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Co-Branding

Maniatis, S; Schwarzkopf, S

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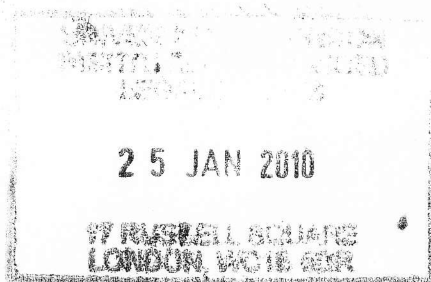

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Trade Mark Law and Sharing Names

Exploring Use of the Same Mark by Multiple Undertakings

Edited by

Ilanah Simon Fhima
Lecturer and Co-Director of the Institute of Brand and Innovation Law, University College London, UK

Edward Elgar
Cheltenham, UK • Northampton, MA, USA

10. Co-branding

Spyros Maniatis and Stefan Schwarzkopf

1. CO-BRANDING AS STRATEGIC ALLIANCE

Trade marks enable choice and competition; they allow consumers to distinguish between products and allow businesses that compete by offering rivalling products. Brands, on the other hand, are trade marks with a 'persona'. They encapsulate images, social values, and emotional attachments. Businesses use brands and branding in order to make their products and services more relevant and attractive for a number of key market stakeholder groups that include not only consumers, but also suppliers, business partners, and retailers. Strong brands help deliver superior customer value and fight off attempts by the competition to capture a firm's target market. The key to these branding activities is the successful transformation of consumers into brand loyal customers, who feel that their needs, demands, and expectations are not only met but exceeded by their favourite brand.[1] In order to make brands meaningful to a larger number of prospective customers and to capitalize on the advantages of a strong existing brand in a new market, businesses are increasingly diversifying their brand- and customer-base. Brands allow them to transfer their customer loyalty into new product markets either on their own or by exploiting synergies with other brand owners; the latter is particularly relevant for the theme of this volume.

Various techniques are known in this field and have extensively been analysed in the marketing literature.[2] Corporate brand licensing, for example, allows manufacturers to use an existing and well-recognized brand, in a particular field, to market other products to a specific target group. Toy and children's wear manufacturers are known to use brands such as DISNEY,

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[1] See D. Aaker, *Building Strong Brands* (Simon & Schuster, London, 2002), pp. 17–24; L. de Chernatony and M. McDonald, *Creating Powerful Brands in Consumer, Service and Industrial Markets* (Elsevier, Oxford, 2003), pp. 3–19 and 447–8 and K. Keller, *Strategic Brand Management: Building, Measuring and Managing Brand Equity* (Pearson Education, Upper Saddle River, NJ, 2003), pp. 104–12.

[2] See P. Kotler et al., *Principles of Marketing* (Pearson Education, Harlow, 2005), pp. 563–7.

WINNIE THE POOH, or BARBIE to increase the recognizability and attractiveness of stationery, shoes, clothing, and accessories. Perhaps best known are techniques of (product) line extensions and brand extensions (stretching). A company can extend an existing brand by introducing new forms, sizes, or flavours of an existing product. These line extensions have taken place in various categories, most famously in the soft drink market where Coca-Cola has successfully extended its brand by introducing COKE with new flavours, in new bottle sizes, or as a diet, and most recently as a zero-sugar, variety. Coca-Cola has used these techniques mainly to revitalize its brand in the face of a very creative competitor (Pepsi Co) and in response to the challenges coming from evolving consumer behaviour and market attitudes towards its core product.[3]

Whereas line extensions often follow a pattern of organic growth, brand extensions at times resemble more aggressive, viral, and anarchic patterns of growth as existing brands are extended to entirely new product categories. Perhaps the most famous example is that of the VIRGIN brand, which has been extended by its creator, Richard Branson, to a vast array of markets, including music production, media and entertainment, internet provider, fashion, air, space and train travel, soft drinks, financial and insurance services, holidays, and most recently stem cell storage.[4] The advantages of using an already successful brand to launch a new or modified product or service in a new category have been analysed by various authors: new markets can be entered more easily with a well-recognized brand, which in turn lowers acceptance barriers in consumers and thus saves expenditure on marketing communication in mature markets.[5] Brands can transpose messages about product characteristics and raise consumer expectations in new product markets.

Another technique of increasing an existing brand's customer base and visibility in the market is co-branding. We define co-branding as a marketing communication and product strategy whereby 'two established brand names of different companies are used on the same product or service'.[6] Co-branding partners use this marketing tool to enhance each other's service or product brand through close association between two brands which are strategically capable of delivering increased customer value. Co-branding is therefore a

[3] A. Bahr Thompson, 'Brand positioning and brand creation', in R. Clifton and J. Simmons, *Brands and Branding* (Profile Books, London, 2003), pp. 79–95, R. Enrico, *The Other Guy Blinked and Other Dispatches from the Cola Wars* (Bantam Books, New York, 1988) and D. Yoffie, 'Cola wars continue: Coke and Pepsi in the twenty-first century'. Harvard Business School case No. 9-702-442 (January 2004).

[4] Keller, n. 1, pp. 596–7.

[5] Keller, n. 1, pp. 575–631 and D. Aaker and K. Keller, 'Consumer evaluations of brand extensions', 54 *Journal of Marketing* 27(4) (January 1990).

[6] Kotler et al., n. 2, p. 564.

major tool of the value-adding process of branding.[7] From a trade mark and intellectual property right perspective, co-branding is an exercise that allows owners of two or more brands to 'lend their intellectual property to a vehicle for their joint exploitation'.[8] Genuine co-branding must be distinguished from the coexistence of the trade marks of the manufacturer and the parallel importer, against the will of the manufacturer, in parallel import cases (see for example *Boehringer Ingelheim v Swingward*).[9]

Marketing scholars have identified various advantages to co-branding. Often, the brands that are part of the co-branding exercise are dominant players in their respective category, their combination reaches a wider consumer audience and increases brand awareness and brand equity. Because of this, co-branding allows firms to enter new markets at a much lower level of risk and investment. Also, as a result of co-branding's synergy effects, additional points of differentiation can be created for the partner-brands in consumer minds.[10]

Co-branding has a number of drawbacks that have also been exposed in the marketing literature. A company that has chosen the wrong partner will suffer from the negative impact of its choice. If a partner-brand becomes unattractive for the co-brand's target market, both parent brands will suffer from the ensuing loss of confidence. Another drawback is that co-branding relationships require complex strategic and legal skills on the side of both partners. Co-branding partners are faced with additional challenges and complexities when co-ordinating their advertising, sales promotion, and public relations efforts. This coordination needs considerable investment in terms of time and money and, often, managers have been found to underestimate the organizational capabilities needed to support and sustain this process. On top of that, co-branding relationships involve complex legal agreements (such as those discussed below) which require continuous administration after the initial

[7] T. Blackett and B. Boad, *Co-branding: the Science of Alliance* (St. Martin's Press, New York, 1999), Aaker, n. 1, pp. 298–300 and Keller, n. 1, pp. 360–70.

[8] J. Phillips, *Trade Mark Law: a Practical Anatomy* (Oxford University Press, Oxford, 2003), p. 533.

[9] *Boehringer Ingelheim Pharma KG and Others v Swingward Ltd and Others* and *Merck, Sharp & Dohme GmbH v Paranova Pharmazeutika Handels GmbH* C-143/00 [2002] 2 C.M.L.R. 26.

[10] A. Rao, 'Strategic brand alliances', in 5(2) *Journal of Brand Management* 111–19 (1997); J. Washburn et al., 'Co-branding: brand equity and trial effects', 117(7) *Journal of Consumer Marketing* 591–604 (2000); K. Desai and K. Keller, 'The effects of brand expansions and ingredient branding strategies on host brand extendibility', 66 *Journal of Marketing* 73–93 (January 2002) and R. Abratt and P. Motlana, 'Managing Co-branding strategies: global brands into local markets', in M. Kotabe (ed.), *International Marketing*, Sage Library of Marketing, Vol. 5 (Sage, London, 2006), pp. 355–66.

agreement is passed. The need to include clauses which regulate the co-branding partner's behaviour (moral clauses) or clauses that address the need for early termination of the licence remind both partners of the potentially severe financial consequences of such a legally binding agreement.[11] A co-branding agreement typifies the cliché that a contract becomes relevant when a relationship turns sour.

An issue that has rarely been addressed in the marketing management literature is the question of when and how a co-branding partnership can be terminated. While legal agreements can set a target and a deadline for such termination, the fact that a co-brand is taken off the market is likely to cause a perceptional rupture in the target market's social and emotional relationship with the co-brand and/or either of its parent brands. In order to avoid doubts and confusion on the side of consumers, a co-brand ideally needs to be phased out just as smoothly as any other brand's decline needs to be managed. The brand life-cycle model can help managers to communicate the 'death' of a co-brand in order to minimize the negative effects that a hasty or unplanned withdrawal might have for both parent brands' equity. Usually, the 'retirement' of brands is managed by slowly cutting back on promotional expenditure (especially advertising and sales promotion), by cutting back on the intensity of distribution (only the most profitable sales outlets will be kept) and by communicating the phasing out of a brand to partners in the distribution channel.[12] However, there may be critical instances where marketers need to convey a message instantly and widely; then, as the Disney case illustrates below, an alternative and more disruptive strategy would be to denounce the synergy publicly and abruptly and shed the burden of the co-brand.

All co-branding is part of diversification strategies of firms: two, or more, established brand owners open up new markets, seek new opportunities, and thus increase their brand's visibility and capitalize on each other's strengths (recognition, loyalty, goodwill and reputation). Co-branding makes use of brand synergy effects. These effects can also be achieved through other means, such as mergers and acquisitions. For example, the merger between Schweppes and Cadbury's and the acquisition of various car brands by Ford have been strategically undertaken so as to make maximal use of the synergies between brands in similar markets or even within the same category of products. Mergers and acquisitions however are not to be confused with co-branding (see definition above), since a co-brand requires the existence of

[11] Phillips, n. 8, p. 533; A. Selden and R. Toop, 'Multibranding', 24 Franchise LJ 181–205 (Winter 2005) and A. Hurwitz, 'Co-branding: managing franchise brand associations', 8 Oklahoma City University Law Review 373–93 (1995).

[12] G. Day, 'The product life cycle: analysis and applications issues', 45(4) *Journal of Marketing* 60–67 (1981) and Keller, n. 1, pp. 668–71.

two established and *independent* brands which *temporarily* join to lend their brand names to a *new* product or service. So, co-branding, unlike mergers and acquisitions, is viewed as a strategic and temporary *marketing* exercise which does not affect the organizational integrity of both partners as independent entities.

Figure 10.1 illustrates the links between co-branding, product and communication. Co-branding as a strategic tool is based either on a product (or service) or on marketing communication. Product-based co-branding aims to offer a new product or service in which the brand names are visible to the consumer.[13] Parallel co-branding occurs when two or more independent brands join to produce a combined brand, whereas ingredient co-branding is found when a supplier explicitly chooses to position its brand as an ingredient of another product. Communication-based co-branding is a tool to strategically link two or more different and independent brands for purposes of joint communication.

2. CO-BRANDING IN ACTION

2.1 Parallel Co-branding

Typical examples of product-based parallel co-branding are the McVitie's brownie sprinkled with M&Ms or Häagen-Daz's ice cream and Baileys liqueur combining to form Baileys flavour ice cream. Nike and Lego Bionicle

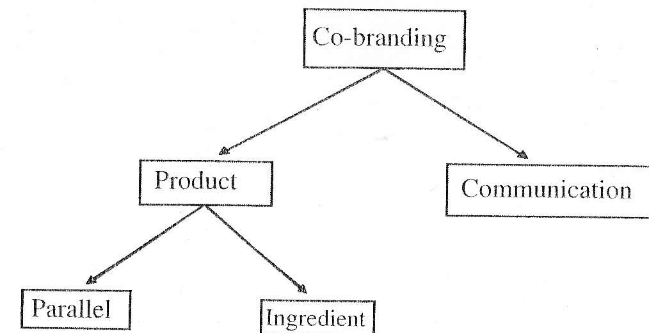

Figure 10.1 Co-branding, product and communication links

[13] D. Jobber, *Principles and Practice of Marketing* (McGraw Hill, Maidenhead, 2007), pp. 353–7.

produced the 'Bionicle by Nike' trainer[14] and Ford joined the women's magazine 'Elle' in producing the 'Ford Focus Elle' car.[15]

A case of potential parallel co-branding which has recently caused debate within marketing circles is the dispute between the Ethiopian Coffee Growers' Association (ECGA) and Starbucks on whether the names of coffee varieties could be protected under registered trade mark law in the US. If the Ethiopian coffee producers had obtained a US trade mark registration, this could have forced Starbucks into compulsory co-branding.[16] However, in December 2007 Starbucks and the Ethiopian government reached an agreement, with Starbucks agreeing to pay a premium for supporting the sustainable production of Ethiopian coffee.[17]

Another example of product-based co-branding is the use of the Fairtrade logo on products directly sourced by supermarkets. When in the early 2000s more and more British supermarkets found that demand for fairly traded goods among their target markets increased steadily, organizations such as the Co-op supermarket chain, Marks & Spencer, Tesco, Sainsbury's, and Waitrose began to buy tea, coffee, chocolate, fruit and vegetables directly from fair-trade certified producers in developing countries. The Fairtrade Foundation acknowledged that the trade agreements between these supermarket chains and local producers met their requirements and so agreed for the Fairtrade logo to be displayed on, for example, Sainsbury's own-label coffee and tea. These products display two brands and are thus the product of a co-operation between two independent organizations who lend the intellectual property rights – in this case the trade marks FAIRTRADE and SAINSBURY'S – to a vehicle for their joint exploitation.[18]

The advantages for the certifier brand, the retailer brand, and the consumer are clear: through the co-branding initiative, the Fairtrade foundation ensures a wider take-up of ethically produced products; the retailer is able to offer an

[14] A training shoe for children linked to a range of Lego action figures which form part of the fictional Bionicle 'saga' – see R. Chandiramani, 'Lego strikes deal with Nike for kids' "Bionicle" trainers', *Marketing*, 11 July 2002, p. 1 and A. Grala, 'Building blocks', *License*, June 2004, pp. 34–6.

[15] P. Brech, 'Ford Focus targets women with "Elle" tie', *Marketing*, 8 August 2002, p. 7.

[16] 'Starbuck's vs. Ethiopia', *The Economist*, 12 February 2006 (Issue 8506), pp. 66–7; D. Holt, 'Brand Hypocrisy at Starbucks' (http://www.sbs.ox.ac.uk/starbucks.htm – accessed 10 January 2008).

[17] See http://seattletrademarklawyer.com/blog/2007/12/4/starbucks-chairman-marks-trademark-settlement-with-trip-to-a.html – accessed 10 January 2008.

[18] A. Nicholls and C. Opal, *Fair Trade: Market-driven Ethical Consumption* (Sage, London, 2005) and R. Harrison et al., *The Ethical Consumer* (Sage, London, 2005).

ethically oriented market segment its own ethically sourced products; and consumers see the FAIRTRADE sign on the Sainsbury's tea package as a sign reassuring them that they are buying independently certified, ethically produced products. There is a synergy between the brands that allows the effective communication of complex messages between all the parties involved. This win-win-win situation for the co-brands and the consumer is often described as strategic 'fit'.[19] This 'fit' ensures that the relationship between the co-brands is relevant, consistent, and mutually reinforces the brands' image and position in the mind of the consumer. Both partners have to monitor each other's activities closely: if Sainsbury's were to be accused of exploiting their trade partners, the Fairtrade brand would be accused of colluding in exploitative business practices and suffer accordingly.

2.2 Ingredient Co-branding

Perhaps the best-known example of ingredient co-branding is the chip-maker Intel, which markets and positions its products as key components of other branded products, such as Sony or Dell computers. Unlike parallel co-branding, ingredient co-branding requires a brand which is positioned on the market purely as an ingredient of another manufacturer's product. It has been pointed out by various studies that Intel's superior co-branding – not its actual product superiority – has allowed it to overtake its main rival AMD, which offers chips of the same, and sometimes even better, quality but whose brand is perceived by consumers to signify inferior quality.[20]

The case of Intel also raises a number of issues linked with market and business moral values which are often ignored by mainstream marketing scholars and specialist lawyers. Intel's practices have repeatedly been found in breach of US and EU law by putting undue pressure on computer hardware

[19] C. Whan Park et al., 'Evaluation of brand extensions: the role of product feature similarity and brand concept consistency', 18(2) *Journal of Consumer Research* 185–93 (1991); B. Simonin and J. Ruth, 'Is a company known by the company it keeps? Assessing the spill-over effects of brand alliances on consumer brand attitudes', 35 *Journal of Marketing Research* 30–42 (1998); C. Baumgarth, 'Effects of brand- and product-fit on the evaluation of co-branding', Proceedings of the 29th European Marketing Academy (EMAC) Conference (CD-ROM-Version, Rotterdam 2000) and R. Pruppers et al., 'Survival of the fittest: the multi-faceted role of fit in co-branding', 32(1) *Advances in Consumer Research* 245 (2005).

[20] D. Norris, 'Ingredient branding: a strategy option with multiple beneficiaries', 9 *Journal of Consumer Marketing* 19–31 (1992); D. Norris, '"Intel Inside": branding a component in a business market', 8(1) *Journal of Business & Industrial Marketing* 14 (1993).

manufacturers not to deal with its main rival AMD and to include only Intel chips in computers.[21]

2.3 Communication-based Co-branding

Communication-based co-branding can take different forms. The maker of dishwashers and washing machines for example can join a producer of detergents so that both brands recommend each other to consumers. Sponsorship often results in co-branding, too, whereby the sponsor's brand name appears on the product being sponsored. Sports events and football clubs are increasingly using this kind of co-branding. For decades Disney has used the McDonald's brand (and vice versa) to extend the brand's outreach over its target group: children, young teenagers, and families. Children received Disney figures in their 'Happy Meals', Disney opened up its theme parks to McDonald's, allowing McDonald's to open branches in the parks, and McDonald's benefited from the increased promotional activities it could offer its customers. The mutual reinforcement of the Disney and the McDonald's brand is a prime example of communication-based co-branding.[22]

Recently, however, Disney cut its ties to McDonald's, with which it had joined on various co-branding initiatives. The reasons for this widely discussed move are to be found in the negative publicity which had ravaged McDonald's in the previous years, such as that arising from *Supersize Me*[23] and *McLibel*.[24] This had begun to negatively affect the Disney brand in consumer surveys. Both brands dominate different categories (fast food and entertainment) but targeted similar segments of the population: families and consumers of low income and low education. These reasons had brought both brands together in highly successful and targeted co-branding exercises. Yet the very reasons which brought these brands together – their focus on the child

[21] See 'Intel investigation', 10 *Corporate Legal Times* 96 (March 2000) and 'Korea Fair Trade Commission investigating "Intel"' 51(33) *Electronic News*, 15 May 2005.

[22] R. Grossman, 'Co-branding in advertising: developing effective associations', 6(3) *Journal of Product & Brand Management* 191–201 (1997).

[23] A film in which the independent film maker Morgan Spurlock eats only food purchased from McDonald's for 30 days. Spurlock gained 24.5lb and experienced various health problems as a result. See E. Cottone and C. Byrd-Bredbenner, 'Knowledge and Psychosocial Effects of the Film Super Size Me on Young Adults', *Journal of the American Dietetic Association*, 107(7), 1197–1203,

[24] The libel trial conducted by McDonald's against two environmental campaigners. The trial exposed embarrassing facts about McDonald's business practices and was the subject of a film documentary. See John Vidal (1997), 'McLibel: Burger Culture on Trial' (New Press, New York, 1997).

and the family as consumer decision-making units – became the reason for Disney's withdrawal, as children and their families began to see McDonald's in a negative light. In October 2006, Disney therefore decided to disassociate itself from all brands that could be perceived as 'junk food', such as Kellogg's and McDonald's. This decision included all communication- and product-based activities of the Disney brand: menus at their theme park would be revised, Disney-themed biscuits would be removed from supermarket shelves, and the promotion of Disney-figures at McDonald's restaurants would be stopped.[25]

Often, communication-based co-branding is used as a positioning tool. The Sony 'Play Station Portable' (PSP) used to be produced in black or dark silver only and was introduced into the market at a very high price. As a result of this, the Sony brand suffered from a lack of recognition and take-up among female teenagers and young women. The product was perceived by this target market as a 'boys' thing'. Sony made the decision to produce the PSP in pink and to adopt the female pop-singer 'Pink' – who had built a successful brand around the concept of 'pink' – as a brand endorser. Both brands, Sony and the pop-singer, capitalized on the obvious strategic 'fit' and the consistency between the Sony PSP brand and the 'Pink' brand, which essentially try to reach the same target groups. 'Pink' is seen by her target group as an independent, 'non-girly' young woman who has her own mind and who causes controversy with her calls to end the fur trade, for example. Sony used these perceptions to surround its product with ideas of independence, open-mindedness, and urban culture in the mind of a target group that would not have seen the original PSP as attractive.[26] The use of 'Pink' in this case goes further than pure celebrity product endorsement: there is a new product that only makes sense to its target segment because of the mental connection to the values that the performer represents rather than its actual colour.

3. ISSUES OF CONTROL AND MANAGEMENT OF CO-BRANDS

The examples mentioned above point clearly at the advantages as well as disadvantages of co-branding. On the one hand, co-branding is able to tap various sources of brand equity and thus adds value to the brand. It provides

[25] M. Garrahan, 'Disney orders healthier food rules for children', *Financial Times*, 17 October 2006, p. 19.

[26] S. Boxer, 'The Gameboy girls', *Financial Times*, 25 May 2004, p. 13 and 'Snapshot Pink', *Musicweek*, 2 September 2006, p. 4.

brands with unique points of differentiation which in crowded markets populated by similar products are often the most important sources of competitive advantage of one brand over another. Co-branding aids the positioning of brands in the minds of consumers. By providing endorsement and promotional opportunities for each other, co-brands provide resources for their partners which lower the overall marketing communications costs for the brands involved as a co-brand carries greater brand equity than the sum of its parts. Communication-based co-branding enhances awareness and interest while product-based co-branding can reduce the overall costs associated with the introduction of a new product in a market that partners are unfamiliar with.[27]

On the other hand, co-branding is a field only to be entered if managers are confident about the consequences of the inevitable loss of control which any brand alliance brings with it. As each company loses a certain degree of control over its own brand, there is potential for disagreement, misunderstanding and conflict. All four main areas of marketing strategic decision-making – Product, Price, Place, Promotion (the '4 Ps') – can become a source of conflict. Let us take the example of an up-market celebrity who lends his or her name (brand) to be displayed on products of a well-known fashion maker. If that manufacturer were to use the celebrity's name to produce low-quality clothing (Product) in the lowest price-bracket (Price), combined with a distasteful advertising campaign (Promotion) in order to push its goods en masse into a down-market supermarket chain (Place), then the celebrity's brand name would be tarnished. Vice versa, celebrities and pop-singers as brands often have short life-cycles and their behaviour in public is often as unpredictable as it is undesirable. Sony as the maker of the PSP therefore has to closely monitor 'Pink's' action in the public sphere.[28] The loss of control over the brand means that a badly managed co-branding partnership can easily result in overall loss of brand equity for either or both brands within the partnership. The poor performance of one brand directly impacts on the perception of the other brand in the minds of the target market.

This loss of control does not only take place under the influence of the activities of the co-branding partner but also as a result of the shifting consumer perception of the parent brands. A co-branded new chocolate product involving a famous whisky brand will not only influence the attitudes of

[27] See J. Motion et al., 'Equity in corporate co-branding: the case of Adidas and the All Blacks', 37 (7–8) *European Journal of Marketing* 1080–94 (2003) and L. Leuthesser et al., '2 + 2 = 5? A framework for using co-branding to leverage a brand', 11(1) *Journal of Brand Management* 35–47 (September 2003).

[28] D. Avery and J. Rosen, 'Complexity at the expense of common sense? Emerging trends in celebrity endorsement deals', 23 *Entertainment and Sports Lawyer* 23 (Summer 2005).

prospective consumers of the new product but also change the attitudes and perceptions of these consumers towards the whisky brand. Its association with a chocolate brand might render it more 'soft' or 'female' in the eyes of its target group. This reminds us of the socio-philosophical and behavioural place of brands in our world, which is not only of a management and strategic, but essentially of a communicative, nature. As much as brands are the outcome of strategic actions of utility-maximizing, rational managers they are the outcomes of communicative interactions between various actors in a market. The decisions of these actors are both based on 'tangibles', such as the physical qualities of a product, as well as 'intangibles', i.e. cultural and social perceptions of a brand. Therefore, co-branding shifts meanings within the minds of target groups and leads to new types of symbolic interactions between brands and their consumers. This can result in a temporarily increased amount of control that consumers have over the market position of a brand. This control is not necessarily exercised by consumers in a pro-active way but often resides in consumers' attitudes towards and perception of brands.[29] The disaffection and consumer confusion caused by a mismanaged co-brand, for example, will be the result of attitudinal and behavioural shifts in consumers. The powerful synergy effects that the owners of brands try to achieve through co-branding can also increase consumer resentment and disaffection if the alliance is seen as a venture to dominate markets without offering more customer value.[30] Problems may emerge from the fact that a co-brand is the result of an intellectual property being lent and, thus, the result of a property transaction.[31] The lack of relevant case law however, probably shows that the relationships between the parties are exhaustively covered in the contractual agreement or that the parties choose to resolve conflicts employing commercial criteria and do not risk protracted legal battles that would cause further negative publicity.

[29] D. Holt, 'Why do brands cause trouble? A dialectical theory of consumer culture and branding', 29 *Journal of Consumer Research* 70–90 (June 2002); C. Lury, *Brands: the Logos of the Global Economy* (Routledge, Abingdon, 2004); A. Arvidsson, 'Brands: a critical perspective', 5(2) *Journal of Consumer Culture* 235–58 (2005), and R. Elliot and L. Percy, *Strategic Brand Management* (Oxford University Press, Oxford, 2007), pp. 44–54.

[30] N. Klein, *No Logo* (Flamingo, London, 2000), pp. 143–64; M. Haig, *Brand Failures: the Truth About the 100 Biggest Branding Mistakes of All Time* (Kogan Page, London, 2003), pp. 40–43.

[31] Phillips, n. 8, p. 533 and A. George, 'Brand rules: when branding lore meets trade mark law', 13(3) *Journal of Brand Management* 215–32 (2006).

4. CO-BRANDS AND INTELLECTUAL PROPERTY RIGHTS

Once the prospective partners have identified the synergies that will make co-branding a mutually beneficial exercise there are a number of legal issues they need to resolve. First, they have to indicate what each one of them is contributing to this exercise and identify how the co-brand is to be protected. In a straightforward case, the brands will be registered trade marks. However, the agreement might also involve unregistered trade marks, other indicia (for instance, trade names, geographical indications, or domain names), product get-up, marketing schemes, or advertising techniques. The rights the parties possess must be identified and clearly described. For example, the get-up of a product might be protected by design rights solely or cumulatively with trade mark rights.

The next step should be to delineate ways of common exploitation. These can range from simple coexistence of two brands on a common co-branded platform (for example Dell and Intel or McDonald's restaurants in a Disney theme park), to the creation of a new co-branded logo (for example the Pink PSP), or more intricate and integrated dealings such as the creation of a new product or the adoption of common production or marketing methods (for example a liqueur flavoured ice cream). The geographical extent of the co-branding must also be settled, keeping in mind that intellectual property rights are jurisdiction specific. One should note that co-branding may facilitate market entrance in one jurisdiction but undermine the value of one of the brands in another jurisdiction. Similarly, the cultural global market is still segmented into local markets with strong traditions.

Maintaining protection of the individual brands and ensuring that any new brands or logos will obtain maximum protection should be the third step; for example, parties should seek to obtain registrations of any new signs but at the same time maintain existing registrations covering their individual brands.

Contextualizing a co-branding agreement, the parties need to take a look at the future. As we have mentioned earlier, failure in co-branding can have consequences beyond the realm of the particular agreement endangering the integrity of the individual brands. The parties should ensure that any break-up is resolved amicably and effectively. After all, from a marketing perspective, co-branding is defined as a potentially long-term relationship but is, in essence only a temporary one. This is why there must also be steps in place from the outset dealing with what happens in the case of early termination. On the other hand, success in co-branding can bring the partners even closer, and they might realize that there are further synergies to exploit. A co-branding agreement should not purport to be the vehicle for closer cooperation; the scope of the agreement is delineated by the nature of the co-branding in general and the

aim of the specific co-branding exercise in particular. Accordingly, setting the limits of the agreement and providing for regular monitoring and review, in other words embedding the agreement in its commercial context, is essential. If the parties decide to cooperate on a more permanent basis they should explore the appropriate vehicles, such as establishing a joint venture. Relying on a co-branding agreement would not provide the necessary contractual checks and mechanisms.

In essence, the first two steps, identified above, aim to facilitate the parties and enable the agreement. The purpose of the third step is to strengthen the positions of the respective parties within the context of the agreement, whereas the last steps must be seen as a flexible safety mechanism. Commentators have identified a number of more specific types of clauses that should be incorporated in co-branding agreements that, for our purposes, are organized below under three steps.[32]

4.1 Facilitating the Parties and Enabling the Agreement

The critical point about co-branding exercises is that they must be seen from the start as a collaborative project where the parties are committed to contribute the use of their individual brands but also to build a mechanism that will allow their common exploitation. Indeed collaboration is what is lacking in parallel importation cases where two trade marks may coexist on the same product.

So, first, the parties must indicate contractually what they will contribute to the agreement: the brands that will enable the co-branding exercise. Secondly, they must indicate how these brands are protected, realizing, once again, that intellectual property rights are territorial. Thirdly, each party must acknowledge the other party's brands and rights.

The next step is to describe how these brands will be exploited and build a structure for their relationship. For example, the parties might opt for dual branding and the grant of reciprocal licences or the creation of a new brand that incorporates or refers to their individual brands. In terms of product, they must determine whether co-branding will involve existing products or the creation of a new product. Finally, they must delineate the geographical extent and the time term of the agreement.

Then they must consider the factors that will support co-branding: funding, the allocation of marketing and product development costs, and the sharing of

[32] See for example A.C. Shelden and R. Scott Toop, 'Multibranding' 24 WTR Franchise LJ 181 (2005) and M. M. Squyres, *Trademark Practice Throughout the World* (West, St Paul, MN, 1998 and updates), §20:11:10.

information regarding customers and product markets. From the opposite perspective they must decide how revenues will be divided and the allocation of customers and rights, in the case of new intellectual property rights that may arise.

4.2 Supporting the Parties

At this stage the approach of the parties becomes somewhat more defensive. They must be reminded of the ephemeral nature of co-branding and provide for the reinforcement of their individual rights within the framework of the agreement.

First, each one of the brands might continue to have an independent existence and, for certain, each individual brand will continue to have a value outside the co-branding context. Accordingly, the parties must agree on the use of their brands outside that context and take measures that will enable them to maintain their integrity and value. For example, they must ensure that there will be no customer confusion regarding their identity: the brands must fit together rather than one 'morph' into the other. Moreover, according to the product market, consumers must be made aware of each party's contribution towards a new product. In principle, the weaker party – in terms of size and market positioning – must ensure that its brand or even its own separate persona will not be engulfed by the stronger brand; the NutraSweets and Gore-Texs of this world should try and maintain their own identity and stand out from the shadow of Coca-Cola and Nike. They need to communicate to their partners, but also to ultimate consumers of their products, that they are distinct entities and brands. From the opposite perspective the stronger brand must be protected from self-inflicted dilution; there is a fine balancing exercise between retaining the exclusivity attributes of a particular brand and entering new product or geographical markets. This is particularly relevant for luxury brands that can be debased by their own proliferation.[33]

The parties must undertake to maintain the validity both of their individual and common rights and seek their enforcement. In the case of a new co-brand the parties must indicate who is responsible for obtaining protection. The same applies to all other intellectual property rights that might cover new products, manufacturing processes, and marketing methods. On the other hand, confidentiality clauses will assist the parties in providing an environment that will encourage them to share information.

[33] See S. Stadler Nelson, 'The Wages of Ubiquity in Trademark Law', 88 Iowa L Rev. 731 (2003).

The next issue to be considered is the allocation of liability if, for example, the product is dangerous or defective. Potential liability is critical as such in any agreement involving consumer products. In co-branding, harming consumers can also affect the value of the brands. This is another fine balancing exercise the parties must attempt between achieving their common goal and protecting their own individual interests.

A tool for securing some of the goals mentioned above is the inclusion in the agreement of quality control provisions combined with the appointment of personnel that carry the responsibility of monitoring and maintaining product quality and responding to quality crises. However as the McDonald's–Disney crisis demonstrates, consumer perceptions change over time. This advocates in favour of the conclusion of medium-, rather than long-term, but renewable agreements.

4.3 Looking to the Future

Setting tangible goals that can be monitored and regularly reviewed is the main way for assessing the effectiveness of co-branding. The agreement should provide a monitoring mechanism and introduce some flexibility by allowing the parties to reconsider and negotiate their strategies at regular intervals. In addition, the parties must be prepared to resolve disputes that they are unable to foresee in the co-branding agreement. The agreement must provide a dispute resolution mechanism that will reassure the parties that co-branding will successfully overcome minor squabbles. In the case of failure the agreement must also provide for exit strategies that will at least attempt to safeguard the integrity of the parties' individual brands.

5. CONCLUSION

In this chapter we have defined co-branding, identified its variations, discussed its advantages and disadvantages, and attempted to outline its legal context.

Co-branding is a valuable communicational fiat; its scope, though, is limited in terms of product and market audiences. What underpins and characterizes, and at the same time potentially limits, co-branding is the dynamism of consumer perceptions and attitudes. And, from a theoretical perspective we have proposed the adoption of a three-step model for enabling, monitoring, and evaluating a co-branding exercise that embeds legal analysis in its commercial context. Sharing names by way of co-branding has great advantages provided there is trust and transparency between the parties; but since the partners are commercial entities a kind of 'pre-nuptial' agreement is always required.