

A dictionary, a survey and a corpus walked into a courtroom...: An evaluation of resources for adjudicating meaning in trademark disputes

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Introduction

When trademark disputes turn on issues of meaning and language use, courts have resorted to three linguistic tools. In the UK, dictionaries, judges' intuitions and market research are the key resources used; in the US expert linguists have developed a "trademark linguistics" (e.g. Butters, 2008; Shuy, 2002), utilising lexicographic methods on legal databases (e.g. LexisNexis, Westlaw) and, more recently, corpora such as COCA.

Corpus analytical tools have been established (e.g. Microsoft Corporation v. Apple Inc., 2010; Kilgarriff, 2015) to assess whether disputed trademarks such as 'Botox', 'Velcro' or 'App Store' are or have become generic everyday expressions. However, research on distinguishing imaginative from arbitrary usage of lexical words in trademarks has been restricted to the psycholinguistic domain (e.g. Hotta & Fujita, 2012). This paper demonstrates a syntactic-pragmatic corpus analytical method for determining the potential meaning of lexical brand names in trademark dilution disputes. The analysis presented here is compared to judges' lexicographical analysis and market research presented as evidence in court during a three-year dispute over the CARBON VIRGIN trademark (Michael Casey v. Virgin Enterprises Ltd, 2010/2011/2012). Corpus linguistics emerges as a viable alternative to both dictionaries and surveys.

Corpus Data

Lower case 'virgin' was analysed across three genre-specific corpora: The Birmingham Blog Corpus, Leeds University Corpus of British Newspapers, and a corpus compiled from Twitter searches for 'virgin' conducted over a two-week period.

Table 1. Corpus data

	Total number of words	Number of 'virgin' tokens
The Birmingham Blog Corpus	600million	1721
Leeds University Corpus of British Newspapers	200million	865
Twitter	50million	1217

Analysis Methods

100 KWIC concordance examples of 'virgin' were randomly sampled from each corpus. These were first grouped by syntactic frames (see *Table 2* below) and a register analysis was then conducted on examples within each frame utilising a Hallidayan framework with the parameters listed in *Table 3* below.

Table 2: Syntactic frames for 'virgin' found in corpus.

VIRGIN + Noun/Noun Phrase[NP]	"virgin territory"
Determiner/No Article/Quantifier + VIRGIN	"the virgin"
Noun/Noun Phrase[NP] + VIRGIN	"kids' party virgin"
Adjective + VIRGIN	"famous virgin"

Table 3: Register analysis framework

Field	Topic	
Tenor	Communicative function based on Searle (1975) illocutionary act classification/	Connotation (Allan, 2007) summarized as positive/neutral/negative evaluation
Mode (Halliday 1976, 2014)	Coherence; Text organisation (Given-New structure); Intertextuality (e.g. legal definition, pop song).	

For comparison, both CARBON VIRGIN and a separately disputed trademark, VIRGIN THREADS, were analysed for plausibility within the NOUN/NP + VIRGIN and VIRGIN + NOUN/NP syntactic frames. Perceived plausibility levels were derived from the extent of fit between the disputed 'virgin' expressions and the uses of 'virgin' observed in the three corpora. Field, tenor and mode parameters were combined to generate a basic overall plausibility rating.

RESULTS

Figure 1: Plausibility ratings for disputed trademarks and suggested position on 'trademark distinctiveness spectrum' (Abercrombie & Fitch Co. v. Hunting World (1976))

Disputed trademark	Field Plausibility	Tenor Plausibility	Mode Plausibility	Overall Plausibility
'CARBON VIRGIN'	Low/Null	Low/Null	Low	Low
'VIRGIN'	Low/Null	Medium	Low/Medium	Medium



Field

NOUN/NP + VIRGIN

'Virgin' as a noun postmodifier has the meaning of "naive in relation to" something other than sex. (The noun phrase 'sex virgin' is tautologous.) The examples of NOUN/NP + VIRGIN in the overall corpus all broadly relate to activities, pastimes and hobbies that one can do, know or experience e.g. attend an event ("*Nationals virgin*"), genre conventions ("*hip-hop virgin*"), enjoy a meal ("*Nandos virgin*").

VIRGIN + NOUN/NP

Fixed collocations "*virgin birth*" and "*virgin territory*" aside, nominal postmodifiers of virgin generally fall into six categories: olive oil variants ("*extra virgin olive oil*"); commercial hair variants ("*virgin hair*"; "*virgin weave*"); nature features ("*virgin land*"; "*virgin snow*"); non-alcoholic cocktails ("*virgin martini*"); inexperienced or newbie ("*virgin millionaires*", "*virgin blogger*", "*virgin (business) angel*"); a state of innocence i.e. without prior exposure to unsocial acts (e.g. "*virgin ears*" for swearing)

Plausibility Evaluation

Since it is difficult to formulate a meaning of 'carbon' that can correspond to something that one can do, know or experience, the 'carbon virgin' rating for Field Plausibility is Low/Null. Although it is true that '*threads*' is a synecdoche for clothes, none of the unclassified virgin word combinations (metaphors such as "*virgin atmosphere*") indicate a readily comprehensible meaning for "*virgin threads*". Consequently its Field Plausibility is Low/Null.

Tenor

NOUN/NP + VIRGIN

Instances of 'virgin' fall into two main interpersonal categories: i) representative self-descriptions ("*I was a kids party virgin*") that do not require expert knowledge, and ii) directive communications delivered with the aim to persuade or advise, often used with positive connotation in PR/advertising contexts as a selling point ("*worth dipping into for the mood-lighting virgin*"). The use of hyphenated noun pre-modifiers (e.g. "*buy-to-let virgin*", "*FTSE-100-company-boss virgin*") is further evidence of sophisticated and witty coinage.

VIRGIN + NOUN/NP

Within a general environmental context, 'virgin' has both positive and negative connotations ("*lure wealthy skiers to spend the day visiting virgin snow*"; "*The reason*

we rape so many virgin sites with crude housing..."). It is also used persuasively e.g. in relation to holidays ("virgin sand"). Non-sexual references to personal physical features are also common as both self-representation ("My virgin eyes are gone now"), advice ("Those with weak stomachs or virgin ears should also stay away") and negative evaluation ("virgin realms of incompetence").

Plausibility Evaluation

CARBON VIRGIN's scope for use as a personal description or in a persuasive context is limited by its specialised claimed meaning and lack of wit. Tenor Plausibility is Low/Null. Outside of the context of olive oil, 'virgin' as a premodifier has a strong emotional connotation that is unlikely to be neutral. This may make 'Virgin Threads' an appropriate trademark for a fashion brand; however, the meaning of 'untouched'/'unexplored' is ambiguous in relation to clothing (environmentally-friendly, unworn and appropriate for the sexually-inexperienced are all possible interpretations). Tenor Plausibility is Medium.

Mode

NOUN + VIRGIN

The meaning of an NP + VIRGIN n-gram is heavily dependent on co-text. Most instances occur with a pre-modifying NP that is an anaphoric reference to the title or main topic of the article or blog post in a GIVEN-NEW organisation (e.g. "*Pop Culture Trivia virgin*", "*Zumba virgin*", "*mood lighting virgin*"). The NP is frequently a proper noun/name (e.g. "*Tiger Tiger virgin*"). Noun Phrases such as "*buy-to-let virgin*" or "*FTSE-100-company-boss virgin*" have no meaning outside of the texts in which they appear.

VIRGIN + NP

'Virgin' is an intertextual reference to external standards (legal definitions, product descriptions) when used to describe products such as olive oil, commercial hair and cocktails. Similarly, other uses of 'virgin', e.g. to describe an inexperienced person or environmental features, are commonly factual assertions.

Plausibility Evaluation

It is possible that the average consumer could be aware of a verifiable standard of 'virgin' in relation to clothing materials, although she would need to be interested in market innovations and trends. Consequently, Mode Plausibility for VIRGIN THREADS is Medium. There is little evidence for a construal of 'carbon' sufficiently defined to give meaning to the phrase 'carbon virgin' outside the context of a specific article, blog post or pun. Mode Plausibility for CARBON VIRGIN is Low.

Discussion

Judges' lexicographic analysis led to contradictory conclusions across three Carbon Virgin cases. Using dictionaries, the courts in the initial two cases agreed that 'virgin' could post-modify a noun phrase (when meaning "a person who is naïve or inexperienced on *issues*") but corpus analysis suggests they failed to limit the range of

potential VIRGIN + NOUN/NP word combinations to proper or otherwise strongly referenced nouns. In the third case, although corpus analysis suggests his analysis of CARBON as an adjectival modifier comparable to the Oxford Dictionary example of '*political* virgin' was overly restrictive, the judge was correct to conclude that CARBON VIRGIN has no clear meaning.

The issue of context was inconclusively addressed in two separate omnibus market research surveys commissioned by the legal parties in the Carbon Virgin dispute. Both offered evidence that the average consumer could associate CARBON VIRGIN with their business if given appropriate context; both were dismissed as evidence due to the use of leading questions and insufficiently representative samples. The Field and Mode parameters used in this analysis provide an alternative tool for evaluating the type and salience of context required to produce meaning.

Conclusions

Three findings emerge from this research:

- 1) The beneficial use of a multi-genre corpus confirms Butter's advice against using general corpora in trademark linguistics (given in *Microsoft Corporation v. Apple Inc.* 2010).
- 2) Register analysis can provide an empirical framework for inductive generation and evaluation of hypothetically plausible, 'suggestive' meanings and thus assist in determination of trademark protection.
- 3) Syntactic analysis demonstrates how the potential meaning of a trademark is influenced by word order - an under-researched area of trademark linguistics (cf. Heymann, 2010).

Two directions for future research are suggested: i) specification of Plausibility Ratings levels for computational linguistic analysis; ii) development of tools to assist legal professionals in the use of corpora in trademark linguistics.

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