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Introduction

Trademark protection and enforcement for Big Tech[1] trademark owners in the United States are akin to adhesive tape that holds a cardboard box together to make it more resilient. A box is first assembled by positioning a flat cardboard into a 3D rectangular shape, folding the bottom four flaps, and subsequently adding adhesive tape to provide stability. The builder of the box puts material into the box, encloses it by folding the top four flaps, and then provides a layer of adhesive tape to ensure protection. Big Tech companies have built various "boxes" comprised of their different products and services within their respective markets (i.e., social networking, online search and search advertising, mobile operating system, and U.S. online retail).[2] Moreover, Big Tech companies have selected the material or information allowed (o r prohibited) within each box,[3] including, but not limited

1. For purposes of this paper, "Big Tech" focuses on tech giants such as Apple, Facebook, and Google; *see generally* Omri Wallach, *How Big Tech Makes Their Billions*, VISUAL CAPITALIST (July 6, 2020), https://www.visualcapitalist.com/how-big-tech-makes-their-billions-2020/; *see generally* Michael Adams, *The 10 Most Valuable Tech Companies in the World*, U.S. NEWS (Feb. 11, 2022), https://money.usnews.com/investing/stock-market-news/slideshows/most-valuable-tech-companies-in-the-world?slide=12 (listing Apple, Facebook, Alphabet (Google), and Amazon among the topmost valuable tech companies in 2020); *see generally* Therese Wood, *The World's Tech Giants, Ranked by Brand Value*, VISUAL CAPITALIST (Aug. 4, 2020) (stating that "Tech brands continue to prove their worth in the face of the pandemic"), https://www.visualcapitalist.com/the-worlds-tech-giants-ranked/.

2. Facebook has monopoly power in the market for social networking. Google has a monopoly in the markets for general online search and search advertising. Apple has significant and durable market power in the mobile operating system market. *See* INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, Majority Staff Recommendations Subcommittee on Antitrust and Administrative Law of the Committee of the Judiciary, US House of Representatives (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

3. *Id.*

to "fake news," misinformation, systemic biases, or viewpoints to benefit a handful of profit driven enterprises.

Analogous to adhesive tape used to provide stability and protection for the contents of each box, trademark law provides protection for Big Tech brands and their cultivated goodwill among consumers. A trademark can be any "word, name, symbol, or device" that is used by a person or entity to "identify and distinguish his or her goods" as being the source of the product or service.[4] When consumers encounter a trademark affixed to a product (or advertising for a service), the trademark allows the consumer to make a mental association between the product (or service) and the source.[5] This allows the consumer to ascertain the value or quality of a product prior to purchasing it since the consumer can identify the source as the producer of that product.[6] Thus, trademarks play an important economic role in helping consumers identify unobservable features of a trademarked product (i.e., durability, preference, taste, etc.) and incentivizing producers to maintain consistent levels of quality over products or services.[7]

U.S. Trademark law provides Big Tech with legal tools to vigorously protect their brands and goodwill. Big Tech takes advantage of these legal tools through aggressive and intimidating pre-litigation and litigation tactics, oftentimes, to the detriment of their competitors. Since trademarks can last in perpetuity[8] and relatively few constraints are imposed on trademark owners, Big Tech can vigorously enforce its trademarks against alleged infringers indefinitely. This allows Big Tech to provide an extra layer of everlasting protection to Big Tech "boxes" of information within its relevant market.[9] Thus, Big Tech uses trademarks as a weapon to create resilient "boxes" that enclose society (i.e., the relevant consuming public within each market) within, thereby creating an echo chamber where consumers are influenced by a select few.

4. Lanham Trade-Mark Act of 1949 § 45, as amended at 15 U.S.C. § 1051; 15 U.S.C. § 1127.

5. BARTON BEEBE, TRADEMARK LAW: AN OPEN-SOURCE CASEBOOK, 23-27 (Version 7, 2020), http://tmcasebook.org/.

6. For example, a consumer searching for a new laptop that encounters the Apple logo on the back of a laptop will not only be able to ascertain that the laptop is made by Apple, but can also make further inferences regarding quality, durability, and whether the consumer liked or disliked the product in the past. *See Id*.

7. *Id*.

8. *See generally* William M. Borchard, *A Trademark is Not a Copyright or a Patent*, 2020, https://www.cll.com/media/publication/335_Trademark-2020-web.pdf (stating trademarks last as long as trademark owner continues to use mark in commerce, renews registration, does not abandon mark, and mark does not become a generic mark).

9. The relevant markets for purposes of this paper include: the social networking market (for Facebook), online search and search advertising market (for Google), or the mobile operating systems market (for Apple).

This paper discusses how broad U.S. trademark laws adversely impact competition and consumer perceptions relating to Big Tech brands and the quality of goods or services provided. Part I focuses on anticompetitive techniques used by Big Tech to maintain market dominance and monopolization. Part II introduces trademark law and focuses on how Big Tech uses it as a tool to vigorously protect and enforce Big Tech trademarks from infringement by competitors. Part III discusses how Big Tech's exploitation of trademark law helps Big Tech reinforce its durable market power at significant costs for U.S. consumers.[10] This paper is not a blueprint outlining how to break up Big Tech market dominance, but rather, this paper seeks to highlight the significant issues that Big Tech market dominance poses within the trademark realm. Thus, Part IV concludes by addressing potential remedies available in trademark law that would make Big Tech more accountable, or at least limit Big Tech's power to engage in frivolous trademark litigation. These remedies focus on preventing Big Tech from using trademark law as a tool to maintain monopoly power; however, other remedies to control Big Tech market dominance may include imposing interoperability requirements, imposing nondiscrimination requirements to prevent Big Tech from self-preferencing or restoring antitrust law enforcement.[11]

I. Big Tech's Gatekeeper Function Over Key Channels of Distribution Strengthens Big Tech Market Dominance

Private companies, such as Google (or "Alphabet"),[12] Apple Inc., and Facebook (hereinafter, collectively "Big Tech"), are among the world's ten most valuable Tech companies[13] with their revenues steadily rising despite the COVID-19 pandemic.[14] Big Tech has garnered significant market power

10. These consumer costs include increased data collection and inadequate privacy controls by Big Tech; increased prices for products and services offered by Big Tech; and a substantial deterioration in Big Tech's quality of goods or services. *See generally* INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 9, at n. 2.

11. *Id.* at 19-21.

12. In 2015, Google introduced Alphabet as Google's parent company. *See* Conor Dougherty, *Google to Reorganize as Alphabet to Keep Its Lead as an Innovator*, N.Y. TIMES (Aug. 10, 2015), https://www.nytimes.com/2015/08/11/technology/google-alphabet-restructuring.html.

13. *See* Michael Adams, *The 10 Most Valuable Tech Companies in the World*, *supra*, note 1, (listing market value for (1) Apple: $2 trillion, (2) Amazon: $1.6 trillion, (3) Alphabet: $1.05 trillion, and (4) Facebook: $760 billion), https://money.usnews.com/investing/stock-market-news/slideshows/most-valuable-tech-companies-in-the-world?slide=12.

14. Therese Wood, *The World's Tech Giants, Ranked by Brand Value*, VISUAL CAPITALIST (Aug. 4, 2020), https://www.visualcapitalist.com/the-worlds-tech-giants-ranked/; *see generally* Lawrence Delevingne, *U.S. big tech dominates stock market after monster rally, leaving investors on edge*, REUTERS: TECH. NEWS (Aug. 27, 2020), https://www.reuters.com/article/us-usa-markets-faangs-analysis/u-s-big-tech-dominates-stock-market-after-monster-rally-leaving-investors-on-edge-idUSKBN25O0FV; *see* Shira Ovide, *How Big Tech Giants Won the Pandemic,* N.Y. TIMES,

by strategically acquiring smaller or medium sized tech companies to gain control over "key channels of distribution" in respective markets.[15] Because consumers rely on Big Tech online platforms and there is an absence of widely available market alternatives, this gatekeeper function allows Big Tech to exploit consumers by charging excessive prices, obtaining data from consumers, or suddenly changing the platform's policies.[16]

In 2021, the U.S. Gross Domestic Product ("GDP") was estimated to be $22.99 trillion.[17] As of 2021, Google, Facebook and Apple had a combined worth of at least $3.81 trillion, or almost 17% of the U.S. GDP.[18] This astounding figure points to the unprecedented market dominance and monopoly power held by the hands of so few. In 2020, the Subcommittee on Antitrust, Commercial and Administrative Law of the Committee of the Judiciary (hereinafter the "Subcommittee"), published an investigation of competition in digital markets.[19] The Subcommittee investigated four online platforms—Apple, Google, Amazon, and Facebook—that "play an important role in the U.S. economy and society as the underlying infrastructure for the exchange of communications, information, and goods and services."[20] The Subcommittee found substantial evidence of Big Tech monopolization that carries significant costs for the economy and society as a whole.[21] Although the Subcommittee referenced Google's use of trademark law to prohibit trademarked terms from being used in Google ads,[22] there is no indication that trademark issues were the Subcommittee's focus.

Thus, this paper uses the Subcommittee Investigation to explore how Big Tech utilizes trademark law and legal strategies to ruthlessly exploit favorable market conditions and maintain market dominance.

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https://www.nytimes.com/2021/04/30/technology/big-tech-pandemic.html (last updated Oct. 12, 2021).

15. *See generally* INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 2.

16. *Id*.

17. For sake of a starker comparison, California's GDP in 2019 was $3.14 trillion. *See generally* Gross Domestic Product (GDP) of the United States from 1990 to 2021, STATISTIA.COM (Feb. 2022), https://www.statista.com/statistics/188105/annual-gdp-of-the-united-states-since-1990/.

18. *Id.*

19. *See generally* INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 2.

20. *Id*. at 10; *see id.* at 9 ("The purpose of the investigation was to: (1) document competition problems in digital markets; (2) examine whether dominant firms are engaging in anticompetitive conduct; and (3) assess whether existing antitrust laws, competition policies, and current enforcement levels are adequate to address these issues.").

21. *Id*. at 10-11.

22. *Id*. at 202.

A. Google Market Dominance: General Online Search Engine

In 1998, Google launched as a general online search engine[23] and has since become the "largest provider of digital advertising, a leading web browser, a dominant mobile operating system, and a major provider of digital mapping, email, cloud computing and voice assistance services."[24] Historically, Google has maintained market dominance by strategically acquiring successful tech companies in competing fields.[25] Google is currently the default search provider on 87% of desktop browsers and the majority of mobile devices, thereby dominating the world online search engine market with 87% of U.S. searches and over 92% of searches worldwide.[26] By acquiring competing tech companies and establishing itself as the default search engine for most devices, Google has successfully hindered free competition. According to the Subcommittee findings, "[n]o new general search entrant over the last decade has ever accounted for more than 1% of all U.S. searches in any given year," which provides sufficient evidence of Google's durable monopoly power. [27]

Google's monopoly power has led to consumer deception and an apparent decrease in quality of Google's products and services, including Google search results.[28] For example, Google's AdWords, originally launched in 2000 to allow advertisers to pay for "keyword-based ads" to appear alongside Google Search results, has become a tool that Google uses to undermine competition and exploit its monopoly of general online search.[29] AdWords users' bid for the privilege of paying Google an exorbitant amount of money in the hopes that their content might be shown among the top searches in the Google search engine. Over the years, Google has increased the number of ads appearing along with organic search results and has displayed ads and organic results in an inconsistent manner.[30] These changes have allowed Google to "extort businesses" to pay higher prices to be able to access

23. Google Inc., Registration Statement (Form S-1) 1 (Apr. 29, 2004), https://www.sec.gov/Archives/edgar/data/1288776/000119312504073639/ds1.htm.

24. *See* INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 2, at 174 (noting that Google products include Google Search, Google Maps, Google Play Store, Google Drive, Chrome, Android, and YouTube, all of which have more than a billion users each).

25. Leena Rao, *Google Spent Nearly $2 Billion on 79 Acquisitions in 2011*, TECHCRUNCH (Jan. 27, 2012), https://techcrunch.com/2012/01/27/google-spent-nearly-2-billion-on-79-acquisitions-in-2011/.

26. *See* INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 2, at 176-77.

27. *Id.* at 181 (stating that "[t]hrough owning Android, the world's dominant mobile operating system, Google was able to ensure that Google Search remained dominant even as mobile replaced desktop as the critical entry point to the Internet").

28. INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *Supra* note 2, at 195.

29. *Id*.

30. *Id*.

Google users.[31] Thus, Google AdWords is a prime example of one of Google's exploitive, money-generating techniques that allows Google to pit users' (in this case, AdWords users) against each other in an auction styled apparatus.

B. Apple, Inc. Market Dominance: Mobile Operating Systems

Apple, Inc. was incorporated in 1977, and in August 2020, became the first publicly traded U.S. company to be valued at $2 trillion.[32] Apple is a leading smartphone vendor in the U.S. that "designs, manufacturers, and markets smartphones, personal computers, tablets, wearables, and accessories, and sells a variety of related services."[33] As one of two dominant mobile systems available in the U.S., Apple's iOS runs on more than half of the smartphones and tablets in the U.S. and accounts for about 45% of the domestic market.[34] Apple accounts for 20% of the global smartphone market with 25% of smartphones worldwide running on iOS.[35] Because Apple installs iOS on all Apple mobile devices and does not allow other mobile device manufacturers to license iOS, Apple controls software distributions on iOS devices.[36] Apple's gatekeeper power over software distribution on iOS devices allows Apple to maintain significant power in the market for mobile operating systems and mobile app stores.[37]

Apple has acquired many software companies over the years to "create a foundation from which it could launch new apps."[38] In 2014, Apple acquired Beats Electronics for $3 billion to launch its Apple Music in 2015.[39] In 2018, Apple acquired Texture (a digital magazine subscription service) which was incorporated into Apple New+ service[40] and Shazam (music recognition app) which was used as a supplement to Apple's music

31. *Id*.

32. *Id.* at 330-331.

33. Apple Inc., Annual Report (Form 10-K) 1 (Sept. 28, 2019), https://www.sec.gov/Archives/edgar/data/320193/000032019319000119/a10-k20199282019.htm.

34. *See* INVESTIGATION OF COMPETITION IN DIGITAL MARKETS *supra,* note 2, at 332.

35. *Id.*

36. *Id*. at 335 (stating that "[Apple] does not permit installation of alternative app stores on iOS devices, nor does it permit apps to be sideloaded").

37. *Id*. at 334.

38. *Id*.

39. Billy Steele, *Apple's $3 billion purchase of Beats has already paid off*, ENDGADGET (May 28, 2019), https://www.engadget.com/2019-05-28-apple-beats-five-years-later.html.

40. Anita Balakrishnan, *Apple buys Texture, a digital magazine subscription service,* CNBC (Mar. 12, 2018), https://www.cnbc.com/2018/03/12/apple-buys-texture-a-digital-magazine-subscription-service.html.

services.[41] In 2019, Apple acquired Intel's smartphone modem business for $1 billion,[42] and in 2020, Apple acquired the Scout FM podcast app for an undisclosed amount.[43] Apple's various acquisitions paved way for its monopoly power in the mobile app store market, which not only allows Apple to control access to over 100 million iOS devices in the U.S. but also creates barriers in competition by excluding rivals and preferencing its own options.[44]

C. Facebook Market Dominance: Social Networking

Facebook (now known as Meta) was founded in 2004 and has become the largest social networking platform in the world.[45] Facebook has acquired "companies it view[s] as competitive threats" to maintain its social networking market dominance.[46] The Facebook app alone has the "third highest reach of all mobile apps, with 200.3 million users" in the U.S.[47] Similarly, the Facebook Messenger app has 183.6 million monthly active users (reaching 54.1% of smartphone users in the U.S.), and Instagram has 119.2 million users (reaching 35.3% of smartphone users in the U.S).[48] These products control a significant share of users in the U.S., which in effect insulates Facebook from competitors entering the social networking market.[49]

Facebook discourages consumers from leaving Facebook social network sites by implementing high switching costs.[50] These include (1) rebuilding the consumers "social graph," which is comprised of photos, comments, posts, and other content; (2) losing access to their social graph and

41. Press release, APPLE*, Apple acquires Shazam, offering more ways to discover and enjoy music* (Sept. 24, 2018), https://www.apple.com/newsroom/2018/09/apple-acquires-shazam-offering-more-ways-to-discover-and-enjoy-music/.

42. Press Release, APPLE, *Apple to acquire the majority of Intel's smartphone modem business* (July 25, 2019), https://www.apple.com/newsroom/2019/07/apple-to-acquire-the-majority-of-intels-smartphone-modem-business/.

43. Mark Gurman, *Apple Buys Startup That Creates Radio-Like Stations for Podcasts*, BLOOMBERG (Sept. 24, 2020), https://www.bloomberg.com/news/articles/2020-09-24/apple-buys-startup-that-creates-radio-like-stations-for-podcasts.

44. *Id*.

45. *See* INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 2, at 132 (noting that Facebook's five primary products in the social networking market include Facebook, Instagram, Messenger, WhatsApp, and Oculus).

46. *Id*. at 134.

47. *Id.* at 137.

48. *Id.*

49. *Id.* at 133-141 (stating that Facebook engages in competition within Facebook's Family products (i.e., Messenger, WhatsApp, Instagram) rather than engaging in "actual competition from other firms in the market.").

50. *Id.* at 144.

data; and (3) learning how to use the competing social networking service.[51] Thus, Facebook's market dominance in the social networking market creates high entry barriers for competitors entering the market and can "discourage direct competition by other firms to offer new products and services."[52] Without competition, Facebook's product quality has diminished resulting in privacy concerns for its users and an increase in the spread of disinformation across the platform.[53]

Taken together, Google, Apple, and Facebook are dominant online platforms that have obtained monopoly power over their relevant markets. Despite consumer concerns relating to Big Tech monopoly power, consumers remain loyal to Big Tech brands due to high switching costs.[54] The foundations of trademark law help Big Tech continue to protect their brands and goodwill among consumers.

II. U.S. Trademark Law Protects Big Tech Brands and Goodwill

Trademark law regulates brand names that populate the marketplace, including Google, Apple, and Facebook.[55] U.S. Trademark law provides protection to both registered and unregistered marks[56] and was developed to (1) incentivize producers to invest in quality; (2) reduce transaction costs, such as consumer search costs, and (3) promote free competition in business and trade.[57] A trademark can be "any word, name, symbol, or device, or any combination thereof […] used by a person […] to identify and distinguish his or her goods, including a unique product, from those manufactures or sold by others and indicate the source of the goods, even if that source is unknown."[58] Thus, trademarks may include words (i.e. "Apple," "Google," or "Facebook"), phrases (i.e., Apple's "Think Different" slogan or Google's "The Web is What You Make of It"), colors (i.e., UPS's brown UPS trucks or T-Mobile's use of the magenta color),[59] sounds (i.e., "Google Dynamic Virtual Surround" software for audio and surround sound), scents (i.e., "FLOWERY

51. *Id.* at 144-145. *See also*, Nicole Nguyen, *If You Created A Spotify Account With Facebook, It Is Forever Tied To Facebook*, BUZZFEED (Oct. 3, 2018), https://www.buzzfeednews.com/article/nicolenguyen/disconnect-facebook-account-from-spotify.

52. *See* INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 2, at 133.

53. *Id.* at 14.

54. *Id.* at 384.

55. *See* BARTON BEEBE, *supra* note 5, at 11-12 (providing that "[t]rademark law protects the goodwill of marks rather than creation of new marks, and stems from the Commerce Clause of the Constitution.").

56. *See* Lanham Act §32, 15 U.S.C §1114; Lanham Act §43(a), 15 U.S.C. §1125(a).

57. *See* BEEBE, *supra* note 5, at 24-25.

58. Lanham Act § 45, 15 U.S.C. § 1127.

59. Stacy Conradt, *9 Trademarked Colors*, MENTAL FLOSS (May 17, 2017), https://www.mentalfloss.com/article/27396/9-trademarked-colors.

MUSK SCENT" in Verizon stores),[60] textures (i.e., textures of wines), motions, building exteriors and interiors, product shapes (i.e., Apple's assertion over iPhone shape),[61] or product packaging (i.e., Coca Cola's bottle packaging).

Trademarks serve to lower consumer search costs and incentivize producers to produce "consistent levels of product quality" by allowing consumers to identify the source of the goods or services.[62] When a consumer sees a product with a trademark, the consumer is able to identify that the product is made by a particular source, which enables the consumer to decide whether he or she liked or disliked "other similarly marked items" in the past.[63] Trademarks are valuable because they allow businesses to cultivate their brands and goodwill (or reputation relating to its products and/or services).[64] For example, if a trademark owner provides an inconsistent level of quality, consumers may be less incentivized to purchase the products, which reduces the overall value of the trademark.[65]

A. Trademark rights and protections pursuant to the Lanham Act of 1946

Generally, to qualify for trademark protection under U.S. federal law, the trademark must (1) be "distinctive" of the source of the goods or services to which it is affixed, (2) must not be disqualified from protection by statutory bars, and (3) must be used in commerce.[66] The Lanham Act of 1946 provides trademark owners with a basis to sue competitors for using similar marks that cause consumer confusion with respect to the registered or unregistered mark.[67]

60. Nick Greene, *The 10 Current Scent Trademarks Currently Recognized by the U.S. Patent Office*, MENTAL FLOSS (Oct. 13, 2015), https://www.mentalfloss.com/article/69760/10-scent-trademarks-currently-recognized-us-patent-office.

61. John DiGiacomo, *Lessons in Trademarking Trade Dress: Apple vs. Samsung*, REVISION LEGAL (Dec. 27, 2017), https://revisionlegal.com/trademark/trademarks/lessons-trademarking-trade-dress-apple-vs-samsung/.

62. *See* BEEBE, *supra* note 5, at 24-25 (A trademark also may induce the supplier of goods to make higher quality products and to adhere to a consistent level of quality).

63. *Id*. at 24.

64. *Id.* at 25.

65. *See* BEEBE, *supra* note 5, at 24 ("The value of a trademark is in a sense a "hostage" of consumers; if the seller disappoints the consumers, they respond by devaluing the trademark. The existence of this hostage gives the seller another incentive to afford consumers the quality of goods they prefer and expect.").

66. *Id.* at 32.

67. *See generally,* § 32, 15 U.S.C. § 1114 (likelihood of confusion with respect to registered marks); §43(a), 15 U.S.C. §1125(a) (likelihood of confusion with respect to registered or unregistered marks); § 43(c), 15 U.S.C. § 1125(c) (likelihood of dilution with respect to registered or unregistered marks); § 43(d), 15 U.S.C. § 1125(d) ("cybersquatting" of registered or unregistered marks).

To successfully enforce a mark, the trademark owner must show that the alleged infringer is using a similar or identical mark in a manner that is "likely to produce confusion in the minds of consumers about the origin of the goods or services in question."[68] There is currently no consensus among the courts about how many factors are needed to trigger a likelihood of confusion.[69] Furthermore, different circuit courts assess consumer confusion inconsistently, using various factors, and hold that no one factor is dispositive in determining likelihood of consumer confusion.[70] To determine whether there is likelihood of confusion, the court must assess who the "relevant consuming public" is, which depends on whether confusion is either: (1) forward (direct) confusion or (2) reverse confusion.[71]

1. An Overview of Trademark Infringement: Forward Confusion

Forward confusion occurs when a trademark owner sues an alleged infringer for using the same or similar mark.[72] The senior user (trademark owner) is typically a larger company that has gained national recognition through its marketing and advertising; whereas, the junior user (alleged infringer) is typically a smaller company that is using a similar mark that causes consumers to believe that the "junior user's goods or services are from the same source as or are connected with the senior user's goods or services."[73] Because the junior user is allegedly using and benefitting "from the senior user's more established goodwill", the court will need to establish

68. *Booking.com B.V. v. United States Patent & Trademark Office,* 915 F.3d 171, 187 (4th Cir. 2019), cert. granted 140 S.Ct. 489; s*ee also, AMF v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979) (holding that courts must balance the totality of circumstances to determine likelihood of confusion by assessing: (1) strength of the mark; (2) proximity of the goods; (3) similarity in the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) type of goods and the degree of care likely to be exercised by the purchaser; (7) defendant's intent in selecting the mark; and (8) likelihood of expansion of the product lines); s*ee also* TMEP § 1207.01 (providing that Likelihood of Confusion occurs when the examining attorney concludes the applicant's mark, as used on or in connection with the specified goods or services, so resembles a registered mark as to likely cause confusion).

69. *See* BEEBE, *supra* note 5, at 369; s*ee generally* Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581 (2006) (stating two main types of confusion-based infringement include (a) signifier confusion, and (b) sponsorship or affiliation confusion.); s*ee also Int'l Info. Sys. Sec. Certification Consortium, Inc. v. Sec. Univ., LLC,* 823 F.3d 153, 161 (2d Cir. 2016) (providing that (a) signifier confusion occurs when consumer fails to detect the difference between two different marks; thus, resulting in confusion as to the source of the product or services; and (b) sponsorship or affiliation confusion occurs when consumer detects the difference between two marks, but concludes that due to the similarities, there must be a commercial connection between the marks).

70. *See* BEEBE, *supra* note 5, at 369.

71. *See* BARTON BEEBE, *supra*note 5, at 391.

72. Molly S. Cusson, *Reverse Confusion: Modifying the Polaroid Factors to Achieve Consistent Results*, 6 FORDHAM INTELLECTUAL PROP., MEDIA & ENT. L.J. 179, 179 (1995).

73. *Id*. at 182.

whether consumers of the junior user's products and services would be confused as to the source of the goods and services.[74] Thus, the proper "relevant consuming public" is composed of potential buyers of the junior user's (alleged infringer) goods or services.[75]

2. An Overview of Trademark Infringement: Reverse Confusion

Reverse confusion occurs when a larger, more powerful, and nationally recognized entity (junior user) adopts the existing mark of a smaller less powerful user (senior user).[76] In reverse confusion, consumers are likely to mistake the senior user's mark with that of the junior user; thus, the proper "relevant consuming public" is composed of potential buyers of the senior user's goods or services. [77] Consumers are likely to be confused as to the source of the senior user's goods, and may come to believe that the senior users products come from the junior user or that the senior user is actually the infringer. [78] Reverse confusion is harmful because the senior user loses value of its trademark, its product identity and corporate identity, which prevents the senior user from controlling its goodwill, reputation, and ability to move into new markets.[79]

B. Big Tech Exploits Trademark Law to Maintain Monopoly Power

In recent years, Big Tech has engaged in anticompetitive practices that prevent smaller tech companies from entering the market altogether.[80] The USPTO has stated in a recent study that a trademark "troll" or "bully" uses its rights to "harass or intimidate other businesses beyond the scope of what that law is reasonably interpreted to permit."[81] Big Tech has "bullied" smaller tech companies by alleging intellectual property theft, blocking

74. Inna Kaminer, *Set the Statutes Straight: Amending the Lanham Act to Dispel the Confusion Regarding Reverse Confusion*, 36 LOY. L.A. ENT. L. REV. 71, 74 (2015), ("for example, a Louis Vuitton knock-off emblazoned with "LV": such a purse sold by a junior user will lead consumers to believe the product actually comes from the senior user, Louis Vuitton, because it bears the "LV" symbol"); Leah L. Scholer, *Righting the Wrong in Reverse Confusion*, 55 HASTINGS L.J. 737, 737 (2004).

75. *See* BARTON BEEBE, *supra* note 5, at 391.

76. *See* sources cited *supra* note 74. *See* BARTON BEEBE, *supra* note 5, at 391.

77. *See* BARTON BEEBE, *supra* note 5, at 391*; See also* sources cited *supra,* note 72; *See also* sources cited *supra,* note 74.

78. *See* sources cited *supra* note 74

79. *Id*.

80. Leah Nylen and Cristalano Lima, *Big Tech's 'bully' tactics stifle competition, smaller rivals tell Congress*, POLITICO (Jan. 17, 2020), https://www.politico.com/news/2020/01/17/big-tech-competition-investigation-100701.

81. Gabriela Falcone, *Trademark Trolls: A Warning to the Entrepreneur*, B.C. LEGAL SERV. LAB (Mar. 19, 2018), http://bclawlab.org/eicblog/2018/3/19/trademark-trolls-a-warning-to-the-entrepreneur.

small tech companies from platforms, and essentially driving smaller tech companies out of business.[82]

Big Tech trademark infringement suits demonstrate how Big Tech manage to prevail (or obtain settlements) in trademark cases simply because they have more resources and money to file meritless or frivolous suits.[83] Because smaller and medium sized companies often have less resources and money available to defend against trademark infringement claims (meritless or not), these competitors are bullied by Big Tech to either (1) leave the market or (2) pay Big Tech licensing fees to use their trademark. As competitors become disincentivized from entering the market, Big Tech is further insulated from competition. This insulation emboldens Big Tech to raise its prices for U.S. consumers while also decreasing the quality of the goods or services provided. Thus, even though trademark law is supposed to incentivize consistent levels of quality for trademarked products and services, Big Tech's exploitative conduct of trademark law effectively allows the opposite to happen. This misleads consumers because they are left with the perception that Big Tech goods (or services) are the highest quality, simply because Big Tech has no other competition that produces products or services of similar or higher quality.

Below is an examination of how Big Tech vigorously enforces their trademark rights by filing confusion-based infringement claims against competitors to prevent new competitors from entering the market. Big Tech files trademark infringement claims whether it is the first to use the mark in commerce; thus, both forward confusion and reverse confusion must be considered.

1. Big Tech Trademark Infringement: Forward Confusion

Trademark law allows Big Tech to "vigorously enforce their rights" to continue to cultivate "a substantial amount of goodwill."[84] Big Tech has demonstrated a willingness to bully competitors from using marks that are slightly similar to Big Tech marks by actively suing or threatening to sue anyone that uses a singular component of their mark.[85] These bully tactics prevent competitors from using their desired mark in commerce and cultivating goodwill among consumers; thus, Big Tech prevents competitors

82. *Id*.

83. *See Id*. (providing that trademark infringement disputes can cost up to $25 million per dispute, which allows Big Tech trademark owners to file trademark infringement claims against any competitor that uses a similar mark, even if that mark is not likely to cause consumer confusion).

84. Michael Mireles, *Trademark Trolls, A Problem in the US?*, 18 CHAP. L. REV. 815, 824-826 (2015), https://www.chapman.edu/law/_files/publications/clr-18-mireles.pdf.

85. *Id.* at 856.

from being able to freely express their products or services through a desired trademark. This prevents competitors from entering the market and allows Big Tech to maintain and manipulate consumer perceptions relating to Big Tech brand superiority and quality.

a. Google: Forward Confusion Cases

Google dominates the general online search and search advertising market and owns many word marks.[86] The Google word mark has been used since 1977 for a variety of goods and services, including Google's search engine.[87] Google actively engages in trademark enforcement to prevent competitors from using marks that are similar to or contain similar components to registered Google trademarks. Such infringement claims are usually based on grounds that an alleged infringer's mark is likely to cause confusion among Google consumers who may come to believe that either (1) Google is the source of the trademarked goods and/or services; or (2) the trademarked goods are sponsored or affiliated by Google. Not all of Google's trademark infringement claims have been meritless, indeed some word marks including "YOUTUTE," "MUOOGLE," and "ITUBER" have understandably been opposed by Google. These marks readily call to mind Google trademarks. Thus, these marks are clear attempts of competitors trying to use Google's brand and goodwill for their products or services. However, Google engages in trademark infringement even in cases where it is unlikely that consumers would be confused by the competitors new mark. Oftentimes the alleged competitor is forced to abandon its mark and either come up with a new mark to describe its goods and services or leave the market altogether.

In 2020, Google filed an opposition to a new trademark, "FLOOGLE," used for "[p]roviding an on-line computer web site notifying healthcare personnel and other individuals of natural and manmade disasters or acts of terrorism and how to respond to such disasters or acts of terrorism."[88] Google claimed that the mark would likely cause consumer confusion due to the similarity between "FLOOGLE" and "GOOGLE" and the fact that both

86. GOOGLE BRAND RESOURCE CENTER, Google Trademarks list, https://about.google/brand-resource-center/trademark-list/ (providing that Google trademarks include "AdWords," "Android Pay," "Android," "Blink," "Chrome OS," "Chromebase," "DART," "Gmail," "Google," "Google Apps," "Google Chat," "Pixel," "YouTube," and many more).

87. Kirsten Errick, *Google Opposes Floogle Mark For COVID-19 Website*, L. ST. MEDIA (Aug. 2020), https://lawstreetmedia.com/tech/google-opposes-floogle-mark-for-covid-19-website/. *See also Google LLC v. Dennis, David B*, 91264012, No. 1 (T.T.A.B. Aug. 3, 2020) (listing the Google search engine as an "easy-to-use interface, advanced search technology, and a comprehensive array of search tools that allows Internet users to search for and find a wide variety of online content in many different languages.").

88. Errick, *supra* note 87.

services are used in "connection with COVID-19 information websites."[89] Furthermore, Google claimed that the "FLOOGLE" mark would readily call to mind Google's trademarked search engine in the minds of the consumers which would allow the competitor to benefit from Google's goodwill.[90]

Although "FLOOGLE" does sound and look similar to "GOOGLE" it is important to remember that to determine whether a likelihood of confusion exists, the courts balance a variety of factors, none of which are dispositive. Just because the marks may sound similar, there may be other factors that would inhibit a consumer from being confused by use of the mark. Additionally, considering that "GOOGLE" is widely known, and likely qualifies as a famous mark, it is questionable whether consumers would actually confuse the "FLOOGLE" mark as originating from Google. Whether consumers would be confused by the "FLOOGLE" mark is undetermined because after Google filed opposition, Floogle failed to answer the Notice of Opposition and the Notice of Default which resulted in termination of the trademark.[91]

Google has filed trademark opposition claims whenever a competitor uses *any* Google trademark component, including certain words. In 2020, Google filed opposition to the "BLUE PIXEL" trademark for use in connection with cameras (tripods, flashes, lens mount, etc.) because it would likely cause confusion among consumers with Google's "PIXEL" trademark.[92] Similar "FLOOGLE," the "BLUE PIXEL" mark was abandoned by its owner in March 2021 after the company failed to respond to Google's opposition claims.[93] Whether these marks have actually caused consumer confusion is unclear, but it appears that Google has developed a strong trend toward filing opposition claims against any competitor that uses a singular component (or word, such as "Pixel") from its trademark. This has allowed Google to vigorously protect its brand and effectively prevent competitors from using any trademark that is similar to a Google trademark.

b. Apple: Forward Confusion Cases

Apple, which dominates the mobile operating system market, has engaged in various trademark infringement suits since its inception in 1978,

89. *Id*. (explaining that Google partnered with the U.S. government in March 2020 to develop a website dedicated for COVID-19 information—including education, prevention, and local resources nationwide).

90. Errick, *supra* note 87. (In the case of *Google LLC v. Dennis, David B,* the T.T.A.B. noted that the FLOOGLE mark "presumably is intended as a combination of the words "Flu" and "Google" at a time of an international public health emergency.").

91. *Id.*

92. Google Notice of Opposition to Pixel, ESTTA: ESTTA1075724, Aug. 18, 2020, https://ttabvue.uspto.gov/ttabvue/v?pno=91264279&pty=OPP&eno=1.

93. *Id.*

and has continued to enforce its trademarks over the years.[94] Apple owns many word marks, several logos and phrases and slogans.[95] To prevent competitors from using components of Apple's trademarks, Apple has filed trademark infringement suits against competitors that raise concerns regarding trademark bullying.[96]

In 2020, Apple (the senior user of the apple logo) filed an opposition to the registration of Prepear's (the junior user of the pear logo) mark for its food prep app.[97] Apple claimed that Prepear's pear logo "readily calls to mind" Apple's widely recognized apple logo and thus would confuse consumers and cause dilution by blurring.[98] To support its claims of infringement, Apple argued that its trademarks cover "identical and/or highly related goods and services" compared to Prepear and that consumers would mistakenly believe Prepear is associated with Apple upon seeing the mark.[99]

Prepear (the junior user, smaller, less powerful company), owned by Super Health Kids Inc., claimed that the two logos looked nothing alike and that Apple was trying to bully the company from dropping the case and walking away.[100] Unlike many small companies that do not have the resources to fight against Big Tech, Prepear decided to fight Apple on its opposition claims regarding the pear logo mark. Although Prepear did not let Apple completely bully them from the market, Prepear did end up making concessions regarding its mark, such as changing the shape of the leaf to have a flat side instead of being circular.[101]

94. Dan Kelly, *What do iPhone, iPad, iCloud, and iBooks Have in Common?*, DUETSBLOG (June 17, 2011), https://www.duetsblog.com/2011/06/articles/trademarks/what-do-iphone-ipad-icloud-and-ibooks-have-in-common/.

95. APPLE LEGAL, *Apple Trademark List*, https://www.apple.com/legal/intellectual-property/trademark/appletmlist.html (providing that Apple owns many word marks such as "Airdrop," "AirMac," "AirPods," Animoji," "Apple Music," "Apple Play," "iChat," "iPad," "iPod," "iTunes," and "iMovie;" Apple owns several logos such as the Airplay Logo, Apple Logo, Mac Logo, Podcast Logo, and QuickTime Logo; and Apple owns phrases and slogans such as "There's an app for that," "Think different," and "Shop different").

96. Kyle Jahner, *It's Apple vs. Startup in Faceoff Over Who Can Use Fruit Logos*, BLOOMBERG L. (Sep. 2020), https://news.bloomberglaw.com/ip-law/apple-said-to-thwart-other-fruit-logos-even-far-from-its-tree.

97. *Apple Reaches Agreement With Prepear Over Logo*, ENTREPRENEUR (Feb. 11, 2021), https://acropreneur.com/apple-reaches-agreement-with-prepear-over-logo/.

98. *Id*.

99. *Id.*

100. Kyle Jahner, *It's Apple vs. Startup in Faceoff Over Who Can Use Fruit Logos,* BLOOMBERG L. (Sep. 2020), https://news.bloomberglaw.com/ip-law/apple-said-to-thwart-other-fruit-logos-even-far-from-its-tree.

101. *See Various authors, supra* notes 97-100.

Figure 1: Apple claimed that Prepear's logo would likely cause confusion among consumers due to the similarities between the two marks. The left-most, green pear-shaped image, with a circular-shaped leaf is Prepear's original trademark design that Apple opposed. The right-most, black apple-shaped image, with a circular-shaped leaf is Apple's registered trademark.

Figure 2: The top image shows Prepear's original ("OLD") trademark design that Apple claimed would cause consumer confusion. The bottom image shows Prepear's revised ("NEW") trademark design, which consists of a leaf with a flat side.

Prepear is not the only small company to be subjected to Apple's trademark bullying.[102] In January 2021, Apple filed an opposition to the registration of the mark "PODSHEDZ" claiming that the mark was confusingly similar in "appearance, sound, and commercial impression to Apple's -POD Family of Marks."[103] Apple claims that its senior use of "pod" is distinctive and allows consumers to associate the mark with Apple and its "various audio and audio-related products."[104] Furthermore, Apple claimed that due to the similarities between the marks, consumers are like to falsely believe that there is a "connection, association, endorsement or other affiliation with Apple."[105] If Apple can successfully show likelihood of consumer confusion, prevailing on the multi-factor likelihood of confusion factors, then it will likely be able to prevent the registration of "PODSHEDZ" and likely prevent future competitors from using any mark containing the word "POD."

Apple's intimidation tactics are a clear announcement to all potential competitors that Apple will not tolerate any competition in its market space and will not hesitate to use trademark legal tactics to accomplish its goals.

c. Facebook: Forward Confusion Cases.

Facebook, which dominates the market for online social networking services, has also bullied competitors using trademark tactics to protect its brand and goodwill. Facebook owns many trademarks for Apps, Platforms, and Social Networking products and services.[106]

102. Jahner, *supra* note 100 (noting that Apple has also opposed trademark registrations for (1) Appleton Area School District in Wisconsin and (2) an autism charity).

103. *Apple Inc. v. Pod Shedz LLC*, 91266908, No. 1 (T.T.A.B. Jan. 6, 2021); *See* Kirsten Errick, *No Pod: Apple Opposes Pod Shedz Mark Over Use of "Pod"*, L. ST. MEDIA (Jan. 7, 2021), https://lawstreetmedia.com/tech/no-pod-apple-opposes-pod-shedz-mark-over-use-of-pod/.

104. *See Apple Inc. v. Pod Shedz, supra* at note 103.

105. *Id*.

106. *Trademarks*, FACEBOOK, https://en.facebookbrand.com/trademarks (providing that Facebook owns word marks such as "Facebook," "Face," "FB," "Book," "Messenger," "Instagram," "Gram,"

In an effort to prevent competitors from using any component of Facebook trademarks, such as "face" or "book," Facebook has vigorously engaged in aggressive trademark infringement lawsuits throughout the years.

In 2010, Facebook filed a trademark infringement suit against a startup social networking company, Teachbook, for using the word "book" in its name and domain name "Teachbook.com."[107] Facebook claimed that Teachbook was "rid[ing] on the coattails of the fame and enormous goodwill of the Facebook trademark" and has become "a blatant attempt to become Facebook 'for teachers.'"[108] Teachbook, a startup comprised of two employees, offers an online community for teachers (less than 30 users) and has not officially launched its website.[109] To avoid costly litigation in a fight for the mark "Teachbook," the startup company agreed to change its mark to "TeachQuest" and as a result the "Teachbook" mark was abandoned.[110]

In 2015, Facebook sued Designbook, a startup social networking service, for its use of the mark "Designbook"[111] Facebook claimed that since Designbook uses the mark in connection with six services that are the "same, related, or complementary to the goods and services offered" under Facebook trademarks, consumers are likely to believe there is "an affiliation or connection between Applicant and Facebook where none exists."[112] Even though none of Designbook's branding is related to Facebook, Designbook's logo consists of different colors and fonts, and Designbook is not targeting the Facebook community, Facebook opposed use of the word "book" in the

"Oculus Touch," "Rift," "Whats," "WhatsApp," as well as logo marks such as the Boomerang Logo from Instagram or the Messenger Logo from Facebook).

107. Courtney Rubin, *Facebook Sues Start-up Teachbook Over Name*, INC. (Aug. 26, 2010), https://www.inc.com/news/articles/2010/08/facebook-sues-startup-for-trademark-infringement.html (citing other examples of Facebook bullying techniques, such as demanding a travel site called Tracebook to change its name to Trip Trace).

108. Julianne Pepitone, *Facebook sues start-up for using 'book' in name,* CNN (Aug. 27, 2010), https://money.cnn.com/2010/08/26/technology/teachbook/index.htm.

109. *See* FACEBOOK, *supra* note 106.

110. *Id. See generally, Facepets.com, LLC v. Facebook Inc.,* DOMAINNAMEWIRE, https://domainnamewire.com/wp-content/facepets.pdf; *See also Facebook hit with "trademark bullying" claim,* TRADEMARKS & BRANDS ONLINE (Feb. 26, 2014), https://www.trademarksandbrandsonline.com/news/facebook-hit-with-trademark-bullying-claim-3536 (providing that in 2014, Facebook bullied startup social networking company, for trademark infringement for using the mark "Facepets" for its social networking site for pet owners); *See* TTABVUE. TRADEMARK TRIAL AND APPEAL BOARD INQUIRY SYSTEM, OPPOSITION NUMBER: 91215074, USPTO (July 21, 2014), https://ttabvue.uspto.gov/ttabvue/v?pno=91215074&pty=OPP (providing that "Facepets" mark was abandoned).

111. Christopher Lei, *Facebook vs Designbook*, MEDIUM.COM (June 3, 2015), https://medium.com/@vtaznboylei/facebook-vs-designbook-7da0dd87c08.

112. Justin F. McNaughton, *United States: FACEBOOK VS. DESIGNBOOK: The Vermont Trademark Wars, Part III,* MONDAQ.COM (June 5, 2015), https://www.mondaq.com/united-states/trademark/402622/facebook-vs-designbook-the-vermont-trademark-wars-part-iii-take-our-survey-too-please-video-content.

"Designbook" mark because of alleged "confusion in the industry."[113] In response to Facebook's bully tactics against Designbook, the Governor of Vermont, Peter Shumlin, sent a letter to Facebook's Cofounder and CEO, Mark Zuckerberg, criticizing Facebook for bullying Designbook unnecessarily.[114] Unfortunately, this made little to no difference for Designbook, which abandoned the "Designbook" trademark in 2016.[115]

These cases demonstrate how Facebook has managed to bully competitors out of their market, to protect Facebook's brand. If a competitor's mark consists of "face" or "book" it is very likely Facebook will oppose registration of the mark by either sending cease and desist letters or filing trademark infringement suits for confusion and dilution of a famous mark. Because startup companies are unlikely to have the money and resources to dispute trademark infringement claims, Facebook is empowered to enforce its trademarks, at any cost, to ensure that it monopolizes and capitalizes off its brand recognition. Facebook's trademark bullying tactics are nothing new and has the effect of decreasing competition within the social networking market and empowering Facebook with total market dominance.

2. Big Tech Trademark Infringement: Reverse Confusion

Reverse confusion occurs when consumers are likely to be confused as to the source of the senior user's goods and may come to believe that the senior users products come from the junior user or that the senior user is infringing on the junior user's mark.[116] Most notably, Apple has successfully taken over several junior user marks over the years that it was not the first to use in the U.S., including the Apple (word and logo) mark, iCloud mark, and iBook mark.[117]

113. Kyle Scott Clauss, *Facebook Wants a Vermont Startup to Drop 'Book' from Its Name*, BOSTON MAG. (June 1, 2015), https://www.bostonmagazine.com/news/2015/06/01/facebook-designbook-trademark-battle/.

114. *Id*. (providing that the letter stated: "I was very concerned to read about Facebook's unnecessary bullying of a Vermont startup called Designbook. The Vermonters behind this company are the type of people that make me proud to be this state's Governor. They are young, entrepreneurial, and innovative. Given your background, I am sure you can relate. The last thing these Vermonters deserve is for a giant corporation to threaten them unnecessarily. We don't stand for that type of injustice in Vermont. Just ask Chick-fil-A.").

115. TTABVUE. TRADEMARK TRIAL AND APPEAL BOARD INQUIRY SYSTEM, OPPOSITION NUMBER: 91225049, USPTO (Jan. 4, 2018), https://ttabvue.uspto.gov/ttabvue/v?pno=91225049&pty=OPP.

116. *See* sources cited, *supra* notes 72-74.

117. Dan Kelly, *What do iPhone, iPad, iCloud, and iBooks Have in Common?*, DUETSBLOG.COM (June 2011), https://www.duetsblog.com/2011/06/articles/trademarks/what-do-iphone-ipad-icloud-and-ibooks-have-in-common/.

The Apple word and logo was involved in trademark litigation from 1978, when Apple first registered its trademark, to 2007.[118] Since Apple Corps (the Beatles holding company) was the first to use the apple logo mark in commerce in the U.S., it filed a trademark infringement suit against Apple Inc. on the grounds that consumers would be confused as to the source of the trademarked goods.[119] Needless to say, in 1981 Apple Inc. paid Apple Corps an undisclosed amount to be able to use its Apple logo on its goods.[120] The two companies decided to settle, again for an undisclosed amount, in 2007, which has allowed Apple Inc. to continue using the Apple logo on its products and services.[121]

Similarly, Apple was not the first to use the iCloud mark in the U.S.[122] The senior user, iCloud Communications, first used the iCloud mark in 2005 for computer telephony, email and video conferencing.[123] In 2011, after Apple launched "iCloud," iCloud Communications filed suit against Apple for trademark infringement, unfair competition, and injury to business reputation.[124] Even though iCloud Communications was the first to use the iCloud mark in the U.S. and had already cultivated goodwill among its consumers, the company decided to drop the suit against Apple and subsequently changed the company name to Clear Communications.[125]

Another example is Apple's use of the "iBooks" mark in connection with electronic library and electronic books.[126] The "iBooks" mark was first used by the New York Publisher Byron Preiss in September 1999.[127] Byron Preiss published over 1,000 hardcover and paperback books under the "iBooks" mark.[128] In June 2011, after launching "iBooks" for electronic library and e-book delivery to electronic devices, Apple was sued for

118. *Apple, Beatles Settle Trademark Lawsuit*, CNBC (Feb. 2007), https://www.cnbc.com/2007/02/06/apple-beatles-settle-trademark-lawsuit.html.

119. *Id*.

120. *Id*. Throughout the years, the two companies were involved in litigation over the use of the Apple logo associated with Apple Inc. products, such as the iTunes Music Store.

121. *Id.*

122. Brad McCarty, *Apple sued by iCloud Communications over iCloud trademark*, THENEXTWEB.COM (June 10, 2011), https://thenextweb.com/news/apple-sued-by-icloud-communications-over-icloud-trademark.

123. *Id*.

124. *Id*.

125. Jacqui Cheng, *iCloud Communications changes name, drops suit against Apple*, ARS TECHNICA (Sept. 2011), https://arstechnica.com/gadgets/2011/09/icloud-communications-ditches-its-own-domain-apple-trademark-suit/.

126. Josh Ong, *Apple sued by publisher over iBooks trademark*, APPLEINSIDER.COM (June 16, 2011), https://appleinsider.com/articles/11/06/16/apple_sued_by_publisher_over_ibooks_trademark.

127. *Id*.

128. *Id*.

trademark infringement.[129] The trademark infringement was filed on the grounds that Apple's use of the "iBooks" mark in connection with an electronic library accessible from iPad and iPhone was likely to overwhelm the goodwill of the plaintiffs "iBooks" marks, rendering them worthless.[130] In 2013, the trademark infringement case against Apple was dismissed the plaintiff did not provide sufficient evidence that their mark "is likely to suffer from reverse confusion with Apple's iBook mark."[131]

These examples demonstrate Big Tech's exploitation of trademark law to not only protect their brands and goodwill, but also to bully competitors from the market. These anticompetitive practices pose serious ramifications to consumers.

III. Vigorous Enforcement of Big Tech Trademarks Has Lasting Repercussions on U.S. Consumers

Big Tech's exploitation of trademark law helps Big Tech reinforce its durable monopoly powers at significant costs for U.S. consumers. Big Tech's anti-competitive practices have posed severe issues to the continuation of a free and open market. The lack of meaningful competition diminishes consumer choice and imposes significant costs to the consumer. Consumer costs include increased prices for products and services offered by Big Tech; increased data collection combined with nonexistent privacy controls by Big Tech; and a substantial deterioration in Big Tech's quality of goods or services.

A. Trademark Law allows Big Tech to increase prices & diminish quality (and user experience) for trademarked goods and services

Online platforms' dominance has left consumers with limited choice of platforms, thereby creating opportunities for exploitive conduct by Big Tech.[132] Because market participants rely on Big Tech's gatekeeper power to access users and markets, concessions and demands have become '"the cost of doing business' given the lack of options."[133]

129. *Id*.

130. *Id*.

131. Steven Musil, *Apple wins trademark lawsuit over use of 'iBooks' term*, CNET.COM (May 9, 2013), https://www.cnet.com/news/apple-wins-trademark-lawsuit-over-use-of-ibooks-term/#:~:text=A%20federal%20judge%20in%20New,of%20the%20term%20%22iBooks.%22&text=The%20lawsuit%20acknowledged%20that%20Apple,sold%20from%201999%20to%202006.

132. *See generally* INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 2. The Subcommittee found evidence that dominant platforms oftentimes exploit their gatekeeper function power to "dictate terms and extract concession that no one would reasonably consent to in a competitive market."

133. *Id*. at 39.

This issue has become more prevalent, especially in light of the COVID-19 pandemic, where many businesses and consumers shifted "work, commerce, and communications online" and held events through video chat applications.[134] Apple began to demand a 30% commission from businesses that moved their events online, using Apple's video chat app (which is also a trademarked product) for virtual class offerings.[135] Because Apple is the trademark owner for all Apple video chat products—iChat, iMessage, Facetime—Apple is incentivized to legally and strategically ensure that it reaps a financial benefit from trademarked products. These exploitive practices have allowed Apple stock to rise from $56.09 per share on March 23, 2020, to $125.91 as of closing on May 11, 2021.[136] Despite the questionable moral ethics of price-gouging during a global pandemic, Apple has largely escaped criticism for its methods. Apple has retained significant brand loyalty, in no small part, due to the goodwill garnered by its trademarks.[137] Apple's trademarks not only serve to prevent competitors from using a similar mark, but in effect, also increase overall consumer costs, contrary to the intents of trademark law. Apple's price increases have not been associated with an increase in quality of products, but rather "an inferior user experience and a reduction of innovation."[138]

Google's "AdWords," also a registered trademark, is another manifestation of Big Tech monopoly power. AdWords is the only product that allows businesses to pay for the chance for their ad to appear alongside Google search results.[139] The Subcommittee noted that even though Google claims to recognize trademark law by prohibiting users from using trademark terms in ads, Google "puts the onus of enforcement on victims" and does not stop trademark infringers unless the trademark is owned by Google.[140] Thus, Google has created a circular economy where all its users contribute to the ultimate monetization of a supposed "free" product. Although Google search

134. *Id*. at 10.

135. *Id*. at 349.

136. *Apple Inc. Financial Report,* GOOGLE FINANCE (accessed May 11, 2021), https://www.google.com/finance/quote/AAPL:NASDAQ?sa=X&ved=2ahUKEwi1iP2ElMPwAhXTpJ4KHXGqBhQ3ecFMAB6BAgoEBo (Apple stock's rise during the pandemic reflect the financial benefits of their monopoly power).

137. *See* INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra,* note 2, at 355.

138. *Id* at 350. (finding that "Apple's commissions and fees, combined with the lack of competitive alternatives to the App Store and IAP, harm competition and consumers" since it "leads to higher prices for consumers.").

139. *Id.* at 202. The chief technology officer and co-founder of Basecamp testified that "Google uses this monopoly to extort businesses like ours to pay for the privilege that consumers who search for our trademarked brand name can find us because if we don't they will sell our brand name as misdirection to our competitors."

140. *Id*.

engine does not invoke a cost per search, AdWords is able to monetize the volume of searches by extorting businesses to pay for an opportunity to display their ads. Ultimately, all participants in this economy help direct money towards Google.[141]

B. Big Tech trademarks and U.S. consumer privacy concerns

Consumers are subjected to a high degree of privacy invasion by Big Tech, which allows for "persistent collection and misuse of consumer data."[142] Because there are no other widely available online platforms accessible to consumers, Big Tech has the power to offer less privacy protection than they otherwise would in a free and competitive market.[143] This permits Big Tech to lower the quality of services and goods by simultaneously monetizing and selling consumer data to third parties.[144]

Big Tech monopoly power harms U.S. democracy because consumers do not know what type of data is being collected or how data is being stored by Big Tech.[145] For example, Facebook cements its market dominance by not only vigorously enforcing its trademark rights against perceived competitors, but also by actively acquiring intellectual property rights of its significant competitors.[146] By acquiring its competitors, Facebook is able to impose high switching costs to its consumers, effectively retaining a vast majority of its billions of users.[147] Because Facebook products are used by their users every day, Facebook is able to gather a significant amount of personal information about their users.[148] Facebook monetizes this massive trove of information by selling its users' information to third party advertisers, generally selling the information to the highest bidder. This dramatically harms the experience of Facebook's users since the user is just as likely to see a sponsored ad as a post from their family or friend.

141. Because Google is the predominate search engine, Google is able to display as many ads or as few ads as it likes, the only thing Google's customers can hope for is that Google keeps its promise to display ads alongside Google searches.

142. *See generally* INVESTIGATION OF COMPETITION IN DIGITAL MARKETS source cited, *supra* note 2, at 18 (stating that Big Tech companies have an absence of "privacy guardrails" for consumers).

143. *Id*. at 53.

144. *Id* at 18. "As a result, consumers are forced to either use a service with poor privacy safeguards or forego the service altogether."

145. *Id.*

146. *Id*. at 149-160.

147. *Id*.

148. *Id.* at 137-148 (providing that information collected includes an array of information about consumers, such as the consumer's location, residence, contact information, prospective love interests, prospective political interests, and even prospective economic interests).

Despite this deteriorated service, Facebook users are still unlikely to change providers because (1) there are no readily available alternatives, and (2) the high switching cost imposed by Facebook oftentimes mean severing ties with other applications, such as Spotify.[149] Facebook's dominance in the social networking market is harmful to democracy because Facebook can obstruct the flow of accurate information. A democracy depends not only on free speech, but informed information. No opinion can be informed unless the facts which substantiate that opinion are true. Facebook's trademark recognition misleads users into believing Facebook provides a superior product. Part of the consumer assumption is that the information found on Facebook is accurate. Unfortunately, much of the information which circulates on Facebook is false or misleading in nature and contributes to false discourse of the state of the nation.[150] Exploitive third parties ranging from snake-oil salesmen to nefarious foreign governments such as China and Russia have attempted, with great success, to exploit Facebook's lax content control to influence the discourse of our democracy. By allowing third parties to influence the opinions of virtually all Americans, Facebook's lax content control poses significant challenges to a free and open democracy as the flow of false information undermines the population's faith in their elected officials and therefore, the democratic process.

IV. Potential Remedies Available in Trademark Law

One remedy to tackle Big Tech's monopoly power includes breaking up Big Tech and regulating Big Tech merger activity (and its trademarks) to prevent unfair competition.[151] Big Tech's trademark dominance readily brings to mind the power and influence held by oil barons and the various monopolies of the early 1900s. Anti-trust laws were enacted to prevent the dominance of the various monopolies that emerged in the U.S.[152] Although the problem is similar today, this solution probably is unrealistic due to the different nature of the dominance held by Big Tech and the old oil barons. Whereas the previous monopolies dominated in obviously distinctive spheres, many Big Tech companies exist in the same plane but in slightly different niches. Facebook, Google, Apple all share notable number of users, yet their business model does not conflict with one another. Therefore, even if these three companies are broken up, other companies will likely just take

149. *Id*. at 145. *See generally* Dave Morin, *Announcing Facebook Connect*, FACEBOOK (Mar. 9, 2008), https://developers.facebook.com/blog/post/2008/05/09/announcing-facebook-connect/.

150. *Id.* at 67.

151. *Id.* at 20, 378-382.

152. *Id.* at 391-92.

their place because the space these companies occupy on the economic ladder is so undefined and subject to change.

An alternative remedy available in trademark law includes imposing higher fees on Big Tech companies that engage in frivolous or meritless trademark infringement claims. However, this is a difficult proposition because the likelihood of confusion multifactor test, discussed *supra*, is implemented differently by different circuits.[153] Because no uniform standard has emerged on how many factors are needed to trigger a likelihood of confusion, the only way that this solution can become realistic is if the Supreme Court, or relevant authorities, implement a consistent confusion-based multifactor test to be used by all circuit courts. A uniform standard established across all circuits, will likely discourage Big Tech companies from pursuing trademark infringement suits based on meritless claims for likelihood of consumer confusion. A uniform standard would mean Big Tech companies who rely on their jurisdictional advantages would no longer be able to hide behind the shield of the law simply because they have more resources to file an infringement suit in a favorable jurisdiction. This should lead to less frivolous and meritless infringement claims and encourage additional competitors to enter the market.

Conclusion

The current market dominance by Big Tech makes the cost of market entry prohibitive and chances of success slim.[154] As Big Tech acquires more technology companies, its market dominance is strengthened; thereby, making it more difficult for consumers to switch providers. High entry barriers and high switching costs reinforce Big Tech brand loyalty.[155] Big Tech strategies run contrary to the intent of U.S. trademark law (i.e., to promote quality of goods and services by allowing customers to associate brands with quality). Big Tech has used trademark law to promote their monopoly power while decreasing the quality of their services. This is a significant problem in the Intellectual Property sphere today and requires immediate correction. Because we are in unchartered historical waters, the solutions are not clear, but what is clear is that unless an actionable solution emerges soon, Big Tech market dominance will not stop, and their continued exploitation of

153. *See* sources cited, *supra* note 74.

154. *See* INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 2, at 47 (stating that "[s]ome venture capitalists, for example, report that they avoid funding entrepreneurs and other companies that compete directly with dominant firms in the digital economy").

155. *Id*. at 341 (stating that "[u]sing its role as an operating system provider, Apple prohibits alternatives to the App Store and charges fees and commissions for some categories of apps to reach customers").

trademark law will only increase as they seek to further entrench themselves into the lives of every American.