

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLAYBOY ENTERPRISES, INC.,)
)
 Plaintiff - Appellant,)
)
 v.)
)
 NETSCAPE COMMUNICATIONS)
 CORPORATION,)
)
 Defendant – Respondent.)
 _____)

No. 99 - 56230 AHS
DC # CV 99 - 320

PLAYBOY ENTERPRISES, INC.,)
)
 Plaintiff – Appellant,)
)
 v.)
)
 EXCITE, INC.,)
)
 Defendant – Respondent.)
 _____)

No. 99 - 56231
DC # CV 99 – 321 AHS

Expert Report of Dr. Laura R. Oswald

Table of Contents

	page
Background, Qualifications, Compensation	3
Assignment	4
<p>(1) Review and comment upon the expert report of Dr. David Yerkes in light of the question as to whether consumers are using the key search words PLAYBOY and PLAYMATE as trademarks on the Excite search engine.</p>	
Summary of Findings	4-5
<p>(1) Dr. Yerkes falls short of researching “the status in the English language today of the words PLAYBOY and PLAYMATE” by analyzing the words in isolation from their social and historical contexts, and reducing their semantic fields to the rubric “generic with a sexual content.” In the context of the adult entertainment web search, it is reasonable to assume that consumers are using the key words PLAYBOY and PLAYMATE as trademarks rather than as generic terms.</p>	
Findings and Supporting Arguments	5-24
<p>I. The web search constitutes a language event that determines how consumers are using key words they type into the Search Terms box.....5-9</p>	
<p>II. The web search for adult entertainment creates a context that highlights the secondary meanings of the key words PLAYBOY and PLAYMATE and plays down their generic meanings.....10-11</p>	
<p>III. The organization of meaning on the Search Results page for the Excite adult entertainment website, including key words, banner ads, Search Results lists and other advertising, over-determines the association of the keywords PLAYBOY and PLAYMATE with the Playboy mark.....11</p>	
<p>IV. The dictionary meanings of the words PLAYBOY and PLAYMATE change over time in terms of their sexual connotations and were the direct result of PEII marketing efforts from the mid-1950’s on.....12-20</p>	
<p>V. Secondary meanings for the words PLAYBOY and PLAYMATE contribute to the esthetic world of the Playboy mark in the consumer’s mind, particularly in the context of adult entertainment.....21-24</p>	
I. Background , Qualifications, Compensation:	

I, Laura R. Oswald, am an Affiliate with the consulting firm of LECG./Navigant Consulting in Evanston, Illinois. I conduct brand image research in the areas of brand equity and development, consumer research and marketing strategy. My qualitative research consulting practice and academic career encompass a variety of application areas, including automotive, cosmetics, food, entertainment, electronics, retailing, and corporate culture. My client list includes the Ford Motor Company, Procter and Gamble, J. Walter Thompson, Worldwide, and Unilever. My *curriculum vitae* is attached at the end of the report. [Attachment 1]

I hold a Bachelor of Science from the Northwestern University School of Speech [1970], a Masters Degree from the New York University Tisch School of the Arts [1972] and a Masters Degree and Ph.D. in French language and semiotics from New York University, in conjunction with the Ecole des Hautes Etudes en Sciences Sociales in Paris, France. [1981].

I have been retained because of my extensive training and expertise in the area of semiotics, a branch of anthropology devoted to the science of signs and symbols in culture. Before going into business, I taught rhetoric, semiotics, literature and film history at Northwestern University, the University of Minnesota, and the University of Illinois, Chicago for many years. I have published a book, *Jean Genet and The Semiotics of Performance*, and numerous articles on semiotics, culture and the visual arts in books and refereed journals such as *The Journal of Consumer Research*, *Deconstruction and the Visual Arts*, *Design Issues*, *Poetics Today*, *Semiotica*, *The American Journal of Semiotics*, and *Diacritics*.

I have never testified or been deposed as an expert witness in litigation.

I am being compensated at a rate of \$350.00 an hour for researching and drafting this report, and \$425.00 an hour for depositions and trial.

II Assignment: Review and comment upon the expert report of Dr. David Yerkes in light of the question as to whether consumers are using the key search words PLAYBOY and PLAYMATE as trademarks on the Excite search engine.

I have been retained by counsel for Playboy Enterprises International, Inc. (“PEII”) in the matter of Playboy Enterprises, Inc., v. Netscape Communications Corporation and Excite, Inc. because of my expertise in semiotics, a branch of anthropology devoted to symbolic communication. Plaintiff’s counsel has asked that I provide a critique of the report of Dr. David Yerkes, expert witness for defendants, and provide expert opinion concerning the issue of whether the words PLAYBOY and PLAYMATE, when keyed as search terms by users of the “Excite” search engine, refer to generic or secondary meanings.

III. Summary of Findings

1. The research of expert witness Dr. David Yerkes falls short of his objective of accounting for “the status in the English language today of the words PLAYBOY and PLAYMATE,” because he
 - i. isolates the terms PLAYBOY and PLAYMATE from the context of the language events in which they occur, and therefore
 - ii. fails to take into account the effects of the language event in question, i.e., the web search, in creating an identification between the terms PLAYBOY and PLAYMATE and the Playboy mark in the consumer’s mind.

2. Dr. Yerkes errs in reducing all instances of the words PLAYBOY and PLAYMATE to the vague and over general classification, “generic with a sexual meaning,” in that he

- i. fails to account for the changes in the sexual connotations of the words PLAYBOY and PLAYMATE over time,
- ii. deliberately omits full dictionary entries when citing the words PLAYBOY and PLAYMATE that would confirm that the words have both generic meanings pre PEII and secondary meanings attributed to PEII,
- iii. fails to acknowledge that changes in the meanings of the words PLAYBOY and PLAYMATE from the period preceding PEII to the period after PEII constitute secondary meanings of the terms, and thereby
- iv. forecloses consideration that these secondary meanings were created by PEII and continue to determine the mark identification of the words PLAYBOY and PLAYMATE in the consumer's mind, particularly in the context of adult entertainment.

IV. Findings and Supporting Arguments

- I. Yerkes's research isolates the terms PLAYBOY and PLAYMATE from the context of the language events in which they occur.
 - A. Language is primarily a social phenomenon. By isolating the words PLAYBOY and PLAYMATE from the communication events in which they occur, Yerkes researches only one level of the English language, the level of words, and overlooks the level of communication. Communication defines the social dimension of language, and concerns the use of words in a language event or "speech act."

In various ways, in various contexts, prominent linguists and philosophers for over fifty years have been insisting on the limitations of a "nominalist" view of language, that is, the study of words in isolation from the context.

Language is first and foremost an instrument honed to the specific context in which it is used. The following scholarly references support this claim:

- 1) John L. Austin, *How to Do Things with Words*; {New York: Oxford University Press}, 1962, pp. 12 – 13. [Attachment 2]

John Austin, a British philosopher, insists on the importance of the speaking context for determining the legal validity of contracts, for example (pp. 12 – 13). A promise to wed, made in the course of a theatrical performance, would not be binding, for example, not because the words “I thee wed,” are false or meaningless in and of themselves, but because they are spoken by actors within the context of a play.

- a) An example of how the context can change the meanings of words is the way Dr. Yerkes references the title of *Playboy of the Western World* to prove that the word PLAYBOY has always had a sexual meaning. He researches both the title and the line from the play out of context. (Yerkes #13, p.13) When viewed in the context of the speaking event in which it occurs in the play, the word PLAYBOY in the title takes on an ironic meaning, entirely based on the context [Attachment 3]. The “playboy” of the title is anything but successful with women.
- b) Moreover, when Dr. Yerkes cites an example of the word PLAYBOY in a line from the play, he cites it out of context. The Widow Quin exclaims, [Act II] “You’re the walking Playboy of the Western World!” she is being sarcastic, since the “playboy,” Christy, is described in dialogue just preceding this quote as: “an ugly young blackguard,” “a hideous, fearful villain.” “Wasn’t he the laughing joke of every female woman where four baronies meet...?” While the word PLAYBOY must have something to do with a man’s success

with women in order to for the irony of this statement to be understood, nowhere in the play is a precise, sexual meaning of PLAYBOY defined. In other words, in the case of this “playboy,” there is no sexual meaning. (*The Plays and Poems of J.M. Synge*, T.R. Henn, ed, London: Methuen & Co., Ltd., 1963, p. 207). [Attachment 3]

This example shows that by researching the word PLAYBOY out of context, Dr. Yerkes fails to prove that word PLAYBOY has always been used with a “generic, sexual meaning” in the English language.

2. Emile Benveniste, “The Levels of Linguistic Analysis,” in *Problems in General Linguistics*. Translated by Mary Elizabeth Meeks. Coral Gables, Florida: U. of Miami Press, 1971, pp. 108-111. [Attachment 4]

The French linguist Emile Benveniste delineates two mutually dependent levels of language: the *meaning* of words, defined by convention, Dr. Yerke’s “generic meaning;” and the reference of words, defined by their use in a specific language event (pp. 108-111). [Attachment 4]

- a) To illustrate this point I will refer to Dr. Yerkes’ own example of the secondary, erotic meaning of the word “apples” = genitalia (Yerkes, # 16, p.16, note #3). Double meanings of this kind are clear examples of how isolated words can mean different things to different people, depending upon how they are used.
- b) In order to prove that the word PLAYMATE has always had a sexual meaning, Dr. Yerkes claims that the lyrics from Saxie Dowell’s song, “Playmates,” written in the 1930’s, refer to sexual acts. He supports his claims with reference to slang definitions for “apples” = genitals, in *A Dictionary of Slang and Unconventional English*. Dr. Yerkes

arbitrarily associates the slang meaning of the word “apples” with the lyrics in this song in order to force a sexual interpretation on the lyrics, “Climb up my apple tree,” and, by extension, on the word PLAYMATE.

Dr. Yerkes errs when he assumes that the lyrics for “Playmates” are sexual by basing his interpretation solely on the slang meanings for “apple” found in the *Dictionary of Slang and Unconventional English*. It is not the slang dictionary that tells the user whether the conventional meaning of “apple” = fruit, or the erotic meaning of “apples” = genitalia, is meant. It is the context of the language event and the intention of the writer that determine the meaning. In this case, the writer, Saxie Dowell, is indeed renowned for children’s songs and innocent, popular ditties such as “Three Little Fishies” that entertained Americans during WWII. His songs are even featured in a book of *Children’s Favorites* for the piano. [Attachment 5]

- 3) I. A. Richards, *The Philosophy of Rhetoric*. New York: Oxford University Press, 1965, pp. 34-35. [Attachment 6]

In his discussion of secondary meanings, most notably figures of rhetoric, Richards dismisses the notion of a “generic” meaning altogether, claiming that meaning is always and already a function of its relation to the language context and the codes determining how that relation is established. He defines context as, “the name for a whole cluster of events that recur together – including the required conditions as well as whatever we may pick out as cause or effect” (Richards, 34). The context enables speakers to resolve confusion as to which understanding of a word is meant – its primary or secondary meaning.

- a) A good example is use of the word PLAYBOY as a keyword on the Excite search engine. [Attachment 7] If the keyword PLAYBOY is juxtaposed with a list of Related Search words associated with Playboy Enterprises, such as Hefner and Playboy Magazine, this association creates a first identification between the word PLAYBOY and the secondary meaning or trademark for Playboy Enterprises. When this list is then juxtaposed with an unsponsored banner ad for adult entertainment, by the rule of Richards' context, the mind will see an analogy between the Playboy trademark and unsponsored adult entertainment on the web. This analogy is further reinforced when the banner ad is juxtaposed with a "Try These First" list in which Playboy Enterprises.com is prominently featured.
- b) This example raises the issue of the web search as a speech act similar to the examples #1 and #2 above, in which the context determines the specific meaning of words typed into the key search term box.

B. By failing to account for the language event in which words are used, Yerkes forecloses consideration of the effects of the web search, a form of "speech act," on creating an identification between the terms PLAYBOY and PLAYMATE and the Playboy mark in the consumer's mind.

1. The web search is a speech act in that the consumer must constantly read, type and make choices as to the direction the search will go. Language use on the web constantly refines the meaning of words, links them to other categories and frames the search within a specific world of meanings. The Search Results page constitutes a language context in I.A. Richard's sense: it forms a "whole cluster of events that recur together – including the required conditions as well as whatever we may pick out as cause or effect." [Attachment 6]

2. Attached is a skeleton of a typical Search Results page generated by the words PLAYBOY and PLAYMATE on the Excite search engine in 1999. [Attachment 8] The organization of elements on the page is codified inasmuch as it recurs whenever a search is performed. Each page contains the following elements: At top left is the Excite logo.

- 1) Top right is a personalized set-up for access to the user's home page, email access, and the Excite home page. This feature does not change from page to page.
- 2) Right below, centered, is the key word search box. This word can be changed every time a user enters the site.
- 3) Below the key word search box is a list of "related searches," a list of words that have been generated over the past 30 days when that specific key word was entered. This list suggests a vast array of verbal associations with the key word.
- 4) Below this menu is the banner ad, the most prominent feature of the page due to size and color.
- 5) Under the banner ad, to the left, is a short list of results, under a "Try These First" box.
- 6) Directly to the right and just under the banner ad is a short Directory of related categories.
- 7) To the right of the short Directory is a place for Web Results.
- 8) To the right of that is a place for Web news or small advertising banners, for variety web vendors such as Amazon.com. On the pages under analysis, data would be entered either under Directory or Web Results
- 9) Below these sections, along the left margin, is a longer Directory of related categories.
- 10) Below this Directory is a long list of Web Results.*

*As the user scrolls down the page, the format is extended, beginning with the sections f, g, h, and i, then another banner ad, then sections c and d.

- 3) In the framework of the web search, Excite creates a sequence of analogies between the key terms PLAYBOY and PLAYMATE, banner ads for unsponsored adult entertainment, and references to Playboy Enterprises, by deliberately and systematically juxtaposing them in a sequence of meanings on the Search Results page. Take for example the Search Results page that was generated by the keyword PLAYBOY in 1999. [Attachment 7] On this page the organization of the various elements of the page takes on a rhetorical dimension, inasmuch as the juxtaposition of specific key words with specific banner ads, with specific “Try These First” lists, with specific Directories and Web results, creates inferences as to the participation of a specific vendor, Playboy Enterprises, in the marketing activities on the web of unsponsored vendors.

Looking closely at this page, I noticed that an alternating juxtaposition [A/B/A/B] of the key word PLAYBOY [A] with the unsponsored banner ad [B], with Playboy Enterprises under the banner in “Try These First” [A], with a Directory of unsponsored adult entertainment categories [B], not to mention references to Playboy Enterprises at the top of the Results list [B], creates inferences as to the implication of Playboy Enterprises in the cyberworld of unsponsored adult entertainment. By creating rhetorical associations between references to Playboy Enterprises and unsponsored adult entertainment in the pattern A/B/A/B/A/B/, the organization of meaning on this page limits the freedom of the user to associate the unsponsored adult entertainment ads with anything other than Playboy Enterprises.

- II. By researching the words PLAYBOY and PLAYMATE in isolation from the contexts in which they occur, the report of Dr. Yerkes not only forecloses

consideration of effects of the web search on the meaning of the words PLAYBOY and PLAYMATE, but draws misleading conclusions about the “status of the words in the English language. “

Even taking the research of Dr. Yerkes as it stands, he errs in reducing all instances of the words PLAYBOY and PLAYMATE in various citations to the vague and over general classification, “generic with a sexual meaning.”

A. Dr. Yerkes claims that from Shakespeare’s England to the present time the words PLAYBOY and PLAYMATE are “generic with a sexual meaning” and “had long been generic when Playboy Enterprises started using them, and both words continue today to be as generic as ever” [Yerkes, #34, p. 36] In order to prove his claims that the words PLAYBOY and PLAYMATE have been and continue to be “generic with a sexual meaning,” Dr. Yerkes deliberately edits reference book entries and literary and non-fiction citations, leaving out important information that would disprove his claims.

1. For instance, Dr. Yerkes cites only partial meanings for the words PLAYBOY and PLAYMATE from the dictionary entries in his report, leaving the impression that the sexual meanings in the entries are the original and only meanings. Moreover, he frequently omits the part of the definitions that associate the word PLAYBOY with other attributes such as ‘wealth’. For example, in the entry from *Oxford Encyclopedic Dictionary*, third edition, copyright 1996, Yerkes omits the complete definition, limiting the definition of PLAYBOY to “*an irresponsible pleasure-seeking man...*” and leaving off “*esp. a wealthy one.*” (Yerkes, p.6, #7) [see attached Table of Secondary Sources]
2. Yerkes misleads the reader by stating PLAYBOY has always had a ‘sexual meaning,’ when 80% of the dictionaries he relies on do not

mention the word 'sexual' or words with sexual connotations at all. For instance he identifies "pleasure-seeking" with "sexual meaning." (Yerkes, p.8, #9)

3. In paragraph seven of his report, Yerkes provides 12 different dictionary definitions for the word PLAYMATE. (Yerkes, pp.5-6) In every single instance, he omits the primary definition for PLAYMATE found in the cited reference. The following are two examples of how Yerkes misleads the reader by selectively quoting from dictionaries.

a) Yerkes states that the *Cambridge International Dictionary*, copyright 1995 defines PLAYMATE as "... sexual partner or esp[ecially] a woman who is shown in photographs wearing few clothes: *We can reveal that the popular singer now has a new playmate...*" [Attachment #11] However, the first definition for PLAYMATE given by the dictionary is "a friend, esp. another child, with whom a child plays often." Before giving the second definition cited by Yerkes above, the dictionary states: "In some newspapers and magazines, playmate is sometimes used of sexual partner or esp. a woman who is shown in photographs wearing few clothes." Hence, Yerkes neglects the important fact that the sexual meaning of PLAYMATE was created by certain "newspapers and magazines;" it was not always imbued with a sexual connotation.

b) Yerkes states that the *New Shorter Oxford English Dictionary on Historical Principles*, copyright 1993 defines PLAYMATE as "... a companion in amorous (esp[ecially] sexual) play, a lover." (Yerkes, p.5, #7) [Attachment 12] Again, this is the second definition given by the dictionary. The first definition is "a child's companion in play." Additionally, the full secondary definition the dictionary offers is "(orig. US) a companion in amorous

(esp[ecially] sexual) play, a lover.” Yerkes neglected to mention that the secondary definition originated in the US (orig. US), a country that post-dates the Shakespearean era.

- c) Yerkes omits important parts of definitions from slang dictionaries and lexicons. Yerkes notes *American Slang*, second edition, by Robert L. Chapman, copyright 1998, defines PLAYMATE as “... One’s companion in the pursuit of pleasure, esp[ecially] of sexual.” (Yerkes, p.7,#9) [Attachment #12] By using ellipsis, Yerkes omitted the words “*by 1970s*” These key words call into serious question Yerkes’ contention that PLAYMATE has always had a sexual meaning. In fact, the key words that he chose to omit disprove his argument.
- 4) Dr. Yerkes also omits direct references to Playboy Enterprises in the definitions of the words PLAYBOY and PLAYMATE in the dictionaries he cites. Dr. Yerkes states that none of the dictionaries he reviewed “ever mentions any trademark status for either the word PLAYBOY or the word PLAYMATE” (Yerkes, p. 4, #6). However, the full dictionary entry, include references to Playboy Enterprises by capitalizing and italicizing the word PLAYBOY.
- a) For example, at page five of his report, Dr. Yerkes states that the *Cambridge International Dictionary of English*, copyright 1995 defines PLAYMATE as “... a sexual partner or esp[ecially] a woman who is shown in photographs wearing few clothes: *We can reveal that the popular singer now has a new playmate. ...*” [Attachment 11] However, he omitted the sentence that came next: “*He plans to marry Playboy’s ‘playmate’ for January and cover girl for August.*” Such omissions abound in Dr. Yerkes’s report.

- b) In another instance, Dr. Yerkes notes that the *Dictionary of American Slang*, copyright 1960, 1967, and 1975, defines PLAYBOY as “a man of any age who is noted for an ostentatious social life, esp[ecially] one who is often seen in public with different women...” (Yerkes, p.8, #9) [Attachment 13] However, he fails to mention that in its definition of the word PLAYBOY, the dictionary also states: “*Playboy*, title of a popular man’s magazine dealing with fashions, entertainment, etc. *The term always implies wealth, education, social standing, and sophistication.*” In other words, Dr. Yerkes deliberately obfuscates the association of Playboy Enterprises with the words PLAYBOY and PLAYMATE in the dictionary. He also reduces the meaning of the word PLAYBOY to its sexual meaning at the expense of lifestyle and esthetic meanings associated with the Playboy trademark.
- c) Finally, Yerkes notes that in *Sexy Origins and Intimate Things*, copyright 1998, PLAYMATE is used with words such as bunny and centerfold to define ‘American Female Icons’ from 1890 to the present: “American Female Icons: ... bombshell, sex kitten, sex pot, ... sex symbol, pinup, cover girl, ... playmate, bunny, centerfold, supermodel.” (Yerkes, p.10, #9) [Attachment 14] However, he omitted the two sentences that immediately follow: “America has produced a mind-boggling cornucopia of sexy female images in just the last one hundred years. From the wholesome Gibson girl to the busty *Playboy* bunny, each has been immortalized in photography or film and christened with a playful nickname or tantalizing term.”
- d) All of the above sources highlight the trademark meaning of the word PLAYBOY and PLAYMATE by means of italics and

capitalization. This is clear evidence that the dictionaries recognize the secondary, PEII-created meaning of PLAYBOY. The context in which the term is used provides further evidence that the above sources cited by Yerkes recognize the secondary, PEI-created meaning, of PLAYBOY—i.e. as a popular men’s magazine, or part of a “cornucopia of sexy female images,” i.e., the Playboy bunny.

Dr. Yerkes even cites a dictionary entry referencing *Playboy Magazine* as a generic use of the *title*! Titles are proper nouns, and cannot be used as generically. (Yerkes, p.32, #24)

- B. Through error of omission, Dr. Yerkes fails to account for changes in the meanings of the words PLAYBOY and PLAYMATE in dictionary entries and literary titles from the period preceding development of the Playboy mark (PEII) to the period following development of the Playboy mark beginning in the mid-1950’s. In this way Dr. Yerkes forecloses consideration of changes in the sexual meanings of the words PLAYBOY and PLAMATE, meanings which form the secondary, figurative meanings related to the Playboy mark. Dr. Yerkes claims that the primary, literal meaning of PLAYBOY and PLAYMATE has remained the same for several hundred years.
1. In the citations dated pre-PEII, the sexual meaning of the words PLAYBOY and PLAYMATE was lacking altogether from dictionary entrees and barely suggested in other secondary sources and literature. The emphasis of the word PLAYBOY tended to be on the character of the man so named – immature, irresponsible and flirtatious, rather than on sexual activity per se. The word PLAYMATE had an even more vague sexual meaning. A PLAYMATE could mean anything from a childhood friend of either sex to a woman’s male companion.

2. In citations dated post-PEII, the sexual meaning of the words PLAYBOY and PLAYMATE is increasingly specific. However, I disagree with Dr. Yerke's inference that the meaning of the words PLAYBOY and PLAYMATE post-PEI were limited to the sexual, since the complete definitions of the words include references to lifestyle choices such as luxury, sophistication and fun.

3. In a detailed analysis of the changes in meaning for the words pre-PEII and post-PEII, including dates, citations and uses of the words PLAYBOY and PLAYMATE in numerous sources, including those attached to Dr. Yerkes's report [see Table of Secondary Sources], I illustrate that the meanings of the words PLAYBOY and PLAYMATE changed with the beginnings of *Playboy Magazine* in the mid-1950's, and that the secondary meaning the words PLAYBOY and PLAYMATE, including sexual and lifestyle meanings, are still in force in the contexts cited. Some examples are included below.

a) Dictionaries:

The majority of standard dictionary entries fail to provide a sexual meaning for the words PLAYBOY and PLAYMATE. The sexual meaning is found mostly in entries for other reference works such as slang dictionaries. [See Table of Secondary Sources]

When Yerkes cites dictionary entries, particularly those derived from sources dated before PEII widely publicized the trademarks, PLAYBOY and PLAYMATE, the "generic" usage of these terms is limited to the somewhat vague and general meaning of an immature adult man or woman engaged in "games and recreation" together, presumably but not explicitly of a romantic or even sexual nature. (Yerkes, p.21, #20) The reader has to fill in details about sexual behavior. For example,

- i. “1829. G. GRIFFEN. *Collegians* viii. 161. The pretty Syl repeatedly told him that he was ‘a funny gentleman’ and ‘a great play-boy.’” *Full Oxford English Dictionary*, copyright 1989. (Yerkes, #13, p.12)
 - ii. “1952 E[UGENE] O’NEILL. *Moon for the Misbegotten* 1. 55. He is not the blatantly silly, playboy heir to millions whose antics make newspaper headlines.” *Full Oxford English Dictionary*, copyright 1989. (Yerkes, #13, p.13)
- b) Thesauruses, Slang Dictionaries, other Lexicons and non-fiction citations:

Looking at the complete citations and entries for the words PLAYBOY and PLAYMATE between the 1620’s and 1995, I observed distinct changes in the focus of the words in popular culture from non-sexual meanings to more sexual meanings of the words PLAYBOY and PLAYMATE. [See Table of Secondary Sources]

The change began after Playboy Enterprises began *Playboy Magazine*. The quote by Surrey Marshe, author of *The Girl in the Centerfold: The Uninhibited Memoirs of Miss January*, copyright 1969, page 6), supports the claim that the meaning of the word PLAYMATE had changed post-PEII, thus contradicting Yerkes’s claim that the term is “generic with a sexual meaning.” (Yerkes #20, p.21)

- i. “According to a leading dictionary, a playmate is ‘a companion in games and recreation.’ Possibly, but having

been a part of the Playboy empire, I can tell you that a rather loose construction has to be put on the meaning of ‘games and recreation.’ We didn’t play hopscotch. Playboy’s Playmate was something else.” [Attachment 15]

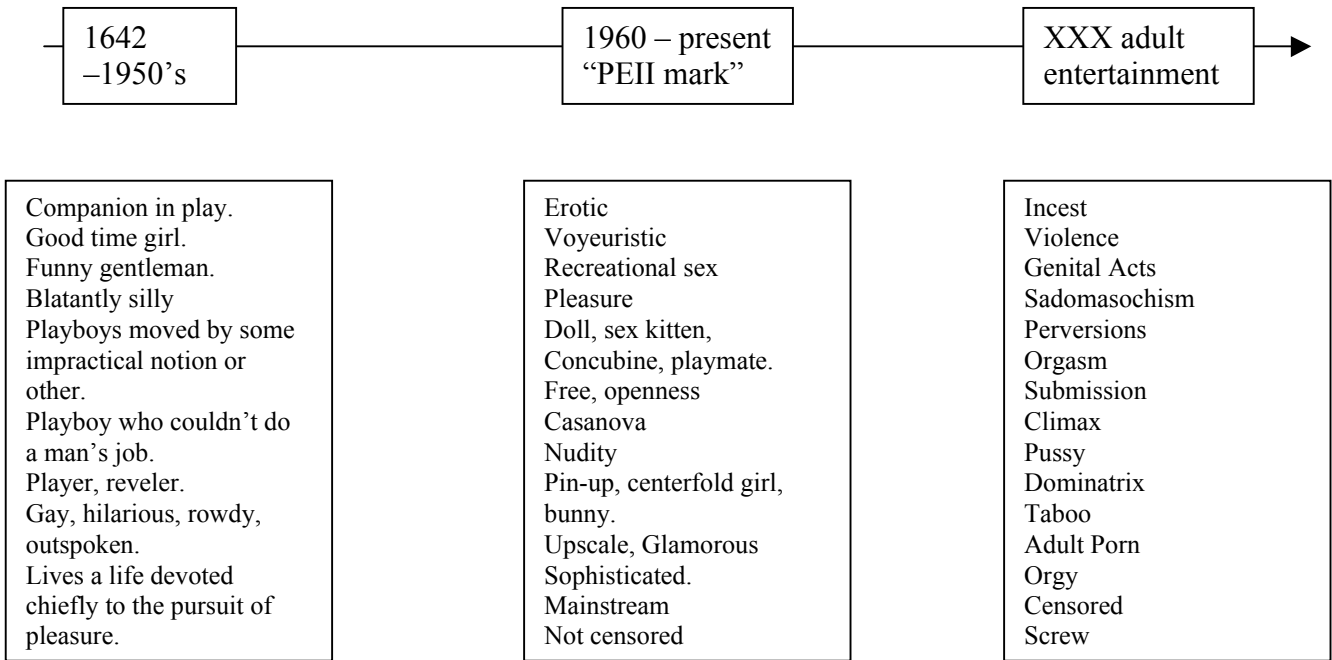
ii. The quote from Gay Talese, *Thy Neighbor’s Wife*, copyright 1980, (Yerkes, p.39, #40) supports the claim that PEII caused a shift in the meaning of PLAYBOY and PLAYMATE. “Prior to *Playboy*, few men in America had ever seen a color photograph of a nude woman, and they were overwhelmed and embarrassed as they bought Playboy at the newsstand.” [Attachment 16]

iii. In the longer entry for PLAYMATE in *I Hear America Talking*, (Yerkes p.37,#37), Stuart Berg Flexner, copyright 1976, the author makes it clear that PEII created a new, more explicitly sexual and feminine meaning for the word PLAYMATE: *playmate* had been used since the 1920’s to refer to a good time girl (1928) who ‘seeks men only as playmates.’ It became a popular term with *Playboy* magazine’s monthly foldout photograph of a sexy, scantily clad girl (nude since the early 1970’s) called the ‘Playmate of the Month.’ The term was well known soon after *Playboy*’s first issue, December, 1953.” [Attachment 17]

4. Yerkes obscures changes in the meanings of the words PLAYBOY and PLAYMATE when he claims that the words are “generic with a sexual meaning and always have been.” The changes in the

meanings of the words PLAYBOY and PLAYMATE constitute secondary meanings referring to a discrete semantic field including but not limited to sexual content and associated with the Playboy mark or brand “world.” Playboy Enterprises both produced a secondary meaning that distinguishes the words PLAYBOY and PLAYMATE from their generic meanings and built a mark around a sophisticated, fun adult lifestyle. [see Table of Secondary Sources]

The following schema also distinguishes the PEII brand “world” from the world of XXX-rated adult entertainment. Words associated with XXX adult entertainment were not found in secondary source citations for PLAYBOY and PLAYMATE, but were pulled from banner ads on the web and the books *Hard Core*, by Linda Williams, (Berkeley, U. of California Press, 1999, pp. 148-149, 172-173, 194-195) [Attachment 18] and *Pornography: Marxism, Feminism, and the Future of Sexuality*, by Alan Sobel (New Haven, Yale U. Press, 1986) [Attachment 19]. Significantly, the words PLAYBOY and PLAYMATE, never appear in Williams’s definitive scholarly book on hard core pornography, nor is *Playboy Magazine* referenced in Sobel’s book, though hard core titles such as *Beauty*, *Hustler*, *20 Days of Sodom*, *Peepholes*, *Penthouse*, *Screw*, *Suck*, *Whip Chick*, *Wicked Sensations* are.



C. Changes in the meanings of the words PLAYBOY and PLAYMATE from the period before Playboy Enterprises built the PLAYBOY mark, to the period after Playboy Enterprises, constitute secondary, specifically sexual meanings created by marketing efforts of PEII since the mid-1950's.

1. The secondary meanings for the words PLAYBOY and PLAYMATE listed above contribute to the esthetic world of the Playboy mark in the consumer's mind, particularly in the context of adult entertainment. Furthermore, these secondary meanings differentiate the Playboy mark from the world of hard core adult entertainment. For instance, nowhere in the references cited are the words PLAYBOY and PLAYMATE associated with meanings shaping the esthetic world of XXX-rated adult entertainment.

2. In “A Content Analysis of Playboy Centerfolds from 1953 through 1990: Changes in Explicitness, Objectification, and Model’s Age, (*The Journal of Sex Research*, Vol. 30, No.2, pp.135-139), Professors Anthony F. Bogaert, Deborah A. Turkovick and Carolyn L. Hafer point out that although the centerfolds became more explicit over time, there was a limit on the extent of sexual content. “The extent to which a true ceiling effect applies to *Playboy* may be limited, however, because, as noted, the magazine stays within fairly restrained standards of explicitness (e.g., rarely showing the genitals),” (p.138). The authors state that *Playboy Magazine* “was chosen because it is the oldest continually published sexually oriented magazine (1953 to present) and its circulation has, on average, exceeded similarly oriented magazines,” (p.136). [Attachment 20]

3. Data from the 10-K form Playboy Enterprises filed with the Securities and Exchange Commission provide even more information about the specific meaning and identity of the Playboy trademark. [Attachment 21]
 - a) The Playboy trademark references a world of ideas, culture and politics, not only the magazine centerfold. On page 4 of the 10-K form is a list of American Presidents, prominent writers, artists and celebrities interviewed in the Magazine, as well as special features on cultural trends, politics and art.
 - b) Playboy Enterprises is associated with mainstream, upscale market, as proven by the choice of advertisers in the Magazine (page 6 of the 10-K report) [Attachment 21]

The Company continues to focus on securing new advertisers from underdeveloped categories. The Company has been utilizing a national trade campaign, Growing Up, I never thought I'd be in Playboy, which features top executives from top advertisers talking

about the power and appeal of the magazine and the Playboy brand. The thrust of the campaign is to reinforce the mainstream, upscale nature of the publication and its readership to the advertising community, specifically targeting the fashion, fragrance and consumer electronics categories.

- c) Playboy Enterprises has never published or sold obscene or illegal merchandise or entertainment. [Attachment 21, page 6].

...From time to time, Playboy magazine, and certain of its distribution outlets and advertisers, have been the target of certain groups who seek to limit its availability because of its content. In its 45-year history, the Company has never sold a product that has been judged to be obscene or illegal in any U.S. jurisdiction.

- d) The Entertainment Group of PEII develops programming that specifically omits the representation of explicit sex acts. [Attachment 21, p. 8]

The Company's programming is designed to be adapted easily into a number of formats, enabling the Company to spread its relatively fixed programming costs over multiple product lines. It features stylized eroticism in a variety of entertaining formats for men and women, with an emphasis on programming for couples. The programming does not contain depictions of explicit sex or scenes that link sexuality with violence, and is consistent with the level of taste and quality established by Playboy Magazine.

4. It is clear from these findings that the words PLAYBOY and PLAYMATE signify the consistent, coherent mark meaning and corporate mission of Playboy Enterprises. This mark identity was developed from the early years of the magazine and continues to be associated with the words PLAYBOY and PLAYMATE in the minds of consumers.

Signed,

Signature

Date