carry all of the weight that trademarks traditionally have been expected to.

That kind of shift in the functions of trademarks opens an intriguing possibility. Modern trademark scholars have long lamented the extent to which trademarks enable artificial differentiation and the development of pure brand value (disconnected from real information about the nature or characteristics of a product or service).<sup>418</sup> At the same time, while scholars differ over how best to limit trademark law's reach, most have accepted that some enablement of brand exploitation is an inevitable (if unfortunate) cost of a system that protects trademarks' core functions. If it is true that trademarks are less important for conveying product-related information because algorithmic tools can provide that information equally or better, then we should not worry if Amazon's practices lead more companies away from source-indicating marks. Indeed, we might celebrate that result and hope it undermines trademark law's incentives.

But it is not clear to us that we are yet at a point where the alternatives to trademarks are better. Empirical evidence suggests that Amazon consumer reviews are inaccurate in important ways—because consumers tend to write reviews only if they are extremely positive or negative, because consumers do not process reviews in cognitively-accurate ways, and because it is estimated that as many as one in every three reviews are fake.<sup>419</sup> And of course the Amazon algorithm is not designed to neutrally provide the products consumers are really looking for—as we have noted,

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<sup>417</sup> For these reasons, the mark is not much different than a UPC code to uniquely identify the goods at hand. A related harm is that many of these businesses, particularly the ones registering nonsense marks, are primed to rebrand with a new (nonsense) mark if they get sufficiently negative product reviews on Amazon. Such rebranding would give them an opportunity to resurface on Amazon with the same product but with a clean slate. And it is not as if consumers remembered the mark anyhow. While such rebranding might also see to contravene trademark's core values, trademark law does not stand in the way of businesses rebranding, as can happen when a business wants to escape scandal, as with ValuJet Airlines becoming AirTran Airways after a plane crash; an association with a negative term, such as ISIS mobile banking app becoming Softcard; or a dated symbol, as with American Telephone & Telegraph becoming primarily known as AT&T. Roy Baharad & Gideon Parchomovsky, *Cainmarks* (unpublished manuscript); Sonia K. Katyal, *A Trademark Theory of Rebranding* (unpublished manuscript).

<sup>418</sup> Beebe, *supra* note 73, at 2069-72; Jeanne C. Fromer, *The Role of Creativity in Trademark Law*, 86 NOTRE DAME L. REV. 1885, 1916-20 (2011); Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137, 179 (2010); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1721-25 (1999); Mark P. McKenna, *Testing Modern Trademark Law's Theory of Harm*, 95 IOWA L. REV. 63, 67-68 (2009).

<sup>419</sup> Gibson, *supra* note 278, at 24-29, 39-41. Amazon is making some effort to deal with fake reviews, having created a team to address the issue and filing lawsuits against sellers or platform users that create and post those reviews. AMAZON, *Amazon's Latest Actions Against Fake Review Brokers: Lawsuits Against Fraudsters Target the Source of Fake Reviews*, May 1, 2024, <https://www.aboutamazon.com/news/policy-news-views/amazons-latest-actions-against-fake-review-brokers>. But even if Amazon were able to make a significant dent in the number of fake reviews, the other problems with relying on reviews would remain.



Amazon has routinely preferenced its own products in search results even when consumers search for other products by brand name, and it gives participants in the Brand Registry access to various search optimization tools.<sup>420</sup> For those reasons, one might reasonably be concerned that trademark law's emphasis on source designation remains important, and that Amazon's policies are undermining the incentives trademark law properly create.

Another trademark-related harm is the clutter of the PTO's trademark register. The increasing number of applications, perhaps particularly for marks that do not function as trademarks, imposes costs on the PTO, other businesses, and consumers. Increased registrations lead to a so-called "trademark thicket."<sup>421</sup> A thicket makes it harder for trademark examiners and businesses to search the register to ascertain whether there are existing registrations that are potentially confusingly similar, a difficult cost to impose particularly when many of these registrations are undermining trademark's core assumptions. The clutter also makes it harder for businesses that want to choose a new mark—particularly one that is used in a traditional trademark sense—to settle on one that is not confusingly similar to previously-registered marks.<sup>422</sup> Even when a business finds a mark that it can clear through this thicket, moreover, that mark might be less useful in the sense that it is more difficult for its user to develop source distinction, compared to other options that might have been available.<sup>423</sup> Relatedly, a thicket can also harm consumers by making it harder for them to distinguish between marks in the crowd.<sup>424</sup>

To be sure, this cluster of harms is less sharp—and perhaps not a harm at all—when it comes to those third-party sellers that are registering source-designating marks that they would have used yet not registered but for Amazon's business model and Brand Registry.<sup>425</sup> Their marks serve trademark's core function and would have been used, just not registered. Indeed, notwithstanding their contribution to clutter,

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<sup>420</sup> *Supra* Part III.

<sup>421</sup> As one of us describes in previous work, "[a] trademark thicket is analogous in some ways to the patent thicket, a crowded area of patent rights, in which rights to the many patents comprising the thicket must be secured for freedom of operation in the space, which can raise cost issues and anticompetitive concerns." Beebe & Fromer, *supra* note 26, at 1024 n.237 (citing Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1614-15, 1627, 1694-95 (2003); Rochelle Cooper Dreyfuss, *Giving the Federal Circuit a Run for Its Money: Challenging Patents in the PTAB*, 91 NOTRE DAME L. REV. 235, 235-39 (2015); Katherine J. Strandburg, Gábor Csárdi, Jan Tobochnik, Péter Érdi & László Zolányi, *Law and the Science of Networks: An Overview and an Application to the "Patent Explosion"*, 21 BERKELEY TECH. L.J. 1293, 1322, 1346-48 (2006)).

<sup>422</sup> *Cf.* Beebe & Fromer, *supra* note 26, at 1021 ("[A]s [trademark] depletion worsens, entrants face higher costs than incumbents had faced earlier when devising a mark that is both competitively effective and also not confusingly similar to an already-registered mark.").

<sup>423</sup> *Cf. id.* at 1026 ("Even when they do not confuse consumers as to source, parallel uses of the same mark diminish the mark's distinctiveness of source. They do so in the sense that parallel uses blur the link between the mark and any one source.").

<sup>424</sup> *Cf. id.* ("Upon exposure to the mark, consumers who are aware that the same mark comes from multiple sources must at the very least think for a moment before linking the mark with one of those multiple sources." (internal quotation marks omitted)).

<sup>425</sup> *Supra* section III.A.

registration of these marks might be welcomed for making the register more comprehensive—making it easier for third parties and the PTO to locate these marks and giving these businesses the benefits of registration.<sup>426</sup> On the flip side, it might be seen as wasteful papering of rights and only very marginal improvement of notice, given the widespread availability of search engines.

But the increase in number of applications itself causes a distinct trademark harm, specifically the delay in getting federal registrations—a harm that exists even if the marks would otherwise have been used.<sup>427</sup> This backlog of so many months is harmful to businesses that want to use the trademark system for its core purposes because they have to wait that much longer to get the benefits of registration and have to operate with some legal uncertainty during this time. The backlog might also undermine the quality of trademark examination because examiners are juggling more applications at a time and are waiting longer periods before being able to return to an application on which they already have begun working.

An additional harm to the trademark system is the fraud committed on the PTO by trademark extortion. The fraud harms legitimate businesses whose marks have been commandeered, as they are the true source designation of those marks. All the while, it consumes scarce PTO resources.

Finally, third-party sellers' increased use of descriptive and generic terms as marks might be problematic for competing sellers on Amazon whose products get ranked lower in search results by virtue of the descriptive or generic term being claimed on the Brand Registry. Those competing sellers that use Brand Registry-protected marks in their Amazon listings might also be accused of infringing. Even if Amazon ultimately clears them, the costs of investigation and possibility of suspension can be significant. By contrast, trademark law has developed tools to make it harder to protect these terms in the first place.<sup>428</sup> And when the law does allow protection, it has developed defenses of fair use to enable competitors to use such terms descriptively and otherwise in ways that do not put them at a disadvantage to compete fairly.<sup>429</sup>

Now that we have cataloged some of the harms that might manifest from Amazon's impact on the trademark system, we turn to what the PTO, trademark law, and Amazon might do to ameliorate them.

## **2. PTO Adjustments**

With regard to the rule-of-law or capture concerns, the PTO ought to at the very least be attentive to the effect of Amazon's policies on trademark filings and consider whether it wants to change its approach to examining applications that are likely attributable to Amazon's influence. It can also engage in discussions with Amazon and its Trademark Public Advisory Committee, as well as more publicly ask for feedback, about whether the new trends reflect the assumptions and approaches of the current trademark system, whether or how the PTO should adapt, and whether the PTO

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<sup>426</sup> *Supra* section I.C.

<sup>427</sup> *Supra* section III.A.

<sup>428</sup> *Supra* section I.A.

<sup>429</sup> *Supra* section I.A.

should encourage Amazon to make its own changes to ameliorate these trends. Especially because small initial shifts in filing trends can quickly become massive given the number of third-party sellers on Amazon, proactivity and self-reflection will be critical.

One of the biggest immediate problems the PTO faces is its backlog of applications and the accompanying delays in registration. The PTO has expressed sensitivity to this backlog. It recently announced that it plans to hire 86 more trademark examiners before the end of 2023 and up to 60 more in 2024, as well as put in place incentives to encourage speedier examination.<sup>430</sup> The PTO is currently targeting an average total application pendency of 8.5 months and 5 months to an initial office action, targets that will likely take two to three years to achieve.<sup>431</sup> While these are good moves, the PTO ought to be cautious in trading off speed for careful examination—especially because some of the effects of Amazon’s policies have been to encourage fraudulent applications. PTO Trademark Commissioner David Gooder concedes as much, by stating that in a world with fraudulent and different sorts of applications, trademark examiners will need to proceed slower and with more caution.<sup>432</sup>

Dealing with this volume unambiguously adds cost, and those costs have to be paid somehow. The PTO should consider whether to adjust fees in some way to better align the increased costs and their source. That will not be entirely straightforward. New applications will not, on their face, announce themselves to be Amazon-related, even if in broad categories the trends can be identified.<sup>433</sup> But, for example, the PTO might consider different fees for descriptive terms, and generally for any mark that is registrable only because of a disclaimer of words.

The PTO has also already begun to address the issues it is facing with fraudulent filing, including from trademark extortionists capitalizing on Amazon’s system as well as other fraudulent filings (many of which originate from China for other reasons).<sup>434</sup> In particular, the PTO has announced that it will seek to identify scams and other untoward filings and shuttle them to its newly-created Register Protection Unit.<sup>435</sup> It also is working cooperatively with Amazon to identify fraudulent filings.<sup>436</sup>

Beyond fraud wrought by trademark extortionists, the PTO ought to confront the other substantive issues raised by the filing shifts for different types of marks. Prominently, it ought to consider whether and how to apply different, but more appropriate, rules for determining the protectability of nonsense marks. It should

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<sup>430</sup> Lince, *supra* note 211.

<sup>431</sup> *Id.*

<sup>432</sup> *Id.*

<sup>433</sup> The most obvious category of new applications is for marks that previously would have been used but not registered—marks that are most likely owned by small and medium-sized businesses. But there is no clear way to identify a mark that previously would not have been registered, and it is not clear that a fee structure that targeted these applications would be politically feasible or even desirable.

<sup>434</sup> Beebe & Fromer, *supra* note 228; *supra* section III.B.

<sup>435</sup> Lince, *supra* note 211.

<sup>436</sup> *Supra* section III.B.

first grapple with what qualifies as a nonsense mark. It should then assess whether to continue to classify such marks as fanciful and thus inherently distinctive.<sup>437</sup> While these terms are indeed coined, they are quite distinct from “conventional” fanciful marks like KODAK, EXXON, and PEPSI, which also have no existing meaning but are pronounceable in English and are more easily memorable because they can be assimilated as words.<sup>438</sup> Indeed, nonsense marks do not sit easily within any of the *Abercrombie* distinctiveness categories. They are more like generic terms or descriptive terms that do not have secondary meaning in the sense that they do not identify source; but they are unlike generic or descriptive terms in that they do not have any alternate meaning. Nonsense marks also should frequently be rejected on failure-to-function grounds.<sup>439</sup> Even if registration is allowed, the PTO should give more consideration to what makes a nonsense mark confusingly-similar to another mark. Given that nonsense marks can only be compared in terms of sight, and not sound or meaning, perhaps all nonsense marks are confusingly-similar to one another as a mere jumble of letters.

The PTO should also reconsider the practice of registering generic or descriptive terms because of their stylization or accompanying images. As we noted, the justification for those registrations is that the scope can be limited to reflect the source-indicating value of the stylization or images.<sup>440</sup> But when those marks can effectively be enforced without the scope limitations, there is additional reason to be concerned about their registration even if the generic or descriptive terms are disclaimed.<sup>441</sup>

### 3. Amazon Adjustments

The PTO cannot fully address Amazon’s impact on the trademark system alone. Ideally, Amazon would play a role too.<sup>442</sup> Indeed, it might want to play such a role. Much of Amazon’s effect on the trademark system is a byproduct of Amazon’s legitimate interest in the concerns of its branded third-party sellers and the company’s interest in avoiding government regulation.<sup>443</sup> Indeed, Amazon has been piggybacking on the U.S. trademark system as a way to signal to regulators that it is

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<sup>437</sup> *Supra* section I.A.

<sup>438</sup> *Supra* section III.D.

<sup>439</sup> *Supra* sections I.B, III.D.

<sup>440</sup> *Supra* text accompanying notes 410-415.

<sup>441</sup> Even with such restrictions, we worry about registration of such terms because the bar to establishing secondary meaning is set so low—making it too easy to register descriptive terms as such—and because of the competitive harm that protection and registration of such terms can inflict on fair competition. Buccafusco, Masur & McKenna, *supra* note 24 (recommending that the bar to establishing secondary meaning be raised); Fromer, *supra* note 24 (proposing instead that a term not be protectable when the conceptual relatedness of the term’s primary meaning to the goods or services for which it is used is too high).

<sup>442</sup> The changes we suggest could be adopted by Amazon voluntarily, or they might be imposed on Amazon as government regulation. We take no position at this juncture on whether that regulation is necessary given the many systemic changes suggested herein that might be made first and evaluated.

<sup>443</sup> *Supra* section II.B.

taking the government's concerns with fraudulent goods in its marketplace seriously.<sup>444</sup> Instead of building its own fully functioning trademark system, Amazon is using the U.S. trademark system and its validation of trademarks by registration as the core of its Brand Registry. In this regard, Amazon should not be shocked that its sanctification of the U.S. trademark system in its massive business has reverberated back into the U.S. trademark system itself. With great power comes great responsibility, and Amazon does bear moral responsibility to support the U.S. trademark system in return for its piggybacking on it.

Beyond moral obligation, Amazon might be motivated by self-interest to cooperate more robustly with the PTO to smooth out the trademark system. In recent years, a number of Amazon's practices have been criticized as anticompetitive, most recently in an FTC lawsuit and congressional investigations.<sup>445</sup> If only for the public-relations benefits, Amazon might emphasize how it wants to help third-party sellers compete fairly on its platform. To that end, it could ramp up its cooperation with the PTO—which it is already doing to fight trademark extortion—to improve its Brand Registry rules in ways that promote the operation of the trademark system.

Most fittingly, it could help rein in the ways in which it is enabling the unfettered protection of descriptive and generic terms. It could change its rules to allow for participation in the Brand Registry only when the corresponding mark is registered in plain text, without stylization or accompanying images.<sup>446</sup> In this way, third-party sellers would not be able to acquire rights to descriptive or generic terms in Amazon's Brand Registry without clearing them as such through the PTO. In most cases, given trademark's distinctiveness rules, they would not be able to get a PTO registration unless they have a descriptive term that has developed secondary meaning.<sup>447</sup> In this vein, Amazon also should clarify its rules on descriptive fair use<sup>448</sup> to ensure that even when a third-party seller secures a PTO registration for a descriptive term, Amazon would not give that third-party seller priority in results displayed when consumers search for that descriptive term and would allow other third-party sellers to use that term descriptively in its listings without fear of repercussion by Amazon. By making these changes, Amazon might very well tamp down third-party sellers' incentive to seek registrations of descriptive and generic terms.

Amazon should also reconsider its policy of allowing businesses to participate in the Brand Registry with only a pending application to register, as opposed to an issued registration. Amazon likely adopted this policy because of the long pendency of applications—a problem it is largely responsible for having created. But that policy exacerbates the logjam at the PTO, and it further encourages fraudulent applications

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<sup>444</sup> *Supra* section B.

<sup>445</sup> *Supra* text accompanying notes 2-4.

<sup>446</sup> Amazon might apply this rule to all marks sought to be registered in its Brand Registry or only to those that are descriptive or generic. We thank Rebecca Tushnet for this suggestion.

<sup>447</sup> *Supra* section I.A. That is, the PTO is applying its rules in this regard properly and the distortion to the trademark system happens only because of Amazon's Brand Registry rules, so the focus ought to be on adjusting Amazon's rules.

<sup>448</sup> *Supra* section I.A.

and enables parties to enforce marks that they are unlikely to be able to register, enticing more businesses to file baseless applications.

More generally, Amazon ought to be encouraged to be more transparent about the ways in which it advantages Brand Registry participants and the rules of qualification, many aspects of which are not publicly clear. Transparency would promote the ability of the PTO and watchdogs to respond, when appropriate, to the ways in which these rules encourage third-party sellers to seek to register marks or adopt particular types of marks.<sup>449</sup>

With regard to the delays in the PTO provoked by the Brand Registry's requirement that a seller obtain a PTO registration (and now merely have a pending application, which will likely aggravate delays yet further), perhaps Amazon ought to bear some of the cost of the delays it has caused in the PTO.<sup>450</sup> There are many forms that such a tax could take, but it might be a tax that corresponds to the number of applications filed annually that are then registered in the Brand Registry. Alternatively, the PTO could consider changes to the fee structure that would specifically target the kinds of applications most likely attributable to Amazon policies.

#### **D. The Future of Trademarks and Competition**

The previous sections focus on ways in which Amazon's policies, and especially the Brand Registry, warp existing trademark law, and they offer suggestions about how to change either PTO rules or Amazon policies to better approximate the pre-Amazon balance in the system. But it is worth considering broader questions about Amazon's impact on branding practice, and what that might mean about the role of trademark law in the future.

As we noted, Amazon's model is largely responsible for the rise of nonsense marks and has provided incentive to claim descriptive and generic terms as marks.<sup>451</sup> Because consumers search for products on Amazon using product categories, descriptive and generic terms, or consumer reviews, and because search results use that kind of information as much or more than brand information, Amazon sellers have diminished incentive to select a memorable brand name that consumers use to search. They need some mark that they can register in the PTO, but nonsense or descriptive or generic terms will do. At the same time, Amazon's own branding practices, and particularly its increasing emphasis on AMAZON-centered brands (such as AMAZON BASICS and AMAZON ESSENTIALS), and its preferencing of its own

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<sup>449</sup> Cf. Kate Crawford & Jason Schultz, *AI Systems as State Actors*, 119 COLUM. L. REV. 1941 (2019) (making the case that third-party vendors of algorithms used by governments be held accountable in court); Vincent M. Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Legal System*, 80 MD. L. REV. 487 (2021) (proposing rules to oversee algorithmic tools used in the criminal legal system).

<sup>450</sup> These delays are costly both to the PTO, which must hire new examiners and institute new systems to improve them, and to the businesses waiting for registrations.

<sup>451</sup> *Supra* sections III.C-D.

products in search results, has the effect of diminishing the importance of third-party brands in favor of the Amazon brand.

On the one hand, these features have positive value for many smaller third-party sellers, whose brands typically cannot compete against large, better-known brands. Indeed, there is an important sense in which Amazon's practices de-center brands altogether. Whereas search-costs theory has always maintained that the value of a trademark is in its ability to decrease search costs by enabling consumers to use marks as a shorthand for product information,<sup>452</sup> Amazon's model makes that product information more directly available and the basis for algorithmic search.<sup>453</sup> The result is a more democratic marketplace, less dominated by big brands. For the many critics of expansive trademark protection and its contribution to an overly-brand-focused economy,<sup>454</sup> that should sound like a win.<sup>455</sup> Of course, Amazon de-centers third-party brands in large part to center its own brand. In that respect, the effects are hardly democratic, as they further entrench the power of a dominant platform.

In terms of the net effects on competition, then, Amazon's practices are a mixed bag: Amazon to some extent enables third-party businesses, especially as against entrenched brands, but it does so in a structure that primarily benefits Amazon and may ultimately promote Amazon's brand over all others.<sup>456</sup> In some ways, this is a long-term response to the rise of brands and their ascendancy vis-à-vis retailers, in which powerful brands wrested value away from retailers by reaching over the shoulders of the retailers and creating direct relationships with consumers who would demand those brands specifically.<sup>457</sup> Amazon reverses those trends, reasserting the dominance of the platform over the third-party brands sold on its site.

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<sup>452</sup> See, e.g., Landes & Posner, *supra* note 56, at 269–70; Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 786–87 (2004).

<sup>453</sup> Cf. Christine Haight Farley, *Trademarks in an Algorithmic World*, 98 WASH. L. REV. 1123 (2023) (making the case that the growing surveillance capitalism that is intertwined with developments in artificial intelligence may well render trademark's informational function obsolete); Lisa Larrimore Ouellette, *Does Running Out of (Some) Trademarks Matter?*, 131 HARV. L. REV. F. 116, 123 (2018) ("If consumers have trouble keeping track of the exploding number of craft beers, they can keep track of favorites with the Untappd app—including by scanning barcodes rather than searching by name. Consumers can scan barcodes or take pictures of other products to see reviews and prices with shopping tools such as the Amazon app."). Cf. generally ITAMAR SIMONSON & EMANUEL ROSEN, *ABSOLUTE VALUE: WHAT REALLY INFLUENCES CONSUMERS IN THE AGE OF (NEARLY) PERFECT INFORMATION* (2014) (arguing that branding is losing its value now that consumers can turn to expert opinions, customer reviews, price comparison apps, and more).

<sup>454</sup> See sources cited *supra* note 418.

<sup>455</sup> To be sure, Amazon has outsourced to the PTO the kinds of decisions that need judgment, even while creating conditions that pervert those judgments, in service of making its own system algorithmically administrable.

<sup>456</sup> Cf. Van Loo & Aggarwal, *supra* note 286 (arguing for an integration of antitrust and consumer protection).

<sup>457</sup> See, e.g., GARY CROSS, *AN ALL-CONSUMING CENTURY: WHY COMMERCIALISM WON IN MODERN AMERICA* (2000); SUSAN STRASSER, *SATISFACTION GUARANTEED: THE MAKING OF THE AMERICAN MASS MARKET* (2004).

In that respect, one's views of Amazon's competitive effects are like a Rorschach test about Amazon: the combined effects of its policies is likely to be more Amazon, however one perceives the platform.

Perhaps more radically, we might see some of the de-centering of brands as evidence that Amazon is merely emblematic of a decreasing significance of the brand, with signs becoming what Barton Beebe and one of us characterize in a different context as "indistinguishable ambient noise."<sup>458</sup> That would be welcome news for those persuaded by Naomi Klein's *No Logo*, which puts some of the blame for the costs of globalization on brands.<sup>459</sup>

If the emergence of nonsense marks—not to mention increased incentive to register descriptive and generic terms—indicates a broader de-centering of brands, then Amazon's practices go to the very core of trademark law's justification. Trademarks have long been understood to have an important informational function: they are the shorthand for information about the qualities or characteristics of goods.<sup>460</sup> Critics have frequently observed that brands also (and maybe even primarily) create artificial product differentiation, allowing brand owners to extract value from consumers based on brand values that have little to do with underlying product quality.<sup>461</sup> To the extent those two functions are in conflict, the current settlement seems to accept enablement of pure brand building as a necessary byproduct of protecting the informational function that most see as central to trademark law. In Barton Beebe's language, we have allowed mark owners to increase their ability to persuade so that they can assume consumers' search costs.<sup>462</sup>

That balance may well need rethinking. If Amazon's algorithm and consumer reviews are as good or better at conveying information about products, then the informational function of brands is less important. In that respect, branding critics might celebrate the emergence of nonsense marks because they have the effect of de-centering brands and thereby reducing their ability to create artificial differentiation. In that sense, nonsense marks might seem like a partial antidote to trademark law's decades-long promotion of brand value, with ever-expanding protections across a range of trademark doctrines.<sup>463</sup>

It has long been true that, despite (largely) the same formal legal rules applying to all marks, in practice the trademark system is really two different systems: one for

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<sup>458</sup> Beebe & Fromer, *supra* note 195, at 990.

<sup>459</sup> NAOMI KLEIN, *NO LOGO: TAKING AIM AT THE BRAND BULLIES* (1999).

<sup>460</sup> *Supra* Part I.

<sup>461</sup> *E.g.*, Stefan Bechtold & Christopher Jon Sprigman, *Intellectual Property and the Manufacture of Aura*, 36 HARV. J.L. & TECH. 291 (2023); Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809 (2010); Litman, *supra* note 418. *See generally* Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165 (1948) (describing the debate whether trademark law promotes such artificial differentiation).

<sup>462</sup> Beebe, *supra* note 73, at 2068 ("The story of American trademark law is a story in which producers have been encouraged to bring ever more information to the marketplace, inside of which is persuasion, and consumers have been allowed to bring ever less, inside of which might have been persuasion sophistication.").

<sup>463</sup> *See* sources cited *supra* note 418



famous brands like CHANEL, and one for the workaday brands. Many of trademark law's expansions over the last several decades have deepened that difference and worked primarily to benefit the famous brands.<sup>464</sup> Amazon's practices seem likely to shift the balance even more radically in favor of certain well-known brands, and especially Amazon's own brands. It is notable here that the truly rarified brands—the luxury brands—are largely unaffected by the changes we have described. Those brands have never really trafficked in the informational function of brands, at least not in the sense of information about the tangible characteristics of those products (the kinds of information that might be replaced by algorithms and consumer reviews). They have instead primarily benefitted from their aura.<sup>465</sup> Perhaps unsurprisingly, those brands do not sell on Amazon—they sell through their own stores and a highly curated group of retailers.<sup>466</sup>

In the longer term, it remains to be seen whether there are countermoves available to brands that might shift the balance back in their direction, perhaps through more use of direct-to-consumer approaches via other platforms, especially social media.<sup>467</sup> That might ultimately effect a shift from product-based competition to platform-based competition, and the competitive effects will depend on the overall value of that kind of competition.<sup>468</sup>

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<sup>464</sup> See sources cited *supra* note 418.

<sup>465</sup> Bechtold & Sprigman, *supra* note 461; Beebe, *supra* note 461.

<sup>466</sup> Renata Geraldo, *In Luxury Market, Being Amazon Is Still a Burden*, WALL ST. J., Oct. 31, 2020, <https://www.wsj.com/articles/in-luxury-market-being-amazon-is-still-a-burden-11604136601>.

<sup>467</sup> Michael Southworth, *Amazon vs. D2C: The Pros and Cons for E-Commerce Brands*, FORBES, Oct. 7, 2020, <https://www.forbes.com/sites/forbesbusinesscouncil/2020/10/07/amazon-vs-d2c-the-pros-and-cons-for-e-commerce-brands>; Thales S. Teixeira, *Case Study: Should a Direct-to-Consumer Company Start Selling on Amazon?*, HARV. BUS. REV., Mar.-Apr. 2019, <https://hbr.org/2019/03/case-study-should-a-direct-to-consumer-company-start-selling-on-amazon>.

<sup>468</sup> We thank Chris Sprigman for this observation.