Advanced Trademark and False Advertising Law Seminar
Course Information and Syllabus

Course Description: In depth analysis of developing issues in trademark and unfair competition law, including the legal, economic and moral rationales for protection of trademarks, trade dress, domain names, celebrity persona, and related intellectual property rights; the nebulous concept of trademark dilution; the tensions among trademark protection on the one hand, and parody, fair use and free speech on the other; regulation of comparative, misleading and deceptive advertising; the international dispute resolution system for challenges to domain name registrations; the use and abuse of trademarks on the Internet; and trademarks in international trade, including the extraterritorial effect of U.S. trademark law, the protection of well-known marks not used in the United States, restrictions on parallel imports, and use of geographic trademarks and indications. This seminar also will include a number of in-class practical exercises, including challenging domain names using the Uniform Domain Name Dispute Resolution Policy (“UDRP”) and a review of a mock website for a new consumer product.

Prerequisites: Prior course work in trademark law or the survey of intellectual property law is required, though students with other professional experience related to trademark law may also enroll.

Course Schedule: Class will be held on Tuesdays from 6:00-7:50 PM. Please note that because Professor Bernstein maintains an active trial practice in trademark, advertising and other intellectual property cases, he will not be able to join us for all of our class sessions. We may modify the order of topics considered to ensure that Professor Bernstein can join us for certain topics and will give course participants significant advanced notice if that occurs.

Course Format: Classes will often include a lecture and extensive Power Point presentations, accompanied with images of the relevant trademarks, websites and advertisements from that week’s topic, followed by active discussion. We generally will post the Power Point slides to blackboard prior to each class.

Online Discussion Board: Three times through the course of the semester, each student will be required to volunteer to post a brief (maximum of two paragraphs) comment on the reading for the following week. Each student will additionally be required at any time through the course of the semester to post at least one comment spontaneously on any particular week’s
reading. Students should plan to post their comments by 10:00 PM the Monday evening before the Tuesday evening class. All students will be expected to read the posted comments before class.

**Final Exam:** The final exam will consist of an 8-hour, self-scheduled, open-book, take-home exam. The exam will present a series of questions and scenarios covering topics discussed in class.

**Substantial Writing:** Students may request permission to write their substantial paper for the course instead of taking the final exam. Please speak with Professor Beebe about this.

**Grading Policy:** Your grade will be based on three elements: (1) your final exam (based on the content and treatment of the questions and scenarios presented), (2) your postings to the course’s online discussion board, and (3) your classroom participation (we will adjust your grade up one step (e.g., a B+ could be lowered to a B or raised to an A-) for excellent, consistent participation in class; we will adjust your grade down one step if you do not regularly attend and participate in class.) Class participation will be assessed based on your familiarity with the reading material, the quality of your comments in class, and your performance during in-class exercises.

**Office Hours and Contact Information:** Office hours with Professor Bernstein are by appointment only. The best way to contact Professor Bernstein is by e-mail to his Debevoise email address shown above. Office hours with Professor Beebe are Friday afternoons, 2:30 PM to 4:00 PM, and by appointment.

**Reading Assignments:** All students are expected to have read the required reading and participate in class discussion. The required reading is available on the course website. In some cases, we have assigned excerpts; for those students interested in extra reading, we have included the full articles in the course packet. We also will expect students to be familiar with the cases covered in the introductory trademark course. For students interested in a refresher on the key cases or in reading more about a particular topic, the syllabus includes citations to the key cases that form the foundation for the week’s topic (these cases are not included in the course packets but can easily be found online or through the library).

**Learning Outcomes:** Students will enhance their substantive knowledge of trademark and false advertising law and practice.
1. January 16 – Rationales for Protection of Trademarks, Trade Dress, Domain Names, Celebrity Persona and Related Intellectual Property Rights

Required Reading

- **RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 9, cmt. c (1995)**


Potential Discussion Topics

- What are the most persuasive justifications for trademark protection? Is trademark law structured to maximize the societal benefits sought to be advanced by trademark protection? How can the law be improved to more effectively promote those benefits?

- A standard critique of trademark protection is that it abets consumerism and irrational consumer decision-making. Is this critique persuasive? If the critique is persuasive, how can trademark law be reformed to minimize the deleterious effects, if any, of branding?

2. January 23 – The History of U.S. Trademark Law

Required Reading

- **RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 9, cmts. b, d-g (1995)**


- **DAPHNE ROBERT, THE NEW TRADE-MARK MANUAL: A HANDBOOK ON PROTECTION OF TRADE-MARKS IN INTERSTATE COMMERCE 228-237 (1947)**

- Pre-Lanham Act American Trademark Legislation (*focus on the 1905 Act*): Act of 1870; Act of August 14th, 1876; Act of March 3, 1881; Act of August 5, 1882; Act of February 20, 1905, as amended; Act of March 19, 1920, as amended; Tariff Act of 1930; Act of June 10, 1938
3. January 30 – Trademark Dilution

Required Reading


Potential Discussion Topics

- Is there a rational basis for trademark dilution protection, or is the harm Schechter envisioned now obsolete in light of legal and marketplace developments over the last 80 years?
- Given the policy goals of dilution law, are there changes you would recommend to the TDRA?
- There are some parallels between dilution protection and right of publicity protection, both of which provide trespass-like protection regardless of the existence of confusion. Are those parallels real or illusory? If they are real, what can each area of law learn from the other? If they are illusory, what different justifications underlie the different treatment?
- How are dilution and dilution-like remedies treated in different countries, and what can we learn from other countries’ experiences in applying dilution law in the United States?

4. February 6 – Celebrities and the Right of Publicity

Required Reading

- *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915 (6th Cir. 2003)

Background Cases

- *Brown v. Electronic Arts*, 724 F.3d 1235 (9th Cir. 2013)
- *In re NCAA Student–Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268 (9th Cir. 2013)
- *White v. Samsung Elecs. Am., Inc.*, *reh’g en banc denied*, 989 F.2d 1512 (9th Cir. 1993) (Kozinski, dissenting)
Potential Discussion Topics

- What are the valid justifications for providing any protection for the right of publicity? How should the law be changed to more closely align the application of right of publicity law to those justifications?

- The Supreme Court has suggested that certain parodies are fair uses under copyright law; to what degree should the same analysis apply in trademark and right of publicity matters?

- Is the transformative use doctrine a principled way of resolving right of publicity cases?

5. February 13 – Parody, Fair Use and Free Speech

Required Reading


6. February 27 – Trademark Functionality Doctrine

Required Reading

- Mark P. McKenna, (Dys)Functionality, 48 HOUSTON L. REV. 823 (2011)

- Jay Franco & Sons, Inc. v. Franek, 615 F.3d 855 (7th Cir. 2010)


Background Cases

- In re Morton-Norwich Products, 671 F.2d 1332 (C.C.P.A. 1982).


- Valu Engineering, Inc. v. Rexnord Corp., 278 F.3d 1268 (Fed. Cir. 2002).
Potential Discussion Topics

1. How should trademark law define functional product features that should not receive trademark protection?

2. As between Valu Engineering and Eppendorf, which is the preferable approach to determining the utilitarian functionality of product features?

3. Is aesthetic functionality a useful doctrine in trademark law? Does it require a doctrinal approach different from that required by utilitarian functionality?

7. March 6 – Issues in Territoriality: Protection Within the U.S. Without Use Within the U.S. & Extraterritorial Application of U.S. Trademark Law

Required Reading

- Belmora LLC v. Bayer Consumer Care AG, 819 F.3d 697 (4th Cir. 2016)
- TIM W. DORNIS, TRADEMARK AND UNFAIR COMPETITION CONFLICTS 159-164 (2017)
- Steele v. Bulova Watch Co., 344 U.S. 280 (1952)
- Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 636-43 (2d Cir. 1956)
- Trader Joe's Co. v. Hallatt, 835 F.3d 960, 962-75 (9th Cir. 2016)

Background Cases

- Person's Co., Ltd. v. Christman, 900 F.2d 1565 (Fed. Cir. 1990)
- Grupo Gigante SA De CV v. Dallo & Co., Inc., 391 F.3d 1088 (9th Cir. 2004)
- ITC Ltd. v. Punchgini, Inc., 482 F.3d 135 (2d Cir. 2007)
8. March 20 – Trademark Rights and the Domain Name System

Required Reading


- WIPO Overview of WIPO Panel Views on Selected UDRP Questions 47-71 (2017) (section on Third UDRP Element)


- ICANN, Rights Protection Mechanisms Review (Sept. 2015)

Potential Discussion Topics

- Is the UDRP an inherently fair and efficient way to resolve domain name disputes, or is the system biased in favor of either trademark owners or cybersquatters (and if so, how can it be fixed)?

- How should the UDRP resolve domain name disputes when the parties are located in two different countries with clearly different approaches to certain substantive law issues (for example, gripe sites and fan sites where the critic or fan managed to register TRADEMARK.tld before the brand owner herself)?

- Should UDRP principles be extended to disputes over new gLTDs, where the alleged cybersquatting occurs in the top level domain itself, and if so, how? What rights protection mechanisms should ICANN adopt as part of the expansion of the domain name system with new gTLDs?

- How should the UDRP system address the growing use of privacy registration services for domain names?
9. March 27 - Regulation of Comparative, Misleading and Deceptive Advertising

**Required Reading**


**Possible Discussion Topics**

- Is the doctrine of “false by necessary implication” (which allows judges to determine the implied messages of an advertisement without considering consumer perception surveys) a principled way of resolving false advertising cases?

- Should courts apply a presumption of irreparable injury upon a showing of a likelihood of success on the merits in false advertising litigation?

- Do FTC orders requiring an advertiser to issue corrective advertising conflict with the advertiser’s free speech rights?

- Should a material false statement made to a single customer in interstate commerce be actionable as false advertising under Section 43(a) of the Lanham Act?

**Advertising Law Exercise**

Materials for the advertising law exercise will be circulated during class. We will review in class potential claims and strategies in challenging and defending against false advertising claims.

10. April 3 - Consumer Perception Surveys in Trademark and Unfair Competition Cases

**Required Reading**


**Possible Discussion Topics**

In reading through the sample survey reports, consider the following questions:
• Were appropriate universes used for these surveys?
• Were appropriate samples selected for the surveys?
• Were the survey questions appropriately phrased?
• Were the surveys properly controlled?
• Were the survey results properly analyzed and reported?
• Do the reported survey results support a finding of confusion?

11. April 10 – Geographic Indications

Required Reading

• TRIPS AGREEMENT, Articles 22-24
• DEV GANGJEE, RELOCATING THE LAW OF GEOGRAPHICAL INDICATIONS 183-264 (2012)

12. April 17 – European Trade Mark Law

Required Reading

• Charles Gielen, Trademark Dilution Under European Law, 104 TRADEMARK REPORTER 693 (2014)

13. April 24 - Secondary Liability in Trademark Law

Required Reading


Background Cases

• Tiffany (NJ) Inc. v. eBay, Inc., 600 F.3d 93 (2d Cir. 2010)
• Perfect 10, Inc. v. Visa Intern. Service Ass’n, 494 F.3d 788 (9th Cir. 2007)


14. May 1 – To be determined
§ 9 Definitions of Trademark and Service Mark

A trademark is a word, name, symbol, device, or other designation, or a combination of such designations, that is distinctive of a person’s goods or services and that is used in a manner that identifies those goods or services and distinguishes them from the goods or services of others. A service mark is a trademark that is used in connection with services.

Comment:

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c. Rationale for protection. The protection of trademarks has been justified on numerous grounds. Early case law emphasized the unfairness inherent in a diversion of trade from the owner of the mark through a fraudulent use of the trademark. Liability for trademark infringement also served to remedy the unjust enrichment resulting from the infringer’s appropriation of benefits attributable to the good will of the trademark owner. The rules prohibiting trademark infringement were seen as part of a general attempt to implement standards of commercial morality and fair dealing in the market.

Modern economic analysis emphasizes additional interests underlying the protection of trademarks. The public benefits afforded by competitive markets cannot be fully realized unless prospective consumers can differentiate the products of competing sellers. In the absence of effective trademark protection, individual sellers gain little from improvements in product quality or service since they cannot easily recapture the benefits of a favorable consumer response. The protection of trademarks thus encourages investment in quality and service by securing to the trademark owner the benefits of a favorable reputation. Nonprofit enterprises such as charitable, educational, governmental, fraternal, and religious organizations have analogous interests in protecting their good will, and the designations adopted by such enterprises to identify their goods or services are similarly eligible for protection as trademarks.

As the geographic scope of markets expanded and systems of distribution became increasingly complex, trademarks came to function as an important instrument of advertising. Trademarks serve as a means of communication between otherwise unknown or anonymous producers and their prospective customers. If the trademark owner succeeds in creating a favorable image for its trademark in the marketplace, the mark itself can become a significant factor in stimulating sales. This ability of a mark to generate good will through advertising has also gained recognition under the law of trademarks.

The protection of trademarks also functions as an indirect form of consumer protection. In some cases a trademark may specifically identify the manufacturer of the goods or services, thus enabling consumers to base their purchasing decisions on the reputation of the business identified by the mark. Even when the trademark does not identify a particular
business entity known to consumers, it can nevertheless indicate that the product emanates from the same source as other goods or services that bear the mark. The trademark thus informs consumers that the product shares a common even if anonymous source with other goods with which they may be familiar. Similarly, the presence of a trademark can signify that the goods or services are sponsored or approved by a particular business. In all these circumstances the trademark functions as an indication of consistent and predictable quality. Trademark infringement increases the cost of acquiring knowledge about goods and services by undermining the capacity of trademarks to communicate useful, reliable information. For consumers who are deceived by an unauthorized use of the mark, trademark infringement can result in improvident expenditures and unfulfilled expectations.

The economic analysis that has been invoked to support a vigorous system of trademark protection has not gone unquestioned. Some argue that strong trademarks act as barriers to the entry of new competitors and also enable trademark owners to escape the full rigors of competition through product differentiation and irrational brand loyalty sustained by advertising. Recognition of trademark rights in words and symbols can also inhibit the communication of useful information by other sellers in the market. The extension of trademark protection to packaging and product features can undermine the freedom to copy successful products unprotected by patent or copyright. Such encroachments on the public domain can result in higher prices and decreased access to goods and services. Although these criticisms have not undermined the basic commitment to the protection of trademarks, their influence is evident in the continuing effort to delineate the appropriate scope of protection.

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That the law of intellectual property, including trademark law, can be analyzed in economic terms is no longer an insight with any power to astonish or even to offend. Still needed, however, is an analysis that formalizes the economics of trademarks, relates trademarks to other forms of property, brings to bear the nascent economics of language and communication, and discusses and interrelates the principal doctrines of trademark law. To supply this need is the task we have set ourselves in this article. It is an essay in positive rather than normative "law and economics." We use economics to explain the structure of trademark law rather than to urge changes in that law. The overall conclusion is that trademark law, like tort law in general (and trademark law is part of the branch of tort law known as unfair competition), can best be explained on the hypothesis that the law is trying to promote economic efficiency.

I. The Economic Theory of Property

The analysis draws heavily on the economics of property rights in law. A property right is a legally enforceable power to exclude others from using a resource, without need to contract with them. A property right confers two types of economic benefit, static and dynamic. The former is illustrated by a natural (that is, uncultivated) pasture. If the owner cannot exclude others from using his pasture, there will be overgrazing; users of the pasture will ignore the costs they impose on each other in reducing the cattle's weight by making the cattle expend more energy in grazing in order to find enough to eat. The dynamic benefit of a property right is the incentive that the right imparts to invest in the creation or improvement of a resource in period 1 (for example, planting a crop) if no one else can appropriate the resource in period 2 (harvest time). For example, a firm is less likely to expend resources on developing a new product if competing firms that have not borne the expense of development can duplicate the product and produce it at the same marginal cost as the innovator; competition will drive price down to marginal cost, and the sunk costs of invention will not be recouped.

1 Both the static and the dynamic benefits of property rights presuppose that there are too many potential users of the property for transactions with all of them to be economical. When transaction costs (which in general, though not always, are a positive function of the number of contracting parties) are low, the Coase Theorem implies that enforceable contract rights are all that are needed to achieve optimal
Property rights impose costs as well as confer benefits. The costs of property rights are fourfold. The first is the cost of transferring such rights. If it is too high, a property right may prevent optimal adjustments to changing values. Suppose a factory is assigned a property right to the use of a river that runs beside it, because the river is more valuable as a sewer than for recreation, but as the years go by the relative values of these uses reverse. If the recreational users are numerous, the transaction costs of their buying the right to use the river from the factory may exceed the value of the right to them. In such a case, a liability rule would be better. The factory could be induced to discontinue its use of the river by being made to pay damages equal to the costs of the pollution to recreational users. The rule would reallocate the use of the river in accordance with changed values, without requiring a transaction.

The second major cost of a property rights system is what economists call "rent seeking." Suppose a ship has sunk and it has a salvage value of one million dollars, while the cost of salvage is only one-hundred thousand dollars. The potential gain (a form of economic rent) to the salvor is nine-hundred thousand dollars if a property right in the sunken ship can be acquired -- and the competition to acquire it may eat up all or most of the potential rents, transforming them into social costs. Intellectual property sometimes creates serious problems of rent seeking, because the resource is continuously created or discovered rather than being already owned. Like the sunken ship whose owner has abandoned it, it is waiting to be invented.

The third cost of property rights is that of protection and enforcement. It includes the costs incurred by police and courts in preventing trespass and theft, as well as the cost of a fence used to mark boundary lines or the cost of a registry used to record land titles. Intellectual property is particularly costly to protect. An idea cannot be seen, the way a piece of land can be. The land might have been transferred by inheritance for many generations but it is the same piece of land, recorded in the same land registry. Tracing the descent of an idea is harder. Moreover, because of the "public good" character (roughly, the ease of using without paying) of intellectual property, it can be costly, without legal protection, to prevent misappropriation and exclude free riders.


This example assumes, of course, that the original owner of the ship abandoned it, so that it is unowned. If it has not been abandoned, the owner can simply auction off the right to salvage the ship to the highest bidder, and there will be no rent-seeking problem.
The last cost of property rights is the social cost of restricting the use of property when it has a public good character. In the case of farmland, whether cultivated or uncultivated, adding a user will impose costs on the existing user(s); so the fact that a fence keeps additional users out need not impose a net cost. But often, adding users will not impose costs on previous users of intellectual property—not directly anyway. One farmer's using the idea of crop rotation does not prevent other farmers from using the same idea. When the marginal cost of using a resource is zero, excluding someone from using it creates a deadweight loss, in addition to the cost of enforcing exclusion.

Since intellectual property is a particularly costly form of property, we would expect (and we find) that it is limited in ways that physical property is not. For example, the requirement that an invention, to be patentable, not be obvious excludes property rights in inventions when excessive rent seeking would be a serious problem if such rights were recognized. For "obviousness" implies a low cost of discovery and development and therefore a large potential gap between value and cost—a large opportunity to obtain economic rents. The limited duration of patents limits rent seeking by putting a ceiling on the expected value of the patent. It also reflects the high cost of tracing an idea over a long period of time in which it may have become embodied in a great variety of inventions.

II. THE ECONOMICS OF TRADEMARKS

A. Introduction

To oversimplify somewhat, a trademark is a word, symbol, or other signifier used to distinguish a good or service produced by one firm from the goods or services of other firms. Thus SANKA designates a decaffeinated coffee made by General Foods Corp.; XEROX the dry copiers made by Xerox Corporation; BIB -- the MICHELIN MAN -- tires made by the Michelin Company. A stylized penguin is the symbol of a line of paperback books published by Penguin Books; a distinctively shaped green bottle is a trademark of the producer of Perrier bottled water; the color pink is a trademark for residential insulation manufactured by Owens-Corning.

1. Benefits of Trademarks

3 It may of course discourage investment by preventing the previous users from recouping their sunk costs. This is the familiar "access v. incentives" trade-off discussed in many intellectual property cases.

4 Of course, when more farmers use crop rotation, output will rise and price will fall. Hence, extending crop rotation to other farmers imposes pecuniary costs on farmers already using crop rotation. We ignore these effects.
Suppose you like decaffeinated coffee made by General Foods. If General Foods' brand had no name, to order it in a restaurant or grocery store you would have to ask for "the decaffeinated coffee made by General Foods." This would take longer to say, require you to remember more, and require the waiter or clerk to read and remember more than if you could just ask for SANKA. The problem would be even more serious if General Foods made more than one brand of decaffeinated coffee—as in fact it does. The benefit of a brand name is analogous to that of designating individuals by last as well as first names, so that, instead of having to say "the Geoffrey who teaches constitutional law at the University of Chicago Law School—not the one who teaches corporations," you can say "Geoffrey Stone -- not Geoffrey Miller." In economic terms, the brand name reduces "consumer search costs."

To perform this economizing function, a trademark or brand name (these are rough synonyms) must not be duplicated. For another maker of decaffeinated coffee to sell its coffee under the name "Sanka" would destroy the benefit of the name in identifying a brand of decaffeinated coffee made by General Foods. (Whether there might be offsetting benefits is considered later.) It would be like allowing a second rancher to graze his cattle on a pasture the optimal use of which required that only one herd be allowed to graze. Moreover, as we are about to see, the failure to enforce trademarks would impose two distinct costs -- one in the market for trademarked goods and the other in the market in language.

(a) The Market for Trademarked Goods

The benefits of trademarks in reducing consumer search costs require that the producer of a trademarked good maintain a consistent quality over time and across consumers. Hence trademark protection encourages expenditures on quality. Suppose a consumer has a favorable experience with brand X and wants to buy it again. Or suppose he wants to buy brand X because it has been recommended by a reliable source or because he has had a favorable experience with brand Y, another brand produced by the same producer. Rather than investigating the attributes of all goods in order to determine which one is brand X or is equivalent to X, the consumer may find it less costly to search by identifying the relevant trademark and purchasing the corresponding brand. For this strategy to be efficient, however, not only must it be cheaper for the consumer to search for the right trademark than for the desired attributes of the good, but past experience must be a good predictor of the likely outcome of current consumption choices. That is, the brand must exhibit consistent quality. Thus, a trademark conveys information that allows the consumer to say to himself, "I need not investigate the attributes of the brand I am about to purchase because the trademark is a shorthand
way of telling me that the attributes are the same as that of the brand I enjoyed earlier.”

[12] Less obviously, a firm's incentive to invest resources in developing and maintaining (as through advertising) a strong mark depends on its ability to maintain consistent product quality. In other words, trademarks have a self-enforcing feature. They are valuable because they denote consistent quality, and a firm has an incentive to develop a trademark only if it is able to maintain consistent quality. If a brand’s quality is inconsistent, consumers will learn that the trademark does not enable them to relate their past to future consumption experiences. The branded product will then be like a good without a trademark; the trademark will not lower search costs, so consumers will be unwilling to pay more for the branded than for the unbranded good. As a result, the firm will not earn a sufficient return on its expenditures promoting the trademark to justify the expenditures. A similar argument shows that a firm with a valuable trademark would be reluctant to lower the quality of its brand because it would suffer a capital loss on its investment in the trademark.

[13] It should be apparent that the benefits of trademarks in lowering consumer search costs presuppose legal protection of trademarks. The value of a trademark is the saving in search costs made possible by the information or reputation that the trademark conveys or embodies about the brand (or the firm that produces the brand). Creating such a reputation requires expenditures on product quality, service, advertising, and so on. Once the reputation is created, the firm will obtain greater profits because repeat purchases and word-of-mouth references will generate higher sales, and because consumers will be willing to pay higher prices in exchange for lower search costs and greater assurance of consistent quality. However, the cost of duplicating someone else's trademark is small -- the cost of duplicating a label, design, or package where the required inputs are widely available -- and the incentive to incur this cost (in the absence of legal regulation) will be greater the stronger the trademark. The free-riding competitor will, at little cost, capture some of the profits associated with a strong trademark because some consumers will assume (at least for a time) that the free rider’s brand and the original trademark holder's brand are identical. If the law does not prevent it, free

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5 As emphasized in John F. Coverdale, Trademarks and Generic Words: An Effect-on-Competition Test, 51 University of Chicago Law Review 868 (Summer, 1984), the benefits of a trademark to the consumer need not depend on whether the trademark identifies a particular brand or identifies the producer of that brand. Consumers benefit even if they are unable to identify the producer of a brand they desire to purchase. See Bayer Co. v. United Drug Co., 272 Fed 505, 509 (SDNY 1921) (L. Hand, J.).
riding will eventually destroy the information capital embodied in a trademark. The prospect of free riding may therefore eliminate the incentive to develop a valuable trademark in the first place.

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2. The Costs of Legally Enforceable Trademarks

[14] These costs are modest, at least in the simple case of the "fanciful" mark, such as EXXON and KODAK, which has no information content except to denote a specific producer or brand. Since the mark "goes with" the brand (in a sense explained later), the transfer of the mark is automatically effected by a transfer of the rights to make the branded product, as by selling or licensing the production rights or assets. Unlike the case of the sunken ship, rent seeking to stake out a trademark is not much of a problem either. The distinctive yet pronounceable combinations of letters to form words that will serve as a suitable trademark are as a practical matter infinite, implying a high degree of substitutability and hence a slight value in exchange. Finally, the costs of enforcement, though not trivial (especially where there is a danger of a brand name's becoming a generic name), are modest, and (again putting aside the generic problem) do not include the cost in inefficient resource allocation from driving a wedge between price and marginal cost. A proper trademark is not a public good; it has social value only when used to designate a single brand.

[15] We may seem to be ignoring the possibility that, by fostering product differentiation, trademarks may create deadweight costs, whether of monopoly or (excessive) competition. We have assumed that a trademark induces its owner to invest in maintaining uniform product quality; but another interpretation is that it induces the owner to spend money on creating, through advertising and promotion, a spurious image of high quality that enables monopoly rents to be obtained by deflecting consumers from lower-price substitutes of equal or even higher quality. In the case of products that are produced according to an identical formula, such as aspirin or household liquid bleach, the ability of name-brand goods (Bayer aspirin, Clorox bleach) to command higher prices than generic (nonbranded) goods has seemed to some economists and lawyers an example of the power of brand advertising to bamboozle the public and thereby promote monopoly, and brand advertising presupposes trademarks -- they are what enable a producer to readily identify his brand to the consumer. Besides the possibility of creating monopoly rents, trademarks may transform rents into costs as one firm's expenditure on promoting its mark cancels out that of another firm. Although no monopoly profits are created, consumers may pay higher prices, and resources may be wasted in a sterile competition.
[16] The short answer to these arguments is that they have gained no foothold at all in trademark law, as distinct from antitrust law. The implicit economic model of trademarks that is used in that law is our model, in which trademarks lower search costs and foster quality control rather than promote social waste and consumer deception. A longer answer, which we shall merely sketch, is that the hostile view of brand advertising has been largely and we think correctly rejected by economics. n22 The fact that two goods have the same chemical formula does not make them of equal quality to even the most coolly rational consumer. That consumer will be interested not in the formula but in the manufactured product and may therefore be willing to pay a premium for greater assurance that the good will actually be manufactured to the specifications of the formula. Trademarks enable the consumer to economize on a real cost because he spends less time searching to get the quality he wants. If this analysis is correct, the rejection by trademark law of a monopoly theory of trademarks is actually a mark in favor of the economic rationality of that law.

Excerpt from Ralph Brown, Advertising and the Public Interest: Legal Protection of Trade Symbols, 57 Yale L.J. 1165, 1165-1170, 1180-1183, 1184-1191 (1948)

"The protection of trade-marks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trademark is a merchandising short-cut which induces a purchaser to select what he wants, or what he had been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the end is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trade-mark owner has something of value. If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress." Frankfurter, J., in Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.

[1] The law of trade symbols is of modern development, largely judge-made and only partly codified. Its impetus comes from the demands of modern advertising, a black art whose practitioners are part of the larger army which employs threats, cajolery, emotions, personality, persistence and facts in what is
termed aggressive selling. Much aggressive selling involves direct personal relationships; advertising depends on the remote manipulation of symbols, most importantly of symbols directed at a mass audience through mass media, or imprinted on mass-produced goods. The essence of these symbols is distilled in the devices variously called trade-marks, trade names, brand names, or trade symbols. To the courts come frequent claims for protection, made by those who say they have fashioned a valuable symbol, and that no one else should use it. Very recently, for example, the vendors of Sun-Kist oranges lost a court battle to prevent an Illinois baker from selling Sun-Kist bread. The highest court, in its most recent encounter with a like case, upheld the power of a manufacturer of rubber footwear to prevent the use of a red circle mark by a seller of rubber heels, which the plaintiff did not manufacture.

[2] In these cases, a choice of premises and techniques is still open. One set of premises, which seems to subsume Justice Frankfurter's felicitous dictum, recognizes a primary public interest in protecting the seller who asks the court to enjoin "another [who] poaches upon the commercial magnetism of a symbol he has created." This expansive conception merits critical attention. Are all forms of poaching forbidden? Should they be, consistent with another premise? This one asserts, in the words of Judge Frank, "the basic common law policy of encouraging competition, and the fact that the protection of monopolies in names is but a secondary and limiting policy."[1] The legal ties which bind together some apparently inconsistent decisions may be found, but not simply in an indiscriminate prohibition of poaching, nor yet in a presumption in favor of competition, no matter how compelling. Rather, courts move from these and other premises to refinements of doctrine.

[3] It is proposed here to seek, in the milieu in which trade symbols are created and used, for data underlying both premises and dogma. This will require an independent evaluation of the institution of advertising. What do we get for the three billions of current annual outlay? Do we want it? Unfortunately, there is little consensus as to what values advertising serves. Its votaries have poured their most skillful symbols back in the soil from which they sprang. Its detractors, maddened by the success of this propaganda, would purge Radio City with fire and sword. One thing the examination will reveal is that what appear to be private disputes among hucksters almost invariably touch the public welfare. We shall therefore be concerned to ask, when courts protect trade symbols, whether their decisions further public as well as private goals.

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I. Trade Symbols and the Economics of Advertising

[4] The principal reason for advertising is an economic one—to sell goods and services. We can describe this process, and its economic effects, with relative confidence, compared to the obscurity which surrounds the psychological, cultural, or other social consequences of modern advertising. These may turn out to be more portentous than the affairs of the market-place. But the materials are uncollected or unrefined. In this survey we can only drop a handful of problems into a footnote. The reader must make his own judgments from his own observations, remembering, as we turn almost exclusively to economic discussion, that man does not live by bread alone.

Informative and Persuasive Advertising

[5] The buying public submits to a vast outpouring of words and pictures from the advertisers, in which, mingled with exhortations to buy, is a modicum of information about the goods offered. From the point of view of the economic purist, imparting information is the only useful function of advertising. A perfect market demands a perfect enlightenment of those who buy and sell. One of the many imperfections of the real world is that, absent advertising, most buyers would have to go to a great deal of trouble to discover that is offered for sale. To the extent that the blandishments of sellers inform buyers what is to be bought, and at what price, advertising undoubtedly helps to quicken the stream of commerce.

[6] Most advertising, however, is designed not to inform, but to persuade and influence. What is the occasion for such tremendous outlays on persuasion and influence in a well-ordered economic system? If we consider first the total stream of production and consumption, persuasive advertising seems only to consume resources that might be put to better use producing more goods and services. It does not increase total demand, it only increases wants. Effective demand arises, not from what we would like to have, but from the purchasing power of the community created by its productive power. We consume what we produce, and no more. Considering the economic welfare of the community as a whole, to use up part of the national product persuading people to buy product A rather than product B appears to be a waste of resources.

[7] Perhaps advertising helps to produce more, if it goads people to work longer and harder. At first blush, this seems a moral and salutary prescription. On second thought, one realizes that more work and more goods means less leisure. Are we interested only in greater possessions? In its own right, and as a time to consume the fruits of labor, leisure is highly prized. Somehow a balance has to be struck between work and play, but the degree of discontent which the advertisers can create is not the way to do it.
[8] In any case, there is a system for multiplying both goods and leisure which has been in operation for some time with some success. It consists of putting savings to work in the form of machines, and is called capitalism, or the Industrial Revolution, or whatever label is politically pleasing. If the process of capital investment is at all affected by advertising, that relationship is far more important to explore than the unsatisfactory proposition that advertising increases production by making people work more.

[9] Any possible connection between advertising and capital investment is especially worth pursuing, because the new economics has taught us that if the rate of additions to or replacements of capital equipment declines, total production and income will also decline, and to a much greater extent. The level of production is a function of the level of investment, and the level of investment is a function of the expectations of enterprisers. People do not start new businesses or expand old ones unless they think they see a profit in it, and that is where advertising comes in. To pursue the relation between persuasive advertising and profits, we shall have to make our way through the thickets of monopolistic competition and the slough of mass-production cost economies. Whatever profit advantages advertising offers spring chiefly from these two sources. Only after exploring them can we consider whether profits, so derived, facilitate the total flow of investment.

... The Sovereign Consumer

[10] Defenders of the institution have two additional lines of defense. The first is that persuasive advertising creates a cluster of values, no less real because they are intangible. The second, related to the first, argues that the sovereign consumer has made a free election between those values and the austerities of price competition.

[11] These considerations bring us to the consumer as an individual. As an individual, instead of a faceless component of mass purchasing power, he is a creature of infinite diversity, with, moreover, a soul. To make a complete analysis of what he gets from advertising, the relations of material rewards and spiritual values, as affected by advertising, would have to be considered. That task we must leave to the philosophers and the psychologists. As was indicated earlier, they have not yet performed it. The only arena which is at all adequately staked out is that of the economic conflict between seller and buyer. The agreed goal is the maximum satisfaction of each consumer, as determined by his free choice in disposing of his income. In a roundabout way, problems of aggregate output and investment, already discussed, bear on the same goal. Now we have to consider how persuasive advertising adds to or subtracts from the sum of the individual’s satisfied wants.
What are the intangible values? One is said to be the assurance of reliability, because the advertiser wants to build up repeat sales, and cannot afford to sell patently unsatisfactory goods. Admitting, for the sake of getting on, that unadvertised brands offer a greater opportunity for "hit-and-run" frauds, the difficulty with this contention is that the hope of continued custom is quite unrelated to the magnitude of persuasive advertising. Nothing more than information as to source is necessary for the consumer to be able to repeat a satisfactory purchase.

Other values derive from the proposition in that cheapness is not enough. The buyer of an advertised good buys more than a parcel of food or fabric; he buys the pause that refreshes, the hand that has never lost its skill, the priceless ingredient that is the reputation of its maker. All these may be illusions, but they cost money to create, and if the creators can recoup their outlay, who is the poorer? Among the many illusions which advertising can fashion are those of lavishness, refinement, security, and romance. Suppose the monetary cost of compounding a perfume is trivial; of what moment is this if the ads promise, and the buyer believes, that romance, even seduction, will follow its use? The economist, whose dour lexicon defines as irrational any market behavior not dictated by a logical pecuniary calculus, may think it irrational to buy illusions; but there is a degree of that kind of irrationality even in economic man; and consuming man is full of it.

The taint of irrationality may be dispelled by asserting flatly that the utility of a good, that is, its capacity to satisfy wants, is measured exactly by what people will pay for it. If, as is undeniably the case, consumers will pay more for an advertised brand than for its unheralded duplicate, then consumers must get more satisfaction out of the advertised brand. The nature of the satisfaction is of concern only to the moralist. Though this argument can easily be pushed to absurdity—suppose it was to the interest of the advertisers to consume half the national product in persuasion?—it seems plausible if it is based on the dogma of consumer autonomy. Then anyone who questions the untrammeled use of influence by the seller and its uncoerced acceptance by the buyer is at best a Puritan, at worst a Fascist. The debate seems to end in a defense of freedom, for the advertiser as well as for the consumer.

But does the sovereign consumer have real freedom of choice? The first requisite of choice is an adequate presentation of alternatives. The classical economists who enthroned the consumer never dreamed that he would make his decisions under a bombardment of stupefying symbols. He should be informed, and willing to pay the necessary price for information. But the most charitable tabulations reveal relatively little information in advertising directed to consumers outside the classified columns and local announcements. National advertising is dominated by appeals to sex, fear, emulation, and patriotism, regardless of the
relevance of those drives to the transaction at hand. The purchase of many
advertised articles, then, has a raw emotional origin. Many others are compelled by
the endless reiteration of the advertisers’ imperative: eat lemons, drink milk, wear
hats. Pseudo-information fills any gaps. It takes many forms. There is the
bewildering manipulation of comparatives and superlatives: "No other soap washes
cleaner"; The world’s most wanted pen." In the atomic age, precise scientific data
are helpful. Bayer’s Aspirin tells us that the tablet dissolves in two seconds. Whether
the analgesic effect is then felt in one hour or two hours will no doubt be explained
in time. Buick lists among its features such well-understood engineering terms as
"Dynaflow Drive, taper-thru Styling, Vibra-Shielded Ride, Hi-Poised Fire-ball
Power." The reader, after ten minutes with a magazine or the radio, can select his
own examples of the types of influence that are thought to move the sovereign
consumer.

[16] The foundation of free choice, to repeat, is an adequate presentation of
alternatives. Admittedly, many choices, for example in politics or religion, are
presented under a smoke screen of exaggeration and emotion. But there are usually
at least two sides to the argument. The choice between one highly advertised
dentifrice and another is, in important respects, no choice at all. It cannot register a
decision to support or reject institutional arrangements which, as had been shown,
contribute to monopolistic waste of resources; it cannot reflect a preference to get
more or less for one’s money, to take an illusion or leave it. It is only a choice of
between one illusion and another. That advertisers, despite their intramural rivalry,
are aware that they stand on common ground, is shown by their united opposition
to institutions which enlarge the consumer’s alternatives. An instance is the forays
and reprisals against the consumers’ movement.

[17] The forces which counter advertising propaganda may be listed as follows.
First, as an individual protest, is the sentiment described as "sales resistance," a
compound of realism, skepticism, and apathy. Second is organized sales resistance,
the pressure for reform by the slow-moving consumers’ organizations. Third, most
important economically, is the still small voice of the lower price tag on an
unadvertised substitute. Fourth, the nub of the present discussion, comes the
shaping of legal institutions, either to curb the excesses of advertising or to foster
the second and third forces just listed. It is intended to discuss in a later article the
enforcement of truth in advertising, as an indication that freedom to persuade and
influence has its boundaries, and the possible use of antitrust, taxation, or other
devices to set new boundaries. The law also has to take a stand when the use or
misuse of advertising has created measurable values for the advertiser, and
"another poaches upon the commercial magnetism of the symbol." How much
protection will be given the advertiser against the poacher? The answer is sought in
the law of trade-marks and trade names.

The world, it seems, is disappearing beneath a deluge of logos. In the past decade, corporations looking to navigate an ever more competitive marketplace have embraced the gospel of branding with newfound fervor. The brand value of companies like Coca-Cola and IBM is routinely calculated at tens of billions of dollars, and brands have come to be seen as the ultimate long-term asset economic engines capable of withstanding turbulence and generating profits for decades. So companies spend billions on brand campaigns and try to indelibly mark everything in sight, from the ING New York City Marathon to the Diamond Nuts cup holders at SBC Park.

Since 1991, the number of brands on US grocery store shelves has tripled. Last year, the US Patent and Trademark Office issued an incredible 140,000 trademarks - 100,000 more than in 1983. The average American sees 60 percent more ad messages per day than when the first President Bush left office. A handful of years ago, David Foster Wallace fantasized in *Infinite Jest* about an America in which corporations sponsor entire years - the Year of the Whopper, the Year of the Depend Adult Undergarment. The fantasy seems more reasonable by the day.

And yet there's something strange going on in branding land. Even as companies have spent enormous amounts of time and energy introducing new brands and defending established ones, Americans have become less loyal. Consumer-goods markets used to be very stable. If you had a set of customers today, you could be pretty sure most of them would still be around two years, five years, ten years from now. That's no longer true. A study by retail-industry tracking firm NPD Group found that nearly half of those who described themselves as highly loyal to a brand were no longer loyal a year later. Even seemingly strong names rarely translate into much power at the cash register. Another remarkable study found that just 4 percent of consumers would be willing to stick with a brand if its competitors offered better value for the same price. Consumers are continually looking for a better deal, opening the door for companies to introduce a raft of new products.

Marketers may consider the explosion of new brands to be evidence of branding's importance, but in fact the opposite is true. It would be a waste of money to launch a clever logo into a world of durable brands and loyal customers. But because consumers are more promiscuous and fickle than ever, established brands are
vulnerable, and new ones have a real chance of succeeding - for at least a little while. The obsession with brands, paradoxically, demonstrates their weakness.

The single biggest explanation for fragile brands is the swelling strength of the consumer. We've seen a pronounced jump in the amount of information available about goods and services. It's not just bellwethers like Consumers Union and J.D. Power, established authorities that unquestionably shape people's buying decisions, but also the crush of magazines, Web sites, and message boards scrutinizing products. Consumers have also become more demanding: Even as the quality and reliability of products have generally risen, satisfaction ratings have not budged, and in some cases they've actually fallen. Businesses are now dealing with buyers who are armed with both information and harsh expectations. In this environment, companies that slip up - even if it's simply failing to match customer tastes - can no longer count on their good names to carry them through. And consumers have become far more willing to experiment with products, because the amount of information out there makes taking a chance far less risky. By the time you think about buying that digital altimeter barometer, chances are the bleeding edge has already weighed in at Epinions. This gives nascent brands an opportunity to succeed, but it also makes staying power a lot harder to come by. Welcome to the What Have You Done for Me Lately? economy.

Some industries are suffering more than others. In consumer electronics, quality has risen across the board, making product differences harder to discern. Manufacturing has commodified: Most of today's computer equipment, television screens, and stereos are made by a small handful of contract manufacturers and then slapped with a logo before hitting store shelves. That doesn't mean that making a better gizmo no longer matters - offering genuinely innovative products is, more than ever, the best way to capture market share. But savvy consumers are no longer willing to pay a high premium for an otherwise identical product just because it has a fancy nameplate.

Undoubtedly, there are strong brands that can still command a premium. In one recent survey by Landor Associates, 99.5 percent of people said they'd be willing to pay more for a Sony. But the size of that premium is smaller than ever. Five years ago, Sony charged 44 percent more for its DVD players than the average manufacturer. Today, Sony DVD players cost just 16 percent more than the average. And yet, even though the price of Sony's most expensive DVD player fell 60 percent between 1999 and 2003,
CyberHome, maker of absurdly cheap DVD players, has knocked off Sony to become the biggest DVD-machine seller in America. Similarly, in the fashion industry, a stronghold of brand identity and obsession, prices fell an average of 9 percent between 2001 and 2003. At least part of the reason is the uptick in private-label sales, which now account for almost half the market. The rise of retailers like Zara and H&M, which make their own cheap but nice designer knockoffs, and the emergence of a high-low aesthetic (in which top designers no longer dictate taste) have weakened the power of fashion brands and fragmented the industry into myriad small ones. Sure, superbrands like Louis Vuitton and Prada can still command a hefty price premium. But they're increasingly the exception.

Marketing types either don't see this trend or choose not to talk about it. In the words of advertising legend Jim Mullen, "Of all the things that your company owns, brands are far and away the most important and the toughest. Founders die. Factories burn down. Machinery wears out. Inventories get depleted. Technology becomes obsolete. Brand loyalty is the only sound foundation on which business leaders can build enduring, profitable growth." Similarly, in the new book *Brands and Branding*, Rita Clifton, chair of Interbrand UK, puts it this way: "Well-managed brands have extraordinary economic value and are the most effective and efficient creators of sustainable wealth." These assertions claim that while factories, source code, and patents are ephemeral, brands are real. But in fact, their long-term value is shrinking. They're becoming nothing more than shadows. You wouldn't expect your shadow to protect you or show you the way. It only goes wherever you do.

Look at Nokia. In 2002, it had the sixth-most-valuable brand in the world, valued by the consultancy Interbrand at $30 billion. But the very next year, Nokia made a simple mistake: It didn't produce the clamshell-design cell phones that customers wanted. Did consumers stick around because of their deep emotional investment in Nokia? Not a chance. They jumped ship, and the company's sales tumbled. As a result, Nokia lost $6 billion in equity. How about Krispy Kreme? In 2003, Fortune called the doughnut maker America's "hottest brand." Then came what might prove to be the hottest name of 2004: Atkins.

Annual rankings of brand value are littered with examples of firms that watched billions of dollars in supposed "brand equity" vanish - not because they messed with their identities, but simply because they didn't make a product or deliver a service that people needed.
Even genuinely powerful brand association is no longer a guarantee that a company will make money. TiVo has revolutionized television, and even introduced a word into the consumer vernacular. But it hasn't made a dime in profit. In the past year, the company has cut prices sharply to try to compete with the cheap DVRs coming to market from cable and satellite companies. Similarly, Apple has had to continually introduce better variations on the iPod - and cut prices - to fend off copycats.

Marketers aren't completely deceived (or being deceiving) when they argue that customers make emotional connections with brands, but those connections are increasingly tenuous. If once upon a time customers married brands - people who drove Fords drove Fords their whole lives - today they're more like serial monogamists who move on as soon as something sexier comes along. Gurus talk about building an image to create a halo over a company's products. But these days, the only sure way to keep a brand strong is to keep wheeling out products, which will in turn cast the halo. (The iPod has made a lot more people interested in Apple than Apple made people interested in the iPod.) If a company must constantly deliver new value to its loyal customers just to keep them, those customers aren't loyal at all. Which means, save for a few perennials like Coke, brands have little or no value independent of what a company actually does. "Brands have run out of juice. They're dead," says Kevin Roberts, CEO of advertising giant Saatchi & Saatchi and author of the new book Lovemarks. "Now the consumer is boss. There's nowhere for brands to hide."

This is all, of course, a bad thing for marketers. A brand is supposed to provide a haven from competition, offering what Nokia CEO Jorma Ollila calls insurance against missteps. But the disappearance of loyalty means that insurance is vanishing, too - which is great for consumers. When companies can't count on their reputations to carry them through, they're forced to innovate to stay alive. The erosion of brand value, then, means heightened competition - and everything we know about economics tells us that the more competition, the better off consumers will be.

The truth is, we've always overestimated the power of branding while underestimating consumers' ability to recognize quality. When brands first became important in the US a century ago, it was because particular products - Pillsbury flour or Morton salt - offered far more reliability and quality than no-name goods. Similarly, many (and arguably most) of the important brands in American history - Gillette or Disney - became successful not
because of clever marketing, but because they offered something you couldn't get anywhere else. (Gillette made the best razors; Disney made the best animated movies.) Even Nike first became popular because it made superior running shoes. Marketers looked at these companies and said they were succeeding because their brands were strong. In reality, the brands were strong because the companies were succeeding.

Over time, certain brands came to connote quality. They did provide a measure of insurance - which in turn made firms less innovative and less rigorous. (Think of the abominable cars General Motors, Ford, and Chrysler made in the late 1960s through the 1970s - remember the Pinto? - in part because they assumed that they had customers for life.) That sense of protection is eroding in industry after industry, and instead of a consumer economy in which success is determined in large part by name, it's now being determined by performance. The aristocracy of brand is dead. Long live the meritocracy of product.
There are 17 logos on Heron Preston’s signature long-sleeve T-shirt: M&Ms and Trix; Google and Remington; Home Depot, huge, on the back; Nascar, upside down, on the front.

Looked at one way, these are 17 advertisements, 17 declarations of loyalty. The function of a logo is to advertise, and these are established images, familiar and eye-catching and effective.

And yet Mr. Preston’s shirt has the air of anti-promotion to it. The logos compete with one another for attention, ultimately privileging none. They become denatured.

But can a logo ever truly be subverted? In fashion, logos are the simplest way to turn a consumer into a billboard, and we are all inexorably branded now. With each passing year, it becomes more difficult to live out of the reach of corporate influence, and each successive generation has less of an idea of what life was like back when opting out was more of a possibility.

So maybe it’s not a shock that this time is also seeing the arrival of the logo as a forward-looking fashion staple, a William Gibson and Milton Glaser fantasy come to life.

This is happening in the hands of a group of young designers who accept the ubiquity of logos and who work within that framework to turn their purpose and effect on their head. The logo becomes the canvas, whether it’s their placement on a garment, the juxtaposition of several of them together or a rendering with an unconventional treatment. In all cases,
the logo becomes a graphic element that can be mined for its familiarity, but is at least in part stripped of its corporate purpose.

“I think about the logos, but not so much,” said Mr. Preston, whose T-shirt was one of this year’s signature downtown fashion items. You see a similar energy in the work of Wil Fry, who works with grayscale prints made from scanned labels from 20 or so high-end designers, or Peggy Noland, who uses puff paint to create logo mash-ups on one-of-a-kind pieces.

You see it in the T-shirts from Hood by Air, with their bold, original logo treatments. It’s there on the racks at VFiles and Opening Ceremony, in the work of a second-wave gaggle of even younger designers building on what they’re seeing this group do. And it’s even crept onto the runway, in the hands of Alexander Wang.

The recent rise in logos is in part a response to the mass anonymity of the American Apparel-Uniqlo age, and taking a longer view, a rejection of the anti-capitalist, grunge, no-logo 1990s. But that same era also saw the rise of hip-hop and streetwear as a consumer force, and as style influences that imprinted deeply on many of these young designers.

Of these, Shayne Oliver, of Hood by Air, has stuck out by creating a line premised on his own logo, not repurposing others. “It represents power, a language, a mind-state,” he said, speaking of the strong HBA box logo, one of the most definitive marks of recent years. “But it’s a sense of commentary, too. An encrypted code.”

Like Mr. Preston, Mr. Oliver, taking what he calls a minimalist “Helmut Lang approach to logos,” also plays with unusual placement — at the top of the chest, on the lower sleeve — and sizing. (They both owe something to the Raf Simons 2003 Consumed collection as well, with its truncated logos splashed across garments.) The result is not just the refining of what are essentially streetwear ideas, but high fashion at its most legible and consumable.

Mr. Preston began making his T-shirts at the beginning of this year. Initially, in order to build mystique and deflect legal snoops, he passed off the design as a factory defect he’d stumbled upon. But eventually, you couldn’t go to a certain kind of party without seeing one or two of them. They began to take on a tribal quality, which was the point. (When New York Fashion Week wanted to make an official T-shirt for the spring shows, they turned to Mr. Preston, who made a version of his T-shirt with modeling agency logos.)

“People look for communities and families to belong to,” said Julie Anne Quay, the founder of VFiles. “They’re saying, ‘I identify with that.’ It’s just like wearing a football jersey.” (This phenomenon has been literalized in the recent T-shirts and jerseys made by Les Plus Dores, which feature designer surnames and birth years on the backs where a player name and number would ordinarily go.)

At VFiles, which is ground zero for this movement, the racks teem with logos, from ’90s rave and streetwear revival brands like X-Girl to the pieces by Mr. Preston, Mr. Oliver and Mr. Fry.

Opening Ceremony, too, has been vital to this moment. “About four or five years ago we had a conversation,” said Humberto Leon, co-owner and creative director of Opening Ceremony, referring to Carol Lim, his business partner — “and we said, ‘O.K., it’s time to bring logos back.’” Both grew up in the California suburbs in the early 1990s, where among young people, he said, “the logo or the brand was what created these mini-communities.”

That’s become part of the Opening Ceremony project, Mr. Leon said, whether it’s the revival of Vision Street Wear or the store’s ongoing collaboration with Donna Karan on a series of reissued DKNY styles.

DKNY, which made its debut in 1989, was one of the first high-profile high-fashion diffusion lines — its block-letter logo was a quick symbol of accessible aspiration.
“This was before the deluge of mass fashion products,” said Ms. Karan, emphasizing that the goal of DKNY was to demonstrate that women didn’t “have to be a designer to wear designer clothes.” She added, “People thought I was wacko.”

But now, fashion isn’t an exclusive language, it’s a common tongue. Thanks to the Internet, never before has so much fashion information been so broadly available, but those objects of study and fascination still remain out of reach to many enthusiasts. In many ways these young designers serve as gateways, bringing high-fashion aesthetics into accessible and relatively affordable clothes that have at least a little kinship with the high-end streetwear that serves as bridges for those who can’t yet afford designer pieces.

More than ever, these two worlds are speaking to each other, though often the conversation involves misunderstandings. See, for example, the recent dust-up over Reason Clothing’s Ain’t Laurent parody T-shirt, which prompted Saint Laurent to terminate its relationship with Colette in Paris, which was carrying them.

Logo mash-ups, particularly the work of Mr. Fry and Ms. Noland, feel like cousins to these sorts of logo remakes and parodies that are native to skate and streetwear brands. Where Mr. Preston’s logo choices derive largely from Nascar culture, Mr. Fry and Ms. Noland tackle fashion pieties head-on — Mr. Fry by creating a pastiche of designer labels, and Ms. Noland by rendering logos in puff paint, giving them a childlike, naïve air.

“It’s all a critique,” Ms. Noland said. “I’m taking the idea of being marketed to and turning it on its head.” The abundance of logos she uses in her work doesn’t necessarily imply an abundance of acceptance. “I feel like it’s the opposite,” she said. Mr. Fry, too, refers to his work as “a satire.” His earlier projects included a Brooklyn Nets jersey overlaid with Givenchy’s Birds of Paradise print, a commentary on how ubiquitous the brand had become in hip-hop circles. His work, he said, “was always geared towards anti-fashion.”

Sometimes, fashion bites back.

First, working with other peoples’ logos is fraught stuff. Parody is protected speech, but the legal implications of repurposing the logos of companies with eager legal departments and no sense of creative irony are less clear. Mr. Preston says he hasn’t received any cease-and-desist letters, but several of the other designers working this turf have.

Plus, the success of this younger generation has helped to institutionalize bootleg culture. Ms. Noland stumbled onto a Korean retailer that had effectively ripped off one of her custom pieces wholesale and made a cotton T-shirt from the print, selling it for less than one tenth of her price. She bought several and stocked them in her store in Kansas City, Mo. “I loved it,” she said. “It was so meta.”

Mr. Preston, too, loves the homage. Pulling out his phone, he rifled through his photos and showed off several he found on Instagram by young designers who took his multi-logo idea and repurposed it for themselves, a logo-laden knockoff of a logo-laden knockoff.

Second, in the way that fashion consumes all (even its detractors), logos are beginning to creep onto the runway, most notably in Mr. Wang’s cheeky spring ready-to-wear collection, his name splayed across tops and belts and laser-cut into leather. It was an unanticipated turn for Mr. Wang, known best for his chic, colorless drapey basics. If it was done as a critique, or a satire, it was tough to tell.

It was a potent reminder that logo culture remains strong, even in the face of misuse and challenge.

“It still glorifies every single logo on the jacket, the fact that I took a shot at them,” said Mr. Fry, who recently jokingly solicited logo ideas for himself on Twitter. “Maybe I’m the butt end of the joke at the end of the day.”
Groceries Are Cleaning Up in Store-Brand Aisles

Almost 40 percent of the products sold at a Stop and Shop in Lyndhurst, N.J., are private label.

By STEPHANIE STROM
Published: October 1, 2013

Grocery store brands once carried a stigma. With no-frills white packaging that telegraphed bargain basement and low quality, they were a last resort for consumers on tight budgets.

Today, they are the stars of grocery store shelves and refrigerated cases.

From Safeway’s Open Nature to Target’s Archer Farms, grocery brands are challenging traditional brands from food companies, and preserving or improving their own slim profit margins.

“There is really widespread acceptance of store brands among consumers,” said Janet Eden Harris, senior vice president of Market Force Information, which recently surveyed consumers and found that 96 percent said they bought private-label brands at least some of the time. “Sometimes I think they don’t actually know what is a store brand.”

Sales of store-brand foods and other grocery merchandise took off during the recession, when shoppers practiced a forced frugality. But to the surprise of consumer and food analysts, sales of store brands have remained strong even as the economy recovers.

Over the last three years, sales of store brands grew 18.2 percent, accounting for $111 billion in sales, according to Nielsen. That is more than twice the rate of growth for national brands — 7.9 percent to $529 billion — over the same period.

“We expect private brands will continue to grab share year over year because of investments they’ve made in enhancing quality, innovation and hiring more people with brand experience to help them with marketing and promotion,” said Todd Hale, vice
Mr. Hale said consolidation among grocery store chains and acquisitions of stores in the United States by European retailers, which stock their shelves heavily with their own brands, were contributing to the trend. For example, Trader Joe's, which is owned by the German retail group Aldi, sells its own brand almost exclusively.

Additionally, grocery retailers have spent heavily to develop their own brands over the last several years, building test kitchens, hiring culinary experts, improving packaging and testing and retesting their products with consumers. And lower-income shoppers, who have not bounced back from the recession as quickly as those in higher brackets, have stayed cautious about their food budgets.

Patricia DeMarco, a shopper at a Stop and Shop in Lyndhurst, N.J., completed a survey comparing pretzel flats that the chain is testing to a low-fat cheese cracker it already sells. “The pretzel thing, it was O.K.,” she said. “I didn’t like the other thing.”

Stop and Shop conducts consumer testing of what it calls “own brand” products every Friday in different stores. Sometimes its products are compared to one another and other times to national brands. Consumers taking the surveys, however, are not told what products they are testing.

Almost 40 percent of the products sold in Stop and Shop, which is owned by Ahold, are private label. Most are simply identified by the store’s logo, which insiders refer to as “the wedge.” It also has a large natural and organic line called Nature’s Promise and an upscale snack line, Simply Enjoy.

Juan De Paoli, who oversees private-label brands for Ahold USA, said of the Simply Enjoy line: “I don’t want to say that’s my favorite, but it’s a very exciting one for us. These are gourmet products of exceptional tastes, discovered and crafted by foodies.”

Mr. De Paoli said the company’s goal was to market its brands in the same way national food companies market theirs. “We’re doing public relations events to promote them, reaching out to food critics and commentators, advertising them on TV and billboards and store signage to make sure customers really know what they stand for,” he said.

Marilee Cortez and Krystle Maldonado stopped to take the survey in Lyndhurst. As roommates, they try to shop together, and they said about half of all their purchases were Stop and Shop private-label products.

“I think they taste just as good as national brands, and in that case, why not save the money?” Ms. Maldonado said.

A Stop and Shop Crispy Thin Crust BBQ Chicken gourmet pizza in the store was priced at $4.99 or two for $7. It was stacked in a refrigerated case right next to a California Pizza Kitchen brand BBQ Chicken pizza that was selling for $6.29. The only difference in ingredients between the two pizzas was cilantro — the Stop and Shop version used parsley.

Similarly, an eight-ounce packet of Stop and Shop brand shredded mozzarella was selling for $2.99, while the same packet from Kraft was priced at $3.49.

Ms. Cortez said their purchases of private-label products had been increasing. “The taste is getting better and better,” she said. “I can tell they’re working on it.”

Last month, Consumer Reports published taste tests comparing store brands to national brands. The organization found that 33 of the 57 private-label products sampled were as good as or better than the national brand version.

Consumer Reports said such brands accounted on average for about one-quarter of the products in a supermarket and could save customers as much as 30 percent. (While branded food manufacturers suggest a retail price, grocery stores set the actual prices they charge.)
Mr. Hale of Nielsen said the greatest opportunity for stores to expand their offerings was in foods and other products aimed at Hispanics and other demographic groups, who tend to buy more private-label brands.

Just this month, for instance, Safeway began selling a line of products named for Marcela Valladolid, the Mexican celebrity chef and the host of the Food Network Show “Mexican Made Easy,” who is teaming with the grocer.

As varied as ready-to-cook meals like carne asada and snacks like chile lime flaquitos, the new store brand is aimed at the growing market of Latino consumers.

In an e-mail, Ms. Valladolid said she had turned down several offers to endorse food products over the years because she thought they did not accurately capture the true tastes of Mexican food.

“I worked closely with the talented chefs at the Safeway culinary kitchens from start to finish to create this product line,” she wrote. “We even took a trip down to Mexico so I could share with them the flavors I grew up with.”

Similarly, new pizzas with hand-stretched dough in the Safeway Select line of premium products were formulated after a team went to a food trade show in Italy. Safeway has more than 20 different brands of its own, including O Organics, the Snack Artist and its largest brand, Lucerne, which accounts for a majority of the chain’s dairy sales.

“It is a multitiered portfolio in terms of price points, appealing to a variety of lifestyles and packaging and promotion,” said Michael Minasi, president of marketing at Safeway.

While that may sound like a grocery retailer on its way to becoming a food company, Mr. Minasi said the goal was to develop products that filled a consumer need that branded manufacturers were missing. “We don’t see ourselves competing with national brands,” he said. “Customers want to see both.”
Abercrombie & Fitch Knows It’s Not Cool Anymore

ABERCROMBIE & FITCH’S NO-GO LOGO

BY VAUHINI VARA

PHOTOGRAPH BY ROLF VENNENBERND/DPA/AP

It might come as a surprise to readers born in the seventies or eighties that the Abercrombie & Fitch logo is no longer a marker of popularity and, in fact, hasn’t been one for years. Anyone who attended a suburban middle school two decades ago or so will recall Abercrombie’s mall stores, decorated with enormous photographs of some guy’s abs and staffed, exclusively, by blonde, stone-faced waifs. The lights were dim. All of this gave the stores—and the clothes they sold, emblazoned with the Abercrombie name—an air of exclusivity that, in retrospect, seems preposterous for a company best known for selling rumpled flannels and T-shirts.

And now that era is over. Since the late aughts, teens have been spending far less at the stores known as the three As—Abercrombie, American Eagle, and Aéropostale—and have been especially disinterested in the T-shirts and hoodies with logos that once made the stores so popular. They’re
shopping instead at places like H&M, Zara, and Forever 21, which are adept at copying fashions from the runway and selling them cheaply. On a conference call on Thursday, Abercrombie’s C.E.O., Mike Jeffries, told analysts and reporters, “In the spring season, we’re looking to take the North American logo business to practically nothing.” (The logo “will remain a factor in the rest of the world,” Jeffries noted.) Instead, Abercrombie intends to focus on “fashion,” he said.

To understand what has changed since the late nineties and early aughts, I spoke with Steph Wissink, an analyst at Piper Jaffray who, for more than a decade, has compiled reports on where teen-agers are spending their money. In the late nineties and early aughts, she said, Abercrombie was the most popular brand among teens. During that time, Abercrombie thrived by exalting conformity. All the popular kids were wearing the Abercrombie logo, the message went, so if you wanted to be one of them, you’d better wear the logo, too.

Jeffries, the C.E.O., was as enthusiastic about this message as anyone. In a 2006 Salon profile, he told Benoit Denizet-Lewis that “in every school there are the cool and popular kids, and then there are the not-so-cool kids. Candidly, we go after the cool kids. We go after the attractive all-American kid with a great attitude and a lot of friends.” He went on, “Are we exclusionary? Absolutely. Those companies that are in trouble are trying to target everybody: young, old, fat, skinny.”

This attitude started working against Abercrombie during the recession, around 2008. That’s when Wissink started noticing fewer Abercrombie logos in the schools she visited; people (young, old, fat, skinny) could no longer afford Abercrombie’s prices for T-shirts and hoodies. Around this the time, H&M and Forever 21 started to thrive by selling super-cheap,
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http://www.newyorker.com/business/currency/abercrombie-logo

accessible runway knockoffs. The economy has recovered since then, but the turn toward “fast fashion” proved durable.

Only in the past year or so has Abercrombie started to change its strategy. Late last year, the retailer announced (http://www.huffingtonpost.com/2013/11/06/abercrombie-larger-sizes-fat-people_n_4226413.html) that it would start selling plus-sized clothes (which, inevitably, meant the resurrection, in the press, of Jeffries’s 2006 comment), along with shoes. In January, Abercrombie stripped (http://www.nytimes.com/2014/01/29/business/chief-of-abercrombie-fitch-is-stripped-of-chairman-title.html?_r=0) Jeffries of his title as chairman of the board, bowing to pressure from investors. In June, Sapna Maheshwari pointed out (http://www.buzzfeed.com/sapna/abercrombie-strips-out-the-sex-and-ivy-league-heritage-from%23jca7e) at BuzzFeed that Abercrombie had even changed how it described itself in a government filing: in the past, it had called itself “the essence of privilege and casual luxury”; in a more recent filing, that language was gone, with the brand now representing “the essence of laidback sophistication with an element of simplicity.”

But these changes, along with the removal of the Abercrombie logo, may not be enough to bring customers back. For one thing, its prices are still much higher than those of H&M and Forever 21. (Abercrombie’s Web site, on a recent visit, advertised twenty-five-dollar sweatpants, which seemed affordable enough until I visited H&M’s site and learned about its Labor Day deals starting at $4.95.)

Perhaps relatedly, kids today seem less interested in the aesthetic of conformity-through-consumption that Jeffries, and the company, still seem to advocate. They have other ways of expressing who they are—through the language they use on social media, for example. While the early aughts were a period of conformity, Wissink said, kids now prefer to show that
they’re different from others. To the extent that they do use purchases as social signifiers, they pay attention to tech brands (http://www.nytimes.com/2014/08/28/business/less-prep-more-plugs-teenagers-favor-tech-over-clothes.html?_r=0)—the latest iPhone or pair of headphones—far more than to clothing lines.

As part of Wissink’s research, she and her colleagues visit high schools and talk to the students about their preferences. “Ten years ago, I could walk into an auditorium of two hundred kids, I could turn my back and tell them to switch seats and scramble.” Then, she said, she would turn around and guess which kids belonged to the same social groups according to what they were wearing—usually with great success. “Today,” she said, “it’s next to impossible.” Why should a teen send subtle signals about her identity by dressing in a certain brand when she can define herself explicitly on Facebook and Instagram?

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