

## Notes

# THIS NAME IS YOUR NAME: PUBLIC LANDMARKS, PRIVATE TRADEMARKS, AND OUR NATIONAL PARKS

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### ABSTRACT

*To generations of Americans, Yosemite National Park and its landmarks have symbolized the core democratic ideals of the United States—spaces truly owned by the people and open to all.<sup>1</sup> For those who created our national parks, “[t]he purpose of preserving this land was to cultivate a kind of rare experience [they] saw as endangered by a social world that turned every thing, moment, and human being to profit.”<sup>2</sup> It is striking, then, that Yosemite, one of the nation’s first national parks, has become the focus of a battle over whether our landmarks and their names belong to us all or to a select few. In 2016, several Yosemite National Park landmarks were renamed due to an ongoing trademark dispute between a concessions company and the National Park Service (NPS). At the end of its contract with the park, the departing concessions company demanded compensation for the trademarks to the words “The Ahwahnee,” “Wawona,” “Badger Pass,” “Curry Village,” and perhaps most shockingly, “Yosemite National Park” itself.<sup>3</sup> During its contractual relationship with the NPS—and apparently unbeknownst to NPS administrators—the concessions company filed for and received trademarks for use of these landmark names in hospitality and merchandising contexts.*

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1. See ALFRED RUNTE, *YOSEMITE: THE EMBATTLED WILDERNESS* 25 (1990) (quoting Sen. George H. Williams as describing the public vision of Yosemite as “one of those magnificent developments of natural scenery in which all of the people of the country feel a pride and an interest, and to which their equal right of access and enjoyment ought to be protected”) [hereinafter RUNTE, *YOSEMITE*].

2. JEDIDIAH PURDY, *AFTER NATURE: A POLITICS FOR THE ANTHROPOCENE* 133–34 (2015).

3. Defendant’s Answer to Plaintiff’s First Amended Complaint at 26–28, *DNC Parks & Resorts at Yosemite, Inc. v. United States*, No. 15-cv-1034 (Fed. Cl. Feb. 11, 2016).

*Allowing short-term concessionaires to trademark the names of publicly owned and culturally treasured assets implicates key trademark principles in several ways. The oft-recited aims of trademark law are providing information to the consumer, promoting competition, and avoiding dilution of brands by protecting accrued goodwill. Allowing short-term concessionaires to register national park landmark names conflicts with each of these aims, as this Note explains. A limited contractual relationship fits poorly with the enduring cultural value of well-known landmarks and raises complex questions about business operations and intellectual property in the national park context. This Note contends that principles of trademark law and policy are undermined if federal contractors can establish long term proprietary rights over national park landmark names. To provide a comprehensive picture of the Yosemite case, Part I will further explore the facts surrounding the trademarks and landmarks in question, as well as the contractual relationship between DNC Parks & Resorts at Yosemite, Inc. (DNCY) and the NPS. Part II considers the NPS's claims for cancellation of the Yosemite-linked trademarks under existing U.S. trademark law. Part III argues that concessionaire registrations are inconsistent with the baseline goals of trademark law. Finally, Part IV suggests that legislation, similar to a statute recently enacted in California, represents a possible solution to the issues surrounding private trademarking of public landmark names. This Note asserts that the purposes of trademark law support taking the names of national parks and landmarks off the bargaining table and out of would-be profiteers' reach, and that providing our national park landmark names with statutory protection from commercial interests fits perfectly within the American tradition of preserving the parks themselves.*

*There is nothing so American as our national parks. The fundamental idea behind the parks is native. It is, in brief, that the country belongs to the people, that it is in process of making for the enrichment of the lives of all of us.*

—President Franklin D. Roosevelt<sup>4</sup>

## INTRODUCTION

To generations of Americans, Yosemite National Park and its landmarks have symbolized the core democratic ideals of the United States—spaces truly owned by the people and open to all.<sup>5</sup> For those who created our national parks, “[t]he purpose of preserving this land was to cultivate a kind of rare experience [they] saw as endangered by a social world that turned every thing, moment, and human being to profit.”<sup>6</sup> It is striking, then, that Yosemite, one of the nation’s first national parks, recently became the focus of a battle over whether our landmarks and their names belong to us all or to a select few. Like those who first contemplated the park’s creation, Americans must again consider what level of commodification of our national heritage we are willing to accept.

In years past, visitors to Yosemite could take in views of the glacially carved valley through grand floor-to-ceiling windows at the Ahwahnee Hotel. The “brainchild” of inaugural National Park Service director, Stephen Mather,<sup>7</sup> the Ahwahnee opened in 1927 and once hosted the likes of Dwight D. Eisenhower, Herbert Hoover, Gertrude Stein, Charlie Chaplin, Greta Garbo, and Queen Elizabeth II.<sup>8</sup> The Ahwahnee also served as a Navy hospital during World War II<sup>9</sup> and earned a National Historic Landmark designation in 1987.<sup>10</sup> Another National Park property, the Wawona Hotel, received its National Historic Landmark designation the same year.<sup>11</sup> Ulysses S. Grant and

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4. President Franklin D. Roosevelt, Radio Address from Two Medicine Chalet, Glacier National Park (Aug. 5, 1934).

5. See RUNTE, YOSEMITE, *supra* note 1, at 25.

6. PURDY, *supra* note 2, at 133–34.

7. *Ahwahnee Naval Hospital*, NAT’L PARK SERV., [s://www.nps.gov/yose/learn/historyculture/navy-hospital.html](https://www.nps.gov/yose/learn/historyculture/navy-hospital.html) [<https://perma.cc/237W-AYCT>].

8. LAURA SOULLIÈRE HARRISON, NAT’L PARK SERV., ARCHITECTURE IN THE PARKS: NATIONAL HISTORIC LANDMARK THEME STUDY 249 (1986).

9. *Ahwahnee Naval Hospital*, *supra* note 7.

10. NAT’L PARK SERV., LISTING OF NATIONAL HISTORIC LANDMARKS BY STATE 1 (2016), <https://www.nps.gov/nhl/find/statelists/ca/CA.pdf> [<https://perma.cc/4N3T-7F57>].

11. *Id.* at 5.

Rutherford B. Hayes each visited the hotel's signature sprawling lawns and white Victorian porches,<sup>12</sup> and modern guests have since delighted in Wawona's "old time charm,"<sup>13</sup> which let them "expect to see Teddy Roosevelt at breakfast."<sup>14</sup> Guests visiting Yosemite National Park today, however, would not find the Ahwahnee or the Wawona Hotel. Those looking to return to the Ahwahnee can stay instead at the newly christened "Majestic Yosemite Hotel," and visitors seeking Wawona's yesteryear ambiance can make arrangements at the "Big Trees Lodge."<sup>15</sup> Though the physical buildings remain much the same, guests hoping to take home a souvenir bearing the name of either historic hotel are likely out of luck. As of March 2016, the "Ahwahnee" and "Wawona" are no more.<sup>16</sup>

The Ahwahnee and Wawona—along with several other Yosemite landmarks—have been renamed due to an ongoing trademark dispute between a concessions company and the National Park Service (NPS).<sup>17</sup> Since 1993, an entity called DNC Parks & Resorts at Yosemite, Inc. (DNCY) served as the concessionaire for the Yosemite National Park facilities.<sup>18</sup> As the end of its contract period approached, DNCY communicated to the NPS that the concessionaire's replacement, Aramark, would need to pay for the intellectual property rights owned by DNCY.<sup>19</sup> This did not come as a surprise to the NPS; the contract between DNCY and the NPS specified that the NPS must

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12. HARRISON, *supra* note 8, at 29.

13. Huntyboy, Comment to *Big Trees Lodge*, TRIPADVISOR (Nov. 5, 2014), [https://www.tripadvisor.com/ShowUserReviews-g61000-d248059-r238382651-Big\\_Trees\\_Lodge-Yosemite\\_National\\_Park\\_California.html](https://www.tripadvisor.com/ShowUserReviews-g61000-d248059-r238382651-Big_Trees_Lodge-Yosemite_National_Park_California.html) [<https://perma.cc/G7VR-NU95>].

14. Scottca075, Comment to *Big Trees Lodge, National Historic Monument*, TRIPADVISOR (Nov. 19, 2011), [https://www.tripadvisor.com/ShowUserReviews-g33243-d531923-r120932907-Wawona\\_Hotel\\_National\\_Historic\\_Landmark-Wawona\\_Yosemite\\_National\\_Park\\_California.html](https://www.tripadvisor.com/ShowUserReviews-g33243-d531923-r120932907-Wawona_Hotel_National_Historic_Landmark-Wawona_Yosemite_National_Park_California.html) [<https://perma.cc/Y7G7-BSVV>].

15. Thomas Fuller, *Bitter Contract Dispute Extends to Who Owns Yosemite Names*, N.Y. TIMES (Mar. 2, 2016), [http://www.nytimes.com/2016/03/02/us/bitter-contract-dispute-extends-to-who-owns-yosemite-national-park-names.html?\\_r=0](http://www.nytimes.com/2016/03/02/us/bitter-contract-dispute-extends-to-who-owns-yosemite-national-park-names.html?_r=0) [<https://perma.cc/KS6C-GKAC>].

16. *Id.*

17. Kirk Siegler, *Yosemite Contractor Leaves—and Takes the Landmark's Names with It*, NPR (Mar. 3, 2016), <http://www.npr.org/2016/03/03/469006049/ionic-names-change-at-yosemite-after-trademark-dispute-with-park-s-concessionai> [<https://perma.cc/A3U4-M92P>].

18. Consolidated Petition to Cancel at 5, Nat'l Park Serv. v. DNC Parks & Resorts at Yosemite, Inc., No. 92063225 (T.T.A.B. 2016).

19. Joint Preliminary Status Report at 3, DNC Parks & Resorts at Yosemite, Inc. v. United States of America, No. 15-1034 (Fed. Cl. 2016); Jim Houser, Opinion, *Beyond the Headlines: The True Yosemite Trademarks Story*, DES MOINES REG. (Mar. 31, 2016, 1:00 PM), <http://www.desmoinesregister.com/story/opinion/columnists/2016/03/31/beyond-headlines-true-yosemite-trademarks-story/82470034> [<https://perma.cc/F7LM-KJJN>].

contractually require the successor to DNCY's concessions operations to pay for "all other property of [DNCY] used or held for use in connection with such operations."<sup>20</sup> The NPS was surprised, though, by some of the "other property" for which DNCY demanded compensation—namely, the trademarks to the words "The Ahwahnee," "Wawona," "Badger Pass," "Curry Village," and perhaps most shockingly, "Yosemite National Park" itself.<sup>21</sup>

During its contractual relationship with the NPS—and apparently unbeknownst to NPS administrators<sup>22</sup>—DNCY filed for and received trademarks for use of the landmark names in hospitality and merchandising contexts.<sup>23</sup> When DNCY demanded compensation for the trademarks from Aramark, the NPS refused to recognize their validity. DNCY then sued the NPS for failing to contractually oblige Aramark to pay for the trademarks as part of the "other property" the NPS agreed to force successors to acquire.<sup>24</sup> The NPS, for its part, initiated an administrative proceeding to cancel DNCY's marks.<sup>25</sup> Rather than risk having DNCY attempt to enjoin Aramark's use of the marks during the coming tourist season, the NPS changed the names of several relevant landmarks, replaced signs at an estimated cost of \$1.7 million,<sup>26</sup> and removed "Yosemite National Park"-emblazoned shirts from store shelves.<sup>27</sup>

Under the Lanham Act,<sup>28</sup> which governs federal trademark registration with the U.S. Patent and Trademark Office, false association, abandonment, and dilution are all grounds for cancellation of a registered trademark.<sup>29</sup> In an administrative proceeding before the

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20. *In re DNC Parks & Resorts at Yosemite, Inc.*, B-410998, 2015 WL 1747274, at \*2 (Comp. Gen. Apr. 14, 2015) (quoting DNCY's contract with the NPS, Contract No. CC-YOSE004-93, at 21).

21. Defendant's Answer to Plaintiff's First Amended Complaint, *supra* note 3, at 26–28.

22. *Id.*

23. Consolidated Petition to Cancel, *supra* note 18, at 1–2.

24. Complaint at 3, *DNC Parks & Resorts at Yosemite, Inc. v. United States*, No. 1:15-cv-01034 (Fed. Cl. 2015).

25. *Id.*

26. Consolidated Petition to Cancel, *supra* note 18, at 7; Fuller, *supra* note 15.

27. Sarah Kaplan, *A Private Company Trademarked the Phrase 'Yosemite National Park.' Should the U.S. Pay To Get It Back?*, WASH. POST (Mar. 21, 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/03/21/a-private-company-trademarked-the-phrase-yosemite-national-park-should-the-u-s-pay-to-get-it-back/?utm\\_term=.747ea8374ced](https://www.washingtonpost.com/news/morning-mix/wp/2016/03/21/a-private-company-trademarked-the-phrase-yosemite-national-park-should-the-u-s-pay-to-get-it-back/?utm_term=.747ea8374ced) [<https://perma.cc/KNC5-9D2M>].

28. Trademark Act of 1946 (Lanham Act), Pub. L. No. 79-489, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. §§ 1051–1127 (2012)).

29. 15 U.S.C. § 1052(a) (2012); *id.* § 1125(c); *id.* § 1064.

Trademark Trial and Appeal Board (TTAB) in February 2016, the NPS challenged DNCY's trademark registrations, citing three primary reasons they should be declared cancelled: first, the implied association with the NPS that the marks create; second, DNCY's abandonment of the marks at the end of the contract; and third, the dilution of the distinctive nature of the NPS's famous marks.<sup>30</sup> In a cancellation proceeding like that initiated by the NPS, the TTAB has the authority to cancel marks challenged under the Lanham Act.<sup>31</sup> On May 18, 2016, however, the TTAB suspended its proceedings, reasoning that the trademark validity question could be resolved by the Court of Federal Claims as part of the ongoing contract dispute initiated by DNCY.<sup>32</sup> In that suit, *DNC Parks & Resorts at Yosemite, Inc. v. United States*,<sup>33</sup> DNCY asks the Court of Federal Claims to determine the value of the trademarks possessed by DNCY, and whether the NPS breached its contractual obligations in failing to require Aramark to pay for those trademarks.<sup>34</sup> As a result of the TTAB's decision to suspend proceedings, a central question in the contract dispute before the Court of Federal Claims is whether DNCY could register trademarks for the names of historic public landmarks.<sup>35</sup> The larger question that needs to be answered, however, is whether a contracting company ever *should* have such an ability. The NPS, in its filings, argues that the case's breach of contract claim is inextricably linked to the question of whether DNCY, a contracting concessions operator, had any right to trademark names long associated with the national park and the public good.<sup>36</sup>

Allowing short-term concessionaires like DNCY to trademark the names of publicly owned and culturally treasured assets implicates key trademark principles in several ways. One issue that may arise in the DNCY case—and in the broader discussion surrounding the questions

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30. Consolidated Petition to Cancel, *supra* note 18, at 12–14.

31. 15 U.S.C. § 1067.

32. Suspension Pending Disposition of Civil Action 1–2, Nat'l Park Serv. v. DNC Parks & Resorts at Yosemite, Inc., No. 92063225 (T.T.A.B. 2016). The suspension was upheld by the Decision on Pet. to the Director 4, Nat'l Park Serv. v. DNC Parks & Resorts at Yosemite, Inc., No. 92063225 (T.T.A.B. June 10, 2016).

33. DNC Parks & Resorts at Yosemite, Inc. v. United States, No. 15-1034 (Fed. Cl. 2016).

34. Joint Preliminary Status Report, *supra* note 19, at 1.

35. *Id.* at 3.

36. *See, e.g., id.* at 6 (asserting that the validity of the registrations “will undoubtedly have a significant impact” on the valuation underlying the contract dispute); Defendant's Answer to Plaintiff's First Amended Complaint, *supra* note 3, at 33 (noting that DNCY's contract claims rely on a flawed method that improperly accounts for the parks' interest in the trademarked names).

it raises—is the geographic nature of the names being registered. Names that serve as geographic identifiers can only be registered as trademarks if they have acquired a “secondary meaning” beyond simply describing the general geographic origins of a product.<sup>37</sup> Because national park landmark names obviously have a geographic component, some commenters may center their discussions on the existence of this secondary meaning in the DNCY case.<sup>38</sup> For the purposes of this Note, the names registered by DNCY will be treated as though they do in fact possess “secondary meaning,” as both DNCY and the NPS have adopted arguments that treat the marks as conveying meaning beyond mere geographic description.<sup>39</sup>

This Note challenges trademarking of national park landmark names on a broader scale. The oft-recited aims of trademark law are providing information to the consumer, promoting competition, and avoiding dilution of brands by protecting accrued goodwill.<sup>40</sup> Allowing short-term concessionaires to register national park landmark names conflicts with each of these aims, as this Note explains. A limited contractual relationship fits poorly with the enduring cultural value of well-known landmarks and raises complex questions about business operations and intellectual property in the national park context.

This Note contends that principles of trademark law and policy are undermined if federal contractors can establish long-term proprietary rights over national park landmark names. The validity of such trademarks under existing law is questionable at best, and the realities of the contracting relationship and the traditional rationales for trademark law directly dictate against allowing registration of national park landmark names by private concessionaires. To provide a comprehensive picture of the Yosemite case, Part I explores the facts surrounding the trademarks and landmarks in question, as well as the contractual relationship between DNCY and the NPS. Part II considers the NPS’s claims for cancellation of the Yosemite-linked trademarks under existing U.S. trademark law. Part III argues that

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37. J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 14.1 (4th ed. 2017).

38. For an exploration of the rules for geographic marks, see generally Robert Brauneis & Roger Schechter, *Geographic Trademarks and the Protection of Competitor Competition*, 96 TRADEMARK REP. 782 (2006).

39. See, e.g., Joint Preliminary Status Report, *supra* note 19, at 3.

40. Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1844–45 (2007) (discussing the “conventional wisdom about trademark law” as encompassing these factors, which are “rampant in the literature”).

concessionaire registrations are inconsistent with the baseline goals of trademark law. Finally, Part IV explains that legislation, similar to a statute recently enacted in California, represents a possible solution to the issues surrounding private trademarking of public landmark names. This Note suggests, that like the lands themselves, the names of our national parks “should not be handed out to a few profiteers, but rather held in trust for all people for all time.”<sup>41</sup>

## I. PARKS AND LITIGATION

*Conservation as we know it is an American phenomenon—born of social reform, weaned by a dynamic national spirit, shocked to maturity by recognition that we have defiled a bountiful land. Conservationists are trying to demonstrate that free people can act in their own behalf, can dedicate their lands not to the profit of the few but to the good of the many.*

—Vice President Hubert H. Humphrey<sup>42</sup>

For a dispute over the privatization of perceived public goods, few battlegrounds seem as apt as the High Sierra birthplace of the “national park idea.”<sup>43</sup> The very granite walls of the Yosemite Valley and the sweeping vistas from their heights inspired the originators of the conservation movement in the United States and pushed them to set aside some of our most unique lands for use by the public at large.<sup>44</sup> The initial act granting Yosemite Valley to the public would go on to serve as a model for the establishment of the rest of our national parks.<sup>45</sup> The Yosemite trademarks case, reviewed in this Part, strikes at the very heart of a debate between privatization and public protection that has long been tied to the story of Yosemite’s creation, as well as that of our other national parks.

### A. Yosemite Origins & Landmark Names

The public grant of the Yosemite Valley in 1864 “was not an ordinary gift of land, to be sold and the proceeds used as desired; but a

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41. ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE 1 (3d ed. 1997) [hereinafter RUNTE, NATIONAL PARKS].

42. NAT’L PARK SERV., QUOTES 3 (1966), <http://npshistory.com/publications/quotes.pdf> [<https://perma.cc/TJ82-KBTJ>].

43. RUNTE, NATIONAL PARKS, *supra* note 41, at 28.

44. See PURDY, *supra* note 2, at 24 (describing the effects of Yosemite Valley on John Muir and others in the movements to set aside land for the benefit of the public).

45. RUNTE, YOSEMITE, *supra* note 1, at 21.

trust imposed on the State, of the nature of a solemn compact, forever binding after having been once accepted.”<sup>46</sup> The protection of California’s Yosemite Valley is said to have been a direct response to prior failures to preserve some of the nation’s natural resources in the East.<sup>47</sup> For early conservationists, privatization had already damaged the cultural value of wonders such as Niagara Falls, “whose uniqueness had been sacrificed to individual gain.”<sup>48</sup> Yosemite’s exceptionality was, by the mid-1800s, well known.<sup>49</sup> Early visitors to Yosemite Valley proclaimed it to be “the most unique and majestic of nature’s marvels.”<sup>50</sup> Though the valley was still unsurveyed public land,<sup>51</sup> some individuals set up camp there to await business opportunities serving the travelers they believed would be drawn by the florid accounts of the area’s natural wonders.<sup>52</sup>

During this period, these pioneers and others began to appropriate the Valley’s natural resources in ways that troubled other Californians.<sup>53</sup> Logging, hunting, and overgrazing were seen to threaten the natural beauty of Yosemite, which spurred a coalition to seek permanent protection of the region to prevent its “misuse . . . for commercial exploitation and economic gain.”<sup>54</sup> Responding to pressure from constituents, Senator John Conness of California proposed to Congress that the lands be set aside for the public by an “inalienable” grant.<sup>55</sup> In June 1864, Congress granted Yosemite Valley to the state of California to “be held for public use, resort, and recreation,” and to be “inalienable for all time.”<sup>56</sup> The valley’s settlers were ultimately compensated for, but ousted from, their homesteads.<sup>57</sup> Still, the 1864

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46. J.D. WHITNEY, *THE YOSEMITE GUIDE-BOOK* 12 (1871).

47. RUNTE, *NATIONAL PARKS*, *supra* note 41, at 28.

48. *Id.*

49. See CARL PARCHER RUSSELL, *ONE HUNDRED YEARS IN YOSEMITE: A STORY OF A GREAT PARK AND ITS FRIENDS* 50 (1947) (describing the attention received by early accounts of sightseeing in the Valley).

50. HORACE GREELEY, *AN OVERLAND JOURNEY FROM NEW YORK TO SAN FRANCISCO IN THE SUMMER OF 1859* 307 (1860)

51. LINDA WEDEL GREENE, *NAT’L PARK. SERV., YOSEMITE: THE PARK AND ITS RESOURCES* 69 (1987).

52. RUSSELL, *supra* note 49, at 91.

53. GREENE, *supra* note 51, at 51.

54. *Id.*

55. RUNTE, *NATIONAL PARKS*, *supra* note 41, at 28–29.

56. Yosemite Grant Act, ch. 184, 13 Stat. 325, 325 (1864).

57. GREENE, *supra* note 51, at 75–77 (explaining the process that led to the end of the Valley’s early private claims).

Yosemite Grant Act allowed private parties to apply for leases of up to ten years to build and operate tourist accommodations in the park.<sup>58</sup> As word of the incredible sights of Yosemite Valley continued to reach the more populated parts of the country, concessionaires and service providers sprung up with the permission of park administrators, along the main routes into and within the park.<sup>59</sup>

Within Yosemite Valley itself, Park Guardian Galen Clark allowed two former schoolteachers to use a site to offer affordable tent accommodations on the valley floor.<sup>60</sup> Those proprietors, who called themselves “The Curry Company,” christened their campsite “Camp Curry” in 1899.<sup>61</sup> Over time, the accommodations increased in number and improved in comfort, from seven tents in 1899 to nearly 500 tents and some 200 cabins by the 1940s.<sup>62</sup> In 1970, “Camp Curry” changed its name to “Curry Village”<sup>63</sup> and in 1979, Curry Village was listed on the National Register of Historic Places as part of the “Camp Curry Historic District.”<sup>64</sup> Like a number of other landmarks in Yosemite, Curry Village was renamed as a result of the DNCY suit—the facility is now being called “Half Dome Village.”<sup>65</sup>

South of the valley, in the park’s early years, Clark struggled to run a service facility providing accommodations, fuel, and refreshments to visitors on their way into Yosemite along the road from the Mariposa Grove of Big Trees.<sup>66</sup> As the property developed, it was given multiple names, but eventually one stuck; in 1882, the family who had acquired the property from Clark chose the name “Wawona” for the hotel in the meadows.<sup>67</sup> Various accounts point to the original

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58. RUNTE, *YOSEMITE*, *supra* note 1, at 24.

59. *See id.* at 102 (describing leasing arrangements and various concessions offerings); RUSSELL, *supra* note 49, at 103–16 (providing a detailed overview of that facilities that would spring up as hotels and way stations).

60. NAT’L PARK SERV., CULTURAL LANDSCAPE REPORT: CAMP CURRY HISTORIC DISTRICT 43–45 (2010), [https://www.nps.gov/parkhistory/online\\_books/yose/camp\\_curry\\_clr.pdf](https://www.nps.gov/parkhistory/online_books/yose/camp_curry_clr.pdf) [<https://perma.cc/2U2P-HCJN>].

61. RUNTE, NATIONAL PARKS, *supra* note 41, at 164.

62. RUSSELL, *supra* note 49, at 112.

63. Consolidated Petition to Cancel, *supra* note 18, at 4.

64. NAT’L PARK SERV., NATIONAL REGISTER OF HISTORIC PLACES INVENTORY – NOMINATION FORM, <http://npgallery.nps.gov/nrhp/GetAsset?assetID=e2add48e-39c3-4348-b375-5f3d4bdba53a> [<https://perma.cc/YYJ3-83DV>].

65. Kaplan, *supra* note 27.

66. *See* SHIRLEY SARGENT, *YOSEMITE’S HISTORIC WAWONA* 11–14, 16 (1979) (describing Clark’s management and money woes at his “station”).

67. *Id.* at 39.

meaning of the word “Wawona.”<sup>68</sup> Some suggest that “wawona” refers to the sequoia trees which surround the property in the language of Yosemite Valley’s original occupants, the Southern Sierra Miwok;<sup>69</sup> others say the word mimics the sound of an owl’s hoot (“wah-wo-nah”).<sup>70</sup> The word “Wawona” would reach the general American public as the name of the leisure destination featured prominently in writings about trips to Yosemite, that “commodious and cheery, yet stately edifice . . . known as the Wawona Hotel.”<sup>71</sup> The Wawona Hotel and its surrounding area were added to Yosemite National Park officially in 1932 and have continued to be key stops on the road into the valley from the south, though Wawona’s antique facilities are now operated under the “Big Trees Lodge” moniker.<sup>72</sup>

The other landmark hotel in Yosemite National Park opened its doors in 1927.<sup>73</sup> In 1925, the Curry Company (of Camp Curry fame) and its rival concessionaire, the Yosemite National Park Company, merged to become the Yosemite Park & Curry Company (YPCC).<sup>74</sup> Around the same time, the NPS commissioned YPCC<sup>75</sup> to construct and operate a hotel on a prominent plot on the park’s valley floor.<sup>76</sup> The vision for the Ahwahnee, as conceived by NPS Director Stephen Mather, was an “impressive building” fit for its “awesome surroundings.”<sup>77</sup> Nestled at the feet of Yosemite’s steep granite cliffs, the grand hotel was given a name to perfectly match its valley floor setting—the word “Ahwahnee” is said to be the Miwok name for the valley itself.<sup>78</sup> “Ahwahnee” would serve as the name of the hotel from

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68. *Id.*

69. See Consolidated Petition to Cancel, *supra* note 18, at 3–4 (explaining Miwok origins and meaning of Wawona); SARGENT, *supra* note 66, at 39 (translating “wa-wo-nah” as “big tree”).

70. SARGENT, *supra* note 66, at 39.

71. *Id.* at 11 (quoting J.M. HUTCHINGS, IN THE HEART OF THE SIERRAS 294 (1886)).

72. *Wawona*, NAT’L PARK SERV., <https://www.nps.gov/yose/planyourvisit/waw.htm> [<https://perma.cc/44HC-Z53H>].

73. HARRISON, *supra* note 8, at 248.

74. *Ahwahnee Naval Hospital*, *supra* note 7 (describing a forced merger between the Curry Company and the Yosemite National Park Company).

75. Consolidated Petition to Cancel, *supra* note 18, at 4.

76. HARRISON, *supra* note 8, at 248.

77. *Id.* at 249.

78. Kenneth Brower, *What’s in a Name at Yosemite?*, NAT’L GEOGRAPHIC (Jan. 25, 2016), <http://news.nationalgeographic.com/2016/01/160125-yosemite-names-ahwahnee-wawona-national-park> [<https://perma.cc/2U XR-ZAYE>].

its opening in 1927 until the year 2016, when the dispute between DNCY and Yosemite led to its relabeling.<sup>79</sup>

Another Yosemite landmark stripped of its name in 2016 was “Badger Pass,” a ski area in the southern portion of the park that is the oldest downhill skiing area in California.<sup>80</sup> Like Curry Village, the Wawona Hotel, and the Ahwahnee before it, the Badger Pass ski area had earned eligibility for listing on the National Register of Historic Places.<sup>81</sup> Badger Pass now operates as the “Yosemite Ski & Snowboard Area” as a result of the ongoing dispute between DNCY and the NPS.<sup>82</sup> It is worth noting that DNCY is absent from the story of Yosemite National Park’s establishment and development.

When the state of California ceded control of Yosemite Valley back to the federal government, it became part of the nation’s third official national park.<sup>83</sup> Though disagreements about how to best manage the park space and its concessions would arise over the years,<sup>84</sup> an unwavering principle remained—the lands and its resources were to be governed for the benefit of the people in whose name they were held.<sup>85</sup>

### B. *The Trademark Dispute*

Yosemite’s landmarks were managed for the better part of a century as NPS facilities by the merged YPCC concessions company.<sup>86</sup>

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79. *Ahwahnee Naval Hospital*, *supra* note 7.

80. *See Winter Sports*, NAT’L PARK SERV., <https://www.nps.gov/yose/planyourvisit/wintersports.htm> [<https://perma.cc/3VXN-8VXG>] (providing a description and linked map for the ski area formerly known as Badger Pass).

81. Consolidated Petition to Cancel, *supra* note 18, at 4.

82. *Trademark Dispute Leads To (Temporary?) Name Change for Badger Pass*, SAM MAG. (Mar. 1, 2016), <http://www.saminfo.com/headline-news/8574-trademark-dispute-leads-to-temporary-name-change-for-badger-pass> [<https://perma.cc/VW6L-2PY8>].

83. *About Yosemite Anniversary Team*, NAT’L PARK SERV., <https://www.nps.gov/featurecontent/yose/anniversary/yosemite125th.com/about/index.html> [<https://perma.cc/Q4MN-ABNK>]. Although Yosemite is credited for sparking the national park idea, Yellowstone became the country’s first official national park in 1872 while Yosemite was still under Californian control. RUNTE, NATIONAL PARKS, *supra* note 41, at 33.

84. *See* RUSSELL, *supra* note 49, at 146–75 (describing the succession of park caretakers, relevant disputes over the relative value of use versus preservation of park space, and internal politics of the NPS).

85. *See* 54 U.S.C. § 100101(b)(2) (Supp. II 2014) (declaring and reaffirming that the national park system shall be managed “to the common benefit of all the people of the United States”).

86. Frank Clifford, *Curry Co. Turns Over Yosemite Concessions*, L.A. TIMES (Oct. 2, 1993), [http://articles.latimes.com/1993-10-02/news/mn-41470\\_1\\_delaware-north](http://articles.latimes.com/1993-10-02/news/mn-41470_1_delaware-north) [<https://perma.cc/9AGD-VNWQ>].

After 94 years, the NPS ended its relationship with YPCC in 1993 and awarded the concessions contract for Yosemite National Park to DNCY.<sup>87</sup> At the conclusion of YPCC's contract, the longtime concessionaire held rights to certain physical assets and trademarks, including a marketing phrase associated with the Yosemite Mountaineering School ("Go Climb a Rock")<sup>88</sup> and a logo featuring a stylized image of Half Dome, one of Yosemite's marquee natural features.<sup>89</sup> DNCY's contract with the NPS obligated the company to acquire these assets from outgoing concessionaire YPCC.<sup>90</sup> DNCY indicates in its current court filings that YPCC previously turned over its possessory interest in park facilities to the federal government, but DNCY agreed to acquire all of YPCC's remaining assets and liabilities.<sup>91</sup> In turn, the NPS agreed to contractually obligate any future concessionaires to purchase DNCY's assets at the termination of the DNCY–NPS relationship.<sup>92</sup>

The requirement that the NPS obligate successor concessionaires to acquire DNCY's property is at the center of the current lawsuit. DNCY contends that it holds trademarks for a variety of Yosemite-related names for which the NPS should require successor concessionaire, Aramark, to pay.<sup>93</sup> Under U.S. law, registerable trademarks "include[ ] any word, name, symbol, or device, or any combination thereof" being used in commerce to "identify and distinguish" the products from a particular source.<sup>94</sup> The trademarks being disputed in the Yosemite case are all names in the form of "typed drawings" also known as "standard character marks," meaning that only the words themselves are trademarked, without any drawing or

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87. Michael Hiltzik, *The Corporate Grab Behind the Yosemite Trademark Clash*, L.A. TIMES (Jan. 19, 2016), <http://www.latimes.com/business/hiltzik/la-fi-mh-the-corporate-grab-yosemite-park-s-trademarks-20160119-column.html> [<https://perma.cc/92M4-26W7>] (explaining the decision to look for a new concessionaire after YPCC ended up under foreign ownership).

88. Christopher Solomon, *Yosemite To Rename Several Iconic Places*, OUTSIDE MAG. (Jan. 14, 2016), <https://www.outsideonline.com/2048041/yosemite-rename-several-iconic-places> [<https://perma.cc/RA9F-TKU3>].

89. First Amended Complaint at 3, 5, DNC Parks & Resorts at Yosemite, Inc. v. United States, No. 15-cv-1034 (Fed. Cl. 2016).

90. Joint Preliminary Status Report, *supra* note 19, at 10–11.

91. First Amended Complaint, *supra* note 89, at 4.

92. DNC Parks & Resorts at Yosemite, Inc., *supra* note 20, at \*2.

93. Joint Preliminary Status Report, *supra* note 19, at 13.

94. 15 U.S.C. § 1127 (2012). The term "service marks" refers to "any word, name, symbol, or device, or any combination thereof." *Id.* For simplicity's sake, trademarks (identifying goods) and service marks (identifying services) are often grouped together as "trademarks," which is how the term "trademarks" is used in the DNCY case filings and in this Note.

logo elements.<sup>95</sup> One of these contested trademarks is for “The Ahwahnee,” for use in “hotel and restaurant services,” a trademark that YPCC registered in 1989 and conveyed to DNCY in 2003.<sup>96</sup> DNCY claims six other marks that it independently registered and did not acquire from YPCC.<sup>97</sup> The following marks were registered by DNCY during the fifteen-year period of its contract term as concessionaire at Yosemite:

- “The Ahwahnee,” for “dishes; namely cups, plates, and bowls,” “blanket throws,” and “hats, golf shirts, denim shirts,” in 2002;
- “Curry Village,” for “hotel and restaurant services” and “recreational services in the nature of ice skating,” in 2003;
- “Wawona,” for “hotel and restaurant services,” “retail store services featuring gasoline,” and “golf club services,” in 2003;
- “Badger Pass,” for “recreational services in the nature of downhill skiing, cross-country skiing and hiking,” in 2003;
- “Badger Pass,” for “apparel, namely t-shirts and sweatshirts,” in 2009; and,
- “Yosemite National Park,” for “pens, cases for pens, and stickers,” “coffee mugs,” and “apparel, namely t-shirts, sweatshirts, and golf shirts,” in 2003.<sup>98</sup>

According to the NPS, DNCY applied for the “Yosemite National Park” mark in 2002, but was initially rejected.<sup>99</sup> The United States Patent and Trademark Office (USPTO) explained that the words “Yosemite National Park” are clearly associated with the NPS and that consumers would incorrectly believe mark-bearing goods were being offered by the park, not DNCY. Without a demonstrated connection between DNCY and the NPS, this risk of false association barred registration of the mark by the concessionaire.<sup>100</sup> Not to be so easily thwarted, DNCY then submitted a portion of its contract with the NPS

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95. Consolidated Petition to Cancel, *supra* note 18, at 2; U.S. PATENT & TRADEMARK OFFICE, TRADEMARK MANUAL OF EXAMINING PROCEDURE § 807.03 (2017), <https://mpep.uspto.gov/RDMS/TMEP/current#/current/TMEP-800d1e1158.html> [<https://perma.cc/6KNJ-545B>].

96. Consolidated Petition to Cancel, *supra* note 18, at 10.

97. *Id.* at 1–3.

98. *Id.*

99. *Id.* at 8.

100. *Id.*

to demonstrate the company's affiliation with the park and successfully argued that no false association would be created by its use of the mark as an affiliated concessionaire.<sup>101</sup> The NPS contends, however, that the USPTO was denied crucial information from the contract; specifically, that DNCY's relationship with the NPS had an expiration date and that the NPS intended to retain control over the products merchandised by DNCY.<sup>102</sup> The NPS alleges that DNCY redacted those portions of the contract from the version the company submitted to the USPTO to support its association with the park.<sup>103</sup>

These and other arguments await resolution in the Court of Federal Claims. The NPS has asserted its belief that the Yosemite name trademarks registered by DNCY should not be considered valid.<sup>104</sup> The marks' validity is central to the lawsuit's outcome—DNCY alleges that the NPS breached its contract by failing to require Aramark to purchase what are, from DNCY's perspective, valid registrations held as some of the property that must be bought by the incoming concessionaire.<sup>105</sup> The following Part reviews the NPS's claims regarding the marks' invalidity and suggests how national park landmark names might be treated under existing trademark doctrine.

## II. VALIDITY OF THE DNCY MARKS

*Nothing dollarable is safe . . . .*

—John Muir<sup>106</sup>

### A. Trademark Basics

Trademarks are registered with the USPTO under the Trademark Act of 1946, otherwise known as the Lanham Act.<sup>107</sup> While patents

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101. *Id.* at 9.

102. *Id.*

103. *Id.*

104. Joint Preliminary Status Report, *supra* note 19, at 2 (containing the NPS's characterization of DNCY's registrations as an "attempt[ ] to monetize a property right . . . it never possessed").

105. First Amended Complaint, *supra* note 89, at 22.

106. San Francisco and the Hetch Hetchy Reservoir: Hearing on H.J. Res. 184 Before the H. Comm. on the Pub. Lands, 60th Cong. 32 (1908) (memorandum from John Muir, President, Sierra Club).

107. 15 U.S.C. § 1051(a)(1) (2012). Separate from these registrations, common law trademark rights may also be recognized by courts. MCCARTHY, *supra* note 37, § 2:14. This Note, however, focuses on federal trademark registrations and their appropriate scope because the DNCY

protect inventions and copyrights protect literary or artistic works, a trademark “typically protects brand names and logos used on goods and services.”<sup>108</sup> The Lanham Act defines a trademark as “any word, name, symbol, or device” used “to identify and distinguish” goods in commerce “from those manufactured or sold by others and to indicate the source of the goods.”<sup>109</sup> The word “trademark” can also describe another specific type of mark, what the Lanham Act more precisely defines as a “service mark” — “a mark used in the sale or advertising of services to identify the service of one person and distinguish them from the services of others.”<sup>110</sup>

The ultimate goals of trademark registration as set forth in the Lanham Act are to “mak[e] actionable the deceptive and misleading use of marks in . . . commerce;” “to protect persons engaged in such commerce against unfair competition;” and “to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks.”<sup>111</sup> To accomplish these ends, the Lanham Act established that trademarks registered with the USPTO can serve as prima facie evidence “of the owner’s ownership of the mark, and of an owner’s exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the [registration] certificate.”<sup>112</sup>

To register a trademark the USPTO requires submission of an application along with “specimens or facsimiles” of the mark in question.<sup>113</sup> Where the mark being registered is a word in the form of “standard letters and numbers without a claim to any particular font, size or color,” a “standard character drawing” (historically known as a “typed drawing”) is used.<sup>114</sup> Protection of a word drawing like

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dispute and others like it have specifically arisen out of disagreements over the federal registration of trademarks.

108. *Trademark Process*, U.S. PAT. & TRADEMARK OFFICE, <https://www.uspto.gov/trademarks-getting-started/trademark-process#step1> [<https://perma.cc/A8TJ-8QA5>].

109. 15 U.S.C. § 1127.

110. See MCCARTHY, *supra* note 37, § 3:1 (quoting 15 U.S.C. § 1127). Technically, the DNCY trademark registrations include designations for both goods and services (trademarks *and* service marks), but those registrations are discussed here and elsewhere using the generalized term “trademark.”

111. 15 U.S.C. § 1127.

112. *Id.* § 1057(b).

113. *Id.* § 1051(a)(1).

114. *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1125 n.6 (9th Cir. 2014) (explaining that the terms “standard character drawing” and “typed drawing” are synonymous and have the same scope of protection, “despite the change in nomenclature”); MCCARTHY, *supra* note 37, § 19:58 (noting that change in terminology occurred to be consistent with international usage).

“Yosemite National Park” is “not limited to any particular rendition of the mark,”<sup>115</sup> and entitles the registrant to protection from a subsequent use of the mark in “any font style, size, or color.”<sup>116</sup> A USPTO application must also specify the goods or services in connection with which a particular mark is used.<sup>117</sup> A registered trademark does not provide protection against all uses of that mark, just those uses which are specified in the registration and likely to result in consumer confusion.<sup>118</sup> Current trademark law applies the “related goods” rule, which protects a registrant from others using “its mark on any product or service which would reasonably be thought by the buying public to come from the same source as, or thought to be affiliated with, connected with, or sponsored by, the owner of the registration.”<sup>119</sup>

The Lanham Act and a number of other statutes disallow registrations that are especially prone to causing consumer confusion or that otherwise do not fulfill the purposes behind trademark law.<sup>120</sup> The Lanham Act also prohibits registration of “immoral, deceptive or scandalous matter”<sup>121</sup> and “the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation.”<sup>122</sup> Meanwhile, other more specific laws regulate use of certain names, characters, and symbols including, among others, the Central Intelligence Agency,<sup>123</sup> the Boy Scouts of America,<sup>124</sup> Smokey Bear,<sup>125</sup> and the United States Olympic Committee.<sup>126</sup> None of these statutory restrictions prevented the DNCY registrations, though the Lanham Act does contain language disallowing registration of marks that

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115. MCCARTHY, *supra* note 37, § 19:58 (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 1348 (Fed. Cir. 2010)).

116. *Id.* (quoting *In re Davia*, 110 U.S.P.Q.2d 1810, 1814 (T.T.A.B. 2014)).

117. 37 C.F.R. § 2:32 (2016).

118. See 15 U.S.C. § 1057; MCCARTHY, *supra* note 37, § 23:76 (“The exclusionary rights of a registered trademark owner are not limited to the goods and/or services specified in the registration, but go to any goods or services on which the use of the mark is likely to cause confusion.”).

119. MCCARTHY, *supra* note 37, § 24:65.

120. *Id.* § 19:75 (explaining the numerous statutory bars found in 15 U.S.C. § 1052, including marks causing confusion with a prior registration, marks that are “generic,” and marks that are geographically misdescriptive).

121. 15 U.S.C. § 1052(a).

122. *Id.* § 1052(b).

123. 50 U.S.C. § 3513 (2012).

124. 36 U.S.C. § 30905 (2012).

125. 18 U.S.C. § 711 (2012).

126. 36 U.S.C. § 220506.

“falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols.”<sup>127</sup> At the time of the DNCY applications, however, the company claimed association with the national park by virtue of its concessions contract and the USPTO issued the requested registrations.<sup>128</sup>

The Lanham Act allows parties to challenge a potential trademark registration through proceedings known as an “opposition” before the TTAB.<sup>129</sup> Pending registrations are published in the “Official Gazette of the Patent and Trademark Office” after they are examined,<sup>130</sup> someone “who believes that he would be damaged” by a mark’s registration has thirty days from the time of this publication to file an opposition.<sup>131</sup> Ostensibly, the National Park Service could have filed such an opposition during this window had it become aware of DNCY’s applications. It is unclear whether the NPS regularly monitors the “Official Gazette” of the USPTO, but the NPS missed the window to challenge the marks prior to their registration. After a mark has been registered, anyone “who believes that he is or will be damaged” may file a petition to cancel that mark within five years of the date of registration.<sup>132</sup> For claims beyond this five-year window, the Lanham Act identifies specific circumstances allowing a petition to cancel to be filed “at any time,”<sup>133</sup> which the NPS used to file for cancellation of the Yosemite marks on February 26, 2016.<sup>134</sup>

### *B. The NPS’s Claims for Cancellation*

The NPS’s claims for cancellation are based on three of the “any time” circumstances defined in the Lanham Act: false association, abandonment, and dilution.

The first claim for cancellation of DNCY’s trademark registrations is the assertion of “false association.”<sup>135</sup> A petition for cancellation can be filed at any time for registered marks suggesting a

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127. 15 U.S.C. § 1052.

128. Consolidated Petition to Cancel, *supra* note 18, at 9.

129. 15 U.S.C. § 1063.

130. *Id.* § 1062.

131. *Id.* § 1063(a).

132. *Id.* § 1064.

133. *Id.* § 1064(3).

134. Consolidated Petition to Cancel, *supra* note 18, at 2. Each of DNCY’s marks had been registered for at least five years by the time the NPS filed its petition to cancel. *Id.*

135. *Id.* at 12.

false association “with persons . . . institutions, or national symbols.”<sup>136</sup> The NPS challenges all seven of DNCY’s registrations under these provisions as misleading and suggesting a false connection with the NPS.<sup>137</sup> The names of all the hotel and recreational properties predate DNCY’s existence,<sup>138</sup> let alone the company’s operation of the facilities.<sup>139</sup> The NPS asserts that DNCY has never held a possessory interest in the “hotels, restaurants, or recreation infrastructure located within Yosemite.”<sup>140</sup> What’s more, park visitors are much more likely to associate the historic names of these landmarks with the park itself, the NPS explains, than with a concessions company which has only operated within the park since the 1990s.<sup>141</sup> Though one of these marks—“The Ahwahnee” for “hotel and restaurant services”—was registered by YPCC in 1989 and was later purchased by DNCY,<sup>142</sup> the NPS contends that all seven marks suggest a false association because consumers will associate the marks with the NPS and not with the concessionaire holding them.<sup>143</sup>

The second claim for cancellation the NPS advances is that the marks DNCY registered are now “abandoned.”<sup>144</sup> A trademark is “abandoned” when “its use has been discontinued with intent not to resume such use.”<sup>145</sup> According to the NPS, DNCY has indicated no plans to continue using the marks now that its contract has been terminated.<sup>146</sup> While this argument gives the NPS grounds to challenge the registered marks, it is not the most helpful argument in the overall contract dispute. If the trademarks were in fact valid up until the contract’s expiration, it could mean that the NPS did breach its contractual obligation by not forcing Aramark to pay for the marks. DNCY made the registrations under the likely impression that it would be conveying the marks to its successor concessionaire, and not abandoning them at all. Because Aramark was not forced to buy the marks, however, DNCY did not pass along the registrations while they

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136. 15 U.S.C. § 1052(a).

137. Consolidated Petition to Cancel, *supra* note 18, at 3.

138. *Id.*

139. *Id.* at 12.

140. *Id.* at 5.

141. *Id.* at 12.

142. *Id.* at 10.

143. *Id.* at 12.

144. *Id.* at 13.

145. 15 U.S.C. § 1127 (2012).

146. Consolidated Petition to Cancel, *supra* note 18, at 13.

were still being used. However, the NPS believes it has a valid cancellation claim based on abandonment since DNCY's operations in the park have ended and DNCY has asserted no plans to continue using the marks.

Finally, for its third claim, the NPS focuses on the "dilution" of the "Yosemite National Park" mark in particular.<sup>147</sup> The NPS argues under 15 U.S.C. § 1125 that DNCY's registration and use of the trademark dilutes the Yosemite National Park "famous mark"<sup>148</sup> that is "widely recognized by the general consuming public of the United States as the designation of source of the goods or services of the mark's owner,"<sup>149</sup> in this case, the NPS. The NPS contends that "when the general public encounters the mark in almost any context," the public associates the term "Yosemite National Park" with the NPS and views the mark as indicating that the NPS is the source of those goods or services, rendering it a "famous mark."<sup>150</sup>

The concern under 15 U.S.C. § 1125 is that marks will be diluted either by "blurring" or by "tarnishment" if used by other parties. Dilution, a "weakening" of a mark's signal value, can occur by blurring where a mark which consumers associate with a particular source becomes used for goods and services of a different origin such that the mark no longer conveys the source information as clearly.<sup>151</sup> The risk posed by blurring is not just that consumers will become confused; the harm is to the mark's strength as a unique identifying signal.<sup>152</sup> The claimed distinctiveness of "Yosemite National Park" as an identifier of NPS products and services would arguably be harmed if a concessionaire had the right to use the mark however it chose and had the ability to exclude the NPS from applying the mark to some of its own merchandising.

Dilution by tarnishment also involves the devaluation of a famous mark, but focuses less on its distinctive signaling power and more on the harm to the reputation associated with the mark.<sup>153</sup> Injury from tarnishment affects the mark when it is applied (or misapplied, rather) to goods and services that diminish the mark's otherwise positive

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147. *Id.* at 14.

148. *Id.*

149. 15 U.S.C. § 1125(c)(2)(a).

150. Consolidated Petition to Cancel, *supra* note 18, at 14.

151. MCCARTHY, *supra* note 37, § 24:69.

152. *Id.*

153. *Id.* § 24:70.

associations.<sup>154</sup> Tarnishment may occur when a famous mark is co-opted for use on products of an unsavory nature—for example, a Tiffany’s strip club tarnishing the mark of Tiffany jewelry, an example pointed out by Judge Posner<sup>155</sup>—or where the mark is applied to products of a lesser quality than those typically associated with the famous mark,<sup>156</sup> likely the greater risk in the DNCY context. Because a contracting concessionaire has a finite link to the NPS, it also has only a finite concern about the NPS brand’s reputation. A contracting concessionaire using trademarks on merchandising items really only has incentive to care about the reputation of the NPS brand so long as the company is working with the park service. Even then, a profit-minded concessions company’s motivations may differ from that of the government enough that the company may be open to stocking merchandise that uses landmark names in a way that the NPS would not. Especially now that its contract has expired, DNCY has little reason to worry about the effect of inferior, defective, or distasteful products on the reputation of the “Yosemite National Park” mark.

In its contract with DNCY, the NPS made clear its intention to retain control over goods and services associated with the park.<sup>157</sup> The NPS explains that its contract language plainly states that the NPS reserved “the right to determine and control the nature, type, and quality of the merchandise and services” to be provided by DNCY.<sup>158</sup> This language evidences the NPS’s desire to avoid the risk of tarnishment to which it could be exposed if DNCY can retain control of the trademarks.

The NPS first asserted the claims above in its Petition for Cancellation before the TTAB.<sup>159</sup> With the TTAB proceeding currently suspended,<sup>160</sup> the NPS’s claims regarding the invalidity of DNCY’s trademarks have instead become part of the lawsuit before

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154. *Id.*

155. *Ty Inc. v. Perryman*, 306 F.3d 509, 511 (7th Cir. 2002).

156. *See* L.L. Bean v. Drake Publishers, 811 F.2d 26, 32 (1st Cir. 1989) (“The threat of tarnishment arises when the goodwill and reputation of a plaintiff’s trademark is linked to products which are of shoddy quality or which conjure associations that clash with the associations generated by the owner’s lawful use of the mark . . .”).

157. Consolidated Petition to Cancel, *supra* note 18, at 9.

158. *Id.* (quoting DNCY’s contract with the NPS, Contract No. CC-YOSE004-93). Interestingly, it was this exact contract language that the NPS says DNCY redacted from the copy of the contract supplied to the USPTO in the trademark registration filings. *Id.*

159. *Id.* at 2.

160. Suspension Pending Disposition of Civil Action, *supra* note 32.

the Court of Federal Claims.<sup>161</sup> As of August 2017, the parties have issued a joint status report outlining their key disagreements post-TTAB suspension<sup>162</sup> and have filed motions related to joinder of Aramark as a party<sup>163</sup> and disclosure of DNCY's valuation methodology for its marks and other assets central to the dispute.<sup>164</sup> Based on the currently available information in the DNCY dispute, it appears that the NPS has legitimate grounds for challenging the concessionaire's registrations. No matter what happens in the NPS–DNCY litigation, however, the lawsuit exposes unique risks which arise from the relationship of the NPS with its concessions operator. Beyond the merits of the NPS's cancellation claims, the rationales underlying trademark law demand that action be taken to prevent future concessionaires from following in the footsteps of DNCY.

### III. APPLYING THE PURPOSES OF TRADEMARK LAW

*[T]he national interest must dictate all decisions affecting public or private enterprise in the parks.*

—Secretary Frederick Knight Lane<sup>165</sup>

At a commonsense level, trademark registrations for the names of public entities, like those made by DNCY, appear problematic. Imagine for a moment that the trademark for “apparel, namely t-shirts, sweatshirts, and golf shirts”<sup>166</sup> bearing the name of “The Ohio State University,” is vested with Levy Restaurants, the company which handles concessions in Ohio Stadium.<sup>167</sup> Or, consider whether Aramark could or should be granted trademarks for the “University of

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161. Joint Preliminary Status Report, *supra* note 19, at 2–4.

162. *Id.*

163. *See, e.g.*, Defendant's Reply in Support of Its Motion To Join Yosemite Hospitality, LLC, as a Necessary Party at 1–2, DNC Parks & Resorts at Yosemite, Inc. v. United States, No. 15-cv-1034 (Fed. Cl. Oct. 3, 2016). Aramark was joined as a party in March 2017. Opinion & Order on Motion for Joinder, DNC Parks & Resorts at Yosemite, Inc. v. United States, No. 15-cv-1034 (Fed. Cl. March 9, 2017).

164. *See, e.g.*, Motion for Protective Order at 1–2, DNC Parks & Resorts at Yosemite, Inc. v. United States, No. 15-cv-1034 (Fed. Cl. Mar. 28, 2016).

165. Letter from Frederick Knight Lane, Sec'y of the Interior, to Stephen Mather, Dir. of the Nat'l Park Serv. (May 13, 1918), *reprinted in* AMERICA'S NATIONAL PARK SYSTEM: THE CRITICAL DOCUMENTS 373 (Lary M. Dilsaver ed., 2d ed. 2016).

166. These are uses for which DNCY has trademarked “Yosemite National Park.” Consolidated Petition to Cancel, *supra* note 18, at 1.

167. Press Release, The Ohio State University, Ohio State Names Levy Restaurants as Exclusive Food and Beverage Partner (Mar. 5, 2013), <https://news.osu.edu/news/2013/03/05/newsitem3639> [<https://perma.cc/7GXR-DKZ8>].

Houston”; the company is, after all, “the exclusive provider of venue management, food, beverage, retail merchandise and facility maintenance services” for all UH athletic facilities.<sup>168</sup>

The university examples might provoke a more automatic discomfort than the equivalent national park case, in part because consumers are likely to be relatively familiar with the merchandising efforts of universities. For many years, however, universities were not in the business of trademarking their names.<sup>169</sup> Over time, as the pressure to merchandise university apparel grew (due at least in part to wider publicity in connection with collegiate athletics),<sup>170</sup> universities began attempting to claim and enforce common law trademark rights to university names and symbols<sup>171</sup> as well as to seek federal protection of those marks through registration with the USPTO.<sup>172</sup> Universities asserting control over marks related to their schools have achieved some success.<sup>173</sup> In *University of Georgia Athletic Association v. Laite*,<sup>174</sup> for example, the Eleventh Circuit protected the university’s rights by preventing mark usage by those who would capitalize on false association with the school’s bulldog mascot to sell beer.<sup>175</sup> These cases might bolster the NPS’s false association claim, as

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168. Press Release, University of Houston, UH Partnering with Aramark To Transform Athletics Facilities’ Hospitality and Event Management Programs (Aug. 6, 2014), <http://www.uh.edu/news-events/stories/2014/August/0806Aramark.php> [<https://perma.cc/K2TW-S5RZ>]. Aramark manages facilities for over 400 colleges including the residential facilities at schools such as the University of Virginia. McGregor Vance, *U.Va Renews Dining Services Partnership for Next Twenty Years*, UVA TODAY (Aug. 28, 2014) <https://news.virginia.edu/content/uva-renews-dining-services-partnership-aramark-next-20-years> [<https://perma.cc/24L6-BPWL>].

169. Ann Bartow, *Trademarks of Privilege: Naming Rights and the Physical Public Domain*, 40 U.C. DAVIS L. REV. 919, 931 (2007) (noting that “public universities used to allow the public to use their names freely” (emphasis added)).

170. *See id.* (citing examples of universities “privatiz[ing] their names so that they can compel licenses and extract revenues from institutional affinities and boosterism”).

171. *See, e.g.*, *University of Notre Dame Du Lac v. J.C. Gourmet Food Imps. Co.*, 703 F.2d 1372, 1374 (Fed. Cir. 1983) (describing Notre Dame’s claim to rights as arising from common law).

172. *See, e.g.*, DUKE UNIVERSITY, Registration No. 1,702,830; DUKE, Registration No. 87,265,122; IRON DUKES, Registration No. 4,760,204.

173. *See, e.g.*, *Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll. v. Smack Apparel Co.*, 550 F.3d 465, 485 (5th Cir. 2008) (holding that plaintiffs Louisiana State University, University of Oklahoma, Ohio State University, the University of Southern California successfully demonstrated the likelihood of consumer confusion from the use of their colors, names and emblems on unlicensed goods).

174. *Univ. of Ga. Athletic Ass’n v. Laite*, 756 F.2d 1535 (11th Cir. 1985).

175. *Id.* at 1548 (“Laite devised a clever entrepreneurial ‘game plan,’ but failed to” account for “the strength of UGAA’s mark and the tenacity with which UGAA was willing to defend that

the actual name of the park or park facilities seems to more directly suggest a connection to the park than even a specific symbol might provide for a school.

The value of name marks in particular has also arisen in the university context. In *University of Pittsburgh v. Champion Products, Inc.*,<sup>176</sup> the court justified protection of the university's name mark as follows:

It is . . . beyond question that, while the market for imprinted soft goods, in the sense of their physical availability to the public and the public's corresponding knowledge of that availability, exists as a result of Champion's efforts, the ultimate demand for the product is a direct result of the efforts of Pitt to make its name widely known through athletic and educational accomplishments. With negligible exception, a consumer does not desire a "Champion" T-shirt, he (or she) desires a "Pitt" T-shirt. The entire impetus for the sale is the consumer's desire to identify with Pitt or, perhaps more realistically, with Pitt's successful athletic programs. From this point of view, then, it is Champion which seeks to profit from Pitt's investment, particularly in its athletic programs.<sup>177</sup>

As the Third Circuit acknowledged, where a recognized entity's name like that of the University of Pittsburgh is featured on merchandise, such a mark can suggest an endorsement from, or authorization by, that institution.<sup>178</sup> Trademarks that serve to identify a "secondary source," such as a university, are registerable by the entity being identified.<sup>179</sup> The "secondary source" issue will almost certainly be discussed by a court evaluating DNCY's claims, and the rationale given by the Third Circuit seems to apply forcefully in the NPS's favor. DNCY would be hard-pressed to argue that "[t]he entire impetus for the sale" of a "Yosemite National Park" t-shirt is "the consumer's desire to identify with" DNCY.<sup>180</sup> It seems apparent that "[w]ith

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mark. Like the University of Georgia's famed 'Junkyard Dog' defense, UGAA was able to hold its opponent to little or no gain.").

176. *Univ. of Pittsburgh v. Champion Prods. Inc.*, 686 F.2d 1040 (3d Cir. 1982). *University of Pittsburgh* was remanded to the district court for further decisionmaking, but the resulting order from the district court was vacated by the Third Circuit shortly thereafter. *Univ. of Pittsburgh v. Champion Prods. Inc.*, 566 F. Supp. 711 (W.D. Pa. 1983), *order vacated* (3d Cir. 1984).

177. *Univ. of Pittsburgh*, 686 F.2d at 1047.

178. *Id.*; see also MCCARTHY, *supra* note 37, § 3:4 ("[T]he name or logo of a university on clothing can signify that the university authorizes, endorses and licenses the sale of such wearing by the manufacturer.").

179. MCCARTHY, *supra* note 37, § 3:4.

180. *Univ. of Pittsburgh*, 686 F.2d at 1047.

negligible exception, a consumer does not desire” a DNCY shirt,<sup>181</sup> but rather a shirt that identifies the wearer as a supporter or guest of Yosemite National Park. A visitor to Yosemite’s historic ski area could conceivably leave the park with a “Badger Pass” sweatshirt without ever hearing the name “DNCY” or even knowing such a company exists. While the item may be made available through the concessionaire’s efforts, the typical consumer—like the typical college fan—will likely intend to associate themselves with the “secondary source” connected to the name featured on his or her gear, not the shirt’s immediate vendor.

Beyond this commonsense comparison, the central principles of trademark law reflected in the Lanham Act’s statement of purpose—providing information to the consumer, promoting competition, and avoiding dilution of brands by protecting accrued goodwill<sup>182</sup>—strongly support protecting national park landmark names in the concessions contract context. Examination of these principles, each in turn, below, illustrates that allowing concessionaires to trademark national park landmark names directly undermines the central aims of the laws that allow registration in the first place.

#### A. *Protecting Consumers*

A mark’s ability to signal information to consumers about a product or service’s source and quality is fundamental to what makes a trademark a trademark.<sup>183</sup> Marks which fail to convey distinct source information, as discussed previously,<sup>184</sup> are not protected under trademark law. This signaling function protects the public by making it so “it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product it asks for and wants to get.”<sup>185</sup> With secondary source signals, what the

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181. *Id.*

182. See Robert Denicola, *Institutional Publicity Rights: An Analysis of Merchandising of Famous Trade Symbols*, 62 N.C. L. REV. 603, 615 n.70 (1984) (describing trademark law as “the delicate balancing of protection of the public from confusion and deception, protection of the business and goodwill of one person from predatory practices and unfair conduct by another, and preserving competition by all fair means” (citing RESTATEMENT 2D OF TORTS (Tent. Draft No. 8, 1963))).

183. LARS S. SMITH & LLEWELLYN JOSEPH GIBBONS, *MASTERING TRADEMARK AND UNFAIR COMPETITION LAW* 16 (2013).

184. See *supra* Part II.A.

185. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 782 n.15 (1992) (quoting the Senate Report on the Lanham Act, S. REP. NO. 79-1333, at 3 (1946)).

public “wants to get”<sup>186</sup> may be dictated by the association between the product and a particular named entity.<sup>187</sup> A public entity’s “brand” may call to mind the institution’s reputation and cultural values;<sup>188</sup> in the case of a national park’s name or the name of a famous facility, the representative value of those marks is almost certainly its ability to convey an association with those locations as “secondary sources,” rather than something specific about the manufacturer or purveyor of the good. The fact that so many colleges and universities now visibly exert control over their marks may encourage consumer belief that products bearing national park landmark names are authorized or endorsed by the NPS.<sup>189</sup> Consumers who buy landmark-labeled merchandise intending to have their purchase benefit the NPS would be harmed by the false association presented by these goods if the label can be applied to a concessionaire’s product without an agreement with the NPS.

The goal of protecting consumers is furthered by the Lanham Act in both the allowance of cancellation of marks at any time for presenting a false association, the basis for the first of the NPS’s cancellation claims, and the refusal to recognize marks which are likely “to cause confusion, or to cause mistake, or to deceive.”<sup>190</sup> Though not available as a basis for a cancellation claim in itself,<sup>191</sup> the likelihood that customer confusion will result from private registration of public asset trademarks strongly guides against allowing such registrations, especially when the private actor is a temporary, contracting party.

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186. *Id.*

187. *See, e.g.,* Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll. v. Smack Apparel Co., 550 F.3d 465, 485 (5th Cir. 2008) (noting that “fans desire to wear the t-shirts precisely because” they feature the plaintiff universities’ names, and that “any demand for Smack’s t-shirts is inextricably tied to the Universities’ [marks] themselves”).

188. *See* Simon Anholt, *Beyond the Nation Brand: The Role of Image and Identity in International Relations*, 2 EXCHANGE: J. PUB. DIPL. 6, 6 (discussing a brand as both “the culture of the organisation behind the product” and “the product’s or corporation’s reputation in the minds of its target audience”).

189. The risk of “endorsement” confusion has led some commentators to push for the right of publicity afforded to protect the identity of individuals to also cover institutional entities. *See* Denicola, *supra* note 182, at 624 (citing the “prevention of false representations of endorsement” as a reason to support public institution publicity rights that would be analogous to the rights of celebrity figures); Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203, 215–16 (1954) (asserting that institutions, like well-known personalities, should have a right to protect their identities from appropriation).

190. 15 U.S.C. § 1052(d) (2012).

191. 15 U.S.C. § 1064.

A limited-term concessionaire who can withhold use of landmark names from successor companies or the NPS further harms consumers if the resulting name changes, as occurred in Yosemite in Spring 2016, confuses park visitors about the locations and types of services being offered at once-familiar locales.<sup>192</sup> When visitors come to the park expecting to stay at renowned locations, confusion seems almost inevitable if the names under which they achieved Historic Landmark status no longer apply. In its coverage of the Yosemite trademark dispute, the New York Times highlighted the plight of a seventy-six-year-old Yosemite visitor who needed to carry around a notebook in order to match up the old and new landmark names to find her way around after the recent rebrandings.<sup>193</sup> The Times reported the name changes as “bewildering to Yosemite veterans,”<sup>194</sup> but the changes proved problematic for newcomers, too. TripAdvisor reviews for the newly christened “Big Trees Lodge” include guests expressing confused disappointment with the hotel’s facilities—it seems that customers aren’t expecting the quaint experience long associated with Wawona.<sup>195</sup> One customer, believing she had booked a room at the Wawona Hotel, “dr[ove] past Big Trees Lodge a few times [before she]

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192. See Gus McCarthy, *Yosemite Name Changes Happening*, UNION DEMOCRAT (Mar. 1, 2016), <http://www.uniondemocrat.com/localnews/4052256-151/yosemite-name-changes-happening> [<https://perma.cc/498E-P5AD>]. This Sonoma, California, publication notes that the “new names ‘were chosen in order to minimize the impact on visitors,’ according to the Park Service.” *Id.*

193. Fuller, *supra* note 15.

194. *Id.*

195. See Flower1990, Comment to *Big Trees Lodge*, TRIPADVISOR (Aug. 7, 2016), [https://www.tripadvisor.com/ShowUserReviews-g61000-d248059-r402632870-Big\\_Trees\\_Lodge-Yosemite\\_National\\_Park\\_California.html](https://www.tripadvisor.com/ShowUserReviews-g61000-d248059-r402632870-Big_Trees_Lodge-Yosemite_National_Park_California.html) [<https://perma.cc/SVV5-WJ7L>] (noting that the lack of modernized comforts was not made clear prior to booking); Rain, Comment to *Big Trees Lodge*, TRIPADVISOR (Aug. 3, 2016), [https://www.tripadvisor.com/ShowUserReviews-g61000-d248059-r401059025-Big\\_Trees\\_Lodge-Yosemite\\_National\\_Park\\_California.html](https://www.tripadvisor.com/ShowUserReviews-g61000-d248059-r401059025-Big_Trees_Lodge-Yosemite_National_Park_California.html) [<https://perma.cc/3K78-34ES>] (“If they intended to sell me an olde-worldye [sic] experience then they should have indicated it . . .”). The General Manger of Big Trees Lodge posted a reply:

I apologize that your experience at the Big Trees Lodge wasn't as you expected. As noted in most literature about the Hotel[,] it was built in 1879 and has since been registered on the National Historical Sites Registry. With the charm of an old building we unfortunately don't have the opportunity to enjoy the luxury of modern accommodations[,] such as private bathrooms in all guest rooms, guest room size, air conditioning or other appliance [sic].

Response to Rain's Comment to *Big Trees Lodge* (Aug. 4, 2016), [https://www.tripadvisor.com/ShowUserReviews-g61000-d248059-r401059025-Big\\_Trees\\_Lodge-Yosemite\\_National\\_Park\\_California.html](https://www.tripadvisor.com/ShowUserReviews-g61000-d248059-r401059025-Big_Trees_Lodge-Yosemite_National_Park_California.html) [<https://perma.cc/3K78-34ES>]. One wonders if guests may more readily anticipate a historic hotel experience if the facility were still operating using the name under which it became listed on National Historic Landmark registry.

decided to go in and ask did they know of the Wawona.”<sup>196</sup> If trademarks exist to avoid consumer confusion, allowing a place’s name to be registered by a temporary contractor, instead of by the property’s owner and protector, fails miserably at achieving that aim.

### B. Promoting Competition

Trademarks have been said to establish “little monopolies” over individual marks by giving one entity exclusive rights to use those marks in the relevant market.<sup>197</sup> Because the Lanham Act aims to promote competition, however, it limits its monopoly-creating effect by providing a process to cancel “abandoned” marks.<sup>198</sup> If registrants are no longer using the mark reserved to them, it makes sense to end the monopoly granted for their protection and make the mark available for someone else’s use. Unlike traditional anticompetitive monopolies, “[a] trademark does not have the monopoly power to force the public to buy something it does not want.”<sup>199</sup> When exclusionary property rights in the form of trademarks actually serve the public interest, “the only question is as to what monopolies there should be, and whether and how much they should be regulated legislatively or curbed judicially.”<sup>200</sup>

So—what kind of monopolies do we want? National parks are meant to embody the principle of prioritizing the public weal over private profits,<sup>201</sup> but the issue of trademarks and their rightful holders has arisen in other preservation-oriented contexts as well. The principle that some items of cultural heritage are too valuable to be privatized has led to some suggestion that even private owners of privately-held historic landmarks should be incentivized to grant their intellectual property rights “to a non-profit organization,” such as the

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196. Ciara B, Comment to *Big Trees Lodge*, TRIPADVISOR (Sept. 5, 2016), [https://www.tripadvisor.com/ShowUserReviews-g61000-d248059-r415131869-Big\\_Trees\\_Lodge-Yosemite\\_National\\_Park\\_California.html](https://www.tripadvisor.com/ShowUserReviews-g61000-d248059-r415131869-Big_Trees_Lodge-Yosemite_National_Park_California.html) [<https://perma.cc/KN8D-P3GQ>] (“Clean, but not all services provided.”).

197. See *Standard Brands, Inc. v. Smidler*, 151 F.2d 34, 38–39 (2d Cir. 1945) (Frank, J., concurring) (noting that “protection of any trade name necessarily involves a legalized monopoly,” with “the essence of a monopoly being the legal power (other than as specially limited by government) to exclude others from its use except upon the owner’s terms”).

198. 15 U.S.C. § 1064 (2012) (regarding cancellation for abandonment).

199. MCCARTHY, *supra* note 37, § 2:10 (quoting S.A. Diamond, Trademarks and the Public Interest, Address Before the Association of the Bar of the City of N.Y. (Oct. 29, 1980)).

200. *Id.* § 2:11 (quoting *E. Wine Corp. v. Winslow-Warren*, 137 F.2d 955, 959 (2d Cir. 1943)).

201. See RUNTE, NATIONAL PARKS, *supra* note 41, at 5–8 (discussing how the “onslaught of commercialism” affecting other landmarks helped spur the movement to set aside national parks).

New York’s Municipal Arts Society or the National Trust for Historic Preservation, “or a state or national agency, which would be empowered to administer voluntary compulsory license grants to members of the public for advertising or commercial use of landmark names and designs.”<sup>202</sup> The NPS, empowered to use its trademarks for private or public purposes, could function in much the same role, one which “is consistent with the idea of a landmark as a public domain object while creating a revenue stream for education and preservation.”<sup>203</sup> That the value of the goodwill accrued by Yosemite National Park and its landmarks would go to the NPS (and by extension, back to the American people) provides one example of the kind of monopolies some think there “should be.”<sup>204</sup>

By contrast, the current legal framework risks putting monopoly power in exactly the wrong hands. Control over the marks could go to the NPS to protect its “brand,” but existing law has made it possible for the monopoly power to instead go to a concessionaire like DNCY that has then wielded that power against its competitors, the NPS, and the public’s pocketbook. If a goal of trademark law is to promote fair competition, that goal is not accomplished by awarding long-term trademark control to potentially short-term contractors. Eventually, a contract’s end date will approach and rebidding must take place. As DNCY has illustrated, concessionaires with protected marks for the names of the institution and its features can create a headache in the renewal process by raising the cost of contracting for all other prospective vendors<sup>205</sup> — of which, it is worth noting, there are very few to begin with.<sup>206</sup> This upfront cost for other concessionaires allows the trademark possessor, DNCY, “to create a poison pill to discourage other would-be bidders.”<sup>207</sup> Ultimately, giving contractors the

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202. Keri Christ, *Edifice Complex: Protecting Landmark Buildings as Intellectual Property—A Critique of Available Protections and A Proposal*, 92 TRADEMARK REP. 1041, 1092 (2002).

203. *Id.*

204. MCCARTHY, *supra* note 37, § 2:10 (quoting S.A. Diamond, Trademarks and the Public Interest, Address Before the Association of the Bar of the City of N.Y. (Oct. 29, 1980)).

205. Kaplan, *supra* note 27.

206. See Kurt Repanshek, *National Park Service Sitting on Half-a-Billion Dollars of Concessions Obligations*, NAT’L PARKS TRAVELER (Mar. 15, 2015), <http://www.nationalparkstraveler.com/2015/03/national-park-service-sitting-half-billion-dollars-concessions-obligations26283> [<https://perma.cc/5YSE-GPLS>] (listing the “four primary companies that manage the Park Service’s largest concessions contracts—Xanterra Parks & Resorts, Delaware North Companies, Forever Resorts, and Aramark”).

207. Kurtis Alexander, *Names of Yosemite’s Sacred Sites Threatened by Trademark Spat*, SF GATE (Jan. 2, 2015, 9:45 AM), <http://www.sfgate.com/bayarea/article/Names-of-Yosemite-s->

trademarks of public entity names harms the American taxpayer. The undue leverage possessed by the trademark holder denies the NPS a potential source of licensing revenue and eliminates concessions competition, freeing the holder to lowball its bid. The NPS's decision to select Aramark and forge ahead despite DNCY's claims allowed it to escape the second of these harms, but it is not difficult to see how this bargaining-chip problem could recur in contract negotiation processes at other NPS properties.

For the contracting context, a perfectly good arrangement for protecting intellectual property exists in the form of licensing. If a licensing regime were adopted, the NPS or an affiliated nonprofit organization could license trademarks to the concessionaires of facilities, and in turn, the concessionaires could contractually demand an exclusive licensing agreement from the mark holder if the company so desired.<sup>208</sup> In doing so, a concessionaire could avoid the concern that the NPS would allow multiple vendors to use the mark. If DNCY keeps the marks, the NPS may need to negotiate for the right to use the names of its buildings, allowing the concessionaire to use treasured landmark names as a bargaining chip against the NPS to get certain other provisions in the contract written in the company's favor. This costly process, potentially repeated at each national park facility, would only exacerbate a longstanding underfunding problem at the NPS.<sup>209</sup>

The public's interest may be best served when the bargaining power associated with the valued names is on the side of the NPS and taxpayers who own the properties that those names represent. To the extent that monopoly creation is unavoidable in serving the other aims of trademark law, placing that monopoly in the hands of the public

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sacred-sites-threatened-by-5989558.php [https://perma.cc/J7UR-ZVCH] (quoting historian Alfred Runte on the motivations of DNCY).

208. Other commenters have similarly indicated that a licensing arrangement would be preferable. Lisa Ramsey, a University of San Diego School of Law professor and "an expert in trademark law," stated that, as opposed to the current DNCY-held trademark, "[a] better approach would be to have made them exclusive licensees. It's very troublesome . . . that they have the rights to the words." Trevor Hughes & William M. Welch, *Feds Fight Over Who Owns National Park Trademarks*, USA TODAY (Jan. 8, 2015, 8:05 PM), <http://www.usatoday.com/story/news/nation/2015/01/08/national-park-contract-dispute/21381747> [https://perma.cc/ZZQ5-DBSP].

209. See Nathan Rott, *National Parks Have a Long To-Do List but Can't Cover the Repair Costs*, NPR (Mar. 8, 2016, 4:59 AM), <http://www.npr.org/2016/03/08/466461595/national-parks-have-a-long-to-do-list-but-cant-cover-the-repair-costs> [https://perma.cc/KVU8-RRAP] (listing the ongoing total maintenance backlog at the national parks at \$11.9 billion).

entity which owns and is responsible for protecting the properties in question would provide clear benefits over the existing regime. Some statutes provide outright reservation of certain entity names and symbols to the government or nonprofits, but may create more problems than they solve.<sup>210</sup> Short of vesting the NPS with all landmark-related marks, disallowing registrations by short-term concessionaires would still be a step in the right direction because it would prevent companies from weaponizing treasured landmark names against their competition and the NPS.

### C. Protection of Goodwill

Goodwill represents “[t]he advantage or benefit, which is acquired by an establishment . . . in consequence of the general public patronage and encouragement which it receives . . . on account of its local position, or common celebrity, or reputation, for skill and/or affluence, or punctuality.”<sup>211</sup> DNCY, or any contractor, would likely struggle to demonstrate that the names of public landmarks symbolize the goodwill felt toward its particular hospitality company, rather than affection for our national park system and its destinations. DNCY has in fact made this claim, indicating that “the Ahwahnee and Wawona marks are extremely valuable *because* they are associated with consistently high-quality hotel and resort experiences and services provided by DNCY *and as a result have gained widespread, nationwide recognition therefore.*”<sup>212</sup> Given that those facilities were famous as Yosemite landmarks well before DNCY became a national parks concessionaire, this position appears untenable. To the extent DNCY claims its right to the names as successor to the historic YPCC, the company must still demonstrate that the goodwill connected to the marks stems from the quality of its operations. Doing so could require evidence that customers choose their accommodations and souvenirs

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210. For example, the statute granting “an exclusive right to use all Olympic-related words and images” to the U.S. Olympic Committee has remained highly controversial. Craig W. Colbrook, Comment, *Gold Meddling: How the U.S. Olympic Committee Overprotects the Olympics Brand*, 5 DEPAUL J. SPORTS L. 57, 57 (2008); see, e.g., Robert N. Kravitz, *Trademarks, Speech, and the Gay Olympics Case*, 69 B.U. L. REV. 131, 134 (1989) (discussing the First Amendment considerations implicated by the outright reservation of trademark rights); Kellie L. Pendras, Comment, *Revisiting San Francisco Arts & Athletics v. United States Olympic Committee: Why It Is Time to Narrow Protection of the Word “Olympic,”* 24 U. HAW. L. REV. 729, 730 (2002) (exploring the “confusing and unfair application of trademark rights in the word ‘Olympic’ that differ from the rights of normal trademark holders”).

211. MCCARTHY, *supra* note 37, § 2:19 (quoting STORY ON PARTNERSHIP § 99 (6th ed. 1868)).

212. First Amended Complaint, *supra* note 89, at 7 (emphases added).

because of the concessionaire's reputation, not their desire to stay in an NPS facility—proof that seems difficult to obtain.

According to the NPS, “it is the unique, natural surroundings that draw visitors to the parks, and to the concessions, and not the strength of a particular hotel's or restaurant's ‘trade’ name.”<sup>213</sup> The Yosemite trademark dispute was generally met with media outcry and statements by the public that support the NPS's contention, as “[m]any visitors saw the destination names as part of Yosemite National Park's heritage—one that long predated [DNCY]'s assumption of the concessions contract in 1993.”<sup>214</sup> The goodwill protected by trademark law can be viewed “as the desirability of the goods or services which are identified by the trademark.”<sup>215</sup> To use goodwill to justify its trademark registrations of a landmark name, a concessionaire would need to argue that the desirability of its services or merchandise comes primarily from the quality of the company's offerings—rather than from, say, the hotel's iconic location or the park's “heritage.”<sup>216</sup>

Notably, “[a] trademark carries with it an implicit message that the owner of the mark is controlling the nature and quality of the goods or services sold under the mark”;<sup>217</sup> otherwise, the value of the trademark as a signal is diminished. In the NPS–concessionaire relationship, both parties may be motivated to provide quality goods and services, but the lawful owner of the properties, the NPS, has a logically stronger need to do so. Long after an individual concessionaire has moved on from operating park facilities, the NPS will continue to be associated with and responsible for their management. In its contract with DNCY, the NPS demonstrated its intention to protect the park's goodwill by “reserv[ing] the right to determine and control the nature, type[,] and quality of the merchandise and services . . . authorized and required to be sold” during the relationship.<sup>218</sup> In other words, the NPS was acting

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213. Defendant's Answer to Plaintiff's First Amended Complaint, *supra* note 3, at 33.

214. Kurtis Alexander, *Yosemite in Settlement Talks To Win Back Historic Park Names*, S.F. CHRON. (July 23, 2016, 1:15 PM), <http://www.sfchronicle.com/bayarea/article/Yosemite-in-settlement-talks-to-win-back-historic-8405045.php> [<https://perma.cc/ZJX9-4D4L>].

215. MCCARTHY, *supra* note 37, § 2:15.

216. Alexander, *supra* note 207.

217. MCCARTHY, *supra* note 37, § 18:38.

218. Consolidated Petition to Cancel, *supra* note 18, at 9 (quoting DNCY's contract with the NPS).

like “the owner of the mark” seeking to protect its goodwill, while DNCY was in a position comparable to a typical licensee.<sup>219</sup>

The Lanham Act helps entities protect accrued goodwill by allowing cancellation of registrations that would dilute a mark.<sup>220</sup> The NPS’s perpetual association with the landmarks gives the NPS reason to be concerned about dilution of their names; by contrast, association of a facility with a contracting concessionaire’s “brand” will naturally have an expiration date. DNCY, for example, only operated Yosemite facilities for twenty-three years<sup>221</sup> out of the national park’s 126-year history.<sup>222</sup> Entrusted with “the protection, management, and administration of the [park system] units,” the NPS is charged with ensuring that activities connected to the park are “conducted in light of the high public value and integrity of the [s]ystem and . . . not . . . exercised in derogation of the values and purposes for which the . . . units have been established.”<sup>223</sup> The NPS therefore has a vested interest in ensuring that names associated with the park are not brought into disrepute or used in poor taste. The names of Yosemite’s landmarks, borrowed from the Valley’s original inhabitants,<sup>224</sup> demand careful, holistic consideration of which types of merchandise would be appropriate for their use. The problem identified by Yosemite’s conservationists, that privatization of the Valley’s resources could mean that “whatever cultural symbolism they len[d] the nation might soon become meaningless,”<sup>225</sup> strongly supports keeping the trademarks out of the hands of concessionaires.

Overall, the values associated with the parks should perhaps ideally be protected by the service we have entrusted to care for the system, but certainly not co-opted by a profiteering contractor. The three trademark law goals discussed here, protecting consumers, promoting competition, and protecting goodwill, are exactly why the

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219. See MCCARTHY, *supra* note 37, § 18:38 (“A trademark or service mark can be validly licensed to another to use but only if the licensor exercises control over the nature and quality of the goods and/or services sold by the licensee under the licensed mark.”).

220. 15 U.S.C. § 1125(c) (2012). For additional discussion regarding dilution, see *supra* notes 151–157.

221. See Consolidated Petition to Cancel, *supra* note 18, at 5 (stating that the initial fifteen-year contract granted to DNCY in 1993 was extended through February 2016).

222. *History & Culture*, NAT’L PARK SERV., <https://www.nps.gov/yose/learn/historyculture/index.htm> [<https://perma.cc/6KVK-W5XP>] (noting Yosemite National Park’s 125th anniversary in 2015).

223. 54 U.S.C. § 100101(b)(2) (Supp. II 2014).

224. Consolidated Petition to Cancel, *supra* note 18, at 3–4.

225. RUNTE, NATIONAL PARKS, *supra* note 41, at 28.

Lanham Act allows for mark cancellation on false association, abandonment, and dilution grounds. Most importantly, all three trademark law policy principles weigh heavily in favor of forbidding concessionaire trademarking of national park property and landmark names. Irrespective of the outcome of the DNCY dispute and Yosemite trademark challenges, Americans and their elected representatives should push for permanent public protection of our national park landmark names in keeping with these principles.

#### IV. LEGISLATIVE SOLUTIONS

*At some time . . . laws to prevent an unjust use by individuals, of that which is not individual but public property must be made and rigidly enforced.*

—Frederick Law Olmsted<sup>226</sup>

The purposes of trademark law, outlined above, support taking the names of national parks and landmarks off the bargaining table and out of would-be profiteers' reach, but do not necessarily dictate the best legal route to doing so. Some existing laws recognize the special status that can and should be afforded to public entities, especially those with national significance, such as the U.S. Olympic Committee.<sup>227</sup> The process of broadly reserving trademarks associated with a public entity can quickly become complicated,<sup>228</sup> so the more attractive legislative solutions fall short of a blanket grant of all "related" marks to the NPS.

Congress recently focused its attention on national landmark names in an act passed on December 19, 2014.<sup>229</sup> The law, put forth "to codify certain existing laws relating to the National Park System,"<sup>230</sup> provides that, "[n]otwithstanding" the Lanham Act provisions of § 1125(c) (which address dilution of famous marks by tarnishment and

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226. FREDERICK LAW OLMSTED, OLMSTED REPORT ON MANAGEMENT OF YOSEMITE (1865), reprinted in AMERICA'S NATIONAL PARK SYSTEM: THE CRITICAL DOCUMENTS 17 (Lary M. Dilsaver ed., 2d ed. 2016).

227. 36 U.S.C. § 220506 (2012).

228. See generally Marcella David, *Trademark Unraveled: The U.S. Olympic Committee Versus Knitters of the World*, 14 MINN. J.L. SCI. & TECH. 705, 705 (2013) (discussing the broad grant of trademark rights to the U.S. Olympic Committee and "how those rights might fail to protect the varying interests of the trademark holders, commercial actors, and the public").

229. Act of Dec. 19, 2014, Pub. L. No. 113-287, 128 Stat. 3094 (enacting Title 54, U.S.C. into positive law).

230. *Id.* § 2, 128 Stat. at 3094.

blurring), “buildings and structures on or eligible for inclusion on the National Register [of Historic Places] or designated as an individual landmark or as a contributing building in a historic district by a unit of State or local government, may retain the name historically associated with the building or structure.”<sup>231</sup> Under this provision, it appears the NPS could possibly have avoided changing the names of “Wawona,” “The Ahwahnee,” “Curry Village,” and “Badger Pass,” as all are registered or are eligible for inclusion on the National Register of Historic Places.<sup>232</sup> The new law could have potentially sheltered the NPS’s uses of these historic names and thwarted an infringement claim by DNCY—for the use of the names on the structures, at least.

Nevertheless, allowing facilities to keep their names without preventing the trademarking of those names by short-term concessionaires does not truly protect the values at stake; it just better masks the problem from public attention. Successful defense of a Yosemite infringement claim under this new federal law would not necessarily prevent other registrations and lawsuits involving any one of the 413 units in the national park system.<sup>233</sup> More importantly, while the physical renamings are themselves troubling, they represent only a portion of the private trademark–public places problem. Even if the physical places were permitted to operate under their historic names, the issues related to unbalanced contract negotiations and consumer confusion would remain. Simply put, the recent federal enactment does not go far enough.

If short-term concessionaires can file for trademarks of national park landmark names on goods and for particular services, the NPS will need to invest time and energy into identifying, stopping, and

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231. 54 U.S.C. § 302106 (Supp. II 2014). Though the statute and legislative history do not indicate a source of authority for this provision, it appears to derive from the special treatment of landmark properties under the National Historic Preservation Act, 54 U.S.C. §§ 300101–307108 (Supp. II 2014) (appearing at 16 U.S.C. §§ 470-1–470x-6 (2012) prior to the passage of the Act of Dec. 19, 2014).

232. For discussion of the historical registration of these landmarks, see *supra* Part II. Separate from this statutory authority, DNCY had stipulated that the NPS and Aramark could continue using the disputed names under a “royalty-free license” while the litigation was ongoing. First Amended Complaint, *supra* note 89, at 20. The NPS did not take the company up on this offer, however, saying it changed the names to avoid running afoul of any of DNCY’s trademarks in case they were found to be valid in the end. Kaplan, *supra* note 27 (noting cost of \$1.7 million to change each sign and logo).

233. *Frequently Asked Questions*, NAT’L PARK SERV., <https://www.nps.gov/aboutus/faqs.htm> [<https://perma.cc/9NXZ-4SUK>] (listing the number of national park “areas covering more than 84 million acres in every state, the District of Columbia, American Samoa, Guam, Puerto Rico, and the Virgin Islands”).

challenging trademark registrations—not an ideal situation for the American public (or our collective wallet). Though some of the 413 units may be less economically enticing for concessionaires than others, it is impractical and wasteful for the NPS to spend public dollars confronting and dealing with individual trademark disputes as they arise in the courts.

Without statutory protection for important national park landmark names, it seems that these suits will only continue to arise. Though DNCY appears to be the first to enter the arena, another national park concessionaire followed close behind. Just weeks after suing the NPS over its Grand Canyon National Park concessions contracts in 2014, Xanterra Parks & Resorts filed for trademarks of some of the Grand Canyon's key facilities including "Hopi House," "El Tovar," and "Phantom Ranch."<sup>234</sup> In preparation for an upcoming rebidding, the NPS had attempted to make the contracts process at Grand Canyon more competitive by paying down some of the money owed to Xanterra for investments in physical improvements at the park, money that an incoming contractor would owe to Xanterra if a changing of the guard were to occur.<sup>235</sup> Xanterra's reactive trademark filing demonstrates how incumbent concessions companies can and will seek to use marks to maintain an edge over their competition. As it turns out, Xanterra dropped its trademark applications, now listed as "DEAD" on the USPTO search system,<sup>236</sup> once it received a contract extension for the Grand Canyon facilities.<sup>237</sup>

To some, trademark filings by concessionaires simply ensure that companies are rewarded for their investment in the park and are provided a certain degree of exclusivity to that end. Proper compensation for such investments need not come at the price of mangling trademark principles. Concessionaires regularly make investments in physical improvements to the facilities they manage,

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234. Jason Blevins, *Park Operator Xanterra Files Trademarks for Iconic Grand Canyon Lodges*, DENV. POST (Apr. 25, 2016, 11:29 PM), <http://www.denverpost.com/2015/01/09/park-operator-xanterra-files-trademarks-for-iconic-grand-canyon-lodges> [https://perma.cc/B9HD-CXEH].

235. *Id.*

236. U.S. Trademark Application Serial No. 86,434,636 (filed Oct. 25, 2014) (HOPI HOUSE); U.S. Trademark Application Serial No. 86,444,229 (filed Nov. 4, 2014) (PHANTOM RANCH); U.S. Trademark Application Serial No. 86,446,998 (filed Nov. 6, 2014) (EL TOVAR).

237. Felicia Fonseca, *Concessionaire Drops Efforts To Trademark Grand Canyon Names*, BOULDER DAILY CAMERA (May 7, 2015, 12:45 PM), [http://www.dailycamera.com/ci\\_28069850/concessionaire-drops-efforts-trademark-grand-canyon-names](http://www.dailycamera.com/ci_28069850/concessionaire-drops-efforts-trademark-grand-canyon-names) [https://perma.cc/8VCA-KBQ3].

pursuant to their contracts with the NPS.<sup>238</sup> Under current law, the NPS must compensate concessions companies for the value of their improvements,<sup>239</sup> and indeed, the DNCY and Xanterra contracts explicitly provided for such compensation.<sup>240</sup> Additionally, a concessionaire can take steps on its own to ensure the profitability of its investment by providing good management and high quality products. The better the quality of the accommodations, service, or merchandise being offered, the higher a company could conceivably charge for these provisions. Furthermore, a trademark law solution can be crafted that protects innovation and investment without awarding the names of our nation's beloved landmarks to short-term operators.

Existing structures of trademark law should be interpreted to allow companies to design and register marks that would be associated with their period of management of a facility, a particular service they provide, or a stylized logo for use on particular goods. The *type* of marks registered matters; part of the issue with the DNCY registrations is that the marks were “typed drawings” or “standard character marks,”<sup>241</sup> which give rights to the use of the registered word itself.<sup>242</sup> If only these basic “word” marks are kept out of reach, contractors could still seek registrations for other, creative marks during their relationship with the NPS.<sup>243</sup>

Trademarks are supposed to “identify the source of one seller's goods and distinguish that source from other sources.”<sup>244</sup> Allowing

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238. See, e.g., Felicia Fonseca, *Concessionaire Gets \$1B Contract at Grand Canyon*, SALT LAKE TRIB. (Sept. 11, 2015, 11:39 AM), <http://www.sltrib.com/home/2937781-155/concessionaire-gets-1b-contract-at-grand> [<https://perma.cc/A79L-3B8B>] (describing prior improvements and future obligations of Xanterra under its new contract at Grand Canyon).

239. 54 U.S.C. § 101915(b)(1) (Supp. II 2014) (recognizing “a right to compensation for” leasehold interests granted “in each capital improvement constructed by a concessioner under a concession contract”).

240. First Amended Complaint, *supra* note 89, at 8; Defendant's Answer to Plaintiff's First Amended Complaint, *supra* note 21, at 26.

241. Consolidated Petition to Cancel, *supra* note 18, at 1–3.

242. See *supra* notes 112–114 and accompanying text.

243. Typed drawings “d[o] not create rights in the registered word combined with other words or designs.” See MCCARTHY, *supra* note 37, § 19:58 (citing *Fossil Inc. v. Fossil Group*, 49 U.S.P.Q.2d 1451 (T.T.A.B. 1998)). According to courts and commentators, this rule has not changed with the change in nomenclature to “standard character marks,” so preventing concessionaires from making “standard character mark” registrations should therefore not stop them from registering logos using those names in particular designs or combined with other words. See *id.* § 19:58 n.23 (citing numerous cases in agreement that “standard character” marks will be treated like “typed” drawings and will not be limited to a specific format).

244. *Id.*

concessionaires to trademark logos or phrases associated with their era of operation does this, but the simple word “Wawona” doesn’t identify DNCY or any other company as the source of the goods (due to the longstanding association of those names with the National Park Service), and doesn’t distinguish “Wawona” operations under DNCY as compared to Aramark, any predecessor, or any antecedent. Concessions companies could conceivably create a “Wawona” logo that features their own corporate design, and rightfully receive trademarks for services or operations they innovate, such as DNCY’s “Bracebridge Dinner” event and “Go Climb a Rock” trademarks.<sup>245</sup> Drawing the line at registering actual landmark names would achieve the goals of trademark law by: (1) mitigating consumer confusion by forcing innovation in the design of new logos, (2) alleviating the contract competition and looming name change costs, and (3) protecting any goodwill associated with unique offerings of a particular concessionaire.

In the wake of the DNCY dispute at Yosemite, the California State Legislature passed a law that provides an example of what statutory protection for our national park landmark names might look like.<sup>246</sup> The California Heritage Protection Act<sup>247</sup> was enacted in September 2016 to “protect[ ] the state’s trademark and service mark interest in the names associated with a state park venue and its historical, cultural, and recreational resources.”<sup>248</sup> The law was proposed to “prohibit[ ] a concession contract from providing a contracting party with a trademark or service mark of the names associated with a unit of the state park,”<sup>249</sup> and “[p]rovide[ ] that a concessionaire, who makes a legal claim to have a trademark or service mark interest in a state park in violation of the law, shall forfeit the right to bid on future state park concession contracts, to the extent

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245. BRACEBRIDGE DINNER, Registration No. 1,527,437; GO CLIMB A ROCK, Registration No. 1,524,529; GO CLIMB A ROCK, Registration No. 1,524,593.

246. See Press Release, Office of Assemblyman Ken Cooley, Cooley Bill To Protect Historic State Park Names Signed into Law by Governor Brown (Sept. 22, 2016), <https://yubanet.com/california/cooley-bill-to-protect-historic-state-park-names-signed-into-law-by-governor-brown> [<https://perma.cc/6Q8M-W7MQ>] (announcing the signing of California’s Heritage Protection Act as a response to the Yosemite trademark dispute).

247. California Heritage Protection Act, CAL. PUB. RES. CODE §§ 5080.05, 5080.18, 5080.22 (West 2016).

248. CAL. PUB. RES. CODE § 5080.18(j) (West 2016).

249. CALIFORNIA OFFICE OF SENATE FLOOR ANALYSES, BILL ANALYSIS OF A.B. 2249, at 1 (2016) [http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab\\_2201-2250/ab\\_2249\\_cfa\\_20160815\\_202343\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_2201-2250/ab_2249_cfa_20160815_202343_sen_floor.html) [<https://perma.cc/YM4U-L9PZ>].

authorized by federal law.”<sup>250</sup> If such a law had been in place at the federal level, DNCY could not have used its contract with the NPS to register any of the name marks associated with Yosemite, and would likely have been barred from future NPS concessions contracts if it had sought the marks in spite of this hypothetical enactment. If restricted, like the California law, to the trademarks “of the names” associated with our parks, a federal law could conceivably still allow room for the types of creative marks discussed above.

The California law provides a solution to the potential strain on the public budget from trademark disputes, too. “[A] current or former concessionaire [that files] in bad faith” for registration for a “mark that incorporates or implies an association with a state park venue, or its historical, cultural, or recreational resources” will be required to pay “attorney fees, costs, and expenses” if a public entity successfully opposes or cancels the registration.<sup>251</sup> Such a measure would discourage companies from treading too close to the line of marks not identifiable with their own services or brands, and also help prevent the kind of eleventh-hour trademark filings made by DNCY and Xanterra to achieve a strategic advantage in contract negotiations. A similar federal provision would ideally eliminate these “poison pill” filings, but if and when the NPS did need to challenge a registration, a losing concessionaire, rather than the American public, would be required to foot the bill for the legal efforts. By setting aside the valuable names of national park landmarks, a federal equivalent of California’s law would prevent the NPS from having to expend resources defending our national heritage through endless lawsuits or filing for individual trademarks for all the public areas it manages.

Limiting the prohibition on registrations to word marks alone still allows concessioners to add value by designing logos and creative programs and services, which would be independently associated with their companies. The law would not preclude companies from registering marks that perform a real signaling function and would not prevent them from using national park landmark names in their operations. Protecting the names of national park landmarks upholds the expectations of the public while still allowing companies to create and register marks that do not confuse customers or misappropriate consumer goodwill. Under the California law, a concessionaire appears free to pursue its own marks knowing that a future contract bid would

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250. *Id.* at 3.

251. PUB. RES. § 5080.18(j).

be barred on trademark grounds only if it had asserted a legal claim to a park-associated name on the basis of another contract, or if it had been determined by a court to have made a claim for a “mark interest in the name or names associated with a state or federal park venue, or its historical, cultural, or recreational resources, without reasonable cause and in bad faith.”<sup>252</sup> Existing, valid trademark rights held by a contracting party before the award of a concessions contract are declared unaffected by the California enactment.<sup>253</sup>

These measures strike a balance between protecting the names integral to a park’s history and providing concessions companies room in which to have protected marks of their own. The law has yet to encounter real opposition—the California parks statute passed unanimously through each committee vote and in both houses of the legislature.<sup>254</sup> Though few things seem uncontentious in Washington these days, the broad Congressional coalition that passed the national parks statute in 2014<sup>255</sup> would ideally be receptive to a law similar to California’s attempt at “heritage protection.”<sup>256</sup> Congress’s 2014 national parks statute indicates willingness to set aside historic

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252. *Id.* § 5080.22(b)(2). As additional reassurance, the California law also specifies that concessionaires denied a contract on these grounds would still receive “an opportunity to rebut the basis for the contract denial at a formal hearing.” *Id.* § 5080.22(c).

253. *Id.* § 5080(e). The law does not appear to automatically strip current companies of existing registrations acquired from prior concessionaires, such as “The Ahwahnee” (for “hotel and restaurant services”) initially held by YPCC before DNCY. *See* THE AHWAHNEE, Registration No. 1,529,066 (citing Yosemite Park & Curry Co. as original registrant). DNCY at this point may be considered to have abandoned that mark, but to the extent that companies currently operating in the parks might claim rights to landmark names themselves, the NPS can resolve those claims on a case-by-case basis under a California-style framework, knowing that the law going forward will prevent such registrations in the future. The statutory solution to the issue raised by the DNCY registrations might not dictate the outcome in the present litigation, but would hopefully limit the risk of such a case reoccurring.

254. *See Bill Information: AB-2249 State Parks*, STATE OF CALIFORNIA, [https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill\\_id=201520160AB2249](https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=201520160AB2249) [<https://perma.cc/LWY3-47BZ>] (collecting vote tallies).

255. *See* H.R. 1068, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/1068/actions> [<https://perma.cc/E5TX-T54E>] (listing a vote count for Pub. L. No. 113-287 of 409-0 in the House of Representatives and “unanimous consent” in the Senate).

256. 2016 Cal. Legis. Serv. Ch. 413 (A.B. 2249) (West). Assemblyman Ken Cooley characterized the law as “a small but vital act to protect [state] parks for many future generations of Californians to enjoy.” *See* Press Release, Office of Assemblyman Ken Cooley, Assemblymen Cooley, Gray, Bigelow Encourage Other States to Follow California’s Lead and Protect Their Historic State Park Names (June 21, 2016), <https://a08.asmdc.org/press-release/assemblymen-cooley-gray-bigelow-encourage-other-states-follow-california%E2%80%99s-lead-and> [<https://perma.cc/29Z5-RVKB>].

landmark names as too important to lose,<sup>257</sup> and California's trademark-protective statute is a fitting application of this principle. A similar federal measure would be an appropriate solution to the issue central to the DNCY case, as it upholds the trademark tenets of protecting consumers, competition, and accrued goodwill and, importantly, does so while defending our shared national heritage from infringement by private interests—the same principle that drove the creation of our national parks.

#### V. CONCLUSION: NATIONAL PARKS, TRADEMARKS AND OUR VALUES

*National Parks are our richest patrimony. They constitute a heritage which must be preserved inviolate by the American people.*

—Dr. John Wesley Hill<sup>258</sup>

Protecting a mark and its meaning could hardly be more important than in the context of our national parks, “America’s best idea,”<sup>259</sup> framed as an “[e]xpression of the American soul.”<sup>260</sup> In establishing our national parks, we “have protected our birthright”<sup>261</sup> — “[e]ach park,” it has been said, “contributes to a deeper understanding of the history of the United States and our way of life.”<sup>262</sup> That these places, their landmarks, and their names have acquired significant meaning to the American people is without question.

The widespread reaction to the Yosemite trademarks case signals the general impression that these names should belong to the NPS, and by extension, to the American public.<sup>263</sup> People travel to the national

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257. See *supra* notes 229–232 and accompanying text for discussion of the recent legislation.

258. Dr. John Wesley Hill, Address at the Annual Opening of Yellowstone National Park (June 20, 1923).

259. Nancy Trejos, *National Parks: Ken Burns on Why They Were America’s Best Idea*, USA TODAY (Apr. 16, 2016), <http://www.usatoday.com/story/travel/2016/04/14/ken-burns-national-parks-americas-best-idea/82499256> [<https://perma.cc/A7B7-23PT>] (discussing the significance of the national parks with experts and the maker of the “The National Parks: America’s Best Idea” documentary series).

260. Ruth Rudner, *Essay*, in DAVID MUENCH, OUR NATIONAL PARKS 15, 15 (2d ed. 2005).

261. *Id.*

262. MAPPING THE FUTURE OF AMERICA’S NATIONAL PARKS: STEWARDSHIP THROUGH GEOGRAPHIC INFORMATION SYSTEMS 53 (Mark Henry & Leslie Armstrong eds., 2004) (quoting George B. Hartzog, Jr., Director of the National Park Service from 1964–1972).

263. See Fuller, *supra* note 15 (“A lot of Americans are concerned about this dispute because it seems to undermine the core idea that these places are owned by all of us.” (quoting Neal Desai, Director of Field Operations with the National Parks Conservation Association)).

parks “to become familiar with national landmarks that enshrine the values, ideals, and origins of our nation.”<sup>264</sup> Even those who never journey to the parks value them—a 2016 survey of the American public revealed that 85 percent “of respondents felt they personally benefitted from National Parks, regardless of whether they visited the parks or not.”<sup>265</sup> The law governing the NPS pronounces that our national park properties, “though distinct in character, are united through their interrelated purposes and resources . . . as cumulative expressions of a single national heritage.”<sup>266</sup> The identifying names associated with our landmarks carry this connotation, not the “branding” of a particular concessions operator.

A trademark is supposed to convey information about the source or quality of the particular good or service to which it is affixed.<sup>267</sup> The name marks registered by DNCY, however, are inextricably linked to the NPS and its facilities. For this reason, a court could determine that DNCY does not possess any rights to the names of Yosemite’s landmarks. The NPS has advanced three claims for cancellation of the marks, each of which can be supported by faithful application of trademark law. Even beyond the present suit, the principles underlying trademark law demonstrate the impropriety of allowing concessionaires to trademark national park landmark names. Our federal trademark regime was intended to prevent consumer confusion, reduce unfair competition, and protect the goodwill associated with the mark’s holder and the marks themselves.<sup>268</sup> Allowing private concessionaires to trademark names long associated with national park landmarks works against these goals. A concessions company that controls well-known landmark names can simultaneously confuse customers, misappropriate the goodwill people associate with the park’s facilities, and hold a harmful advantage over competitors and the NPS in the contracting process. Without congressional intervention, the NPS will be left to fend off attempts to

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264. Edwin Bernbaum, *The Spiritual and Cultural Significance of National Parks*, in STAN JORSTAD, *AMERICA’S BEST IDEA: A PHOTOGRAPHIC JOURNEY THROUGH OUR NATIONAL PARKS* 10, 11 (Mark J. Safenstein & Christopher E. Stein eds., 2d ed. 2008).

265. Michelle Haefele, John Loomis & Linda J. Bilmes, *Total Economic Valuation of the National Park Service Lands and Programs: Results of a Survey of the American Public* 3 (Harv. Kennedy Sch. Faculty Res. Working Paper Series, Paper No. 16–024, June 2016).

266. 54 U.S.C. § 100101 (Supp. II 2014).

267. For a discussion of the purposes of trademark law, see *supra* notes 108–112.

268. For a discussion of the Lanham Act’s foundational principles, see *supra* note 111 and accompanying text.

privatize public landmark names in the courts, at great expense. A statute preventing concessionaires from trademarking these names, like that recently passed in California, would protect the fundamental principles of trademark law, the American taxpayer, and the meaning of these names to the public at large.

The names of our national park landmarks are valuable because of their connection to our scenic landscapes, facilities rich with history, and the ideals that helped preserve them. If these marks are detachable from the public entity with which the public connects them, the names end up crassly reduced to commercial souvenir labels and bargaining chips in contract negotiations. Providing our national park landmark names with statutory protection from predatory interests fits perfectly within the American tradition of preserving the parks themselves, and ensures they will be “preserved and managed for the benefit and inspiration of all the people of the United States.”<sup>269</sup> What’s a better idea than that?

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269. Act of Aug. 18, 1970, Pub. L. No. 91-383, § 1, 84 Stat. 825, 825 (1970) (codified at 54 U.S.C. § 100101(b)(1)(C) (Supp. II 2014)).