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978-1-107-10346-7 - Brands, Competition Law and IP

Edited by Deven R. Desai, Ioannis Lianos and Spencer Weber Waller

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Introduction

DEVEN R. DESAI, IOANNIS LIANOS, AND
SPENCER WEBER WALLER

Brands and brand management have become a central feature of the modern economy and a staple of business theory and business practice. In the business world it is common wisdom that brands have important effects on competition and the marketplace. Yet the two areas of law most concerned with competition – trademark and antitrust – have not yet fully come to grips with the importance of branding.

In simplest terms, the law conflates trademarks and brands. Those scholars who contend that this is a mistake argue that brands are seen as indicating source and quality but that the other functions of brands are missed. Marketing and consumer literature brims with studies about the way brands use identity, emotion, and behavioral levers to compete beyond price. A brand-loyal customer may pay a premium for a brand for reasons other than quality and price. If one's brand cannot be copied, one's product may be so differentiated that competitors cannot compete and commodities such as wheat can be sold at higher margins than would otherwise be possible.

Until recently, these effects were lost in trademark and competition law (antitrust) discussions. Part of the problem flows from reliance in both Europe and the USA on price theory for both intellectual property and antitrust law. Embracing other social science perspectives should bridge the gap. Current brand literature tends to describe competitive advantages a brand can offer, but the welfare and consumer effects are less clear. At first, understanding brands may challenge current models of competition law, as it may not offer the seemingly crisp outcomes regarding whether preferences and related market results are endogenous or exogenous. Nonetheless, given the importance of branding, the explicit desire to use brands to compete, and the way in which brands evade price theory, there is a vigorous debate regarding the extent to which competition law and trademark law must delve into these literatures.

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Thus the goal of this volume and our broader project on the nature of brands is to bring together scholars and practitioners from all of the relevant disciplines to learn from each other and explore what would constitute an appropriate legal framework for the treatment of brands in the modern economy. Professors Desai and Waller began with their 2010 article in the *BYU Law Review* examining the shortcomings of US antitrust and trademark law in understanding and regulating brands.¹ They continued to analyze the importance of brands as a potential new legal construct both individually and collectively.² At the same time, Professor Lianos from the Centre for Law, Economics and Society at UCL was publishing work on the impact of private labels in competition law assessment,³ following up the discussions arising out of the UK Competition Commission's groceries market investigations and the focus of the European Commission (and some national competition authorities) at the time on retailer power in the process of the revision of the EU regulation on vertical restraints.

The study of brands as an interdisciplinary exercise grew into an ongoing collaboration between the Institute for Consumer Antitrust Studies of Loyola University Chicago School of Law⁴ and the Centre for Law Economics and Society at University College London.⁵

The first aspect of this collaboration was a December 2011 conference, held at UCL in London, focusing primarily on the role of brands in UK and EU competition and trademark law.⁶ This conference included distinguished panelists from industry, academia, government, the judiciary, and the bar with a special focus on the issues relating to the role of private label brands as well as broader issues of competition and intellectual property.

¹ D. R. Desai and S. Weber Waller, "Brands, Competition, and the Law," *Brigham Young University Law Review* 5(1) (2010), 1425–500.

² D. R. Desai and S. Weber Waller, "The Competitive Significance of Brands," *Competition Policy International* 1 (July 2014); D. R. Desai, "Response: An Information Approach to Trademarks," *Georgetown Law Journal* 100 (2012), 2119–31; D. R. Desai, "A Brand Theory of Trademark," *University of Florida Law Review* 64 (2012), 981; D. R. Desai, "Bounded by Brands," *University of California Davis Law Review* 47 (2014), 821.

³ I. Lianos, "The Vertical/Horizontal Dichotomy in Competition Law: Some Reflections with Regard to Dual Distribution and Private Labels," in A. Ezrachi and U. Bernitz (eds.) *Private Labels, Brands and Competition Policy* (Oxford University Press, 2009), 161–86; I. Lianos, "New Kids on the Block: Retailer-Driven Vertical Practices and the New Regulation of Vertical Restraints in EU Competition Law," *Competition Policy International* 10(1&2) (2010), available online at: www.competitionpolicyinternational.com/new-kids-on-the-block-retailer-driven-vertical-practices-and-the-new-regulation-of-vertical-restraints-in-eu-competition-law/.

⁴ www.luc.edu/antitrust. ⁵ www.ucl.ac.uk/cles.

⁶ www.eventbrite.co.uk/e/brands-competition-law-and-ip-law-tickets-2338470428.

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This collaboration continued with a follow-up conference in October 2012 at Loyola University Chicago School of Law, which focused primarily on US perspectives. This conference brought together speakers from the business world, business theory, competition and intellectual property law, and economics to reflect on the role of brands in the economy and the differing ways that these fields have defined and regulated brands.⁷

There is a growing recognition that brands are too important a topic to be examined using a piecemeal and fragmented approach. There has been a recent proliferation of conferences and publications in the USA and the EU on this topic including symposia in the *University of California Davis Law Review*⁸ and the *Georgetown Law Journal*.⁹

At the same time, competition enforcers in both the United States and the European Union have shown an increased interest in, and sensitivity to, the role of brands in their cases and investigations. In general, the attention to unilateral effects in merger and other investigations is the study of product differentiation, branding, and its effects on competition in the relevant markets. As the authors in this volume discuss in greater detail, the role of brands appear with increasing frequency in the existing guidelines, consent decrees, commitments, and decisions in analyzing questions of market definition, entry barriers, market power, theories of competitive harm, and remedies in both jurisdictions.

This volume is part of the continuing conversation over the current treatment of brands in both competition and trademark law, and whether the law could benefit from a broader perspective on brands drawing on the vast and evolving business and marketing literature used by business theorists and executives in the marketplace. The twelve chapters and comments presented in this volume are drawn from, or inspired by, the two joint LUC and UCL brands conferences and the ideas they have generated.

While the debate in the chapters of this volume will continue, important themes have emerged. First and foremost, competition lawyers, trademark lawyers, business theorists, marketers, and economists all tend to view brands in different terms and often with a different vocabulary.

⁷ www.luc.edu/law/centers/antitrust/events/brands_competition_law.html.

⁸ Brand New World, <http://lawreview.law.ucdavis.edu/symposia/2012-fall/>.

⁹ M. A. Lemley and M. P. McKenna, "Is Pepsi Really a Substitute for Coke? Market Definition in Antitrust and IP," *Georgetown Law Journal* 100 (2012), 2055–117; D. R. Desai, "Response: An Information Approach to Trademarks," *Georgetown Law Journal* 100 (2012), 2119–131.

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We hope that the chapters in the volume will help guide the discussion toward a common understanding and eventually common proposals for improvement of the existing legal regime regarding brands and brand management.

The volume starts with an exploration of the way price theory and business studies have engaged with the concept of brand.

Professor Davis and Doctor Edwards-Warren from Compass Lexecon in their chapter on “An introduction to the competitive effects of branding” question the view that economics does not take brands sufficiently into account. Economics as a discipline is not defined by the very special case of homogeneous product industries where firms compete only in prices, consumers and firms have perfect information, and all industry dynamics happen instantaneously. The phenomenon of differentiated product markets is prevalent in the modern economy; hence the need for economics to develop tools to assess the effect of brands on prices. The chapter provides a brief overview of the different economic theories on the competitive effects of branding. It concludes that brands may play both a positive and negative role for consumer welfare and that public intervention through competition law should not occur without careful investigation of the effects of branding in the market at hand.

In their chapter on “Bayer or Walgreen’s? The relationship of premium and value brands in the United States,” Doctors James Langenfeld, Wenqing Li, and Sophie Yang of Navigant Economics dive into the world of private label brands and show that national brands and private or store brands compete and operate differently from each other. The authors find that national brands sales are often *more price-sensitive* than store brands; national brands often *compete more closely* with one another than with store brands; price changes in national brands often affect sales of store brands *more than store-brand price changes affect national brands*; the entry of store brands can lead to an increase in the own price elasticities of national brands; and promotions affect sales independently of actual prices in *economically predictable ways*. Their findings offer insights regarding how national and store brands compete and how pricing decisions are made depending on what other brands are offered in a given market.

Tony Appleton from Procter & Gamble and John Noble from the British Brands group, in their chapter on “The value of brands and the challenge of free-riding,” discuss the reality of brands from a business perspective, in particular the opposition between national brands

and private labels. They lament the fact that notwithstanding the role of brands in markets and the important value they generate for firms and consumers, there is no common understanding of what a brand is. Appleton and Noble take a “consumer-centric” approach to the concept of brand, explaining the role both consumers and brand owners play in the development of the brand value. They acknowledge that the practice of branding, which includes the manufacture, distribution, and sale of products, is highly regulated in a number of different ways. To illustrate this, they take a well-known problem for brand owners – parasitic copying – and explore the different remedies that have been put forward by different regulatory regimes interacting in this area, such as competition law, self-regulation, intellectual property law, and consumer law. Through their highly interesting problem-based study, Appleton and Noble illustrate the benefits of thinking across legal categories and regimes, thus exemplifying one of the major advantages of the concept of “brand law” in organizing the remedial response of these different areas of law.

The second part of this volume engages with the implications of brands and branding on competition law.

Professors Deven Desai of the Georgia Institute of Technology, Scheller College of Business, and Spencer Weber Waller of Loyola University Chicago School of Law present their chapter on “Brands, competition and antitrust law,” which is an adaptation of their earlier work. In this chapter they argue that US antitrust law has largely missed the competitive significance of modern brand management because of its focus on neo-classical price theory. They argue that the rise of the brand in the modern economy diminishes the role of price competition and raises issues of market segmentation, price discrimination, and consumer lock-in that antitrust law is only just beginning to analyze directly. They conclude by recommending that antitrust law enforcers and courts engage more directly with marketing literature and business theory to better understand brands and how to apply antitrust principles in a brand-based world economy effectively.

Professors Gregory Gundlach of the Coggin College of Business of the University of North Florida and Joan Phillips of the Quinlan School of Business of Loyola University Chicago apply their marketing expertise in their contribution “Brands and brand management: insights from marketing for antitrust.” In their contribution they survey the economics of product differentiation and the key marketing literature and seek to apply these insights to how antitrust policy makers should understand brands

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and brand management. They conclude that brands involve real product differentiation for both producers and consumers, pose complex effects for competition, and therefore require a greater use of business literature and theory to determine the effects of powerful brands in specific market settings.

Associate Dean Daniel Crane of the University of Michigan Law School offers “Brands and market power: a bird’s eye view.” In this thoughtful comment, Dean Crane introduces three challenges that brands pose for a coherent and effective antitrust policy. He first surveys the possible pro- and anti-competitive effects of brands. He then rejects the view that excessive branding can create artificial distinctions in the minds of consumers on the grounds that this premise places in jeopardy the underlying consumer sovereignty assumption of antitrust law. Finally he analyzes, but expresses doubt, whether individual brands should ever be defined as their own relevant market.

Professor Warren Grimes of Southwestern Law School continues his long-standing focus on vertical restraints and resale price maintenance in “The two sides of brand marketing: reconsidering competition law governing distribution restraints.” In this comment, Professor Grimes considers how brands are an essential part of modern efficient marketing, but at the same time represent a strong risk as a form of non-informational product promotion. In probing the pluses and minuses of modern brand management under the US antitrust laws, Professor Grimes analyzes the legality of three commonly used distributional restraints for branded products: dealer location clauses, exclusive territories, and minimum resale price maintenance.

Turning to competition law in Europe, Professor Ioannis Lianos’ chapter on “Brands, product differentiation and EU competition law” explores the way EU competition law has so far integrated the concept of brands in different areas of enforcement. Professor Lianos notes that although EU competition law has engaged with branding and product differentiation in multiple instances, brands do not constitute an operational concept in EU competition law. This is due to an important uncertainty as to the normative choices that need to be made with regard to the relation between brands and the formation of consumer preferences. The concerns raised by retailer power and the development of private labels also indicate that the existing economic theory on product differentiation may also not provide the complete picture of the effects of brands on the competitive process and ultimately on consumers. Competition law will also need to tackle the issues raised by the development of “social branding” and the

dialogic interaction between brand owners and consumers in the constitution of their brand identity, which breaks with a unidirectional view of the power relations between brand owners and consumers. Professor Lianos concludes by emphasizing the importance of normative choices and assumptions on the interaction between brands and the formation of consumer preferences, which, according to him, will be a key parameter in the integration of the concept of brands in EU competition law and other related areas of law (e.g. unfair trade practices law).

Professors Ariel Ezrachi and Ketan Ahuja further explore the nature of competition between private labels and brands in their chapter on “Private labels, brands and competition law enforcement.” Their contribution considers the unique characteristics of label/brand competition, which combine horizontal, vertical, and market power elements. According to them, these mixed characteristics pose a challenge to traditional competition analysis. The chapter explores the question whether traditional competition analysis may capture the complex competitive landscape and accurately weigh the short- and long-term effects of private labels on competition. The authors conclude that traditional competition analysis suffers from important limitations and suggest some alternatives.

The third part of the volume delves into the implications of brands on intellectual property law and its interaction with competition.

Professor John D. Mittelstaedt of the University of Wyoming, College of Business, brings law and brand management together in “Trademark dilution and the management of brands: implications of the Trademark Dilution Revision Act for marketing and marketing research.” In his contribution Professor Mittelstaedt argues that dilution recognizes that producers play an equal role to consumers in creating brand value. He offers that this shift requires that marketing scholarship plays a role in understanding the contours of fame, likelihood of dilution, and potential universal standards or thresholds at which blurring or tarnishment occur. He also offers the challenge that just as the concept of trademark has been constrained by the law, brands – which have not been so constrained – may be limited in the future where trademarks and brands are merged into legal analysis.

In her chapter Doctor Ilanah Fhima explores how “Trade mark law meets branding.” She notes that although trademarks and brands are often thought of as synonymous, lawyers and branding experts have different conceptions of how, why, and to what extent the identifying features of goods and services should be protected. Her chapter considers what those different conceptions are, and the extent to which there is common

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ground in relation to trademark dilution, which protects the image and reputation of the mark, as well as its more traditional distinguishing function. In her thoughtful contribution, Doctor Fhima explores the case law of the Court of Justice of the European Union (CJEU) on dilution and concludes that this takes two directions. The first suggests that the CJEU is moving toward protecting aspects of image and branding in a way that recognizes how consumers respond to trademarks and the brands of which they form a part. This line of case law protects trademarks not just as indications of trade origin but also as carriers of a protectable image built up through promotion and advertising. At the same time, however, the jurisprudence of the CJEU begins to show a willingness to treat aspects of brand image as a holistic whole in judging distinctiveness, use, and infringement, allowing brand owners to more successfully capture the benefit of the entirety of their brand, rather than just the individual elements that are registered as trademarks.

Professor Andrew Griffiths concludes this volume with a chapter on “Brands, firms and competition.” The chapter explores the “nebulous relationship” between brands and trademarks. It is acknowledged that the legal entity of the trademark provides the main legal platform for the marketing entity of the brand, yet it does not capture fully the multiple uses of brands by firms and other business organizations to compete with each other at the level of marketing. Professor Griffiths shows that the use firms make of brands may vary considerably. Some brands provide a “personable façade for the firms behind them”; other firms control a range of product-focused brands, and some brands can appear to be distinct and autonomous entities in their own right. Firms may also develop various competitive strategies. They may decide to invest in the emotional impact of their brands rather than directing investment and competitive effort at improving product quality and at building and maintaining a good reputation for product quality with the aim of achieving a sustainable competitive advantage and reinforcing their market power. While the “emotional and cognitive appeal” of branding should be taken into account when calibrating the property rights conferred on brand owners in order to ensure that they provide an optimal incentive, its social costs should also be considered. Professor Griffiths explores the way this balancing was performed by the jurisprudence of the CJEU on trademarks.

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