

WHAT TRADEMARK LAW COULD LEARN FROM EMPLOYMENT LAW

By

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I. Introduction

Employment litigation runs like a well-oiled machine. Charges of discrimination are filed, mediated or conciliated, and investigated.¹ Some end up in court, but few actually go to trial.² And there is no bouncing back and forth between the administrative agency established by Congress to do the heavy lifting in employment cases (the Equal Employment Opportunity Commission) and a federal court with the jurisdiction and authority to decide charges on the merits. Once in federal court, the machine runs particularly well: in the vast majority of cases, there is an order to the litigation that provides cadence and plenty of timing.³ First the plaintiff offers proof, followed by the defendant's rebuttal, followed by the plaintiff's last chance to raise a genuine issue of material fact for trial.⁴

Contrast that to the chaos and disorder of the way trademark cases are litigated in the intellectual property world. An administrative agency⁵ also exists to hear claims of likely confusion between marks (what is termed "infringement" if the case lands in court),⁶ and it has more power than its employment world cousin, but it exists in a parallel or alternative universe from courts. So much so that plaintiffs can litigate in both worlds, or only one, in no particular sequence. Once in either the administrative world of the Trademark Trial and Appeal Board or a federal court, there is no equivalent well-running machine. Quite the opposite: both parties operate at the mercy of a hodgepodge of decisive trademark factors that will decide the ultimate issue, with no particular understanding as to what factors matter most and, indeed, how many there are in the first place.⁷

If the intellectual property world of lawyers, scholars and judges are willing, they could learn a lot from the way in which employment cases are litigated. That kind of interdisciplinary learning is not common in litigation practice, especially in these two highly specialized areas.⁸ But intellectual property lawyers⁹ should be willing to ask whether they would benefit from the kind of machine that employment lawyers and judges (with the considerable help of the Supreme Court¹⁰) have built and have used for decades to advance and defend claims, decide cases, and hopefully, distribute justice. The question is: are these lawyers willing?

II. How Employment Litigation Works

An employee cannot simply march into federal court (or, for that matter, state court) once he concludes that he has experienced discrimination in the workplace.¹¹ In setting up the Equal Employment Opportunity Commission, Congress also installed a set of well-defined procedures and gate-keeping mechanisms in these cases.¹² Under those procedures, filing a charge of discrimination with the EEOC or a similar state agency is a jurisdictional prerequisite to suing.¹³ The EEOC has many purposes, but foremost among them is the conciliation and settlement of meritorious charges of discrimination,¹⁴ and it is hard to argue with that charge.¹⁵ Under the EEOC's procedures, employment-based civil rights cases can be resolved at the administrative level, thereby sparing parties the costs and lengthy timelines associated with full-blown litigation.¹⁶

Indeed, a charging party cannot sue in court until the EEOC has issued a "right to sue" letter allowing the party to do so.¹⁷ According to federal regulation, the letter comes after mediation or investigation of the charge,¹⁸ though in some cases charging parties and their attorneys seek permission to sue before the EEOC has completed its work.¹⁹ For the most part, though, the "right to sue" framework sends the right messages to prospective plaintiffs: slow down, show your cards, and settle if possible.²⁰ The message is only slightly undermined by something out of the EEOC's control: by statute, it is ultimately powerless to do anything (other than sue in its own right) about civil rights violations proven by charging parties at the administrative level.²¹

But it would be in error to believe that what happens at the administrative level matters little if a case ends up actually being litigated in court. It matters greatly.²² For example, the theory of discrimination pursued by the employee before the EEOC is a decision of great consequence. An employee who believes that he suffered intentional, "disparate treatment," discrimination at the hands of his employer may not later be heard in court changing his theory to the unintentional, "disparate impact," variety.²³ Likewise, a party who files his charge after the proscribed administrative timelines (180 or 300 days after a violation, depending on whether a state has its own civil rights investigative agency),²⁴ may not later sue in court.²⁵ In these cases, the federal "statute of limitations" is as short as six months, certainly the shortest in any area of law, and federal courts enforce the limitations period with consistency.²⁶

If a charge is timely filed, then in many cases the parties have the option of immediately pursuing mediation or preferring that the EEOC begin its investigation.²⁷ Mediation is informal and optional (either party can opt out) and may

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result in a case having a particularly short life, at least in legal terms.²⁸ Investigation is orderly: typically, an employer is asked to file a position statement in response to the charge and an investigator often follows up with the parties by seeking additional information or documentary evidence.²⁹ The EEOC's fact-finding process may also include an on-site visit to an employer and witness interviews.³⁰ The EEOC's investigation is informal: parties are not under oath when giving testimony and position statements are not verified by stating their truthfulness.³¹ It's also possible at this stage that the parties may determine that the matter can be settled. That certainly remains true after the investigator issues her "reasonable cause" finding that discrimination probably or probably did not occur.³² Even with a finding in his favor, the charging party has proven nothing in a court of law: a cause determination may be admissible in court, but it is not controlling on a court's decision.³³

If a party does end up in court, it hardly means that the administrative system failed. Instead, it is highly likely that the parties seriously considered the prospect of settlement, gained important insight into the other's theory of the case, and understood going forward that an important threshold had been crossed. On the other side of the threshold lay steep attorney's fees and a much slower timeline. That alone is information all parties should intuitively appreciate prior to embarking on litigation. No windfall awaits the plaintiff in court, either, as damage caps in these cases are fairly low and have not been adjusted upward since they were first set by Congress twenty years ago.³⁴ There is an incentive for the plaintiff's lawyer, though, as the Civil Rights Act is one of the few federal statutes that provides for the recovery of attorneys fee's for the prevailing party.³⁵

Once in court, the plaintiff has a well-defined and Supreme Court-dictated burden and method of proof. Most employment cases are litigated under what is termed the "indirect method,"³⁶ simply meaning that the plaintiff lacks the kind of direct discriminatory evidence that would make short work of the ultimate matter and that most employers stopped providing long ago (such as "you're being fired because you are too old.").³⁷ An indirect case involves a three-step dance in which the plaintiff has important burdens in the first and third steps.³⁸ First, he must establish each element of a "prima facie" case of discrimination, which in most cases involves four elements: (1) membership in a protected class; (2) proof that he was meeting his employer's legitimate job expectations prior to the adverse decision; (3) evidence that similarly situated employees were treated more favorably by the employer; and (4) evidence of an adverse employment decision, such as a firing.³⁹ Establishing a prima facie case is not necessarily light lifting, and many cases die at this state even before the employer is required to carry its burden in step two.⁴⁰

If the plaintiff can establish a prima facie case, then it is the employer's job to do the equivalent of drawing a breath: it simply must advance a non-discriminatory reason as the reason it took the action challenged by the plaintiff.⁴¹ This should not be difficult (the plaintiff was fired because he was insubordinate, or consistently tardy or absent, or because his job was eliminated), but sometimes it proves too difficult anyway. An employer may have actually fired an employee because of his personality, but may later feel embarrassed by that reason. So it offers up a falsehood in step two (such as job elimination), which undoubtedly is not provable under oath and probably does not match any documentation anyway. But assuming that the employer can meet what should be a relatively low burden here, the ball shifts to the employee's court (step three) to raise enough doubt about the truthfulness of the employer's articulated reason to justify a trial. Is the employer lying about its reason?⁴² If so, then a jury may be free to conclude that the real reason for its decision is the discriminatory one advanced by the plaintiff in the first place.⁴³

The orderly nature of the case means that it is usually fairly clear whether the plaintiff has enough to prove the ultimate fact – discrimination – at the moment discovery ends. While intentional discrimination implies mind-reading or, as the Supreme Court has indicated, looking into the heart of the decision-maker at the moment of the decision,⁴⁴ the proof process is not nearly so mystical. Either the plaintiff has enough to raise a genuine issue on the motive behind his firing or he does not. Without proof of pretext, or that the employer is lying, he does not.⁴⁵ The result is summary judgment, and given the relative burdens here it should be no surprise that such a result has become fairly routine in employment cases.⁴⁶ Indeed, the three-step, *McDonnell Douglas* paradigm undoubtedly established to make it easier for plaintiffs to make their cases is in practice the opposite: the reason their cases fail before ever seeing the inside of a courtroom.⁴⁷

There are other factors working against plaintiffs, to be sure. Courts have developed strong (and sensible) presumptions in these cases that tend to put an end to them at the summary judgment stage. It is unlikely that the supervisor who hired the plaintiff would be the same one to fire her for belonging to a protected class (such as her sex or race),⁴⁸ just as it is unlikely that an employer who has fired an employee and replaced her with someone less than ten years younger has done so on account of her age.⁴⁹ In both cases, the presumptions work against finding discrimination, though they can be rebutted with other evidence.⁵⁰ But here the point is not whether the presumptions are necessarily fair, or, for that matter, whether the administrative scheme and the *McDonnell Douglas* method always work in the way that they were first intended. The point is that they fill a litigation space that otherwise would be filled by chaos or at least disorder. There would be no gatekeeping mechanism preventing (or nearly so) the frivolous case from being litigated,⁵¹ no proof-formula like the indirect method that has been used thousands of times over decades and that by now is well understood and accessible to parties, and no inexorable (if not tangible) pull towards conciliation and settlement in advance of outright litigation. In other words, employment litigation would be expensive and largely directionless, or very similar to the way parties litigate over their trademarks.

III. How Trademark Litigation Works

Trademark litigation exists in an alternate, or shadow, universe, and that's where the problems begin. The core issue in a trademark case is whether one mark so resembles another mark "as to be likely . . . to cause confusion, or to cause mistake, or to deceive."⁵² The test is known simply as the "likelihood of confusion."⁵³ If a likelihood of confusion exists, then in the general case the mark that was used or registered with the trademark office first receives priority and the later mark is restricted.⁵⁴ Confusion may be measured by examining the marks on paper or how they are actually used in the marketplace. The trademark office, which handles petitions to register trademarks, examines the marks in a near-laboratory setting, or exactly how the registrant presents the mark on paper.⁵⁵ Courts that hear trademark infringement cases examine the marks in use.⁵⁶ In other words, it would be no defense in a trademark infringement case for a defendant to argue that the trademark office had approved the registration of its mark if the mark in dispute in court is different from the mark examined in Washington.⁵⁷

The difference between how a mark appears on paper and how it is used in commerce is an important one, but it does not have to be that way. There is no reason, for example, that the trademark office cannot also examine a mark in commerce. After all, it requires evidence that the mark is either used in commerce⁵⁸ (or intended to be used in the near term)⁵⁹ before it will expend its staff resources and actually conduct an examination. In either case, whether the mark is subject to a registration petition, an "opposition" proceeding with the Trademark Trial and Appeal Board, or a trademark infringement lawsuit in court, the core issue remains the same: are consumers likely to be confused if they confront the mark in the marketplace?⁶⁰ Will they mistake it for another mark?⁶¹

If the owner of a registered trademark contests the registration of another mark, it typically does so on the grounds of likely confusion and files an "opposition" with the litigation branch of the trademark office:⁶² the Trademark Trial and Appeal Board.⁶³ Litigation before the Board proceeds much like federal court litigation;⁶⁴ indeed, while the Board has voluminously detailed procedures governing everything from motion practice to discovery,⁶⁵ it also incorporates by reference the Federal Rules of Civil Procedure.⁶⁶ As they do in federal court, the parties must conduct an initial discovery and settlement conference and exchange initial disclosures.⁶⁷ Thereafter, they have the ability to conduct both written and oral discovery.⁶⁸ They can file for summary judgment.⁶⁹ One difference stands out: while there is a trial,⁷⁰ all testimony is submitted on paper.⁷¹ There is no live testimony and, of course, no jury.⁷² The Board decides the case, and the likelihood of confusion issue, based on the written record.⁷³

The Board does not use any particular metric or calculus in reaching its decisions. There certainly is no proof-shifting paradigm similar to the *McDonnell Douglas* method used in employment cases. Instead, the Board consults as many as 13 different factors that were first articulated by its supervising court, the Federal Circuit, almost forty years ago.⁷⁴ Those "likelihood of confusion" factors range from the similarity of the marks⁷⁵ to the relative degree of care that a consumer exhibits in shopping for the type of product or service in question.⁷⁶ No one factor necessarily means more than another,⁷⁷ though in practice the similarity of the marks (in terms of appearance, sound, and impression) means the most.⁷⁸ But the Board has consistently resisted any urge to refine the factors, or narrow them, or even acknowledge that balancing 13 factors is a hopelessly (ridiculously?) directionless calculus.⁷⁹

Courts deciding trademark infringement cases confront the same "likelihood of confusion" issue and also employ multi-factor tests. On the plus side the tests usually involve fewer than 13 factors. The Seventh Circuit's test in these cases includes seven factors.⁸⁰ But balancing seven and balancing 13 factors is only a difference in number. Without some decision making mechanism (which factors are the most important,⁸¹ or at least, which ones might be deal-breakers for one of the parties?), they provide little more guidance than the Board's approach.

The real problem is not necessarily the number of factors that courts or the Board employ to determine likelihood of confusion, but rather their respective roles. A party seeking registration of a mark with the trademark office may learn that its mark has been opposed and find itself in full-scale litigation before the Board.⁸² If it does, the result of the Board's decision (let's say that it denies the opposition and grants the registration) will generally not preclude the same plaintiff from filing a trademark infringement lawsuit in federal court.⁸³ It will avoid both issue and claim preclusion by simply arguing that the defendant's actual use of the mark in commerce departs enough from the mark it registered to require successive litigation on the likelihood of confusion issue.⁸⁴ Similarly, a plaintiff (or opposer) may initiate an opposition before the Board, litigate a case through discovery, then ask the Board to suspend the case so that it can file a federal trademark infringement suit in federal court (thereby restarting the case and beginning discovery all over again in a different forum).⁸⁵ The Board's policy in that circumstance is to suspend the case so as to avoid concurrent litigation⁸⁶ as, at least in theory, the district court's decision holds the promise of being binding on the Board.⁸⁷ But in practice, the Board may end up not deferring to the court's decision after all if the court took into account a single factor (such as the actual use of the mark in commerce) that does not show up in its own list of thirteen.⁸⁸ The result is Groundhog Day for the defendant: it may have won judgment in federal court only to find itself in litigation over basically the same issue all over again. Or consider one more possibility (though there are many more): an opposer successfully objects to a mark's registration, thereby ruling out the nationwide registration of the mark, but finds itself unable to collect any damages from a court in a trademark infringement lawsuit because a court has determined that, in commerce, the marks are not confusingly similar after all.⁸⁹

If damages are sought, the game is played in federal court, not the TTAB, which is powerless to award damages⁹⁰ and is basically limited to the equivalent of issuing equitable relief.⁹¹ There are no concrete timelines that operate here, either.⁹² Because a party's use of its mark in commerce is continuing, a plaintiff can file a federal lawsuit at any time.⁹³ Nor is there any need to tie a federal lawsuit to a theory pursued at the administrative or TTAB level. (Recall that once she lands in court an employment plaintiff is bound by the discrimination theory she advanced with the EEOC.)⁹⁴ There is no need to litigate at the administrative level in the first place.⁹⁵

Against this backdrop of shadow litigation are these realities. Unlike the EEOC in the employment law world, the TTAB is not a gatekeeper of any sort. A party need not file a claim of likely confusion with the TTAB (in response to a proposed registration) prior to pursuing a full-blown, expensive infringement claim in federal court.⁹⁶ Similarly, a party can in effect ping-pong back and forth between the Board and a federal court pursuing highly related, but not completely overlapping, claims. A party may litigate for a time before the Board, then in federal court, then back before the Board.⁹⁷ The Board itself is not a mediator or conciliator.⁹⁸ It conducts no investigation prior to setting the parties loose in litigation over the mark that its sister agency, the trademark office, approved for registration. And it offers no sense of finality, certainly, nor can it: a party who wins registration of a mark after litigation before the Board may just as easily find itself sued the next day for infringement in federal court. Finally, there are no settlement conferences,⁹⁹ no hearings (typically) or oral arguments before the Board,¹⁰⁰ and no court to show up to alongside an opposing counsel.¹⁰¹ The paper process seems to minimize any possible prospect of inter-party communication and dialogue.¹⁰²

In a nutshell, if attorneys' fees and purgatory are appealing to a party, then trademark litigation is where it wants to be. An administrative level exists, but its purpose is neither to rule out some cases nor assist the parties in ending their disputes.¹⁰³ The administrative level is armed with judges, but their orders are not binding on federal courts,¹⁰⁴ nor are a court's orders necessarily binding on them.¹⁰⁵ A party need not pick its poison in opposing a registration and suing for trademark infringement. It can do one or the other, or both, in no particular order.¹⁰⁶ In short, trademark litigation is very nearly the mirror opposite of employment litigation, where deadlines, preclusion, and finality prevail, and where there is both a prerequisite purpose to the administrative agency (the EEOC) and a statutory framework heavily tilted toward resolving disputes prior to outright litigation.¹⁰⁷ Trademark litigation does not lie in any happy medium and appears happily driven to excess. If the core principle of the rules by which parties pursue litigation is the fast and efficient resolution of disputes (and it is),¹⁰⁸ then trademark litigation violates the very first rule.

IV. How Trademark Law Might Work Better By Borrowing From Employment Law

An immediate improvement to trademark litigation, which is one of the most expensive forms of litigation,¹⁰⁹ is easy to imagine: simply change the charge of the Patent and Trademark Office (and perhaps the Trademark Trial and Appeal Board) from one of supervising registrations and oppositions to investigating the basis of those oppositions. One of the reasons that employment litigation works is that the government role in discrimination claims is largely investigative and conciliatory (in other words, tilted toward preventing litigation).¹¹⁰ The Trademark Office's role is strangely disassociated from the basis of the claims of confusion that it processes (before the Board) and the chance, because of its unique role and stature as an arm of the government, that it might resolve confusion claims just as easily as it presently speeds them along the litigation path in the form of oppositions.¹¹¹

How would the Office's new role work? Simple. As it stands, once a trademark registration is published for opposition, Opposers from across the country have the chance to derail the path to registration,¹¹² a delay which is both tremendously expensive and time-consuming.¹¹³ Once an opposition to the proposed registration has been filed, the Trademark Office washes its hands of the registration matter and passes the nascent litigation to the Board.¹¹⁴ In other words, all of the power lies in the hands of the opposer, who single handedly (and with little adverse consequence) can call into question the legitimacy of a mark that not even the trademark examiner (an attorney) who approved the mark for publication thought was a source of confusion.¹¹⁵

A much better system would involve the Trademark Office as more than a pass-through to the litigation-supervising Board. Instead, an opposition should be passed through only after it was investigated by the Office (and these same lawyer-trademark examiners) and determined that it is supported by probable cause. In other words, the Trademark Office would assume a role that the EEOC has perfected: receiving claims (or charges) of discrimination and investigating them before even issuing a "right to sue" to the charging party.¹¹⁶ Imagine the number of frivolous claims that would be wrung out of the system if the Trademark Office assumed this new role, and imagine the signals that it would send to all parties: namely, that oppositions to registration are not tactical devices to forestall the registrations of legitimate businesses, and that the purpose of the Office is not merely to facilitate litigation. The purpose is to play the role of gate-keeper, too.

In addition to the clear advantage of sending all the right signals to litigating parties, the Trademark Office has the added advantage of already *existing*. No new administrative agency need be created in order to support the Office's new role. The Office would be taking on an important new investigative and gate-keeping responsibility, but trademark lawyers and, indeed, legislators, would not have to propose an entirely new administrative scheme or bureaucracy. Rather, these same lawyers and legislators should be demanding that the intellectual property community get more out of an agency that already exists, and, indeed, that is expert in the area of trademarks.

Some complaints of infringement (or, technically, a likelihood of confusion) will wash away under the bright lights of the Trademark Office's investigation. That happens in the employment law world once the EEOC issues a ruling that it finds no probable cause in support of a discrimination charge. Other trademark charges will have to be conciliated and settled, perhaps because they present closer cases, or there is, in fact, an investigative decision in favor of the party claiming confusion. The Trademark Office should embrace this second, equally important conciliatory purpose, just as the EEOC does. Settling a case at this stage of the process frees the courts to handle cases where the parties present tougher issues less subject to settlement, or at least cases where the parties have consciously decided (rather than had it decided for them) that they are willing to bear the high costs of trademark litigation.¹¹⁷ In all events, parties amenable to settlement are assisted in their efforts and given the tools and mechanism they need to avoid the uncertainty and costs associated with going to court.

Like the new investigatory role, the conciliatory role described here would not require either inventing a new government agency or creating an expertise that does not already exist. The Trademark Office, armed with trademark lawyer-examiners, is already expert in the field. Certainly it would require additional resources and these same experts would also have to be trained in conciliation and settlement, but any chance to settle these cases should be too alluring to pass up. The Office already has access to the parties once an opposition is filed, and already enjoys the stature necessary to fill the conciliatory role. This is precisely the role that the EEOC plays, and in recent years courts (both district and appellate) have gone beyond mandatory case management or settlement conferences to formalize dispute resolution processes.¹¹⁸ They have left the trademark bar behind, an incredible lost opportunity given the existence, size, and access to the parties already enjoyed by the Trademark Office.

Leaving aside the new investigatory and conciliatory role for the Trademark Office, trademark law could borrow from employment law and improve in three important ways: (1) by eliminating forum shopping, or the bouncing that parties can do between the Board and federal courts;¹¹⁹ (2) by adopting a simplified proof method that resembles the *McDonnell-Douglas* method¹²⁰ and installs consistency and predictability in trademark cases; and (3) by distinguishing between intentional and unintentional infringement cases, just as Congress has distinguished between intentional and unintentional discrimination cases and provided very different remedies for each.¹²¹

As it stands, a party can actually invoke the processes of the Trademark Trial and Appeal Board and set sail down the litigation path, only to drop anchor and decide that it would rather pursue its infringement claims in federal court.¹²² When it does so late in the litigation game, such as after the close of discovery, it amounts to an expensive abuse of process. (Why the Board tolerates such forum-shifting is a mystery.) Consider the reasons why a party may want to leave its Board litigation behind and start all over again by filing a federal trademark infringement lawsuit. It may have concluded that the Board cannot provide it with the kind of remedy (money damages) it seeks.¹²³ It may have concluded that it has a better chance of proving infringement based on the defendant's actual use of its mark in commerce versus the manner in which the defendant has presented it on paper for registration.¹²⁴ Or it may have concluded that the administrative litigation is not going particularly well and it would like a do-over, which includes a fresh round of discovery and perhaps another chance to include expert testimony. The first two reasons cannot justify forum shifting. They are circumstances to take into account prior to selecting a forum, not after having done so and having litigated the matter for a time. In other words, they should inform the choice of forum in the first place. The third prospect should be reason enough to rule out the forum shifting practice in its entirety: it's the kind of gamesmanship and scorched earth litigiousness that causes these cases to be so expensive and that causes cynicism in the public's assessment of the work litigators do.¹²⁵

The solution is simple. Once the Trademark Office has completed its investigatory and conciliatory work, the plaintiff should be faced with an election. It may choose to litigate its claim of infringement with the Board, which may well offer a speedier and somewhat simplified process in part because trials are conducted on paper, not in person, or it can file its claim in federal court. As it stands, both fora presently decide the same likelihood of confusion issue, though the Board does not consider actual usage of the offending party's mark. Nothing needs to change on that score. If a plaintiff elects to litigate before the Board, the issue of confusion will be confined to the parties' marks as presented in registration materials. If a plaintiff elects to proceed in court, then it must also ask the court to decide the registration issue. In other words, a plaintiff stays where it started the case. What would be ruled out? A tactic in which a party could start litigating before the Board, place that litigation "on hold" at a time of its choosing, then litigate basically the same issue in federal court, only to return to its administrative case to continue the madness of successive, highly related litigation. That is exactly what it can do now, but it should not be able to.

But there is more to fix. Even if a party is constrained to litigate a typical trademark matter in a single forum (the administrative realm or federal court), it can expect a mess once it lands there. There is simply no set legal standard that is applied in trademark cases. The core issue common to most cases is relatively simple: is one mark likely to cause confusion in the marketplace when compared to another mark? The question is simple, as it is in many legal cases no matter what area, but there is no consensus or even near-consensus as to how to answer the question. Most courts, and for that matter the Board, resort to the application of a long list of "factors" that ostensibly help it to provide an answer.¹²⁶ The Board's list of factors numbers 13, with a catch-all: namely, that other factors may also be considered.¹²⁷ Applying that many factors in a legal matter in the hopes of finding a single answer (does a mark infringe?) is exactly what it sounds like: it would be easier to reach consensus as to what good art is.¹²⁸ Are some factors more important than others? Yes, but then again not really. Is it a numbers game in that more factors tilting in favor of one party leads to victory? No. Are all of the factors relevant in

every case? No again.¹²⁹ Hopefully the point is made: a bucket full of factors yields an unpredictable, nearly random legal landscape that does a disservice to cases with important issues at stake and clients paying a lot of money to resolve them.

While courts tend to do a little better than the Board and apply fewer than 14 factors,¹³⁰ the landscape is not much more defined. The United States Court of Appeals for the Seventh Circuit, for example, does a reasonable job by applying “only” seven factors: (1) similarity of marks; (2) actual confusion; (3) intent; (4) concurrent markets; (5) sophistication or care of customers; (6) strength of the plaintiff’s mark; and (7) similarity of products.¹³¹ It has even helped litigants and, in particular, district courts by signaling to them that the first three of these factors are the most important.¹³² But for all the good it does by keeping the list of factors to at least the single digits (though balancing seven factors is still unwieldy), it muddies things considerably by assuring everyone that “courts may assign varying weights to each of the factors depending on the facts presented.”¹³³ Good grief. In other words, a trial court should feel free to put the factors in any order and establish its own legal framework as it sees fit. Try litigating with that standard in mind.¹³⁴

Compare the legal landscape in trademark cases with the relative clarity that awaits litigants in employment cases. While the prima facie case in employment discrimination cases is somewhat adaptable to the case at hand, its four elements are nearly standard across all cases.¹³⁵ In other words, the legal standard is both approachable to the parties in advance and by now well understood. Even the three-part burden-shifting paradigm is routine.¹³⁶ The prima facie case, once established by a plaintiff, must be answered by the employer, and that answer must in turn be seriously called into question before the plaintiff gets to trial.¹³⁷ If employment cases were litigated like trademark cases, both parties would submit evidence on all sorts of things at the same time, ranging from how the employer treated similarly situated employees to why it fired the plaintiff, with neither an order to the presentation nor any sense of what matters most. In fact, each part of the *McDonnell Douglas* method acts as a gatekeeper to a federal court. If a plaintiff cannot establish a prima facie case (step one), then there is no need for an employer-defendant to even articulate its reason for its challenged decision.¹³⁸ And if the plaintiff cannot call into question the truthfulness of that reason, then there can be no trial.¹³⁹ So the course each party must travel is well-laid, though admittedly the plaintiff has more to do to get through it.

Trademark law needs a similar burden-shifting method to be used in litigating likelihood of confusion cases. It might work like this. Rather than litigate over seven or even 13 factors in a simultaneous, directionless manner, a plaintiff alleging trademark infringement would need to establish four things, the equivalent of a prima facie case: (1) that the marks are, in fact, similar; (2) that the plaintiff’s mark is strong; (3) that customers exercise little care prior to purchasing products in the industry; and (4) that the products themselves are similar. Establishing all four factors would trigger a responsibility on the defendant’s part to proffer that it is not aware of many instances in which customers have actually confused the two parties’ marks. That may sound like a low hurdle, but so is the burden on an employer in step two under *McDonnell Douglas* (it is met simply by articulating a non-discriminatory reason for its decision). If there are no or few instances of actual confusion, then the burden would shift back to the plaintiff alleging infringement to establish a triable issue concerning a likelihood of confusion. It might do so in multiple ways: by showing intent on the defendant’s part to infringe, or greatly overlapping markets, or perhaps survey evidence strongly suggesting that customers are poised to start confusing the marks once they confront them in the actual marketplace. An intent to infringe is not the same thing as actual infringement, but at step three it should be enough to get the plaintiff to trial on the matter. As to overlapping markets: if the parties’ marks are similar and across the street from one another,¹⁴⁰ the case is likely not suited for summary judgment. Survey evidence is routine in these cases in the first place,¹⁴¹ so there can be no argument that the plaintiff has not yet been given the opportunity to simulate confusion where none is yet apparent.

Damages in trademark cases are as undisciplined as the likelihood of confusion factors that courts juggle to determine infringement. While statutory damages are considered equitable in this case,¹⁴² they include money: a prevailing plaintiff (and a prevailing defendant in limited circumstances) can claim its lost profits and the disgorged profits of the infringing party,¹⁴³ compensatory but not punitive damages,¹⁴⁴ and, typically in cases of intentional infringement or willful ignorance, treble damages.¹⁴⁵ All of this on top of attorneys’ fees,¹⁴⁶ which can easily exceed seven figures in a major case.¹⁴⁷ Compare these damages to those a prevailing party in an employment discrimination case can expect to receive: compensatory and punitive damages (not trebled) up to a statutory cap of \$300,000,¹⁴⁸ and only in cases where the plaintiff has brought a case of intentional discrimination.¹⁴⁹ In cases lacking intent (disparate impact claims), the plaintiff gets none of these monetary damages and can only receive equitable relief from a judge (juries do not decide disparate impact cases).¹⁵⁰

Ruling out money damages in unintentional discrimination cases makes sense. If a plaintiff prevails, it means she can trace a difference in treatment and injury to an employer policy but not an employer’s animus¹⁵¹ (a weight-lifting or height requirement are classic examples of potential sex discrimination).¹⁵² While it might make sense to compensate the plaintiff in a case like this for lost wages,¹⁵³ it makes no sense to award money damages against an employer that did not set out to break the law. Substitute an infringing party for this employer and the same arguments hold. A company that adopts a confusingly similar mark, but does so unintentionally, is in the same position as the employer that adopts a facially neutral policy that ends up discriminating nonetheless. Without intent, there is no reason to punish the defendant with compensatory money damages.¹⁵⁴ Perhaps the only money damages that should be awarded in a case of unintentional infringement are lost profits that are directly attributable to the defendant’s infringement. Their close cousin in the world of employment law: back pay for the prevailing plaintiff.¹⁵⁵

The great disparity between available damages in employment cases and trademark cases – both set by Congress – makes sense only if the harms associated with trademark infringement justify the difference. To be sure, trademarks serve important purposes. Protecting them helps reduce consumer search costs,¹⁵⁶ which could not be accomplished if businesses operated in a Wild West of lawless competition rooted in counterfeit and infringement. And once a brand is established and identifiable – which takes time and money – it makes sense to protect it from free riders and fly-by-night companies out to make a quick buck.¹⁵⁷ But unintentional infringement lacks these ignoble pursuits. Indeed, this form of infringement lacks motive, period. And while the injury or damage nevertheless remains, it also remains in the case of unintentional discrimination, and employees and employment markets need confidence, too: they need to know that workplaces are free of unlawful stereotypes or discriminatory work rules. If anything, given the history of discrimination in employment markets, the argument for awarding money damages in all cases (with or without intent) appears stronger in employment law than in trademark cases.

V. What Trademark Law Can Teach Employment Law

Nothing's perfect, including employment litigation, and there are at least three areas where trademark litigation could teach a thing or two to the employment bar. First, the formal manner in which the TTAB approaches inter partes litigation provides both structure and order so that the parties can litigate.¹⁵⁸ Parties start the case with a discovery conference just as they do in federal court.¹⁵⁹ They meet and confer over disputes,¹⁶⁰ file motions,¹⁶¹ and pursue summary judgment just as they do in the federal system.¹⁶² The Board's docket is publicly available,¹⁶³ just as it is on PACER.¹⁶⁴ And if the parties finish what they start before the Board, and actually litigate a case to its conclusion, there may well be little reason for them to litigate in federal court.¹⁶⁵ While the EEOC does little to nothing in terms of finding facts and deciding cases on the merits,¹⁶⁶ that is exactly what the Board does.¹⁶⁷ More work done at the administrative level may well lead to a final outcome that both parties accept as just that: final.

Second, experts are more common and welcome in trademark cases¹⁶⁸ but are not regularly used in employment cases.¹⁶⁹ They could be used more with success. In a trademark case, a party may hire an expert to conduct a consumer survey testing the likelihood of confusion between marks¹⁷⁰ or even an expert in linguistics to help the court understand the meaning and likely commercial impression of words.¹⁷¹ Words matter in employment cases, too. In fact, expressions such as "hard to teach an old dog new tricks" have been interpreted by some courts as strong evidence of age discrimination.¹⁷² But these courts have no expertise in language, idioms, or the etymology of English expressions. Under the right circumstances, an expert may help a court understand what these expressions mean or, at the very least, might make them cautious before it quickly concludes that it can determine the meaning on its own.

Third, the Trademark Office is smart to staff itself with attorneys. The Examiner, who is the first person to review a trademark applicant's specimen for national registration,¹⁷³ is a lawyer who specializes in trademark law and evaluates the proposed mark within the existing legal framework. In other words, the examining attorney knows not only the facts surrounding the trademark application, but what the Board and courts are looking for in these cases. Imagine if the EEOC investigator assigned to a discrimination charge were an employment lawyer who understood what cases are likely headed for summary judgment. The investigator could save everyone a lot of time – and money – by persuading the charging party that she is unlikely to win, and that advice might be respected by her attorney, too. As it stands, the reality is that defendants' attorneys generally look at the EEOC's investigative phase as something of little consequence to endure. And plaintiff's attorneys certainly don't see the process as providing a realistic assessment of their chances in court.

VI. Why Lawyers Should Fight Against Excessive Specialization

In many ways, what lies at the heart of this paper, and its approach, is foreign to the modern day lawyer. General practitioners still exist, but not at the largest firms with the most important clients, and even lawyers with larger practice areas would generally not include both trademark and employment litigation in their listed practice areas. We are taught to specialize, or we are taught by specialists, and both circumstances provide little room for a lawyer to seek or see connections across disciplines or even across the room. It's an odd result, really, when placed in the context of what brought many of these lawyers to the profession in the first instance: strong writing skills that are typically tied to being a well-read individual, qualitative majors like English that tend to reward creativity and non-linear thinking, and liberal arts backgrounds. Something happens in law school that stifles, and what's started there is completed by the experience in the firm.

But the most successful individuals in other industries tell us we are missing a great deal as we wear these blinders. Consider the experience of Steve Jobs, one of the founders of Apple, relayed by him at a commencement address at Stanford University. Jobs spoke about dropping out of Reed College as an undergraduate student, only to drop into the classes that interested him:

Reed College at that time offered perhaps the best calligraphy instruction in the country. Throughout the campus every poster, every label on every drawer, was beautifully hand calligraphed. Because I had dropped out and didn't have to take the normal classes, I decided to take a calligraphy class to learn how to do this. I learned about serif and sans serif typefaces, about varying the amount of space between different letter combinations, about what makes

great typography great. It was beautiful, historical, artistically subtle in a way that science can't capture, and I found it fascinating.

None of this had even a hope of any practical application in my life. But ten years later, when we were designing the first Macintosh computer, it all came back to me. And we designed it all into the Mac. It was the first computer with beautiful typography. If I had never dropped in on that single course in college, the Mac would have never had multiple typefaces or proportionally spaced fonts. . . . Of course, it was impossible to connect the dots looking forward when I was in college. But it was very, very clear looking backwards ten years later.¹⁷⁴

When Jobs died, his Stanford speech was cited for the way he thought about life and prepared for death.¹⁷⁵ But it's also an eloquent demonstration of what can happen to the human imagination and intellect if we allow ourselves to solve one problem by borrowing what we have undoubtedly learned and perhaps stored from other life experiences.

Judges know how to do this better than lawyers do. Of course, they are not allowed to specialize: the typical federal appeals court judge may be faced with writing an opinion in a criminal appeal one day but a civil rights or trademark case the next. Judges Posner and Easterbrook are two judges known for making references to other areas of law.¹⁷⁶ One example that relates here: the use of surveys is pretty standard in trademark infringement cases, Judge Easterbrook points out, so why not in products liability cases?¹⁷⁷ A jury of six is probably too small to make the call as to whether marks are likely to be confusing in the marketplace, and they are certainly not a reliable proxy for what stands as a reasonable "consumer's expectations" when handling a product.¹⁷⁸ That's where surveys come in. But it's simply not in the DNA of most lawyers to argue about the need for survey evidence in one area of law by referencing its use in another.

The solution to excessive specialization may be at the law school level, where law students could be taught that the same liberal arts background and thinking that brought many of them to these schools in the first place can save them from a stifling career of compartmentalization. Some graduate schools in business have capstone courses that come toward the end of a student's curriculum. The courses force students to put their classroom experiences together in an effort to think multi-dimensionally.¹⁷⁹ The students are then more likely to come up with richer solutions to problems in the real world. (Think of a human resources manager who uses his knowledge of information systems to improve his evaluations of employees and perhaps establish performance-based incentives.) But law schools tend not to weave their courses together at the end, which means lawyers have no practice doing it and no personal experience that it can be a helpful exercise.

As it is, without any institutionalized effort to make lawyers less myopic, attorneys might make their own efforts in order to improve their practice and their workmanship. Lawyers in large firms might suggest associating or apprenticing on a case outside of their practice area. Those in small firms might find joining unfamiliar practice groups in bar associations can do the trick. Those lawyers who make these efforts are the ones who can speak to clients – as well as to judges and juries – in words and with references that suggest knowledge and not narrowness.

VII. Conclusion

The law is simply too specialized. In fact, it may be one of the most specialized professions. Lawyers at the highest levels rarely practice in more than one area. Most trademark lawyers could not march through the *McDonnell-Douglas* indirect method if their life depended on it; similarly, employment lawyers would hardly consider intellectual property to be a close cousin. But what would happen if we, as lawyers, started to borrow from various areas of law in order to improve the one in which we spend most of our time? What would happen if we thought of ourselves first and foremost as attorneys rather than employment- or IP-lawyers? We could still specialize, but we would no longer miss out on improvements that are waiting us for us if we seek them out.

The purpose of this paper has been to point to the kinds of connections and improvements that are possible. In one sense employment law and trademark litigation have little in common. Different governmental agencies supervise these areas and lawyers need vastly different training to practice in them. But these are not foreign languages. They are laws, written in English, and in the case of trademarks, they present striking opportunities for improvement. Jettisoning an unworkable multi-factor likelihood of confusion test and overhauling the role of the TTAB are two prime paths to improvement.¹⁸⁰

If trademark law can borrow from employment law and improve, there are undoubtedly other combinations that could lead to a simpler, and more elegant legal landscape. The question is: what are they and how quickly can we discover them?

Footnotes

¹ As discussed in this paper, The Equal Employment Opportunity Commission (EEOC) does this work after the charge is filed. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 and 42 U.S.C. § 2000e-5(b).

² More than 90% of employment cases are resolved before trial. *Brill v. Lante Corp.*, 119 F.3d 1266, 1270 (7th Cir. 1997).

³ The order followed in most cases was laid out by the Supreme Court in *McDonnell Douglas v. Green*, 411 U.S. 792, 802-03 (1973). *See also Brill*, 119 F.3d at 1270 (referring to the *McDonnell Douglas* “relay” that the courts often face in these cases and describing it as a “necessary schematic”).

⁴ *See id.*

⁵ The Trademark Trial and Appeal Board.

⁶ The core issue in a trademark infringement case is whether the alleged infringer’s mark so resembles the plaintiff’s mark that it is “likely to cause confusion, or to cause mistake, or to deceive” consumers. 15 U.S.C. §§ 1114, 1125(a).

⁷ *See infra*, Part III.

⁸ But it does not have to be that way. *See infra*, Part VI.

⁹ One of the problems might well be that lawyers use these kinds of modifiers to describe their practice: “intellectual property” and “employment law.” But the terms also may provide a pecking order of sorts within law firms and the bar in general. Intellectual property law is often seen as complex, but as discussed in this paper, when it comes to the chief issue in most infringement cases (“likelihood of confusion”), the law is better described as simply disorganized.

¹⁰ The Supreme Court has created a mature federal common law of employment discrimination practice, from outlining appropriate methods of proof in garden-variety discrimination cases, *see McDonnell Douglas*, to creating an entire landscape of sexual harassment law, a term that appears nowhere in any federal statute. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64-66 (1986) (following the lead of the EEOC’s 1980 Sexual Harassment Guidelines and other federal courts and concluding that “[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor discriminate[s] on the basis of sex.”).

¹¹ *See* 42 U.S.C. § 2000e-5(a)-(k) (granting power to the EEOC to prevent unlawful employment practices by requiring the Commission to investigate the validity of claims).

¹² *See id.* (describing the process in which a claim is filed).

¹³ *See* 42 U.S.C. § 2000e-5(f)(1).

¹⁴ *See* 42 U.S.C. § 2000e-5(b) (“If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”).

¹⁵ The Federal Rules of Civil Procedure themselves make plain Congress’ preference for “the just, speedy, and inexpensive determination of every action and proceeding.” FED. R. CIV. P. 1.

¹⁶ The EEOC reports that in Fiscal Year 2010 it caused the settlement or conciliated over 10,000 charges of discrimination, which represented over 10% of all charges filed. *See* www.eeoc.gov/eeoc/statistics/enforcement/all.cfm.

¹⁷ *See* 42 U.S.C. § 2000e-5(f)(1).

¹⁸ Under statute the EEOC has 180 days to investigate and possibly conciliate the charge before a private right of action arises. *Id.* *See also Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 361 (1977).

¹⁹ *See Walker v. United Parcel Serv., Inc.*, 240 F.3d 1268, 1270-71 (10th Cir. 2001). In 1977, the EEOC issued a regulation allowing charging parties to receive right-to-sue notices upon request, that is, before the 180 days has elapsed, “provided . . . it is probable that the Commission will be unable to complete its administrative processing of the charge within 180 days from the filing of the charge and has attached a written certificate to that effect.” 29 C.F.R. § 1601.28(a)(2)-(3).

²⁰ But the reality of issuing so-called early right to sue notices is that this message is often not sent to charging parties.

²¹ *See* 42 U.S.C. § 2000e-5(f)(1).

²² At a minimum the administrative proceedings provide a party with a chance to size up the other side and to obtain what amounts to free discovery. An example: how would an opponent likely perform as a witness at trial or in a deposition? Attend an administrative hearing or fact-finding conference to find out.

²³ Consider the cases brought by Eileen Lynch and Audrey Jo DeClue. Lynch worked as a carpenter apprentice for the Tennessee Valley Authority. *See Lynch v. Freeman*, 817 F.2d 380, 381 (6th Cir. 1987). DeClue worked as the only female linesman for the Central Illinois Light Company. *See DeClue v. Central Illinois Light Co.*, 223 F.3d 434, 436 (7th Cir. 2000). Lynch had no sanitary portable bathroom to use. 817 F.2d at 381-82. The lack of a toilet caused her urinary tract infections and tremendous discomfort. *Id.* DeClue had no portable bathroom to use at all, and her employer told her to relieve herself in the open just like her male counterparts did. 223 F.3d at 436. A federal appellate court affirmed the dismissal of DeClue’s hostile environment claim, while a different federal appellate court sided with Lynch. The reason: Lynch had sued under disparate impact theory while DeClue had not. *See DeClue*, 223 F.3d at 437 (“But this case has not been litigated as a disparate-impact case.”).

²⁴ A plaintiff has only 180 days to file in states that do not have agencies capable of investigating and granting relief. *See* 42 U.S.C. § 2000e-5(e)(1). If a state has such an agency and further has a so-called “worksharing agreement” with the EEOC, then the timeline is extended to 300 days. *See id.* For a description of how typical worksharing agreements operate, see *Hong v. Children’s Memorial Hospital*, 936 F.2d 967, 969 (7th Cir. 1991). *See also* 29 C.F.R. §§ 1601.13(a)(4), (b)(1), 1601.80 (2011).

²⁵ *See National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002) (“A claim is time barred if it is not filed within these time limits.”).

²⁶ See *Leo v. Garmin Int'l, Inc.*, 431 Fed.Appx. 702, 704 (10th Cir. 2011); *Tompkins v. Alliedbarton Sec. Servs.*, 424 Fed.Appx. 42, 43 (2nd Cir. 2011); *Nagle v. Village of Calumet Park*, 554 F.3d 1106, 1121 n.4 (7th Cir. 2009); *Davis v. Polk Cty Sherriff's Office*, 170 Fed.Appx. 598, 600 (11th Cir. 2005).

²⁷ See archive.eeoc.gov/employers/investigations.html (last visited May 1, 2012).

²⁸ See *id.* According to the EEOC, the average processing time for mediation is 84 days, while the average time it takes to process an EEOC investigation is approximately 182 days. *Id.*

²⁹ See *id.*

³⁰ *Id.*

³¹ *Id.*

³² If the EEOC determines that there is reasonable cause to believe that discrimination occurred, both parties are issued a "Letter of Determination" to that effect and the agency will attempt to resolve the charge through conciliation. If the EEOC determines that there is no reasonable cause to believe that discrimination occurred, the charging party is issued a "Dismissal and Notice of Rights" letter. In that case, the charging party is instructed that she has the right to file a lawsuit in federal court within 90 days from the date of the receipt of the letter. *Id.*

³³ As the Seventh Circuit has observed, a district judge has "great discretion" in the treatment of EEOC reasonable cause determinations, but ultimately must make its own "de novo decision on the plaintiff's claims." *Silverman v. Board of Ed. of City of Chicago*, 637 F.3d 729, 732 (7th Cir. 2011), citing *Tulloss v. Near North Montessori School, Inc.*, 776 F.2d 150, 152-54 (7th Cir. 1985). The safe approach for a district court concerned about the probative value of a cause determination and prejudice or confusion in a case is to exclude it. See *Lewis v. City of Chicago Police Dept.*, 590 F.3d 427, 442 (7th Cir. 2009) (concluding district court did not abuse its discretion by excluding EEOC reasonable cause determination); *Young v. James Green Mgmt, Inc.*, 327 F.3d 616, 623-25 (7th Cir. 2003) (affirming decision to exclude EEOC findings of discrimination from evidence in jury trial).

³⁴ See 42 U.S.C. §1981a(b)(3) (setting caps by employer size but in no circumstances allowing awards for compensatory and punitive damages to exceed \$300,000 in the aggregate).

³⁵ See 42 U.S.C. § 1988(b).

³⁶ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973) (setting forth the framework that would come to be known as the indirect method of proof in employment discrimination cases).

³⁷ See *Bass v. Bd of County Comm'rs*, 256 F.3d 1095, 1105 (11th Cir. 2001) ("[O]nly the most blatant remarks, whose intent could be nothing other than to discriminate . . . constitute direct evidence of discrimination.") (quoting *Damon v. Fleming Supermkts of Fla., Inc.*, 196 F.3d 1354, 1359 (11th Cir. 1999)). In *Damon*, the court provides an example of direct evidence by citing a management memorandum stating, "Fire Early – he is too old." 196 F.3d at 1359. See also *Hasham v. Cal. State Bd. of Equalization*, 200 F.3d 1035, 1044 (7th Cir. 2000) (giving as an example of direct evidence a supervisor's statement, "I did not promote you because of your national origin").

³⁸ For a good description of the three-step process as it operates in a federal court case, see *Brill v. Lante*, 119 F.3d 1266, 1270 (7th Cir. 1997).

³⁹ See *id.*

⁴⁰ See, e.g., *Dickerson v. Board of Trustees of Comm. College Dist. No. 522*, 657 F.3d 595, 602-03 (7th Cir. 2011) (case did not move on to second stage because plaintiff was not meeting employer's legitimate job expectations).

⁴¹ *McDonnell Douglas Corp.*, 411 U.S. at 803.

⁴² See *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995).

⁴³ *McDonnell Douglas Corp.*, 411 U.S. at 803.

⁴⁴ "The critical inquiry . . . is whether gender was a factor in the employment decision *at the moment it was made.*" *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989).

⁴⁵ See *Brill*, 119 F.3d at 1270.

⁴⁶ See *id.* ("This is the relay confronting district courts each time they face a discrimination lawsuit brought under the *McDonnell Douglas* framework. Because more than 90 percent of employment cases are resolved before trial, they face it often, and so do we.")

⁴⁷ An argument can be made that the paradigm is unnecessarily complicated and simply confuses the only issue that matters in employment discrimination cases at any stage of a case: whether a plaintiff can point to sufficient evidence to establish that her age, race, or some other protected characteristic motivated the challenged employment decision. See *Gordon v. United Airlines, Inc.*, 246 F.3d 878, 893 (7th Cir. 2001) (Easterbrook, J., dissenting).

⁴⁸ See *Chiaromonte v. Fashion Bed Group, Inc.*, 129 F.3d 391, 399 (7th Cir. 1997) ("We have previously held that when an employee is hired and fired by the same decision-maker in a relatively short time span, a presumption, or inference, of nondiscrimination arises.")

⁴⁹ See *Hartley v. Wisconsin Bell*, 123 F.3d 887, 893 (7th Cir. 1997).

⁵⁰ See *id.*

⁵¹ See *Brill*, 119 F.3d at 1270 ("But it is a necessary schematic if the real cases of discrimination are to emerge from the 'spurious ones.'")

⁵² See 15 U.S.C. § 1052(d), Trademark Act § 2(d).

⁵³ See TRADEMARK BOARD MANUAL OF PROCEDURE (2011) (“TBMP”) § 309.03(c)(B); *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357 (C.C.P.A. 1973).

⁵⁴ See TBMP § 309.03(c)(A) (“A plaintiff must plead (and later prove) priority of use.”). See also *Media Online, Inc. v. El Clasificado, Inc.*, 88 U.S.P.Q.2d (BNA) 1285, 1287 (T.T.A.B. 2008) (priority is a required element of likelihood of confusion claim under the Trademark Act); *Kohler Co. v. Baldwin Hardware Corp.*, 82 U.S.P.Q.2d (BNA) 1100, 1108 (T.T.A.B. 2007) (priority established by proof of prior use).

⁵⁵ See *Mattel, Inc. v. Funline Merchandise Co.*, 81 U.S.P.Q.2d (BNA) 1372, 1374 (T.T.A.B. 2006); *Carefirst of Md. v. Firsthealth of the Carolinas*, 77 U.S.P.Q.2d (BNA) 1492, 1508 (T.T.A.B. 2005).

⁵⁶ See *Jim Beam Brands Co. v. Beamish & Crawford Ltd.*, 937 F.2d 729, 734-35 (2d Cir. 1991) (“In contrast [to the TTAB in a registration case], in determining the similarity of marks in an infringement action, a court must examine the visual appearance of each mark in the context of its use.”).

⁵⁷ See 6 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:101 (November 2011) (“It must be kept in mind that a determination of a likelihood of confusion in the context of an opposition or cancellation and its review on appeal to the Federal Circuit may sometimes bear little relevance to the issues presented in a subsequent infringement suit.”).

⁵⁸ See 15 U.S.C. § 1051(a)(3)(C).

⁵⁹ See 15 U.S.C. § 1051(b)(3)(B).

⁶⁰ See MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 20:15 (4th ed., online) (“In many oppositions, the merits will revolve around the issue of the likelihood of confusion between opposer’s prior mark and applicant’s mark. The test of likelihood of confusion is identical to that applied in *ex parte* determinations under § 2(d) and in infringement actions.”); see also MCCARTHY at § 32:94 (“a court decision on likelihood of confusion is *res judicata* and binding on the Patent and Trademark Office on an issue of likelihood of confusion arising under Lanham Act § 2(d)”).

⁶¹ See *id.* at § 24:72 (“[t]raditional trademark law rests primarily on a policy of protection of customers from mistake and deception”).

⁶² See 15 U.S.C. § 1063(a).

⁶³ See 37 C.F.R. §§ 2.101 through 2.107.

⁶⁴ See TBMP § 102.03 (“An *inter partes* proceeding before the Board is similar to a civil action in a federal district court.”).

⁶⁵ See generally TRADEMARK BOARD MANUAL OR PROCEDURE (Third Edition).

⁶⁶ See 37 C.F.R. § 2.116(a) (“Except as otherwise provided, and wherever applicable and appropriate, procedure and practice in *inter partes* proceedings shall be governed by the Federal Rules of Civil Procedure.”).

⁶⁷ See 37 C.F.R. § 2.120(a)(3) (“[a] party must make its initial disclosure prior to seeking discovery”); see also TBMP § 401 (“Introduction to Disclosures and Discovery”).

⁶⁸ See TBMP § 401 (discussing the range of “discovery devices” available to a litigant before the Board, including “discovery depositions, interrogatories, requests for production of documents and things, and requests for admission”).

⁶⁹ *Id.* at § 528; see also FED. R. CIV. P. 56.

⁷⁰ See generally TBMP (Chapter 700).

⁷¹ “The principal difference [between a civil action in a federal district court and a Board proceeding] is that proceedings before the Board are conducted in writing, and the Board’s actions in a particular case are based upon the written record therein.” TBMP § 102.03.

⁷² See *id.* (“all testimony is taken out of the presence of the Board during the assigned testimony periods”).

⁷³ See *id.*

⁷⁴ See *E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 1361-62 (1973) (listing 13 factors, including this one: any other established fact probative of the effect of use).

⁷⁵ Or, more precisely, the “dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression.” *Id.* at 1361.

⁷⁶ In particular, the issue is whether a customer is driven by “impulse” or can be considered “careful” or “sophisticated.” *Id.* at 1361.

⁷⁷ A single factor may “play a dominant role.” *Id.* at 1361-62; see also *Shen Manufacturing Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238 (Fed. Cir. 2004) (“Neither we nor the board, however, need consider every *du Pont* factor”).

⁷⁸ See *Odom’s Tennessee Pride Sausage, Inc. v. FF Acquisition, LLC*, 600 F.3d 1343 (Fed. Cir. 2010) (Board did not err in basing its decision on dissimilarity of marks alone); *Kellogg Co. v. Pack-em Enterprises, Inc.*, 951 F.2d 330, 333 (Fed. Cir. 1991) (affirming summary judgment on first *duPont* factor – dissimilarity – in case involving FROOT LOOPS and FROOTEE ICE marks). See also *Boston Red Sox Baseball Club LP v. Sherman*, 88 U.S.P.Q.2d (BNA) 1581 (T.T.A.B. 2008) (dissimilarity of marks dispositive); *Mattel, Inc. v. Funline Merchandise Co.*, 81 U.S.P.Q.2d (BNA) 1372, 1374 (T.T.A.B. 2006) (key considerations are similarities between the marks appearing in the parties’ registrations); *Truescents, LLC v. Ride Skin Care, LLC*, 81 U.S.P.Q.2d (BNA) 1334, 1342 (T.T.A.B. 2006) (decision based on dissimilarity alone).

⁷⁹ “The relevance and weight to be given the various factors may differ from case to case and a single *du Pont* factor may be dispositive in certain cases.” TBMP § 309.03(c)(B).

⁸⁰ See *AutoZone, Inc. v. Strick*, 543 F.3d 923 (7th Cir. 2008).

⁸¹ The Seventh Circuit has indicated that three factors carry particular importance: the similarity of the marks, evidence of actual confusion, and any intent to confuse on the defendant's part. *Id.*; see also *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 643 (7th Cir. 2001).

⁸² See TBMP § 102.03.

⁸³ Indeed, the Board is “empowered to determine only the right to register” and “is not authorized to determine the right to sue, nor may it decide broader questions of infringement or unfair competition.” See TBMP § 102.01.

⁸⁴ The Board makes its finding on the likelihood of confusion issue after examining only the marks themselves (as they appear in the parties' registrations), without concern as to how a party displays a mark in the marketplace. *Carefirst of Md. v. Firsthealth of the Carolinas*, 77 U.S.P.Q.2d (BNA) 1492, 1508 (T.T.A.B. 2005).

⁸⁵ See TBMP § 510.02(a) (“Whenever it comes to the attention of the Board that a party or parties to a case pending before it are involved in a civil action which may have a bearing on the Board case, proceedings before the Board may be suspended until final determination of the civil action.”).

⁸⁶ See *id.* (“Ordinarily, the Board will suspend proceedings in the case before it if the final determination of the other proceeding may have a bearing on the issues before the Board.”).

⁸⁷ See *Ziebart Int'l Corp. v. Z Tech Rustproofing, LLC*, 2009 WL 129481, at *5 (T.T.A.B. 2009) (holding that the Board was bound by the district court's conclusion that the parties' marks were dissimilar, which meant that there could be no likelihood of confusion); see also TBMP § 510.02(a) (“To the extent that a civil action in a federal district court involves issues in common with those in a proceeding before the Board, the decision of the federal district court is often binding upon the Board, while a decision of the Board is not binding upon the court.”). But see *American Hygienic Laboratories, Inc., v. Tiffany & Co.*, 228 U.S.P.Q. (BNA) 855, 857 (T.T.A.B. 1986) (court decision that the use of one mark does not constitute infringement on another mark may not end up binding the Board “because a claim of infringement before the court and a claim of priority and likelihood of confusion before this Board are different claims”); see also MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:82 (4th ed., online) (“an opposer would not necessarily be barred by the rule of claim preclusion when it lost a previous infringement claim in court”).

⁸⁸ See *In re Infinity Broadcasting Corp. of Dallas*, 60 U.S.P.Q.2d (BNA) 1214, 1218 (T.T.A.B. 2001) (“infringement cases in which no likelihood of confusion has been found because the marks are used in different geographical areas are not helpful to our analysis” because registration confers exclusive right to nationwide use of the registered mark).

⁸⁹ It might happen if the mark is used differently in commerce compared to its depiction in the registration papers, but in general, the Board's findings should not be ignored by a court. See *Torres v. Cantine Mezzacorona*, 108 Fed. Appx. 816, 820 (4th Cir. 2004) (the Board's determinations “should be considered ‘powerful evidence’ of the presence (or lack thereof) of one or more of the factors that must be considered in an infringement action”).

⁹⁰ See TBMP § 502.05.

⁹¹ *Id.*

⁹² The Lanham Act does not contain a statute of limitations. See 15 U.S.C. § 1051 et seq.; see also *Audi AG v. D'Amato*, 469 F.3d 534, 545 (6th Cir. 2006).

⁹³ But a court may use the doctrine of laches to determine whether a suit should be barred. *Audi, id.*

⁹⁴ See *DeClue v. Central Illinois Light Co.*, 223 F.3d 434, 437 (7th Cir. 2000).

⁹⁵ A district court can decide both infringement and registration issues. See 15 U.S.C. § 1119.

⁹⁶ Compare 42 U.S.C. § 2000e-5(f)(1).

⁹⁷ This could happen if a party first files an opposition to a registration with the Board, then later files a civil action and suspends the Board proceeding, only later to return to the Board to argue that the result in the civil action is not controlling. See MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:82 (4th ed., online) (“an opposer would not necessarily be barred by the rule of claim preclusion when it lost a previous infringement claim in court”).

⁹⁸ Rather, the Board is an administrative tribunal with no official mediation or conciliation responsibilities. See generally TBMP § 102.03; see also 76 Fed. Reg. 22679 (April 22, 2011) (“There is no routine Board involvement in settlement discussions in cases in which the Board is not invited into the discovery conference or, for cases in which the Board is so invited, after the completion of the discovery conference.”).

⁹⁹ *Id.*

¹⁰⁰ “Indeed, a party to a proceeding before the Board need never come to the offices of the Board at all . . . unless the party wishes to argue its case at oral hearing (an oral hearing is held only if requested by a party to the proceeding).” TBMP § 102.03.

¹⁰¹ *Id.*

¹⁰² In fact, a mandatory discovery conference is the only required communication between parties at the TTAB, just as it is in federal court. See TBMP § 404.01; see also FED. R. CIV. P. 26(f)(2). But the reality of most discovery conferences in the federal system is that they are routine and boilerplate.

¹⁰³ See *supra* note 98.

¹⁰⁴ In fact, a party that loses a case before the TTAB may appeal that decision directly to either the Federal Circuit or a federal district court. Both appeals come with de novo review, but appealing to a federal district court is really the start of a new civil action because in that circumstance the parties are allowed to submit new evidence and even raise new claims. *See* TBMP §§ 901.01, 906.01.

¹⁰⁵ *See supra* note 87.

¹⁰⁶ *See* TBMP § 102.01.

¹⁰⁷ *See supra* Part II.

¹⁰⁸ *See* FED. R. CIV. P. 1.

¹⁰⁹ Even in minor trademark infringement cases (with less than \$1 million at stake), a party can expect to spend nearly \$500,000 in litigation costs. In major infringement cases (with more than \$25 million at stake), a party spends on average almost four times that amount. AIPLA REPORT OF THE ECONOMIC SURVEY (2009) at I-135.

¹¹⁰ *See supra* Part II.

¹¹¹ While the Board asked for public comments in 2011 on whether it should be more active in settling and conciliating inter partes claims of confusion, it did nothing after it received those comments (which were mostly negative).

¹¹² Anybody may sue. *See* 15 U.S.C. § 1063(a). *See also* Enbridge, Inc. v. Excelerate Energy Limited Partnership, 92 U.S.P.Q.2d (BNA) 1537, 1540 n.10 (T.T.A.B. 2009) (a plaintiff does not have to prove claims or actual damage to establish standing).

¹¹³ In 2011 the average total pendency of TTAB inter partes trial proceedings was over four years (213 weeks). http://www.uspto.gov/trademarks/process/appeal/TTAB_New_Filings_and_Performance_Measures.jsp (accessed May 10, 2012).

¹¹⁴ *See* TBMP § 302.

¹¹⁵ There is also no requirement that a plaintiff plead damages – or even ultimately prove damages – in order to establish standing or prevail in an opposition proceeding. *See* TBMP § 303.03.

¹¹⁶ *See supra* Part II.

¹¹⁷ *See supra* note 109.

¹¹⁸ For example, the Northern District of Illinois operates a “Lanham Act Mediation Program.” *See* <http://www.ilnd.uscourts.gov/LEGAL/LanhamAct/LanhamActprg.htm> (last visited May 10, 2012).

¹¹⁹ *See supra* text accompanying note 85.

¹²⁰ *See supra* Part II.

¹²¹ *See* 42 USC § 1981a (no compensatory or punitive damages in disparate impact cases).

¹²² *See* TBMP § 510.02(a).

¹²³ *See* TBMP § 502.05 (“The Board will not hold any person in contempt, or award attorneys’ fees, other expenses, or damages to any party.”); *see also* 37 C.F.R. § 2.127(f) (ruling out attorneys’ fees and expenses but not explicitly listing damages).

¹²⁴ *See supra* note 84.

¹²⁵ In many ways, forum shifting is considerably worse than forum *shopping*. Forum shifting necessarily means redundant litigation because it allows a party to shift from the administrative forum to a federal court after placing a toe in the water.

¹²⁶ *See supra* Part III.

¹²⁷ *See* E.I. DuPont de Nemours & Co., 476 F.2d 1357, 1361-62 (C.C.P.A. 1973) (listing 13 factors, including this one: any other established fact probative of the effect of use).

¹²⁸ “Multifactor tests with no weight assigned to any factor are bad enough from the standpoint of providing an objective basis for a judicial decision; multifactor tests when none of the factors is concrete are worse.” *Menard, Inc. v. Commissioner*, 560 F.3d 620, 622-23 (7th Cir. 2009).

¹²⁹ In fact, the multitude of factors gives a decision-maker the ability to decide a case based on “impulse” when a case seems exceptional; in such a case, “the felt necessities of the day overwhelm the general principle, and a balancing test has no resource to prevent it.” *Stevens v. Tillman*, 855 F.2d 394, 399 (7th Cir. 1988).

¹³⁰ *See* 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:2.75 (4th ed.) (“Every federal circuit has its own list of about eight factors to be weighted and balanced before reaching the ultimate conclusion as to whether confusion is or is not likely.”).

¹³¹ *See* *AutoZone, Inc. v. Strick*, 543 F.3d 923 (7th Cir. 2008).

¹³² *Id.*; *see also* *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 643 (7th Cir. 2001).

¹³³ *See* *Packman*, 267 F.3d at 643.

¹³⁴ The impracticality of multi-factor balancing tests has drawn comment from the Supreme Court, which has in some circumstances rejected them when proposed by administrative agencies. *See* *Lechmere, Inc. v. National Labor Relations Board*, 502 U.S. 527, 536 (1992) (rejecting the Labor Board’s adoption of a “multifactor balancing test” to determine union access to private property and pointing out that even the Board “conceded that [its] analysis was unlikely to foster certainty and predictability in this corner of the law”). *See also* *Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995) (“the proposed four- or seven-factor test would be hard to apply, jettisoning relative predictability for the open-ended

rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal”); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 70 (1989) (rejecting a test based on “intuitive judgments” to interpret the Constitution in favor of one “anchored in rules, not set adrift in some multifaceted ‘balancing test’”) (Scalia, J.) (concurring).

¹³⁵ See *supra* Part II.

¹³⁶ A Westlaw search reveals that the Supreme Court’s *McDonnell Douglas Corp. v. Green* decision has been cited by courts over 125,000 times.

¹³⁷ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973).

¹³⁸ See, e.g., *Dickerson v. Board of Trustees of Comm. College Dist. No. 522*, 657 F.3d 595, 602-03 (7th Cir. 2011).

¹³⁹ This is because a court’s decision that an employer’s articulated reason for its decision is true (and not a cover-up) is incompatible with a decision that a jury might find discrimination occurred. Either the employer is lying or it’s not. Ultimately, an employer might not be found liable even if the plaintiff does call into question its truthfulness. The Supreme Court has made it clear that at trial it is not enough to disbelieve an employer’s reason; a plaintiff must also prove that discrimination was the real reason for the employer’s action. *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 515-16 (1993).

¹⁴⁰ Or at least close enough for a typical consumer to run across both marks. See *AutoZone, Inc. v. Strick*, 543 F.3d 923, 927 n.2 (7th Cir. 2008) (reversing summary judgment in trademark infringement case where junior OilZone mark was within one mile of AutoZone store).

¹⁴¹ See *Evory v. RJM Acquisitions Funding, LLC*, 505 F.3d 769, 776 (7th Cir. 2007).

¹⁴² See *Masters v. UHS of Delaware, Inc.*, 631 F.3d 464, 471 (8th Cir. 2011).

¹⁴³ See 15 U.S.C. § 1117(a).

¹⁴⁴ See *id.*; see also *Zazu Designs v. L’Oreal, S.A.*, 979 F.2d 499, 507 (7th Cir. 1992) (“Punitive damages are problematic because the Lanham Act, although providing for the trebling of compensatory damages, forbids other penalties.”).

¹⁴⁵ Section 1117(a) of the Lanham Act does not expressly require a finding of willful infringement or bad intent in order to award treble damages. 15 U.S.C. § 1117(b). The statute allows that a court may, “according to the circumstances of the case,” determine that a “sum above the amount found as actual damages, not exceeding three times such amount,” may be appropriate. *Id.* Nevertheless, some courts do require a finding of willfulness prior to awarding any monetary damages. See *Masters*, 631 F.3d at 472 n.2 (noting circuit split on the issue); see also *Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436 (7th Cir. 1989) (treble damages proper when infringement is deliberate).

¹⁴⁶ The Lanham Act allows a court to award attorneys fees to the prevailing party in “exceptional cases.” 15 U.S.C. § 1117(a).

¹⁴⁷ See, e.g., *Central Benefits Mut. Ins. Co. v. Blue Cross and Blue Shield*, 1992 WL 393577, at * 1 (6th Cir. Dec. 29, 1992) (affirming award of \$2.5 million in attorneys’ fees).

¹⁴⁸ 42 U.S.C. § 1981a(b)(3).

¹⁴⁹ See *id.* § 1981a(c).

¹⁵⁰ See *id.* §§ 1981a(a)(1), 1981a(c).

¹⁵¹ See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87 (1988) (“In certain cases, facially neutral employment practices that have significant adverse effects on protected groups have been held to violate the Act without proof that the employer adopted those practices with a discriminatory intent.”) (emphasis in original).

¹⁵² See *id.* at 988-89 (describing different disparate impact cases).

¹⁵³ See 42 U.S.C. § 1981a(b)(2).

¹⁵⁴ As it stands, a court may fashion its own notion of appropriate compensatory damages under section 1117(a) of the Lanham Act based on the “circumstances of the case.” See 15 U.S.C. § 1117(a).

¹⁵⁵ 42 U.S.C. § 1981a(b)(2) (backpay not included in the definition of compensatory damages).

¹⁵⁶ See 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:5 (4th ed.) (An “important economic function of trademarks is that they reduce the consumer’s cost of collecting information about products”).

¹⁵⁷ See *id.* § 2:3.

¹⁵⁸ See *supra* Part III.

¹⁵⁹ See TBMP § 404.01.

¹⁶⁰ See, e.g., TBMP § 408.01 (describing the parties’ general duty to cooperate); § 502.06(b) (detailing power of Board to order parties to appear in person for pretrial conference in order to resolve disputes); and § 523.02 (describing duty of party to make good faith effort to resolve discovery dispute before filing a discovery motion).

¹⁶¹ See TBMP § 500 *et seq.* (detailing large catalogue of motions available to parties practicing before the Board); see also *id.* § 502.01 (“There is a wide range of motions which may be filed in inter partes proceedings before the Board”).

¹⁶² See TBMP § 528; see also FED. R. CIV. P. 56.

¹⁶³ See <http://www.ttabvue.uspto.gov/>.

¹⁶⁴ PACER stands for Public Access to Court Electronic Records. It is managed by the United States Courts but, unlike TTABVUE, it does not provide free access to filings.

¹⁶⁵ See TBMP § 700 *et seq.* (describing trial procedure before the Board).

¹⁶⁶ Technically the EEOC has the power to order that the parties attend a fact-finding conference, see 29 C.F.R. § 1601.15(c), and even has the power to issue subpoenas to require testimony or the production of evidence. See 29 C.F.R. §§ 1601.16(a), 1601.17(a). But as described in Part II, these are powers that head nowhere as the agency has no authority to make findings of fact or award any relief to a private sector plaintiff. In fact, the agency may determine to issue a right to sue letter to a charging party after concluding that it probably will not be able to complete its investigation within the statute's prescribed timeline (180 days). See 29 C.F.R. § 1601.28(a)(2).

¹⁶⁷ See TBMP § 803.

¹⁶⁸ See MCCARTHY § 23:2.75.

¹⁶⁹ Or at least not regularly used well. See *Collier v. Bradley Univ.*, 113 F. Supp. 2d 1235, 1244 (C.D. Ill. 2000).

¹⁷⁰ See MCCARTHY § 32:158.

¹⁷¹ Qualified linguistic experts in trademark cases have been accepted by courts for almost fifty years. See *Duncan, Inc. v. Royal Tops Manu. Co.*, 343 F.2d 655, 660 (7th Cir. 1965) (describing expert testimony of Professor of Linguistic English, who qualified as an expert linguist in trademark case and testified as to the origin of the term “yo-yo”); see also *Mead Johnson & Co. v. Abbott Lab.*, 201 F.3d 883, 886 (7th Cir. 2000) (explaining that discovering usage and interpreting usage is best left to experts: “it would be a bad idea to replace the work of these professionals with the first impressions of people on the street”).

¹⁷² See *Blackwell v. Cole Taylor Bank*, 152 F.3d 666, 672 (7th Cir. 1998).

¹⁷³ See 37 C.F.R. § 2.61.

¹⁷⁴ See Steve Jobs, Commencement Address at Stanford University (June 12, 2005), available at <http://news-service.stanford.edu/news/2005/june15/jobs-061505>.

¹⁷⁵ See John Markoff, Steven P. Jobs, 1955-2011; Redefined the Digital Age as the Visionary of Apple, *N.Y. Times*, Oct. 6, 2011, at A1.

¹⁷⁶ Both are judges on the United States Court of Appeals for the Seventh Circuit.

¹⁷⁷ See *Show v. Ford Motor Co.*, 659 F.3d 584, 586 (7th Cir. 2011).

¹⁷⁸ See *id.* (“Many federal civil cases are resolved by six-person juries, and none by more than twelve. That is too few to reveal what expectations consumers as a whole may have.”).

¹⁷⁹ For example, the University of Notre Dame Executive MBA program requires students to end their education with a course entitled “The Weave.”

¹⁸⁰ See *supra* Parts IV and V.