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NYLS Journal of International and Comparative Law

Volume 2 | Issue 3 Article 2

1981

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John P. Spitals

THE UNCTAD REPORT ON THE ROLE OF TRADEMARKS IN DEVELOPING COUNTRIES: AN ANALYSIS

*JOHN P. SPITALS**

In 1979, the United Nations Conference on Trade and Development (UNCTAD) secretariat[1] released a report[2] on the role of trademarks in the developing countries of the world. This report is highly critical of the current status of trademark law, and proposes a number of alternatives to the present situation. It is of paramount importance to scrutinize these proposals carefully, in view of their potential dramatic effects on the world economy. Further, the existence of other

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*Associate, Fish & Neave; J.D. *magna cum laude* (1980), New York Law School; Masters (1977), Yale University; B.S. (1975), Brown University.

1. At the 1962 summer session of the Economic and Social Council (ECOSOC), it was decided that a Conference on Trade and Development should be convened, specifically to consider commodity markets. In December 1962, the General Assembly, at its seventeenth session, asked the Council to convene the first session of a Preparatory Committee for the Conference. The Conference was held in Geneva on March 23, 1964, with representatives of 120 countries. In a Final Act, the Conference formulated a number of principles governing trade relations and trade policies and recommended that the Conference be established as a permanent organ of the General Assembly. In a resolution adopted on December 30, 1964, the Assembly decided to establish the United Nations Conference on Trade and Development as a permanent organ of the Assembly. On the establishment of UNCTAD, see generally Cordovez, *The Making of UNCTAD*, 1 J. WORLD TRADE L. 243 (1967).

2. The Role of Trademarks in Developing Countries, U.N. Doc. TD/B/C.6/AC.3/3/Rev.1 [hereinafter cited as Report]. This report had originally been prepared for the session of the Group of Governmental Experts meeting in Geneva in October 1977. At that meeting, a precursor text to the present report was discussed, and a set of agreed conclusions and recommendations was adopted.

methods of dealing with the trademark-related problems of third world economies should be acknowledged. This paper will address both of these points. First, it will provide a brief historical analysis of the development of trademark law, both on the national and on the international level. Second, it will criticize the economic model adopted by the secretariat for its analysis of the role of trademarks in developing countries. The third section will summarize the findings of the report on the relative costs and benefits of trademarks to the economies of developing countries. The final section will analyze the suggestions for change which the report recommends, and will propose possible alternatives.

I. Historical and International Perspectives

Trademarks are used by the distributor of goods to identify them. The earliest uses of marks were presumably to indicate ownership. By the Middle Ages, these identification marks had evolved into two distinct groups based on usage: merchants' marks, indicative of a possessory interest in the goods; and production marks, indicative of source or manufacturer.[3] This latter type eventually developed into the modern trademark.[4]

There are some major differences between the early production marks and the modern trademark. While production marks were compulsory, and their use strictly monitored by the guilds,[5] modern trademarks are employed on a strictly voluntary basis.[6] Moreover, the modern trademark is treated as an asset, often the most valuable single asset of the modern business.[7] In contrast, the tracing function that

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3. *See* Diamond, *The Historical Development of Trademarks*, 65 Trademark Rep. 265, 272-80 (1975); Ruston, *On the Origin of Trademarks*, 45 Trademark Rep. 127 (1955). *See generally* F. Schechter, The Historical Foundations of the Law Relating to Trademarks 38-48 (1st ed. 1925).

4. 1 J.T. McCarthy, Trademarks and Unfair Competition § 5.1 (1973). At that time, the marks were the symbol of a single craftsman. The purpose was not to prevent the buyers from confusion, but rather to act as a device to enable the tracing of defective goods back to the producer. *Id. See* Ruston, *supra* note 3, at 127.

5. *See* Family Circle Inc. v. Family Circle Association, Inc., 332 F.2d 534 (3d Cir. 1964) (providing a general discussion of guilds and the requirements of the marking of goods by their members).

6. 1 J.T. McCarthy, *supra* note 4, § 2.7. A trademark becomes the property of the owner and a symbol of the goodwill of the business it represents. *Id.*

7. *Id.* § 2.9(A). An example of the value of a trademark is represented by the once highly recognizable chimes of NBC, which are a registered service mark owned by NBC. P. Rosenberg, Patent Law Fundamentals §4.01, at 4-3 (2d ed. 1981).

the production marks served was a distinct liability, because defective products could be traced to their makers.[8]

The modern trademark is basically a tool of memory. Both informative and persuasive advertising[9] is directed towards creating an association in the mind of the consumer between the product bearing the mark and certain qualities or values.[10] The trademark is useful in this regard when purchasers of goods wish to repeat satisfactory purchasing experiences or avoid unsatisfactory ones because customer approval or displeasure is registered with the mark affixed to the goods.[11]

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8. P. ROSENBERG, *supra* note 7, § 4.01, at 4-3.

9. Advertising essentially performs two functions. The first is to provide the consumer with essential information regarding the merits and demerits of the goods and services that are available to him. Only after all possible choices are made known to him can the consumer make an intelligent decision as to the best allocation of his resources in regard to his relative needs.

In conjunction with the dissemination of information, however, there is also a persuasive element involved. The advertiser does not merely undertake to impartially present his product to the buying public, but also to convince them that this product would be the best choice. When this persuasive function overtakes the informative function, any benefits to society are negated, and abuses in advertising occur. The producer praises his product to excess, and the result is not only a misrepresentation of the product, but a false disparagement of competing goods. Other producers must respond in a similar manner. *See* E.W. KITNER, A PRIMER ON THE LAW OF DECEPTIVE PRACTICES: A GUIDE FOR THE BUSINESSMAN, 1-3 (1971). The net result is a distortion of the original principle of a market governed by consumer choice with no positive effects on the market system. *Id.*

For a discussion on the theory of consumer behavior, see MCCORNELL, ECONOMICS, 488-92 (1963).

10. P. ROSENBERG, *supra* note 7, § 4.01, at 4-3.

> Because consumers associate all goods bearing the same trademark with a common source, by placing the same trademark on different goods the trademark owner, at least by implication, certifies that the various goods are of like or equal quality. A trademark thus carries with it its owners' good will and reputation, and serves as a focal point for advertising.

Id.

11. This aspect of trademark use was emphasized in Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813 (1927) [hereinafter cited as Schechter, *Rational Basis*]. Schechter noted that a trademark does not indicate the actual source or origin of consumer goods, but does indicate "that the goods . . . emanate from the same . . . source . . . that [has] already given the consumer satisfaction, and that bore the same trademark." *Id.* at 816.

The trademark, however, is not merely a symbol of good will. It is "an agency for the actual creation and perpetuation of good will." *Id.* at 818. Therefore, the trademark both identifies the producer as satisfactory and stimulates further purchases by the consuming public. *Id.* Schechter provides the following example:

> The signboard of an inn in stage-coach days, when the golden

Trademarks are administered as a form of intellectual property by the governments of the nations in which they are used.[12] Domestic trademark legislation commonly requires the registration of a mark with an administrative agency.[13] The legal significance of this registration varies, depending upon the country. In most systems, registration of the mark is sufficient for a grant of protection.[14] In a few systems — notably that of the United States — use of the trademark in commerce is a prerequisite for protection to be granted.[15] Registration is, however, important in itself because it provides significant practical advantages, such as facilitation of the legal process for punishment of infringers.[16]

> lion or the green cockatoo actually symbolized to the hungry and weary traveler a definite smiling host, a tasty meal from a particular cook, a favorite brew and a comfortable bed, was merely "the visible manifestation" of the good will or probability of custom of the house; but today the trademark is not merely the symbol of good will but often the most effective agent for the creation of good will, imprinting upon the public mind an anonymous and impersonal guaranty of satisfaction creating a desire for further satisfactions. The mark actually *sells* the goods. And, self-evidently, the more distinctive the mark, the more effective is its selling power.

Id. at 818-19. In sum, the "creation and retention of custom, rather than the designation of source, is the primary purpose of the trademark today, and . . . the preservation of the uniqueness or individuality of the trademark is of paramount importance to its owner." *Id.* at 822. *See also* Hanak, *The Quality Assurance Function of Trademarks*, 65 TRADEMARK REP. 318 (1975).

12. *See generally* E.D. OFFNER, INTERNATIONAL TRADEMARK PROTECTION (1965).

13. *E.g.*, Trademark (Lanham) Act, 15 U.S.C. §§ 1051-1127 (1976). The Lanham Act requires that if the owner of a trademark used in commerce wishes to protect it, he must register it under the terms of the statute with the U.S. Patent and Trademark Office. *Id.* at § 1051.

14. *E. Vandenburgh III, Trademark Law and Procedure* § 1.22, at 16-17 (1959). "In the United States, adoption alone is insufficient to form a basis for the acquisition of a trademark. The contrary is true in some foreign countries. In [the United States], a trademark is acquired as a result of use." *Id.* In contrast, whereas the "use approach is a creature of the common-law legal system . . . the registration approach is a characteristic of continental or Civil-law legal systems. . . . [I]n Great Britain, trademark rights may be created either by use or by an intention to use, i.e., by registration." P. ROSENBERG, *supra* note 7, § 4.02 [1][a], at 4-8.

15. *E. Vandenberg III, supra* note 14, § 1.22, at 16-17.

16. P. ROSENBERG, *supra* note 7, § 4.02[1][a], at 4-9 to 4-10,

> [F]ederal registration . . . give[s] the registrant certain extremely valuable advantages, e.g., access to the federal courts and incontestability. Federal registration also has the effect of shifting the burden of proof from the plaintiff, who in a common-law infringement action would have to establish his right to exclusive use, to the defendant, who must introduce suffi-

In addition to domestic protection, there is also an international system of laws regulating the use of trademarks. The principal international arrangement pertaining to trademarks is the Paris Convention for the Protection of Industrial Property.[17] Originally concluded in 1883, the Paris Convention is based upon the principle of national treatment: trademarks valid in one country of the Union are granted the same protection as a national mark in any other country.[18] In addition, a six month priority period is provided,[19] during which a trademark registered in one country may be registered in any of the others.[20] The trademark is then treated as if the application in the foreign country has been made on the same date as the original.[21]

Once the first trademark registration is filed in one of the member states, the other states have little discretion with respect to granting registrations for that mark.[22] Despite these provisions, an international trademark is not created: in order to obtain protection

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> cient evidence to rebut the presumption of the plaintiff's right to such use. . . . [A]n important substantive right is also created, namely, the right to exclude even a prior user from those parts of the United States in which he was not actually using the mark prior to federal registration. The first to obtain a federal registration can confine a prior user to the geographical market area in which such prior user was actually using the mark before the federal registration occurred. The rest of the United States is reserved for the holder of the federal registration.

Id.

17. Union Convention of Paris for the Protection of Industrial Property, Mar. 20, 1883, 25 Stat. 1372, 161 Parry's T.S. 410 (French text), *revised* Dec. 14, 1900, 32 Stat. 1936, 189 Parry's T.S. 134 (French text), June 2, 1911, 38 Stat. 1645, 213 Parry's T.S. 405 (French text), Nov. 6, 1925, 47 Stat. 1789, 74 L.N.T.S. 289, June 2, 1934, 53 Stat. 1748, 192 L.N.T.S. 17, Oct. 31, 1958, 13 U.S.T. 1, T.I.A.S. No. 4931, July 14, 1967, 21 U.S.T. 1583, T.I.A.S. No. 6923 *(ratifying* arts. 13-30), 24 U.S.T. 2140, T.I.A.S. No. 7727 *(ratifying* arts. 1-12) [hereinafter cited as Paris Convention].

18. According to article 6 quinquies of the Convention, the only exceptions to the right of registration are (1) possible infringements of marks already registered; (2) lack of distinctive character; and (3) a determination that the mark is contrary to morality or public order. Registration may also be refused, and existing trademarks cancelled, according to the provisions of article 6 bis. By the terms of this article, trademarks which are likely to create confusion among consumers with a mark considered to be well-known or already registered and used for the same or similar goods are prohibited. Reproductions, imitations or translations of registered or well-known marks are also forbidden. A final method whereby trademark registration may be limited or cancelled is through article 10, which permits cancellation or refusal to register in cases of unfair competition.

19. Paris Convention, *supra* note 17, 24 U.S.T. art. 4(C)(1), at 1632.

20. *Id.* art. 4(A)(1), at 1631-32.

21. *Id.* art. 4(B), at 1632.

22. *See supra* note 18 and accompanying text.

throughout the Union, it is necessary to file trademark applications in all member states.[23]

Criticism of the Paris Convention has focused primarily on the concept of non-discrimination embodied in article 2.[24] Developing countries have voiced opposition to the requirement that foreign corporations must be permitted to register marks if they have a valid registration in their home state.[25] In addition, the use of trademarks in certain sectors, most particularly in the pharmaceutical industry, has been challenged on a global scale.[26] The reasoning used to support these objections forms the basis for the next two sections of this paper.

II. The UNCTAD Report's Model for the Economic Role of Trademarks

The authors of the UNCTAD report present a model for the market system as a framework for analysis of the role of trademarks in the economies of the developing countries. Under this model, the contemporary marketplace is compared with an idealized market structure. In this structure, characterized as one with perfect competition, individual buyers and sellers deal with perfectly homogeneous products; in addition, there is complete knowledge of all relevant data by all par-

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23. Paris Convention, *supra* note 17, at 1643, art. 6 quinquies (A)(1). This article provides that: "[e]very trademark duly registered in the country of origin shall be accepted for filing and protected as is in the other countries of the Union, subject to the reservations indicated in this Article." *Id.*

24. Report, *supra* note 2, para 19. Article 2, paragraph 1 of the Paris Convention provides:

> Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.

Paris Convention, *supra* note 17, art. 2, para. 1.

25. Report, *supra* note 2, para. 23. The Paris Convention supposes that a trademark duly registered in one country is independent of the same mark registered in another country of the Union. This places the burden of registering the trademark in each country separately where protection of the trademark is desired. *Id.*

26. *Id.* para. 184-200. The cost of pharmaceuticals is increased because of the use of trademarks. This stems from the fact that the same product is marketed using numerous trade names. This causes great competition which results in higher prices for pharmaceuticals sold under trade names than those sold under their generic name. *Id.*

ties. In such a perfect market, price is the predominant competitive factor.

Modern economies, on the other hand, are characterized as systems of imperfect competition. There are limited numbers of buyers or sellers or both; the goods are not homogeneous; buyers and sellers do not have full knowledge of either the market or of the products; and barriers to entry into the marketplace exist. A peculiar creature of the system is the oligopoly, a market structure in which the actions of a few firms have a significant impact on price and supply.

An underlying assumption of the model is that the cross-elasticities of demand between two similar products approach infinity. In other words, one of a pair of products in virtually all cases will be accepted as a perfect substitute for the other. When the market is altered from this ideal state through product differentiation, the correspondence is reduced. As a result, competition appears and, depending upon the degree of differentiation, competitive products that were once perfect substitutes become more or less close substitutes.

Thus, market shares while in a perfect competitive system are acquired through strict price competition, price is no longer the sole criterion for consumer choice once differentiation occurs. As a result of product differentiation, therefore, it is no longer possible to treat all goods of any given class as perfect substitutes: since the consumer public no longer perceives them in that manner.[27]

The trademark is introduced into the market system as the preeminent tool for the effectuation of product differentiation. Because imaginary bases for distinguishing between products are sufficient, the trademark can at times serve as a talisman, in itself sufficient to make the same different. Far more common, however, is the combined use of trademarks and persuasive advertising. Distinction between practical substitutes are sought to be implanted in the minds of consumers; the trademark serves as a mnemonic for the full advertising message.

The present market is one in which the trademark, as the symbol for an enterprise, is associated with goodwill, customer satisfaction and the total advertising effort. This goodwill, in turn, gives the enterprise owner market power. Because of market power, the enterprise enjoys greater profits. Those with market power are then assumed to modify the market - either in terms of price or of demand - to their benefit.

The accrual of goodwill to enterprises through the use of trademarks occurs through the development of brand loyalty by the con-

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27. In addition to differentiation based on characteristics of the product itself, factors such as packaging and manner of sale can reduce the cross-elasticities of demand between a product and available potential substitutes.

sumer.[28] This concept has several interesting market consequences. When the hypothetical objective value of goods chosen solely on the basis of brand is less than the market price, the consumer is guilty of an error of commission. The price elasticity among brands of consumer goods can also be reduced. Another consequence is a proliferation of brands on the part of existing firms: instead of the introduction of new firms into the market, a limited number of firms already in operation produce a multitude of brands, crowding out new competitors.[29]

The conclusions and recommendations of the UNCTAD report appear to have been derived from a rather strict application of the theory of Edward H. Chamberlin.[30] In assessing the utility of the UNCTAD model, it should be noted that a perfect competitive systems model does have some advantages. In particular, the simplicity of the model makes its application relatively straightforward. Unfortunately, this simplicity also prevents the model from accurately reflecting the real marketplace.

Chamberlin hypothesized that the ideal market consists of a large number of producers willing to sell standardized goods.[31] Through product differentiation and the creation of brand loyalty, the system is removed from one of perfect competition. The results of this shift from the perfect mark are (1) higher prices for consumers and (2) high barriers to entry of new firms into the marketplace. Because of these negative results, Chamberlin argued that legal enforcement of trademark rights should be eliminated, and trademark infringements and imitations allowed. His conclusion was that "to permit such infringements and imitations would be to purify competition by eliminating monop-

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28. Brand loyalty refers to the concept whereby the repeated purchase of a product occurs solely because such product bears a particular brand name. This is of particular significance in the area of experience goods, that is, those that can only be evaluated after purchase. The distinction between search goods, which can be evaluated before purchase, and experience goods appears to have been first formulated in Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311 (1970).

29. A phenomenon related to that of brand loyalty is referred to as semantic generalization. This is the psychological term for the phenomenon that takes place when consumers, consciously or unconsciously, rely on a trademark's guarantee in making purchasing decisions. When marketers employ family branding, company trade names or brand extension strategies, they are using this phenomenon to increase sales and decrease costs. Goldstein, *Products Liability and the Trademark Owner: When a Trademark Is a Warranty*, 67 TRADEMARK REP. 587, 606 (1977).

30. E. CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION (7th ed. 1956). Professor Chamberlin's theory utilizes a fusion of competition and monopoly. He argues that the concept of pure competition is inadequate to deal with classes of products which are not homogenous. *Id.*

31. E. CHAMBERLIN, *supra* note 30, at 7. Professor Chamberlin asserts that slight differentiations of products provide artificial control of prices to sellers. *Id.*

oly elements."[32]

In order to provide products among which there is very high cross-elasticity of demand, allowing for perfect competition, there must be no siginificant basis for distinguishing one product from the others. As the size of the market increases, the difficulties with achieving this uniformity multiply. For there to be no features distinguishing products, some type of limitations on product variety must be set. One method is to centralize production of each category of goods. This leads directly to the homogeneous oligopoly, a state of affairs renounced because of the limited opportunity for new enterprises to enter the field. Alternatively, some form of external standards may be established, for example through governmental regulation. This too has its drawbacks, as noted *infra*. In any event, in a perfect competitive system model the issue is reduced to that of providing necessary goods. A global approach to the marketplace cannot be so paternalistic.

Moreover, analysis of the impact of advertising on the consumer, from the perspective of a Chamberlin model, is biased in many respects. For example, advertising induces confidence: the very fact that an enterprise engages in advertising activity may persuade the consumer that the goods will be satisfactory and should be purchased more than once. This follows from the desire of the enterprise to maintain its goodwill; in order not to disappoint customers, inferior merchandise is not sold under the brand name. Thus, "even though its informational content may be nominal, the fact that the information exists is information in its own right."[33] This "psychic" assurance function cannot be completely disregarded.

In addition, it can be argued that advertising is pro-competitive. Advertising substitutes "cheaply provided information for expensive search costs."[34] Moreover, advertising can make firm demand curves more elastic, thereby making markets more competitive. In the absence of advertising, products used to fulfill real or imagined needs are not likely to be replaced.[35] Finally, the new enterprise may not necessarily

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32. *Id.* at 270. Chamberlin's theory has been adopted by a number of subsequent analyses. *See, e.g.*, Brown, *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165 (1948); McClure, *Trademarks and Unfair Competition: A Critical History of Legal Thought*, 69 TRADEMARK REP. 305, 345 (1979); Mueller, *Sources of Monopoly Power: A Phenomenon Called "Product Differentiation,"* 18 AM. U.L. REV. 1 (1968); Papandreou, *The Economic Effect of Trademarks*, 44 CALIF. L. REV. 503 (1956).

33. Jordan & Rubin, *An Economic Analysis of the Law of False Advertising*, 8 J. LEGAL STUD. 527, 532 (1977).

34. Brozen, *New FTC Policy from Obsolete Economic Doctrine*, 41 ANTITRUST L.J. 477, 479 (1972).

35. *Id.*

be hampered by the fact that advertising in a particular market is extensive; the new enterprise can itself use advertising to enter new markets.[36]

III. The Costs and Benefits of Trademarks to National Economies

Consideration of the evolution of developing economies according to this model led the UNCTAD secretariat to some disturbing conclusions. In order to understand how these conclusions were derived, it is useful to consider the global distribution of trademark ownership. During the ten year period between 1964 and 1974, there was an observable trend towards increased foreign ownership of trademarks in developing countries.[37] Specifically, by 1974, fully half the trademarks registered in developing countries were owned by foreigners.[38] Regional figures were even higher: about 65% of all Asian registrations were held by foreigners, while in Africa the percentage exceeded 88%.[39] Of foreign-owned trademarks, 96-99% originated in developed countries.[40] Of these, the United States, Japan, Great Britain, West Germany and France accounted for 78% of the total.[41]

In view of this gross disparity in ownership, the UNCTAD secretariat tried to determine the relative costs and benefits of trademarks to the economies of developing countries.[42] The cost to society of the market power generated through the use of trademarks was seen to be of two types: "the misallocation of resources through advertising and . . . the social impact of persuasive advertising expenditures."[43] As benefits derived from trademark use, the secretariat noted the identifi-

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36. Callahan, *Advertising's Influence on Consumers*, 14 J. Advertising Research 45 (1974).

37. Report, *supra* note 2, para. 101. In 1964, the foreign share of registered trademarks in Africa, Asia and Latin America was 72.8, 56.1% and 11.9%, respectively. By 1974, this percentage had increased to 88.4%, 65.2% and 34.0%, respectively. *Id.* Table 6.

38. *Id.* para. 101.

39. *Id.* Table 6.

40. *Id.* Table 8.

41. *Id.* The United States held the largest share with 34.3%. Japan, Great Britain, West Germany and France held 15.1%, 12.2%, 9.2% and 7.0%, respectively. *Id.*

42. *Id.* paras. 201-256. The secretariat first analyzed the costs and benefits of trademarks to society generally and then considered them in the specific context of developing countries. *Id.* para. 201. The secretariat relied on statistics garnered from various sources including information provided by the UNESCO Statistical Yearbook 1975, and U.S. Senate hearings. *Id.* para. 208, 214.

43. *Id.* para. 204.

cation and guarantee functions as primary.[44] After consideration of these components, the secretariat concluded that whereas "the private benefits that the owners of a trademark derive from its use and licensing are high, the net benefits accruing to society are low."[45]

With respect to the allocation of resources to advertising, a major criticism was that the costs were generally shifted to the consumer, thereby making trademarked goods more expensive than non-advertised ones.[46] The development of new and modified demands resulted in unnecessary expenditures at the expense of basic consumption[47] and in increased consumption at the expense of savings.[48] Moreover, advertising competition may increase to such a degree that efforts to promote competing products would cancel out over time, at which point intensive advertising would be necessary just to retain the same marketing position.[49] This was considered a "wasting of resources,"[50] particularly since advertising expenditures in developing countries were 70% higher than research and development investments.[51]

The UNCTAD secretariat questioned the wisdom of such expenditures in developing countries, where resources for solving the basic problems of underdevelopment are scarce.[52] The trademark, moreover, was deemed the prime element in this misallocation of resources, to the extent that "an important part of this advertising effort is made to develop the goodwill-creation function."[53]

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44. *Id.* para. 215. Basically, consumers are benefited by this quality identification function in that enables them to make informed purchasing decisions. *See id.*

45. *Id.* para. 221. The Secretariat found that the quality identification function was secondary to the function of trademarks in creating goodwill. *Id.* Earlier in the Report, the Secretariat had defined good will as product reputation building. *Id.* para. 36. The later dichotomy of these functions seems somewhat strained. A reputation created by a trademark cannot be totally illusory and must, to a certain degree, be representative of quality thereby faciliating consumer decisionmaking. To this degree these functions are compatible and cannot be relegated to the categories of costs and benefits. The Secretariat noted one commentary demonstrative of the flaw in this dichotomy. The commentary stated that "the greater the discrepancy between promised and actual experience qualities, the less likely the customer is to do further business with the same firm and the greater the likelihood that it will be worthwhile to recover damages or file charges for fraud." Darby & Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 72 (1973).

46. Report, *supra* note 2, para. 205.

47. *Id.*

48. *Id.* para. 205.

49. *Id.*

50. *Id.*

51. *Id.* para. 208.

52. *Id.* para. 213.

53. *Id.* para. 213. *See also* Brown, *supra* note 32, at 1165; Mueller, *supra* note 32, at 1; Papandreou, *supra* note 32, at 503.

In developing countries, trademarks are also seen as "symbols of the foreign business influence in the development process of the less advanced countries of the world."[54] The influence of persuasive advertising in certain categories of products was felt to be so strong that in effect there had been a redefinition of certain basic needs.[55] Through domestic marketing efforts, foreign subsidiaries would modify consumption patterns and tastes, instead of adapting products to local needs. Not surprisingly, a principal effect of this effort has been the development of a tendency in favor of advertised products bearing trademarks.[56] This tendency was believed to extend even to the lower income sectors.[57] Thus, the poor in developing countries were spending money on goods which did not satisfy their basic needs.[58] Moreover, production of these goods would either require inputs not available in the local country or would create less employment than traditional indigenous activities.[59]

A potential negative effect on the balance of payments was noted, in that higher profit margins achieved by foreign firms due to persuasive advertising would lead to an increased market share, increased foreign remittances, or possibly both.[60] In addition, the accrual of higher profits by foreign corporations would increase their available resources for business expansion, to the detriment of developing local industry.[61] Other indirect costs were felt to be even greater, since domestic firms attempting to enter the market would either have to enter into licens-

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54. Report, *supra* note 2, para. 222.

55. *Id.* para. 230. This was, in part, related to the demonstration effect. This label was given to the result of presentation through advertising of the consumption patterns of more affluent classes and/or foreign countries. The theory is that once such patterns are observed, there is a tendency to emulate them. *Id.*

56. *Id.* para. 242. Subsidiaries achieved this primarily through use of the mass media including the use of radio, television, cinema, newspapers, outdoor advertising and direct mail. *Id.* paras. 229-234. The Secretariat found that instead of adapting products to local need, subsidiaries chose to adapt local needs to their products. *Id.* para. 242. The Secretariat's basis for this conclusion was that "in the majority of [host developing countries] the product[s] [were] basically the same." *Id.* para. 242 n.178.

57. *Id.* para. 245.

58. *See* Vargas, *Major Innovations Regarding Trade and Service Marks in the Newly Revised Mexican Law on Inventions and Marks — A Mexican Perspective*, 66 TRADEMARK REP. 188 (1976).

59. Report, *supra* note 2, para. 246.

60. *Id.* para. 245. "Foreign subsidiaries and licensees are leading factors in the creation and re-creation of consumption patterns in favour of advertised products bearing trademarks. Advertising plays a role in shaping values, tastes and attitudes which, on the whole, contribute to consolidate what could be called a consumption ideology." *Id.* Thus, high-powered advertising by foreign corporations will eventuate into added revenues.

61. *Id.*

ing agreements to use popular trademarks, or else accept reduced market shares.[62] Another related cost was the loss of goodwill which might potentially be acquired by local industries.[63] When foreign products are sold under licensing agreements, the goodwill accrues to the owner of the trademark, rather than to the licensee.[64]

A few benefits of the use of trademarks in developing countries were acknowledged.[65] Trademarks were considered useful in the identification of goods in the minds of consumers,[66] thus serving as a type of guarantee that goods currently purchased would be of a similar quality to those purchased previously.[67] In addition, identification of goods by trademark was said to facilitate the process of product rating and reporting.[68] In developing countries in particular, the protection provided for foreign trademarks helps make certain products available, especially those that appeal to tourists. Local manufacturing of such products presupposes transfer of new technology and marketing techniques, including distribution methods, quality and inventory control.[69] Finally, local advertising efforts had a favorable effect upon expansion of the media.[70]

On balance, however, the UNCTAD secretariat came to the con-

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62. *Id.* para. 238. These costs would be felt by the "domestic firms engaged in the manufacturing of goods the consumption patterns of which favor foreign-owned brands." *Id.*

63. *Id.*

64. *Id.*

65. *Id.* paras. 215-218.

66. *Id.* para. 217. The idea of such product identification holds a central position in trademark law. The likelihood of consumer confusion as to the origin of the good is a determining factor in the issue of infringement. *See, e.g.*, E.W. KITNER, *supra* note 9, at 54-55. Indeed, the likelihood of confusion is sufficient to establish damages under United States trademark law. W.D. SHOEMAKER, TRADEMARKS 918-19 (1931).

67. *See, e.g.*, T.S. ROBERTSON, CONSUMER BEHAVIOR, 26-27 (1970). One function of the trademark is to give accurate information regarding the origin of the product that had proven satisfactory to the consumer. By repeating the successful purchase, the consumer, somewhat inaccurately, assumes that the trademark infers a guarantee of the maintenance of the same level of quality. *See* Brown, *supra* note 32, at 1185-87. This notion of a trademark reflecting a high level of business repute can be dated back to the early silversmiths, who originally used these marks to signify quality standards. *See* E. W. KITNER, *supra* note 9, at 51.

68. Report, *supra* note 2, para. 218. For example, "*Consumer Reports* in the United States and *Which*? in the United Kingdom could not operate were it not for the identification provided by trademarks. And of course the whole idea behind product rating is to reduce purchase errors." *Id.*

69. *Id.* para. 249.

70. *Id.* para. 250. Advertising revenue aids in "financing the entertainment industry, local radio and TV programmes, and as a sizeable source of income for newspapers and magazines." *Id.*

clusion that the costs of trademark systems in developing countries far outweighed their benefits.[71] While part of the analysis no doubt is valid, many of the ills cannot be blamed solely on the trademark system *per se*, but rather on the uses to which trademarks are put.[72] Moreover, the kind of evaluation of relative costs and benefits indulged in by UNCTAD is in many instances a simple matter of preference; for example, it is virtually impossible to quantify the value of the guarantee function of trademarks.[73] Similarly, there is no way to judge whether certain transfers of technology would occur in the absence of trademark protection for goods produced using this technology.[74]

In the final analysis, of course, there is a disparity between the developed and the developing nations with respect to the ownership and utilization of trademarks.[75] In order to help reduce this disparity, the UNCTAD has made certain proposals for change in the existing trademark system. A consideration of these proposals, as well as possible alternatives, forms the basis of the final part of this paper.

IV. The UNCTAD Proposals and Some Alternatives

In order to help improve the situation in the developing countries, the UNCTAD secretariat made a number of proposals after investigating various policy alternatives.[76] The policy alternatives deline-

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71. *See id.* para. 252-256.

72. *Id.* For example, the UNCTAD Secretariat found that advertising costs inflate prices of trademarked goods. *Id.* para. 253. Moreover, the Secretariat found that advertising facilitates the misallocation of resources in developing countries by creating demand for superfluous consumption. This greater demand for luxury items decreases the availability of resources for meeting basic human needs. *Id.* paras. 253-256. *Cf.* Willis, *Trademarks in Argentina, Brazil and Andean Pact Countries—A Mexican Perspective*, 66 Trademark Rep. 183 (1976) (where the author agues that the prominence of imported trademarked products in developing countries is the result, rather than the cause, of low levels of economic development).

73. *See* Diamond, *The Trademark: It Protects and Identifies*, 51 Advertising Age 59 (Jan. 7, 1980). It is argued that consumer satisfaction, which is identified with a trademark, is often a matter of personal style or taste. In all cases consumer satisfaction is an intangible state of mind, and therefore cannot be quantified. *Id.*

74. *See* Lanahan, *Trademarks in Mexico—A United States Perspective*, 66 Trademark Rep. 205 (1976) (arguing that Mexican legislation restricting foreign ownership of trademarks will tend to reduce some technology transfers, thereby aggravating that country's unemployment dilemma, since production would take place in other states). *Id.*

75. Report, *supra* note 2, para. 90. In 1974 approximately 70% of the world's trademarks were registered in developed countries, compared with 25% in developing countries. *Id.*

76. A full chapter of the Report is devoted to discussion and in-depth analysis of

ated by the secretariat were the following: (1) abolition of trademarks completely in certain sectors; (2) institution of compulsory licensing of trademarks; (3) regulation of certain matters related to trademarks; (4) quality identification through trademark legislation; and (5) quality identification independent of the trademark system.[77] While concededly not mutually exclusive, each of these alternatives deserves separate analysis, both in light of the UNCTAD approach and in terms of global policy.

The most drastic remedy to the ills supposedly caused through the use of trademarks would be the abolition of their use entirely in certain sectors. Even the UNCTAD secretariat noted some of the difficulties with this approach.[78] For example, companies that have marketed products exclusively under trademarks would be at a disadvantage relative to those enterprises operating under trade or enterprise names, regardless of the relative culpability of the firms.[79] Moreover, to prevent the passing-off of one firm's goods as those of a competitor, and to protect the consumer from inferior products, new legislation would be required in those countries where these functions had been carried out through the trademark system.[80] Finally, foreign enterprises whose trademarks had goodwill value would presumably be entitled to some form of compensation for their loss.[81]

The UNCTAD secretariat, while conceding that the difficulties in elminating trademarks could be extensive, nonetheless considered the

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policy alternatives. *See id.* Chapter VI.

77. *Id.* para. 258.

78. Report, *supra* note 2, paras. 261-262. The trademark as a quality control method is more costly to consumer than alternative mechanisms would be. Abolishing trademarks in some sectors should result in a diminishing of product differentiation activities. *Id.* para. 261.

79. *Id.* para. 261.

80. *Id.* para. 262. *See also id.* para. 260 (quoting E. CHAMBERLIN, *supra*, note 30)

> [I]f producers were free to imitate the trademarks, labels, packages and products of others, no one would have any incentive to maintain the quality of her goods, for they would inevitably be imitated by inferior products at lower prices, put up to look identical. It is evident at once that, in fields where differentiation is possible, the consumer needs legal protection against inferior quality. The law of trademarks and unfair trading safeguards him by putting a premium on differentiation and protecting the monopolies thereby established. Equally effective, however, would be a policy permitting imitation provided only it were perfect, or of defining standards of quality by law.

Id.

81. *Id.* para. 294.

pharmaceutical industry a "good case" for policy proposals leading to a shift from non-price to price competition through the abolition of trademarks.[82] The report cited proposals made in India to eliminate trademarks from the labels of five necessary drugs and to phase out trademarks on single ingredient drugs, requiring the use of the generic name in addition to any trade name.[83] This latter type of change over had already been carried out in Sri Lanka and Afghanistan.[84] It should be noted, however, that neither of these systems mandate the abolition of trademarks; the addition of the generic name on the label is the major requirement.[85] In this way, the amount of information available to the consumer is increased, without any damage to the owner of the valid trademark.

Additional problems not noted by the UNCTAD secretariat in the report should be mentioned. The elimination of trademarks, and the associated possibility of capturing a share of the market, would eliminate some incentive for further research and development.[86] Even more significant to underdeveloped economies would be the fragmenting of the market in the absence of advertising.[87] If smaller producers

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82. *Id.* para. 269.

83. *Id.* para. 262.

84. *Id.* para. 266. Both countries are now making the change from brand names on pharmaceuticals to generic names.

85. *Id.* paras. 265-266.

86. *See* Diamond, *supra* note 3, at 289. *See also* McCornell, *supra* note 9. In a market where products serve as close substitutes for one another, the manufacturer often relies on "product differentiation." Differentiation may be "real" or physical, involving differences in design, craftsmanship, durability and quality, or "imaginary" dealing with packaging, brand names and trademarks. *Id.* at 560. This non-price competition is an important means of achieving technological innovation and improvement over a period of time. *Id.* at 564. Thus, if the means of imaginary differentiation were to be abolished, along with the means of identifying product origin, the incentive to discover means of real differentiation through product betterment would also weaken. *Cf.* McCarthy, *Compulsory Licensing of a Trademark: Remedy or Penalty*, 67 Trademark Rep. 197, 227 (1977) [hereinafter cited as McCarthy, *Compulsory Licensing*]. (McCarthy notes that the trademark licensor under a voluntary system, must monitor the quality of the goods produced under the trademark. If there is inadequate quality control, "the license is 'naked' and can result in partial or total abandonment of the mark." *Id.* The theory underlying this is that "when quality standards are not observed by licensees, the trademark ceases to have meaning and becomes either generic or deceptive." *Id.* McCarthy concludes that the licensor therefore has a "vital economic interest" to "preserve the 'image' of the licensing program." In a system in which there are no trademarks, fear of loss of trademark would be lacking and there would be no incentive to improve the product.)

87. Gibson, *The New Game—Trademark Handicapping*, 69 Trademark Rep. 74, 78 (1979).

Where advertising acts as a barrier to entry into the market, the absence of advertising would therefore enable more manufacturers to enter into the production of goods

were spreading costs over smaller volumes of business, economies of scale would be eliminated and prices would necessarily increase. Finally, in the absence of trademarks, the identification of goods for comparison purposes either would require more extensive advertising, or else would become exceedingly difficult.[88]

A second proposal of the secretariat was the institution of compulsory licensing of trademarks for reasons of the public interest.[89] The Mexican Law on Invention and Trademarks of 1976[90] makes provision for compulsory licensing,[91] and a Federal Trade Commission decision in the case of *In re Borden*[92] introduced the possibility of such a procedure in American law as well.[93] The secretariat felt that compulsory

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which they otherwise could not afford to do. Thus many smaller producers would now be competing in a market formerly reserved for a select few. This, however, may not be the optimum condition for certain industries to exist under. In many instances, maximum efficiency can only be obtained by large-scale mass production. Each producer is enabled to cut its per unit costs by increasing total output. This is known as economies of large scale production. Where the economy can only absorb a limited quantity of the goods, the introduction of new manufacturers results in fragmenting the market into more, smaller sized producers. In this way, no one can realize decreasing costs, and the final outcome is higher prices. *See generally* BACK, ECONOMICS—AN INTRODUCTION TO ANALYSIS AND POLICY 451-53 (1960).

88. *See* Goldstein, *supra* note 29, at 601-05, in which Goldstein discusses the concept of semantic generalization. Semantic generalization occurs where a consumer relies on a trademark symbol when he hasn't the information upon which to base a particular purchasing decision. If he associates excellent performance with the trademark, he will purchase that product, even though actual experience with that product is lacking. This may save time and cost for the consumer and the manufacturer as there is no need for extensive advertising for each individual product. *Id.*

89. Report, *supra* note 2, paras. 270-273.

90. Rangel Medina, *Significant Innovations of the New Mexican Law on Inventions and Trademarks*, 7 GA. J. INT'L & COMP. L. 5-16 (1977); Vargas, *supra* note 58 (discussing the Law of Inventions and Trademarks (Ley de Invenciones y Marcas) D.O., Feb. 10, 1976).

91. If the owner refuses to grant use of the trademark and its use is deemed to be in the public interest, art. 132 authorizes the issuance of an obligatory license therefor. Rangel Medina, *supra* note 90, at 14.

92. 92 F.T.C. 669 (1978). In its initial decision of August 19, 1976, the FTC found that Borden, Inc., had obtained an illegal monopoly in the processed lemon juice market, and had illegally engaged in acts to preserve that position. *Id.* at 773. The same conclusion as to monopoly power was reached in the final opinion issued on November 7, 1978. *Id.* at 778-805.

A summary of the initial decision appears in [1977] 3 TRADE REG. REP. (CCH) para. 21,194; and of the final order in [1979] 3 TRADE REG. REP. (CCH) para. 21,490.

93. The FTC ordered compulsory royalty-free licensing of the trademark ReaLemon as a remedy for monopolization by Borden of the reconstituted lemon juice market. In the initial decision of August 19, 1976, Judge Hanscom stated:

> The heart of the monopoly power preserved and maintained by respondent Borden lies in the ReaLemon trademark and its

licensing could become a major alternative policy in those cases where utilization of trademarks is a main basis of monopoly position.[94]

While the penalty of cancellation might prove a useful deterrent in isolated instances,[95] compulsory licensing is a poor alternative. If a competitor is allowed to obtain a compulsory license, it is difficult to imagine how one would prevent the marketing of inferior goods under the mark. The competitor, particularly if the license is for a limited duration, would have no incentive to maintain quality standards: since the goodwill would remain associated with the owner of the mark, the licensee has little to lose and much to gain by selling inferior goods.[96] Revocation of the license, the major penalty available,[97] would simply return the competitor to the *status quo ante*. The predicted increase in competition would be outweighed in most cases by the amount of harm created by deception of consumers as to quality.[98] Moreover, there

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> dominant market position. For competition to enter the processed lemon juice industry the barrier to entry which inheres in the ReaLemon trademark must be eliminated. As a consequence . . . the only effective relief . . . requires the licensing of the ReaLemon brand name to others wishing to enter the production, marketing and sale of processed reconstituted lemon juice.

92 F.T.C. at 774-75. The final order, however, rejected compulsory licensing as a means of relief under the circumstances. [1979] 3 TRADE REG. REP. ¶21,490.

94. Report, *supra* note 2, para. 272.

95. Isolated instances may include those instances in which the owner or licensee of a trademark "has speculated or made unlawful use price-wise or quality-wise" of the product which adversely affected the public interest. *Id.* para. 270.

96. Gibson, *supra* note 87, at 48. A trademark itself is not a guarantee that the goods of a licensee will meet a standard of quality. It is the careful selection and supervision by the licensor which insures that these standards are met. As such, the trademark is a vehicle for quality.

This value is lost, however, under a system of compulsory licensing. Without the element of authority over the selection or continuation of a license, a licensor has little leverage in insuring the standards of quality. The licensee has less incentive to live up to the original level of quality, as he knows the sanctions against him are weak. Palladino, *Compulsory Licensing of a Trademark*, 26 BUFFALO L. REV. 457, 474 (1977).

97. It is possible that the trademark holder under a compulsory trademark licensing system might not even have the option of revocation available to him in the event that the quality standards represented by the mark are not adhered to by the licensee. Palladino, *supra* note 96, at 474.

98. *Id.* at 477-78. Under a voluntary trademark licensing system, the holder of the license has a valid interest in maintaining the expected levels of quality. He is subject to the controls exercised by the licensor over the quality of goods and services sold under the mark. In instances where mandatory quality control is not possible, the compulsory licensing may ultimately force the original licensor to abandon his mark as it is now a mark of deception. *See* McCarthy *Compulsory Licensing*, *supra* note 86, at 226-30.

would seem to be no method to induce foreign trademark owners to provide compulsory licensees with the technology necessary to produce products of quality similar to those sold under the mark by the original owner. In any event, the more users in more territories of the trademark under license, the greater the eventual exclusionary power of the mark is likely to be when the compulsory licensing period has come to an end.[99]

Two of the policy alternatives relating to trademarks that were considered dealt with questions of quality control.[100] One suggestion was that quality identification be made a part of the trademark system.[101] Under such an approach, cancellation of the trademark would result when the goods sold under the mark were no longer of the same quality as those originally sold under the mark.[102] This proposal might well overtax the administration of the intellectual property system as currently formulated, and would in any event make regulation of trademarks an unwieldy task.[103] Nonetheless, there is little question that cancellation as a penalty for deceptive changes in product quality could well be incorporated into many domestic trademark systems.[104]

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99. McCarthy, *Compulsory Licensing*, *supra* note 86, at 226. *See also* Warner Bros. Inc. v. Road Runner Car Wash Inc., 189 U.S.P.Q. 430 (TTAB 1975).

100. Report, *supra* note 2, para. 258. For a list of all the proposed policy alternatives, see text accompanying notes 76-77 *supra*.

101. Report, *supra* note 2, para. 275. The Report points out that legislative and judicial scrutiny of the actual quality of trademarked products, would add a new dimension to trademark liability. Insofar as the only benefit inuring to consumers from the trademark is its quality function (i.e. reduces purchasing errors and expensive search costs), imposition of liability for failing to deliver the quality represented by a trademark, would serve to balance the social system. *Id.* Commentators have recognized the need for such balance and have proposed various solutions. *See, e.g.*, Goldstein, *supra* note 29 (arguing that trademarked products carry a warranty that their quality will be consistent with the advertised quality of other products bearing the same trademark; that it is reasonable for consumers to rely on such warranties; and that, therefore, when the quality of the trademarked product is inferior or defective, the trademark owner should be held strictly liable); Hanak, *supra* note 11; (emphasizing the importance of the quality function and urging that present trademark laws be interepreted and applied in a way that will promote that function); Note, *Tort Liability of Trademark Licensors* 55 IOWA L. REV. 693 (1970) (licensor of trademark should be liable in the case of negligent exercise of quality control, resulting in misrepresentation).

102. Report, *supra* note 2, para. 275.

103. *Cf.* McCarthy, *Compulsory Licensing*, *supra* note 86, at 227-29. (McCarthy noted that forced quality control in a compulsory trademark licensing system would be "too difficult to enforce and supervise." He also equated compulsory licensing with "judicially-ordered confiscation" of a trademark. As such, the results above described would be similar to those in the non-trademark system referred to in the text).

104. *See, e.g.*, Hanak, *supra* note 11, for a consideration of United States law. In fact, an affirmative disclosure program supervised by the Federal Trade Commission has been proposed for the United States. *See* Rhoades, *Reducing Consumer Ignorance: An*

A far preferable approach would be the creation of a quality control system external to the trademark system. This would be more manageable, and would probably have a more positive effect on the market as a whole.[105] The superposition of quality standards on the differentiated markets now in existence would permit a certain amount of non-price competition while at the same time allowing the consumer access to the quality information he needs to make informed choices.[106] In fact, an affirmative disclosure program supervised by the Federal Trade Commission has been proposed for the United States.[107] Under this proposal, disclosure of characteristics critical for rational market choices by consumers would be required.[108] Among the benefits foreseen would be a better allocation of consumer resources, a decline in artificial product differentiation, lower scale economy barriers, and increased competition.[109]

One approach that the UNCTAD report seems to pass over lightly was the regulation of other elements of the marketing chain while leaving the trademark system intact.[110] The primary area of proposed regulation would be advertising. The possible banning, reducing or taxing of persuasive advertising was believed to lead eventually to some reduction in market power by reducing price competition.[111]

This type of approach would most directly address the types of behavior patterns which the report seems to find most offensive. The main complaint of the UNCTAD seems to be that much advertising, of which they described two types, is irrational.[112] One type is the promotion of the sale of products contrary to the best interests of society, such as those which are directed to desires for physical ease, social sta-

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Approach and Its Effects, 20 ANTITRUST BULL. 309 (1975).

105. Report, *supra* note 2, para. 279-280. The Report suggested that external quality control could be achieved through consumer education programs, information disclosure programs, and/or government regulation of minimum standards of product performance. The benefit of such quality control would be that the trademark owner would not lose his industrial property right, while the consumer would be able to objectively identify the quality of products differentiated by trademarks. *Id.*

106. *Id.*

107. This proposed affirmative disclosure program has the ultimate goal of alleviating consumer ignorance, and is found in Rhoades, *supra* note 104.

108. *Id.*

109. *Id.*

110. Although the Report did suggest an approach that would leave the trademark system intact, that approach did not focus on other elements of the marketing chain. *See supra* notes 105-106 and accompanying text.

111. Report, *supra* note 2, para. 274.

112. *See* Report, *supra* note 2, para. 48; *see also* McCarthy, *Compulsory Licensing*, *supra* note 86, at 247-52, which discusses irrational advertising.

tus or "feeling good."[113] The other type of irrational advertising is that which promotes goods regarded as essential, but by means of non-informational content appealing to irrational impulses of the consumer.[114] The first type raises the problem of priorities in a world of shrinking resources.[115] The second presents the question of the degree to which government should regulate the content of communication of commercial ideas to consumers who are motivated by more than just price and quality.[116] There are, of course, problems with this analysis: it is not clear whether consumers purchase because induced by advertising, or whether irrational bases for choice are an inextricable element of the human psyche.[117] Nonetheless, it is important to realize that the regulation of persuasive advertising and the control of the trademark system *per se* are separate questions which should not be confused.

In a final section of the report, the UNCTAD secretariat made certain concrete proposals to reduce the costs of foreign trademarks to consumers.[118] The most radical approach was again the banning of all foreign trademarks.[119] This is associated, however, with the enormous potential of consumer confusion until there is a readjustment to the new names.[120] Moreover, extensive relabelling and repackaging costs would be expected.[121] Finally, some form of compensation for the loss of an element of intellectual property would undoubtedly be due to the foreign owners.[122]

An alternative proposal is of the type embodied in the Mexican

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113. McCarthy, *Compulsory Licensing*, *supra* note 86, at 249. McCarthy uses "the sale of nutritionless convenience foods, gas consuming and polluting automobiles and energy devouring appliances" in a world with "shrinking resources and increasing population" as an example of this type of irrational advertising. *Id.*

114. *See* Jordan & Rubin, *supra* note 33, at 528-29, where the authors state, "Much advertising is patently uninformative: rational consumers should not care what sort of breakfast cereal is eaten by famous baseball players, nor should they expect any relationship between the cleanliness of their clothes and the catchiness of the tune used to advertise washpowder." *Id.*

115. Report, *supra* note 2, para. 213.

116. *See* McCarthy, *Compulsory Licensing*, *supra* note 86, at 249-250.

117. *Id.* at 250.

118. Report, *supra* note 2, paras. 288-300.

119. *Id.* para. 294.

120. *Id.* The Report suggests that dual or combined labelling be used for a breaking-in period so that consumers can make the transition from foreign to domestic trademark without losing touch with the products they have learned to prefer. *Id.*

121. *Id.* If the costs of relabelling imported goods exceeds the benefits of local trademarks, the relabelling will not produce any overall savings, and thus would be counterproductive.

122. *Id.*

Law on Inventions and Trademarks.[123] Article 127 of the Mexican law provides that foreign marks used with goods produced in the national territory must be associated with a mark originally registered in Mexico.[124] These marks must both be displayed in an equally prominent manner.[125] This, it is argued, would lead to the generation of goodwill, which would be associated with both the foreign and the domestic mark.[126] Moreover, in the majority of cases, the domestic mark would additionally benefit through association with the foreign mark, which would be generally better known and already associated with some brand loyalty.[127]

This type of program is also not without its pitfalls. First of all, there is the possibility of more than one domestic licensee. If each uses his own national mark in conjunction with the foreign mark, there is a real danger of the latter becoming generic.[128] Moreover, in the multiple

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123. Law of Inventions and Trademarks *(Ley de Invenciones y Marcas)*, D.O., Feb. 10, 1976.

124. *Id.* art. 127. This article reads as follows:

> All marks of foreign origin or which may correspond to a foreign physical or juridical person, which are intended to protect articles manufactured or produced in national territory must be used in conjunction with a mark originally registered in Mexico. Both marks must be used in the same noticeable manner. The provisions of Article 91, section XIII, of this law will be applicable to the mark originally registered or to be registered in Mexico.

Id.

125. *Id.*

126. For example,

> [T]he proponents of the law have disclosed three principal policy objectives for linking trademarks. The first is that linking will facilitate the penetration of Mexican products into the Mexican market by virtue of the "coat-tail" effect of associating Mexican trademarks with the more widely known foreign trademarks. It is thought this circumstance will assure the survival of the Mexican trademark in the event that a foreign licensor might terminate the Mexican licensee's right to use the foreign mark. Secondly, it is though that the "coat-tail" effect of linking trademarks will facilitate the penetration of Mexican goods into foreign markets. Finally, generally speaking, linking will have the effect of defending the Spanish language and the Hispano-American culture.

James, *Linking Foreign with Mexican Trademarks: Boon or Bane?*, 8 CAL. W. INT'L L.J. 43, 49 (1978).

127. *Id.*

128. This problem was noted by Lanahan, *supra* note 74, at 214.

> What if there are a number of licensees and they are allowed to use their individual Mexican mark in association with the

party situation, the quality identification aspect of the mark may be completely lost.[129] Nonetheless, if such combined use is restricted to situations where the licensor can in fact monitor the quality of goods sold under the foreign mark, the local government could achieve its purported goals with reduced damage to the foreign trademark owner.

Perhaps the most useful approaches to the problem are those which the UNCTAD report tended to minimize or ignore. For example, the warranty function of trademarks could be more strongly emphasized. Under United States law there is a significant body of precedent for imposing product liability on a trademark licensor for goods manufactured by a licensee.[130] By forcing the owners of trademarks to monitor the quality of goods bearing the mark through the indirect means of holding them responsible directly for defective merchandise sold under the mark, one would return in effect to a situation in which the trademark would also serve as a production mark, common in medieval times.[131] The value of trademarks to the society at large would thus be increased, without there necessarily being any diminution in their value to the owners thereof.

Another viable alternative is the elimination of restrictions on competitive advertising. It is a generally accepted economic principle that the competitive information necessary to make choices will be generated by sellers, since their natural incentive is to influence consumer purchases.[132] The role of the government should be to "ensure

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> licensor's mark such as national-foreign (Lopez-Coca-Cola, Sanchez-Coca-Cola, etc.), is not there a strong danger that the foreign mark could become a generic term?

Id. See also Kranzou, *The Trademark Forum: Trademark Licensing by Foreigners in Mexico*, 66 TRADEMARK REP. 552, 554-55 (1976), where it was noted that:

> It seems possible that in a dual mark system, one of the marks may be taken by consumers to be the generic name of the product, the apt descriptive term which identifies the product as to type no matter who makes it, while the other mark is to be construed to be the functioning trademark identifying the source of the product.

Id.

129. *Id. See* Lanahan, *supra* note 74, at 214.

130. *See, e.g.*, Kosters v. The Seven-Up Co., 595 F.2d 347 (6th Cir. 1979); Drexel v. Union Prescription Center, Inc., 582 F.2d 781 (3d Cir. 1978); Gizzi v. Texaco, 437 F.2d 308 (3d Cir.) *cert. denied*, 404 U.S. 829 (1971); Carter v. Joseph Bancroft & Sons Co., 360 F. Supp. 1103 (E.D. Pa. 1973); Connelly v. Uniroyal, Inc., 75 Ill.2d 393, 389 N.E.2d 155 (1979); City of Hartford v. Associated Construction Co., 34 Conn. Supp. 204, 384 A.2d 390 (Super. Ct. 1978); Kasel v. Remington Arms Co., 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972). For a holding to the contrary, see Oberlin v. Marlin American Corp., 596 F.2d 1322 (7th Cir. 1979). *See generally* Goldstein, *supra* note 29.

131. *See* text accompanying notes 3-4 *supra*.

132. Stigler, *The Economies of Information*, 69 J. POL. ECON. 213 (1961).

the existence of reliable data which in turn will facilitate an efficient and reliable competitive market process."[133] Until this approach has been implemented fully, it is too early to judge the advertising system, since a major part of its potential power is unused.[134]

A final approach would probably be the most successful of all: providing consumers with comparative price and quality information.[135] This could be accomplished either through a government agency, or through private firms subsidized by the government.[136] Since it appears that the availability of more information influences consumers to choose higher quality brands in all cases,[137] this would eliminate the negative effects of persuasive advertising and induce competition based on other factors.[138] Moreover, the government would avoid taking a patronizing approach to the consumer, while achieving the goal of an increased information flow at potentially the minimum cost.[139] Finally, such an approach would avoid the problem that besets most of the other proposals by the UNCTAD secretariat: the needless withdrawal of goodwill protection and the reward for piracy by infringers, without any appreciable increase in competition.[140]

V. Conclusion

While the goals of the UNCTAD secretariat are laudable, the analysis ultimately fails on a number of grounds. First, the economic analysis is woefully incomplete, and at best could only be successful in analysis of the provision of essential products. As such, its applicability to the real world is limited at best. In addition, the intelligence of consumers and the actual effects of trademarks on consumers are often

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133. Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661, 671 (1977).

134. Nonetheless, care should be taken that competitor's remedies for misrepresentation do not become too easy, since such remedies could be used disproportionately against new entrants into the market. *See* Jordan & Rubin, *supra* note 33, at 532.

135. *See* Russo, Krieser, & Miyashita, *An Effective Display of Unit Price Information*, J. Marketing, Apr. 1975, at 11, 17. E.g., when unit-pricing is used on supermarket shelves, studies have shown that consumers will resultingly pay less for products.

136. *See* Schwartz & Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. Pa. L. Rev.. 630, 673-74 (1979).

137. *Id.*

138. *See generally* Sproles, Geistfeld & Bodenhop, *Informational Inputs as Influences on Efficient Consumer Decision-Making*, 12 J. Consumer Aff. 88 (1978).

139. *See generally* Crowther, *Misappropriation of Trade Symbols - Synthesis of Public and Private Priorities*, 60 Trademark Rep. 321, 322-23 (1970).

140. *Id.*

misunderstood or mischaracterized.

More significant is the fact that the report appears to be based upon an assumption that the "trademark-system is guilty of something or other."[141] In this sense, the report does a major disservice: "When it comes to deciding remedies for monopolization, the trademark, as a very visible symbol, may be the most vulnerable and convenient asset of a business to attack."[142] But without real investigation into the problem the remedies proposed may have no real effect upon the economic market.[143] It is no answer to argue that "trademarks are somehow inherently anti-social and are fair game in the promotion of various other economic and political concerns."[144] The trademark, in and of itself, is a virtual nonentity - it is its *use* that should be scrutinized. It is undesirable to alter a system which has been developed and expanded internationally over centuries unless such modifications will have positive results.

While the UNCTAD secretariat is to be commended for its analysis, which in many respects is quite informative, it is necessary to remember that the modification of the trademark system on the international level is "at best only a diversionary vendetta delaying the taking

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141. Gibson, *supra* note 87, at 76. "The Code of Conduct proposed by UNCTAD represents excessive and inflexible restrictions that alienate prospective licensors and investors." *Id.* Such restrictions include a tax based upon the market value of the mark; the linking the trademarks; the compulsory licensing of trademarks; and, the control over advertising content. *Id.* at 74. "There is no need for such international restrictions in view of the fact that licenses and investment require prior governmental approval in most developing countries. . . ." *Id.*

142. McCarthy, *Compulsory Licensing*, *supra* note 86, at 207. The author explains that trademarks are vulnerable to attack because "[a] trademark is a symbol of the good will of a business, the monopoly position of a company may be mistakenly blamed upon the trademark-as-symbol, rather than upon the position and function of the company itself within a particular relevant market." *Id.* at 202. Therefore, "[r]egardless of the commercial reality of the source of market power, it may be intellectually more convenient to seize upon a trademark as symbolic of that power, rather than engage upon a demanding investigation of the true source of power." *Id.* at 207.

143. *Id.* Compulsory trademark licensing, for example, has been advanced as a pro-competitive device to remedy a variety of social and economic problems. Among the advocates of compulsory licensing is the Federal Trade Commission. The Commission has been seeking compulsory licensing as a remedy for antitrust violations. *Id.* at 197-98. *See also* text accompanying notes 92-93 *supra*. McCarthy rejects the notion that compulsory licensing will remedy antitrust violations. He condemns compulsory licensing as an "imprecise antitrust remedy" because of its unpredictable "competitive effect upon a market." McCarthy, *Compulsory Licensing*, *supra* note 86, at 253. McCarthy suggests that it is essential that economic, legal and social rationales which justify compulsory trademark licensing be scrutinized to determine the remedial effectiveness of the device. *Id.* at 199.

144. McCarthy, *Compulsory Licensing*, *supra* note 86, at 199.

of effective measures to deal with the real causes" of the problems besetting the developing world.[145] These include lack of infrastructure to support technological and economic development,[146] lack of stable market incentives,[147] lack of education[148] and lack of political stability.[149] In addition, there appears to be little evidence to suggest that the foreign owners of trademarks "have become monsters devouring the nation-state piece by piece."[150] Proposals which alienate the developed nations and reduce investment of resources in the developing nations will only work to the latter's detriment. With some moderation in the application of the insights provided by the report, the desirable goals of consumer education and development of third world economies may well be forwarded. Without restraint and careful consideration, however, the possibility of market chaos is not all that remote.

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145. Willis, *supra* note 72, at 183-84. Willis emphasized that excessive prominence of international trademarks in a country is merely symptomatic of economic underdevelopment. He stressed that such prominence cannot be condemned as the cause of such underdevelomont. *Id.* at 183. He rejected the allegation that the "elimination of international trademarks will enhance the rate of magnitude of national economic development within a country. *Id.*

146. *Id.* at 184.

147. *Id.*

148. *Id.*

149. *Id.*

150. Oyebode, *International Regulation of the Multinational Corporation: A Look at Some Recent Proposals*, 5 BLACK L.J. 231, 247 (1977).