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# Patterns of trademark genericization

Good and bad practices

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# Abstract

Trademark genericization is a threat to companies with well-known products or services. Past cases have demonstrated that breaking certain trademark usage rules can lead to the loss of exclusive rights. This dissertation sought to determine the good and bad practices in trademark genericization processes. Genericization of a trademark occurs when the general public starts using the trademarked name as the generic name for the product category. Companies can counter this by implementing certain strategies. Timing and amount of effort have been proven crucial in past cases. Failure to do so can lead to the loss of enforceable trademark rights. A study has been conducted on trademarks that are facing genericization. The results reveal that trademarks such as Lava<sup>®</sup> Lamp, Frisbee<sup>®</sup>, Keso<sup>®</sup>, Jacuzzi<sup>®</sup>, and Post-it<sup>®</sup> are facing an extent of genericization in the Netherlands or Sweden.

**Keywords:** trademark, genericization, genericized trademark, generic brand, intellectual property, descriptive concept, communication

# Preface

Over the past year I have been studying intellectual property rights. I have a special interest in the branding of organisations, and trademarks are a big part of that. Claiming a product name usually starts with registration of the trademark. Once registered, these need to be managed well in order to build brand value. This value is tradable and can give the company financial benefits, next to giving it an image. Furthermore, I find it fascinating that products or companies can become so well known, that their name is used to describe products of competitors. This is something that should be countered, so as not lose the value that has been built up. In order to do that, one must know the rules and regulations regarding trademark genericization as a start. This thesis is the product of my research into the good and bad practices in trademark genericization.

# Table of contents

1. Introduction	6
2. Theoretical framework	11
3. Methodology	18
4. Results	22
5. Discussion	29
6. Conclusions	39
Appendix	42
1. The questionnaire	42
2. Answers in "other" clusters	48
3. Lifespan Brands LLC Design Rights	53
4. Trademark registrations	54
5. Trademark registrations by Lifespan Brands LLC and Lava Lite LLC	55
Bibliography	57

## List of abbreviations

BX	Benelux
CA	Canada
DE	Germany
EM	European Union Intellectual Property Office
EU	European Union
EUIPO	European Union Intellectual Property Office
GB	Great Britain
INTA	The International Trademark Association
SE	Sweden
TM	Unregistered Trademark
US	The United States
USPTO	United States Patent and Trademark Office
®	Registered trademark

# 1. Introduction

*A trademark is subject to cancellation if it “becomes the generic name for the goods or services, or a portion thereof, for which it is registered.”*

*15 U.S.C. §1064 (section 14 of the Lanham act): cancellation of registration*

A trademark is an identifier (word, symbol) that is graphically representable and used to distinguish the origin of products and services. It serves four main functions: (1) distinguishing the products from those of other actors, (2) indicate the origin of goods, (3) guaranteeing a certain level of quality, and (4) appearing in advertising (Ingram, 2004).

Occasionally a trademark becomes the generic term of certain goods or services (e.g., all vacuum insulated bottles are called Thermos bottles). This can have intended and unintended effects. In both cases, the general public no longer uses the trademarked name to distinguish the goods from one company to another. To consumers, the primary meaning and connotation of a trademark must be related to the producer, not the product itself (Kellogg Co v. National Biscuit Co 1938). If this is not the case, and the trademark is being used by the general public as the generic name for the whole product category, the trademark can then be subject to cancellation. This results in the loss of the enforceable trademark rights for the trademark holder, a process called “trademark genericization.”

Trademark genericization has both a legal and practical side. A trademark usually can only become legally generic after court ruling. In this case, someone needs to build a case and provide sufficient proof that a certain trademark has become known to the general public as the identifier of a certain category of products, rather than the indicator of the origin of the products. The practical side of genericization is how people are using the trademark in their communication and usually occurs before legal genericization. Even though a trademark has not been genericized from a legal perspective, the general public

might still use the trademark as the generic term for the category of goods. The main difference between practical and legal genericization is that other companies are not allowed to commercially exploit the protected trademark as long as it is not legally genericized. Trademarks are valuable assets to businesses; they fulfil important functions towards the communication with the market (e.g., indicating the origin or the goods, exclusivity, lifestyle).

A recent example of a company that faced their trademark becoming the generic term for “searching something on the internet” is Google®, in the Elliott v. Google® Inc. case. David Elliott is an individual who has commercial benefit from domain names registered under a third-party’s GoDaddy.com account. GoDaddy.com is a domain name register company. The domain names Elliott registered contained the trademark “Google” in them. Upon Elliott’s registrations, Google® filed a complaint. Elliott tried to argue that “Google” is a generic term, leading to the Elliott v. Google® Inc case.

For companies it can be disastrous to lose the exclusive rights to a trademark. The trademark “Google” was estimated to be worth \$113 billion in 2014, almost a third of the total value (at the time of writing) of the company (\$367 billion) (Goldman, 2014). It is important to note that there are different methods of calculating trademark value, and each method can give a different result. Trademarks can be licensed, sold, or used in brand extensions to build a strong brand (Cohen, 1991). “If the ‘Google’ trademark was to be declared generic, the company would have lost this brand value.”

It is well-known that the general public often says “Google it”, instead of “Search for it on a search engine”. Elliott argued that using Google’s trademark as a verb (“Googling”) is recognised by the majority of the public as “the indiscriminate act of searching the internet”. In this act, it does not matter which search engine is actually being used. Because of this, one is not able to distinguish the Google® service from other search engine services. Based on this logic, it should therefore lose its trademark rights.

Elliott further argued that the verb use of a trademark makes the mark generic. Google® then argued that the majority of the general public is aware that the Google® mark is used to identify a distinct product (the Google® search engine). The case was linked by Google® to an Adobe® Photoshop® example, where “photoshopping” was seen as a the usage of any image manipulation software. They argued that the “verb use of a trademark is not fundamentally incapable of identifying a producer or denoting source.” This means that even though a trademark is being used as a verb, it can still perform its statutory function as long as it distinguishes the product from those of others (e.g., Googling is connected to Google). The example continued that the Photoshop® mark both describes a particular activity (e.g., using Adobe’s Photoshop software) and the category of the service (e.g., using image manipulation software). Having this dual function does not render a mark

generic because the name still identifies an unique product. The judge ruled that it would be contrary to the law to take away the legal rights of the Google® trademark because of successful marketing and quality control of the mark. The plaintiffs also failed to produce any evidence of dictionaries that did not mention the trademark significance of the word “Google”. Thus, Google® retained the rights to block others from using the Google® trademark and avoided the ruling of it becoming generic. Even though the plaintiff provided a survey in which the majority said “Googling” was “to search something on the internet”, the court ruled that these surveys were not according to the generally accepted survey principles which will be explained in the methodology section. They also did not allow respondents to select an answer similar to “to search for information using the Google search engine.”

Examples of trademarks that have been genericized are “escalator” (Otis Elevator Company), “aspirin” (Bayer), and “trampoline” (Griswold-Nissen Trampoline & Tumbling Company). These products or brands were once the respective names for moving staircases, acetyl salicylic acid, and rebound tumblers (Mansfield, 2015). Although trademark genericization might seem to be a negative phenomenon, it can have positive effects for businesses as well. This dissertation will both identify the good and bad practices in trademark genericization.

Trademarks have been distinguishing the origin of products for centuries. It is believed they were first applied to cattle as a “brand” to mark from which farm or village they came. Trademarks started to become more common in Britain between the 17th and 18th centuries, with some trademark dispute cases as early as 1618. The first modern trademark system based on registration was passed into law as the “Manufacture and Goods Mark Act” in France in 1857. Since then, many countries have adopted the system (Qinghu, 2005).

The basis of trademark law originated in protecting the consumers from the possibility of confusion regarding the origin of a physical product. This was later extended to include the protection of the goodwill value of a company (Cohen, 1991), with enforceable rights to prosecute an infringer. “Goodwill” is the value of intangible assets, which may include the value of the trademark. This means, for example, that you are not allowed to copy the trademarks of another company to benefit from their image, in order to sell more products of your own.

To avoid losing the exclusive right to a trademark, it must keep its distinctive character. Generic terms are used to identify a product category (e.g., cars, computers, vacuum-insulated bottles) and will face many difficulties in obtaining trademark protection. The trademark name can be measured on the spectrum of distinctiveness: (1) arbitrary, (2) fanciful, (3) suggestive, (4) descriptive, and (5) generic, as established in the *Abercrombie &*



*Fitch Co. v. Hunting World* 537 F.2d 4 (2nd Cir. 1976) case. Usually, the more arbitrary and fanciful a trademark is, the easier it is to obtain trademark protection. The more descriptive and generic a trademark is, the less likely it is to obtain protection. Arbitrary trademarks are common words used in an unrelated context to the subject they are identifying (e.g., “Apple” for electronic devices). Fanciful trademarks are inherently distinctive words that are used to identify the products (e.g., “Kodak” for cameras). “Airbus” is an example of a suggestive trademark for airplanes, indicating the nature, quality, or a characteristic of the goods. Marks that are descriptive usually describe the ingredients or attributes of a product, and therefore should not be able to function as a trademark (e.g., “cold and creamy” for ice-cream). Generic trademarks are used to identify a whole product category, which makes them incapable of functioning as a trademark (e.g., “watch” for timepieces). However, in the *Abercrombie & Fitch* case they argued that descriptive words can obtain trademark protection provided that a well-defined secondary meaning has been developed that is tied to a particular company and that is not related to its generic usage. An example of this is the trademark “SHARP” for televisions (“Trademark Strength,” 2014).

One obtains a trademark by filing an application at a trademark office (e.g., USPTO or EUIPO). A trademark can be refused registration on absolute or relative grounds. Refusal on absolute grounds means the registration will be denied on a predefined set of rules (i.e., lack of distinctiveness)(Section 3 of the 1994 Trade Marks Act). Refusal on relative grounds means that a confusingly similar trademark already exists, or has existed in the past (Section 5 of the 1994 Trade Marks Act).

Companies can appeal a negative decision from the trademark office, and provide their reasoning on why their mark should obtain trademark protection. Trademark applications often get refused on absolute grounds, by being too descriptive for example, and are therefore not be able to obtain trademark protection. Trademarks can also become descriptive over time when the general public starts using the term as the descriptor for the product category (e.g., using Kleenex® for the product category “tissue”). At this point, the trademark is subject to cancellation. This is also true for words that have a meaning in a foreign language. Though largely meaningless to the general public, a descriptive word in a foreign language cannot normally obtain protection since the word or device holds a real meaning (Re Hercules Powder Co., 46 App. D.C. 52). On these grounds, some trademarks have been denied registration. The New York Supreme Court held “*Conserva Di Tomate*” descriptive, since it is Italian for “preserved tomatoes” (Roncoroni v. Gross, 92 App. Div. 221, 86 N.Y.S. 1112).

For this dissertation I will define a trademark as a word, name, symbol or device, or any combination thereof that is used to distinguish the origin or manufacturer of certain goods or services. I will distinguish ‘name’ from ‘word’ in the following way: names can be

novel and fanciful while words cannot. I will distinguish 'symbol' from 'device' in the following way; such that 'devices' (company logos) can contain symbols next to words or names. A 'symbol' is a mark or character, used as a conventional representation of an object, function, or process.

I will focus my research on Sweden and The Netherlands because I have a Dutch origin but have been living in Sweden for the past two years.

This thesis addresses the following research question: *What are the identifiable patterns behind trademark genericization in Sweden and The Netherlands?* To help answer the research question, the following sub-questions have been drafted: (1) *To what extent do these patterns generalise?* (2) *What are the prominent examples in a European context of trademarks that have become generic?* My hypothesis is that I will find little open evidence of conscious efforts by the companies to promote the genericization of their trademarks, and consequently most of the evidence to line up in favour of trademark genericization to be unintended and largely part of a negative process.

This dissertation will build the theoretical framework on a number of trademark genericization cases in the theoretical background section, before introducing my own empirical studies of trademark genericization in the discussion section. The conducted research has shown that certain trademarks are having a high degree of genericization, these will be presented in the results section. In the discussion section, the results have been interpreted and have been connected to other evidence indicators of trademark genericization. The conclusion section describes that trademark genericization is a very complex process with many different good and bad practices.

## 2. Theoretical framework

A generic name is understood to be a name that is free to use for any product (Cohen 1991). Trademark genericization is the process in which a trademarked name becomes generic, and its original owner loses their enforceable trademark rights and protection. At this point, any other business can use the trademark to promote their own products or services (e.g., all “acetyl salicylic acid” may be called “aspirin”). Some businesses want to reach a certain degree of genericization since it will make their trademark a widely used term for consumers, potentially leading to increased adoption of the products; however, genericness comes with many risks. This section will set the stage for the subsequent discussion of my own research.

The Elliott v. Google® case presented in the introduction section is an example of good practices in defending the trademark against genericization from a legal perspective. Aside from the lack of sufficient proof from Elliott, it is important to mention that the judge ruled that successful marketing efforts should not in itself lead to the genericization of a trademark. This is largely dependent on how the product has been marketed in the past, which I will explore in detail. Registration and defence of trademarks are an essential part of the brand process of a company. To that end, a brand manager must create an effective system for planning, implementing, and controlling trademarks (Cohen, 1991).

Another important aspect the court takes into account in trademark cases is how much the company has done to counter trademark genericization. Businesses having shown no effort into countering trademark genericization generally have a more difficult time defending their exclusive trademark rights.

In the American Thermos vs Aladdin Industries case, the trademark “Thermos” was being violated by the selling of vacuum-insulated containers by Aladdin Industries under the name “Thermos”. The defendant acknowledged the intention of selling vacuum-insulated containers under this name, but argued that the name “Thermos” or “Thermos Bottle” had become a generic term for the product and no longer a distinguisher for the origin of it.

The American Thermos company took over its German predecessor in 1907 and founded the The American Thermos Bottle Company. It then launched a successful marketing campaign for the product. According to the court proceedings the sales of Thermos® products exceeded \$225 million in 1957, until that time they invested well over \$9 million on marketing efforts. Since they first obtained their trademark in 1908, they solely communicated their products as “Thermos” or “Thermos Bottle” without reference to the generic term “vacuum bottle” or “vacuum-insulated bottle”. According to the court

proceedings, Thermos itself asserted that "Thermos had become a household word" (Kingseeley Thermos Co., Plaintiff-appellant, v. Aladdin Industries, Incorporated, Defendant-appellee, 321 F.2d 577 (2d Cir. 1963)). According to the case text they used "Thermos" as a synonym for vacuum-insulated containers in their catalogues, rather than a descriptor of the term. At this point, they were close to losing their trademark, after which they quickly implemented generic descriptors following their trademark (e.g., Thermos® vacuum bottle). By sending out letters to the media asking to seize the generic use of the trademark in articles and the news, the company was actively countering trademark genericization. Later between 1923 and 1953, the efforts of countering genericization decreased significantly.

Around 1957 the company started selling products non-related to vacuum-insulated bottles, and used the "Thermos" trademark on them. In an effort to take the sole association with vacuum-insulated bottles away. At the same time, efforts in countering genericization were increased again. Unfortunately these efforts were re-implemented too late, and the court ruled that the trademark "Thermos" had become a generic descriptive word. The American Thermos Bottle Company kept its trademark rights to the capitalised version of the word "Thermos", but competitors were allowed to use the word with restrictions, such as, they could only write it in lowercase letters.

The American Thermos Bottle Company had a successful marketing campaign from the beginning around 1907, although, they made the mistake of marketing their product (Thermos®) as a synonym to the descriptive concept (vacuum-insulated bottles). Furthermore, they did not actively counter genericization of the trademark for nearly 30 years. This demonstrates the importance of defining and communicating the descriptive concept next to the trademark. In order to retain trademark protection, companies must show clear effort in countering genericization.

The American Thermos Bottle Company had been successful for a long time, which may have been due to the degree of genericization they had from the start. Being the synonym for vacuum-insulated bottles could potentially have increased sales and popularity. This is an example of how trademark genericization to a certain degree can have wanted effects.

The case around the trademark "aspirin" was between Bayer Co. and United Drug Co. The generic term for the drug aspirin is acetyl salicylic acid. The company had spent a lot of money on the marketing efforts to make the product a popular choice in the market. The product patent lent support to making the trademark a household term; patent rights gave the company an exclusive right to sell the product. The product was sold to retailers under the "aspirin" name, in some relation with "acetyl salicylic acid", but without sufficiently mentioning the Bayer name in connection to the product. In fact, some manufacturing chemists started to put their own company name on the labels. At this point,

it was hard to demonstrate where the drug was actually coming from, which is one of the core functions of a trademark. Eventually, Bayer managed to prove that their competitor, United Drug, was selling acetyl salicylic acid advertised as “genuine Aspirin”. This gave the consumers the impression that the drug was made by United Drug. Because Bayer itself did not communicate sufficiently that the product was made by them, the general public was not well informed about the origin of the product. Even though Bayer had control over the trademark, it did not communicate well enough that “aspirin” refers to a Bayer product, resulting in confused consumers. Bayer’s marketing efforts had instead led to aspirin becoming the synonym for acetyl salicylic acid. On this basis, the U.S. District Court of the Southern District of New York declared that the trademark was no longer valid. The reason for invalidation was that the regular consumer was sold a product labelled “Aspirin” without sufficient indication of its manufacturer. Consumers were also not fully educated on the existence of the generic name “acetyl salicylic acid” for the product. In 1915, two years before the patent expired, Bayer started to sell the product with a label reading “Bayer — Tablets of Aspirin”. This merely indicated to the general public that it was Bayer’s version of the drug by the wording they used. The general public had already adopted “aspirin” as the household name for “acetyl salicylic acid” (Bayer Co. v. United Drug Co., 272 F. 505 - S.D.N.Y. 1921).

From both the Thermos® and aspirin case it becomes clear that the way a product is marketed has a significant impact on the genericization process. The way the product is perceived by the average consumers can make the difference between legally becoming generic or not. The U.S. Trademark Law Revision Act of 1988 describes that marketing a product as a synonym to the generic term (commission), or not marketing the product as being a trademark at all (omission), can cause the mark to become generic. Furthermore, the act describes that the perception of the consumers about the trademark determines if the mark has actually become generic (Trademark Law Revision Act of 1988).

What I take away from these cases is that there are certain actions a trademark holder can perform to keep the exclusive rights to the trademark: (1) promote the generic term, (2) use a descriptive concept, (3) create usage standards (e.g., capitalisation of the trademark name), and (4) extend the meaning of the trademark by attaching it to additional product categories (e.g., when Thermos® started selling other products than vacuum insulated bottles).

Arla® Sweden held a advertising campaign in a newspaper in 2009 to protect their trademark Keso® against genericization by *promoting the generic term*. Keso® is Arla®’s cottage cheese and the name is often used in Sweden for cottage cheese of any origin. The campaign promoted the generic term for the product in a rather interesting way; instead of

writing "cottage cheese" they wrote "kåttitsch schiis", which drew significant media attention (Helander, 2009).

If one uses a trademark in combination with a *descriptive concept* (a.k.a. generic descriptor), one counters genericization: e.g., "Apple® computers", "Starbucks® coffee", "Samsung® mobiles". It indicates what category your product belongs to, and it also categorises similar products from competitors assuming you or they are using a similar descriptive concept (e.g., competitors Windows® operating system and Mac® operating system). A descriptive concept makes the consumer understand that, for example, the goods are trademarked with Windows® but the generic term of the goods is "operating system". As noted in the case, American Thermos tried to promote the descriptive concept "vacuum-insulated bottles" to counter the ongoing genericization of their trademark. However, since their 1910 product catalogue, they demonstrated an encouragement for the generic use of the word "Thermos". By then the trademark was already widespread being used as a household term, and they could not turn the genericization process around. The Otis Elevator Company is another example. The company advertised "the latest in elevator and escalator design", indicating that "escalator" is a generic descriptor like "elevator" for a category of goods. They used the product as the descriptive concept, rather than adding "moving staircases" after "escalator" which should have been capitalised as well. Since the Otis Elevator Company was not treating "escalator" as a trademark, a case was brought forward which led to the trademark being cancelled and legally genericized (Haughton Elevator Co. v. Seeberger).

When a product does not fit an existing descriptive concept because it is highly innovative, a new descriptive concept must be created and actively promoted. If no new descriptive concept is being created, the risk of the trademark becoming the descriptive concept increases as seen in the aspirin case. Although there was a descriptive concept available (i.e., acetyl salicylic acid), it was not promoted well enough. The name "acetyl salicylic acid" is arguably not as friendly for the average consumers to remember, therefore a new one could have been created and advertised in order to protect the aspirin trademark.

To counter the genericization of a trademark, companies can set up *usage standards*. The "TM" and "®" symbols are used to indicate that a certain term is trademarked. Whenever the trademarked name is written, it should be connected to the correct symbol (i.e., "TM" or "®"). A term followed by "TM" means that the company is claiming a certain ownership; however, the use of "TM" does not mean the company has full registered trademark protection, but rather an unregistered trademark protection, which is less strong. For instance, it could happen that multiple companies are trying to claim the same trademark. They then must prove in court which one is the most established brand in the market, which is a lengthy and costly process. Trademarks that are followed by "®" have

full trademark protection. Companies are not allowed to use the “®” when no actual protection has been registered at a trademark office. The protective rights are enforceable in all markets in which the trademark is registered. In contrast to the unregistered trademarks (TM), registered trademarks (®) do not need to prove establishment among the consumers in the market to obtain trademark protection. In the perception of the average consumer, communicating these symbols elevates the trademark status and thus communicates ownership. Consumers are made aware of the fact that the term represents a product from a specific origin, and not the general term of the category of the goods. Nowadays, American Thermos has wisely added the ®-symbol behind every mention of the word “Thermos” on their website to indicate that it is a registered trademark.

Finally, *extending the meaning of a trademark* can take away the sole association with the product category it is in. American Thermos tried this strategy when they started to sell products in product categories other than vacuum-insulated bottles. Unfortunately, this strategy was implemented when the degree of genericization was already at a level where it was being used as a household term, and therefore could not save it in time. Once a company starts using the trademark for other products in other categories, it takes away the sole association a trademark has with a specific product category, if correctly implemented.

The countermeasures mentioned above have one core function in common which is important in court: to actively campaign against the misuse of the trademark. These countermeasures mainly focus on the product name, but the company name also plays a role. If a product is not clearly connected to a company, the general public cannot discern its origin. If Bayer had clearly communicated that they were the company behind the well known aspirin brand, they would have had a stronger position to defending their trademark. When Bayer finally realised that they needed to do this, they started advertising their product as “Bayer -- Tablets of Aspirin.” However, this does not fully create the connection between Bayer and aspirin. The phrase implied that this was Bayer's version of aspirin tablets, according to the court. A stronger connection would be mentioning that aspirin is “a product by Bayer” or rather “a trademarked product by Bayer”. In the perception of the consumers, “aspirin” was a generic term, and the perception of the general public is that generic terms are rarely understood to be trademarks (Palladino, 1989).

Regarding literature on measures for countering trademark genericization, one finds surprisingly little in the way of concrete theories or strategies to avoid or advantageously use trademark genericization. Former trademarks such as “escalator” (Otis Elevator Company), “aspirin” (Bayer), and “trampoline” (Griswold-Nissen Trampoline & Tumbling Company) were all ruled generic around the 20th Century. The field of trademark genericization is relatively young. For example, nowadays, a company's success can be dependent on the their trademark's ability to be turned into a verb (van Dijck, 2013).

“Skypeing, Googling, and Facebooking” are examples of trademarks that are being used as verbs when people interact with them. This form of genericization has had positive effects on the adoption of the product and demonstrates advantageous aspects. With this in mind, new brands should have a solid trademark strategy to avoid genericization, while enjoying the benefits of becoming a popular term within the industry. Interestingly, former trademarks such as trampoline, thermos, heroin, escalator, aspirin, laundromat, and videotape were all ruled generic during or after the 20th century. This indicates that the field of trademark genericization is relatively young.

The International Trademark Association (INTA) has a subsection on their website on which they give handy rules for avoiding genericization (Trademarks vs. Generic Terms, n.d.). “Use a generic descriptor” and “use a trademark notice” have already been covered on page fourteen in this dissertation, however three of these rules have not.

The first is to enforce correct grammatical usage and avoid using the trademark as a noun or verb in advertising, but rather as an adjective (e.g., I need a KLEENEX<sup>®</sup> tissue, not I need a KLEENEX<sup>®</sup>).

The second is to make a trademarked term stand out from surrounding text. Consumers should be able to easily identify and distinguish between the trademarked term and its generic descriptor (e.g., using capital letters or quotes).

Finally, one should avoid all variations on the trademark as it encourages or allows the improper use of the trademark. Such variations could be spelling changes, plurals, or abbreviations.

INTA offers the following six indicators as evidence that may be used for determining generic usage or genericization: (1) found in dictionaries, (2) used generically by competitors and others in the trade, (3) used generically by trademark holder itself, (4) used generically in media, (5) missing alternative generic words, and (6) indicating genericization by consumer surveys. These six rules will be used in the discussion section to evaluate the degree of genericization for certain brands.

When a trademark has been adopted by one or many different dictionaries as a generic descriptor for a category of goods, it is an indication of the trademark becoming genericized. Generic descriptive terms, such as are typically found in a dictionary without any capitalisation, cannot normally obtain trademark protection. If no indication is being given that it is an actual trademark, then they have most likely been adopted by the general public as the descriptor of the category of products.

Competitors using a trademark unhindered as the generic descriptor for their products is an indication that the trademark is no longer being used or recognised to indicate the specific origin of the product as was originally intended. Since the term is



being used as the generic descriptor for a category of products, it is in the process of being genericized.

In the Thermos case, The American Thermos Company used their trademark as a generic descriptor in their own catalogue. It was even communicated that "Thermos had become a household word" by the company itself. Using and promoting the trademark as a generic term indicates that genericness is (in the process of) being established.

When the media repeatedly uses a trademarked term as the generic descriptor for something; the general public could potentially at some point adopt it that way. This also includes whether the media is writing it without capital letters or without trademark symbols. Trademark holders usually try to avoid misuse of the trademark in the media by sending out letters to them. However, if insufficient action is being taken, the continued generic use will indicate some degree of established genericness.

The unavailability of alternative generic words indicate that there is no other way of describing the product category than to use the generic term (e.g., calling all hot tubs "Jacuzzi" because no one is aware of the term "hot tub"). Usually companies try to avoid this by introducing and promoting a generic descriptor, indicating the category of goods the trademark belongs to.

Established in the theoretical background, a trademark becomes the generic term by (1) the failure to defend and enforce the trademark rights (Elliott v. Google<sup>®</sup>), (2) the failure to avoid it becoming the representing name for a class as a whole (aspirin), (3) the development of the trademark becoming the descriptive name for the type of product (Thermos<sup>®</sup>), and (4) the generic use of the trademark by the trademark owner in advertising (escalator). INTA provides the five rules of proper usage and the six evidence indicators as ways to evaluate the degree of genericization of any trademark.

As established, consumer surveys are often used in trademark genericization cases as evidence indicators. The established genericness of a trademark is tested by surveying a representative sample of the general public. Consumer surveys can be reliable indicators that can determine genericization in court cases, if conducted according to the rules. The concept of customer surveys will be further explained in the methodology section of this dissertation. As this dissertation will test the degree of genericization of certain trademarks, I conducted a questionnaire of my own.

### 3. Methodology

As presented in the theoretical framework section, there are six INTA evidence indicators for genericization. This dissertation therefore has been divided into two types of analysis; a content analysis and a consumer questionnaire. The content analysis will evaluate the brands on five of the six evidence indicators, while the consumer questionnaire evaluates the last evidence indicator. The results section will present the findings from the questionnaire, after which the discussions section will put the findings of the content analysis and questionnaire findings together and interpret them. The methodology of the questionnaire will now be further explained.

I conducted a study, in the form of an online questionnaire, on different brands to evaluate if they are facing trademark genericization. As noted in the theoretical framework section, the perception of consumers about trademarks is important in genericization research. Questionnaires are a common method to test trademark genericization. Questionnaires are often presented in trademark genericization cases in which a large group of people are asked for their response on a certain topic. In the *Elliott v. Google*<sup>®</sup> case, a questionnaire was presented that did not comply to the general accepted principles, and was therefore rendered useless in the case. My online questionnaire takes into account selected general accepted principles, drafted by the International Trademark Association (INTA). I will adopt these principles as appropriate. The important principles regarding the design of the questions in the questionnaires are:

1. Ensure that the survey population has been properly defined and chosen. This includes: a minimum of 300 participants, appropriate profile representing the general public, appropriate geographical representation, and targeting prospective purchasers.
2. Ensure that questions are properly formulated and presented. This includes: clear and unbiased questions, not too restrictive questions, questions should be randomly ordered, attorneys should be involved in the design, and each questions should contain a maximum of one variable.

The principles above have been designed to fulfil the requirements for presenting the results to a court or tribunal. This is not the case with my online questionnaire. Therefore, the most applicable principles are:

1. People with an appropriate profile, including different ages, gender, and education representing the targeted general public.
2. Respondents are an appropriate geographical representation, meaning they either live in The Netherlands or Sweden.

3. The respondents are assumed to be prospective purchasers or users, meaning they could either afford to buy or might experience the selected products.
4. I have drafted the questions to avoid any overt bias.
5. Questions have no inbuilt restriction; respondents are allowed to write their own answer, with no character limit.
6. Each question involves only one variable; i.e., showing one picture only for each question, with only one object being prominently featured in that picture.

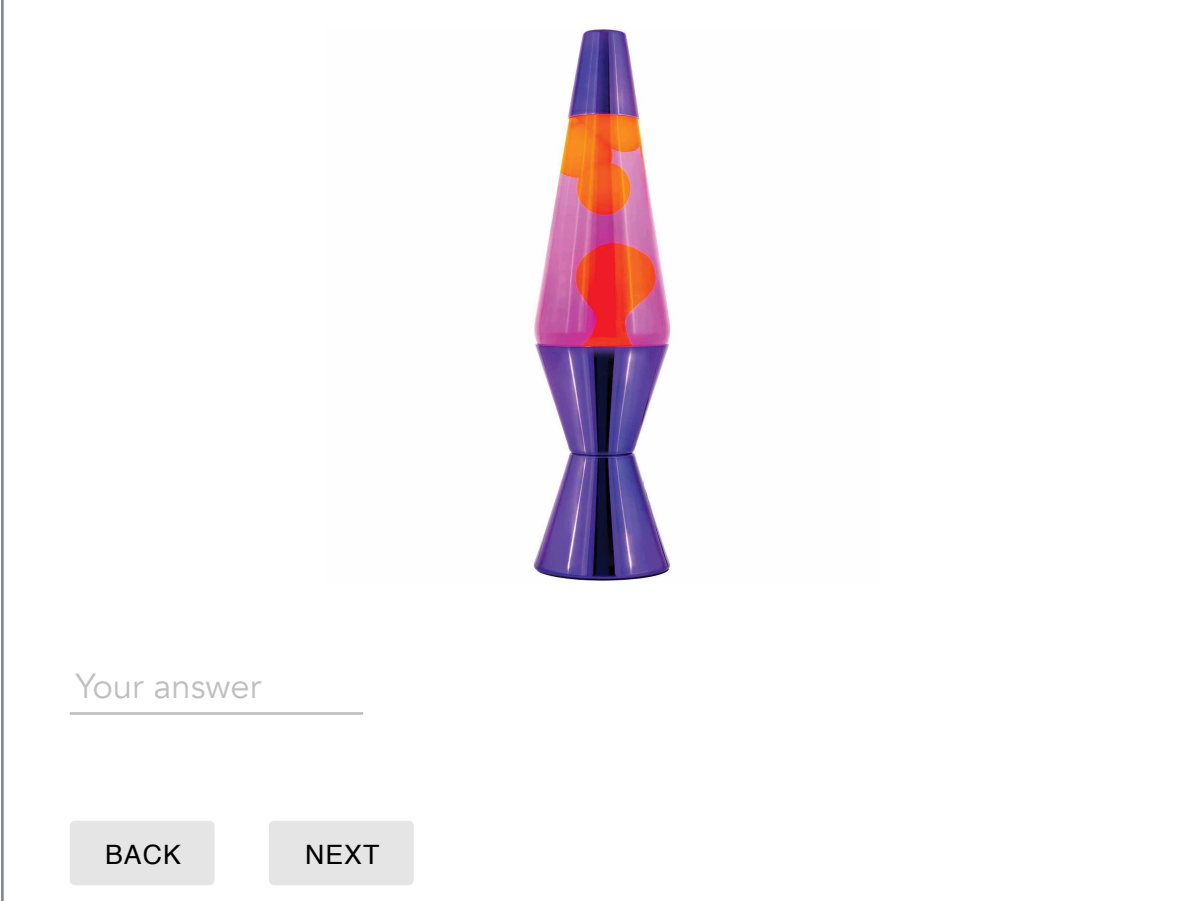
Respondents are asked to identify the contents of each of nine pictures, each showing a product from a different product category -- a product that might be seen to be facing genericization. The products are displayed without any branding. The following types of products have been tested: (1) motion lamp<sup>1</sup> (Lava lamp), (2) water scooter (Jet Ski), (3) table tennis (Ping-Pong), (4) cottage cheese (Keso), (5) sticky notes (Post-it), (6) flash drive (Memory Stick), (7) hot tub (Jacuzzi), (8) a flying disc (Frisbee), and (9) a stun gun (Taser). I arrived at this list by a combination of background research (Quirk, 2014), and personal experience. Quirk indicated that the trademarks on the list presented in the article are facing genericization. However, these statements have not been specifically connected to the degree of genericization within certain countries. As the author of this dissertation, I chose to research these products because I understood all of them to represent a registered trademark in The Netherlands or Sweden. I attempted to select products that have a registered trademark in relevant countries in Europe or the United States. However as I later realised, the Lava lamp trademark is not registered in any country as I will explain in the discussion section. The online questionnaire encourages the respondents to answer whatever comes first to mind. Figure 1 shows the initial instructions.



**FIGURE 1. QUESTIONNAIRE INSTRUCTIONS**

<sup>1</sup> Since the company behind the Lava lamp never really promoted its own generic descriptor, I will use "motion lamp" throughout the dissertation.

The nine pictures follow, each with a blank space for the person to enter a response. The question has no additional instructions and shows a product in a neutral environment. The respondent must insert an answer in the answer field in order to be able to continue to the next question. See appendix 1 for the complete questionnaire.



Your answer

BACK NEXT

**FIGURE 2.** EXAMPLE OF QUESTION

Figure 2 shows one of the questions. As one can see, no pre-defined answers are provided, from which to choose. The respondent simply writes whatever first comes to mind. After the nine pictures, the respondents are asked to give details about their age, gender, geographical representation, and educational background. The respondents are also asked to disclose whether they are already familiar with the concept of trademark genericization.

The chosen approach has limitations; due to the lack of face-to-face contact, it is not possible to check whether a respondent is answering the truth about what first comes to their mind when answering the questions. In face-to-face interviews it is easier to assess whether someone is answering the truth about what first comes to mind, based on their response time when seeing the pictures. Furthermore, people partaking in online questionnaires have a lower commitment compared to face-to-face interviews in general.

Also, an online questionnaire also causes issues with the random distribution. Targeted networks are connected to the researcher, such as Facebook groups and LinkedIn groups. These groups are inherently biased in a way because social media is not used by all people, and are usually connected to a common interest. In Sweden, roughly 6 million people (~65%) use social media, while in the Netherlands roughly 12 million (~70%) are using it (Statista, 2016). Researchers typically do not want to have a connection with a respondent since this might bias their responses. Since respondents might be aware of my educational field of study, they might bias their answers because they could potentially know what they are supposed to answer. Friends of the researcher might be biased in a way that they are answering what they think the researcher wants them to answer. By not explicitly mentioning what is being researched, I hope this will not pose any difficulties to the results, still, some respondents might be familiar with my studies and so guess at the purpose of the questionnaire. The results indicate that twenty percent of the respondents are familiar with the concept of trademark genericization.

According to my best judgement, the answers to the questions in the online questionnaire have been clustered together with other similar answers. The results section of this dissertation will present the findings of the online questionnaire.

## 4. Results

This section will be divided into two parts; the first part of this section will summarise the recorded answers, and the second part will focus on the demographics of the respondents to the questionnaire. The results from the online questionnaire suggest that the trademarks Lava<sup>®</sup> Lamp, Keso<sup>®</sup>, Post-it<sup>®</sup> and Frisbee<sup>®</sup> have the highest degree of genericization. Jet Ski<sup>®</sup> and Jacuzzi<sup>®</sup> are having a medium degree of genericization. This means that if anyone in Sweden or The Netherlands challenges the validity of these trademarks in court, these companies will face possible challenges defending them. Ping-Pong<sup>®</sup>, Memory Stick<sup>®</sup>, and Taser<sup>®</sup> are having a low degree of genericization.

In every question, the trademarked name of the product was being used at least once as a descriptor of the product. Moreover, in the majority of the questions the trademarked term was being mentioned the most often. The Frisbee<sup>®</sup> trademark was used as a descriptor of the object by over 85 percent of the total respondents. For the questionnaire, I attempted to show either the product of a competitor or a generic version of it without any branding. However as I later realised, the Lava<sup>®</sup> Lamp picture (Figure 3) displayed an original but was described to be generic by the source of the image, the discussions section will go into further detail on that.

When looking solely at Sweden and the Swedish respondents, a little over 90 percent used the term “Keso” as the descriptor of the picture showing cottage cheese (Figure 6). Overall, the degree of genericization is relatively high. The results also included a term that seems similar to the trademarked term Ping-Pong<sup>®</sup>; Swedish people call table tennis “pingis”, which is almost certainly derived from the Ping-Pong<sup>®</sup> brand. Potentially this can be seen as evidence of trademark genericization, however, this argument seems too difficult uphold in court as there are significant differences between the terms in the way they are written and spoken.

The results from the questionnaire will be presented in the same order as the questions were asked. The respondents answered the online questionnaire in Dutch, Swedish, and English. Each question received a total of 212 responses. The answers given in the “other” cluster are presented in Appendix 2.



**FIGURE 3. PICTURE QUESTION 1**

In the first question, the respondents were shown a picture (Figure 3) of a motion lamp. A total of 170 respondents answered "lavalamp" or similar and 42 respondents answered something different. Initially, I thought the "Lava Lamp" was a registered trademark for the category of products. As mentioned in the methodology section I found out that "Lava Lamp" is no longer a trademark, which will be clarified in the discussions section. Additionally I found out that the picture was actually representing an original.

These results need to be understood in the lack of a registered trademark. The degree of genericization for this product can therefore not be measured with the results of the online questionnaire. None of the respondents mentioned the generic name for the product (motion lamp). The Lava<sup>®</sup> Lamp will be further discussed in the discussions section.



**FIGURE 4. PICTURE QUESTION 2**

The second question showed a picture (Figure 4) of a "water scooter". A majority of the respondents, 99 out of 212, mentioned "water scooter" or similar. In the results of this question, the Swedish term "vattenskoter" and "vattenscooter" was mentioned 36 and ten times respectively. A total of 82 respondents answering they saw a Jet Ski<sup>®</sup>. Furthermore, ten respondents answered that they saw a "boat" or similar. The remaining 21 respondents mentioned something different. Due to the large amount of people using the generic term, the degree of genericization is middle to low.



FIGURE 5. PICTURE QUESTION 3

In the third question, the respondents were shown a picture (Figure 5) of table tennis. Out of the 212 respondents, 79 mentioned they saw "table tennis" or similar. This includes nine responses translated from the Swedish "*bordtennis*" and 65 from the Dutch "*tafeltennis*". However, the Swedish people mentioned "*pingis*" 79 times as well, which is certainly derived from Ping-Pong®. However, this is unlikely enough evidence to build a court case. "Ping-Pong (or similar) was mentioned 50 times by the respondents. Only four people answered something that did not contain anything close to the clusters mentioned. Since "*pingis*" is not related but rather derived from to the actual Ping-Pong® brand, and the majority of the Dutch respondents used the generic term, the overall degree of genericization is low.

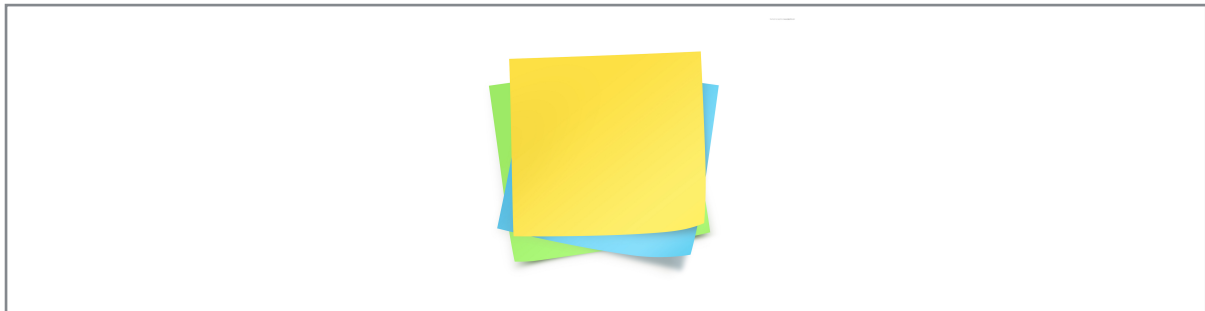


FIGURE 6. PICTURE QUESTION 4

The picture (Figure 6) in the fourth question showed cottage cheese on a spoon. Because cottage cheese was not easily recognised in a picture, a hint was given indicating that it was "a type of cheese". The results also confirmed that many people could not exactly identify what was displayed; 26 people answered something that could not be clustered (other). These answers contained very different variables such as "Mozarella", "Ricotta", and "Mascarpone", among others. Interestingly, 94 respondents responded to the picture with "Keso", which is a registered trademark by Arla®. Moreover, this also included thirteen Dutch people who live in Sweden. "*Hüttenkäse*" (or similar) was named 36 times, which is the Dutch translation of cottage cheese. "Cottage cheese" itself was mentioned 26 times. Other small clusters were "feta" (five mentions), "cheese" (sixteen



mentions), and “cream” (nine mentions). The degree of genericization for the Keso® trademark among the Swedish people is high, and low among the Dutch people.



**FIGURE 7. PICTURE QUESTION 5**

As Figure 7 illustrates, the respondents were shown a picture of sticky notes in the fifth question. Out of the 212 respondents, the majority (131) described what they saw as “Post it” or similar. Post-it® is a registered trademark by 3M for their sticky notes product. The term “sticky” or similar was only mentioned fourteen times. A total of nineteen Dutch respondents mentioned “folding paper” (translated) or similar. On this question, 28 respondents answered something “other”, such as “yellow” and “coloured paper”(translated). Due to the high amount of people who described the picture as “Post It” or similar, the degree of genericization is relatively high.



**FIGURE 8. PICTURE QUESTION 6**

The sixth picture (Figure 8) showed a flash-drive. A large majority of respondents, 109 out of 212, described what they saw as a “USB Stick” (or similar). “USB minne” or similar was mentioned 57 times. Additionally, 27 respondents answered simply “USB”, and merely four respondents actually wrote “flash drive”. Memory Stick®, which is a registered trademark by SONY®, was mentioned just four times. Thirteen respondents answered something “other”. For the trademark Memory Stick®, any indications of genericization are, at best, unclear; therefore I conclude that the degree of genericization is low.



**FIGURE 9.** PICTURE QUESTION 7

The seventh question showed a picture (Figure 9) of a hot tub. A majority of respondents, 83 out of 212, described what they saw with “Jacuzzi” or similar. Jacuzzi® is a registered trademark. Interestingly, respondents wrote down many variations, such as; Jacuzi, Jaccusi, Jaccuzzi, and Jaccuzi. Though the majority of 70 respondents used the trademarked spelling. Surprisingly, 61 respondents described what they saw with “Bubblebath” or similar. “Bubble-bath” used to be a registered trademark of its own but expired in 1984 in the United States. Another trademarked term which was used 16 times is “Whirlpool”, which is still registered. Furthermore, 28 respondents used the generic term “hot tub” or similar. “Badtunna” was mentioned seven times, “spa” four times, and there were eighteen “other” descriptions. The degree of genericization for the Jacuzzi® trademark is showing indications of genericization, and is therefore medium. Many people described the picture as a “Jacuzzi” while a significantly smaller amount actually used the generic term.



**FIGURE 10.** PICTURE QUESTION 8

The flying disc was shown in the eighth question (Figure 10). Convincingly, 197 respondents described what they saw as a “Frisbee” or similar. Frisbee® which is still a registered trademark in the United States Patent and Trademark Office (USPTO) and the European Union Intellectual Property Office (EUIPO). Eight respondents mentioned a disc or similar, and just seven respondents mentioned something “other”. Unsurprisingly, there is a significant indication of genericization, and I therefore conclude it is high.



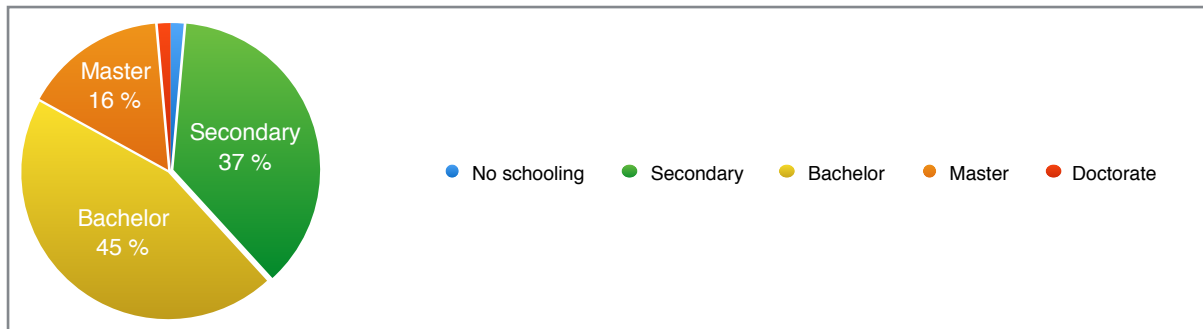
**FIGURE 11.** PICTURE QUESTION 9

The final question showed a picture (Figure 11) of a stun gun. This product was perhaps not a good choice to test, since at least twenty respondents did not know what it was and answered nothing or wrote a question mark. This was possibly because many people do not know what a stun gun looks like. Additionally, 22 respondents answered something that could not be meaningfully clustered. However, 62 respondents described what they saw as a “Taser” or similar. TASER® is a registered trademark for a stun gun. Furthermore, 26 respondents described the object as a “laser”, and 23 answered with something similar to “electric gun”. Another seventeen respondents wrote something similar to “gun”, 30 wrote something close to “light”, referring to the light that is part of the stun gun. Just twelve respondents actually used the term “stun gun”. The degree of genericization for the TASER® is showing no significant signs, due to the great variations in answers and the relatively low amount of people actually using the trademark as a descriptor, the degree of genericization is low.

As for the demographic: 89 respondents are Swedish, 113 are Dutch, and a remaining ten respondents have a different nationality but are living in either one of the countries. Almost 70 percent of the respondents had never heard of trademark genericization before; 20 percent indicated that they are familiar with it; and a remaining 10 percent indicated that they have heard of it, but they do not know what it means. This indicates that most of the respondents were not aware of, or did not understand, the subject for which they were being researched.

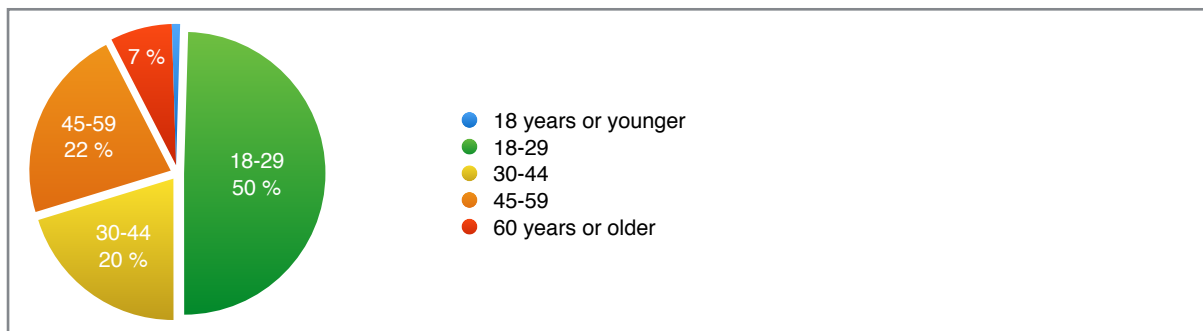
Looking at where the respondents live, 163 are living in Sweden while, merely 48 are living in The Netherlands. Roughly 60 percent of the respondents are female, leaving 40 percent being male.

They are rather well educated; 45 percent have indicated that they have completed a bachelor degree or equivalent, sixteen percent have completed a master’s degree, and 37 percent completed a high school education. Additionally, three people have a doctorate degree, and three other people have not completed any formal schooling at all.



**FIGURE 12.** WHAT IS THE HIGHEST DEGREE OR LEVEL OF SCHOOL YOU HAVE COMPLETED?

Looking at Figure 13 below, shown is that the largest part of the respondents are between 18 and 29 years old (50 percent), followed by people between 45 and 59 years old (22 percent), and people between 20 and 44 years old (twenty percent). Additionally, fifteen people indicated being older than 60 years old, while just two respondents indicated to be younger than eighteen years old.



**FIGURE 13.** WHAT IS YOUR AGE?

## 5. Discussion

One of the most prominent results I have found is that even though some brands show a high degree of genericization in my online questionnaire, many are still registered trademarks and have their legally enforceable rights (Appendix 4). This means that even though the general public is widely using the term as a generic descriptor for a category of goods, the trademark can keep its registration. In the introduction section, two kinds of trademark genericization have been identified: (1) legal, and (2) practical. From the questionnaire results, there is a clear pattern that Lava<sup>®</sup> Lamp, Frisbee<sup>®</sup>, Keso<sup>®</sup>, and Post-it<sup>®</sup> are prominent examples of trademarks that are showing significant evidence of trademark genericization, which I believe is a bad sign for the trademarks.

I believe that the trademark holders are clearly not effectively campaigning against the misuse of their trademarks, and that the general public in Sweden and The Netherlands is insufficiently educated on the correct use of the trademarks. I believe that the companies need to put in more effort in protecting their trademarks to avoid them becoming part of the public domain, meaning anyone can use the trademark to describe their products. As I am reading the results of my online questionnaire, I think that some of the trademarks are already genericized practically. I acknowledge that additional evidence is needed to strengthen the case especially if one is concerned about the legal, as opposed to the practical questions.

To become legally genericized there needs to be enough proof to initiate a court case. The theoretical framework section introduced the six INTA evidence indicators of trademark genericization. While I was evaluating the trademarks through the six evidence indicators, I found that the trademark behind the Lava<sup>®</sup> Lamp showed significant evidence of genericization. This evidence led me to believe I had possibly missed something of significance and possibly made some mistake. I took a closer look at the "LAVA LAMP" registration in the trademark database; here I discovered to my surprise, and indeed shock, that the name "LAVA LAMP" is not a registered trademark of the company that is claiming it.

The terms and conditions section on the official Lava<sup>®</sup> Lamp website (<http://www.lavalamp.com>) states the following: "LAVA<sup>®</sup>, LAVA LAMP<sup>®</sup>, LAVA LITE<sup>®</sup>, WAVE<sup>®</sup>, MAGMA<sup>®</sup>, WIZARD<sup>®</sup>, LAVA LITE LLC<sup>®</sup> and the configuration of the Lava Lamp are registered trademarks of Lifespan Brands LLC." Take note that they claim that "LAVA LAMP" is a registered trademark. I investigated deeper and found that although there is a registered trademark for this term, the TMview trademark database revealed that it is not owned by Lifespan Brands LLC. Currently, a company called Ingram Enterprises, Inc. is the

owner of the trademark. Ingram Enterprises has registered the term for use in relation to fireworks, not motion lamps. Furthermore, the company does not seem to have any connection with the original Lava<sup>®</sup> Lamp product. Regarding the original Lava<sup>®</sup> Lamp products, registrations have been made on two company names; Lava Lite LLC and Lifespan Brands LLC. Lava Lite LLC changed its name to Lifespan Brands LLC on the 11th of January 2016 (Lava Lite, LLC Changes Name To Lifespan Brands, LLC, 2016). The registrations for the word mark "LAVA LAMP" by the Lava Lite LLC company ended for unknown reasons years before the name change took place (Appendix 5). My best guess based on the collected evidence, is that they became the generic term for motion lamps, making it unable to perform as a trademark. Despite this, Lifespan Brands LLC and Lava Lite LLC still hold other trademarks regarding the Lava<sup>®</sup> Lamp product.

Lifespan Brands LLC is using the registered trademark symbol on their website to indicate that "LAVA LAMP" is a registered trademark owned by the company. The theoretical framework section noted that the misuse of a registered trademark symbol can be found illegal, at least in Europe and the United States. The misuse could constitute fraud and could be seen as false advertising if intent can be proven ("Consequences of Non-use or Misuse of Trademark Symbols - Part II," 2007).

Even though there is no valid "LAVA LAMP" trademark, competitors using the name for their own version of the motion lamp are rather difficult to find. Lifespan Brands LLC does have a registered trademark on the word "LAVA" as they claim. Even though "LAVA LAMP" is not a registered trademark anymore, the "LAVA" registration makes it difficult for a competitor to sell a "Lava Lamp". It can arguably be seen as that you are trying to sell a "LAVA" branded lamp, making it trademark infringement. The trademark "LAVA" is registered in the United States, European Union (EU), and Canada according to the TMview trademark database. I think this makes "LAVA" the trademark and "lamp" a possible generic descriptor. Because "LAVA LAMP" turned out to no longer be a trademark, I will continue to use "Lava<sup>®</sup> Lamp" instead to evaluate the degree of genericization for the remainder of this dissertation. Potentially, a court case might establish that the "LAVA" term has become the generic term for the category of "lamps" the product is in, provided that significant evidence can be handed over. I cannot use the results from my online questionnaire as an evidence indicator for the Lava<sup>®</sup> Lamp, as the picture showed the original product.

I will now use the six INTA evidence indicators to evaluate how much evidence of genericization the trademarks are showing.

In the first piece of evidence (Table 1), Lava<sup>®</sup> Lamp was missing a trademark indicator in all of the five relevant dictionaries that have been used; the Lava<sup>®</sup> Lamp mark clearly showed evidence of being genericized on this field. Keso<sup>®</sup> only has a dictionary entry in the

Swedish dictionary, in which a subtle trademark indication has been made by using the “®” symbol. All others show fairly low evidence of genericization, with Frisbee® showing the most genericization by the lack of a trademark indication in two out of five dictionaries.

**TABLE 1. DICTIONARY ENTRIES OF TRADEMARKS**

	Dictionary entry (Cambridge)	Dictionary entry (Oxford)	Dictionary entry (American Heritage)	Dictionary entry (Nationalencyklopedin)	Dictionary entry (Van Dale)
Trademark	English	English	American	Swedish	Dutch
Lava® Lamp Motion Lamp	A decorative electric lamp in which a brightly coloured amount of wax moves up and down a container full of transparent liquid, forming new shapes as it does so.	A transparent electric lamp containing a viscous liquid in which a brightly coloured waxy substance is suspended, rising and falling in irregular and constantly changing shapes.	NO ENTRY	NO ENTRY	NO ENTRY
Frisbee® Flying disc	* A circular piece of plastic with a curved edge that is thrown between people as a game.	* A concave plastic disc designed for skimming through the air as an outdoor game or amusement.	* A trademark for a plastic disk-shaped toy that players throw and catch.	* Engelska, av ett varumärkesnamnskvivor eller diskar (discar) av plast som kastas; i Sverige m.fl. länder också.	Plastic werpschijf
Keso® Cottage cheese	NO ENTRY	NO ENTRY	NO ENTRY	* Keso ®, kornig färskostmassa med som lägst 20 % torrsubstans.	NO ENTRY
Post-it® Sticky notes	* A small, coloured piece of paper for short messages that can be stuck temporarily to something else.	* A piece of paper with an adhesive strip on one side, designed to be stuck prominently to an object or surface and easily removed when necessary.	* A trademark for a slip of notepaper with an adhesive edge that allows it to be attached and removed from a document without causing damage.	NO ENTRY	NO ENTRY
Jacuzzi® Hot tub	* A bath or pool into which warm water flows through small holes, producing a pleasant bubbling effect	* A large bath with a system of underwater jets of water to massage the body.	* A trademark for a whirlpool bath or a device that swirls water in a bath.	* Jacuzzi ®, liten bassäng med strömmande vatten från väggarna.	* Bubbelbad
Ping-Pong® Table tennis	* Table tennis	* Table tennis	* A trademark for table tennis and associated equipment.	Ping-pong, äldre benämning på bordtennis.	Tafeltennis
Jet Ski® Waterscooter	* A small water vehicle for one or two people that is moved forward by a fast stream of water being pushed out behind it.	* A small jet-propelled vehicle which skims across the surface of water and is ridden in a similar way to a motorcycle.	* A trademark for a personal watercraft.	NO ENTRY	Waterscooter
Memory Stick® Flash Drive	* A small piece of equipment that you connect to a computer or other piece of electronic equipment to copy and store information.	* A type of memory card.	NO ENTRY	NO ENTRY	NO ENTRY
Taser® Stun gun	* A weapon that gives someone a small electric shock and makes them unable to move for a short time, sometimes used by police.	* A weapon firing barbs attached by wires to batteries, causing temporary paralysis.	* A trademark for a brand of conducted electrical weapons that cause neuromuscular incapacitation, used widely in law enforcement.	NO ENTRY	NO ENTRY

This table shows the dictionary entries of the trademarks. The entries with a “\*” are giving an indication in the dictionary that it is a trademark.

The second piece of evidence about the generic use by competitors is rather complex. Many products are often sold by wholesalers who often use the trademarked name, but do not always show the actual trademarked product. For example, the Frisbee category on the web shop <http://www.frisbeeshop.com.au> shows “flying discs” mainly from other brands (e.g., Innova). The website is using “Frisbee” as the generic descriptor for the category of products, but it often called the individual products “disc” or “flying disc”. Within the “Frisbee” category, out of the 22 products, only one of them is an actual Wham-O Frisbee®.

Searching on other websites, brands like Innova avoid calling their product “Frisbee”, which is quite logical since the trademark are still active. As a business, you generally want to avoid promoting your competitor, and you do not want to risk being sued for trademark infringement. From the perspective of the wholesalers, consumers might not recognise the product category if it was being called “flying discs”, making it a strategic move for them to name the category “Frisbee”. Technically, no direct competitors seem to be using any trademarked term as a generic descriptor, but other parties tend to use the trademarked name more often as the category name in which the product belongs.

The third evidence indicator, the trademark holder’s own generic use, can be measured by the way they communicate the trademark on their own websites and in advertising. The lack of a generic descriptor or a trademark symbol is an indicator of their own generic use. The Lava® Lamp does not communicate a generic descriptor on their current website; although they do not have a trademark on the complete term anymore, it does not support their claim that they do.

On the Wham-O website, “Frisbee” goes together with “Disc”. This clearly indicates the promotion of a generic descriptor. The web archive (<http://www.web.archive.com>) shows that at least since November 1999, Wham-O® has been using trademark indicators and generic descriptors by, for example, the following statement on their website: “FRISBEE® is the original brand of flying disc.”

Since their first website, the Jacuzzi® website has been indicating that “Jacuzzi” is a trademark. What is interesting is that until 2005 they were describing their hot tubs as a “whirlpool bath”. They possibly stopped describing it as such because of trademark infringement, since Whirlpool® is a trademark owned by Whirlpool Properties Inc.

On its current website, Sony® is not indicating at all that “Memory Stick” is a trademark, nor is it using any sort of generic descriptor. The same goes for TASER®, which gives their products unique identifiers (e.g., TASER X2, TASER X26P), but no consistent generic descriptors (i.e., stun gun) are mentioned on their website.



TABLE 2. GENERIC USE IN MEDIA

	Reuters	New York Times	Business Insider	SVT News	De Telegraaf
Trademark	United Kingdom	United States	United States	Sweden	Netherlands
Lava® Lamp Motion Lamp	No capitals, no trademark indication, used as noun often	15 out of 20 not capitalised, no symbols, 4 times pluralised	18 out of 20 not capitalised, no trademark indication, and pluralised twice	All sources say "lavalampa" without capital letter or trademark indication	N/A
Frisbee® Flying disc	All capitalised, some with indication of flying disc, used as noun often	19 out of 20 capitalised, no further trademark indication given, used as noun often	3 out of 19 not capitalised, no other indication of trademark given, no pluralisation or verb use	20 out of 21 not capitalised, some are capitalised because they start the sentence	14 out of 16 not capitalised, no trademark indication given
Keso® Cottage cheese	N/A	N/A	N/A	Out of 71 hits, none are capitalised, also used as definite form 5 times	N/A
Post-it® Sticky notes	All capitalised, some say "Post-it maker", majority says "Post-it note maker"	N/A	N/A	9 out of 10 not capitalised, however, all use <i>lapp</i> (note) as a generic descriptor after the term	1 out of 2 hits was repeatedly capitalised, the other was pluralised and used as a noun
Jacuzzi® Hot tub	13 out of 20 not capitalised, very little indication that it is a trademark	All relevant articles are capitalised and give good indication that it is either a brand or a company	6 out of 20 not capitalised, no trademark symbols, used as noun often	9 out of 9 use no capital letters or trademark indication, used as noun often	All not capitalised (11), used as a noun without trademark indication
Ping-Pong® Table tennis	18 out of 20 not capitalised, very little indication that it is a trademark, and used as noun often	7 out of 10 not capitalised, no indication of trademark given, used as noun often	All not capitalised (19), mainly used as the descriptor for the sport rather than the brand	12 out of 20 not capitalised and no trademark indication given.	4 out of 4 not capitalised, used as noun, and no trademark indication
Jet Ski® Waterscooter	All not capitalised (19), no trademark indication, and 5 times pluralised	6 out of 16 not pluralised, no trademark symbol used, and 9 times pluralised	N/A	All not capitalised (18) or were incorrec (e.g., "Jetski" or "Jet ski"), no trademark indication	17 out of 18 not capitalised, all are written as one word (i.e., "jetski"), no trademark indication
Memory Stick® Flash Drive	All not capitalised (18), no trademark indication, and 9 times pluralised	7 out of 20 not capitalised; no trademark logo, but SONY is mentioned in 12 out of 20; no pluralisation	1 out of 1 capitalised and connected to the SONY brand.	1 out of 1 not capitalised, no trademark indication given	N/A
Taser® Stun gun	1 out of 20 not capitalised, no trademark symbol, but also not pluralised.	All capitalised (20), often used in relation to the company "Taser International", and pluralised once	All capitalised (6), no trademark symbols used, pluralised two times, and used as a verb once	1 out of 7 not capitalised, no trademark indication given, used in relation to generic descriptor	15 out of 18 not capitalised, no trademark indications given, used as verb once

A summary an informal study of the generic use in the media.

The generic use in the media is the fourth evidence indicator. The generic use in media is quite mixed for all of the trademarks (see table 2). The use of the trademark by a competent source can be used as evidence in a trademark genericization case. A small and informal study on the media use has been conducted by visiting the webpage of the source and using the search function to find articles on the trademark. Results were filtered by relevance. Usually, the first and second page of the search were scanned, which equaled

roughly twenty hits. What I was looking for was the (1) use of capital letters, (2) use of trademark symbols, and (3) use as verb, noun, or in a plural form. Unsurprisingly, the Lava<sup>®</sup> Lamp is being used as a generic term in the media, and none are recognising Lava<sup>®</sup> as a trademark. I believe that all of the trademarks are showing significant evidence of generic use in the media in Sweden and The Netherlands, and that companies are more actively protecting the trademark in the United States and, in some cases, the United Kingdom.

My background research showed that there is at least one generic word being used by the media for each of these categories. These have been presented below the trademark in Table 1 and 2. The trademark holders can use them to describe the category in which the product belongs. Since 1957, when registering a trademark, companies must provide a classification to which list of goods and services the trademark belongs. For the Canadian registration of the (now expired) Lava<sup>®</sup> Lamp, Lava Lite LLC wrote: "ornamental electrical device in the form of a lighting unit or lamp; motion lamps; acrylic displays containing flowable colored liquids." For the current "LAVA" registration, owned by Lifespan Brands LLC in the EU, they wrote: "Ornamental novelty lamps; electrical novelty lighting fixtures." This indicates that the descriptions do not always have to be the same for similar registrations. Moreover, what is written in the trademark registration does not always have to be the generic descriptor of the goods, but they can be used if wanted. There is an important distinction to be made between trademarks in new and in existing product categories. When the company introduced the Lava<sup>®</sup> Lamp, there may have been no existing category in which to fit it, and they may have been unaware of any risks of not promoting a generic descriptor. As discussed in the theoretical framework section, it is generally the job of a brand manager to create a descriptive concept in case there is no existing category. I would recommend the promotion of a descriptive concept in order to reduce the risk of the trademark becoming legally genericized.

The questionnaire shows that many people are not familiar with the alternative generic words for the trademarks shown in tables 1 and 2, assuming that the alternative words are appropriately considered generic. The test for determining whether a term is generic depends on how the term is perceived by the relevant public (Loglan Institute Inc. v. Logical Language Group, Inc., 962 F.2d 1038 (Fed. Cir. 1992)). The questionnaire shows that many people do not recognise Lava<sup>®</sup> lamp, Frisbee<sup>®</sup>, Keso<sup>®</sup>, Post-it<sup>®</sup>, and Jacuzzi<sup>®</sup> as trademarks. I believe that the relevant public perceives these terms as the generic descriptor of the relevant category of goods. According to my knowledge of brand management, I believe these companies are making a mistake for not being more active in defending their trademarks.

However, in the case of Keso<sup>®</sup>, a person or recipe telling someone to add Keso<sup>®</sup> to the meal, is indirectly telling that person to specifically buy Keso<sup>®</sup> instead of any other

cottage cheese. This makes a big difference in how people make purchase decisions. If all of the competitors can name their cottage cheese "Keso", it would logically result in lower sales for Arla®. The introduction section established that a descriptive word in a foreign language cannot normally obtain protection; however, "Keso" is written and phonetically quite similar as the Spanish word for cheese *queso*. Arla® admits on its website that "Keso" is derived from the Spanish word: "*KESO är en försvenskning av det spanska ordet queso, som betyder ost*" (Norberg, n.d.). In my interpretation this could, next to the genericization issue, be another potential ground for refusing the trademark registration in the future. Considering the results from the questionnaire, I do not believe that the general public in Sweden is fully aware that Keso® is a trademark.

The answer to our research question consists of multiple aspects. The identifiable patterns behind trademark genericization in Sweden and The Netherlands are: (1) using the trademarks as generic terms is common in the media, (2) breaking the rules does not mean the trademark is automatically genericized, (3) using other intellectual property mechanisms can still protect your unique product, (4) being a practical generic terms could potentially be beneficial regarding sales, (5) using trademarked names for a category of products is rather common.

From looking at the general patterns in genericization, I have found that external factors seem relatively hard to control. The trademarks show strong evidence of genericization in their usage in the media in Sweden and The Netherlands, and from the results of a consumer questionnaire. These are pieces of evidence that can indicate in which stage the practical trademark genericization occurs. It has possibly become too late, in my opinion, to undo trademark genericization on a practical level when the media and the general public begin using the trademark extensively as a generic descriptor. Since the companies do not have complete control over what other people write, usually their only option is to send out letters to the journalists after they see them misusing the trademark. I believe well-known marks have a bit more leverage in the sense that they can establish rules with bigger media companies regarding proper usage.

In the theoretical framework section I presented the INTA rules for proper trademark usage. As I have shown, however, breaking these rules does not automatically lead to the loss of enforceable trademark rights; however, it significantly increases the risk of losing a trademark. For example, in the Otis Elevator Company case in the introduction section on how their "escalator" trademark became the generic term for what used to be called moving staircases due to their own generic use.

Besides trademarks, there are other mechanisms that help to protect a product. These mechanisms can be the key in keeping some sort of control position after a trademark has been genericized; for example, Lifespan Brands LLC has design right

protection on the shape of their product (Appendix 3). The well-known configuration of the product can not be copied by competitors without infringing on the design rights; however, designing a motion lamp with a distinct name that has a completely different shape is an option. When searching for "motion lamp", instead of "Lava Lamp", one finds the product that was just described. Creative Motion® is one example of a brand that is selling motion lamps that have a different shape and a different name.

As proven, the general public is well aware of the term "Lava Lamp", and this is where the positive side of trademark genericization reveals itself. Many consumers will still use the term to find a motion lamp to buy. Searching for "Lava Lamp" will often lead to an original one, just like the Keso® example in this section. As discussed, Lifespan Brands LLC only has partial trademark protection on "LAVA" in the United States, European Union, and Canada. This protection blocks competitors from using "LAVA" in their product names.

By claiming trademark rights, having trademark redundancy, and by having design protection, Lava Lite LLC and Lifespan Brands LLC have been moderately successful in defending themselves from competitors on the market. Trademark genericization has slightly weakened their defensive position, but it remains quite effective in blocking competitors trying to sell "Lava Lamps". Although alternative brands are trying to penetrate the market, the high degree of genericization has made the general public unaware of the "motion lamp" category, thus making purchases in that category less likely.

As for general patterns, the brands tested in the questionnaire are sticking to the rules on how to communicate their trademarks nowadays, but mistakes have been made in the past. I believe it is the job of the brand manager to set the usage rules for the trademark(s) from the start. I think consistency is needed to educate the general public and the media on the correct use of a trademark. The significance of trademark usage is becoming more obvious that even Apple® Inc. is starting to show subtle signs of worries about their trademarks. In a Twitter® message ("tweet") sent the 28th of April 2016, Apple's Head of Marketing, Phill Schiller, reminded everyone to not pluralise the name of their products: "One need never pluralize Apple product names. Ex: Mr. Evans used two iPad Pro devices."

Furthermore, it is clear that practical genericization is more common than legal genericization. Obvious reasons for this are that court cases require significant resources and solid evidence, and it is usually the last option for a trademark holder to defend its trademark rights in court if negotiations fail.

My interpretation of trademark genericization is that it is a phenomenon that only causes legal issues when two parties disagree over the use of a certain term. The validity of the trademark is then challenged in court, either from a defensive or an offensive side. Practical genericization makes, as I have examined, those cases much stronger by providing

additional evidence. I believe that the legal genericization is, in large part, decided by the general public (the degree of practical genericization).

I could not find indications that losing the trademark right is automatically disastrous for all companies, especially considering the companies behind Thermos<sup>®</sup>, aspirin, Lava<sup>®</sup> Lamp, and escalator still exist. Losing their trademarks has not resulted in any of these companies to cease activity completely. Since there is no study on the exact financial effect that genericization has had, it is unclear whether they have benefited from or been hindered by becoming the generic term from a financial perspective. I have not identified conscious efforts by the companies surveyed to actually promote the generic use, as no clear patterns in their activities are being shown. Actually, I believe that Keso<sup>®</sup> is currently benefitting from being the practical generic term for cottage cheese, while the company is following the rules quite well. However, the company behind the Frisbee<sup>®</sup> seems to be losing sales due to wholesalers who are attracting customers to their websites' "Frisbee" sections, where the products of competitors are being sold. Frisbee<sup>®</sup> does not show clear signs of actively campaigning against this, but they still follow the rules in the other aspects. I think the Jacuzzi<sup>®</sup> trademark is going to see an increase in practical trademark genericization in Sweden and The Netherlands, as the media is widely and repeatedly using the term in a generic way. I foresee new generations of people continuing to be educated on this particular use of the term that is, for example, uncapitalised. I believe this also applies to the Post-it<sup>®</sup> trademark, which more people were already using generically in the results of the online questionnaire, as well as the generic use in the media, especially in Sweden. Combined, this could lead to the legal genericization of some of these brands.

As the respondents are rather well educated, with roughly 60 percent having a bachelor degree or higher, I could not find any clear correlation between their level of education and the use of trademarked terms to describe the pictures.

There is a pattern in cases, such as escalator, Thermos<sup>®</sup>, aspirin, and Lava<sup>®</sup> Lamp, where the consumers have been told that the trademark is the sole identifier of the product, not the generic descriptor. What these products have in common is that they were somehow first able to successfully market the product on a large scale, making them the popular term. Interpreted from my analysis, had they used descriptive concepts next to their trademark from the beginning (e.g., a Thermos vacuum insulated bottle), followed the trademark rules, and countered the evidence indicators or genericization, the consumers and the competitors would have probably adopted the generic descriptor rather than the trademark to describe the product. They would also have had a stronger defence position in the court cases. Had they done all that, the general public nowadays would quite

possibly not be asking for an aspirin or using an escalator, but asking for willow bark extract<sup>2</sup> or using the moving stairs to take them up or down.

Again, it is unclear if the companies that had their trademarks genericized benefited from or been hindered by becoming the generic term. What is clear, is that they lost the enforceable trademark rights and the tradable trademark value.

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<sup>2</sup> A crude form of aspirin can be made from the bark of a willow tree.

## 6. Conclusions

As demonstrated, trademark genericization is a rather complex process. I have established how trademarks become generic, given the proper rules of usage, and given the evidence indicators. I have applied these concepts to a set of trademarks that still have legal protection in relevant locations. What I found is that, even though these rules of proper usage are not being applied, and even though there is some evidence of genericization clearly showing, a company can still keep the enforceable trademark rights to those trademarks. Trademark genericization is a process that is both dependant and independent of the law (practical vs. legal). I found that practical genericization is somewhat of a natural process, and does not require any legal action to occur. On the other side, as I have demonstrated in the cases, the legal genericization occurs when the trademark holder fails to defend or enforce its trademark rights in court.

The efforts many companies have been putting into updating their websites with the adding of trademark symbols, the adding of generic descriptors, and campaigning in advertisement about the correct use of the trademark, shows that they are actively trying to counter trademark genericization. However, the efforts in avoiding misuse in the media seem to be close to absent in Sweden and The Netherlands. I have seen many trademarks that have become generic, and I believe there will be many more to come if the companies do not change their strategies, especially in Sweden and The Netherlands.

I established that the use of a trademark in the media is hard to control because they represent actions from people outside the company. Even though a trademark right has been lost, a company can apply other intellectual property rights, such as design rights, in order to protect the iconic configuration of the product. I also found that if a trademark consists of two or more words, registering each separate word as a trademark as well can potentially block competitors, as in the "LAVA LAMP" vs. "LAVA" case. This is something Jet Ski® could potentially do.

As demonstrated from the many examples, losing a trademark due to genericization does not normally force a company into bankruptcy. A trademark is more commonly applied to a product or product line from a company, which usually has several other products in their offerings as well. Losing a trademark basically means that competitors are allowed to use the same name for products of their own, but there are other ways to secure your differentiation or competitive advantage (e.g., through design rights).

As I established, the concept of trademark genericization, derived from analysis of some of the most prominent examples of genericized trademarks, conducted a formal study of my own, and analysed these results, I was able to answer the research question. I have

mapped out the most compelling patterns in trademark genericization for Lava® Lamp, Frisbee®, Keso®, Post-it®, Jacuzzi®, Ping-Pong®, Jet Ski®, Memory Stick®, and Taser® in Sweden and The Netherlands, and how they generalise for their countries.

During the research, I have been confronted with additional limitations. The empirical study was limited by the time available; I would have preferably wanted to keep the online questionnaire open for a longer period of time in an attempt to get a more balanced response. The invitation to the questionnaire clearly attracted more people who actually felt a close connection to The Netherlands, Sweden, or both. Because of this, a lot of Dutch people living in Sweden took the time to respond to the questions as they are of abundance in my network.

For the results, I did not use a second coder due to limited time and resources. Having a second coder could have potentially had a positive effect on the clustered answers from the questionnaire. In some aspects, it would have been better to do semi-structured, face-to-face interviews in order to ask the respondents the questions, with the ability to go more in depth; it would have also allowed me to test whether the respondent is answering what first comes to mind. However, with the restricted time and resources, the online research allowed me to collect relatively more data with less resources, compared to conducting face-to-face interviews. I opted for a larger sample size at the expense of having an admittedly non-random sample.

Some trademarks are not registered in all countries (Appendix 4). Some have abandoned registrations in Sweden, The Netherlands, or the EU. This indicates that the situation is indeed more complex as it appears.

In the case of a doctoral thesis I would perform a face-to-face questionnaire with the aim of an increased diversity of demographics. I would like to include the purchase decisions based on the use of the generic terms in that study. This study would allow me to find out whether people would actually buy the product they are describing (e.g., when they say they want to buy a Frisbee®, and then actually buy an original Frisbee® from Wham-O). This would further allow the study of the financial impact of a genericized trademark, and would answer the question whether trademark genericization has a negative financial effect on a business. Having this information would potentially strengthen the case regarding whether genericization should generally be promoted or avoided.

At the beginning of this dissertation I presented the following hypothesis: “My hypothesis is that I will find little open evidence of conscious efforts by the companies to promote the genericization of their trademarks, and consequently most of the evidence to line up in favour of trademark genericization to be unintended and largely part of a negative process.” In my research, companies have not shown conscious efforts to promote genericization. There have been signs in the cases of elevator, Thermos®, and aspirin, but



they all fought to keep the rights to their trademarks. Although they were promoting genericization in their advertising, it is unclear if this was done consciously and with intent. As no clear financial benefit can be demonstrated, overall/for the most part, trademark genericization has produced slightly negative results from a financial perspective. That said, some signs show that being the generic term does potentially have an influence in the way people stimulate certain purchase decisions (e.g. the Keso and Lava<sup>®</sup> Lamp cases). For example, one can find recipes for meals stating “Keso” has to be added, which undoubtedly stimulates the purchase of actual Keso cottage cheese to some extent. Therefore, the hypothesis has not completely been upheld, and this dissertation has shown that trademark genericization can have positive effects by being the popular term within the market. Popularising a trademark clearly has two sides: it can potentially make your product the popular choice within the market due to successful marketing, however it can also lead to the genericization of the trademark. I believe the golden mean is somewhere in between.

# Appendix

## 1. The questionnaire

### Questionnaire / Vragenlijst / Frågeformulär

\*Obligatorisk

**Please read the instructions carefully. / Gelieve lees de instructies. / Var god läs instruktionerna.**

---



Deze enquête bestaat uit 9 vragen. In elke vraag is een object te zien. Beschrijf wat u ziet. Beantwoord alle vragen in uw moedertaal (Nederlands).



Detta frågeformulär kommer bestå av 9 frågor. Vid varje fråga finns en bild som visar ett objekt. Du blir ombedd att beskriva vad du ser. Svara gärna på alla frågor på ditt modersmål (Svenska).



This questionnaire will consist of 9 questions. Each question will show you a picture of an object. You are asked to describe what you see. Please answer all questions in your native language (English).

If your language is not listed, please answer in English.



BACK

NEXT



---

BACK

NEXT



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BACK

NEXT

Hint: A type of cheese



---

BACK

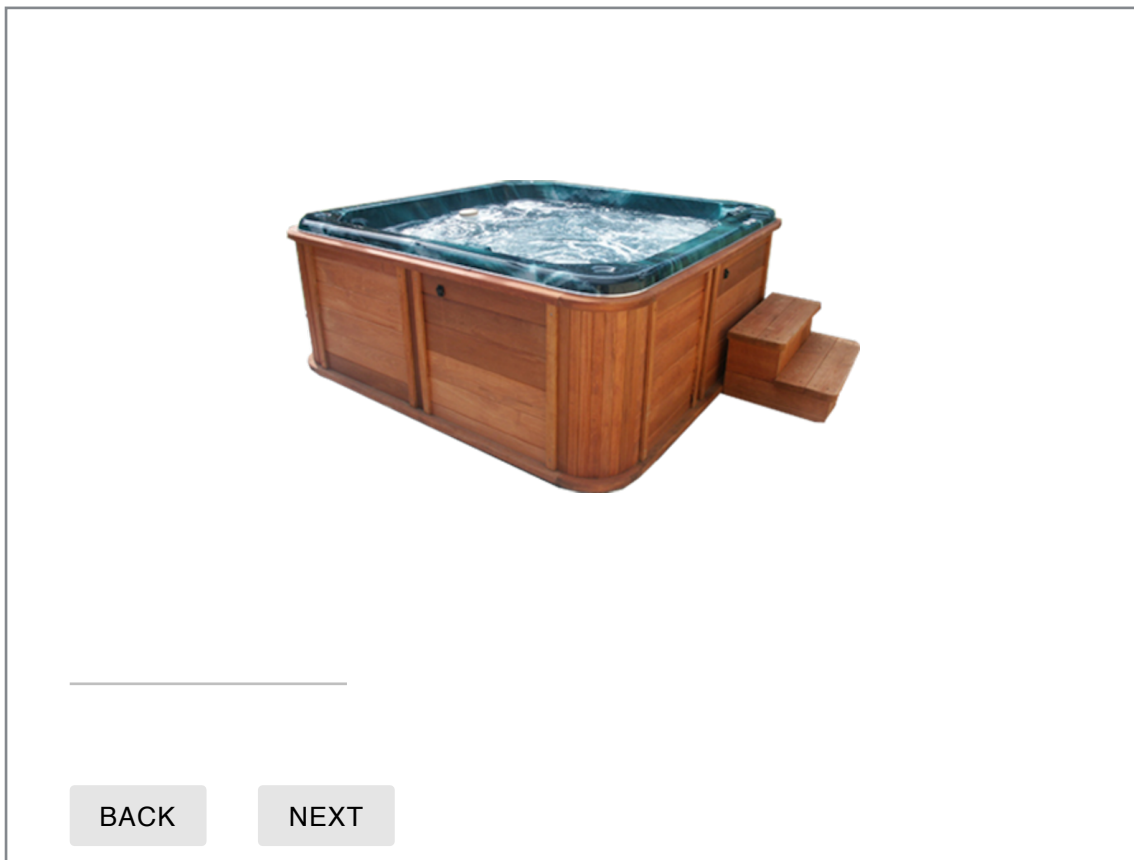
NEXT



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BACK

NEXT





---

BACK

NEXT



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BACK

NEXT

## Demographics / Demografie / Demografi

### 10. What is your nationality? / Wat is uw nationaliteit? / Vilken är din nationalitet? \*

Markera endast en oval.

- Dutch / Nederlands / Holländsk
- Swedish / Zweeds / Svenska
- Övrigt: .....

### 11. Where do you currently live? / Waar woont u momenteel? / Var är du bosatt? \*

Markera endast en oval.

- The Netherlands / Nederland / Nederländerna
- Sweden / Zweden / Sverige
- Övrigt: .....

### 12. What is your age? / Wat is uw leeftijd? / Hur gammal är du? \*

Markera endast en oval.

- Under 18 years old / Jonger dan 18 jaar oud / Under 18 år
- 18-29 years old
- 30-44 years old
- 45-59 years old
- 60 years or older / 60 jaar of ouder / Över 60 år

### 13. What is your gender? / Wat is uw geslacht? / Vad är ditt kön? \*

Markera endast en oval.

- Male / Man / Man
- Female / Vrouw / Kvinna

### 14. What is the highest degree or level of school you have completed? / Wat is uw hoogst behaalde opleidingsniveau? / Vilken är den högsta nivå du har studerat färdigt på? \*

Markera endast en oval.

- No schooling completed / Geen scholing / Ingen utbildning
- High school graduate / Middelbaar onderwijs / Gymnasial
- Bachelor's degree / Bachelor diploma / Kandidatexamen
- Master's degree / Master diploma / Master
- Doctorate degree / Doctoraat / Doktorand
- Övrigt: .....

### 15. Have you heard about trademark genericization before? / Heeft u ooit eerder van trademark genericization gehoord? / Har du hört talas om trademark genericization förut? \*

Markera endast en oval.

- No, I have not. / Nee, ik heb er nooit van gehoord. / Nej, det har jag inte.
- Yes, but I don't know what it is. / Ja, maar ik weet niet wat het is. / Ja, men jag vet inte vad det är.
- Yes, I am familiar with it. / Ja, ik ben er bekend mee. / Ja, jag är bekant med det.

**Don't forget to submit the form. / Vergeet niet om het formulier te verzenden. / Glöm inte att skicka in formuläret.**

## 2. Answers in “other” clusters

Answers given in the “other” clusters are shown in the column to the right.

PICTURE 1		OTHERS:
Answers containing		?
<b>Lavalamp (or related)</b>	<b>170</b>	70 bubbellamp
<b>Other</b>	<b>42</b>	A lamp
		Bubbellamp
<b>Total</b>	<b>212</b>	Carambol
		Det jag ser är en lampa, en lampa som inte är så vanligt förekommande numera. Däremot var den en naturlig och häftigt inslag i min barndom, som om bara de häftiga barnen hade en sådan, för jag hade aldrig en. Jag tänker väldigt mycket 90-tal, och reflekterar kring att den har blivit populär igen.
		Een lamp
		Een lamp met een diabolvoet.
		Een paarse jaren 70 sta lamp, model smal, hoog, taps toelopend
		Een paarse lamp met chemische substantie waardoor de 'bubbels' drijven en zichzelf vermeederen.
		Een sfeer lamp
		En lampa som ändrar färg
		Geen idee
		halogeenlamp
		i see bright colors and pretty abstract shapes. i like what i see, it's simple.
		kegel staand
		Konstlampa
		Lamp
		lamp
		Lamp
		Lamp
		Lamp
		lamp
		Lamp
		Lampa
		Lampa
		Lampa
		Lampa
		lampa
		Lampa
		lampa
		Nostalgie
		Olie beweeglamp
		Olie lamp
		ornament
		Plasmalamp
		priktoel
		Rare lamp
		Speelgoed
		verrekijker
		Vulkanlampa
		Vulpendop



PICTURE 2		OTHERS:
Answers containing		Aquatic AV
Jet ski	9	Batmobile
<b>Waterscooter (or related)</b>	<b>99</b>	Detta är nog en sak som jag tyvärr inte kan vid namn. Verkar rolig att åka på men jag tänker mest på att det är störiga killar som åker på den, som sommaren 2010 körde förbi mig och skvätte vatten på mig som förstörde min Ipod med 80 Gb.
Waterscooter	50	Droom
Water scooter	3	Een jetscooter
Vattenskoter	36	Een soort van zwarte snowjet zonder skies, meek wave runner. Met oranje lijnen
Vattenscooter	10	i see design elegance and power. i think the black color gives a bit of a masculine impression.
<b>Boat (or related)</b>	<b>10</b>	Motorbåt
Boat	3	racerbåt
Båt	4	Ski motor
Boot	3	Sneeuw scooter
<b>Other</b>	<b>21</b>	Sneeuwscooter
		sneeuwscooter
<b>Total</b>	<b>212</b>	Snel
		Snelheid
		snowwscooter
		spaceship
		Speed
		Speedboot of sneeuwmobiel?
		Supersonische slee
		vaartuig

PICTURE 3		OTHERS:
Answers containing		?
<b>Pingpong (or related)</b>	<b>50</b>	i see fun!!!
Pingpong	39	Reflex
Ping-pong	2	TENNISBORD
Ping pong	9	
<b>Pingis</b>	<b>79</b>	
<b>Tabletennis (or related)</b>	<b>79</b>	
Table tennis	5	
Tafeltennis	65	
Bordtennis	9	
<b>Other</b>	<b>4</b>	
<b>Total</b>	<b>212</b>	

PICTURE 4		OTHERS:
Answers containing		?
<b>Keso</b>		<b>94</b> a spoon full of ice-creame
<b>Cottage cheese</b>		<b>26</b> Brie
<b>Hüttenkäse (or related)</b>		<b>36</b> Cottoncheese
	Hüte	7 Een lepel met stukjes mozzarella
	Hütte	15 Färskost
	Hute	5 Geen idee
	Hutte	9 Gorganzola
<b>Feta</b>		<b>5</b> Grof Zout
<b>Cheese (or related)</b>		<b>16</b> Lepel
	Kaas	13 Lepel met onbestemde inhoud
	Ost	3 Lepel rijst
<b>Cream (or related)</b>		<b>9</b> Mascarpone
	(Slag)room	7 Meringue
	Grädde	2 mozerella
<b>Other</b>		<b>26</b> Mozzarella
		Mozzarella
<b>Total</b>		<b>212</b> Ricotta
		Ricotta
		Ricotta
		Ricotta
		ricotta
		Ricotta
		rijst
		Vies

PICTURE 5		OTHERS:
Answers containing		3 A pile of coloured sheets of paper. one yellow, one blue, one green
<b>Post it</b>		<b>131</b> 3 pappersbladet i olika färger
	Postit	8 aanteken papier
	Post-its	82 Aantekenblokje
	Post its	41 Bladje
<b>Note (or related)</b>		<b>20</b> Diskhandduk
	Notis	3 Disktrasa
	Notitie	4 färgad papper
	Memo	13 Färgade lappar
<b>Sticky (or related)</b>		<b>14</b> Färgade papper
	Sticky	5 geel
	Stick	9 Gekleurd papier
<b>Vouw (or related)</b>		<b>19</b> Gekleurde blaadjes
<b>Other</b>		<b>28</b> gekleurde blaadjes
		Gul
<b>Total</b>		<b>212</b> Kreativ idégenerering
		olikfärgade papper
		papier hier! origami
		Postlappar
		precies
		Stick upp briefjes
		stickit papiertjes
		three different colored papers
		Trasa
		Tre pappersark i olika färger
		Vellen gekleurd papier
		Viltpapier
		Zeem

PICTURE 6		OTHERS:
Answers containing		Computerplug
<b>Memory stick (or related)</b>	<b>4</b>	Ett flash-minne
Memory Stick	1	G4
Memorystick	3	Geheugenstick
<b>USB Stick (or related)</b>	<b>109</b>	geheugenstick
USB stick	80	Memory
USB-stick	26	Mobilt bredbanstick
USBstick	3	Skick
<b>USB minne (or related)</b>	<b>57</b>	Sticka
USB minne	13	Stikje voor computer
USB-minne	39	usb geheugen
USBminne	5	USB pen
<b>Flash drive (or related)</b>	<b>2</b>	USB Pinne
<b>USB</b>	<b>27</b>	
<b>Other</b>	<b>13</b>	
<b>Total</b>	<b>128</b>	

PICTURE 7		OTHERS:
Answers containing		Badkuip
<b>Jacuzzi</b>	<b>83</b>	Bauitenbadkuip
Jacuzzi	70	coziness and relaxation in warm water in the middle of winter.
Jacuzi	5	Een hottube (bubble bad)van hout met opstapje
Jaccusi	2	een pool
Jaccuzzi	2	Graag vandaag nog
Jaccuzi	4	Hotpool
<b>Bubblebath (or related)</b>	<b>61</b>	hotpool
Bubblebath	2	Nog een droom
Bubbelbad	28	Pool
Bubbelpool	27	Pool
Bubblebad	2	Pool
Bubblepool	2	Pool
<b>Hot tub (or related)</b>	<b>28</b>	Pool
Hot tub	14	Pool
Hot-tub	3	Utomhusbad
Hottub	11	Verwarmd buitenbad
<b>Whirlpool (or related)</b>	<b>11</b>	Warmwatertube
Whirlpool	8	
Wirtpool	3	
<b>Badtunna</b>	<b>7</b>	
<b>Spa</b>	<b>4</b>	
<b>Other</b>	<b>18</b>	
<b>Total</b>	<b>212</b>	

PICTURE 8		OTHERS:
Answers containing		a freeze with a human hand
<b>Frisbee (or related)</b>	<b>197</b>	air cushion
Frisbee	179	gooischiif
Frisby	7	Hond
Fresbee	4	Ikea bordje ondersteboven
Freesbee	7	Kussentje
<b>Disc (or related)</b>	<b>8</b>	Surf Bord
Discus	2	
Diskus	1	
Disk	5	
<b>Other</b>	<b>7</b>	
<b>Total</b>	<b>212</b>	

PICTURE 9		OTHERS:
Answers containing		boy fun, to me it's violence
<b>Taser (or related)</b>	<b>62</b>	Een of ander gereedschap?
Taser	48	Een zwart (lijm?) pistool met gele inhoud en verlichting
Tazer	8	En kamera där man kan mäta avstånd
Teaser	6	En prismärkare
<b>Electric gun (or related)</b>	<b>23</b>	Ett häftstift
Elpistol	19	Fartmätare
Stroomstootwapen	4	flitser
<b>Gun (or related)</b>	<b>17</b>	kluding
Gun	3	Knijpkat
Pistol	10	Lichtpistool
Pistool	4	Märkmaskin
<b>Stun-gun (or related)</b>	<b>12</b>	Niet pistool
Stun-gun	1	nietpistool
Stun gun	1	Pew pew
Stungun	10	Scanner?
<b>Laser</b>	<b>26</b>	Snelheids controle apparaat
<b>Flashlight (or related)</b>	<b>30</b>	Statens spargris
Lampa	18	sten
Flash	1	Stengun
Zaklamp	11	Vapen
<b>No answer (or related)</b>	<b>20</b>	Vreemd
<b>Other</b>	<b>22</b>	
<b>Total</b>	<b>212</b>	

### 3. Lifespan Brands LLC Design Rights

An excerpt from the TMview trademark database on the Lava lamp configuration owned by Lifespan Brands LLC. A comparison is made with the picture used in the questionnaire.

19



The mark consists of the configuration of the goods. The lining in the drawing is for the purpose of showing the three-dimensional roundness of the configuration.

(210)/(260) Ansökningsnummer	78076332
(270) Ansökningspråk	en
(220) Ansökningsdatum	2001-07-30
Varumärkesmyndighet	United States - USPTO
(190) Registreringsmyndighet	US
(111) Registreringsnummer	2591733
(151) Registreringsdatum	2002-07-09
Typ av immateriell äganderätt	Trade mark
(550) Varumärkestyp	Figurative
(551) Kategori av varumärke	Individual
(511) Niceklassificering	11
(531)/(532) Wienklassificeringen	19.01.25
Aktuell varumärkesstatus	Registered
Datum för aktuell varumärkesstatus	2011-08-24
Startdatum för invändningsperiod	2002-04-16
Handelsärskiljningsförmåga	true



## 4. Trademark registrations


This table indicates in which countries an **active** registration is available. Note that in some locations the registration has been abandoned.









Trademark	Netherlands	Sweden	European Union	United States	Total
Lava®	NO	NO	YES	YES	2/4
Frisbee®	YES	YES	YES	YES	4/4
Keso®	NO	YES	NO	NO	1/4
Post-it®	YES	YES	YES	YES	4/4
Jacuzzi®	YES	YES	NO	YES	3/4
Ping-Pong®	NO	NO	NO	YES	1/4
Jet Ski®	NO	NO	NO	YES	1/4
Memory Stick®	YES	YES	YES	YES	4/4
Taser®	NO	NO	YES	YES	2/4

Collected from the TMview database: <https://www.tmdn.org/tmview/>

## 5. Trademark registrations by Lifespan Brands LLC and Lava Lite LLC

Graphic representation	Trade mark name	Trade mark office	Designated territory	Application number / Registration number	Trade mark status	Nice class	Applicant name	Application date	Trade mark type	Registration date
		CA	CA	1078938-00 TMA619731	Registered	11	Lifespan Brands LLC	17-10-2000	3-D	16-09-2004
		CA	CA	1078940-00 TMA619776	Registered	11	Lifespan Brands LLC	17-10-2000	3-D	16-09-2004
		CA	CA	1187465-00 TMA662294	Registered	6,9,14,16,18,21,24,25,26,28,34	Lifespan Brands LLC	18-08-2003	Figurative	06-04-2006
		CA	CA	1177287-00 TMA655710	Registered	6,9,11,28,35,37	Lifespan Brands LLC	07-05-2003	Figurative	22-12-2005
		US	US	73761875 1611140	Registered	11	LIFESPAN BRANDS LLC	04-11-1988	Figurative	28-08-1990
		US	US	75598284 2316231	Registered	11	LIFESPAN BRANDS LLC	02-12-1998	Figurative	08-02-2000
		US	US	78076332 2591733	Registered	11	LIFESPAN BRANDS LLC	30-07-2001	Figurative	09-07-2002
		US	US	75598283 2314046	Registered	11	LIFESPAN BRANDS LLC	02-12-1998	Figurative	01-02-2000
		US	US	85883944 4450493	Registered	28	LIFESPAN BRANDS LLC	22-03-2013	Figurative	17-12-2013
		US	US	76124416 2733775	Registered	28	LIFESPAN BRANDS LLC	08-09-2000	Figurative	08-07-2003
		US	US	75141931 2113753	Registered	11	LIFESPAN BRANDS LLC	30-07-1996	Figurative	18-11-1997
		BX	LU, NL, BE	959435 686976	Registered	11	Lifespan Brands LLC,	09-03-2000	Figurative	-
	AN AMERICAN ICON SINCE 1965	US	US	86524320 4944083	Registered	11	LIFESPAN BRANDS LLC	04-02-2015	Combined	26-04-2016
CLEARVIEW	CLEARVIEW	US	US	85195471 4195340	Registered	11	LIFESPAN BRANDS LLC	10-12-2010	Word	21-08-2012
COLORMAX	COLORMAX	US	US	85962823 4598463	Registered	11	LIFESPAN BRANDS LLC	18-06-2013	Word	02-09-2014
DOUBLE PLAY	DOUBLE PLAY	US	US	86487599 4933643	Registered	11	LIFESPAN BRANDS LLC	22-12-2014	Word	05-04-2016
iCONNECT	ICONNECT	US	US	85675304 4936994	Registered	9	LIFESPAN BRANDS LLC	12-07-2012	Word	12-04-2016
-	LAVA	CA	CA	1093258-00 TMA584438	Registered	9,11,14,28	Lifespan Brands LLC	19-02-2001	Word	27-06-2003
-	LAVA	CA	CA	1007329-00 TMA535433	Registered	11	Lifespan Brands LLC	03-03-1999	Word	23-10-2000
	LAVA	US	US	76124415 4043605	Registered	11	LIFESPAN BRANDS LLC	08-09-2000	Word	25-10-2011
	LAVA	US	US	78166033 2799386	Registered	9	LIFESPAN BRANDS LLC	19-09-2002	Word	23-12-2003
	LAVA	US	US	75219192 2121684	Registered	11	LIFESPAN BRANDS LLC	30-12-1996	Word	16-12-1997
	LAVA	EM	EM	001199876 001199876	Registered	11	Lifespan Brands, LLC	09-06-1999	Word	11-12-2000
	LAVA	EM	EM	011751625 011751625	Registered	11,28,35	Lifespan Brands, LLC	18-04-2013	Figurative	24-10-2013
	LAVA BRAND	US	US	78191251 2972900	Registered	11,28	LIFESPAN BRANDS LLC	04-12-2002	Combined	19-07-2005
	LAVA brand	EM	EM	003227411 003227411	Registered	11,20,28,35,40	Lifespan Brands, LLC	13-06-2003	Figurative	04-02-2005
-	LAVA LITE	CA	CA	538831-00 TMA313640	Registered	11	Lifespan Brands LLC	26-03-1985	Word	25-04-1986
	LAVA LITE	US	US	72259746 0852625	Registered	11	LIFESPAN BRANDS LLC	30-11-1966	Word	16-07-1968
-	LAVA LITE	GB	GB	UK00001567 615 UK00001567 615	Registered	11	Lifespan Brands, LLC	05-04-1994	Word	07-04-1995
-	LAVA LITE	BX	LU, NL, BE	781805 515471	Registered	11	Lifespan Brands LLC,	18-06-1992	Word	-
-	LAVA LITE	DE	DE	2040426 2040426	Registered	11	Lifespan Brands, LLC	01-06-1992	Word	14-07-1993

-	THE ORIGINAL SHAPE OF COOL	CA	CA	1432109-00 TMA788811	Registered	11,20	Lifespan Brands LLC	24-03-2009	Word	27-01-2011
THE ORIGINAL SHAPE OF COOL	THE ORIGINAL SHAPE OF COOL	US	US	77979562 3815790	Registered	11	LIFESPAN BRANDS LLC	25-03-2009	Word	06-07-2010
THE SHAPE OF COOL	THE SHAPE OF COOL	US	US	78460866 3094194	Registered	11	LIFESPAN BRANDS LLC	03-08-2004	Word	16-05-2006
	THE WAVE	US	US	72333927 0912764	Registered	28	LIFESPAN BRANDS LLC	30-07-1969	Word	08-06-1971
WEIGHRITE	WEIGHRITE	US	US	85661525 4506243	Registered	9	LIFESPAN BRANDS LLC	26-06-2012	Word	01-04-2014

Graphic representation	Trade mark name	Trade mark office	Designated territory	Application number / Registration number	Trade mark status	Nice class	Applicant name	Application date	Trade mark type	Registration date
	LAVA LITE	FR	FR	92428954	Registered	11	LAVA LITE, LLC, Société organisée selon les lois de l'Etat du Delaware	30-07-1992	Combined	-
-	LAVA	IS	IS	535/1999 476/1999	Registered	11	Lava Lite, LLC, a Delaware limited liability company	04-03-1999	Word	28-04-1999
	LAVA BRAND	MX	MX	0598929 804521	Registered	28	LAVA LITE, LLC.	30-04-2003	Combined	15-08-2003
	LAVA BRAND	MX	MX	0598927 802691	Registered	11	LAVA LITE, LLC.	30-04-2003	Combined	07-08-2003
	LAVA BRAND	MX	MX	0598928 816481	Registered	14	LAVA LITE, LLC.	30-04-2003	Combined	09-12-2003
	LAVA BRAND	MX	MX	0598930 805471	Registered	35	LAVA LITE, LLC.	30-04-2003	Combined	02-09-2003
	LAVA BRAND	MX	MX	0598931 805104	Registered	40	LAVA LITE, LLC.	30-04-2003	Combined	22-08-2003
-	LAVA	MX	MX	0366408 644620	Registered	11	LAVA LITE, LLC.	05-03-1999	Word	29-02-2000
-	LAVA LITE	BR	BR	822862700 822862700	Registered	11	LAVA LITE, LLC	23-06-2000	Word	09-12-2008
	LAVA brand	CH	CH	51572/2003 P-516598	Registered	11, 14, 28 35, 40	Lava Lite, LLC	09-05-2003	Combined	02-12-2003
-	LAVA	CH	CH	04944/1999 P-466416	Registered	11	Lava Lite, LLC	04-06-1999	Word	04-11-1999
-	LAVA LITE	CH	CH	06298/1992 P-400133	Registered	11	Lava Lite, LLC	26-08-1992	Word	16-03-1993
LAVarium	LAVARIUM	US	US	78392098 3064412	Registered	16	LAVA LITE, LLC	28-03-2004	Word	28-02-2006
		BR	BR	821583786 821583786	Registered	11	LAVA LITE, LLC	30-04-1999	Figurative	26-08-2003
-	LAVA LITE	ES	ES	M1721080 M1721080	Registered	11	LAVA LITE, LLC	21-09-1992	Stylized characters	16-09-1994
-	LAVA LAMP	CA	CA	1430777-00	Ended	11,20	Lava Lite, LLC	12-03-2009	Word	-
LAVA LAMP	LAVA LAMP	US	US	77610796	Ended	30	Lava Lite, L.L.C.	10-11-2008	Word	-



## Bibliography

1. Abercrombie & Fitch Co. v. Hunting World 537 F.2d 4 (2nd Cir. 1976)
2. Bayer Co. v. United Drug Co., 272 F. 505 (S.D.N.Y. 1921)
3. Cohen, D. (1991). Trademark Strategy Revisited. *Journal of Marketing*, 55(3), 46-59. Retrieved March 29, 2016.
4. Consequences of non-use or misuse of trademark symbols - Part II. (2007). Retrieved May 06, 2016, from [http://www.smithsholar.com/single\\_tip.php?id=321](http://www.smithsholar.com/single_tip.php?id=321)
5. Dijck, J. V. (2013). *The culture of connectivity: A critical history of social media*. Oxford: Oxford University Press.
6. Elliot v. Google Inc., No. CV-12-1072, 2014 WL 4447764 (D. Ariz. Sept. 10, 2014)
7. Goldman, E. (2014). Google Successfully Defends Its Most Valuable Asset In Court. Retrieved May 15, 2016, from <http://www.forbes.com/sites/ericgoldman/2014/09/15/google-successfully-defends-its-most-valuable-asset-in-court/#573b23da3f05>
8. Haughton Elevator Co. v. Seeberger, 85 U.S.P.Q. 80 ( 1950)
9. Helander, M. (2009). *Arla i cheese-möte efter fonetikhaveri*. Retrieved March 29, 2016, from <http://www.resume.se/nyheter/artiklar/2009/02/13/arla-i-cheese-mote-efter-fonetikhaveri/>
10. Ingram, J. D. (2004). The Genericide of Trademarks. *Buffalo Intellectual Property Law Journal*, 2(2), 154-163. Retrieved March 29, 2016.
11. Kellogg Co. v. National Biscuit Co., 305 U.S. 111 (1938)
12. Keso. (n.d.). In Wikipedia. Retrieved April 26, 2016, from <https://sv.wikipedia.org/wiki/Keso>
13. Lava Lite, LLC Changes Name To lifespan brands, LLC, Reflecting A New House Of Brands Strategy. (2016, January 11). Retrieved May 18, 2016, from <http://www.prnewswire.com/news-releases/lava-lite-llc-changes-name-to-lifespan-brands-llc-reflecting-a-new-house-of-brands-strategy-300202405.html>
14. Loglan Institute Inc. v. Logical Language Group, Inc., 962 F.2d 1038 (Fed. Cir. 1992)
15. Mansfield, W. (2015). Genericization: Friend or Foe? Retrieved March 29, 2016, from <http://www.globaltrademag.com/global-trade-daily/commentary/genericization-friend-or-foe>

16. Matheson, J. A., & Naydonov, A. B. (2010). Losing Grip on the FRISBEE. Retrieved April 26, 2016, from <http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=f2bab1ee-ca17-465b-afd5-0281d2b712f3>
17. Norberg, K. (n.d.). *Så kom Keso till*. Retrieved May 15, 2016, from <http://www.arla.se/bondeagda-arla/om-oss/arlans-historia/produkterna/keso/>
18. Palladino, V. N. (1989). Genericness and the Trademark Clarification Act: Five years later. *Trademark reporter*, 79, 657-80.
19. *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194, 105 S. Ct. 658, 661, 83 L. Ed. 2d 582 (1985)
20. Perrin, A. (2015, October). Social Media Usage: 2005-2015. Retrieved April 24, 2016, from <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/>
21. Qinghu, A. (2005). Well-known marks & China's system of well-known marks protection. *The Trademark Reporter*, 95(3), 705-707. Retrieved April 30, 2016.
22. Quirk, M. B. (2014). 15 Product Trademarks That Have Become Victims Of Genericization. Retrieved April 21, 2016, from <https://consumerist.com/2014/07/19/15-product-trademarks-that-have-become-victims-of-genericization/>
23. *Roncoroni v. Gross*, 92 App. Div. 221, 86 N.Y.S. 1112
24. Statista. (2016). Number of social network users in the Netherlands from 2014 to 2018. Retrieved from <http://www.statista.com/statistics/260735/number-of-social-network-users-in-the-netherlands/>
25. Statista. (2016). Number of social network users in Sweden from 2014 to 2018. Retrieved from <http://www.statista.com/statistics/260738/number-of-social-network-users-in-sweden/>
26. Trademark Law Revision act of 1988. §1127. Construction and definitions; intent of chapter
27. Trademark Strength. (2014). Retrieved April 30, 2016, from <http://www.inta.org/TrademarkBasics/FactSheets/Pages/TrademarkStrengthFactSheet.aspx>
28. §15 U.S.C. 1064 (Section 14 of the Lanham Act): Cancellation of registration. (n.d.). Retrieved March 29, 2016, from <http://www.bitlaw.com/source/15usc/1064.html>