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No (More) Logo: Plain Packaging and Communicative Agency

Alain Pottage*

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The tobacco industry’s archives suggest that the global campaign for the plain packaging of tobacco products originated in 1986, when the Canadian Medical Association passed a resolution calling for cigarettes to be sold in packages bearing only a brand name and the health message “this product is injurious to your health.”¹ In most jurisdictions, regulations requiring the apposition of health warnings to cigarette packs have been in force for decades. Proposals for plain packaging aim to go further, and eliminate the visual and tactile features that turn cigarette packs into “badge” wrappers,² and which express the subliminal messages that diminish or subvert the effect of even the most uncompromising health messages. Given that effective

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¹ See Ron Tully, Tobacco Documentation Centre, *Plain Packs History*, LEGACY TOBACCO DOCUMENTS LIBR. 1-3 (2007), available at <http://legacy.library.ucsf.edu/tid/jxd28a99>; cf. Rebecca Arbogast, *A Proposal to Regulate the Manner of Tobacco Advertising*, 11 J. HEALTH POL’Y & L. 393, 395 (1986) (describing countries’ tobacco advertising restrictions imposed in the mid to late 1980s).

² See M. Wakefield et al., *The Cigarette Pack as Image: New Evidence from the Tobacco Industry Documents*, 11 TOBACCO CONTROL (SUPP. 1) 73, 73 (2002) (“[U]nlike many other products where the packaging is discarded after opening, smokers generally retain the cigarette pack until after the cigarettes are used and keep the pack close by on their person. Thus, cigarette packs are constantly being taken out and opened, as well as being left on public display during use.”).

plain packaging regulations would severely restrict the tobacco companies' ability to exploit their trademarks or rights in trade dress, the question of the domestic or international constitutionality of such restrictions has become an essential ground for the industry's contestation of plain packaging measures.³ This Article argues that the contest over plain packaging is the latest, and perhaps the last, phase in a history of brand "positioning," in which cigarette companies used their brands to exploit the dynamics of the health debate to "refresh" the image of their brands and products.

Australia passed the Tobacco Plain Packaging Act of 2011, which came into force on December 1, 2012, and became the first nation in the world to impose a mandatory scheme of plain packaging. In the process, Australia became the first jurisdiction to adjudicate on the constitutionality of plain packaging.

The Australian statute addresses the well-documented power of brands to induce young people to take up smoking. The tobacco companies have never been especially discriminating in their pursuit of prospective clients — as Philip Morris's in-house advertisers once put it, "they got lips, we want 'em"⁴ — but younger smokers have always been the prime target.⁵ To capitalize on the strength of brand loyalty in the cigarette market, rival tobacco companies seek to capture young "starters" just as they are embarking on their careers.⁶ The aesthetic of the cigarette package plays an essential role in these recruitment strategies. A report commissioned by Liggett & Myers in 1963 observed that "the primary job of the package is to create a desire to purchase and try. To do this, it must look new and different enough to attract the attention of the consumer."⁷ Over the course of the twentieth century, the effect of youth advertising campaigns was progressively to reduce the average age at which young people began

³ See Eric Crosbie & Stanton A. Glantz, *Tobacco Industry Argues Domestic Trademark Laws and International Treaties Preclude Cigarette Health Warning Labels, Despite Consistent Legal Advice that the Argument Is Invalid*, TOBACCO CONTROL 1, 1-2, 4-5 (2012).

⁴ ROBERT N. PROCTOR, *GOLDEN HOLOCAUST: ORIGINS OF THE CIGARETTE CATASTROPHE AND THE CASE FOR ABOLITION* 82 (2011).

⁵ See, e.g., ALLAN BRANDT, *THE CIGARETTE CENTURY: THE RISE, FALL, AND DEADLY PERSISTENCE OF THE PRODUCT THAT DEFINED AMERICA* 26, 31-32 (2007) (James Duke, the man who "almost single-handedly invented the modern cigarette," used the new technologies of lithography to exploit the print cigarette cards market, in which boys and young men were invited to collect and to sell cigarette cards).

⁶ See PROCTOR, *supra* note 4, at 75.

⁷ See Wakefield et al., *supra* note 2, at 75 (continuing as follows: "Repeat sales will depend mostly on acceptance of the product . . .").

smoking. Cynically, as evidence of increased mortality rates among smokers became irrefutable, the industry characterized these initiates as “replacement smokers.”⁸ With this history in mind, the Tobacco Plain Packaging Act sought “to reduce the attractiveness and appeal of tobacco products to consumers, particularly young people” and to “reduce the ability of the tobacco product and its packaging to mislead consumers about the harms of smoking.”⁹

The Act, which runs to 111 pages, augmented by regulations, seeks to disqualify all the media that resourceful advertising agencies might use to “dress” a cigarette pack — shape, size, texture, color, scent, and so on. The Act stipulates that tobacco packaging may have no “decorative ridges, embossing, bulges or other irregularities of shape or texture.”¹⁰ Cigarette packs or cartons must be rectangular and of prescribed sizes,¹¹ with surfaces that meet “at firm 90 degree angles,”¹² and the adhesives used on those surfaces must be transparent. The lid of a pack can be sealed by means of a perforated strip,¹³ but there may be no other re-sealable opening,¹⁴ and the inner lip must have straight edges, with no embellishment. The lining of the pack should be made exclusively of foil,¹⁵ which may be embossed only with the dots or squares that are necessarily produced by the manufacturing process.¹⁶ The color of the outer surfaces of all primary and secondary packaging must be Pantone 448C: “a drab dark brown [color] found in market research to be optimal in terms of decreasing the appeal and attractiveness of tobacco packaging, decreasing the potential of the pack to mislead consumers about the harms of tobacco use, and increasing the impact of graphic health warning.”¹⁷ The inner white

⁸ See PROCTOR, *supra* note 4, at 75-80 (noting a report commissioned by Philip Morris which characterized “today’s teenager” as “tomorrow’s potential regular customer,” and attributed the success of the Marlboro brand to the fact that it had become “the brand of choice among teenagers who then stuck with it as they grew older”).

⁹ Explanatory Memorandum, Tobacco Plain Packaging Bill 2011 (Cth) 1 (Austl.).

¹⁰ Tobacco Plain Packaging Bill 2011 (Cth) s 18(1)(a) (Austl.).

¹¹ *Id.* ss 18(2)(b)(i), 18(3)(a); Explanatory Statement, Select Legislative Instruments 2011 No. 263, *Tobacco Plain Packaging Act & Regulations 2011* (Cth) 7 (Austl.) (explaining that one of the objects of these provisions is to exclude “very small packs and tall narrow packs,” and cites market research showing that very small packs appeal to the teenage smoker, and slim packs to women smokers).

¹² S 18(2)(b)(ii).

¹³ *Tobacco Plain Packaging Regulations 2011* (Cth) reg 2.1.2 (Austl.).

¹⁴ *Id.* reg 2.1.1(3).

¹⁵ S 18(3)(d).

¹⁶ Reg 2.1.3.

¹⁷ Explanatory Statement, Select Legislative Instruments 2011 No. 263, *Tobacco*

surfaces, lined with silver foil backed with white, and the packaging may not “make a noise, or contain or produce a scent, that could be taken to constitute tobacco advertising or promotion,”¹⁸ nor may it contain any features that are designed to change after sale.¹⁹ The only proprietary mark allowed on the surfaces of these standardized packs is the name of the brand or company, and a variant, printed in Lucida Sans eight point font.²⁰ The cigarettes themselves must be white, with an imitation cork wrapping for the filter and a white filter tip, and may be marked only with an alphanumeric code encrypting manufacturing data.²¹ These measures might seem unnecessarily exhaustive, until one recalls the canniness with which the industry has responded to attempts to regulate the packaging of cigarettes.²²

Plain packaging legislation raises a number of engaging theoretical and practical questions: about the legal qualities of the intellectual property rights that articulate branding strategies, about the

Plain Packaging Act & Regulations 2011 (Cth) 8 (Austl.).

¹⁸ S 24.

¹⁹ *See id.* s 25

The retail packaging of tobacco products must not include any features designed to change the packaging after retail sale, including (without limitation) the following:

- (a) heat activated links;
- (b) inks or embellishments designed to appear gradually over time;
- (c) inks that appear in a certain light;
- (d) panels designed to be scratched or rubbed to reveal an image or text;
- (e) removable tabs;
- (f) fold-out panels.

Id.

²⁰ The font was invented in 1985. *See* U.S. Patent No. D289,420 (filed Dec. 7, 1984). Additionally, the font is advertised as the best font for technical or commercial information. MY FONTS, <http://www.myfonts.com/fonts/adobe/lucida-sans/> (last visited Aug. 20, 2013) (“The strong shapes and generous proportions are based on traditional Roman letterforms, making them clear and easy to read in the fine print of directories and parts lists, as well as clean and powerful in business correspondence and newsletters.”).

²¹ Ironically, the technical precision of the machine-made cigarette is one factor in its appeal.

²² For example, when the government of the Philippines banned the sale of cigarettes in packs of fewer than twenty, because smaller packs are more appealing to the (furtive) teenage smoker, the Philip Morris company responded by marketing Marlboro cigarettes in packs of twenty that unfolded into four detachable “packs” of five. *See* PROCTOR, *supra* note 4, at 78.

relationship between the regimes of international trade law and world health policy, and about the history of regulatory initiatives to address the public health implications of smoking. Here, I am interested in questions about the communicative agency of the mass media: what does the example of Australia's plain packaging law tell us about the role played by the surfaces of material wrappers and packages in branding practices?; how do brands articulate with the other strands of the mass media?

I. BONSAI BILLBOARDS

In December 2011, a group of Australia's leading tobacco companies challenged the validity of the Tobacco Plain Packaging Act before the High Court,²³ alleging that it was inconsistent with the terms of section 51(xxxi) of the Australian Constitution, which provides that the Commonwealth cannot acquire property otherwise than on "just terms."²⁴ According to the constitutional jurisprudence of the Australian courts, the terms of section 51(xxxi) are engaged only if one can show both a "taking" and a correlative "acquisition":

The emphasis in section 51(xxxi) is not on a "taking" of private property but on the acquisition of property for the purposes of the Commonwealth. To bring the constitutional provision into play it is not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be.²⁵

The plaintiff tobacco companies claimed to have been substantially deprived of three species of property: First, statutory intellectual property rights arising under the Trade Marks Act 1995, the Patents Act 1990, the Designs Act 2003, and the Copyright Act 1968; second, common law rights relating to the ability to use unregistered trademarks and a particular get up to a package, and relating to the material package and its contents; and third, "rights in connection

²³ The High Court is the highest court in the Australian judicial system.

²⁴ AUSTRALIAN CONSTITUTION s 51(xxxi) ("The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to . . . [t]he acquisition of property on just terms from any State or person for the purpose in respect of which the Parliament has power to make laws.").

²⁵ *Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1, 68 (Austl.).

with the physical materials which comprise the cigarettes, and the retail packaging of the cigarettes that it sells.”²⁶

The Commonwealth argued that statutory and common law intellectual property rights or rights to goodwill give no positive right (or liberty) to use a mark: “What an owner gains by registration of a trade mark is relevantly no more than a monopoly right to exclude others from using the mark without the owner’s authority.”²⁷ Moreover, the plaintiffs retained what might be called “technical rights” with respect to their trademarks.²⁸ Although a majority of Justices in the High Court accepted some part of this argument,²⁹ they recognized that negative rights can be turned to positive rights, in practice and effect. Justice Gummow observed that, although intellectual property rights conferred no liberty to use a work, invention, or mark, a trademark nonetheless carried with it “the right to relax that exclusivity in favour of licensees and assignees of the intellectual property in question,” such that it qualified as “property” in the sense of the Constitution,³⁰ and this property had been diminished by the Act: “while the trademarks remain on the face of

²⁶ See Submissions of Plaintiffs at 2, *British Am. Tobacco Australasia Ltd. v Commonwealth* [2012] HCAASO 21 (Austl.) (No. S389 of 2011).

²⁷ Submissions of the Commonwealth of Australia at 20, *British Am. Tobacco Australasia Ltd. v Commonwealth* [2012] HCAASO 21 (Austl.) (No. S389 of 2011); see *id.* at 21 (“What is created by the registration [of a trademark] is not the proprietor’s right to use the mark but a right to prevent other persons from using it as a trade mark [sic] or in other specified ways.” (quoting *In re Svenska Aktiebolaget Gasaccumulator’s Application* [1962] 1 WLR 657, 666 (Austl.))); see also *The Queen v. Sec’y of State for Health ex parte British Am. Tobacco (Invs.) Ltd. & Imperial Tobacco Ltd.*, [2002] E.C.R. I-11453 1 CMLR 266 (2003) 1 CMLR 266 (Austl.) (“[T]he essential substance of a trademark right does not consist in an entitlement as against the authorities to use a trademark unimpeded by provisions of public law. On the contrary, a trademark right is essentially a right enforceable against other individuals if they infringe the use made by the holder.”).

²⁸ Transcript of Proceedings at 14, *JT Int’l SA v Commonwealth & British Am. Tobacco Australasia Ltd. v Commonwealth* [2012] HCATrans 91 (Austl.) (No. S389 of 2011) [hereinafter Transcript 1].

²⁹ See, e.g., *British Am. Tobacco Australasia Ltd. v Commonwealth* [2012] HCA 43, para. 36 (Austl.) (“It is a common feature of the statutory rights asserted in these proceedings that they are negative in character. As Laddie, Prescott and Vitoria observed: ‘Intellectual property is . . . a purely negative right, and this concept is very important. Thus, if someone owns the copyright in a film he can stop others from showing it in public but it does not in the least follow that he has a positive right to show it himself.’”) (citing 1 LADDIE, PRESCOTT & VITORIA, *THE MODERN LAW OF COPYRIGHT & DESIGNS* 3 (4th ed. 2011)).

³⁰ See *id.* at para. 137.

the register, their value and utility is very substantially impaired.”³¹ So, granted a “taking,” had there been a correlative “acquisition”?

In their oral and written submissions to the High Court, the plaintiffs argued that a cigarette pack was a “bonsai billboard,”³² a material terrain for the inscription of brand emblems. The tobacco companies’ ownership of packaging materials³³ gave them powers of control over this billboard, powers which underwrote their use of trademarks and trade dress to create a distinctive packaging aesthetic. The statute, they argued, required them to cede this control over packaging materials to the Commonwealth, which then assumed these powers of control for itself by imposing enlarged health warnings. According to the plaintiffs, this amounted to:

[T]he physical occupation [of the pack], first by the removal of virtually everything which is distinctive of the manufacturer from the pack, and then the occupation on the pack, not only of health warnings in themselves unexceptionable, but also of other material of a kind that could have been the subject of board advertising on buses or taxis or magazines or television.³⁴

So, the statute “essentially conscript[ed] the cardboard package so as to serve the Commonwealth’s purposes.”³⁵

The gist of the argument can be gleaned from the following exchanges:

KIEFEL J: [W]hat do you say that the Commonwealth is actually acquiring? In your argument thus far you were saying that the Commonwealth is appropriating some space upon which it delivers a public health message.

MR GRIFFITH: It is acquiring our billboard, your Honour, in effect.

³¹ See *id.* at para. 139.

³² See Submissions of Van Nelle Tabak Nederlad BV (Intervening) at 7, *British Am. Tobacco Australasia Ltd. v Commonwealth* [2012] HCAASO 21 (Austl.) (No. S389 of 2011).

³³ Formally the idea of “property in the physical chattels which constitute the retail packaging in which [the tobacco company] sells cigarettes and the cigarettes themselves.” Submissions of Plaintiffs, *supra* note 26, at 4.

³⁴ Transcript of Proceedings at 3, *JT Int’l SA v Commonwealth & British Am. Tobacco Australasia Ltd. v Commonwealth* [2012] HCATrans 92 (Austl.) (No. S389 of 2011) [hereinafter Transcript 2].

³⁵ Transcript 1, *supra* note 28, at 62.

...

GUMMOW J: So, what is the relevant property, the space, is it?

MR GRIFFITH: The space.

GUMMOW J: Not the trademark?

MR GRIFFITH: No. Your Honour, (a) it is the space and (b) —

GUMMOW J: Trademark registration is something incorporeal, really.

MR GRIFFITH: Yes, it is your Honour, but as far as a trademark is concerned, the effect of taking the only space where you are allowed to fix your trademark . . . is that you are prevented from using your trademark anywhere in Australia for the purpose of a product for sale and we say that constitutes an acquisition of our trademarks.³⁶

All of this went to the proposition that the Commonwealth acquired “exclusive possession of the surface areas of the packs and cigarettes”³⁷ otherwise than on just terms.

The object was to represent the intellectual property rights of the plaintiffs and the regulatory powers of the Commonwealth as antagonistic exercises of power over the same “territory,” power that the latter gained at the expense of the former. A majority in the High Court was not persuaded that this theory of material control over a “billboard” really closed the “logical gap”³⁸ between “taking” and

³⁶ *Id.* at 16, 18-19; see also Transcript 2, *supra* note 34, at 6-7 (“Gummow J: Now, you keep using this expression ‘rights of property’ and ‘rights of ownership’ in relation to this chattel which is what, a blank box? Mr Walker: Never blank but, yes, your honour. It is a box. It is a packet.”).

³⁷ Submissions of Philip Morris Ltd. (Intervening) at 9, *British Am. Tobacco Australasia Ltd. v Commonwealth* [2012] HCAASO 21 (Austl.) (No. S389 of 2011); see also Submissions of Plaintiffs, *supra* note 26, at 11 (“The legislative scheme as a whole, therefore, operates to deprive the plaintiffs of a substantial property interest in their cigarettes and cigarette packets, vesting that same interest in the Commonwealth.”).

³⁸ Chief Justice French stated:

[T]he negative character of the plaintiffs’ property rights leaves something of a logical gap between the restrictions on their enjoyment and the accrual of any benefit to the Commonwealth or any other person [T]here is no expansion in rights, interests, or benefits accruing to the Commonwealth that corresponds to or bears any relationship to the restrictions imposed on the use of the plaintiffs’ intellectual property rights. The fact that the

“acquisition.”³⁹ Although the Australian courts have developed a uniquely creative approach to the analysis of property rights,⁴⁰ this sense of proprietary control went too far:

[T]o characterize as “control” by “the Commonwealth” compliance with federal law which prescribes what can and cannot appear on the retail packaging of tobacco products diverts attention from a fundamental question presented by section 51(xxxi) of the Constitution. Compliance with federal law does not create a relationship between “the Commonwealth” and the packaging which is proprietary in nature.⁴¹

restrictions and prohibitions imposed by the TPP Act create the “space” for the application of the Commonwealth regulatory requirements as to the textual and graphical content of tobacco product packages does not constitute such an accrual. Rather, it reflects a serious judgment that the public purposes to be advanced and the public benefits to be derived from the regulatory scheme outweigh those public purposes and public benefits which underpin the statutory intellectual property rights and the common law rights enjoyed by the plaintiffs. The scheme does that without effecting an acquisition.

British Am. Tobacco Australasia Ltd. v Commonwealth [2012] HCA 43, para. 43 (Austl.).

³⁹ The argument “slip[ped] between control of the market and control of the space.” *Id.* at para. 45 (Kiefel J.).

⁴⁰ In particular, native title jurisprudence has expanded the sense of what property is. In one case, the High Court cites with approval Kevin Gray’s observation that “the ultimate fact about property is that it does not really exist: it is mere illusion.” *Yanner v Eaton* [1999] HCA 53, para. 17 (quoting Kevin Gray, *Property in Thin Air*, 50 CAMBRIDGE L.J. 252, 252 (1991)).

⁴¹ *British Am. Tobacco Australasia Ltd. v Commonwealth* [2012] HCA 43, para. 150. Justice Heydon, in dissent, held that the Commonwealth had indeed acquired a correlative property right, stating:

[T]he legislation caused the Commonwealth to acquire the use of the space on the proprietors’ cigarette packets for its own purposes. The life of a cigarette before it is purchased from a retailer is no doubt a short one. For the whole of that life [the act] gives the Commonwealth exclusive use of the space on a chattel owned by a proprietor. This is more than the destruction of a substantial range of property rights. The legislation deprives the proprietors of their statutory and common law intellectual property rights and their rights to use the surfaces of their own chattels. It gives new, related rights to the Commonwealth. One is the right to command how what survived of the intellectual property (“the brand, business or company name”) should be used. Another is the right to command how the surfaces of the proprietors’ chattels should be employed. The proprietors called this conscripting, commandeering or dominating space. To put it more neutrally,

The control that the Commonwealth achieved over the space on the packaging, to which the plaintiffs referred, did not accrue to it a benefit or advantage other than the pursuit of its statutory objectives. The British American Tobacco plaintiffs' argument that the Commonwealth was saved the cost of acquiring the space for its own advertising takes the matter no further. It would not have had to pay for such advertising in any event, given that it could require warnings of any size to be displayed on the packaging.⁴²

II. WHAT DO WRAPPERS DO?

Although it failed to persuade the High Court, the plaintiffs' theory of the cigarette package as a "bonsai billboard" reminds us that the communicative agency of brands is conditioned by the materiality of the media in which they circulate. Susan Strasser's history of mass marketing suggests how modern trademark law was shaped by the introduction of packaging technologies.⁴³ Until quite late in the nineteenth century, most goods were sold in bulk, unmarked, to a wholesaler, and then to a retailer, who could supplement the evidence of the consumer's own senses with information about provenance and quality. These localized markets were thoroughly transformed by the introduction of retail packaging and the development of the railroads and the postal system, which expanded the potential scale of markets in both perishable and non-perishable goods across the United States.⁴⁴ Consumers could no longer see or handle goods directly, and retailers often knew little more about the provenance of the product than their customers.⁴⁵ Henceforth, the "quality" of a product could be judged only by reference to a symbolic representation of provenance,

these new rights are rights of control.

Id. para. 217 (Heydon, J., dissenting).

⁴² See *id.* para. 369 (Kiefel, J., dissenting).

⁴³ See SUSAN STRASSER, *SATISFACTION GUARANTEED: THE MAKING OF THE AMERICAN MASS MARKET* 7 (1989) (telling the story of how a "population accustomed to homemade products and unbranded merchandise [was] converted into a national market for standardized, advertised, brand-named goods in general").

⁴⁴ See Phillip Thurtle, *The Poetics of Life: Luther Burbank, Horticultural Novelties, and the Spaces of Heredity*, 26 *LITERATURE & MED.* 1, 2-3 (2007) (explaining the role played by the railroads in expanding markets in plants and fruits). See generally ANNE MCCLINTOCK, *IMPERIAL LEATHER: RACE, GENDER, AND SEXUALITY IN THE COLONIAL CONTEST* (1995) (detailing the effects of transportation).

⁴⁵ Consumers had to be educated in the appreciation of packaged goods. See STRASSER, *supra* note 43, at 34-35.

and hence to the landscape of vernacular culture inhabited by figures such as Aunt Jemima.

The content and effect of these symbolic representations were closely conditioned by the properties of packaging materials and by the evolution of the technologies which determined what sorts of images or symbols could be printed, stamped, or inscribed on what sorts of materials. To begin with, packages had to be adapted to the practicalities of large-scale manufacture and retailing; packages and wrappers had to be pliable enough to adapt to conveyor-belt processes of filling and sealing, sturdy enough to withstand transportation, aesthetically suited to the new modes of retail display, and images and inscriptions had to be resistant to wear and tear.⁴⁶ So, for example, the look and feel of the package depended in part on the development of packaging materials such as corrugated cardboard or molded fiber.⁴⁷ The aesthetics of the package also depended on the development of technologies whose history is more familiar: the cylinder steam press was first used to print the *Times* of London in 1814, the first rotary press was patented in the United States in 1845, and the offset lithography press, which enabled text and images to be printed on the same plane of paper, was introduced in 1905.⁴⁸ The net effect of these developments was that mass-produced things came to be advertised and sold by means of other mass-produced things.

These historical factors inform Franck Cochoy's sociological analyses of the agency of material packaging.⁴⁹ Cochoy begins by identifying what he calls a tacit division of labor between economists

⁴⁶ See *id.* at 31-32 ("The first paper-bag-making-machine was patented in 1852 by Francis Wolle, who founded the Union Paper Bag Machine Company, which eventually owned or controlled 90 per cent [sic] of the paper-bag business in the United States. In the late 1860s, a patent was granted for the now-familiar square-bottomed bag. Throughout the next decade, British and American printers devised techniques for printing on metals, and manufacturers applied those processes to a variety of decorated tins. By the early 1880s, the folding cardboard cartons that would eventually contain Uneeeda Biscuits and Kellogg's Toasted Corn Flakes could be produced by machines. The first 'automatic-line' canning factory brought the continuous-process concept to canning in 1883, with machinery that could make cans at the rate of about 3,000 per hour."); see also Steven Heller, *Appetite Appeal*, 66 SOC. RES. 213, 215 (1999) (noting the historical significance of the self-adhesive label).

⁴⁷ See DIANA TWEDE & SUSAN E. M. SELKE, CARTONS, CRATES, AND CORRUGATED BOARD: HANDBOOK OF WOOD AND PAPER PACKAGING (2004).

⁴⁸ For a summary, see DAVID S. KAUFER & KATHLEEN M. CARLEY, COMMUNICATION AT A DISTANCE: THE INFLUENCE OF PRINT ON SOCIOCULTURAL ORGANIZATION AND CHANGE 26-27 (1993).

⁴⁹ See generally FRANCK COCHOY, UNE SOCIOLOGIE DU PACKAGING OU L'ÂNE DE BURIDAN FACE AU MARCHÉ (2002).

and sociologists: economists treat the package as a direct representation of those qualities of the product which are apt to engage the calculative intelligence of the rational actor, while sociologists and cultural theorists “detach signs from products, and identify them as instruments of manipulation.”⁵⁰ The oscillation between these two perspectives — an oscillation which characterizes mainstream legal scholarship on trademarks — obscures the crucial role of packages in mediating the relation between consumer and product.

Cochoy observes that the contemporary consumer package proposes diverse “representations” of the product: “Far from being a space in which one and the same speaker (such as the manufacturer) can express themselves freely, a package is a forum, a space of public expression, in which a host of different messages intersect, interconnect, and jostle one another.”⁵¹

Besides the insignia of the brand, most packages also carry ancillary information such as the company name and contact details, customer service information, depictions of the contents of the package, instructions on how to open the package and use the contents, marks of compliance with safety or food quality standards, nutritional information panels,⁵² use by and sell by dates, and so on. Cochoy suggests that the relative weightings of these different messages will depend on the way that they are organized into a hierarchy by each particular consumer. The agency of wrappers lies in their capacity to elicit from consumers cognitive competences and modes of attention that they would not otherwise have,⁵³ which in turn, when they are

⁵⁰ *Id.* at 36.

⁵¹ *Id.* at 109.

⁵² FDA food labels are standardized in terms that are not dissimilar from those imposed by the Tobacco Plain Packaging Act. *See* 21 C.F.R. ch. 1 (West, WestlawNext through Aug. 15 2013). According to the designers who created the format for the first nutrition information panel, the object was to create “something that you see over and over and over and over again, across all media or all packaging and the like, [something that] gradually . . . seeps itself in the mind so that you start to . . . understand it and absorb it in ways that supersede reading.” *See* Xaq Z. Frohlich, *Accounting for Taste: Regulating Food Labelling in the “Affluent Society,” 1945–1995*, 13 *ENT. & SOC’Y* 744, 757 (2012) (quoting Burkey Belser).

⁵³ This is partly a historical effect — the competences involved in reading a nutritional label have evolved over the past few decades — and partly an effect of technology. *See generally* FRANCK COCHOY, *SOCIOLOGIE D’UN CURIOSITIF: SMARTPHONE, CODE BARRES 2D ET SELF-MARKETING* (2011) (providing a study of apps that scan wine labels, enlivening them with extensive information about the terroir and with a repertoire of critical notes, and drawing the consumer into an apparatus of knowledge that ascribes all sorts of potential qualities to the product in the bottle).

deployed by a particular consumer, reflexively give products qualities that they would not otherwise have.

Cochoy is interested in the immediate context in which consumers choose between products in a store; these choices are not made from the abstracted perspective of economic or sociological theory, but in the “real time” of a shopping trip, and within a spatial environment configured by marketing techniques. Although brand logos are imbued with a charisma generated by their broader circulation in print or visual media, the immediacy of in-store decision-making means that consumers who compare products — rather than automatically buying a preferred brand — will relate brands to other “messages” by scanning the wrapper through an individualized grid of preferences. It is not clear that cigarette packs can be scanned in this way; smokers don’t “read” packages in the way that wine drinkers might decipher labels. The smoker who has yet to fix on a brand is confronted not with a multiplicity of messages, but with a brand image starkly offset by health warnings. The material package may now be the only medium in which tobacco companies can express a brand aesthetic,⁵⁴ but the charisma of this aesthetic is an effect of the progressive development of branding semantics (a cognitive and affective language of color, texture, shape, and graphical form) that was evolved by the tobacco industry’s advertising agencies in the decades that preceded the general proscription of tobacco advertising. Even if they cannot entirely blank health warnings, smokers engage with this historically evolved branding semantics more or less directly, either as a subliminal reaffirmation of the experiential values derived from “their” brand, or, perhaps, as an exhortation to switch to a new experience or “landscape.”⁵⁵

The process of forging brands as communicational artifacts becomes clearer if we shift our attention from multiplicity as the kind of surface effect that is addressed by Cochoy to the kind of processual multiplicity that is expressed in the notion of brand “positioning”:

[In the course of the twentieth century], it became increasingly accepted that sales were most effectively made as a result of the positioning of the brand in what has become an increasingly media-intensive culture, in which the distinction

⁵⁴ From the perspective of the tobacco companies, the pack is “the only mechanism for us putting the product into the market in Australia.” Transcript 1, *supra* note 28, at 14.

⁵⁵ Here, one might recall the famous Philip Morris advertisement: “No roof but the sky, no walls but the wind. And some men get to call it home. Marlboro Country.” See PHILIP MORRIS USA INC., MARLBORO COUNTRY ADVERTISING CAMPAIGN (1975).

between advertising, promotion, and media message is increasingly blurred. What becomes increasingly important, in short, is the effect of media (or media effects), that is, the successful communication of a signal against a presumed background of noise.⁵⁶

The agency that matters in this kind of multiplicity is not the agency of wrappers, or the agency that wrappers elicit from consumers, but the agency of the mass media, and, more precisely, the articulation of the three main strands of the mass media: news, advertising, and entertainment.⁵⁷ The articulation of these three strands is analyzed in Niklas Luhmann's characteristically incisive study of "the reality of the mass media," which proposes that "fresh money and new information are two central motives of modern social dynamics."⁵⁸ My hypothesis is that the contest over plain packaging is the latest, and perhaps the last, phase in a history of "positioning," in which the cigarette companies used their brands to exploit the dynamics of the health debate to "refresh" the image of their brands and products.

III. ACCELERATING KNOWLEDGE

For Luhmann, the history of packaging is one dimension of the history of the mass media as institutions that circulate particular kinds of material artifact:

[T]he term "mass media" includes all those institutions of society which make use of copying technologies to disseminate communication. This means principally books, magazines and newspapers manufactured by the printing press, but also all kinds of photographic or electronic copying procedures, provided that they generate large quantities of products whose target groups are as yet undetermined.⁵⁹

The last point is crucial. The object of the mass media is to communicate, sometimes to small constituencies of specialists, but in

⁵⁶ See Celia Lury, *Brands as Assemblages: Assembling Culture*, 2 J. CULTURAL ECON. 67, 71 (2009).

⁵⁷ These strands are offered "[w]ithout meaning to offer a systematic deduction and justification of a closed typology." NIKLAS LUHMANN, *THE REALITY OF THE MASS MEDIA* 24 (2000) [hereinafter *MASS MEDIA*].

⁵⁸ *Id.* at 21.

⁵⁹ *Id.* at 2; see also *id.* at 16 ("Only with the printing press is the volume of written material multiplied to the extent that oral interaction among *all* participants in communication is effectively and visibly rendered impossible.").

all cases they communicate across distances, and at speeds, which make immediate interaction impossible. Whatever facilities a print or web-based newspaper offers for comment or feedback, its communicative offering (including these responses) is addressed to readers whose profiles and interests can only be modeled indirectly. In the case of branding, of course, considerable resources are devoted to profiling the consumer, and one might speculate that the diversity of approaches to the modeling of consumers — the “identity approach,” the “consumer-based approach,” and the “personality approach”⁶⁰ — reflects the broader point that the addressees of mass media communications are semantic artifacts, constructs of communications *about* real people.

Luhmann begins with the apparently anodyne proposition that “[w]hatever we know about our society, or indeed about the world in which we live, we know through the mass media.”⁶¹ Media unfurl a horizon of common knowledge that continually has to be renewed, and the information that they make available is constituted by this process of renewal. The nature of our engagement with the mass media becomes evident if we reflect on the ways in which are gripped by the plot line of a novel, movie, or serialized television show, by the unfolding of a sporting event or series of events, or by the scandals unearthed by the progressive journalistic investigation of some political scandal. For Luhmann, what engages us is a dynamic of information; not “information” in the sense of a quantum of knowledge but “information” as the process or technique of distinguishing “information” from “non-information”:

Information cannot be repeated; as soon as it becomes an event, it becomes non-information. A news item run twice might still have its meaning, but it loses its information value. If information is used as a code value, this means that the operations in the system are constantly and inevitably transforming information into non-information. The crossing of the boundary from value to opposing value occurs within the very autopoiesis of the system. The system is constantly feeding its own output, that is, knowledge of certain facts, back into the system on the negative side of the code, as non-

⁶⁰ For an overview, see Deven Desai, *From Trademarks to Brands*, 64 FLA. L. REV. 981, 995-99 (2012).

⁶¹ LUHMANN, MASS MEDIA, *supra* note 57, at 1. “Every morning and every evening the web of news is inescapably lowered down on earth and determines what has been and what one has to be aware of.” HANS-GEORG MOELLER, THE RADICAL LUHMANN 32 (2012).

information; and in doing so it forces itself constantly to provide new information.⁶²

The operation of this code is manifest in the dynamic of the news media,⁶³ where news becomes old almost as soon as it has been broadcast.⁶⁴ For the journalist, the object is to seek out the next story, or, failing that, to find a new angle on old news — the back story, the personalities, the so-far hidden connections between the event and newly-unearthed historical precursors, the likely effects of what has just happened, and so on. And the effect of publishing whatever is thereby uncovered as “news” is to fold it into the horizon against which the next iteration of the “new” can appear as such. The operation of the mass media — including the strand of advertising and branding — is characterized by this acceleration of information, and brands have to be held steady within this flow.

The point is not simply that events succeed one another in time, but that the recursive operation of folding the new into the old itself generates the temporality of “news.”⁶⁵ If the new exists as such only in relation to what is identified as old, and vice versa, then both temporal moments, indeed the flow of “information time” itself, are produced by the operation that distinguishes these moments. So the temporality

⁶² LUHMANN, *MASS MEDIA*, *supra* note 57, at 19-20.

⁶³ This dynamic is also obvious in the academic world, where conference themes, the presentation of books and articles, and the aesthetics of personal websites are motivated by the imperative to come up with the next “new” idea, the “new” being anticipated as that which will make the state of the art “old.” (Again, this is not a matter of historical time: Luhmann may already be old news, while Aquinas or Epicurus might at any point be new again.) The phenomenon of novelty is not merely incidental or supplemental to the real business of generating academic knowledge. The orientation to the new is precisely what influences funding decisions, choices of topic, publication venues, and, more crucially, the sense of how a theme should be unfolded, and for whom. So the construction of academic originality symptomatizes the role of the mass media in “accelerating” cognition, by constituting and refreshing the baseline of “common” knowledge, techniques of schematization, and what is presupposed by any specialized discourse.

⁶⁴ This is a historical effect. The simultaneity of communication is a consequence of the evolution of telecommunications technologies. See TEHRI RANTANEN, *WHEN NEWS WAS NEW* 13-16 (2009).

⁶⁵ See LUHMANN, *MASS MEDIA*, *supra* note 57, at 21 (“[T]he mass media are behind the much debated characteristics of modern temporal structures, such as the dominance of the past/future schema, the uniformization of world time, acceleration, the extension of simultaneity to non-simultaneous events. They generate the time they presuppose, and society adapts itself accordingly. The almost neurotic compulsion in the economy, in politics, science and art to have to offer something new (even though no one knows where the novelty of the new comes from and how large a supply of it exists) offers impressive evidence of this.”).

of the mass media is self-constituting. This is what one might expect, given Luhmann's theory of society as a multiplicity of functionally-differentiated self-referential systems which each evolve their own "reality."⁶⁶ For systems theory, the only reality, or realities, we have are those that are elicited from the world by systemic communications, and these contingent realities emerge through the articulation of each system's basic code. In the case of the mass media, the binary code of information/non-information develops the selective frame through which the mass media schematize the world. What the news media encounter is not the world as such but the world as it is reconstructed by the orientation to novelty. So the news media's quest for the next story does not involve simply picking elements of information out of a world that is entirely present; rather, it involves making selections within a horizon that has always already reconstructed the world.

If "old" information is the baseline against which the "new" can appear as such, then the layering of newly-old news into old news gives rise to effects of path dependency which progressively shape the cognitive schemata through which the mass media apprehend "reality." These effects — which Luhmann characterizes as "condensates of meaning, topics, and objects"⁶⁷ — are evident, first, in the evolution of forms or types of news,⁶⁸ typologies which are actualized materially and organizationally in the layout of print or pixel pages, and in the administrative configuration of media corporations. More important, perhaps, the operation of the information/non-information code progressively evolves a set of cognitive equipment and orientations which delimit what can be recognized as information and how. One might take the example of news "topics":

⁶⁶ MOELLER, *supra* note 61, at 84 ("When a society based on functional differentiation emerges, varieties of rationality emerge and evolve. Legal rationality differs from political rationality, and political rationality differs from economic rationality, and so on. In a co-evolutionary systems-environment context, all of these rationalities are continually changing. Along with these incommensurable rationalities, incommensurable realities emerge and evolve. The legal reality differs from that of politics or the economy. All these realities are subject to ceaseless change.").

⁶⁷ LUHMANN, MASS MEDIA, *supra* note 57, at 37.

⁶⁸ *See id.* at 28 ("[I]n order to recognize novelty we need familiar contexts. These may be types (earthquakes, accidents, summit meetings, company collapses) or even temporary stories, for example, affairs or reforms about which there is something new to report every day, until they are resolved by a decision. There is also serial production of novelties, for example, on the stock exchange or in sports, where something new comes up every day.").

A topic such as AIDS is not a product of the mass media themselves. It is merely taken up by them and dealt with in particular way, subjected to a thematic trajectory that cannot be explained from medical diagnoses nor from the communication of between doctors and patients. Above all, recursive public discussion of the topic, the prerequisite that it is already known about and that there is a need for further information, is a typical product and requirement for the continuation of mass media communication; and securing this public recursivity in turn has a retroactive effect upon communication in the environment of the mass media — for example on medical research or on the plans of the pharmaceutical industry.⁶⁹

The upshot is that events will be cognizable to the news media only if they bring something new to existing contexts or topics; only, that is, to the extent that they have been cued up by, or resonate with, an existing thematic trajectory (even if resonance takes the form of exposing what has so far been neglected or misrepresented by the media).

The orientation of the mass media to novelty exemplifies the general logic of communication as a process which constructs “information.” Luhmann characterizes communication as the synthesis of three terms: information, utterance, and understanding. Many theories of speech or communication — notably speech act theory — adopt these three terms;⁷⁰ what is distinctive about Luhmann’s theory is the primacy it accords to understanding. Communication exists given both utterance and information,⁷¹ but these elements are not givens; they are distinguished — and therefore “produced” — by the operation of understanding. The basic idea will be familiar from everyday experience. Whether we are listening to politicians, or, perhaps, academic colleagues, what we know of the speaker and what we observe of their behavior will condition how we interpret the

⁶⁹ *Id.* at 12.

⁷⁰ See generally JÜRGEN HABERMAS, *POSTMETAPHYSICAL THINKING* 3-8 (1990) (explaining how Luhmann’s triadic structure echoes the distinctions that speech act theory makes between locutionary, illocutionary and perlocutionary acts — respectively, the act of utterance, the intended meaning, and effects of understanding).

⁷¹ The conjunction of information and utterance is essential, first, because information can be said to be communicated only when it is “offered” in the form of some gestural, spoken, or textual utterance, and, second, because utterance-like activity without information is just behavior (which provides information in a different way).

propositional content of what they have to say.⁷² In short, the quality and effect of information is conditioned by our interpretation of the mode of its utterance. Something like this point is made by speech act theory,⁷³ but for Luhmann this approach does not go far enough because it synthesizes utterance and information into pre-formed analytical “types.”⁷⁴ For Luhmann, the point is that the unity or meaning of a communicative event is contingent on the way that utterance and information are understood, and hence upon the particularity of each act of understanding.

It is the “understanding” of the addressee that constitutes a communication (for that addressee), first by identifying sounds, gestures, or inscriptions as utterances, and, second, by splicing information into these utterances so as to yield meaning: “If no distinction is made from the position of understanding between utterance and information, no communication can come about. It is only in the component “understanding” that communication generates the duality of information and utterance by which it is actually made into communication.”⁷⁵

This is not a linear process. A speaker might seek to anticipate how the addressee will splice utterance and information together, and to try to modulate their performance accordingly (crudely, by adopting a particular demeanor or carefully formulating informational or propositional content). So, even if understanding is logically prior to utterance or information, the speaker might try to anticipate this priority and the addressee might try to factor this anticipation into the process of understanding. This explains why communication is not a process of transmitting or transferring a quantum of information from one place to another;⁷⁶ again, the value or meaning of information is not given in advance of the process of understanding, but emerges

⁷² Psychology and ethnomethodology might offer expert reconstructions of these behavioral cues.

⁷³ The most famous example is Austin’s example of the formula that effects marriage.

⁷⁴ NIKLAS LUHMANN, INTRODUCTION TO SYSTEMS THEORY 215 (2013) (explaining how speech act theory considers the relation between information and utterance to be fixed analytically, into a typology of routines that can be performed by speakers and hearers, but Luhmann seeks to replace “analytical unity” with “a relation in time and space”).

⁷⁵ *Id.* at 220. And, if “language has no mode of operation of its own” then Saussurean linguistics lacks this vital element.

⁷⁶ As the ambitions of neuro-marketing suggest, the marketers might see this instrumentally; hence, the idea that neural activity promotes the premise that “there is an objective truth behind intangible brand values.” Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 508 (2008).

from the complex nexus of communicative action. If we give proper attention to the defining characteristic of the mass media — which is that they communicate across spatial or temporal distances to unknown addressees — then Luhmann’s emphasis on understanding seems almost self-evident. When we read printed texts from earlier centuries, we necessarily bring to bear on them the cognitive equipment of our own period and specialism.⁷⁷

IV. SWITCHING CHANNELS

In the late 1930s, the tobacco corporations began to issue advertisements promoting the health advantages of their cigarettes, a celebrated example being the slogan “*More Doctors Smoke Camels than Any Other Cigarette.*”⁷⁸ These advertisements responded to the growing sense that there was some correlation between smoking and respiratory disease, but euphemistic references to effects such as “irritation” localized in the “throat”⁷⁹ glossed over the suspected physiological effects of smoking. Competitive advertising turned the relation between smoking and health into a question that smokers could address for themselves, simply by savoring the “smoothness” of a particular blend. Advertisements that depicted a white-coated doctor holding an open pack of Lucky Strikes or Camels signaled that even medical practitioners did not consider smoking to be inherently

⁷⁷ STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 13 (1980) (“[I]nterpretive strategies are not put into execution after reading; they are the shape of reading, they give texts their shape, making them rather than, as is usually assumed, arising from them.”); see also *id.* at 16-17 (“[I]nterpretation is the source of texts, facts, authors, and intentions. Or to put it another way, the entities that were once seen as competing for the right to constrain interpretation (text, reader, author) are [the] products of interpretation.”).

⁷⁸ See BRANDT, *supra* note 5, at 105. One of the first was the advertisement issued by Philip Morris in 1937, which claimed that “doctors” had carried out trials which “proved conclusively that when smokers changed to Philip Morris, every case of irritation cleared completely or definitely improved.” *Id.* at 104.

⁷⁹ The famous Camel advertisement — “*More doctors smoke Camels than any other cigarette!*” — proposed the “T-Zone” test: “The ‘T-Zone’ — T for taste and T for throat — is your own laboratory for any cigarette. For only you taste and you throat can decide which cigarette tastes best to you . . . and how it agrees with your throat. On the basis of the experience of many, many millions of smokers, we believe Camels will suit your ‘T-Zone’ to a ‘T.’” See Stanford Research into the Impact of Tobacco Advertising, *More Doctors Smoke Camels*, STAN. SCH. MED. (Sept. 2, 2013, 1:30 PM), http://tobacco.stanford.edu/tobacco_main/images.php?token2=fm_st001.php&token1=fm_img0002.php&theme_file=fm_mt001.php&theme_name=Doctors%20Smoking&subtheme_name=More%20Doctors%20Smoke%20Camels (providing examples of “More Doctors Smoke Camels” advertisements).

dangerous, and that one could rely on this simple taste test to eliminate any risk of “scratchiness” or “irritation.” But as evidence showing clearer correlations between smoking and cancer and heart disease began to accumulate, it became apparent that this strategy could easily become counterproductive. In 1953, recognizing that advertising premised on health advantages could actually reinforce media messages about the dangers of smoking, the tobacco companies agreed not to engage in competitive advertising.⁸⁰

The new strategy was to engage these media messages directly, by switching from the communicative channel of advertising to the channel of current affairs. In 1954, the industry issued the so-called “Frank Statement to Cigarette Smokers,” which reassured customers that “the fact that cigarette smoking today should even be suspected as a cause of serious disease is a matter of deep concern to us,” and went to assert that “there is no proof that cigarette smoking is one of the causes [of lung cancer].”⁸¹ The strategy was implemented by a public relations firm, which “had contacted editors and writers from across the country to ensure favourable coverage.”⁸² The Statement announced the formation of the Tobacco Industry Research Committee, which was to be directed by “a scientist of unimpeachable integrity and national repute,” and which was to assist with “the research effort into all phases of tobacco use and health.” Unsurprisingly, perhaps, the activities of the Committee failed, as one internal evaluation put it, “to specifically test the anti-cigarette theory.”⁸³ But the effect of the strategy was to persuade many that the health effects of smoking were a matter of scientific controversy: “The very idea that cigarettes caused lung cancer had come to be vigorously contested by the companies, and the emerging scientific consensus of 1953 had by 1960 given way to widespread debate — even as new peer-reviewed findings repeatedly confirmed the causal link between smoking and disease.”⁸⁴

⁸⁰ See Tracy L. Swedrock, Andrew Hyland & Janice L. Hastrup, *Changes in the Focus of Cigarette Advertisements in the 1950s*, 8 TOBACCO CONTROL 111, 111 (1999).

⁸¹ The Tobacco Leaf, *A Frank Statement to Cigarette Smokers*, LEGACY TOBACCO DOCUMENTS LIBR. 1 (1954), available at <http://legacy.library.ucsf.edu/tid/qxp91e00/tiff;jsessionid=87DED6713D16FE6018490690264B16E0.tobacco03>. See generally PROCTOR, *supra* note 4, at 258-59 (“The Frank Statement may well be the most widely publicized — and expensive — single-page advertisement up to that point in human history. Four hundred forty-eight newspapers in 258 cities with an estimated circulation of 43,245,000 printed the ad, at a cost of more than \$244,000.”).

⁸² PROCTOR, *supra* note 4, at 259.

⁸³ BRANDT, *supra* note 5, at 173.

⁸⁴ *Id.* at 183; see PROCTOR, *supra* note 4, at 313 (“The turning point for when a

The strategy had to be rethought after 1964, when a Report of the Surgeon General's Advisory Committee on Smoking and Health announced that "[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action."⁸⁵ A few days after the publication of the Surgeon General's Report, the Federal Trade Commission ("FTC") proposed rules requiring that all cigarette packs and advertisements contain a warning that "[c]igarette smoking is dangerous to health" and "may cause death from cancer and other diseases."⁸⁶ The tobacco corporations responded by exercising their considerable lobbying power to induce Congress to pass legislation requiring a somewhat weaker disclosure. Congress passed the Cigarette Labeling and Advertising Act of 1965 which imposed a more equivocal health warning: "CAUTION: Cigarette Smoking May Be Hazardous to Your Health,"⁸⁷ and which prohibited the FTC from requiring further health warnings on cigarette advertising for the next four years.⁸⁸

majority of smokers in the United States realized that cigarettes are a major cause of death does not come until the 1970s and 1980s, though most people still ranked smoking lower on the scale of hazards than the reality as recognized by the medical authorities.").

⁸⁵ U.S. DEP'T HEALTH, EDUC., & WELFARE, NO. 1103, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE 33 (1964); *see also id.* at 31 ("Cigarette smoking is associated with a 70% increase in the age-specific death rates of males The total number of excess deaths causally related to cigarette smoking in the U.S. population cannot be accurately estimated. In view of the continuing and mounting evidence from many sources, it is the judgment of the Committee that cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate.").

⁸⁶ Advertising and Labeling of Cigarettes, 29 Fed. Reg. 530, 531 (Jan. 22, 1964) (to be codified at 16 C.F.R. pt. 408) (internal quotation marks omitted). The proposed warnings took the following forms:

"CAUTION — CIGARETTE SMOKING IS A HEALTH HAZARD: The Surgeon General's Advisory Committee on Smoking and Health has found that cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate."

"CAUTION: Cigarette smoking is dangerous to health. It may cause death from cancer and other diseases."

Id.

⁸⁷ M. JOYCELYN ELDERS, U.S. DEP'T HEALTH & HUMAN SERVS., PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL 257 (1997). *See generally id.* at 257-61 (providing a history of health warnings in the United States).

⁸⁸ *See id.* at 257. The 1969 Act required a somewhat stronger warning, "WARNING: The Surgeon General has Determined that Smoking is Hazardous to Your Health," and banned tobacco advertising on radio and television. *Id.*

These developments prompted the industry to intensify its long-standing attempts to develop — or market — a plausible technical solution to concerns about the health effects of smoking. Already, the clean, sleek, and technically precise aesthetic of the modern machine-rolled cigarette belied its toxic effects, and the industry built on this symbolism by promoting filter-tipped cigarettes. The first patents on filter tips date back to the 1930s,⁸⁹ but the market share of filter-tipped cigarettes remained negligible until the 1950s, when the increased awareness of the dangers of smoking prompted large numbers of smokers to switch to brands with filter tips.⁹⁰ This set off a new wave of competitive advertising, in which rival brands made more or less extravagant claims for the technical performance of their filters. Initially, perhaps, scientists working in the labs of tobacco corporations might have believed that this technological fix was achievable,⁹¹ but the research program eventually foundered on an unavoidable paradox: how could one design a cigarette filter “that would appreciably reduce the health hazards imposed by smoking (caused by tar, nicotine, and gases) while preserving the taste and ‘satisfaction’ that smokers craved (provided by tar, nicotine, and gases)?”⁹² Nonetheless, the industry was all too ready to nurture the impression that filter-tipped cigarettes were safer. Many historical accounts cite the observations of the RJ Reynolds researcher who invented a filter tip that would change color when exposed to smoke;⁹³

⁸⁹ See J.L. Pauly et al., *Cigarettes with Defective Filters Marketed for 40 Years: What Philip Morris Never Told Smokers*, 11 *TOBACCO CONTROL* (SUPP. 1) 51, 53 (2002).

⁹⁰ See PROCTOR, *supra* note 4, at 347 (“[W]hereas in 1950 less than one percent of all cigarettes smoked in the United States had a filter, by the end of the decade their share had streaked past [fifty] percent.”).

⁹¹ Bradford Harris, *The Intractable Cigarette “Filter Problem,”* 20 *TOBACCO CONTROL* (SUPP. 1) 10, 15 (2011) (“[T]he available historical evidence suggests that many of the early efforts to make smoking less harmful by designing effective filters were sincere, and were motivated by the belief that it was only a matter of time and money until scientific solutions to the ‘filter problem’ were found. This period was an age of big science, of NASA, of the explosion of the plastics market, of the discovery of the DNA double helix. From the perspective of cigarette filter engineers in the 1950s with blank checks for filter research, ‘safe cigarettes’ would not necessarily have appeared as a technological impossibility.”).

⁹² *Id.* at 14.

⁹³ BRANDT, *supra* note 5, at 245 (“[T]he cigarette smoking public attaches great significance to visual examination of the filter material in filter tip cigarettes after smoking the cigarettes. A before and after smoking visual comparison is usually made and if the filter tip material, after smoking, is darkened, the tip is automatically judged to be effective. While the use of such colour change material would probably have little or no effect on the actual efficiency of the filter tip material, the advertising and sales advantages are obvious.”).

and, as scientists working for Philip Morris observed, “the illusion of filtration is as important as the fact of filtration.”⁹⁴

In 1971, Philip Morris invented the “light” cigarette,⁹⁵ which was closely followed by the “slim” cigarette and the menthol cigarette.⁹⁶ Each of these products was carefully marketed to appeal to a particular constituency of health-conscious smoker; for example, slim cigarettes were marketed to women, often with the suggestion that “skinny” cigarettes were diet cigarettes.⁹⁷ Crucially, this period also saw the evolution of color-coding schemes to suggest particular strengths or qualities of tobacco, and hence recruit particular constituencies of smoker.⁹⁸ The power of this code is evidenced by experiments showing that if the same cigarettes are placed in packs of two different colors — red and blue — smokers will find those placed in the blue pack to be too mild, or those placed in the red pack to be too strong or too harsh, depending on their predilections.⁹⁹ In response to the Food and Drug Administration’s 2012 ban on the use of terms such as “light” or “mild,” Philip Morris changed the names and colors of its brands: “Marlboro Mild” became “Marlboro Blue,” “Marlboro Light” became “Marlboro Gold,” and “Marlboro Ultra-light” became “Marlboro Silver.” The products themselves remained the same.¹⁰⁰ One

⁹⁴ W.L. Dunn & M.E. Johnston, Jr., *Market Potential of a Health Cigarette*, LEGACY TOBACCO DOCUMENTS LIBR. 6 (1966), available at <http://legacy.library.ucsf.edu/tid/bdw67e00>.

⁹⁵ See PROCTOR, *supra* note 4, at 406-07 (“This was about when Philip Morris acquired Miller Beer: the tobacco giant invented ‘light’ beer around the same time it invented ‘light’ cigarettes. I suspect many people will be surprised to learn that the entire concept of light (or lite) as applied to foods, beer, and virtually everything else was a tobacco industry invention . . .”).

⁹⁶ For the controversy surrounding the latest version of the menthol cigarette, the Camel Crush, see Jason Notte, *Groups: Camel Cigarettes Still Targeting Kids*, MSN.COM (May 31, 2013), <http://money.msn.com/now/post.aspx?post=1fd887fb-98d8-4f8e-bda9-b903cbe0d9c4>.

⁹⁷ See Semira Gonseth et al., *The Tobacco Industry’s Past Role in Weight Control Related to Smoking*, 21 EUR. J. PUB. HEALTH 1, 2 (2011).

⁹⁸ See the industry document cited by PROCTOR, *supra* note 4, at 417: “Light colors connect with light tasting. Combinations of yellow, orange and red now equate to smoking enjoyment. Merit’s brown projects a slightly stronger taste. Certain blues are contradictory to smoking enjoyment and can denote strength and coldness. Other blues are prestigious though in a passive sense.”

⁹⁹ Wakefield et al., *supra* note 2, at 76.

¹⁰⁰ Duff Wilson, *Coded to Obey Law, Lights Become Marlboro Gold*, N.Y. TIMES (Feb. 18, 2010), http://www.nytimes.com/2010/02/19/business/19smoke.html?_r=0 (according to a spokesman for Philip Morris’s parent company, “[c]olors are really used to identify and differentiate different brand packs. We do not use colors to communicate whether one product is less harmful or more harmful than another”).

year after the ban took effect, the results of a public survey suggested that 92% of smokers found it either “somewhat easy” or “very easy” to identify their preferred “light” or “mild” cigarette.¹⁰¹ The provisions of the Tobacco Plain Packaging Act that require all packs to be of a uniform “drab” color are designed to counter precisely this effect.¹⁰²

V. REFRESHING THE BRAND

What does this historical snapshot tell us about the fabrication of tobacco brands through techniques of “positioning”? Brandt characterizes the strategy that informed the “Frank Statement” as “an inspired manipulation of the natural tendencies within science to encourage skepticism and seek more complete answers to important questions.”¹⁰³ The documents deposited¹⁰⁴ by the tobacco corporations pursuant to the terms of the settlement in *State v. Philip Morris*¹⁰⁵ offer ample evidence of the discrepancy between the industry’s own understanding of the risks of tobacco smoking and the terms in which it presented its products to the public. It is plain that tobacco company executives were entirely aware of the addictive and toxic properties of cigarettes, and that they went to great lengths to disguise this knowledge. A normative analysis might rest there, but a sociological analysis has to be more expansive. From a sociological perspective one might notice how the differentiation of systemic “realities” facilitates the fabrication of controversies such as the tobacco debate of the 1950s and 1960s,¹⁰⁶ but what is more important is the form of relation that articulates these differentiated realities. Whereas the normative

¹⁰¹ Gregory N. Connolly & Hillel R. Alpert, *Has the Tobacco Industry Evaded the FDA’s Ban on “Light” Cigarette Descriptors?*, TOBACCO CONTROL 1, 3 (2013).

¹⁰² See generally Simone Dennis, *Golden Chocolate Olive Tobacco Packaging Meets the Smoker You Thought You Knew: The Rational Agent and New Cigarette Packaging Legislation in Australia*, 40 CONTEMP. DRUG PROBLEMS 71 (2013) (providing an account of how seasoned smokers might decipher the new guise of cigarette packaging in Australia).

¹⁰³ BRANDT, *supra* note 5, at 204.

¹⁰⁴ The documents can be accessed, and searched with the aid of optical recognition technology, in the Legacy Tobacco Documents Library, at: <http://legacy.library.ucsf.edu>.

¹⁰⁵ Nos. CX-98-414, CX-98-431, 1998 WL 154543 (Minn. Mar. 27, 1998).

¹⁰⁶ See LUHMANN, MASS MEDIA, *supra* note 57, at 7 (“The question is *not*: how do the mass media *distort* reality through the manner of their representations? For that would presuppose an ontological, available, objectively accessible reality that can be known without resort to construction Scientists might indeed be of the opinion that they have a better knowledge of reality than the way it is represented in the mass media But that can only mean comparing one’s own construction to another.”).

theme of manipulation reduces the articulation of brands in media culture to an antagonistic relation between two representations, systems theory introduces a more complex form of relation, which does not function in the zero-sum or asymmetrical way that is suggested by the logics of cause and effect or truth and falsity.

If each system construes the world in its own terms, so that its susceptibility to the world is conditioned by its own internal operations, then it follows that the relations between systems and “their” worlds cannot be causal in nature: system observations do not correspond more or less accurately to “an objectively accessible reality”; systems “intervene” only in — or through — “reality” as they construe it; and, although systems obviously affect each other, they do so in the mode of reciprocal occasioning rather than direct causation.¹⁰⁷ The upshot is that rationalities connect only by means of reciprocal “translation”; information is reconstructed by its translation from one communicative rationality to another, or from one strand of the mass media to another. Precisely because they sought to manipulate, tobacco executives did not apprehend the results of research scientifically, as data to be correlated with other data, confirmed through experimentation, and interpreted inductively to generate hypotheses. Rather, they modeled this scientific process from the perspective of advertising and public relations, reconstructing scientific reasoning to find the aspects that could be “spun” into evidence that the case against tobacco was not proven, and crucially, scrutinizing the media presentations of scientific data to identify anxieties that could be exploited in the construction of its brands and products.

This mode of second-order observation is interesting because it enacts the kind of relation that links different system rationalities to one another. What goes on in one system might quite radically engage the operations of another system, but this will always be because what goes on resonates with the schemata through which the “affected” system construes the world. These schemata are reflexive; crudely, system rationalities can observe their engagement with the reality they elicit from the world. So, for example, the news media might decide which topics to pursue on the basis of what is likely to generate the best sales figures. For the mass media, this means that the orientation to novel information implies an orientation to what is interesting or engaging more than to what is true.¹⁰⁸ So the reflexivity of the mass

¹⁰⁷ In other words, the effect that one system can have on another depends on the receptivity of the “addressee” system.

¹⁰⁸ LUHMANN, *MASS MEDIA*, *supra* note 57, at 12-13 (“The success of the mass media

media is already a species of manipulation, and the duplicity of advertising is a variation on this mode of operation: “Advertising seeks to manipulate, it works insincerely and assumes that that is taken for granted. It takes, as it were, the deadly sin of the mass media upon itself.”¹⁰⁹ In these terms, the mode of manipulation that is identified by historians of the tobacco industry — namely, the capture of news media by advertising — actually exemplifies the relation between two mutually irritating systemic rationalities. The relation between the tobacco brands and public health information was a relation between the two media channels of news and advertising, which, like the relation between advertising and the economy,¹¹⁰ was based on reciprocity rather than asymmetry.

If information is inherently socio-degradable, then the basic predicament of “positioning” lies in the question of how to hold brand identities steady within the process of constant renewal. Brands are immersed in a multiplicity of economic, legal, and political processes, and, more immediately, in the flow of information circulated by the other two strands of the mass media, and they have to adapt to the changes that affect their visibility or charisma: everything from a radical change in market conditions or negative commentary on labor conditions in factories, to the circulation of humorous parodies or images showing a lead product being worn by the “wrong” celebrity. To hold a brand steady it is not enough to simply repeat or reinforce an established aesthetic;¹¹¹ the art of positioning is to adapt the identity of the brand to a changing medial environment by balancing continuity and variation, or, as systems theorists would say, “redundancy” and “variety.” The historical relation between tobacco advertising and health information illustrates this process rather well,

throughout society is based on making sure that topics are accepted, regardless of whether there is a positive or a negative response to information, proposals for meaning-making or recognizable judgements. Interest in a topic is frequently based precisely on the fact that both positions are possible.”).

¹⁰⁹ *Id.* at 44.

¹¹⁰ *Id.* at 66 (“[A]dvertising has to make its product a reality via the auto-dynamics of the social system of the mass media and not merely, as is typically the case with other products, via technological or physical-chemical-biological suitability for the satisfaction of a particular need. Within the strand of advertising, then, the economy is just as dependent upon the system of the mass media as the latter is upon it . . .”).

¹¹¹ *Id.* at 45. Which is not to say that the form of an iconic logo or the aesthetic of a fantasy landscape such as Marlboro country cannot “secede” to some extent from the corrosive flux of information: “Good form destroys information. It appears as though determined by itself, as if requiring no further clarification, as if it immediately made perfect sense. Therefore it offers no occasion for further communication to which the further communication might then react with a ‘yes’ or a ‘no.’” *Id.*

the irony being that the tobacco industry's advertising agencies quite artfully exploited — or parasitized — the energy of the debate about smoking and health to recharge the brand charisma that bound smokers to cigarettes.

The competitive “health” advertisements of the 1950s exploited the circulation of potentially negative information about the risks of smoking as a resource from which to animate or refresh cigarette brands. Here, “positioning” was not only a matter of gaining a competitive advantage; the effect of competitive advertising was to forge a favorable — and visible — association between cigarette smoking and the medical profession. The strategy of the Frank Statement adopted a more radical mode of positioning, in which advertising crossed over into news reporting. Again, the manipulative aspects of this strategy are plain to see, but bearing in mind the question of how brands work within the mass media system, the strategy is an extreme example of a phenomenon which can be seen in other cross-overs between advertising and news reporting (product placement in movies, sports sponsorship, political lobbying, public relations campaigns of various sorts, and so on) or between advertising and entertainment (the use of narrative, dramatic, or comedic forms within advertising). The latter example suggests the deeper, structural, relation between news reporting and advertising; witty advertisements typically play on knowledge that the viewer or reader can be presumed to know through the mass media; they “play[] with the receiver’s implicit knowledge without recalling it in a straightforward, direct way.”¹¹² So the narrative or aesthetic form of the advertisement is intelligible only in terms of horizon of information generated by the news or entertainment media. The development of “light” and “slim” cigarettes illustrates a more complex engagement, in which brands were positioned by playing one kind of health concern off against another (slim cigarettes are purer or less toxic than regular cigarettes, and in any case smoking promotes weight loss).

Brandt observes that the increased awareness of the health hazards of smoking radically affected the tobacco industry's control over its product: “Having brilliantly mastered the meaning and character of their product for more than half a century, the tobacco companies found that they had begun to lose control of the very cultural processes that they had so effectively utilized in creating the modern

¹¹² *Id.* at 64.

cigarette.”¹¹³ One might say, however, that the strategies adopted by the industry from the 1950s onwards actually exemplify what is involved for all corporations in managing and enhancing the brand identities that reflect back onto the consumer experience of products.

CONCLUSION: A MORE PERSISTENT ADDICTION?

Although nothing in the Tobacco Plain Packaging Act obstructs the bare identification of the source of a product,¹¹⁴ the only real scope left for developing brand identities is that which is afforded by the use of variant names. In September 2012, before the statute came into force, British American Tobacco launched its proposed plain cigarette packs, which bore thirty-eight different variants, including “rich,” “smooth,” “fine,” “ultimate,” “original rum and wine,” and, for menthol cigarettes, “release chilled,” “sea green,” and “cool frost.”¹¹⁵ These descriptors evoke the symbolism that the industry developed through the now-proscribed media of color, shape, texture, and brand, and there is evidence that these condensed formulae shape the smoker’s perception of the product.¹¹⁶ The tobacco corporations may now be unable to position these vestigial brand signifiers through advertising, but there are suggestions that brand identities are being kept alive in social media.¹¹⁷ Assuming, however, that these opportunities are of only marginal significance, and assuming that the Australian statute survives referral to a WTO panel, it seems likely that the statute will achieve its objective of extinguishing the power of brands to capture new smokers and bind established smokers to their preferred brand. This prompts a somewhat speculative concluding observation: what if the smoker’s addiction to nicotine were an apt metaphor for the nature of our attachment to brands?

Robert Proctor observes that the smoker’s craving for cigarettes is motivated both by the charisma of brands and by the psycho-chemical agency of nicotine; in the tobacco business, “[m]arketing joins with psychopharmacology to transform a rare or ritual indulgence into

¹¹³ BRANDT, *supra* note 5, at 160.

¹¹⁴ Explanatory Statement, Select Legislative Instruments 2011 No. 29, *Tobacco Plain Packaging Act & Regulations* (Cth) 12 (Austl.) (“Plain packaging does not prevent tobacco companies from distinguishing their products . . .”).

¹¹⁵ See *Tobacco’s Slick Marketing Ploys*, ACTION ON SMOKING & HEALTH, <http://www.ashaust.org.au/lv4/MarketingPloys.htm> (last updated Apr. 4, 2013).

¹¹⁶ See Ron Borland & Steven Savvas, *The Effects of Variant Descriptors on the Potential Effectiveness of Plain Packaging*, TOBACCO CONTROL 1, 5-6 (2012).

¹¹⁷ A less affirming example of the role of consumers in co-producing brands and brand value, perhaps.

brain-rewiring mega-morbidity.”¹¹⁸ Nicotine is obviously the more persistent agent of addiction; according to industry insiders, the charisma of the brand holds the smoker until the effects of nicotine kick in.¹¹⁹ And, once hooked to the brand, smokers will “taste” in the tobacco the lifestyle qualities that are projected by the aesthetic of the pack. Even connoisseur smokers cannot savor a cigarette without ascribing to the tobacco the psychic effects of cues such as the color of a pack.¹²⁰ Louis Cheskin, one of the great marketing gurus of the twentieth century, called this the effect of “sensation transference,”¹²¹ in which the auratic effects of the branded package are translated into innate qualities of the product.

It might be a stretch to characterize our attachment to brands as an effect of cultural “addiction,” but the hypothesis is that the notion of addiction gets at an essential feature of the agency of brands. Addiction is not a straightforward concept. The contemporary notion can be traced back to the moral and religious censure of alcohol consumption in the nineteenth century, and the old moralistic characterization of drunkenness as a “disease of the will” still echoes through to the expert categorization of addictions.¹²² Cigarettes illustrate the point rather well.¹²³ The characterization of brands as

¹¹⁸ PROCTOR, *supra* note 4, at 87.

¹¹⁹ See the observations of the vice-president of research and development at Philip Morris, cited in BRANDT, *supra* note 5, at 318: “[T]he cigarette is the vehicle of smoke, smoke is the vehicle of nicotine and nicotine is the agent of pleasurable body response. . . . We are not suggesting that the effect of nicotine is responsible for the initiation of the habit. To the contrary. The first cigarette is a noxious experience To account for the fact that the beginning smoker will tolerate the unpleasantness we must invoke a psychosocial motive. Smoking a cigarette for the beginner is a symbolic act. . . . As the force from the psychological symbolism subsides, the pharmacological effect takes over to sustain the habit, augmented by secondary gratifications.”

¹²⁰ See Wakefield et al., *supra* note 2, at 75 (“[E]ven with the use of panellists who are trained to be objective in their evaluation of cigarettes . . . both brand identification and pack imagery variables have a significant effect on the individual’s perception of the sensory attributes of the product.”).

¹²¹ MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 160 (2005).

¹²² The classic study is Harry Gene Levine, *The Discovery of Addiction; Changing Conceptions of Habitual Drunkenness in America*, 39 J. STUD. ON ALCOHOL 143 (1978).

¹²³ The 1964 Report of the Surgeon General characterized “the tobacco habit” as a “habituation” rather than an “addiction.” Kirsten Bell & Helen Keane, *Nicotine Control: E-Cigarettes, Smoking & Addiction*, 23 INT’L J. DRUG POL’Y, 242, 243 (2012). Even now, the nicotine doesn’t really fit the categories of the DSM. *Id.* at 243 (“[T]he distinctiveness of smoking is highlighted rather than undermined, for chain smoking is likely to be combined with other activities, including work and study, rather than taking up time on its own.”).

culturally addictive is based not on the premises of neuromarketing,¹²⁴ but on the implications of Luhmann's theory of mass media information. What we are addicted to is knowledge: "[t]he desire for information becomes as socially essential as the intake of new food is biologically essential."¹²⁵ More precisely, we are addicted to the *speed* of knowledge in the age of the mass media. We are compelled to be up to date and in the know, in current affairs, sports, literature, entertainment, and fashion,¹²⁶ and the aesthetic of brands presupposes, captures, and reinforces this compulsion.

¹²⁴ Which proposes that the circulation of brand signifiers can have its own "brain-rewiring" effects: "Just as practicing the piano or learning to read can physically alter areas of the cerebral cortex, the intense, repetitive stimulation of marketing might shape susceptible brain circuits involved in decision-making." Tushnet, *supra* note 76, at 516.

¹²⁵ Hans-Georg Moeller, *Knowledge as Addiction: A Comparative Analysis*, 1 KRITIK 1, 9 (2007).

¹²⁶ The fashion industry perfectly illustrates the effects of this orientation to novelty. The devotee wearing this season's collections will already have seen (and perhaps pre-ordered) items from next season's collections, and might already be perusing the journals to gather intelligence on trends for the following season. In this, one can see a perfect confluence of accelerated flows of money and information, brands and products, corporate identity and consumer experience.