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## Brands, Competition, and the Law

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## Brands, Competition, and the Law

*Deven R. Desai\* and Spencer Waller\*\**

*Brands matter. In modern times, brands and brand management have become a central feature of the modern economy and a staple of business theory and business practice. Coca-Cola, Nike, Google, Disney, Apple, Microsoft, BMW, Marlboro, IBM, Kellogg's, Gucci, and Virgin are all large companies, but they are also brands that present powerful, valuable tools for business. Business is fully aware of that power and value. Contrary to the law's conception of trademarks, brands are used to indicate far more than source and/or quality. Indeed those functions are far down on the list of what most businesses want for their brands. Brands allow businesses to reach consumers directly with messages regarding emotion, identity, and self-worth, such that consumers are no longer buying a product but buying a brand. Businesses pursue this strategy to move beyond price, product, place, and position and create the idea that a consumer should buy a branded good or service at a higher price than the consumer might otherwise pay. Branding explicitly contemplates reducing or eliminating price competition, as the brand personality cannot be duplicated. In addition, this practice can be understood as a product differentiation tactic that allows a branded good to turn a commodity into a special category that sees higher margins compared to the others in that market space. In sum, brands have important effects on competition and the marketplace.*

*Given that both trademark law and antitrust law address business competition, one might expect them to address brands as they fit into each doctrine's areas of concern and that together trademark and*

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*antitrust law would offer a coherent legal regime to manage the way in which brands affect competition. That, however, is not the case.*

*In this Article Professors Desai and Waller begin the process of broadening the legal understanding of brands by explaining what brands are and how they function, how trademark and antitrust law have misunderstood brands, and the implications of continuing to ignore the role brands play in business competition. They conclude that branding is so central to the business world, the modern economy, and the law that legal discourse must understand brands or it will continue to reach incoherent results as it tries to navigate the realities of business competition in the twenty-first century.*

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## I. INTRODUCTION

Brands matter. In modern times, brands and brand management have become a central feature of the modern economy and a staple of business theory and business practice. Coca-Cola, Nike, Google, Disney, Apple, Microsoft, BMW, Marlboro, IBM, Kellogg's, Gucci, and Virgin are all large companies, but they are also brands that present powerful, valuable tools for business. Business is fully aware of that power and value.<sup>1</sup> Contrary to the law's conception of trademarks, brands are used to indicate far more than source and/or quality. Indeed those functions are far down on the list of what most businesses want for their brands. Brands allow businesses to reach consumers directly with messages regarding emotion, identity, and self-worth, such that consumers are no longer buying a product but buying a brand. Businesses pursue this strategy to move beyond price, product, place, and position and create the idea that a consumer should buy a branded good or service at a higher price than the consumer might otherwise pay. Branding explicitly contemplates reducing or eliminating price competition, as the brand personality cannot be duplicated. In addition, this practice can be understood as a product differentiation tactic that allows a branded

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1. See, e.g., Bloomberg, *Top 100 Global Brands Scoreboard*, BUSINESSWEEK.COM (August 6, 2007) [http://bwnt.businessweek.com/interactive\\_reports/top\\_brands/index.asp](http://bwnt.businessweek.com/interactive_reports/top_brands/index.asp) (listing Coca-Cola as the number one brand with a \$65 billion value and Hertz as the number one hundred brand with a value of \$3 billion); MILLWARD BROWN OPTIMOR, BRANDZ TOP 100 MOST VALUABLE GLOBAL BRANDS (2009), available at [http://www.brandz.com/upload/brandz-report-2009-complete-report\(1\).pdf](http://www.brandz.com/upload/brandz-report-2009-complete-report(1).pdf). Brand valuation is a contested area, yet regardless of the method used to calculate the value, all agree that brands can be worth a large amount. Deven R. Desai & Sandra L. Rierson, *Confronting the Genericism Conundrum*, 28 CARDOZO L. REV. 1789, 1794-95 (2007) (noting different brand valuation methods).

good to turn a commodity into a special category that sees higher margins compared to the others in that market space. In sum, brands have important effects on competition and the marketplace.

Given that both trademark law and antitrust law address business competition, one might expect them to address brands as they fit into each doctrine's areas of concern and that together trademark and antitrust law would offer a coherent legal regime to manage the way in which brands affect competition. That, however, is not the case. This Article begins the process of broadening the legal understanding of brands by explaining what brands are and how they function, how trademark and antitrust law have misunderstood brands, and the implications of continuing to ignore the role brands play in business competition.

To some extent, both trademark and antitrust law's myopia stem from the same cause. Over the past thirty years, both bodies of law have relied heavily on neo-classical price theory to define legal rules that promote efficiency as the key to understanding competition. In many cases, this approach is a useful and powerful tool to understand and manage competition as it relates to price. But such a focus misses (and often assumes away) the role that brands play as businesses seek to maximize profits in ways that may be inefficient. In short, businesses and business literature explicitly acknowledge that brands are used to compete on dimensions other than price.<sup>2</sup> From a business point of view, brands are levers that permit companies to differentiate their products and services, price discriminate, and increase customer loyalty to the point where price theory no longer explains well what brands (if any) consumers view as substitutes, when confusion does or does not arise in the marketplace, and how consumers choose between brands and between dealers for the same brands.<sup>3</sup>

In simplest terms, trademark law fails to recognize that trademarks are only a subset of businesses' broader brand strategy in the real world. The dominant theoretical approach is the search cost theory of trademarks, which holds that a trademark should function as a sign of "consistent source and quality."<sup>4</sup> Once that occurs,

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2. See, e.g., MILLWARD BROWN OPTIMOR, *supra* note 1, at 8 (noting that brands are "among a company's most valuable assets" as they can "ensur[e] higher demand and market share," "command[] premium prices and better supplier terms," and "create differentiation that allows companies to overcome commoditization").

3. *Id.*

4. Robert N. Klieger, *Trademark Dilution: The Whittling Away of the Rational Basis*

“[r]ather than having to inquire into the provenance and qualities of every potential purchase, consumers can look to trademarks as shorthand indicators. Because information is less expensive, consumers will demand more of it and will arguably become better informed, resulting in a more competitive market.”<sup>5</sup> As Barton Beebe has observed, this view has been “a totalizing and, for many, quite definitive theory of American trademark law.”<sup>6</sup>

A successful brand, however, encompasses far more than merely indicating source and quality. Accordingly, trademark law is incomplete and regulates only a fraction of the relevant business behavior pertaining to brands. In addition, trademark law has expanded the subject matter of trademarks and what constitutes infringement over time. The combined effect is to provide increased protection for trademarks from products and services that do not compete or where there is no consumer confusion as to source and quality.<sup>7</sup> As trademark law has provided protection for such situations, the claimed protection for a *mark*, first subtly and then more aggressively, has transformed into protection for a *brand*.

This dramatic shift took place with little recognition of the significance of brands and branding. The overall effect was an important legal change that occurred without debate or recognition of the elevation of the brand to one of the most protected forms of legal property and one of the most valuable assets in the marketplace.<sup>8</sup> Neither advocates nor opponents of these changes appreciated the subtle shift from marks to brands. This blindness led to unintended (or at least misunderstood) change and one-sided expansion of the legal regime. In addition, trademark doctrine looked to antitrust laws to regulate anti-competitive behavior involving trademarks and related rights.

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*for Trademark Protection*, 58 U. PITT. L. REV. 789, 790 (1997).

5. Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 786–87 (2004); accord Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 623 (2004).

6. Beebe, *supra* note 5, at 623.

7. See generally Mark P. McKenna, *Testing Modern Trademark Law's Theory of Harm*, 95 IOWA L. REV. 63 (2009) (examining how trademark law has grown to protect non-competing, non-confusing uses and explaining what constitutes harm in those contexts).

8. It is estimated that the top 100 brands in the world are worth, collectively, more than \$2 trillion and increase in value at a rate of approximately 18.5%. MILLWARD BROWN OPTIMOR, BrandZ Top 100 Most Valuable Global Brands (2010), available at [http://c1547732.cdn.cloudfiles.rackspacecloud.com/BrandZ\\_Top100\\_2010.pdf](http://c1547732.cdn.cloudfiles.rackspacecloud.com/BrandZ_Top100_2010.pdf).

Antitrust law as a discipline was, however, in no better position to understand the shift to a brand-based economy and make a conscious decision as to the appropriate legal regime. Older cases identified where trademarks were used as a cover for collusion,<sup>9</sup> but those were easy cases both before and after the rise of the brand. Ironically, antitrust doctrine explicitly engages with many of the same issues as brand literature: market definition, market power, and customer lock-in.

Antitrust doctrine's emphasis on neo-classical price theory, however, interfered with the doctrine's ability to understand and respond to the rise of the brand as a tool for possibly anti-competitive behaviors such as diminishing the role of price competition, segmenting market demand, facilitating price discrimination, and locking in consumers to a favored brand. Two critical questions remain underdeveloped. First, when do brands confer meaningful market power? And, second, how should brand management be integrated into the calculus of existing antitrust analysis? Yet, like trademark law, antitrust law either fails to ask the right questions, ignores the non-price aspects of how brands and branding affect market competition, or defers to trademark law to set the proper limits of the intellectual property rights in question.

The combined effect of this failure in both trademark law and antitrust law is a dangerous vacuum that this Article seeks to fill. Part II sets forth, as a descriptive matter, what brands are and what they do. In explaining a brand's functions, the section shows how business practices from around 1900 to the present have always seen brands as having dimensions well beyond being marks of origin and quality.

Part III shifts the analysis to law. We analyze how trademark law does, or does not, understand brands, and yet nonetheless has fostered a trademark regime to protect and promote the growth of national brands. We further demonstrate how several doctrines related to confusion and the dilution doctrine within trademark law are better explained as protecting brands rather than protecting trademarks as symbols of source and quality upon which consumers rely to make purchasing decisions.

Part IV changes the focus from trademark law to antitrust law. In this section, we analyze the limited ways that antitrust has sought to come to grips with competition issues relating to brands. First,

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9. *See infra* note 206.

antitrust law has focused on narrow notions of trademark rather than the broader notion of the brand. Second, antitrust has relied on price theory in defining relevant markets and measuring potential competitive harms, thus again missing the significance of the role of the brand. Finally, we argue that antitrust perversely has become the enabler of brands by simplistically using key concepts such as inter-brand competition and intra-brand competition that fly in the face of the realities of the business world and the current role of the brand.

Part V addresses what would be required for a brand perspective to take hold in trademark and antitrust law and where such a perspective could lead those two doctrines. We conclude that branding is so central to the business world, the modern economy, and the law that legal discourse must understand brands or it will continue to reach incoherent results as it tries to navigate the realities of business competition in the twenty-first century.

## II. BRANDS: WHAT THEY ARE AND WHAT THEY DO

Although there is voluminous literature that explores brand theories, brand strategies, brand meaning, brand components, and brand functions,<sup>10</sup> it is difficult to find a succinct definition of what a brand is. Marketing expert Sidney Levy's characterization of a brand as a complex symbol that incorporates consumers' motives, feelings, logic, and attitudes<sup>11</sup> captures some major functions of a brand. For our purposes as legal academics, we will refer to brands as manufacturers' or service providers' coordinated use of design, packaging, graphics, logos, advertising, promotion, public relations, marketing, distribution, pricing, communications, and other strategies to create a durable identity and loyalty with their consumers. We believe this view fairly synthesizes the mainstream serious business literature on branding and provides a useful starting place for the topic that interests us the most—namely, how should the law account for the importance of brands in the business world?

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10. *See, e.g.*, MARK BATEY, *BRAND MEANING* (2008); BRANDS, CONSUMERS, SYMBOLS, & RESEARCH: SIDNEY J. LEVY ON MARKETING (Dennis W. Rook ed. 1999); GIEP FRANZEN & SANDRA MORIARTY, *THE SCIENCE AND ART OF BRANDING* (2009). In addition to serious business scholarship, there are literally hundreds of more general books and articles on how to create a successful brand and case studies of successes and failures in the field.

11. Burleigh B. Gardner & Sidney J. Levy, *The Product and the Brand*, 33 *HARV. BUS. REV.*, Mar.-Apr. 1955, at 33.



Despite the rich business literature on brands and branding, the question of what is a brand or what makes a brand has received little attention in legal literature.<sup>12</sup> Part of the problem stems from historical accounts of the development of trademarks, which often look to early uses of markings on goods as examples, if not the seeds, of modern trademark usage and law.<sup>13</sup> Although many different ancient and medieval civilizations—from the Indus river valley to China to several Mediterranean cultures to Nigeria to the Arab Empire to medieval England—used brands and a variety of other commercial symbols to indicate ownership<sup>14</sup> and facilitate commerce; none of those uses corresponds to modern brands.<sup>15</sup> As economies

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12. Cf. McKenna, *supra* note 7, at 67–68 (noting that trademark theory regarding confusion has not used “a growing body” of brand related literature to inform trademark theory’s views).

13. See FRANK I. SCHECHTER, *THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADE-MARK LAW* (1925); Sidney A. Diamond, *The Historical Development of Trademarks*, 65 TRADEMARK REP. 265, 265–66 (1975); Daniel M. McClure, *Trademarks and Unfair Competition: A Critical History of Legal Thought*, 69 TRADEMARK REP. 305 (1979); Benjamin G. Paster, *Trademarks—Their Early History*, 59 TRADEMARK REP. 551 (1969); Edward S. Rogers, *Some Historical Matter Concerning Trade-Marks*, 9 MICH. L. REV. 29 (1911).

14. See Diamond, *supra* note 13, at 266–67, 273, 283–85.

15. See Karl Moore & Susan Reid, *The Birth of the Brand: 4,000 Years of Branding History* (MPRA, Working Paper No. 10169, 2008), available at <http://mpra.ub.uni-muenchen.de/10169/> (studying the transition from proto-brands to brands and the features of these two categories across the Indus River Valley, Shang Chinese, Cyprian, Tyrian, Greek, and modern civilization); see also WILLIAM HENRY BROWNE, *A TREATISE ON THE LAW OF TRADE-MARKS AND ANALOGOUS SUBJECTS, (FIRM-NAMES, BUSINESS-SIGNS, GOOD-WILL, LABELS, &C.)* 11 (1885) (indicating 1200–1300 BCE for the trade between Asia Minor and India); STANLEY WOLPERT, *A NEW HISTORY OF INDIA* 225 (2000) (noting that trade was contract based “with a scheduled and predetermined movement of merchandise, of the Assyrian type” and seems to have been “partly under state control and partly in the hands of professional merchants, subject to price-regulating market conditions”); Diamond, *supra* note 13, at 269, 270–73 (noting Roman quality symbols on bricks and the use of empire marks to identify that certain eye salves, wines, and cheeses came from a particular source especially the use of FORTIS as mark for a specific type of lamp). On the use of commercial symbols in Nigeria see generally Ida Madieha Azmi, Spyros Maniatis & Bankol Sodipo, *Distinctive Signs and Early Markets: Europe, Africa and Islam*, in 1 PERSPECTIVES ON INTELLECTUAL PROPERTY SERIES: THE PREHISTORY AND DEVELOPMENT OF INTELLECTUAL PROPERTY SYSTEMS 143 (Alison Firth ed. 1997) and John Ohi Asein, *Consumer Literacy and Confusing Similarity of Pictorial Trademarks in Nigeria*, 84 TRADEMARK REP. 64, 67 (1994). It is a mistake to conflate Arab culture with Islam, as Egypt and Tyre are both examples of rich pre-Islamic traditions, which used commercial symbols. See Amir H. Khoury, *Ancient and Islamic Sources of Intellectual Property Protection in the Middle East: A Focus on Trademarks*, 43 IDEA 151, 152 (2003). For an understanding of the link between Islamic law and commercial symbols see generally Azmi, Maniatis, & Sodipo, *supra* at 150–56. For a detailed description of the evolution of the uses of commercial symbols from Medieval to more recent England, including an explanation of the state-based, liability nature of such symbols, see SCHECHTER,

grew and centralized under the auspices of a royal, religious, and/or guild authority, marks were used to regulate industry.<sup>16</sup> Unlike modern trademark systems, where the company decides whether and what trademark to use, ancient and medieval industries did not choose to use marks. Instead, the government required these industries to use marks to allow the government to trace a good to a specific manufacturer so it could be held accountable for products that did not meet government-established standards.<sup>17</sup>

Even in such limited market systems, as trade expanded beyond local environs and reached far flung areas, marks came to indicate source and quality. In some specific industry sectors leading up to the mid-nineteenth century, British law began to recognize the goodwill value and property-like interests that grew with the use of liability marks.<sup>18</sup> Once an economy moves to a more pure private market system and moves away from face-to-face transactions, marks *seem*, of necessity, to become predominantly symbols of origin and quality with modern trademark systems using voluntary mechanisms to fuel the system.<sup>19</sup>

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*supra* note 13, at 26, 38–121.

16. *See, e.g.*, Moore & Reid, *supra* note 15, at 7–10, 14–18 (explaining the connection between religious/state authority symbols and long-distance trade in the Indian and Tyrian civilizations); SCHECHTER, *supra* note 13, at 129 (“The slight degree of national economic significance acquired by trade-marks prior to the middle of the nineteenth century accounts for much of the tardiness in the growth of modern trade-mark law both in England and in the United States.”). However, as specific trade items were traded over ever-broader territories, including international ones, the move and call for better protection of commercial symbols as indicating origin and embodying goodwill grew. SCHECHTER, *supra* note 13, at 130–34; accord Lionel Bentley, *The Making of Modern Trademark Law: The Construction of the Legal Concept of Trade Mark (1860-1880)*, in TRADEMARKS AND BRANDS: AN INTERDISCIPLINARY CRITIQUE 3–4 (2008) (“British trade mark law did not really take anything like its modern shape until the latter half of the nineteenth century.”).

17. *See, e.g.*, SCHECHTER, *supra* note 13, at 26, 38–121; Rogers, *supra* note 13, at 29 (use of symbols as quality control for bricks in Roman Empire).

18. *See* SCHECHTER, *supra* note 13, at 122–23.

19. *See* David Higgins, *The Making of Modern Trade Mark Law: The UK, 1860-1914*, in TRADEMARKS AND BRANDS: AN INTERDISCIPLINARY CRITIQUE 42–43 (2008). Paul Duguid’s work on early branding practices also shows that British and French trademark law and brand practices can be traced to the beginning of the 1800s. Specifically, the alcohol trade played a major role in shaping the way marks were used and regulated. *See* Paul Duguid, *French Connections: The International Propagation of Trademarks in the Nineteenth Century*, 10 ENTERPRISE AND SOCIETY 3 (2009) [hereinafter Duguid, *French Connections*]; Paul Duguid, *Developing the Brand: The Case of Alcohol, 1800-1880*, 4 ENTERPRISE AND SOCIETY 405 (2003) [hereinafter Duguid, *Developing the Brand*]. Duguid’s analysis seems to fit within the idea that as trade expanded in various civilizations and economies, use of and reliance on commercial symbols grew.

Nonetheless, using marks for the “utilitarian provision of information regarding origin and quality in order to reduce risk and uncertainty”<sup>20</sup> is only a part of what brands encompass.<sup>21</sup> Brands have “more complex . . . characteristics . . . which are related to image building and include status/power, inherent value and finally, the development of brand personality (transformational).”<sup>22</sup> As one study has put it, marks that only convey information and/or offer only one part of image building are proto-brands.<sup>23</sup> Not until the late nineteenth century did the birth of modern brands occur, where a private mark provided information regarding source and quality and simultaneously had image components regarding power, value, and personality.<sup>24</sup>

Unlike trademark law, the business literature has moved quickly to keep pace with the realities of modern branding. Writers in the early 1980s, such as Kotler, defined the brand in terms roughly coextensive with the legal definition of a trademark: a “name, term, symbol, or design, or a combination of them, which is intended to signify the goods or services of competitors.”<sup>25</sup> Even at the start of the 1990s, marketing theorist David Aaker argued that a brand is “a distinguishing name and/or symbol (such as a logo, trademark, or package design) intended to identify the goods or services of either one seller or a group of sellers, and to differentiate those goods or services from those of competitors.”<sup>26</sup> By the end of the 1990s, brand theorists had moved well beyond considering brands as only indicating source and/or guaranteeing quality, and instead explicitly saw them as encompassing a broader array of functions.

Reid and Moore document the growth of the brand, which entails a company creating a personality for a brand that a consumer then incorporates into how he or she “express[es] his or her own

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20. Moore & Reid, *supra* note 15, at 25.

21. See, e.g., Susan Fournier, *Consumers and Their Brands: Developing Relationship Theory in Consumer Research*, 24 J. CONSUMER RES. 343, 344 (1998) (challenging the way in which brand theory often reduces to utilitarian views); Ariel Katz, *Beyond Search Costs: The Linguistic and Trust Functions of Trademarks*, 2010 BYU L. REV. 1555, 1564 (noting that pure utilitarian views of trademark functions are “naïve” and fail to capture the persuasive branding aspect of trademarks).

22. Moore & Reid, *supra* note 15, at 25.

23. *Id.* at 26.

24. *Id.* at 24–26.

25. PHILIP KOTLER, *MARKETING MANAGEMENT, ANALYSIS, PLANNING, IMPLEMENTATION, AND CONTROL* 482 (5th ed. 1984).

26. DAVID AAKER, *MANAGING BRAND EQUITY* 7 (1991).

self, an ideal self, or specific dimensions of the self.”<sup>27</sup> Other marketing literature emphasizes the way a brand allows product differentiation, impacts consumer preferences, and enables cross-cultural marketing.<sup>28</sup> Recent work has described a brand as a promise,<sup>29</sup> a relationship between company and consumer,<sup>30</sup> and even having a soul.<sup>31</sup> In short, brands are far more than trademarks.

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27. Moore & Reid, *supra* note 15, at 24 (citations and internal quotations omitted); accord MARCEL DANESI, BRANDS 33 (2006); MARK BATEY, BRAND MEANING (2008).

28. Moore & Reid, *supra* note 15, at 24 (citations omitted); see also DAVID ARNOLD, THE HANDBOOK OF BRAND MANAGEMENT 2 (2002) (“Today’s great brands are personalities . . . branding, therefore, has to do with the way customers perceive and buy things; it is not simply a characteristic of certain industries.”); MICHELE FIORONI & GARRY TITTERTON, BRAND STORMING: MANAGING BRANDS IN THE ERA OF COMPLEXITY 32 (2009) (“[A] brand today can really be thought of as being like a living organism, with an identity and a personality which the consumers themselves have asked it to take on—perhaps in order to re-appropriate them later.”); Gardner & Levy, *supra* note 11.

29. See, e.g., ALLEN P. ADAMSON, BRANDSIMPLE: HOW THE BEST BRANDS KEEP IT SIMPLE AND SUCCEED 3 (2006) (“[A] brand is something that lives in your head. It’s a promise that links a product or service to a consumer.”); SCOTT M. DAVIS, BRAND ASSET MANAGEMENT: DRIVING PROFITABLE GROWTH THROUGH YOUR BRANDS 3 (2002) (“[A] brand is a set of promises. It implies trust, consistency, and a defined set of expectations.”). Business executives hold similar views. Ed Buckley (VP, UPS) and Matt Williams (Senior VP, Marti Agency) agree that “at its most basic level, a brand is simply a promise a company makes to the market.” Ed Buckley & Matt Williams, *Internal Branding*, in KELLOGG ON BRANDING: THE MARKETING FACULTY OF THE KELLOGG SCHOOL OF MANAGEMENT 320 (Alice M. Tybout & Tim Calkins eds., 2005).

30. See, e.g., Scott Davis, *Building a Brand-Driven Organization*, in KELLOGG ON BRANDING: THE MARKETING FACULTY OF THE KELLOGG SCHOOL OF MANAGEMENT 226 (Alice M. Tybout & Tim Calkins eds., 2005) (“[A brand is] about the relationship forged between an entity and its products and services—represented by the brand—and consumers.”); FIORONI & TITTERTON, *supra* note 28, at 48 (“[A]ccording to a simplified definition, a brand represents the relationship which is established between the consumer and the company.”); LIZ MOOR, THE RISE OF BRANDS 6 (2007) (internal quotations omitted) (describing brands as an “ongoing relationship between consumers and businesses”); John F. Sherry, Jr., *Brand Meaning*, in KELLOGG ON BRANDING: THE MARKETING FACULTY OF THE KELLOGG SCHOOL OF MANAGEMENT 41 (Alice M. Tybout & Tim Calkins eds., 2005) (“A brand is a contract, a relationship, a guarantee; an elastic covenant with loose rules of engagement . . .”). Even business leaders concur with this definition. According to Sumner Redstone, chairman and CEO of Viacom, a brand is “a special relationship that you develop with a particular audience where they trust what you’re doing and you trust them.” MICHAEL LEVINE, A BRANDED WORLD: ADVENTURES IN PUBLIC RELATIONS AND THE CREATION OF SUPERBRANDS 194 (2003).

31. See, e.g., CORPORATE CULTURES AND GLOBAL BRANDS 2 (Albrecht Rothacher ed., 2004) (“Simply put, a brand is the soul of a product. It facilitates consumer choice as it represents reliable qualities, images and pricing.”); John F. Sherry, Jr., *Brand Meaning*, in KELLOGG ON BRANDING: THE MARKETING FACULTY OF THE KELLOGG SCHOOL OF MANAGEMENT 41 (Alice M. Tybout & Tim Calkins eds., 2005) (“A brand is a mental shortcut that discourages rational thought, an infusing with the spirit of the maker, a gathering, an inspiration. A brand is a semiotic enterprise of the firm, the companion spirit of the firm, a

This section explains what modern brands are, how they grew, and their different, related functions.

*A. Brands: Much More Than Source and Quality Indicators*

Trademark law is quite naïve or at best myopic in how it accounts for the way in which brands function. Rather than simply being a vehicle for information regarding source and quality, brands play multiple, interconnected roles in the construction of the marketplace. As Celia Lury explains: “The brand is thus a mechanism—or medium—for the co-construction of supply and demand. It is not simply an add-on, a mark to identify an origin that is fixed. Instead, it is an abstract machine for the reconfiguration of production.”<sup>32</sup> No matter what dimension of brand one examines or accepts, brands have enormous, malleable market power. Companies understand that potential power and seek to develop and use it to further their success.

*1. How brands drive demand, act as levers of power in supply chains, and facilitate price control*

From the birth of modern branding to today, businesses have used brands as a way to *create* demand, extract value from within the supply chain, and control prices. Early nineteenth century U.S. markets operated with regional manufacturers using a system of wholesalers and commissioned merchants.<sup>33</sup> These “middlemen” represented the demand manufacturers aimed to meet for “most goods were sold as unbranded commodities, and the wholesalers wielded the power in the system, buying from the producer who offered white soap or tenpenny [sic] nails at the best price.”<sup>34</sup> It was the wholesalers who both distributed *and* promoted the products.<sup>35</sup>

Most importantly, the manufacturers *did not mark their goods*.<sup>36</sup> Instead, the manufacturer sold its production run to the wholesaler

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hologram of the firm.”).

32. CELIA LURY, BRANDS: THE LOGOS OF THE GLOBAL ECONOMY 27 (2004) (citation omitted); accord MOOR, *supra* note 30, at 37; Gardner & Levy, *supra* note 11; Sidney J. Levy & Dennis W. Rook, *Brands, Trademarks, and the Law*, in BRANDS, CONSUMERS, SYMBOLS, *supra* note 10, at 141.

33. See SUSAN STRASSER, SATISFACTION GUARANTEED: THE MAKING OF THE AMERICAN MASS MARKET 18–19 (1989); see also DANESI, *supra* note 27, at 14.

34. STRASSER, *supra* note 33, at 19.

35. *Id.*

36. *Id.* at 36.

who moved it along to retailers.<sup>37</sup> Retailers then “weighed, blended, and packaged”<sup>38</sup> the goods for consumers including choosing whether to label goods and, if so, placed the retailer’s name on the goods.<sup>39</sup> Potential purchasers relied on those who ran the stores by “requesting [products] from the proprietors and clerks who retrieved goods from the walls of shelving behind the counters at general stores, groceries, drug stores, and other retail shops.”<sup>40</sup> Point-of-sale institutions also had great power over whether to recommend or even carry manufacturers’ goods.<sup>41</sup>

This situation did not last. The late 1800s to early 1900s, the Industrial Revolution, saw massive shifts in how British and U.S. society made, distributed, and sold goods. Several events converged to create a fertile ground for the use of marks by private actors on a scale and in a manner never before seen or perhaps necessary. The birth of modern corporations, the legal recognition of intangible assets such as goodwill, the ability to raise large amounts of capital, the factory process, the use of rail to ship goods, the rapid communication possible through telegraph and telephone, and new methods for packaging goods all intersected to allow for the rise of national manufacturers that had new opportunities and concerns.<sup>42</sup>

One issue was that large-scale production could lead to oversupply problems that were exacerbated by relying on wholesalers. Those selling food items had to make sure goods reached markets while still fresh.<sup>43</sup> Makers of typewriters, farm equipment, and sewing machines had to service hundreds of thousands of new customers.<sup>44</sup> The local merchant stood in between

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37. *Id.*

38. LURY, *supra* note 32, at 18.

39. STRASSER, *supra* note 33, at 36–37.

40. *Id.* at 21.

41. *Id.* Paul Duguid also shows that a similar pattern of production by large manufacturers, local labeling, and then friction within the supply chain occurred in the alcohol trades in Britain and France. See Duguid, *Developing the Brand*, *supra* note 19, at 411–14.

42. See *id.* at 23–25; LURY, *supra* note 32, at 18–19; accord Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 576–77 (2006). Another way of understanding these shifts is the view that brands began to protect and extract value based on a company’s place in a supply chain. In this view, the better-branded company reaps larger rewards while the other players operate on thin margins. See generally Paul Duguid, *Brands in Chains*, TRADEMARKS, BRANDS, AND COMPETITIVENESS (2009) (forthcoming).

43. STRASSER, *supra* note 33.

44. *Id.*

the national manufacturer and the consumer and could interfere with the national retailer's goals. At almost every turn, national manufacturers had to overcome the "strong loyalties [customers had] to the people with whom they did business, which might surpass their interest in nationally advertised products that they had not yet tried."<sup>45</sup> Furthermore, local retailers were acutely aware that national manufacturers were cutting into their profits and often refused to carry these new goods.<sup>46</sup>

Enter corporate marks and advertising.<sup>47</sup> Large-scale production altered the locally informed supply and demand system. For example, Crisco was created because "of a supply consideration in the cottonseed-oil market[:] [Procter and Gamble] and others attempted to design consumer demand to meet the needs of production and company growth."<sup>48</sup> In addition, national manufacturers realized that "[i]f retailers and wholesalers could purchase Uneda biscuits or Ivory soap only from the National Biscuit Company or Procter and Gamble, they would have to pay the manufacturers' prices."<sup>49</sup> Both these concerns intersected perfectly.

Without an obvious demand for a good (be it a new good or a branded commodity), manufacturers needed to educate consumers about why their product was *the product* to buy. Manufacturers had to convince consumers to buy a nationally made product instead of a locally labeled product vouched for by a trusted local retailer. National manufacturers had to use trademarks to educate consumers about their goods well before marks could take on the additional roles such as assuring quality and indicating source. For example, Campbell's had to inform the public about the "soup idea," Colgate had to convince the public they had to use a toothbrush, and Gillette had to sell the benefits of shaving one's face every day from home.<sup>50</sup>

The way in which Procter and Gamble developed and sold Crisco illustrates a paradigmatic example of the way companies used

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45. *Id.*

46. *Id.*

47. *See* DANESI, *supra* note 27, at 8–12 (describing the link between advertising and branding).

48. STRASSER, *supra* note 33, at 27.

49. *Id.* at 19.

50. *Id.* at 95–97; *cf.* DANESI, *supra* note 27, at 14 (explaining how naming a good with a brand leads to consumers associating an idea such as "ultra-white," "regal," and "a good friend" with specific products).

marks, advertising, and marketing to sell.<sup>51</sup> Procter and Gamble undertook massive efforts in advertising (traveling cooking schools to show women why the product was needed, newspaper, street car, and door-to-door efforts), marketing (using specially designed containers for railroads), and testing and development (sending samples to food researchers) to communicate directly with the consumer and develop the product category of Crisco.<sup>52</sup>

This type of advertising was designed, in part, to move beyond a world where companies made things people wanted to buy to a world where companies “make people want many other things, in order to get a big increase in business.”<sup>53</sup> Once producers such as Singer, McCormick, American Tobacco, Procter and Gamble, National Biscuit Company, and others<sup>54</sup> had created consumers who asked for a product by name, manufacturers (rather than wholesalers or retailers) could set price: “By advertising branded products, manufacturers explicitly intended to eliminate price competition and to eclipse price sensitivity: the consumer who would accept no substitutes for Ivory soap or Steinway pianos would be unwilling to settle for another product just because it was cheaper.”<sup>55</sup>

These practices persist today. For example, Nestlé recently built its Buitoni brand in much the same way that Procter and Gamble built Crisco. Nestlé faced a U.K. market where per-capita pasta consumption was one fourth that in the United States, private label pasta held 60% of the market, and people simply did not include pasta in their basic recipe list.<sup>56</sup> Just as Procter and Gamble used customer engagement, event marketing, food study centers, and more to build and maintain customer bases, many food companies like Campbell’s, Jello, and Heinz distributed recipes, established a dedicated cooking school, offered in-store sampling, and held

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51. See STRASSER, *supra* note 33, at 14 (noting that Procter and Gamble’s Crisco campaign is considered a key moment in advertising and marketing history).

52. *Id.* at 11–12.

53. *Id.* at 27; see DANESI, *supra* note 27, at 17; see also Graeme W. Austin, *Trademarks and the Burdened Imagination*, 69 BROOK. L. REV. 827, 856–57 (2004) (“Economist John Kenneth Galbraith famously identified the ‘dependence effect’ of modern systems of production that are aided and abetted by advertising, whose ‘central function is to create desires—to bring into being wants that previously did not exist.’” (citation omitted)).

54. See STRASSER, *supra* note 33, at 30.

55. *Id.* at 28; accord DANESI, *supra* note 27, at 1.

56. See STRASSER, *supra* note 33, at 46.



numerous factory tours and road shows to allow people to experience the product.<sup>57</sup>

These cases reveal another way in which the law must understand brands better: competition between branded and private label goods. Unlike the early 1900s where scalable manufacturing power rested within national manufacturers' hands, national retailers now use similar resources to offer high-quality, private-label goods—goods offered by a retailer under its label rather than a manufacturer's branded good<sup>58</sup>—in an attempt to reclaim a piece of the market.

Given the improved quality of private-label goods, one might expect that branded goods would suffer greatly. Instead, branded goods are able to rely on their head start in having a product with strong brand awareness to maintain their market position<sup>59</sup>:

Retailers cannot afford to cast off national brands that consumers expect to find widely distributed; when a store does not carry a popular brand, consumers are put off and may switch stores. Retailers must not only stock but also promote, often at a loss, those popular national brands—such as Miracle Whip, Heinz ketchup and Campbell's soup—that consumers use to gauge overall store prices. Even if, in theory, retailers can make more profit per unit on private-label products, those products (with rare exceptions such as President's Choice chocolate-chip cookies) just do not have the traffic-building power of brand-name goods.<sup>60</sup>

Despite the necessity of carrying certain brands even at a loss so that customers will use a given store, as a general matter, branded goods are less price elastic than private-label goods.<sup>61</sup> A decrease in a branded good's price “would swing twice as many sales from private

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57. Erich Joachimsthaler & David A. Aaker, *Building Brands Without Mass Media*, 75 HARV. BUS. REV. 39, 46 (1997) (“[M]ass-media advertising has long been the cornerstone of most brand-building efforts.”).

58. See John A. Quelch & David Harding, *Brands Versus Private Labels: Fighting to Win*, 74 HARV. BUS. REV., 99, 100–02 (1996) (explaining various factors including quality competition that have allowed for the growth of private labeled goods). See generally PRIVATE LABELS, BRANDS, AND COMPETITION POLICY: THE CHANGING LANDSCAPE OF RETAIL COMPETITION (Ariel Ezrachi & Ulf Bernitz eds., 2009); Ariel Ezrachi, *Unchallenged Market Power? The Tale of Supermarkets, Private Labels and Competition Law*, 33 WORLD COMPETITION: L. & ECON. REV. 257 (2010).

59. See Quelch & Harding, *supra* note 58, at 102.

60. *Id.* at 102–03.

61. *Id.* at 107–08.

labels to national brands as a corresponding increase would swing sales to private labels from national brands.”<sup>62</sup>

Using brand strategy also allows a branded good to defeat a private-label’s ability to compete. In one case in the United Kingdom, Coca-Cola had lost a large amount of the soda market to Classic Cola, the private label cola made by the Cott Corporation for the supermarket Sainsbury.<sup>63</sup> When Coca-Cola encountered Cott in Canada, Coca-Cola leveraged its knowledge of soda consumers, price power, relationship with retailers, and advertising—in others words Coca-Cola used brand strategy—and “retaliated aggressively” to the problem Cott’s product posed.<sup>64</sup> Cott’s “profits as a percentage of sales plummeted along with its stock price; the company then moderated its ambitions to extend its private-label success formula to other product categories.”<sup>65</sup> Furthermore, the company decided to target its future growth “at the expense of competitors smaller than Coca-Cola.”<sup>66</sup>

Brands also have a dramatic effect on pricing and competition. According to one author, brand power can be translated into price power, with many customers willing to pay a 20, 25, or 30 percent price premium for a branded good.<sup>67</sup> Some customers even state that price is not a factor when buying a brand to which they are loyal.<sup>68</sup> In other words, for some, a branded good is highly price inelastic.

Outside the private label market, brands in general can pose substantial entry barriers. As David Aaker has explained, even a large corporation can have trouble launching a new brand because of the cost required to build brand awareness, identity, and customers and because of distribution barriers.<sup>69</sup> Retailers may not carry a new brand because they are not certain that it will survive and provide

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62. *Id.* at 108.

63. *Id.* at 100.

64. *Id.* at 109.

65. *Id.*

66. *Id.*

67. DAVIS, *supra* note 29, at 5.

68. *See id.* (“72 percent of customers say they will pay a 20 percent premium for their brand of choice, relative to the closest competitive brand. 50 percent of customers will pay a 25 percent premium. 40 percent of customers will pay up to a 30 percent premium. 25 percent of customers state the price does not matter if they are buying a brand that owns their loyalty.”).

69. *See* David A. Aaker, *Should You Take Your Brand to Where the Action Is?*, 75 HARV. BUS. REV. 135, 136–37 (1997).

returns that justify displacing goods already taking up limited shelf space.<sup>70</sup>

A study by economists Michael Baye and John Morgan lends further support to the idea that branding has effects beyond what the legal literature currently recognizes, including ensconcing price dispersion, where, instead of a competitive market that brings prices down, prices remain dispersed above marginal cost.<sup>71</sup> The study examined branding for consumer electronics with an average price of \$500 in a large online market, the most popular online consumer electronics comparison shopping site.<sup>72</sup> Consumers were separated into loyals—those who buy only from a specific firm (i.e., brand-driven buyers)—and shoppers—those who saw products as identical.<sup>73</sup> As the authors noted in describing their model, “[o]ne can imagine that endogenizing brand-building might matter a great deal. If brand advertising ultimately converted all consumers into ‘loyals,’ firms would find it optimal to charge the ‘monopoly’ price and price dispersion would vanish.”<sup>74</sup>

Price dispersion should go away in another situation. “[W]here the number of potential competitors is ‘large,’” (as was the case in the model) one might expect that price dispersion would “vanish,” but, instead, “prices remain[ed] dispersed above marginal cost.”<sup>75</sup> The study found that accounting for branding activities starts to explain this result.<sup>76</sup> Two other predictions important to the law’s understanding of brands were borne out: “[w]hen brand advertising is higher, average listed prices are also higher” and “[w]hen brand advertising is higher, the average minimum listed price is also higher.”<sup>77</sup> Although the study acknowledges that more work needs to be done in this field, for the purposes of our paper, the study indicates that the legal understanding of how marks function fails to capture certain key and potentially negative market effects branding appears to have.<sup>78</sup>

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70. *Id.* at 137.

71. See Michael R. Baye & John Morgan, *Brand and Price Advertising in Online Markets*, 55 *MGMT. SCI.* 1139 (2009).

72. *Id.* at 1140, 1146.

73. *Id.* at 1139.

74. *Id.*

75. *Id.* at 1139, 1140.

76. *Id.* at 1149.

77. *Id.* at 1145.

78. *Id.* at 1150.

In short, although brands affect price, it appears that some consumers are buying goods and services based on non-price considerations. Consumers are buying goods that are arguably the same but for a premium. Understanding other dimensions of branding helps explain this behavior.

*2. How brands use non-price factors to differentiate products and drive purchasing decisions along non-functional dimensions*

From the end of the nineteenth century to the middle of the twentieth century to today, companies have had to find ways to compete over selling essentially the same goods and manage excess production capacity.<sup>79</sup> Product design became a key factor in developing and marketing a good because “the lack of obvious differences between products made good appearance a ‘necessity.’”<sup>80</sup> By the 1960s and 1970s, this new emphasis on design connected to the larger aim of creating a brand that projected a singular corporate identity with integrated design coordination and a more scientific approach to marketing.<sup>81</sup> A key insight was that brands allowed companies to move beyond the 4 “P”s—product, price, place, and promotion—which a competitor could duplicate, to include a fifth P, personality of a company, which competitors could not copy.<sup>82</sup> Although manufacturers used brands and marketing strategy to provide information about why to purchase a new or branded good, advertising and even a good’s packaging could communicate values to encourage consumers to purchase one company’s product over a competitor’s for reasons other than the price or quality of the good.<sup>83</sup>

In both the United States and Britain one sees “the emergence of a system that could link brand names to broader values and

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79. MOOR, *supra* note 30, at 26–27.

80. *Id.* at 27 (citation omitted); DANESI, *supra* note 27, at 60–67 (detailing the importance of product and package design through the examples of the automobile, perfume, and tobacco industries).

81. See MOOR, *supra* note 30, at 30–31; LURY, *supra* note 32, at 20–22; cf. Moore & Reid, *supra* note 15, at 3 (noting that branding has been a topic in marketing studies prior to the 1970s but was only “a major topic of study” from 1970 forward).

82. LURY, *supra* note 32, at 24, 33–34; cf. DANESI, *supra* note 27, at 33 (explaining brands as personalities with identities).

83. See MOOR, *supra* note 30, at 18–20; cf. Joachimsthaler & Aaker, *supra* note 57, at 39 (“[M]ass-media advertising has long been the cornerstone of most brand-building efforts.”).

meanings.”<sup>84</sup> As Lury explains, in the 150 years of modern brand history, companies used marketing, messaging, special events, and more to offer the consumer the perception that the product carried more than its functional qualities.<sup>85</sup> Products had “essence[s]” that met consumers’ psychological needs and lifestyle goals.<sup>86</sup> Furthermore, this broad conception of the brand can be seen right from the birth of the modern brand.<sup>87</sup>

For example, commercial images and standardized packaging allowed for greater control over price and distribution while simultaneously allowing companies to create a sense of nationhood and belonging.<sup>88</sup> For U.S. immigrant and rural populations who had moved to cities, national goods became “the most familiar and stable features of a strange new environment and, in some cases, the only bond between people who were otherwise culturally heterogeneous.”<sup>89</sup> Buying goods became a sign of being an American. National interests were also in play for Britain as it sought to maintain its empire’s position.<sup>90</sup> With the aid of the Empire Marketing Board, images of Empire-era superior manufacturing, military might, national pride, and in some cases claimed concern for the plight of the labor force were found in cigarette, soap, candy, and many other industries’ trademarks and packaging.<sup>91</sup>

Circa-1900 advertising shows that using a Kodak allowed one to capture vacations and Christmas and keep them safe at home; writing with a Waterman was for upscale writers; and owning Standard baths and toilets meant one had entered the modern age.<sup>92</sup> Companies told stories and invented characters about how goods were made:

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84. MOOR, *supra* note 30, at 23; DANESI, *supra* note 27, at 8.

85. See LURY, *supra* note 32, at 24; see also DANESI, *supra* note 27, at 10 (noting that branding is 150 years old).

86. See LURY, *supra* note 32, at 24–25; cf. DANESI, *supra* note 27, at 8, 16 (describing how advertising aims to persuade a consumer that a product will fulfill “emotional, social, and other kinds of human needs.”).

87. See DANESI, *supra* note 27, at 12.

88. See MOOR, *supra* note 30, at 20–21.

89. *Id.* at 21; cf. Douglas B. Holt, *Why Do Brands Cause Trouble? A Dialectical Theory of Consumer Culture and Branding*, 29 J. CONSUMER RES. 70, 82 (2002) (explaining that the same stabilizing effect occurred as Americans moved from cities to suburbia, where they knew no one and looked to brands as social anchors).

90. MOOR, *supra* note 30, at 21.

91. See *id.* at 21–23. These notions continue today in the form of British opposition, on cultural and nationalistic grounds, to the takeover of iconic brand Cadbury by the U.S. firm Kraft. See Henry Chu, *Kraft’s Bid Has Brit’s Cheesed Off*, CHI. TRIB., Jan. 18, 2010, at 17.

92. See STRASSER, *supra* note 33, at 101–15.

Procter and Gamble soap was made by Brownies; Baker's cocoa was made in clean, new factories; elves made Post Toasties; kewpies made Jell-O.<sup>93</sup> Mr. Peanut wore a monocle, top-hat, and cane to evoke sophistication.<sup>94</sup> Images of old, wise women helped sell coffee, tea, mattresses, and Crisco.<sup>95</sup> Other culture's symbols, such as the Dutch girl in the clean, white cap, were used to sell cleaning products and Heinz food goods.<sup>96</sup>

Other brand identity approaches mirror strategies begun in the 1900s. Heinz had the Heinz Ocean Pier in Atlantic City, which welcomed 15,000 people per day who experienced Heinz's version of its history and how it made its products.<sup>97</sup> Cadbury built Cadbury World in 1990, which a study notes "vividly links [a customer's] taste experience to the brand's history" and likely led to the company being named "the most admired company in the United Kingdom."<sup>98</sup> As discussed above, Nestlé built its Buitoni brand in much the same way that Procter and Gamble built Crisco, but Nestlé went even further by creating a club about the Italian lifestyle that further drew on the brand as a way of defining how consumers organized their lives.<sup>99</sup> Adidas and Virgin parallel this customer engagement strategy by offering urban lifestyles or innovative, immersive entertainment experiences, respectively.<sup>100</sup>

In other words, brands allow companies to create a type of product differentiation that might turn a commodity into a special category that attains higher margins compared to other products in that market space.<sup>101</sup> One modern case study shows how in several industries companies used brands and brand identity to demand higher prices in what had been a commodity market or isolated market. For example, the Body Shop offers a "profits-with-a-principle" philosophy that has linked its business to social causes in a

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93. *Id.* at 114–17.

94. *See* DANESI, *supra* note 27, at 45.

95. *See* STRASSER, *supra* note 33, at 118–20; DANESI, *supra* note 27, at 44–45.

96. *See* STRASSER, *supra* note 33, at 121.

97. *Id.*

98. Joachimsthaler and Aaker, *supra* note 57, at 46.

99. *Id.* at 46–47.

100. *See, e.g., id.* at 46–49 (detailing how Cadbury and Nestlé used similar methods of customer engagement and event marketing to build and maintain their brands); *see also* Henry Chu, *Kraft Takeover Bid of Cadbury Leaves Bitter Taste in Britain*, L.A. TIMES, Jan. 18, 2010, at A16 ("Like fish and chips or Marmite, Cadbury's chocolate is part of what it means to be British, a piece of identity you can taste.").

101. *See* Aaker, *supra* note 69, at 141.

market where most product “lines are indistinguishable.”<sup>102</sup> The Body Shop has differentiated its cosmetics line by turning it “into something more than it has ever been.”<sup>103</sup> Once it was suggested that the Body Shop might be more talk than action, some questioned whether the brand identity was bogus and how divergence from its stated identity posed problems.<sup>104</sup> The company was nonetheless acquired by L’Oreal for £652.3 million in 2006 because of the way the Body Shop’s brand complemented L’Oreal’s brand,<sup>105</sup> thus proving that the talk may matter more than the action. Likewise, Häagen-Dazs used branding so that its brand came to mean “thicker, creamier, and pricier than any other ice cream on the market; a sensual, self-indulgent, pleasurable treat targeted at sophisticated, affluent adult consumers,” which allowed it to enter the ice-cream market at “a price 30% to 40% higher than its closest competitors and many times higher than the lower-priced products.”<sup>106</sup> Hugo Boss went from a 4 million DM a year company to one with sales of “100 million in 1980 [that] increased tenfold during the 1980s” because of its sponsorship strategy which raised the brand’s visibility by affiliating with elite, exclusive events such as Formula 1 racing and its placement on stylish television shows.<sup>107</sup> SMH’s Swatch transformed the watch market from “either low-cost time-measurement instruments or a high-cost combination of heirloom and investment” to one where Swatch became the symbol for Swiss watches that had a “stylish, fun, youthful, provocative, and joyful brand personality.”<sup>108</sup> In so doing, SMH created the fashion watch market.<sup>109</sup>

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102. Joachimsthaler and Aaker, *supra* note 57, at 40–41.

103. *Id.* at 41.

104. See, e.g., TILDE HEDING, CHARLOTTE F. KNUDTZEN & MOGENS BJERRE, BRAND MANAGEMENT RESEARCH, THEORY AND PRACTICE 63 (2009) (noting the problem of “misaligned identities” the Body Shop faced); John Entine, *High St Chain’s Idealism Masks a Harsh Reality*, U.K. MAIL, Aug. 29, 2001, available at [http://www.jonentine.com/reviews/mail\\_on\\_Sunday\\_roddick.htm](http://www.jonentine.com/reviews/mail_on_Sunday_roddick.htm) (reporting on claims of environmental harms and poor treatment of developing countries’ industries as trading partners).

105. *L’Oreal Buys Body Shop for £652m*, THE INDEPENDENT, Mar. 17, 2006, available at <http://www.independent.co.uk/news/business/news/loreal-buys-body-shop-forpound652m-470244.html>.

106. See Joachimsthaler and Aaker, *supra* note 57, at 41.

107. *Id.* at 44.

108. *Id.*

109. *Id.*

These strategies arguably satisfy unmet demand, or create demand, as early manufacturers sought to do. In either case, the brand is used as a way to move beyond product, price, place, and promotion, so that companies face less, or, ideally, no competition as consumers remain loyal to the brand, *even* if a competitor offers an arguably interchangeable good or service for the same or less cost.<sup>110</sup>

### *3. How brands assure quality and generate equity*

Marks can and do come to represent source and quality and reduce search costs—that is, consumers can buy an item repeatedly by relying on the mark as an indicator that the product will be of the same quality as previous purchases and continue to purchase or choose not to purchase based on their experience with the good.<sup>111</sup> That aspect of what a mark does is merely a part of a mark's function and, in fact, an unintended consequence. The desire to shape markets and generate demand, at work during the early history of trademarks, runs contrary to the neoclassical model of markets on which the search costs theory is based. As shown above, manufacturers use trademarks to differentiate Ivory soap from soap, Swatch watches from watches, and so on as a strategy to extract higher prices from consumers for essentially fungible commodities.<sup>112</sup> Massive advertising and marketing resources were used to achieve these goals, and trademarks were the vehicles that carried the goals forward.<sup>113</sup> Consumers imbued or attributed quality assurances to companies, but that was not the only, or core, function of manufacturers' use of marks. It was simply a by-product of building a national brand as a vital corporate asset.

As early as the 1920s, corporations had achieved success with the strategy and people began asking for products by brand names.<sup>114</sup> For example, in one study, 145 out of 147 grocers reported that Campbell's was the best selling soup.<sup>115</sup> The American Tobacco

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110. See DAVIS, *supra* note 29, at 5.

111. See David Higgins, *The Making of Modern Trade Mark Law: the UK, 1860-1914*, in TRADEMARKS AND BRANDS: AN INTERDISCIPLINARY CRITIQUE 42-43 (2008); accord Diamond, *supra* note 13, at 289 ("A trademark does not necessarily guarantee good quality. What it does guarantee is consistency.").

112. See DANESI, *supra* note 27, at 1; DAVIS, *supra* note 29, at 3 ("A brand differentiates products and services that appear similar in features, attributes, and possibly even benefits.").

113. See DANESI, *supra* note 27, at 8-12.

114. *Id.* at 1.

115. STRASSER, *supra* note 33, at 52.



Company was claimed to have had a total value of \$227 million, with \$45 million of that value coming from its trademarks.<sup>116</sup> Other companies touted their marks' value, like National Biscuit Company claiming that its Uneeda mark was worth \$6 million and Coca-Cola claiming \$5 million for its mark.<sup>117</sup>

During the 1980s, the shift to branding took a clearer role with accepted, quantifiable results.<sup>118</sup> Tangible assets went from being "the greatest proportion of the amount bid for companies," at the start of the decade, to "only represent[ing] 30 per cent of this amount, with intangible assets—usually in the form of brand names—representing the larger share," by decade's end.<sup>119</sup> And today top brands have estimated values in the billions of dollars.<sup>120</sup>

As soon as brands were perceived as valuable assets, trademark holders understandably began to use the law to address competition related to the use of marks. For example, by the early 1900s, brands had taken enough hold on the market that competitors began copying national brands, and companies engaged in enforcement strategies to prevent the use of their marks.<sup>121</sup> In addition, the growth of international trade, accompanied by the increased counterfeiting of labels and marks, meant that U.S., U.K., and especially French manufacturers sought better domestic and international recognition of trademark protection.<sup>122</sup>

As explained further in part II, the way in which the law was used to feed brand protection relied on the source/quality mantra. That foundation is, by definition, ill-equipped to address the brand functions that operate beyond the source/quality dimension. As such, trademark law grew to protect brand interests without

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116. *Id.* at 47.

117. *Id.*

118. Methods of brand valuation continue to be debated but the fact remains that brands account for a growing proportion of a company's overall valuation. *See* LURY, *supra* note 32, at 120 (examining the growth of the brand as an asset and that the London Stock Exchange accepts brand valuation whereas the United States does not yet account for brand value on balance sheets).

119. MOOR, *supra* note 30, at 34 (citation omitted); *accord* LURY, *supra* note 32, at 118.

120. *See, e.g.*, Bloomberg *supra* note 1 (noting one brand valuation method's assessment of the top 100 brands ranging from Coca-Cola as the number one brand with a \$65 billion value to the 100th place brand being worth \$3 billion and contested issues within brand valuation).

121. STRASSER, *supra* note 33, at 48–52; *cf.* Duguid, *French Connections*, *supra* note 19 (explaining the role counterfeiting of international marks played in the evolution of trademark law).

122. Duguid, *French Connections*, *supra* note 19, at 11–16.

appreciating that it did so. Furthermore, trademark law protected brands without asking whether it ought to.

### *B. Brand Lessons*

Since the births of mass market, mass communication, and mass transportation systems, companies have understood that trademarks are but a small part of the brand. Although the roles and functions of brands have only recently been explicitly theorized, business practices beginning around 1900 reveal that companies were well-aware of the way they could use brands to further a range of strategic objectives, all of which zeroed in on one objective: competitive dominance obtained by shaping preferences and extracting rents. Early manufacturers used marks as a way to “get around the retailer” and extract higher prices from consumers for otherwise interchangeable goods.<sup>123</sup>

The same situation is found today. As Baye and Morgan explain in their 2009 study regarding the online world, “[T]he branding efforts of firms reduce the traffic enjoyed by the ‘information gatekeeper’ operating the price comparison site,”<sup>124</sup> and “appear to reduce the value of the price comparison site.”<sup>125</sup> In the past and present, branding can and does undercut the way in which consumers might otherwise shop and obtain the lowest price for goods.

Brands are complex strategic tools that perform a variety of functions including creating demand, circumventing middlemen so that a company can reach consumers directly, controlling prices, managing quality, providing a platform for trademark enforcement, defining national identities, and satisfying a consumer’s emotional and psychological needs. These functions, separately and in combination, allow a company to differentiate products, avoid commoditization of its products or services, and distinguish the company and its goods or services from its competition, thus building loyal customer bases for whom no other brand or item will suffice. Regardless of what dimension or dimensions of a brand a company pursues to build its brand, commentators recognize the power of a strong brand. A strong brand creates the ability to attain

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123. LURY, *supra* note 30, at 19.

124. See Baye & Morgan, *supra* note 71, at 1142–43.

125. *Id.* at 1150.

“real and sustainable competitive advantage . . . [because] the resulting effectiveness and efficiency of the program can represent significant barriers to competitors.”<sup>126</sup>

The law, however, has ignored the full role of brands and focused solely on the trademark, source/quality, and dimension of brands. Accordingly, the law has only addressed notions of harm done to a trademark and failed to capture the way companies use brands as a competitive advantage and the possible harm brands can pose for markets and consumers. In short, brands affect both price and competition in ways that the law may not wish to foster but currently fosters through a permissive trademark system that effectively grants brand protection but fails to acknowledge that it does so. The next section shows how trademark law reached this state of affairs.

### III. TRADEMARK LAW’S (LACK OF) UNDERSTANDING OF BRANDS

Thus far, we have shown the multi-dimensional aspect of brands as opposed to the law’s conception of trademarks. This section argues that trademark law protects brand interests, which are real and important, without knowing that it is doing so. It may be that the system should foster and even protect the way in which a company tries to exploit its brand to create and/or satisfy consumer needs that transcend source, quality, and/or price concerns. Before one can address such issues, one must identify how that protection occurs so that one can address the foundations of such potential protections and the way in which such protections relate to both the producer and consumer interests at stake.

In this section, we set forth the way in which the law and legal theory related to trademarks has, regardless of explicit statements to the contrary, supported brand interests beyond the source/quality concerns of the search costs theory of trademarks. We then examine certain aspects of trademark doctrine, such as initial interest confusion, post-sale confusion, merchandising rights, and dilution doctrine, as examples of trademark law that do not fare well at all under the source/quality explanation of trademarks and argue that a brand perspective better explains these doctrines.

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126. Joachimsthaler & Aaker, *supra* note 57, at 50.

*A. Brands, Source, and Schechter*

In 1926 Frank Schechter displayed an insightful understanding of brand theory as he criticized trademark law for being “predicated upon certain historical preconceptions as to the nature and function of a trademark and as to the necessities for its protection.”<sup>127</sup> Schechter sought to attack “[t]he orthodox definition of ‘the primary and proper function of a trademark’ . . . given by the Supreme Court of the United States in the leading case of *Hanover Star Milling Co. v. Metcalf*: ‘to identify the origin or ownership of the goods to which it is affixed.’”<sup>128</sup> He documented how courts struggled with this narrow conception of trademarks because, rather than denoting personal ownership or origin of a good, “the ramifications of modern trade and the national and international distribution of goods from the manufacturer through the jobber or importer and the retailer to the consumer [created a situation where] the source or origin of the goods bearing a well known trademark is seldom known to the consumer.”<sup>129</sup> Despite the Supreme Court’s view, Schechter argued that the law should follow courts that recognized that consumers did not know who made Baker’s Cocoa,<sup>130</sup> Coca-Cola,<sup>131</sup> or Yorkshire Relish,<sup>132</sup> but instead recognized a single and often anonymous source.<sup>133</sup>

According to Schechter:

The true functions of the trademark are, then, to identify a product as satisfactory and thereby to stimulate further purchases by the consuming public. The fact that through his trademark the manufacturer or importer may “reach over the shoulder of the

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127. Frank Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 813 (1926).

128. *Id.* at 813–14 (citing and quoting *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 412 (1916)).

129. *Id.* at 814 (citing *McLean v. Fleming*, 96 U.S. 245 (1877); *Rouss v. Winchester Co.*, 300 F. 706, 722–23 (2d Cir. 1924)); accord LURY, *supra* note 32, at 19 (describing early brand strategy as seeking to “circumvent or limit the role of the retailer”).

130. *Walter Baker & Co. v. Slack*, 130 F. 514, 518 (7th Cir. 1904).

131. *Coca-Cola Co. v. Koke Co.*, 254 U.S. 143, 146 (1920).

132. *Birmingham Vinegar Brewery Co. v. Powell*, [1897] A.C. 710 (H.L.) 715; *Powell v. Birmingham Vinegar Brewery Co.*, 13 Rep. Pat. Cas. 235, 250 (1896).

133. Schechter, *supra* note 127, at 816–17; (citing *Shredded Wheat Co. v. Humphrey Cornell Co.*, 250 F. 960, 963 (2d Cir. 1918); *Saalfeld Publ’g. Co. v. Merriam Co.*, 238 F. 1, 8–9 (6th Cir. 1917); *Bayer Co. v. United Drug Co.*, 272 F. 505, 509 (S.D.N.Y. 1921); *Deering Harvester Co. v. Whitman & Barnes Mfg. Co.*, 91 Fed. 376, 380 (6th Cir. 1898); *Hilton v. Hilton*, 102 A. 16, 18 (N.J. Ch. 1917)).

retailer” and across the latter’s counter straight to the consumer cannot be over-emphasized, for therein lies the key to any effective scheme of trademark protection. To describe a trademark merely as a symbol of good will, without recognizing in it an *agency for the actual creation and perpetuation* of good will, ignores the most potent aspect of the nature of a trademark and that phase most in need of protection.<sup>134</sup>

Schechter’s view reflects part, but only part, of what the business history shows: manufacturers were actively using marks to get beyond anyone who stood in between manufacturers and consumers.<sup>135</sup> Rather than simply being a passive conduit of information, the mark was an active agent of corporate strategy.<sup>136</sup> Learned Hand captured this dynamic aspect of trademark strategy when he wrote, “The art of advertising *spuriously* reinforced a genuine demand by the power of reiterated suggestion. . . . [T]he public was buying because it wanted, or *had been made to think it wanted*, the biscuit which the plaintiff produced.”<sup>137</sup> Even in 1918, some courts understood that companies used their position and advertising to build consumer relationships and generate demand.

Despite this partial recognition, Schechter surveyed the landscape of trademark cases and their rationales and found both wanting. It was a legal realist approach to trademark law.<sup>138</sup> Under this view, the law should expand its view of trademarks not only because of the increased reach of trade,<sup>139</sup> but because of business realities such as the need to change or the desire to use a trademark established in one product category for another category.<sup>140</sup> Companies that wanted to shift from selling war to peace goods, or to expand from

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134. Schechter, *supra* note 127, at 818 (citing and quoting H.G. WELLS, 1 THE WORLD OF WILLIAM CLISSOLD 237 (1926)) (emphasis added).

135. See LURY, *supra* note 32, at 19.

136. See *id.* at 18, 46–47.

137. *Shredded Wheat Co.*, 250 F. at 962–63 (emphasis added); cf. DANESI, *supra* note 27, at 8 (describing how advertising aims to persuade a consumer that a product will fulfill “emotional, social, and other kinds of human needs”).

138. See Robert Bone, *Schechter’s Ideas in Historical Context and Dilution’s Rocky Road*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 469, 482–90 (2008) (describing the general legal realist atmosphere of Schechter’s era, its connection to Columbia Law School from where Schechter obtained his doctorate of law, and the way in which the legal realist approach is seen in Schechter’s article).

139. Schechter, *supra* note 127, at 824.

140. *Id.* at 823; accord Sara Stadler Nelson, *The Wages of Ubiquity in Trademark Law*, 88 IOWA L. REV. 731, 743 (2003).

selling ice cream to selling milk, or from cheese to butter, had an expanded view of what constituted a related product class and wanted to prevent competitors from using marks such as Borden on ice cream when Borden had already established itself as a milk producer.<sup>141</sup>

The law, however, did not have such a view. According to Schechter, the law's focus on source confusion missed the point of modern business entirely for "*the creation and retention of custom*, rather than the designation of *source*, [was] the primary purpose of the trademark . . . and . . . the preservation of the uniqueness or individuality of the trademark [was] of paramount importance to its owner."<sup>142</sup> Schechter's insights regarding the way trademark functioned and his proposal for legal protections that matched those functions never explicitly took hold during his time.<sup>143</sup>

### *B. Goodwill and Confusion Doctrines Protecting Brands*

Although Schechter's brand-view of trademarks did not gain traction, brand protection entered trademark law by defining the concepts of goodwill and what constituted confusion broadly. Those who desired expanded trademark protection obtained their wish as the law chose to address the question of whether one could use another's trademark on non-competing goods by focusing on the theory that goodwill is a form of property:

That theory focused on the goodwill that a mark symbolized and protected that goodwill as the seller's property. This goodwill-as-property theory was flexible enough to support broad trademark protection provided "goodwill" was defined to include goodwill that attached to the firm as well as to the particular brand. . . . The goodwill-as-property theory was capable of reconciling seller protection with the dominant and persistent consumer protection strand of trademark law. The way a defendant injured or appropriated a plaintiff's firm goodwill was by confusing consumers about sponsorship. Therefore, protecting a mark against

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141. See Schechter, *supra* note 127, at 823; accord Nelson, *supra* note 140, at 743.

142. Schechter, *supra* note 127, at 822 (emphasis added).

143. Compare Nelson, *supra* note 140, at 739, 757–58 (noting courts hostility to Schechter's idea and how the history surrounding the Lanham Act's passage removed dilution from the initial act's iteration), with Bone, *supra* note 138, at 492–96 (indicating other reasons for the doctrine's failure to take hold in its early days).

sponsorship confusion prevented harm to the seller at the same time as preventing harm to the consumer.<sup>144</sup>

Thus trademark law paid lip service to consumer protection and imported a notion of goodwill that opened the door to expanded producer protection, but without any clear grounding for that shift.

Several different criticisms were made about this approach to trademark law. For one, defining goodwill is difficult.<sup>145</sup> Goodwill seems to be connected to a consumer's tendency to make repeat purchases from a certain source, which is more of an effect than telling one what goodwill is, in which case it is based on a backward inference about cause that is not always (or perhaps ever) justified; but it could also be understood as a company's reputation or a company's value beyond its tangible assets.<sup>146</sup> Why, and if so how, the law ought to protect this interest was unclear.

The legal realists of the era argued that formalist property approaches erred and ignored what they held to be the best policy for trademark law: preventing source confusion.<sup>147</sup> Those concerned about monopolies understood that companies were using advertising and psychological tools to build loyalty to encourage consumers to buy goods or services based on something other than rational choice and objected to protecting goodwill on the grounds that this practice was anti-competitive.<sup>148</sup> In sum, those in favor of more property-like treatment of trademarks saw the way businesses leveraged marks while others looked to the way marks seemed to affect consumers.

Neither approach integrated the business practices and attendant concerns well, if at all. The opposing perspectives are simultaneously correct and incorrect, because they fail to grasp or address all the ways a brand works and instead focus on narrow conceptions of

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144. Bone, *supra* note 138, at 493; cf. Glynn Lunney, *Trademark Monopolies*, 49 EMORY L.J. 367, 371–72 (1999) (explaining the growth of “property mania” in trademark law).

145. See, e.g., Irene Calboli, *Trademark Assignment “With Goodwill”: A Concept Whose Time Has Gone*, 57 FLA. L. REV. 771, 799 (2005) (“[G]oodwill is an ill-defined term that is difficult to frame in a legislative context and that has taken different forms over the decades.”); Desai & Rierson, *supra* note 1, at 1794 n.18.

146. Desai & Rierson, *supra* note 1, at 1794–95 (noting differences in brand valuation methods but the asserted connection between brand value and goodwill); accord Bone, *supra* note 42, at 583–84.

147. See, e.g., Daniel M. McClure, *Trademarks and Competition: The Recent History*, 59 LAW & CONTEMP. PROB. 13, 15 (1996); accord Bone, *supra* note 42, at 586–89.

148. See Bone, *supra* note 42, at 590–92.

trademark as it was understood at the time. This perspective zeroed in on a desired end without seeing the more general effects that brands have.

Trademark case law also struggled with the multi-dimensional aspect of brands. Although trademark law was technically supposed to address “directly competing products and passing off or source confusion,”<sup>149</sup> around the 1920s cases lauded by people such as Schechter started to protect non-competing goods. Under these cases, one could not make Aunt Jemima syrup when the Aunt Jemima pancake mix is already on the market because consumers may think the two products are from the same source.<sup>150</sup> Given the way companies were expanding product lines, this claim was not absurd. As companies made incremental changes to their businesses and product lines, a court could plausibly hold that certain product categories were related enough that a newcomer-competitor could not use a mark in that new market. Yet, other cases went further and enjoined using marks for locks as marks for flashlights, marks for cars as marks for radio tubes, marks for watches as marks for shoes, marks for tobacco products as marks for shirts, marks for jewelry as marks for motion pictures, and more.<sup>151</sup>

David Post explains this problem as a “phase transition”:

[O]ne orderly arrangement of the interlocking parts of a complex system gives way, rather suddenly, to an entirely different arrangement. Think of the transformation of liquid water into solid ice. As the temperature falls, the individual components of the system—the hydrogen and oxygen atoms and the bonds between them—slowly change, releasing small quanta of energy, while retaining the orderly arrangement that defines the “liquid” state. But at the freezing point, the system abandons gradualism, changing abruptly into a different kind of orderly arrangement of its atoms, an entirely different configuration.<sup>152</sup>

149. *Id.* at 593; Lunney, *supra* note 144, at 391; Nelson, *supra* note 140, at 742–44.

150. Aunt Jemima Mills Co. v. Rigney & Co., 247 F. 407, 408, 410 (2d Cir. 1917); accord Lunney, *supra* note 144, at 392.

151. Bone, *supra* note 42, at 595–96; accord Nelson, at 759–60 (examining how the courts in Tiffany & Co. v. Tiffany Prods., Inc., 264 N.Y.S. 459 (N.Y. Sup. Ct. 1932) quoted and incorporated Schechter’s ideas and opened the door to dilution rationales in confusion cases).

152. David Post, *Against “Against Cyberanarchy”*, 17 BERKELEY TECH. L.J. 1365, 1378 n.60 (2002).



Each little step in trademark law may have made sense in isolation, but at some point the aggregate creates an entirely new system.

By the middle of the twentieth century, some courts tried to cabin trademark law by holding that “[o]nly two types of harm mattered: loss of current customers due to a reputation injury created by defendant’s lower quality product, or loss of future customers due to the plaintiff’s inability to enter a new market with its mark.”<sup>153</sup> These were still broad ideas, loosely applied, and in some cases certainly not fully tied to the idea of consumer search costs.

Courts looking to reputation and loss of future customers began importing brand ideas into the law. Brand theory openly looks to the brand to support much more than a specific product, and specifically includes the idea that one “build[s] a brand not around products but around reputation,”<sup>154</sup> in addition to the idea that the brand allows a corporation to create diffusion products. A company can offer not just one product but a range of goods and services at different prices and market points so that a range of people can have “access to the brand.”<sup>155</sup>

By the late twentieth century, the law yet again changed its approach to trademarks and re-embraced expanding its reach. Shifts in economic and marketing theory began in the 1960s and 1970s and took full hold by the 1980s.<sup>156</sup> Faith in markets and trademarks as conveyors of information enabling efficient, rational choices by efficient, rational market participants animated the trademark law and policy. Yet, as trademark law protected non-point-of-sale confusion, brand oriented protection crept deeper into trademark law without most realizing it.

### *C. Trademark Doctrines Better Explained as Brand Protection*

Trademark law has come under scrutiny for expanding its reach. Many of the criticisms focus on how trademark law strays from point-of-sale confusion and protects interests other than those the

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153. Bone, *supra* note 42, at 599 (citing *Dwinell-Wright Co. v. White House Milk Co.*, 132 F.2d 822, 825 (2d Cir. 1943) (Hand, J.); *S.C. Johnson & Son, Inc. v. Johnson*, 116 F.2d 427, 429 (2d Cir. 1940) (Hand, J.)); *cf.* Nelson, *supra* note 140, at 743–45.

154. LURY, *supra* note 32, at 121 (quoting Richard Branson’s explanation of branding) (citation omitted).

155. *Id.* at 25, 61–62.

156. See Bone, *supra* note 42, at 602–04; see generally William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265 (1987).

search cost theory of trademarks supports. The open question is, what then do these doctrines protect? Rather than arguing that they protect a more property-like view of trademark, we believe that brands better explain what has happened in these expanded areas of protection.

For example, the initial interest confusion doctrine tries to prevent the following situation. A consumer is drawn to a provider of goods or services because of a name or logo. The consumer arrives at the provider's place of business and quickly realizes that this provider is not the one the consumer was seeking. The provider, however, offers the same or almost the same goods, and the consumer decides that it is best to close the deal with the provider. Unlike the problem where a consumer buys a good mistakenly thinking it is from Producer A when in fact it is from Producer B, in these cases, the consumer has suffered some costs in finding A but knows that she is buying something from a different producer, and any short-fall in quality will be attributed to Producer B. The consumer is not confused by the time she purchases the good, and the doctrine has little to do with rational choice problems that traditionally animate trademark law.<sup>157</sup>

Post-sale confusion is another example where a consumer is not confused and search costs are not at stake.<sup>158</sup> The consumer knows that she bought an imitation Gucci bag or Rolex watch. The doctrine holds that the harm lies in others possibly being fooled into thinking that the item was genuine and protects the prestige of the mark.<sup>159</sup>

Until recently, trademark law prohibited licensing a trademark without quality control, because such practices would erode the source and quality function of a trademark.<sup>160</sup> This position has given way to the recognition and protection of merchandising rights which prevent someone from making T-shirts, mugs, posters, and so on

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157. See Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 *CARDOZO L. REV.* 105, 164–65 (2005); cf. Katz, *supra* note 21, at 1597 (arguing that initial interest confusion could be justified if search costs truly increased but that the “number of such cases is probably very small”).

158. See Lunney, *supra* note 144, at 404–08.

159. *Id.* at 407–08.

160. See Irene Calboli, *The Sunset of “Quality Control” In Modern Trademark Licensing*, 57 *AM. U. L. REV.* 341, 351–52 (2007); cf. Calboli, *supra* note 145, at 776 (arguing “for a change toward free trademark transferability, or assignment ‘with or without’ goodwill, to eliminate the ambiguities and inconsistencies created by the current [trademark law]”).

with sports team logos or company brands, despite there being no confusion as to the source or quality of the product.<sup>161</sup> Consumers can know full well that these items are not licensed. They are not confused nor do they lack information as they purchase.<sup>162</sup> Still, trademark law will in some cases prevent unlicensed manufacturers from producing such goods.<sup>163</sup>

In all these examples, source, quality, and confusion concerns of the consumer do not explain why the underlying practices are prohibited. Once one takes a brand perspective, however, these doctrines begin to make sense. Initial interest confusion protects a company's investment in creating a product category, advertising its goods, and reaching directly to the customer. It also aids in limiting comparative advertising that may interfere with certain notions of brand-building. Post-sale confusion protects a company's desire to build and manipulate identity and personality aspects of a brand. Merchandising rights cases protect a company's interest in generating and controlling consumer identity.

Whether the law ought to protect these interests and, if so, how it should do so, are normative questions. The point here is that the law should be more aware of what it is allowing. The law's ignorance of brand logic leads to results that make little sense under the current claimed foundations of trademark law. Indeed, the failure to appreciate brand theory explains some of the problems one of the more infamous parts of trademark law, dilution, has encountered.

The original federal statute for dilution simply stated that the holder of a famous mark may bring a claim for dilution and obtain an injunction against the junior user of the mark if that use "causes dilution of the distinctive quality of the mark."<sup>164</sup> Under the revised federal statute, a claim may still only be brought by the holder of a famous mark, but now the junior user's use must be "likely to cause

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161. See generally Calboli, *supra* note 160; see also LURY, *supra* note 32, at 108 (explaining that British trademark law was revised in 1994 to allow trafficking in a mark which is analogous to the U.S. merchandising right).

162. See Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 EMORY L.J. 461, 471-72 (2005) ("[T]he mark in these cases is rarely serving the traditional function of a trademark. Rather than indicating something to the consumer about the source . . . of a product, the mark *is* the product . . .").

163. See, e.g., *Bos. Prof'l Hockey Ass'n v. Dall. Cap & Emblem Mfg.*, 510 F.2d 1004, 1008 (5th Cir. 1975), *cert. denied*, 423 U.S. 868 (1975); see also Calboli, *supra* note 145, at 799; LURY, *supra* note 32, at 108 (explaining that British trademark law was revised in 1994 to allow trafficking in a mark which is analogous to the U.S. merchandising right).

164. 15 U.S.C. § 1125(c)(1) (2000).

dilution by blurring or dilution by tarnishment of the famous mark” for the holder to have a remedy under the cause of action.<sup>165</sup> In addition, the revised statute explicitly states that a dilution claim may be brought “regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.”<sup>166</sup> Although the revised statute sought to narrow some parts of the doctrine by clarifying what constitutes a famous mark and defining the types of dilution, the essence of a dilution claim remained: holders of famous marks can sue junior users even when the junior user does not compete with the mark holder, there is no likelihood of confusion, or there is no quantifiable economic harm.

Dilution has been subject to intense criticism and scrutiny in legal academia.<sup>167</sup> Clarisa Long captures the range of criticisms:

Ever since the creation of federal dilution law, legal commentators have expressed consternation about this variation of the trademark entitlement. Dilution law has been called “absolute and unlimitable,” “powerful,” and “immensely popular.” Commentators have labeled dilution law “a fundamental shift in the nature of trademark protection,” concluded that “plaintiffs frequently win” their dilution claims, and wondered whether the statute will prove to be a “disaster.” Some commentators are concerned that dilution law represents an expansion in property rights at the expense of the public domain. Others worry that it stifles expression, hampers commercial communication, or reduces competition. Richard Posner frets about dilution’s “seductive appeal.”<sup>168</sup>

From a traditional, search-costs and information view, these criticisms have much force.<sup>169</sup> Dilution law, however, is not concerned with consumers’ search costs and maps its roots in

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165. 15 U.S.C. § 1125(c) (2000).

166. *Id.*

167. *See, e.g.*, Clarisa Long, *Dilution*, 106 COLUM. L. REV. 1029, 1029–30 (2006); Nelson, *supra* note 140, at 732.

168. Long, *supra* note 167, at 1029–30 (footnotes omitted).

169. *See also* LURY, *supra* note 32, at 109 (noting growth of dilution doctrine in the United Kingdom and shift from confusion to more expansive protection against all uses of a mark). *But see* Long, *supra* note 167, at 1031 (arguing that doctrine has added little to enforcement power of trademark holders); Lunney, *supra* note 144, at 408–10 (“[dilution] was often tacked onto the court’s opinion as little more than an afterthought”); Barton Beebe, *The Continuing Debacle of U.S. Antidilution Law: Evidence from the First Year of Trademark Dilution Revision Act Case Law*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 449, 450 (2008) (showing that the revised act also seems to add little power to trademark enforcement).

Schechter's argument that trademark law should protect "the creation and retention of custom, rather than the designation of source . . . and . . . the preservation of the uniqueness or individuality of the trademark [because that] is of paramount importance to its owner."<sup>170</sup> "[D]ilution law is producer-focused rather than consumer-focused: It seeks to prevent diminution in the value of a famous mark stemming from the use of the mark by someone other than the trademark holder [sic]."<sup>171</sup>

Providing legal recourse based on a company's "investment in the mark" and its construction of a mark's "aura" fits directly into the way brand strategy operates. When Congress explained the Act as protecting "the substantial investment the owner has made in the mark and the commercial value and aura of the mark itself,"<sup>172</sup> it implicitly took a brand view of trademarks.<sup>173</sup> Such perspectives acknowledge that companies that seek to construct an identity and personality for a mark and have those traits offer something much more than information to the consumer. In other words, criticisms that dilution is far removed from trademark law's search-cost and consumer-focused foundations are accurate but miss the point that trademark law has already imported a brand perspective into its doctrine. Dilution, like the other brand-based extensions of trademark law in recent times, can be seen as merely the most obvious iteration of that view.

#### IV. ANTITRUST LAW'S FAILURE TO GRASP THE POWER OF BRANDS

Whereas trademark law failed to appreciate how it protected brands while still claiming to be concerned with consumer confusion and search costs, antitrust law has never fully understood the role of brands. Because of this misunderstanding, antitrust law has never developed an appropriate set of tools designed to measure brand power, distinguish lawful branding techniques from unlawful exclusionary conduct, or design functional remedies to deal with these issues. In this Part, we focus on the missed opportunities to

170. Schechter, *supra* note 127, at 822 (emphasis omitted).

171. Long, *supra* note 167, at 1034; *e.g.*, *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 429 (2003) (noting that dilution law is aimed at protecting producers and not consumers).

172. H.R. REP. NO. 104-374, at 3 (1995).

173. *But see* Lunney, *supra* note 144, at 474-76 (arguing that the Federal Dilution Act of 1995 imported source confusion and "does not reflect a purely property-based view of trademarks").

incorporate the key aspects of brand management into competition policy and show how an understanding of modern branding can provide a tool to address issues such as market power, market definition, merger enforcement, and vertical restraints as exemplified by resale price maintenance doctrine.

*A. Missed Opportunities: Antitrust's View of Product Differentiation and Struggle to Understand Brands*

Antitrust law and economics in the early decades of the twentieth century missed an early opportunity to take advantage of the growing importance of brands and, more generally, product differentiation. Edward Chamberlin, one of antitrust's pioneering economists, was deeply interested in this topic and made it the focus of his principal work, *The Theory of Monopolistic Competition*.<sup>174</sup>

In *Monopolistic Competition*, he investigated the vast middle ground between perfect or pure competition and monopoly. At the time, the only middle ground had been the exploration of duopoly by Cournot and others.<sup>175</sup> Chamberlin instead focused on product differentiation, the critical real world phenomenon that rendered useless the prevailing models of pure monopoly and perfect competition.

As he noted:

Where there is any degree of differentiation whatever, each seller has an absolute monopoly of his own product, but is subject to the competition of more or less imperfect substitutes. Since each is a monopolist and yet has competitors, we may speak of them as "competing monopolists," and, with peculiar appropriateness, of the forces at work as those of "monopolistic competition."<sup>176</sup>

Chamberlin defined product differentiation broadly.<sup>177</sup> He viewed patents, trademarks, and copyrights as critical for product differentiation and considered them monopolies, though normally in competition with other more or less imperfect substitutes.<sup>178</sup> He was uncertain whether patents or trademarks had the greater potential for

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174. EDWARD HASTINGS CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION: A RE-ORIENTATION OF THE THEORY OF VALUE* (8th ed. 1962).

175. ANTOINE A. COURNOT, *RICHERCHES SUR LES PRINCIPES MATHÉMATIQUES DE LA THÉORIE DES RICHESSES* (1838); FRANCIS Y. EDGEWORTH, *MATHEMATICAL PHYSICS* (1881).

176. CHAMBERLIN, *supra* note 174, at 9.

177. *Id.* at 56–57.

178. *Id.* at 60–61.

monopoly power and pointed to the example of the prestige value of such 1930s brand names as Coca-Cola, Ivory, and Kodak.<sup>179</sup> Regardless of which was more important, patents or trademarks, all types of intellectual property were critical in preventing the erosion of high returns. Intellectual property rights rendered competitors unable to create effective substitutes because of strong consumer preferences for the IP protected products.<sup>180</sup>

Chamberlin conceived of competition as a spectrum where perfect competition and monopoly were limits, not equilibriums.<sup>181</sup> He noted: “As long as the substitutes are to any degree imperfect, [the producer] still has a monopoly of his own product and control over its price within the limits imposed upon any monopolist—those of the demand.”<sup>182</sup> The closeness of the available substitutes determined the extent that price would exceed and quantity would fall short of the predictions of a competitive model.<sup>183</sup>

For Chamberlin, product differentiation changes one’s world view.<sup>184</sup> However, product differentiation does not automatically produce classical monopoly. Even if every producer has a monopoly of his own variety of product, he still faces the competition of imperfect substitutes.<sup>185</sup> Because the competitive ideal was no longer possible in a world of differentiated products, “[h]ow much and what kinds of monopoly, and with what measure of social control, become the questions.”<sup>186</sup>

As Rudolph Peritz notes, Chamberlin’s theory of monopolistic competition transformed traditional notions of a market for goods and services “into a commercial marketplace of ideas and images.”<sup>187</sup> Unfortunately, Chamberlin’s insights regarding product differentiation and brands as they existed in his time were never deeply integrated into antitrust policy. He is cited in only a limited

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179. *Id.* at 62.

180. *Id.* at 111–12.

181. *Id.* at 63.

182. *Id.* at 67.

183. *Id.* at 103–04, 112, 117.

184. *Id.* at 204–05.

185. *Id.* at 205–06.

186. *Id.* at 214–15.

187. RUDOLPH J. R. PERITZ, COMPETITION POLICY IN AMERICA, 1888–1992: HISTORY, RHETORIC, LAW 109 (1996).

number of places, but never relied upon, in the contemporary legal or economic treatises, textbooks, and court opinions.<sup>188</sup>

Other commentators have glimpsed the importance of brands but similarly had little effect on modern antitrust law and policy on this issue. For example, Joe Bain had important insights into the importance of advertising for competition policy.<sup>189</sup> Bain, however, did not move beyond advertising into the broader concept of the brand, and much of his work on advertising and his broader interest in the structure of markets has been rejected by price theory and other “Chicago School” approaches to competition policy.<sup>190</sup>

Lester Telser, a figure more associated with the Chicago School, provides an unexpected example where antitrust literature understood why brands matter. In his 1972 book, Telser recognized the price premium aspect of successful branding and called for its recognition in market definition and the measurement of market power.<sup>191</sup> Unfortunately, as with Chamberlin, most recent commentators and courts have not engaged Bain or Telser on these points or have too reflexively come to the opposite conclusion.<sup>192</sup>

Despite these apparent blind spots, there has been a somewhat greater willingness to recognize the importance of premium brands as opposed to value brands and branded products as a separate market segment from the unbranded and private label segments of the same industry. For example, the 2006 Commentary to the Merger Guidelines discusses several enforcement actions in the

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188. See, e.g., *Baltimore & Ohio R.R. v. United States*, 386 U.S. 372, 448 n.9 (1967); *FTC v. H.J. Heinz*, 246 F.3d 708, 724 n.23 (D.C. Cir. 2001); *Int'l Detective Serv., Inc. v. Interstate Commerce Comm'n*, 613 F.2d 1067, 1075 n.18 (D.C. Cir. 1979); *N. Natural Gas Co. v. Fed. Power Comm'n*, 399 F.2d 953, 965 n.21 (D.C. Cir. 1968); *Pevely Dairy Co. v. United States*, 178 F.2d 363, 368 (8th Cir. 1950); *Durable, Inc. v. Twin Cnty. Groceries Corp.*, 839 F. Supp. 257, 261 n.3 (S.D.N.Y. 1993); *United States v. Twentieth Century-Fox Film Corp.*, 137 F. Supp. 78, 93 nn.22–23 (S.D. Cal. 1956); DENNIS W. CARLTON & JEFFREY M. PERLOFF, *MODERN INDUSTRIAL ORGANIZATION* 318, 344 (1990); W. KIP VISCUSI, JOSEPH E. HARRINGTON, JR. & JOHN M. VERNON, *ECONOMICS OF REGULATION AND ANTITRUST* 87–88, 119 (4th ed. 2005). But see F.M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* (3d ed. 1990) in which Chamberlin's work is more central.

189. See 1, 2 JOE S. BAIN & P. DAVID QUALLS, *INDUSTRIAL ORGANIZATION: A TREATISE* 310–11, 395–96 (1987); JOE S. BAIN, *BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING INDUSTRIES* 115, 217 (1956).

190. Timothy J. Muris, *Improving the Economic Foundations of Competition Policy*, 12 *GEO. MASON L. REV.* 1, 8–9 (2003).

191. LESTER G. TELSER, *COMPETITION, COLLUSION AND GAME THEORY* (1972).

192. E.g., William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 *HARV. L. REV.* 937, 956–57 (1981).



butter, flour, tissue, and bread industries where branded products were recognized as distinct markets for merger analysis, despite the presence of important producers of generic and private label goods.<sup>193</sup> In addition, there is an older Federal Trade Commission (“FTC”) challenge to a merger in the soft drink industry that focused on the major branded segment of the industry as the relevant market for merger analysis.<sup>194</sup>

Furthermore, there are some meaningful engagements with the broader effects of branding on market definition, such as the second edition of the Sullivan & Grimes treatise which states:

When market power is properly defined as power over price, it is clear that sellers of branded products often exercise market power. Just as a pure monopolist, the seller of a branded good may face an inelastic demand curve, allowing it to raise price without losing offsetting sales revenues. . . . A seller with a powerful brand, for example, may have brand-loyal consumers who will absorb price increases rather than switch to a different brand. The basis for this brand loyalty may be accurate information about the characteristics of the favored brand and all rival offerings. But brand loyalty may also be based on inaccurate, out-of-date or incomplete information. Brand loyalty will be reinforced by “satisficing” conduct—where market actors are not constantly reevaluating their alternatives and patterns tend to stabilize and be repeated until something disorienting occurs.<sup>195</sup>

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193. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (2006), <http://www.justice.gov/atr/public/guidelines/215247.pdf> [hereinafter Commentary to the Merger Guidelines] (citing *United States v. Dairy Farmers of Am.*, 2001-1 Trade Cas. (CCH) ¶ 73,136 (E.D. Pa. 2000); *United States v. Kimberly-Clark Corp. and Scott Paper Co.*, 1996-1 Trade Cas. (CCH) ¶ 71,405 (N.D. Tex. 1995); *United States v. Interstate Bakeries Corp.*, 1996-1 Trade Cas. (CCH) ¶ 71,271 (N.D. Ill. 1995)); *cf.*, Commission Decision 2002/156/EC in Case COMP/M.2097 – SCA/Metsa Tissue, 2002 O.J. (L 57) 1 at ¶¶ 84, 94 (barring merger under EU merger regulation combining four major brands where minor brands not effective substitutes).

194. *Coca-Cola Bottling Co. of the Sw. v. FTC*, 85 F.3d 1139 (5th Cir. 1996); *cf.* Commission Decision 98/327/EC in Case IV/M.833 – The Coca-Cola Company/Carlsberg A/S, 1998 O.J. (L 145) 41 at ¶¶ 72–73, 110, 118 (permitting soft drink merger reducing international brands from four to three upon condition of divestiture of brand and assets). *See generally*, Ezrachi & Bernitz, *supra* note 58.

195. LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* § 2.4e, at 43 (2d ed. 2000) (footnote omitted); *see also* Warren S. Grimes, *Brand Marketing, Intra-brand Competition, and the Multibrand Retailer: The Antitrust Law of Vertical Restraints*, 64 ANTITRUST L.J. 83 (1995).

In this field, like most of life, “always” and “never” are always never the right answers. Yet from the time of Edward Chamberlin to the present, two crucial questions remain: When do brands confer meaningful market power, and how to integrate brand management into the calculus of existing antitrust analysis. Even critics of Chamberlin acknowledge that the key issue is identifying the “noticeable ‘gap[s] in the chain of substitutes.’”<sup>196</sup>

As a general matter, despite robust economic theories about product differentiation, antitrust law and policy have not done a good job of incorporating these insights. In addition, the brand and business literature is quite clear about the way brands are used to achieve product differentiation and control price. As one business school professor noted in a recent hearing before the FTC and the Antitrust Division about the importance of brands:

[W]hat’s missing from all that is the search for and the attempt to maximize scarcity rents. And that’s kind of what brands are about. In brands you are trying to create a scarce asset and try to extract as much profit as you can from that scarce asset that you’re creating.

And that’s an awful lot about what business is trying to do left and right. And I think, to a large extent, the way we think about antitrust, both economists and lawyers often kind of misses that. And I think that perspective is enormously useful.<sup>197</sup>

Put differently, cultivating powerful brands is the principal competitive strategy of many actors who antitrust purports to regulate. Yet, rather than embrace these perspectives, the antitrust world heavily discounts what is obvious to the business world, that brands matter and can be the source of durable competitive advantage and the ability to sell at a premium without significant constraint from potentially competing substitutes.

The rise of the Chicago School as the prevailing economic discourse for antitrust reinforced the focus on price theory to the

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196. Richard Schmalensee, *On the Use of Economic Models in Antitrust: The Realemon Case* 127 U. PA. L. REV. 994, 1010 (1979) (quoting JOAN ROBINSON, *ECONOMICS OF IMPERFECT COMPETITION* 5 (2d ed. 1969)). As Schmalensee noted in general that perfect markets are rare, short term market power is ubiquitous, but “[a]s long as the goods or services thus aggregated are close enough substitutes, their prices will move together, and an appropriate price index can thus serve as a useful summary statistic.” *Id.* Schmalensee errs by assuming that most markets have close substitutes.

197. Mr. Robert Gertner, Testimony before Horizontal Merger Guidelines Review Project: A Series of Five Workshops 46 (Dec. 10, 2009), *available at* <http://www.ftc.gov/bc/workshops/hmg/transcripts/091210transcriptchicago.pdf>.

exclusion of most other factors.<sup>198</sup> It relegated business discourse to the fringes of the profession of antitrust, whether practiced by the liberal or conservative wings of the discipline. Consider this quote by Judge Easterbrook about predatory pricing as an example of the prevailing ethos in antitrust law:

Firms “intend” to do all the business they can, to crush their rivals if they can. . . . Rivalry is harsh, and consumers gain the most when firms slash costs to the bone and pare price down to cost, all in pursuit of more business. Few firms cut price unaware of what they are doing; price reductions are carried out in pursuit of sales, at others’ expense. Entrepreneurs who work hardest to cut their prices will do the most damage to their rivals, and they will see good in it. You cannot be a sensible business executive without understanding the link among prices, your firm’s success and other firms’ distress. If courts use the vigorous, nasty pursuit of sales as evidence of forbidden “intent,” they run the risk of penalizing the motive forces of competition.<sup>199</sup>

Now compare Judge Easterbrook’s rhetoric to that used by Michael Porter, an economist by training who established a preeminent reputation as a business strategist. In his classic treatise, *Competitive Strategy*, Porter lays out a roadmap of how to build and increase entry barriers, mobility barriers, and switching costs to maintain competitive advantage in the face of a strategic challenge from another firm.<sup>200</sup> In his catalogue of strategies for raising structural barriers, increasing expected retaliation, and lowering the inducement for attack, he continues to emphasize product differentiation as the most effective strategy for obtaining a sustainable competitive advantage, while downplaying price competition.<sup>201</sup> He tellingly states: “Any fool can cut the price, goes

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198. Spencer Weber Waller, *The Language of Law and the Language of Business*, 52 CASE W. RES. L. REV. 283, 283–84 (2001); Spencer Weber Waller, *The Use of Business Theory in Antitrust Litigation*, 47 N.Y.L. SCH. L. REV. 119, 120 (2003).

199. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1401–02 (7th Cir. 1989). See also Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 6 (1984).

200. MICHAEL E. PORTER, *COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITORS* (1980).

201. *Id.* at 21–22, 170–71. Or as one business commentator more succinctly noted: “Differentiate or die.” JILL GRIFFIN, *TAMING THE SEARCH-AND-SWITCH CONSUMER: EARNING CUSTOMER LOYALTY IN A COMPULSION-TO-COMPARE WORLD* 119 (2009).

the old maxim, and a firm often hurts itself more than the challenger in defending in this way.”<sup>202</sup>

As a result of this cognitive dissonance, there has been a limited incorporation of brand management in antitrust.<sup>203</sup> As in trademark law, this incoherence has allowed the continued and virtually unchecked growth of brand power. Strategic brand management has grown with little or no IP or antitrust consequences even where branding is a basis for meaningful market power as traditionally defined in antitrust law. In other cases, a brand perspective may show that there is less, not more, cause for antitrust concern. Yet, given that antitrust does not understand branding, antitrust cannot coherently navigate when brands have, or do not have, negative effects. In short, applying a knowledge of brands to antitrust law provides at least two benefits. First, understanding brands is necessary if antitrust law is to make coherent decisions about the businesses it regulates. Second, brands offer a powerful way to understand and improve specific aspects of antitrust doctrine and analysis.

### *B. Where Antitrust Can Learn from Brands*

Although there are numerous antitrust cases which involve trademarks in some way, most of these contain no discussion, let alone analysis, of the role of brands more generally. Several reasons account for this peculiarity. First, most courts do not distinguish between the general issue of brands and the specific, but lesser, role of trademarks in supporting the larger branding effort. Second, most of the leading trademark-antitrust cases have been relatively easy cases where the use or licensing of a trademark has been a sham designed to implement a typical per se unlawful price fixing or market division conspiracy.<sup>204</sup> Thus, trademarks (and sometimes

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202. MICHAEL E. PORTER, *COMPETITIVE ADVANTAGE: CREATING AND SUSTAINING SUPERIOR PERFORMANCE* 501 (1985) [hereinafter PORTER, *COMPETITIVE ADVANTAGE*].

203. Mark D. Whitener, *Business Strategy and Antitrust: Editor's Note*, 21 *ANTITRUST* 5 (Fall 2006) (stating that Business school perspective is “probably the least understood by most antitrust practitioners.”); Joseph P. Gultinan, *Choice and Variety in Antitrust Law: A Marketing Perspective*, 21 *J. PUB. POL'Y & MARKETING* 260 (2002) (observing that, because of an emphasis on price, antitrust has tended to ignore non-price aspects which a marketing theory can illuminate).

204. See *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46 (1990); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); see generally 2 WILLIAM C. HOLMES, *INTELLECTUAL PROPERTY AND ANTITRUST LAW* §§ 30.5, 31.1 n.8 (2009) (collecting cases).

brands) were important factually, but not analytically, in deciding these cases.

More troubling, antitrust law does not take its own methods seriously when applied to brands. As a result, antitrust law has tilted toward a laissez-faire, hands-off approach in a number of areas where the questions are much more difficult and complex than normally acknowledged. This section examines issues of market definition, all the different stages of merger analysis, and vertical distribution issues as areas where a more significant analysis of the power of brands leads to a richer analysis, even if it does not always change the outcome. The section also briefly analyzes the area of after-market restrictions where the brand issue has been discussed but ironically has served as a red herring to obscure the real issues at stake.

### *1. Brands and the curious case of market definition*

Antitrust law depends heavily on market definition in almost every case and investigation except for hard-core price fixing and other cartel activity. Antitrust law has used a number of related, but slightly different, methods to define the group of products and services that are viewed as effectively competing with each other. None have properly taken account of the power of brands.

The modern law of market definition began with the Supreme Court's 1956 decision in a monopolization case involving DuPont, the company which invented cellophane. Market definition was crucial to the case because monopolization law requires both proof of market power (the power to raise price or exclude competition) and an exclusionary act which injures competition.<sup>205</sup> While DuPont dominated sales of cellophane, it argued that the true relevant market was a much broader market for flexible wrapping materials in which it lacked any significant market share or power.<sup>206</sup>

The Court held that the relevant market for antitrust purposes consisted of those products and services which were reasonably interchangeable.<sup>207</sup> The opinion also identified cross-elasticity of demand, whether a decrease in price for one product would

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205. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 389 (1956) (citing *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 85 (1911)).

206. *Id.* at 381.

207. *Id.* at 395.

substantially reduce demand for potentially competing products, as a critical element in defining the contours of the market.<sup>208</sup>

The Court specifically rejected an important role for brands in this analysis, stating the “power that . . . automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly.”<sup>209</sup> The majority concluded that, except for some niche aspects of the industry, cellophane did in fact compete with such alternatives as glassine and greaseproof papers and that any attempted price increase for cellophane would cause substantial defection to these other wrapping materials for most foods and other pre-packaged consumer products.<sup>210</sup> As a result, DuPont could not be liable for monopolization because it lacked any significant market power in the properly defined market despite the possibility that the DuPont cellophane brand conferred substantial real world power.

The Supreme Court returned to the question of market definition in its 1962 *Brown Shoe* merger decision.<sup>211</sup> As in *DuPont*, the Court held that the outer boundary of a relevant market for antitrust purposes is set by reasonable interchangeability and cross-elasticity of demand.<sup>212</sup> The Court likewise indicated that “practical indicia” of how the products or services were sold and perceived by consumers were also relevant parts of the analysis.<sup>213</sup> The Court concluded that “submarkets” within broader markets may be relevant for antitrust purposes.<sup>214</sup>

The 1982 Merger Guidelines and its subsequent iterations introduced a somewhat more technical version of the same type of analysis to guide the Antitrust Division and the FTC in deciding whether to challenge proposed mergers and acquisitions between horizontal competitors.<sup>215</sup> These guidelines, as revised, have been

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208. *Id.* at 400.

209. *Id.* at 393.

210. *Id.* at 401, 403 nn.29 & 31. While many commentators have pointed out the so-called “Cellophane Fallacy,” that relying on cross-elasticity of demand under these circumstances produced an unnecessarily broad relevant market (and hence no finding of market power), few have done so by considering brand issues.

211. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

212. *Id.* at 325.

213. *Id.*

214. *Id.*

215. The current version of the guidelines is set forth in U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (Aug. 2010), *available at* <http://ftc.gov/os/2010/08/100819hmg.pdf> [hereinafter HORIZONTAL MERGER

adopted by numerous lower courts as the appropriate methodology for market definition in merger cases.<sup>216</sup>

The current version of the guidelines state:

The hypothetical monopolist test requires that a product market contain enough substitute products so that it could be subject to post-merger exercise of market power significantly exceeding that existing absent the merger. Specifically, the test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products (“hypothetical monopolist”) likely would impose at least a small but significant and non-transitory increase in price (“SSNIP”) on at least one product in the market, including at least one product sold by one of the merging firms. For the purpose of analyzing this issue, the terms of sale of products outside the candidate market are held constant. The SSNIP is employed solely as a methodological tool for performing the hypothetical monopolist test; it is not a tolerance level for price increases resulting from a merger.<sup>217</sup>

The “small but significant and nontransitory” increase in price in the Guidelines is generally referred as the SSNIP test and normally utilizes a hypothetical 5% price increase to determine the parameters of the relevant product and geographic market.<sup>218</sup> It has been widely adopted by other leading competition regimes for their own merger analysis processes.<sup>219</sup> Smaller market definitions are used when the agencies can show that the merging firms will be able to effectively

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GUIDELINES]. See also FED. TRADE COMM’N, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996–2007 (2008), available at <http://www.ftc.gov/os/2008/12/081201hsrmergerdata.pdf>.

216. See, e.g., *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008); *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045 (8th Cir. 1999); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004); *FTC v. Swedish Match*, 131 F. Supp. 2d 151 (D.D.C. 2000). The Supreme Court has not had an opportunity to weigh in on this issue since the guidelines were drafted.

217. HORIZONTAL MERGER GUIDELINES, *supra* note 215, § 4.1.1 (footnote omitted).

218. HORIZONTAL MERGER GUIDELINES, *supra* note 215, § 4.1.2.

219. Commission, Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C31) 5, 6 at ¶ 10 [hereinafter EC Merger Guidelines] (incorporating by reference the Commission’s separate 1997 Market Definition Notice (1997 O.J. (C372) 5); Competition Bureau, Merger Enforcement Guidelines (2004) (Can.) ¶ 3.4, available at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01245e.html> [hereinafter Canadian Guidelines].

price discriminate and effectively raise price against a sub-set of its customers within the relevant market.<sup>220</sup>

The economics literature suggests another test for market power. The Lerner index relies on the ratio of price over price minus marginal cost.<sup>221</sup> The Lerner index reflects the notion that the higher the ratio, the greater degree of monopoly power, reflecting the ability of the monopolist to increase price above the limits in a perfectly competitive market.<sup>222</sup> The Lerner curve is thus a measure of the firm's own price elasticity rather than the cross-elasticity of demand with other products.

An excellent hypothetical from Professor Glynn Lunney shows how none of these approaches to market definition, particularly the SSNIP test, works in a world of brands.<sup>223</sup> Professor Lunney posits a student lounge with a vending machine selling Coke soft drinks and one immediately next to it selling the equivalent Pepsi products. As one might expect, raising or lowering the price of soda even more than the 5% used in the standard version of the SSNIP test is unlikely to move a substantial proportion of loyal Coke drinkers over to the Pepsi machine or vice-versa.<sup>224</sup>

As Professor Lunney concludes:

If we were to extend this type of pricing analysis to other products, we would almost certainly find that many popular brands do possess sufficient brand loyalty to constitute distinct product markets. To the extent a protected trademark serves as the device for capturing such brand loyalty, even narrow trademark protection will quite often prohibit competitors from marketing a product that consumers will recognize and accept as a perfect or even reasonable substitute for the popular brand.<sup>225</sup>

This common sense proposition is borne out by the very existence of brands. Without contending that this is in fact the case, if cigarette smokers of a particular brand would "rather fight than switch" then there is no reasonably effective substitute for that brand and the

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220. Horizontal Merger Guidelines, *supra* note 215, § 4.1.4.

221. A.P. Lerner, *The Concept of Monopoly and the Measurement of Monopoly Power*, 1 REV. ECON. STUD. 157, 169 (1934).

222. *Id.*

223. Lunney, *supra* note 144, at 424–25.

224. *Id.*

225. *Id.* at 426–27 (citation omitted).



relevant market is that brand of cigarettes.<sup>226</sup> Again, if it is literally true (as opposed to a catchy slogan) that “nothing Runs like a Deere” then your market definition exercise is complete for the type of farm equipment you are examining for antitrust purposes.<sup>227</sup> At a more technical level, scholars have analyzed the effect of branding on internet price comparison sites and have shown that successful retail branding can maintain price disparities on identical electronic goods even though lower prices for the same item are at most one mouse click away.<sup>228</sup>

In addition, once one considers the role of price discrimination, the need to consider brands increases. The Merger Guidelines also state that the ability to price discriminate may be evidence of a smaller market definition than might otherwise be the case.<sup>229</sup> The 2006 Commentary to the Merger Guidelines points out several instances where the ability to price discriminate has been the basis for government enforcement action.<sup>230</sup> The current chief economists for both enforcement agencies also have noted the importance of this concept in their scholarly writings and rely on price discrimination to establish relatively narrow market definitions when courts are reluctant to accept direct proof of anticompetitive unilateral effects.<sup>231</sup>

Yet, what is noticeably missing is the role of brand management in establishing the ability to price discriminate. As discussed above, brand management can be a critical element in facilitating price discrimination in important, but underappreciated, ways for market definition purposes. The very purpose of branding is to allow a company to charge higher prices compared to unbranded or commodity goods. The same producer may thus manufacture a branded item for a significant premium, a house (or private label) brand of the same item at a lesser price, and where necessary the bulk form of the item at prevailing market prices.<sup>232</sup> More generally, the

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226. *Id.* at 427–29.

227. *Id.* at 409 n.161.

228. See Baye & Morgan, *supra* note 71, *passim*.

229. HORIZONTAL MERGER GUIDELINES, *supra* note 215, § 4.1.4.

230. Commentary to the Merger Guidelines, *supra* note 193, at 7–9.

231. Gregory K. Leonard & Mario A. Lopez, *Farrell and Shapiro: The Sequel*, ANTITRUST, Summer 2009, at 14, 17.

232. See generally PRIVATE LABELS, BRANDS, AND COMPETITION POLICY: THE CHANGING LANDSCAPE OF RETAIL COMPETITION (Ariel Ezrachi & Ulf Bernitz eds., 2009) (providing a detailed overview of the competitive and intellectual property issues raised by

branded segment of a market will typically enjoy a substantial premium over the unbranded segment even when produced by different manufacturers. This can even be the case in agricultural goods, the ultimate commodity goods for most purposes.<sup>233</sup>

Even when market power is recognized as a function of brands, courts and commentators misunderstand how the brands and market definition interact. For example, when an accepted market definition test is applied and shows the market power of a successful brand, the market power is often dismissed as either trivial or irrelevant for antitrust purposes.<sup>234</sup> As the Seventh Circuit noted in a recent case:

What is true is that a firm selling under conditions of “monopolistic competition”—the situation in which minor product differences (or

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private brands in Europe and the U.S.); John A. Quelch & David Harding, *Brands versus Private Labels: Fighting to Win*, in HARVARD BUSINESS REVIEW ON BRAND MANAGEMENT 23 (1999).

233. Dermot J. Hayes, Sergio H. Lence & Andrea Stoppa, *Farmer-Owned Brands?* 20 AGRIBUSINESS 269, 270 (2004). A second type of de facto price discrimination that has received virtually no attention is what we will term intra-brand price discrimination. Most brands of consumer goods will strive to offer a series of sub-brands to further segment purchasers along different price and style points. We recognize that such further product differentiation is not price discrimination within the meaning of the Robinson-Patman Act as it normally does not involve differential pricing of the same commodity. Nonetheless we contend that such price discrimination is critical to understanding branding and its relevance to market definition and antitrust policy more generally. Thus, the Armani fashion line has couture, black label, white label, Le Collezioni, Emporio Armani, and Armani A/X in roughly descending order of price. Similarly, Marc Jacobs has one line for the highest end of his products and the Marc line as a starter line for younger or more price-conscious consumers. Certain fashion houses use a different strategy of creating entirely separate brands under the same corporate family to slice and dice demand along every conceivable price and style distinction.

234. Daniel J. Gifford, *Farewell to the Robinson-Patman Act? The Antitrust Modernization Commission's Report and Recommendation*, 53 ANTITRUST BULL. 481, 485 (2008) (classifying the “power” possessed by the seller of a product differentiated by brand name” as “often trivial”); Benjamin Klein, *Market Power in Antitrust: Economic Analysis After Kodak*, 3 SUP. CT. ECON. REV. 43, 72 (1993) (arguing that “no court would conclude that the manufacturers of [branded products] possess[] market power” based on the existence of “significant pricing discretion”); Landes & Posner, *supra* note 192, at 956–57 (rejecting Telser’s analysis of own elasticity of branded consumer goods as irrelevant to market power for antitrust analysis); William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 274–75 (1987); Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 260 (2003) (noting that Landes and Posner would “recoil” from the suggestion that price discrimination due to branding indicates monopoly power); Schmalensee, *supra* note 196, at 1015–16 (arguing that ReaLemon, other brands of reconstituted lemon juice, and fresh lemon juice are all imperfect substitutes, but rejecting meaningful long term market power for ReaLemon in any of the potential relevant markets); Katarzyna A. Czapracka, *Where Antitrust Ends and IP Begins – on the Roots of the Transatlantic Clashes*, 9 YALE J.L. & TECH. 44, 53 (2007) (even if IP allows price above marginal cost, there are huge sunk costs in development).

the kind of locational advantage that a local store, such as a barber shop, might enjoy in competing for some customers) limit the substitutability of otherwise very similar products—will want to trademark its brand in order to distinguish it from its competitors' brands. But the exploitation of the slight monopoly power thereby enabled does not do enough harm to the economy to warrant trundling out the heavy artillery of federal antitrust law.<sup>235</sup>

The “slight” market power conferred by a location advantage in a particular neighborhood that the court mocks says nothing, however, about the more real market power that a successful brand can confer.

Sometimes, the criticism of markets defined by significant brand power is simply contradictory. As one commentator states:

[W]here differentiation is significant among an array of products, many products that are interchangeable will not have a high degree of cross-elasticity of demand with other substitutes or may have none at all.<sup>236</sup>

The problem with this line of analysis is, of course, that if the products do not have a significant degree of cross-elasticity then they should not be considered substitutes in the first place, *despite physical or functional similarities*. This line of reasoning trivializes a sophisticated branding industry whose entire purpose is to reduce or eliminate the substitutability of intuitively competing products or services. In simplest terms, when branding strategies are successful, that success should be recognized rather than ignored, or assumed away.

Those proceeding from a trademark perspective err as well. Too often, those who do take the power of trademarks seriously err in the other direction and often assert that trademarks frequently or inevitably constitute monopolies. Even the work in this field which is more sophisticated is rarely being done by antitrust specialists and has not had a major impact in the competition law field.<sup>237</sup> Much of

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235. *Sheridan v. Marathon Petrol. Co.*, 530 F.3d 590, 595 (7th Cir. 2008).

236. James A. Keyte, *Market Definition and Differentiated Products: The Need for a Workable Standard*, 63 ANTITRUST L.J. 697, 702 (1995) (ultimately arguing for 20% or more version of SSNP test for differentiated products).

237. See Chad J. Doellinger, *A New Theory of Trademarks*, 111 PENN ST. L. REV. 823 (2007) (arguing that “trademark law provides a normative code of proper business conduct”); Lunney, *supra* note 144; Doris Estelle Long, *Is Fame All There Is? Beating Global Monopolists at their Own Marketing Game*, 40 GEO. WASH. INT’L L. REV. 123 (2008).

this work is also focused more narrowly on trademark law and not on the broader concept of the brand.<sup>238</sup>

To be clear, engaging with brands as part of market definition analysis does not mean that each brand is its own market for antitrust purposes or that the existence of a successful brand automatically constitutes proof of monopoly power. But taking brands seriously calls into question whether antitrust is ignoring the central reality of modern business practice in judging the competitive impact of those practices.<sup>239</sup>

Nor is this an excuse for lazy lawyering. Courts are correct to reject facile shortcuts where market power based on the presence of brands is asserted but not proved. For example, it is hard to argue with a decision that declines to take judicial notice of the “fact” that Splenda-brand artificial sweetener is a separate market unto itself.<sup>240</sup> An attempt to prove that Marathon brand gasoline had market power in the gasoline or credit card market based solely on submission of volume of sales and number of dealers also seems appropriately doomed to failure.<sup>241</sup> Similarly, most attempts to prove that franchise systems are their own markets will be problematic, particularly if viewed *ex ante* in a broader market of similarly branded franchise opportunities.<sup>242</sup> In short, mere invocation of the existence of brand power without rigorous proof is insufficient and not what we advocate.

If one takes the notion of brands and branding seriously, however, there will be instances where a single brand of a product or service *is* the relevant market, even if there are physically identical or similar alternatives. The so-called cellophane fallacy may be an indirect recognition of just this reality.<sup>243</sup> The courts and agencies must look beyond the physical similarities and focus on whether the branding campaign has been successful enough so that consumers do

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238. Long, *supra* note 237.

239. It also calls into question the core notion of inter-brand competition if product differentiation strategies are successful or most market participants employ similar branding strategies.

240. Diamond Crystal Brands, Inc. v. Food Movers Int’l, Inc., No. CV407-42, 2008 WL 2811940, at \*3 (S.D. Ga. July 21, 2008).

241. Sheridan v. Marathon Petrol. Co., 530 F.3d 590, 594–95 (7th Cir. 2008).

242. Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 487–88 (5th Cir. 1984) (rejecting market of Holiday Inn franchises); Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 713 (11th Cir. 1984) (no market for Waffle House franchise system). See *generally* Keyte, *supra* note 236, at 697 n.3 (collecting cases).

243. See *supra* notes 205–10 and accompanying text.

not view the possible alternatives as reasonably effective substitutes.<sup>244</sup> This can also be true even when the brand is not accompanied by a registered trademark.<sup>245</sup>

## 2. Brands and proof of anticompetitive harm

The prediction of anticompetitive harm in merger cases is the closest that antitrust comes to the effective recognition of the unique role of brands. Following the definition of the relevant market and the measurement of the market share of the merging firms, the government or private plaintiff must show that the transaction is likely to produce a “substantial lessening of competition” or a tendency to create a monopoly.<sup>246</sup>

There are two theories of competitive harm in merger cases. The first, coordinated effects theory, is only rarely relevant to brand issues.<sup>247</sup> Coordinated effects theories of harm focus on whether the merger will raise the likelihood of collusion or oligopolistic interdependency as a result of changes in the structure of the market.<sup>248</sup> It is the most traditional of merger theories and focuses on the change in the market share of the merging firm, the increase in the concentration of the industry, and whether these changes will make it more likely that the merging firms will take the behavior of the remaining firms into account and limit their competitive zeal.<sup>249</sup>

In contrast, unilateral effects (or non-coordinated effects) theories of harm focus on the effect of the merger *regardless* of the behavior of other firms.<sup>250</sup> Harm from unilateral effects can be shown

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244. U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 997–98 (11th Cir. 1993), (explaining the dominant brand of anchors is the relevant product market because of consumer perception and behavior that competing makes and models of anchors are not effective substitutes).

245. Vitale v. Marlborough Gallery, No. 93 Civ. (PKL) 6276, 1994 WL 654494, at \*3–4 (S.D.N.Y. July 5, 1994) (showing Jackson Pollack sub-market as example of powerful brand without trademark).

246. 15 U.S.C. § 18 (1996).

247. Council Regulation 31/03, Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31/5) § IV.22 [hereinafter EU Merger Guidelines].

248. *Id.* § IV.39.

249. HORIZONTAL MERGER GUIDELINES, *supra* note 215, § 7. The FTC did challenge the *Diageo-Vivendi* merger in the liquor industry on the grounds that the consolidation of the brands of rum caused by the merger would make coordination more likely with Seagrams, the remaining important player in the market. *Diageo plc*, 66 Fed. Reg. 66,896 (FTC Dec. 27, 2001).

250. HORIZONTAL MERGER GUIDELINES, *supra* note 215, § 6. *See also* EU Merger

at far less than near-monopoly market shares in markets with more differentiated products—precisely the type of markets where brands are likely to be involved.<sup>251</sup> Mergers at relatively low market share levels can be barred on this theory when the government or private plaintiff can prove that customers view the merging firms as the closest substitutes to each other.<sup>252</sup> If no other firm is viewed as a close substitute, this would allow the merging firms to raise price or limit output and capture more profits than they would lose through customers migrating to weak substitutes.<sup>253</sup> In its strongest form, proponents of the unilateral effects theory suggest that proof of likely anticompetitive harm can be shown directly through proof of low customer loss without the indirect proxy of proof of market definition and market share.<sup>254</sup>

The most detailed treatment of unilateral effects comes in the scholarly literature and the commentary on the merger guidelines. In the merger commentary, the role of branding in product differentiation and segmenting of markets between different levels of brands has played a more significant role.

The older General Mills-Pillsbury merger involving flour is of importance because of the commodity nature of business.<sup>255</sup> The key to understanding the competitive harm alleged by the government lies in the success of these two firms in creating effective brands for what was otherwise a functionally equivalent baking product. Because of the branding, neither unbranded flour nor the imperfect

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Guidelines, *supra* note 247, ¶ 36 (discussing role of brands in EU version of unilateral effects theory of competitive harm). See generally Herbert J. Hovenkamp, *Analyzing Horizontal Mergers: Unilateral Effects in Product-Differentiated Markets*, U. Iowa Legal Studies Research Paper No. 09-12 (March 2009), <http://ssrn.com/abstract=1359288>.

251. HORIZONTAL MERGER GUIDELINES, *supra* note 215, § 6.

252. *Id.*

253. *Id.*

254. Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 235 (Robert Pitofsky, ed., 2008); Jonathan B. Baker & David Reitman, Research Topics in Unilateral Effects Analysis (American University Washington College of Law Research Paper No. 2009-37), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1504863](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1504863). However, courts have been suspicious when the government's proof of harm under any theory has not also been accompanied by traditional market definition. *F.T.C. v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1036 (D.C. Cir 2008); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1110 (N.D. Cal. 2004).

255. General Mills Inc./Diageo PLC/Pillsbury Co., F.T.C. file No. 001-0213, available at <http://www.ftc.gov/os/2001/10/index.shtm#23>.

substitute of certain regional brands were predicted to be an effective constraint on the merged companies' ability to raise prices and the merger was permitted subject to divestiture of Pillsbury's baking products line.<sup>256</sup>

The merger commentary also discusses the 1996 merger between Kimberly Clark and Scott as likely to produce anticompetitive harm for consumers of tissue paper and baby wipes on a similar theory.<sup>257</sup> In another example, the Federal Trade Commission challenged a merger between Dreyer and Nestlé in a market they defined as "superpremium ice cream."<sup>258</sup> In these cases, there were a large number of potential suppliers of functionally interchangeable, and often physically identical, substitutes. That fact would indicate that courts would not be concerned with such mergers. Yet, when the FTC considered the power of successful branding, they had a meaningful, accurate basis for being concerned about the transaction.

Nonetheless, the unilateral effects theory has not proved to be a fully viable entry point for brand management into antitrust theory and practice.<sup>259</sup> It remains the more controversial of two different theories in merger law, which is merely one of the important segments of antitrust practice. In addition, it has become highly technical and has lost sight of the importance of product differentiation and branding which gave birth to the theory in the first place.<sup>260</sup> Despite these limitations, unilateral effects analysis is not always blind to the power of brand in market definition and does focus directly on the likely harms of product differentiation.<sup>261</sup> It addresses the vital question of the closeness of the available substitutes and avoids the artificial line drawing common to traditional market definition.<sup>262</sup> It also suggests that harm to competition may occur at market shares not normally defined as

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256. *Id.*

257. Commentary to the Merger Guidelines, *supra* note 193, at 29–30.

258. *Id.* at 28–29. Nestle Holdings, Inc., 68 Fed. Reg. 39,564, 39,565 (July 2, 2003). *But see In re Super Premium Ice Cream Distrib. Antitrust Litig.*, 691 F. Supp. 1262, 1268 (N.D. Cal. 1988) (indicating no separate market for superpremium ice cream, just a continuum of price and quality).

259. *See, e.g., Oracle Corp.*, 331 F. Supp. 2d 1098; *State v. Kraft General Foods*, 926 F. Supp. 321 (S.D.N.Y. 1995). *But see HORIZONTAL MERGER GUIDELINES*, *supra* note 215, § 6 (expanding treatment of unilateral effects).

260. Hovenkamp, *supra* note 250.

261. *Id.* at 19–20.

262. *Id.* at 23–24.

potentially anticompetitive.<sup>263</sup> Here antitrust begins to appreciate the central insight of brand management. When successful branding generates sufficient customer loyalty, customers simply do not regard other products as reasonably effective substitutes and are unwilling to switch.<sup>264</sup>

### *3. Brands, entry barriers, and remedies*

Brands are quite important at a later stage in antitrust analysis. Once the relevant markets are defined, power within those markets is measured, and anticompetitive harm is shown to be likely, the agency or court will normally proceed with an analysis of barriers to entry.<sup>265</sup> If barriers to entry are low, then the firms are presumed to lack the ability to raise price or restrict entry and the merger is normally allowed.<sup>266</sup>

It has long been recognized that the possession of a strong brand or brands by the merging firms can constitute a barrier to entry.<sup>267</sup> If the presence of strong branding (or any other factor) would prevent timely and effective entry at pre-merger prices then the Merger Guidelines and the Commentary will deem there to be substantial barriers to entry and continue on to later steps in the merger analysis.<sup>268</sup>

The EU Merger Guidelines also state brands and patents may create entry barriers:

[I]ncumbents may . . . enjoy technical advantages, such as preferential access to essential facilities, natural resources, innovation and R & D, or intellectual property rights . . . . In particular, it may be difficult to enter a particular industry because

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263. *Id.* at 18–20.

264. *Id.* at 22 (citations omitted).

265. HORIZONTAL MERGER GUIDELINES, *supra* note 215, § 9.

266. *Id.*

267. Commentary to the Merger Guidelines, *supra* note 193, at 38–39. (addressing the likelihood of entry). See generally F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 600 (3d ed., Houghton Mifflin Co. 1990); DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 609 (1990).

268. Czapracka, *supra* note 234, at 53; HORIZONTAL MERGER GUIDELINES, *supra* note 215, §§ 3.0–3.3. Commentary to the Merger Guidelines, *supra* note 193, at 38, 45. In addition, the presence or absence of strong brands can be a factor in determining whether a firm is deemed a rapid entrant, one whose ability to enter is so timely and effective that it should be considered a current participant in the relevant market. HORIZONTAL MERGER GUIDELINES, *supra* note 215, § 5.1.



experience or reputation is necessary to compete effectively, both of which may be difficult to obtain as an entrant. Factors such as consumer loyalty to a particular brand, the closeness of relationships between suppliers and customers, the importance of promotion or advertising, or other advantages relating to reputation will be taken into account in this context.<sup>269</sup>

Conversely, the U.S. Merger Commentary also suggests that if competing producers can reposition their existing brands then this will also be considered as an alternative to entry, determining whether the merger is likely to pose a threat to competition.<sup>270</sup> The reference to repositioning brands is one small example of the need to better understand the brand literature. The business literature on branding discusses in considerable detail why brand repositioning in the sense used by the Merger Guidelines is virtually impossible.<sup>271</sup> Brand repositioning normally refers to moving a brand either upwards or down in the minds of consumer.<sup>272</sup> Both are difficult and problematic for different reasons. David Aaker notes:

Straightforward repositioning from a mainstream or value market into an upscale one is nearly impossible. A mainstream brand simply lacks the upscale associations—such as user image, brand personality, and perceived quality—that are necessary to convince customers that the product or service should command a premium price.<sup>273</sup>

Moving a brand from a premium position to a mainstream or value brand is easier, but creates such significant risks that it is rarely worth doing.<sup>274</sup> The principal risk is forfeiting the price premium that having a premium brand allows in the first place.<sup>275</sup> The price reductions normally involved in such a move are extremely costly in both the short term and the long term and risk turning a branded,

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269. EU Merger Guidelines, *supra* note 247, § VI.71.

270. Commentary to the Merger Guidelines, *supra* note 193, at 31.

271. Aaker, *supra* note 69, at 136.

272. *Id.*

273. *Id.* at 142. *See also* DARYL TRAVIS, EMOTIONAL BRANDING: HOW SUCCESSFUL BRANDS GAIN THE IRRATIONAL EDGE 18 (2000) (“When a brand is first being introduced, there is a short period of time when marketers can influence its positioning. But after that, consumers decide what it means, and once they’ve decided, they don’t like to change it.”); DAVID A. AAKER, MANAGING BRAND EQUITY 122 (1991) (“upgrading a brand can be tricky”).

274. Aaker, *supra* note 69, at 137.

275. *Id.*

differentiated product or service back into a commodity.<sup>276</sup> Price reductions normally are a signal that the product has become an entirely different kind of brand.<sup>277</sup> Taken to an extreme, this is referred to as the “branding doom loop.”<sup>278</sup>

As a result, most brand strategists suggest creating sub-brands where a new product or service is offered rather than changing the core brand products or services themselves.<sup>279</sup> A frequent example is Courtyards by Marriott which allowed Marriott to enter a lower priced segment of the hotel industry, draw on the positive aspects of the Marriott brand, without damaging the core portion of Marriott’s more upscale hotel. These strategies can be successful if done correctly, but to call this repositioning in the sense used by the Guidelines is a misnomer. Rather than repositioning an existing brand, companies normally create a new sub-brand to enter a different slice of the market.<sup>280</sup> This is simply new entry, rather than brand repositioning, and already adequately covered by the existing Guidelines.<sup>281</sup>

On the remedy side, brands have played an important role in deciding what to do about a transaction once the Agencies conclude that it represents a substantial risk to competition. The Agencies will work with the parties before proceeding to court to address areas of concern if the threat to competition can be remedied through partial divestitures, rather than a challenge to the entire transaction.<sup>282</sup> In this situation, numerous challenges to mergers have been resolved through the divestiture of assets which have consisted of, or included, competing brands so that the post-merger market will consist of the same number of viable competitors as before.<sup>283</sup>

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276. *Id.*

277. DAVID A. AAKER, BUILDING STRONG BRANDS 281–82 (1996) (citing Marlboro and Schlitz price cutting strategies as examples).

278. Tim Calkins, *The Challenge of Branding*, in KELLOGG ON BRANDING: THE MARKETING FACULTY OF THE KELLOGG SCHOOL OF MANAGEMENT 1, 5 (Alice M. Tybort & Tim Calkins eds., 2005).

279. See Aaker, *supra* note 69, at 140–41; Regina Fazio Maruca, *How do you grow a Premium Brand?*, 73 HARV. BUS. REV. 22, 26 (Mar.–Apr. 1995).

280. David A. Aaker, *Should You Take Your Brand to Where the Action Is?*, in HARVARD BUSINESS REVIEW ON BRAND MANAGEMENT 79 (1999).

281. HORIZONTAL MERGER GUIDELINES, *supra* note 215, § 9.

282. U.S. Dep’t of Justice, Antitrust Div., Policy Guide to Merger Remedies, 30–31 (2004), available at <http://www.usdoj.gov/atr/public/guidelines/205108.pdf>.

283. Commentary to the Merger Guidelines, *supra* note 193, at 38. Similarly, the divestiture or licensing of brands has been a condition of EU approval of a number of mergers. See, e.g., Case T-114/02, *Babyliiss v. Comm’n*, 2003 ECR II-000, ¶ 176 (stating approval of

#### 4. *The red herring of after-markets*

Ironically, the one place where the role of single market brands has been debated most vigorously turns out to be the ultimate red herring. A line of cases addresses whether a firm can exploit the aftermarket for parts or services of its own product. The most famous case is the 1992 *Kodak* case.<sup>284</sup> Kodak was accused of unlawful tying and monopolization of the market for parts and service for its brand of photocopiers.<sup>285</sup> In the market for original photocopying equipment, Kodak was a small player with no significant share of the market.<sup>286</sup> Initially customers who purchased a Kodak copier could service it through Kodak or through independent service operators (“ISOs”) who purchased replacement parts from Kodak.<sup>287</sup> Kodak subsequently changed this policy and refused to sell parts to such ISOs or even to the customers themselves unless they self-serviced.<sup>288</sup> This had the effect of requiring most customers to get both their replacement parts and their service from Kodak at higher prices.<sup>289</sup>

An independent service operator sued alleging that the change in policy constituted both unlawful monopolization under Section 2 of the Sherman Act and unlawful tying under Section 1 of the Sherman Act.<sup>290</sup> Kodak moved for summary judgment on the grounds that it lacked the necessary market power prerequisite to liability under either of the plaintiff’s theories.<sup>291</sup> Kodak argued because it lacked market power in the original copier equipment market, as a matter of law it lacked power over replacement parts or service for such equipment.<sup>292</sup>

The Supreme Court held that there were material questions of fact whether or not Kodak enjoyed market power over the parts and

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merger of small kitchen appliance makers on condition of five year exclusive trademark license); *Coca-Cola Bottling Co. v. FTC* 85 F.3d 1139 (5th Cir. 1996); *cf.* Commission Decision (EC) 98/327 in Case IV/M.833, *The Coca-Cola Company/Carlsberg A/S*, 1998 O.J. (L 145) ¶¶ 72-73, 110, 118 (permitting soft drink merger reducing international brands from four to three upon condition of divestiture of brand and assets).

284. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

285. *Id.* at 456.

286. *Id.*

287. *Id.* at 458.

288. *Id.*

289. *Id.*

290. *Id.* at 459.

291. *Id.*

292. *Id.* at 470.

service for its own copiers and reversed the grant of summary judgment.<sup>293</sup> The defendant had offered evidence that customers could factor in parts and service along with the original purchase price of the equipment and life cycle price.<sup>294</sup> The defendants argued that any attempt to raise any component of the life cycle price would be unsuccessful given Kodak's small share of the equipment market.<sup>295</sup> In contrast, the plaintiff introduced evidence that purchasers' buying decisions did not work in this manner for a variety of reasons including actual purchasing policies, lock-in effects, and switching costs.<sup>296</sup>

The decision produced a dissent by Justice Scalia who argued:

The Court today finds in the typical manufacturer's inherent power over its own brand of equipment—over the sale of distinctive repair parts for that equipment, for example—the sort of “monopoly power” sufficient to bring the sledgehammer of § 2 into play. . . . In my opinion, this makes no economic sense. The holding that market power can be found on the present record causes these venerable rules of selective proscription to extend well beyond the point where the reasoning that supports them leaves off. Moreover, because the sort of power condemned by the Court today is possessed by every manufacturer of durable goods with distinctive parts, the Court's opinion threatens to release a torrent of litigation and a flood of commercial intimidation that will do much more harm than good to enforcement of the antitrust laws and to genuine competition.<sup>297</sup>

The aftermath of *Kodak* produced little of the torrent of litigation predicted by Justice Scalia<sup>298</sup> but did produce a vigorous debate in literature about the validity of after-markets and single market brands.<sup>299</sup> Whether lock-in theories and related after-market claims

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293. *Id.* at 477.

294. *Id.* at 459.

295. *Id.* at 464.

296. *Id.* at 496–97.

297. *Id.* at 489 (Scalia, J., dissenting).

298. *But see* Hilti AG v. Comm'n, Case T-30/89, 1991 E.C.R. II-1439, 1992 4 C.M.L.R. 16 (Ct. First Instance).

299. Compare Benjamin Klein, *Market Power in Aftermarkets*, 17 *MANAGERIAL & DECISION ECON.* 143, 157 (1996); Benjamin Klein, *Market Power in Antitrust, Economic Analysis After Kodak*, 3 *SUP. CT. ECON. REV.* 43 (1993); Thomas Arthur, *The Costly Quest for Perfect Competition: Kodak and Nonstructural Market Power*, 69 *N.Y.U. L. REV.* 1, 60–71 (1994), with Eleanor M. Fox, *Eastman Kodak Company v. Image Technical Services, Inc. – Information Failure as Soul or Hook?*, 62 *ANTITRUST L.J.* 759 (1993–1994); Joseph Kattan,

should be recognized has nothing to do with brand power and everything to do with contractual opportunism.<sup>300</sup> The Kodak brand has nothing to do with whether the defendant should be held liable to its customers or competitors for its policies with respect to replacement parts and services. What commentators are really debating is the validity and importance of after-markets as the proper level of analysis for such antitrust claims and not whether the brand defines the market.<sup>301</sup>

The controversies surrounding *Kodak* and its progeny in the United States and the EU have tarred more legitimate questions of how brands shape definitions of markets, power, and liability and unhelpfully suggested that these are “single brand” cases.<sup>302</sup> Instead they speak to whether the market in a particular case (whether there are powerful brands, weak brands, or no brands at all) should be defined at the original equipment stage or the downstream parts and service stage for those who are already customers. It also raises issues regarding whether someone can service a product or tinker with it in whatever manner they wish. If one considers the culture and societal benefits of car and computer improvements, the idea that a company can prevent someone from tinkering with technology in any form presents important issues regarding innovation and control. But these issues shed no light on the questions we are seeking to explore about the nature of brands and the power they may confer in business competition.

*5. Antitrust as enabler of brands: vertical restraints and resale maintenance*

As shown above, manufacturers have used brands to control price and extract value that may otherwise go to a wholesaler or

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*Market Power in the Presence of an Installed Base*, 62 ANTITRUST L.J. 1 (1993–1994); Mark R. Patterson, *Product Definition, Product Information, and Market Power*, 73 N.C. L. REV. 185 (1994–1995); Rudolph J.R. Peritz, *Theory and Fact in Antitrust Doctrine: Summary Judgment Standards, Single-Brand Aftermarkets and the Clash of Microeconomic Models*, 45 ANTITRUST BULL. 887 (2000).

300. See Warren S. Grimes, *Brand Marketing, Intra-brand Competition, and the Multibrand Retailer: The Antitrust Law of Vertical Restraints*, 64 ANTITRUST L.J. 83, 88, 121 (1995–1996).

301. Compare Klein, *supra* note 299, at 43; Arthur, *supra* note 299, at 887; Patterson, *supra* note 299, at 185; Fox, *supra* note 299, at 759; Kattan, *supra* note 299, at 1.

302. James A. Keyte, *Market Definition and Differentiated Products: The Need for a Workable Standard*, 63 ANTITRUST L.J. 697, 705–06 (1994–1995).

retailer or be retained by the consumer. In antitrust terms, this relates to the issue of vertical restraints, which addresses the relationship among manufacturers, wholesalers, and retailers. Vertical restraints are imposed by a manufacturer on someone “down” the distribution chain such as a wholesaler or distributor, or between a wholesaler/distributor and a retailer. The restraints can involve price terms, which are referred to as resale price maintenance, or non-price terms such as the location, territories, or customers that a wholesaler, distributor, or retailer can serve. Antitrust has trended toward a permissive case-by-case rule of reason review of such restraints and away from per se rules barring such practices. A largely unobserved result of this trend has been that antitrust law has become the ultimate enabler of the growth of brands as a marketing strategy.<sup>303</sup>

The seminal case in this regard, *Sylvania*, was premised on the importance of inter-brand competition, which is arguably an oxymoron, for any powerful successful brand by definition seeks to be its own category and face no competition.<sup>304</sup> *Sylvania* was decided against a complicated and rapidly evolving antitrust landscape for vertical non-price restraints.<sup>305</sup> In 1963, the Supreme Court declined to impose a per se rule against such restraints in *White Motors*.<sup>306</sup> Yet four years later, in *Schwinn*, the court held that non-price vertical restraints which forbade the retailer to sell bicycles outside a certain geographic territory were per se illegal if title had passed from the manufacturer to the bicycle dealer.<sup>307</sup> If title had not passed and the dealer was acting as the agent or consignee of the manufacturer, the restraints were subject to the rule of reason.<sup>308</sup>

Ten years later, the Court reversed itself and established a broad rule of reason analysis for all vertical non-price restraints. *Sylvania* itself concerned the efforts of a small market share television manufacturer to restructure its distribution system to stay alive and attempt to regain market share. To do so, the defendant established location and territorial restraints for its dealers and terminated a Northern California dealer who did not abide by those restrictions.<sup>309</sup>

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303. See *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977).

304. *Id.* at 51–52.

305. *Id.* at 53 n.21.

306. *White Motor Co. v. U.S.*, 372 U.S. 253, 261–62 (1963).

307. *U. S. v. Arnold, Schwinn & Co.*, 388 U.S. 365, 373–75 (1967).

308. *Id.* at 380–82.

309. *G.T.E. Sylvania*, 433 U.S. at 38–40.

The Sylvania court began with the unsupported proposition that inter-brand competition was “the primary concern of antitrust law.”<sup>310</sup> It then reasoned that certain restrictions on intra-brand competition (consumers’ ability to shop at different dealers for the same brand) were necessary to promote inter-brand competition.<sup>311</sup> The court noted that restrictions on intra-brand competition might also create incentives for dealers to promote a given brand and would prevent one dealer from free riding off the promotional efforts of another.<sup>312</sup> In the court’s view, non-price vertical restraints could promote inter-brand competition more than it restricted intra-brand competition.<sup>313</sup> Such restraints were unlikely to harm consumers if the manufacturer imposing the restriction lacked significant market power.<sup>314</sup> The court concluded that a broad rule of reason was the appropriate standard to weigh the antitrust consequences of such restrictions regardless of the common law property concepts of title ownership and risk of loss.<sup>315</sup>

Missing from this analysis is any assessment of brand strength and product differentiation. We are not the first to note that the relationship between inter-brand and intra-brand is far more complex than the court acknowledges in *Sylvania* and its progeny. As Professor Grimes notes in his seminal article on *Sylvania*:

The Court was on solid ground when it found that vertical restraints can provide an effective tool for promoting a producer brand. But the Court’s assertion that interbrand competition provides “a significant check on the exploitation of intrabrand market power” fails to recognize that the brand promotion associated with vertical restraints tends to increase brand differentiation and that increased brand differentiation means lower demand elasticity, and hence greater market power. To put it another way, the more effective a vertical restraint is in differentiating a brand, the greater the reduction in interbrand competition.<sup>316</sup>

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310. *Id.* at 52 n.19.

311. *Id.* at 54–55.

312. *Id.* at 55.

313. *Id.* at 65 (White, J., concurring).

314. *Id.* at 52, n.19 (majority opinion).

315. *Id.* at 57–58.

316. Grimes, *Brand Marketing*, *supra* note 195, at 96 (citations omitted); *see also* Robert L. Steiner, *The Inverse Association Between the Margins of Manufacturers and Retailers*, 8 REV. INDUS. ORG. 717 (1993) (arguing that strong advertised brands increase manufacturer’s

There are numerous examples of the concerns raised by Professor Grimes. Products like the Apple computer, the iPod, high end bicycles, golf clubs, luggage, electronics, and a number of luxury and status goods have been subject to an increasing array of vertical price and non-price restraints.<sup>317</sup> While free riding and other traditional justifications for resale price maintenance (“RPM”) and non-price vertical restraints may be present to varying degrees for some of these items, such concerns are not uniformly applicable or necessarily significant.<sup>318</sup> What is present across the board is the perceived need to build an effective branding strategy with the goal of consumers who no longer recognize other potential functional substitutes as effective substitutes.<sup>319</sup> As Professor Grimes notes, at some point the vertical restraints reduce both intra- and inter-brand competition.<sup>320</sup> Equally important, they increase the power and value of the brand in question.<sup>321</sup>

The most recent example of this line of simplistic thinking is the 2007 *Leegin* decision where the Supreme Court held 5–4 that even minimum resale price maintenance should be subject to the rule of reason.<sup>322</sup> The court’s decision was based on the same inter-brand competition and free rider rationale used in *Sylvania*.<sup>323</sup> While the history of resale price maintenance is longer than that of vertical non-price restraints, it shows the same disregard of brands in formulating antitrust policy.<sup>324</sup>

As far back as 1911, the Supreme Court in *Dr. Miles* held that after title had passed from the manufacturer, any attempt to dictate the minimum price of an item was illegal.<sup>325</sup> The Court relied on the passage of title to reach this conclusion: the vertical price restriction was an unlawful restraint on alienation.<sup>326</sup> The court rejected any defense based on the limited market position of the defendant or on

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margins and prices and decrease retailer’s gross margin).

317. Grimes, *Brand Marketing*, *supra* note 195, at 100–06.

318. *Id.*

319. *Id.* at 118–19.

320. *Id.* at 107–13.

321. *Id.* at 113.

322. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 877 (2007).

323. *Id.* at 895–96.

324. *Id.* at 896–98.

325. *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911).

326. *Id.* at 404.



the presence of trade secrets.<sup>327</sup> Although the Court did not speak specifically in terms of harm to competition, *Dr. Miles* became the basis of a per se rule against such restraints that lasted until *Leegin*.<sup>328</sup>

The medicine in question was a so-called patent medicine, a tonic that calmed the nerves, probably through the alcohol that it contained. Such patent medicines were in fact not patented at all but secret formulas developed by the manufacturer and sold under various brand names.<sup>329</sup> The patent medicine industry began to rely on RPM strategies in the late nineteenth century at precisely the same time as the rise of branding and advertising that facilitated product differentiation.<sup>330</sup>

It is not surprising that the Supreme Court did not discuss the branding aspects of *Dr. Miles* in formulating its rule. Brand management was still in its infancy.<sup>331</sup> The Court saw the case more about property rights and the need to limit restrictions on the sale of products after title had passed.<sup>332</sup> This is a concern that modern intellectual property law addresses, if at all, through the first sale doctrine.<sup>333</sup> It is interesting to note, however, that the per se rule in *Dr. Miles* rejects the notion of any property rights remaining with the manufacturer after sale, despite the presence of a successful brand.

The severity of the per se rule from *Dr. Miles* against RPM waxed and waned for the next century. Almost immediately, the Court held that Section 1 of the Sherman Act did not apply to unilateral decisions to terminate a distributor for refusal to adhere to price levels.<sup>334</sup> The focus then shifted to what could be considered an illegal resale price *agreement* and what would be considered lawful *unilateral* decisions to terminate a dealer or distributor. Courts first

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327. *Id.* at 403–04.

328. *See Leegin*, 551 U.S. at 901–03.

329. *See Dr. Miles Med. Co.*, 220 U.S. at 374. A modern day equivalent may be the secret formula for Coca-Cola, which is unpatented but arguably the most guarded and valuable trade secret in the world.

330. Barak Y. Orbach, *Antitrust Vertical Myopia: The Allure of High Prices*, 50 ARIZ. L. REV. 261, 262–63 (2008).

331. *Id.* (citing JAMES D. NORRIS, *ADVERTISING AND THE TRANSFORMATION OF AMERICAN SOCIETY, 1865–1920* (1990); FRANK PRESBREY, *THE HISTORY AND DEVELOPMENT OF ADVERTISING*, 113–445 (1929).

332. *See Dr. Miles Med. Co.*, 220 U.S. at 403–05.

333. *See* Copyright Act, 17 U.S.C. § 106 (2006); *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700, 708 (Fed. Cir. 1992).

334. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

expanded when an agreement could be inferred and then tightened the standard for finding an agreement to impose unlawful resale prices.<sup>335</sup>

As to substance of the per se rule from *Dr. Miles* against RPM, there was a similar expansion and contraction. The Court first explained that the *Dr. Miles* per se rule applied to both maximum and minimum RPM.<sup>336</sup> Then in 1997, the Court, in *State Oil v. Khan*, reversed course and held that the rule of reason would apply to maximum RPM.<sup>337</sup>

This set the stage for the *Leegin* case and the sea change eliminating the per se rule for even minimum RPM agreements. In *Leegin* the Court held that because RPM had the potential to increase inter-brand competition through the elimination of free riding, case-by-case consideration under the rule of reason was justified.<sup>338</sup> Though the Court acknowledged the potential for RPM to be used as a facilitating device for either dealer or manufacturer cartels, it concluded that the rule of reason was flexible enough to handle these concerns.<sup>339</sup> To implement its holding in *Leegin*, the Court invited the lower courts to consider different presumptions and structured forms of the rule of reason as they gained experience in these cases to streamline review of the competitive consequences of RPM in different factual settings.<sup>340</sup>

Throughout the foregoing line of cases, the Supreme Court was quite literally obsessed with brands without ever seeking to define what brands were, how they functioned, why they mattered, or the effects of vertical restraints on the product differentiation critical to successful branding. As set forth in Table 1, the number of cites to “brands” “inter-brand” and “intra-brand,” or the total of all three, in the majority opinions of the Court’s recent decisions addressing vertical restraints has risen dramatically.<sup>341</sup>

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335. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984); *Bergen Drug Co. v. Parke, Davis & Co.* 307 F.2d 725, 727–29 (3d Cir. 1962).

336. *Albrecht v. Harold Co.*, 390 U.S. 145, 152 (1968), *overruled by State Oil Co. v. Khan*, 522 U.S. 3 (1997).

337. *State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997).

338. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 882, 891–92 (2007).

339. *Id.* at 897.

340. *Id.* at 898–99. *See generally* Christine A. Varney, *A Post-Leegin Approach to Resale Price Maintenance Using a Structured Rule of Reason*, 24 ANTITRUST 22 (2009).

341. The trend is even more striking if one omits the *State Oil* case from the Table. *State Oil* dealt with the treatment of maximum resale price maintenance in the retailing of gasoline,

TABLE 1

Case Name	“Interbrand”	“Intrabrand”	“Brands”	Total
Dr. Miles (1911)	0	0	0	0
White Motor Co. (1963)	3	2	3	8
Schwinn (1967)	2	2	7	11
GTE Sylvania (1977)	13	21	3	37
State Oil (1997)	4	1	1	6
Leegin (2007)	15	9	25	49

With this doctrinal evolution, brands have thrown off all antitrust constraints short of being used as a sham for traditional horizontal collusion among competitors. First, *Leegin* only applies where the manufacturer has parted with title.<sup>342</sup> Otherwise, the manufacturer is free to price at any level it wishes. Furthermore, the *Leegin* rule only applies when a manufacturer and a retailer make an explicit agreement.<sup>343</sup> A manufacturer is free to do anything it wishes under Section 1 of the Sherman Act regarding price if it acts alone.<sup>344</sup>

The debate over *Leegin* and RPM generally has also almost entirely ignored the role of brands. Of the many defenders and critics of *Leegin*, Professor Barak Orbach is one of the few commentators who has noted the centrality of brands to the RPM debate.<sup>345</sup> We wholeheartedly agree with him descriptively, even if we reach

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which raised fewer of the brand issues discussed in the other cases on vertical restraints.

342. See *Leegin Creative Leather Prods., Inc.*, 551 U.S. at 898.

343. See *id.*

344. See *Colgate & Co.*, 250 U.S. at 307.

345. See Orbach, *supra* note 330, at 266; see also Barak Y. Orbach, *The Image Theory: RPM and the Allure of High Prices*, 55 ANTITRUST BULL. 277 (2010); cf. 8 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 324–25 (2d ed. 2004) (arguing that presence of strong brand is factor favoring treating a particular resale price maintenance agreement as per se unlawful). *But see generally* George R. Ackert, *An Argument for Exempting Prestige Goods from the Per Se Ban on Resale Price Maintenance*, 73 TEX. L. REV. 1185 (1995) (arguing in terms of prestige goods, but not directly engaging brands literature).

different normative conclusions for reasons discussed below. While the Supreme Court implies that brand image is the primary asset that should be protected from cradle to grave, and from creation through consumption, it never explicitly says so. This is a breathtaking proposition and a dramatic reversal from the historical assertion that the manufacturer lost all rights upon transfer of title. Now title is virtually meaningless, and the manufacturer's property-like interest in its brand is a strong justification for restrictions on price, marketing, and use long after the item has been transferred down the chain of distribution.

It is one thing to say that economics, rather than property law, will govern antitrust liability. It is another far more troubling thing, however, to in-effect propertize brands without explicitly saying so and strip downstream distributors and, potentially, consumers of their traditional property rights in the items they purchase and consume. If brands are going to become legal super-property, this stealth approach is an improper substitute for the robust public debate that such a dramatic change in the law should require.

Ironically, *Leegin* was not a particularly compelling case to empower the brand in this fashion. The defendant in *Leegin* had only a middling brand for woman's purses and belts,<sup>346</sup> with no significant free-rider issues to justify the resale price maintenance scheme in question. The defendant may not have had significant market power whether measured traditionally or through a brand lens. But nor did it have many compelling arguments that the restraints in question were necessary or even useful in promoting its brand or creating further product differentiation within its retail category. Regardless of who should prevail in *Leegin* or future cases, antitrust will not have strong tools to deal with these types of issues under the rule of reason that the Supreme Court has announced without a more sophisticated understanding of brands and brands management.

#### V. WHERE BRANDS TAKE US

Our claim is simple. Brands are important tools in business competition; trademark and antitrust law ought to catch up to this real-world practice. We have shown that brands are far more complex and robust than the legal conception of brands as merely trademarks. In addition, we have shown how both trademark and

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346. *Leegin Creative Leather Prods., Inc.*, 551 U.S. at 882.

antitrust law have tried to manage brand practices, but only inadvertently, for neither area appreciated what it was doing. These blind behaviors enabled brands' power to grow without asking whether such increased power was desirable. This paper is a call to see the importance of brands and to begin to integrate brand understandings into the law. We close with what we think must happen for that call to reach its full potential and set forth the benefits of such a shift.

*A. Fixing Trademark and Antitrust Law's Myopia*

So far, brands have eluded both trademark and antitrust law. Brands do not fit precisely within trademark, and they are not a well defined antitrust issue. This situation has allowed brands to grow in importance as part of business practice and strategy while neither body of law recognizes the importance of brands and misses the way in which brands affect competition and society. As such, compromises and limitations that have evolved over time in trademark and antitrust doctrines as a way to balance the needs of business and consumers often no longer operate as well or at all. That change upsets the balance that both areas of the law ought to maintain as their guiding star of competition policy.

The law must recognize the transcendence of brands. A rich literature on brands exists and can aid in remedying the law's brand blind spot.<sup>347</sup> It is obvious that brands matter as a fundamental business strategy designed to create artificial scarcity, economic rents, and consumer loyalty and indeed make brands a core aspect of consumer identity. In other words, brands and the brand literature provide an important lens for analyzing and formulating legal policy.

Yet, this opportunity has rarely been seized. Both the law of antitrust and the law of trademarks have either pretended that brands don't matter or have discussed them indirectly by filtering this key business concept through the language of law and economics. For example, Professor Orbach is correct when he notes that "[t]he prevalence of RPM in markets for premium-brand goods has never drawn serious attention in the RPM literature."<sup>348</sup> But he is only correct with respect to the legal literature and the law and economics literature on this subject. The marketing and brand management

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347. See, e.g., *supra* notes 23–30.

348. Orbach, *supra* note 330, at 266.

literature is replete with discussions on this topic.<sup>349</sup> This alternate body of literature is rarely drawn upon by either the proponents or the critics of the past or current legal rules on the myriad of business practices that antitrust and trademark law seek to regulate.

We are not calling for replacing the language of economics with the language of business literature. Economics is a vital and important language in the law, but it must be supplemented if we are to have a coherent legal regime with respect to brands. When law and economics first entered the legal academy, few had a background in economics; yet, now, some level of economic analysis travels with much of legal education.

Today, the legal academy faces a similar problem with brands. Most lawyers lack formal business or marketing training. Regardless of formal training, the business literature is challenging. It is large and often draws on other social science disciplines.<sup>350</sup> Some of the literature is anecdotal or motivational and aimed at a popular audience of either students or managers in the work force. And, as with almost any discipline, some of it lacks rigor.

Nonetheless the field of marketing and brand management is a well-established and respected field with its own serious scholars, journals, conferences, networks, vocabulary, and other means of transmission.<sup>351</sup> We submit that an understanding of the field is necessary to understand the concepts of product differentiation, market segmentation, price discrimination, customer loyalty, and customer identity that are the heart of modern brand management. In short, scholars, practitioners, policy makers, legislators, and judges need to be as familiar with the literature and language of marketing and brand management as they are with different strands of economic thought.<sup>352</sup>

Such a familiarity would likely result in a different language and vocabulary for both antitrust and trademark law—one that addresses the realities of how business operates. In antitrust, talk of cross-elasticity of demand and own elasticity would probably be replaced by analysis of “shoppers” or “switcher[s]” versus “loyals.”<sup>353</sup> Survey

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349. See, e.g., *supra* notes 33–110 and accompanying text.

350. See HEDING ET AL., *supra* note 104, at 246–47 (describing seven major scientific traditions found in brand theory).

351. *Id.* at 21 (documenting evolution of brand studies as robust and clear enough to allow for Kuhnian analysis of a paradigm shift in the theoretical approaches to branding).

352. See Waller, *Language of Law*, *supra* note 198, at 337–38.

353. GRIFFIN, *supra* note 201, *passim*; Baye & Morgan, *supra* note 71, *passim*.

data might be considered instead of or along with regression and simulation models. The focus would be on how companies compete to create loyal consumers who will return over and over again to the same brand or family of brands over their lifetime and trade up to the higher price, higher profit segments of the brand.<sup>354</sup> The competitive strategic techniques to be analyzed will vary from case to case but would include brand extensions, increasing switching costs in different ways, RPM and other restrictions on distribution to maintain and enhance brand image, bundled discounts, loyalty rebates, increasing shelf space, and denying these same advantages to competitors in order to segment the market to the utmost degree possible. Few if any of these techniques emphasize price competition, which is the starting point for most economic analysis.

In trademark, the change may be more radical. In some cases, producer concerns regarding brand equity, the ability to enter new markets, and free-riding would be considered alongside trademark's traditional focus on consumers and the likelihood of confusion.<sup>355</sup> Not all changes would favor producers. Whereas trademark doctrine does a poor job of accommodating consumers' desires to use marks for expression, recent brand theory recognizes the dynamic nature of a brand and that consumers play an important role in shaping the brand such that complete control of the brand message and meaning may be unwise and untenable.<sup>356</sup> At its most fundamental level, the very definition of a trademark could expand so that trademark law would be able to discuss the multi-dimensional nature of brands and properly address issues beyond source and quality.

A deeper understanding of brands and brand discourse can yield a better picture of what the law is doing and a metric by which to see whether those results match the law's stated foundations. Insofar as the law champions a brand result, it should do so explicitly and be better equipped to say so. This, in turn, would permit clear, critical discussion regarding the normative desirability of such outcomes. In

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354. See, e.g., GIORGIO ARMANI, <http://www.giorgioarmani.com/> (last visited Oct. 22, 2010); MARC JACOBS, <http://www.marcjacobs.com/> (last visited Oct. 22, 2010); POTTERY BARN, <http://www.potterybarn.com> (last visited Oct. 22, 2010) (describing families of brands aimed at different age and income demographics).

355. See McKenna, *supra* note 7, at 117.

356. See, e.g., HEDING ET AL., *supra* note 104, at 21, 153–55; Deven R. Desai, *A Brand Theory of Trademarks* 52–54, Thomas Jefferson School of Law Research Paper No. 1585327, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1585327](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1585327); cf. Beebe, *supra* note 5, at 630–34 (discussing the semiotic and dyadic nature of trademarks).

simplest terms, we are in a world where the law fosters cradle to grave protection for companies' branded goods and services. The law must expand its horizons to appreciate what it is doing, articulate what it is doing, and answer whether it wants to be doing so in some other manner, if at all.

### *B. Expanding the Brand Perspective*

Parts II and III laid out where theoretical and practical literature on brands explains certain outcomes in trademark and antitrust doctrines that are not well-addressed by the doctrine or the law and economic literature's understanding of the disciplines. This section provides examples of where a brand perspective could prove useful to further studies within the two doctrines.

For example, beyond questions of market definition and merger guidelines, understanding more about the role of brands can provide equally important insights into other hot-button issues being debated in the antitrust field. The courts and enforcement agencies have split badly over the proper antitrust treatment of different marketing practices in the branded pharmaceutical industry.<sup>357</sup> The mere fact that the industry is normally referred as the "branded pharmaceutical industry" suggests that branding is the key to understanding the competitive significance of such practices as payments to generic drug manufacturers to delay entry, the creation and sale of "authorized generics" by the original manufacturer of the branded medicine in order to blunt the effects of generic entry, the massive increase in advertising of brand name pharmaceutical medicines, and many of the more general issues being debated under the rubric of health care reform. Again this is an area where an understanding of brands would seem to be central but is missing.

Issues of bundling, bundled discounts, and loyalty rebates are another contentious area in the antitrust world.<sup>358</sup> Most cases and commentators have sought to analogize these practices to other areas of antitrust where the legal rules are more clear-cut.<sup>359</sup> But once one

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357. See, e.g., FEDERAL TRADE COMMISSION, *FTC Chairman, Members of Congress Call for Legislation to End Sweetheart "Pay-for-Delay" Deals That Keep Generic Drugs Off the Market*, (Jan. 13, 2010), <http://www.ftc.gov/opa/2010/01/payfordelay.shtm>.

358. Compare, *LePage's Inc. v. 3M*, 324 F.3d 141, 154 (3d Cir. 2003) (en banc), and *Cascade Health Solutions v. PeaceHealth*, 502 F.3d 895, 905-14 (9th Cir. 2007), amended by 515 F.3d 883 (3d Cir. 2008).

359. See generally ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 83 (2007) (proposing predatory pricing test for allegations of



flips the brand switch, it is easy to see the fundamental unity of all these practices. They are coordinated attempts to recruit and retain customers and create loyal brand customers through a variety of different means. What is the appropriate legal rule to deal with these phenomena? That is a difficult question. Using a brand lens helps ask the right set of questions directly rather than by analogy.

A full discussion of the numerous ways in which brands can similarly help better explain current trademark doctrine is beyond the scope of this Article. As set forth above, initial interest confusion, post-sale confusion, merchandising rights, and dilution doctrines are better explained as brand issues rather than trademark ones.<sup>360</sup> Other areas of trademark law could benefit from such analysis as well. For example, the amount and scope of protection for trade dress continues to pose problems for trademark law.<sup>361</sup> Trade dress is understood as “the total image of a product and may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques.”<sup>362</sup> A brand perspective would allow a court to see that trade dress can be quite valuable to a company and that the company invested time and money in developing that trade dress as part of the company’s branding strategy. The courts could then better evaluate whether the law ought to protect trade dress and the grounds for doing so.

Trademark doctrine’s struggle to manage speech interests offers another area where knowledge of brand literature could prove useful.<sup>363</sup> In the abstract, expressive use of a trademark is not actionable. Individual uses of marks such as Barbie in artistic contexts,<sup>364</sup> Lego on fan sites,<sup>365</sup> and any use in almost any non-

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anticompetitive bundling); Einer Elhauge, *Tying, Bundled Discounts and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397 (2009).

360. See *supra* Part III.C.

361. See, e.g., Lars Smith, *Trade Distinctiveness: Solving Scalia’s Tertium Quid Trade Dress Conundrum*, 2005 MICH. ST. L. REV. 243, 252.

362. See Ingrida Karins Berzins, Comment, *The Emerging Circuit Split Over Secondary Meaning in Trade Dress Law*, 152 U. PA. L. REV. 1661, 1664 (2004).

363. See generally William McGeeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49, 52–53, 61–66 (2008) (arguing that should a case reach a court, free speech concerns usually prevent the plaintiff from recovery but that ambiguous trademark “fair use” doctrines generate litigation and chill speech).

364. In artistic contexts, expressive uses entail incorporating a trademark into a painting, sculpture, etc. These uses fall under a different, yet related, issue of the incorporation of a trademark into art and whether a given use is protected under First Amendment principles. See, e.g., *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 806 (9th Cir. 2003) (artistic works incorporating and transforming Mattel’s Barbie doll constituted parodic speech

commercial context is supposed to be permitted. Yet what is an expressive use of a mark and what constitutes fair use is an unclear and unstable area of trademark law.<sup>366</sup>

The dominant view of trademark law as being a private good,<sup>367</sup> and as such fully under the control of the mark holder, has led to dubious litigation tactics by mark holders.<sup>368</sup> Brand theory, however, acknowledges and, as a business matter, encourages businesses to exploit a simple reality: people use brands in ways that are beyond source identification and in addition to legal conceptions of speech.<sup>369</sup> At the individual level, brands become part of how someone creates who they are and represents that self to the world.<sup>370</sup>

Brand theory appreciates the community dimension of brands as well. In this view, a brand community is “a specialized, non-geographically bound community, based on a structured set of social relationships among admirers of a brand”<sup>371</sup> and a given brand community collectively negotiates with companies regarding the brand.<sup>372</sup> In other words, rather than seeing trademarks as a one-way information device, brand theory indicates that companies recognize the two-way nature of a brand and truly engage in negotiation regarding company practices.<sup>373</sup> The brand perspective respects the

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protected by the First Amendment).

365. See, e.g., Desai & Rierson, *supra* note 1, at 1840 (describing the Lego Corporation’s response to the www.ratemylego.com fan site).

366. See generally McGeveran, *supra* note 363.

367. See David W. Barnes, *A New Economics of Trademarks*, 5 NW. J. TECH. & INTELL. PROP. 22, 24, 50–57 (2006) (exploring the tension between private and public goods conceptions of trademarks).

368. See, e.g., Desai & Rierson, *supra* note 1, at 1791 (citing K.J. Greene, *Abusive Trademark Litigation and the Incredible Shrinking Confusion Doctrine—Trademark Abuse in the Context of Entertainment Media and Cyberspace*, 27 HARV. J.L. & PUB. POL’Y 609 (2004); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005)).

369. See, e.g., Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 972–73 (1993) (discussing rights of a mark holder when the mark’s “role transcends identifying the source.”).

370. Cf. *id.* at 974–75 (noting that because of mark holder’s efforts to make a mark part of people’s cultural experience and daily language “the mark or symbol or image is no longer entirely its own, and that in some sense it also belongs to all those other minds who have received and integrated it”).

371. Albert M. Muniz, Jr. & Thomas C. O’Guinn, *Brand Community*, 27 J. CONSUMER RES. 412, 412 (2001).

372. See HEDING ET AL., *supra* note 104, at 187.

373. See Desai, *supra* note 356, at 53.

company's investment in the brand but has room for expressive uses; a balance which the law currently struggles to obtain.

All of these controversial issues are different ways of asking what is the nature of a brand and what is the extent of the legal protection we as a society wish to offer. A brand perspective may not provide all the answers. It does, however, ask the right questions for legal and economic scholars to pursue and take more seriously. In simplest terms, trademark and antitrust law are protecting and growing brands and brand power. As a normative matter the law must re-orient itself to understand brands and their effects on competition. From that basis the law can see how the management of brands and competition ought to be structured.

## VI. CONCLUSION

Brands and competition. Brands and the law. Brands, competition, and the law. Brands may be discussed as part of competition and business strategy. Brands may be discussed as part of separate doctrines within the law, but, uncoupling brands, competition, and the law is a mistake. The three operate together.

Companies use a combination of logos, packaging, advertising, distribution, and more to fashion a specific brand that functions as a company's identity, generates consumer loyalty, and affects the consumer's identity and self-image to reinforce that loyalty. The brand becomes a powerful tool allowing businesses to affect demand, exert power within supply chains, control price, and more. Rather than simply functioning as a mark that identifies the source and quality of a good or service, a brand is a vital, dynamic part of a company's competitive repertoire.

Despite brands being a dominant way in which the business world conceives of a company's value and competition strategy, legal discourse has little to no understanding about these important, powerful business tools. This flaw has led to the law's permissive treatment of brands, with little appreciation for the implications of those behaviors as they affect the marketplace and competition in general. Specifically, two areas of the law—trademark and antitrust—that ought to operate as complementary parts of a coherent system to regulate competition, are giving corporate mark holders broad and increasing competitive brand power without either an explicit public policy debate or a conscious attempt to craft an appropriate legal regime to manage brands.

As such, the current debate misses questions about the appropriate limits, if any, for the near absolute control of brand image, and the interaction of manufacturers, distributors, and consumers. Instead, strange doctrines with dubious theoretical foundations have arisen. For example, in trademark law, odd results in confusion analysis and recent expansions of trademark law such as initial interest confusion and dilution grow and upset the balance between competing producers and between producer and consumer. In antitrust law, courts analyze questions of market definition, anticompetitive harm, barriers to entry, and vertical restraints but fail to see the how a brand, by design, directly affects these issues.

All is not lost, however. Competition law can and must begin to remedy the situation by simply drawing on the rich literature on brands and embracing a brand perspective as competition law confronts the realities of brands and competition. Such a perspective would allow all involved with competition policy to see more precisely what is at stake in a given issue.

Brands and competition travel together and will continue to do so well into the twenty-first century. As one commentator has said, “the brand is” the “reason, or ‘logos’ of the economy.”<sup>374</sup> If legal systems and legal discourse wish to remain relevant and vibrant as they address competition, they must understand the brand. Failing to understand brands will lead to further confusion and dissonance as the law attempts to manage business realities with incomplete theoretical models. Understanding brands, however, can only enhance the way in which brands and the law interact to provide a coherent, dynamic competitive system.

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374. LURY, *supra* note 32, at 6.

