
THEY BELONG WITH TAYLOR SWIFT™: APPLYING TRADEMARK LAW AND TEXTUAL ANALYSIS TO THE BRANDING OF LOVE SONG LYRICS

*April Xiaoyi Xu**

“Music is art, and art is important and rare. Important, rare things are valuable. Valuable things should be paid for.”

— Taylor Alison Swift¹

I. TRADEMARKS: BRANDING LOVE SONG LYRICS THE TAYLOR SWIFT™ WAY

American singer-songwriter Taylor Swift has always been a phenomenon, from becoming the youngest artist to be signed by Sony/ATV Music, to maintaining her status as one of the world’s most popular singers for more than 10 years consistently, to frequently receiving top music awards, to developing a reputation for serial-dating famous men, to audaciously taking her entire catalog off Spotify to protect her copyrights,² to being openly vocal about politics despite previously insisting on being “a good girl” who does “what everyone else wants”

* J.D. Candidate, Class of 2021, Harvard Law School. The author would like to thank her family and friends for their love and support, especially during the COVID-19 pandemic; Professor Christopher T. Bavitz at Harvard Law School for the thought-provoking “Music and Digital Media” seminar and his kind guidance during many office hours sessions that inspired not only this paper, but also the author’s growing interest in intellectual property law more generally; as well as *University of Illinois Law Review* editors for their diligent work.

1. Taylor Swift, *For Taylor Swift, the Future of Music Is a Love Story*, WALL ST. J. (July 7, 2014, 6:39 PM), <https://www.wsj.com/articles/for-taylor-swift-the-future-of-music-is-a-love-story-1404763219>.

2. *Taylor Swift Seeks to Trademark Her Song Lyrics*, MANDOUR & ASSOCIATES, <https://www.mandour-law.com/blog/taylor-swift-seeks-to-trademark-her-song-lyrics/> (last visited July 4, 2020) (“While album sales are decreasing industry wide, financial gains are not the driving force behind her decision to trademark her lyrics. Rather, she claims it is to protect herself from others who are trying to make money off of her work without her knowledge or approval. Swift stated that she values her art, and she is willing to do what is necessary to protect it.”).

her to do. . . .³ As a *Bloomberg* article boldly declares, “Taylor Swift Is the Music Industry.”⁴

However accustomed the world is to perceiving Swift as a trailblazer, the Internet exploded again when Swift filed a number of trademark applications with the United States Trademark and Patent Office (“USPTO”) for phrases from some of her popular song lyrics, having already trademarked her full name and initials “T. S.,” as well as the term “Swiftie(s)”—the nickname for her fans.⁵ These phrases include “Nice to meet you. Where you been” and “could show you incredible things” from the song *Blank Space*, and “cause we never go out of style” from the song *Style*.⁶ Both of these love songs are from the album 1989, which, in itself, is not only the year of Swift’s birth, but also the subject of another phrase that Swift trademarked: “party like it’s 1989.”⁷ After releasing her new albums REPUTATION (Big Machine, 2017) and LOVER (Republic, 2019), Swift continued her “trademark play” by applying for trademarks for phrases including “the old Taylor can’t come to the phone right now” from *Look What You Made Me Do* and the word “Lover” from her 2019 album.⁸ Although not all of her applications succeeded, a sizable number of them were approved by the USPTO, making Swift perhaps the first musician to trademark lyrics.⁹

The filings prohibit the use of those phrases from appearing without a license on “everything from guitar straps and other accessories to removable tattoos.”¹⁰ Some of the more obscure items that Swift’s trademarks cover include “typewriters, walking sticks, non-medicated toiletries, Christmas stockings,

3. See, e.g., Karim R. Lakhani & Marco Iansiti, *Taylor Swift and the Economics of Music as a Service*, HARV. BUS. REV. (Nov. 6, 2014), <https://hbr.org/2014/11/taylor-swift-and-the-economics-of-music-as-a-service>; *Taylor Swift Biography*, BIOGRAPHY (Feb. 28, 2020), <https://www.biography.com/musician/taylor-swift>; *Achievements and milestones of Taylor Swift*, TAYLOR SWIFT WIKI, https://taylorswiftlifeandmusic.fandom.com/wiki/Achievements_and_milestones_of_Taylor_Swift (last visited July 4, 2020); Steve Knopper, *Taylor Swift Abruptly Pulls Entire Catalog From Spotify*, ROLLING STONE (Nov. 3, 2014, 6:37 PM), <https://www.rollingstone.com/music/music-news/taylor-swift-abruptly-pulls-entire-catalog-from-spotify-55523/>; see also Katie Shonk, *The Importance of Power in Negotiations: Taylor Swift Shakes it Off*, HARV. PROGRAM ON NEGOT. (May 18, 2020), <https://www.pon.harvard.edu/daily/dispute-resolution/dispute-resolution-with-spotify-taylor-swift-shakes-it-off/>.

4. Devin Leonard, *Taylor Swift Is the Music Industry*, BLOOMBERG (Nov. 13, 2014, 8:02 PM), <https://www.bloomberg.com/news/articles/2014-11-12/taylor-swift-and-big-machine-are-the-music-industry>.

5. *Swift, Taylor Trademarks*, JUSTIA TRADEMARKS, <https://trademarks.justia.com/owners/swift-taylor-1396036/> (last visited July 4, 2020).

6. *Id.*

7. See *id.* As a general note, when using the phrase “love songs” throughout this article, I refer to songs that focus specifically on romantic love.

8. Thomas J. Daly, *Taylor Swift’s Trademark Play*, NAT. L. REV. (Jan. 13, 2016), <https://www.natlawreview.com/article/taylor-swift-s-trademark-play>; Sarah Spellings, *Taylor Swift Filed for a Whole New Set of Trademarks*, THE CUT (Sept. 4, 2017), <https://www.thecut.com/2017/09/taylor-swift-plans-to-trademark-reputation-phrases.html>; *Taylor Swift’s Lover Trademark Application Rejected*, AHLAN LIVE (Sept. 16, 2019), <https://www.ahlanlive.com/taylor-swifts-lover-trademark-application-rejected-641369.html>.

9. Christopher Coble, *Taylor Swift Could Be 1st Musician to Trademark Lyrics: Report*, FINDLAW (Mar. 4, 2015, 11:41 AM), https://blogs.findlaw.com/celebrity_justice/2015/03/taylor-swift-could-be-1st-musician-to-trademark-lyrics-report.html; see JUSTIA TRADEMARKS, *supra* note 5.

10. Kory Grow, *Taylor Swift Trademarks ‘This Sick Beat’ and Other ‘1989’ Phrases*, ROLLING STONE (Jan. 28, 2015, 9:38 PM), <https://www.rollingstone.com/music/music-news/taylor-swift-trademarks-this-sick-beat-and-other-1989-phrases-41228/>.

knitting implements, pot holders, lanyards, aprons, whalebone, napkin holders and the ‘particularly ominous’ collection of whips, harness and saddlery.”¹¹

Purchase of Swift’s merchandise is sometimes essential for fans to obtain tickets to her concerts.¹² For her *Reputation* tour, for example, Swift formed a partnership with Ticketmaster, which drew scrutiny for “forcing fans to spend money on merch[andise] and albums to get a shot at buying tickets”: through a complex arrangement known as the “Verified Fan program,” prospective concertgoers were prompted to pre-order *Reputation*, shop for *Reputation* merchandise, and buy *Reputation* “about a dozen more times from the Taylor Swift store, Walmart, Target, and iTunes to unlock access to tickets.”¹³ Essentially, “[t]he more things you buy, the better your chance of scoring a ticket.”¹⁴

For Swift, trademarking key phrases from her song lyrics is a savvy business decision—after all, Swift is widely recognized as an incredibly successful businesswoman, in addition to being a singer-songwriter and pop icon.¹⁵ Differentiating herself from “other flash-in-the-pan teen sensations” and short-term pop trends that die down quickly, Swift “has long been a branding success story.”¹⁶ Swift’s brand is one which “just about every teenage girl could relate to,”¹⁷ as she has won herself nicknames such as the “reigning mistress of the breakup song.”¹⁸

A substantial portion of Swift’s accomplishments rests on her success in branding and commercializing love in a way that continues to captivate her listeners. Most of the prolific singer-songwriter’s songs center on romance, covering a myriad of nuanced emotions that are both immensely relatable for her worldwide audience and intensely personal to Swift alone at the same time. On the one hand, Swift’s love songs cover a broad spectrum of emotions that one may experience in different stages of a romance: anticipation, idealism, a proclivity to fantasize and dream wildly, pure bliss, euphoria, playfulness, secrecy, possessiveness, jealousy, narcissism, nostalgia, regret, guilt, heartbreak, anger, hate, and vengefulness.¹⁹ These are emotions with which the general public

11. *Id.*

12. See, e.g., Emma Hinchliffe, *Taylor Swift’s Ticketmaster Scam is Why She’s Capitalism’s Favorite Pop Star*, MASHABLE (Aug. 25, 2017), <https://mashable.com/2017/08/25/taylor-swift-ticketmaster-reputation/>.

13. *Id.*; see also Hazel Cills, *Taylor Swift’s Ticketmaster Program Is a Complex New Way to Boost Sales*, JEZEBEL (Aug. 25, 2017, 10:25 AM), <https://jezebel.com/taylor-swifts-ticketmaster-program-is-a-complex-new-way-1798424061>.

14. Hinchliffe, *supra* note 12.

15. See, e.g., Joe Harpaz, *The Business Lessons We Can Learn from Taylor Swift*, FORBES (Sept. 13, 2017, 10:48 AM), <https://www.forbes.com/sites/joeharpaz/2017/09/13/business-lessons-from-taylor-swift/#5c80f8846573>.

16. Marian Salzman, *Taylor Swift Fills a Blank Space in Branding with Trademarked Lyrics*, FORBES (Mar. 3, 2015, 11:24 AM), <https://www.forbes.com/sites/mariansalzman/2015/03/03/taylor-swift-fills-a-blank-space-in-branding-with-trademarked-lyrics/#75ca74ee41e2>.

17. *Id.*

18. Patricia Murphy, *Taylor Swift, Lighten Up!*, WASH. POST (Mar. 7, 2013, 9:00 AM), <https://www.washingtonpost.com/blogs/she-the-people/wp/2013/03/07/taylor-swift-lighten-up/>.

19. This list is one that I brainstormed after closely surveying 28 of Swift’s popular love songs from seven of her albums: TAYLOR SWIFT, FEARLESS, SPEAK NOW, RED, 1989, REPUTATION, and LOVER. I listened to each song multiple times and documented the central emotions that came to mind while listening, and reflected on my

could subconsciously relate, and the story-like quality and colloquial nature of Swift's lyrics further the universal appeal of her songs. On the other hand, Swift's love songs are almost paradoxically personal to her own life in a disorienting fashion.²⁰ Notorious for writing about her ex-boyfriends as a way of catharsis and therapy,²¹ Swift sometimes mischievously throws in lyrics that specifically reference herself in a way that "mid-karaoke, mid-memory of your stupid ex who shouldn't be texting you," one suddenly realizes that this song is about Swift instead of oneself.²² This partially explains why Swift's songs have relatively few covers despite their popularity²³—perhaps forming another layer of self-protection mechanism that is similar to Swift's trademark strategy that strives to protect her originality and preserve her exclusive ownership of her creative work.

The subsequent sections of paper zoom in on Taylor Swift's application of trademark law principles as a strategy to further brand and commercialize her song lyrics. After exploring relevant trademark law doctrines and applying a legal analysis to Swift's trademark applications for her song lyrics in Section II, Section III of this paper selectively includes a number of Swift's love songs as specific case studies to briefly engage in a textual analysis of some of her love song lyrics, as an extension of my legal analysis. Section IV concludes.

II. APPLYING TRADEMARK LAW TO TAYLOR SWIFT™'S TRADEMARK GAME: A LEGAL ANALYSIS

A. Key Trademark Law Doctrines

A trademark is "any word, name, symbol, or design, or any combination thereof," used in commerce to identify and distinguish the goods of one manufacturer or seller from those of another and to indicate the source of the goods.²⁴ Per the Lanham Act—the main federal statute that governs U.S. trademark law,²⁵ a trademark is defined as a mark that is "used in commerce, or registered with a

list after surveying all of the songs to identify commonalities. Having surveyed other love songs by Taylor Swift, I am confident that these emotions form common themes among her songs across the span of more than a decade.

20. Leah Donnelly, *Taylor Swift Is the 21st Century's Most Disorienting Pop Star*, NPR (Sept. 26, 2018, 10:42 AM), <https://www.npr.org/2018/09/26/646422866/taylor-swift-is-the-21st-century-s-most-disorienting-pop-star>.

21. See, e.g., *Taylor Swift's Boyfriend Timeline: 12 Relationships & Their Songs*, BILLBOARD (Sept. 6, 2017), <https://www.billboard.com/photos/1484087/taylor-swifts-boyfriend-timeline-12-relationships-their-songs>.

22. *Id.* Examples include the spoken-word line in the song 22: "Who's Taylor Swift anyway?" and the line "And you would hide away and find your peace of mind / With some indie record that's much cooler than mine" in the song *We Are Never Ever Getting Back Together*. After all, the vast majority of our names are presumably not "Taylor Swift," and most Swifties do not have their own music records that are not some form of independent records. As Swift commented herself, through her lyrics, people have "essentially gotten to read my diary for the last 10 years," and it is "pretty hard to cover someone else's diary." *Id.*

23. *Id.*

24. 15 U.S.C. § 1127 (2018).

25. *Overview of Trademark Law*, HARV. L. SCH., <https://cyber.harvard.edu/metaschool/fisher/domain/tm.htm> [hereinafter *Overview of Trademark*] (last visited July 4, 2020); see *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159 (1995).

bona fide intent to use it in commerce.”²⁶ Under certain circumstances, trademark protection may extend beyond “words, symbols, and phrases” to include “other aspects of a product, such as its color or its packaging.”²⁷ Trademark is distinguished from other areas of intellectual property law—copyrights (which protects an original artistic or literary work) and patents (which protects an invention); collectively, the three areas protect different types of intellectual property.²⁸

To be eligible for trademark protection, a mark must meet two basic requirements: (1) it must be in use in commerce and (2) it must be distinctive:²⁹

The first requirement, that a mark be used in commerce, arises because trademark law is constitutionally grounded in the congressional power to regulate interstate commerce. *See* Commerce Clause . . . Both at common law and under traditional Lanham Act registration procedures, exclusive rights to a trademark are awarded to the first to use it in commerce.

The second requirement, that a mark be distinctive, addresses a trademark’s capacity for identifying and distinguishing particular goods as emanating from one producer or source and not another. Trademarks are traditionally divided into four categories of distinctiveness: arbitrary/fanciful, suggestive, descriptive, and generic.³⁰

An “arbitrary/fanciful” mark is one that bears no logical relationship to the underlying product, such as “Apple” and “Kodak.”³¹ A “suggestive” mark is one that evokes or suggests a characteristic of the underlying good, such as “Copperstone,” which is suggestive of sun-tan lotion but does not specifically describe the underlying product.³² If a mark is classified as either arbitrary/fanciful or suggestive, it would be considered as “inherently distinctive”; in that case, exclusive rights to the mark would be determined solely by priority of use.³³

A descriptive mark is one that “directly describes, rather than suggests, a characteristic or quality of the underlying product (e.g. its color, odor, function, dimensions, or ingredients).”³⁴ An example would be the hotel chain “Holiday Inn.”³⁵ A trademark that is categorized as “descriptive” would only be protectable as a trademark if it “has acquired a secondary meaning in the minds of the consuming public.”³⁶ In the “Holiday Inn” example, the term has acquired

26. *Overview of Trademark*, *supra* note 25.

27. *Id.*

28. *Protecting Your Trademark: Enhancing Your Rights through Federal Registration*, USPTO 2 (Feb. 2020), <https://www.uspto.gov/sites/default/files/documents/BasicFacts.pdf>.

29. 15 U.S.C. § 1127 (2018).

30. *Id.*; *see* *Zatarain’s, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786 (5th Cir. 1983); *see also* *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976). These factors are commonly referred to as “the *Abercrombie* taxonomy,” “the *Abercrombie* scale,” or “the *Abercrombie* spectrum of distinctiveness.” *See, e.g.*, Timothy Denny Greene & Jeff Wilkerson, *Understanding Trademark Strength*, 16 STAN. TECH. L. REV. 535, 548, 559 (2013).

31. *Overview of Trademark*, *supra* note 25.

32. *Id.*

33. 15 U.S.C. § 1127 (2018).

34. *Overview of Trademark*, *supra* note 25.

35. *Id.*

36. 15 U.S.C. § 1127 (2018).

secondary meaning because “the consuming public associates that term with a particular provider of hotel services, and not with hotel services in general.”³⁷ Secondary meaning is also necessary to “establish trademark protection for a personal name or a geographic term.”³⁸

The fourth and final category of distinctiveness is whether a mark is “generic.”³⁹ A “generic” mark is one that describes the “general category to which the underlying product belongs,” such as the word “computer.”⁴⁰ Per U.S. trademark law, generic terms are never eligible for trademark protection, since they refer to a “general class of products rather than indicating a unique source.”⁴¹ A mark may be “generic *ab initio* and refused registration,” or it may “become generic over time through use.”⁴²

The USPTO suggests a number of factors to consider when choosing a mark: (1) the likelihood of confusion with other marks, (2) similarity of marks, (3) relatedness of goods and/or services, (4) strength of the marks, among other factors.⁴³ Multiple parties may use the same trademark “only where the goods of the parties are not so similar as to cause confusion among consumers.”⁴⁴ Federally-registered trademarks have a nation-wide geographic scope.⁴⁵ Trademark law strives to protect both mark owners and consumers.⁴⁶

Under American trademark law, a trademark is infringed when “another person uses a device (a mark) so as to cause confusion as to the source or sponsorship of the goods or services involved.”⁴⁷ The standard is “likelihood of confusion.”⁴⁸ In deciding whether consumers are likely to be confused, the courts typically consider a number of factors, including: “(1) the strength of the mark; (2) the proximity of the goods; (3) the similarity of the marks; (4) evidence of actual confusion; (5) the similarity of marketing channels used; (6) the degree of caution exercised by the typical purchaser; (7) the defendant’s intent.”⁴⁹ Generally, defendants in a trademark infringement case may appeal to the fair use or parody doctrines as affirmative defenses.⁵⁰

Registering trademarks offer several key advantages. Firstly, registration creates the rebuttable presumption that the owner listed on the registration is the

37. *Overview of Trademark*, *supra* note 25.

38. 15 U.S.C. § 1127 (2018).

39. *Id.*

40. *Overview of Trademark*, *supra* note 25.

41. 15 U.S.C. § 1127 (2018).

42. *Id.*

43. *See supra* note 28, at 3–9.

44. *Summary of Trademark Law*, BITLAW, <https://www.bitlaw.com/trademark/index.html> (last visited July 4, 2020).

45. *Id.*

46. S. REP. NO. 79-1333, at 3 (1946), https://ipmall.law.unh.edu/sites/default/files/hosted_resources/lipa/trademarks/PreLanhamAct_026_HR_1333.pdf.

47. *See* 15 U.S.C. §§ 1114, 1125.

48. *Overview of Trademark*, *supra* note 25.

49. *Polaroid Corp. v. Polarad Elec. Corp.*, 287 F.2d 492 (2d Cir. 1961).

50. *Overview of Trademark*, *supra* note 25.

actual owner of the mark.⁵¹ Secondly, the registration documents the registered mark's priority date and gives the owner the right of priority over other individuals who subsequently attempt to use the mark.⁵² Lastly, the use of the trademark symbol notifies the public that the owner of the trademark is federally protected to use it for any commercial purpose.⁵³ In the context of the music industry, for an established artist, trademark registrations protect rights in his/her brand, help guard revenue streams, and provide him/her with additional control over the brand when embarking on new business ventures, while for the record label involved, trademarking also benefits the label by offering additional security.⁵⁴

B. Applying Trademark Law Principles to Taylor Swift™'s Trademark Game

In seeking trademark protection for parts of her lyrics, Swift once again broke new ground—this time, through testing the limits of the law. New York University law professor Christopher Jon Sprigman considers Swift's trademark applications “a smart move” in achieving her dual purposes of protecting her intellectual assets in her lyrics while being able to use some of those on various products, goods, and services herself.⁵⁵ Specifically, Professor Sprigman applauds Swift's lawyers for getting imaginative in cooking up a scheme that fills in the loopholes of copyright law: by turning to trademark law, Swift would be able to “pull little, short phrases out of her lyrics and have some kind of property right in them when they are applied to products and services”; while copyright law grants Swift rights to her song lyrics, it does not apply to words and short phrases, posing difficulty in copyrighting a song title.⁵⁶ Unlike copyright law, trademark rights do not require phrases to be completely unique or for Swift to

51. Erik M. Pelton & Elizabeth M. Dukette, *Cause They Never Go out of Style: Why Musicians Are Registering More Trademarks than Ever*, 8 *LANDSLIDE* 54, 56 (2016).

52. *Id.*

53. *Id.*

54. *Id.* at 56–57.

55. Knowledge @ Wharton, *Taylor Swift, Trademarks and Music's New Branding Model*, UPENN (Mar. 14, 2015), <https://knowledge.wharton.upenn.edu/article/taylor-swift-trademarks-and-musics-new-branding-model/>; Accord Jacob Davidson, *Can Taylor Swift Really Trademark “This Sick Beat”? Yes, and Here's Why*, *MONEY* (Jan. 29, 2015), <https://money.com/taylor-swift-this-sick-beat-trademark/> (“[Sprigman] thinks Swift is ahead of the curve when it comes to trademarking random song lyrics. The rise of streaming makes it increasingly difficult for artists to monetize their music, leaving musicians to look for new ways to make money. ‘The music industry isn't dying,’ says Sprigman, ‘the music industry is changing. And different revenue sources are coming to the fore, and one of them is merchandise.’”).

56. Knowledge @ Wharton, *supra* note 55. Professor Bavitz mentioned that the limitation of copyright protection for words or short phrases is fundamental, in the same way that copyright law affords little or no protection for musical building blocks and trite/common musical expressions. E-mail from Christopher T. Bavitz, Professor of L., Harvard L. Sch. to April Xiaoyi Xu, J.D. Candidate, Harvard L. Sch. (June 22, 2020) (on file with author). To the extent trademark law effectively permits an end-run around copyright law's limitations, that appears to be notable. *Id.* However, the “use in commerce” requirement of trademark law demonstrates that copyright and trademark law are essentially distinct, in material ways. *Id.*

have personally coined them, and grant Swift the ability to “make money off of the things she’s created.”⁵⁷

There is an additional reason why Swift’s trademark strategy can be considered a shrewd business decision: according to intellectual property lawyer Jeremy Morton, high-street fashion designers often take advantage of pop artists’ creative output by “using lyrics and titles as slogans on clothing.”⁵⁸ In the worlds of art and music, bootleg or counterfeit goods are “a common pitfall.”⁵⁹ It is thus reasonable for Swift to protect the products of her creative process and license authorized merchandise herself. Morton considers trademarking lyrics, specifically, to be a better strategy than relying on Swift’s name or image, because arguably, the latter may not truly serve as a trademark because often, “consumers buy products bearing the name or image because they like the artist, not because they think the artist licensed the goods.”⁶⁰

For Swift to fully succeed in this trademark game scheme and maximize her gains by harnessing the power of trademark law, she would need to satisfy both requirements under 15 U.S.C. § 1127 of (1) being used in commerce and (2) being distinctive.⁶¹

For the first requirement, Swift cannot merely protect a catchy phrase from her love song lyrics absent a *bona fide* intent for “commercial use”—when the trademark is used in commerce in connection with a good or service.⁶² In Morton’s view, “any phrase can become a valid trade mark for use on a variety of merchandise”: to transform a song lyric or title into a trademark “takes an investment in educating the public to recognize the phrase as signifying a source of goods,” which can be done through “extensive use on goods, protection through trade mark registration, proper labelling to indicate claimed trade mark rights, and effective enforcement against unlicensed products.”⁶³

Meanwhile, the fact that Swift filed applications for a large number of trademarks for use on a near-overwhelming range of goods and services has been asserted as evidence that her intent to use the marks was not *bona fide*, therefore potentially invalidating her applications.⁶⁴ Despite that, Swift’s legal team can counter that argument with evidence of her plans to use the marks, including business plans and/or trademark clearance searches, as well as evidence of

57. Megan Buerger, *The Real Reason Behind Taylor Swift Trying to Trademark ‘This Sick Beat’*, BILLBOARD (2015), <https://www.billboard.com/articles/business/6465331/taylor-swift-trademark-phrases-this-sick-beat-1989>.

58. Andrew Trendell, *Lawyers Respond to Taylor Swift’s Attempt to Copyright Phrases from New Album ‘Reputation’*, NME (2017), <https://www.nme.com/news/music/lawyers-respond-taylor-swifts-attempt-copyright-phrases-new-album-reputation-2135122>.

59. Josh Gerben, *Intellectual Property, What Do Musicians Need to Know About Trademarks?*, GERBENLAW.COM, <https://www.gerbenlaw.com/blog/what-do-musicians-need-to-know-about-trademarks/> (last visited July 12, 2020).

60. *Id.*

61. *See supra* Section II(A).

62. Daly, *supra* note 8; Pelton & Dukette, *supra* note 51, at 57.

63. Trendell, *supra* note 58.

64. Daly, *supra* note 8.

activities she plans to undertake to develop those goods and services; this intent to use is hard to defeat and likely accepted at face value.⁶⁵

As to the second requirement pursuant to 15 U.S.C. § 1127, the USPTO considers trademarks “on the basis of their strength” as related to the *Abercrombie* spectrum of “how distinctive a mark is,” where the strongest marks are “fan-fiful” or “completely made up words or phrases,” while generic words or phrases cannot be trademarked.⁶⁶ In this particular context, this requirement would mean that Swift may not simply trademark a generic, commonly-used, merely-descriptive word or phrase solely by virtue of using or popularizing it in a song.⁶⁷ This explains why the USPTO chose to reject Swift’s application to trademark the word “Lover,” which is the title for both her 2019 album and one of the songs in that album, on merchandise (including phone cases, guitar picks, key chains, stationery and drinking glasses).⁶⁸ Instead, “the lyric in question needs to be a distinct, original combination of words, and it must also be able to be proven as closely related or identified with the singer.”⁶⁹

This is related to Professor Sprigman’s open question of whether Swift’s use of trademarks serves the purposes of trademark law—one of which is preventing consumers from being confused about the source of the products⁷⁰—at all: “[w]hen people see [the phrase from Swift’s song *Shake It Off*] ‘This Sick Beat’ on a baby bib, do they think this baby bib comes from Taylor Swift and is licensed by her? Does that lyric communicate anything about the source of the product?”⁷¹ Arguably, the slang “this sick beat” exemplifies a common parlance, where “sick” is used as a synonym for “cool.”⁷² No matter how many times Swift

65. *Id.* (“Should actual use of the marks on the goods and services begin, which will be required for any registrations to actually issue, and the registrations issue, they will protect against use by others of any marks with any goods or services where such use could cause confusion. That is, others could potentially use the same or similar marks as long as such use would not be likely to cause people to incorrectly believe that the use was associated with Taylor Swift. For example, use of 1989 with plumbing supplies may be acceptable because people would not necessarily believe that Swift was associated with such supplies. However, should the marks become ‘famous,’ Swift could use a trademark dilution cause of action to block use of the marks even in connection with goods or services where no confusion would be likely. Given Taylor Swift’s star power, it is possible she may have a fair chance of developing fame for her marks. Thus, the ultimate scope of protection for these marks may develop over time.”).

66. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9; Gerben, *supra* note 59. *See supra* Section II(A); *see also* Caitlin Conway, *Taylor Swift to Trademarks: You Belong with Me - Does Intellectual Property Law Leave a Blank Space for the Protection of Short Phrases Taken from Song Lyrics*, 20 INTELL. PROP. L. BULL. 63, 72 (2016).

67. Gerben, *supra* note 59.

68. Team Ahlan!, *Taylor Swift’s Lover Trademark Application Rejected*, AHLNLIVE (Sept. 19, 2019), <https://www.ahlanlive.com/taylor-swifts-lover-trademark-application-rejected-641369.html>.

69. Gerben, *supra* note 59.

70. Conway, *supra* note 66, at 72–73 (“‘trademarks are ‘source-identifiers.’ Gaining trademark registration could turn on ‘whether consumers would recognize that the slogan [or phrase] is meant to be a trademark . . . or] how the public is likely to perceive the use’ . . . If a proposed mark is determined to be ornamental, then it cannot be registered”).

71. Knowledge @ Wharton, *supra* note 55.

72. Pelton & Dukette, *supra* note 51, at 57.

sings “this sick beat” in her concerts, some are convinced that this would not create a trademark use of the phrase.⁷³

In terms of the *Abercrombie* scale of distinctiveness, Swift’s lyrics would likely be categorized as “arbitrary” in relation to the merchandise, for her lyrics (e.g. “nice to meet you, where you been” and “cause we never go out of style”) bear no relation to the merchandise (e.g. Christmas stockings and handbags).⁷⁴ No secondary meaning is involved here.⁷⁵

While creativity is not required for trademark registration, it may be easier for Swift to create a commercial impression with a more creative mark to prevent it from being rejected on the basis that it could be confused with another mark, or is merely descriptive of the goods or services. The following section of this article briefly analyzes how original/creative some of Swift’s love song lyrics are. After all, there is at least some validity in some critics’ questioning of whether a simple phrase from a song is sufficient for the USPTO to grant Swift a limited monopoly over those words, and the belief that simply placing certain words together in a phrase does not rise to the same level of creativity.

III. APPLYING TRADEMARK LAW TO TAYLOR SWIFT™’S LOVE SONG LYRICS: A TEXTUAL ANALYSIS

Despite the diversity of themes and stories among Swift’s love songs that span over longer than 15 years, one can quickly identify several patterns in Swift’s lyrics.

Firstly, the lyrics involve much repetition of key phrases or sentences, often tying back to Swift’s song titles. Examples include “All I can say is I was / enchanted to meet you” and “It was enchanting to meet you” in *Enchanted*, “It’s a love story, baby just say yes” in *Love Story*, “Have you ever thought just maybe / you belong with me” in *You Belong With Me*, “I go back to December all the time” in *Back to December*, “Loving him was red” in *Red*, “Cuz baby now we got bad blood” in *Bad Blood*, “You are so gorgeous” in *Gorgeous*, and “I promise you will never find another like me” in *Me*.⁷⁶ Although it is hardly a Swift-specific technique to repeat key words and phrases in the body (often choruses) of the lyrics that also forms the title of a song, trademarking these phrases likely helps ensure that “the lyric in question [is] able to be proven as closely related or identified with the singer.”⁷⁷ It would be interesting to consider whether other songwriters can use a similar strategy when they consider trademarking their lyrics.

73. *Id.*

74. Conway, *supra* note 66. See also Davidson, *supra* note 55 (“Just as the word [apple] is arbitrary when applied to a laptop, Taylor Swift’s lyrics are equally arbitrary when placed on a Christmas stocking or a ‘non-medicated preparation for the care of skin’—two of the products that T-Swift has applied for trademarks on.”).

75. Conway, *supra* note 66.

76. See AZ Lyrics, *Taylor Swift Lyrics*, AZLYRICS, <https://www.azlyrics.com/t/taylorswift.html>.

77. Gerben, *supra* note 59.

Secondly, as discussed in Section I of this paper, one of Swift's signature lyrics-writing techniques in her love songs is her use of visual or otherwise sensory cues or tools that both individualize and universalize the listening experience in a typical Swiftian fashion. For instance, in *Red*, we hear: "Loving him is like driving a new Maserati down a dead-end street / Faster than the wind, passionate as sin, ending so suddenly / Loving him is like trying to change your mind once you're already flying through the free fall / Like the colors in autumn, so bright just before they lose it all."⁷⁸ Many listeners may have a specific "him" in mind and immediately re-experience some past memories involving that person alongside Swift's singing voice and imagery. As another example, in *Blank Space*, Swift paints images such as "New money, suit and tie / I can read you like a magazine," "Grab your passport and my hand," and "Screaming, crying, perfect storms / I can make all the tables turn / Rose garden filled with thorns."⁷⁹ These all constitute catchy, addictive phrases that often compel people to purchase or manufacture tee-shirts or other fan merchandise with those phrases. Although many of these phrases are identifiable as elements of everyday life that perhaps any songwriter can include in the lyrics of a song, the specific way of using those words is arguably unique to Swift alone. This feature may help the lyric in question meet the requirements of being "a distinct, original combination of words" and "closely related or identified with the singer."⁸⁰

Thirdly, many of Swift's love song titles are words and phrases of common parlance. These include "Mean," "Mine," "Shake It Off," "We Are Never, Ever Getting Back Together," "Welcome to New York," and "Look What You Made Me Do."⁸¹ These phrases, while quintessentially Taylor Swift in their flavor in the sense that she made these phrases famous in the country/pop music contexts, arguably do not lend her the authority to monopolize rights to those phrases. This is perhaps similar to the rationale behind the USPTO's rejection of Swift's trademark application for the word "Lover."⁸²

Last but not least, although not as ubiquitous in Swift's love songs as the three aforementioned characteristics, some of the lyrics are specific to Swift's personal experience, as I briefly mentioned in Section I of this paper. In addition to the examples in Section I,⁸³ the entire premise of the song *Blank Space* is Swift's personal mockery of the press' portrayal of her own image as a "boy-

78. AZLyrics, *supra* note 76.

79. *Id.*

80. Pelton & Dukette, *supra* note 51, at 57.

81. AZLyrics, *supra* note 76.

82. See Team Ahlan!, *supra* note 68.

83. See *supra* note 22 ("Examples include the spoken-word line in the song 22: 'Who's Taylor Swift anyway?' and the line 'And you would hide away and find your peace of mind / With some indie record that's much cooler than mine' in the song *We are Never Ever Getting Back Together*.").

crazy” “serial-dater” that very few people can claim to be theirs.⁸⁴ These could be deemed as “closely related or identified with the singer.”⁸⁵

All in all, while originality is a criterion that is challenging to apply objectively and Swift’s songs tend to capitalize on their universal attributes, based on this brief exploration of some of her love song lyrics, we may identify certain characteristics that render Swift’s lyrics easier to be trademarked than some others, pursuant to trademark law requirements.

IV. SYNTHESIS: TAYLOR SWIFT™ AS A CONGLOMERATE, ART VS. MONEY, AND BEYOND

Throughout our explorations in this article, we have observed Taylor Swift’s shrewd business decision and legal strategy of using trademark law to her advantage. Despite that not all of Swift’s trademark applications have been successful with the USPTO, it does appear to be the case that a substantial number of these applications were trademarked.

Swift generally justified her trademark adventures as a genuine desire to protect the fruits of her hard work and creative inputs. However, there is still much controversy surrounding her trademark applications for Swift’s song lyrics. According to Professor R. Polk Wagner of the University of Pennsylvania Carey Law School, Swift’s positioning of herself to have her lyrics associated with a range of goods and services through trademark applications represents Swift’s understanding that “she’s bigger than the music”: “[i]t’s more of a branding right, thinking of Taylor Swift as a conglomerate.”⁸⁶ To Professor Wagner, Swift—whom people with differing viewpoints have labeled as an “aggressive” and “savvy” artist—has the option to determine how strictly she will enforce her trademark rights, where enforcing it too strictly would risk “alienating some of her strongest fans,” who might begin to regard Swift as “in it for the money” instead of really being an artist.⁸⁷ Julia Matheson, a partner at IP-focused law firm Finnegan, Henderson, Farabow, Garrett & Dunner, echoed Professor Wagner’s view, “[Swift] has to walk a very narrow tightrope to protect her brand while simultaneously remaining a popular figure.”⁸⁸

Ultimately, romantic love is at least partially about exclusivity and possession—of another person’s heart. As an international celebrity with an infamous “serial-dater” reputation, a self-acknowledged control-freak of sorts,⁸⁹ and the

84. Constance Grady, *A Unified Theory of Taylor Swift’s Reputation*, VOX (May 7, 2018, 10:42 AM), <https://www.vox.com/culture/2017/11/9/16598106/taylor-swift-reputation-intimacy-control>; Lauren Cowling, *Taylor Swift’s Acoustic “Psycho, Serial-Dater Girl” Song Is Solid Gold*, ONE COUNTRY (Jan. 8, 2016), <https://www.onecountry.com/entertainment/taylor-swifts-acoustic-psycho-serial-dater-girl-song-is-solid-gold/>.

85. Pelton & Dukette, *supra* note 51, at 57.

86. Shoba Babu, *Penn Law Professor Speaks Out About Taylor Swift’s Trademark Requests*, THE DAILY PENNSYLVANIAN (2015), <https://www.thedp.com/article/2015/05/penn-law-professor-speaks-out-about-taylor-swift-trademarks>.

87. *Id.*

88. Trademarks and Brands Online, *Taylor Swift Trademark Applications: Walking the Line*, TBO (2015), <https://www.trademarksandbrandsonline.com/article/taylor-swift-trademark-applications-walking-the-line>.

89. *See, e.g.*, MISS AMERICANA (Netflix 2020).

creator of a remarkable repertoire of love songs that center feelings of insecurity, possessiveness, jealousy, Swift is similarly possessive of her lyrics. Simultaneously as Swift captures the hearts of her listeners and win their love, she values exclusivity of ownership to her art and wishes to get the corresponding value in monetary terms—understandably so, as this does fulfill some of the key objectives of intellectual property law.

Meanwhile, one may also justifiably wonder further if Swift might have written some of her lyrics with a trademark calculus in mind.⁹⁰ As the creator of eight studio albums as of July 24, 2020,⁹¹ Swift—no longer an innocent teenage girl-next-door constantly wondering if the boy next door, her secret crush, would belong with her one day⁹²—presumably would have had acquired a more acute sense of what could be trademarked, and what could not. What if Swift, or other artists following her lead, wrote songs with this ulterior motive in mind to game the Lanham Act? Would that dangerously jeopardize, or even defeat, the very purpose and soul of art? Does art need to be for art's own sake?⁹³ Love Taylor Swift or hate her, we will eventually need to embrace these deeper questions that her trademark endeavors have triggered.

90. For further research on this topic, one plausible method of determining whether Swift wrote some of her lyrics with trademarkability in mind could be tracking the registration or application dates for some of Swift's trademarks to see how soon after the songs are released did Swift begin pursuing trademark protections. For instance, the trademark application for the capitalized phrase "this sick beat" (serial number: 86434770) was filed on October 25, 2014. JUSTIA TRADEMARKS, *supra* note 5. The lead single *Shake It Off*—the source of the phrase—premiered on August 18, 2014, before Swift released the album *1989* on October 27, 2014: two days after Swift filed the trademark application for "this sick beat." Taylor Swift—Shake It Off, STORY SONG, <https://storyofsong.com/story/shake-it-off-4/> (last visited July 23, 2020); Emily Yahr, *Taylor Swift Announces First Pop Album '1989,' Releases New Single and Music Video*, WASH. POST (Aug. 18, 2014, 5:56 PM), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2014/08/18/taylor-swift-announces-first-pop-album-1989-releases-new-single-and-music-video/>.

91. On July 24, 2020, Swift released her latest album, *FOLKLORE* (Republic, 2020). Lyndsey Mckenna, *Stream Taylor Swift's New Album, 'Folklore'*, NPR (July 24, 2020, 12:08 AM), <https://www.npr.org/2020/07/24/894861412/stream-taylor-swift-new-album-folklore>. *FOLKLORE*, recorded during the COVID-19 quarantine period and released only eleven months after *LOVER*, is Swift's eighth studio album. *Id.*

92. *See You Belong with Me Lyrics*, GENIUS LYRICS, <https://genius.com/Taylor-swift-you-belong-with-me-lyrics> (last visited July 23, 2020).

93. *See, e.g.,* Zoe McIntyre, *What Oscar Wilde Taught Us About Art*, CULTURE TRIP (Jan. 11, 2017), <https://theculturetrip.com/europe/ireland/articles/8-things-oscar-wilde-taught-us-about-art/>.