

## #Trademarks Twitter Addresses a Gap in the Literature

Ed Timberlake

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## #TRADEMARKS TWITTER ADDRESSES A GAP IN THE LITERATURE

ED TIMBERLAKE

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# #TRADEMARKS TWITTER ADDRESSES A GAP IN THE LITERATURE

ED TIMBERLAKE\*

ABSTRACT

*Twitter can be a great place to talk about trademarks.*

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## I. INTRODUCTION

Attorneys can be slow. Slow to return calls, slow to embrace change. We tend to be cautious, sometimes to a fault. With this in mind, it may come as no surprise that many legal professionals (and future legal professionals) remain wary of social media, as if the prospect of human interaction (through social media or otherwise) presents little more a series of potential ethical pitfalls.

Particularly within the context of Twitter, attorneys who have yet to create a Twitter account may be surprised to find just how well-suited it is to explore a deep interest in trademarks, and how helpful it can be for lawyers generally.

Before Twitter, trademark lawyers typically talked about trademark cases when one company was suing another company for infringement. Once Twitter became available (and a sufficient number of attorneys joined) it became easier to

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engage in conversations, often with people all over the country and around the world, about trademarks matters other than simply who's suing whom.

## II. TRADEMARKS (IN THE WORLD, NOT JUST AT THE USPTO)

Lawyers are accustomed to discussing trademarks that have led to lawsuits (and appeals), but are often less accustomed to discussing trademarks that have not resulted in infringement actions, or even registrations. It seems safe to say that there are more trademarks (which is to say, symbols indicating source) in the world than there are trademarks which are the subject of lawsuits, and more lawsuits at the trial level than appeals. Similarly, it seems probable that there are more things functioning in the world as trademarks than there are registered trademarks. Therefore, to restrict attention predominantly to registered marks, primarily those that have been subject to litigation, and disproportionately those that have been appealed (often more than once), is to imagine that the problems of the 1% are somehow representative of the remaining 99%. The wide availability of the Twitter app (both to people in and outside the legal field), and, perhaps more importantly, the fact that the app could be accessed from one's phone, made it terribly convenient to document trademarks *in situ* and to share such documentation with (potentially many) others immediately.

## III. TRADEMARK FILINGS (NOT JUST TRADEMARK REGISTRATIONS)

Another area receiving short shrift before Twitter were trademark filings at the United States Patent & Trademark Office (USPTO). At a time when even registered trademarks received little attention until somebody filed a lawsuit, other filings such as Office Actions and applications for registration of trademarks were unlikely to receive any attention at all. In fact, the general consensus at the time seemed to be (and still may be) that, because a single application for registration or refusal of registration had no individual precedential value, it basically amounted to nothing until a registration was issued, a lawsuit for infringement completed, and an appeal filed.

There is a great deal practitioners can learn from filings at the USPTO, almost all of which are freely available online and easily linkable. To begin with, the goal for a well-rounded education in trademarks (hopefully) is not primarily to teach law students how to represent big companies so they can sue other big companies for infringement over often not terribly distinctive trademarks (and, if they're lucky, appeal). Since trademark law is, in a sense, primarily a consumer protection scheme, students should be taught how to counsel businesses to stand apart more dramatically from other businesses (in keeping with the goal of avoiding confusion),<sup>1</sup> rather than continually pushing a somewhat simple-minded "protect," "police," "own" agenda, which often serves to enrich lawyers while failing to add significant value to a business's worth. Practitioners might also improve conditions for both lawyers and businesses by emphasizing the importance of thinking strategically about trademarks, and trademark registrations, before expensive trouble arises. An awareness of what kinds of applications for registration are being

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1. 15 U.S.C. § 1114(1)(a) (2012).

filed, and what kinds of Office Actions are being issued, often far before any appeal, can provide valuable insights on both of these fronts.

#### IV. VISUALS

It is easy to include visuals on Twitter. Since the Lanham Act defines the subject matter of trademarks as “symbols,”<sup>2</sup> and symbols in this sense can mean almost anything, it is perhaps not surprising that a great many trademarks contain visual elements. For various reasons, discussions of even entirely non-verbal trademarks in our traditional legal media (e.g., court cases, treatises, law review articles) tend to be heavily text-centric, often with a single, seemingly perfunctory, frequently black-and-white image of the mark at issue appended at the end. One major benefit of Twitter is the ability to include a significant amount of visual material with each tweet without exhausting one’s character allotment. No text is required. Frequently, an image, a link, and a minimal amount of text will be sufficient to start a lively trademarks conversation. For instance:



Figure 1: From U.S. Federal Trademark Registration 5,529,824<sup>3</sup>

2. 15 U.S.C. § 1127 (2012).

3. Ed Timberlake (@TimberlakeLaw), TWITTER (Mar. 18, 2019, 2:47 PM), <https://twitter.com/TimberlakeLaw/status/1107760546626109442>.

Differentiation is at the core of what trademarks do,<sup>4</sup> yet many people thinking deeply about trademarks have had little opportunity to practice looking, or to develop a framework for analyzing, or a vocabulary for discussing visuals. Twitter offers the ability to place visuals at the front and center of any trademarks discussion. It is axiomatic to observe that the likelihood of confusion analysis requires more than a side-by-side comparison of the marks at issue.<sup>5</sup> While this may be true, it can still be a great place to start, and Twitter facilitates, and even improves, such comparisons:



**Trademarks Are Magic** @TimberlakeLaw · 6 May 2018

Me:

Obviously, likelihood of confusion analysis requires more than **side-by-side** comparison

Also Me:

[#trademarks](#)



*Figure 2: Comparing beer label (left) and federally registered trademark (right)*<sup>6</sup>

#### V. LINKING

Also important is the fact that Twitter makes it easy to include links. The beneficial effects of connecting statements directly to the material being discussed—especially in the legal context—can hardly be overstated. If one wishes to discuss a particular statute, it is often possible to link directly to that statute, so that anybody who wishes to participate in the conversation can quickly and easily

4. *Abercrombie & Fitch Co. v. Hunting World*, 537 F.2d 4, 9 (2d Cir. 1976).

5. *Homeowners Group v. Home Mktg. Specialists*, 931 F.2d 1100, 1106 (6th Cir. 1991).

6. Ed Timberlake (@TimberlakeLaw), TWITTER (May 6, 2018, 9:57 AM), <https://twitter.com/TimberlakeLaw/status/993172858204577794>.

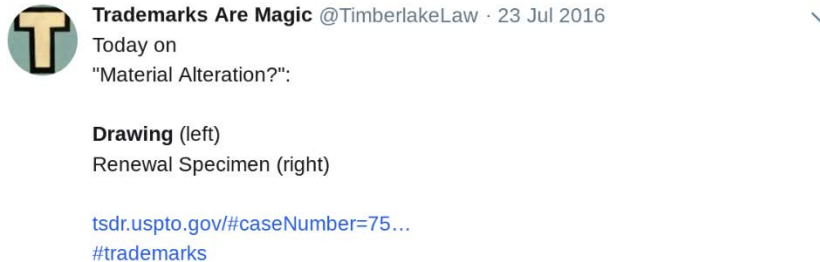
work from the same text. In the case of reviewing applications for registration of trademarks, the ability to link directly to records at the USPTO can lead to more meaningful, nuanced discussions. Many applications for registration of trademarks will include an image of the mark in the abstract (called the drawing of the mark, whether or not it is actually drawn), an image of the mark as it actually appears in the world (known as the specimen), and a detailed statement of the goods (called the identification of the goods) on which the mark will appear.<sup>7</sup> Each of these elements can have legal significance—they work together to define what the trademark is—and each can appear as part of a separate document.<sup>8</sup> The ability to link to each separate element can save one from exhausting the character allotment with lengthy descriptions, but perhaps more importantly, often improves trademark analysis by underscoring the separate significance of each of these elements. For instance, what may appear to be inconsistencies when viewing a single element (such as registering a word in one application for registration but not in another), often will not seem inconsistent when all of the elements of applications for registration can be viewed together. The ability to link to each of these elements makes such comparisons easier and more accurate. Especially when employed alongside the option of including images, the linking feature allows a great deal of relevant trademark information (e.g., the mark, the drawing, at least

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7. See generally UNITED STATES PATENT AND TRADEMARK OFFICE, PROTECTING YOUR TRADEMARK: ENHANCING YOUR RIGHTS THROUGH FEDERAL REGISTRATION (September 2018), <https://www.uspto.gov/sites/default/files/documents/BasicFacts.pdf>.

8. *Id.*

some of the goods and the specimen, along with a link to the full application for registration) all to appear together in a single tweet. For instance:



*Figure 3:* Illustrating the benefits of side-by-side visual comparisons accompanied by a direct link to the filing records.<sup>9</sup>

In addition to direct access to records, linking can also encourage the creation of collections of related material. The records of registered trademarks and applications for registration of trademarks at the USPTO are so vast as to be overwhelming. As is often true, a good starting point for understanding the record search process is to meaningfully exclude most of the records so as to encourage careful attention to a subset of records related in some way. For instance, some of the most interesting examples of trademarks are often referred to as “trade dress” trademarks.<sup>10</sup> In a way, trade dress trademarks are not really different from other trademarks in that all trademarks function to indicate source.<sup>11</sup> However, it is not uncommon for trade dress trademarks to lack verbal elements. They often simply look very different than typical word trademarks; all of which make them natural subjects for gathering into a visual collection such as my Trade Dress visual blog on Tumblr:

9. Ed Timberlake (@TimberlakeLaw), TWITTER (Jul. 23, 2016, 10:57 AM), <https://twitter.com/TimberlakeLaw/status/756911099207749632>.

10. See *Trade Dress: The Forgotten Trademark Right*, FINDLAW (2019), <https://corporate.findlaw.com/intellectual-property/trade-dress-the-forgotten-trademark-right.html>.

11. *Id.*



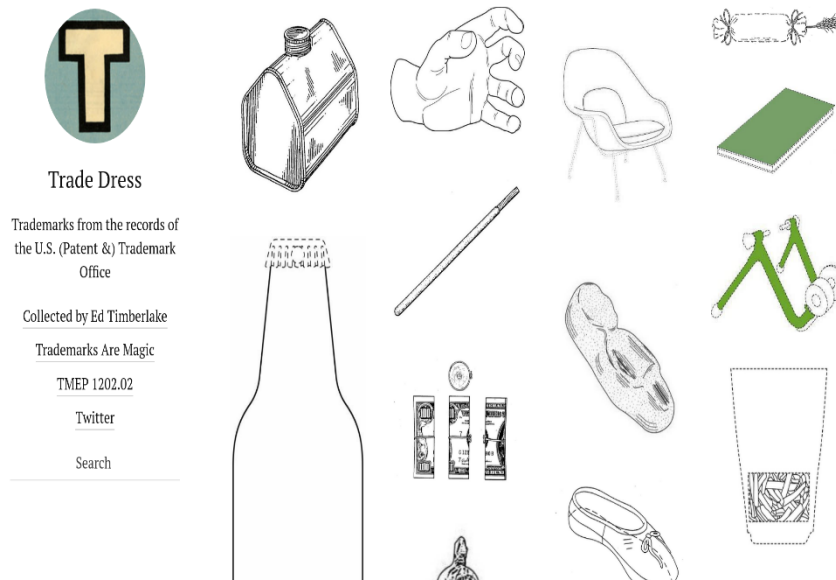


Figure 4: Trade Dress Tumblr Page<sup>12</sup>

Linking allows direct access to individual records at the USPTO, and access to online collections of individual records grouped according to subject or theme. Another example would be boards devoted to trademark subjects on Pinterest. The ease of setting up multiple boards devoted to different subjects, combined with the ability to link to them in Twitter, encourages close attention to records at the USPTO. For example:

12. Ed Timberlake, *Trade Dress*, TUMBLR, <http://tradedress.tumblr.com> (last visited Mar. 25, 2019).

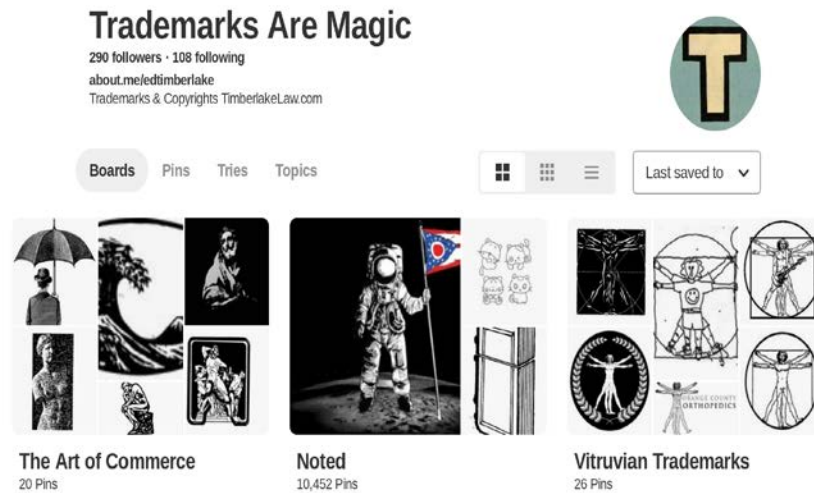


Figure 5: Trademarks Are Magic Pinterest Boards<sup>13</sup>

Examples of Pinterest boards I add to, and tweet about, periodically include: Applications for Registration of Trademarks,<sup>14</sup> Applications for Registration as Social Commentary,<sup>15</sup> Visual Puns,<sup>16</sup> Words at Play,<sup>17</sup> How Images Convey Meaning,<sup>18</sup> Portraits as Trademarks,<sup>19</sup> Trademarks Containing Incongruous Antlers,<sup>20</sup> Ambiguity in Trademarks,<sup>21</sup> and 3-D Biscuity,<sup>22</sup> among many others.

Linking also makes it convenient to create and share collections of applications for registration grouped by examination issue as a teaching and discussion tool.

13. Trademarks are Magic, PINTEREST, <https://www.pinterest.com/timberlakelaw/> (last visited Mar. 25, 2019).

14. Trademarks Are Magic, *Applications for Registration of Trademarks (2019)*, PINTEREST, <https://www.pinterest.com/timberlakelaw/applications-for-registration-of-trademarks-2019> (last visited Mar. 25, 2019).

15. Trademarks Are Magic, *Applications for Registration as Social Commentary*, PINTEREST, <https://www.pinterest.com/timberlakelaw/applications-for-registration-as-social-commentary> (last visited Mar. 25, 2019).

16. Trademarks Are Magic, *Visual Puns*, PINTEREST, <https://www.pinterest.com/timberlakelaw/visual-puns> (last visited Mar. 25, 2019).

17. Trademarks Are Magic, *Words at Play*, PINTEREST, <https://www.pinterest.com/timberlakelaw/words-at-play> (last visited Mar. 25, 2019).

18. Trademarks Are Magic, *How Images Convey Meaning*, PINTEREST, <https://www.pinterest.com/timberlakelaw/how-images-convey-meaning> (last visited Mar. 25, 2019).

19. Trademarks Are Magic, *Portraits as Trademarks*, PINTEREST, <https://www.pinterest.com/timberlakelaw/portraits-as-trademarks> (last visited Mar. 25, 2019).

20. Trademarks Are Magic, *Trademarks Containing Incongruous Antlers*, PINTEREST, <https://www.pinterest.com/timberlakelaw/trademarks-containing-incongruous-antlers> (last visited Mar. 25, 2019).

21. Trademarks Are Magic, *Ambiguity in Trademarks Descriptions*, PINTEREST, <https://www.pinterest.com/timberlakelaw/ambiguity-in-trademarks-descriptions> (last visited Mar. 25, 2019).

22. Trademarks Are Magic, *3D Biscuity*, PINTEREST, <https://www.pinterest.com/timberlakelaw/3d-biscuity> (last visited Mar. 25, 2019).

For instance, the following image could be linked to a group of applications for registration:



Figure 6: Trademarks Are Magic Pinterest Board, "Mustache Trademarks"<sup>23</sup>

Many applications for registration of trademarks filed at the USPTO share common issues. An awareness of, and attention to, these issues (which can be aided by grouping) can improve articulation of these issues to applicants and help applicants avoid such issues in drafting applications for registration. To this point, the following two images are illustrative:



Figure 7: Trademarks Are Magic Pinterest Board, "Looking for Trademarks Trouble"<sup>24</sup>

23. Trademarks Are Magic, *Mustache Trademarks*, PINTEREST, <https://www.pinterest.com/timberlakelaw/mustache-trademarks/?lp=true> (last visited Mar. 25, 2019).

24. Trademarks Are Magic, *Looking for Trademarks Trouble*, PINTEREST, <https://www.pinterest.com/timberlakelaw/looking-for-trademarks-trouble> (last visited Mar. 25, 2019).

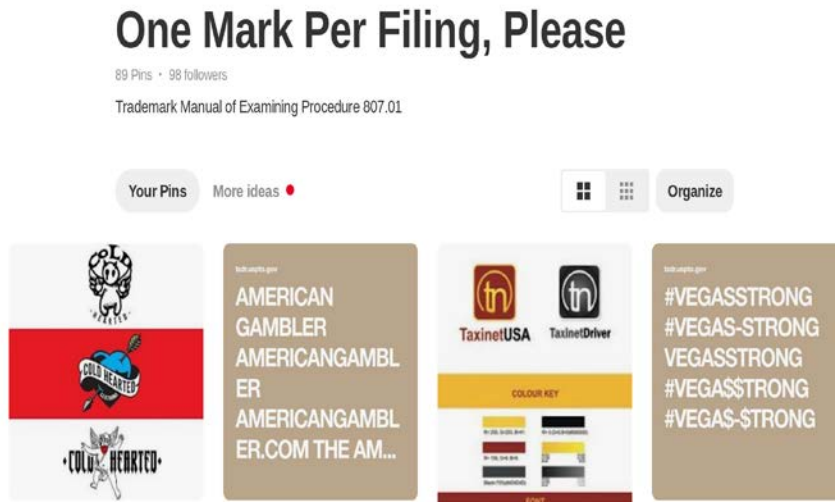


Figure 8: Trademarks Are Magic Pinterest Board, “One Mark Per Filing, Please”<sup>25</sup>

## VI. REPETITION

An aspect of Twitter that can be very helpful for understanding how trademarks work, but that might be less obvious than the ability to attach images or include links, is the simple repetitive nature of the service. It doesn't matter whether you tweeted something especially intelligent yesterday, or clueless the day before, or whether the U.S. Supreme Court issued a major ruling overturning decades of precedent the day before that, the timeline moves relentlessly on. The repetitive nature of Twitter is fitting for a focus on trademarks because, at least in terms of filings, trademarks never stop. Typically, over a thousand new applications for registration of trademarks are filed every day.<sup>26</sup> An understanding of why some applications for registration are registered while others are rejected can help in drafting new applications for registration and in counseling applicants. There may be no better way to practice spotting issues in applications for registration of trademarks than repetition. Whereas drafting a new blog post in essentially the same format every single day would risk becoming tedious (for authors and readers alike), the forever moving forward nature of Twitter rewards such formulae. In a sense, all practitioners are genre artists on Twitter. If looking at one application for registration of a trademark can help begin to make the examination process understandable, then assessing 10,000 applications for registration, in a somewhat uniform format, should greatly deepen understanding of the examination process.

25. Trademarks Are Magic, *One Mark Per Filing, Please*, PINTEREST, <https://www.pinterest.com/timberlakelaw/one-mark-per-filing-please> (last visited Mar. 25, 2019).

26. *Trademark Application Filing Statistics*, USPTO, <https://developer.uspto.gov/visualization/trademark-application-filing-statistics> (last visited Mar. 25, 2019).

## VII. FRAMING

Related to repetition is the opportunity afforded by Twitter to frame issues in a meaningful way. For some reason, humans seem to have a habit of taking relatively clear statements (e.g. “applications for registration of trademarks,” “dilution of famous marks by tarnishment or blurring”) and abbreviating them until their meaning is muddled (“trademark applications,” “dilution”). While a, or perhaps the, defining trait of Twitter is the character limit, it is frequently still possible to use the right, and clear, words for things. Simply making the choice of refusing to use confusing shorthand can be an important tool. Similarly, consciously and repeatedly framing matters in a meaningful way can have a more powerful impact than any number of statements that run the risk of sounding like scolding. Rather than frequently reminding people that trademarks only work in relation to identified goods or services, a more Twitter-fitting approach might be to adopt the following framing:

Application to register:  
[leave space for mark]  
as a trademark for:  
[leave space for goods]  
[provide link to record]

For instance:



**Trademarks Are Magic** @TimberlakeLaw · Mar 3  
**Application to register:**

PRAY FOR MY HATERS

as a trademark for:

music publishing services

[tsdr.uspto.gov/#caseNumber=88...](https://tsdr.uspto.gov/#caseNumber=88...)

[prayformyhaters.com](https://prayformyhaters.com)

[#trademarks](https://twitter.com/TrademarksAreMagic)



*Figure 9:* Illustrating that it is only meaningful to speak of trademarks as trademarks for something.<sup>27</sup>

Employing such a formula, and repeating it over and over every day, hopefully can have the effect of keeping us all in the habit of only speaking of whatever an applicant has put in the “Mark” field in relation to whatever the applicant has put in the “Identification of Goods” field (ideally, informed by proof of how the mark is actually used in the world). Such framing might also prove useful for those less accustomed to reviewing applications for registration of trademarks, as a simple, structural means of conveying the issues.

#### VIII. LIVE-TWEETING

Through the wonder of live-tweeting, one can attend more trademark conferences through Twitter than one could have attended in person. One great benefit of following live-tweets (and Twitter in general) is the opportunity to ignore them. If one is attending a conference and tweeting in real time about a presentation on a subject of no interest to that person, that person can simply pay attention to something else. People are surprising though, and not infrequently I’ve found myself closely following live-tweets (often from somebody I don’t know) about a subject (often one with which I am unfamiliar) that I never would have thought I’d find engaging, from a conference I didn’t even know about; and by the end, I want to go out and read all of the author’s work.

The act of live-tweeting can also be highly instructional. As with many seemingly small accomplishments, it’s harder than it looks. As a highly stylized form of note-taking, but with an audience, live-tweeting requires one simultaneously to listen, digest, and compose. Hopefully the subject will include many succinct, easy-to-paraphrase statements, as well as several simple, clear slides, as compared to simply a reading of the author’s paper accompanied by a single, very crowded graph.

A more widely participatory variation on live-tweeting is the opportunity for many people to share their views on a recent development (such as a newly-issued Supreme Court opinion), in real time (ideally with a link to the opinion). Such conversations may not be likely to replace casebooks anytime soon, but can be an enjoyable, communal exercise in textual analysis, and provide interesting insights, particularly when somebody else notices something easily overlooked.

#### IX. OTHER #TWEETERS

One reason Twitter is such a good fit for the subject of trademarks is that trademarks is a very wide-ranging area, incorporating elements of visual art, poetry, music, meaning, design, and commerce, and interests of those on Twitter are similarly wide-ranging. While the repetitive nature of the medium tends to reward various forms of monomania, a great number of monomaniacs, in a great number of fields, are represented. Exposure to, and the opportunity to interact with, people in other areas of law, as well as fields unrelated to law, can make for a highly

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27. Ed Timberlake (@TimberlakeLaw), TWITTER (Mar. 23, 2019, 4:23 AM), <https://twitter.com/TimberlakeLaw/status/1102182813749702656>.

engaging and enlightening experience. Whole areas of study can be learned by a person that, despite undergraduate and law degrees, never knew such areas existed. An attorney can have interactions with people from around the world that can inform the view of their field.

#### X. EGALITARIAN

Twitter can be a very welcoming venue. One of my favorite things about my experience using Twitter is that I've had the opportunity to interact with people, many of whom I've never met, whom I would never have called on the telephone, or contacted by email. Some interactions have been serious. Many have involved humor. More than a few have led to connections with still more people I've never met whose work and comments I've found engaging. As someone who can't quite decide between being an academically-minded practitioner (current status) or a practically-minded academic (aspirational status), I have been particularly impressed with the patience and generosity of the actual academics on Twitter, and their willingness to countenance questions that occasionally must seem far below their pay grade. Their openness, not only to lowly practitioners, but to people in many fields, has been an inspiration.

#### XI. LEGAL WRITING BENEFITS OF TWITTER

In addition to improving our ability to analyze and discuss trademarks, Twitter also has several benefits for those in other fields of law, and beyond.

##### A. Brevity

Lawyers aren't known for brevity. They write long statutes. They write long briefs. They tend to have long opinions. Writing short isn't their strong suit. Which may be why a service defined not by page limits but character-limits might serve as such good practice. One quickly learns—even with an expanded character limit—that abbreviations will only get one so far. If one wishes to avoid turning every utterance into a thread, one must face difficult choices as to what to leave out. Even though a resulting tweet may contain relatively few words, there can be a great deal of writing involved to get a thought right. Twitter clearly shows that much of what attorneys think of as writing is actually editing, which is probably a good lesson for people writing in any context.

##### B. Analogy

The law moves by analogy: Is this situation more like this (where we did A), or that (where we did B)? While law students read a lot of words in law school, often attorneys do not have that many opportunities to work on writing analogies. Twitter, by virtue of being short, free, always changing, and instantly available on a phone from almost anywhere, can be a great place to work on analogies. More than this, Twitter can be a great way, and a great place, to get in the habit of trying out analogies. Perhaps they're apt, perhaps not, but you will not get a real feel for them until you have tried to write them.

## C. Humility

There are people on Twitter who know more than you do about almost anything you can imagine. This doesn't mean that you should be terrified to speak, but (and there's probably a good life lesson here) it can mean that it's not the best idea to saunter into an unfamiliar space already mouthing off about something. Perhaps especially if you're somewhat knowledgeable in a given area: have some humility. It will likely lead to a better conversation, and if you're lucky, you might even learn something.

## D. Humor

Finally, it has been said that you don't really understand a subject unless you can explain it in simple terms. I'd like to suggest the corollary concept that perhaps one doesn't fully appreciate a particular body of knowledge until one can make (relatively intelligent) jokes in that idiom. For instance:



Figure 10: Suggesting that lawyers might be bad at slogans.<sup>28</sup>

28. Ed Timberlake (@TimberlakeLaw), TWITTER (Aug. 30, 2016, 9:26 AM), <https://twitter.com/TimberlakeLaw/status/770659069212422147>.



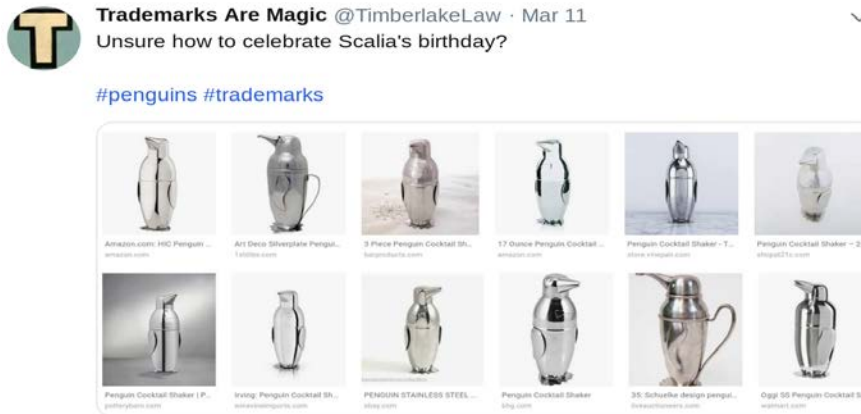


Figure 11: Apparently, Justice Antonin was a big fan of penguin-shaped cocktail shakers.<sup>29</sup>

## XII. CONCLUSION

In short, Twitter can be more enjoyable, more helpful, and more gratifyingly social than you may expect. Trademark attorneys and academics can derive many benefits from engaging in Twitter. The ease with which one can incorporate images and links, together with what turn out to be liberating limitations on length, make the platform surprisingly useful, particularly for discussing trademarks. This is just one role that Twitter serves; it also generally helps attorneys learn to write concisely and can facilitate beneficial interaction between practitioners by providing a community and sense of belonging.

29. Ed Timberlake (@TimberlakeLaw), TWITTER (Mar. 11, 2019, 6:47 AM), <https://twitter.com/TimberlakeLaw/status/1105103060890734592>.