

Do We Need a Law of the Brand?

Brands matter. Brands have existed in various forms, serving various functions, for nearly four thousand years. In more modern times, brands and brand management have become a central feature of the modern economy and a staple of business theory and business practice. Businesses rely on branding to avoid 1) commoditization of their products and services, 2) distinguish themselves from their competition, and 3) build loyal customer bases for whom no other brand or item will suffice. Consumers in turn rely on brands to 1) guide their purchasing patterns, 2) express their sense of style and individuality, and 3) form important connections with the brand providers and fellow brand consumers.

Given the centrality of brands and branding, one would expect that the law to understand this critically important concept, ponder the appropriate legal regime, and develop effective legal rules in one or more areas of the law that deal with business behavior. Instead, the law has been largely blind to the power of brands.

Both trademark law and antitrust law stand out as promising discourses for understanding the significance of brands and constructing an appropriate legal regime. Neither has proved up to the challenge, and more dishearteningly, neither field seems to perceive much of a need.

To some extent, both trademark and antitrust law suffer from the same myopia and for the same reason. Over the past thirty years, both bodies of law have relied heavily on neo-classical price theory to define legal rules that promote efficiency. For many purposes, this is entirely appropriate. But such a focus misses the point (and often

assumes away) the role that brands play in promoting product differentiation, market segmentation, price discrimination, and increasing customer loyalty to the point where price theory no longer explains well what brands (if any) consumers view as substitutes, when confusion does or does not arise in the marketplace, and how consumers choose between brands and between dealers for the same brands.

Trademark law has failed to recognize that trademarks are only a subset of businesses' broader brand strategy in the real world. A successful brand encompasses far more than a registered trademark and sometimes does not require a trademark at all. Trademark law was thus always incomplete and regulated only a fraction of the real business behavior that mattered. In addition, trademark law over time has largely abandoned effective regulation over the slice of the action that it has retained as it has expanded the subject matter of trademarks and what constitutes infringement. The combined effect is to provide greater and greater protection for trademarks from competition from products and services that do not purport to originate from the mark holder. Protection for a *mark* has first subtly, and then more aggressively, transformed into protection for a *brand*.

This dramatic transformation took place with virtually no recognition of the significance of brands and branding. The overall effect was an important legal change without debate or recognition of the elevation of the brand to one of the most protected forms of legal property and one of the most valuable assets in the marketplace. Neither advocates nor opponents of these changes appreciated the subtle shift from marks to brands. This blindness led to unintended (or at least misunderstood) change and one-sided expansion of the legal regime.

To the extent this discussion took place, both sides of the debate were reassured by the presence of the antitrust laws which allegedly would regulate anti-competitive behavior involving trademarks and related rights. In the end, antitrust law as a discipline was in no better position to understand the shift to a brand-based economy and make a conscious decision as to the appropriate legal regime. Older cases identified where trademarks were used as a cover for collusion, but those were easy cases both before and after the rise of the brand. Otherwise, the increasing emphasis on neo-classical price theory in the past thirty years robbed antitrust of any chance of understanding and responding to the rise of the brand as a tool for diminishing the role of price competition, segmenting market demand, facilitating price discrimination, and locking in consumers to a favored brand. Like trademark law, antitrust law either fails to ask the right question, ignores the non-price aspects of how brands and branding affect market competition, or defers to trademark law to set the proper limits of the intellectual property rights in question.

The combined effect of this failure in both trademark law and antitrust law is a dangerous vacuum. No one is asking the right questions. No body of law is confronting what brands are, what role they play in business practice, how they affect traditional concepts of trademark law, how antitrust law should incorporate brand management in analyzing market competition, how the two fields of law should be better integrated to address the brand juggernaut, or whether there needs to be a true law of the brand.

Co-author (and fellow Concurring Opinions blogger) Deven Desai and I are working on these topics and more in an on-going [effort](#) to transform the law [so that it is](#) more in line with the realities of the business world. [We have each done previous solo](#)

work on the disconnect between the language of law and the language of business. Our first effort together consists of comments filed with the Federal Trade Commission and the Antitrust Division of the Justice Department as part of upcoming hearings on possible revisions of the antitrust merger guidelines. Later versions will include at least one weighty traditional co-authored law review article and then various individual offshoots since we are each interested in slightly different aspect of these issues.

In the meantime, we welcome your input as to whether we are on the right track. Do brands matters (legally)? Should they? Why has the law paid so little attention? What is the right response?