CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
July 2014 (2)

The Competitive Significance of Brands

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I. INTRODUCTION

Brands and brand management have become a central feature of the modern economy and a staple of business theory and business practice. Brands also have important effects on competition and the marketplace; yet the two key areas of law concerned with competition—trademark and antitrust—have missed the importance of branding.

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.

As a competition matter, businesses pursue that 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. This practice can be understood as a product differentiation tactic, which allows a branded good to turn a commodity into a special category that sees higher margins compared to the others in that market space. Despite these clear strategies and effects, trademark and antitrust law are somewhat blind to brands.

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 driver in understanding competition. This approach can be a useful and powerful way 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 contrast, businesses and business literature explicitly acknowledge that brands are used to compete on dimensions other than price. 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 (i) what brands (if any) consumers view as substitutes, (ii) when confusion does or does not arise in the marketplace, and (iii) how consumers choose between brands and between dealers for the same brands.

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The critical question is how to integrate brand management into existing legal doctrine. Our project is to answer this question.[2] We start by describing the way brands work. Then we set out the core mistakes trademark and antitrust law make. We conclude by explaining some of the differences a brand perspective would have for antitrust and trademark law.

II. HOW BRANDS WORK

Brands are far more than trademarks. Since the birth of mass market, mass communication, and mass transportation systems, companies have understood that trademarks are but a small part of the brand. 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 one objective: competitive dominance obtained by shaping preferences and extracting rent. Early manufacturers used marks as a way to "get around the retailer" and be able to extract higher prices from consumers for otherwise interchangeable goods.[3] The same situation is found today.

Brands are complex strategic tools that perform a variety of functions, including:

- creating demand;
- circumventing middlemen so that a company can reach consumers directly;
- managing quality;
- providing a platform for trademark enforcement, defining national identities; and
- satisfying consumers' emotional and psychological needs.

These functions, separately and in combination, allow a company to differentiate products, avoid commoditization of its products or services, distinguish the company and its goods or services from its competition, and build loyal customer bases for whom no other brand or item will suffice, such that consumers will pay a premium for that brand.

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 "real and sustainable competitive advantage … [because] the resulting effectiveness and efficiency of the program can represent significant barriers to competitors."[4] Put simply, branding undercuts the way in which consumers might otherwise shop and obtain the lowest price for goods.

The law, however, has ignored the full role of brands and failed to capture the way companies use brands for competitive advantage, and has also ignored 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 promotes, through a permissive trademark system that effectively grants brand protection but fails to acknowledge that it does so.

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[2] *See* Deven R. Desai & Spencer Weber Waller, *Brands Competition and the Law*, 2010 B.Y.U. L. REV. 1425. This essay is adapted from our article.

[3] CELIA LURY, BRANDS: THE LOGOS OF THE GLOBAL ECONOMY 19 (2004).

[4] Erich Joachimsthaler & David A. Aaker, *Building Brands Without Mass Media*, 75 HARVARD BUS. REV. 39, 50 (January-February 1997).

III. TRADEMARK MISTAKES

Trademark law fails to recognize that trademarks are only a subset of businesses' broader brand strategy in the real world.[5] The dominant theoretical approach is the search cost theory of trademarks, which holds that a trademark ought to function as a sign of "consistent source and quality."[6] Once that occurs, "Rather 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."[7] As Barton Beebe has observed, this view has been "totalizing and, for many, [the] quite definitive theory of American trademark law."[8]

A successful brand, however, encompasses far more than source and quality functions. As such, trademark law is incomplete and regulates only a fraction of the real business behavior that matters. In addition, trademark law over time has expanded the subject matter of trademarks and what constitutes infringement. 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.[9] 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 transformation took place with little recognition of the significance of brands and branding. The overall effect was an important legal change 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. 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 anticompetitive behavior involving trademarks and related rights. Antitrust law, however, fared no better.

IV. ANTITRUST MYOPIA

Antitrust law as a discipline was also unable 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, 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 law's ability to understand and respond to the rise of the brand as a tool for possibly anticompetitive behaviors

[5] *See* Deven R. Desai, *From Trademarks to Brands*, 64 FLORIDA L. REV. 981 (2012).

[6] Robert N. Klieger, *Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection*, 58 U. PITT. L. REV. 789, 789 (1997).

[7] Stacey Dogan & Mark Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 786-787 (2004).

[8] Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 623 (2004).

[9] *See generally* Mark 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-confusion uses).

such as (i) diminishing the role of price competition, (ii) segmenting market demand, (iii) facilitating price discrimination, and (iv) locking in consumers to a favored brand.

The antitrust world heavily discounts what is obvious to the business world—that brands matter and can be the source of both 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 exclusion of most other factors.[10] 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 in a predatory pricing as an example of the prevailing ethos in antitrust law:

> 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. … Entrepreneurs who work hardest to cut their prices will do the most damage to their rivals, and they will see good in it. … 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.[11]

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 emphasizes product differentiation, and downplays price competition, as the most effective strategy for obtaining a sustainable competitive advantage.[12] He tellingly states: "Any fool can cut the price, goes the old maxim, and a firm often hurts itself more than the challenger in defending in this way."[13]

As a result of this cognitive dissonance, there has been a limited incorporation of brand management in antitrust.[14] 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 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.

Although there are numerous antitrust cases that 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 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

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[10] Spencer Weber Waller, *The Language of Law and the Language of Business*, 52 CAS. WES. L. REV. 283, 283-84 (2001); Spencer Weber Waller, *The Use of Business Theory in Antitrust Litigation*, 47 N.Y.L.S. L. Rev. 119, 120 (2003).

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

[12] MICHAEL E. PORTER, COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITORS, 21-22 and 170-171 (1980).

[13] MICHAEL E. PORTER, COMPETITIVE ADVANTAGE xv, 501 (1985).

[14] *Roundtable Discussion, Business Strategy and Antitrust*, 21 ANTITRUST 6 (Fall 2006); Joseph P. Guiltinan, *Choice and Variety in Antitrust Law: A Marketing Perspective*, 21 J. PUB. POL'Y & MARKETING 260 (2002).

use or licensing of a trademark has been a sham designed to implement a typical *per se* unlawful price-fixing or market division conspiracy.[15] Thus, trademarks (and sometimes 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. Put differently, given that antitrust does not understand branding, antitrust cannot coherently navigate when brands have, or do not have, negative effects.

V. THE BRAND DIFFERENCE

Our claim is simple: 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.[16] 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.

Applying 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. For example, talk of cross-elasticity of demand and own elasticity is replaced by analysis of "shoppers" or "switchers" versus "loyals."[17] Survey data may be considered instead of, or along with, regression and simulation models. The focus will 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.[18]

The competitive strategic techniques to be analyzed will vary from case to case but would include brand extensions, increasing switching costs in different ways, resale price maintenance 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 law 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.[19] Not all changes would favor producers. Whereas trademark doctrine does a poor job of accommodating

[15] Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990); U.S. v. Sealy, Inc., 388 U.S. 350 (1967); Timken Roller Bearing Co. v. U.S., 341 U.S. 593 (1951).

[16] *See* Waller, *Language of Law*, *supra* note 10, at 337-38.

[17] *See* JILL GRIFFIN, TAMING THE SEARCH AND SWITCH CONSUMER: EARNING CUSTOMER LOYALTY IN A COMPULSION-TO-COMPARE WORLD (2009), *passim*.

[18] Note that some of these ideas should not be foreign to economics as some game literature investigates how one shifts from a one-off interaction to a series of interactions that changes cost structures.

[19] *See* Desai, *supra* note 5.

consumers' desires to use marks for expression, recent brand theory recognizes both 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.[20] 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 issues beyond source and quality would be properly addressed. [21]

VI. CONCLUSION

We are in a world where the law fosters cradle-to-grave protection for branded goods and services. The law must expand its horizons to appreciate what it is doing, better articulate what it is doing, and determine what it seeks to achieve. A deeper understanding of brands and brand discourse can yield a more accurate 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, which would in turn permit for clear, critical discussion regarding the normative desirability of such outcomes.

In the five years since we started this work, many have heeded our call. There have been two conferences about the ideas raised in our paper, and Cambridge University Press is publishing an edited volume of prominent U.S. and E.U. scholars' views on questions we have raised.[22] Professor Desai's follow-up works on brands has set forth (i) how brand logic animates trademark law, (ii) where information and network theory shows better how brands operate, and (iii) the way in which brands apply behavioral economic strategies to ensconce competitive advantages.[23] U.C. Davis's School of Law also held a conference digging deeper into the many issues branding raises.[24]

Most encouragingly, antitrust regulators have begun to ask explicit questions in both guidelines and cases about the role branding plays in the competition space. In short, we plan on continuing this work, are excited that others are joining in, and hope to see more on brands, competition, and the law.

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[20] *See e.g.*, TILDE HEDING, CHARLOTTE F. KNUDTZEN, MOGENS BJERRE, BRAND MANAGEMENT RESEARCH, THEORY AND PRACTICE 21, 154-155 (2009); Desai, *supra* note 5.

[21] *See* Desai, *supra* note 5.

[22] BRANDS, COMPETITION, AND THE LAW (Deven Desai, Ioannis Lianos, & Spencer Weber Waller, eds. forthcoming 2015).

[23] Desai, *supra* note 5.

[24] *Symposium—Brand New World: Distinguishing Oneself in the Global Flow*, 47 U.C. DAVIS L. REV. 455-733 (2013).