



Sensorium[®]: The Splash of Sensory Trademarks

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Abstract

Sensory trademarks present a compelling case in which to explore the senses as “containers of possibility,” and this article explores the emergence and logic of sensory trademarks from a legal and marketers’ perspective. Using sensory trademark cases from the United States, I suggest that the current socio-legal environment opens a conversation about what I would call sensory capitalism—the monetization of the senses rather than the proprietization of the senses—that requires intellectual property law to properly function. I argue that the sensory model espoused by the trademarking of the senses is one of the mass sensorium, whereby the “audience” universally recognizes marks as designating a particular source or origin of goods. The mass sensorium offers something quite novel, however, because embedded in it is the (corporate) promise of a lingua franca that valorizes all of the senses and generates a type of mediated affect that is shared.

Keywords: trademark, sensory marks, senses, non-traditional, monetization, intellectual property, marketing, smell, media, capitalism, United States, Canada

Résumé

Les marques de commerce sensorielles sont des concepts intéressants aux fins d’une exploration des sens en tant que « conteneurs de possibilités ». Le présent article explore l’émergence et la logique des marques de commerce sensorielles du point de vue juridique et dans une perspective de commercialisation. En se fondant sur des cas étatsuniens de marques de commerce sensorielles, l’auteur suggère que l’environnement sociojuridique actuel ouvre une discussion sur ce que l’on pourrait appeler le capitalisme sensoriel—soit la monétisation des sens plutôt que l’appropriation des sens—ce qui nécessite le respect du droit de la propriété intellectuelle. L’auteur soutient que le modèle sensoriel adopté par la commercialisation des sens constitue un des *sensoriums* de masse, selon lequel le « public » reconnaît universellement que les marques désignent une source ou une origine particulière

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de produits. Le *sensorium* de masse offre cependant quelque chose de tout à fait novateur dans la mesure où il se base sur la promesse (entrepreneuriale) de lingua franca valorisant tous les sens et générant un type d'affect médiatisé et socialement partagé.

Mots clés : marque, marques de commerce sensorielles, sens, non traditionnel, monétisation, propriété intellectuelle, marketing, commercialisation

In May 2018, multinational toy giant Hasbro trademarked the smell of Play-Doh. Granted as a trademark for “toy modeling compounds” in the United States, Registration No. 87335817 describes the mark as “the scent of a sweet, slightly musky, vanilla fragrance, with slight overtones of cherry, combined with the smell of a salted, wheat-based dough.”¹ According to the company, Play-Doh’s “iconic smell” is “one of the best-loved and most widely-known scents among consumers”²—and, after sixty-two years of use, Hasbro can now claim rights to its smell. Play-Doh’s smell joins the handful of other trademarks perfuming the American marketplace, including cherry scented race car fuel,³ the smell of bubble gum for sandals,⁴ and “the scent of a pina colada” for ukuleles.⁵

If the idea of owning rights to the smell of Play-Doh or bubble-gum scented flip flops seems odd, consider the ways in which “sensory marks”—including sound, fragrance, colour, touch and taste—extend beyond the sense of smell. Tarzan’s famous yell, for example, is registered as a trademark for toy action figures⁶ while another holler—the YAHOO yodel—designates online computer services.⁷ T-Mobile owns the rights to magenta in the field of telecommunication service,⁸ United Parcel Service owns brown in association with delivery services,⁹ and Tiffany & Co. famously governs its “robin’s egg blue” for jewellery boxes and bags.¹⁰ In the world of wine, a “sensory touch mark” exists for “a leather texture wrapping” on wine bottles,¹¹ and in the category of bakery goods, Cinnabon Inc. has registered the “cylindrical configuration” of its cinnamon bun (complete with melted frosting).¹² Even taste remains in the sightlines of aspiring mark holders, as per the case of the Texas-based pizza chain that tried—unsuccessfully—to claim “protected trademark interest in...the flavor of its products” (*New York Pizzeria, Inc. v. Ravinder Syal, et al.* 2014, 10) and filed a “flavor infringement” claim against a competitor (14).

Sensory trademarks present a compelling case in which to explore the senses as “containers of possibility” (Peters 2015), and this article explores the emergence

¹ See the United States Patent and Trademark Office (USPTO) registration No. 87335817 (Principal Register).

² See USPTO registration No. 87335817 Response to Office Action.

³ See USPTO Registration No. 2563044 (Principal Register).

⁴ See USPTO Registration No. 4754435 (Principal Register).

⁵ See USPTO Registration No. 4144511 (Supplemental Register).

⁶ See USPTO Registration No. 2210506 (Principal Register).

⁷ See USPTO Registration No. 2442140 (Principal Register).

⁸ See USPTO Registration No. 3263625 (Supplemental Register).

⁹ See USPTO Registration Nos. 2901090, 2159865, 2131693 (Principal Register).

¹⁰ See USPTO Registration Nos. 2359351, 2416795 (Principal Register).

¹¹ See USPTO Registration No. 77858216 (Principal Register).

¹² See USPTO Registration No. 2098432 (Supplemental Register).

and logic of sensory trademarks from a legal and marketers' perspective, identifying some key resonances and points of disconnect between these two perspectives. Using sensory trademark cases from the United States, I suggest that the current socio-legal environment opens a conversation about what I would call *sensory capitalism*—the monetization of the senses—that depends on intellectual property law to function effectively. Sensory capitalism captures a move towards treating the sensory components of products (or product marketing) as monetizable assets, in which consumers should be educated to make the “right” interpretation of particular sense experiences. I argue that the sensory model espoused by the trademarking of the senses is one of the *mass sensorium*, whereby the “audience” universally recognizes marks as designating a particular source or origin of goods. The *mass sensorium* offers something quite novel, however, because embedded in it is the (corporate) promise of a lingua franca that valorizes all of the senses and generates a type of mediated affect that is shared. But first, let's examine how sensory trademarks emerged in the United States and Canada, and the legal and marketing rationale for this turn to the sensory.

The Legality and Logic of Sensory Trademarks

The 1946 US *Lanham Act*—the United States' first uniform federal trademark law—defines a trademark as “any word, name, symbol, or device, or any combination thereof used ... to identify and distinguish” goods in the marketplace and “to indicate the source of the goods, even if that source is unknown” (15 USC, 1127). For instance, the *word* Cadbury is a registered trademark, as are Nike, Disney, and Pepsi. *Logos* such as the Nike swoosh, Lacoste crocodile, and McDonald's Golden arches, as well as *phrases* (e.g., McDonald's “I'm Lovin' It”) also function to indicate the origin of goods or services. Even though the *Lanham Act* is over seventy years old, its all-inclusive language continues to set precedents for what is considered to “identify or distinguish” specific goods in the United States (15 USC, 1127). Provisions of the *Act*, for example, have allowed for the trademark registration of the sound of NBC's three chimes (1950), the shape of the Coca-Cola bottle (1977), and the scent of plumeria blossoms on sewing thread (1990). And in a watershed case in 1995 (*Qualitex Co. v. Jacobson Products Co., Inc.*), the US Supreme Court relied on the *Lanham Act* to rule that colour *per se*—colour alone—could function as a trademark, provided that it passes the key trademark “tests”: namely, the colour mark must not be *functional* (i.e., it must not be essential to the use or purpose of the article, or affect its cost or quality); the colour must be *inherently distinctive*; and the colour must contain *secondary meaning* (i.e., it must create a “mental association in buyers' minds between the alleged mark and a single source of the product”) (McCarthy, as cited in Kearns 1996, 340n18). Justice Breyer, writing for the Supreme Court, observed that the language of Lanham Act “describes the universe of things that can qualify as a trademark in the broadest of terms” (*Qualitex Co. v. Jacobson Prods. Co.* 1995, 162). Drawing attention to the definition of trademark as any “word, name, symbol or device,” he noted that a “symbol” or “device” is “almost anything at all that is capable of carrying meaning”—including a colour (162).

Note that in US trademark law, sensory marks are implicitly sanctioned. The senses are not written into the *Lanham Act*; rather, it is the language and intent of the *Act* that permits sounds, shapes, colours, and scents to function as trademarks (172). As Justice Breyer pointed out, aside from the exceptions cited in the *Act*, the statute's wording suggests that “[n]o trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration” (173). As one trademark lawyer succinctly claimed: when it comes to trademarks, “the sky’s the limit” (Stockell and Lyapis 2017).

North of the US border, legal developments in Canada also reveal this “sky high” thinking when it comes to sensory marks. Here, the intensification of attention to sensory mark is signalled by (among other things) an increasing normalization and recognition of non-traditional marks in legal interpretation and by statute. Historically, the registrability of non-traditional marks has been “contentious” in Canadian trademark law because they are not explicitly contemplated in the *Trade-Marks Act* (McGinnis 2005, 119). While Canada’s *Trade-Marks Act* deliberately did not define “mark” in order to avoid a restrictive interpretation (121), a mark has been “interpreted narrowly in Canadian jurisprudence” (120). The upshot was that a visual requirement was “imposed” on the trademark registration, creating a barrier to trademarking marks that cannot be visually represented, like sound (120), smell (Mackie 2005, 428), or colour (Stevenson 2015). Despite this barrier, positive rulings over sensory elements emerged. In 1989, one sound mark registration was granted, even though subsequent applications were denied on the grounds that sound was not a valid trademark (McGinnis 2005, 117). Ten years later, the Federal Court of Canada ruled that colour alone was registrable (*Simpson Strong-Tie Company, Inc. v. Peak Innovations Inc.*, 2009), relying on a previous ruling that green, when applied to the exterior of a pharmaceutical tablet, was a valid trademark (*Smith Kline & French Canada Ltd v. Canada Registrar of Trademarks*, 1987).

The vexed state of sensory trademarks in Canada was remedied in December 2014, when the Canadian Parliament enacted the *Combating Counterfeit Products Act* (CCPA), an omnibus bill that—while explicitly about stemming the tide of counterfeit goods—also expanded the scope of registrable trademarks. The CCPA redefines a trademark by replacing the word “marks” with the word “signs or combination of signs” under Section 2 of the *Trade-Marks Act* (CCPA 2014, 63). This redefinition entails a shift from understanding the trademark as a *mark* used for distinguishing goods and services to a *sign* used to distinguish those goods and services. More significantly, a “sign” is defined as including a colour, a sound, a scent, a taste, and a texture. The senses, in short, are explicitly tagged as suitable trademarks, and written into the language of the *Act*.

The success of sensory marks in Canada is too new to evaluate.¹³ However, these developments in Canada illustrate the intensification of attention to the senses by and in law.

¹³ Indeed, *success* is too bold of a word since the Bill has not yet come into force. Bill C-8, the CCPA, received royal assent on December 9, 2014. However, its commencement is not expected until late 2018 or early 2019, after the Canadian Intellectual Property Office develops Regulations to guide the implementation of the amended provisions (see Dennis Brooks and Schnurr, 2017).

As might be expected, proponents from the more sensorially (trade-)marked United States and elsewhere suggest that sense marks are an innovative strategy for companies to expand their branding and to stand out in a competitive marketplace. Legal analyses and trademark lawyers frame these non-traditional marks as “outside the box” thinking (Stockell and Lyapis 2017) or as opportunities for businesses to “stir the imagination” while “enlarging their trademark portfolios” (Gilson and Gilson LaLonde 2005, 820). Some laud non-traditional trademarks as one of the “new, nonlinear ways to grab consumer attention” (Donahue 2014a). Others root their appeal in the increasing sophistication of consumers (McGinnis 2005, 147) or affirm the need to “protect non-traditional trademarks in the interest of global trade” (Lukose 2015, 214). Arguably, the emergence of sensory marks might be linked to what Beebe (2010) calls a *post-rarity* society—one in which mimetic technology makes it increasingly difficult to “produce distinctions” (815). Beebe suggests that intellectual property law “is the one area of law (outside of prohibitions against fraud) that is capable of protecting forms of distinction from imitation and overproduction” (815). That is, while we have the *technological* capacity to imitate goods, intellectual property law prevents them from being *legally* imitated. In a post-rarity society, Beebe argues, intellectual properties “are the most stable ... forms of rarity that we have left” (815–16). And, if we consider the legal and lawyerly arguments for non-traditional trademarks, they suggest that these sensory marks offer an extra-ordinary level of distinction for businesses competing in a post-rarity society.

Marketing the Sensory

The increasing *legal* recognition of the senses has been surpassed by its *marketing* recognition—specifically, the marketers and marketing literature that position sensory elements as the solution to the problem of communicative abundance. In *BrandSense: Build Powerful Brands through Touch, Taste, Smell, Sight, and Sound* (2005), marketing guru Martin Lindstrom presents the senses as tools to exploit in the quest to create a powerful emotional attachment to commercial goods. Lindstrom entreats business owners to conduct a sensory audit on their brands, with an eye to leveraging all sensory touch-points (67–101). Businesses should strive to move from two-dimensional (2-D) to 5-D branding, Lindstrom counsels, because building on more senses will create “the ultimate bond between the consumer and the brand” (5). Lindstrom’s subsequent work bolsters this thesis with neuromarketing studies. *Buy-ology: Truth and lies about why we buy* instructs on “selling to our senses” (141) and pitches “Sensory Branding™” as the means of capturing consumer attention in a “visually overstimulated” world (142–43).

Although much hyped, Lindstrom’s work does not stand alone. Sensory marketing literature is increasingly common (see Hultén, Broweus, and van Dijk 2009; Hultén 2010; Krishna 2013; Krishna, Cian, and Sokolova 2016; Géci, Nagyová and Rybanská 2017; Wardlaw 2017). It builds on earlier work on experiential marketing (Schmitt 1999) and experiential consumption (Holbrook and Hirschman 1982), which suggests that sensory impressions are the pathway to consumer impact. As Wardlaw (2017) explains, with a “sensory-led approach to brand, pack and product development” and a “seamless consumer experience across all touchpoints ... the

whole is greater than the sum of its parts” (54). But is this accurate? There is a disconnect, I suggest, between the characterization of and enthusiasm for the sensory in the *marketing* literature and its *legal* treatment and expression, historically and today. It is this disconnect to which we now turn.

The “Sense Experts” and the Sensory (Marketing/Legal) Disconnect

In “How Capitalism Came to its Senses—and Yours: The invention of sensory marketing,” David Howes (2017) examines how advocates of sensory marketing such as Lindstrom (2005), Krishna (2013) and others consistently stress the “newness of their approach” (Howes 2017, 2; see also Howes 2005, 290–93).¹⁴ These “sense experts” (Howes 2017, 2) distinguish their privileging of smell, taste, touch, and sound from earlier eras of product marketing, claiming to herald a “new epoch” where the senses will dominate marketing strategies (2–5). Howes reveals these “newness” claims to be specious. A focus on presentation and *pleasing the senses as a sales strategy*, Howes argues, reaches back to the 1850s and the birth of the first department store, which offered visual and tactile displays to entice customers (4; also see Howes 2005, 284–90; Howes 2003, 208–12). Moreover, much like Lindstrom’s call to 5-D branding in the early twenty-first century, early consumer capitalism turned to “multiplying the sensory bases of product differentiation,” with the development of Coca-Cola’s “contour bottle” in 1916 (touch) and General Mills’ first jingle in 1926 (sound) (Howes 2017, 5–6). With the marketing of the contour bottle dating back over a century and the promotional jingle, ninety-three years, sensory marketing is certainly not new. Sensory marketing in history is also not *accidental*, as Aradhna Krishna argues in her book, *Customer Sense: How the 5 Senses Influence Buying Behavior* (2013). Here Krishna claims that, historically, companies may have “unknowingly manipulate[d]” sensory attributes, but lacked awareness that they were doing so (4). This claim is patently false. As will be illustrated presently, businesses have long sought to claim trademark rights to sensory aspects of their products, demonstrating keen awareness of the power of colour, smell, and sound.

If the *sense experts’* claims to the “newness” of sensory *marketing* are problematic, so too are *legal experts’* claims about the “newness” of business interest in sensory *marks*. Recall that “legal experts” who favour non-traditional trademarks affirm that these marks represent “outside the box” thinking (Stockell and Lyapis 2017) and a “new” response to our present consumer attitudes and cultural conditions (see McGinnis 2005; Donahue 2014a; Lukose 2015; Setyawan 2017). However, attempts to “own” sensory marks are *not* new.¹⁵ American business attempts to claim rights to *colour*, for example, reach back to 1906, when Leschen & Sons Rope Co. requested protection for blue woven into wire rope¹⁶ and Diamond Match Co. sought the exclusive use of red on match heads.¹⁷ In 1949, Campbell

¹⁴ Here, Howes specifically points to Krishna’s (2010) work, but his argument equally applies to Lindstrom’s (2005) call to move from 2-D to 5-D branding.

¹⁵ Several of the following cases, including some of the language/phrasing, are drawn from Elliott (2003).

¹⁶ See *A Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co.*, 201 U.S. 1906.

¹⁷ See *Diamond Match Co. v. Saginaw Match Co.*, 142F (6th Cir.) 1906.

Soup sought to monopolize red and white for its soup labels; in 1950, Life Savers requested protection of a “colored striped background” for candy wrappers;¹⁸ and in 1960, Tas-T-Nut claimed “propriety rights” to certain colours on packaged nuts.¹⁹ All of these cases were denied registration on the basis that colour could not be owned. As Justice Brown opined in the 1906 Leschen & Sons case, it is impossible to register a mark “of which the only distinction is the use of a color, because practically, under the terms of the act, that would give you a monopoly on all of the colors of the rainbow.”²⁰ Similarly, the 1949 Campbell Soup ruling affirmed:

What the plaintiffs are really asking for, then, is a right to the exclusive use of labels which are half red and half white for food products. If they may thus monopolize red in all of its shades the next manufacturer may monopolize orange in all its shades and the next yellow in the same way. Obviously, the list of colors will soon run out.

That a man cannot acquire a trade-mark by color alone has been stated a good many times in decisions and textbooks (Campbell Soup Co. v. Armour & Co. 1949, para 8–9).

Numerous other attempts to register colour trademarks exist: suffice to it say that the longstanding preoccupation with trademarking colours—and particularly the “good many times” legal decisions rejected these trademarks—reveals that, far from being a present-day brainwave, such “outside the box” thinking characterized business owners well over a century ago. In a similar vein, NBC applied to register the first US sound mark on November 20, 1947, claiming its “service mark” was created and first used in the “sale or advertising of services and the services rendered in commerce”²¹ in November 1927. NBC’s sound trademark was granted in April 1950. Forty years later, smell also received trademark protection, when an appeal before the US Patent and Trademark Office Trial and Appeal Board (TTAB) found “no inherent bar” to registering an arbitrary, non-functional scent or fragrance—in particular the scent of plumeria blossoms on sewing thread.²² Simply put, just as *sensory marketing* is not new, *neither are attempts to trademark the sensory*.

Even though the marketing and legal “sense experts” align in overstating the newness of the sensory in commerce, a marked disconnect exists between the marketing recommendations and the legal reality. As stated earlier, marketing “sense experts” advocate for a “seamless consumer experience across all touch-points” (Wardlaw 2017, 54), proclaiming that 5-D branding trumps 2-D branding when it comes to creating a bond between consumers and a brand (Lindstrom 2005, 67–69). The more senses, the better. Marketers even create a hierarchy of the senses according to each sense’s ability to override rational decision-making and to create an emotional attachment to brands. “Smell, taste, and touch are the senses most in vogue in the current sensory marketing literature” (Howes 2017, 10), and Lindstrom devotes much of his chapter on “Selling to Our Senses” to unpacking

¹⁸ See *Life Savers Corporation v. Curtiss Candy Co.*, 182 F.2d 4 (7th Cir. 1950).

¹⁹ See *Tas-T-Nut Company v. Variety Nut & Date Company*, 245 F.2d 3 (6th Cir. 1957).

²⁰ See *A Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co.*, 201 U.S. 1906.

²¹ See USPTO registration No. 523,615 (Principal Register).

²² See USPTO Registration No. 1639128.

how the right smell—the allegedly most powerful sense—can “seduce” consumers to the benefit of brands (Lindstrom 2008, 144). As Lindstrom reports, with “our other senses, you think before you respond, but with scent your brain responds before you think” (2008, 147).

But if 5-D branding is the aim of marketing “sense experts,” it certainly is not the reality at the trademark office. Sensory trademarks are not easily obtained: they must be non-functional²³ and they also require that businesses provide substantial evidence of secondary meaning (i.e., that consumers identify the mark as an indication of source). Despite the marketers’ exuberance for multiple sensory touch-points, I cannot find one case where a brand has registered a smell *and* a taste mark or a colour *and* a touch mark, much less a smell, colour, taste *and* touch mark—indeed, 5-D trademarked brands certainly seem a long way off. And the sensory trademarks that *are* registered create a different hierarchy: sound marks are the most prevalent while only a handful of smell marks exist. Smell has been deemed “nearly impossible to register,” and attempts to register taste marks have failed: at the USPTO, nine flavour applications have been filed, but all of them have been abandoned (Stockell and Lyapis 2017, 14). And the 2014 “flavour infringement” case brought by New York Pizzeria Inc. against a rival was ridiculed by the judge as “plainly half-baked” (*New York Pizzeria Inc. v. Ravinder Syal, et al.* 2014, 14).

Containers of Possibility and Sensory Capitalism (Or, Media and Monetization)

Thus far, I have traced the increasing legal acknowledgement of sensory trademarks, as well as the legal and marketing rationale for these marks. Although the law’s reasoning and *requirement* for sensory registration pivots on the growing recognition that colour, taste, sound, smell, and touch can, in fact, communicate the source of goods to consumers, in many respects, *justifications* for the need for sensory marks by both legal and marketing “sense experts” are the same: namely, consumers are bombarded by commercial messages, and sensory marks stand out.²⁴ Neither the marketing of the senses nor attempts to sequester them are new, but *there is something new about the way that sensory marks function and can be understood in our present timeframe*. In this section, I suggest that there is value in understanding the senses as *media* and in light of *monetization*, because it underscores elements of a sensory model unique to our particular cultural moment.

Containers of Possibility (The Senses as Media)

In *The Marvelous Clouds: Towards a Philosophy of Elemental Media* (2015), communication scholar John Durham Peters argues for a new understanding of media, as “containers of possibility” that are both natural and cultural (2).

²³ As previously noted, non-functional means that the mark must not be essential to the use or purpose of the article, or affect its cost or quality.

²⁴ These types of critiques echo those made by social theorists, who argue that ‘sensory overload’ typifies contemporary life (Harvey 1990, 286; Lipowski 1975, 199; 1973, 521); the constant bombardment of individuals by messages makes it challenging to capture their attention (Bauman 1992).

Media, he suggests, are not simply “the means by which meaning is communicated” (such as newspapers, radio, television, and the Internet) but also “sit atop layers of more fundamental media that have meaning but do not speak” (2). For Peters, these fundamental media include the elements, such as water, fire, sky, earth, and ether, which do not exist in pure form but are, instead, “drenched with human manipulation” (2). Without question, the senses equally qualify as fundamental media. They are basic *human* elements that are often taken for granted, and exist as “an ensemble of the natural and human craft” (9).²⁵ Sensory trademarks embody one instance of that ensemble, with the law, businesses and marketers functioning as brokers and intermediaries for particular sensory meanings. Recall Justice Breyer’s reading of the US *Lanham Act* and its definition of trademark as any “word, name, symbol or device.” Justice Breyer emphasized that a “symbol” or “device” is “almost anything at all that is capable of carrying meaning” (*Qualitex Co. v. Jacobson Products Co.* 1995, 162)—an observation remarkably like Peters’ understanding of media as “containers of possibility” that also function to “communicate meaning” (Peters 2015, 2).

Such “containers of possibility” are channelled in very precise directions when it comes to sensory trademarks. The trademarked smell of Play-Doh, recall, comprises “the scent of a sweet, slightly musky, vanilla fragrance, with slight overtones of cherry, combined with the smell of a salted, wheat-based dough”²⁶: it is difficult to imagine a more precise description of the smell of a toy modeling compound. Understanding the senses as media, as ensembles of the natural and human craft, proves useful here because it encourages consideration of the *layered reality of sensory trademarks*—particular sensory experiences are contextualized, channelled and “taught” to the public, so as to link particular sensations with precise, albeit artificially constructed, origins. In marketing and legal circles, this is known as “look-for advertising” (Stockell and Lyapis 2017, 36; Donahue 2014b, para 14), promotion that uses the sensory mark in question and also teaches consumers to look for it as an indicator of source. As such, Deutsche Telekom AG Co. subsidiary T-Mobile, which owns trademark rights to magenta for its wireless telecommunication services, was able to ban a competitor from using a shade of purple in its marketing and branding efforts. Central to its favourable ruling was the billions of dollars T-Mobile spent on “look-for advertising,” which not only included the magenta tinting all of its advertisements, but also embraced T-Mobile’s sponsored promotional events, such as “Vote Magenta” on Election Day, “Magenta Saturday” before Black Friday, and rolling out a magenta carpet at the 2011 NBA All-Star game (Donahue 2014b). Similarly, in what might be better described as “smell-for advertising,” in its quest to register Play-Doh’s scent mark, Hasbro specifically drew attention to its \$220 million in advertising expenditures globally since 2004, and to the \$77 million paid promoting Play-Doh to US consumers between 2004 and 2016 (Hasbro, Inc. 2017, 6). Hasbro noted that “all Play-Doh modeling compound

²⁵ That the senses are cultural constructions is well documented (see Classen 1993, 1998, 2007, 2012; Howes 2003, 2005, 2017; Howes and Classen, 2013).

²⁶ See the United States Patent and Trademark Office (USPTO) registration No. 87335817 (Principal Register).

sold in the United States bears the same scent, so that all advertising of the product in the United States necessarily promotes the scented compound” (9). Asserting that “its unique scent is exclusive within the marketplace” (4), the company also made reference to the many promotional campaigns featuring the scent over the years, including the 2012–2013 *Stop and Smell the Play-Doh* campaign (9).

Sensory Capitalism

The multi-million or multi-billion dollar price tags in these “look-for” advertising examples bring us to a key argument about sensory trademarks as media/containers of possibility; namely, that they need to be understood in terms of *monetization* and what I would call *sensory capitalism*. While critical scholars often decry the ever-expanding vista of intellectual property as a problem of *propertization* (see Rose 2003; Elliott 2003; Moore 2003; Lessig 2005, 116–73; Beebe 2010), I suggest that *monetization* reorients the focus in important ways. But before discussing this element of sensory capitalism, it seems necessary to acknowledge—albeit in an acutely limited fashion—the variety of “capitalisms” emerging in critical and popular scholarship in order to better situate sensory capitalism. There are the standard late capitalism, post-capitalism, welfare capitalism and global capitalism, but also, and more recently, informational capitalism (Castells 2000; Fuchs 2010), digital capitalism (Mosco 2009, 2018; Betancourt 2010), cognitive capitalism (Moulier Boutang 2011), affect capitalism (Arvidsson and Colleoni 2012; Massumi 2015), surveillance capitalism (Zuboff 2015), and platform capitalism (Srnicek 2017).²⁷ All of these recently coined “capitalisms” share common themes, including how capitalism has changed in a post-industrial economy (and its implications for the capitalist mode of production) and how knowledge/information/data have emerged as principal resources to be extracted, processed and sold for profit. Significantly, all of these “capitalisms” track elements of monetization,²⁸ be it the monetization of user-generated content on social media platforms (Fuchs 2010), the monetization of affect (or affective investments) in brand building and financial markets (Arvidsson and Colleoni 2012)²⁹ or the commodified digital infrastructures that connect groups in platform capitalism (Srnicek 2017). As Shoshana Zuboff (2015) explains of surveillance capitalism, reality itself becomes “subjugated to commodification and monetization and reborn as behavior” (85). The upshot of this is, for her, a world of the Big Other, “a ubiquitous networked institutional regime that records, modifies, and commodifies everyday experience from toasters to bodies,

²⁷ There is also disaster capitalism (Klein 2007; Loewenstein 2015), but it has a different orientation than informational capitalism, digital capitalism, affect capitalism, surveillance capitalism, platform capitalism, etc.

²⁸ While not all of the authors use that precise term, the concept is still present.

²⁹ Arvidsson and Colleoni (2012) draw on Gilles Deleuze to define affect as “nonrepresentational thought” or something that “signifies the ‘mood’ of an act or a statement.” They observe that such affects were, until quite recently, considered private matters—only shared with primary networks, such as family, friends and the community—whereas public participation was, “at least ideally, understood to be affectively neutral” (144). However, “with social media, affective investments become increasingly objectified and public” and “acquire a public presence” by blogging, tweeting, and posting about brands, celebrities, etc. (144). These affective investments prove significant to the implicit valuation of the company and its “perceived capacity” to attract future investments (145).

communication to thought, all with a view to establishing new pathways to monetization and profit” (81).

Scholars of these recent “capitalisms” often emphasize that they are capturing something “new.”³⁰ However, I view sensory capitalism far more modestly (and recognize that it can exist as a subset of informational or affect capitalism). Sensory capitalism is here used to draw attention to the ways that the senses have become enmeshed in the broader *process* of monetization, and have also become monetized within a framework that recognizes the role of intellectual property as key. Stated differently, in sensory capitalism certain sensory experiences become reframed as monetizable assets and entangled in the system of intellectual property. I suggest there are three components of sensory capitalism to consider here—the *senses/sensory experiences*, *monetization*, and *intellectual property*—and each will be dealt with in turn.

First, the senses. I have argued, thus far, that (in sensory capitalism) specific senses and sensory experiences are treated as elemental media to be assembled into brand assets and source indicators. “Look for advertising” functions solely to train or educate consumers on how to “properly” decode particular sensory experiences. In cases where attempts to register a sensory element fail, such as General Mills’s nearly two-year quest to trademark Cheerios’ yellow box, the rejection typically pivots on the fact that consumers’ senses were not trained as desired. As the Trademark Trial and Appeal Board ruled in its 2017 rejection of General Mills’s trademark, yellow on a cereal box had not acquired enough distinctiveness in the eyes of consumers. Consumers were more likely to see yellow as “eye-catching ornamentation” than “an indicator of unique source” (Donahue 2017). Consumers, in short, did not see yellow and ‘think’ Cheerios or Cheerios by General Mills.

Monetization comprises the second component of sensory capitalism. As detailed in the section on the *Sense Experts* (see above), monetization implicitly underpins the current focus of marketing and legal “sense experts” on sensory branding. Of course, monetization can *explicitly* drive this focus as well. As New York-based law firm Hilfer Law affirms, marketers should consider the senses “to develop their intellectual property portfolios” for one core reason: “the power of the senses can translate into monetizable assets in the form of trademarks if a brand thinks proactively and creatively” (Hilfer Law 2013). These assets are understood not only in terms of driving sales, such as the one billion dollars in revenue Hasbro earned from US sales of Play-Doh between 2004 and 2016 (Hasbro, Inc. 2017, 6), but also in terms of the ability to engage and attract followers/customers. For instance, the smell of Play Doh—*something that was once simply part of the product but is now protected as an asset in its own right*—arguably factors in what Arvidsson and Colleoni (2012) call “affective investments,” a term used to capture the feelings and moods of an act or a statement (*or toward a brand*), which then “acquire a public presence”

³⁰ For example, Srnicek describes platform capitalism as a “new business model” pivoting on “the centrality of data” that “indicat[es] a wider shift in capitalism” (2017b, 254) and Zuboff defines surveillance capitalism as “a new market form that is a radically disembedded and extractive variant of information capitalism” (2015, 81).

via social media and the ubiquitous “blogs, tweets, and ... ‘social buttons’” characterizing contemporary society (144). Such affective investments are critical to the implicit valuation or “financial valuation” of the company because they contribute to the “perceived capacity of attracting future investments” (i.e., financial rent) (Arvidsson and Colleoni 2012, 144). Why does this apply to the smell of Play-Doh? As one of the largest publicly traded toy companies in the United States, Hasbro must constantly strive to attract shareholders. In its Response to Office Action³¹ for the Play-Doh scent mark, Hasbro specifically pointed to its 2,074,000 Facebook followers, 76,000 Instagram followers, and the 42,000 mentions of Play-Doh’s scent or smell made by “end users” on social media platforms between 2015 and 2017 (Hasbro, Inc. 2017, 7). Hasbro further documented the positive and overwhelming recognition of scented Play-Doh by “the media and the general purchasing public” (7), its volumes of “unsolicited and favorable press coverage” (7), and its “nostalgic” impact on adult consumers (5), who not only associate the scent with childhood but also, through their long association with the product/smell combination, “expect that goods sold under that scent will be of the high level of quality consistent among Play-Doh products” (1). Establishing this positive public profile of Play-Doh’s smell—synonymous with childhood, no less—is one way Hasbro seeks to demonstrate affective investment in the brand.

Finally, *intellectual property* (IP) such as trademark law works to legitimate the sensory meanings granted and, importantly, to affirm this legal pathway as significant to our current sensory world. Intellectual property is central to understanding the current workings of capitalism, even though it tends to be overlooked (or given cursory or vague treatment) in current theorizations of capitalism (Zukerfeld 2017). Zukerfeld (2017) makes a strong case for recognizing that “intellectual property institutions are no longer supporting actors, but protagonists in the capitalist theatre” (244). The centrality of IP can be witnessed in its expansion (in terms of laws, duration of protection, and what IP guards), “which now undergird almost all sectors of the economy” (255). This IP expansion, as we have seen, includes the recognition, endorsement, and policing of sensory marks.

Summing up the Sensorium[®]: Meaning and the Mass

This article has traced the legal, marketing, and business consideration of the senses, revealing a long history of sensory engagement between these players. Marketing experts and trademark lawyers who laud the (so-called) new, “out of the box” thinking when it comes to brand owners’ use of the senses fail to recognize that neither sensory marketing nor attempts to trademark sensory marks are new. What is new is the heightened recognition of the senses by the law,³² alongside the need to consider the senses as *media* and in terms of *monetization*.

³¹ After a trademark application has been filed, a USPTO examining attorney will review the application. The examining attorney will issue an Office Action if there are issues with the application, including questions needing clarification or further requirements that need to be met. This gives the registrant the chance to address or correct any issues prior to a ruling being made.

³² In terms of broadly interpreting what can constitute a valid trademark in the case of the United States, or explicitly deeming colour, sound, scent, taste, and texture valid trademarks in the case of Canada.

Shifting the focus to think of senses themselves as media allows us to view them as fundamental to our bodies but subject to brokers, intermediaries, and enforcers (in the form of businesses, marketers, and the law) that create and channel particular sensory meanings. Viewing the senses as *media* is particularly appropriate in the present climate because it captures scent, colour, sound, taste, and touch, as well as the *promotional media* used to establish the sensory meanings that businesses seek to trademark, and the *social media* and *mainstream media* relied upon to demonstrate and reinforce that trademark's meaning, affective investments, and public presence. Moreover, I have argued that sensory capitalism captures a move towards treating the sensory components of products (or product marketing) as monetizable assets. *Monetization*, not *proptertization*, I suggest, is the appropriate lens here and I would like to make clear why. Certainly, one could argue that monetization has always been an integral component of proptertization: IP is typically sought as a way to monetize property-like assets. But the concept of *proptertization*, in terms of its primary focus, is about creating boundaries and fences. Indeed, the literature critical of proptertization highlights this, pointing to the problematic “enclosure of the commons” and chiding the “world of rapacious, state-aided ‘privatization’” created by expanding IP rights (Boyle 2003, 34). Such critiques focus on the dangers—to innovation, society, and the public good—of this enclosure and the various problems generated by creating boundaries and blocking “access” (Boyle 2003; also see Runge and Defrancesco 2006; Angell 2008). In contrast, the concept of *monetization* places explicit attention on how IP can translate into monetizable assets. The conceptual focus is not on creating *borders* around intellectual “property” but rather on how one might exploit all possible elements of a brand/service to a financial end. Central to this is how a company's financial investment in creating precise associations in the minds of consumers (through promotional campaigns, effective social media pick up, and so on) can be leveraged as affective investments that not only contribute to present day sales but, as detailed above, also contribute to the perceived ability of the company to attract investments in the future. With *proptertization*, the discussion pivots on creating fences and barring access by competitors; with *monetization* the discussion is about communicating broadly and aiming for pick up (and redistribution of the corporate message) by consumers.

In many respects, the monetization of the senses in terms of sensory trademarks mirrors other arenas in our culture where personal data and aspects of our body are being monetized.³³ With sensory capitalism, however, collecting personal “data” or individual sense experiences is not the goal. Rather the intent is to establish a type of mass sensorium, whereby consumers universally associate a sensory mark with a particular source or origin of goods. Of course, the success of this pivots on training people to properly decode particular sense experiences, on taking an individual sensation and transforming it into a type of mediated affect that is shared.

³³ This would include, for example corporations tracking user behaviour online (personal data) or tracking data from fitness trackers, apple watches, etc. (bodily tracking). Here, corporations take your personal data and use it to market back to you: essentially, with Facebook, Google, FitBit and Apple you are the product (or, more precisely, your personal data is the product).

Or so the logic goes. Consider Play-Doh's scent mark: according to Hasbro, the smell not only signals its Play-Doh products but also unites consumers in visions of childhood itself. Now *that's* a grandiose vision for the scent of a toy modeling compound.

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