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ARTICLES

BRAND LOYALTY & LOYALTY OF BRANDS: *A SYMBIOTIC RELATIONSHIP*

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*Amir H. Khoury**

ABSTRACT

Brand Loyalty has become a truism in trademark discourse. Consumers tend to formulate their purchasing decisions by the power of consumption-momentum. That is to say they buy what they have already bought in the past and opt for the brands that they have already had a positive experience with. Experienced consumers manifest devotion to their preferred brands. This is the essence of Brand Loyalty. But should this Brand Loyalty be reciprocated by the brand owner? Is there such loyalty by the brand towards the consumer? Should the brand owner sustain the quality of products covered by his brand? Even more so, should he maintain any other defining attribute of the product (or service) marketed under his brand? And are such demands from the brand owner still of relevance in an age of expanding outsourcing? This paper explains why all of these questions should be answered in the affirmative. This paper argues that just as there is Brand Loyalty, there is (or, at least, there should be) Loyalty of the Brand. My assertion is that Loyalty of the Brand constitutes a morally sound concept which is inherently compatible with the general philosophy underlying trademarks and brands, and which rests firmly on numerous legally accepted disciplines and doctrines that form the backbone of

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commercial-contractual law. Loyalty of the Brand, thus, constitutes the counterbalance to Brand Loyalty, and should exist on par; not only as a legal phenomenon but as a practical one as well. It is, in the context of brand-consumer relationship, the other side of the same coin.

INTRODUCTION

Consider this situation; Jack was hooked on CONALIB electronic products. He always believed that electronic products from Germany were of the highest standard and quality. Jack wanted to buy a new TV. So, without hesitation, Jack bought a new CONALIB TV. He was extremely disappointed upon discovering that the TV was not produced in Germany but rather in another country. He was even more upset to discover that his new CONALIB TV was of an all-around lesser quality than he expected. Jack, felt a need to express his frustration. He logged on to CONALIB's website and then posted the following: "*Why are you still using the CONALIB brand if your TVs are no longer produced in Germany? Why do you pretend to be what you are not? It's Unfair!*"

Is Jack's notion of fairness right? This is, among other things, what this research explores.

Brand Loyalty has become a truism in trademark discourse. Consumers tend to formulate their purchasing decisions by the power of consumption momentum. That is to say they buy what they have already bought in the past and opt for the brands that they have already experienced. Consumers tend to manifest devotion to specific brands. This is the essence of Brand Loyalty. But should this relationship be reciprocated by the brand or rather by the brand owner? Do the brand and/or its owners owe any loyalty towards the consumer? Should the brand owner maintain the quality of products covered by his brand? Even more so, should he maintain any other defining attribute of the product (or service) marketed under his brand? And are such demands of the brand owner still of relevance in an age of globally expanding outsourcing?

In this research, I argue that all of these questions should be answered in the affirmative. I contend that just as there is Brand Loyalty, so there should be Loyalty of Brands. As I explain in this research, this concept of Loyalty of the Brand is morally sound and is inherently compatible with the general philosophy underlying trademarks and brands, and it also rests firmly on numerous legally accepted disciplines and doctrines that are

generally used in commercial-contractual law. Loyalty of the Brand, thus, constitutes the counterbalance to Brand Loyalty, and should exist on par. Both of these are interdependent. That means that we cannot expect Brand Loyalty to play out if it is not fortified by the Loyalty of a Brand to its consumers. Indeed, while the first (Brand Loyalty) is a manifestation of the action by the Brand on consumers, the other (Loyalty of the Brand) is the reaction by the consumers in terms of their collective expectations.

This research paper is comprised of three chapters. In chapter one I shed light on the nature of Brand Loyalty, how it came to be and why its impact is felt throughout the market and industry. In the second chapter I examine the justification and need for Loyalty of Brands as the counter concept. Specifically I look at the interface between this concept and well established doctrines in commercial and contractual law. Here I explain why, my proposed concept of “Loyalty of Brands” is embedded in these commercial concepts and in trademark theory and doctrine. I also consider the compatibility of my proposed concept with the concepts underlying commercial contracts, and fiduciary duty. What is more, I consider the importance of the Loyalty of Brands in a world of outsourcing. Finally, I tie my proposed concept with the underlying property rights in brands, and explain why rights entail obligations in the realm of brands. In the third and final chapter of this work I look at the practical applicability of my proposed concept and demonstrate how it can be applied into commercial discourse and trademark law or the benefit of consumers, brand owners and fair competition at large.

I. ON BRAND LOYALTY

The simple fact of the matter is that consumers tend to stick with specific brands and, as repeat players, continue to act in the same consistent manner when making determinations and choices about the products or services that they seek. This might also be a logical outcome given that the bulk of consumers are also, by definition, inherently risk averters.¹ But,

¹ Srinivas Prakhya, *Quality Perceptions and Dynamic Brand Choice*, Indian Institute of Management (IIMB), Bangalore (June 2005), IIM Bangalore Research Paper No. 237, at 6–7, file:///C:/Users/user/Downloads/SSRN-id2147355%20(1).pdf. Also see Chi-Lu (Edward) Peng, *Risk Tolerance, Marketing Information and Investment Decision Makings Under Loss Aversion: Theory and*

while the phenomenon of Brand Loyalty is recognized by many, there is no wholehearted agreement as to its nature and its attributes (or lack thereof).² In fact there exist two diverging views as to the potential ramifications of Brand Loyalty and while some speak highly of its attributes, others are more skeptical and focus on its pitfalls. On the one hand, there are those that view Brand Loyalty as a most vivid reflection of autonomous choice by the consumer i.e. that he or she choose to stick with a specific brand despite the ever-increasing number of competing brands over the same market segment. On the other hand, brand loyalty, is seen, as symptomatic of a submissive consumer base that feels overwhelmed by the sheer number of brands to choose from or the information that they need to encompass to

Evidence, Chung Hua University—Department of Finance; National Sun Yat-sen University, at 1–4 (June 2011). For more on how risk aversion impacts consumer choice see Miao Miao & Krishna Jayakar, *Bounded Rationality and Consumer Choice: An Evaluation of Consumer Choice of Mobile Bundles in China*, 1–2 (Mar. 29, 2013). In their paper, Miao and Krishna examine the rationality of consumers' choice of alternative mobile bundling plans comprising voice, short message service and internet data offered by a major wireless provider in China. Using a large dataset of consumer usage, billing information and demographics, they demonstrate that the vast majority of consumers chose non-optimal bundles, most choosing more expensive bundles than the one warranted by their actual level of usage. They found that the probability of non-optimal selection increased with the complexity of bundling plans, and decreased with the length of time the user has been in a subscription relationship with a service provider, suggesting a “learning effect” by which users optimized their choice over repeated subscription cycles. They show that consumer choice is affected by three elements: the risk aversion hypothesis, the complexity hypothesis and the learning effect hypothesis. In their view, the risk aversion hypothesis states that users will prefer to subscribe to a more expensive bundle to avoid possible overages in usage and the consequent unpleasant surprises. The complexity hypothesis states that the probability of non-optimal selection will increase with the complexity of bundles. The learning effect hypothesis states that users will eventually “learn” to better optimize their bundle selection over repeated subscription cycles, with the result that the probability of non-optimal selection will decrease with the duration of a consumers continuous subscription relationship with a service provider. It is worth noting that risk aversion is not limited to consumers.

² Syeedun Nisa, *Brand: Managing and Developing Equity* (unpublished manuscript) (on file with author); Rajagopal, *Leisure Shopping Behavior and Recreational Retailing: A Symbiotic Analysis of Marketplace Strategy and Consumer Response* (Monterrey Institute of Technology and Higher Education (ITESM) Mexico City Campus, Working Paper June, 2006), available at <http://ssrn.com/abstract=914086>; Nitin Mehta, Surendra Rajiv & Kannan Srinivasan, *Active Versus Passive Loyalty: A Structural Model of Consideration Set Formation* (Review of Marketing Science Working Paper No. 2001628), available at <http://ssrn.com/abstract=310888>; René Algesheimer, Utpal M. Dholakia, & Andreas Hermann, *Interplay Between Brand and Brand Community: Evidence from European Car Clubs* (Working Paper), available at <http://ssrn.com/abstract=534542>; Bing Jing, & Zhong Wen, *Finite Brand Loyalty and Equilibrium Price Promotions* (Stern School of Business, New York University, June 26, 2005, Working Paper), available at <http://ssrn.com/abstract=817450>; Yun-Tsan Lin & Chen-Hsien Lin, *Factors Influencing Brand Loyalty in Professional Sports Fans*, 2 *GLOBAL J. BUS. RESEARCH* 1, 69–84 (2008).

make a single purchasing choice.³ Granted, consumers in many markets face a growing variety of products grouped under different umbrella brands, and can access vast amounts of information about these products. This may result in increasing product-level competition between firms. However, some observers argue that the increase in the availability of products and information can cause clutter and confusion, and that brands play a useful role as a form of commercial “short hand” that convey information about their underlying products.⁴ This effect works to reduce product-level competition and increase the relative importance (and relevance) of brands. Hence Brand Loyalty is also some form of safe haven that is intended to shield consumers from market clutter! In his research on the effects of Brand Loyalty, Halim highlights the relationship between brand trust (for whatever the brand stands for) and its effect on consumer choice.⁵ In Halim’s view, that effect ultimately affects the brands performance. That is to say, Brand Loyalty is not a thing that just happens by a stroke of luck, rather it emanates from the deepest fathoms of the consumers’ inner being where trust resides. In this context Halim contends that: a brand [owner] has to really understand what consumers desire most, by way of both utilitarian and hedonic values. And in doing so consumers are likely to feel that the brand is actually an integral part of themselves and of their lives.⁶ Interestingly, Brand Loyalty is so impactful on consumers that it is oftentimes used not only in marketing but also as a tool which indirectly increases the term of patent protection. Parchomovsky and Siegelman submit that “[w]hen a patentee can develop brand loyalty among its customers, the existence of trademark protection allows her to extend its protection even after her patent expires, and thereby earn higher profits than would be possible without such leverage.”⁷

³ See Bharat N. Anand & Ron Shachar, *Brands, Information, and Loyalty*, at 1 and 22 (Harvard Business School Competition & Strategy Working Paper Series No. 00-069), available at <http://ssrn.com/abstract=240792>.

⁴ Sadaf Sirji & Shyama Kurami, *Archotyping the Brand: Strategy to Connect*, 8 IUP J. BRAND MGMT. 1, 47–59 (2011).

⁵ Rizal Edy Halim, *The Effect of the Relationship of Brand Trust and Brand Affect on Brand Performance: An Analysis from Brand Loyalty Perspective (A Case of Instant Coffee Product in Indonesia)* (2006), available at <http://ssrn.com/abstract=925169>.

⁶ Halim, *supra* note 5.

⁷ Gideon Parchomovsky & Peter Siegelman, *Towards an Integrated Theory of Intellectual Property* (Fordham Law & Economics Research Paper No. 18), available at <http://ssrn.com/abstract=>

But does this mean that Brand Loyalty can overcome all obstacles connected with the brand? Obviously not, well, at least not in theory. Notably, Halim's empirical research shows (with respect to four coffee brands) that the utilitarian and hedonic value of the brand is not sufficient, in and of itself, to create brand affect and brand trust. These are contingent on the existence of other more dominant attributes such as quality, uniqueness and availability. This shows that a brand owner cannot base his strategy solely on the hedonic and utilitarian values in the consumer's perception but that they have to ensure quality, uniqueness and availability as well. In simpler terms, the utilitarian and hedonic values can do so much to propel the brand forward but in order for the brand to maintain its momentum it needs to have additional attributes; in the overall experience of the brand.⁸ Thus, while Brand Loyalty might be based on what the brand has been about, its continued success is contingent on what it does and continues to do in the future. But, even if Halim's assertion is correct, it is not sufficient in and of itself to keep the brand (and its owner) on their toes. In other words, in a world full of competing brands and a lack of timely and unbiased information, the consumer cannot really make clear and informed determinations about the quality of different (competing) brands. Thus, he usually resorts to the information that is supplied to him by the producers through advertising or by simply (being predominantly a risk averter) sticking with a given brand without really making the effort to examine its attributes or to consider its substitutes. In this regard, Anand and Shachar, in their empirical research, demonstrate that "individuals are not fully informed about products' attributes."⁹ They show that consumers rely on the (umbrella) "brand image" of firms in order to resolve this uncertainty,

304064. In their view, this patent/trademark leverage is actually efficiency-enhancing, that is because "it gives patentees an incentive to price less monopolistically than they would if their protection terminated upon the expiration of the patent." This is also reminiscent of LEGO Corporation's zeal to protect its brand at all costs and to prevent others from any use of it even if not on toys but on other brands.

⁸ See Bernd H. Schmitt, Lia Zarantonello & J. Josko Brakus, *Brand Experience: What Is It? How Is It Measured? Does It Affect Loyalty?*, 73 J. MKTG. 1, 52-68 (2009) (discussing brand as experienced by consumer).

⁹ Bharat N. Anand & Ron Shachar, *Brands, Information, and Loyalty*, 13-14 (HBS Comp. & Strategy, Working Paper No. 00-069, 2000), available at <http://ssrn.com/abstract=240792>. Bharat and Shachar contend that a consumer's loyalty to a brand stems from one of four reasons: switching costs (or, state dependence); homogeneity in offerings of products by different brands; unobserved tastes or emotional attachment to a brand; and, incomplete information about product attributes).

and that the “reliance on brand attributes is greater than the reliance on product attributes.”¹⁰ A vivid example of the impact of Brand Loyalty on consumers emanates from a test involving the *Coca-Cola* brand *vis-à-vis* an imaginary “*Lora Cola*” brand. In that test conducted in 1996 by Zaichkowsky and Simpson, it was observed that those who were most brand loyal to *Coca-Cola* continued to rate that taste experience (of poor tasting Cola that was placed in a Coca-Cola bottle) higher than the good tasting (the *real* Coke) from the fake *Lora Cola* bottle. In this regard, Zaichkowsky submits that “such is the power of brand equity and loyalty that the perception that comes with well-known trademark and trade dress overrides the actual experience of what is inside the package.”¹¹ In this regard, the brand experience mimics to a great extent the Ames Room optical illusion, where things might seem smaller or larger than they are just by reason of location (or placement).¹² Indeed, in the case of brands our commercial perception of their stature and value is directly affected by both our exposure to them but also by our inclination to avert exposure to their competitors or to access information that might alter our preferences.

II. THE NEED FOR LOYALTY OF BRANDS

Given all of the above, it is logical to conclude that while Brand Loyalty exists, it is not always a product of a rational choice, given that consumers in many cases tend to act on that loyalty based on brand groups rather than single products, and they do so absent full information pertaining to the products (or services) that are covered by the brand. That

¹⁰ Anand & Shachar, *supra* note 3.

¹¹ J.L. ZAICHKOWSKY, THE PSYCHOLOGY BEHIND TRADEMARK INFRINGEMENT AND COUNTERFEITING 35 (2006) (citing J.L. Zaichkowsky & R.N. Simpson, *The Effect of Experience with a Brand Imitator on the Original Brand*, in 7 *MARKETING LETTERS* 31–39 (1996)).

¹² See *Ames Room*, WIKIPEDIA (Oct. 10, 2013, 5:47 PM), http://en.wikipedia.org/wiki/Ames_room; *Ames Room (Philip Zimbardo)*, YOUTUBE (Feb. 22, 2010), <https://www.youtube.com/watch?v=hCV2Ba5wrcs>; *Ames Room Optical Illusion Optica*, YOUTUBE (Aug. 25, 2010), <https://www.youtube.com/watch?v=vhoSqSHMIAc> (An Ames room developed by the American ophthalmologist Adelbert Ames, Jr. in 1934, is constructed so that from the front it appears to be an ordinary cubic-shaped room, with a back wall and two side walls parallel to each other and perpendicular to the horizontally level floor and ceiling. However, this is a trick of perspective and the true shape of the room is trapezoidal: the walls are slanted and the ceiling and floor are at an incline, and the right corner is much closer to the front-positioned observer than the left corner (or vice versa)).

is to say that it is not possible to rely on the consumer himself to make determinations. Rather, the consumer is effectively in need of “external” assistance that would offset the inherent (often times self-imposed) bias that he might have for some brands because of his loyalty that is based on sketchy data and information and on (perceived) image than on objective quality.¹³ Indeed, this consistent lack of timely and complete information prompts the question as to the counterbalance that needs to be put in place in order to offset this existing (inherent) deficiency. This counterbalance should, in my opinion, be in the form of a reaction to brand loyalty namely, “Loyalty of the Brand” towards its consumers. In my view, just as the brand owner has privileges emanating from his property over his brand, so too does he have an obligation towards the end-consumer. This chapter is devoted to exploring and justifying the need for this counter loyalty; this “Loyalty of the Brand.”

In trying to address this question of Loyalty of the Brand, one is required to first think about the nature of marks and why they came to be. This analysis is needed in order to show that Loyalty of the Brands is indeed an important prerequisite for the continued use, indeed existence, of marks and (even more so) brands as we know them to be.

A. Loyalty of the Brand and the Ultimate Purpose of Marks

Brands and trademarks generally have existed in order to serve a dual purpose: The first, and obvious reason is to function as a tool for denoting the source of the products and services that they cover. The second, less obvious reason is to create a “codified” market in which the trademark encapsulates all of the information that the consumer seeks in his endeavor to choose a certain product that is available among a wide array of other competing products.¹⁴ In this regard, one can assume that trademarks play a

¹³ Raj Sethuraman, *What Makes Consumers Pay More for National Brands than for Store Brands—Image or Quality?* (Rev. Mktg. Sci., Working Paper No. 318, 2001), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=310883.

¹⁴ SEAN MOFFITT & MIKE DOVER, WIKIBRANDS: REINVENTING YOUR COMPANY IN A CUSTOMER-DRIVEN MARKETPLACE 39 (1st ed. 2011) (Moffitt and Dover contend that: “Brands are fundamentally important They are not merely logos or a roll call of features; they are a point of view on how products and businesses project to the world. Although the tactics may have changed, customers still place extraordinary value on them, pay more for them, and want to participate in them”).

crucial role in forming the contract that underlies the business deal that is struck between the consumer and the seller (or service provider). However, the main problem with viewing trademarks as a “thing” that encapsulates product information is that there is, in fact, a deficiency in the information that trademarks contain. In other words, trademarks, in the context of sale-relevant information, tend to imply more than supply. *Desai* observes that “trademark law’s current conception of information and how trademarks enable information transmission is underdeveloped.”¹⁵ According to *Desai*, this has led to a world where trademark law hinders the flow of information in markets.¹⁶ Indeed, the consumer, as the lesser informed party in the transaction, exercises his freedom of choice based on various pieces of information. Clearly, that information is not always correct and is oftentimes patchy and based on misconceptions. I share this view. Trademarks, as they function today, are reminiscent of a “one way” street in which the mark is pushed towards the customer without the customer really having any say in the matter or having the ability to react to changes in the mark. In my view, this state of affairs is not satisfactory. In my view, the legitimacy (for lack of a better term) of the brand should stem from the quality of the product or services that it covers and not vice-versa.¹⁷ That is why, there needs to be another legal norm or principle, tasked with counterbalancing this deficiency in the functioning of marks (and brands). Naturally, this counterbalance is not intended to nullify the existence of brand loyalty or to prevent successful marks from thriving, but, rather it is intended to inhibit any misuse of the power that is harnessed through brand loyalty. In simpler terms, just as the consumer puts his trust in the mark, so too the mark owner should reward its “loyal” consumer with various incentives including transparency, truth, and preciseness. That is what I have referred to here as Loyalty of the Brand. As such, both Brand Loyalty

¹⁵ Deven R. Desai, *Response: An Information Approach to Trademarks*, 100 GEO. L.J. 2119, 2119 (2012).

¹⁶ Desai, *supra* note 15, at 2119–20.

¹⁷ Desai, *supra* note 15, at 2122 (Desai states that with little evaluation beyond this first encounter—let alone communication back about the good or service—exactly how or when consumers push producers to create better products is uncertain. This system also takes the view that a trademark is part of a stable vocabulary. Trademark law thinks of each trademark as a sign capable of having a singular, consistent meaning. It is an approach that believes in a “perfectly order[ed],” one-to-one relationship for a word and a thing. “Such languages are artificial: they do not exist in nature.” Nor do they exist for the way Trademarks are used and operated.).

and Loyalty of the Brand, are two sides of the same coin; the Golden coin (as it were) of fair trade. One is not complete without the other.

B. Loyalty of the Brand as the Core of a Commercial Contract

Contract theory and freedom of contract assume that both contracting parties knowingly and willfully enter into a contract. Such knowledge and will is thus contingent on there being an environment of clear and specific information as to the product or service that is at the heart of the commercial contract. Which begs the question: How can one ensure the basic notion of this free will in contracts if at its core lays a brand that lies?

Thus, Loyalty of the Brand is not intended to be a catchy term denoting moral interactions between consumer and brand owner. Rather, it is a crucial mechanism without which the entire commercial contract construct may capitulate to outright “cat in the sack” type commerce, where we buy stuff or receive services and hope for the best! My view is further enhanced by the good faith requirement that underlies contract law. Indeed, while some legal systems may not have a formal requirement of good faith, this requirement also stems from the very notion of what commercial contracts are all about; to allow the consumer to make informed decisions. Here I need to emphasize that in my view, good faith does not amount to complete and utter disclosure of every minute element pertaining to the commercial business deal. In this regard, we would not expect a party to disclose to its counterpart that a better deal (pricewise) can be struck elsewhere. Business logic dictates that parties seek the best deal that they can attain within the bounds of law and morality. Yet, if brands have indeed become beacons of light in a (treacherous) sea of information, then this will entail that they be used in a way that would guide rather than mislead the consumer to his destination (safely). Indeed, this view is in line with the (above mentioned) dual function of marks that of indicating source and that of signaling quality. With respect to the later function, it is clear that any deviation from the quality that is encapsulated in the brand constitutes a deviation from the “Promise” that the brand carries therein, and thus, also a deviation from the consumer’s expectation. Hence, any deviation

undermines the entire construct of the free will in the underlying commercial contract.¹⁸

C. Loyalty of the Brand as a Reflection of the Brand Owner-Customer Fiduciary Duty

My view as to the application of the Loyalty of the Brand concept through good faith can be further enhanced (and leveraged) by what I deem to be a fiduciary duty that the brand owner has towards the customer.¹⁹ That is because, not only is the brand a commercial tool, it is a certificate of “trust” that binds the customer to the product or service marketed under that given brand. Indeed, the legal system is dotted with different circumstances in which this duty applies. Suffice it to note cases involving trustee-beneficiary and director-shareholder. The common denominator in all of these cases is that party A trusts party B, and so party A becomes vulnerable to harm as a result (of the misconduct by party B). Such a state of affairs applies to the case of brands given that consumers trust the brand and indeed manifest loyalty to it. According to *Smith*, “fiduciary law supplements self-help by depriving the fiduciary of the benefits from opportunism.”²⁰ He also contends that “[w]here self-help is effective, fiduciary constraints are relatively weak, and where self-help is weak, fiduciary constraints are relatively intense.” In this regard, given that consumers are (ex-ante) inherently misinformed about the quality of products and services and given that consumers may (at best) discover the lack of brand loyalty only ex-post, it is only logical to apply a fiduciary duty in order to promote a higher level of ethical conduct on the part of the seller or service provider.

¹⁸ MOHAMMAD A. NASER, REVISITING THE PHILOSOPHICAL FOUNDATIONS OF TRADEMARKS IN THE US AND UK 62 (2010).

¹⁹ D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1487-88 (2002), available at <http://dx.doi.org/10.2139/ssrn.339100>. Smith explains that the “fiduciary duty and the contractual obligation of good faith and fair dealing are close cousins, both imposing loyalty obligations of varying intensity to combat opportunism.”

²⁰ Smith, *supra* note 19, at 1438. Smith introduces the critical resource theory of fiduciary duty according to which every relationship properly designated as “fiduciary” conforms to the following pattern: one party (the “fiduciary”) acts on behalf of another party (the “beneficiary”) while exercising discretion with respect to a critical resource belonging to the beneficiary.

I would further stress that there is an undisputable interconnection between marketing and morality in brands. These two elements are not mutually exclusive. On the contrary, they are intertwined, especially due to the “conventional” method by which products are sold and services rendered. That is to say that many sellers and service providers now operate in a wide geographical or international scope and (understandably) with almost no person-to-person (interpersonal) interaction between the brand owner and the consumer. Hence, there is need for more transparency. The best way to achieve that is through enhancing the “moral” imperative imbedded in branding. With that said, the role of morality in trademarks does not seem to fit well in any of its two acceptable justifications, the economic one and the Lockean natural rights theory. *Sheff* proposes a third method, with which I agree.²¹ He analyzes the laws of trademark and unfair competition as a system of moral obligations between producers and consumers drawing on the contractarian tradition in moral philosophy. He, as I, believes that this “contractualist” theory “holds great promise not only as a descriptive and prescriptive theory of trademark law, but as a framework for normative analysis in consumer protection law generally.”²²

D. The Importance of Loyalty of the Brand in a World of Outsourcing

Crucially, another reason why Loyalty of the Brand needs to be recognized reverts back to the nature of the globalized world in which we now live. While brands once covered products in a specific and localized setting, they are today much more elusive and now cover products of a vastly varying nature than their predecessors. This is largely owed to outsourcing where services and products are no longer comprised of the same original components or elements. However, before I elaborate further I would like to shed light on the nature of outsourcing and how it interacts with the world of production and services.

There is no denying it, we live in a globalized world where information, people, products, services and production exist in a fast moving environment with fewer borders and limitations. Manufacturers and

²¹ Jeremy N. Sheff, *Marks, Morals, and Markets*, 65 STAN. L. REV. 761 (2013), available at <http://dx.doi.org/10.2139/ssrn.2021394>.

²² Sheff, *supra* note 21.

service-providers (of all types) now have various venues to consider when choosing to manufacture or produce a product or to render a service. Geographic proximity is no longer the obvious choice for production. Given the movement of goods and information, outsourcing is not primarily about expanding sales but more about cutting costs.

Indeed, outsourcing in all forms—on shore, near shore and off shore—has emerged as a popular strategy for companies seeking to cut costs associated with traditional production or rendering of services.

Outsourcing has become the norm. So much so that a debate has ensued as to what products (or services) could still be considered as “national” products of a defined geographic location. The SWISS mark constitutes a case in point. In 2009 the Swiss parliament had resolved to deprive any product from the lucrative SWISS mark if its components originating in Switzerland account for less than 60% of its total composition.²³ In fact, this problem is not only a Swiss issue but rather a worldwide issue.²⁴ Should a shoe continue to be marketed under an Italian

²³ See Nazanin Lankarani, *Special Report: A Cut Above: Watches; A Swiss Debate*, N.Y. TIMES, Mar. 26, 2009, available at <http://query.nytimes.com/gst/fullpage.html?res=9E0CE1D81639F935A15750C0A96F9C8B63>. “What, exactly, is a Swiss watch? That question, now under examination by the Swiss Federal Council, the government’s executive authority, is generating heated debate in the watch industry, where the fate of some manufacturers hangs on the answer. A “Swiss Made” watch is not necessarily made entirely in Switzerland. By a 1971 ordinance of the council, modified in 1992, a watch may legally bear the label “Swiss” or “Swiss Made” if it has a Swiss movement and is cased up in Switzerland, where the manufacturer must have carried out its final inspection. Furthermore, components of Swiss manufacture must account for at least 50 percent of the total value—not number of parts—exclusive of assembly costs. But with watchmakers importing an ever-increasing number of parts, the council announced in October that it intended to tighten the legal definition of “Swiss Made” applicable to all products, including horological. Proposed legislation would raise the value threshold to 60 percent.”

²⁴ E.g., Gene M. Grossman & Elhanan Helpman, *Outsourcing in a Global Economy*, 72 REV. OF ECON. STUD., 135, 135 (2005). According to Grossman and Helpman: “we live in an age of outsourcing. Firms seem to be subcontracting an ever expanding set of activities, ranging from product design to assembly, from research and development to marketing, distribution, and after-sales service.” They add that some firms have gone so far as to become “virtual” manufacturers, owning designs for many products but making almost nothing themselves. Vertical disintegration is especially evident in international trade. In this context Grossman and Helpman refer to a World Trade Organization (1998) which details the production of a particular “American” car: That report shows that 30% of the car’s value goes to Korea for assembly, 17.5% to Japan for components and advanced technology, 7.5% to Germany for design, 4% to Taiwan and Singapore for minor parts, 2.5% to the United Kingdom for advertising and marketing services, and 1.5% to Ireland and Barbados for data processing. This means that only 37% of the production value ... is generated in the United States.” Bearing in mind that this

brand if more than 60% of its components come from Indonesia? Should another shoe be marketed under an Italian brand if all of its components are produced in China and the shoe is produced on Italian soil? Is this case the same for cars or for toothpaste? These are some of the questions that emanate from the interface between brands, globalization and outsourcing.

Obviously, my approach to outsourcing is not about reproach. I do not dispute the position according to which outsourcing is an important, indeed legitimate, tool for industry. In this regard, I agree with McGee's findings. Clearly, outsourcing has become a reality, and it appears that it is here to stay.²⁵ In essence, national pride is no longer contingent on national production. On the contrary, countries and nations now pride themselves on the fact that they have "gone global" not only in terms of marketing but also in terms of production. The motives for outsourcing appear to be financially sound given that, according to some estimates, outsourcing can reduce costs by about 30 percent. Still, outsourcing does not come without cost to the economy.²⁶ However, due to the scope of this research, I shall only deal, here, with the ramifications of outsourcing on branding.

In the context of branding, the pressure for engaging in outsourcing, in order to cut costs, can also go rouge (as far as consumers are concerned)! By this I mean that the brand owner may not only shift his production to less costly venues or labor (or both) but also, opt for cutting corners in components, quality, quality control, best practices, and oversight. As a result, the brand becomes an empty shell or a façade and effectively part of

WTO report dates back to the late 1990s, it is easy to envision that the national share of the national portion of the car is value of the car, or any other product or service for that matter.

²⁵ See, Robert W. McGee, Barry University, *Outsourcing: An Ethical Analysis of an International Trade Issue* (Apr. 7–10, 2005), available at <http://dx.doi.org/10.2139/ssrn.648764>. According to McGee, at 10, "from the utilitarian perspective, prohibiting or restricting outsourcing would result in introducing more inefficiency into the system. The result is a lower rate of economic growth and more job losses than gains. Thus, placing restrictions on outsourcing fails the utilitarian ethical test."

²⁶ Ashok Bardhan & Cynthia A. Kroll, *The New Wave of Outsourcing* (Fisher Ctr. for Real Estate & Urban Econ. Research Report Series, No. 1103, 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=985741. Bardhan and Kroll, assess the potential impact of the ongoing phenomenon of services offshoring (frequently referred to as outsourcing in the media) by analyzing the occupational structure of the U.S. labor market. They consider the occupational attributes of off shoreability, point out the institutional characteristics, wage-differences and other features of the recipient economies, such as India, and compare and contrast manufacturing and services offshoring. They contend that 14 million jobs or 11% of the employed labor force is vulnerable and at-risk to offshoring.

the cover up. This practice is not only harmful to the consumer but ultimately to the brand owner as well. But therein lies the fine line that some brand owners might be aiming for; for while the harm (direct or indirect) to the consumer is immediate, the harm to the brand and its owner may not materialize and, in some cases, may only appear at a later stage. Thus, while consumers may experience harm in close proximity to the commercial transaction, the brand owner will not. That is simply because consumers are, by definition, less informed, and in some cases less sophisticated, so as to shift their consumption choices based on a single experience. And even if consumers do react quickly, there are always new consumers “hopping” on board. Consider the example pertaining to buying a car. While the consumer might elect to purchase a certain brand given the decades-old goodwill associated with that brand, that same consumer will, in almost all cases, not be aware of the fact that the new car now bearing the same OLD brand is not made by the same car maker and does not necessarily contain the same high quality components. So while the new car of a lesser quality will almost immediately reduce the quality of customer experience, it will take much more than that for this dissatisfaction to manifest itself in the company’s brand values and consumer perception thereof. The same holds true for cheaper off the shelf consumer goods where the consumer may not have the objective tools to detect changes in the product, which might still taste the same. This holds true for consumer products such as honey and coffee, or even milk. In these cases, while the brand is the same brand that the consumer might have to come to recognize and trust over decades, he may not know where his honey, coffee and milk now come from and what they are truly comprised of.²⁷ All he has is the inclination to “trust” that the brand continues to deliver the same product.

²⁷ That is not to say that I am for banning or limiting exports from other countries. On the contrary, I believe this to be a sound practice. Indeed, research shows that it is unfair and wrong to close the doors to imports. All are entitled to compete and market their products; the problem starts when a business entity, generally a national of the state with an established mark, starts to market products of lesser quality (from a domestic or foreign source) under their brand. For context of the cost of closing markets to imports, see generally Julio J. Nogués, *U.S. Contingent Protection Against Honey Imports: Development Aspects and the Doha Round* (Academia Nacional de Ciencias Economicas, World Bank Policy Research Working Paper No. 3088, 2003). (Nogués explains that “[t]housands of poor people around the world live from honey production, and contingent protection measures destabilize their incomes and make their lives and futures more uncertain.” I am only trying to explain here that we should not use the brand known to consumers in order to allow for products of lesser quality to impose

It is important to point out that the interrelationship between a mark and a place is not new. In fact, the laws pertaining to the protection of appellations of origin and the newer term (that was introduced by the TRIPS agreement) “geographical indications” do just that. The logic behind the creation of legal rights in such names is that the quality of the product is contingent on the geographical location in which it was harvested and/or produced.²⁸

It is worth mentioning that the impact of outsourcing (or offshoring) is not limited to brands. This method of engaging in production and services rendering remains in contention. Various costs are associated with this method including loss of local employment opportunities, reduced quality. Some even identify a connection between offshoring and the value of real-estate as well as the effect on the urban way of life.²⁹ Thus, this discussion pertaining to the effect that outsourcing has on marketing and branding fits well into this critical assessment of outsourcing.

E. Curbing Property Rights in Brands

When discussing the ramifications of trademarks or brands, one might be inclined to fall into a (logical) trap. That trap has to do with the fact that

themselves on trusting consumers based on their brand loyalty). See Susan Berfield, *The Honey Launderers: Uncovering the Largest Food Fraud in U.S. History*, BLOOMBERG BUSINESSWEEK (Sept. 19, 2013), available at <http://www.businessweek.com/articles/2013-09-19/how-germany-s-alw-got-busted-for-the-largest-food-fraud-in-u-dot-s-dot-history>.

²⁸ See generally Justin Hughes, *Champagne, Feta, and Bourbon—the Spirited Debate About Geographical Indications*, 58 HASTINGS L.J. 299 (2006); Tomer Broude, *Taking “Trade and Culture” Seriously: Geographical Indications and Cultural Protection in WTO Law* (Hebrew University of Jerusalem—International Law Forum, Working Paper, 2005); Dev Saif Gangjee, *Quibbling Siblings: Conflicts Between Trademarks and Geographical Indications*, 82 CHI.-KENT L. REV. 1 (2007). With respect to the debate surrounding geographical indication, see Irene Calboli, *Expanding the Protection of Geographical Indications of Origin under TRIPS: Old Debate or New Opportunity?*, 10 MARQ. INTELL. PROP L. REV. 181, 189 (2006).

²⁹ For more on this, see Ashok Bardhan & Cynthia Kroll, *The New Wave of Outsourcing* (Fisher Ctr. for Real Estate & Urban Econ. Research, Report Series No. 1103, 2003). In this research, Bardhan and Kroll assess the potential impact of the ongoing phenomenon of services offshoring (outsourcing). They caution that, in the U.S., 14 million jobs or 11% of the employed labor force is vulnerable and at risk to offshoring. They also allude to the potential impact of offshoring on real estate and on regional/metropolitan areas in the U.S. For more on the potential ramifications of outsourcing, see generally Satwik Seshasai & Amar Gupta, *Global Outsourcing of Professional Services* (MIT Sloan, Working Paper No. 4456-04, 2004).

registered (or even well known) trademarks or brands entail a property right. This property right can best be described as a right to sole use of such property and the right of a mark's owner to prevent unauthorized use of his mark. But from this, one cannot deduce that this property is unlimited in scope or that it entails no obligations. On the contrary, trademarks are a tool for communicating with the public, and, as such, they carry a promise (to do something) and the consumer expects that promise to be fulfilled. So in essence, while property over the use of the brand vests in the brand owner, that same owner has no correlated right to misuse or abuse the brand. That is because the property right that is vested in brands also entails a social or contractual responsibility towards the consumer. In my view, in property (both real and intellectual), rights and obligations, are interconnected. A property right in this regard is not absolute but rather curbed by other social interests that foster obligations. In terms of the relative nature of property rights (in Intellectual property), suffice it to mention the Exhaustion doctrine in the case of parallel imports where a "first sale" can disconnect the brand owner's right to dictate to whom and at what price the item bearing the mark can be resold.³⁰ Another example of the lack of absolute property in trademarks is that pertaining to the ability to cancel the registration of marks that have not been used for a consecutive term (generally three years).³¹

Indeed, when considering the property that is associated with brands, one simply cannot overlook the fact, that the customer has some interest in the brand and in how it is used by the brand owner and, more specifically, in the way that it is communicated to him. In my view, the rights-obligations interrelationship in intellectual subject matter (and in these

³⁰ For more on parallel imports, *see, e.g.*, Nancy T. Gallini & Aidan Hollis, *A Contractual Approach to the Gray Market*, 19 INT'L REV. L. & ECON. 1 (1999); *see also* Daniel G. Grove, *Independent Adoption: The Case for the Gray Market*, 13 VILL. L. REV. 116 (1968). For a discussion on the consumers' perspective on parallel imports, *see generally* Jen-Hung Huang, Bruce C.Y. Lee & Shu Hsun Ho, *Consumer Attitude Toward Gray Market Goods*, 21 INT'L MKTG. REV. 598 (2004); *see also* Foad Iravani, Hamed Mamani & Reza Ahmadi, *Coping with Gray Markets: The Impact of Market Conditions and Product Characteristics* 1-39 (Oct. 1, 2011) (unpublished manuscript) (on file with the Social Science Research Network).

³¹ STEPHEN PERICLES LADAS, 1 PATENTS, TRADEMARKS, AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION 1160 (1975); DEBORAH E. BOUCHOUX, PROTECTING YOUR COMPANY'S INTELLECTUAL PROPERTY: A PRACTICAL GUIDE TO TRADEMARKS, COPYRIGHTS, PATENTS, AND TRADE SECRETS 95 (2001).

brands) is even easier to justify and explain given that this type of property (namely brands) is used to provide information to the consumer, which information the latter uses to formulate his purchase decisions. Thus, the right in the mark entails a social interest to preserve the right of the consumer that he not be misled and thus, in turn, obligates the brand owner to operate within these preset parameters and to maintain the “identity” of his brand.³² Loyalty of the brand then is the brand owner’s obligation towards the consumer to maintain the brand’s identity. It is an objective test—the identity of the brand through the eyes of the “reasonable” consumer.

These obligations that are placed on the brand owner are the response to what appears to be an asymmetrical system in English-American law whereby too much emphasis has been placed on the rights of trademark owners while too little attention has been given to the rights of consumers in this regard. Naser has observed that “the rights of trademark owners have recently expanded to extreme levels [and that] this has happened to the detriment of the rights of the consuming public and other traders and rivals.”³³ However, I do not go as far as the Economic-Social Planning theory (cited by Naser), according to whom trademarks are in effect “‘co-authored’ by the public and trademark owners.”³⁴ The ownership right that is vested in the trademark owner should be continuously subjected to obligations of said owner towards the consumers and the market at large because of their vested rights therein.³⁵ The Brand is a by-product of the collaboration between the mark’s owner and the consumers.³⁶

³² A Brand is like a living person, it has character. It has a personality of its own. It is that personality that leverages the brand, and which consumers expect not to be deceiving. For more on the personality of the brand, see ROHIT BHARGAVA, *PERSONALITY NOT INCLUDED: WHY COMPANIES LOSE THEIR AUTHENTICITY AND HOW GREAT BRANDS GET IT BACK* 3 (2008). Bhargava contends that “Personality is the key element behind your brand and what it stands for, and the story that your products tell to your customers. Every element of your business, from your interaction with your customers to the packaging of your product is an element in your brand personality.”

³³ Mohammad Amin Naser, *Revisiting the Philosophical Foundations of Trademarks in the US and UK* 1–2 (Cambridge Scholars Publishing, 2010). Naser explains that “it is vital to provide a further theoretical framework, which could set out boundaries to protect trademark owners, and would be able to provide justice to trademark owners, the consuming public and other traders and rivals.”

³⁴ Naser, *supra* note 33, at 7.

³⁵ In this regard, see James Leach, *An Anthropological Approach to Transactions Involving Names and Marks, Drawing on Melanesia*, reprinted in *TRADE MARKS AND BRANDS: AN INTERDISCIPLINARY CRITIQUE* 338 (Lionel Bently et al. eds., 2011). Leach observes that “[t]he value of

It is important to note that my approach with respect to trademarks fits well within the broader idea of an inherent linkage between property and social obligations. Indeed, the idea of the existence of obligations that are intertwined in property is now widely acceptable in the context of real property. It is referred to as the Social Obligation theory, and is perceived by some to be a worthy alternative to the law-and-economics theory, that is deemed to be “the dominant mode of theorizing about property in contemporary legal scholarship.”³⁷ In his research, Alexander submits that this social obligation has always existed in (American) property law but has never been (until recently) “explicitly recognized as such nor systemically developed.” It is worth mentioning that the idea of social obligation in property discourse is not only evident in U.S. legal thought, it has existed in other countries and cultures.³⁸ According to Alexander, this theory is “morally superior” because it “best promotes human flourishing, i.e., enabling individuals to live lives worthy of human dignity.”³⁹ In his view “the social obligation theory holds that all individuals have an obligation to others in their respective communities to promote the capabilities that are essential to human flourishing (e.g., freedom, practical reasoning). For property owners this has important consequences. If we accept the existence of an obligation to foster the capabilities necessary for human

the trade mark sign is something that both buyer and seller are making appear. It is a social value that you as receiver/consumer are party to creating. But the traders claim this as theirs solely. Hence there is a distortion of the transaction given by the very form of the name or mark that is attached to the commodity.”

³⁶ See Susan Fournier & Claudio Alvarez, *Brands as Relationship Partners: Warmth, Competence, and In-Between*, J. CONSUMER PSYCHOL. (Forthcoming), Boston U. School of Management Research Paper No. 2011-19, file:///C:/Users/user/Downloads/SSRN-id1962508.pdf. In fact, this view applies to all forms of intellectual property subject matter. See VALBONA MUZAKA, THE POLITICS OF INTELLECTUAL PROPERTY RIGHT AND ACCESS TO MEDICINES 21 (2011). Muzaka agrees with various research on the nature and rationales of intellectual property and observes that: “Market value is a socially created phenomenon which cannot be produced or controlled by an individual or company alone. It is clear that, far from being natural rights, the rights of IP-holders to receive all or most of the market value of their products are in fact socially created privileges and ought to be governed as such.”

³⁷ Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 745 (2009).

³⁸ See, e.g., Matthew C. Mirow, *Origins of the Social Function of Property in Chile*, 80 FORDHAM L. REV. 1183 (2011); see also Gabriel J. Michael, *Catholic Thought and Intellectual Property: Learning from the Ethics of Obligation*, 25 J.L. & RELIGION 415 (2009).

³⁹ Alexander, *supra* note 37.

flourishing, and if we understand that obligation extending to an obligation to share property, at least in surplus resources, in order to enhance the abilities of others to flourish, then it follows that, in the predictable absence of adequate voluntary transfers, the state should be empowered and may even be obligated to step in to compel the wealthy to share their surplus with the poor so that the latter can develop the necessary capabilities.”⁴⁰ Furthermore, Dagan and Heller (amongst others) can also in their respective research pertaining to the nature and scope of property rights, help us understand how it is possible to assign the brand (as property) to one entity but still allow for debate over the extent or nature of that property.⁴¹

When taking these ideas and applying them against the backdrop of brand owner’s property over brands, the same brands that help generate his income from the public, one can clearly see the resemblance and the link: How can a brand owner benefit from brands that he owns while at the same time not own up to the standards that he himself has set for said brands in the eyes of the public? Clearly, this is not only immoral, but also it negates the social obligation of the brand owner, not to deviate from the “promise” that his brand carries with it. The mark’s coverage at a given point in times needs to always be consistent with the image that it emits to the world. While in sculpting this constitutes an admirable form of art (and amazing

⁴⁰ *Id.* at 745–46 (Alexander argues that “[a] proper understanding of the social obligation explains a remarkably wide array of existing legal doctrine in American property law, ranging from the power of eminent domain to the modern public trust doctrine. In some cases social obligation reaches the same result as law-and-economics, but in other cases it will not. Even where it reaches the same result as law and economics, social obligation theory provides a superior explanation.”); see also Hanoch Dagan, *The Social Responsibility of Ownership*, 92 CORNELL L. REV. 1255 (2006); see also Matthew C. Mirow, *The Social-Obligation Norm of Property: Duguit, Hayem, and Others*, 22 FLA. J. INT’L L. 191 (2010).

⁴¹ Hanoch Dagan & Michael A. Heller, *The Role and Limits of Legal Regulation of Conflicts of Interest (Part I): Conflicts in Property*, 6 THEORETICAL INQ. L. 37 (2004) (Dagan and Heller explain that property concerns conflicts—both conflicts between individuals and conflicts of interest. In their view, while conflicts between individuals have long been the paradigmatic property focus, there is a need to shift more attention to the latter element namely that relating to conflicts of interest. Dagan and Heller assert that “[b]y helping people manage conflicts of interest, a well-governed property system balances interdependence with autonomy and productive cooperation with productive competition.” In their work, they identify three mechanisms woven throughout property law that help manage conflicts of interest: (1) internalization of externalities; (2) democratization of management; and (3) de-escalation of transactions. These in my view can be applied to conflicts involving intellectual property such as I have done here.).

optical illusions) as in the wonderful works by Shigeo Fukuda or Ames;⁴² in commerce (in the context of brands) this simply cannot be tolerated, and the law needs to create mechanisms to ensure that it does not continue to be practiced under the cover of the brand.

It is also worth noting, that this synthesis between property and obligation is, in my view, not only applicable to brands, but to all other fields of intellectual property. In two of my previously published research papers I have allude to this as well. The first paper dealt with the right of access to medicines at the expense, in some case, of the property right that is associated with the active ingredient that is at the heart of a pharmaceutical patent. In my second research paper I have also reflected on this social obligation whereby some property rights in the brand need to be reduced so as to allow for competition and market entry by (brand owning) “newcomers” to the market.⁴³

III. ON THE PRACTICAL APPLICABILITY OF LOYALTY OF BRANDS

I have thus far established that the brand owner’s (legitimate) right to engage in production and/or outsourcing does not entail a dormant right to “toy” with his product while hiding behind the brand. The brand owner has no right to engage in any modification of the product (in terms of quality or otherwise) in such manner that detracts from the product and ignores the obligations (and responsibility) that the ownership of the brand carries within.

But having established this, a practical question arises. What can the consumer and/or the laws do about this state of affairs? In my view, not only is this concept of Loyalty of the Brand a necessary and logical one, it is also attainable. In this chapter I shall shed light on the applicability of

⁴² See Shigeo Fukuda, *The Underground Piano Illusion*, MIGHTY OPTICAL ILLUSIONS (Jan. 21, 2013, 1:02 PM), available at <http://www.moillusions.com/2006/04/fukadas-underground-piano-illusion.html>; see also Shigeo Fukuda, *The Shadow Sculptures Illusion*, MIGHTY OPTICAL ILLUSIONS (Jan. 21, 2013, 1:03 PM), available at <http://www.moillusions.com/2007/04/shadow-sculpture-video-illusion.html>; see also Ames, *supra* note 13.

⁴³ Amir H. Khoury, *The “Public Health” of the Conventional International Patent Regime and the Ethics of “Ethicals,”* 26 CARDOZO ARTS & ENT. L.J. 25, 25–70 (2008); Amir H. Khoury, *A NeoConventional Trademark Regime for “Newcomer” States*, 12 U. PA. J. BUS. L. 351, 351–406 (2010); see also MUZAKA, *supra* note 36.

this concept. And I shall also explain how the brand owner can engage in a few steps that if undertaken, can indeed, be deemed to sufficiently fulfill that loyalty.

A basic “liberal” approach market to marketing would claim that nothing can really be done by way of direct intervention, about any lack of Loyalty of Brands. This approach would probably contend that the consumer-brand owner relationship needs to be defined by the market itself. That is that the market players namely the brand owner, his competitor and their consumers will logically act in their own subjective interests and that in such a process, the market will ultimately even things out in accordance with the conventional rules of supply and demand. In other words, this view calls for no intervention in the branding arena and assumes that consumers will ultimately express their preferences with respect to various brands. This obviously, is at best a gradual and slow process in which consumers on the basis of trial and error will shift to new brands. The reasoning for such a position might be along the lines the consumers today are essentially empowered through social media to share their experience, to alert each other and to publicize their grievances against a product or a service.

While this may be true to a limited extent given than consumers many a times simply do not have adequate information on which to base their assertions, this approach simply cannot in and of itself be the answer. What is more, any expectations that competitors will act to advise consumers is also wrong given that competitors my, rationally, choose to “overlook” problems with their competitors product, hoping for reciprocity as to their own fault. This then is a kind of negative prisoner dilemma that we often encounter in Game Theory simulations and in real life. But even, for the sake of argument, if these two mechanisms were applicable in branding, the question that poses itself is, is this enough?

In my view, this liberal market approach in not enough because its impact is limited to the ex-post and does not apply to the ex-ante nor provide for sufficient deterrence. In other words, while this might cause some consumer to elect not to buy such a product or service, it does nothing by way of holding the brand owner accountable to his own actions and provides no effective legal recourse to the consumer.

This section in the work is devoted to proposing a practical model for implementing and enforcing the concept of Loyalty of Brands. In this way the concept would become a practical tool in commerce and trade.

As I have demonstrated thus far, the Loyalty of the Brand constitutes the practical manifestation of the obligation that a brand owner has towards his consumers. It empowers consumers to translate the expectation in the brand to a legally recognized right that they are entitled to exercise against the brand owner. This would, hopefully, improve the branding culture for the benefit of consumer as well as fair competition and fair dealing in the market.

In my opinion, Loyalty of Brands should now constitute an independent or stand-alone legal cause of action. To my mind there should be no ambiguity as to its conceptual existence of this Loyalty, and thus similarly there needs be no ambiguity about it being an “offensive” rather than “reactionary” action by consumers. In other words, once a breach of Loyalty of Brands is established, then the way is paved for legal recourse against the brand owner. That is because the brand owner who initiated this wrongful action was in full control and could have opted not to cheat. In this regard, I would go as far as suggesting that trademark law should make room for “reverse” trademark infringement whereby the consumer can sue the brands owner for infringement (by way of disloyalty) of his own (i.e. the brands owner’s) mark. As radical as this might seem, it is about defending the mark’s existence and thus relevant subject matter under trademark law. Thus, if we are indeed bent on preserving this institution of trademarks and branding in its deepest form, then constructive ambiguity cannot be the order of the day. Rather, a clear cut rule would be required and should be applied.

With that being said, the Loyalty of the Brand principle can also exist absent a specific rule. That is to say, it can rest on recognized legal rights and/or norms. In this regard suffice it to mention six possible rules which, in my opinion can “host” such a doctrine until such time that a formal rule is enacted. They are, and not necessarily in the order to importance: the Good Faith Doctrine; Consumer Protection, Origin of Source, Unlawful Enrichment, a General Duty of Care, and, last but not least, Unfair Competition (use of misleading information). Thus, this chapter will, in its first section shed light on establishing a special rule with respect to Loyalty of Brands. In the second section of this chapter, I look at the other six legal doctrines on which one can base a legal action to enforce Loyalty of Brands. For the sake of simplicity, I shall refer to the first approach as direct legal enforcement of Loyalty of Brands and I shall refer to the second section as indirect legal enforcement of Loyalty of Brands.

A. Direct Legal Enforcement of Loyalty of Brands

To my mind, the bigger challenge in this context, I think, is not to prove the de-facto existence of Loyalty of Brands; rather, the challenge is to formulate a workable rule for the direct enforcement of this loyalty. But therein lies the problem. Any rule that is aimed at enforcing Loyalty of Brands from abuse by brand owners would need to be broad so as to cover various types of brands and a host of industries as well as various forms of disloyalty. Thus, to suggest a rigid rule would be tantamount to securing failure. Indeed, it would be very hard to envision a conclusive rule or set of rules. That is why the correct approach to formulating a direct approach to the enforcement of such loyalty would have to be in the form of a standard rather than a rule. Typically, such a standard would need to include a host of factors that need to be weighed in every time that such a claim arises. And so, without committing to any specific test I would say that the courts need to consider the case on its merits and to take into account the following (non-exhaustive) list of elements that need to be factored in:

- a. For how long has the brand existed?
- b. What is marketed under the brand?
- c. What is the main theme behind the brand, as seen by the reasonable and relatively well informed consumer?
- d. In what way does the brand deviate from that theme?
- e. How drastic in terms of time and scope was the deviation?
- f. Could a reasonable and knowledgeable brand owner have known or expected such a deviation?
- g. Was the deviation a goal or a result of action undertaken by the brand owner or done with his consent?
- h. Could the brand owner have, through reasonable measures, have nullified or mitigated the deviation?
- i. Did the brand owner adequately advise the consumer of said deviation, in a timely manner?
- j. Would the deviation, if previously known by the client, have constituted a sufficient reason, in and of itself, to refrain from further purchase of the service or the product that are marketed under said brand?

Once it is determined that the loyalty of the brand has been compromised, then it would be possible to initiate a legal action wherein the court would be asked to provide for remedies including ordering to the

brand owner to notify consumers of discrepancy, and to provide some form of compensation (or restitution) that we compensate the consumer for the damage that he has sustained as a result of the brand owner's disloyalty. With such a norm, trademark law would become complete, in that it not only addresses the interests of the brand owner but that it also addresses and protects the interests of all who interact with the protected brand. In my view, there is no reason that trademark law should focus only on the mark owner and his rights. Just as the law of contracts, trusts, etc. deal with the rights and obligations of all involved, that is how trademark law should approach the market in a more comprehensive manner.

B. Indirect Legal Enforcement of Loyalty of Brands

Having established that a direct legal rule is the preferred approach, it is important to acknowledge that enacting such a rule may take time. But while such a rule might not be readily available, it is important to take stock of the six legal doctrines and norms stated above that can in and of themselves provide effective enforcement for Loyalty of Brands. Thus, in my opinion, even today, courts can enforce Loyalty of the Brand by basing their findings on one (or more) of the legal doctrines, detailed below, and which already exist in our legal systems:

1. Consumer Protection

The laws of consumer protection set out to empower consumers by allowing them to independently bring suit against any manufacturer, seller or service provider who has provided him with incorrect information or who has failed to provide relevant information pertaining to the product or service.⁴⁴ This, again, is based on the notion that consumers need to be advised of all relevant information pertaining to choices because the consumers are predominantly in a continuous state of information deficiency. That is to say that in their relationship with the commercial actors, consumers are not playing on a level playing field, but rather

⁴⁴ See Spencer Weber Waller, Jillian G. Brady, R.J. Acosta & Jennifer Fair, *Consumer Protection in the United States: An Overview* (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1000226.

battling a built-in bias that is to be found in all commercial transactions of this nature. Production date, ingredients, location of production, weight, expiry date, and warnings are just a few examples of the information that is in the hands of the manufacturer or seller or service providers. Thus, it is no wonder that consumer protection is there to even the playing field.

This notion underlying consumer protection is clearly aligned with the Loyalty of Brands concept, whereby information pertaining to the deviation from a brand's true qualities and image could adversely lead consumers to making commercial decisions that they would not have made had it not been for that omission of information pertaining to the change in the brand. Given that the brand encapsulates much for the information pertaining to the characteristics of the product, there is absolutely no reason why it should be excluded from consumer protection doctrine. Thus, any deviation from the standards of loyalty by the brand owner to his customers should also constitute a sufficient cause of action by the consumers against the brand owner. What is more, the long lists of circumstances that are associated with consumer deception are sufficiently broad (and flexible) so as to encompass Loyalty of Brand as well.

2. *Origin of Source*

Origin of source, the second of the existing legal bases for establishing a Loyalty of the Brand claim, is especially helpful in cases involving off-shore outsourcing activity. Indeed, if we can determine that a specific brand is associated with a specific country or region, then any deviation from such production while maintaining the same exact brand could lead to an infraction in the Loyalty of Brands. This logic is akin to that used by the laws protecting "Appellations of Origin" and "Geographical Indications."⁴⁵ Indeed, products bearing feta, or champing, or Roquefort cheese, or scotch etc. are clear-cut cases of the linkage between locality and product. In such a cause of action based on Loyalty of Brands in the context of "origin," the

⁴⁵ See, e.g., the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, Oct. 31, 1958, 923 U.N.T.S. 189, available at <http://www.wipo.int/treaties/en/registration/lisbon/> and the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) arts. 22, 23, Apr. 15, 1994, 1869 U.N.T.S. 299, available at http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm.

plaintiff would need to substantiate, through the use of objective tests, that there is in fact a direct link between consumer expectation of the brand and the venue in which the branded goods were produced or manufactured or where services were rendered.

3. *Unlawful Enrichment*

The doctrine of “Unlawful Enrichment” is intended to cover cases in which one party unduly harvests benefits based on the efforts of others. In such a case where an action amounts to unlawful enrichment, the aggrieved party is entitled to seek restitution from the defendant.⁴⁶ Such restitution is generally aimed to cause the defendants to pay to the plaintiff an amount that is equivalent to the scope of enrichment earned by the defendant, and which was generated unlawfully. Given this broad definition, it is possible to construct a legal claim whereby, if the owner of the brand earns more (also due to reduction of costs) than a consumer can seek restitution of the difference if he shows that the defendant has capitalized on the loyalty of the consumer towards the brand without actually meeting his own duty of loyalty towards that consumer base.

4. *Fiduciary Duty of Care*

An additional tool that, although general in nature, should be considered is the general duty of care that should be placed on all brand owners *vis-à-vis* their respective clients. In other words, given that the brand constitutes the primary, and in some cases the only, line of communication between the brand owner and his consumers, it is logical to assume the existence of a *de facto* duty of care, according to which, the brand owner should refrain from deviating from the brand’s essence, even if such deviation constitutes an economically rational action (on his part) at a given point in time. This connection between Loyalty of Brand and the duty of care, that underlies the tort of negligence, is not a difficult one, given the fact that the latter has been broadly interpreted in legal thought and

⁴⁶ Emily L. Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79(7) TEX. L. REV. 1–2 (2001).

literature. (See, for example, as pertaining to climate change litigation.⁴⁷) It is worth noting that even with respect to the fiduciary duty, D. Gordon Smith contends that restitution is the usual remedy for a breach.⁴⁸

5. Good Faith

Good faith is an even more expansive, and some would argue vague, legal term that is intended to test if one party have acted in accordance with a specific threshold of morality and disclosure to another party.⁴⁹ As I have already stated earlier, while the good faith requirement originates in contract law, it is seen as one that is applicable to all commercial and procedural conduct as well as other fields such as corporate law.⁵⁰ In other words, one should not only act in accordance with the letter of the law, but also with a reasonable level of morality by way of disclosure or ascertaining existing legal rights and procedures that he is entitled to demand. So in this regard, when the brand owner elects to use his brand in a manner that falls below the promise of his brand, or the basic characteristics or attributes that define the brand in the eyes of the consumer, then he can be seen as acting contrary to good faith and hence creating a cause of action against him by consumers.

⁴⁷ See Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1 (2005) (discussing corporate managers and directors); Stephen J. Lubben & Alana J. Darnell, *Delaware's Duty of Care* (Seton Hall Public Law Research Paper No. 32, 2005), available at <http://ssrn.com/abstract=698223>; Tamo Zwinge, *Have Directors' Duties of Care and Skill Become More Stringent? What has driven this Development? Is this Development Beneficial? An Analysis of the Duty of Care in the UK in Comparison to the German Duty of Care* (Oct. 20, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1591590/>; James E. Salzman & David B. Hunter, *Negligence in the Air: The Duty of Care in Climate Change Litigation*, 155 U. PA. L. REV. 1741 (2007) (climate change related litigation); Hans-Bernd Schäfer, *Efficient Third Party Liability of Auditors in Tort Law and in Contract Law*, 12 SUP. CT. ECON. REV. 181 (2004) (auditors' responsibility); Ariel Porat, *The Many Faces of Negligence*, 4 THEORETICAL INQUIRIES IN LAW 105 (2003), available at <http://ssrn.com/abstract=376205> (a more in-depth account of the nature of negligence); Margaret Isabel Hall, *Duty to Protect, Duty to Control and the Duty to Warn*, 82 CAN. BAR REV. 645 (2003), available at <http://ssrn.com/abstract=894325>.

⁴⁸ Smith, *supra* note 19.

⁴⁹ See Emily Houh, *The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?*, 2005 UTAH L. REV. 1 (discussing the potential use of good faith).

⁵⁰ Eisenberg, *supra* note 47.

6. Fair Competition Practices

Last but not least, it is also possible to enforce Loyalty of Brands by involving competitors. When a brand deviates from its promise, not only does the consumer stand to lose but so too do the brand's competitors. That is because an infraction in the context of Loyalty of Brands impacts consumer preferences among various competing products. Thus, Loyalty of Brands should also be seen as a form of unfair competition and it should therefore involve competitors in this action. In my view, competitors in such cases need to be authorized and legally empowered to initiate independent legal action against the brand owner. Such action would be done because of the direct interest that the competitors have in the matter. What is more, such action can also function as a form of proxy action on behalf of consumers because of the products or services that are sold to them under false pretenses. This legal construct is a form of proxy claim and is not new to the law. Consider for example cases wherein a specific group of shareholders (or external actors) initiate a proxy law suit against management if and when the general interests of shareholders are put in unjustified risk.⁵¹ This same logic can be applied to consumers' interests wherein brand disloyalty of the brand owner is involved.

In concluding this segment, I should note the above-mentioned legal tools that can support my Loyalty of Brand are not mutually exclusive, but are intended to complement one another. That is because they all stem from the basic notion of fairness, though they diverge to cover specific angles in a given state of affairs.

In terms of procedure, all of these causes of action (both the direct and the indirect) can be initiated in one of three ways: first, through an independent claim filed by a single customer. Here, the consumer would be seeking compensation for the brand's default on its loyalty obligation. Second, it would be important to allow for filing of derivative/proxy lawsuits by other interested parties, such as competitors or organizations that represent the consumer, or the state, if need be. Last, and most

⁵¹ David F. Larcker et al., *Outsourcing Shareholder Voting to Proxy Advisory Firms* (Rock Ctr. for Corporate Governance at Stanford University Working Paper No. 119, Stanford Graduate Sch. of Bus. Research Paper No. 2105, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2101453#.

substantially, it is important to recognize the loss of the brand (based on any of the above mentioned causes of action) as a basis for filing a class action law suit. This, in all likelihood, would be the option that is most invoked against disloyal brand owners because this method would provide the biggest incentive to the individual plaintiff. This would also create the most impactful deterrence for brand owners not to default on the loyalty of their brand.

C. The Impact of Loyalty of Brands on Brand Owners

In line with the importance of the Loyalty of Brand that I have highlighted above, it seems as though the responsibility for maintaining Loyalty of Brand should rest with the brand owner given that he is the cheapest cost avoider. That is to say, the owner of the brand knows exactly how he has deviated from the brand's initial identity and why. In doing so, he has most likely weighted the costs against the benefits and has elected to undertake such a calculated step. Thus, he too, can backtrack on such a policy if and when it becomes too costly marketing wise, i.e. when fewer and fewer consumers are happy with the product. So the best and most efficient method in which to secure the Loyalty of Brand is to simply hold the brand owner accountable. In this way, the brand owner can make strategic steps in which to mitigate the effects of the costs that are associated with the loss of Loyalty of Brand, such as sufficient notice, sub-brands, compensation funds, rebates, etc.

I predict that the successful application of the brand loyalty would ultimately change the strategic and tactical approaches of brand owners to branding. And that is to be welcomed!

On the strategic level, brand owners should first understand and appreciate the crucial importance of their (brand) asset. All those engaged with all the stages of product (or service) that will be marketed under the brand should come to appreciate the fact that the brand encapsulates all of the values and consumption experiences that the brand creates in the minds of consumers. A brand is no less than the emotional umbilical cord that the brand owner has with the market.

Once this view filters downstream and upstream in a corporation, then all those engaged in production will be more attuned not only to the choices that they have (e.g. outsourcing) but more importantly, to the limitation that they must impose upon themselves, given the need to preserve the brand.

Furthermore, and on the same strategic level, the brand owner (and his subordinates) should come to appreciate that the brand is not a facade of sorts, but rather an indicator. Hence, the assumption that a winning brand can mend all wrong is a grave misconception. Brands have a specific degree of elasticity, and once they are pulled too much they can tear, exposing the weak product that they were trying to cover in the first place.

What is more, this strategic acceptance of the importance of brands needs to be compounded by a strategic policy relating to outsourcing and its limitations. Here a company needs to formulate a clear policy relating to outsourcing *vis-à-vis* brands. Here, the decisionmakers in a brand-owning corporation need to demand a deeper insight into the ramifications of outsourcing before engaging in such conduct. Consider for example the service sector; the brand owner in such a sector should not be satisfied with an increased volume of calls, but, more so, he needs to take stock of other indicators such as the level of satisfaction with the service that has been rendered. The same applies to products. Focusing on cost-saving in materials and an impressive bottom-line in a given period of time may backfire on the company if and when the consumer loses trust in the brand. But in any case, if indeed customers are empowered to initiate a legal action based on Loyalty of Brand, then that would add to the brand owner's incentive to really care about customer satisfaction. In this way, the slogan that "every customer counts" would become a reality, thus changing the branding culture, the commercial paradigms, and boosting truth in advertising.⁵²

On the tactical level, and in light of this cautious approach to outsourcing, the brand owner should avoid any long term commitments to outsourcing in general and to any specific entity in particular. The brand owner should first research and evaluate the performance of the entity with which he wishes to engage in outsourcing. Such pilot testing could prove the difference between a stumble and a tumble! Avoiding long term deals at the start of the outsourcing relationship will allow for an effective and less costly exit strategy as far as branding mistakes are concerned. It is important for the outsourcing brand owner to make sure that the outsourcer

⁵² J. Shahar Dillbary, *Trademarks as a Media for False Advertising*, 32 CARDOZO L. REV. 327 (2009).

is committed to the brand, that it will provide products and services of equal quality (as the brand owner had done before), and that consumer satisfaction is periodically checked to ensure no drop therein. Above all, it remains the duty of the brand owner to educate the outsourcer as to the promise that the brand carries and to make sure that said outsourcer will work diligently within those parameters. In essence, such steps are not only intended to maintain the quality of the brand; they also serve to protect the interests of the brand owner as well. Even more so, such steps are the most effective method to ensure the same Loyalty of Brand. After all, it is clear that the brand owner remains the cheapest cost avoider.

D. On the Law of Attraction and the Law of Reaction

Before concluding this work, I should like to use another metaphor that pertains to attraction. Brand loyalty is about attraction; it is what draws consumers to certain marks and services and keeps them there. In my view, Loyalty of Brand is the adhesive that keeps the consumer loyalty to the brand. So, if indeed a brand does “attract” a consumer based on a sublime set of promises, it is only natural to expect and demand that these promises are kept.

That is why I propose the “A.T.T.R.A.C.T.” as a fitting acronym of my proposed model. A.T.T.R.A.C.T. represents the logical and fair reaction to a brand’s attraction. It defends the basic interests of the consumer based on the promise that the brand owners makes through his respective brand. The seven letters stand for summaries of the main themes of my proposal:

Accountability: This proposed concept, at its essence, is about the brand owner’s obligation to maintain the quality of his brands and not to alter their use in any form that hampers the stability of their commercial image. In a nutshell, the concept is all about the brand’s obligation (through the conduct of its owner) to maintain the quality of products covered by his brand to a level that meets the level of brand loyalty that is manifested by the consumer towards said brand. That is to say, brand owner is not at liberty to tamper (at-will) with the quality or characteristics of the goods or services that he markets under his brand, because the brand is, in more ways than one, a public rather than a private good. Just as competitors are not entitled to free ride on another’s good will so too the brand owner cannot free ride on the consumers’ inherent loyalty towards his own brand.

Trustworthiness: When consumers lower their defenses and become ever receptive to all the products that the brand has to offer, they base their decisions and actions on the discretion of the brand owner and where he chooses to take

them with the brand. They follow the brand, without hesitation and with no or little questions asked. Thus, the burden is on the brand owner not to abuse their trust.

Truth: Unfortunately, this appears to be a fading word in the world of trade, branding and advertising. This word should be revived for two reasons: first, because, a truthful society is much healthier in the long run than one based on cheating and deceit. Secondly, and practically, without truth, consumers may lose all faith in the brand as an institution and thus become much slower in the choices that they make, thus spending less and slowing the entire economy down.

Reciprocity: Brand loyalty constitutes a strategic element in the success of brand marketing. But, as of yet, this element lacks a counter-balance, which I refer to as Loyalty of Brand. My concept stipulates that the consumers' loyalty towards the brand needs to be reciprocated by the brand towards the consumer. Trust and loyalty should be a two-way street.

Applicability: The proposed concept is not only conceptually sound but it is also practically attainable and enforceable. It has the capability to be implemented, and should become an integral part of trademark law. Specifically, this can be done by shifting the trademark paradigm of property to a paradigm of public good, and by empowering the customer to seek legal recourse where Loyalty of Brand is lacking.

Compatibility: Various legal concepts in the commercial and contractual field support the proposed concept of Loyalty of Brand. These include: the nature of brands, good faith, fiduciary duties, consumer protection, as well as expectation in contact law, negligence in torts, duty of care, fair dealing, truth in trade, anti-trust and the first sale doctrine.

Timeliness: I think that the proposed concept is not only legally warranted but timely. It is acutely needed nowadays in this era that is characterized by the proliferation of outsourcing and off-shoring.

SUMMARY

This research explains why brand loyalty by the consumer ought to be reciprocated by the brand owner. My view is that just as the consumer manifests a loyalty towards the brand, so too there should be a counter loyalty by the brand towards the consumer. I have chosen to refer to this counter balance as "Loyalty of the Brand." Loyalty of the Brand constitutes a morally sound concept that is compatible with general trademark philosophy, and which rests firmly on many legally accepted disciplines that are generally used in commercial law, as well as contracts and tort law.

Loyalty of the Brand is a concept that should be an integral part of trademark law and practice. I have argued that the property interest that a brand owner has over his mark needs to be counterbalanced by obligations, namely the obligation to sustain the quality of products (or services) covered by his brand. The brand owner is expected to preserve and maintain any other defining attribute of the product (or service) marketed under his brand. I have also explained why the need for this concept is now accentuated in an age of expanding outsourcing. I have showed that this concept of Loyalty of the Brand is a morally and legally sound concept and that it can also be applied into and enforced by trademark law.

In addition to the direct benefits that Loyalty of the Brand can provide to consumers by empowering them, it can play an effective role in revamping fair dealing, truth in advertising and strategic respect for one's own brands.

In my view, while brand loyalty is the power that drives the brand forward, the Loyalty of the Brand is the force that keeps it on track. A brand, as a freight train, needs both forces to deliver!

So now, Jack is back! And, in my view, his post on the company's website need not be bashful or discrete. It should be voiced loudly and clearly, that just as consumers are loyal, so too, brand owners have obligations to which they must adhere to in commercial conduct and branding.