

2010

## The Unbranding of Brands: Advocating for Source Disclosure in Corporate America

Cassi G. Matos  
*Fordham Alumnus*

Follow this and additional works at: <https://ir.lawnet.fordham.edu/iplj>



Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Intellectual Property Law Commons](#)

---

### Recommended Citation

Cassi G. Matos, *The Unbranding of Brands: Advocating for Source Disclosure in Corporate America*, 20 Fordham Intell. Prop. Media & Ent. L.J. 1307 (2010).

Available at: <https://ir.lawnet.fordham.edu/iplj/vol20/iss4/5>

This Note is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Intellectual Property, Media and Entertainment Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# The Unbranding of Brands: Advocating for Source Disclosure in Corporate America

Cassi G. Matos\*

INTRODUCTION .....	1308
I. THE RISE OF THE BRAND .....	1313
A. <i>The Demise of Source Disclosure</i> .....	1314
B. <i>The Growth of Consumer Cynicism</i> .....	1319
C. <i>Unbranding: The Wolf in Sheep's Clothing</i> .....	1321
1. The Architecture of Unbranding .....	1321
a) One Company, Two Brands, Same Product.....	1324
b) One Company, Two Directly Competing Brands.....	1324
c) Two Companies, Two Brands, Same Product.....	1325
d) The "Unbranded" Brand.....	1326
2. Carving Out a Niche Product: Decision to Unbrand.....	1327
II. HOW UNBRANDING HARMS THE CONSUMER.....	1331
A. <i>Investigation of the Brand: A Case Study</i> .....	1331
B. <i>But Where Did It Come from?</i> .....	1335
1. One Company, Two Brands, Same Product .....	1336
2. One Company, Two Directly Competing Brands .....	1337
3. Two Companies, Two Brands, Same Product ...	1338
4. The "Unbranded" Brand .....	1338
C. <i>Trademark Law Looses Its Grip</i> .....	1339
III. THE DISCLOSURE REGIME GRABS HOLD .....	1342
A. <i>Stealth Marketing: Regulation Falls Short</i> .....	1342

1308	<i>FORDHAM INTELL. PROP. MEDIA &amp; ENT. L.J.</i> [Vol. 20:1307	
	<i>B. Disclosure Laws: Beyond Broadcasting</i> .....	1343
	CONCLUSION.....	1347

## INTRODUCTION

In an age when consumers are constantly bombarded by advertisements,<sup>1</sup> brand association is an important tool for building customer loyalty. The companies that own these brands are constantly seeking ways to penetrate the advertising bubble and reach consumers in new and innovative ways. Consider, for example, the viral video campaign launched by Zappos in 2009: over the span of two months a dozen videos were posted to YouTube showing a man streaking through New York City wearing nothing more than sneakers, tube socks, and a forward-facing fannypack.<sup>2</sup> Several media outlets picked up the story, including CNN's Anderson Cooper, and were shocked when the final video went up.<sup>3</sup> As the man is streaking, a van pulls up and several people wearing Zappos t-shirts emerge carrying boxes.<sup>4</sup> Moments later, the van pulls away revealing a fully-clothed streaker.<sup>5</sup>

---

A PDF version of this Note is available online at <http://iplj.net/blog/archives/volumexx/book4>. Visit <http://iplj.net/blog/archives> for access to the IPLJ archive.

\* J.D., Fordham University School of Law, 2010; B.A., Marist College, 2006. Thank you to the editors and staff of the IPLJ for all their hard work and Professor Sonia Katyal for her inspiration and guidance. Special thanks to my parents, brother and sister for their endless support and encouragement; my friends for keeping me sane and grounded; and to Brian, for absolutely everything.

<sup>1</sup> On average, a person views close to 3000 advertisements per day. Am. Acad. of Pediatrics, *Children, Adolescents, and Advertising*, 118 PEDIATRICS 2563, 2563 (2006), available at <http://pediatrics.aappublications.org/cgi/reprint/118/6/2563> ("The average . . . person views more than 3000 ads per day on television (TV), on the Internet, on billboards, and in magazines."); *Advertising: It's Everywhere*, MEDIA AWARENESS NETWORK, [http://www.media-awareness.ca/english/parents/marketing/advertising\\_everywhere.cfm](http://www.media-awareness.ca/english/parents/marketing/advertising_everywhere.cfm) (last visited May 17, 2010).

<sup>2</sup> Andrew Adam Newman, *A Campaign for Clothes by a Guy Not Wearing Any*, N.Y. TIMES, Oct. 28, 2009, [http://www.nytimes.com/2009/10/29/business/media/29zappos.html?\\_r=2&ref=business](http://www.nytimes.com/2009/10/29/business/media/29zappos.html?_r=2&ref=business).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

These companies are catering to an audience whose persuasion knowledge regarding the motives and tactics of advertisements is developing and who are no longer easily susceptible to traditional marketing methods.<sup>6</sup> “Unbranding” is an attempt to cater to the jaded consumer on whom blatant methods of advertising will not work.

An unbranded object, simply defined, is anything “not marked with the owner’s mark” or “not sold under a brand name.”<sup>7</sup> Implicit in unbranding is the departure from a pre-existing “brand.”<sup>8</sup> The term “brand” is derived from the practice of branding, commonly used on livestock.<sup>9</sup> Today, the term connotes much more; in addition to indicating source, it is a term of art used to express all the characteristics that make a product distinct from its competitors.<sup>10</sup> By unbranding, these distinctive characteristics are being shed.

---

<sup>6</sup> “A consumer’s persuasion knowledge consists of her commonsense beliefs and experiential hypotheses about the motives, tactics, and efficacy of commercial persuasion agents, such as advertisements, salespeople, and brands.” Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2047 (2005). See generally Marian Friestad & Peter Wright, *The Persuasion Knowledge Model: How People Cope with Persuasion Attempts*, 21 J. CONSUMER RES. 1 (1994) (defining the term “persuasion knowledge”).

<sup>7</sup> *Unbranded*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/unbranded> (last visited Dec. 14, 2009).

<sup>8</sup> See generally Stephen Denny, *Note to CMO: The Power of Unbranding*, NOTE TO CMO (Mar. 2, 2008, 5:26PM), <http://note-to-cmo.blogspot.com/2008/03/note-to-cmo-power-of-unbranding.html> [hereinafter *Note to CMO*] (discussing the “unbranded” movement in the organic food industry).

<sup>9</sup> See Thomas D. Drescher, *The Transformation and Evolution of Trademarks—from Signals to Symbols to Myth*, 82 TRADEMARK REP. 301, 309 (1992) (“It has also been frequently noted that the modern English ‘brand,’ as in ‘brand name,’ is derived from the Anglo-Saxon verb for ‘to burn’ and that, modern brand marks, therefore, have descended directly from the practice of branding.”).

<sup>10</sup> *Brand*, BUSINESSDICTIONARY.COM, <http://www.businessdictionary.com/definition/brand.html> (last visited Dec. 14, 2009) (“Unique design, sign, symbol, words, or a combination of these, employed in creating an image that identifies a product and differentiates it from its competitors. Over time, this image becomes associated with a level of credibility, quality, and satisfaction in the consumer’s mind. Thus brands help harried consumers in crowded and complex marketplace[s], by standing for certain benefits and value.”).

Unbranding can take many forms; advertisements,<sup>11</sup> stores,<sup>12</sup> and even art<sup>13</sup> can all be “unbranded.” Entire industries have seen unbranded movements take form:<sup>14</sup> While the marked growth of the organic food industry has helped branded retailers like Whole Foods,<sup>15</sup> which currently touts itself as “the world’s leader in natural and organic foods,”<sup>16</sup> it has also led people to seek out “unbranded” alternatives, such as farmer’s markets.<sup>17</sup> If the increased number of people seeking out unbranded alternatives is evidence of a significant trend in the market, it would signify a shift away from the mainstream and a revolt against the mega-

---

<sup>11</sup> See *Best Unbranded TV Advertisement/Campaign*, MED. MARKETING & MEDIA (Oct. 29, 2009), <http://www.mmm-online.com/best-unbranded-tv-advertisementcampaign/article/156512> (discussing an unbranded PSA).

<sup>12</sup> See *About MUJI*, MUJI, <http://www.muji.us/about-muji> (last visited Dec. 14, 2009) (“MUJI aspires to modesty and plainness, the better to adapt and shape itself to the styles, preferences, and practices of as wide a group of people as possible. This is the single most important reason people embrace MUJI.”).

<sup>13</sup> See HANK WILLIS THOMAS, <http://hankwillisthomas.com/portfolio.html> (follow “Unbranded” hyperlink) (last visited Apr. 7, 2010) (“UNBRANDED is a series of images taken from magazine advertisements targeting a black audience or featuring black subjects, which I digitally manipulated and appropriated. In this work-in-progress project that will unilaterally span from 1969 through the present, I have removed all aspects of the advertising information, e.g., text, logos, in order to reveal what’s being sold. Nothing more has been altered. . . . By ‘unbranding’ advertisements I can literally expose what Roland Barthes refers to as ‘what-goes-without-saying’ in ads, and hopefully encourage viewers to look harder and think deeper about the empire of signs that have become second nature to our experience of life in the modern world.”).

<sup>14</sup> See *Note to CMO*, *supra* note 8.

<sup>15</sup> “Organic foods’ share of total food sales is up from 1.9 percent in 2003 and approximately 2.5 percent in 2005. According to survey results, sales of organic foods grew by 22.1 percent in 2006 to reach \$16.9 billion. Sales in 2005 were \$13.831 billion.” Press Release, Organic Trade Ass’n, U.S. Organic Sales Show Substantial Growth (May 6, 2007), [http://www.organicnewsroom.com/2007/05/us\\_organic\\_sales\\_show\\_substant\\_1.html](http://www.organicnewsroom.com/2007/05/us_organic_sales_show_substant_1.html).

<sup>16</sup> *About Whole Foods Markets*, WHOLE FOODS MARKETS, <http://www.wholefoodsmarket.com/company> (last visited Dec. 14, 2009).

<sup>17</sup> See *Note to CMO*, *supra* note 8 (“[A]s ‘big organic’ becomes mainstream, the real growth industry becomes the ‘unbranded on purpose’ farmer’s market.”).

brand.<sup>18</sup> As one marketer touts, “unbranding is the new branding.”<sup>19</sup>

One of the most prolific methods of unbranding is the creation of advertisements that do not look like ads. This method of advertising is commonly referred to as stealth marketing.<sup>20</sup> Stealth marketing can take the form of product placement, where companies pay to have their products placed in movies and songs in such a way that the audience would not think the companies intentionally contracted for the products to be there.<sup>21</sup> Companies may even provide samples of their products to consumers who are influential in the social marketing atmosphere as a means of spreading the word about their products through artificial word-of-mouth promotion.<sup>22</sup> By engaging in stealth marketing, companies are able to promote their products by means other than direct endorsement.

While some hold the belief that unbranding is a new form of deceptive advertising,<sup>23</sup> others believe it is merely a way to expand already existing brands into new markets—something companies have always done.<sup>24</sup> Expanding brands into new markets is not problematic when companies create endorsed sub-brands to bolster

---

<sup>18</sup> “Think about the difference between what’s happening in organic food and most other industries: perceived value increases if the product carries no label. ‘Un-brand’ loyalty is dramatically enhanced when you know the person who produces it personally, and see them every week.” *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Stealth marketing has been broadly defined as passing off promotional messages as editorial content. Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 89 (2006).

<sup>21</sup> *Id.* at 93–94.

<sup>22</sup> See FORD FIESTA MOVEMENT, <http://chapter1.fiestamovement.com/missions/view/25> (last visited Dec. 14, 2009) (“The Ford Fiesta has come to play on the American roads. In the ultimate foreign exchange program, our 100 agents will spend 6 months behind the wheel of their own Fiesta, lifestreaming their experiences, and completing monthly missions to show you what the Fiesta is all about.”).

<sup>23</sup> In response to Starbucks opening three “locally branded” coffee shops in the Seattle area, one blogger said, “This deception by Starbucks is wrong. . . . Their use of the word ‘neighborhood’ is misleading. If Starbucks really wanted to help the community (or gain community), they should do it openly and honestly.” *Deception Could Lead to Rejection*, THREE MINDS (Aug. 5, 2009), [http://threeminds.organic.com/2009/08/deception\\_could\\_lead\\_to\\_reject.html](http://threeminds.organic.com/2009/08/deception_could_lead_to_reject.html).

<sup>24</sup> See *infra* Part I.C.

their brand portfolio, because the companies are still using their original trademarks in connection with their products.<sup>25</sup> However, some companies have taken the concept of expanding into new market areas through the creation of sub-brands a step farther and are abandoning their brand identities entirely—seeking to develop an altogether unbranded alter-ego.<sup>26</sup> Companies are utilizing individually branded product lines to do this; the products lack the corporate trademark and instead bear a new mark. These individually branded product lines signal a marked departure from historical trademark function:<sup>27</sup> while the products in these individually branded product lines all bear the new mark, which serves as an indication of source by signaling that all the products come from the same place, the mark does not indicate the original source of the goods because it fails to identify the corporate brand.

The phenomenon of unbranding raises several issues, including source disclosure. Should these companies be forced to disclose that they are the source behind this unbranded product or line of products? Or, should companies be allowed to rebrand the *apparent* source without focusing on the *actual* source?

This Note will explore the phenomenon that is “unbranding.” It sets forth the argument that unbranding causes two distinct harms to the consumer. First, unbranding undermines the primary function of the trademark as an identifier of source.<sup>28</sup> Ideally, the mark should point back to the company that is ultimately responsible for the product.<sup>29</sup> By hiding the source of the product, either by removing the trademark entirely or by hiding behind a sub-brand, companies are divorcing the trademark from its historical purpose of source identification. Second, by removing this source-identifying function, consumers are inherently deceived. This deception is the result of the failure to disclose the company ultimately responsible for the product. Furthermore, based on this lack of transparency, the consumer is unaware of

---

<sup>25</sup> See *infra* Part I.C.

<sup>26</sup> See *infra* Part II.A.

<sup>27</sup> See *infra* Part I.A.

<sup>28</sup> See *infra* Part I.A.

<sup>29</sup> See *infra* Part I.A.

who is ultimately receiving compensation from his or her transaction.

Part I will investigate the historical roots of today's "brand" and its correlation to the depleted functionality of the trademark, along with the growth of consumer cynicism towards advertising. Part I will also explore the role that trademark law plays in branding, as well as unbranding, and the laws that govern disclosure in specific types of advertising, namely the Federal Trade Commission Act (the "FTC Act"). It will also explain the methods companies use to separate their brands from the parent company, and thus unbrand. Part II will examine the specific methods companies use to separate their brands from the parent company in order to determine how each method harms the consumer—by undermining the primary function of the trademark, deceiving consumers, or both. Finally, Part III of the paper will propose that sponsorship disclosure law might be the ideal regime to address the issues presented by unbranding.

#### I. THE RISE OF THE BRAND

Brands are all around us. It is impossible to walk down the street, turn on the television, listen to the radio, flip through a magazine, or read a newspaper without being bombarded by, or targeted by, brands. Each brand is unique, bearing its own trademark, trade dress, and, ideally, identity. These unique signifiers, Nike's Swoosh on the sneakers of the guy walking down the street<sup>30</sup> or the apple on the MacBook<sup>31</sup> of the person next to you in the library, for example, are what we use to identify brands. We recognize the trademark on a specific product as connoting its relationship to other products bearing the same mark.<sup>32</sup> Consumers rely on these marks to tell us who makes the product and where it comes from.<sup>33</sup> However, in today's marketplace, as consumer

---

<sup>30</sup> See NIKE, [http://www.nike.com/nikeos/p/nike/en\\_US/](http://www.nike.com/nikeos/p/nike/en_US/) (last visited Apr. 14, 2010).

<sup>31</sup> See APPLE, <http://www.apple.com> (last visited Apr. 14, 2010).

<sup>32</sup> See Drescher, *supra* note 9, at 321–25.

<sup>33</sup> "The primary and proper function of a trade-mark is to identify the origin or ownership of the article to which it is affixed." *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 412 (1916).

cynicism toward advertising continues to grow, and companies try to subvert their persuasion knowledge, a breakdown of trademark function is occurring.

A. *The Demise of Source Disclosure*

Dating back as early as 1333,<sup>34</sup> the goal of the trademark has been to convey information to the consumer.<sup>35</sup> The modern trademark can be traced back to two historical roots: the proprietary mark and the regulatory production mark.<sup>36</sup> Primarily, these marks have served as indicators of source,<sup>37</sup> which allow the consumer to “identify the origin . . . of the goods to which it is affixed.”<sup>38</sup> Trademarks also evolved into a quality assurance mechanism; consumers know that a product bearing a specific trademark will be of a similar quality to other products bearing the

---

<sup>34</sup> See Drescher, *supra* note 9, at 313–14 (describing the story of John Odinsay, a bladesmith, who proved that someone had made a counterfeit of his work by examining the mark placed upon the dagger).

<sup>35</sup> “Trademarks are an efficient and simple means of communicating information.” Laura R. Bradford, *Emotion, Dilution and the Trademark Consumer*, 23 BERKELEY TECH. L.J. 1227, 1240 (2008).

<sup>36</sup> See Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 814 (1927) (“The modern trademark has two historical roots: (1) the proprietary mark, which was optionally but usually affixed to goods by the owner, either for the benefit of illiterate clerks or in order that in case of shipwreck or piracy the goods might be identified and reclaimed by the owner. . . . [and] (2) The regulatory production mark, which was compulsorily affixed to goods by statute, administrative order or municipal or guild regulation, so that defective work might be traced to the guilty craftsman and heavily punished, or that ‘foreign’ goods smuggled into an area over which a guild had a monopoly might be discovered and confiscated. This mark was a true mark of origin, designating as it did the actual producer of the goods.”).

<sup>37</sup> See Drescher, *supra* note 9, at 319–20 (“[T]he production mark of the medieval craftsman was a compulsory mark, a ‘police mark’ in the full sense of the phrase in that it allowed defective work to be traced back to its source so that responsibility could be fixed on the individual master. Thus, although the medieval mark, like its counterpart, served as an indicator of source, the medieval craftsman’s mark was a ‘liability mark’ which only later evolved into an ‘asset mark’ as a valuable symbol of individual good will.”).

<sup>38</sup> See Schechter, *supra* note 36, at 813–14 (“The orthodox definition of ‘the primary and proper function of a trademark’ is that given by the Supreme Court of the United States in the leading case of *Hanover Star Milling Co. v. Metcalf*: ‘to identify the origin or ownership of the goods to which it is affixed.’” (quoting *Hanover*, 240 U.S. at 412)).

same mark.<sup>39</sup> Through continued use of a mark, coupled with consistency of quality, companies are able to generate goodwill for their products.<sup>40</sup>

Over time, the role of trademarks has undergone a drastic change: rather than serving purely as an indicator of source, in today's marketplace, these marks, or logos, have also become an integral part of the products they adorn.<sup>41</sup> Much of this increased role can be attributed to the pervasiveness of advertising and the birth of branding as we know it. Advertisements were initially used to introduce people to new inventions and convince them of the inventions' usefulness. Later advertisements became a way to distinguish different brands of similar goods.<sup>42</sup> Naomi Klein outlines this evolution in her book *No Logo*; essentially, she says, as goods began to be mass-produced in factories and "the market was . . . being flooded with uniform mass-produced products that were virtually indistinguishable from one another . . . the role of advertising changed from delivering news bulletins to building an image around a particular brand-name version of a product."<sup>43</sup>

---

<sup>39</sup> See Drescher, *supra* note 9, at 320 ("An essential, perhaps the essential, function of trademarks today is, as it was for their medieval predecessors, to serve as a warranty of quality to be expected from a particular source.").

<sup>40</sup> See, e.g., *Quality Inns Int'l v. McDonald's Corp.*, 695 F. Supp. 198, 221 (D. Md. 1988) (holding that the use of "McSleep" for a chain of hotels was an attempt to free ride on the goodwill of the McDonald's mark).

<sup>41</sup> See Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 960–61 (1993) ("[N]o longer do trademarks merely identify sources; frequently today they become part of the product itself . . . . There's a growing tendency to use trademarks not just to identify products but also to enhance or adorn them, even to create new commodities altogether."). Kozinski argues that this use of the trademark is inconsistent with its traditional role:

When trademarks are used in this way, they acquire certain functional characteristics that are different from—and sometimes inconsistent with—their traditional role as identifiers of source. Where trademarks once served only to tell the consumer who made the product, they now often enhance it or become a functional part of it.

*Id.* at 962 (internal citations omitted).

<sup>42</sup> NAOMI KLEIN, *NO LOGO* 6 (2d ed. 2002).

<sup>43</sup> *Id.* at 5–6. In order to separate themselves from their competitors, companies attached unique logos to their products:

The first task of branding was to bestow proper names on generic goods such as sugar, flour, soap and cereal, which had previously been scooped out of barrels by local shopkeepers. In the 1880s,

Companies could assign any image they desired to their products, and building this brand image became the beginning of branding as we know it.

Advertising served to deliver this newly minted brand image to the consumer: “Think of the brand as the core meaning of the modern corporation, and of the advertisement as one vehicle used to convey that meaning to the world.”<sup>44</sup> As corporations explored their “core meaning,” it became increasingly obvious that the brand was much more than just a trademark slapped on a label.<sup>45</sup> With that realization, the focus of advertising moved away from individual products and their attributes and began focusing on what brands could *mean* to a person.<sup>46</sup> In addition to designating source and quality, it became clear that trademarks, as the signifier of the “brand,” could also have psychological influence on the consumer.<sup>47</sup> In the words of one consumer, “brands allow us to turn the soap we use into an expression of our inner truth, to make buying a new shirt our momentary entrée into a world of glamour, [and] to make a richer identity for ourselves through the myriad associations brands can be made to bear.”<sup>48</sup>

As such, trademarks themselves have become very valuable commodities.<sup>49</sup> Consumers began purchasing products not just

---

corporate logos were introduced to mass-produced products like Campbell’s Soup, H.J. Heinz pickles and Quaker Oats cereal. . . . After the product names and characters had been established, advertising gave them a venue to speak directly to would-be consumers. The corporate “personality,” uniquely named, packaged and advertised, had arrived.

*Id.* at 6. For a more complete discussion of the evolution of the brand, see KLEIN, *supra* note 42, at 5–26.

<sup>44</sup> *Id.* at 5.

<sup>45</sup> “[T]here was a burgeoning awareness that a brand wasn’t just a mascot or catchphrase or a picture printed on the label of a company’s product; the company as a whole could have a brand identity . . . .” *Id.* at 7.

<sup>46</sup> *Id.*

<sup>47</sup> See Drescher, *supra* note 9, at 334 (“The consumer no longer buys a product; he buys, consumes and seeks to assume an identity.”).

<sup>48</sup> Rob Horning, *Going Generic*, POPMATTERS (Nov. 7, 2008), <http://www.popmatters.com/pm/post/going-generic>.

<sup>49</sup> See Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1728 (1999) (“Consumers have come to attach enormous value to trade symbols, and it is no longer uncommon to see the symbols valued far in excess of

because of their physical capabilities; instead they connected the product with how it made them feel and their perception of how it could change their lifestyle.<sup>50</sup> Trademarks became signifiers of products which had characteristics consumers found attractive<sup>51</sup>—characteristics which may have little to do with source and everything to do with advertising and branding.<sup>52</sup>

In 1948, Ralph Brown examined the effects advertising had on trademark law.<sup>53</sup> Brown was of the traditional school of thought that the only true value of the trademark was the source information it conveyed to the consumer.<sup>54</sup> Furthermore, he believed that for a consumer, the true value of advertising was its ability to bring information to the consumer.<sup>55</sup> It is easy to see that

---

the worth of the underlying products they identify. In a very real sense, trade symbols are themselves often products . . .”).

<sup>50</sup> See Drescher, *supra* note 9, at 306 (“Inherent in every product, from tennis rackets to prunes, are certain cultural associations or mythical attachments which may or may not be desirable to the seller of the product. Since context is so important to the determination of meaning, a manipulation of context can influence our perception of the product.”).

<sup>51</sup> See Kozinski, *supra* note 41, at 962 n.9 (“As Judge Posner has noted: ‘In an age when fashion-conscious consumers wear T-shirts emblazoned with the trademarks of consumer products and owners of Volkswagens buy conversation [sic] kits to enable them to put a Rolls Royce grille on their car, it is apparent that trade names, symbols, and design features often serve a dual purpose, one part of which is functional in the sense of making the product more attractive, and is distinct from identifying the manufacturer or his brand to the consumer.’” (quoting *W.T. Rogers Co. v. Reene*, 778 F.2d 334, 340 (7th Cir. 1985))).

<sup>52</sup> See Litman, *supra* note 49, at 1732 (“[T]he pervasiveness of advertising has transformed our environment . . . . Trade symbols have wormed their way into everyday language, precisely as their owners probably intended. As happens with language, speakers and writers have imbued these trade symbols with connotations distinct from and sometimes unrelated to their significance as designators of product source.”).

<sup>53</sup> See generally Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 *YALE L.J.* 1165, 1167 (1948) (questioning whether the courts are protecting public or private interests when they protect trademarks).

<sup>54</sup> See Litman, *supra* note 49, at 1727 (“An important premise underlying Ralph’s analysis was that trade symbols themselves had no legitimate intrinsic value except insofar as they symbolized information about the products they accompanied.”).

<sup>55</sup> See *id.* at 1731 (“One reason that Ralph’s premise—that from the public’s point of view advertising’s value lies in its ability to convey information—may seem quaint today stems in part from the way consumers have come to view advertising. Advertising is utterly pervasive, and consumers’ relation to the ads they see and hear is complex. Most obviously, to the extent that advertising seeks to convey bald information, that information is possibly false and almost certainly slanted in misleading ways.”).

the landscape of advertising has surely changed since Brown's day:

When Ralph Brown wrote his seminal article on trademark law fifty years ago, the modern era of trademark law had just begun. The Lanham Act, the foundation of trademark law today, was only two years old, and the nature of modern commerce was only just beginning to take shape.

Quite a lot has changed in [sixty] years. More and more of the currency of commerce is not goods, but information and brand-loyalty itself. The economics of trademarks and advertising has grown increasingly sophisticated over this period. . . . [T]here has been a gradual but fundamental shift in trademark law. Commentators and even courts increasingly talk about trademarks as property rights; as things valuable in and of themselves rather than for the product goodwill they embody . . . they are well on their way to divorcing trademarks entirely from the things they are supposed to represent.<sup>56</sup>

Brown viewed advertising as adding to the informational function that trademarks already served.<sup>57</sup> Given the pervasiveness of advertising today, advertising often does less to *inform* the consumer and more to *persuade* the consumer to subscribe to the brand's image.<sup>58</sup> Thus, the relationship consumers have to advertisements is increasingly complex; today's consumers know that advertisements cannot always be taken at face value.<sup>59</sup> And yet, advertising still has an unmistakable power—a power trademark law grapples with.<sup>60</sup> Traditionally, trademark law has

---

<sup>56</sup> Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 *YALE L.J.* 1687, 1687–88 (1999).

<sup>57</sup> See Brown, *supra* note 53, at 1185–87.

<sup>58</sup> See Litman, *supra* note 49, at 1732.

<sup>59</sup> See *id.*; see also *supra* Part I.B.

<sup>60</sup> Mark Bartholomew, *Advertising and the Transformation of Trademark Law*, 38 *N.M. L. REV.* 1, 4 (“Trademark law assumes that advertising’s effects are transient and that the appeal of one brand can always be shrugged off in favor of another. To the

“focused on preserving informational clarity in the marketplace.”<sup>61</sup> Brown believed that the goals of trademark law were bound to this “information function.”<sup>62</sup>

### B. *The Growth of Consumer Cynicism*

Marian Wright and Peter Friestad coined the term “persuasion knowledge,” which is used to define a consumer’s theories and beliefs about persuasion tactics.<sup>63</sup> Today’s consumers are aware that brands are trying to seduce them.<sup>64</sup> Because of the vast number of messages bombarding consumers, companies need to find innovative ways to get through the advertising clutter. Some believe that companies who are willing to take big risks are doing the right thing<sup>65</sup> in order to “overcome[ ] consumers’ defenses to [their] brand.”<sup>66</sup>

Consumers know, for instance, that attention, emotion and trust are common tactics in influence. Celebrity endorsements capture *attention*. Scare tactics spur *emotion*. Brands provide *trust*. And when any of these aspects seems suspect—is

---

contrary, recent research in cognitive psychology demonstrates that advertising does, in effect, leave a permanent mark on its audience.”).

<sup>61</sup> Stacey L. Dogan, *What Is Dilution, Anyway?*, 105 MICH. L. REV. FIRST IMPRESSIONS 103, 106 (2006).

<sup>62</sup> Lemley, *supra* note 56, at 1688 (“For Brown the goals of trademark law are bound up with the ‘information function’ of trademarks. Trademarks are a compact and efficient means of communicating information to consumers.”).

<sup>63</sup> Friestad & Wright, *supra* note 6, at 1 (“People learn about persuasion in many ways: from firsthand experiences in social interactions with friends, family, and co-workers; from conversations about how people’s thoughts, feelings, and behaviors can be influenced; from observing marketers and other known persuasion agents; and from commentary on advertising and marketing tactics in the news media. As a consequence of this learning, over time the effects of certain actions by persuasion agents (e.g., advertisers, salespeople) on people’s attitudes and behaviors will also change, because people’s persuasion knowledge shapes how they respond as persuasion targets.”).

<sup>64</sup> Ben Kunz, *Starbucks’ Unbranding and the Persuasion Defense*, THOUGHT GADGETS (Aug. 15, 2009, 8:26 AM), <http://www.thoughtgadgets.com/2009/08/starbucks-unbranding-and-persuasion.html> [hereinafter *Starbucks’ Unbranding*] (“In simple terms, persuasion knowledge means consumers know that you are trying to seduce them, so they filter every message accordingly. . . . [C]onsumers are constantly on guard against the hidden motive.”).

<sup>65</sup> For example, see the case study on Starbucks, *infra* Part II.A.

<sup>66</sup> *Starbucks’ Unbranding*, *supra* note 64 (quoting media analyst Gladys Santiago).

*William Shatner really your gateway to travel savings? Will health care reform really kill old people in death panels? Is Starbucks really so trustworthy that you wouldn't rather try a little unknown coffee shop?—consumers move on.*<sup>67</sup>

The idea is to get consumers to stop and pay attention, and as Klein notes, “marketers . . . have dutifully come up with clever and intrusive new selling techniques to do just that.”<sup>68</sup> Klein perfectly captures the essence of consumer cynicism, explaining that the more advertisements consumers are exposed to, the more their persuasion knowledge develops, and the more resistant they become:

According to the . . . United Nations Human Development Report, the growth in global ad spending “now outpaces the growth of the world economy by one-third.”

This pattern is a by-product of the firmly held belief that brands need continuous and constantly increasing advertising in order to stay in the same place. According to this law of diminishing returns, the more advertising is out there (and there is always more, because of this law), the more aggressively brands must market to stand out. . . . David Lubars, a senior ad executive in the Omnicom Group, explains the industry’s guiding principle with more candor than most. Consumers, he says, “are like roaches—you spray them and spray them and they get immune after a while.”<sup>69</sup>

As Klein succinctly summarizes, “So, if consumers are like roaches, then marketers must forever be dreaming up new concoctions for industrial-strength Raid.”<sup>70</sup>

---

<sup>67</sup> *Id.* (emphasis in original).

<sup>68</sup> KLEIN, *supra* note 42, at 9.

<sup>69</sup> *Id.* at 8–9.

<sup>70</sup> *Id.* at 9.

### C. *Unbranding: The Wolf in Sheep's Clothing*

One way a company tries to subvert a consumer's persuasion knowledge is to create what is essentially a "sub-brand" with its own brand and trademark. Companies have been using sub-brands as a form of "industrial-strength Raid" for decades:

Marketers have known for decades that consumers are gun shy about buying from single brand entities. Brand architecture often creates fragmented options to provide the illusion of choice and to remove boredom; stroll down a convenience store beverage aisle or the laundry detergent row in your grocery store and you'll see hundreds of sub-brands produced by the same five or six corporate parents.<sup>71</sup>

Think of Procter & Gamble. What products does Procter & Gamble make?<sup>72</sup> Procter & Gamble has given each of its products unique trademarks and from there, branded each of them separately as sub-brands: Febreze,<sup>73</sup> Iams,<sup>74</sup> Clairol,<sup>75</sup> Old Spice,<sup>76</sup> and Duracell,<sup>77</sup> just to name a few.<sup>78</sup> This is Procter & Gamble's brand architecture. Procter & Gamble's sub-branded brand architecture presents questions of source disclosure.

#### 1. The Architecture of Unbranding

Companies employ brand architecture to organize their brand portfolios.<sup>79</sup> Ideally, the brand architecture should define how the

---

<sup>71</sup> Starbucks' *Unbranding*, *supra* note 64 (quoting media analyst Gladys Santiago).

<sup>72</sup> For a complete list of products, see *All Brands*, P&G, [http://www.pg.com/common/product\\_sitemap.shtml](http://www.pg.com/common/product_sitemap.shtml) (last visited May 17, 2010).

<sup>73</sup> FEBREZE, [http://www.febreze.com/en\\_US/home.do?gclid=CNiXvrmC2J4CFchn5QodiBVArg](http://www.febreze.com/en_US/home.do?gclid=CNiXvrmC2J4CFchn5QodiBVArg) (last visited Dec. 14, 2009) (air freshener).

<sup>74</sup> IAMS, [http://www.iams.com/iams/en\\_US/jsp/IAMS\\_Page.jsp?pageID=IPPDA](http://www.iams.com/iams/en_US/jsp/IAMS_Page.jsp?pageID=IPPDA) (last visited Dec. 14, 2009) (dog food).

<sup>75</sup> CLAIROL HAIR COLOR, <http://www.clairol.com/index.jsp> (last visited Dec. 15, 2009) (hair color product).

<sup>76</sup> OLD SPICE, <http://www.oldspice.com> (last visited Dec. 15, 2009) (deodorant and antiperspirant).

<sup>77</sup> DURACELL, <http://www.duracell.com> (last visited Dec. 15, 2009) (batteries).

<sup>78</sup> See *All Brands*, P&G, *supra* note 72.

<sup>79</sup> "Brand architecture is an organizing structure of the brand portfolio that specifies brand roles and the nature of relationships between brands." David A. Aaker & Erich

corporate brand and the sub-brands relate to and support each other and also how the sub-brands reflect or reinforce the core purpose of the corporate brand to which they belong.<sup>80</sup> Most well-known, large corporations fit into three distinct brand architectures: the corporate brand, the endorsed brand, and the individually branded product line.<sup>81</sup>

In the corporate brand structure, the company's name is used as a brand name.<sup>82</sup> The company's name is how the company is known to all its stakeholders and the name may also be used in conjunction with product descriptions and sub-brands/endorsed brands.<sup>83</sup> An example of a company with a corporate brand structure is Sony.<sup>84</sup> Sony is readily identifiable as a brand whether its trademark is placed on a television, headphones, or on the back of a record. Sony also uses its corporate brand to endorse its sub-brands: Sony Records and Sony PlayStation for example.<sup>85</sup>

An endorsed brand depends on the parent brand for brand recognition.<sup>86</sup> As the name suggests, the parent brand is used as an endorsement for a sub-brand.<sup>87</sup> Generally, the parent brand builds its brand recognition in one market, and once established, branches into other diverse markets.<sup>88</sup> Virgin, which originally consisted of just Virgin Records,<sup>89</sup> is a great example. Although Virgin is a readily identifiable corporate brand, Virgin most often uses its

---

Joachimsthaler, *The Brand Relationship Spectrum: The Key to the Brand Architecture Challenge*, 42 CAL. MGMT. REV. 8, 8 (2000).

<sup>80</sup> *See id.*

<sup>81</sup> *BrandCareers—Glossary*, BRANDCHANNEL, [http://www.brandchannel.com/education\\_glossary.asp](http://www.brandchannel.com/education_glossary.asp) (last visited Apr. 6, 2010).

<sup>82</sup> *Corporate Branding vs. Product Branding*, BRAND EXPRESS, <http://www.brandxpress.net/2006/02/corporate-branding-vs-product-branding> (last visited Apr. 6, 2010).

<sup>83</sup> *Id.*

<sup>84</sup> SONY USA, <http://www.sony.com/index.php> (last visited Apr. 6, 2010).

<sup>85</sup> *Sony Corporation of America—Corporate Fact Sheet*, SONY USA, <http://www.sony.com/SCA/corporate.shtml> (last visited Apr. 6, 2010).

<sup>86</sup> *BrandCareers—Glossary*, *supra* note 81.

<sup>87</sup> *Id.* A parent brand acts as an endorsement to one or more sub-brands within a range. A sub-brand is a product or service brand that has its own name and visual identity to differentiate it from the parent brand.

<sup>88</sup> This is known as “brand extension.” *See Understanding Brand Extension*, BRAND EXTENSION RES., <http://www.brandextension.org/definition.html> (last visited Aug. 31, 2010).

<sup>89</sup> *History*, VIRGIN, <http://www.virgin.com/history> (last visited Apr. 1, 2010).

mark to endorse its sub-brands: Virgin Mobile, Virgin Airlines, Virgin Megastore, Virgin Records, etc.<sup>90</sup> In most cases, the sub-brand would not be uniquely identifiable without the parent brand—for example, Heinz Tomato Ketchup would not be as recognizable to a consumer if it were called Tomato Ketchup.

Unlike the two architectures described above, where the source of the product is readily identifiable, the individually branded product line lacks transparency. This structure is the brand architecture employed by Procter & Gamble.<sup>91</sup> When products are individually branded, the company creates a separate brand image for each product, or product category, in its portfolio.<sup>92</sup> In addition to Procter & Gamble, PepsiCo. and Unilever are universally recognized companies that also create separate brand images for the products in their portfolios.<sup>93</sup> PepsiCo. is the parent company of Pepsi-Cola, Frito-Lay, Quaker Oats, Tropicana, and Gatorade.<sup>94</sup> Unilever is the parent company behind both Dove and Axe,<sup>95</sup> to name just two of its individual brands. In the case of the individually branded product, consumers are less likely to be able to identify the source of the product because the source is not clearly identified. Individually branded products are an example of branding an *apparent* source rather than the *actual source*.<sup>96</sup>

---

<sup>90</sup> *A-Z Index*, VIRGIN, <http://www.virgin.com/company> (last visited Apr. 1, 2010).

<sup>91</sup> *All Brands*, P&G, *supra* note 72.

<sup>92</sup> *Id.*

<sup>93</sup> *About Us*, UNILEVER, <http://www.unilever.com/aboutus> (last visited Apr. 1, 2010); *Global Structure & Operations*, P&G, [http://pg.com/en\\_US/company/global\\_structure\\_operations/index.shtml](http://pg.com/en_US/company/global_structure_operations/index.shtml) (last visited Apr. 1, 2010); *PepsiCo Brand Portfolio*, PEPSICO, <http://www.pepsico.com/Brands.html> (last visited Apr. 1, 2010) [hereinafter *PepsiCo Brand Portfolio*].

<sup>94</sup> *PepsiCo Brand Portfolio*, *supra* note 93.

<sup>95</sup> *Our Brands*, UNILEVER, <http://www.unilever.com/brands> (follow “Personal Care Products” hyperlink) (last visited Dec. 14, 2009). In other parts of the world, Axe is sold under the brand name LYNX. See LYNX EFFECT, <http://www.thelynxeffect.com/#/home.aspx> (last visited Apr. 1, 2010).

<sup>96</sup> For example, Unilever is the parent brand or actual source of apparent source sub-brands Dove and Axe.

## a) One Company, Two Brands, Same Product

The Starbucks corporation recently opened a new location in Seattle, named 15th Avenue Coffee and Tea.<sup>97</sup> By opening 15th Avenue Coffee and Tea, Starbucks opened its first “unbranded” location.<sup>98</sup> 15th Avenue Coffee and Tea is an “unbranded” Starbucks store.<sup>99</sup> Although it *is* a Starbucks location, no traditional Starbucks branding elements are present.<sup>100</sup> It lacks any of the tell-tale Starbucks identifiers, including the Starbucks logo and trade dress.<sup>101</sup> 15th Avenue Coffee and Tea has its own brand identity.<sup>102</sup> By giving 15th Avenue Coffee and Tea its own name and distinctive atmosphere, Starbucks is creating a sub-brand.<sup>103</sup> However, this sub-brand is still selling the same goods as the parent company.<sup>104</sup> At 15th Avenue Coffee and Tea, Starbucks products will be “dressed up” in 15th Avenue Coffee and Tea packaging.

## b) One Company, Two Directly Competing Brands

Sometimes, a company will introduce two individually branded products in the same product category. For example, Procter & Gamble is the maker of both Tide and Cheer.<sup>105</sup> These two products can often be found next to each other on the shelves of supermarkets, forcing consumers to choose one over the other. By placing multiple brands in one product category, companies are able to target a larger segment of the market. They can sell products at similar price points, and also include a “discount” or “premium” brand.<sup>106</sup> In product categories like laundry detergent, it is unlikely consumers know which brands belong to which companies a majority of the time.

---

<sup>97</sup> Melissa Allison, *Starbucks Tests New Names for Stores*, SEATTLE TIMES, July 16, 2009, [http://seattletimes.nwsourc.com/html/localnews/2009479123\\_starbucks16.html](http://seattletimes.nwsourc.com/html/localnews/2009479123_starbucks16.html).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *See supra* note 96.

<sup>104</sup> *See supra* note 96.

<sup>105</sup> *All Brands*, P&G, *supra* note 72.

<sup>106</sup> Procter & Gamble manufactures the “discount” brand Gain. *Id.*

Sometimes these brands generate entire product lines: the Tide product line includes powders, liquids, stain release products, “ToGo” pens, and cleaning accessories.<sup>107</sup> Within just the Tide liquids category, there is Tide, Tide Free, Tide Coldwater, Tide TOTALCARE, and many more.<sup>108</sup> Cheer has a similar, albeit smaller, line of products.<sup>109</sup>

### c) Two Companies, Two Brands, Same Product

Although the scenario of two companies marketing two essentially identical products may appear in many contexts, this paper is most concerned with “unbranded” generic products.<sup>110</sup> No matter what the product, it is rare that you cannot find a generic “unbranded” version of that product. As you walk through the store, conveniently located next to each other on the shelves, you can find Clean & Clear and the “unbranded” generic version. A few aisles over, you might spot Swiffer cleaning pads next to their “unbranded” generic version. This list is never-ending. However, generics are not really unbranded; as one consumer observes, “unbranded goods are merely branded by the retailers themselves, without the aid of expensive marketing campaigns.”<sup>111</sup>

Many stores, including Target and Walmart, and supermarkets, including Stop & Shop, have created their own lines of “unbranded products.”<sup>112</sup> Generally these brands are advertised as “equal

---

<sup>107</sup> *Tide*, TIDE PRODUCTS, <http://www.tide.com/en-US/productLanding.jspx> (last visited Apr. 1, 2010).

<sup>108</sup> *Tide Liquids*, TIDE, <http://www.tide.com/en-US/categories/tide-liquids.jspx> (last visited Apr. 1, 2010).

<sup>109</sup> *Buy Cheer Laundry Detergent Products Online*, CHEER, <http://www.cheer.com/buy-laundry-detergent-online.shtml> (last visited Apr. 1, 2010).

<sup>110</sup> *Door Sys., Inc. v. Pro-Line Door Sys., Inc.*, 83 F.3d 169, 171 (7th Cir. 1996) (“A generic term, in the jargon of trademark law, is a word that denotes the product rather than any of the brands of the product.”).

<sup>111</sup> Horning, *supra* note 48.

<sup>112</sup> *See Up & Up*, TARGET, <http://pressroom.target.com/pr/news/brands/up> (last visited Dec. 14, 2009) (stating that Target’s Up & Up brand includes over 40 product categories with more than 800 products); WALMART, <http://www.walmart.com/search> (enter “Equate” in the search field) (last visited Dec. 14, 2009) (listing 358 products made with Equate trademark); *Brands*, STOP & SHOP, [http://www.stopandshop.com/our\\_stores/offerings/brands/index.htm](http://www.stopandshop.com/our_stores/offerings/brands/index.htm) (last visited Dec. 14, 2009) (calculating that the four separate Stop & Shop labels—Nature’s Promise, CareOne, Simply Enjoy, and Guaranteed Value—make a combined 2500 products).

quality as national brands but at a fraction of the cost.”<sup>113</sup> During the financial crisis of the past couple of years, people have increasingly turned to generic “unbranded” products.<sup>114</sup> During good times, people are hesitant to depart with brands with which they have developed a psychological connection, even if those brands do cost more than the generic versions.<sup>115</sup> There is a certain mystique that surrounds “unbranded” versus name-brand goods.<sup>116</sup> However, if a consumer looks closely, he or she will often find that the “unbranded” store-brand goods contain the exact same ingredients as do the brand-name goods, at a fraction of the price.<sup>117</sup>

#### d) The “Unbranded” Brand

A fourth brand structure is the “unbranded” brand. These brands fit the traditional definition of the term unbranded: anything

---

<sup>113</sup> *Up & Up*, *supra* note 112.

<sup>114</sup> See Ellen Byron, *At the Supermarket Checkout, Frugality Trumps Brand Loyalty*, WALL ST. J., Nov. 6, 2008, at D1, available at <http://online.wsj.com/article/SB122592835021203025.html> (“[A]bout 40% of primary household shoppers said they started buying store-brand paper products because ‘they are cheaper than national brands,’ according to a September report by market-research company Mintel International, which interviewed 3,000 consumers. Nearly 25% of respondents reported that it is ‘really hard to tell the difference’ between national brands and store brands of paper products. Store brands on average cost 46% less than name-brand versions, Mintel found. . . . Meanwhile, private-label versions of soap and other bath products are up 23% in the 52-weeks ended Sept. 6, to \$168 million, according to Nielsen Co. Private-label versions of skin-care items are up 16% to \$182 million during the same period.”).

<sup>115</sup> You can keep the same sort of stuff, only cheaper, when you go generic. People generally choose to fail to recognize this discovery in flush times because it impedes the chief appeal of brands, which is to serve as a vector for the consumer to experience the lifestyle marketing for various products vicariously—brands allow us to turn the soap we use into an expression of our inner truth, to make buying a new shirt our momentary entrée into a world of glamour, to make a richer identity for ourselves through the myriad associations brands can be made to bear.

Horning, *supra* note 48; see also *Unbranding Our Identity*, NEURONARRATIVE (Nov. 11, 2008, 3:36 PM), <http://neuronarrative.wordpress.com/2008/11/11/unbranding-our-identity> (“[A] lack of disposable income acts as an antidote to brand mystification, leading to epiphanies like, ‘So Suave at \$2.99 really *is* just as good as Paul Mitchell at \$15.99!’”).

<sup>116</sup> See Horning, *supra* note 48.

<sup>117</sup> See *Buying Generic Could Save You a Bundle*, NEWSNET5.COM (Sept. 23, 2009), <http://www.newsnet5.com/money/21079812/detail.html>.

“not marked with the owner’s mark” or “not sold under a brand name.”<sup>118</sup> Unbranded brands do not put their trademark on their products. These products differ from the “unbranded” generic brands, a difference which is the most obvious by looking at branded clothing. For example, unlike Polo, whose clothing is marked with its omnipresent polo player, American Apparel does not embellish its clothing with a trademark.<sup>119</sup> However, that is not to say that American Apparel’s clothing has not taken on a unique brand identity or that its clothes are unidentifiable based on the absence of a trademark. Much like “unbranded” generics, unbranded brands are a fiction—“unbranded” generics and unbranded brands are, inevitably, branded. The difference is that unbranded “generic” brands generally do not have large-scale marketing campaigns but generate business just by being strategically located in stores, whereas these unbranded brands are marketed and advertised much like other “branded” brands.<sup>120</sup> When you step back and examine the entities that promote themselves as “unbranded,” that, in itself, becomes the brand identity. In our logo-driven world, brands that are “unbranded” might be considered a novelty.

## 2. Carving Out a Niche Product: Decision to Unbrand

By employing the individually branded product architecture, and “unbranding” certain parts of the company portfolio—specifically when a company creates two directly competing brands or sells the same product under two different brands—companies are ultimately attempting to keep up with consumer trends.

During the rise of branding, it made sense for big companies to buy smaller companies and use the better-known brand to promote the lesser-known products.<sup>121</sup> However, as consumer cynicism has

---

<sup>118</sup> *Supra* text accompanying note 7.

<sup>119</sup> See AMERICAN APPAREL STORE, <http://store.americanapparel.net> (last visited Apr. 9, 2010).

<sup>120</sup> *Advertising Archive*, AMERICAN APPAREL, <http://americanapparel.net/presscenter/ads/index.aspx> (last visited Dec. 14, 2009).

<sup>121</sup> Chris Anderson, *Why Niche Brands Win*, LONG TAIL (Feb. 19, 2007, 5:58 PM), [http://www.longtail.com/the\\_long\\_tail/2007/02/why\\_niche\\_brand.html](http://www.longtail.com/the_long_tail/2007/02/why_niche_brand.html) (“Once upon a time, big companies bought smaller companies and integrated their offerings into the

increased, marketers have realized that niche products are becoming increasingly popular.<sup>122</sup> For example, in July of 2003, Nike purchased Converse for \$305 million dollars,<sup>123</sup> yet nowhere on its website does Nike mention Converse, nor does the Converse website mention Nike.<sup>124</sup> Blue Moon Brewing Company, which produces the specialty beer Blue Moon Belgian White Ale,<sup>125</sup> does not openly advertise that it is actually a subdivision of Molson Coors Brewing Company.<sup>126</sup> In today's marketplace of constantly changing business structures, it is hard for consumers to keep up.<sup>127</sup> Instead of companies driving products, in today's marketplace, the products themselves rule.

In this product-driven world, consumers have built strong connections to the brands they care about. One reason companies might choose to use unbranding to build their company portfolio is that consumers tend to have strong reactions when brands they like

---

larger product line. It made sense to sprinkle the better-known brand on the lesser-known products and leverage all that brand power.”).

<sup>122</sup> See *id.* (“[N]ow big is bad. Consumers are fleeing the mainstream for the authenticity and quality of niche products. Today, when a big company buys a little one, it hopes nobody notices. The aim is to keep the indie feel of the niche brand, while applying the distribution and marketing advantages of the big acquiring firm.”).

<sup>123</sup> Leslie Wayne, *Nike Purchasing Converse, a Legend on the Blacktop*, N.Y. TIMES, July 10, 2003, at C2, available at <http://www.nytimes.com/2003/07/10/business/10NIKE.html>.

<sup>124</sup> “Converse is a wholly owned subsidiary of Nike . . . [but] Nike Store doesn't mention Converse and Converse marketing doesn't mention Nike. If people knew that Converse was a division of Nike it wouldn't be as cool. Call it brand dis-synergy.” *Why Niche Brands Win*, *supra* note 121.

<sup>125</sup> See *History*, BLUE MOON, <http://www.bluemoonbrewingcompany.com> (last visited Apr. 9, 2010).

<sup>126</sup> James Bennet, *Coors to Introduce Specialty Beers*, N.Y. TIMES, Sept. 18, 1995, <http://www.nytimes.com/1995/09/18/business/the-media-business-advertising-addenda-coors-to-introduce-specialty-beers.html>. Note, in 2004, the Adolph Coors Company merged with Canada's Molson Inc. and became Molson Coors Brewing Company. See *Coors and Molson Sign Merger Agreement*, ALL BUS. (July 22, 2004), <http://www.allbusiness.com/retail-trade/food-stores/4482747-1.html>.

<sup>127</sup> See Dick Rowan, Comment to *Why Niche Brands Win*, LONG TAIL (Feb. 21, 2007, 7:43 AM), [http://www.longtail.com/the\\_long\\_tail/2007/02/why\\_niche\\_brand.html](http://www.longtail.com/the_long_tail/2007/02/why_niche_brand.html) (“I think the larger point is that most of us can't keep up with the changing business structures or corporate shenanigans behind our brand choices. Expectations for corporations are low. Products rule.”).

are altered.<sup>128</sup> In 2009, Kraft expanded its Australian product line with the addition of a new Vegemite product.<sup>129</sup> The new product combined traditional vegemite with a swirl of cream cheese to make an entirely new product.<sup>130</sup> They released the product in July, putting it on the shelves with a label that read “Name Me.”<sup>131</sup> After receiving nearly 50,000 entries, the company revealed the product’s new name during a nationally televised Australian football game: Vegemite iSnack 2.0.<sup>132</sup> Based on the reaction of consumers,<sup>133</sup> it took only four days for Kraft to announce that they would put the name to another vote.<sup>134</sup> Ultimately, the new product was named Vegemite CheesyBite. Kraft is not the first company to have a product unveiling go terribly wrong. In 1985, Coke attempted to release New Coke and consumers reacted so poorly that the product was pulled from the shelves after just three months.<sup>135</sup> Similarly, consumers were so upset with the packaging redesign PepsiCo introduced for its line of Tropicana Premium Orange Juice that Tropicana reverted back to the prior packaging.<sup>136</sup> When it comes to beloved products, it seems consumers do not like to see changes:

---

<sup>128</sup> See Vicki Lane & Robert Jacobson, *Stock Market Announcements to Brand Extension Announcements: The Effects of Brand Attitude and Familiarity*, J. MARKETING, Jan. 1995, at 63 (“However, although popular, brand leveraging can lead to the adverse consequences of cannibalization, brand image dilution, and brand franchise destruction.”).

<sup>129</sup> Meraiah Foley, *Vegemite Contest Draws Protest*, N.Y. TIMES, Nov. 2, 2009, <http://www.nytimes.com/2009/11/03/business/global/03vegemite.html>.

<sup>130</sup> VEGEMITE CHEESYBITE, <http://www.vegemite.com.au/vegemite/page?PageRef=758> (last visited Mar. 17, 2010).

<sup>131</sup> Foley, *supra* note 129.

<sup>132</sup> *Id.*

<sup>133</sup> “The reaction was fierce. Vegemite-loving consumers took to the Internet to voice their collective indignation about the name. Thousands of Twitter posts, at least a dozen Facebook groups and a Web site dedicated to ‘Names that are better than iSnack 2.0’ blasted American-owned Kraft for tampering with an Australian icon.” *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> See Michael E. Ross, *New Coke and Other Marketing Fiascoes*, MSNBC (Apr. 22, 2005), <http://www.msnbc.msn.com/id/7209828>.

<sup>136</sup> Stuart Elliot, *Tropicana Discovers Some Buyers Are Passionate About Packaging*, N.Y. TIMES, Feb. 22, 2009, <http://www.nytimes.com/2009/02/23/business/media/23adcol.html>. For a consumer’s reaction to the new package design, see PARTNERS IN DESIGN (Dec. 16, 2008, 10:08 AM), <http://partnersindesign.blogspot.com/2008/12/tropicana-fail.html>.

As Coke learned with New Coke and Pepsi learned with Tropicana you have to be careful with brands people love. You may own the company and the product, but you do not own the brand. Your customers do. They are the ones who ultimately decide if your brand is going to be a success. Toying with their feelings in such a way is going to come back and haunt you. It's not that you can't challenge them, or bring them with you on the journey but you must do so in a way that connects to them and rings true.

. . . It's relatively easy to create a splash with a new brand extension, as Kraft have shown. But what's the point when you alienate your audience and possibly damage the parent brand.<sup>137</sup>

In order to avoid damaging the parent brand, companies might see unbranding as a way to expand their brand portfolios without experiencing consumer backlash. While companies may believe that this disassociation works in their favor, this might not be the case. While no specific studies have been done on the types of unbranding that this Note addresses, there has been research into whether exposing the source behind other covert methods of advertising,<sup>138</sup> thus triggering the consumer's persuasion knowledge, has a negative effect on the result of the advertising.<sup>139</sup> The study sought to determine whether disclosing the source behind the advertising had a negative effect on either the brand itself or the effectiveness of the ads.<sup>140</sup> One researcher has concluded that "triggering persuasion knowledge does not necessarily result in diminished evaluations of brands engaged in covert marketing . . . . Rather, its impact depends on factors such

---

<sup>137</sup> *iSnack 2.0!—When Brand Naming Goes Wrong*, TRULY DEEPLY (Sept. 30, 2009, 1:58 PM), <http://www.trulydeeply.com.au/madly/2009/09/30/isnack-2-0-when-brand-naming-goes-wrong>.

<sup>138</sup> Product placements are designed to blend into non-promotional plot lines, props, and dialogue on television, in songs, and in movies.

<sup>139</sup> See Mei-Ling Wei, Eileen Fischer & Kelly J. Main, *An Examination of the Effects of Activating Persuasion Knowledge on Consumer Response to Brands Engaging in Covert Marketing*, 27 J. PUB. POL'Y & MARKETING 34, 34 (2008).

<sup>140</sup> *Id.*

as the familiarity of the brand, the consumer's attitude toward covert marketing, and the way consumers become aware of the persuasion attempt."<sup>141</sup> In fact, the study showed that "for high-familiarity brands, activating persuasion knowledge can even bring about positive effects."<sup>142</sup> This research shows that a company's fear in disclosing that it is associated with, or owns, a particular brand, may be entirely unfounded.

## II. HOW UNBRANDING HARMS THE CONSUMER

The case study that follows provides a first-hand look at the harms caused by unbranding. First, it shows how unbranding undermines the primary function of the trademark: as identifiers of source, trademarks aim to provide the consumer with information about where a specific product was derived and ideally the mark should point back to the company that is ultimately responsible for the product.<sup>143</sup> However, by hiding the source of the product, either by removing the trademark entirely or by hiding behind a sub-brand, companies are divorcing the trademark from its historical purpose of source identification.

Second, by removing this source-identifying function, consumers are inherently deceived. This deception is the result of the failure to disclose the company ultimately responsible for the product. Furthermore, based on this lack of transparency, the consumer is unaware of who is ultimately receiving compensation from his or her transaction.

### A. *Investigation of the Brand: A Case Study*

Starbucks is arguably one of the most recognizable brands of the current day.<sup>144</sup> Since opening the doors of its first location at

---

<sup>141</sup> *Id.* at 35.

<sup>142</sup> *Id.* at 36.

<sup>143</sup> *See* Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 412 (1916).

<sup>144</sup> *See* Ann Marie Boncella, Jim Martin & Robert Boncella, *Calculated Intangible Value and Brand Recognition* (Washburn Univ. Sch. of Bus., Working Paper No. 55, 2005) (finding that out of twelve public companies, Starbucks ranked highest amongst graduate students in brand recognition).

Seattle's Pike Place Market in 1971,<sup>145</sup> Starbucks has grown to nearly 17,000 locations across the globe.<sup>146</sup> In 1994, Starbucks set up shop in New York City; at the time, the chain had only 425 locations.<sup>147</sup> Fifteen years later, there are 184 locations in New York City alone.<sup>148</sup> Just two years after opening in the Big Apple, Starbucks went international, opening stores in Japan and Singapore.<sup>149</sup> By then, the company had opened 1015 stores worldwide,<sup>150</sup> a nearly 250% increase in just over two years.<sup>151</sup>

The man behind the branding of Starbucks, Scott Bedbury, says that successful branding requires a company to "transcend the boundaries" of its product category.<sup>152</sup> For Starbucks, this required looking at how people view coffee: "We see how coffee has woven itself into the fabric of people's lives, and that's our opportunity

---

<sup>145</sup> *Starbucks Company Timeline*, STARBUCKS, <http://news.starbucks.com/images/10041/StarbucksCompanyTimeline-JAN2010.pdf> (last visited Apr. 13, 2010).

<sup>146</sup> This figure does not account for the 300 stores Starbucks reportedly closed in 2009. Janet Adamy, *At Starbucks, A Tall Order for New Cuts, Store Closures*, WALL ST. J., Jan. 29, 2009, at B1 ("Starbucks will close an additional 200 locations in the U.S. and 100 locations internationally by [Fall 2009]. That is on top of more than 600 store closures the company announced last year. The chain currently has nearly 17,000 outlets and 167,000 workers."). The last official number of stores Starbucks lists on its website is 16,706 locations in over 50 countries. *Company Profile*, STARBUCKS, <http://assets.starbucks.com/assets/company-profile-feb10.pdf> (last visited Apr. 9, 2010).

<sup>147</sup> Adelle Waldman, *We Are Totally Starbucked*, N.Y. OBSERVER, Nov. 13, 2007, <http://www.observer.com/2007/we-are-totally-starbucked>.

<sup>148</sup> *Starbucks Store Locator*, STARBUCKS, <http://www.starbucks.com/store-locator> (search "New York, New York, United States") (last visited Apr. 9, 2010).

<sup>149</sup> *Starbucks Company Timeline*, *supra* note 145.

<sup>150</sup> *Id.*

<sup>151</sup> Some of this explosive growth can be attributed to a man named Scott Bedbury, who was also the mastermind behind Nike's "Just Do It" campaign. See Alan M. Weber, *What Great Brands Do*, FAST COMPANY, Aug. 31, 1997, at 96, available at <http://www.fastcompany.com/magazine/10/bedbury.html?page=0%2C0> ("Since Bedbury joined Starbucks in 1995, the company has been on a branding blitz: beginning a relationship with United Airlines to serve Starbucks on all United flights; joining with Redhook Ale Brewery Inc. to introduce Double Black Stout, a malt beer flavored with coffee; venturing with Pepsi-Cola Co. to market Starbucks's Frappuccino drink in supermarkets; joining with Dreyer's Grand Ice Cream to introduce six flavors of Starbucks Ice Cream; opening its first retail stores in Tokyo and Singapore, with 10 more to follow in each market; expanding the Starbucks stores to 1,100 outlets with 22,000 employees; and serving coffee to 4 million people each week.").

<sup>152</sup> *Id.*

for emotional leverage.”<sup>153</sup> Although Starbucks is a coffee shop, its brand image is about much more than coffee. This is Starbucks’ mission: “[T]o inspire and nurture the human spirit—one person, one cup and one neighborhood at a time.”<sup>154</sup> When you enter a Starbucks coffee shop, you enter an experience. Starbucks strives to make each customer feel comfortable and welcome, no matter where the location: “When our customers feel this sense of belonging, our stores become a haven, a break from the worries outside, a place where you can meet with friends. It’s about enjoyment at the speed of life—sometimes slow and savored, sometimes faster. Always full of humanity.”<sup>155</sup>

The branding of Starbucks has included marketing Starbucks’ Frappuccino drink in supermarkets, introducing six flavors of Starbucks Ice Cream, and serving Starbucks coffee on all United Airlines flights.<sup>156</sup> These partnerships were, for a long time, the cornerstone of Starbucks advertising. In fact, the company did not run its first national television advertisement until late 2007.<sup>157</sup> By entering new markets, Starbucks successfully kept the brand fresh and innovative, and kept the customer coming back for more—something only the numbers can verify: today Starbucks serves nearly two million people per week.<sup>158</sup>

Yet, what does a company like Starbucks do next? Scott Bedbury, who departed Starbucks in 1998, encourages companies to “strike out in a new direction”<sup>159</sup> and in 2009, Starbucks did just

---

<sup>153</sup> *Id.*

<sup>154</sup> *Mission Statement*, STARBUCKS, <http://www.starbucks.com/mission/default.asp> (last visited Nov. 28, 2009).

<sup>155</sup> *Id.*

<sup>156</sup> Weber, *supra* note 151.

<sup>157</sup> See Ken Wheaton, *What You Say*, ADVERTISING AGE, Dec. 3, 2007, at 4.

<sup>158</sup> Press Release, Starbucks, Starbucks Serves Up Its First Fairtrade Lattes and Cappuccinos Across the UK and Ireland (Sept. 2, 2009), *available at* [http://news.starbucks.com/article\\_display.cfm?article\\_id=259](http://news.starbucks.com/article_display.cfm?article_id=259). While two million customers per week may seem like a large figure, compared to fast food establishments like McDonald’s, this figure is relatively low. In 2007, McDonald’s reportedly served forty-seven million customers per week. *FAQs*, MCDONALD’S CANADA, <http://www.mcdonalds.ca/en/aboutus/faq.aspx> (last visited Nov. 29, 2009).

<sup>159</sup> Weber, *supra* note 151 (“To keep a brand alive over the long haul, to keep it vital, you’ve got to do something new, something unexpected. It has to be related to the

that. In a move that appears very consistent with the brand's core position, as Bedbury recommends,<sup>160</sup> Starbucks is reinventing its "neighborhood" feel. While Starbucks claims to be about "neighborhood,"<sup>161</sup> Starbucks' current locations lack any neighborhood inspiration, and much like other large chains, each store is nearly identical to the next—the only difference is the actual location. In Seattle, one store has gotten a complete neighborhood makeover. When the Starbucks coffee shop at 328 15th Ave. E. closed for renovations and passerby saw the sign "YOUR neighborhood coffeeshop is getting a makeover,"<sup>162</sup> it is unlikely they expected 15th Avenue Coffee and Tea to open in its place. Although the coffee shop is still owned by Starbucks, the new "neighborhood coffee shop" is missing one key element: the Starbucks logo.<sup>163</sup> The ubiquitous, universally recognizable green mermaid is nowhere to be found. Instead, all the products have been rebranded with the "15th Avenue Coffee and Tea" name.<sup>164</sup> Starbucks has officially unbranded itself.

Why would a company with the brand recognition of Starbucks throw away its most powerful asset? Perhaps Starbucks is just picking up on a consumer trend,<sup>165</sup> or trying to garner a part of the market it has not been able to appeal to in the past—the part of the market who would never set foot in a traditional Starbucks location. Rather than changing the décor or modifying the offerings at select Starbucks locations, but continuing to use the goodwill associated with Starbucks' trademark, Starbucks is launching an entirely new concept store, complete with a new

---

brand's core position. But every once in a while you have to strike out in a new direction, surprise the consumer, add a new dimension to the brand, and reenergize it.").

<sup>160</sup> *Id.*

<sup>161</sup> "Every store is part of a community, and we take our responsibility to be good neighbors seriously. We want to be invited in wherever we do business." *Mission Statement*, STARBUCKS, *supra* note 154.

<sup>162</sup> Photograph by Erica Shultz, *Starbucks Tests New Name for Stores*, SEATTLE TIMES, July 16, 2009, available at <http://seattletimes.nwsourc.com/ABPub/zoom/html/2009479124.html>.

<sup>163</sup> Allison, *supra* note 97.

<sup>164</sup> *Id.* The store will, however, bear the disclaimer "Inspired by Starbucks." See 15TH AVE COFFEE & TEA, <http://www.streetlevelcoffee.com> (last visited Nov. 29, 2009).

<sup>165</sup> "[N]ow big is bad. Consumers are fleeing the mainstream for the authenticity and quality of niche products." Anderson, *supra* note 121.

trademark. The company gathered inspiration for its neighborhood coffee shop feel by sitting in other small coffee shops in the neighborhood.<sup>166</sup> Industry insiders think this unbranding could be the most brilliant move Starbucks has made in a decade.<sup>167</sup> The unbranding will give the company a chance to expand to a new target market. Consumers, however, are not as impressed.<sup>168</sup> Some see Starbucks' move to ditch its trademark as an attempt to merely "pretend they are something they're not."<sup>169</sup> They feel that 15th Avenue Coffee and Tea is a guise to fool those who would not otherwise buy its coffee into doing so.<sup>170</sup> Whatever the consumers' reasoning, this new venture shines a bright light on the issue of source disclosure and the evolution of the trademark. In this case, not only do consumers risk being deceived by the lack of source disclosure, but the new 15th Avenue Coffee and Tea trademark is only identifying an *apparent* source and completely fails to identify the *actual* source.

#### B. *But Where Did It Come from?*

As demonstrated above, the individually branded product is at the root of corporate unbranding. It is within this brand architecture that the trademark loses its function and consumers are deceived. By revisiting the individually branded product structures

---

<sup>166</sup> See Emily York, *Starbucks Gets Back Its Roots with Café Concept*, CRAIN'S DETROIT BUS., July 20, 2009, <http://www.crainsdetroit.com/article/20090720/EMAIL01/907209981#>.

<sup>167</sup> See, e.g., *id.* ("It feels like the first time they've done something right in a long time . . . . This has the opportunity of being the next evolution in coffee." (quoting Robert Passikoff, President of Brand Keys) (internal quotation marks omitted)).

<sup>168</sup> See Jonathan Read, Comment to *Starbucks Trials Unbranded Stores in "Stealth" Move*, BRAND REPUBLIC (July 21, 2009, 10:19 AM), <http://www.brandrepublic.com/News/921446/Starbucks-trials-unbranded-stores-stealth-move>.

<sup>169</sup> Tom Brush, Comment to *Starbucks Tests New Names for Stores*, SEATTLE TIMES (July 16, 2009, 7:59 AM), [http://community.seattletimes.nwsourc.com/reader\\_feedback/public/display.php?thread=150611&offset=120#post\\_608529](http://community.seattletimes.nwsourc.com/reader_feedback/public/display.php?thread=150611&offset=120#post_608529).

<sup>170</sup> See Mr. Joe, Comment to *Starbucks Tests New Names for Stores*, SEATTLE TIMES (July 16, 2009, 6:17 AM), [http://community.seattletimes.nwsourc.com/reader\\_feedback/public/display.php?thread=150611&offset=120#post\\_608529](http://community.seattletimes.nwsourc.com/reader_feedback/public/display.php?thread=150611&offset=120#post_608529) ("So Starbucks is rebranding their coffee to try getting business from the anti-Starbucks or Starbucks isn't hip crowd. That's funny!").

discussed in Part I.D,<sup>171</sup> this Note will closely examine the harms inherent in unbranding.

### 1. One Company, Two Brands, Same Product

For Starbucks, the benefit of a structure that allows it to have a “sub-brand” that is distinct from the corporate brand, but still sells the same product, is that Starbucks and 15th Avenue Coffee and Tea—the brand and sub-brand—will appear as separate entities to the public. Essentially, Starbucks has created a sub-brand to market its products in a new way. Ideally, if people begin to stray away from Starbucks as a brand, they will not be deterred from 15th Avenue Coffee and Tea because it is decidedly not a Starbucks. This brand structure allows Starbucks to target consumers who might not otherwise enter a Starbucks location by promoting itself as a local alternative to the giant parent corporation.<sup>172</sup> However, the cost to Starbucks is precisely the opposite; 15th Avenue Coffee and Tea will not be able to benefit from the goodwill associated with the Starbucks brand.

The problem with this unbranded model is that, without knowing it, 15th Avenue Coffee and Tea consumers might unwittingly generate business for Starbucks. Starbucks is misleading consumers who think they are visiting a small corner coffee shop and tricking them into buying from the corporate giant. Rather than affording consumers the chance to make an educated decision, companies employing this brand architecture are siphoning off a larger segment of the market by creating an illusion of market competition. Although it appears to the consumer as two brands putting forth competing products, in reality it is the same product being marketed to multiple target markets.

The second harm inherent in this model is the departure from the source-identifying purpose of the trademark; Starbucks is branding the *apparent* source instead of the *actual* source. While Starbucks is the actual source of the products sold at 15th Avenue

---

<sup>171</sup> See *supra* Part I.D.

<sup>172</sup> See, e.g., Bradford, *supra* note 35, at 1275 (“If we see the same things too often, we resent having to use effort to evaluate them repeatedly. Brand owners manage this advertising wearout by varying advertising campaigns and redesigning logos from time to time.”).

Coffee and Tea, consumers are led to believe that 15th Avenue Coffee and Tea is the source. As discussed in Part I.A, traditionally, marks have served as indicators of source which allow the consumer to identify the origin of goods.<sup>173</sup> When the mark discloses an apparent source, a mark stops functioning as a true indicator of the source. Furthermore, the actual source is no longer accountable for the quality and reliability of the product.

## 2. One Company, Two Directly Competing Brands

Some of the mystification inherent in this type of brand architecture can be removed by simply looking at the label on the back of a product. For instance, Procter & Gamble's name can be found just below the barcode on most of its products. However, it is not always this simple and transparency and disclosure are not always present. When one company owns two directly competing products, the problem is that the consumer is not afforded the opportunity to make a fully educated choice because of the trademark's failure to properly identify the actual source.

This harm may manifest itself in different ways. The first is where, as discussed above,<sup>174</sup> a company produces two individually branded product lines in the same product category and places them at different price points. The second is where a company produces individually branded products in the same product category but markets them in completely distinctive ways. Take, for example, Dove and Axe. The Campaign for Real Beauty,<sup>175</sup> Dove's marketing campaign, invites you to "join . . . in creating a world where real beauty is a source of self confidence."<sup>176</sup> The campaign celebrates the natural beauty of women and together with partners like the Girl Scouts and Boys and Girls Clubs of America runs self-esteem workshops for girls.<sup>177</sup> On the other hand, the Axe marketing campaign features women objectifying themselves and throwing themselves at men

---

<sup>173</sup> See *supra* Part I.A.

<sup>174</sup> See *supra* Part I.C.1.b.

<sup>175</sup> CAMPAIGN FOR REAL BEAUTY, <http://www.campaignforrealbeauty.com> (last visited May 26, 2010).

<sup>176</sup> *Campaign Feature—Self-Esteem*, DOVE, <http://www.dove.us/#/cfrb/selfesteem> (last visited May 26, 2010).

<sup>177</sup> *Id.*

who use Axe products.<sup>178</sup> These two individually branded product lines, which both have a men's care line and are both owned by Unilever,<sup>179</sup> have entirely distinctive marketing campaigns that stand in contradiction. While some consumers may be drawn to Dove based on the stance it takes advocating for women, the same consumer may be repulsed by the marketing campaign of Axe. Some consumers would be shocked to find out the same corporate giant is responsible for both products and their choices as consumers might be affected.

### 3. Two Companies, Two Brands, Same Product

Products that are—for all intents and purposes—identical but come from two distinct sources are misleading because the “unbranded” generic is selling the same thing as the brand-name product for less money. However, if the “unbranded” generic is clearly identified as such, the consumer is not being deceived. As for the name-brand product, chances are it falls within one of the two categories described above and has disclosure issues of its own. Providing consumers with both “branded” and “unbranded” generic versions of the same product is beneficial because it encourages competition in the marketplace.<sup>180</sup> Identical “branded” and “unbranded” products only cause harm to the consumer when a company is putting out the same product under two different names and failing to disclose the source, as is presented in Part I.C.1.a.<sup>181</sup>

### 4. The “Unbranded” Brand

As far as brand architecture is concerned, the altogether “unbranded” or “anti-branded” brand does not cause harm to the consumer because the product is not falsely representing a source.<sup>182</sup> Although the brand does not outwardly broadcast the source of its product, the source is transparent. As discussed in

---

<sup>178</sup> See, e.g., *The AXE Effect—Women—Billions*, YOUTUBE, <http://www.youtube.com/watch?v=I9tWZB7OUSU> (last visited May 26, 2010).

<sup>179</sup> *Brands for Life*, UNILEVER, [http://www.unilever.com/brands/?WT.GNAV=Our\\_brands](http://www.unilever.com/brands/?WT.GNAV=Our_brands) (last visited May 26, 2010).

<sup>180</sup> See *supra* Part I.C.1.c.

<sup>181</sup> See *supra* Part I.C.1.a.

<sup>182</sup> See *infra* text accompanying note 183.

Part I.C.1.d, unbranded brands are inevitably branded. When you look at the labels on these goods, you are able to identify who they are coming from. The trademark is still serving its source-identifying function, and there is no consumer deception.<sup>183</sup>

### C. Trademark Law Looses Its Grip

By unbranding, companies are moving, drastically and intentionally, away from the primary purpose of trademark law.<sup>184</sup> As we can see in today's marketplace, as companies unbrand, a trademark may do little to designate the *actual* source of a product,<sup>185</sup> but that should not diminish the protection the trademark receives under the law. Nor should the law fail to address the current needs of the market. As discussed above in Part I.A,<sup>186</sup> trademark law has two essential goals: preventing consumer deception by allowing the consumer to clearly identify the *actual* source of the goods, and ensuring product quality by holding the maker accountable for goods bearing his mark. By granting ownership rights in trademarks and preventing others from using confusingly similar marks, trademark law serves these twin goals.<sup>187</sup> A third reason for the protection of trademarks is the promotion of competition in the marketplace.<sup>188</sup> Without competition, there is no need to protect trademarks because consumers would not be tempted to borrow from the goodwill associated with others products.<sup>189</sup> By protecting the trademark, producers are encouraged to build their own reputation and

---

<sup>183</sup> See Bradford, *supra* note 35, at 1240.

<sup>184</sup> See *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163–64 (1995) (“[B]y preventing others from copying a source-identifying mark, [it] reduces the customer’s costs of shopping and making purchasing decisions . . . . [T]he law helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product.” (internal citation omitted)).

<sup>185</sup> See *supra* Part I.A.

<sup>186</sup> See *supra* notes 35–40 and accompanying text.

<sup>187</sup> Lemley, *supra* note 56, at 1688 (“By granting ownership rights over trademarks, we serve the twin goals of encouraging investment in product quality and preventing consumer deception.”).

<sup>188</sup> See Litman, *supra* note 49, at 1735 (“Competition, though, is the basis for the rationale underlying any protection of trade symbols. If we do not want to encourage producers of different products to compete with one another for consumers’ dollars, then we do not really need to protect trade symbols at all.”).

<sup>189</sup> See *id.*

compete with the goods of others. This competition rationale is directly linked to the source indicator function of trademarks.<sup>190</sup> Consumers must be able to identify the source of the trademark in order for them to generate goodwill for that source. Unbranding detracts from this ability because consumers are not able to identify the actual source.

Advertising and branding, and thus unbranding, are heavily intertwined. As discussed in Part I, advertising has been used to build an image around a particular trademark, thus building a brand image, and to deliver that brand image to the consumer. Through advertising “speakers and writers have imbued [trademarks] with connotations distinct from and sometimes unrelated to their significance as designators of product source.”<sup>191</sup> Although advertising has been a driving force in changing the role trademarks play in our everyday lives,<sup>192</sup> we must not let the law lose sight of these fundamental goals. As Judge Learned Hand proclaimed nearly sixty years ago, “[w]e are nearly sure to go astray in [trademark law] as soon as we lose sight of the underlying principle that the wrong involved is diverting trade from the first user by misleading customers who mean to deal with him.”<sup>193</sup> Yet, as Mark Lemley explains in *The Modern Lanham Act and the Death of Common Sense*, “courts increasingly treat brands as things owned in their own right, rather than as advertising connected with a particular product.”<sup>194</sup> This treatment by the courts reflects the change that has occurred in the marketplace; by unbranding, companies are increasingly treating brands as separate entities distinct from the parent company.<sup>195</sup> Lemley believes “these changes have loosed trademark law from its traditional economic moorings and have offered little of substance to replace

---

<sup>190</sup> See *id.* (“If what we are trying to accomplish is the promotion of competition, classic trademark rules remain well-suited to that goal.”).

<sup>191</sup> See *id.* at 1732 (“Trade symbols have wormed their way into everyday language, precisely as their owners probably intended.”).

<sup>192</sup> See *id.* (“[T]he pervasiveness of advertising has transformed our environment . . .”).

<sup>193</sup> Brown, *supra* note 53, at 1184 (quoting *S.C. Johnson & Son v. Johnson*, 116 F.2d 427, 429 (2d Cir. 1940)).

<sup>194</sup> Lemley, *supra* note 56, at 1697.

<sup>195</sup> See *supra* Part I.C.1.

them.”<sup>196</sup> We need to revisit the reason why trademarks and source disclosure are important:

[W]ithout doctrinal rules that encourage consumer self-reliance, advertising’s hold on the public mind will only grow stronger and stronger. Consumers need protection from confusion, but they also need the freedom to break free from affective responses to appealing trademarks. . . . As it stands now, trademark law doctrine creates a vicious cycle. As consumers become more dependent on advertising, they are more likely to be confused. But when a court detects confusion, it awards senior advertisers greater intellectual property rights. This only results in more advertising, less competition, and more consumer dependence. . . . Consumers should be protected from duplicitous advertising, but they should also be encouraged to engage in the sort of non-affective cognitive analysis that can break the bonds of loyalty, bonds forged by repetitive advertising surrounded by appealing contextual cues. At its core, the law of advertising must concern itself with correcting abuses while fostering a fair and healthy marketplace. Confronting the historical reasons for trademark law’s current doctrinal framework is a step in the right direction.<sup>197</sup>

If the words of Mark Lemley are true, then trademark law could be at the edge of a slippery slope. Trademarks became signifiers of products that had characteristics that consumers found attractive<sup>198</sup>—characteristics which may have little to do with source, and everything to do with advertising and branding.<sup>199</sup>

---

<sup>196</sup> Lemley, *supra* note 56, at 1688.

<sup>197</sup> Bartholomew, *supra* note 60, at 48.

<sup>198</sup> See, e.g., *supra* note 51.

<sup>199</sup> See Litman, *supra* note 49, at 1732 (“[T]he pervasiveness of advertising has transformed our environment . . . . Trade symbols have wormed their way into everyday language, precisely as their owners probably intended. As happens with language, speakers and writers have imbued these trade symbols with connotations distinct from and sometimes unrelated to their significance as designators of product source.”).

Unbranding brings to light a reality in today's marketplace; trademarks are increasingly used to conjure up images and feelings in the mind of the consumer rather than to identify the source of the good.

### III. THE DISCLOSURE REGIME GRABS HOLD

#### A. *Stealth Marketing: Regulation Falls Short*

Currently, the law does not address the types of unbranding identified in this Note. It does, however, for the specific purposes of broadcasting, and more recently, the Internet, regulate stealth marketing. Stealth marketing attempts to blur the line between free publicity and paid advertising by circulating paid-for messages that lack source attribution.<sup>200</sup> With stealth marketing, the issue is that a company is benefitting from the promotion of a product, without disclosing that it is receiving compensation.<sup>201</sup> The distinct harms that are apparent in unbranding are the loss of the trademark's function and the harm of consumer deception caused by a failure to disclose the proper source.<sup>202</sup> Both harms stem from the same issue: the trademark on the product does not disclose the *actual* source of the product, but rather, the *apparent* source. Therefore, a company is benefitting from promotion of the product, without disclosing that it is receiving compensation.<sup>203</sup>

While the loss of a specific trademark's function is a fundamental trademark problem, in order for regulation to come within the ambit of the Lanham Act,<sup>204</sup> the statute governing trademark law, advertising must be demonstrably false, and there

---

<sup>200</sup> "Publicity is the circulation of messages for free in the hopes of further dissemination without attribution of source. Advertising, by contrast, involves the paid circulation of messages, without attribution. Stealth marketing blurs the line between publicity and advertising by concealing sponsorship for a price." Goodman, *supra* note 20, at 90.

<sup>201</sup> See Rebecca Leung, *Undercover Marketing Uncovered*, CBS NEWS, July 25, 2004, <http://www.cbsnews.com/stories/2003/10/23/60minutes/main579657.shtml>.

<sup>202</sup> See *supra* Part II.B.

<sup>203</sup> See *supra* Part II.A.

<sup>204</sup> Lanham Act, 15 U.S.C. §§ 1051–1127 (2006).

must be a material harm to the consumer.<sup>205</sup> Ellen Goodman found that the problem with applying these laws to stealth marketing is that “[s]tealth marketers rarely make explicit or even implied misstatements of fact. If such marketing deceives, it does so with impressions. . . . The purpose is to bypass audience resistance to promotional messages by giving an erroneous impression of source.”<sup>206</sup> Unbranding, alternatively, purposely gives a false sense of source identification; companies intend for consumers to believe that each brand in its brand portfolio—each individually branded product or line of products—is derived from a different source.<sup>207</sup> However, as is the problem with applying these laws to stealth marketing, there are no explicit or even implied misstatements of fact. Companies merely give consumers the impression that each individually branded product or line of products comes from a different source. Therefore, the Lanham Act provides us with little guidance.

#### *B. Disclosure Laws: Beyond Broadcasting*

It would seem that advertising law is likewise concerned with only a small area of potentially deceptive practices. As Ellen Goodman points out, “The Federal Trade Commission Act, for example, covers only advertising that makes material misrepresentations likely to mislead reasonable consumers with respect to ‘a consumer’s choice of or conduct regarding a product.’”<sup>208</sup> Section 5 of the FTC Act prohibits “unfair methods of competition,” and was amended in 1938 to also prohibit “unfair or deceptive acts or practices.”<sup>209</sup> Furthermore, section 5 of the FTC Act was amended in August 1994 to provide that an act or practice is unfair if the injury it causes or is likely to cause to consumers is substantial, not outweighed by countervailing

---

<sup>205</sup> See *Skil Corp. v. Rockwell Int’l Corp.*, 375 F. Supp. 777, 783 (N.D. Ill. 1974) (setting forth the elements typically required for a Lanham Act false advertising claim).

<sup>206</sup> See Goodman, *supra* note 20, at 109–10 (footnotes omitted).

<sup>207</sup> See *supra* Part II.A.

<sup>208</sup> See Goodman, *supra* note 16, at 109 (quoting FTC, Policy Statement on Deception, appended to *FTC v. Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 182–83 (1984)).

<sup>209</sup> Act of March 21, 1938, ch. 49, § 3, 52 Stat. 111 (codified at 15 U.S.C. § 45(a)(1) (2006)).

benefits and not reasonably avoidable by consumers themselves.<sup>210</sup> The regulation of consumer deception, which occurs when there is a failure to disclose the source of sponsorship in advertisements, including testimonials and endorsements, is the responsibility of the Federal Trade Commission (the “FTC”), as designated by section 5 of the FTC Act. In an argument parallel to the one posed in this paper, Ellen Goodman has advanced the argument that the greatest harm of stealth marketing is deceit.<sup>211</sup>

Goodman suggests that sponsorship disclosure law might be the proper method to address the problem.<sup>212</sup> Sponsorship law draws its roots in broadcasting.<sup>213</sup> “The [Federal Communication Commission’s (the “FCC”)] incantation of the public’s ‘right to know whether the broadcast material has been paid for and by whom,’ and audience members’ ‘entitlement to know by whom they are being persuaded’ seems directly related to a fear of deceit.”<sup>214</sup> In the context of stealth marketing, “[u]ndisclosed sponsorship is not designed to appear authorless so that people know it is ‘anonymous writing’ but to assume false authorship—the authorial identity of the editor.”<sup>215</sup> Similarly, in the context of unbranding, undisclosed sponsorship is not designed to appear authorless, but rather it is designed to assume the “authorial” identity of the brand being advertised. By promoting the 15th Avenue Coffee and Tea entity, Starbucks is attempting to assign

---

<sup>210</sup> See Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 9, 108 Stat. 1691 (codified at 15 U.S.C. § 45(n)). The Commission previously relied on similar criteria to define the scope of its authority to prohibit unfair acts or practices pursuant to section 5(a) of the FTC Act. See, e.g., *Orkin Exterminating Co.*, 108 F.T.C. 263, 362 (1986); *Int’l Harvester Co.*, 104 F.T.C. 949, 1061 (1984). See generally FTC, Policy Statement on Unfairness, appended to *Int’l Harvester Co.*, 104 F.T.C. at 1070–76.

<sup>211</sup> See Goodman, *supra* note 20, at 100.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 98–99 (“The history of sponsorship disclosure law tracks the history of broadcasting. Section 317 is rooted in a 1912 law requiring newspaper and magazine publishers to provide ‘reading notices’ identifying paid advertisements as a condition of receiving second-class mail privileges. . . . It was not until the 1950s, however, in the wake of two highly publicized media scandals, that the sponsorship disclosure rules became important.”); see also Federal Communications Act of 1934, 47 U.S.C. § 317.

<sup>214</sup> See Goodman, *supra* note 20, at 110.

<sup>215</sup> *Id.* at 135.

“authorial” identity to 15th Avenue Coffee and Tea when, in reality, Starbucks is the true source of the promotion.

Goodman advocated revamping and extending sponsorship disclosure law beyond broadcasting: “[t]he potential of stealth marketing to deceive audiences is another, and thus far the best, justification for sponsorship disclosure law.”<sup>216</sup> It seems the Federal Trade Commission agreed. On December 1, 2009,<sup>217</sup> the FTC implemented new agency guidelines, which require all bloggers to disclose whether they are being paid, or receiving products for free, in exchange for posting reviews of products on their blogs.<sup>218</sup> The new guidelines are the first revision to the laws governing the use of endorsements and testimonials since 1980. The guidelines mark an attempt by the FTC to address how marketers approach viral and stealth marketing through social media.<sup>219</sup> They are a step toward increasing transparency on the Internet.<sup>220</sup> The implementation of these guidelines shows that the FTC is aware that disclosure is certainly an issue when it comes to how today’s products are marketed.

Presently, disclosure law is focused on the harm to consumers caused by the lack of sponsorship disclosure accompanying various forms of advertisements. We must look at the bigger picture: unbranded brands serve as advertisements in and of themselves. The problem is the “branding” inherent in the

---

<sup>216</sup> *Id.* at 100.

<sup>217</sup> FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255 (2009), available at <http://www.ftc.gov/os/2009/10/091005endorsementguidesfnnotice.pdf>.

<sup>218</sup> Marilyn Much, *FTC Mandates Disclosure by Blogs Used in Marketing*, INVESTORS.COM (Dec. 2, 2009), <http://www.investors.com/NewsAndAnalysis/Article.aspx?id=514113>.

<sup>219</sup> See *FTC Publishes Final Guides Governing Endorsements, Testimonials*, FED. TRADE COMM’N (Oct. 5, 2009), <http://www.ftc.gov/opa/2009/10/endortest.shtm>.

<sup>220</sup> See *Transparency in Social Media. Do You Trust Me?*, SOCIALWAYNE.COM (Feb. 6, 2009, 10:08 AM), <http://socialwayne.com/2009/02/06/transparency-in-social-media-do-you-trust-me> (“Transparency in social media especially pertaining to blogging and covering a product, brand or service means that I’m giving you an honest non-biased opinion or truth when I write or cover a particular topic. Online this can mean that, I am who I say I am online and that my reason for posting or having a discussion about a product, brand or service does not have any hidden agendas. Or if I’m posting or having a discussion about a product, brand or service and was paid or hired to do so, you’ll know about it up front or it will be included in the conversations.”).

unbranding; Starbucks is branding itself as 15th Avenue Coffee and Tea. At their core, disclosure laws require that when a company is promoting a product and receiving consideration for promoting that product, it must disclose this association.<sup>221</sup> When a parent company, like Starbucks, is branding, and thus promoting, a new entity, like 15th Avenue Coffee and Tea, Starbucks is receiving consideration without letting the consumer know it is the party receiving that consideration. The parent company is making it seem as though the new entity is the source of the products, brand, and advertisements; yet in reality, the actual source is the parent company. Therein lies the inherent problem, and the harm the FTC seeks to address: deception of the consumer. This deception is eliminated if companies disclose not only the *apparent* source of a product, but the *actual* source of the product. Disclosure laws should require that companies disclose not only the *apparent* source of a product, but the *actual* source of the product. Goodman advocated for a radical progression of disclosure laws by applying them to a new set of market issues, but we need to expand the laws themselves to encompass this larger problem. The new guidelines are an attempt to address the issues, but they fail to encompass the entire harm.

The extension of the sponsorship disclosure guidelines is a sign that the law is catching up to the trends of consumers and the ways in which companies are marketing to them. While companies have been diversifying their portfolios for decades,<sup>222</sup> the unbranding of Starbucks might be a sign of similar moves by other big companies in the future. It is time to take disclosure to a new level and promote transparency from the level of the corporate parent, even if this disclosure is as simple as putting the Procter & Gamble trademark on the back of Tide—at least then the consumer is given the chance to identify the *actual* source of the good.

Source disclosure also protects the integrity of trademarks. It prevents consumer deception by allowing the consumer to clearly identify the source of a good, but it also ensures product quality by holding the maker accountable for a good bearing his mark. By

---

<sup>221</sup> See, e.g., *supra* text accompanying notes 217–18.

<sup>222</sup> See *supra* Part I.C.

requiring that companies disclose not only the *apparent* source of a product, but the *actual* source of the product, the *actual* source of the good is held accountable.

#### CONCLUSION

The law seeks to protect consumers from deceitful and misleading advertising, but there is an apparent disconnect. Although the current regime of disclosure law recognizes that an omission can act as a lie, and thus be deceptive, it focuses on a micro-level rather than looking at the bigger picture. The law addresses the actions of individuals operating as vehicles to promote brands, yet it fails to take into account similar actions, taken on a much grander scale, by the companies themselves. Disclosure law promotes transparency in advertising, but there is little or no transparency in allowing companies to unbrand. Instead of encouraging transparency, the law is letting companies hide behind a shroud of their own making.

By unbranding, companies are misleading and deceiving the consumer, but they are also moving, drastically and intentionally, away from the primary purpose of trademark law.<sup>223</sup> Trademarks themselves are supposed to act as transparent indicators of source. Consumers should not have to dig through layers of branding to get to the *actual* source. Trademarks are protected by courts because of the goodwill that is generated by companies who invest in and build them. But what goodwill can discarding your trademark generate? We are at risk of losing touch with the primary goal of trademark law if this trend continues.

I propose that courts and consumers look to disclosure laws for a solution to the unbranding problem. Consumers need brands, and brands need consumers. In order to thrive in the marketplace, it is clear that brands need to be innovative in the ways they reach

---

<sup>223</sup> An additional theory that encompasses the harms apparent in stealth marketing, as advanced by Goodman, rests in the integrity of public discourse. *See* Goodman, *supra* note 20, at 100. I submit that this theory of harm is applicable to the subsets of unbranding addressed in this paper, but investigation into this harm should be left for another day.

1348            *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* [Vol. 20:1307

out to consumers and target new consumer bases.<sup>224</sup> However, companies need to do this in a transparent way that protects, rather than harms, consumers. I propose a call to action, for all those who promote transparency and disclosure law, to take a closer look at unbranding and the harm it causes consumers.

---

<sup>224</sup> See *supra* Part I.B.