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Using linguistic analysis to go below the surface in trademark disputes

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Abstract: The notions of same or different are ubiquitous in trademark disputes. At issue is the likelihood of confusion between marks in the mind of the "average consumer." The test for confusion rests on establishing their degree of resemblance in terms of "sound, appearance and ideas suggested." Evidence adduced by forensic linguists typically centers on whether the marks contain the same word, share the same sounds, letters, and dictionary meaning, or share the same number of phones, phonemes, or syllables. But since the features appealed to are typically surface-level, and thus ostensibly also available to the layperson, the judge may decide that expert assistance is superfluous. I argue that reliance on such features to the exclusion of underlying linguistic structure may lead to misleading results. Drawing on various linguistic processes, I present several Canadian trademark cases in which I served as expert witness to demonstrate that different words (or collocations thereof) may in fact be instantiations of the same structure, while superficially like ones may be involved in entirely different constructions. The results of these analyses make a strong case for going beneath the surface in determining questions of same or different.

Keywords: trademark; confusion; distinctiveness; descriptiveness; expert testimony, linguistic analysis

1 Introduction

The popular characterization of a trademark as "language that one owns" (Butters, 2020) is fundamentally at odds with the linguist's conception of language as a human faculty, the property of all speakers. How, then, could one go about "owning" it? By applying for a trademark. Indeed, any "sign or combination of signs" (e.g., Canadian Intellectual Property Office, 2022) should be eligible for trademark status, so long as it can be demonstrated to "distinguish the goods or services of one person or organization from those of others" in the marketplace. Because a trademark "gives you legal title to it the way a deed gives you title to a piece of real estate," an applicant who succeeds in registering one thus gains "the whole right to use the mark" (in this sense owning it; Canadian Intellectual Property Office, 2022), and this (domain-specific) right is protected under law. One crucial exception involves words that are descriptive. The *Trademarks Act* (1985) stipulates that a mark cannot be registered if it simply describes the wares or services sold under the mark:

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> […] a trademark is registrable if it is not, whether depicted, written or sounded, either clearly descriptive or deceptively misdescriptive in the English or French language of the character or quality of the wares or services in association with which it is used or proposed to be used […]. (*Trademarks Act* 1985, section 12, 1, b)

This ostensibly prevents one company from monopolizing a word that everyone should have the right to use. An important consideration in determining whether a mark qualifies as descriptive resides in the goods with which it is associated. Thus APPLE would be rejected as a mark for the fruit, but—as is by now plainly evident—fully acceptable when associated with computers, telephones, and tablets. This kind of mismatch qualifies the APPLE mark as "arbitrary," which in turn renders it distinctive, and distinctiveness is what enables a trademark to fulfill its mission.

These considerations seem straightforward enough. What then accounts for the plethora of trademark disputes? In the typical scenario, one party, sometimes called the senior mark, attempts to protect its linguistic property from infringement by a junior mark that it considers to be similar or identical. Establishing identity would seem elementary, but what constitutes similarity? As Shuy observed (1), the tools of linguistics should enable us to make short shrift of this question.

> (1) […] issues of phonology, morphology, syntax, lexicography, semantics, pragmatics, and discourse […] are likely to be relevant in a trademark case. (Shuy, 2002, p. 182)

But issues that are straightforwardly amenable to resolution via linguistic analysis frequently lend themselves to a good deal of debate (often linguistically uninformed). In this article, I present several Canadian trademark cases in which I served as expert witness to demonstrate the utility of (sometimes granular) linguistic analysis to resolve trademark disputes. Although the illustrations below are drawn from Canadian trademark law, the message—that different words (or collocations thereof) may in fact be instantiations of the same structure, while superficially like ones may be involved in entirely different constructions—is widely applicable.

2 *Masterpiece v. Alavida*

The landmark Supreme Court of Canada ruling *Masterpiece Inc. v. Alavida Lifestyles Inc.* (2011) (hereafter *Masterpiece v. Alavida*), has not only come to enshrine the guiding principles in trademark disputes, but has also introduced evidentiary criteria that are of particular relevance to expert linguist testimony.

In this case, Masterpiece Inc., which used the senior mark MASTERPIECE THE ART OF LIVING for its high-end retirement homes, opposed Alavida's application to register MASTERPIECE LIVING for a similar purpose. The issue involved was confusion: would the average consumer think that both marks are associated with the same company? The trial judge ruled in the negative, the decision was upheld on appeal, then the appeal was appealed, and the case eventually made it to the Supreme Court (2011 SCC 27). Both sides produced expert witnesses, but their testimony was dismissed as unhelpful, distracting, and a waste of time and money. Alavida's expert in particular was called out for appealing to "morphology, semantics, rules of grammar and conventions of expression" (para. 81) to support his opinion that there was little likelihood of confusion. Supreme Court Justice Rothstein reported "considerable difficulty understanding how this expert reached these conclusions" (para. 82), alleging that no explanation was offered. To him, the opposite conclusion seemed "more intuitively likely" (para. 82). For the reasons reproduced in (2), he opined that there was likelihood of confusion. As it turns out, he was right, but not for the reasons he adduced.

> (2) The distinctive word is "Masterpiece" in both cases, not "Living". "Masterpiece" is the first word in each trade-mark. The word "Living" appears in both the Masterpiece Inc. and Alavida trade-marks. The idea of the trade-marks is the same. (*Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011, para. 82)[2]

From the perspective of a linguist, two important issues emerge from this case. One was a clarification, and to some extent, consecration, of the test for confusion. As part of the backlash against the linguistic expertise, it was deemed improper to engage in granular analysis of portions of the mark, as was allegedly done in *Masterpiece v. Alavida* by an expert (who, parenthetically, is not even a linguist). Instead, the test to be applied is:

> […] a matter of *first impression* in the mind of a casual consumer somewhat in a hurry who sees the [mark], at a time when he or she has no more than an imperfect recollection of the [prior] trade-marks, and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks. (Emphasis added, *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011, para. 40, citing *Clicquot Ponsardin v. Boutiques Cliquot Ltée*, 2006, para. 20)

Where does that first impression come from, and more important, how can we tap into it? As a linguist, I would contend that two crucial sources must be considered. One is general language use, something that sociolinguists are particularly well versed in apprehending, thanks to detailed analyses of corpora of spontaneous everyday speech. The other is linguistic *structure*, knowledge of which is shared by all speakers of a language, despite the fact that they are generally unaware of the (implicit) rules they are following. Uncovering that structure is the very stuff of the discipline of linguistics. So *Masterpiece v. Alavida* should have constituted an open invitation to linguists.

But the decision also calls the role of linguistic evidence into question, by virtue of its caution that in general, an expert should only be permitted to testify if the testimony is likely to be outside the experience, knowledge—and they should have added, *intuitions*—of the judge. Justice Rothstein worded this warning as follows:

> Where the "casual consumer" is not particularly knowledgeable and there is a resemblance between the marks, expert evidence that simply assesses that resemblance will not usually be necessary. *Judges should consider the marks at issue*, each as a whole, but having regard to the dominant or most striking or unique feature of the trade-mark, *using their own common sense*, to determine whether the casual consumer would be likely to be confused when first encountering the trade-mark. *In this case, Alavida's expert engaged in a discussion of morphology and semantics instead of considering the marks as a whole*. (Emphasis added, *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011, pp. 390–391)

Such equation of "common sense" with objective scientific evidence is a dangerous turn, since it is a well-documented fact that naïve speakers' intuitions about their own language use are generally wrong (e.g., Gibson & Fedorenko, 2013; Labov, 1975, 1996; Sampson, 2007). Their intuitions about the casual consumer's first impressions would be even more tenuous. And this is equally true of opinions about language proffered by people whose business is language, including trained linguists and lawyers. In what follows, I submit that matters to do with language structure

[2] Except where otherwise noted, the typographic conventions of the original sources are retained in citations.

and language use are generally not accessible to common sense, but rather emerge from technical linguistic analysis. Indeed, common sense, which necessarily draws on what is readily observable on the surface, often to the detriment of what lies below, is more often misleading than not. The following cases in which I served as expert will illustrate the role of linguistic analysis in elucidating the core trademark issues of descriptiveness, confusion, and distinctiveness.

3 Illustrations

3.1 Descriptiveness

At about the same time *Masterpiece v. Alavida* was playing out, I was contacted in connection with another dispute, whose conclusion regarding the utility of technical linguistic evidence was the opposite. In that case, Molson/Coors (*Molson Canada 2005/Coors Global Properties Inc. v. Drummond Brewing Company Ltd*, hereafter 2011 TMOB 43, 2011 TMOB 44, 2017 TMOB 78) opposed an application by Drummond to register the trademark BEER BEER for their wares. They claimed that the mark "was not distinctive, since it does not distinguish […] the Wares from the wares and/or services of others" (2011 TMOB 43/44, para. 8, section 7) and in fact is "clearly descriptive of the character or the quality of the Wares" (para. 3). There is no need for a trained linguist to license the conclusion that the word *beer* is clearly descriptive of the substance "beer," and as we know from basic trademark law, a descriptive mark cannot be registered. The trademark Drummond Brewing Company Ltd. sought to register, however, was not BEER but BEER BEER. In support of its application, it appealed to a precedent that *had* been duly registered: PIZZA PIZZA. In that case (Pizza Pizza Ltd. v. Registrar of Trade Marks, 1982), the expert opinion of a linguist convinced the Court that doubling the descriptive word *pizza* resulted in a coined or invented phrase with "no specific descriptive connotation" (1982, p. 204) or "assignable meaning" (1982, p. 203, citing Reich, 1981, para. 5). In reaching its decision, the Court cited the expert as opining that "[t]he expression 'pizza pizza' is not a linguistic construction that is part of normally acceptable adult spoken or written English" (1982, p. 203, citing Reich, 1981, para. 6). The judge further declared that "[t]he words 'pizza pizza' do not go together in a natural way" (1982, p. 203).

By the time I was called in to provide a counter-expertise in this case, it was plain to me—and eventually to the court as well—that far from having no assignable meaning, BEER BEER had a very specific and readily interpretable connotation. This was none other than an instantiation of a widespread process known to linguists as *contrastive reduplication*, whereby a part of speech or even a whole phrase is repeated to denote the real or prototypical instance of the copied element. So well-known was the phenomenon even then that several linguistic analyses of it had been published in peer-reviewed scientific journals (e.g., Ghomeshi et al., 2004; Horn, 1993). One team had even compiled a corpus of naturally occurring examples of this phenomenon observed in spontaneous speech (Ghomeshi et al., 2003). Analysis of that corpus revealed that pretty much any part of speech (nouns, verbs, adjectives, adverbs), and even whole phrases, could be reduplicated with the same effect. The following examples taken from this *Corpus of English Contrastive Focus Reduplications*,[3] where the reduplicated element is underlined, illustrate.

(3) Just because people think God's talking doesn't mean he's *talk*-*talking*$_{[\text{VERB}]}$.

(4) We're not *together*-*together*$_{[\text{ADVERB}]}$. We're just hanging out.

(5) I'll make the tuna salad, you make the *salad*-*salad*$_{[\text{NOUN}]}$.

[3] https://home.cc.umanitoba.ca/~krussll/redup-corpus.html

(6) They're obscenely rich by the world's standards; but not ***rich*-*rich***$_{[\text{ADJECTIVE}]}$; not New York City rich.

(7) I knew her. I mean, I didn't ***know her*-*know her***$_{[\text{VERB PHRASE}]}$. But I'd see her at parties and stuff.

Regardless of whether it involves a verb (as in (3)), an adverb (as in (4)), a noun (as in (5)), or some other part of speech, and independent of the actual word reduplicated, the interpretation is the same: contrastive reduplication refers to the real or prototypical instantiation of the item invoked. Thus God is not actually talking, we are not really "together" (as a couple), you bring the canonical (i.e., green) salad, etc. The evidence from language use thus suggests that the casual consumer would interpret BEER BEER as the 'real beer', as opposed to, say, 'light beer' or 'non-alcoholic beer'. The lexical identity of the word in question, whether *salad*, *rich*, or *beer*, is immaterial, invalidating the applicant's argument that no examples of use of the specific collocation BEER BEER could be found in "normal spoken or written English" (2011 TMOB 43/44, para. 40). Rather, the meaning of the collocation is derived from the process of reduplication itself, regardless of the word involved. This process does not alter the underlying meaning of the reduplicated word, as claimed by the applicant; on the contrary, it intensifies its meaning by describing a "real" or prototypical example of the referent. BEER BEER was thus deemed by the court to be clearly descriptive and accordingly denied registration. One outcome of this case was the ruling that common usage in the language does not constitute a criterion for descriptiveness, as can be seen in the following excerpt from the decision letter:

> I do not think that the applicable test to determine if a trade-mark is clearly descriptive is the fact that the trade-mark is commonly used in the English language. Dr. Poplack has demonstrated in her affidavit that repetition of a common word is a more common construction in the English language. It has been the subject of papers and it has a technical name namely, contrastive reduplication. As stated above, she opines that an average consumer confronted with the Mark would interpret the mark to mean "real beer" as opposed to a less prototypical beer. According to her, and there is no evidence to contradict her opinion, the repetition of the word "beer" intensifies the meaning of that word. For all these reasons I maintain the third ground of opposition. (2011 TMOB 43, paras. 40–41)

And this has now been cited as a precedent in at least six subsequent cases.[4]

Note that the judge also approved of the facts that the process had a name and scholars had published papers about it. Even more important as far as I'm concerned, it embraced the utility of expert evidence deriving from technical linguistic analysis, by recognizing that the meaning of the mark derives not from its surface components (i.e., the specific words involved) but from the underlying structure of reduplication. The following is reproduced from the judge's opinion:

> […] Dr. Poplack's affidavit meets the Mohan tests of necessity and relevance. In this regard, she is an expert in sociolinguistics, and the necessity of her testimony concerns the very meaning and effect of the particular grammatical construct which comprises the Mark, that

[4] *Lac Seul Airways, Ltd. v. Canadian Fly-In Fishing (Red Lake) Limited*, 2017 TMOB 79; *Real Foods For Real Kids Inc. v. Boaden Catering Ltd.*, 2019 TMOB 113; *Clover Leaf Seafoods Company and Bumble Bee Foods, LLC v. Jim Pattison Enterprises Ltd*, 2019 TMOB 139; *Conec Corporation v. Thomas & Betts International, LLC*, 2020 TMOB 54; *Weston Foods (Canada) Inc. v. Bimbo Bakeries USA, Inc*., 2021 TMOB 130; *Red Deer Driver Take Home & Delivery Ltd. v. DD Take Home Ltd*, 2022 TMOB 19.

> is, a contrasting reduplication. The evidence *informs and assists the trier of fact* in this case on how the consumer is going to react to the words "beer beer", and is distinguishable from the *Mövenpick, supra* case in my view, as the evidence shows that it is a recognized phenomenon as a specific type of linguistic construction. […] With respect to relevance, despite that the examples of [contrastive reduplication] provided in Dr. Poplack's evidence are in the context of conversation, the examples are merely intended to be illustrative to explain the phenomenon of contrasting reduplication. (Emphasis added, 2017 TMOB 78, paras. 96–97)

3.2 Confusion

Linguistic analysis can also be usefully marshalled to establish *confusion* between marks. An illustrative case involved application for the mark BELLPAL (2018, TMOB Application #1905386) in reference to a watch designed for seniors featuring a fall detection alarm and positioning system. Bell Canada (2021, Opposition #2021-02056) alleged likelihood of confusion with its own trademarks, which include, or are completely comprised of, the term BELL. In a previous case involving opposition to the mark BELLROY (*Bell Canada v. Bellroy Pty Ltd*, hereafter 2021 TMOB 108), the court ruled against Bell Canada. Among the reasons cited were BELLROY's "higher degree of inherent distinctiveness" (2021 TMOB 108, para. 41) when compared with BELL, as apparently inferred from the fact that BELLROY is neither a dictionary word nor a surname. For this reason, in the judge's opinion, the mark would likely be conceived as a "coined term" (para. 41), while BELL, on the other hand, would be interpreted as an object or a proper name (Alexander Graham Bell). BELLROY's status as a coined term was also implicated in the judge's finding that "the most striking element of the Applicant's mark is the term BELLROY as a whole" (para. 41), in contrast with the Opponent's, said not to "use marks comprised of the component BELL in combination with other word matter to form a unique, coined term" (para. 51). For these reasons, he concluded (para. 55) that the degree of resemblance is not "sufficiently high to give rise to a likelihood of confusion."

The logic applied to BELLROY should be equally relevant to BELLPAL. But linguistic analysis leads to the opposite conclusion, viz. that the average consumer would readily confuse the two marks. The test for confusion of the *Trademarks Act* specifies that

> The use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would likely lead to the inference that the goods and services associated with those trademarks are manufactured, sold or leased by the same person […]. (*Trademarks Act* 1985, section 6, 2)

The following considerations explain why this is exactly what the linguistic *structure* of the coinage suggests.

In the first instance, it is self-evident that the most striking (and indeed, the only) element of the opponent's mark is BELL. The first syllable of BELLPAL is not merely similar, but identical. That BELL is also the most striking element of BELLPAL derives from the typical *phonetic* rendition of two-syllable words like BELLPAL in the English language. Most such words are accented (or *stressed*) on the first syllable, as exemplified by *in*dex, *nap*kin, *pic*nic (where underlining indicates word stress). Instrumental phonetic research shows that stressed syllables are acoustically more *prominent* than unstressed syllables. Prominent syllables tend to be longer, louder, higher in pitch, and enunciated more clearly than their unstressed counterparts (e.g., Cooper & Zec, 2013). All of these characteristics render the stressed syllable more noticeable, or "striking," than its unstressed

counterparts. As a two-syllable noun, the ordinary native speaker of English would therefore pronounce the mark as ***Bellpal***. Notably, other two-syllable (and even three-syllable) words beginning with the noun *bell* already exist in the English language. These include ***bell**boy*, ***bell**pull*, ***bell**hop*, ***bell**bird*, ***bell**wort*, ***bell**man*. (Three-syllable words include ***bell**hanger*, ***bell**foundry*, ***bell**wether*, ***bell**flower*.) All of them are stressed on the first syllable. On phonetic grounds, therefore, the most striking element of each mark is clearly BELL.

Morphological and semantic analysis further reveal that, above and beyond simple phonetic and visual resemblance, the idea suggested by the juxtaposition of *bell* and *pal* is that *pal* is associated in some capacity with *bell*. To coin a "successful" or felicitous novel term, such as BELLPAL, the word-formation rules of the language in which it is being created must be followed. One very productive method of coining new words in English is compounding: the juxtaposition of two, or occasionally, more, words so as to function as a single unit. English compounds commonly take the form of NOUN + NOUN (as in $dog_{[NOUN]}$ + $house_{[NOUN]}$ or $bell_{[NOUN]}$ + $pal_{[NOUN]}$). Parenthetically, compounds also tend to be stressed on the first syllable, enhancing the likelihood of the prominent phonetic realization of BELL alluded to above.

The English language features several types of compounds. Of interest here are *endocentric compounds*, of which BELLPAL is one. These comprise a head, which determines the category of the compound (here, *pal*, a noun), and a modifier, which specifies the type of head (here BELL).

In terms of meaning, the specific relationship between modifier and head may differ somewhat according to compound. For example, *dry cleaning* refers to 'a type of cleaning effected without water', *doghouse* refers to 'a house intended for a dog', *wallpaper* refers to 'paper for the wall', *beehive* refers to 'a hive belonging to bees', and so on. Regardless of these nuances, the semantic effect of compounding is to convey a special type or subcase of the head. This indicates an *association* between modifier and head. In the case of BELLPAL, the prototypical interpretation would be 'a pal of BELL'.

Evidence from semantics will clarify. BELLPAL also qualifies as a *genitive*, or *possessive*, construction. This type of grammatical collocation is used to express a relationship between two nouns, such as *bell* and *pal*. The relationship involved is typically one of *possession* of one noun by the other, or *attribution* of some property of one noun to the other. As with compounds more generally, a genitive construction involves a head, here *pal*, and a modifier (BELL). The modifier expresses a *property* of the head. This explains why the likely reading of BELLPAL would be 'a pal of, or belonging to, BELL'.

Consider now the semantic reading of the word *pal*. Dictionary definitions of *pal* include 'friend', 'comrade', 'mate' (Merriam-Webster Online Dictionary, 2024). These terms imply *reciprocity*: One cannot be a pal in isolation. Rather, the presupposition is that a pal is in a (friendly) *association* with another person or entity. This is bolstered by the fact that *pal* usually appears either 1) in unambiguously *possessive* constructions (e.g., ***my** pal*, *the kid**'s** pal*; featuring the English genitive markers ***my*** and ***'s***), or 2) reciprocal constructions (e.g., ***They** were never great pals*). These facts served to bolster my opinion that the ordinary default interpretations of BELLPAL would be 'a pal of BELL', 'a pal belonging to BELL', or—a logical inference in the context of business offerings—'a pal manufactured by BELL'. All of these evoke an *association* of *pal* with BELL, and by extension, of BELLPAL with BELL.

BELLPAL can further be classified an *eponym*, defined as a name of an entity (usually, but not always, a disease, disorder, or condition) named after a person. Eponyms are a longstanding

tradition in Western medicine, and a great number of them are in common parlance in English, such as *Tay Sachs disease*, *Tourette syndrome*, and *Lisfranc fracture*, to name but a very few. The disease may be named after the doctor who identified it, the researcher who reported it, the patient who suffered it, or even a fictional character who showed symptoms of it. In every case—as in all of the previous examples considered—the relationship between the head and the modifier is one of *association*, the very same relationship we observe between BELL and *pal* in BELLPAL.

Regardless of how one chooses to analyze the coinage, the results converge on the crucial finding that the prototypical interpretation of BELLPAL is that the "pal," whoever or whatever it may be, is associated with, or possessed by, BELL. This interpretation derives from the underlying linguistic structure of BELLPAL, which in turn is part of the internalized mental grammar of the English language universal to every native speaker of English. That structure explains *why* the average anglophone Canadian who sees BELLPAL would infer, upon first impression, that it is associated with, or possessed by, BELL. BELLPAL withdrew its application for trademark registration.

3.3 Distinctiveness

Structural linguistic analysis has also proved successful in determining *distinctiveness*, again in contrast to the claims of *Masterpiece v. Alavida*. In the case reviewed in this section, Montréal Auto Prix Inc. (MAP), a used car dealership, opposed 168360 Canada Inc. (GenX)'s use of the mark MONTREAL AUTO CRÉDIT (MAC) for the same purpose (*Montréal Auto Prix Inc. v. 168360 Canada Inc.*; hereafter 2022 QCCS 2036). MAC produced a linguistics expert who opined that the marks differed enough to avoid any confusion in the minds of consumers, alleging that any apparent resemblance was outweighed by linguistic aspects well-known to any francophone (Ostiguy, 2021, p. 1, summarized in 2022 QCCS 2036, para. 63, section 4). He did concede that the first two elements of the marks (i.e., MONTREAL and AUTO) are identical (Ostiguy, 2021, p. 2), but homed in on the third: PRIX vs. CRÉDIT. Among the differences between these two words he cited were the following: PRIX is made up of four letters in contrast to six for CRÉDIT, PRIX has only one syllable in contrast to two for CRÉDIT, and the words share only two sounds: those corresponding to the letters <r> and <i> (Ostiguy, 2021, pp. 2–3). Moreover, according to him, the meaning of the word *prix* ('price') differs from that of *crédit* (Ostiguy, 2021, pp. 1–2). All of this is of course true, and no special linguistic training is required to arrive at this conclusion. But would the "average consumer somewhat in a hurry who sees the two marks" (2011 TMOB 43, para. 40) targeted in *Masterpiece v. Alavida* count and compare their letters and syllables in order to decide whether the dealerships are run by the same company? I endorse Justice Rothstein's earlier suspicion that this would be highly doubtful. In fact, my research led me to conclude the diametric opposite—that the similarities between the marks were so extensive that likelihood of confusion was great. Linguistic analysis revealed that the most compelling of these similarities derives from underlying linguistic structure.

The facts are as follows: Both marks are instantiations of the same syntactic structure, a multi-word phrase known as a compound. As in English, French compounds are typically formed from two nouns: *café*$_{[NOUN]}$-*filtre*$_{[NOUN]}$ ('drip coffee'), *oiseau*$_{[NOUN]}$-*mouche*$_{[NOUN]}$ ('hummingbird'), *appareil*$_{[NOUN]}$ *photo*$_{[NOUN]}$ ('camera'). MAP, however, has three: MONTRÉAL$_{[NOUN]}$-AUTO$_{[NOUN]}$-PRIX$_{[NOUN]}$, making it *distinctive* in this regard, and this unusual feature is echoed in MAC (MONTREAL$_{[NOUN]}$-AUTO$_{[NOUN]}$-CRÉDIT$_{[NOUN]}$) as well.

Also as in English, most French compounds have a HEAD, which determines the semantic category of the compound, and a modifier, which describes some aspect of it. This is what tells us

that *filtre* is a type of coffee, that *oiseau-mouche* is a bird and not a fly, and that *photo* in *appareil photo* describes a type of device. Importantly, knowledge of how compounds are organized, and in particular, that the head of the compound is the main marker of meaning, forms part of every speaker's implicit grammatical knowledge. Ample experimental research (e.g., Bourque, 2014, pp. 15–24) confirms that the vast majority of speakers are able to correctly identify the head of a compound, even if they are unlikely to be able to articulate the principles underlying their formation.

Now, as it happens, in the French language, the head of a compound is almost always (87%; Bourque, 2014, p. 95) found on the left of the collocation. Strikingly, in neither MAP nor MAC is this the case. Instead, MAP employs the non-canonical word order [MODIFIER]-[HEAD]-[MODIFIER]: MONTRÉAL[MOD]-AUTO[HEAD]-PRIX[MOD], contributing to the distinctiveness of the mark. In this context, it is most telling that MAC features the very same non-canonical structure: MONTREAL[MOD]-AUTO[HEAD]-CRÉDIT[MOD]. It has been argued in the linguistic literature that the atypical nature of compounds with non-canonical heads may affect their interpretation. Bourque (2014) suggests the following procedure: the initial interpretation of a non-canonical compound will be based on the *expected* (here, the *leftmost*) head, and will only be reanalyzed if this interpretation is deemed impossible or unlikely. Thus, in interpreting MAP, the casual consumer would look first to MONTRÉAL (canonical leftmost head), and then to PRIX (non-canonical rightmost head), and finding both unlikely as business names, would then appeal to *pragmatic* (real-world) knowledge to home in on AUTO as the head, and thus infer that the business in question has to do with automobiles. The additional processing time required to correctly interpret the sequence MAP adds even further to its inherent distinctiveness, and further contributes to the likelihood that the structurally identical sequence MAC will be confused with it by the casual consumer. This is regardless of the single difference in the final word (CRÉDIT vs. PRIX), to which we return below. Where the semantic relations among constituents of a compound are not overtly expressed (as with MAP and MAC), in order to make sense of the compound, those relations must be *computed*, whether via head-modifier identification, as discussed above, or through some other means. This turns out to be much more difficult when *three* constituents are involved, as in the case of both MAP and MAC, than when there are only two.

In addition, the disposition of the constituents of MAP contravenes the syntax of French. In French, most adjectival modifiers follow the head: *être*[HEAD] *humain*[MOD] ('human being'). The *Régistraire des Entreprises du gouvernement de Québec* explicitly qualifies the opposite order (MOD-HEAD; *humain*[MOD] *être*[HEAD]) as "non-conforme," specifying that it "respecte les règles de la syntaxe anglaise et non celles de la syntaxe française" 'respects the rules of English syntax and not those of French syntax' (n.d., section 4). The non-conformity of the word order of MONTRÉAL[MOD]-AUTO[HEAD]-PRIX[MOD] is yet another source of the distinctiveness of MAP[5]. The fact that MAC features the identical non-canonical word order (MONTREAL[MOD]-AUTO[HEAD]-CRÉDIT[MOD]) could hardly be coincidental. This substantially enhances the likelihood that they will be associated in the mind of the casual consumer.

What of the third elements of the compound, PRIX and CRÉDIT, which, according to the applicant, are dissimilar enough to rule out any possibility of confusion? That the two words differ in appearance is self-evident. Semantically, however, they are not *opposing* or *contrasting*

[5] Precisely how an anglophone consumer might interpret these marks is unclear, given that English is a *right*-headed compound language. But the likelihood of confusion would be similar, since here, too, both collocations are non-standard, and in the same way.

designations of some entity, but instead belong to the same narrow meaning domain: that of terms involved in exchanging money for goods. PRIX refers to the amount of money to be paid, CRÉDIT to the modality of payment (deferred). In pragmatic terms, CRÉDIT is the most common, if not default, payment option in vehicle sales, and it is not unusual for it to be offered by car dealers, including MAP itself, as explicitly advertised in their publicity. This strong real-world association of credit with vehicle sales (in contrast to food sales, for example, where it would be exceptional), suggests that the average consumer could readily infer that MAC is associated with MAP, in its credit-granting capacity.

Summarizing, in insisting that MAP and MAC differ enough to rule out any possibility of confusion, the applicant's expert conceded only that the marks bear some resemblance by virtue of the identity of their first two elements, MONTREAL and AUTO. Analysis of their linguistic structure, however, reveals that the resemblance is in fact far greater and far deeper than the simple sharing of the two words. Instead, it confirms that the way in which the collocation MAP is formed is distinctive in and of itself. It not only features more elements than are typical in French compounds, but more importantly, both the word order and the grammatical relations among those elements are non-canonical. These facts increase the computation time required for the average consumer to decode the mark, and in so doing render MAP particularly salient and distinctive. The non-canonical linguistic structure adopted by MAC is identical to that of MAP. The number of words, the grammatical category of the words, the order of the words, and the semantic relations among the words are all identical. The lexical identity of the first two elements is the same. The sole surface difference involves two words which, by virtue of belonging to the same semantic domain, could in fact lead to confusion. These facts underlay my opinion that MAC represented a reproduction of the collocation MAP, crucially *including its distinctive semantic and syntactic anomalies*. It is the very unusual structural properties of MAP, all of which are shared by MAC, that make it so unlikely that the applicant could have coined the mark MAC *ex nihilo*.

MAP won this case, a victory I take as another validation of the facts of linguistic *structure* to determine questions core to trademark eligibility. Importantly, The Supreme Court of Quebec specifically invoked *Masterpiece Inc. v. Alavida* to rule that the expert opinions brought by MAC (which, as detailed above, derived largely from surface-level observations) "détournent la réelle question en litige que le Tribunal doit trancher" ('detract from the real question under litigation') and "s'avèrent peu utiles au débat" ('are of little benefit to the debate') (2022 QCCS 2036, para. 98), in effect forcing MAP to furnish a counter-expertise.

4 Apologia

The above examples are but a few of those for which linguistic expertise "informs and assists the trier of fact" (2017 TMOB 78, paras. 96–97) on what the first impression of the casual consumer is likely to be, and in so doing contributes key evidence to resolving trademark disputes. Each appeals to linguistic processes *underlying* the formation of contentious marks, admittedly invoking seemingly arcane phenomena like compounding, nominal modification, word order, and stress patterns, among others. The analyses presented may look complicated on their face, and may even appear reminiscent of the type of granular scrutiny specifically dismissed by *Masterpiece v. Alavida*. There is no question that technical linguistic training is required to carry them out. But the crucial point here is that they cannot be confused with the computations casual consumers engage in upon forming that all-important first impression. On the contrary! Speakers have no need to engage in granular linguistic analysis when producing or apprehending language, because they are *already cognizant* of the tacit rules explicated above. Those rules are part of the implicit

linguistic knowledge, known to linguists as the *mental grammar*, with which every speaker is endowed. The role of the expert here is simply to make explicit just what the casual consumer is appealing to when they make those judgments "somewhat in a hurry." In this way, the linguist acts as "semantic tour guide" (Solan, 1998), elucidating for the trier of fact how shared intuitions about language use derive from the structure of the human language faculty, and exposing potential interpretations that may have escaped notice. Taken together, the above illustrations, and others like them, make a strong case for capitalizing on linguistic expertise to go beneath the surface in determining questions of same or different.

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