

The Myth and its Registration

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As consumerism expands and narrative becomes an increasingly valuable commodity, this study asks: what are the consequences for creativity? Does commodification provide creative writers expanding opportunities for content creation? Or are creative practices restricted by the structural elements of enclosed markets that merely purport to be free?

By focussing on trade marks as icons for narratives, this enquiry into the fields of creative writing and intellectual property places the writer's belief in freedom of expression under scrutiny; first by analysing the nature of trade marks and their relationship with creative writing and the politics and philosophy of our times [part1], and secondly through a fictional narrative, in which emerging themes concerning identity, truth and the nature of belief are explored [part 2].

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Introduction

In *Heroic Failure: Brexit and the Politics of Pain*, Fintan O'Toole implies that the England of Boris Johnson and William Rees-Mogg is no less mythical than Tolkien's alternative Albion, The Shire.¹ For O'Toole, Brexit can be summarised as the product of a uniquely English set of misrepresentations or myths.

Perhaps the idea of myth as something inherently bogus, disruptive and irrational was cemented by Roland Barthes who, in *Myth Today*, characterised the ubiquitous nature of modern myth: 'since myth is a type of speech, everything can be a myth provided it is conveyed by a discourse.'² He also described its potency: 'In passing from history to nature, myth acts economically: it abolishes the complexity of human acts, it gives them the simplicity of essences, it does away with all dialectics, with any going back beyond what is immediately visible, it organizes a world which is without contradictions because it is without depth, a world wide open and wallowing in the evident, it establishes a blissful clarity: things appear to mean something by themselves.'³

Subsequent mythographers have sought to ameliorate this view, which could be seen to emanate from an empirical, 'scientific' view of the world, grounded in the explosion of certainty that accompanied the development of the sciences and their application through engineering, medicine and urban planning in the nineteenth century. The development of social sciences in the twentieth century, to some extent, imported many of the beliefs associated with 'natural'

¹ See Fintan O'Toole, *Heroic Failure, Brexit and the Politics of Pain* (London: Head of Zeus, 2018) p 38.

² Roland Barthes, *Mythologies* (London: Vintage, 1993) p 109.

³ *Ibid.* p 143.

science. Myth, which seemed unmeasurable, irrational, primitive and invisible could not be 'true'.

Today, the 'myth of mythlessness' underpins our sensibility.⁴ Myth is everywhere. Indeed, even the proposition that science has nothing in common with myth seems doubtful. Karl Popper's doctrine of falsification, grounding scientific enquiry in the impetus to disprove connects the two, as Robert Segal points out; 'for theories, like myths, can never be proved, only disproved and therefore remain 'essentially uncertain or hypothetical.'"⁵

In *Myth*, Lawrence Coupe charts the development of modern myth, making important connections with literature, the study of narrative and the significance of story as our means of understanding (or perhaps mythologising) our world. He reflects on the idea that everything can be framed in the context of myth. We have already seen how a word like 'science' has mythic connotations. 'The law' is no exception. He discusses how both Kafka in *The Trial* and Dickens in *Bleak House* explore apocalyptic mythical symbols and idioms drawn from Christian traditions which they expose as they transpose them into a legal context.

The Law is universal, indeed wholly impersonal, in its modern secular manifestation; but one lives; one is judged and one dies in isolation and absurdity, Kafka replaces the myth of deliverance with the myth of denial, and the hero myth with an anti-hero myth.⁶

In respect of the interminable case of Jarndyce versus Jarndyce in *Bleak House*, he cites Mrs Flite's forlorn hope for apocalypse and new beginning; 'I expect

⁴ Lawrence Coupe, *Myth* (London: Routledge, 2009) p 9.

⁵ Robert A. Segal, *Myth: A Very Short Introduction* (Oxford: Oxford University Press, 2004) p 33. Here Segal quotes Popper in - Karl Popper *The World of Parmenides: Essays of the Presocratic Enlightenment* (London: Routledge, 1998) p 116.

⁶ Coupe p 128.

judgement. Shortly. On the day of judgement'.⁷ Here Coupe shows how fiction writers have used the 'secular', 'universal' law as a counterpoint to their reflections on our beliefs. *The Myth and its Registration* consists of two parts, an analytical section and work of fiction. Both also focus on the law and they illustrate how its 'wholly impersonal' means of concretising capitalism's mythologies may also be viewed as myth.

The discursive part of *The Myth and its Registration* focuses on one aspect of the law, the Register of Trade Marks. Created in 1876 to streamline the legal stagnation Dickens identified in *Bleak House*, the register, the law defining it, the case-law developing it and the bureaucracy administering it exemplify two aspects our myth-laden modernity: firstly, the development of the institutions of the law as myth-making entities and, secondly, the interpretation of legal decisions and practices as mythologies in their own right.

In the case of the UK Trade Marks registry, one other aspect of the legal framework should be considered. The register is numerical. It begins with trade mark number 1. The mathematical implications of this ordered succession of trade marks locates trade mark registration, narrative creation and protection, in an infinite realm. The stories represented by trade marks are 'brand narratives', intended to confirm the values implicit in that trade mark to the purchasing public. It is these stories which, when viewed as a group, contribute to what might be described as a capitalistic 'grand narrative'.⁸

A key objective of this study is to connect the abstract and the tangible. How are the complex implications of modern myth at a theoretical level revealed

⁷ Ibid.

⁸ See - Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (Manchester: Manchester University Press, 1984).

in the experience of life? And how is the experience of living transformed into story? This study seeks to expose some of the latent influences our culture places on the writers of stories, or myth-makers. Robert Segal equates myth with 'story' and for the purposes of this enquiry, which is concerned with the practice of writing stories, a definition of the term offered by Robert McKee to writers who want to succeed in the most commercial of contexts – screen-writing – is the preferred starting point. 'As our faith in traditional ideologies diminishes,' writes McKee, 'we turn to the source we still believe in: story.'⁹ For McKee, 'Story is a metaphor for life.'¹⁰ This enquiry asks whether this statement is valid, or whether, today, story is a product for life.

We value creativity and study it carefully in art colleges, film schools and creative writing departments. But do we give enough credence to the idea that, just as science and the law can be construed as mythical, so may the idea of creativity? As a story-writer I have taken a practical approach to this question. I have sought to exemplify it in two ways: first by considering legal institutions and processes that represent creativity and its monetisation, asking to what extent this capitalist framework 'encloses' our stories in today's global capitalist monoculture. Secondly, I seek to explore the same idea through a story. *The Pumpkin Season* is set in Eastern Europe before capitalism was embedded, but after communism had been abandoned. This brief period was notable for the absence of communist and capitalist mythologies, thus making it an interesting setting for a story about the nature of identity.

⁹ Robert McKee *Story, Substance, Structure, Style and Principles of Screenwriting* (London: Methuen, 1999) p 12.

¹⁰ *Ibid* p 25.

Just as Britain wrestles with its own mythologies today, so Eastern Europe did during the 1990s. Today the pain Fintan O'Toole identifies in England's Brexit echoes that felt during the aftermath of independence in Eastern Europe. In *Poetics of Imagining, Modern to Post-modern* Richard Kearney describes the multi-layered, ideas and stories we negotiate as 'a labyrinth of mirrors'. This analysis describes i/ how that labyrinth developed (in respect of trade marks and their narratives) and ii/ what happens if the mirrors break.

Chapter I of *The Myth and its Registration* demonstrates practical links between the legal sphere of trade marks and the brands they represent, and literature, tracing a harmonious relationship between branding and writing from Dickens to the present day. Having established this connection, it explores the nature of trade marks and demonstrates how their registration, how the register itself, acts as a tangible representation of intangible assets, stories or myths. This realisation of myth or story is crucial, because this process enables the monetisation of intangible brand narratives – thus permitting the capitalisation of myth.

In Chapter II considers the method of analysis adopted by Roland Barthes in *Mythologies*. I quote three trade mark registrations and explain and explore the mythologies implied by their registration numbers. In so doing I illustrate how the bureaucratisation of creativity, represented by the numbers, compartmentalises or 'encloses' creative output and I indicate some important qualities of trademarks.

Chapter III connects our understanding of writer, trade mark, brand and bureaucracy with theory, focussing on Raymond Williams, Roland Barthes and Slavoj Žižek. In this section I characterise the psychological, political and cultural

aspects of trade mark myths and view them from the point of view critical theory, complimenting the legal and historical perspectives already discussed.

A natural avenue for further development is to consider in more detail the relationship between myth and narrative. In this study these are viewed as components of stories and I have chosen a practical, rather than theoretical approach to explore them. *The Pumpkin Season*, which forms the second part of this analysis, is a fiction about narrative, myth and their relationships with identity. The novella seeks to reveal the tendency of fiction to follow patterns, structures and principles discussed in the first part of this enquiry by eschewing them. *The Pumpkin Season* is set at a place and time during which structural mythologies (government, the legal framework, national identity) were unclear or absent. It exemplifies trade mark narratives through a fictitious, perhaps Dickensian or Kafkaesque, trade mark legal case. It concludes with an observation about observation.

Chapter 1: Marks in Time

i/ Making Marks

Barely visible in the top right corner of this box, part of a government file store containing thousands of similar boxes, are the words 'DO NOT DESTROY'. In spite of the fact that the warning is underlined twice, the message understates the importance of the object within. It also underestimates it: the thing inside the box cannot be destroyed.

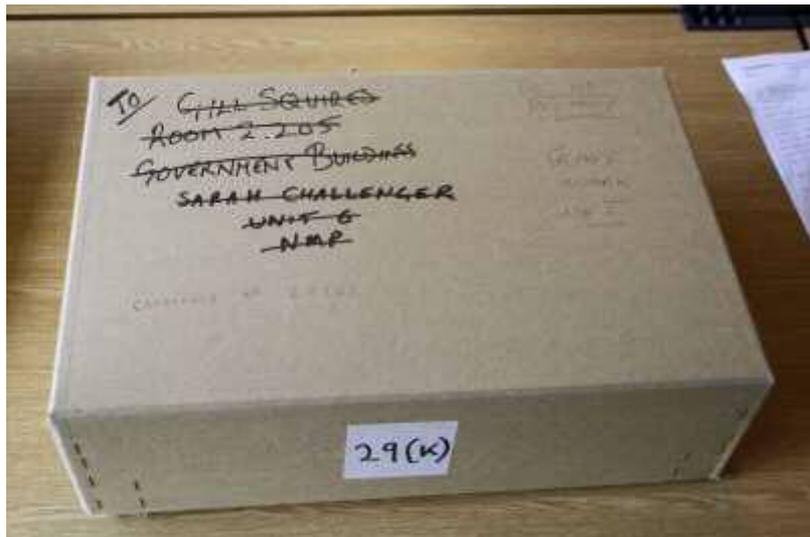


Figure 1: box.¹¹

The opening of boxes, for those interested in the creation of narratives, is an ancient story-telling technique appealing to an innate human quality: curiosity.

¹¹ IPO Archive, Nine Mile, Point, Cwmfelinfach, ref: Trade Marks – Box 29 (k) (accessed July 4th, 2014).

Closed boxes (sometimes with specific instructions not to look inside) have been striking fear or delivering delights to story-believers for thousands of years.

This box, stored at the Intellectual Property Office archive contains one of the most significant cultural artefacts of modern times; an item (if that's what it is) so valuable that our economy and culture might disintegrate if we stopped believing in it. To the uninitiated the contents, a few application forms and some correspondence from an office dating from 1876, may seem worthless. However, these documents are a quantum of our commercial world. They represent an essence that seems to be forever present and not present simultaneously. This is one of our earliest intangible assets. The application form to register the Bass Brewing Company's famous red triangle as a trade mark – trade mark number 1.



Figure 2: *Bass* trade mark.¹²

¹² Detail of Bass trade mark copy from IPO Archive, Box 29(k), IPO Archive, Nine Mile Point, Cwnfelinfach.

Trade marks are simple, almost primitive, signs: a few words, shapes or symbols denote origin. We have been scratching them out since the dawn of civilisation; trying at first to authenticate our work, and then, more recently, to stake out our property. The red triangle is comparable to ancient trade marks, where craftspeople added hallmarks or designs to physical objects to signify the maker and geographical origin. One of the earliest marks, the octopus design on the Minoan pot below, demonstrates the lasting practical value of the mark. As well as signifying the producer and place, the mark forms an appealing design with artistic impact, perhaps, even, a message. It is an icon for a narrative. For thousands of years pottery, metalwork, woodwork, anything manufactured by artisan craftspeople, was authenticated by maker's marks.



Figure 3: Minoan stirrup jar with an octopus trade mark and spreading tentacles from Cyprus; 1300-1200 B.C.¹³

¹³ © Trustees of the British Museum see online at: http://www.britishmuseum.org/research/collection_online/collection_object_details/collection_image_gallery.aspx?partid=1&assetid=34837001&objectid=462233 (accessed 3/8/2017).

However, there are significant differences between the red triangle and earlier marks. In 1876 it became possible to register a trade mark. The new Registry, part of the Patent Office, was responsible for validating, numbering and storing application forms for trade marks. It changed the nature of maker's marks. The moment when trade marks began to be registered represents a significant step in the development of a 'virtual' world and the establishment of a culture of commodification. The box does not contain the original Bass triangle, it contains an application form with a copy of one of millions of beer bottle labels attached. The red triangle registration, the UK's first registered trade mark, represents the moment authentication through registration superseded craftwork. The red triangle, with its brand narratives, its global reach, its industrial methods of production and dissemination became one of the first officially recorded intangible assets. It linked the 'real' and the 'virtual'.¹⁴ A product's registration number, rather than its maker, imbued it with mystical power, veracity and value. The first of January 1876 was the moment when signs, symbols and the stories they represent

¹⁴ In the fast moving world of branding the term 'brand narrative' has many nuances. In this discussion it is understood as the story, or group of stories a trade mark represents. This 'brand narrative' is often a company's most valuable asset. The following quote is from Forbes magazine website – it explores the notion of 'brand narrative'. 'The more that your brand is in touch with a larger story, the greater your ability for success. It's about creating the narrative first. Building your strategic brand narrative is foundational to your success, almost a parallel path with your technology, product or service build. This narrative is "Strategic" because by carefully designing the seven pieces of social code (creation story, creed, icons, rituals, lexicon, nonbelievers, leader), you can distribute each piece via content in digital and social media to design a holistic communications surround for users and fans that keeps them in touch with your community. It is "Brand" because, today, "brand" is your community of users, fans, zealots and others who share your beliefs, values and experiences' Hanlon Patrick, What Is Strategic Brand Narrative? *Forbes Magazine Online*, Apr 26, 2016, <<https://www.forbes.com/sites/patrickhanlon/2016/04/26/what-is-strategic-brand-narrative/>> 16/4/2016 9 (accessed 15/2/2019).

were entered on a kind of land-register of the non-physical. This is when brands and their narratives became commodities.

Today the value of trade marks as ‘intangible assets’ encompasses a plethora of legal, financial, business and socio-economic factors.¹⁵ This complex matrix is rendered difficult to define by the fact that one of its components, the brand, is itself an unstable mixture of advertising spin, media presence, consumer perception, product and brand-narrative, it’s a kind of myth. Trade marks and brands are very closely connected. Through their registration process and their strict legal definitions, trade marks can be understood as the title deeds of brands. Because they objectify brand value, trade marks have become extremely important assets, representing, according to UK Government reports, 70% of most companies’ value.¹⁶ Defining the value of modern trade marks is a complex operation undertaken by specialists.¹⁷

¹⁵ The UK Government defines the broad concept of intangible assets as follows: ‘Intangible assets encompass a broad range of assets, for example, data, software, knowledge management systems, business processes, goodwill, licences and intellectual property rights. Intangible assets have similar characteristics to tangible assets in that they can be owned or controlled by an organization and may have a monetary value.’ From the ‘Intangible assets network’ website at <https://www.gov.uk/government/news/intangible-assets-network> (accessed 3/8/2017).

¹⁶ In 2006 The Gowers Review of Intellectual Property stated: ‘In today’s knowledge economy, IP has never been more important for securing Britain’s prosperity and has never been more challenged by the changing context of innovation: it is estimated that 70% of a company’s value lies in its intangible assets, up from 40% in the early 1980s.’ Brassell, M. and Maguire, J. *Hidden value: a study of the UK IP Valuation Market*, (Full report), (UK Intellectual Property Office, Newport, 2017) p12 <https://www.gov.uk/government/publications/hidden-value-a-study-of-the-uk-ip-valuation-market> (accessed 4/12/2017).

¹⁷ See for example, global brand value specialists BrandFinance website at <http://brandirectory.com/> (accessed 10/12/2016). The value of a business is not necessarily connected to its real estate, its plant, or its bank balance. Value often resides in its intellectual property. Forbes magazine’s websites, quoting research from Brand Finance, lists the top trade marks by value as: 1 – Google - \$44.3 bn; Microsoft \$42.8 bn; Walmart \$32.6bn. The trade mark registration encapsulates the huge investment into a company over a period of time. The relationship between these companies and their trade marks is complex, the sign is a reflection of the company, its public profile, its products and popularity etc. On the other hand, a business is also, to a degree, defined by the sign and the story it embodies.

From the point of view of this study we are concerned with the foundations upon which brand value resides: the trade mark registration. By focussing on the development of a legal understanding of trade marks and the role taken by bureaucracy in validating them, especially in the formative years, it is hoped that important aspects of the implicit, myth-making, cultural role of trade marks may be revealed. It will be suggested that – notwithstanding the importance of brands and brand narratives in a world in which social media enables individuals to brand themselves and where branded goods and services characterise all economic activity – the essential component in concretizing this value, in securing the mythology of brand narratives, is the trade mark: more specifically it is the trade mark registration. It will be suggested that this process is not passive, that the register of trade marks is not a mere list of numbers. The process of registration, the mystery associated with the bureaucracies that house the boxes of trade marks, means that we are influenced by them. For creative writers, engaged in a process of creating narratives, trade marks may be viewed either as lucrative marketing and narrative tools or a latent force, sculpting our thought processes, calling into question the very creativity they are supposed to embody.

Today the UK register of trade marks is administered by the Intellectual Property Office.¹⁸ The register is an expanding list of over three million numbers. The list is a link between the past and the present. Trade marks never expire. So long as the fees are paid, and they remain in use, they may live for ever. As a cultural resource the register of trade marks is a significant repository. Not only does its file store contain historical artefacts, like the still living initial Bass triangle; the register itself and the bureaucracy supporting it is also an active myth-making system which

¹⁸ Originally called The Patent Office in 1852, the ‘new’ name was adopted in 2007.

influences our perception of intangible value and branded culture. The decisions made by the Registry since it began registering trade marks in 1876, in disputes over the ownership and scope of trade mark protection, represent a record of capitalism's myth-making system at work through time. As will be seen, analysis of trade marks either as legal entities or as marketing tools and brand emblems is substantial. However, the role of trade marks as intellectual conduits linking and influencing bureaucratic, legal, cultural, social, historical, artistic, economic and creative traditions remains, to a great extent, unexplored. In this study, careful analysis of legal decisions, bureaucratic practice and their interplay with cultural, historical political and economic factors reveals the developing significance of these mysterious and influential narrative commodities.

ii/ Trade mark writers

Fiction writers have, since the development of mechanised printing, been engaged in a mass production process. Since the early modern period, writing books, and then writing in other mass media, has been a commercial activity predicated on the transformation of original text into mechanically or digitally produced copies of text. Fiction writers identify their products in this commercial context using their own names, *noms de plumes*, publishers' names and the titles of their books as a means of authentication. Due to the longevity of this process, writers have a seemingly innate insight into the concepts of intangible assets and intellectual property, either because these ideas were formed at the same as writing became a trade, or because of that fact.¹⁹

One early interconnection between the concept of authorial ownership (what we refer now to as part our intellectual property right – in this case copyright) and the creative process (inspiring new artistic work) occurred when printing was the 'new' media and writers adapted to technical change. After having achieved success with the first volume of *Don Quixote* in 1604, Miguel de Cervantes was 'inspired' to complete the second part after a writer using the pen name Alonso

¹⁹ William St Clair makes the point that, at the cutting edge of intellectual property law creation, many factors drove the process of legislative development, including the practices of artists and writers:

'Many intellectual property practices have been operated for long periods of time in contravention of the law. We also find examples of intellectual property regimes operating without any basis in the laws. The 1862 statute on artistic copyright, for example, begins with the words 'Whereas by Law as now established, the Authors of Paintings, Drawings and Photographs have no Copyright in such their work', but the record shows that, in practice, for at least half a century before the passing of that act, artists had been able to exercise a de facto copyright, and to obtain large sums from engravers and print sellers in return for extra-statutory exclusive rights.' William St Clair, 'Metaphors of Intellectual Property', in *Privilege and Property: Essays on the History of Copyright*, ed. Ronan Deazley, Martin Kretschmer and Lionel Bently, (Cambridge: Open Book Publishers, 2010), pp. 370-371.

Fernández de Avellaneda created a his own continuation of the story in 1614.²⁰ The important point for writers today to remember is that it is arguable that Cervantes, who died the year after finishing his version of the second volume, may never have completed part two of the story if someone hadn't trespassed on his fictional enclosure – the world of Don Quixote. Protection of intellectual property and securing a place in the market was as significant an inspirational factor in the early seventeenth-century as it is today.

By the nineteenth-century copyright law and a publishing industry, coupled with steam printing presses and a railway system that could circulate books and information across the country overnight, turned fiction into big business. The realm of trade marks, however – the signs that stand for narratives exchanged in trade – was still being codified.

In 1859, for example, (seventeen years before the register of trade marks began recording marks) Charles Dickens engaged in a dispute about the use of his former publication's name – 'Household Words' – as he sought to set up a new publication called *All the Year Round*. During the case he described the new publication as follows: 'The task of my new journal is set, and it will steadily try to work the task out. Its pages shall show to what good purpose their motto [*All the*

²⁰ In charting the development of fan fiction in the eighteenth-century when 'reading circles penned annotations in the margins, circulated alternate endings, corresponded with authors to advocate for happier endings and shared their revisionist interpretations with other fans', Judge points out that Cervantes was partially inspired by dislike of plagiarism. 'In Cervantes's metatextual display, the fictional characters make clear to whom their allegiance lies, promising fidelity to the original author' p. 44. The second part of Don Quixote was written in response to a copyright dispute. Cervantes used his own characters to give credence to his version of the second part of his own story in response to the theft of his story: 'Cervantes marshals his own fictional characters to justify their encore appearance: "Does the author promise a second part at all?" said Don Quixote. "He does promise one," replies Sanson, "but he says he has not found it, nor does he know who has it, and we cannot say whether it will appear or not."' p. 44. See Judge, E.F. 'Kidnapped and Counterfeit Characters: Eighteenth-Century Fan Fiction, Copyright Law and the Custody of Fictional Characters', ed. McGinnis, R. *Originality and Intellectual Property in the French And English Enlightenment* (Abingdon, Routledge, 2009), pp. 22-68.

Year Round] is remembered in them, and with how much fidelity and earnestness they tell the story of our lives from year to year.²¹ This attention to detail regarding the ‘motto’ and the way in which it both describes and distinguishes itself is characteristic of the relationship between a trade mark and brand. At the time no official register of trade marks existed and there was no means of securing trade marks as property rights.

Dickens wrote a great deal about trade marks. He also explored bureaucracy in general and the Patent Office specifically in *Little Dorrit*.²² Moreover, as a novelist, perhaps more than any other, he named people and publications with trade mark inventiveness. Dickens’s portrayal of the ‘Office for Circumlocution’ perhaps says more about his dislike of legal quacks who disagreed with him than his view of intellectual property. Dickens complained against and satirised bureaucracy. He had no problem with the value of intellectual property. He wanted better access to it.

On the question of trade marks as property rights, referring specifically to the Merchandise Marks Act of 1862, he wrote:

The law rightly recognises a commercial value as attached to marks, brands, stamps, or symbols such as these. But although the law gives this recognition, the defining of its limits is often very puzzling. A trade mark properly so called, a good will, a title, a style, a designation, the labels of a house of business, a particular wrapper, all have special value to the proper owner; but the law leaves judge and jury sometimes rather at a loss. It is, however, certain, that any mark by which a manufacturer identifies himself

²¹ William Bradbury and Fredrick Mullet Evans v Charles Dickens and William Henry Wills; Chancery Court 1859. National Archive REF C 15/596/B76 pg. 6.

²² Daniel Doyce’s case in Dickens’ *Little Dorrit* (1855-7) is foreshadowed by an earlier tale: ‘A poor Man’s Tale of Patent’, which appeared in *Household Words* in October 1850. (Charles Dickens, ‘A Poor Man’s Tale of Patent’ in *Household Words*, Vol. II, 19 October 1850 pp. 73-75, Dickens Journal Online: The University of Buckingham: <<http://www.djo.org.uk/indexes/articles/a-poor-mans-tale-of-a-patent.html>> (accessed 11/2/2018).

with any product creditable to his skill and enterprise, is morally in the nature of property, and ought to be protected.²³

In an article entitled 'Duffers' Dickens attacks the plagiarism and copying he saw in his own business:

The duffing publisher—the word is capable of being resolved into every part of speech, noun, adjective, verb, and adverb—the duffing publisher takes your play and turns it into a book with the same title—as the duffing dramatic author takes your book without your leave and turns it into a play;—when you become successful as an author, he hunts up any early scraps of yours that he may have a doubtful title to, and publishes them in volumes, taking advantage of some other publisher's advertisements to direct attention to them. He follows up your *Lady in Blue* with his *Lady in Green*; brings out *Sketches of the Playhouses* as colourably the same concern as your *Sketches of the Workhouses*—borrows from you, filches from you on every hand, feeling no compunction, thinking no shame if he can only escape the un-certain clutch of the law. If you have a new or striking idea of any kind, you may make sure that he will parody it. He has no original ideas of his own. Duffers never have. If you placard the walls with a mysterious advertisement that "Jones will appear shortly," he will have his bill-stickers at work the next day with "Smith is coming." He makes a pretty shrewd guess that Jones will be popular, and so he puts up Smith to divide the constituency. Go to his shop for Jones, and he will tell you that Smith is the party you require. He is not particular. He will publish a volume of sermons, or the *Adventures of Hop Light Loo*.

Coincidentally, in the same piece, Dickens refers to the totemic Bass triangle:

Duffers of this class not only imitate trade-marks, but they contrive to stamp their goods with the genuine trade-marks of manufacturers of repute. Who has not found the trade-marks of Allsopp and Bass covering

²³ Charles Dickens, 'Trader's Marks and Tokens' in *All the Year Round*, Vol. XVII 11th May 1867 p. 465, Dickens Journal Online: The University of Buckingham: <<http://www.djo.org.uk/all-the-year-round.html>> (accessed 3/8/2017).

bottles of the vilest beer ever decocted? The labels are the labels of Bass and Allsopp, but the beer is not theirs. This is not at all astonishing, when we remember that a band of forgers contrived to get hold even of the note paper of the Bank of England. The great brewers have a number of agents to whom they entrust any quantity of their labels, and these agents are sometimes careless, and not always scrupulous. N.B. When you empty a bottle of genuine beer or wine, always run your penknife through the labels. Labels are taken, off and used again. I have found Røederer's champagne label upon a bottle of unmitigated gooseberry.²⁴

In these extracts Dickens elides trade mark, copyright infringement and unpalatable trading practices. Although apparently scattergun, his target remained the same: lack of authenticity. The trade mark was referred to as a symbol of validity in contrast to the work of 'Duffers'. Dickens seems to have almost instinctively envisaged modern trade mark property rights, perhaps exemplifying the process of practitioner-led legal development described by St Claire. He also understood that, in the eyes of the law, this is not how trade marks were viewed. When it came to copyright and trade marks Dickens understood the threats to his business as an author were no different from those confronting the makers of Bass beer, whose labels are taken off and re-used by rogue traders. Indeed, he seems to have been well aware of the complex bundles of intangible assets associated with what we now call 'creative industries'.

Importantly, when writing on 'Havana Cigars', Dickens demonstrates that for him, the significance of trade marks and the interplay between narrative and product, was a matter of morality. For Dickens and his 100,000 readers, trade

²⁴ Charles Dickens 'Duffers' in *All the Year Round*, Vol. XIII 1 July 1865 p. 538, Dickens Journal Online: The University of Buckingham: <<http://www.djo.org.uk/all-the-year-round.html>> (accessed 3/8/2017).

marks, and the fictions they embody, were concerned with a form of truth: one that connects fiction with trade.²⁵

What's in a name? they ask; and so they call a cabbage a Cabaña, just for the fun of the thing. But would it be fair, I may ask, to stamp the little figure of the "porro," or dog, which is the trade-mark of the real Toledo blade, on the haft of a carving-knife made at Liège, or to brand "Moet et Chandon" on the cork of a bottle of cider? There are, doubtless, numbers of highly trustworthy cigar manufacturers in England, who make their cigars of the very best foreign tobacco that can be imported; but I must refer again to the reports of the commissioners of inland revenue for some very ugly revelations made from time to time as to fines inflicted on manufacturers who adulterate their tobacco, and, in any case, the practice of marking the boxes which contain home-made cigars, even if they be of good tobacco, with the names and brands of celebrated Havana houses, is unfair, untradesmanlike, and immoral.²⁶

During the same period Charles Baudelaire made quite different observations, based on similar phenomena, from his viewpoint in Paris. For him the signs and symbols he noted in the paraphernalia of modernity in the metropolis did not inspire an early attempt to rationalise an intellectual property portfolio. In *The Salon of 1859* he recognised them as a new creative language in themselves.

The whole visible universe is but a storehouse of images and signs to which the imagination will give a relative place and value; it is a sort of pasture which the imagination must digest and transform.²⁷

²⁵ Initially 120,000 copies of *All the Year Round* were produced – circulation figures levelled out at around 100,000 (see Dickens Journal Online – The University of Buckingham: <<http://www.djo.org.uk/indexes/journals/all-the-year-round.html>> (accessed 38/2017).

²⁶ Charles Dickens, 'Havana Cigars' in *All the Year Round*, Vol. XVII 26 January 18, 1864 p. 112: Dickens Journal Online: The University of Buckingham: <<http://www.djo.org.uk/all-the-year-round.html>> (accessed 3/8/2017).

²⁷ Charles Baudelaire, *The Salon of 1859*, ed. by Jonathan Mayne, trans. by Jonathan Mayne (London: Phaidon, 1965), pp. 41-68.

Boris Wiseman identifies Baudelaire's insight concerning the metaphorical and narrative significance of the constructed surface as central to twentieth- (and twenty-first) century creative thought.

[Baudelaire] founded a whole aesthetics and a poetics on the principle of the direct translatability of sensory experiences – their translatability into one another (= synaesthesia) and into ideas. Put differently, he realised the centrality for art of the correspondences that the imagination 'naturally' establishes between certain sensations and certain ideas and moods.²⁸

From our point of view, assessing the significance of trade marks in the creative milieu, it was Baudelaire who released the idea that trade marks were not merely the possessions of their owners; they were, also, part of the fabric of a new reality, and therefore capable of re-possession and augmentation by those who perceived them. This reconfiguring of the man-made surface, our relation to it and location within it, inform the narratives that have characterised our existences ever since.

One of the central tenets of structuralism is that we should not be studying objects so much as the relationships between objects [...] The role that Baudelaire assigns to the imagination in poetic invention parallels that of the intellect in the act of interpretation.²⁹

This difference in approach, between the perception of trade marks as essentially utilitarian concepts which may facilitate, streamline, and (to some extent) 'unduffer' a writer's practice, and the idea that signs and symbols are not merely emblematic of a new order – that they may also be manipulated so that

²⁸ Boris Wiseman, *Structuralism, Symbolic Poetics and Abstract Art* (Cambridge: Cambridge University Press, 2007) pp. 105-106.

²⁹ *Ibid.*, p. 102.

they become means of expression in themselves – is a recurring theme in our relationship with trade marks in the creative sphere.

Dickens's recognition of the 'motto' as central to his creative project regarding *Household Words* demonstrates his understanding of the value of brand, brand narrative, and title, as controlling ideas in his creative process. By the turn of the nineteenth-century one can see commercial and artistic ideas merging and sharpening so that literature and the signs that delineate it combine to create what we might call a brand identity. It is also possible to see the conceptual aspect of artistic expression liberated by Baudelaire and, arguably, put into practice by conceptual artists like Marcel Duchamp in the next century, as turning the literary or artistic brand into something far less stable than a label. As the title, or perhaps trade mark, *Les fleurs du mal* exemplifies, contradiction, non-sequitur and destruction haunt our images of order, production and profit. The poem 'Correspondences' highlights this complex relationship:

La Nature est un temple où de vivants piliers
 Laissent parfois sortir de confuses paroles;
 L'homme y passé à travers des forêts de symbols
 Qui l'observent avec des regards familiers.³⁰

³⁰ Charles Baudelaire 'Correspondences' in *The Flowers of Evil*, ed. Jonathan Culler, translated from French by James McGowan, (Oxford: Oxford University Press, 1993) pg. 19. Here, distanced further from the English-speaking reader by the need to translate, words, paths of meaning, are transmuted into the knowledgeable observers of men who cross symbolic forests. McGowan's translation reads as follows:
 'Nature is a temple, where the living
 Columns sometimes breathe confusing speech;
 Man walks within these groves of symbols each
 Of which regards him as a kindred thing.'

Roger Fry's iconic Omega Workshops opened their doors in 1913. His trade mark registration was published in *The Trade Mark Journal* in that year. Among the many ground-breaking aspects of the Omega Workshops, whose contribution to design and the visual arts is of global significance, was its use of the trade mark. No individual artists were credited with Omega designs. The mark, the brand, the identity acted as both badge of origin and protective shield, beneath which artists could work without fear of becoming type-cast or branded, or, perhaps, paradoxically, 'trade marked'.

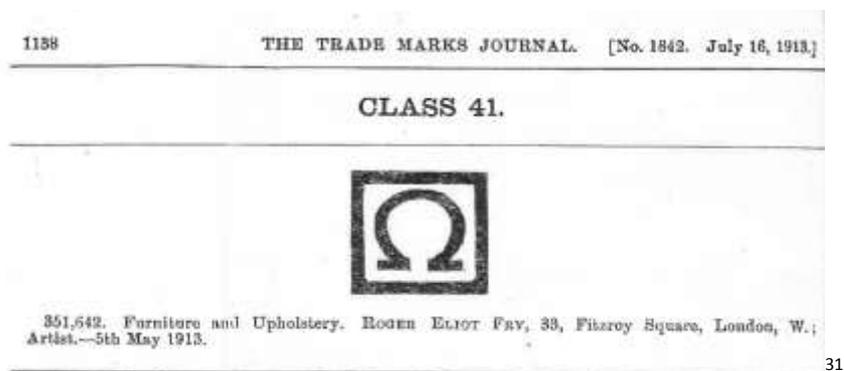


Figure 4: Roger Fry's trade mark advertisement.

Two years before the closure of Omega in 1919, Virginia Woolf, with the help of her husband Leonard and with support from Fry, circulated the first publication from a different 'new' commercial venture. Curiously, Virginia Woolf's contribution to the Hogarth Press' first volume was a short story called 'A Mark on the Wall', which can be read as a meditation on the psychoactive potential of a 'a mark'.³² By the time of Woolf's death in 1941, the press had published over four

³¹ Patent Office Trade Marks Journal No. 1842, 16/7/1913 – held at the IPO Archive, Nine Mile Point, Cwmfelinfach.

³² Virginia Woolf and Mark Haddon, *Two Stories* (London: Penguin, 2017).

hundred titles. For Drew Patrick Shannon, the Hogarth Press, not just the work of Woolf herself, was a significant literary talisman:

Why does the Hogarth Press matter? Why should we care about it? We should care because someone thought to publish a book like *Sado*, which would not have been published today (too small, too insignificant, not commercial enough, not gay enough, not sexy), that it was published based on the opinions of precisely two intelligent people and not by a committee in thrall to the marketing department. We should care because Leonard and Virginia Woolf had taste, that they chose works that pleased them aesthetically, not works that would make them rich. We should care because in this age of e-readers and cheaply-made eminently disposable books, the Hogarth Press produced books which, however flawed... still retain a stamp of originality, singularity, and still possess beauty...³³



Figure 5: Vanessa Bell's dust jackets and woodcuts for Hogarth Press.

A key factor in the aesthetic quality of the Hogarth Press' output was its branding. Vanessa Bell and Virginia Woolf established a visual and literary style which was applied to all of Woolf's publications, and extended (through the press) into the tactility of the products. Woolf did not conform to the predilections of a

³³ Drew Patrick Shannon, 'Why the Hogarth press matters', in *Virginia Woolf in Context*, ed. by Bryony Randall and Jane Goldman (Cambridge: Cambridge University Press, 2012), p. 313.

literary establishment. It could be argued that, through branding, she created a new one.³⁴ Image was important to the Hogarth Press, as Elizabeth Wilson Gordon points out, the Hogarth Press trade mark logo was reworked between 1928 and 1929 by designer E. McKnight Kauffer as he developed its relationship with the market.³⁵

The combination of writer and image maker, working together over a long period of time, in association with trade mark branded products, is connected with both populist fiction and 'niche' literary fiction. More recently, in the realm of children's fiction, Jacqueline Wilson and Nic Sharratt were linked by their publisher David Fickling in 1991. The two achieved great success. This technique mirrors the success of Roald Dahl whose brand was solidified when Tom Maschler of Jonathan Cape teamed Dahl with Quentin Blake to create *The Enormous Crocodile* in 1979. Dahl's output, possibly as a result of this rebranding, increased: *The Twits* (1980), *George's Marvellous Medicine* (1981), *The Big Friendly Giant* (1982) and *The Witches* (1983) following in rapid succession. Today, despite the fact that Dahl worked with many illustrators during a long career, his work is presented as if it were a single, coherent structure, vivified through continuous partnership with Blake.³⁶

³⁴ For alternative view of Woolf's relationship to the market, in which her literary fiction was presented more as 'gift' than commodity see Katherine Simpson, 'Woolf's Bloomsbury', in *Virginia Woolf In Context*, ed. by Bryony Randall and Jane Goldman (Cambridge: Cambridge University Press, 2012) and Katherine Simpson, *Gifts, Markets And Desire* (Basingstoke: Palgrave Macmillan, 2008).

³⁵ Elizabeth Wilson Gordon, 'On or About December 1928 the Hogarth Press Changed: E McKnight, Kauffer, Art, Markets and the Hogarth Press 1928-39' in *Leonard and Virginia Woolf, The Hogarth Press And The Networks of Modernism*, ed. by Helen Southworth (Edinburgh: Edinburgh University Press, 2010).

³⁶ Dahl's work before his relationship with Blake began is not, however, divorced from the market. His first two major works – *James and the Giant Peach* and *Charlie and Chocolate Factory*, tune in to an economic link between the UK and America. Aside from the peach, two of the significant images in the story are the White Cliffs of Dover and the Empire State Building. Charlie's journey is a more cerebral evocation of capitalism – Wonka is the capitalist inventor genius – a sort of Alexander Graham Bell of the confectionery world –

The extent to which trade marks are involved in literary production today can be seen still more clearly if we consider writers whose identities are registered as trade mark, for example: *Jacqueline Wilson* (UK TM 2361632, 2004); *Stephen Hawking* (UK TM 3097042, 2015) and *J. K. Rowling* (UK TM 2218081, 1999).³⁷ Deceased writers whose identities are preserved in trade mark mausoleums are (for example): *Roald Dahl* (UK TM 2273780, 2001) and *Dylan Thomas* (UK TM 2607666, 2012). Perhaps of equal significance are characters who are registered as trade marks, whose writers (or descendants) must perpetuate their existences in fictional worlds, for example: *Sherlock Holmes* (EU TM 1263342, 1999); *Jack Reacher* (EU TM 1041397, 2011) and *James Bond* (EU TM 251981, 1996).³⁸ Other aspects of the strong relationship between trade marks and the creation of fiction can be found in the vectors of communication, for example *The Booker Prize* (UK TM 2143404, 1997), encapsulating the narratives that win it.

Writers' most obvious relationship with trade marks is through a name/pseudonym. Thus, in the age of pulp fiction it was possible for Lionel Fanthorpe to write under more than 20 pseudonyms during the 1950s/60s, producing around 180 science fiction paperback novels for Badger Books.³⁹ Similarly, writers who produce work for strongly branded publishers design their

Charlie's dad has the misfortune of being a human 'oompa loompa' see: Roald Dahl *Charlie and the Chocolate Factory* (London: Puffin, 2013).

³⁷ Trade mark registration number and dates of registration references are from the UK Intellectual Property Online search engine <<https://www.gov.uk/search-for-trademark>> (accessed 15/12/2017).

³⁸ The first UK 'Bond' registration 'James Bond Special Agent 0007' registered in 1967 (UK TM 908164) in respect of toy cars represents a very early attempt to transform a fictional character into a property right.

³⁹ Debbie Cross, *Down the Badger Hole* (Everett: Wrigley-Cross Books, 1995).

work to complement the brand, for example, of *Mills and Boon* (EU TM 1377126, 1999).⁴⁰

Accidental trade marks

Today, it could be argued that trade marks are so embedded in our creative culture that we don't create anything without them. That with the unconsciousness of the 'predestined' - as Robert Louis Stevenson put it – we may work from trade mark toward the text creating trade marks and brands almost without consideration.⁴¹ Perhaps, regardless of whether or not it has been registered, most narrative fiction today is defined by 'accidental' trade marks – the titles of stories, the names of authors, the logos of publishers. These apparently peripheral signs may be significant landing lights in the route between ethereal contemplation and market reality. There are two ways of looking at them: they are either helpful guides, aiding writers so that they arrive safely at their destinations; or they are wreckers' lanterns, defining well-worn routes so that all fiction that follows them takes the reader on the same old journey, to the same old rocks.

The relationship between fiction writer and trade mark is well established. It crosses genres and transcends boundaries between literary and popular fiction. Trade marks are important in both delineating and directing fiction for consumers in the market and for writers creating work for it (or against it; or despite it). In addition to their utilitarian value, as well as being tools for historical and cultural research, registers of trade marks are also of great relevance to creative writers

⁴⁰ See Val Derbyshire's work on Mills and Boon – referenced here in an article in the Guardian newspaper: <<https://www.theguardian.com/books/2016/aug/24/mills-and-boon-romances-are-actually-feminist-texts-academic-says>> (accessed 4/8/2017).

⁴¹ Robert Louis Stevenson, 'My First Book: Treasure Island', *The Idler*, VI, August 1894, Vol. VI

who are in the business of forging new narrative today. A register of trade marks is an expanding directory of narratives, corralled and branded by the signs that comprise them. As the lists of marks expand, it is worth asking whether the register reflects or defines the creativity it represents.

Trade mark definitions

In 2013 The Office for the Harmonization of the Internal Market (now renamed the European Union Intellectual Property Office), which is responsible for administering trade marks and designs throughout the EU, produced a report on the public perception of Intellectual Property or 'IP' as it is often referred to.⁴² Given the sophistication of the modern workforce, one might have expected the level of understanding of intellectual property to be high throughout Europe. Most of us work in institutions that rely on intellectual property for their existence; many of us create intellectual property for a living. However, whilst a large percentage of Europe's population claims to understand the meaning of the term 'Intellectual Property', when questioned further, only 13 percent of Europeans had what the report described as a 'good' understanding of the term. 37 percent were 'poor'. Similarly, surveys of businesses' awareness of intellectual property conducted by the UK Intellectual Property Office in 2015 discovered that although 94 percent of businesses thought it was 'important' to understand how to protect their

⁴² OHIM Public Awareness Report – 2013 < https://oami.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IPContributionStudy/25-11-2013/european_public_opinion_study_web.pdf> (accessed on 11/12/2016).

intellectual property, only 10 percent trained their staff in any aspect of intellectual property.⁴³

Although we live in knowledge economies, and despite the fact that we trade in services, it is surprising how unaware people remain about intellectual property. This is not because it doesn't impinge on everyday life. It is not because it isn't important. Perhaps it is because it sounds complicated, rather dull, and it refers to material which is, by definition, is intangible and therefore out of sight.⁴⁴ Perhaps most significantly, the explanation for the low level of awareness was that it wasn't necessary. There was no need for IP awareness to extend beyond the realms of well-informed experts. The system was specialised and (largely) unchanging. Today, as the expansion of the private domain gathers momentum because of technological change, contact with intellectual property has become a significant social issue. This connection brings questions of ownership and inventiveness into the psychic space of the average phone-user.

Trade marks, patents, designs, copyright material, trade secrets, business methods, management techniques or any other value-adding, non-physical quality may be understood as intangible property. Intangibility is by definition 'off the page' – it requires imagination to conceive of it and to clarify it. Thus, it is quite easy to see how almost 100 percent of businesses recognise the importance of intangible assets *in theory*, whilst only a small percentage train staff regarding

⁴³ Intellectual Property Awareness Survey – UK Intellectual Property Office, Newport. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/500211/IP_awareness_survey_2015.pdf> (accessed on 11/12/2016).

⁴⁴ For a detailed analysis of the technical aspects of trade marks examination and the proposed influence of bureaucratic techniques with legal practice in the formation of the 'object' – the trade mark see Jose Bellido and Hyo Yoon Kang, 'In Search of a Trade Mark: Search Practices and Bureaucratic Poetics', *Griffith Law Review*, 25.2, (2016). <<http://www.tandfonline.com/doi/abs/10.1080/10383441.2016.1170654?journalCode=rlaw20>> (accessed 23/8/2017).

specific IP issues *in practice*. It takes imagination to recognise an intangible asset. All attempts to define and clarify intangibility are subject to interpretation. The law is designed to give the impression of clarity and aid objectivity in specific, commonly used areas, like trade marks, designs, patents and copyright, but, ultimately, especially in the broader cultural realm – where trade marks are actually used – the significance of intangible assets is always subject to interpretation.

Trade marks, and intellectual property in general, are defined in at least two realms. In the legal sphere their definitions are meticulously worded and have been modified through (by and large) small gradations in language over long periods of time.⁴⁵ On the other hand, as we will see, the term ‘trade mark’ is used in everyday language to denote a characteristic trait or quality, adding weight to a description by implying – but not actually meaning – legal certainty. Moreover, the term is also loaded by the individual’s personal experience and relationship with specific brands. A biscuit lover may conceive of a trade mark like *Penguin* as almost a pleasurable friend; the same person may regard a name like *Exxon* as the antithesis. The term ‘trade mark’ includes within its scope a spectrum of emotional responses. It has already been noted that the wider public or cultural perception of what intellectual property might be does not necessarily match its legal meaning.

There is a sense that the legal community and the bureaucracies supporting intellectual property awareness, the *cognoscenti*, see this divergence as evidence of ignorance on the part of non-*cognoscenti*. However, the history of trade mark administration is peppered with surveys and enquiries into the same question: what does the legal community think is a trade mark and what does the general

⁴⁵ The legal definitions of a trade mark in the UK since 1875, for example, can be found at appendix 1, p. 189.

public think?⁴⁶ The recurring difference between the two perceptions illustrates a fundamental property of trade marks: both culturally and legally it is necessary to continually paint trade marks into existence. Neither the cognoscenti, nor the non-cognoscenti are truly sure about the meaning of the term 'trade mark'.

In fact, if one approaches the concept of intellectual property with a broad perspective, what might be categorised as inaccurate by an administration may in fact represent a valid opinion in the non-specialist sphere: thus, meaning is relative. Legally speaking, a trade mark is 'any sign capable of distinguishing the goods of one undertaking from another'; culturally speaking the term may have far looser but no less relevant connotations.⁴⁷ The term is, and always has been, unclear. As an 'intangible' asset, it can only 'exist' if it is continually re-imagined. For the purposes of this study no single definition of a trade mark is preferred.

As well as being closely connected with the creation of narrative fiction, the term trade mark is ambiguous. Like the objects it describes, it is always changing. This mutability in both legal and wider circles can be seen in the formative years of trade marks registration during the late Victorian period. To some extent, it is embedded in the system.

⁴⁶ In seeking to redress this problem in 1913, Sir D.M. Kerly wrote: 'Although the principles upon which the law of trade-marks rest have often been dwelt upon and explained in the judgment of leading cases on the subject... yet judges have but seldom attempted to state precisely what a trade-mark is, and I have found no formal definition in my reported judgment.' D M Kerly, *The Law of Trade Marks* (London: Sweet and Maxwell, 1913), p. 27.

⁴⁷ The 1994 Trade Marks Act (London: HMSO, 1994).

iii/ Historic marks

To understand more about the nature of the modern trade mark, it is necessary to study the administrations that bring them into existence. These institutions are themselves creative undertakings. They exist in a symbiotic relationship with the marks they authorise. They are concerned with the exploitation of intangible narratives, with the transformation of the imagined into the 'real'.⁴⁸

Frank Schechter in *The Historical Foundations of the Law Relating to Trade Mark Law*, written in the mid-1920s, a time of economic instability and therefore great interest in the latent power held in intangible assets, considers the practical question of how trade marks create wealth.⁴⁹ Schechter provides a detailed analysis of the development of trade marks from the middle ages to the present day. He warns us, as we look back beyond the nineteenth-century, that evidence of trade mark awareness becomes less clear the further back in time we go; that it is possible, just as the lawyers of the late seventeenth, eighteenth and early nineteenth-century did, to grasp at snippets of case law as evidence of a clear, long-term, developmental history of trade marks in the market and in law where, in fact, there was none.

Schechter urges caution when extrapolating from limited pre-nineteenth-century sources. He argues that early English trade marks law shows a reliance on just one case, that of *Southern v How*, dating from 1618.⁵⁰ The case was, he points

⁴⁸ Here the term 'intangible narratives' refers to the brand narratives associated with 'intangible assets' – trademarks and other forms of intellectual property.

⁴⁹ Frank Schechter, *The Historical Foundations Of The Law Relating to Trade-Marks* (New York: Colombia University Press, 1925), p. 9.

⁵⁰ *Southern v How*, *Popham's Reports* at 143, 79 Eng. Rep. at 1243-44.

out, misquoted, interpreted differently, sometimes in diametrically opposed ways, until it became a totem for a tradition that never really existed.

Southern v How appears to have acquired considerable weight as authority for the proposition that the unauthorized use of a trade-mark is unlawful and may be the subject of an action in deceit.... The English Courts have unequivocally relied upon the authority of Southern v How to establish the antiquity of their jurisdiction to prevent trade mark piracy.⁵¹

In Schechter's words, Southern v How 'was practically worthless in demonstrating that the common law of trademarks developed any earlier than the Industrial Revolution.'⁵²

More recently, legal historian Lionel Bently and others have demonstrated that an increasing volume of case law from the late eighteenth and early nineteenth-century may indeed evidence the development of a clear legal concept of trade mark law prior to the onset of the Industrial Revolution and the creation of a register of trade marks in 1876.

The two points of view are worth bearing in mind: on the one hand the fact that English courts in the early history of trade marks case law may have over-emphasised one specific case does not necessarily mean a practical understanding of trade marks in the law was not developing. On the other hand, care should be taken when extrapolating from precedent and case law, especially when we are trying to gauge the meaning of the term 'trade mark' and the brands they signified in the past. Furthermore, it should be recognised that there has always been an

⁵¹ Schechter, p. 20.

⁵² The strength of Schechter's argument is evidenced by relatively recent comments in its favour, see: K. M. Stolte, 'How Early Did Anglo-American Trademark Law Begin? An Answer to Schechter's Conundrum', *Fordham Intellectual Property, Media and Entertainment Law Journal*, Vol. VIII.2, (1997), No. 6.

interest within the legal community in emphasising the ‘legal certainty’ of trade marks law and verifying an associated long heritage of competent trade marks administration. This approach foregrounds the interests of a commercially motivated profession and asserts its own credentials.⁵³ It also establishes a self-serving narrative: that ‘lack of awareness’ of intellectual property in general equates to a lack of sophistication. This is not necessarily the case. An alternative reading of the situation is that the legal profession have always preferred the privatisation of the public domain, if for no other reason than that it creates more assets and expands the market for legal services.

The Patent Office

The establishment of the Patent Office in 1852 was not universally approved of and its success was not a foregone conclusion. Just as today, many commentators objected to the creation of monopolies and to the negative effect unwanted bureaucratic control might have on the creative process.⁵⁴

⁵³ Bigland Wood began his text book on The Merchandise Marks Act 1862 and The Trade Marks Registrations Act 1875 as follows ‘Although the principles of Trade Mark law are well ascertained, there has been since 22nd Eliz (a) [see the case mentioned by Dodderidge in *Southern v How*, Popham 143], a large and increasing amount of litigation relating to trade marks, shewing the value which is set by the by the world commerce upon the use of these symbols.’ This statement reassures potential trade mark owners that the intangible product offered by the legal profession has provenance. John Bigland Wood, *The Law of Trade Marks* (London: Sevens and Haynes, 1876), p. 2.

⁵⁴ ‘I believe,’ wrote Brunel, ‘that the most useful and novel inventions and improvements of the present day are mere progressive steps in a highly wrought and highly advanced system, suggested by and dependant on, other previous steps, their whole value and the means of their application probably dependent on the success of some or many other inventions, some old, some new... Without the hopes of any exclusive privileges, I believe that a clever man would produce many more good ideas and derive much more easily some benefit from them. It is true that he will earn only a few pounds instead of dreaming of thousands; but he will earn these few pounds frequently and without interfering with his daily pursuits; on the contrary, he will make himself more useful.’ Angus Buchannan *The Life and Times of Isambard Kingdom Brunel (1806-1859)* (New York: Hambledon Continuum, 2006), pp. 178-179. See also: Ben Sherman and Lionel Bently, *The Making of*

Perhaps the event that tipped the balance in favour of the creation of an office specifically intended to protect inventions and to encourage inventiveness was the Great Exhibition of 1851.⁵⁵ The international trade shows which were held throughout the nineteenth-century to showcase innovation and technical advancement also became foci for copiers, seeking to benefit from the investment of others. The negative effects of unlicensed copying spurred legislators on in their attempts to safeguard and reward creativity.⁵⁶

The organisation that administers trade marks registration, The Patent Office, was created to facilitate innovation and business by protecting invented

Modern Intellectual Property Law (Cambridge: Cambridge University Press, 1999), pp. 50-56.

Moreover, moral objections to the 'unnatural' nature of patent were voiced. Sir Roundell Palmer in evidence to the 1871 Select Committee on Patent law stated: 'Knowledge used by inventors 'is like air, or light or whatever else is universal and simultaneously capable of equal enjoyment by all.' See Moureen Coulter, *The Patent Question in Mid-Victorian Britain* (Hamilton: Thomas Jefferson Press, 1991).

John Stuart-Mill, on the other hand, favoured the concept of patents: 'The condemnation of monopolies ought not to extend to patents by which the originator of an unproved process is allowed to engage, for a limited period, the exclusive privilege of using his own improvement. This is not making the commodity law for his benefit, but merely postponing a part of the increased cheapness which the public owe to their inventor in order to compensate and reward him for service' John Stuart-Mill, *Principles of Political Economy* (London: Longman, 1962) p. 932.

⁵⁵ Coulter states: 'It was the government's decision to sponsor an international exhibition in 1851, however, which ultimately tipped the balance in favour of legislative action on the patent question' Moureen Coulter, *The Patent Question In Mid-Victorian Britain* (Hamilton: Thomas Jefferson Press, 1991), p. 36. See also a centenary publication produced by the Patent Office in 1953 confirming this view: 'To encourage participation [in the Great Exhibition] Parliament passed legislation granting temporary protection to all unpatented items exhibited for the duration of the exhibition. More importantly, it created a new committee to study the working of the patent system and recommend reforms.' H. Harding, *Patent Office Century – A Study Of 100 Years Of Life And Work Of The Patent Office* (London HMSO/Patent Office 1953).

⁵⁶ A similar process occurred internationally. This quotation is taken from the World Intellectual Property Office's website – it directly attributes the first international intellectual property agreement to the negative effect of international trade events: 'The Paris Convention for the Protection of Industrial Property is born. This international agreement is the first major step taken to help creators ensure that their intellectual works are protected in other countries. The need for international protection of intellectual property (IP) became evident when foreign exhibitors refused to attend the International Exhibition of Inventions in Vienna, Austria in 1873 because they were afraid their ideas would be stolen and exploited commercially in other countries.' See: <<http://www.wipo.int/about-wipo/en/history.html>> (accessed 12/12/2016).

assets. Its first role was to administer patents so that rights would be easier to establish, more publicly visible, easier to prove and more of a deterrent against copying or theft. The first Clerk to the Commission of Patents, Bennet Woodcroft, can be credited with establishing much of the infrastructure needed for an intangible economy to succeed.⁵⁷ He understood that, in order to bring intangible assets to life, he had to show them. For example, Woodcroft's Patent Office Museum, which opened in 1857 was a collection of inventions filed as patents at the Patent Office. It grew to become the basis of the Science Museum.

Woodcroft was to Victorian intellectual property what Joseph Bazalgette was to its sewerage – an unsung hero, a visionary administrator and innovator. As Bazalgette built the tunnels that would facilitate the growth of the real city, Woodcroft worked to vivify the virtual world, printing and disseminating patent specifications to patent libraries all over the UK. The Trade Marks Registry opened in Woodcroft's retirement year. It was intended to bring order to a chaotic trading environment and it represented a radical progression in the work of The Patent Office because it made trade marks 'real'.

Writing in the Trade Mark Registry's centenary publication *Trade Marks Century* in 1976, Ronald Moorby, the Assistant Registrar for trade marks, noted: 'Trade mark law differs radically in principle from patent law, the prime impetus for which has always been the social desirability of encouraging invention.'⁵⁸ Trade Marks law had: 'for the past 100-150 years sought to protect what has always been

⁵⁷ See: Brian Spear, 'Bennet Woodcroft – Patent information pioneer', *World Patent Information*, Volume 34, Issue 2, June 2012, Pages 159-162), No. 6 (pp. 159-162).

⁵⁸ R. L. Moorby, D. G. A. Myall, F. J. Ward Dyer, *Trade Marks Century* (London: HMSO/Patent Office, 1976), p. 4.

regarded as the natural right of any trader to maintain the goodwill in any true trade mark he has made distinctively his own'.⁵⁹

To characterise the nature of a trade mark it is worth exploring the development of the idea of a register of trade marks.

The creation of the Register

Parliament's decision to create a register of trade marks was inspired by a need to streamline protection against one of the consequences of industrialisation and commercialisation: the fraudulent misrepresentation of brands. The economic damage caused by such misuse was clear to manufacturers and trade associations, notably in the 1860s by the Sheffield steel manufacturers and Burton brewing industry. At the same time, the need for a register was questioned by advocates of market freedom.

The first fifty years of the nineteenth-century had seen the transformation of British industry and society. The change wasn't simply material, from sail to steam, from wood to steel, from country to town: marketing and communications systems spread throughout the United Kingdom, turning industrialised, urban communities into a new consumer society.⁶⁰ The rate of change was precipitous. Obsolescence was as instant as progress.⁶¹ The problem of fraud and confusion in a market full of new mass-produced products, manufactured and transported cheaply and widely, created legal bottlenecks. Legally speaking, manufacturers and

⁵⁹ Moorby, Myall and Dyer, p. 4.

⁶⁰ See Terrence R. Nevett, *Advertising in Britain: A History* (London: Heinemann, 1982).

⁶¹ *HMS Duke Of Wellington* (1863), the biggest wooden sailing ship of the line, was obsolete before it was launched. It was redesigned – cut in two and reassembled – this time containing a screw propeller and steam turbine. See Phil Carradice, *A Town Made To Build Ships – Pembroke Dock*, (Pembroke Dock: Accent Press, 2006).

consumers alike found the system of trade marks law prior to 1876 cumbersome and unfit for purpose. In certain areas of trade and geography, rights and even registers of rights were already well established. The Cutlers Company of Sheffield, for example, maintained its own register of hallmarks owned by the Sheffield steel manufacturers.

By 1862 the issue of trade marks dispute resolution and clarification – defining what exactly a trade mark is and when misrepresentation occurred – was pressing enough for a Parliamentary Select Committee to be set up. The first witness called by the committee was Robert Jackson, Vice President of the Chamber of Commerce, Sheffield. His discussion with the committee chair, Sheffield MP John Arthur Roebuck opened the proceedings.⁶² The exchange between the utilitarian Roebuck, and the Director of Spear and Jackson's sets the scene for the debate and gives an insight into how trade marks were perceived by those who wanted to benefit from them:

Will you give the Committee some explanation as to what you mean by a trade mark?

Yes, a trade mark means the name, emblem, or device used by any person to denote any article of manufacture to be the manufacture, workmanship, or production of such person, and serving to distinguish the products of one manufacturer from those of another. It does not mean a word, or name, or common denomination, descriptive of quality or quantity.

So that a trade mark is only used to indicate that a manufacture is the manufacture of A. B.?

⁶² Born in Madras, raised in Canada, Roebuck was a noted speech maker, a follower of Jeremy Bentham and a friend of John Stuart Mill. 'His independence of party ties and conscientious exposure of shams and abuses suggested to the English public a person of great integrity, but he remained one of the most wayward politicians of his time.' *Online Canadian Dictionary of National Biography*: <http://www.biographi.ca/en/bio/roebuck_john_arthur_10E.html> (Accessed 7/8/2017).

Exactly. I will illustrate what I mean. Those four first marks (pointing to a piece of steel) are what we understand by trade marks, and which we have registered in France as our trade marks under the late treaty with France. This one (pointing to the same) is also registered in the books of the Cutlers' Company; those four are the trade marks. The other two, below, you will perceive, are the descriptions of the quality; one is spring steel, and the other is fast steel; those are the simple descriptions of the quality. The four are trade marks. That is the French certificate of registration. (Handing in the same).⁶³

Roebuck and Jackson were both in favour of the establishment of a trade marks register and their exchange shows us that their views on the purpose and nature of a trade marks were nuanced, sophisticated and, within reason, remarkably similar to knowledgeable users of trade marks today.

For Robert Jackson, fraud through brand misrepresentation was a major threat against his business. Limiting damage to its reputation was of paramount importance and trade marks were already seen as international rights. The global reach of trade required the import and export of not just products but beliefs and ideas, in this case brand values and the systems that support them.

For Ronald Moorby, writing in 1976, the testimony of Mr Jackson serves as an example of how widespread an understanding of trade marks was in mid Victorian Britain. In fact, all that this part of the committee's deliberations show is how well-developed the understanding of trade marks and brands was in parts of Sheffield, amongst the directorship of the Spear and Jackson company. Just as

⁶³House of Commons, Report on the Select Committee on Trade Marks Bill and Merchandize Marks Bill, 6th May 1862, Minutes of Evidence, 20th March, 1862, pg. 1. House of Commons Parliamentary Papers Online – Pro Quest UK Parliamentary <<https://idp.cf.ac.uk/idp/profile/SAML2/POST/SSO>> (accessed 08/8/2017).

today, there were cognoscenti with an interest in trade marks who speculated on their potential and sought to define them and then there were the rest of us, living lives 'in relation' to trade marks, without necessarily perceiving their role as bureaucratic, economic and cultural lynch-pins.

Trade mark property

In his description of the development of trade marks law, Lionel Bently characterises the mid-Victorian legal profession's understanding of trade marks as focussed on protection against damage caused by fraud (at least, until the passing of the 1875 Trade Marks Act). Notwithstanding a mid-century 'crisis', as the numbers of cases grew, Bently maintains that the records of court cases shows that trade marks were recognised as signs indicating the origin of products which were protected, in law, against fraud and misrepresentation, but that they were not property rights.⁶⁴ As evidence for this, Bently points to a string of decisions made by the Master of the Rolls, Lord Langdale, and his successor Sir William Page Wood, indicating a reluctance to update the legal concept of what a trade mark might be:

In all these cases, Lord Langdale grounded the intervention of equity in fraud. In *Knott*, the question was whether 'the defendant fraudulently imitated the title and insignia used by the plaintiffs for the purpose of injuring them in trade', and he found it had. In *Perry*, he indicated that he did not think 'a man can acquire property merely in a name or mark'; but he had 'no doubt that another person has not a right to use that name or

⁶⁴ See: Ben Sherman and Lionel Bently *The Making of Modern Intellectual Property Law* (Cambridge: Cambridge University Press, 1999), p. 11: 'The late 1850s and 60s witnessed a surge in case law on trade marks, fuelled by important economic and social shifts' (see Sherman and Bently's footnote on the same page: 'In 1850 a writer in *The Jurist* attributed the rise in the importance of trade marks to "the progress of the useful arts", and predicted increased importance "as national and international intercourse extends the value of commercial and manufacturing character, and consequently, of the mark or sign by which it is denoted and guaranteed": Anon 'Trades Marks' (1850) 12(2) *The Jurist*, 223.'

mark for the purpose of deception, and in order to attract to himself that course of trade or that custom which, without that improper act, would have flown to the person who first used or was alone in the habit of using the particular mark or name. In *Croft v Day*, he explained that no man has a right to sell his own goods as those of another' for 'it is perfectly manifest, that to do [so]... is to commit a fraud, a very gross fraud'. Given the defendant shared the name Day with the deceased, Lord Langdale reiterated that the basis of intervention was not 'any exclusive right... to a particular name, or to a particular form of words', but a right 'to be protected against fraud'. In *Franks v Weaver*, the Master of the Rolls characterised the 'crafty adaptation' of the testimonials as a kind of fraud, a concept he famously explained as being indefinable because 'it is so multiform. And in *Holloway*, while noting that the defendant was perfectly entitled 'to constitute himself a vendor of Holloway's pills' 'he had no right to do so with such additions to his own name as to deceive the public and make them believe he is selling the plaintiff's pills'; the 'law protects persons from fraudulent misrepresentations' and the evidence revealed 'as clear... a fraud as I ever knew.'⁶⁵

Sir William Page Wood stated, in a case in which an American company claimed that a Sheffield manufacturer had been stamping their marks on their goods, that it was 'settled law that there is no property whatever in a trade mark.'⁶⁶

Bently demonstrates that fear of creating an unwanted property right led to the adoption of the Merchandise Marks Act of 1862, which did not create a register of trade marks despite pressure to do so. He argues: 'calls for recognition of trade marks as property first emerged in the late 1850s as part of a more general campaign for legislation strengthening the rights of traders against piracy. In 1862, a Bill (the so-called 'Sheffield Bill', so named because it was drafted on behalf of the

⁶⁵ Lionel Bently, 'From Communication to Thing: historical aspects of the conceptualisation of trade mark as property', in *Trade Marks Law and Theory, a handbook of contemporary research*, ed. by Graeme B. Dinwoodie and Mark D. Janis, (Cheltenham: Edward Elgar, 2008), p. 11.

⁶⁶ Bently p. 13.

Sheffield Chamber of Commerce) was introduced into the House of Commons proposing that trade marks be expressly recognised as property. Clause 9 stated that a registered trade mark 'shall be deemed the personal property of the proprietor and shall be transmissible according to the ordinary rules of law affecting personal property.'

These arguments were rejected by Parliament. The change came in 1875 when Trade Marks Act was passed and the Trade Marks Registry opened on the 1st January 1876. From now on, Trade Marks were not merely protective shields, they were assets.

The creation of the UK Trade Marks register can be understood from a number of perspectives: legally, it transmuted a trade mark from an anti-fraud device into a property right thus enabling commodification and the emergence of the 'knowledge' economy; practically it was a solution to the clogged markets and courts; internationally, it demonstrated the global nature of trade and the concepts that go with it; and, organisationally, it created a bureaucracy whose objective was the interpretation, organisation and administration of signs. It was here that the boundary between the public and private domains (in respect of trade marks) was formalised and maintained. This combination of distinct influences, coupled with the fact that trade marks represented not just the brand values of the companies who own them, but also the values of consumers mediated through a market-orientated creative dialogue, changed the nature of marketing and, to an extent, creative processes in market-led economies.

Paradoxically, although the register of trade marks was created to bring legal certainty and facilitate trade, as time has passed and trade marks and commodification have moved deeper into our culture, the question 'what is a trade

mark' has not become any easier to answer. The register of trade marks was the reef upon which barnacles of brands could grow. The Registry became the fulcrum for the capitalisation of ideas through branding. Over time it transformed from being a utilitarian solution to an existential problem into an almost mythical, magical bureaucracy. By the mid-1950s the capacity of brands to influence all aspects of culture, and the significance we attach to them, was well understood. Today, the relationship between branding and creativity is such that it is difficult to see any creative work outside the context of branding, trade marks and (since our understanding of trade marks is predicated on their quantum leap into the realm of personal property identified by Bently), registration. Although a great deal has been written about brands, trade marks, capitalist culture and the law, comparatively little attention has been given to the institutions which perform the trans-substantive sacrament of capitalism – transforming dreams into things.

iv/ Trade mark bureaucracies

A key facet of a trade mark's mythological power is the fact that it has a bureaucratic foundation. This makes it 'real'. A registration number confirms the existence of a trade mark myth. Before exploring this aura of authority, it is first worth considering what the bureaucracy that administers trade marks does and illustrating how its process is concerned, at a fundamental level, with the analysis of signs, and a search for their 'distinctiveness'. This process was not intended to formalise myths; it was meant to provide practical assistance to business people. In fact, it has done both.

On the evening of the 31st December 1876 an employee of the Bass Brewing Company was dispatched to stand outside the door of the Patent Office in London's Chancery Lane. He had with him a copy of the Bass label used on beer bottles and a pound to pay the registration fee. The following morning, as his employer had hoped, he was the first applicant to set foot in the UK Patent Office's Trade Marks Registry, which consisted of Henry Reader Lack, acting Registrar, supported by J. H. Clark, W. Tomlinson, E. T. Kingford, G. Stanford, T. W. H. Davies and W. E. Milligan, along with five writers and two messengers.⁶⁷ The Bass red triangle is still a 'live' registration today, now owned by multinational drinks manufacturer Brandbrew SA.⁶⁸ Since that date millions of trade marks have been registered.

By 1880 a hierarchy had been established at the office. A Registrar and Assistant Registrar, supported by second- and third-class clerks, higher divisional

⁶⁷ H. Harding, *Patent Office Century – A study of 100 Years of Life and Work of the Patent Office* (London HMSO/Patent Office 1953).

⁶⁸ See Trade Mark No1 – UK IPO Trade Mark Database (online)
<<https://www.ipo.gov.uk/tmcase/Results/1/UK0000000001?legacySearch=False>>
(accessed 10/12/2016).

clerks, lower divisional clerks, a compositor and type setters (to produce printed copies of the newly registered trade marks in *The Trade Marks Journal*) formed a structured decision-making and information-giving bureaucracy. In 1886 annual filings for trade marks exceeded 10,000 for the first time and volumes of filings remained at this level until the late 1950s.⁶⁹

Although there have been changes in the law, alterations in administrative practices and huge shifts in the way administrators work in offices, the nature of a trade marks examiners' work has remained intrinsically unaltered since 1876. These specialist civil servants applied the definition of a trade mark set out in the Act to applications to register marks. They were and are gate-keepers, imposing an intangible boundary line on signs. Gradually, as the system expanded, nuances within the bureaucratic perception developed (with caselaw, more legislation and increasing administrative precedent), so that a rule book or work manual could be created, identifying the kinds of marks that could be accepted onto the register and those that couldn't. Essentially, trade marks examiners made decisions that might otherwise have been made in law courts – greatly speeding up the legal process. Only marks which were distinctive and that didn't impinge on existing rights could be registered.⁷⁰

Examining trade marks requires the objectification of symbols and the quantification of their significations or meanings. It involves maintaining a

⁶⁹ See - Reports of the Comptroller General of Patents, Designs and Trade Marks available at House of Commons Parliamentary Papers Online – Pro Quest UK Parliamentary <<https://parlipapers-proquest-com.abc.cardiff.ac.uk/parlipapers/search/basic/hcppbasicsearch>> (accessed 08/8/2017) and appendix III for graph of trade mark applications – 1875-2017 – p. 210.

⁷⁰ Trade mark examination is a specialist job undertaken by generalist civil servants – given the length of time it takes to train examiners, trade marks examiners tend to stay within the administration for the duration of their careers. Over the years the Registry built up a pool of highly knowledgeable trade marks specialists who formed a classic silo – a small, expert, and relatively impenetrable administrative unit.

bureaucracy skilled in the art of the granular dismemberment of words and images. The Trade Marks Registry measures the levels of distinctiveness, non-distinctiveness or descriptiveness signs possessed, then compares them with earlier registrations to assess the potential for 'confusion' in the marketplace.

On the one hand, the labels attached to objects telling us who made them are blindingly direct. On the other hand, deciding what is 'a distinctive device, heading, label or ticket' and whether it 'nearly resembles' another, as the 1875 Act put it, is a complex operation requiring interpretive skills, and, if fairness is to be guaranteed, objectivity, transparency and consistency. To some extent the act of examining words like *Hovis* and *Brasso* (both are over a century old), was a search for neologisms. It involved the analysis of words, researching their derivations and then rebuilding them in the mind of an 'average consumer', before measuring their distinctiveness. This process contributed to the mythical importance of trade marks by endowing them with a hinterland of meaning. The creation of a bureaucracy with an almost poetic function opened up new dimensions of significance and surrounded the words and symbols of trade with an aura of credibility represented by the symbol ®.

Although the 1875 Trade Marks Act was rapidly augmented, the principles of modern trade marks registration are contained within it.⁷¹ For an application and registration fee of £1.00 a monopoly for the use of a mark, possibly forever, was granted. A registration prevented the addition of marks that were the same or

⁷¹ In a paragraph on 'The Meaning of a trade mark' Moorby states that the views expressed in the discussion of trade marks from the 1862 Select Committee: 'This is essentially what, with elaborations and different wording, statute law says today'. R. L. Moorby, D. G. A. Myall and F. J. Ward Dyer, *Trade Marks Century*, (London: HMSO/Patent Office 1976) p.4.

'nearly resembling' earlier rights. For a further fee of £2.00 all registrations could be renewed after 14 years. Where disputes arose an opposition procedure was in place, enabling competitors to raise objections to potential registrations. In 1875 a trade mark was defined as:

A name of an individual or firm printed, impressed or woven in some particular distinctive manner; or,

A written signature or copy of a written signature of an individual or firm; or,

A distinctive device, heading, label or ticket

And there may be added to any one or more any letters, words or figures or combination of letters words or figures;

Also any special or distinctive word or words or combination of figures or letters used as a trade mark before the passing of this act may be registered as such under this Act.⁷²

In creating a register upon which only certain kinds of trade marks could be recorded, and in insisting that identical marks or marks that 'nearly resemble' earlier registrations should be blocked, the Trade Marks Registry was established as a bureaucracy dedicated to the analysis of signs. Legislation after 1875 was a matter of fine-tuning the original definitions and the bureaucracy systematised approaches to trade marks registration and, importantly, enmeshed decision-

⁷² The Act retrospectively incorporated all 'old trade marks' which were already in use as registerable. That was the carrot. The stick to make the legislation work was the clause stating that in future only registered marks could be used as the basis of infringement. 'The Trade Mark Registration Act provides that from and after the 1st of July, 1876, a person shall not be entitled to institute any proceeding to prevent the infringement of any trade mark as defined by the Act, until and unless such trade mark is registered in pursuance of the Act. The reason, therefore, for the registering is plain to all traders who value the reputation which attaches to a trade. In return for the compulsion thus put upon the trader to register, the act greatly facilitates the proof of his title to use the make – which was formerly often a matter of extreme difficulty, proof of exclusive public user being required – and the discovery of information as to marks already in use.' J. Bigland Wood, *The Law of Trade Marks*, 1876 (London: Sevens and Haynes, 1876), p. 35.

making within global networks of similar administrations. The frequent re-drafting of legislation should be regarded as an outcome of the system's success and, perhaps, evidence of what is now becoming a recurring point – trade marks are interpreted, not defined.

Fuelled by the demands of increasingly organised and international business interests, legislators created evolving definitions of trade marks.⁷³ In his commentary on the 'new' Act of 1883 Roger Wallace notes, with regard to trade marks, that: 'The law itself is, however, very little altered [in relation to the 1875 Act], the only important change being that the definition of the trade mark is made by the wording of the present Act more extensive by the admission of (a) a fancy word or words not in common use; (b) brands; and (c.) single letters as old trade marks.'⁷⁴ Specifically, the 'new' 1883 Act said:

64 (1.) For the purpose of this Act, a trade mark must consist of or contain at least one of the following essential particulars;

a/ A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or

b/ A written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade mark; or

c/ A distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use.

d/ There may be added to any one or more of these particulars any letters words or figures or combination of letters, words, or figures or any of them.⁷⁵

⁷³ See Moureen Coulter, *The Patent Question in Mid-Victorian Britain* (Hamilton: Thomas Jefferson Press, 1991), p. 1. 'From 1875 to 1883 bills embodying a range of reform proposals were introduced almost annually – sometimes two or three a year'.

⁷⁴ Roger William Wallace, *The Patent, Designs and Trade Marks Act 1883* (London: W M Maxwell and Sons, 1884).

⁷⁵ The Patents Designs and Trade Marks Act, 1883. See appendix I at p. 199.

Thus notwithstanding all of the above, the practical nature of the work conducted by the Registry was semiotic. An immediate problem arose: what, exactly are ‘fancy words’? What, for that matter, is a brand?

Fancy words

To try to define concepts like ‘fancy words’, libraries of cross-referenceable decisions were maintained, ensuring that once one definition of a ‘fancy word’ was applied to a particular mark used (for example) on ranges, or shaving bowls, it might also be applied to gutta percha or needles. Goods and marks were categorised and decisions were recorded creating indexes of meaning designed to bring objectivity to the analysis of marks.

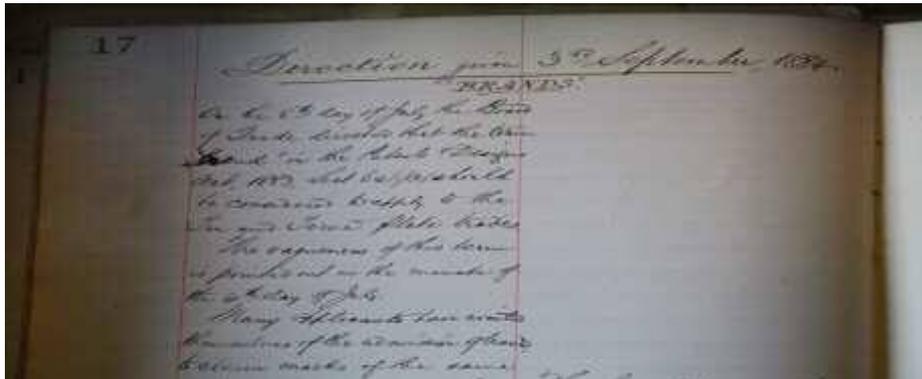


Figure 6: Patent Office trade mark case queries, 1884.⁷⁶

In the excerpt from a Patent Office minute book above, the examiner’s note illustrates difficulty in dealing with a familiar term – ‘brand’:

⁷⁶ Ref Patent Office minutes, 1884 REF KP and HCG 3/9/84. IPO Archive, Nine Mile Point Archive Cwmfelinfach.

On the 8th day of July the Board of Trade directed that the term 'Brand' in the Patent and Designs Act, 1883 Sect 63 (1) should be considered to apply to the tin and terne plate trades.

The reply refers the examiner to an earlier decision:

The vagueness of this term is printed out in the minute of the 4th day of July. Many applicants have availed themselves of the admission of brands, to claim marks of the same in instinctive character to be applied to sheet iron, rod iron and other descriptions of goods included in Class 5. A similar claim has been made under No 38,765 for a mark to be applied to goods in Class 13. The limitation to the term 'Brand' to tin terne and black plate must be maintained.⁷⁷

Furthermore, the way a word was represented might tip it over the edge, to make it 'fancy' or otherwise distinctive. This minute of 1884 could have been written by a trade marks examiner today.



Figure 7: Patent Office trade mark case queries, 1884.⁷⁸

The exchanges between junior and senior administrators shown above indicates how the recording of decisions built up databases of practice on all

⁷⁷ MS Patent office minutes, 1884 REF KP and HCG 3/9/84. IPO Archive, Nine Mile Point Archive Cwmfelinfach.

⁷⁸ MS Patent office minutes, 1884 REF KP and HCG 3/9/84, IPO Archive, Nine Mile Point Archive Cwmfelinfach. Transcription: Can this method of printing the word 'Bolton' (BolTon) be said to come within the definition of the trade marks act. Accept.

aspects of trade marks administration. Codification of rules and accumulation of past decisions created a systemised approach to trade marks registration. Note the trade mark application number – in just eight years the Registry had processed 38,651 applications.

II.—Trade Marks Registry.					
Mr. Tomlinson	-	Principal	-	1	400 0
"	Davies	-	Second Class Clerk	1	385 0
"	E. T. Kingsford	-	Third Class Clerk	1	265 0
"	Hodges	-	Higher Division Clerk	3	212 10
"	Housman	-	"		137 10
"	Tarrant	-	"		137 10

Figure 8: Trade Mark Registry staff list, 1888.⁷⁹

‘The expanding and refined systems of registration not only led to the closure of intellectual property, they also played an important role in managing and shaping that property,’ wrote Ronald Moorby in 1976.⁸⁰ In 1905 another ‘new’ act was created, rewording the definition of a trade mark. It provided, according to the Assistant Registrar looking back from 1976 ‘the first comprehensive statutory description of a mark.’⁸¹ Perhaps what Moorby really meant to say was that this

⁷⁹ MS Patent office minutes, 1884 REF KP and HCG 3/9/84, IPO Archive, Nine Mile Point Archive Cwmfelinfach. Trade Marks Registry Distribution of Business and Staff 1888. This Higher Divisional Clerk was A E Housman. Recently searches were made of the files he worked on. He was found to have been a good examiner who left no secret stanzas on his files.

⁸⁰ Moorby, Myall and Dyer, p. 4.

⁸¹ Moorby, Myall and Dyer, p. 8.

was the first definition which concurred with the understanding of the term in 1975.⁸²

In and for the purposes of this Act

4/ A mark which (while not coming within any of the above classes) is nevertheless of a distinctive character so as to be adapted to distinguish practically the goods of the proprietor of the trade mark from those of other firms.⁸³

As soon as the slippery eels of ‘brands’ and ‘fancy words’ were taken out of the legal definition of trade marks, another phrase was captured. This would give examiners, seeking to apply these laws, a new headache. One form of uncertainty had been replaced with another: what exactly is something that is ‘of a distinctive character so as to be adapted to distinguish ...’?

In 1919 the register of trade marks was divided into two ‘Parts’. ‘Part A’ contained normally registered trade marks. ‘Part B’ marks contained applications for registrations which might succeed in actions for passing off goods in the courts, but were not, in themselves, distinctive enough to achieve registration under the terms of the ‘old’ act.⁸⁴

⁸² It read, according to a memorandum prefacing the 1905 Trade Marks Bill the ‘provisions as registerable trade marks are made wider and more elastic so as to embrace many types of trade marks which, through existing practice, have hitherto been excluded from registration.’ House of Commons Parliamentary Papers Online – Pro Quest UK Parliamentary < <https://parlipapers-proquest-com.abc.cardiff.ac.uk/parlipapers/result/pgpdocumentview?accountid=9883&groupid=107330&pgId=aa3d3f4e-612f-49c4-a4fe-229658451ee5&rsid=15D788D06D2>> (accessed 24/8/2017).

⁸³ See appendix I for full text at p. 189.

⁸⁴ The reasons for this change were economic. One year after the First World War had ended, stimulating trade became another criterion defining what a trade mark might be. W Temple Franks, Comptroller General of the Patent Office wrote in his annual report of 1919: ‘The new Part B promotes facilitation of the registration in the United Kingdom of Marks which, although not registerable under the old legislation are nevertheless common law marks and could be protected in the form an of an action known as a ‘passing-off action, It is hoped that these facilities will make it easier to register British

Britain's final attempt to nail down the definition of a trade mark occurred in 1938. The 1938 Trade Marks Act maintained the two-tier registration and now required two separate sections to describe what a registrable trade mark was. The desire on behalf of legislators to remove as much ambiguity from the definition of a trade mark as possible was clear.⁸⁵

Thus registerable trade marks, for most of the twentieth-century fell in two categories: those which were 'distinctive' – meaning 'adapted to distinguish' – and those which were merely 'capable of distinguishing'. Different scopes of protection were offered to the two classes of mark. Using the same techniques as A. E. Housman and the early staff of the Registry, trade marks examiners created databases of precedents illustrating the difference between 'Part A' and 'Part B'. Disclaimers and limitations were published, and the courts produced landmark decisions deciding, legally speaking, what the boundaries between these levels of distinctiveness were.

The defence of the public realm

The broadening of the understanding (or invention) of what may or may not be registerable as a trade mark is ongoing. Since 1876 trade mark owners have sought to claim wider rights and, in the UK, courts have often resisted. There are many examples of cases defining the limitations of registration. In several of these

Marks in foreign countries where, as a condition precedent to registration of a mark it is necessary to prove a registration in the country of origin.' Twenty Eighth Report of the Comptroller General of Patents, Designs and Trade Marks and Appendices, 1919, p. 6 <<https://parlipapers-proquest-com.abc.cardiff.ac.uk/parlipapers/result/pqpdocumentview?accountid=9883&groupid=107330&pgId=9234b698-3314-45e0-9e34-27e3009feacf&rsId=15D78A47C25>> available at House of Commons Parliamentary Papers Online – Pro Quest UK Parliamentary (accessed 08/8/2017).

⁸⁵ See appendix I for full text at p. 193.

the longevity of a judgment's relevance relied on the precision of its language and its capacity to make the abstract world of trade marks as real and as tangible as possible. One of the most important early twentieth-century decisions, which (arguably) still influences the UK's stance on trade mark registrability was issued in 1909. Sir Herbert Cozens-Hardy, Master of the Rolls, wrote, in relation to an application to register the trade mark *Perfection*: 'Wealthy traders are habitually eager to enclose part of the great common of the English language and to exclude the general public of the present day and of the future from access to the enclosure.'⁸⁶

In this decision Cozens-Hardy made a direct comparison between a trade mark monopoly and an Act of Enclosure. Big business should not be allowed to sequester common land or language for its own aggrandisement. Thus, English courts have traditionally taken a conservative view of what a trade mark might be. Notwithstanding the desires of business people and governments to encourage trade and make wealth, there is a strong streak of negativity towards the capitalisation of culture running through the decisions of the English courts relating to trade marks.

Throughout the twentieth-century, the courts, and the Registry, might be said to have balanced the interests of individual citizens and businesses. The 1938 Trade Marks Act recognised this rather paternalistic role. The purpose of the legislation was to enable businesses to register trade marks and facilitate trade by enhancing legal certainty; at the same time the courts and the Registry's reluctance

⁸⁶ See Cozens-Hardy M.R.: In the Matter of an Application by Joseph Crosfield & Sons Ltd to Register a Trade Mark ('Perfection') (1909) 26 R.P.C. 837 at 854. Also see: - British Sugar Plc v. James Robertson & Sons Ltd [1996] RPC 284. Jacob J. quoting and Advocate General's opinion at 842. 1909 Sir Herbert Cozens-Hardy M.R. – also see: Jennifer Davis, 'European trade mark law and the enclosure of the commons', *Intellectual Property Quarterly*, 2002, 4, 342-367.

to grant unrestricted monopolies – because of the ‘need to keep free’ unenclosed aspects of the English language and other birthrights – limited the availability of marks and the scope of protection available to trade marks registrations. Case law and Registry practice created a bureaucratic language of trade marks examination which was incorporated into the longstanding traditions of the Trade Marks Registry (and Patent Office) bureaucracy.⁸⁷ For example, common names, descriptions and certain symbols and combinations of letters were kept in the public domain. Decisions regarding trade marks were made with the idea that the public should be protected against monopolists.⁸⁸ This principle changed at the end of the twentieth-century.

Until Margaret Thatcher’s governments of the 1980s, the 1938 Trade Marks Act, with its complex definitions of what a trade mark might be, and an ever-increasing weight of legal precedent, kept the innate uncertainty concerning the meaning of the term ‘trade mark’ within the silo of a paternalistic bureaucracy. The field of trade marks law and administration was specialist and, as the figures for applications show, remarkably static. During the first 100 years of the Registry’s existence, volumes of applications rose from around 10,000 per annum to 20,000.⁸⁹

In 1994, as part of its harmonization with the EU, the UK abandoned the 1938 Act in favour of a European Directive which consolidated trade marks law throughout the Union.⁹⁰ The 1994 Trade Marks Act dismantled the gradual

⁸⁷ See online essay on ‘the need to keep free’: Rasmus Dalgaard Laustsen *The Principle of Keeping Free Within EU Trade Mark Law* (Universities of Manchester and Aarhus, 2010). <http://law.au.dk/fileadmin/site_files/filer_jura/dokumenter/forskning/rettid/2010/afh2-2010.pdf> (accessed 24/8/2017).

⁸⁸ See for example, *Coca Cola Trade Marks* [1986] RPC 421, House of Lords. Lord Templeman described UK trade marks law a ‘protective law’ not ‘a source of monopoly’.

⁸⁹ See appendix III – trade marks application volumes 1886-2014 at p. 210.

⁹⁰ See appendix I, p. 196 - *First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks* Official Journal L 040 , 11/02/1989 P. 0001 – 0007 at <<http://eur->

accumulation of practices and case law associated with the 1938 Act and its predecessors.⁹¹ At the same time that markets were deregulated, the digital economy developed and branding started to move in a new direction.⁹² Today, those apparently simple things called ‘brands’, excluded from the definition of trade marks during the 1880s, are exchanged, traded, developed and nuanced in our own Facebook profiles, on personal web pages, in the layout of rooms, in the shape of our houses, in the smells we encounter, in the sounds we hear.

The new definition of a trade mark included the phrase ‘capable of distinguishing goods or services of one undertaking from those of other undertakings’.⁹³ The term ‘capable of distinguishing’, which appeared in part B of the UK’s ‘old’ legislation, became the defining characteristic of a European trade mark. The ‘fancy words’ question hadn’t gone away; it had been updated, again.

The European Directive on Trade Marks and the 1994 Trade Marks Act brushed away the UK’s ‘protective’ legislation with a far more market-friendly view of what it was permissible for registers of trade mark to accept. Businesses began to test the boundaries, seeking to extend the scope of the commercial, trade mark realm.

lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989L0104:en:HTML (accessed 1/8/2017).

⁹¹ The UK Courts immediately began revitalising the key components of the ‘old’ legislation. Months after the ‘new’ UK Trade Marks Act was passed in 1994, Mr Justice Jacob passed judgment on whether the word ‘Treat’ could be registered as a trade mark for sugary toppings. In barring the registration Jacob quoted Cozens-Hardy, arguing that the great common of the English language should not be monopolised by wealthy traders, in this case the British Sugar Corporation. See: *Jacob v British Sugar Plc v. James Robertson & Sons Ltd Reports of Patent, Design and Trade Mark Cases*, Volume 113, Issue 9, 1 January 1996, Pages 281–306.

⁹² The transformation of culture and intellectual property is illustrated by two government reports: Hargreaves, Ian, *Digital Opportunity: a review of intellectual property and growth*, (Newport, Intellectual Property Office, 2011); Department of Culture Media and Sport: *Digital Britain*, (London: The Stationary Office, 2009).

⁹³ 1994 Trade Marks Act (London, HMSO, 1994), 1 (i).

In 2016, the expansion of the legal definition of a trade mark took one more step. Ever since the register began in 1876, registration has been based on a representation of a mark, firstly on a piece of paper, then digitally. That limitation, according to the EU's Second Directive relating to trade marks law, has been lifted. Trade marks must now be 'represented on the register in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor'.⁹⁴ It could be argued that the meaning of the term 'trade mark', which between 1876 and 2016 included the idea that a registerable trade mark had to be capable of 'being represented graphically' – generally agreed to mean 'written', printable and publishable in a book – became, if anything, slightly less clear.

From property to mythology

The procedures employed by the Trade Marks Registry represent a government's interpretation of legal principles; they reflect the mores and zeitgeist of a time; they are practical; they are designed to produce results and move cases through a system, preventing logjams and, where possible, they are repeatable and capable of systemisation and bureaucratisation.⁹⁵ The Trade Marks Registry

⁹⁴ See: Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks: 2, 1, 3(b) at <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015L2436&from=EN>> (accessed on 11/8/2016).

⁹⁵ This aspect of trade marks administration has led to criticism from at least two sources. On the one hand legal practitioners accuse trade marks bureaucracies of adopting a mechanistic, deterministic approach to the law - see Rhys Morgan 'Ensuring greater legal certainty in OHIM decision taking by abandoning legal formalism' in *The Journal of Intellectual Property Law & Practice*, (2012) 7, p. 408.

On the other hand, observers of the market and the proliferation of trade marks culture question the practical value of trade mark bureaucracies. See Burrell, 'Trade Mark Bureaucracies', in *Trademark Law & Theory: A Handbook of Contemporary Research*, ed. by Graeme B. Dinwoodie and Mark D. Janis (Cheltenham: Edward Elgar, 2008), pp. 95-132.

examination teams evolved their own rule books for the processing of trade marks. As the Registry grew in authority with the passage of time, it became a protagonist in the debates over what the definitions of trade marks should be.

The trade marks register provided trade mark owners with a tool to ward off infringers; a property right which could be valued, traded, licensed and exchanged and a bureaucracy with an additional cultural function: guaranteeing the 'reality' of branded commodities by making their mythologies as real as possible. It also, almost as a consequence of this process, had the reverse effect. It sharpened and maintained a concept of the public domain, which, as we have seen, saw no role for trade in cultural commodities like language

Today the role of the register as protector of the public domain may have diminished. The Registry, through its capacity to make 'real' also engages with the opposite process, gradually extending the concept of ownership into new fields of creativity as they are dreamed up, turned into products and marketed. In the UK the watershed exemplifying this change in direction was the replacement of the 1938 Trade Marks Act with the harmonized European legislation of the 1994 Trade Marks Act.

Changing history

If Christian time began with a birth, perhaps consumer time started with a registration.⁹⁶ 'Number one Bass', as James Joyce called it, in his story about a day in the life of an adman, Leopold Bloom, is part of our commercial culture. 'Any object,' he wrote about the triangle and its transcendental properties (or lack of

⁹⁶ The Bass logo now includes the phrase 'Trade Mark No 1' with the triangle.

them), 'intensely regarded may be a gate of access to the incorruptible eon of the gods.'⁹⁷ Brands connect the real with the imagined. Their narratives define who we are and what we do. And because historians, whether they like them or not, use perceived watersheds to organise the flows of events, the commencement of trade mark registration in 1876 enables 'BR' or 'Before Registration' and 'AR' (After Registration) versions of history to be envisaged. Trade mark number one created an infinite future for registrations and it gave the past a sense of direction.

In a way, the creation of the Victorian register facilitated the development of compelling narratives describing its own success. This capitalist assessment of the history of trade marks has a strangely deterministic quality.

⁹⁷ See James Joyce, *Ulysses* (London: Vintage 1990), Chapt. 14: The Oxen of the Sun.

v/ Trade marks today

Registrable trade marks now include goods and services. They may be words, devices, sounds, three-dimensional shapes and, since the abandonment of a need to 'represent graphically', potentially anything imaginable. In 2013 the UK Intellectual Property Office received 41,624 applications to register trade marks, while at the European Union Registry (the EUIPO) over 100,000 applications for trade marks were received.⁹⁸ As the idea of what may be marketable broadens and the defence of the public domain weakens, so the borderline between the public and private aspects of language and culture is extended and virgin territory may be enclosed.⁹⁹

Today, rising numbers of applications are perceived as evidence of the success of the system. We have seen, however, that the first century of successful trade marks administration in the UK was characterised, not by supercharged volumes of applications, but by focussed efforts to define the term and to protect both rights owners and the public domain through the creation of legal certainty and 'a high presumption of validity' (as the British Standard's Institute recognised when it awarded the Intellectual Property Office an ISO 9001 Quality certification in 2016).¹⁰⁰

⁹⁸ Statistics available at IPO Facts and Figures 2012-13 calendar years.

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/318346/Facts_and_Figures.pdf> (accessed 19/2/2018).

⁹⁹ See graph at appendix III (p. 210) for trade mark application numbers from 1875 to 2017 – the huge increase in recent years is partly due to a relaxation in the limits of what can and cannot be registered.

¹⁰⁰ See <<https://www.gov.uk/government/news/trade-marks-and-designs-division-iso-9001-quality-certification>> (accessed 4/3/2017).

Today, high volumes of trade mark applications characterise the ‘successful’ expansion of the concepts of what a trade mark may be, as well as of the commodification of culture.

Boxes of trade marks

Set in stone and concrete, trade mark registries are real buildings evidencing the existence of the ‘intangible’ assets they deal with in the fabric of the surface. The register of trade marks now held on databases in Newport (where the UK Intellectual Property Office resides) and Alicante (where the European Registry is situated) are administered in large modern offices. They are staffed by experts well-versed in Registry practice and case law spanning three centuries. Registries create confidence by replacing ambiguity with certainty. Their architecture and official stamps imbue certainty.



Figure 9: Trade mark architecture – Southampton Buildings – formerly London’s Patent Office

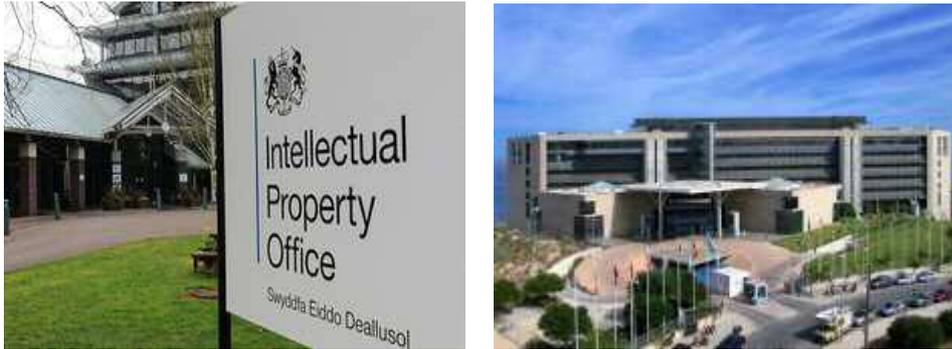


Figure 10: The UK Intellectual Property Office (Newport); The EU Intellectual Property Office (Alicante) 2017.

It is perhaps overstating the point to suggest that the trade marks registration and the buildings where this activity occurs conceal or cover up ambiguity. On the other hand, the certainty implied by registration, and the widespread belief in the credibility of registered trade marks overlies an elusive reality which trade mark owners have been considering at least since the case of *Southern v How* in 1618. Defining and justifying them is an endless occupation. It is a process that cements the mystique of brands in the architecture of administration and government.

‘The principles of trade mark law are simple,’ wrote Ronald Moorby in his 1976 celebration of a century of registration at the Patent Office; ‘but their application in disputed cases is frequently not, because elucidation of the fact is often difficult, the facts themselves are often complex and each of the thousands of reported cases has its own special features. Since each decided case is taken as a precedent in deciding analogous cases, there is ample scope for elaborate legal argument.’¹⁰¹ It is in this realm that the true meaning – or implication – of the

¹⁰¹ Moorby, Myall and Dyer, p.4.

mythical term 'trade mark' can be found. It is never certain. Therefore it is, implausibly, always *new*.

Chapter 2: Registrations

Registration 2361632 – Jacqueline Wilson

Jacqueline Wilson has written 101 children's books. She has sold over 35 million copies. Her work is published and translated throughout the world. She combines critical recognition as a children's author with global commercial success and, in 2004, the year before becoming children's laureate, she became a registered trade mark.

The registration of an author's name as a trade mark transforms a name into property. Registration is contingent on the author's undertaking that he or she will use the name as a trade mark. With registration come responsibilities; as well as benefitting from the value added to a brand by objectifying its worth through the mark (which may be bought or sold or licensed or used as collateral), failure to act to protect a registration by taking action against infringers can leave an owner vulnerable to cancellation. To maintain a registered trade mark the owner must adapt his or her behaviour.

The impact of a trade mark registration should not adversely affect most authors. If authors are selling any books at all, then they are already commercially active and their names (real or fictitious) are known to be signs telling readers that story X is written by writer Y.¹⁰² Indeed, our concept of the author, functioning (since the early-modern period) in mass-markets where book production

¹⁰² See Hephzibah Anderson: 'How Authors become Mega-brands.' BBC Culture, (20/102014) : <<http://www.bbc.com/culture/story/20140219-become-an-author-mega-brand>> (accessed 10/7/2018)

predominated and copyright law developed, has evolved over centuries.¹⁰³ Ronan Deazley explores the origins of copyright law and authorial ownership, stressing a variety of influences, including, as we have seen with regard to trade marks, longstanding awareness of the importance of the public domain.¹⁰⁴

Almost as soon as the technology for producing large numbers of printed stories became widely available, the idea that writing fiction was a commercial activity was born.¹⁰⁵ The novel, rather like a blog or a radio play, is a technological, rather than wholly artistic creation. And, although it is understood to be a form of ‘intellectual property’, a copyright should not be confused with a trade mark. A trade mark is a symbol which encapsulates and protects an unspecific, time-unlimited narrative; copyright protects a specific work of art (in this case literature) for a certain amount of time (70 years after the author’s death) against a particular kind of commercial infringement – copying. The registration as trade marks of authors’ names, their *noms de plumes* and their characters is a relatively new phenomenon. The practice developed in the UK after 1994, and it is really only in

¹⁰³ Charles Dickens (public readings), Bram Stoker (theatre), Edgar Rice Burroughs (multi-media), Agatha Christie (format), Enid Blyton (children’s literature) exemplify authors who saw that, in many ways, the writing of the story is only a part of a creative process which extends into the market.

¹⁰⁴ See: Ronan Deazley, *The Origin of the Right to Copy; Charting the movement of copyright law in eighteenth-century*, (Oxford: Hart Publishing, 2004). In a review Simon Stokes writes: ‘Copyright, he [Deazley] persuasively argues, was primarily defined and justified in the interests of society and not the individual.’... ‘By piercing some cherished assumptions about copyright and authors’ rights, and in particular through demolishing as a “myth” the traditional view about the development of copyright and displacing the centrality of the modern author as the *raison d’être* of the copyright system, Deazley’s book is welcome ammunition to those who would try to reassert the public domain.’ Simon Stokes, *On the Origin of the Right to Copy* (review of ‘*On the Origin of the Right to Copy*’, by Ronan Deazley), *Law Review*, (2005), 16(2), p. 41. Deazley quoted this review in the introduction to his next book in which he developed his ideas concerning the mutability of apparently robust, objective terms like ‘the public domain’ and ‘copyright’. He states that the book ‘concerns the place of both myth-making and rhetoric in contemporary copyright discourse.’ Ronan Deazley, *Rethinking Copyright: History, Theory, and Language*, (Cheltenham: Edward Elgar, 2006) p. 8.

¹⁰⁵ See Marshall McLuhan, *The Gutenberg Galaxy: the making of typographic man* (Toronto: University of Toronto Press, 1962).

this century that it has gathered momentum. The most likely explanation for Jacqueline Wilson's decision to register her name is that her publisher, keen to exploit the success of her books, sought effective protection by registering the author and one of her fictional characters, *Tracy Beaker*, in one process.¹⁰⁶ The aim was practical – to develop the portfolio of intellectual property rights surrounding Jacqueline Wilson's work, in order to maximise their value and potential. It was not simply to protect against copying.

Perhaps this is why J. K. Rowling became a registered trade mark in 1999 (2455203), Dylan Thomas was posthumously registered in 2012 (2607666) and Robert Markham, Kingsley Amis' alter ego, when working for the Bond franchise, was registered in 2012 (2455203). The registration of the author may have its origins in a creative industrial application of commercial/legal strategies but its effect in the 'real world' is unusual. It is not only possible to revitalise dead authors as effective legal entities and brands, but it is also possible to infuse a spark of being into authors who never existed. Similarly, although copyright protection for literature expires seventy years after the author dies, trade marks are infinitely extendable IP rights. Moreover, reputation may be indelible. This is why a Japanese company recently failed to register the trade mark *Tarzan* on plastic manufacturing machines even though copyright on the *Tarzan* stories has now passed into the public domain and there were no similar trade marks registered in respect of the same or similar goods.¹⁰⁷ In Japan, *Tarzan* seems to have become an unregistrable trade mark due to its reputation. The *Tarzan* stories are so bound up with their

¹⁰⁶ Both Tracy Beaker (TM [2361634](#)) and Jacqueline Wilson ([2361632](#)) were applied for as trade marks for on the 24th April 2004.

¹⁰⁷ IP High Court Heisei 23 (gyo-ke) 10399 (May 14, 2012). See: <http://www.internationallawoffice.com/Newsletters/Intellectual-Property/Japan/Nishimura-Asahi/TARZAN-trademark-invalidated-by-IP-High-Court> (accessed 14/8/2017).

invented name that, for a Japanese court, it was impossible to untangle the two. The court decided that the sign *Tarzan* was so replete with jungle connotations and the popular imagination is so familiar with them that it could not be put to work as a distinctive identifier of plastics wrapping machines (specifically: "plastic processing machines and apparatus, automatic extruding robot for plastic extruding machines and chuck (machine elements)"). In the UK the same facts – the power of the word *Tarzan* to conjure up images and stories – resulted in a similar decision in a landmark legal decision. Here, in a case dating from 1970, Lord Justice Salmon decided that the name *Tarzan* had become too famous, that it pointed only at the stories, not at the makers of the stories, that it had been transmuted from private property to public property because of its universal popularity. *Tarzan* belonged to everyone.¹⁰⁸ In short, by becoming such an obvious means of identifying story content, *Tarzan's* name had (as his character would have appreciated) freed himself from the bonds of servitude imposed on him by his creator Edgar Rice Burroughs and become a generic term.¹⁰⁹

¹⁰⁸ See -'Tarzan' Trade Mark *Reports of Patent, Design and Trade Mark Cases*, Volume 87, Issue 15, 3 December 1970, Pages 450–461, <<https://academic.oup.com/rpc/article-lookup/doi/10.1093/rpc/87.15.450>> (accessed 14/8/2017). Here, Edgar Rice Burrows Inc. sought to register *Tarzan* as a trade mark – the application was rejected on the grounds that the word *Tarzan* could only be understood as a reference to the nature of a product ('a *Tarzan* film') rather than its origin. See appendix V (at p. 216) for a quotation from the judgement. Once words pass into the public domain as referring to a character or event they lose the ability to be distinctive of any particular trader's goods. See also: *Jane Austen Trade Mark* [1999] RPC 879, where an author's name (not a character) was considered incapable of making one particular trader's products distinctive of him.

¹⁰⁹ It is possible to view Edgar Rice Burroughs as the inventor of the multi-platform format – Edgar Rice Burroughs Inc. was created by the author in 1923 to exploit *Tarzan* stories through every available niche. His name, however was not registered as a trade mark until 2012.

Registration of the author

In 1876, when the first UK registrations were filed, a signature was regarded as the obvious proof of individuality. A signature was not merely a name; it illustrated literacy and social class and, through its flourishes and idiosyncrasies, perhaps even a little about the character of the one who wrote it. A signature can look beautiful or ugly. It can even be a status symbol. Until digital technology replaced it with the password, a signature was a pre-requisite for bourgeois respectability.

The first trade marks recorded in the UK often included signatures – an obvious way of showing that the goods the marks were applied to came from a trader of quality and an easy way of displaying the uniqueness of the brand. The signature of the first registered trade mark owner, that of the brewer William Bass, still appears on Bass beer.



Figure 11: the signature of William Bass was first used to identify his beer in 1777.¹¹⁰

Without its wobbly hand, its leaky pen, its flourish, a name isn't particularly distinctive of goods or services used in trade. Fear of infringing on the natural rights of citizens to trade honestly using their own names meant that registration of

¹¹⁰ See UK IPO Opposition Decision, No 52025 by Brandbrew SA based on earlier trade mark 'Bass': <<https://www.ipo.gov.uk/t-challenge-decision-results/o36402.pdf>> (accessed 14/8/2017).

surnames and full names in plain typeface required argument and justification for most of the twentieth-century.

Wilson and Thatcher

When, in the 1980s, Thatcher's government agreed to harmonise its trade mark laws with the EU, a new world was created and an invisible force was unleashed. One apparently trivial change that the 1994 Trade Marks Act made possible was the registration of names in plain typeface. Individuals could become trade marks more easily, indeed, generally speaking, the restrictions on what could not be registered as a trade mark were weakened by the 1994 Trade Marks Act.¹¹¹

By 2004 trade marks registration practice had developed and it had become possible for Jacqueline Wilson's name and the name of her fictional character *Tracy Beaker* to be registered as trade marks. What could be more natural than registering one's own name as a trade mark? In a free-market capitalist society surely this kind of behaviour should really be understood as a fundamental right? From henceforth – potentially forever – there will be only one *Jacqueline Wilson*® and only one *Tracy Beaker*®.¹¹² If they live forever those ordinary names, which up until 1994 could not have been registered, on face value, as trade marks, will be the seeds of the brands they grow into. If Jacqueline Wilson's publishers succeed, her house may become as iconic as Dylan Thomas'® boathouse, or Roald Dahl's® writing shed and *Tracy Beaker's* fictitious life in her children's home The Dumping Ground – will join Captain Cat, the BFG and Augustus Gloop as indestructible products of creative industry, defined by their iconic and, indelible brand names.

¹¹¹ The 1994 Trade Marks Act harmonized UK trade marks law with European law.

¹¹² *Tracy Beaker* – UK TM, 2361634, 2004.

Jacqueline and Tracy will only be able to escape from the business of being trademarks by emulating *Tarzan* and committing 'genericide': becoming so famous that their otherwise distinctive names become generic. If they remain distinctive, they may live forever.

Mythical marks

Outside the realm of the intellectual property specialist, where the signification of trade marks is measured forensically, trade marks resonate. They have cultural lives of their own. They interrupt our everyday speech, they become part of the environment surrounding us and, as Roland Barthes pointed out when discussing the Citroen DS 19, they can enter the realm of mythology.¹¹³ There is nothing ambiguous about a trade mark and its mythology – it is a claim to a brand or narrative, the scope of which may be designed and developed by the interplay between the myth-maker and the myth-consumer. The globally recognised symbol for a trade mark is a letter R in a circle and this represents the meta-mythology of a trade mark. Registration concretises the creation of bourgeois mythology first identified by Barthes. It offers access to a practical, eclectic, popular and perhaps 'utilitarian' concept of mythology. The 'R', or registration, makes myths. The trade marks registration system offers universal access to myths. It renders the cult of the bourgeois mythologist, the 'expert' in attributing value to culture, obsolete. It doesn't seek or require the consideration of a specialist in taste, it ignores it preferring legal, rather than cultural, arbitration for its validity and sales figures to define its success.

¹¹³ Roland Barthes, *Mythologies*, translated from French by Annette Lavers (London: Vintage, 2009), p. 101.

The author as trade mark

Trade marks have grown in popularity. During the year 1957, when Roland Barthes published his *Mythologies*, the UK trade marks Registry processed 11,000 trade marks per annum. Today over 200,000 applications for UK-valid trade marks are made every year.¹¹⁴ It could be argued that the spread of trade marks, and their registrations, has had a profound influence on our cultural mythology. Through their unambiguous commercial message they seem, perhaps, easier to understand than more complex ‘traditional’ mythologies associated with (for example), nationhood, politics or religion. Trade marks industrialise the process of myth-making, not in the covert way with which political, commercial and bureaucratic authorities may generate myths, but in an overt, easy-to-use, consumer-friendly way. In other words, although designed to create myths in the market, these utilitarian symbols could have the effect of dumbing all other myths down, simplifying myth by processing it, bureaucratising it and commercialising it, confounding, as Laurence Coupe describes it, ‘the myth of mythlessness’.¹¹⁵

Trade mark myth can belong to everyone. It has been proletarianized. It is a product, and the way to access its realm is by owning a trade mark. Trade mark registration is an industrial process allied to the ‘creative industries’. It involves an alliance of lawyers, bureaucrats, business people and creatives and, in all cases, it builds brands. Brands and their narratives are ‘held’ or suspended in the world of property by their trade marks registrations. A trade mark registration is an

¹¹⁴ The UK and EU Intellectual Property Office forecast a combined annual input of 200,000 marks – see UK IPO website [<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/593529/trade-mark-and-design-application-figures.csv/preview >](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/593529/trade-mark-and-design-application-figures.csv/preview) (accessed 6/12/2017). [<https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/Strategic_plan_2020/strategic_plan2020_en.pdf>](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/Strategic_plan_2020/strategic_plan2020_en.pdf) (accessed 6/12/2017).

¹¹⁵ Laurence Coupe, *Myth* (Abingdon: Routledge, 2009) p. 12.

anchoring point, a legal ‘point de capiton’, holding the interplay between producers and consumers steady around an everlasting sign.¹¹⁶

From critic to advocate

The Jacqueline Wilson trade mark registration shows that the author, far from being dead, has gained a new lease of life – or even immortality – in the commercial realm. Trade mark registration is something all consumers can access. It seems open and fair. It objectifies and rewards inventiveness, guaranteeing everyone the chance to make something from nothing. And it doesn’t forbid entry into the mythological realm on the grounds of taste. It is taste-less. Prior to the 1990s there were no trade mark authors (with registrations). Today increasing numbers of writers are adding their names to the list, along with their characters, their titles and, in tow, the stories they signify. Perhaps the spread of consumerism and the trade marks that guarantee it have altered the role of the author. Caught somewhere between the living and the dead, today’s trade mark writers are like zombies, alive to the creative potential of brands and the market and all of the freedom of expression that gives, but ideologically dead, unable to break free from their own marks?

Perhaps the trajectory of the author from late nineteenth-century/early twentieth-century avant-garde myth breaker/maker into today’s registered producer of trade mark stories is understandable.¹¹⁷ Two world wars and collapse

¹¹⁶ Slavoj Žižek, *The Sublime Object of Ideology* (New York: Verso, 2008), p.87. See Žižek’s discussion of Lacan’s concept of these images. As Žižek puts it ‘points de caption, or ‘quilting points’, pin the otherwise floating fabrics of the perceived universe into place.

¹¹⁷ Suzanne Moore notes that Lou Reed’s death symbolises the end of avant-garde art and an artistic link to Andy Warhol. In doing so she refers to Jorgen Leth’s film of Andy Warhol eating a burger – noting that the clip seems less and less comprehensible as time passes. She compares this with the rise of Lady Gaga. In fact – one element connecting Warhol

of the Berlin Wall symbolising the end of the East/West, Left/Right ideologically divided globe, may have changed the function of the author from critic and creator for a bourgeois readership, focussed on existential and ideological nuances, to a supportive role in an egalitarian drive to transform every story into a product and every citizen into a brand. Everyone is an author today. But what is there to say?¹¹⁸

with Gaga is the trade mark. Warhol was an artist who worked through the medium of trade marks, Lady Gaga, is a trade mark [UK TM – 2509635] and Jorgen Leth's film misunderstands the nature of a trade mark hamburger. Suzanne Moore 'Postmodernism killed the avant-garde. Lady Gaga is no substitute for Lou Reed', *The Guardian* 30/10/2013.

<<http://www.theguardian.com/commentisfree/2013/oct/30/postmodernism-avant-garde-lady-gaga-lou-reed-x-factor>> (accessed 14/8/2017). NB: Jorgen Leth's desire to see the world without trade marks (a high cultural trait) contrasts with Warhol's opposite view. See: <<http://www.artbabble.org/video/louisiana/j-rgen-leth-andy-warhol-eating-hamburger>> (accessed 14/8/2017) *66 Scenes from America*, dir. by Jorgen Leth, (Sunset Production Inc., 1981).

¹¹⁸ Viewed in this way debates concerning the nature of the canon of English literature and its ongoing re-alignment have conducted by critical cognoscenti or, as Laurence Coupe describes them 'Mythographers': Laurence Coupe, *Myth* (Abingdon: Routledge, 2009). Trade marks are a vital part of this process.

Registration 2175686 – Cardiff University

On October 1st 1986 the first British university to register its name as a trade mark made its application to protect the term 'university services'. Perhaps because it broadcast to its students throughout the UK, the Open University understood that its conceptual, or virtual, existence was more important than any bricks and mortar. Well before the Internet turned all bureaucracies into media providers, the OU was the first to secure its brand with a trade mark registration. After that date almost all UK universities followed suit. Cardiff University was a relative late-comer to trade mark registration, registering its name and logo in 1998.

CARDIFF UNIVERSITY
PRIFYSGOL CAERDYDD



Figure 12: UK TM 2175686

Trade mark construction

Cardiff University's trade mark is worth considering in detail because it reveals some of the myths associated with the process of registration – or 'trademarking', to use the American verb - and illustrates how every mark has its own unique mythology.

Firstly, it is worth noting that the specific registration comprises four distinct signs. All of these signs have been registered together under one number because of cultural and bureaucratic conventions. One of the very few derogations the UK was permitted when it updated its trade marks legislation (so that it complied with the European Directive on the Harmonization of EU trade mark law) was to allow the continuation of an administrative practice established by the UK trade marks Registry which permitted the registration of a series of marks provided they did not affect its 'material particulars'.¹¹⁹ In this case two completely different pairings of words 'Cardiff University' and 'Prifysgol Caerdydd' have been deemed to be materially identical because they are Welsh and English versions of the same thing.¹²⁰ Of course, this is nonsense – visually the words 'Prifysgol Caerdydd' and 'Cardiff University' have very little in common. They begin and end with different

¹¹⁹ Section 51(3) of the 1994 Trade Marks Act states that: 'a series of trade marks means a number of trade marks which resemble each other as to their material particulars and differ only as to matters of a non-distinctive character not substantially affecting the identity of the trade mark'. *1994 Trade Marks Act* (London, HMSO 1994). A series of trade marks are, essentially, different versions of the same mark. Any changes in the mark should not alter its distinctive character. Typical examples of series of marks might be the specific varieties of soup contained in Campbell's soup tins. The words 'chicken' or 'tomato' have no trade mark relevance; they function only as descriptors. In cases such as this it is possible, in the UK, to register a single trade mark which actual consist of a number of distinctively identical, but descriptively different versions of the same mark – a 'series'.

¹²⁰ See European Court First Instance decision: In Case T-6/01 Matrazen <<http://euipo.europa.eu/en/mark/aspects/jugement/T-6-01.htm> as of 19/12/2016> (accessed 24/8/2017). In this case the European Court of Justice ruled that translations of words are not, as trade marks, equivalent. Thus, as a trade mark, according to Matrazen, 'Prifysgol' and 'University' should be regarded as distinct from each other.

letters; they are pronounced differently; and conceptually, even if we accept that they mean the same thing, only a limited number of bilingual speakers would understand this point.¹²¹

Secondly, the Cardiff University trade mark contains two stylised versions of the two English and Welsh marks. Again, it is hard to justify the claim that the stylised versions of the marks are materially the same as the word-only versions, particularly when one considers the double 'D' at the end of the stylised Welsh mark. This monogram materially alters the nature of the mark rendering it visually distinct from the three other word marks. It also emphasises the digraph 'DD' which is a letter in the Welsh alphabet, one that does not exist in English.

The complex nature of Cardiff University's trade mark does, however, convey an identity which contributes to its unique trade mark myth. The trade mark is complex – it is neither visually, nor conceptually clear. Where many marks display the clarity and simplicity of (for example) a simple stylised tick – readily understandable all over the world as a symbol for sports clothing, Cardiff's four-barrelled mark, in two languages, with two typefaces and a monogram on its double 'D', represents Cardiff University's complex relationship with its heritage, its civic history, its position in the capital city of an emerging, bilingual nation and its desire to make its mark (literally) on the world stage and stay in touch with its roots.

The mark, like many things in Wales, is not obvious. Cardiff University's registration is a trade mark as riddle. Perhaps geography is to blame. The reluctance

¹²¹ This triangulation, comprising an analysis of the visual, aural and conceptual nature of a trade mark is essential to the legal understanding of what a trade mark signifies and how it is analysed. From the legal point of view, the sign is broken down three ways (whilst at the same time taking into consideration the 'totality' of the mark) and it is understood from the point of a view of a 'relevant' consumer in an agreed process of legal, semiotic, evaluation.

to solidify symbols can sometimes be found in regions where there is a question as to which culture predominates. Possibly, a perceived need to define symbols so as to 'modernise' and keep abreast of semiotic practices in the market place has produced an opposite reaction, a desire to avoid crude representations of potentially offensive or misleading 'truths' are preferred in the face of 'one sign for all' symbols. In Cardiff University's case the message of its mark is, very unusually, ambiguous.¹²²

University brands

No trade marks incorporating the word 'university' registered between 1876 and 1976 appear on the UK register of trade marks (in the name of a university); this would seem to corroborate the idea that commerce was perceived as quite distinct from academic enquiry and criticism. Today, 100 universities own portfolios of trade marks registered at the UK Registry alone. Between 1984 and 1994, 96 marks were registered for educational services incorporating the word 'university', this number went up to 362 between 1994 and 2004. Between 2004 and 2014, 835 such trade marks were registered.¹²³ Universities have become branded competitors: schools, universities and galleries have joined publishing houses, literary and cultural magazines, the press and broadcasters; all have

¹²² Interesting examples of this use of complex signs involving letters can be found decorating the passport control room at Cardiff (Wales) airport and, more famously, on the roof of the Wales Millennium Centre where Welsh and English sentences are juxtaposed, almost intertwined, rendering them almost incomprehensible.

¹²³ Source – UK IPO trade mark search database <<https://trademarks.ipso.gov.uk/ipso-tmtext>> (accessed on 18/8/2016).

become trade mark institutions competing to organise and broadcast their brand narratives which are defined by their trade marks.¹²⁴

Universities are brands. Oxford Limited 'is responsible for the protection of the University's trademark, the belted device, in all commercial classes around the world'.¹²⁵ This work entails the application for new trademark registrations in specific product categories relevant to the brand licensing programme, and the renewal of those registrations that remain required, as they come up to expiry.' Harvard University has a 'trademark programme' which exists 'in order to protect Harvard's trademarks; to regulate the use of the trademarks on products sold under license from the University; and, after covering its operational expenses, to help support Harvard's student-aid initiatives with royalties received from the sale of licensed products.'¹²⁶ The university trade mark serves not only to identify the teaching organisation so that it can compete for clients, or students and academic staff, it also enables the university to more effectively monetize its academic assets and its academic brand. Through trade mark registration, universities have become brands. It isn't right to say that trade mark universities are 'in it for the money' or even for profit. It is more accurate to say that, post-registration, they are in it 'for the brand'. The trade mark, the symbol, values and loyalties, its culture and its story, are the things that must survive. The trade mark is, to borrow a concept from

¹²⁴ A search for trade marks owned by the British Broadcasting Corporation reveals 1107 marks. Notwithstanding the BBC's prominence in British culture the mark *BBC* was only registered in 1996. Prior to that, trade marks registration seems to have been limited to very few iconic cultural products: *Match of the Day* (UK TM 1015557), 1973; *Blue Peter* (1976). Interestingly, one of the earliest BBC trade marks was one of its most futuristic – *The Daleks* (UK TM 868065/6, 13/8/1964) didn't just threaten the real universe – they were some of the first metaphysical marauders in the hitherto undiscovered regions of intellectual property. *The Tardis* became a trade mark twelve years later (UK TM 1068700). Source – UK IPO trade mark search database <<https://trademarks.ipo.gov.uk/ipo-tmtext>> (accessed 18/8/2016).

¹²⁵ See <<http://www.oxfordlimited.co.uk/brand.php>> (accessed 14/8/2017).

¹²⁶ See <<http://www.gse.harvard.edu/guide>> (accessed 19/12/2016).

Richard Dawkins, like the selfish gene, replicating and spreading itself as far as possible: money is just the blood that flows around the system, keeping it metabolising.¹²⁷

Trade mark universities create dilemmas: where, for example, is the boundary between public property (the 'natural' landscape of words, numbers and concepts which was once an unenclosed prairie for free-riding scholars) and the private property of brands funded and developed by academic institutions? To what extent are the teachers in branded universities required to think and behave in accordance with the values of their institution? To what extent do the fruits of their labour, their articles, books, experiments, inventions and symphonies belong to or even extol the virtues of their commissioner – the branded university? Do students and academics who achieve commercial success from research conducted in the employment of a university owe their employer anything? Or, conversely, are the creative scientists and artists on university payrolls entitled to turn themselves into brands so that they themselves can exploit the value of their own intellectual property as brands?¹²⁸

The management of university trade marks and the brands they represent requires an almost surgical understanding of countless rights/rewards relationships and a saintly reverence for submerging foundations that still support the edifice:

¹²⁷ See: Richard Dawkins, *The Selfish Gene* (Oxford; Oxford Paperbacks, 1989), It is worth noting that this a-moral view of brands and the market is contradicted at senior levels within the corporate establishment. Paul Polman CEO of Unilever stresses the moral dimension of brands and commerce. See report on International IP Enforcement Summit London 2014 Central Hall Westminster 11-12 June, 2014 <https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/about_ohim/press_releases/IP_summit_report_en.pdf> (accessed 19/12/2016).

¹²⁸ Registration 2558160 protects the series of marks Professor Brian Cox and Prof Brian Cox against infringement. In all there are three Brian Cox registrations. These registrations are personal to the physicist and broadcaster, not a university.

the public domain, the work of dead discoverers.¹²⁹ It also enables the objectification, or capitalisation, of learning. It explains why educational league tables are so important and how a *Russell Group* (EU TM 12089247) university like Cardiff requires trade marks (albeit inward-looking in design) with real global reach.

The act of registering a university trade mark is a significant step in the enclosure of a landscape that once belonged to all creatives. The market of services-as-things has extended the reach of trade marks beyond pots and pans. University trade marks and brands are synonymous with ways of learning, the quality of learning; and they demonstrate the profits of learning. Universities are increasingly concerned with the development and exploitation of intellectual property and their trade marks symbolise both the processes through which they teach and the products of their learning. Perhaps it could be argued that the Open University, when it registered the first university trade mark, created the university market almost as an unintended consequence of its desire to create a home for itself in the ether. For the artist, teaching or learning in a trade mark university, a new question arises: but it is a variant of an old question.

What is art?

In a branded university a virtuous circle between learning and productivity unleashes the value of focussed, positive, brand-sensitive creativity, benefiting everyone. It is art – but not as we knew it. This version of art has an honest purpose – to make money. The old version also made money, but the strictures of bourgeois

¹²⁹ Isaac Newton made the point to Robert Hooke 'If I have seen further it is by standing on the shoulders of Giants.' H.W. Turnbull, *The correspondence of Isaac Newton, volume 1*, (Cambridge: Cambridge University Press, 1959), p. 416.

conventions meant that a degree of hypocrisy was implied. Artists should traditionally 'struggle', suffering from genuine commercial hopelessness resulting from their commitment to their own idealised artistic mission, whilst the art itself could appear, for example, over the mantelpiece accruing wealth for its owner. The bourgeois myth of the inspired artist is, perhaps, being superseded by the myth of the trade mark and its registration. The myth of registration takes control from the cultural myth makers and puts it in the hands of everybody in the marketplace: in this case, a university.

Of course, the idea that the creative output could be in some way compromised by something as mundane as a trade mark registration seems ridiculous. However, their power is most easy to see in visual arts. Trade marks were frequently represented by late nineteenth and twentieth-century artists. They were re-orientated through new contexts so as to become 'ironic', 'self-referential' and even 'subversive'..¹³⁰

There remains, however, a lurking sense that the trade mark is the master, rather than slave of the artist. Certainly, the most striking works of art incorporating trade marks succeed because of the tension they expose through their inclusion. The trade mark often seems more robust than the artistic concept it is deployed in, as Andy Warhol famously observed through his images of soup tins.¹³¹

George Ritzer makes this point in the Introduction to Jean Baudrillard's *The Consumer Society – Myths And Structures*: 'Indeed, one of the major subjects of pop artists is low culture as represented in Andy Warhol's work on Campbell's soup cans

¹³⁰ Slavoj Žižek refers to John Carpenter's film 'They Live' (1988), in which special sunglasses reveal the true repressive meaning of trade marks and adverts 'maintaining the invisible order' through the use of ideological messages: *The Pervert's Guide to Ideology*, dir. by Sophie Fiennes (P Guide Productions, 2013).

¹³¹ See appendix II at p. 207.

and Marilyn Monroe. Art, or at least pop art, has ceased to be creative or subversive; it is merely one more set of objects to be included in the system of objects. It no longer creates or contradicts the world of consumer objects, it is part of that world.’¹³²



Figure 13: Édouard Manet, *A bar at the Folies-Bergère*, oil on canvas, Courtauld Gallery, London, (1882).¹³³

Manet’s bar at the Folies-Bergère shows the Bass trade mark triangle, turning the whole image into a ‘knowing’ image-conscious bar in which everything is structured around red triangles from beer bottles and all that the viewer sees can be bought.¹³⁴ Marcel Duchamp’s famous ‘fountain’ has a signature attached to it,

¹³² Jean Baudrillard, *The Consumer Society – Myths and Structures* (London: Sage Publications, 1998), p. 16.

¹³³ See appendix II at p. 200 for examples of trade marks interpreted in visual media.

¹³⁴ Manet’s wobbly, glassy image is a critical work in the development of art. See: Michel Foucault, *Manet and the Object of Painting*, translated from French by Mathew Barr (London: Tate Publishing, 2009). Foucault describes how Manet plays with new techniques and acquires a new concept of space. The subject matter of the image a prostitute (Suzon), flanked by two global trade marks (the Bass triangle) is also worth noting - everything is for sale. The Bass triangle is structurally embedded in the image. It is possible to interpret Manet’s work as being entirely about trade marks and creativity. Also see: Malcolm Park *A bar at the Folies-Bergère, Ambiguity, and the Engagement of Spatial*

'R Mutt'; it thereby contributes to the question of what art is and who an artist might be.¹³⁵ In fact after the original Duchamp himself ended up remarking the revolutionary urinals and signing them himself, in the correct fashion.¹³⁶ Perhaps Malcolm McLaren understood the true power of a trade mark: it cannot be put to any use other than the one for which it was intended, it cannot be subverted and, unlike the old idea of art, it is, at the very least, honest, open to public inspection, by and for the people. On the 1st of November 1977 the name *Sex Pistols*, the ultimate anti-authoritarian pop culture icon was registered as a UK trade mark.¹³⁷ A registered trade mark, ultimately, is a symbol of compliance, not anarchy in the UK. A few months later, in January, Jonny Rotten found himself bashing the stage with his bare hands screaming 'this is no fun'. Rotten quit and the band played on. Visiting Professor of Fine Art at Falmouth University, Cornelia Parker, treads the fine line between sculptor, conceptual artist and university brand maker.¹³⁸ Her work, suspended in mid-air, falling off cliffs, or buried, often (though not always) explores transience, impermanence, incongruity and uncertainty.¹³⁹ She speaks of an interest in 'anti-monuments' and in the incidental world. She is an English Situationist. Instead of blowing up installations, she installs 'sheds exploding' which she embroiders with bullets. She seems to encourage her audience to break free and to drift off into space. At times her work defies the indelible, time-unspecific

Illusion Within the Surface of Manet's Paintings (Sydney: University of New South Wales 2001) for an analysis of the painter's point of view.

¹³⁵ UK trade mark 10770881.

¹³⁶ The Tate Gallery displays one such replica – the provenance of the piece is discussed online here: <http://www.tate.org.uk/art/artworks/duchamp-fountain-t07573> (accessed 16/2/2018). see appendix II at p. 203.

¹³⁷ UK TMs 1085921 and 2.

¹³⁸ Contemporary art is closely associated with the image making of branding, Tracy Emin is a registered trade mark (EU 6226807) as is, perhaps unsurprisingly, Damian Hurst (2024644).

¹³⁹ Cornelia Parker, *Thirty pieces of silver* [silver objects] (London: Tate Gallery 1988/9); Cornelia Parker, *Words that defy gravity* [Intervention] (Dover: 1992; Cornelia Parker, (2003) *Different Dirt* [found objects] (London: Alan Christie Gallery 2003).

nature of trade marks. She says that she works best without the strictures of commissions from corporate bodies (in other words trade mark bureaucracies) and she creates popular work for a wide audience, which doesn't require explanation by professional cultural analysts (from trade mark universities). In some ways, Cornelia Parker could be regarded as an artist without a brand; even, perhaps, the creator of art-beyond-brand.¹⁴⁰ Parkers seems to ask whether, in a post-ideological consumerist world, an artist can create work which is not branded. Her trade mark image is an explosion of shards of shed in 'Cold, Dark Matter'.¹⁴¹ For the time being, Parker's work, as it collapses, floats, explodes or disappears seems strikingly unregistrable. It questions the branded universe. Perhaps one way to avoid enclosure is not to exist in the material world. Parker's overtly liminal works reveal, possibly, the boundaries of the trade mark universe.



Figure 14: Cornelia Parker, *Cold, dark matter*: Tate Gallery, London (1991).

¹⁴⁰ One of the best ways to subvert a trade mark is not to mention it.

¹⁴¹Cornelia Parker, *Cold, dark matter*, [Wood, metal, plastic, ceramic, paper, textile and wire] (London: Tate Gallery, 1991).

Registration EU 1104306 – Google

The penetration of the word ‘Google’ into the global, human lexicon must, by now, be almost complete. Google, through its mission, to: ‘Organize the world’s information and make it universally accessible and useful’ is, according to some psychologists, so powerful that it is changing our evolutionary trajectory. The way our brains are wired is being googled.¹⁴² Google’s former Chief Executive, Eric Schmidt, made the following comment at the World Economic Forum in Davos in 2010,

As the world looks to these instantaneous devices [...] you spend less time reading all forms of literature, books, magazines and so forth[...] That probably has an effect on cognition, probably has an effect on reading.¹⁴³

Google has created and cornered the market for asking questions and finding things out. In 2012 Google conducted 1.2 trillion searches, it conducts 78 percent of the world’s internet searches and is estimated to facilitate around 3.5 billion searches per day.¹⁴⁴ In 2011, *Forbes* business magazine estimated the

¹⁴² See Google’s ‘mission statement’ at: <<https://www.google.com/about/our-company/>> (accessed 11/07/2018). Also see: Sherry Truckle, ‘How Computers Change The Way We Think’, *The Chronicle of Higher Education*, 50.21, (2004), 26. <http://web.mit.edu/sturkle/www/pdfsforstwebpage/Turkle_how_computers_change_w_ay_we_think.pdf> (accessed: 19/12/2016).

¹⁴³ Quoted on BBC website: Sandra Vogel, *Do computers change the way we think?* (2012). <<http://www.bbc.co.uk/blogs/webwise/2012/01/do-computers-change-the-way-we.shtml>> (accessed 24/8/2017).

¹⁴⁴ Source Google Zeitgeist website at <<http://www.google.co.uk/zeitgeist/2012/#the-world>> (accessed 20/12/2016). Worldmeter algorithm see: <<http://www.internetlivestats.com/google-search-statistics/>> as of 20/12/2016.

Google trade mark's value at \$44 billion. According to recent posts on *Forbes'* website, it is currently worth £113 billion.¹⁴⁵

Aside from its power in the market place, the proliferation of communication devices and apps and the transformation of business and social networks the structure of the basic Google search page, with its ranked hits descending in order of relevance, has altered our perception of all pages.¹⁴⁶ Today, using an English search term, a page begins with words in the top left corner, which tend (broadly speaking) to be read from left to right and which become less 'relevant' the further down a reader travels.

This descent of relevance is mirrored in news pages. The heading, sub-heading, introductory paragraph and occasional sub-paragraph, provide increasingly detailed variants of the same one or two-word (trade mark-like) title. News crawler apps are designed to transform less structured information into manageable, easily digestible, useful chunks.¹⁴⁷ Style guides like 'Hemingway'

¹⁴⁵ See: Eric Goldman, *Google Successfully Defends Its Most Valuable Asset In Court* (2014) <<https://www.forbes.com/sites/ericgoldman/2014/09/15/google-successfully-defends-its-most-valuable-asset-in-court/#46c3a4e921e1>> (Accessed 24/8/2017). Google was estimated at a value of \$114bn – its trade mark being 'its most valuable asset'. It was attacked on the grounds that the mark had become a common word – Google provided evidence to show that 94% of users saw the term as a trade mark – only 5% saw it as a descriptive word. In this case Google was successful. But it is worth noting the sheer economic scale of the question of belief in a word: Google, to retain its value, must strain every sinew to stop language from changing (something which we know happens quite naturally)

¹⁴⁶ The most obvious question about the nature of this search is, how is 'relevance' defined? PR and advertising firms specialise in the adaptation of websites so as to maximise the chance of it being found by Google's engines. So although Google provides answers, and they usually seem plausible, 'knowing' users of Google understand that the information they receive has been through a purification and presentation process based on algorithms drawn from both user and supplier preferences.

¹⁴⁷ Schoolboy Nick D'Aloisio was paid \$30 million for his *Summly* app in 2013 by Yahoo for software which searched, read and summarised online news stories. See: David McCormack, *Teenage multimillionaire who sold his app to Yahoo for \$30million now divides his time between Silicon Valley and studying philosophy at Oxford University* (2014) <<http://www.dailymail.co.uk/news/article-2890245/Teenage-multimillionaire-sold-app-Yahoo-30million-divides-time-Silicon-Valley-studying-philosophy-Oxford-University.html>> (accessed 24/8/2017).

ensure that short sentences and simple words predominate – thus guaranteeing global comprehension.¹⁴⁸ Stories, are algorithmically mashed, blended, ranked and rated so that users all over the world, have a good chance of understanding what, in the world according to Google, is important. As a result of this, content creators for web sites tailor their language to suit the requirements of the ‘average’ British person’s reading age (nine years) and they adopt writing structures that are linear, repetitive and progressively less relevant. Internet writing is all about a story’s first impression.¹⁴⁹

Of course, this utilitarian way of reading and writing has little in common with the way a real author, like the real Ernest Hemingway, might have approached fiction on the paper page. The technology of the printing press was used by novelists to create long fictions in which meaning is not grasped initially and complication, ambiguity and an interplay between reader and writer are desired.¹⁵⁰ The lasting appeal of Cervantes’ early novel about a wayward, knight is that it presents an alternative reality – one which the reader wants to re-enter and (paradoxically) never wishes to come to an end. The journey down a page of search results, or even an online blog, has the opposite in mind. Online, alternative realities, like that created by Cervantes with words, are accessed without them.

Google’s search engines and the economic power of ranking means that online writers adapt their text so that it appeals to computer code. Word-writers

¹⁴⁸ See: <<http://www.hemingwayapp.com/>> (accessed 14/8/2017).

¹⁴⁹ When asked to search for the term ‘UK adults reading age’ – this site was top of the list: <<http://www.see-a-voice.org/marketing-ad/effective-communication/readability/>> (accessed 14/8/2017) It claims that the average UK reading age is 9.

¹⁵⁰ Fiction can place great emphasis on the creativity of the reader, who assimilates subtexts, gaps and ambiguities, actively. Online text is often structured and designed to resolve matters and prompt the reader or ‘user’ to act rather than read on. This difference in the perception and ‘use’ of text was described as ‘scriptible’ and ‘lisible’ (‘writerly’ and ‘readerly’) by Barthes: Roland Barthes, *The Pleasure of the Text*, trans. by R. Miller (New York: Hill and Wang, 1980).

are not becoming analogous to code-writers because readers prefer code; they are making the transition because machines do. Computer algorithms decide what appears at the top of a Google search page. Those of us who write online must now create 'readerless' text.

Utility vehicles

Like the ancient car giants of Detroit or the studios of Hollywood, Google's useful, successful and engaging qualities are born out of a rigorous, compartmentalised production process that drives towards product-perfection and markets itself with aplomb. Perhaps, to a European eye, Google's efficiency is characterised by a certain dullness, or at least, a lack of originality, or possibly merely non-thought-provoking reliability. To compensate, Google invests heavily in refreshing its bright logo and the idea of 'interestingness'.¹⁵¹ But the formula for being interesting is hard to define. The internet is replete with industrial/fictive hooks: lists, for example, create an interesting sensation, but do we really care about the ten most exciting beef burgers, the twenty richest labradoodles and the thirty most exciting funicular railways in Macedonia, or is this simply another example of how the medium configures messages?¹⁵²

In the world according to Google, doing is much more important than thinking. Google and most corporate websites are tools for 'completer finishers'.

¹⁵¹ See: BBC web article inspired by Google's revised logo Google logo: Why do businesses change their typeface? <<http://www.bbc.co.uk/news/magazine-34126251>> (accessed 20/12/2016). 'Google doodles' animated graphic elements that accompany the logo also contribute to its everlasting 'newness'. See also: images of Google's everlastingly 'new' office spaces at appendix VI (p. 218).

¹⁵² See: Marshall McLuhan, *Understanding Media: The Extensions Of Man*, (Cambridge: MIT Press, 1994).

They direct users to useful outcomes.¹⁵³ Indeed, the term ‘user’ has replaced ‘reader’ when it comes to online engagement: ‘user’ chimes with the ‘useful’ vision set out in Google’s utilitarian mission statement.¹⁵⁴ Dreamers are left wandering through the tunnels of knowledge, accumulating lists of unconnected facts. They will never discover anything. They will be overwhelmed by trillions of instantly forgotten ‘hits’, which they will re-read and re-forget, over and over again, in a form of internet dementia through data-overload. The only way out of Google is to do something, preferably to buy something.

Neogoogle

Google is a twenty-first century version of the great-nineteenth and twentieth-century American business corporations and it is based on the same technologically driven promise: ‘this telephone, this car, this camera, this television this search engine is new and better’.¹⁵⁵ As executive chairman Eric Schmidt said in 2012, when quizzed about the company’s tax avoidance strategies: ‘it’s capitalism’.¹⁵⁶

¹⁵³ See: Meredith Belbin, *Management Teams: Why they succeed or fail* (London: Heinemann, 1981).

¹⁵⁴ Internet readers are often referred to as ‘users’. Their habits and eye movements are tracked by ‘usability’ specialists who can discern when a web page is hitting its mark and when ‘users’ aren’t ‘using’ correctly. It may be no more than a cultural glitch caused by the proximity of computer code and word writers when designing web pages, but the preference for the ‘utilitarian’ word ‘use’ over the old word ‘read’ is worth noting.

¹⁵⁵ Old trade marks may represent newness forever. For example Coca Cola (earliest current UK Registration is UK TM No. 427817 -1925), Budweiser (earliest current UK Registration is UK TM No. 807395 (1960), Chanel (earliest current UK Registration is UK TM No. 602372 – 1938).

¹⁵⁶ For example: in an article titled: ‘Google Chairman Eric Schmidt Defends Tax Dodge’ Schmidt is quoted as explaining Google’s reluctance to pay taxes as follows: ‘It’s Called Capitalism... We are proudly capitalistic. I’m not confused about this.’
<http://www.huffingtonpost.com/2012/12/13/google-tax-dodge_n_2292077.html>
Huffington Post: Kavoussi B., (accessed 19/2/2018).

Google suffers from the same life-threatening ailment as other successful, possibly monopolistic, corporate trade marks did. Kodak, Hoover, Kleenex and now Google became such common words that they morphed from trade marks into verbs, they lost their capital letters and have become generic.¹⁵⁷ For example, in everyday speech it is not uncommon to hear the verb 'to google' - this usage threatens the trade mark 'Google'. If we habitually replace the verb 'search' with 'google' then the original term will lose its trade mark quality because it no longer points to trade origin, it describes an action. In 2014 the District Court of Arizona passed judgement on a case where it was alleged that the verbal use of the word Google demonstrated that the word had slipped from the private domain, into the public.

In fact, the case was rejected for the following reasons:

Accepting Plaintiffs' evidence as true and drawing all justifiable inferences therefrom in Plaintiffs' favor, a majority of the public uses the word google as a verb to refer to searching on the internet without regard to search engine used. Giving Plaintiffs every reasonable benefit, the majority of the public uses google-as-verb to refer to the act of searching on the internet and uses GOOGLE-as-mark to refer to Defendant's search engine. However, there is no genuine dispute about whether, with respect to searching on the internet, the primary significance of the word Google to a majority of the public who utilize internet search engines is a designation of the Google search engine. Therefore, Defendant is entitled to judgment as a matter of law that the '075 and '502. Marks are not generic.¹⁵⁸

¹⁵⁷ A successful trade mark can become too popular. If people no longer associate a trade mark with a particular manufacturer and replace its meaning with an activity (like 'doing the Hoovering') a mark may lose its capacity to distinguish and its registration becomes liable to invalidation.

¹⁵⁸ United States District Court For The District of Arizona CV-12-1072-PHX-SMM Stephen M McNamee Senior United States District Judge September 2014.

For the time being Google remains, unequivocally, a trade mark, but its success, its linguistic omnipotence, is a threat to its own identity. To counter this Google must appear new – always. It must obliterate its own history. Every morning, through its Google doodle, it re-engages with its Sisyphean task; being interesting, for Google, is a matter of life and death.¹⁵⁹

Paleoogle

The term ‘Google’ appears to be a truly inventive trade mark. Google was first registered as a trade mark in the UK in October 2005¹⁶⁰. It is designed to distinguish its owner’s services. The term ‘Google’ is, legally speaking, a highly distinctive trade mark which is entitled to what is called a ‘high penumbra of protection’.¹⁶¹ It is an (almost) new word with one function, the one it was created to perform – to act as a sign distinguishing the source of products. But the word itself has an etymology, it was not born with the search engine in tow.¹⁶² According to Google Inc., the word Google is derived from googol and googolplex created by US mathematician Edward Kasner to describe a figure with 100 zeros behind it. According to mathematical mythology, this term was first coined by Milton Sirota, Keaner’s 9-year-old Nephew, in 1920. The trade mark Google was invented because

¹⁵⁹ Google doodles – the little animations that occasionally commemorate worthy anniversaries and appear above the Google logo – have a Sisyphean feel. Every morning they suggest inventiveness, but by the end of the day they are dull and uninteresting – they must be replaced with new news.

¹⁶⁰ UK trade mark number 2404306.

¹⁶¹ Jennifer Davis and Alan Durant, ‘HAVE A BREAK and the changing demands of trademark registration’, *Queen Mary Journal of Intellectual Property Law*, (2015), 5 (2). pp. 132-156. ISSN 2045-9807., p 14.

¹⁶² ‘In that perspective, the more distinctive the earlier mark, the greater will be the likelihood of confusion’. European Court of Justice - Judgment of the Court 11/11/1997 – Sabel Puma C251-95
<<http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d2dc30dd7196743df6cc4143a804e026f5749f87.e34KaxiLc3qMb40Rch0SaxyNaNz0?text=&docid=43450&pageIndex=0&dolang=EN&mode=lst&dir=&occ=first&part=1&cid=975326>> (accessed 16/2/2017).

Larry Page and Sergey Brin, the company founders, misspelled 'googol' when they were brainstorming a new name for their search engine in 1988. When they discovered their mistake they kept the error, preferring their version.¹⁶³

Unlike googol, Google was already a name. Henpecked Barney Google, owner of Spark Plug, a not very fast racehorse, was first created by newspaper writer/cartoonist Billy De Beck.¹⁶⁴ De Beck's character, Barney Google, was one of the first long-term, continually evolving newspaper cartoon characters and he reached a huge readership for decades. Barney Google was a kind of goggle-eyed Homer Simpson. He first appeared in cartoon form on June 17th, 1919 and was popular throughout the 1920s and '30s. Snuffy Smith, his partner (to continue the Simpsons analogy), an early variant of Cletus, the slack jawed yokel, joined the strip and Barney Google and Snuffy Smith had many adventures. It was Smith, rather than Google who appeared in most of the cartoons after the Second World War. Today Barney Google and Snuffy Smith remain registered trade marks in the UK.¹⁶⁵

It is interesting to note that the term Google was not first written down by the Google Inc. founders as they grasped for a word created by a mathematician to describe something brain-dazzling. It was coined by a writer/cartoonist to describe a goggle-eyed character who is occasionally to be seen leading his horse to the race track.

¹⁶³ See: <http://graphics.stanford.edu/~dk/google_name_origin.html> (accessed 19/2/2018).

¹⁶⁴ See: Anthony Harkin, "'Sweet Mamas" to "Bodacious" Hillbillies: Billy DeBeck's Impact on American Culture', *Studies in American Humor*, 3.14, (2006), pp. 55-72. Billy De Beck and Google, or rather Barney Google, gave voice to neologisms like 'heebie geebies', 'bodacious' and 'hotsy totsy'.

¹⁶⁵ UK TM number 813699, registered in 1960.

Google and the gadget

The power of Google is transmitted by hardware: computer terminals, laptops, mobile appliances, gadgets. This, at times uncanny, passage illustrates how Jean Baudrillard saw gadgets (and perhaps even iPhones) three years before Google founder Larry Page and Sergey Brin were born:

The gadget is defined in fact by the way we act with it, which is not utilitarian or symbolic in character, but ludic. It is the ludic which increasingly governs our relation to objects, persons, culture, leisure and, at times, work and also politics. It is the ludic which is becoming the dominant tone of our daily habits, the extent indeed that everything – objects, goods, relationships, services – is becoming gadgetry or gimmickry. The ludic represents a very particular type of investment: it is not economic (useless objects) and not symbolic (the gadget/object has no soul), but consists in a play with combinations, combinatorial modulation: a play on the technical variants or potentialities of the object - in innovation *a playing with the rules of play*, in destruction a play with life and death as the ultimate combination.¹⁶⁶

Although it was written before the internet was ‘invented’, Baudrillard’s view of the gadget as ‘a technological parody, an excrescence of useless functions, a continual stimulation of function without any real, practical referent’, seems to describe many of Google-plus-gadget’s attributes.¹⁶⁷ It is an outcrop of the old consumer society masquerading as the dawning of yet another new age. Is the power of Google, which sounds new, but is actually the name of a proto-Homer Simpson, so strong because of our reluctance to accept the fact that, once again, we are recycling, going nowhere fast?¹⁶⁸ We want to believe things are changing,

¹⁶⁶ Jean Baudrillard, *The Consumer Society* (London: Sage Publications, 1998), pp. 125.

¹⁶⁷ *Ibid.*, p 123.

¹⁶⁸ *Ibid.*, p 112, ‘It is now the case that everyone who does not wish to fall behind, be left on the shelf or lose their professional standing must ‘update their knowledge, their expertise – in short, their practical range of skills on the labour market.’

argues Baudrillard, but in fact they are not. We're trapped in a consumerist spin cycle of which Google is merely the latest setting.

Of course, the problem with this line of argument, attractive though it sometimes seems, is that it tends towards tautology. Evidence of its validity is dependent on the existence of yet more invention and gadgetry which can also be viewed as the natural result of human creativity. However, forty years after Baudrillard's analysis of consumer society, George Ritzer's introduction to the English edition of *The Consumer Society* suggested that Baudrillard's arguments remain pertinent. Ritzer emphasises Baudrillard's statements that 'Consumption is laying hold of all life.'¹⁶⁹ Ritzer adds: 'What this communicates is the idea that consumption has been extended to all of culture; we are witnessing the commodification of culture. This, in turn, leads to one of the basic premises of postmodernism; the erosion of the distinction between high and low Art.'¹⁷⁰

Trade mark art

Ritzer's reference to 'high' and 'low' art is revealing. 'High' and 'low' art exist in the minds of culture consumers, and, in particular, interpreters, 'mythographers' or critics. They are, themselves, heavily laden terms, redolent of a cultural order which was sustained through complex social interplay. Dislike of the advance of branded consumerism and its levelling of the mythological playing field, may mask the fact that the 'old' world – in which 'high' and 'low' art, literature, music and drama existed – was, itself, predicated upon prejudices. Perhaps these were driven by bourgeois desires to own the high ground commercially, physically

¹⁶⁹ Ibid., p 29.

¹⁷⁰ Ibid., p. 127.

and intellectually. Perhaps, to put it crudely, ‘high’ art (literature, plastic arts, music and drama) is best understood as likely to include the cultural material consumed by people with enough property and wealth to be considered ‘high’; whilst ‘low’ art is simply that which the rest encounters. No art, ‘nothing’, as it is described by Ritzer in *The Globalisation of Nothing*, may be a misconception. It is a qualitative judgement about the standard of art and as such it reveals the somewhat presumptuous position of those who push forward their own understanding of what the term might mean at the expense of everyone else’s.¹⁷¹

Google is not a new word, it isn’t a new concept, and, as a consumer product, it isn’t revolutionary. However, it extends the reach of the brand and its narratives through the devices it is carried on – which are now attached to our bodies. It brings the trade mark into the personal dimension. It breaks the boundary between the interior and exterior worlds and creates a new realm for branded capitalism to explore – our insides. In so doing, it liberates consumers from the old ‘high culture’/‘low culture’ divisions making all culture simultaneously available to everyone at almost no cost. It erodes class divisions. It subverts cultural elites. It blows away moribund mythologies. Google is for the company AND it is for the people. It is, to borrow a phrase from the political arena, ‘populist’. It further extends the scope of trade mark enclosures and empowers millions of consumers, regardless of where or who they are.

Given the global reach of Google and the significant social and economic effects it incorporates, it is surprising to note that few arguments against Google, outside China, are to be found. The presumption by UK Governments – and many

¹⁷¹ Ibid, p. 17. Also see: George Ritzer, *The McDonaldization of Society* (London: Sage Publications, 2002) and George Ritzer, *The Globalization of Nothing* (London: Sage Publications, 2004), in which the branded consumer world is equated to ‘nothing’.

others in the West – that the freedom offered by the internet and search engines like Google is, in some way, hard-wired into their cultures seems to have overlooked a fairly obvious truth. Freedom of this kind was never part of their agendas. In the UK, freedom of expression in the market, as legal historians like Bently (in respect of trade marks) and Deazley (in respect of copyright) point out, has been the subject of ongoing negotiation. A variety of competing influences, including market forces, but not precluding moral and philosophical concerns regarding the public domain and governmental concerns regarding censorship, were negotiated over centuries. From the Statute of Anne to the ‘Lady Chatterley’ case, the courts have passed judgment on how much freedom they feel is appropriate to encourage.¹⁷² The internet, through its capacity to skip over jurisdictions, has implied that the UK, and countries like it, endorse the USA’s understanding of ‘freedom’. Since the UK doesn’t share the same constitution, this is not true. The UK’s change of heart regarding censorship was brought about by the same factors that changed the course of thinking in the Soviet Union during the 1980s: technology and trade marks.

Dysfunctional trade marks

Baudrillard’s eloquent description portrays the ‘gadget’ as something that is inherently duplicitous - attractive but trivial. It presumes that the ‘ludic’ quality of gadgetry supplants utilitarian virtues. The fact that google-in-a-phone has all the

¹⁷² The Statute of Anne (1710) was a landmark in the development of copyright law. It ‘deregulated’ the publishing industry, breaking the Stationers Company’s monopoly on publishing and it created, for the first time, authorial ownership of copyright. See: Ronan Deazley, *Rethinking Copyright: History, Theory, Language* (Cheltenham: Edward Elgar, 2006) ‘The passing of the Statute of Anne in April 1710 marked a historic moment in the development of copyright. As the world’s first copyright statute it provided legal protection of 14 years for works published after the commencement of the Act.’(pg1).

shiny attributes of a precious stone, the smoothness of a seashell and the unpredictability of a pinball machine, suggest that it should be even more of a waste of time than anything available in late 1960s France. We are drawn to ‘gadgets’ in the same way as members of a contemporary stone-age society on an undiscovered island might be attracted to shards of a DC 10 fuselage. Gadgets twinkle and sparkle, and, especially when we don’t understand how they work, we find them magical. We invent myths to explain them, their inexplicability feeds our imaginations and, because we like gadgets no matter what epoch we live in, they make us feel connected. The only difference between a Google gadget and a wing-nut dropped from a passing jet, is that Google really does connect us. It is, in reality – to refer to Baudrillard’s description – ‘a horse’; a completely honest, reliable tool and that is, to some extent, its problem.¹⁷³

Google does not intimate connection, it does not connect in the imaginary or symbolic realm: it is a plug, a utilitarian socket, it makes instant, universal connectivity real and is therefore boring – not ludic. That is why the Google brand is so unconvincingly jolly. Its continued existence depends as much on its ability to crack jokes as to actually work. It must appear like a toy and work like tool. As we saw in the case of genericide from Arizona, for trade marks to function properly they must not describe; they must symbolise. If they become too literal they lose that whimsical ‘gadget’ appeal Baudrillard so disliked.

¹⁷³ Baudrillard, p. 126. ‘There is nothing here of their relation of rider to horse, worker to tools or art-lover to works of art. The relation of man to object is strictly magical, which is to say that it is bewitched and manipulator.’

Google and literature

A trade mark is not merely a logo devoid of any semiotic significance outside of shops. It is a sign with a plurality of significations: it has a unique implication of its own (the brand narrative); it also has meta-significance, derived from the legal, bureaucratic, social and political system of trade mark as way of life. Google has become one of the most important ways of disseminating these meanings, to everyone on the planet, all day and all night.

Is there a way for a writer today to create fiction which is not in some way structured by the Google trade mark? Or, in order to reach the maximum audience, must fiction-writers first engage with Google's ability to bring trade marks into every reader's mind by trade marking their own work with a single word or slogan; then writing first line, first paragraph, first page, using Hemingway, so as to make it easy for web crawlers to find and summarise the material?

Chapter 3: Controlling ideas: myth, magic and belief

i/ Mythologies

Dreams

Valuable intellectual property is most commonly associated with patents, trade marks, copyright and design. In fact, many other categories of intellectual property exist: trade secrets, the varietal names of plants, and indications of geographic origin all have clearly defined legal boundaries. And then there are the forms of intellectual property we access free of charge. As well as the 'great common' of the English language, the traditional knowledge we have accrued, all the inventions, designs and plans that have passed from the private into the public domain, and the relatively new 'creative commons' – there are secrets and there are even gifts.¹⁷⁴ The World Wide Web was presented to the global audience at the opening ceremony of the 2012 Olympics as a gift of intellectual property from Tim Berners-Lee to the whole of humanity. It was a gift which not only Mark Zuckerberg, Larry Page and Sergey Brin and other tech giants benefitted from, but one which everyone in the world profited by. Gifts can be malevolent.

And then there are the other, even less obvious, aspects of intellectual property; assets which are not merely 'intangible' like trade marks or designs;

¹⁷⁴ For a discussion of gifts and the 'gift economy' see: Lewis Hyde, *The Gift: How the Creative Spirit Transforms the World* (Edinburgh: Canongate, 1983). Here, Hyde explores his idea that: 'It is a cardinal difference between gift and commodity exchange that a gift establishes a feeling-bond between two people, while the sale of commodity leaves no necessary connection.' p 58. He argues that the means of exchanging art is as, or more, important than the object of exchange, in translating it into 'art'. In conclusion he states: 'I still believe that the primary commerce of art is a gift exchange, that unless the work is the realization of the artist's gift and unless, we the audience, can feel the gift it carries there is no art.' p 267. Hyde's work exposes the long and complex history of gifts and their relationship with art. He does not, however, explore the idea of gift as intellectual property.

assets which are ‘intangible-plus’ – inventions-yet-to-come: books-as-yet-unwritten; unconceived, unregistered trade marks; *potential*. The footballer Gareth Bale cost Real Madrid 100 million euros in 2013 because of the IP he could generate. His value was based on his potential for hitting the target. His price was real – his goals were dreams of goals. The boundaries of *property* appear infinite.

Dreams are intimately connected with intellectual property.¹⁷⁵ It might seem that there could be nothing more natural and uncommercial than the relationship between dreamer and dream. Yet if you dream of goals, and you are a fan of Real Madrid, even in your sleep, each time Gareth Bale evades a defender from Real Betis, Atletico Madrid, or even better, Barcelona, you will affect the value of Gareth Bale as a footballer, and, ultimately, as a trade mark.¹⁷⁶ Intellectual property transcends the boundary between the real world and the imagined. Intellectual property is the mythology of business.

The boundary between intellectual property (which can be protected and monetized) and the common land of everyday human life is less clear than we might think.¹⁷⁷ From our rooms in the ‘real’ realm of real estate and ownership, we look inwards and outwards on personal dream worlds and the meaninglessness of unconscious nature. These are primal, incoherent nightmare worlds which we perceive as if peering through the window of one of Ridley Scott’s space ships. We

¹⁷⁵ Inventors and artists traditionally speak of ‘dreaming up’ solutions to problems – Francis Crick and James Watson’s double helix DNA structure was revealed in a dream of spiral staircases; Keith Richards recorded the riff of ‘I can’t get no satisfaction’ after he dreamed it (he then forgot he’d recorded it); Einstein’s teenage dream of sledging fast enough to change colours inspired his work and on the 10th November 1619 Descartes’ dreams inspired his inquiry into what we now understand as the scientific method. See: Gregor Sebba *Dream of Descartes* (Carbondale, Southern Illinois University Press, 1987).

¹⁷⁶ EU TM 11770641 – Gareth Bale.

¹⁷⁷ See: Joanna Gibson, *The Logic of Innovation: Intellectual Property, and What the User Found There* (Abingdon: Routledge 2014). Gibson argues that ‘Social life has itself become a sphere of production’ and asks, ‘how might that be understood within the cultural and structural transformation of creativity, innovation and property?’

observe a strange planet, where twisters spin across prairies sucking Dorothies and Totos away from their families, up into vortices, spitting them out again, only to repeat the process after the settlers pull themselves together and begin to nail back the planks of their dwellings. We are propelled into our frenzy for ownership of property by a desire to impose predictability, order and hope upon a chaotic world. Without the uplifting mythology of ownership, we'd exist in a kind of living hell.¹⁷⁸ Things would never get better. We'd lurch along in states of ignorance and fear, unaware of the fact that the way to stop twisters twisting is to capitalise them – to turn the prevention of twisters into brands and to reward twister-stoppers until the weather calms down.

Perhaps, in the unmade Ridley Scott movie, after leaving a few settlers behind, the heroes fly away. Ten years later they return to discover a suburb on the spot where they first landed - with houses and roads and pavements, grass growing in the gardens and no twisters. The street, of course, would be called Twister Street, which might also be the name of the movie, its trade mark. As the story progresses, the apparent success of the original mission to colonise the planet and make it like earth may be called into question by the inevitable Ridley problem. Exactly at the spot where we thought safety and security would be at its maximum, we discover the opposite is true. In the womb of someone living in Twister Street a menace is incubating. Except, in this story, after a full gynaecological examination, the threat is revealed to be elsewhere, even more viciously embedded in the culture and

¹⁷⁸ It is worth noting that during the nineteenth-century, at the same time as capitalist and consumerist patterns of commerce widened and the notion of what might be owned expanded to include 'intangible assets' like trade marks, powerful antithetic theories developed offering alternatives to capitalistic individualism based on cooperation. Proudhon's famous aphorism 'Property is theft', exemplifies these alternative ideologies [Joseph-Pierre Proudhon, J.P. *What is Property?* (London: Cosimo Classics, 2007), p.1.] and his creation of the neologism 'Capitalist' encapsulated the political and social disquiet industrialisation, ownership and resulting class division created. One facet common to ideologies of both the left and right is a desire to create meaning.

psychology of things – the alien presence is in the name ‘Twister Street’. It contains an idea that renders our imagination infertile and neutralises our seminal nature, a shard of code, a crucial sequence of DNA, an indelible semiotic meme. It’s a trade mark. It controls every storyline in town, on the street and in the dreams. How?

Symbolic bureaucracies

The administration of intellectual property is a system that seeks to bring bureaucratic order and legal certainty to quite distinct entities which are otherwise in a surprisingly malleable state of flux. Legally and culturally, the idea of what a trade mark might be has changed through time. Today, it is arguable that trade marks have ceased to be mere commercial tools and also that commerce has stopped being ‘mere’. Notwithstanding the decisions of UK courts and administrators throughout the period of their existence, with the development of markets that extend (through our communications devices) into our homes and our minds (even if one believes that they remain essentially benign signs, encouraging shoppers to understand where things come from), trade marks have a profound impact on our culture, our creative processes and our approaches to creativity.

We have seen how it is broadly accepted that during the sixteenth century, with the growth of trade and the development of markets, trade marks became more and more important as indications of the origin of products used in trade. At the same time, infringing these indications became a worthwhile criminal occupation. As more cases were referred to courts, a body of case law and legal practice developed until at the peak of the steam age, bureaucratized trade marks

registration began and the development of the trade mark *as property* ensued.¹⁷⁹ An administrative bureaucracy developed in order to render trade marks available to those who wanted to use them by streamlining legal processes, formalising the publication of registered marks, issuing judgements settling trade mark disputes, searching for and barring the registration of conflicting marks and applying an evolving set of criteria defining what a trade mark is. For trade marks in the UK, this bureaucracy was created when the Trade Marks Registry was opened in 1876. As we have seen, the first mark to go through this system, a label featuring the red triangle used to identify bottles of Bass beer, remains valid today.

The relative certainty lawyers and historians bring to the meaning of the term trade as a practical, legal entity with a utilitarian legal function - facilitating trade in capitalist markets - masks uncertainty regarding its wider cultural significance. The developing cultural role of trade marks, the ripples these registrations cause, their non-legal and un-bureaucratic connotations in other realms, remains somewhat mysterious – dreamy, perhaps.¹⁸⁰ For whilst we can

¹⁷⁹ In the UK, the care with which trade mark registration authorities and courts took to protect the English language from ‘wealthy traders’, since bureaucratised registration began in 1876, has been striking. For example, in 1888 the Herschell parliamentary committee reporting on the confusability of trade marks stated that it was clearly desirable that ‘no one ought to be granted the exclusive use of a word describing a quality of a character of any goods. Such words of description of the property are the property of all mankind.’ From David M. Higgins, ‘Trademarks and Infringement in Britain c1875 – c1900’, in *Trademarks, Brands and Competitiveness*, ed. by Teresa da Silva Lopes and Paul Duguid (Abingdon: Routledge, 2010).

¹⁸⁰ For example, in a 2011 Government Report on the relationship between trade marks and business performance, having identified a ‘guarantee of origin’ and a ‘signal of innovation’ as reasons why trade marks are valuable, the report states: ‘The third interpretation of trade marks is that they form a basis for building successful brands. Firms want to have a portfolio of strong quality brands as this ensures customer loyalty and deters new firms from entering the market. To build such a portfolio, firms will register trade marks for their new products and then engage in promotional advertising and other marketing activities, such as short-term price discounting. Over time, they want the brand to embody a lifestyle and acquire significance beyond its distinctive name. When this occurs, it can also make it easier for a firm to apply a trusted trade marked name in new fields of activity, reducing the need for advertising.’ Christine Greenhalgh, Mark Rogers, Phillipp Schautschick, V Vania Sena *Trade Marks Incentives* (Newport; Intellectual Property

point to dates of significant legal cases, land-mark registrations, Acts of Parliament and EU Directives describing changes in the legal definition of a trade mark over time, there remain aspects of a registered trade mark that exist forever ‘off the page’. This part, the mysterious part, the potential part, is precisely what capitilasts seek to enclose and monetise. At the same time – because it is dreamy – we find it hard to visualise.¹⁸¹ Although many Acts of Parliament, two European Directives and countless legal judgements have sought to define trade marks so that their functional status is clear and unambiguous, an implicit myth, which came into existence the moment the trade marks register was opened, cannot be exorcised. Exactly what makes ‘Coke’ ‘add life’?¹⁸² This ‘gap’ between the ‘legal certainties’ of a bureaucratized registration, the aesthetic appeal of a trade mark and the functional aspects of a product is the point where bureaucracy and mythology meet.¹⁸³ In reality, there is surprisingly little certainty about the meaning of the term trade mark in any context: legally, socially and culturally the term seems always to be subject to interpretation.

Office, , 2011). This paragraph suggests that the relationship between a trade mark and a brand is close, culturally and economically significant, yet difficult to objectify.

¹⁸¹ Recent trade marks case law is, to some extent, motivated by the desire of some large companies to enclose these ‘undiscovered’ areas previously in the public domain or simply un-thought of. See: Philips Razor (Philips - Remington C-299-99 18/6/2002 ECJ), Lego brick (14/9/2010 ECJ Case C- 48/09 P) and Cadbury’s colour purple: (4/10/2013, Court of Appeal *Société des Produits Nestlé SA v. Cadbury UK Limited* [2013] EWCA Civ 1174 and *JW Spear & Sons Limited & Ors v. Zynga Inc.* [2013] EWCA Civ 1175). In these cases, trade mark protection for functional shapes and ordinary colours was sought and rejected.

¹⁸² In the second EU Directive on Trade Marks of 2015, updating the original of 1988, a deregulatory theme is visible. For example, the waiving of the need to represent trade marks ‘graphically’ broadens the scope of what may be deemed a trade mark. The definition of a trade mark now includes the phrase: ‘being represented on the register in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.’ See: EU Directive on trade marks at Directive (EU) 2015/2436 of the European Council and Parliament of 16 December 2015 to approximate the laws of the Member States relating to trade marks (Recast) <<http://eur-lex.europa.eu/eli/dir/2015/2436/oj>> (accessed 10/8/2016).

¹⁸³ Raymond Williams referred to this as ‘magic’ see: ‘Advertising: The Magic System’ in Raymond Williams, *Problems in Materialism and Culture: Selected Essays* (London: Verso, 1980), pp. 170-95.

Interpreting marks

From a Marxist point of view, the desire to create, believe in and pay for mysterious, spiritual qualities embodied by products is ‘fetishistic’, predictable and undesirable.¹⁸⁴ Viewed in this way, trade marks may be unwanted cultural control mechanisms; enclosing creativity in a predictable, psychologically flawed market, in which creative output simply sustains more creative output in a hamster wheel of repetitive invention.

However, creative writers, may be sceptical of theory. As Professor Philip Gross said in his Inaugural Professorial Lecture at the University of Glamorgan, for writers interested in creating the *new*, ‘not knowing’ is better than pre-judging. Keats’ concept of negative capability suggests that writers do not necessarily seek theoretical justification, they seek sensation. ‘Theory speaks on a level of absolutes and generality in which I can’t recognise my own experience or struggles as a writer,’ argues Gross.¹⁸⁵ Despite the fact that Marx warns us not to tarry too long

¹⁸⁴ ‘As against this, the commodity-form, and the value-relation of the products of labour within which it appears, have absolutely no connection with the physical nature of the commodity and the material relations arising out of this. It is nothing but the definite social relation between men themselves which assumes here, for them, the fantastic form of a relation between things. In order, therefore, to find an analogy we must take flight into the misty realm of religion. There the products of the human brain appear as autonomous figures endowed with a life of their own, which enter into relations both with each other and with the human race. So it is in the world of commodities with the products of men's hands. I call this the fetishism which attaches itself to the products of labour as soon as they are produced as commodities, and is therefore inseparable from the production of commodities.’ Karl Marx, *Capital* (London: Penguin Classics, 1990), p. 165.

¹⁸⁵ Gross states: ‘Let's be honest: Theory (capital T) worries writers. This is not only because it tells them they, the author, are dead, though that's hardly a tactful gambit in a conversation. It is not only because Theory is rarely interested in the one concern that bugs creative writers night and day: how can I make this draft of mine better?’ This antipathy towards theory need not be confused with rejection of Theory (with a capital T) – replacing it, for example, with faith or superstition, or perhaps nothing at all.’ Professor Philip Gross, ‘A Walk in the Abstract Garden: how Creative Writing might speak for itself in universities Cardiff’, *Inaugural Professional Lecture*, Cardiff, University of Glamorgan, October, 2006. [Available online at <<https://www.nawe.co.uk/DB/current-wip->

in a fetishized universe of capitalistic trade mark iconography, from the point of view of a curious creative writer, this under-reported other world in front of our noses is, perhaps, worth a visit. After all, every writer who puts a title above their story and ‘with the unconsciousness of the predestined’, ‘tickets’ their ‘performance’ (if Robert Louis Stevenson’s approach is to be believed) is making a mark.¹⁸⁶ Put like this, perhaps the term ‘creative writing’ really can be better understood as ‘creative branding’. Culturally, trade marks seem like apples: forbidden fruit, according to theoreticians of the left; defining icons for the right. Creative writers, if Gross is to be believed, are predisposed, maybe required, to pick those apples – regardless of the warnings that go with them.

If trade marks are understood as capitalistic control devices, or as figureheads designed to provide legal compliance for companies engaged in the battle for marketing supremacy, additional important aspects of their nature may be ignored. They can be attractive toys for our imaginations, ludic concepts so malleable that, Roland Barthes, almost despite his observations concerning our susceptibility to their myths, is caught up in their mythology.¹⁸⁷ Barthes’ description

[edition/articles/a-walk-in-the-abstract-garden-how-creative-writing-might-speak-for-itself-in-universities.html](#)> (accessed 18/7/2018). From Descartes’ maxim ‘doubt is the origin of wisdom’ to Popper’s doctrine of falsification – disbelief, ‘when man is capable of being in uncertainties’ as Keats put it – is closely connected with both artistic and scientific creativity.

¹⁸⁶ Robert Louis Stevenson, ‘My First Book: Treasure Island’, *The Idler*, August 1894. Vol. VI, pp. 3-11.

¹⁸⁷ Marco Roth puts the point more succinctly in the *New Yorker*: ‘Barthes may not have looked favourably on what he called “the domestication” of the automobile, but when he notes how “the dashboard looks more like the worktable of a modern kitchen than a factory control room,” he was articulating a change that made cars more acceptable to women and families, of which the Citroën designers themselves may have been only dimly aware.

The legacy of “Mythologies” falls short of the complete smashing of signs, the “semioclastm” Barthes wished for in his 1970 preface—neither he nor anyone else has solved the problem of why certain basic human longings for freedom, or heroes, of cleanliness attach themselves so easily to travel guides, bicycle races, plastics, and laundry detergent. And he probably could not have anticipated how completely the very instruments of his analysis could then be adapted to sell even more of those things,

of the Citroën DS as ‘the very essence of petit-bourgeois advancement’ today strengthens the Citroën brand, connecting it with high cultural debate. The stickiness of our relationship with modern mythology (and, by implication, trade marks) as revealed by Barthes, extends from symbols into fiction.¹⁸⁸ Perhaps because trade marks are symbolic representations of brand narratives (or stories), they encompass contradictions easily; they require interpretation.

The significance of signs

The difference between the legal certainties implied by registered trade marks as bureaucratised intellectual property rights and their ambiguity in a cultural context exists because, by and large, they must be read.¹⁸⁹ Admittedly the

especially in Europe’s former colonial domains.’ Marco Roth, ‘Roland Barthes: myths we don’t outgrow’, *New Yorker*, April 18th, 2012. <<http://www.newyorker.com/books/page-turner/roland-barthes-myths-we-dont-outgrow>> (accessed 11/8/2016).

¹⁸⁸ Paul de Man describes the relationship between myth and fiction as identified by Barthes as follows: ‘It is in the nature of fictions to be more persuasive than facts, and especially persuasive in seeming more “real” than nature itself. Their order, their coherence, their symmetry is possible because they are accountable only to themselves, yet these are precisely the qualities wistfully associated with the world of nature and necessity. As a result, the most superfluous gestures are most likely to become the hardest to do without. Their very artificiality endows them with a maximum of natural appeal. Fictions or myths are addictive because they substitute for natural needs by being more natural than the nature they displace.’ Paul De Mann, ‘Roland Barthes and the limits of Structuralism’, in *Roland Barthes* ed. by Neil Badmington, (Abingdon: Routledge, 2010), p. 37.

¹⁸⁹ The first element of the UK 1994 Trade Marks Act and the first European Directive on Trade Marks states that, for it to be registered a trade mark, it must be capable of being ‘capable of being graphically represented’ – so that it can be read. See: Article 2 of First Council Directive 89/104 of the European Parliament and of the Council of 21 December 1988 to approximate the laws of Member States relating to trade marks at <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31989L0104>> (accessed 10/8/2016). From 1876 until the trade marks register went online in 2002 trade marks existed only in books (or ‘journals’) held in libraries and the idea that they should be ‘represented graphically’ and therefore published and read was an essential characteristic. The current EU Directive states at Article 3(b) that a trade mark must be; ‘represented on the register in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.’ It may be that this means that for the first time in their history trade marks may no longer be merely ‘scriptible’, essentially bookish entities. See: Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the

text of a trade mark is often only one word long. However, even if it contains no words, a mark requires interpretation by its reader and, until relatively recently, 'registration' implied publication in a book, or journal.¹⁹⁰ As Barthes might have put it – a trade mark is a 'scriptible' text.¹⁹¹ The reader must see the sign for a trade mark and create a story through participation with the brand.

Barthes' *Mythologies* are stories exploring our relationships with commercial signs and (in the case of the Citroën DS) trade marks. With tongue in cheek, Barthes exposes their mythical potential, writing that the parts of the 'Déesse' are 'held together by virtue of their wondrous shape', the whole being the equivalent of a Gothic cathedral, its appearance as being 'from another universe'.¹⁹² He exposed the controlling power of modern myth, its ability to obliterate history, to simplify and redefine reality, as well as – by implication – to direct or curtail our creativity. Trade marks, because they are nurtured in our imagination, are central to this process; they are shards of corporate property we carry with us;

Member States relating to trade marks: 2, 1, 3(b) at <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015L2436&from=EN>> (accessed 11/8/2016)

¹⁹⁰ In UK law this issue, the fact that signs are interpreted by those who perceive them not merely those who broadcast them, is dealt with by the concept of 'an average consumer'. This quote, taken from UK Trade Mark attorneys D. Young and Co's website describes the importance of this fictional individual pithily: 'In the world of trade marks, the 'average consumer' is an important figure. Any tribunal in Europe considering whether trade marks are likely to be confused must assess the issue from his perspective. It is now established that the hypothetical 'average consumer' is reasonable well informed, observant and circumspect - by contrast with the "moron in a hurry" so memorably dismissed by the English Courts in the 'MORNING STAR' case some years ago.' From:

<<http://www.dyoung.com/article-1-looking-out-for-the-average-consumer-do-they-need-this-much-protection>> (accessed on 10/8/2016). The 'average consumer' objectifies the difficult questions relating to the interpretation of signs. Although never mentioned in legal cases, Saussure's 'sign' and 'signifier' are understood through the eyes of this imaginary third party akin, perhaps, to Charles Sanders Peirce's 'interpretant' ('I define a sign as anything which is so determined by something else, called its Object, and so determines an effect upon a person, which effect I call its interpretant, that the latter is thereby immediately determined by the former.' Peirce Edition Project ed. *The Essential Peirce. Volume 2.* (Bloomington I.N.: Indiana University Press 1998), p. 478.

¹⁹¹ 'Writable' or 'writerly' - from Roland Barthes, *The Pleasure of the Text*, translated from French by Richard Millar, (New York: Hill & Wang, 1980).

¹⁹² Roland Barthes, *Mythologies*, p. 88.

they influence us when our eyes are open and when they are closed – and we influence them.¹⁹³ They are, perhaps, reference points where modern myths are pinned into the real world, using registration numbers.

The pervasive power of trade marks as myth-makers – registered, protected and fired into fictional life by the imaginations of those who create them and those who are exposed to them – is often underestimated or not recognised by consumers.¹⁹⁴ Perhaps because they seem rather ordinary, utilitarian, trade-orientated labels, or maybe because they were created, in their post 1876 form, by lawyers and bureaucrats as registrations, trade marks are perceived (incorrectly) as legalistically complete, more certain, nerdier and geekier than the stories they contain – brands.¹⁹⁵

Gift horses

The study of symbols developed alongside the bureaucratisation of the trade mark sign, or logo, during the last quarter of the nineteenth-century.¹⁹⁶ Trade marks proliferated as consumerism spread. Through a legal and bureaucratic

¹⁹³ The vectors for transmitting trade marks into our imaginations have, since registration began, in 1876, bifurcated. Similarly, the products that can legally be protected as trade marks have increased. In 1986 it became possible to register services as trade marks – previously a trade mark could only exist in respect of a physical object.

¹⁹⁴ Slavoj Žižek describes our apparently masochistic drive to spend and own things as ‘fetishistic disavowal’. It should be remembered that trade marks may feed this addiction because they instantly transform a product or a thing into something which has an identity beyond the real. See: Slavoj Žižek, *For They Know Not What They Do: Enjoyment As A Political Factor* (London: Verso, 2002).

¹⁹⁵ See: James Joyce, *Ulysses* (London: Wordsworth 2010), p. 377. ‘During the past four minutes or thereabouts he had been staring hard at a certain amount of number one Bass bottled by Messrs Bass and Co at Burton-on-Trent which happened to be situated amongst a lot of others right opposite to where he was and which was certainly calculated to attract anyone’s remark on account of its scarlet appearance.’ In the same chapter Joyce writes – ‘Any object intensely regarded may be a gate of access to the incorruptible eon of the gods.’ He recognises the mythic potential of everyday objects, but interestingly alights on one of the most potent trade marks to demonstrate the point.

¹⁹⁶ Ferdinand de Saussure’s first publication appeared in 1879 : Ferdinand de Saussure, *Mémoire sur le système primitif des voyelles dans les langues indo-européennes* (Leipzig: Teubner, 1879).

process of registration, trade marks draw the ambiguities of modern mythology into the realm of the 'real'.

It could be argued that this process is an inevitable consequence of capitalistic commodity fetishism – indeed, it might even be regarded as proof of the process. It is also conceivable that the consequence of trade mark registration, and the ensuing bureaucratisation of trade mark registration by 'experts' (who conducted their business in a cul-de-sac, shielded from public observation by the intricate and specialist nature of their work) effectively excluded trade marks from scrutiny. In a sense, the study of trade marks may have been de-politicised because they were locked into a quasi-legal corner of bureaucratic, legal and commercial management. They became a specialism – notwithstanding the fact that they are in plain sight almost all of the time.¹⁹⁷

The story of the Trojan horse is packaged, as the Greek warriors were, by the animal. The horse acts like a trade mark, anchoring all of Odysseus' cunning and the ultimate success of the operation in one weird object, which we can all easily call to mind. The Trojan horse is a piece of intellectual property from the unenclosed side of the fence. It speaks of the danger of making incorrect assumptions about signs and our enduring susceptibility to 'gifts', it refers to a concept Descartes crystallised – never accept something as true until all doubt is removed. The fickle, untrustworthy or (if you're not Trojan) *brilliant* idea behind the horse undermines assumptions.

¹⁹⁷ It should be noted that Soviet Russia developed an alternative system for rewarding innovation – this did not recognise the 'property' dimension of patents, trade marks etc, although it did seek to reward tangible innovations. Similarly, although trade marks existed as symbols of identification, their significance as property was connected to state and collective ownership, not private property. See: James M. Swanson, *Scientific Discoveries and Soviet Law: A Sociohistorical Analysis* (Florida: University Press of Florida, 1989).

Trade marks, because they can be registered, have a special ability. They can mine beneath apparently strong fortifications, they can pass through walls, they can be spread through the air in sound, they can cross Iron Curtains, subvert cultural revolutions and reconfigure religions. The wooden horse was not a trade mark but what if trade marks are wooden horses?

ii/ Magic

From consumer to 'ism'

'We are all consumers now,' says Mathew Hilton in the introduction to *Consumerism in the Twentieth Century*.¹⁹⁸ He states that 'consumerism has been a mobilizing force at the heart of twentieth-century social and political history', which: 'for too long has been studied separately from politics.' He argues that the cultural assessment of the 'logic of signs', which appeared in the 'early post-modern period', 'developed into an emphasis on the *bricoleur*, the consumer who could forever play out, adapt and experiment with the signs and imagery of commodity capitalism.'¹⁹⁹ For Hilton, the capacity of consumers to act and understand autonomously, as if outside the world of commodities, cannot be over-emphasised. 'Consumerism, as a historical movement, might not have been the "ism" that won, but it is fair to say that its organisations and proselytisers have been almost as crucial to the dynamo of change as workers, voters, employers and citizens.'²⁰⁰

At the end of the Cold War, consumerism – represented by the trade mark - was welcomed through the Brandenburg Gate, just like the horse into Troy. Since the 1980s, privatisation, globalisation and technological innovation have transformed trade marks. Today, brands and the trade marks that define them are no longer technically necessary add-ons to products and advertising, they *are* the products.²⁰¹ A significant tipping point in the development of our trade mark society

¹⁹⁸ Matthew Hilton, *Consumerism In The Twentieth Century* (Cambridge: Cambridge University Press, 2003), p. 1.

¹⁹⁹ Hilton, p. 8.

²⁰⁰ Hilton, p. 24.

²⁰¹ *The Lego Movie*, dir. by Phil Lord and Christopher Miller (Warner Bros. Pictures, 2014) is a film about a trade mark.

was the UK's 1994 Trade Marks Act. This was the moment when a trade mark became, for the first time, legally speaking, 'a sign', and the moment when the fine-tuned, and essentially nineteenth-century restrictions of the 1938 Trade Marks Act were abandoned in favour of EU-wide 'harmonized' legislation. It was here that the 'protective law' identified by Lord Templeman in the Coca Cola case was replaced with legislation designed to expand markets and increase the scope and potency of trade marks.²⁰² In the last decade of the twentieth-century, trade marks were set free.

The relationship between the 'average consumer', 'the interpretant' or the reader of 'scriptible' texts and the trade mark is complex and creates layers of multiple meanings. The greatest names in capitalism from 'Ford' to 'Starbucks' are trade marks. Indeed, these names have almost become alternative words for 'capitalism'. The might of these marks is easy to see. They divide their audience into advocates and opponents. A change of perspective, however, reveals different, less theoretical, direct and personal implications of trade mark use in a range of contexts. All businesses have trade marks. If you are a small publisher or a writer then your trade mark (and you will have one; every business does) is more likely to be seen as a statement of your individuality than compliance with a global multinational. If you work for a university or publishing house then you will be

²⁰² In *Coca Cola Trade Marks* [1986]. RPC 421, House of Lords. Lord Templeman described UK trade marks law a 'protective law' not 'a source of monopoly'. As the register developed after the 1876 Trade Marks Act, so the nature of marks that could be added to it was carefully regulated to protect the interests of both the legitimate businesses and the English language from monopolistic enclosure. Abstract signs, unconnected with the goods they were to be used in relation to were preferred (eg OXO – UK TM 221355 – 29/9/1904 and HOVIS - UK TM 191869 – 14/12/1895). Today, relatively descriptive words and slogans are registrable as trade marks. See: *BABY DRY - TM 200006 EU – 9/4/1996 JUDGMENT OF THE COURT 20 September 2001* (1) In Case C-383/99 P, <<http://euipo.europa.eu/en/mark/aspects/jugement/jj990383.htm>> (accessed 19/2/2018). The boundary of protection continues to extend further and further into what was once understood to be in the public realm or what was simply un-imagined.

expected to represent your brand. A trade mark can mean both monopoly and freedom.

It seems unlikely, if you are reading this text with, for example, a KitKat next to your tea, that you genuinely feel the trade marks registration KitKat is broadcasting an overtly controlling political message to you. It is. Attempts to monopolise common phrases like *Have a break* and chocolate coated biscuit shapes, represent the battle ground for public and private ownership.²⁰³ Your biscuit really is telling you a story. The question is, which story do you choose to believe in and which one do you choose to reject. Indeed, do you have any choice in the matter at all?²⁰⁴

One of the most striking observers of an unhinged, zombie version of our consumer society, in which snacks may eat us, was Jean Baudrillard. For Baudrillard consumer society is dependent on the manufacture of myths about freedom and desire for objects. Baudrillard describes the market as an alternative to the ‘natural’ world echoing themes from Baudelaire:

Objects are neither a flora nor a fauna. And yet they do indeed give the impression of a proliferating vegetation, a jungle in which the new wild man of modern times has difficulty recovering the reflexes of civilization.’ ... ‘Our

²⁰³ There are at least two levels at which these stories can be accessed. Firstly, the image of, for example, a Kit-Kat - the words, the packaging, the shape and taste of the product – resonate with the ‘user’ on a personal level (their first memory of Kit-Kat, the time of day they enjoy eating Kit-Kats) triggering a raft of brand-related stories. Secondly, at a legal level, Kit-Kat has been at the forefront of trade marks law, provoking a number of important legal decisions which define the limits of trade mark registration. These judgments are story-like in their construction individually and collectively. See - European Court of Justice, 7 July Judgment of the Court (Second Chamber) 7 July 2005 (*) (Trade marks – Directive 89/104/EEC – Case C-353/03 <https://www.ippt.eu/files/2005/IPPT20050707_ECJ_Nestle_v_Mars.pdf> (accessed 26/2/2018). Court of Justice EU, 16 September 2015 Judgment of the Court (First Chamber) 16 September 2015— Kit Kat four finger chocolate coated wafer In Case C- 215/14, <https://www.ippt.eu/sites/default/files/2015/IPPT20150916_CJEU_Nestlé_v_Cadbury.pdf> (accessed 26/2/2018).

²⁰⁴ The earliest registration for KitKat was filed on the 1st of April, 1911 UK TM 332454.

markets, major shopping thoroughfares and superstores also mimic a newfound nature of prodigious fecundity. These are our Valleys of Canaan where, in place of milk and honey, streams of neon flow down over ketchup and plastic.²⁰⁵

For Baudrillard, our fabricated reality, formed with images layered upon images, is a horrible disfigurement of the natural world.

Control cultures

Scott Wilson writes: 'Cultural materialism sought to free itself from the totalizing, teleological historicism of traditional Marxism whilst at the same time maintaining the moral imperative and materialist commitment dependent on it.'²⁰⁶ Although Raymond Williams did not address trade marks specifically in his descriptions of cultural materialism, he did discuss trade marks as aspects of material culture in advertising. Here he described the role of advertising in elevating products into objects of desire, as 'magic', rather than 'myth'.

It is impossible to look at modern advertising without realizing that the material object being sold is never enough: this indeed is the crucial cultural quality of its modern forms. If we were sensibly materialist, in that part of our living in which we use things, we should find most advertising to be of an insane irrelevance. Beer would be enough for us, without the additional promise that in drinking it we show ourselves to be manly, young in heart, or neighbourly. A washing-machine would be a useful machine to wash clothes, rather than an indication that we are forward-looking or an object

²⁰⁵Jean Baudrillard, *The Consumer Society Myths and Structure*, translated from French by Chris Turner (London: Sage, 1970), pp. 25-26. The notion of a new, manufactured, or simulated world which in some way replaces, mimics and even adds to the natural world, warping life into a hyper-real ride through time is explored further in *Simulacra and Simulation* - see Jean Baudrillard, *Simulacra and Simulation*, translated from French by F.S. Glaser (Ann Arbor: Michigan Press., 2000).

²⁰⁶ Scott Wilson, *Cultural Materialism* (Oxford: Blackwell, 1995), p. 122.

of envy to our neighbours. But if these associations sell beer and washing-machines, as some of the evidence suggests, it is clear that we have a cultural pattern in which the objects are not enough but must be validated, if only in fantasy, by association with social and personal meanings which in a different cultural pattern might be more directly available. The short description of the pattern we have is magic: a highly organized and professional system of magical inducements and satisfactions, functionally very similar to magical systems in simpler societies, but rather strangely coexistent with a highly developed scientific technology.²⁰⁷

Perhaps the place where the 'magic', in a technology obsessed culture, resides is in the trade mark.

Williams also approached trade marks indirectly in his work regarding other influential cultural vectors. In relation to television, for example, Williams identifies the formation of small, economically and socially 'separable', 'privatised' families well before enabling technology existed.

This relationship [between a family and the outside world] created both the need and the form of a new kind of 'communication': news from 'outside', from otherwise inaccessible sources. Already in the drama of the 1880s and 1890s (Ibsen, Chekhov) this structure had appeared: the centre of dramatic interest was now for the first time the family home, but men and women stared from its windows, or waited anxiously for messages, to learn about forces 'out there', which would determine the conditions of their lives. The new 'consumer' technology, which reached its first decisive stage in the 1920s, served this complex of needs.²⁰⁸

Television did not create a new way of thinking: it facilitated it. Similarly, the parlours to which Williams refers already contained (for instance) branded

²⁰⁷ Raymond Williams, *Problems in Materialism and Culture* (London: Verso, 1980), p. 221.

²⁰⁸ Raymond Williams, *Television: technology and cultural form* (Abingdon: Routledge, 2003), p. 21.

polishing products. In a sense, product-placement in the heart of homes also began before electronic mass communication devices gave it a further push. Williams rejects the idea that technological change alone, in this case the invention and then the popularisation of television, determines social change and thinking, in favour of a search for more subtle combinations, structures (economic, social and political) and events.

Trade marks bridge the gaps between technological developments. They are the consistent *content*, regardless of the technological medium, which is always in a state of flux, or 'development'. The register of trade marks which has been expanding since 1876 is a permanent structural element in our myth or magic making process. Perhaps trade marks should not be viewed as exhortations to buy things, or icons of the digital age. They are incitements to *be* things.

Williams died in 1988, one year before the collapse of the Berlin Wall and the end of the Cold War. He was concerned with a holistic and dialectical form of literary analysis: work, culture, commerce and creativity were perceived as an ecosystem in which literary output could be considered as part of the process of production and consumption. In Western society the processes of literature and art were seen as, in essence, similar to that of any other product. Today, Williams' view is confirmed, in a back-handed way, by the rise of the 'creative industries'.²⁰⁹ 'Culture' has replaced 'material' as the driver of capitalist economies.²¹⁰

²⁰⁹ Current government estimates put the value of creative 'industry' to the UK economy at £84.1 billion. See: <<https://www.gov.uk/government/news/creative-industries-worth-almost-10-million-an-hour-to-economy>> (accessed on 12/8/2016).

²¹⁰ Indeed, the relationship between trade marks and the growth of capitalism would seem to confirm Williams' suggestion that, behind the mass extinctions and inventions in our technological advancement, there lie more fundamental structures. Trade marks, through their bureaucratic connotations, embody these structures.

An Academy Award winning movie, for example, can be understood as cultural material of particular significance because it has been identified by representatives of 'industry' (the film industry) as important. The movie represents more than the views of its director or writer: its endorsement by the Academy, renders the work the product of a far bigger team than artists or crew. The Award denotes industrial approval. To some extent, both Barthes and Williams explore this trait through the downplaying of the role of the individual author or artist as autonomous cultural driver, in favour of a politicised (in varying degrees) analysis of the structures of cultural production and the text.²¹¹

Perhaps the lasting effect of these approaches has not been to kill off the individual author or artist (we live in an age where the opposite is true – successful authors and artists command huge salaries and the cult of the individual footballer/manager/artist/writer has never been stronger); rather, it has been to undermine the certainties provided by elite culture.²¹² As Jeff Wallace notes in the preface to the first edition of *Key Words*: 'after Williams 'literature' and 'culture' could never again be considered without those quotation marks; they were historically contingent concepts or, in the case of literature in particular, an abstraction from the totality of writing.'²¹³

²¹¹ Williams argues that language: 'is not a medium, it is a constitutive element of material social practice.' 'At a final level [an author's] 'individual autonomy is radically attacked and overrun' Raymond Williams, *Language and Literature*, (Oxford: Oxford University Press, 1977), p. 165 and p. 193-4.

²¹² David Beckham (EU registration 1796473), registered in 2000, was one of the first individuals to protect themselves as a brand through trade mark registration. Of course, it should be remembered that perhaps the lesson both Williams and Baudrillard want to teach us is that a sign – or a trade mark – does not necessarily mean 'exactly what it says on the tin' [UK TM 2195193 registered 21/4/1999]. Individualistic trade marks like David Beckham may, in fact, indicate, the suppression of individuality by transforming human identities into products, into simulation and simulacra.

²¹³ Jeff Wallace, 'Editorial ', *Key Words - A Journal of Cultural Materialism*, Vol 1.No 1, (1998), Page 5.

Trade marks can be understood as important elements of a matrix of cultural materialism. They represent significant elements of the dominant capitalist milieu and have an important role to play in organising both the culture we consume and that which we create.

Because a great deal of post-war critical and cultural analysis emanated from standpoints that were (in varying degrees) critical of capitalist markets, for the creative writer, the influence of trade marks on his or her thinking may appear to be rather negative. Viewed from a political standpoint on the left, trade marks can be identified as symbols which are part of a system that controls consumption and creativity by encouraging more of it. For the creative writer, a trade mark can be seen as some kind of symbol of compliance – a brand, in the original sense of the word – burned onto the author's hide so as to prevent him or her escaping from the herd.

There is a rather obvious alternative argument. Why should the collapse of communism and the success of global capitalism be regarded as evidence of failure? For writers who produce fiction for markets (something all writers at least since Cervantes have done), an understanding of the nature of those markets, through analysis of trade marks, can only improve the chances of commercial success.²¹⁴

²¹⁴ The Author's 'Preface to the Reader' of *Don Quixote* can be seen as an ironic sales pitch, praising the reader and diminishing the value of other works in the market and, indeed, the market itself: 'In conclusion, let thy project be to overthrow the ill-compiled machina and bulk of those knightly books, abhorred by many, but applauded by more; for, if thou bring this to pass, thou hast not achieved a small matter.' Cervantes Saavedra, Miguel de. *Don Quixote, Part 1*, translated by Thomas Shelton. Vol. XIV. The Harvard Classics. New York: P.F. Collier & Son, 1909–14; Bartleby.com, 2001. www.bartleby.com/14/. (accessed 16/8/20116).

A single market

Capitalism no longer competes with Soviet communism (or, for that matter, with Chinese communism). Culture is free from a right/left two-sided tussle of the Cold War. In Europe, division, represented physically by the Iron Curtain and mentally between the two ideologies of communism and capitalism, was supported by two nuclear superpowers who achieved control through a standoff offered by 'mutually assured destruction'. Division was a principle of governance. Division was structurally influential.

Richard Sakwa identifies a void left by the removal of the divide, particularly pertinent to the object of his enquiry – Russian and Ukrainian history.

Unlike Germany and Japan in 1945, who acknowledged that they had been at fault and used the moment as the starting point of their transformation into Western-style liberal democracies, Russia did not in the least consider itself a defeated power [in 1989]. This did not prevent the alleged victors after the Cold War believing that the Soviet collapse vindicated not only the institutions that had been created to wage the struggle but above all the ideology in whose name it had been fought. This gave rise to the triumphalism of the 'end of history', which effectively replaced one ideology with another, namely the belief in the inexorable advance of liberal democracy and the 'European choice'. Marxist historicism was replaced with liberal historicism, the belief that the telos – or purpose – of history was knowable. This rendered all those who resisted it, in some way, fundamentally evil, thus closing down the space for pragmatic debate, diplomacy or even common sense.²¹⁵

In the later years of the twentieth-century and the early years of the twenty first, a new reality, free from the bureaucracy of the Cold War, has taken global control: consumerism. The only powerful objectors to global consumerism are

²¹⁵ Richard Sakwa, *Frontline Ukraine* (London: I B Tauris, 2015), p. 2.

found in Islamic State (Daish), North Korea (at the time of writing) and Afghanistan. Consumerism is now a basic social and economic norm which is embraced by everyone who isn't identified as insane or a terrorist. Scepticism, pragmatism, doubt are, as Sakwa puts it, perceived as 'evil'. Without the influence of nuclear-facilitated division, energy has been withdrawn from cultural debate, revealing a sinister consumerist hegemony.

On the one hand, as Sakwa points out, an increasingly simplistic reliance on a version of capitalism within which criticism is regarded as subversive – not merely in a political way, but in a deviant, incoherent, mad, unpatriotic, terroristic way – presents obvious problems. Here, consumerism's rise seems equivalent to what we now might call a Darwinian 'truth' – not so much a scientific proposition any more, but a semi-mythological doctrine which cannot [and should not] be refuted.²¹⁶ Consumerism has become a tautology – because it is successful it is with us; it is with us because it is successful. On the other hand, it is also possible that the freedoms afforded by consumerism, offer writers boundless scope for free expression. Donald Trump, perhaps the ultimate human trade mark, can, in theory, be outvoted.

Culturally speaking, trade marks have significant power. Your biscuit, which you may now be regarding with some suspicion, could be a fascinating, creative, valuable, ludic symbol: something which creative writers may experiment with (and profit from) fruitfully. Or, it may be a chocolate coated mental straightjacket. It may

²¹⁶ Contradicting Descartes, Keats and Popper all of whom, stressed the importance of doubt, negativity and falsification, respectively as central to the nature of being. Popper states, regarding creativity and 'truth': 'It so happens that my arguments in *The Logic of Scientific Discovery*, are quite independent of this problem. However, in my view of the matter, for what it is worth, is that there is no such thing as a logical method of having new ideas, or a logical reconstruction of this process. My view may be expressed by saying that every discovery contains 'an irrational element', or 'a creative element.' See: Bryan Magee, *Popper* (London: Fontana/Collins, 1973), p. 32.

be a self-replicating meme, mutating like a virus, re-inventing itself in a history-less, timeless, parody of art and culture encouraging us all to do the same. It is a story that looks like a story, reads like a story, sounds like a story – but is not a story. It has no end. It is a kind of drug.

iii/ BeliefFreedom

The idea that some creative writers and artists work outside or even ahead of the dominant culture of their time, is (paradoxically) not new. In many ways, the concept of a creative writer as one who seeks a highly personal, 'new' response to stimuli characterises the subject of creative writing. The Romantic image of an artistic writer is that he or she is touched by sparks of passion and inspiration that sets him/her apart. Through unique gifts the artist may fashion 'new' art, 'new' responses to it and, in a sense, 'new' beliefs. At the same time, Romanticism may have had a more mechanistic influence on our attitude to creativity and belief. The word Romantic is not a trade mark; however it does seem to denote both a way of creating and looking, maybe even a brand. Romanticism underscored the commercial success of literary production of the nineteenth-century and it profoundly influences our idea of what 'creative' writers do today.²¹⁷

A less marketable, perhaps, but no less important idea, linking concepts of creativity and art is the aesthetic. The well-known line from Keats' poem ode on a Grecian Urn, 'Beauty is truth, truth beauty' – coupled with Keats' emphatic endorsement – 'that is all Ye know on earth, and all ye need to know' is a riddle that

²¹⁷ See Wordsworth's preface to *Lyrical Ballads* (1802), for example: 'I have said that Poetry is the spontaneous overflow of powerful feelings: it takes its origin from emotion recollected in tranquillity: the emotion is contemplated till by a species of reaction the tranquillity gradually disappears, and an emotion, kindred to that which was before the subject of contemplation, is gradually produced, and does itself actually exist in the mind. In this mood successful composition generally begins, and in a mood similar to this it is carried on; but the emotion, of whatever kind and in whatever degree, from various causes is qualified by various pleasures, so that in describing any passions whatsoever, which are voluntarily described, the mind will upon the whole be in a state of enjoyment.' William Wordsworth, and Samuel Taylor Coleridge, *Lyrical Ballads* (Abingdon: Routledge, 2013). p. 286.

condenses an essence of aestheticism into a slogan.²¹⁸ As well as neatly summarising the inherent difficulties in understanding both beauty and truth, by expressing them as a tautology; by giving the best line to an urn, and then commenting upon it, Keats provides us with two characters. There is a dialogue between the urn and the urn appreciator. Perhaps, according to Keats, these ideas: beauty / truth as timeless, inscrutable essences, and interpretative dialogue as the means of realising them, characterises the aesthetic. Writer/artist and interpreter must, in a sense, work together to enter the realm of the aesthetic, a place which could be described as replete with the timeless, inspirational uncertainties of doubt, negativity and falsification.

Concepts of art as a brand or product in contrast with art as aesthetic discourse are acted out in 2015's Oscar winning movie *Birdman*, the story of a middle-aged Hollywood star, Riggan Thompson (played by Michael Keaton who, significantly, in an earlier film – in 'real life' – played *Batman*) hell bent on escaping from the shadows of his great success. Riggan, as the comic book character Birdman, achieved global fame and fortune and, consequently, found himself carrying the artistic equivalent of a dead albatross. From Antarctica to Algeria he was known as Birdman. He was not himself. He was a trade mark. He had a global existential 'issue'. The film explores the tipping point, the point when Riggan stops being Birdman and tries to re-impose his own identity on his comic book alter-ego. Thompson's predicament isn't particularly unusual – his problem is something that many within the sophisticated audience the film is aimed at may identify with. He's trapped by his job, his culture, his surroundings, and his associates. He's not free. He's not himself. What is unusual is that his alter ego, Birdman, is a trade mark,

²¹⁸ *John Keats: The Complete Poems* ed. J. Barnard (London: Penguin, 1977), p. 344.

roughly equivalent to *Batman*.²¹⁹ *Birdman* is a film about a man who thinks he's a trade mark.

Audiences across the globe are attuned to this kind of corporate, existential problem. However, the film didn't only tell the story of how Thompson escaped from his industrial identity to become his true self. Instead the focus was also on art – how could Riggan, someone who was well aware that he had grown into a cultural product, ever express a true artistic thought? How could he break out of the cultural straight-jacket he'd strapped himself into? Early on in its development, the screenplay refers to Roland Barthes, foreshadowing the multi-layered nature of the story.

The story starts in the theatre and Riggan Thompson is already striking out to make a new name for himself as a real actor, an *artist*. Problems pile up as the play within the play goes wrong. One of his actors is terrible. Riggan finds a replacement who is good at acting, but even less sure who he is than Thompson himself. Riggan's ex-wife, his daughter, his girlfriend, his accountant, and a hostile theatre critic circle around him as he revolves around the stage, creating a movie whose themes of authenticity and identity are articulated by the stage play in development. Riggan's commitment is tested as his character is stripped down to essentials (he even loses his clothes). Finally, he delivers a masterful performance on stage which receives unexpected critical acclaim, but he kills himself in the process. Even in death, Riggan cannot escape Birdman. Birdman flaps into his

²¹⁹ Earliest UK trade mark registration 12th Dec 1944 – *Bat Man*  UK TM no. 879197. See: UK IPO Trade Mark Search database <https://trademarks.ipo.gov.uk/ipo-tmcase/page/Results/1/UK00000633526> (accessed 11/8/2017).

dreams and his hospital ward. Finally, Riggan Thompson flies out of his hospital window. He is Birdman.

A pivotal figure in this story is the theatre critic Tabitha Dickinson whom Riggan meets in the Rum House, a bar next to the theatre. After Riggan has quoted Flaubert to her, this is how she responds: 'I'm going to destroy your play.'²²⁰

Elite art

The Old World elitist snobbery, as represented by the unappealing Tabitha Dickinson, is something Riggan Thompson can't stomach. But he must get her on side if he is to achieve his ambition of becoming an artist, because Tabitha is The Gatekeeper. If only Riggan could realise, before it's too late, that the critic – apart from seeming stuck-up, crude, cruel and more than a little snobbish – was fallible, and that his wish to impress her was driven by his own snobbish desire to join a self-proclaimed cultural elite who, without justification, belittle his work.

Tabitha Dickinson was perhaps the kind of person Roland Barthes was writing for when he created his *Mythologies* back in 1957 – an educated, intelligent, opinion-former, confident that her cultural qualifications and experience are sufficient to enable her to make valid pronouncements on the nature of culture for the good of everyone else. Barthes' point, that the 'ordinary' objects and activities like boxing, or commodities like wine and washing powder, may contain their own contemporary myths; that they may require the same interpretive skills, the same

²²⁰ From *Birdman*, dir. by Alejandro González Iñárritu (Searchlight Pictures, 2014). In the movie the final beat of scene 48, in which Shakespeare (enacted by the barman) evidences great art, does not appear. This may be because 'true' art didn't 'work'. See: appendix IV for transcript of the full scene (p. 211). Available online at: <<http://www.imsdb.com/scripts/Birdman.html>> (accessed 11/8/2017).

breadth of knowledge, the same nuanced stylistic skill to fully understand and describe as ‘genuine’ works of art, doesn’t threaten the conventions of art criticism represented by Tabitha Dickinson; it extends its scope. Roland Barthes encouraged critics to see mythology in consumerism and, at the same time, he ridiculed it. Like Tabitha, he was a gatekeeper.

If only Riggan Thompson had realised that Birdman was a creature who already had a place in the taxonomy of art.²²¹ Classified in Ray Lichtenstein’s Pop Art family, Birdman the trade mark always had artistic merit. Riggan may have created a great play but in the end it turned out that his alter ego Birdman was already *real* art. The fact that Riggan Thompson blew his brains out before he realised this is indicative of the power of the elite artistic culture and Riggan’s own desperate desire to trust it. The message is clear: for those in search of the new avant-garde, don’t sit in bars trying to figure out how to impress bitter and twisted critics with products you think they’ll like – embrace the things you like. Your art is just as good as everyone else’s. In the end Birdman, rather than the play, has true artistic value – as Keaton steps out of the hospital window and flies down, not up, he moves his audience.

Birdman promotes a familiar North American attitude: art is for everyone and, with a Warholian trade mark twist, it makes money.²²² In the case of *Birdman*,

²²¹ ‘The taxonomy of art’ refers to the categorisation of elite art into knowable subsets: for example, ‘cubist’, ‘post-modern’, ‘dada’, ‘new objectivity’, ‘futurist’ and ‘pop art’. This nomenclature facilitates art and literary criticism, it also helps delineate subject matter and creates a jargon which may also differentiate between those who can ‘talk the talk’ and those who cannot. Although such structural taxonomies enable students and critics to cut to the chase by exchanging *a posteriori* concepts, without continually having to argue points from their origin, over-reliance on the classification of ideas may mitigate against creativity by distancing source material from its observers and/or linking concepts accidentally.

²²² Riggan Thompson’s view chimes, up to a point, with Tolstoy’s concept of ‘universal art’ in which ‘individuality, clarity and sincerity’ are deemed to be essential features of art. Thompson’s dislike of sophistry equates with Tolstoy’s rejection of artifice. However,

the mythology of popular trade mark culture is eulogised: the film's effects and spectacular use of the backstage world of a theatre; its references to the making of new art with its own mythology (the play); the mythologies of Riggan Thompson's family; Birdman – the trade mark; Riggan's death and resurrection; his pre-set trajectory, all explore our relationship with consumerism. Does it trap us or frees us? Most importantly, the film explores consumerism and a trade mark's myth-making potential. As *Birdman*, Riggan may live forever. In this consumerist version of magical realism anything is possible – trade mark dreams really can become real.

The role of the critic

Bourgeois art is exclusive and elite – consumerist art is inclusive. There is a kind of semi-permeable membrane between the two. Experts like Tabitha Dickinson are the only people qualified to perform the osmosis of art validation and Tabitha shows that they are not *all* bad.²²³ To date (although Tabitha is too stuffy to realise it) the consumer age has been a bonanza time for cultural specialists. Digitisation, globalisation, mass dissemination – they all require expert interpretation. As Raymond Williams demonstrated when discussing television, we

Tolstoy's rejection of the relationship between financial reward and art distances Riggan from his view of art as a basic, universal mode of communication. 'Real art, like the wife of an affectionate husband, needs no ornaments. But counterfeit art, like a prostitute, must always be decked out. The cause of the production of real art is the artist's inner need to express a feeling that has accumulated, just as for a mother the cause of sexual conception is love. The cause of counterfeit art, as of prostitution, is gain. The consequence of true art is the introduction of a new feeling into the intercourse of life, as the consequence of a wife's love is the birth of a new man into life. The consequences of counterfeit art are the perversion of man, pleasure which never satisfies, and the weakening of man's spiritual strength.' Leo Tolstoy, *What is Art?* Translated from Russian by Maud, A., (Replica Books, 2001), pp. 169-172.

It seems that, accompanying every definition of art, there is a gatekeeper. Andy Warhol put things differently: 'Money is the MOMENT to me. Money is my MOOD.' Andy Warhol, *The Philosophy of Andy Warhol* (London: Penguin Classics, 2007), p. 136.

²²³ Although Tabitha Dickinson isn't a very warm character, she does redeem herself by supporting Riggan's play.

need not kid ourselves that everything in our material culture today that claims to be ‘new’ really is. Even the Romantic desire for the new may represent a cyclical historical process, a kind of intellectual perpetual motion machine of market regeneration represented by a term like ‘New Romantic’. Consumers, critics and producers of art have been working in the field of mass production for three centuries and our digital environments can be seen in the context of a well-established commercial cultural continuum.

Notwithstanding the extraordinary variety of artistic output today, changing technologies and a complex history of ‘movements’ during the development of consumerism, there remains a connection between today’s curators, critics and academic specialists and those of the elite salons of Paris during the Third Republic, the coffee houses of London in the Georgian era, the courts of Italy during the *Cinquecento*. The long-standing principle remains: the quality of artistic and literary production is decided by experts. The credibility of these decisions makes its creation and the consumption via a market possible. Artist, writer, critic and consumer are involved in an ongoing interplay where the separable aesthetic and commercial values of culture meet, are decided and are maintained. The contribution of an artist like Duchamp, or a critic like Barthes, was to take part in the unending task of updating the process – if you like, of deciding upon the nature of ‘newness’.²²⁴

Today, the critic remains an essential part of our cultural, quality control process. Because few of us can tell whether objects are ‘genuine’ or not, because

²²⁴ Professor Kevin Mills explored the holistic relationship between creator and critic in establishing the ‘new’ in Professor Kevin Mills, ‘What’s new to speak?’ keynote lecture in ‘*Writing Between the Lines: Creative Writing Postgraduate Symposium*’, Cardiff Metropolitan University, September 2016 arguing that ‘Creativity is always, in a sense, blasphemy;’ ‘newness consists in relation to what went before’.

digital culture is so adept at replication and dissemination, because everybody can read, instantly, everything anyone writes anywhere in the world, literature and art require interpreters. As Rónán McDonald says, changes in communication techniques and popular culture have not made the people who make sense of it, who judge it, redundant:

Perhaps the critic is not dead, but simply side-lined and slumbering. The first step in reviving him or her is to bring the idea of artistic merit back to the heart of academy criticism. 'Judgment' is the first meaning of *kritos*. If criticism is to be valued, if it is to reach a wide public, it needs to be evaluative.²²⁵

Creative industries

The importance of 'creative industries' to global economic performance means that an understanding of what makes art and literature valuable is needed for political as well as cultural reasons. The increasingly market-orientated focus of criticism, curation and cultural expertise can be seen in the field of creative writing. A close proximity between 'literature' and 'creative writing' and a blending of the objectives of the critic/curator and the writer are characteristics of creative writing teaching in universities. It is noteworthy, therefore that the disciplines of English Literature and Creative Writing are strengthening their market position through partnerships, and the introduction of joint degrees.

At the same time, trade marks have become more popular and their use has spread generally into service industries and specifically into education (as we have seen) and communication. Similarly, trade marked organisations not previously known as broadcasters have, through the internet, become them.

²²⁵ Rónán McDonald, *The Death of the Critic* (London: Continuum, 2007), p. 149.

Content creation, building the fictions for brand narratives, is a significant revenue-stream for writers. In this 'fictionalised' market, criticism itself, once a viewing platform from which those who understood 'elite culture' could map the terrain, has become a trade marked, branded product. Critics cease to be Tabitha Dickinsons. They no longer fulfil Roland Barthes' role, explaining culture and art, as abstract ideas, to a (largely, but not exclusively) bourgeois audience, who share the belief that contemporary 'art' is at the experimental 'new', 'cutting edge' of things. 'Avant-garde' has become a brand.

Critics themselves are commodified because the institutions and publications they work for are identified and (to some extent) defined by their trade marks. In this market place, criticism exists within a branded, trade mark-certified culture. Approaching literary texts from a Marxist point of view, Terry Eagleton suggested that cultural modes of production which developed in the mid-nineteenth-century (through innovation – the steam printing press, the organisation of markets – through advertising and consumerism and through capital – the nascent creative industries) formed what we now describe as 'literature'. For Eagleton, the literary text was a product of economic and ideological factors. 'Anything can be literature and anything which is regarded as unalterably and unquestionably, literature – Shakespeare for example – can cease to be literature.'²²⁶

Paul March-Russell's description of the position of the individual writer in this landscape captures a sense of insecurity: 'Writers were caught between

²²⁶ Terry Eagleton, *Literary Theory: An Introduction* (Oxford: Wiley-Blackwell, 2004), p. 9.

fulfilling their own personal and artistic beliefs and the needs of the production process'.²²⁷

From the point of view of the critic, as Rónán McDonald says in *The Death of the Critic*, the effect of Eagleton's arguments [and others] was profound. 'The very word 'Literature' accrued a bad political odour precisely because of its association with the traditionally [and therefore questionably] esteemed.'²²⁸

Perhaps, as we consider the relationship between creative writing and consumerism today, it can be argued that Eagleton's emphasis on the role of markets in the creation of literature is skewed (from our point of view) by the fact that he 'understood' those markets from a Marxist point of view. Literature can also be understood in the context of consumerism inasmuch as today, as trade marks move further and further into our lives, our ability to produce work which is not in some way predicated upon a trade mark – the symbol of consumerism – is compromised. The apparent dominance of markets, cultural materialism and trade marks do not, however, mean that creative writing, creative story making, has come to an end. Perhaps the hegemony of trade mark culture liberates the creative thinker.

Thus, despite McDonald's assertion that critics and criticism are as valuable today as they ever were, the role of the critic may have mutated so that it is not so clearly focussed on the understanding of 'art' as a stand-alone concept. Just like writers, a critic must now perform the additional function of sustaining the brand narrative of his or her trade mark. Traditionally, literary specialists were able to view the market from 'an ivory tower'. Today, as demonstrated at Cardiff

²²⁷ Paul March-Russell, *The Short Story, an Introduction* (Edinburgh: University of Edinburgh Press, 2009), p. 67.

²²⁸ McDonald, p.26.

University, the university's buildings (in this case, a twelve storey tower near the city centre) has the university trade mark emblazoned on the top. The tower supports a trade mark.

The end of invention

The triumph of consumerism in a society where the value of the 'creative industries' passed the £100bn mark in 2017 might suggest that Western societies are full of happy, creatively employed people.²²⁹ But instant global communication, more products, longer lives, cheaper holidays, seem – at least for the Riggan Thomsons of this world - to produce an unexpected reaction. They make us sad; grumpy, even. Slavoj Žižek in the opening chapter of *In Defense of Lost Causes* refers to an 'atonal world' in which 'the very injunction to enjoy, in other words, the (often imperceptible) shift from the permission to enjoy to the injunction (obligatory) to enjoy sabotages enjoyment, so that, paradoxically, the more one obeys the superego command, the more one feels guilty.'²³⁰ The problem with capitalism isn't external, it is internal and psychological. Even apparently innate motivations like pleasure or enjoyment are perverted by our fetish for more and more ownership. In fact, the masochistic sense of unfulfillment we experience when we fail to realise the promised pleasures our culture offers us extends from the micro (New Year's Eve celebrations seem simultaneously to wrap together a promise of enjoyment with the inevitable lack of it) to the macro (paying off a

²²⁹ See: *Creative Britain*, Report by the Centre for Economics and Business Research Ltd for Falmouth University (2014) estimate the value of the UK's creative industries at £100bn in 2017.

<https://www.falmouth.ac.uk/sites/default/files/download/falmouth_cebr_report_final.pdf> (accessed 19/2/2018).

²³⁰ Slavoj Žižek, *In Defense of Lost Causes* (London: Verso, 2008), p. 30.

mortgage). Žižek's analysis of the problem, relying on Jacques Lacan's psychoanalytical analysis of, in this case, 'jouissance', presents our consumerist cul-de-sac, not so much as a sweet shop full of goodies, but more as a pharmacy stuffed with pain killers.²³¹ Consumerism, for Žižek, is a symptom of neurosis. Shopping is a form of collective self-medication. Since it is marketed as a trade marked product, fiction (Žižek frequently refers to fiction – particularly movies – in order to articulate his own stories) as a product is packaged with trade marks or controlling ideas, most of which leave us in an unsatisfied state, craving more. Our society is predicated on the creation of newness, but it is structured never to deliver.

Slavoj Žižek's status as a an icon for non-conformity (if an icon can be a bearded man in a T shirt that looks as if it may have been bought before the Iron Curtain came down) derives from two sources: his academic prowess and his charm as a story teller. Žižek's subject matter – a critique of global consumer culture based on an interlinked array of influences including politics, philosophy, psychoanalysis and cultural criticism – is rendered popular across the world by the fact that he characterises and performs his arguments. He does not merely write them down (in vast amounts): he acts them out. As a public speaker/YouTube/TV/cinematic star he is a supreme, transgressive communicator, a story-teller who undermines the dry, besuited, linguistically dead world of corporate communication by telling dirty jokes, being politically incorrect, twitching, dribbling and mumbling so that, to hear him, you have to lean forwards and listen carefully. This transmutation from theory into action is central to Žižek's performance – it explains why he is the only

²³¹ Tony Myers defines 'jouissance' as: 'Enjoyment, or jouissance, is to be distinguished from mere pleasure. It is the pleasure beyond mere pleasure itself – a pleasure that has an orgasmic change, indexing the point where pleasure becomes pain. As such it expresses the kind of satisfaction to be garnered from picking at your own festering wound, a wound which Žižek advises, neatly symbolises the notion of symptom.' Tony Myers, *Slavoj Žižek* (Abingdon: Routledge, 2003), p. 86.

Hegelian, Lacanian, Marxist with more than 250,000 views on his You Tube videos. It is also the bridge that links Žižek's complex metaphysical views with the 'real'. For Žižek acting, or rather, a certain kind of acting, changes things (the present, the future and the past).

Žižek writes: 'An act does not occur *within* the given horizon of what appears to be 'possible' – it redefines the very contours of what is possible (an act accomplishes what, within the given symbolic, universe appears to be 'impossible', yet it changes its conditions so that it creates retroactively the conditions of its own possibility').²³² This description is significant for creative writers, because it outlines one view of a process creative writers are very interested in: the formation of new stories and their capacity to act retroactively, 'framing' not just history, but individual emotional and psychological sensations. In *Slavoj Žižek: Live Theory*, Rex Butler explores the idea a little further;

There is always an element of the unexpected and unpredictable associated with the act, of something not foreseeable within the current conceptual horizons, and this means that if the act necessarily arises from within the old symbolic order it cannot entirely be named or judged within this order, its very aim is to redefine what is possible, to change the criteria by which it will be understood. To this extent, the act, in so far as it is successful, can only be spoken of in its own terms. It transforms the symbolic context, so that, after it, it does indeed seem possible.²³³

The same emphasis on the significance of the act or 'acting' can be found in Ian Parker's *Slavoj Žižek : A critical introduction*.

For Žižek , the underlying primary position of the subject is as hysteric and capitalism is a form of hysterical social bond. It incites complaining and

²³² Judith Butler, Ernesto Laclau and Slavoj Žižek, *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left* (London: Verso, 2000), p. 121.

²³³Rex Butler, *Slavoj Žižek, Live Theory* (London: Continuum, 2005), p. 67.

questioning about what is being done to us and where we are in all this, as men or women. And this hysterical condition of the subject as historically located in certain economic conditions does not so much provoke a psychotic *passage a l'acte* as 'acting out'. The crucial difference between the two kinds of act is that a *passage a l'acte* – which Žižek takes as his exemplar for an act that will escape immersion in a symbolic system that has come too overwhelmingly close – is completely outside the frame of the Other. Acting out, on the other hand, is always staged for the Other – a display of hysterical challenge that accuses and refuses. So, when he accuses and refuses his readers he also does so as someone who knows something more than ourselves about what we enjoy. That is why it does not need to make sense, and then it could be said that Slavoj Žižek is acting out, for us, and that is why we like it.²³⁴

Žižek's description of how an act can, at the same time as creating a new view of things, re-align that past so that the differential potential once visible in an act itself almost disappears, is relevant to creative writers who, to some extent, routinely try to pull off the same trick through story-telling. At the end of the good story things will have changed, during the journey, the past will have been reconfigured – not really forgotten it will be re-booted; transformed.

The disappearance of veracity in the passage of time, or its antithesis, the re-framing of meaning through a new story, is both a familiar theme and a tool for fiction writers, especially those who write scripts, for whom the literal passing of time (pace) is something they strive to manipulate. Moreover, the fact that on completing a new work of fiction a writer will, inevitably, undergo a further alteration, swapping a table thumping euphoria, characterised by the (rarely used) words 'The End' for a more considered inquiry into an experiment that inevitably went wrong, chimes with Žižek's emphasis on the act as a doomed yet constant

²³⁴ Ian Parker, *Slavoj Žižek: A critical introduction* (London: Pluto Press, 2004), p. 127.

imperative. The only serious response to the built-in obsolescence of one act is to act again. Writers know this. The end is the beginning.

Zižek presents himself as an idiosyncratic outsider and then subverts this impression. Žižek demonstrates or acts, that it is not Žižek who is the odd one out – it is everyone else – and in so doing, he uncorks doubt. He performs our post-modern predicament, by implying through his story telling techniques, almost through his trade mark beard and T shirt, that the multitude – his audience – is the *real* misfit. We're not being duped into an undemocratic, self-destructive, unfair, uncreative, creative cul-de-sac; we're going there voluntarily, knowingly, as if we want to.²³⁵

For Žižek the contrariness at the heart of our motivation (why, for example, Coke is not 'the real thing') is due to the absence of 'the big Other', the myth that holds us together.²³⁶ The important thing about the big Other is not so much that everybody truly believes in it, it is that everyone *agrees* to believe in it (or at least not to *disbelieve*). This symbolic glue is described by Žižek as 'symbolic efficiency'.²³⁷ As bureaucratised symbols of capitalism, it could be argued that the attraction of trade marks is, in part, due to the fact that they characterise, or make 'real' this symbolic efficiency. Here the office, the behind-the-scenes register, the trade marks 'examiners', the 'officers' and judges, the culture of careful, almost religious rule-bound decision making brings the big Other reassuringly close to us. Perhaps

²³⁵ . *Titanic* is a not a film about 'a ship hitting an iceberg'. Leonardo DiCaprio is a 'vanishing mediator' who gets a spoiled little rich girl back on the right road. After he's served his purpose, he disappears beneath the surface of the North Atlantic. Slavoj Žižek, *In Defense of Lost Causes* (London: Verso, 2008), pp. 57-58.

²³⁶ 'The big Other is thus a kind of collective fib or lie to which we all individually subscribe. We all know very well that the emperor is naked in front of us (in the Real) but we nonetheless agree to the deception that he is fact wearing clothes (in the Symbolic).' Tony Myers, *Slavoj Žižek* (Abingdon: Routledge, 2003), p. 49-51.

²³⁷ See: Slavoj Žižek, *For They Know Not What They Do: Enjoyment As A Political Factor* (London: Verso, 2002).

the global reach of the ® symbol is due, in part, to its implication that the big Other is still with us.

Today, argues Žižek, the problem is that ‘there is no big Other’, or, to put it in trade mark terms: we’ve lost our faith in ®.²³⁸ For Žižek, life in the postmodern capitalist, consumerist world has become a facsimile of the real thing because, in a sense, choice through a kind of infinite, digitised repetition has been exposed as meaningless. As Tony Myers puts it: ‘we are all desperately free to do whatever we choose’. We are all on our own, making up our own rules, inventing lonely existences in which ‘sensual gratification has been elevated to the status of an official ideology’. ‘The freedom of postmodernity,’ adds Myers, ‘is analogous of the freedom of speaking a language without a grammatical framework. We have no rules to follow or interpret.’²³⁹

Rex Butler puts this psychological deficiency, or symptom, at the heart of Žižek’s analysis of our post-modern world; ‘This symptom is for Žižek a way of bringing together a long-running problem for progressive politics – the specifics of individual psychology with a wider analysis of the social.’²⁴⁰

For Žižek, the post-modern world presents the post-modern human being with an array of economic, political, social and psychological de-humanising problems. Žižek’s attempt to understand belief and create belief, his use of story as a tools in that process and his focus on the interpretations of the stories we consume in our popular culture, enable creative writers not so much to think

²³⁸ Here Žižek declares emphatically that the big other has gone away. See: excerpt <<https://www.youtube.com/watch?v=VNE7pK0kSxc>> (accessed 19/8/2016) from *The Pervert’s Guide to Ideology* dir. Sophie Fiennes (P Guide Productions 2013).

²³⁹ Tony Myers, *Slavoj Žižek* (Abingdon: Routledge, 2003), p. 56.

²⁴⁰ Rex Butler, *Slavoj Žižek: Live Theory* (London: Continuum, 2005), p. 3.

‘outside the box’, but to recognise the fact that there might be a hitherto unseen box somewhere out there in the first place.

Žižek’s interest in Lacan and his emphasis on the nature of symbols is also relevant to creative writers. The writer’s tools *words*, contain the symbolic order in the same way that mirrors contain their onlookers. They do not blink out their empirical meanings like reliable conceptual lighthouses: meaning morphs as we and others decode it and as its ripples refract in the pool of resonances we call ‘real’. For the writer, or the organiser of words, the knowledge that the reader will re-assemble them and engage in a symbiotic exchange is integral to the process of writing. Barthes’ differentiation between ‘scriptible’ or ‘lisible’ text turned writing ‘scriptibley’ into a technique.²⁴¹ Writers also know that fiction contains a truth of its own, defined by its own mythology.²⁴² If we fail to consider Žižek’s argument, we may, particularly those of us who produce fiction that is trade marked, be talking to ourselves, saying nothing at all by continually producing predictable generic, trade-mark-friendly work, for a world in which only predictable generic, trade-

²⁴¹ For example, when discussing her short story collection *Married Love*, Tessa Hadley, when asked about the techniques of short story said: ‘It used to be easier because what you did was do something spectacular like pull a rabbit out of a hat...’ Today ‘good short stories don’t tend to do that... It doesn’t resolve on a tonic chord, it should become something sounding and left over and yearning at the end.’ This rejection of harmonic completion in favour of unresolved chords which the reader can explore exemplifies a technique of interactive ‘scriptible’ writing. *Book Club*, Radio Programme. BBC Radio 4, TX 4pm, 4/10/2015. Tessa Hadley interview.
<<https://www.bbc.co.uk/programmes/b06f54rs>> (accessed 5/3/2018).

²⁴² These are the layers of stories put down over time, a narrative version of archaeological stratigraphy, which means that; the stories on top – the ones we are laying down – inevitably rest upon the ones that went before.

mark-friendly work can exist.²⁴³ As, Tony Myers puts it: ‘The demise in symbolic efficiency leaves the post-modern subject in a state of narcissistic self-conferral.’²⁴⁴

For the creative writer, Žižek’s analysis of our consumption-oriented psychology calls into question our basic assumptions. Politics, the market, publishing, the media, the houses we live in, the motorways we build, the libraries we close, the banks we subsidise, the power stations we pay for, the schools we avoid, the schools we desire, the diseases we fear, the writers we value, the stories we write: everything, including creativity, is pretence. The art of creative writing becomes pretence. It is not creative. How can it be creative if it is predictable?

In his quest for belief Žižek explores the – as he sees them – moribund structures that underpin our stories in search of vitality. If we feel unhappy without a big Other, can we make a new one? What makes us happy? Are we really, deep down, only happy when something stops us being happy? Like a fiction writer, Žižek seems to want to make meaning (or perhaps, to inculcate a way of thinking that creates meaning which he approves of).²⁴⁵ The paradox fiction writers routinely

²⁴³ For example, Žižek (following Lacan) uses the term ‘master-signifier’ to describe controllers of ‘the symbolic’ order: ‘Our descriptions do not naturally and immutably define the symbolic order – things in retrospect begin to resemble their description. Thus, in the analysis of ideology, it is not simply a matter of seeing which account of reality best matches the ‘facts’, with the one that is closest being the least biased and therefore the best. As soon as the facts are determined we have already – whether we know it or not – made our choice, we are already within one ideological system or another.’ From Butler op. cit. P 131 - p. 31

Žižek frequently cites the use of the term ‘Jew’ by the Nazis in Weimar Germany: ‘the Nazis provided a single agent which accounted for it all – the Jew, the Jewish plot. Therein lies the magic of the Master: although there is nothing new at the level of positive content, ‘nothing is quite the same’ after he pronounces his word. Slavoj Žižek, *The Parallax View*, (Cambridge MA: MIT Press, 2006), p. 37.

²⁴⁴ Myers op. cit, p131 - p. 59. The only alternative is the ‘act’, a revolutionary act ‘giving birth to a new Symbolic Order’.

²⁴⁵ ‘You cannot be Žižekian, and only Žižek can be Žižek’. ‘The concepts he works with are borrowed and distorted before they are applied and transmuted into something else, and something slightly different happens each time they appear. This is why there are no specific ‘Žižekian’ concepts that could be outlined in a glossary guide to this work.’ Ian Parker, *Slavoj Žižek, A Critical Introduction* (London: Pluto Press, 2004), p. 10.

work with is the fact that fiction calls into the realm of the 'real' material that didn't exist until the writer thought of it. The challenge creative writers claim as their own is the creation of new work – work that hadn't been conceived of before. Žižek's suggestion, that this is more or less impossible, without subverting (for example) the world symbolised, entitled and narrativized by trade marks, is relevant. It is why, if Ridley Scott ever did make a film about trade marks, he would call it 'Twister Street' and we would be able to guess the plot without watching it. We would all be engaged in an utterly predictable act or trade mark cultural production and consumption. Žižek's take on much of our fiction, one that he incorporates into his performance, is that it is predictable – not creative. Twister Street has already been made. Our dreams are parts of defunct symbolic efficiency.²⁴⁶ This is bad news for 'creatives' and 'newness'.²⁴⁷

Transformation characterises the process of fiction writing. Žižek's interest in mutability, or (in our post-modern context) the illusion of mutability, coupled with his identification of action as central to creativity suggests that Žižek might, in part, be viewed as a creative writer – one who feels inspired to make believe by telling stories.

²⁴⁶ McKenzie Wark quotes a Lettrist slogan from Potlatch, the 'information bulletin of the French section of the Lettrist International': 'Remember you are sleeping for your boss!'. The twenty-first century version of this might be: 'Remember you are dreaming for your boss!' McKenzie Wark *The Beach beneath the Street* (London: Verso, 2013) p. 23.

²⁴⁷ Perhaps one of the reason why Government is so supportive of 'creative industries' is because they are predictable and, perversely, not 'creative'.

False proofs and true stories

According to Žižek, one of the most important causes of our product-fetishized predicament is our inability to articulate an alternative to something we already do not fully believe. As Paul Taylor puts it:

We pretend to believe that money made of paper/bytes is actually worth the physical goods we buy with it and that commodities have special non-physical properties. Thus, once again in a reversal of the primitive who publicly believes, but is privately cynical, although claiming that we do not *really* believe that brands are special, contemporary consumers nevertheless continue to routinely pay orders of magnitude above the material value of a T-shirt if it is adorned with a logo such as a Nike swoosh. Žižek's key point is that conscious disavowal contradictorily co-exists with practical acts that embody belief.²⁴⁸

'At the level of belief,' argues Taylor, 'key capitalist ideas - commodities are animate; capital has a quasi-natural status – are repudiated, but it is precisely the ironic distance from such notions that allows us to *act* as if they were true. The disavowal of beliefs allows us to perform the actions.'²⁴⁹ This 'fetishistic disavowal' is central to Žižek's view of capitalism and the media and it explains, in part, why brands and (although they are rarely mentioned) trade marks are so significant.²⁵⁰ Trade marks are Trojan horses. We pretend not to believe in, say, the 'coolness' of

²⁴⁸ Paul Taylor, 'Fetish/Fetishistic Disavowal', in Butler, Rex (ed), *The Žižek Dictionary* (Abingdon: Routledge, 2014), p. 93.

²⁴⁹ Taylor, p. 95.

²⁵⁰ Taylor summarises fetishist disavowal as 'pretending to pretend to believe' – it contrasts with merely paying lip-service to a system (a religion one doesn't accept for example) in public whilst, in private, deferring. 'Žižek's theoretical insight regarding the notion of *pretending to pretend to believe* is that, whereas so-called 'primitive' cultures develop working modes of symbolism/ideology embodied in social rituals and objects, if pushed, their members retain the ability to maintain a healthy sceptical distance towards those practices. Primitives act at a social level as if they believe, but at an individual level they may in fact demur. By contrast 'advanced' media consumers are part of a generally cynical zeitgeist but, as individuals, tend to act with uncritical belief. The split nature of this cynical disavowal–structure is encapsulated in the phrase 'je sais bien, mais quand même...' Taylor, p. 94.

RayBan sunglasses, we buy them at great expense amidst the cynicism and spectacle (no pun intended) of the market, we bring them home, we put them on. That is the point at which Odysseus, Menelaus and all the other Greek warriors hidden inside the horse start running around in our heads.

For the fiction writer, either participating in consumerism or not, awareness of the symbolic potency of trademarks is important. Perhaps, if one wants to explore an alternative to 'trade mark fiction', one must create one. In pursuing this goal it is perhaps Žižek's ability to employ the techniques of the storyteller *and* the philosopher which enchants and irritates his supporters and his critics. The sequential steps of a philosopher's arguments may get in the way of good stories. Stories are, as one icon of commercial storytelling, Mr Spock, might have said 'illogical'. Additionally, far from wishing to avoid or change the market as described above, and the creative predictability it seems to offer, many writers are drawn to it: a/ because it is a market, and b/ because they don't have to agree with Žižek.

Paul Taylor explores the difficulty that the 'empirically rooted quasi-scientific social inquiry' of the Anglo Saxon tradition has in coming to terms with Žižek's 'relatively esoteric' theories.

One major bone of contention between the two (the Anglo Saxon tradition and Žižek), relates to the status of facts. While the Anglo-Saxon tradition tends to see them as statements that are verifiable by scientific testing, continental philosophy is known for emphasising how their status is relative to the context from which they derive. Subsequently, a second difference exists between their chosen methods of conceptualizing those facts, especially in relation to the realm of culture. 'Social science' applies rigorous methods to cultural phenomena, while

continental philosophy seeks to understand those aspects of society that exist but which, it argues, cannot be adequately conceptualised via empirical methods.²⁵¹

Taylor characterises criticisms of Žižek's work as symptomatic of cultural division. Others, like John Gray, don't accept that. For them Žižek's 'act' is quite simply unbelievable. 'Why should anyone adopt Žižek's ideas rather than any others?' writes Gray in a critical review of Žižek's *Less Than Nothing: Hegel and the Shadow of Dialectical Materialism* and *Living in the End Times* for the *New York Review of Books*.²⁵² 'The answer cannot be that Žižek's are true in any traditional sense. 'The truth we are dealing with here is not 'objective' truth,' Žižek writes, 'but the self-relating truth about one's own subjective position; as such, it is an engaged truth, measured not by its factual accuracy but by the way it affects the subjective position of enunciation.'²⁵³

In the end, Gray concludes: 'In a stupendous feat of intellectual overproduction, Žižek has created a fantastic critique of the present order, a critique that claims to repudiate practically everything that currently exists and in some sense actually does, but that at the same time reproduces the compulsive, purposeless dynamism that he perceives in the operations of capitalism. Achieving

²⁵¹ Paul Taylor, 'Žižek's Reception: Fifty Shades of Gray Ideology', in *Žižek and media studies a reader*, ed. by Matthew Flisfeder and Louis Paul Willis (New York: Palgrave-Macmillan, 2004), p. 16. In *The Pumpkin Season*, this discrepancy, or, more accurately, this inability to reach a 'fact' without destroying its meaning underpins the story. In the end, one of the few facts any of the characters discerns is perceived retrospectively, drawn on a serviette – the ripples on a river where a man disappeared. When we see 'facts' recorded by telescopes, microscopes and Hadron Colliders, the latest scientific apparatus, we see the equivalent of drawings on serviettes. We can neither see, nor imagine facts, we use technology to infuse them with reality overpainting our only reliable tool – disbelief – or as described it in *The Logic of Scientific Discovery*, falsification.

²⁵² John Gray, 'The Violent Visions of Slavoj Žižek', *New York Review of Books*, July 12th, 2012. <<http://www.nybooks.com/articles/2012/07/12/violent-visions-slavoj-zizek/>> (accessed 25/8/2017).

²⁵³ Ibid.

a deceptive substance by endlessly reiterating an essentially empty vision, Žižek's work—nicely illustrating the principles of paraconsistent logic—amounts in the end to less than nothing.²⁵⁴

Creative writers may have some sympathy for Žižek's standpoint and recognise the source of the attack. Fiction does not rely on facts either. Indeed, fiction writers may feel that it is, perhaps, through stories that we best understand the world. Facts, as Gradgrind realised, don't get us very far on their own. Žižek explains:

To avoid a misunderstanding, I am not advocating here a 'postmodern' idea that our theories are just stories we are telling each other, stories [that] cannot be grounded in facts; I am also not advocating a purely neutral unbiased view. My point is that the plurality of stories and biases is itself grounded in our real struggles.²⁵⁵

For the creative writer, the gulf between Žižek's anecdote-filled, metaphysical texts and 'Anglo Saxon' objectivity, identified by Taylor, underscores an idea fiction writers know very well: that an absence of 'fact' is not proportional to an absence of 'truth'. 'Anglo-Saxon' empiricists may disagree.

²⁵⁴ Ibid.

Also see Charles Dickens, *Hard Times* (London; Penguin Classic, 2003)

²⁵⁵ Eero Laine, 'Bureaucracy', in *The Žižek Dictionary*, ed by Rex Butler, (Abingdon: Routledge, 2014) p. 19.

No creativity

Žižek defines bureaucracy as ‘a depoliticised and competent administrative apparatus’.²⁵⁶ He describes Tito’s government as ‘a benevolent hypocrisy’.²⁵⁷

Enigmatically, Eero Laine summarises Žižek’s attitude to bureaucracy as follows:

‘Throughout Žižek’s writing, the idea of bureaucracy is closely linked to Hegelian considerations of monarchy. Bureaucracy also holds its own symbolic efficiency, however, and in contemporary society, in the absence of a monarch, can take the place of the master-signifier. The mystique of bureaucracy holds power to shape both social reality and functional fantasies within it’.²⁵⁸

In short, perhaps, for Žižek, bureaucracy has mythical potential.

In *In Defense of Lost Causes* Žižek summarises the Lacanian phenomenon, ‘the master-signifier’ as follows; ‘Apropos school exams, Lacan pointed out a strange fact: there must be a minimal gap, delay, between the procedure of measuring my qualifications and the act of announcing the result (grades). In other words, even if I know that I provided perfect answers to the exam questions, there remains a minimum element of insecurity of chance, till the results are announced – this gap is the gap between the constative and the performative, between *measuring* the results and *taking note* of them (registering them) in the full sense of the symbolic act. The whole mystique of bureaucracy at its most sublime hinges on this gap: you know the facts but you can never be quite sure how this fact will be registered by bureaucracy.’²⁵⁹ This time-delay process might also describe the trade mark registration process. It is crucial to our belief in trade marks that

²⁵⁶ Slavoj Žižek, *In Defense of Lost Causes* (London: Verso, 2008), p. 259.

²⁵⁷ Ian Parker *Slavoj Žižek, A critical Introduction* (Chicago: Pluto Press, 2004), p. 15.

²⁵⁸ Eero Laine, p. 22.

²⁵⁹ Slavoj Žižek, *In Defense of Lost Causes*, p. 72.

registration rather than *creation* is an important part of the process of mythologisation.

From a European perspective, Žižek's description of life today as a set of nagging symptoms, as a result of a surfeit of goods, services and history, chimes with our zeitgeist. Žižek is an anti-trade mark, a symbol for paradox, rubbing the cultural production of capitalist global culture he contributes to. His ability to articulate a pervasive distrust in the cultural products we, through social convention and necessity, invest in, reassures his global audience. Feeling paradoxical – or even hypocritical – is OK. Žižek the trade mark is a kind of intellectual Archibald Tuttle from Terry Gilliam's take on George Orwell's *1984*, *Brazil*, bursting, without invitation, into the living rooms and lounges of Western society, telling readers and viewers what we know but were too embarrassed to admit: none of this clutter is going to make us happy.²⁶⁰

Žižek occupies a somewhat awkward position amongst the panoply of critics of capitalism. Perhaps he isn't an anti-capitalist, he's just 'anti'. 'Anti' is an integral part of *jouissance* and, as mentioned before, it is a perversely creative impulse.²⁶¹ Žižek's communication style is almost an exercise in anti-communication. Žižek presents himself as the antithesis of a corporate brand: he is an anti-trade mark, or, possibly, a trade mark for 'anti'. Žižek's respect for the negative chimes with Descartes' emphasis on doubt, Keats' 'negative capability' and Popper's doctrine of falsification. Negativity, suspicion, mistrust and unwillingness are creative behaviours corporate capitalism dampens down, because the negative is not 'up-beat'. Conversely, although the positive seems to

²⁶⁰ *Brazil*, dir. Terry Gilliam (20th Century Fox 1985).

²⁶¹ See: Slavoj Žižek, *Tarrying With The Negative: Kant, Hegel and the Critique of Ideology* (Durham: Duke University Press, 1993).

pulsate with potential, it contributes to the unbelievable language of our symbolic order and our sense of stasis. Maybe capitalism's problem with negativity is that it leads to revolutionary newness.

Žižek frequently refers to big brands like 'Coke', 'Starbucks' and 'McDonald's'. When he does he seems to be calling old West V East icons, characterising global capitalism's crushing power over the individual. In fact, trade marks are no longer the vectors of cold war political dispute and they were never designed as such.²⁶² They predate and have outlived the old binary structure. They may now be central, in Žižek's terms, to our 'post-modern' symbolic order in which disbelief is recycled.

There are three modalities of the Real: the 'real Real' (the horrifying Thing, the primordial object, from Irma's throat to the Alien); the 'symbolic Real' (the real as consistency: the signifier reduced to a senseless formula, like quantum physics formulas which can no longer be translated back into – or related to – the everyday experience of our life-world); and the 'imaginary Real' (the mysterious *je ne sais quoi*, the unfathomable 'something' on account of which the sublime dimension shines through an ordinary object).²⁶³

²⁶² Although we have been focussing on the example of trade marks in the UK, trade marks registration grew, in part, out of globalisation – it was the Sheffield steel manufacturer's anger at European fakes that drove UK trade marks legislation in the mid-nineteenth-century and, during the latter part of the century, the globalisation of markets led to the first international agreement relating to intellectual property, the Paris Convention for the Protection of Industrial Property of 1883. A bureaucracy soon followed with the creation of BIRPI in 1893 (the forerunner of WIPO – the World Intellectual Property Organisation). The internationally recognised ® sign was conceived during a stable, peaceful period of global history. See: WIPO website for a brief history of the organisation at: <<http://www.wipo.int/about-wipo/en/history.html>> (accessed 24/8/2016).

²⁶³ Slavoj Žižek, *For They Know Not What They Do: Enjoyment as a Political Factor*, (London: Verso, 2002) (forward to Second Edition: 'Enjoyment within the Limits of Reason Alone.'). p xi-xii.

Within this realm trade marks are master-signifiers, encapsulating the symbolic order, beaming the 'imaginary real' into consciousness. Ownership of branded products and the narratives they imply is increasing.²⁶⁴ Consumerism, through its mastery of every new vector of communication occupies more and more of our public and private space and time. Brands, and the trade marks that transmute their mythologies into property, are everywhere. They are carried by technology.²⁶⁵ They are registered and their mythologies have been accredited by bureaucracy. For fiction writers, the proliferation of brands and the rise of brand *narrative* is hugely important. Žižek's encourages us to conceive of the market itself at a structural, political and psychological level.²⁶⁶ His ideas challenge our understanding of creativity and present the writer as (possibly) an unwitting contributor to a psychotic symbolic landscape. However, he does not seem to want to leave creativity in the post-modern, consumerist, trade-mark era to suffocate. Žižek' offers new avenues for creative speculation and he identifies the problem of

²⁶⁴ Applications for trade marks at the UK IPO increased from 28,721 per year in 2010 to 48,858 in 2014 (see: *Facts and figures: Patent, trade mark, design & hearing administrative data 2013 and 2014 calendar years*, (Intellectual Property Office: Newport, 2015).

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/456097/Facts_and_Figures_2015.pdf>. The EU Intellectual Property Offices reports a year-on-year rise in applications of 11 percent to a total of 135,296 applications in 2016 (see: The EUIPO Annual Report, 2016, Facts and Figures). <https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/about_euipo/annual_report/ar_2016_annex_07_en.pdf>.

²⁶⁵ Were I to be writing this on a typewriter, twenty years ago, the machine I would have used - with me now - is called an *Olympia Splendid 66*. During my writing I would only be aware of that single trade mark – my Splendid, how reassuring! During the past half hour, whilst writing this paragraph, I have encountered dozens of trade marks, I explored several of them, including the BBC, the *New York Review of Books*, Google (several times). To imagine that this symbolic rain has simply bounced off an umbrella of market cynicism is ridiculous.

²⁶⁶ One of the many agencies engaged in creating Brand Narrators is Aesop agency – 'the brand storytellers', 'a creative agency powered by narrative thinking' (see: website at <<http://aesopagency.com/>> (accessed 25/8/2017)). For creative writers, the burgeoning field of brand narrative creation represents a lucrative and expanding market.

creating belief as our central dilemma. His frequent use of the negative as part of his 'act' emphasises the restorative power of 'no'.

No logo

Naomi Klein's brilliantly branded book *No Logo* explored popular distrust of big brands and offered a popular version of 'no', highlighting the limitations of big brands and their trade marks.²⁶⁷ It should be remembered that even Klein's arguments were not that trade marks are bad, rather they are being mistreated. Huge multinationals use their leverage to pin their logos onto ever more youthful audiences, whilst monopolistic retail empires (on and offline) diminish freedom of choice by excluding dangerous competitors. *No Logo* argues in favour of the purity of the trade mark. Naomi Klein is a Good Sheriff. She wants to take down the trade mark equivalent of the old US railroad companies who monopolise free employment in 'their' towns as they stretched westwards; she opposes overzealous ranchers who want to string barbed wire across the prairie, thus preventing the small farmer from rounding up his cattle. This isn't anti-capitalism or even anti-consumerism. It's anti-monopolism (something, incidentally, framers of UK trade marks legislation and legal decision makers have bent over backwards to concur with since 1876).

For the creative writer, trade mark writing (writing fiction for trade marks organisation; contributing the brands of publishers, universities and broadcasters through the creation of fiction; inventing fiction to be marketed and sold under a trade mark; writing under a name registered as a trade mark) exposes a problem

²⁶⁷ Naomi Klein, *No Logo* (London: Fourth Estate, 2010).

with the division between 'commercial fiction' and 'literary fiction'. 'Literature' is generally assumed to have characteristics of a higher order than reading as entertainment. In fact, 'literature' has never not been commercial; it has used its cultural status to create a mythology of efficacy, specialness and class. Today the very idea of non-commercial, non-trade mark literature is threatened by the bifurcation of trade mark literature providers.

Trade marks are not merely short-hand logos that one either believes in or doesn't; they symbolise the dominant controlling idea of our time. The binary world of the East/West Counter Culture has disappeared. Our trade mark world is characterised by a quality which Žižek brings to life: it must be interpreted.

iv Conclusion

Trade mark literature

After the invention of the printing press, literature changed from something that could only be consumed by aristocrats or priests into two products. On the one hand, populist work was produced for growing markets, and then there was the good stuff. Deciding on what this was and making it became tasks for experts.²⁶⁸

The knowledge embedded in this critic/artist relationship – existing alongside the mainstream market – has always had commercial value, but this was often expressed subtly in terms of kudos and social standing. In fact, high sales and popularity may be seen as evidence of the fact that a work is ‘non-elite’ – or commonplace and unworthy of serious consideration.

McDonald identifies frustration with this system as formative in the development of modern critical lack of confidence;

A key moment was surely the anti-authoritarianism of 1968, with its student riots and revolutionary fervour. An elite coterie of aging university dons, pronouncing what the rest of us should read, is not going to win a sympathetic ear at the barricades.²⁶⁹

The attack reduced the critic to: ‘The critic-as-instructor, as objective judge and expert, has yielded to the critic who shares personal reactions and subjective enthusiasms. If anyone can be a critic then there is hardly any need for specialized and devoted professionals.’²⁷⁰ Criticism has also suffered, he argues, because it has

²⁶⁸ In *The Globalization of Nothing*, George Ritzer takes this qualitative approach to culture to the market, identifying ‘four types of nothing’ – ‘non place, non-things, non-people and non-scenes’ – he regards globalized cultural markets as a kind of South Sea Bubble waiting to explode.

²⁶⁹ McDonald, *The Death of the Critic*, p. 2.

²⁷⁰ *Ibid*, p. 5.

always been disliked by the mavericks interested in new or challenging works. He quotes *Waiting for Godot* where the term 'critic' is the most grievous insult Beckett can think of.

VLADIMIR: Moron!

ESTRAGON: Varmint!

VLADIMIR: Abortion!

ESTRAGON: Morpion!

VLADIMIR: Sewer rat!

ESTRAGON: Curate!

VLADIMIR: Cretin!

ESTRAGON: [*With finality*]: Critic!

VLADIMIR: Oh!²⁷¹

McDonald quotes this exchange as an example of the low opinion artists have of critics. In the journey to the punch line, Beckett mentions curates. He was probably referring to parish priests. Today, perhaps Facebook has turned us all into curates, curators of our own trade mark brands and critics of everyone else's.

Trade marks, however, call into question the very existence of 'art' outside a commercial context and they may alter the role of the knowledgeable critic. Perhaps lawyers and trade mark examiners, rather than critics, are the new cultural arbiters, alternatives to self-appointed elites whose judgments added semblances of reason to matters of taste.²⁷² Trade mark art is non-elitist; it is functional. Pop

²⁷¹ McDonald, p. 8.

²⁷² Registered trade marks, through their legally agreed registration process, award credence – and consequently power – to trade marks because of their legal acceptability,

art and pulp fiction are its recent manifestations, but ever since printing presses could multiply literature (of any standard) it has existed. Dickens, a writer who self-published, who did not rely on a literary elite for permission to write and who justified success in terms of sales and audiences for his talks, was an early trade mark writer. He was not only writing what we now teach as 'literature', he created brands and trade marks for himself through his own publications like *Master Humphrey's Clock* (1840-41), *Household Words* (1850-1859) and *All the Year Round* (1859-1895).

On one level, trade marks, their registration and their lives in the market and our consciousness, are utilitarian. They were created with function in mind, as a means of clarifying and organising trade. They were brought into being by a group of brewers, steelmakers and textile manufactures to reduce the threat of counterfeiting. However, in 1876, the year the first British trade mark was registered, the world of the sign, the image, global communication and commodification became real; they were plumbed into the national grid of the imagination by a register. The trade mark, through its registration, and through the concurrent development of interest in the study of signs, became a locus for modern myth, magic and belief - one which Žižek shows us may catch us in a creative feedback loop.

In fact, trade marks defy definition and they must always be interpreted rather than defined. They can perform contrary functions. On the one hand they may be utilitarian, market-measurable, accountable property rights. And on the other they may be mythological, bureaucratised, symbols for stories: gateways to

not their perceived artistic merit. In measuring a trade mark's 'distinctiveness' trade marks examiners do not evaluate quality.

Lacan's 'imaginary', contributing to the 'symbolic order', adorning the utilitarian reality they were designed to preserve with mythology and a kind of spirituality.

We have seen how trade marks may embody narrative, how they market stories and how they may contribute positively to creative processes. From Woolf's use of her own trade marks to create and market her own brand of fiction, to the writer's relationship with branded publishers, trade marks make modern myth real, modern magic plausible, modern belief palatable, modern fiction available.

We have also followed three arguments against this view: firstly, that trade marks and their enclosed stories may facilitate the disingenuousness of modern myth; second, that they enclose language and ideas that were once in the public domain, transforming the once freely available tools for story making and dissemination into private property, and thirdly, that they support and justify a capitalist realpolitik that has lost its connection with truth, morality and justice. Trade marks can be seen (to borrow Lacan's phrase) as quilting points that pin Barthes', Williams' and Žižek's critiques of myth, magic and belief to the real world.

The 2016 Turner Prize, was not won by an artist; it was won, for the first time, by a collective or a group. *Assemble* does not play by the old rules, as *The Guardian* put it: 'Art? We're more interested in plumbing'.²⁷³ *Assemble* is not an individual artist with a kooky name like *Banksy*. *Assemble* is a loose-knit group of architects and designers with a sensible name and the work of art that won the

²⁷³ See: Charlotte Higgins, 'Turner prize winners Assemble: 'Art? We're more interested in plumbing'', *The Guardian*, 8 December 2015.

<http://www.theguardian.com/artanddesign/2015/dec/08/assemble-turner-prize-architects-are-we-artists> (accessed: 25/8/2016).

prize was a renovation project in Liverpool. There was no individual art-object, or artist, on display.

How could *Assemble* be considered art? Perhaps the answer is in the name. The trade mark -the word that describes the values and ethos of the loose assembly of Cambridge architecture graduates who first joined forces in 2009, is the thing that imparts the magic, not the [actual] plumbing. Assemble Architecture is UK trade mark 3054366, registered in May 2014. *Assemble* are recognised as the first 'collective' to win the Turner Prize, perhaps it could also be said that *Assemble* is the first trade mark to win the Turner Prize.

It is not clear whether *Assemble* is a traditional trade mark for architectural services or whether it is a kind of ironic artist-as-trade-mark non-individual. At the very least *Assemble's* victory demonstrated the close link between trade marks and 'art'. It also serves to highlight the ludic use of symbolic energy contained within nuclei of functional trade marks.

Perhaps one of the most significant group of writers to work within this brand-aware, solipsistic milieu is the Italian group Wu Ming, who's first novel *Q* was published under the 'open pop star' pseudonym Luther Blissett. Wu Ming, possibly by adding a twist of anonymity to the collaboration, functions as a collective trade. The five original Wu Ming writers, Wu Ming 1, Wu Ming 2, Wu Ming 3, Wu Ming 4 and Wu Ming 5 are now identifiable, but a level of authorial non-specificity was their goal, a foregrounding of market structures and branding is their milieu and the trade mark author is their inspiration.

Wu Ming 1's comments regarding Stephen King suggest that, although toying with the idea of trade mark and brand, Wu Ming does in fact function in the same market with the same objectives as Picador or Harper Collins. It is an indie

brand, not an anti-brand. It sees the trade mark and branding as integral parts of the story.

In the last few years one of the writers that's experimented the most, pushing and breaking almost all the rules of the novel, inventing idioms, "amputating" parts of the narrative usually believed to be fundamental, hybridizing, digressing ad infinitum, risking failure and looking ridiculous, is Stephen King. A writer who, even when he falls short, nevertheless sells tens of millions of copies worldwide. He's someone whose books are awaited and devoured by a huge community, by a whole universe of affection and expectation. He's someone whose works never stop to influence all the arts, from cinema to videogames and cartoons. On the contrary of what Palahniuk says, I believe the more your books are of interest, the more freedom you can carve out for yourself. In our case, without having the success of "Q" and "54" behind us, we wouldn't have produced difficult books like *New Thing* and *Free Karma Food*.²⁷⁴

Consumerism and our responses to it offer new approaches to trade mark literature. Creative writing and criticism today occur within the domains of trade marks and consumerism because, in part, they are taught in trade mark universities by writers of trade mark fiction to students who want to participate. The role of the trade mark in fiction is, however, rarely explored. The 'quilting point', in which stories are mythologised and the quasi-legal bureaucratic process of trade mark registration takes place, is rarely recognised as part of our creative ecosystem. Is it, for example, unreasonable to suggest that Wordsworth and Coleridge's advertisement and preface to *Lyrical Ballads*, were, like Thomas Vinterburg and Lars Von Trier's *Dogma Manifesto*, literary versions of brand descriptions coupled with

²⁷⁴ Wu Ming Manituana (2007) 'The Perfect Storm or rather The Monster Interview' <<http://www.manituana.com/documenti/0/8246/EN>> (accessed 25/8/2016).

trade marks: *Lyrical Ballads* and *Dogma 95*?²⁷⁵ Were the advertisement and the preface to *Lyrical Ballads* attempts to define and monopolise the Romantic Poetry brand outside ‘our own pre-established codes of decision’?²⁷⁶

The study of both literature and creative writing can mythologise the writer and the mystique of the creative process. The ‘divine hand’ of inspiration, moments of almost extra-sensory awareness, give birth to novel and original texts, which only authors, through their own, individual, alchemical processes, may brew up.²⁷⁷ The Romantic view of creative writing sees literature and the author as outside the structures of daily life and because of this difference, capable of ‘inspired’, ‘ground breaking’, ‘new’ work which their own individuality, their own ‘genius’ leads them to. In asking whether this authorial specialness is, in fact, connected to the need for literature to define itself outside a trade mark structure, I am not seeking to replay old arguments.²⁷⁸ I am asking whether, as literature, authors and universities become increasingly branded and trade marked, an old myth has been superseded by a new one.

²⁷⁵ See: ‘The Director Must Not Be Credited’ – website of the Museum of Art and Design, New York. <http://www.madmuseum.org/series/director-must-not-be-credited-20-years-dogme-95> (accessed 31/5/2016). The Dogma ’95 manifesto functioned like a certification trade mark: film makers would make their work according to the ‘vow of chastity’ set out in the manifesto and submit their film. They would be allowed to use the Dogma name and certificate if the film was judged to have followed the rules. *Lyrical Ballads* functioned similarly, clarifying a brand of Romanticism.

²⁷⁶ Art historian Alexander Graham-Dixon described the Pre-Raphaelite Brotherhood as ‘a brand’: *Word of Mouth*, Radio Programme, BBC Radio 4, TX 11pm, 15/8/2016. Alexander Graham-Dixon interview. <<https://www.bbc.co.uk/programmes/b07bbyj8>> (accessed 5/3/2018). The same might be said of the otherwise contested term ‘Romanticism’.

²⁷⁷ See: Robert Louis Stevenson, ‘My First Book: *Treasure Island*’, *The Idler* August 1894. Vol. VI, pp. 3-11 - Stevenson’s ‘ticketing’ of his new children’s story with the name ‘*Treasure Island*’ occurred before he wrote the text.

²⁷⁸ The title of Micheline Wandor’s book summarises the persistence of the idea of author as visionary: Micheline Wandor, *The Author Is Not Dead, Merely Somewhere Else: Creative Writing after Theory: Creative Writing Reconceived*, (Basingstoke: Palgrave-Macmillan 2008).

It is possible to argue that the relationship between culture and trade marks suggests that an elite cultural group, who saw themselves as unconnected to commercial markets, mediated between Romantic and commercial literary approaches to authorship; to some extent defining what we understand as literature? Today, as markets re-orientate cultural institutions into trade mark cultural industrial institutions, this structural process of quality affirmation is less robust.²⁷⁹ The world is no longer structured into dominant and counter cultures either side of an Iron Curtain: it constitutes a single consumerist trade mark culture. There is a lot more on the menu, the restaurant is bigger – but it's the only one town. In this place, critics and the cultural elite may not disappear – they may refocus on the signs of our times – our trade marks. For the creative writer the importance of trade mark literature has serious implications: the concepts of art and literature, curated by an elite cultural establishment may be replaced by the more transparent concepts of 'high end' and 'low end'.

Perhaps, by understanding both the mythology of Romantic inspiration and the mythology of the market, it is possible for writers and artists to have their cake and eat it, as Assemble and Wu Wing show. In both these cases the trade mark is, to some extent, embroiled in the story. Indeed the questions of whose story it is and how it should be interpreted are liberated through a ludic approach to trade marks. Maybe Romantic writers will reject the commodification of literature, feeling their way forwards, without regard to the structures of market, landscape and society, in the belief that they can abstract themselves from the global trade mark symbolic order. The danger here is, that 'not knowing' may contain an

²⁷⁹ Here the term 'quality' refers to the role Tabitha Dickinson played – as a gatekeeper and custodian of 'art'.

element of self-deception. Perhaps 'Not knowing' remains at the heart of creativity but 'pretending not to know' won't work.

A by-product of the commodification of art and criticism is that, far from moving towards non-academic creative disciplines associated with vocations such as journalism or script writing, creative writing as an academic subject gravitates towards 'literature' – which itself becomes less 'literary' and more branded, market orientated and vocational. The emergence of trade mark literature, competing with other styles of writing and other literary educational institutions (each competing with their own 'unique' brand of literary approach) locates the study of literature within a commercial, branded context. Literature does not exist outside the context of branding and commodification. Perhaps, in this broader context, even the word 'literature' can be viewed with suspicion. Has 'literature' become a collective trade mark for the cultural elite? Is the myth of writer as inspired genius marketing puff, a mythology for a top-of-the range story, a verbal equivalent of the old Citroën DS?

Knowing too much

If trade marks have a significant role in myth creation, they cannot be ignored. Not only are they increasingly central to the way we organise our bureaucracies and markets, they also encapsulate and enclose stories. They underpin the working parts of our global capitalist system, and through their combination of myth-making bureaucracy and narrative potential, they symbolise the core values and, arguably, the inner psychosis of our society. They also frame, enclose and brand our fictional work.

Two trade marks in particular have been discussed during this analysis. One, a red equilateral triangle, the first British registered trade mark, symbolises an orderly system with a geometric mark. The triangle is bold and clear, a bright sign that isn't easy to miss, and once you know what it represents, it is easy to remember. The triangle may have become art, through reinterpretation and clever juxtaposition, as creative individuals played with the trade mark's fictional enclosure and the artist's ability to superimpose new meanings on the surface, as *Monet's Bar at the Folies-Bergère* demonstrates, but few would argue that the triangle itself was created by an artist.

The other trade mark, the Minoan pot, with its octopus tentacles twirling and moving into every orifice, is, arguably, a work of art *and* a trade mark. The octopus signified the place of production, perhaps the particular shape of this octopus even denoted an individual. Like all modern trade marks, the image is arresting and functional. Almost three thousand years ago, on an island in the Mediterranean, someone created a trade mark which describes a trade mark. It is unlikely that the original octopus trade mark was a warning: a sign telling the user that the sign itself – not the pot – would worm itself into every nook and cranny of the user's existence. Unlikely, but not impossible; after all, this was the era of the horse.

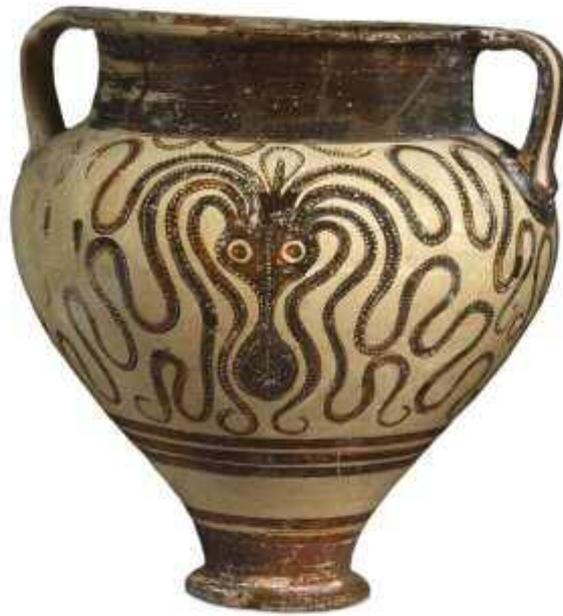


Figure 14: Minoan storage vessel.

The Pumpkin Season is set in Ljubljana, one October between 1992 and 1999. During this period, the iconography of the old anti-trade mark Eastern Bloc hung around like cigarette smoke after a party. In the void there was a brief hiatus, a period during which only a few McDonalds and *bureaux de change* moved in to fill it. It was a strange moment. It was not that nothing meant anything, more that there was nothing to mean. The octopus and the triangle were both absent.

Chapter 4: The gift economy 2017

It is a week before Christmas and I am standing on the first floor of the St. David's Centre in Cardiff, staring down at shoppers swarming in the ground floor arcade. I daydream about the spectacle below, glancing around my level. Who else is hanging onto these rails outside M.A.C? How many others have stopped to look down? Is there another man of the crowd?

Everyone is sauntering up here.

I peer below as if into an underground stream channelling its way through a limestone throat. They look like twigs, I think, bobbing along past invisible patterns in a relentless current. And then I remember David Attenborough.

How could I forget him? He seems immortal. His *Blue Planet* has just been on the television. He has been the voice of nature for as long as I can remember. I recall how he described worker ants, carrying leaves four times their size. The ants bit the leaves off Amazonian trees and dragged them back to their nests. The ants formed roads, discernible by their great green trophies wobbling in the air, towering over their porters, who wound their ways along the forest floor. They were like motorways, not rivers, and the main roads bifurcated up trees, into hollows, along branches – anywhere that a leaf cutter ant could find a leaf to cut. I stare down at the flow of people, some moving empty-handed in one direction, others burdened with presents going elsewhere.

People and their trade marks.

I mutter.

The trade marks are invisible leaves.

Everyone carries a leaf: the Mercedes baseball cap on one boy represents a brand narrative many times his size. All of the logos carried by the people below display compelling tales of compliance. They struggle not just to carry their goods, but also under the psychological weight of the stories they invest in and the cost of those stories. Expensiveness is, in this context, something we need. This kind of shopping must cost more money than is reasonable. The more we invest in brands and trade marks the greater our obligation to believe in them becomes and the stronger their mythological, aspirational impetus seems. This is shopping, as Žižek might say, at a transcendental level. Parting with money is an act of faith. Or, perhaps to put it more accurately, it is an act of hope.

There is nothing special about me. I am wearing a black cap with 'Eureka' written at the back on a little metal label which I only became aware of a few months ago, two years after buying it. Until I arrived up here I hadn't given the manufacturer of my cap much thought, but now, as I try to come up with a new idea, I understand what is going on. My cap is laughing at me.

Eureka, it says. It taunts its contents. Go on then – do it. Do a 'eureka'.

Trade marks are like icebergs, I mutter.

My cap sneers.

How many metaphors can you mix before things get silly?

We're not interested in goods and services. What we really want is to be a part of the reassuring, everlasting mythologies the brands offer.

I turn my back on the view below and look up at the roof of the St David's Centre arcade, trying to remember how I came by my cap. The roof of the arcade looks like the ceiling above the nave of a cathedral. It's big enough, but it isn't

straight; there's a kink in it. I bought my cap in a shop in Porthmadog. I was driven there by another writer. Did he trick me? Did he put me in this dunce's cap? At the time I thought I'd avoided his ruse. He wanted me to replace my threadbare, old hat with a theatrical, green fedora. I suspected at the time that he was trying to dress me like a clown. I thought I chose my 'Eureka' cap of my own volition, to sidestep his joke. I didn't noticed the little badge sewn onto the seam at the back.

Christmas past

In his book of stories about economics, Yanis Varoufakis asks his daughter which of the two – Goethe's Faust or Dickens' Scrooge – are most in tune with Capitalism. Faust, he explains (answering his own question). Because Scrooge was a miser who saved his wealth without spending and borrowing, thus restricting the development of capitalism, which requires big spenders and big borrowers, whereas Faust borrowed on everything. This does Dickens, and Dickens' view of Christmas, a disservice. Surely the point of *A Christmas Carol* is that being a miser was wrong for Scrooge and terrible for Christmas. Dickens' *A Christmas Carol* has grown to exemplify the mythology of branding that I and all the other Christmas shoppers in Cardiff were acting out. Instead of transporting big leaves like ants, we carried big metaphors.

Nostalgia

In the mid 1990's I was lucky enough to visit Ljubljana, in Slovenia. These days we are familiar with the small country sandwiched between Hungary and Italy. Maribor, its second city, appears in the UEFA Champions League Cup regularly; its

Alpine mountains attract walkers and its capital city is a popular weekend destination. I first went to Ljubljana, not because I knew this, but because I didn't. It's hard to believe today, but in those days, up until 1990 we knew Slovenia – if we knew it at all – as an area of Yugoslavia, which became, after the wars following its disintegration, 'The Former Yugoslavia'. In the early '90s I had never heard of Slovenia. When someone mentioned it, it sounded like a made-up place, a dream place. I went there to find out what it was.

I arrived by train. I caught the Venice to Budapest express and got off midway between the two. I found myself in a city which felt distinct, foreign and, at the same time, eerily familiar. Many of the trappings of communism were still in evidence. There were hardly any hotels and there were very few private rooms to rent. Ljubljana didn't feel poor, just moneyless. That's not to say that there weren't shops and bars, night clubs, theatres, restaurants and *bureaux de change*: there were – but there weren't many and they weren't always open. Also, perhaps because it was October, and it was Tuesday, or maybe Wednesday, nobody felt like going out. Indeed, many of the newer shops, new businesses built with government grants, seemed to be perpetually empty, as if the proprietors and customers didn't really know what they were for. People hadn't become accustomed to the business of buying metaphors.

Much of the geography of Ljubljana is described in *The Pumpkin Season*. The interior of the Tivoli Hotel; the toy witches hanging in the branches of the trees on the river bank; the fact that in the town's only jazz club there was a good chance of seeing the minister for culture and his entourage, are all unimagined. After one visit I had satisfied my initial question – I knew where Slovenia was. Now I had two more: what was it and why was it eerie? I knew I didn't have long to find out

because every time I returned there were more shops, better ones, parts of German chains; there were more hotels, better ones, with phones without old fashioned-round dials that weren't connected through exchanges using jack plugs and there were more tourists. Ljubljana was becoming a successful product; it was vanishing behind the image of a new brand.

For a brief period Ljubljana was caught in a kind of symbolic low tide. Tito had died (in the local hospital), Communism had gone and Yugoslavia had, with some reluctance, ceased to exist. At the same capitalism and consumer culture had arrived in name only. Freedom, everyone agreed, was on the way. As a Westerner I wasn't convinced. As I watched the flickering lights of NATO jets flying from Italy towards their targets in Niš in Serbia from the riverbank in Ljubljana, I had a feeling that Blair's view of freedom – 'choice' as he kept saying – was really about the opposite: a lack of freedom and no choice.

Perhaps, as I lay on one side of the river staring up at the sky on a starlit, warm October night, another man, with a much better understanding of what the blinking jets meant, also cast an eye upwards. Military jets make a distinct sound. You can't mistake it. Žižek, who lived in Ljubljana, would have recognised it. He would have looked up at night at the same twinkling bomb-busses.

I remember being asked by someone in a bar, which I think was called 'Nostalgia', where icons from the past like pictures of television transmission masts, radios with valves, and Austro-Hungarian maps had been gathered: why I was in Ljubljana when the interesting story was in the South, in Sarajevo. I explained that I thought that the big story was right there. The only problem was I didn't know what it was. I just had this feeling that could best be described as 'eerie'.

X marks the spot – the fictional ‘quilting point’

The word ‘mystery’, if it appears as part of the title of a book or on the blurb at the back, is usually a misnomer: ‘mysteries’ are in fact ‘explanations’. Writers, or perhaps marketers of fiction anxious to sell stories to readers, accentuate the explicable even as they appear to entice us with the unexplained or surprising. What happens in a story defines it. Its title becomes symbolic. Questions regarding character, period, genre and outcome must be answered by the story so that its meaning is unambiguous and marketable. Certainty displaces uncertainty (unless it is corralled into the comfort-zone of a cliff-hanger): ‘cold philosophy’ overpowers charm. In *The Pumpkin Season* I am concerned with the opposite process, the creation of questions and a description of uncertainty. *The Pumpkin Season* describes the month of October in Ljubljana sometime in the mid-1990s. This was a revolutionary, carnivalesque period. It was also contradictory, introspective and characterised by ‘not knowing’.

In writing *The Pumpkin Season* I was motivated by a feeling. Perhaps I wanted to keep something alive. Or, to put it another way, to stop something from disappearing. The futility of this task, the impossibility of preserving a moment in time, of describing negativity, strikes me as comic. Comedy seems to me to be concerned with the observation of the indescribable, of the impossible, of profound negatives. It accentuates gaps in our understanding and peers into them. Umberto Eco explored this idea by comparing comedy with tragedy. *Madame Bovary*, Eco reminds us, is not a tragedy about why we should be adulterous, it’s a warning against it for all society to benefit from. Tragedy answers questions. Comedy makes them.

Déjà vu

The Pumpkin Season is set in a place where the controlling aspects of our consumer economy, trade marks and brands, were absent. It uses this vacancy as the backdrop for a story, or series of connected stories, that explore characters experiencing transitional sensations. The story contradicts, or exposes, many of the conventions and controlling ideas influencing the creation of trade mark fiction.

Aside from geopolitics, jazz, and jets, one other feeling about Ljubljana prompted me to write about it. I was a visitor who was not a true stranger. I couldn't help feeling as if I'd been there before. I found this sensation, like the Dormouse Master does when he nearly dies of thirst, embarrassing. I do not believe in life after death or re-incarnation. The more I learned about the city, with its dragons, its collection of invaders stretching back throughout its history and its surviving (and thriving) language and culture (which seemed to exist in some hinterland partly represented by folkloric tricksters like Martin Krpan, a Twm Siôn Cati-type who lived in the mountains, and partly in bookish, bourgeois parlours of small suburban enclaves), the more it reminded me of Wales. Even Ljubljana's flag, incorporating a dragon in a flag with three colours – red, white and green – reflected the Welsh flag. The survival techniques adopted by a country of three million reminded me of my own, where opinion and culture is created in relation to stronger neighbouring powers and tight-knit unofficial, invisible, mediatory elites. I think the realisation that what I once perceived as a singularly Welsh trait – surviving because of, not in spite of, this complexity - was shared by Slovenians, sparked interest in writing about characters who contextualise themselves in the historical 'longue durée'. The general acceptance that nothing is what it seems and

nobody says what anything is (or might be); that every conversation contains an element of concealment, made me feel at home, nostalgic, spooked.

I still carry a fifty Tolar note in my wallet. It suggests to me that the European Union, which now provides the currency for Slovenia, will probably end its days with the same pejorative prefix, 'The Former', as the state 'Slovenia' replaced. The money also reminds me that the place and time the note came from was real, it did exist. After the '10 Day War' my Slovenian Tolar, dated 1992, replaced the Yugoslav Dinar. Fifteen years after it was brought into being to affirm the reality of the Slovenian economy, it disappeared. But not from my wallet.

Slovenia, Wales, Žižek, reality itself, symbolised by this valueless note, which for all I know, could have been printed in Llantrisant, set the tone for *The Pumpkin Season*. In this story perhaps the only thing one can be reasonably certain about is that everything is uncertain. This is what connects a twenty-first century reader with this twentieth-century context.

Dreams

I understood that my observations of Slovenian society were, in part, observations of Welsh society, liberated by the fact that they could be pinned on neither Wales nor Slovenia. I wrote about a dream place – Ljubljana as I felt it. In this region two ideas seemed to emerge – symbolic emptiness and the value of the negative.

In the backwash of communism, before consumerism replaced its icons, characters appeared almost larger than life, thrown into view by the absence of order. There was a strange sense that all aspects of life existed without any clear

understanding of *why*. The old order underpinned government, business, education: everyone from a bus driver to a philosopher used to see themselves in relation to the old agenda. People, to different extents, were either subversive or complicit, usually both. Now they were finally free.

But free to be whom?

Free to do what?

Only after listening to Slavoj Žižek at a lecture in Cardiff in 2010 and then beginning a PhD in 2013 did I return to my unfinished stories about Ljubljana. I hadn't been to Ljubljana for more than ten years. As the city transformed into a successful entrepreneurial capital, I became less interested in it. Its secret life had vanished. Žižek, whom I had never read, whom I went to see primarily because he was from Ljubljana, made me feel nostalgic, something I'm sure he wasn't trying to do. His sheer difficult-to-pin-downness reminded me of conversations I had had years ago. To me, he represented a place and a time. He reminded me that whilst I couldn't write, let alone sell, *The Pumpkin Season* – the story about a place that was not a place, a time that had been forgotten, full of people who were uncertain of their identity – it was about something that actually happened, which I did observe with my own eyes, just as Žižek had. He reminded me that what I recalled was based on an observation of the 'real' world. Not a fantasy. As I listened to his arguments he suggested to me that, in the Ljubljana I had seen, the 'reluctant real' was searching for a new master-signifier. He reminded me that I still had Tolars in my pocket. Like Janja at the end of the story, I began to sketch it all out again, from memory. I realised that this method, looking at and working from words being formed on pages, or pencil lines on serviettes, or photographs showing the tracks of smashed electrons, or waves from distant inter-stellar bodies, or computer code,

is the same for artists and scientists – we understand everything projected on something else. We never get to the ‘real thing’. We approximate it.

The joke

The Pumpkin Season was inspired by a city in transition. It considers the contradictions of our trade marked consumer culture by highlighting a society without one, on the point of accepting it. Structurally, it explores readers’ expectations by questioning the conventions of the market for stories today. Stories are sold with reference to their plots – ‘what they are about’. In this story none of the characters know what is going on. Stories are packaged by their characters – *Madam Bovary* is, to pursue Eco’s example, a trade mark for the consequences of adultery. Anne Fontaine’s 2013 film *Gemma Bovary* based on Posy Simmonds’ late twentieth-century graphic novel, plays with that idea. In *The Pumpkin Season*, the apparent central character, Gregor, a male detective, turns out to be a female biologist. Other characters like the Dormouse Master, or Clara, or Slabo, or perhaps Vala, may seem to occupy the role of central protagonist – something almost all trade mark fiction requires. Even if the reader insists that Janja is the central character, because she is the one who realises what has happened, or to be more accurate, she realises that someone has been shot and seems to have enough interest in the murdered person to want to find out who did it, we do not know what happens next because the story ends. I feel Janja is about to become the driving force in a middle European version of a Scandi-noir tale. It would turn *The Pumpkin Season* into trade mark fiction in which Janja, the scientist-sleuth, solves her first case. Trade mark fiction does not permit the primacy of the central character to be questioned. Furthermore, trade mark fiction does not like structural

ambiguities regarding time and place to remain unanswered. The name of the city and the period in which the story is set is never revealed. The location has, perhaps, a vaguely Eastern European personality, but it is not crystal clear that the story is set during the post-communist, post-wall period. Generically, the story may be connected to *Wendeliterature*, 'change-literature', focussing on 'post-wall' era in Germany, but, I hope, other influences – its Welshness or Sloveneness, for example – render it contrary enough to avoid that net.

So what is wrong with publishing predictable stories?

Nothing. During the period I've been considering *The Pumpkin Season* I have written seven children's novels, five situation comedy series and several radio plays. You can't pitch ideas to producers and publishers and keep working if you don't do what you say you'll do and write predictably.

This story was not drafted with publication as its first goal. It was written because I was given an opportunity to develop it in the context of a PhD in Creative Writing. It concerns the things I am interested in, not necessarily the reader or the market that connects writers to readers. It is about comedy, creativity, markets, music, identity, character, bureaucracy, structure, geography and time. How *The Pumpkin Season* relates to trade marks frames the story. *The Pumpkin Season* imagines a city as a character and individuals within it as facets of its personality. Throughout the story, all of the characters, in their own ways, try and fail to create something new, to express themselves as individuals. Perhaps the Dormouse Master (and because she discovers him, Janja) are the ones who get closest to seeing the problem: we are not as smart as we think we are – we are more like ants than we like to imagine. Even within the field of creative writing, the structures of

market and convention mould our work into a series of fantastic looking, but similar tasting, jellies.

In *Ulysses*, Joyce imposes a mythical plot on the real Dublin. At the level of the sentence, the phrase and even the word, his language is labyrinthine, it melts and reforms from chapter to chapter. Comic freedom contrasts with a rigid structure: a day in the life of Leopold Bloom owes its structure to Homer's *Odyssey*. In *The Pumpkin Season* the structure is weaker: the characters are held together (if that's the word for it) by their search or craving for a structure. The language of *The Pumpkin Season* is – unlike Joyce's – neither brilliant nor labyrinthine. It is quite ordinary. Through this ordinariness labyrinthine structures are revealed. Janja is a scientist who, in conjunction with her alter ego, Gregor, searches for plots at atomic, cellular, personal and metaphorical levels. She also sees the joke – as soon as she knows something it becomes part of her, it loses its objective value. She is like an archaeologist – destroying the information she values.

The Pumpkin Season is a comedy. It should make the reader laugh and it suggests, I hope, that the comic can be profound. Twentieth-century theories of comedy, from Bergson's description of its 'scanty', 'bitter' taste, to Eco's excavation of 'carnival' do not do justice to the possibility that perhaps the twentieth-century's most profound literature – Kafka, Borges, Beckett, to name but three – was comic. I am drawn to the comic because life feels funny. Jokes and expressions are little time capsules we carry with us, they are given to us by our associates, they remind us who we are not. For me, comic writing is an almost musical experience in which images and rhythms are used to inculcate a state of mind, the actual words, it seems to me, are – comically – not as important as they purport to be. Writing in this way is perhaps like orchestration. Through the repetition and development of

themes and moods, variations in tempo and mood, an emotional context may be explored.

After Christmas

I remember leaning over the balcony in the St David's Centre, realising that trade mark-carrying humans remind me of leaf-carrying ants. Aside from the occasional outburst, Attenborough carefully maintains an impartial relationship with the natural world. He does not favour the lions or the victims of lions. He tries to describe what he sees and make available what lions and their prey get up to. I feel much the same about people and stories. I am not trying to coerce or persuade anyone – in this case to suggest that they should protest about the consumerisation of everything or that they should oppose it. I have written a story set twenty years ago during a social transformation. I have tried to illustrate how difficult it is, how impossible it may be, to think creatively, even though we now believe that our own creativity is a universally available right and that it is economically viable. I have tried to show how structures and individuals may connect and I have written a comedy about a feeling. The preceding chapters of the critical commentary were written after I had finished *The Pumpkin Season*: they represent an attempt to explore some aspects of the story.

Very seldom does the business of entertainment display real humour. More frequently it sells carnival. When a real piece of humour appears, entertainment becomes avant-garde: a supreme philosophical game. We smile because we feel sad for having discovered, only for a moment, the truth. But at this moment we have become too wise to believe it. We feel

quiet and peaceful, a little angry, with a shade of bitterness in our minds.
Humour is a cold carnival.²⁸⁰

If you don't believe in Christmas, it's time for *The Pumpkin Season*.

²⁸⁰ Umberto Eco, 'The Comic and the Rule' in *Carnival!* by Umberto Eco, V.V. Ivanov and Monica Rector, (New York: Mouton Publishers, 1984). p. 8.

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Appendix I

Legal definitions of UK trade marks since 1875

Trade Marks Registration Act, 1875²⁸²

Section 10

For the purposes of this Act:

A trade mark consists of one of or more of the following essential particulars; that is to say

A name of an individual or firm printed, impressed or woven in some particular and distinctive manner; or

A written signature or copy of a written signature of an individual or firm; or

A distinctive device, mark, heading label, or ticket and there may be added to any one or more of the said particulars any letters, words, or figures, or combination of letters, words, or figures; also

Any special and distinctive word or words in combination of figures or letters used as a trade mark before the passing of this Act may be registered as such under this Act.

Patents, Designs and Trade Marks Act 1883²⁸³

Section 63

- (1) For the purposes of this Act, a trade mark must consist of or contain at least one of the following essential particulars (a):-
 - a) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or
 - b) A written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade mark; or
 - c) A distinctive device, mark, brand, heading, label, ticket or fancy word or words not in common use.
- 2) There may be added to any one or more of these particulars any letters, words, or figures, or combination of letter, words or figures, or of any of them
- 3) Provided that any special and distinctive word or words, letter, figure, or combination of letters or figures, or of letterers and figures used as a trade mark before the thirteenth day of August one thousand eight

²⁸² Daniel, E.M., *The Trade Marks Registration Act and Rules Thereunder*, (London: Stephens and Haynes, 1876).

²⁸³ Sebastian, Boyd Lewis, *The Law of Trade Marks and Their Registration*, (London: Stevens and Sons Ltd, 1890).

hundred and seventy five (a) may be registered as a trade mark under this part of this Act.

Patents, Designs, and Trade Marks Act 1883 (Amendment) Act 1888²⁸⁴

64 (1) For the purposes of this Act, a trade mark must consist of or contain at least one of the following essential particulars:

- (a) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or
 - (b) A written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade mark; or
 - (c) A distinctive device, brand, heading, label, or ticket; or
 - (d) An invented word or invented words; or
 - (e) A word or words having no reference to the character or quality of the goods, and not being a geographical name
- (2) There may be added to any one of or more of the essential particulars mentioned in this section any letters, words or figures, or combination of letters, words, or figures, or of any of them, but the applicant for registration of any such additional matter must state in his application the essential particulars of the trade mark, and must disclaim in his application any right to the exclusive use of the added matter, and copy of the statement and disclaimer shall be entered on the register,
- (3) Provided as follows:
- i) A person need not under this section disclaim his own name or the foreign equivalent thereof, or his place of business, but no entry of any such name shall affect the right of any owner of the same name to use that name or the foreign equivalent thereof:
 - ii) Any special and distinctive word or words, letter, figure, or combination of letters or figures, or of letters and figures used as a trade-mark before the thirteenth day of August one thousand eight hundred and seventy five, may be registered as a trade mark under this part of the Act

²⁸⁴ Patents, Designs, and Trade Marks Act 1883 (Amendment) Act 1888 Available at: - House of Commons Parliamentary Papers Online – Pro Quest UK Parliamentary Database (accessed 1/8/2017)

Trade Marks Act 1905²⁸⁵**Section 3:** In and for the purposes of this Act-

A “mark” shall include a device, brand, heading, label, ticket, name, signature, letter, word, or any combination thereof:

A “trade mark” shall mean a mark used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, dealing with, or offering for sale:

A “registrable trade mark” shall mean a trade mark which is capable of registration under the provisions of this Act:

“The register” shall mean the register of trade marks kept under the provisions of this Act:

A “registered trade mark” shall mean a trade mark which is actually upon the register:

“Firm” shall include a corporation, company, or person carrying on a business:

“Prescribed” shall mean prescribed by this Act and the Rules for the time being in force thereunder:

“Person!” shall include a corporation, company or firm,.

Section 9: A registrable trade mark must contain or consist of at least one of the following essential particulars:-

- (1) The signature (or the name or trading style written in some particular and distinctive manner) of the firm applying for the registration, or of some predecessor in its business; or
- (2) An invented word or invented words; or
- (3) A word or words having no obvious reference to the character or quality of the goods, and not being in its ordinary signification a geographical name or a surname; or
- (4) A mark which (while not coming within any of the above classes) is nevertheless of a distinctive character so as to be adapted to distinguish practically the goods of the proprietor of the trade mark from other firms.

In determining whether a mark is distinctive for the purposes of this section, the tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered

²⁸⁵ Trade Marks Act 1905 House of Commons Parliamentary Papers Online – Pro Quest UK Parliamentary Database (Accessed 1/8/2017)

or proposed to be registered, but subject hereto a pictorial representation of such goods, or non-invented words having obvious reference to the character or quality of such goods shall not of themselves be deemed distinctive under the provisions of this section.

Trade Marks Act 1905 (Amendment) Act 1919²⁸⁶

Section 1 (1) The register of trade marks (including the Manchester Register) kept under the Trade Marks Act 1905 (hereinafter referred to as the principal Act), shall be divided into two parts to be called respectively Part A. and Part B.

- (3) Part A. of the register shall comprise all trade marks entered in the register of trade marks at the commencement of this Act and all trade marks which after the commencement of this Act may be registered under the principal of this Act.
- (4) Part B. shall comprise all trade marks registered under this Part of this Act, and all trade marks entered on or removed thereto under this Act.

2 (1) Where any mark has for not less than two years been bona fide used in the United Kingdom upon or in connection with any goods (whether for sale in the United Kingdom or exportation abroad) for the purpose of indicating that they are the goods of the proprietor of the mark, may apply in writing to the registrar in the prescribed manner to have the mark entered as his registered trade mark in Part B. of the register in respect of such goods.

(2) The registrar shall consider every such application for registration of a trade mark in Part B. of the register, and if it appears to him without search that the application is inconsistent with the provisions of section eleven or section nineteen of the principal Act, or if he is not satisfied that the mark has been so used as aforesaid, he may refuse the application or may accept it, subject to conditions, amendments or modifications as to the goods or classes of goods in respect of which the mark is to be registered, or to such limitations if any, as to mode or place of user or otherwise as he may think right to impose and in any other case he shall accept the application.

(3) Every such application shall be accompanied by a statutory declaration verifying the user, including the date of first user, and such date shall be entered on the register.

(4) Any such refusal or conditional acceptance shall be subject to appeal to the court, and if the ground for refusal is insufficiency of evidence as to user, such refusal shall be without prejudice to any application for registration of the trade mark under the provision of the principal Act.

(5) Every such application shall, if accepted, be advertised in accordance with the provisions of the principal Act.

²⁸⁶ Trade Marks Act, 1905 (Amendment) Act 1919, House of Commons Parliamentary Papers Online – Pro Quest UK Parliamentary Database (accessed 1/8/2017).

(6) A mark may be registered in Part B. notwithstanding any registration in Part A, by the same proprietor of the same mark or any part or parts thereof.

3. The provision of the principal Act, as amended by this Act, with the exception of those set out in the First Schedule of this Act shall, subject to the provisions of this Part of this Act, apply in respect of trade marks to which this Part of this Act applies as if they were herein re-enacted and in terms made applicable to this Part of this Act.

4 The registration of a proprietor of a trade mark in Part B. of the register shall be prima facie evidence that that person has the exclusive right to the use of that trade mark, but in any action for infringement of a trade mark entered in Part B. of the register, no injunction, interdict or other relief shall be granted to the owner of the trade mark in respect of such registration, if the defendant establishes to the satisfaction of the court that the user of which the plaintiff complains is not calculated to deceive or to lead to the belief that the goods the subject of such user were goods manufactured, selected, certified, dealt with or offered for sale by the proprietor of the trade mark.

5. If any person applies for the registration of a trade mark under the principal Act in Part A. of the register, the registrar may, if the applicant is willing, instead of refusing the application treat it as an application for registration in Part B. of the register under this Part of this Act and deal with the application accordingly.

Trade Marks Act 1938²⁸⁷

Registrability and validity of registration.

9.-(1) In order for a trade mark (other than a certification trade mark) to be registrable in Part A of requisite for the register, it must contain or consist of at least one of the following essential particulars.

(a) the name of a company, individual, or firm, represented in a special or particular manner ;

(b) the signature of the applicant for registration or some predecessor in his business ;

(c) an invented word or invented words;

(d) a word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname ;

(e) any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the foregoing paragraphs (a), (b), (c) and (d), shall not be registrable under the provisions of this paragraph except upon evidence of its distinctiveness.

²⁸⁷ Trade Marks Act 1938, House of Commons Parliamentary Papers Online – Pro Quest UK Parliamentary Database (Accessed 1/8/2017)

(2) For the purposes of this section " distinctive " means adapted, in relation to the goods in respect of which a trade mark is registered or proposed to be registered, to distinguish goods with which the proprietor of the trade mark is or may be connected in the course of trade from goods in the case of which no such connection subsists, either generally or, where the trade mark is registered or proposed to be registered subject to limitations, in relation to use within the extent of the registration.

(3) In determining whether a trade mark is adapted to distinguish as aforesaid the tribunal may have regard to the extent to which- (a) the trade mark is inherently adapted to distinguish as aforesaid ; and 6 [1 & 2 GEO. 6.] Trade Marks [CH. 22.] Act, 1938. (b) by reason of the use of the trade mark or of any other circumstances, the trade mark is in fact adapted to distinguish as aforesaid.

10 (1) In order for a trade mark to be registrable capability in Part B of the register it must be capable, in relation to the goods in respect of which it is registered or proposed to be registered, of distinguishing goods with which it is registered or proposed to be registered, of distinguishing goods with which the proprietor of the trade mark is or may be connected in the course of trade from goods in the case of which no such connection subsists, either generally or, where the trade mark is registered or proposed to be registered subject to limitations, in relation to use within the extent of the registration.

(2) In determining whether a trade mark is capable of distinguishing as aforesaid the tribunal may have regard to the extent to which -

(a) the trade mark is inherently capable of distinguishing as aforesaid; and

(b) by reason of the use of the trade mark or of any other circumstances, the trade mark is in fact capable of distinguishing as aforesaid.

(3) A trade mark may be registered in Part B notwithstanding any registration in Part A in the name of the same proprietor of the same trade mark or any part or parts thereof.

Trade Marks Act 1938 (Amendment) Act 1983²⁸⁸

1. Sections 2,3,5,7,8,9,10, 21(2)(a), 23(5), 26(1)(except the Proviso) and (3), 28, 29, 34 (1) (d), 36, 40(1)(b), 60(1)(c), 61, 62 and 68(2) are amended by the insertion of the words "or services" after the word "goods" wherever that word occurs.

²⁸⁸ Trade Marks Act 1938 (Amendment) Act 1983 House of Commons Parliamentary Papers Online – Pro Quest UK Parliamentary Database (accessed 1/8/2017).

Trade Marks Act 1994²⁸⁹

Section 1 - (1) In this Act a 'trade mark' means any sign capable being represented graphically which is capable of distinguishing the goods of one undertaking from those of other undertakings.

A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging.

Section 3 – (1) The following shall not be registered –

- (a) signs which do not satisfy the requirements of section 1(1),
- (b) trade marks which are devoid of any distinctive character
- (c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services,
- (d) trade marks which consist exclusively of signs or indications which have been customary in the current language or in the bona fide and established practices of the trade:

Provide that, a trade marks shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for the registration, it has in fact acquire distinctive charter as a result of the use made of it.

2/ A sign shall not be registered as a trade marks if it consists exclusively of –

- (a) the shape which results from the nature of the goods themselves,
- (b) the shape of the goods which is necessary to obtain a technical result,
or
- (c) the shape which gives substantial value of the goods.

3/ A trade mark shall not be registered if it is –

- (a) contrary to public policy or to accepted principles of morality, or
- (b) of such a nature as to deceive the public (for instance as to the nature, quality or geographical origin of the goods or service)

4/ A trade marks shall not be registered if or to the extent that its use is prohibited in the United Kingdom by an enactment or rule of law or by any provision of Community law

5/ A trade mark shall not be registered in the cases specified, or referred to in section 4 (specially protected emblems)

6/ A trade mark shall not be registered if or to the extent that the application was made in bad faith.

²⁸⁹ Trade Marks Act 1994, (London: HMSO,1994).

First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks²⁹⁰

Article 2

Signs of which a trade mark may consist

A trade mark may consist of any sign capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.

Article 3

Grounds for refusal or invalidity

1. The following shall not be registered or if registered shall be liable to be declared invalid:

- (a) signs which cannot constitute a trade mark;
- (b) trade marks which are devoid of any distinctive character;
- (c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, or the time of production of the goods or of rendering of the service, or other characteristics of the goods or trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade;
- (e) signs which consist exclusively of:
 - the shape which results from the nature of the goods themselves, or
 - the shape of goods which is necessary to obtain a technical result, or
 - the shape which gives substantial value to the goods;
- (f) trade marks which are contrary to public policy or to accepted principles of morality;
- (g) trade marks which are of such a nature as to deceive the public, for instance as to the nature, quality or geographical origin of the goods or service;
- (h) trade marks which have not been authorized by the competent authorities and are to be refused or invalidated pursuant to Article 6 ter of the Paris Convention for the Protection of Industrial Property, hereinafter referred to as the 'Paris Convention'.

²⁹⁰ First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks Official Journal L 040 , 11/02/1989 P. 0001 – 0007 at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989L0104:en:HTML>> (accessed 1/8/2017).

2. Any Member State may provide that a trade mark shall not be registered or, if registered, shall be liable to be declared invalid where and to the extent that:

- (a) the use of that trade mark may be prohibited pursuant to provisions of law other than trade mark law of the Member State concerned or of the Community;
- (b) the trade mark covers a sign of high symbolic value, in particular a religious symbol;
- (c) the trade mark includes badges, emblems and escutcheons other than those covered by Article 6 ter of the Paris Convention and which are of Public interest, unless the consent of the appropriate authorities to its registration has been given in conformity with the legislation of the Member State;
- (d) the application for registration of the trade mark was made in bad faith by the applicant.

DIRECTIVE (EU) 2015/2436 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 December 2015 to approximate the laws of the Member States relating to trade marks²⁹¹

SECTION 1

Signs of which a trade mark may consist

Article 3

Signs of which a trade mark may consist

A trade mark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of:

- (a) distinguishing the goods or services of one undertaking from those of other undertakings; and
- (b) being represented on the register in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.

SECTION 2

Grounds for refusal or invalidity

Article 4

Absolute grounds for refusal or invalidity

1. The following shall not be registered or, if registered, shall be liable to be declared invalid:

²⁹¹ DIRECTIVE (EU) 2015/2436 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 December 2015 to approximate the laws of the Member States relating to trade marks <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015L2436&from=en>> (accessed 1/8/2017).

- (a) signs which cannot constitute a trade mark;
 - (b) trade marks which are devoid of any distinctive character;
 - (c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, or the time of production of the goods or of rendering of the service, or other characteristics of the goods or services;
 - (d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade;
 - (e) signs which consist exclusively of:
 - (i) the shape, or another characteristic, which results from the nature of the goods themselves;
 - (ii) the shape, or another characteristic, of goods which is necessary to obtain a technical result;
 - (iii) the shape, or another characteristic, which gives substantial value to the goods;
 - (f) trade marks which are contrary to public policy or to accepted principles of morality;
 - (g) trade marks which are of such a nature as to deceive the public, for instance, as to the nature, quality or geographical origin of the goods or service;
 - (h) trade marks which have not been authorised by the competent authorities and are to be refused or invalidated pursuant to Article 6ter of the Paris Convention;
 - (i) trade marks which are excluded from registration pursuant to Union legislation or the national law of the Member State concerned, or to international agreements to which the Union or the Member State concerned is party, providing for protection of designations of origin and geographical indications;
 - (j) trade marks which are excluded from registration pursuant to Union legislation or international agreements to which the Union is party, providing for protection of traditional terms for wine;
 - (k) trade marks which are excluded from registration pursuant to Union legislation or international agreements to which the Union is party, providing for protection of traditional specialities guaranteed;
 - (l) trade marks which consist of, or reproduce in their essential elements, an earlier plant variety denomination registered in accordance with Union legislation or the national law of the Member State concerned, or international agreements to which the Union or the Member State concerned is party, providing protection for plant variety rights, and which are in respect of plant varieties of the same or closely related species.
2. A trade mark shall be liable to be declared invalid where the application for registration of the trade mark was made in bad faith by the applicant. Any Member State may also provide that such a trade mark is not to be registered.

3. Any Member State may provide that a trade mark is not to be registered or, if registered, is liable to be declared invalid where and to the extent that:

(a) the use of that trade mark may be prohibited pursuant to provisions of law other than trade mark law of the Member State concerned or of the Union;

(b) the trade mark includes a sign of high symbolic value, in particular a religious symbol;

(c) the trade mark includes badges, emblems and escutcheons other than those covered by Article 6ter of the Paris Convention and which are of public interest, unless the consent of the competent authority to their registration has been given in conformity with the law of the Member State.

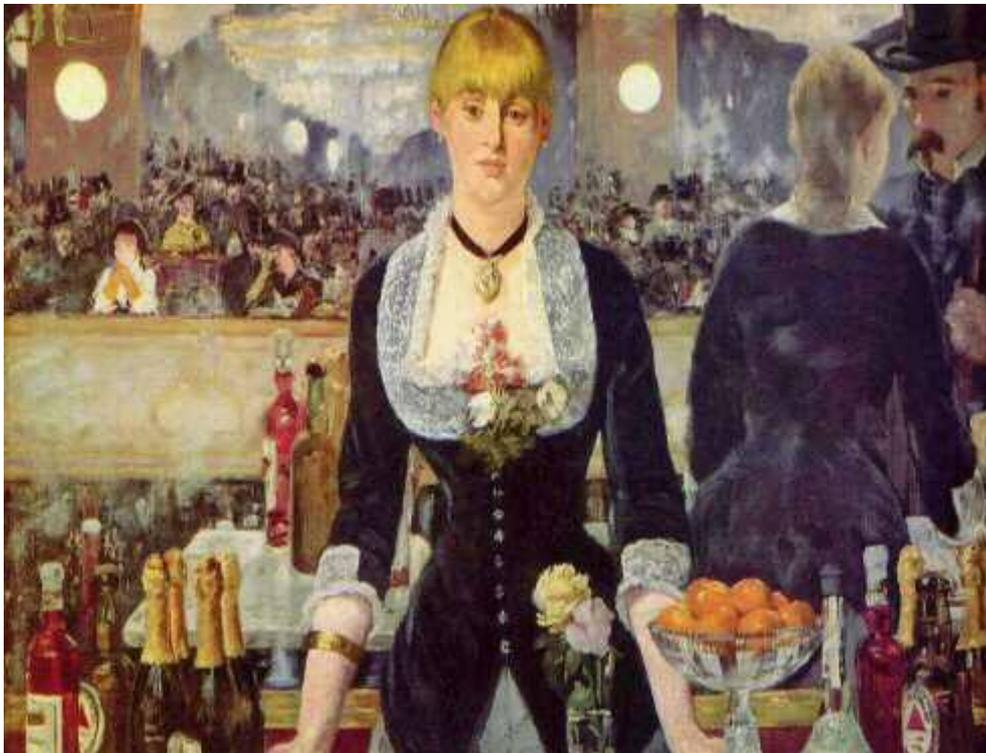
4. A trade mark shall not be refused registration in accordance with paragraph 1(b), (c) or (d) if, before the date of application for registration, following the use which has been made of it, it has acquired a distinctive character. A trade mark shall not be declared invalid for the same reasons if, before the date of application for a declaration of invalidity, following the use which has been made of it, it has acquired a distinctive character.

5. Any Member State may provide that paragraph 4 is also to apply where the distinctive character was acquired after the date of application for registration but before the date of registration.

Appendix II

Captured dreams – trade mark images, re-imagined

Édouard Manet, *A bar at the Folies-Bergère*, 1882.



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²⁹² Édouard Manet, *A Bar at the Folies-Bergère*, Oil on canvas, Cortauld Gallery, London, (1882).

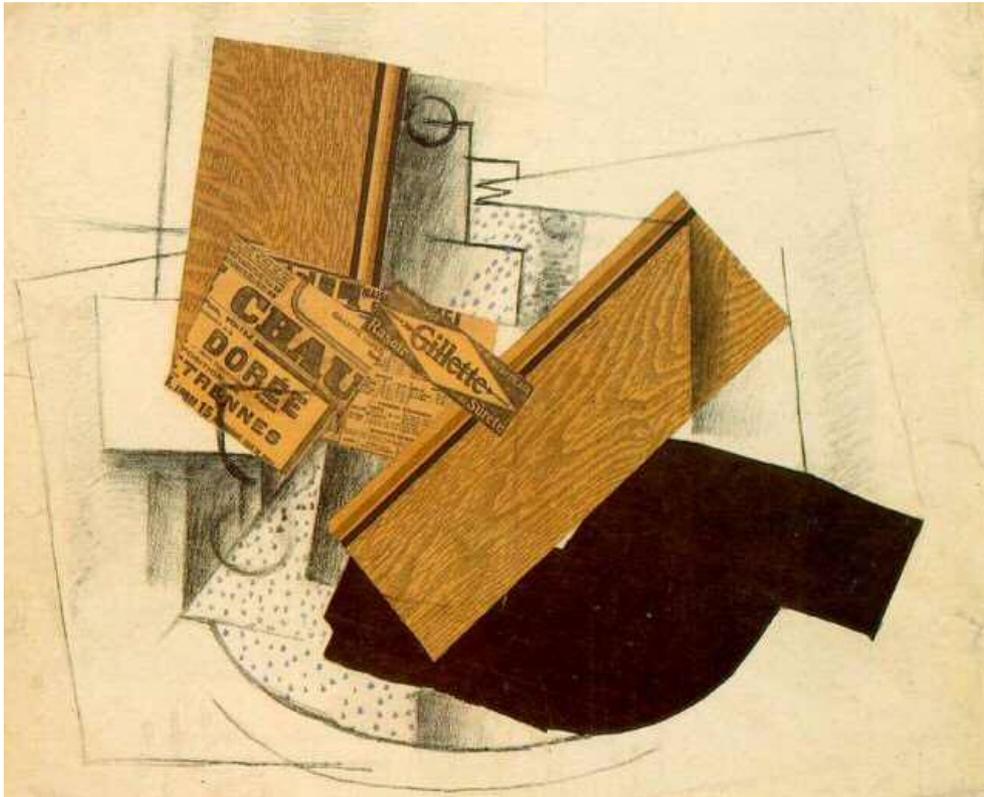
Detail from: Henri de Toulouse-Lautrec, *Confetti*, 1894.



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²⁹³ Henri Toulouse-Lautrec, *Confetti*, Lithograph, The Museum of Modern Art, New York, (1894).

Georges Braque, *Still life on a table: Gillette*, 1914.



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²⁹⁴ George Braque, *Still Life on a Table: "Gillette"*, Charcoal, pasted paper, and gouache, Musée National d'Art Moderne, Centre Georges Pompidou, Paris, (1914).

Marcel Duchamp, *Fountain*, 1917, replica 1964.



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²⁹⁵ Marcel Duchamp, *Fountain*, porcelain, Tate Gallery, London (1917, replica 1964).

Edward Hopper, *Gas*, 1940.



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²⁹⁶ Edward Hopper, *Gas*, oil on canvas, Museum of Modern Art, New York, 1940.

Ed Ruscha, *Standard station*, 1963.



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²⁹⁷ Ed Ruscha, *Standard Station*, oil on canvas, Dartmouth College Museum of Art, Hanover, 1963.

The Myth and its Registration

Andy Warhol, *Campbell's Soup Cans and Other Works*, 1953-1967.



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²⁹⁸ *Andy Warhol: Campbell's Soup Cans and Other Works, 1953–1967* (2015) [Exhibition] New York, USA. The Museum of Modern Art. April 25–October 12, 2015 [Photo: Jonathan Muzikar. © 2015 The Museum of Modern Art, New York]

Richard Estes, *Supreme Hardware*, 1974.



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²⁹⁹ Richard Estes, *Supreme Hardware*, oil and acrylic on canvas, Atlanta, High Museum of Art, 1974.

Roberto Bernardi, *Candy Machine*, 2009.



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³⁰⁰ Roberto Bernardi, *Candy Machine*, oil on canvas, Private Collection, 2009.

David Hockney, *The Sun Newspaper*, 2017.

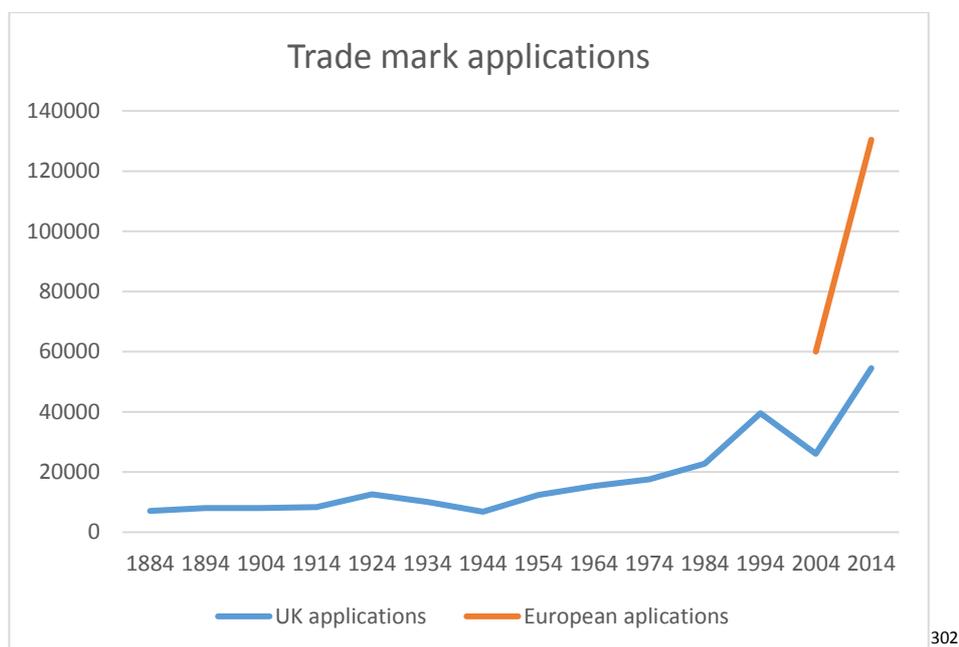


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³⁰¹ The Sun masthead – redesigned by David Hockney for the Friday, February 3rd 2017 edition of The Sun newspaper

Appendix III

UK-valid trade mark applications 1884 – 2014



³⁰² All UK statistics up to 1984 from *Reports Comptroller General of Patents, Designs and Trade Marks and Appendices*, available at House of Commons Parliamentary Papers Online – Pro Quest UK Parliamentary Database (Accessed 1/8/2017) and from - 1994-2004 – *Annual Report of the Patent Office* – available at House of Commons Parliamentary Papers Online – Pro Quest UK Parliamentary Database (Accessed 1/8/2017) and in relation to UK Statistics - 2014 - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/456097/Facts_and_Figures_2015.pdf (Accessed 2/2/2017)
 EU Statistics 2004 - <http://is.jrc.ec.europa.eu/pages/ISG/patents/documents/Wajsman.pdf> (Accessed 2017)
 EU stats 2014 - [http://ec.europa.eu/eurostat/statistics-explained/index.php/Intellectual_property_rights_statistics#Data sources and availability](http://ec.europa.eu/eurostat/statistics-explained/index.php/Intellectual_property_rights_statistics#Data_sources_and_availability) (accessed 2/2/2017).

Appendix IV

Birdman Excerpt

48 INT. RUM HOUSE - LATER**48**

...Riggan's video is being played now in a television in the bar. We see the MTV logo on the bottom of the screen and a video caption that reads: "Birdman goes viral, 930.000 views and counting". The camera pans to find Riggan sitting at the bar, drunk. He is one of the few customers. He polishes off his drink.

RIGGAN

Let me have another one.

BARTENDER

You got it.

The bartender pours another whiskey for Riggan. A waiter steps up to the bar. The bartender points to a martini.

BARTENDER (CONT'D)

(To the waiter.)

That's going over to Ms. Dickinson.

Riggan's head tilts at the mention of the name. He looks over to see Tabitha sitting at a table, scratching in her notebook.

RIGGAN

(Hands the waiter a bill.)

I got it. She's a friend of mine.

(CONTINUED)**10/29/14 /****91.**

The waiter pockets the money and gives Riggan the drink. He walks it over to Tabitha and places it down in front of her. Not looking up, she pulls the drink closer and takes a sip.

Riggan sits down across from her. She looks up and immediately recognizes him. He takes out the Carver cocktail napkin and pushes it in front of her. She looks at him, and then down to the napkin. She reads it in silence.

RIGGAN (CONT'D)

(Re: The napkin.)

That was twenty years before I put on that damned costume.

A pause. Then she pushes the napkin back toward him.

TABITHA

I don't care.

RIGGAN

I'm just saying, when you come tomorrow night, I want you--

TABITHA

It doesn't matter.

RIGGAN

What are you--

TABITHA

I'm going to destroy your play.

RIGGAN

You haven't even seen it. I don't-- Did I do something to offend you?

TABITHA

As a matter of fact you did. You took up space in a theater which otherwise might have been used on something worthwhile.

RIGGAN

But you don't even know if it's--

TABITHA

That's true. I haven't read a word of it, or even seen a preview, but after the opening tomorrow I'm going to turn in the worst review anybody has ever read. And I'm going to close your play. Would you like to know why? Because I hate you. And everyone you represent. Entitled. Spoiled. Selfish. Children. Blissfully untrained, unversed and unprepared to even attempt real art. Handing each other awards for cartoons and

(MORE)

(CONTINUED)

10/29/14 /

92.

TABITHA (CONT'D)

pornography. Measuring your worth in weekends. Well, this is the theater, and you don't get to come in here and pretend you can write, direct and act in your own propaganda piece without going through me first. So, break a leg.

Tabitha goes back to her writing. Riggan sits for a moment.

RIGGAN

What has to happen in someone's life, for them to end up becoming a critic?

She looks up at him.

RIGGAN (CONT'D)

Whatcha writin'? You reviewin' a play? Was it good? Bad? Did you even see it? Lemme read.

He snatches the notebook from her.

TABITHA

I will call the police.

RIGGAN

No you won't. Let's read your review!
 (He scans the notebook.)
 "Callow". A label. "Lackluster". Label.
 "Marginalia". Sounds like you need
 penicillin to clear that up. None the
 less... label.
 (Looks to Tabitha.)
 All labels. You're a lazy fucker
 aren't you?
 (Looks one last time at
 the notebook.)
 Epistemological vertigo?

Tabitha wants to reach for the notebook, but her pride won't let her. Riggan takes a flower from a vase at the center of the table.

RIGGAN (CONT'D)

You know what this is? You don't, do you? You can't even see it if you don't label it. You mistake those sounds in your head for true knowledge.

TABITHA

Are you finished?

RIGGAN

(Wrinkling one of the pages.)
 Nothin' about intention, structure,
(MORE)

(CONTINUED)

10/29/14 /

93.

RIGGAN (CONT'D)

technique. Just crappy opinions backed up by crappy comparisons. You're incapable of writing more than a couple of paragraphs, and you risk nothing of yourself.
 (He tears out the page and tosses the notebook.)
 Well, I'm an actor and this play has cost me everything. So you can take your cowardly, malicious, shittily written reviews and shove them up your... (Showing her the wrinkled page.) ...wrinkly, tight ass.

Riggan wears a proud smile. And suddenly, Tabitha begins to smile with him.

TABITHA

You think you're an actor?
 (Calls to the waiter.)
 Eddie!

Eddie the waiter approaches the table.

WAITER

Yeah, Mrs. Dickinson?

TABITHA

Give us some Shakespeare.

WAITER

No problem. Got anything in mind?

Tabitha looks over at Riggan picking the perfect verse.

TABITHA

The Scottish Play. Act five...

WAITER

Tomorrow, and tomorrow, and tomorrow,
Creeps in this petty pace from day to
day, To the last syllable of recorded
time; And all our yesterdays have lighted
fools. The way to dusty death...

He is brilliant. The monologue is perfectly played and powerful. Riggan being mercilessly reminded of his mediocrity... by Eddie the waiter.

WAITER (CONT'D)

...Out, out, brief candle! Life's but a
walking shadow, a poor player, That
struts and frets his hour upon the
stage, And then is heard no more. It is
(MORE)

(CONTINUED)

10/29/14

/ 94.

WAITER (CONT'D)

a tale told by an idiot, full of sound
and fury... Signifying nothing.

A few drunks clap at the beautiful performance. Then, a powerful silence rings out for a moment, until...

TABITHA

Thank you, Eddie.

WAITER

You got it.

TABITHA

(To Riggan. A derisive laugh.)
You're no actor. You're a celebrity.
Let's be clear on that.

Tabitha rises from her seat and grabs her things.

TABITHA (CONT'D)

I'm going to kill your play.

She walks away. Riggan sits numb. After a moment, he reaches over and gulps down Tabitha's entire martini, gin pouring out the sides of his mouth. Unaware, he slams the empty martini

glass on top of the Carver napkin and gets up. We follow him out...³⁰³

³⁰³ *Birdman*, dir., Alejandro González Iñárritu, (Searchlight Pictures, 2014) scene 48, version 10/12/14. Script available online at: <<http://www.imsdb.com/scripts/Birdman.html>> (accessed 11/8/2017).

Appendix V

Excerpts from the judgment of Lord Justice Salmon, L.J. in the Tarzan case.³⁰⁴

‘In the present case, there is nothing at all in the word TARZAN which would suggest to the public or to the trade that a film or magnetic tape recording had anything to do with the applicant or anyone else. The word TARZAN when used in connection with a film suggests - and suggests only - that the film has something to do with the well-known fictional person TARZAN, a man of great strength and agility.’

‘Just as in those two authorities, the words in question, Yorkshire in one case and Weldmesh in the other, had nothing standing on their own feet inherently apt to distinguish the applicants' goods, so here, in my view, TARZAN has nothing standing on its own feet, upon which it would be possible to find that it is inherently apt to distinguish the applicants' films or magnetic recordings as being the applicants' or anyone else's goods....Even if the word could be stated to be to some extent inherently adapted to “distinguish”, the court still has to have regard to the extent to which it is so inherently adapted. I do not think, however, that we get as far as that point, because I can see nothing upon which this court could hold that the word TARZAN is to any extent inherently adapted to “distinguish” any goods in connection with what it is used as the plaintiff's or anyone else's goods. I therefore hold that the application to register the mark under Part A in respect of films and magnetic tape recordings fails.

As far as the other application is concerned, which relates to games, toys, playthings, and gymnastic and sporting articles, the case was fought upon the basis that these goods were all of a kind closely connected with the character of TARZAN. It seems to me that the application stands or falls with the application made in respect of films and tape recordings.’

³⁰⁴ Tarzan Trade Mark *Reports of Patent, Design and Trade Mark Cases*, Volume 87, Issue 15, 3 December 1970, Pages 450–461, <<https://academic.oup.com/rpc/article-lookup/doi/10.1093/rpc/87.15.450>> (accessed on 14/8/2017).

Appendix VI

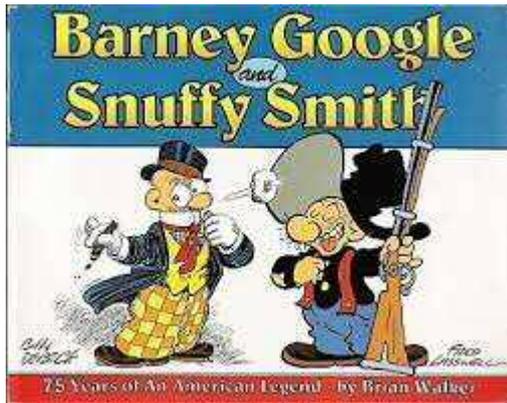
Google's original web page



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³⁰⁵ From The History of the Internet in a Nutshell - <https://www.webpagefx.com/blog/web-design/the-history-of-the-internet-in-a-nutshell/> (accessed 14/8/2017).

The first Google



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³⁰⁶ From Walker B, and Lazzell, F, *Barney Google & Snuffy Smith: 75 Years of an American Legend* (Wisconsin: Kitchen Sink Press, 1994).

Google's London office



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³⁰⁷ From <<https://www.seroundtable.com/photos/google-london-posh-lobby-19121.html>> (accessed 14/8/2017).

Google's Amsterdam office



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³⁰⁸ From <<https://www.officelovin.com/2014/07/08/inside-googles-amsterdam-office/>> (accessed 14/8/2017).

Google's New York office



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³⁰⁹ Google's New York Office <<http://nydesignagenda.com/google%C2%B4s-new-york-city-office/>> (accessed 14/8/2017).

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