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Brand New World: Distinguishing Oneself in the Global Flow

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Ancient physicians engaged in property disputes over the seals they impressed on the containers of their medications, making brand marks

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the oldest branch of intellectual property.¹ The antiquity of brand marks, however, has not helped their proper understanding by the law. While the conceptual and historical foundations of copyrights and patents continue to be part and parcel of contemporary legal debates, the full history and theorizing on business marks is largely external to trademark doctrine. Furthermore, with only a few and by now outdated exceptions,² whatever scholarship exists on these topics has been performed mostly not by legal scholars but by archaeologists, art historians, anthropologists, sociologists, and historians of material culture.

Such a striking imbalance suggests that the law is more eager to assume and state what trademarks should be rather than understand how they actually work today. Nor does the law often acknowledge the many different ways in which marks have always been deployed to distinguish both goods and their makers. This is not just a scholarly problem: given the extraordinary importance of brands in the global economy, the growing disjuncture between the way brands function in different contexts and cultures and trademark law's simplified conceptualization of that function has become a problem with increasingly substantial policy implications. The innovative and wide-ranging papers collected in this *UC Davis Law Review* symposium respond to an urgent need to re-align the law with business practices and consumer culture and behavior. These papers can, however, only move toward that re-alignment. If the disciplinary, geographical, and chronological scope of this symposium is a good indication of the complexity of the issues and of the range of perspectives needed to understand them, the length of this volume, while unusual, still underrepresents the size of the problem. The papers occupy two issues of the *UC Davis Law Review* — a first in this journal's history — but much more empirical research and cross-disciplinary analysis will be needed to understand what marks are and what the law should do about them.

Brands represent the oldest branch of intellectual property, and yet modern law has focused on their conceptual instantiation in only one form: trademarks. To make an artificially narrow conceptualization

¹ Danielle Gourevitch, *How Did Gallo-Roman Physicians Treat Their Patients? A Look into the Earliest Pharmacopoeias of France*, 34 *MEDICOGRAPHIA* 238, 245-47 (2012).

² See, e.g., FRANK ISAAC SCHECHTER, *THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADE-MARKS* (1925) (tracing the development of trademark law from medieval times to the early twentieth century); Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 *HARV. L. REV.* 809, 848-59 (2010) (discussing trademark law's expanding role as a modern form of sumptuary law).

even narrower, modern scholarship on trademarks has focused on one aspect of their role in commerce — the economics of information. In agreement with the assumptions of law and economics, marks have come to be seen as devices to reduce consumer search costs, thereby supporting investment by a producer in consistent quality over time and space.³ This economic analysis elegantly coupled both consumer and producer interests in the legal protection of marks, but only recognized certain features of business marks. It failed to recognize, for example, that brands were being used to supply information not just about the product or service, but about the user. It failed to see how clothes of a certain design or with a certain logo constructed the person who bought and wore them: woman or man, cool or reliable, energetic or sedentary, etc. — that, in the eyes of many, clothes made the man or woman. The law also failed to recognize how users contributed to making and promoting the brand, thus giving it value. The relationship between the person and the brand has never been a unidirectional flow of information from good to buyer, but rather a dialogic process bordering on co-authorship.

The lacuna is greater still. The psychological impact of brands was masked by the simple understanding of brands as informational. The modern account failed to see the brand as an emblem of material culture, as *zeitgeist*, or a symbol of the times. Finally, the modern understanding obscures the relationship of brands to our station in life. Indeed, a popular song today has a girl in New Zealand reciting the luxury brands from the other side of the earth, even as she rejects them — simultaneously as being beyond her means and also outside her desires:

We're driving Cadillacs in our dreams.
But everybody's like Cristal, Maybach, diamonds on your
timepiece.
Jet planes, islands, tigers on a gold leash
We don't care, we aren't caught up in your love affair
And we'll never be royals.⁴

The papers presented here explore the complex social, psychological, and cultural role played by brands, and how their

³ William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 269 (1987) (“The benefits of trademarks in reducing consumer search costs require that the producer of a trademarked good maintain a consistent quality over time and across consumers. Hence trademark protection encourages expenditures on quality.”).

⁴ LORDE, *ROYALS* (Lava Records 2013).

production exceeds the agency of those who may design, own, or control them. They also begin to consider how brands (when broadly construed as inscriptions conveying distinctive differences, as well as the performances through which those distinctions are displayed and made public) are in fact quite distinct from trademarks as lawyers understand them. In this introductory article, we have chosen not to summarize the sixteen other papers included in these two symposium issues, but rather to use their arguments and findings to inform our discussion. In Part I below, we briefly sketch a cultural approach to brands, distinguishing our analysis from the economic theory that currently dominates the understanding of business marks. In Part II, we anticipate future challenges to branding logics.

I. FROM ECONOMICS TO CULTURE & FROM GOODS TO PERFORMANCES

When you unbox an Apple iPhone today, you find inside an Apple logo sticker, not an instruction manual. The sticker is not to be affixed to the iPhone, which already has that mark etched on its back, and on its screen upon powering up. The logo here is not designed to help inform the user that he or she has purchased an Apple product. Rather the hope is that the user might want to tell others that he or she has purchased an Apple product. (This act of signification may not even be performed by the buyer him/herself, but rather delegated to the “kinship network,” like when children attach those stickers to their bike or school binder.) The Apple logo here seeks to inform the world about the buyer or those connected to the buyer, not the product. Furthermore, even while the buyer seems to endorse the product, *the product endorses the buyer back*. This was particularly evident in pre-internet days, when certain luxury goods could not simply be purchased online by anybody armed with Google and a capacious credit card, but required some pre-knowledge, like knowing where or through whom one could buy them. This symmetry between buyers endorsing (or confirming the distinction of) goods and goods endorsing the distinction of the person who could buy them has been missed by the conventional economic view of trademarks. Economic theory saw the informational function of marks as unidirectional — from the product to the buyer. But, as Margaret Chon observes, trademark law is “devoid of a deep understanding of the communicative process underlying brand value.”⁵

⁵ Margaret Chon, *Slow Logo: Brand Citizenship in Global Value Networks*, 47 UC DAVIS L. REV. (2014); see also Stacey L. Dogan & Mark A. Lemley, *Parody as*

The brand is not just about expressive identity; it is a full-fledged *social* phenomenon, a sign of the times. Brand packaging, ads, and slogans are emblems of material culture that help us define and understand who we are, or who we were. To wit: imagine a visit to a Museum of Brands (there actually is one in London). Such a visit is a step back through history. It tells us about who we were through the products of the age and the lifestyles they enabled. The slogans of the age represent its zeitgeist. *Have it your way. I want my MTV. Think different. Rip, Mix, and Burn.* Brand marks reflect the technologies and people of a time and place. In his fascinating account of the new plain packaging for cigarettes required under Australian law, for example, Alain Pottage describes retail packaging as “closely conditioned by . . . the evolution of the technologies which determined what sorts of images or symbols could be printed, stamped, or inscribed on what sorts of materials.”⁶ Pottage writes, “[T]he look and feel of the package depended in part on the development of packaging materials such as corrugated cardboard or molded fiber.”⁷ At the same time, brands do not just convey a time period. Brands themselves have “agency,” in Pottage’s words — they act on the world, eliciting particular consumer responses and giving products qualities “they would not otherwise have.”⁸ Indeed, in the context Pottage is describing — the tobacco industry — brands have blood on their hands. Brands, for better or for worse, make a brand new world. At the same time, brands are also resources used by individuals and communities for contesting and reshaping the values of a time and place. Brands both shape and convey meanings. Indeed, we can recognize shifts in culture through changes in marks — for example, from the change in warnings on cigarette packages from “CAUTION: Cigarette Smoking May Be Hazardous to Your Health” to mandated plain packaging.⁹ We may usefully apply Clifford Geertz’s famous definition of culture as “webs of significance”¹⁰ to similarly understand brands as evolving cultural meanings that change over time.¹¹

Brand, 47 UC Davis L. Rev. (2014) (“Brands shape our communities and define our values. And while the traditional economic account views brands as conveying information unidirectionally — from producer to consumer — brands also convey information about the consumer and allow members of the public to communicate to each other.”).

⁶ Alain Pottage, *No (More) Logo: Plain Packaging and Communicative Agency*, 47 UC DAVIS L. REV. (2014).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 5 (1973) (“The concept of

In elaborating the cultural work that brands do, our argument is not that the conventional economic analysis of trademarks is wrong, but that it is certainly incomplete. It is not simply that advertising changes the nature of one's preferences, thus fouling the assumption of "*de gustibus non disputandum est*" — the economists' attempt to hold individual preferences exogenous from the analysis. We take the effect of brands to be far more profound: they are tools that allow buyers to construct and perform distinctive personae for themselves. Brands are not valuable to the buyer simply because of the information they convey, but because of the "identity performances" they enable. Paradoxically, buyers may be attracted to branded goods because of these goods' potential instability, that is, not so much because of their stability or reliability as products or the stability of the information they carry, but rather because they function as resources the buyer can use to do something with — something that is always to some extent new. Buyers mobilize brands as props in their performances of image construction, which means that the meaning of brands is modified by the very performances they make possible. This may take place through the juxtaposition of varied branded goods brought together in the buyers' homes, on their clothing, etc. Barton Beebe describes the phenomenon of "shanzhai," or elaborate mimicry of established brands, in China today as "performance art" on a national scale.¹² Individuals, towns, and companies engage, imitate, and play with well-known luxury brands and experiences as both commerce and comment. Sonia Katyal describes transnational "anti-brand" movements by which consumers seek to upend the "official" meaning of the brand.¹³ Stacey Dogan and Mark Lemley identify ways that brands beget brands — how Starbucks precipitated Charbucks, and Louis Vuitton spawned Chewy Vuitton.¹⁴ Indeed, in their identification and discussion of the phenomenon of "brand parodies" — branded products that also serve as commentary on well-known brands — Dogan and Lemley acknowledge many ways in which "[b]rand

culture is essentially a semiotic one. Believing, with Max Weber, that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs.").

¹¹ Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 511 (2001).

¹² Barton Beebe, *Shanzhai, Sumptuary Law, and Intellectual Property Law in Contemporary China*, 47 UC DAVIS L. REV. (2014) [hereinafter *Shanzhai*] (quoting YU HUA, CHINA IN TEN WORDS 181 (Allan H. Barr trans., 2012)).

¹³ See Sonia K. Katyal, *Trademark Cosmopolitanism*, 47 UC DAVIS L. REV. (2014).

¹⁴ See Dogan & Lemley, *supra* note 5.

parodies . . . don't fit well within existing trademark infringement or dilution law."¹⁵

James Leach forces us to imagine the next conceptual step, that is, to go beyond the performative use of branded goods and brands and think of the performance itself as the process through which persons and cultural distinctions are created.¹⁶ The lengthy and intricate initiation rituals that turn some Papua New Guinea teenagers into “men” do rely on all sorts of specific objects — from clothing to staging devices. They are also quite expensive and physically taxing (growing up looking cool has never been cheap or painless anywhere). But what matters there are not the objects and props as distinct and distinguishing objects, but rather the performances that construct these specific new persons by connecting them to things, persons, and cultural narratives. This is not a call to happily go back to times and places where cultural distinction was produced through expensive performances rather than expensive branded goods, but rather to realize that when we mention “performance art” in connection to brands, as Beebe invites us to do, we may in fact be speaking a lot less metaphorically than we think.

Branding is and has always been performative. Evelyn Lincoln and Pascale Rihouet, for instance, show how late medieval and early Renaissance Italian religious confraternities developed distinctive marks, which they had included in the paintings and ritual objects they commissioned as well as on the buildings they owned. These marks spread long-lasting signs of the confraternity's presence and virtuous activities for everybody to see in a much more permanent fashion than today's ads and billboards can. At the same time, several of these branded objects, as well as the distinctive uniforms that members wore during confraternity-related activities (including processions featuring self-flagellations) were obviously designed for, and part of, public performances. It was through such performances that the confraternity members, together with the attending public, displayed and confirmed their corporate identity and their place in the town's life. Their marks may have been attached to goods, but they functioned by moving around together with the body of the confraternity member, by producing an “animated logo for the confraternity.”¹⁷

¹⁵ *Id.*

¹⁶ James Leach, “We Will Make a Man Out of You”: Taro “Brands” and Initiation “Styles” on the Rai Coast of Papua New Guinea, 47 UC DAVIS L. REV. (2014).

¹⁷ Evelyn Lincoln & Pascale Rihouet, *Brands of Piety*, 47 UC DAVIS L. REV. (2014).

We believe that several of the symposium essays indicate that we are finally learning to recognize the performative nature of branding practices and thus go beyond “object thinking.” It is easy to understand why we have privileged objects over associations, especially the kind of performative associations between persons and things that are so important to understanding brands. Property needs its objects, and perhaps pursues them even more single-mindedly when they are elusive, as is certainly the case with intellectual property. IP always strives, necessarily so, to stabilize its constructs: work, author, invention, etc. — a goal that is always approached but never fully achieved. But this process of objectification may be even more difficult in the case of trademarks because, as suggested by historical and ethnographic examples, socio-cultural distinctions may be even more performative (and more visibly so) than other forms of cultural productions like literary works, art, inventions, etc. And collectivity follows from performativity. Inventors and authors build on the work of their predecessors and of those around them, but in the case of brands, the notion of collaboration often goes well beyond borrowing from peers or predecessors. Especially with goods that are valuable to buyers because of the social distinction they bestow on him/her, the brand functions by establishing, expanding, and then maintaining associations and connections. That is an inherently collective — not just derivative — process.

Goodwill and brand recognition may be treated as intangible but they are inherently based on many interactions and associations between people, things, and signs. This web of associations, however, has been reduced by trademark law (and its roots in law and economics doctrine) to an object that is attributed “information” (instead of potentialities, associations, etc.) while treating its users as buyers with “taste” (that is, an inclination to buy objects rather than to produce new subjectivities and cultural assemblages with them). And, in any case, the “taste” of the potential purchaser or user is cast as having nothing to do with the user’s engagement with that good. Networks are cut, sealed objects and self-contained subjects are created — precisely the kind of dichotomy that the humanities and social sciences have so convincingly questioned and sometimes undone.¹⁸

Some corporations, however, are smarter than the law. They try to channel the buyers’ transformative uses of their brands in directions they can control, for instance, by inviting consumers to connect to the

¹⁸ See, among many other interventions, BRUNO LATOUR, *INQUIRY INTO MODES OF EXISTENCE: AN ANTHROPOLOGY OF THE MODERNS* (2013).

company through their social networks. This means that companies understand that buyers change the meaning of their brands, but try to direct that process of change in a direction they can represent as the “growth” — not dilution — of their brands. Customers change the brands, but that’s fine insofar as, by doing so, they end up identifying even closer with the company whose brands they are contributing to develop. It thus makes sense, as Deborah Gerhardt suggests, that consumer investment in trademarks facilitates the rise of brands, a practice that has grown with the rise of social media.¹⁹ Deven Desai observes that not only do consumers share information about a mark, but the mark-holder can seek to convey different messages simultaneously with the mark.²⁰ As Desai writes, “[T]he mark is a medium through which many messages flow.”²¹

In the old world, marks on goods — from coins to Chinese silk²² to medicines — sought to convey authenticity, which was typically coupled with assumptions about quality. If I can be sure that the sword I am considering buying is made in Toledo with Toledo steel, then chances are it is a good sword. If I can be sure that the stamp on this brick means that it was really produced in Argilopolis — a place famous for the quality of its clay, its brickmakers, and its kilns — then I can be reasonably confident that the house I have built with these bricks will not crumble before I put the roof on. And so on. In some cases, the “brand” did not need to be attached to the good or printed on it, but could be integral to how the good looked, tasted, or sounded.²³ A Toledo steel blade could be recognized by distinctive striatures and color patterns, and one could tell pewter cups of good provenance and quality by recognizing the specific sound they made when you ticked them.²⁴ Visual or aural, marks conveyed information, but one needed to know both what that information was — “Toledo blades are good” — and be able to read the brand off the object. That is, one needed the skill to tell that a certain pattern of striatures on a blade meant “Toledo.” While modern brands work well only when

¹⁹ Deborah R. Gerhardt, *Social Media Amplify Consumer Investment in Trademarks*, 90 N.C. L. REV. 1491, 1505-09 (2012).

²⁰ Deven R. Desai, *Bounded by Brands: An Information Network Approach to Trademarks*, 47 UC DAVIS L. REV. (2014).

²¹ *Id.*

²² Dagmar Schäfer, *Peripheral Matters: Salvage/Chef-de-piece Inscriptions on Chinese Silk Inscriptions*, 47 UC DAVIS L. REV. (2014).

²³ Gary Richardson, *Brand Names Before the Industrial Revolution 4* (NBER Working Paper Series, Working Paper No. 13930, 2008), available at <http://www.nber.org/papers/w13930>.

²⁴ *Id.*

they are easy to recognize, the detection of old branding marks could be a task that necessitated some expertise — expertise that had to be mobilized even *before* one could connect a certain mark to specific information about the quality of that good. One needed to be able to sound a word, not just understand what that word meant.

In the brand new world, the detection of brands no longer requires special skills. (Actually that's precisely the point: to lower the threshold of connoisseurship and hermeneutic skills required of buyers so that they do not need to "read the good" but simply recognize the brand.) At the same time, "brand new brands" do a lot more than their ancestors. The rise of brands marks a fundamental shift in the law and business practice of trademarks. Where trademarks have long protected marks that signal the source of a good or service to consumers, increasingly today customers value logos such as the Nike "Swoosh" in and of themselves. In the "experience economy," corporations sell (the potential for) identity and community, authenticity and auras, not products. Starbucks is "everything but the coffee" — it is billed as an experience, a place to connect with others. Brands mark one as adventurous, sensible, whimsical, glamorous, rugged, carefree, sophisticated, cosmopolitan, old-school, and even anti-brand. At this point, advertisement professionals have a much better grasp than legal scholars of how brands work.

Of course, this division between the old world of marks and the new world of marks is too neat. That separation is not an essential but a contextual one, depending on the specific feature of the good, its uses, its durability, modalities and scale of circulation and display, the ease or difficulty to disseminate information about it, copy it, etc. In even the "olden days," marks served a multiplicity of functions, designed to evoke the sights and sounds of exotic places or the sturdiest and hardiest elements of nature. As Lionel Bently reveals in his historical account of one of the earliest English trademark cases, *Singleton v. Bolton*, Mr. Singleton, a manufacturer of a medicine called *Dr. Johnson's Yellow Ointment* in the eighteenth century, sought to use a trademark to control the distribution channels of his product, much the way that luxury brand makers seek to do today.²⁵ Dagmar Schäfer's paper reveals that while brands are becoming increasingly crucial to modern business, they are as old as language itself. Used to establish prestigious identities (for example, the hegemony of the Chinese

²⁵ Lionel Bently, *The First Trademark Case at Common Law? The Story of Singleton v. Bolton* (1783), 47 UC DAVIS L. REV. (2014).

Emperor as Schäfer describes²⁶), or to connect goods with their makers, they have been found in signature seals, royal coins, artists' anagrams, coats of arms, goods stamps, chops, guild marks, and more. By revisiting historical branding landscapes, papers in this symposium raise questions of what elements of these practices have been included, or excluded, from the object of modern trademark law, and why.

If there is one thing that appears different today, it is the scale of branding practices, and their global spread. Branding has become ubiquitous. Even a generic drug retailer wants to distinguish itself through branding, as Cori Hayden points out in a delightful inversion.²⁷ Brands are so pervasive in middle-class America that one can often tell the story of one's day through one's encounters with brands. Every charity, organization, and social movement seeks to brand itself, that is, to cultivate and trade off its distinct identity. Entire countries seek to distinguish themselves through brands. South Africa has an official entity called "Brand South Africa," which is "charged with marketing the country abroad."²⁸ *Foreign Affairs* journal characterizes even China's ambassador to the United States as a "brand ambassador."²⁹ A non-profit group, Light Years IP, is helping East Africa's Maasai to win trademarks to their name and customs across the world.³⁰

Brand creation, management, and licensing involve concerns distinct from those of traditional trademark, less focused on consumer confusion and more akin to copyright law's concerns for story-telling and expressive control. Where trademarks focus on quality, brands focus on feeling. Deven Desai observes that while trademarks provide consumers with information about the identity of products, brands have an emotional or symbolic component.³¹ Corporations now invest time and resources into leading the consumers to associate a certain

²⁶ Schäfer, *supra* note 23.

²⁷ Cori Hayden, *Distinctively Similar: A Generic Problem*, 47 UC DAVIS L. REV. (2014).

²⁸ Robyn Dixon, *South Africa Stumbles While Looking to Market Itself Abroad*, L.A. TIMES (Oct. 25, 2013), <http://www.latimes.com/world/worldnow/la-fg-wn-south-africa-economic-woes-zuma-20131025,0,1749866.story#axzz2inZgJZu3>.

²⁹ Cui Tiankai, *Beijing's Brand Ambassador*, FOREIGN AFF., July–Aug. 2013, at 10, available at <http://www.foreignaffairs.com/discussions/interviews/beijings-brand-ambassador>.

³⁰ Olga Khazan, *The Maasai People Take Back Their Brand*, ATLANTIC (Aug. 14, 2013), <http://www.theatlantic.com/magazine/archive/2013/09/big-in-kenya/309425/>.

³¹ Deven R. Desai, *From Trademarks to Brands*, 64 FLA. L. REV. 981, 994 (2012) (describing how economic view of trademarks does not allow for emotional or irrational aspect of purchasing behavior).

brand with a certain image and, in the process, “to look beyond price when making purchasing decisions.”³² In short: the move from trademarks to brands heralds a shift from product identification to the appreciation of the cultural meaning of that good.³³ A brand, Mark McKenna notes, “is a comprehensive concept that encompasses all of its representations and all the associated meaning.”³⁴

The range of the meaning and societal values delivered by brands proves to be very broad and varied, and it becomes more so whenever scholars look carefully at specific cases, as the interdisciplinary papers in this symposium do. Nicole Aylwin and Rosemary Coombe argue, for instance, that “[Intellectual property rights] are no longer regarded merely as tools to solve economic public-goods problems and advance capitalist accumulation.”³⁵ Rather, these scholars observe, “they are implicated and deployed in agendas as seemingly unrelated as identity politics, rural development, ethical consumption practices, the preservation of biological and cultural diversity, and indigenous self-determination.”³⁶ Marks also symbolize conditions of production, not just the identity, of the product. As Paul Duguid observes, California long ago began permitting the registration of union labels, “which determinedly, though not uniquely, sought to make the conditions of production evident to the consumer.”³⁷ This point connects Duguid’s essay to Aylwin’s and Coombe’s as they too observe the importance of what they call “Marks Indicating Conditions of Origin” (or MICOs).³⁸ MICOs signal the provenance of a product, including identifying which communities made the goods and under what conditions of market and social exchange. Aylwin and Coombe argue for a “commitment to rights-based criteria if [MICOs are] to avoid reproducing old forms of privilege or perpetuating new forms of injustice.”³⁹ Chon’s paper raises related questions:⁴⁰ Can marks serve as indicators of morality? Can they improve products and processes,

³² *Id.* at 985.

³³ Alain Pottage’s discussion of meaning in the context of mass communication is particularly helpful here. See Pottage, *supra* note 6.

³⁴ Mark P. McKenna, *Testing Modern Trademark Law’s Theory of Harm*, 95 IOWA L. REV. 63, 93 (2009).

³⁵ Nicole Aylwin & Rosemary Coombe, *Marks Indicating Conditions of Origin in Rights-Based Sustainable Development*, 47 UC DAVIS L. REV. (2014).

³⁶ *Id.*

³⁷ Paul Duguid, *California Marketing & Collective Amnesia*, 47 UC DAVIS L. REV. (2014).

³⁸ Aylwin & Coombe, *supra* note 35.

³⁹ *Id.*

⁴⁰ Chon, *supra* note 5.

policing international trade? Who watches the watchers? What does certification mean when one group's "fair trade" may not coincide with another group's "fair trade"?

We cannot wrap up this part of our brief introduction without pointing to another interesting and counterintuitive finding of the interdisciplinary approach adopted by these papers. Several of them make and support the claim that trademark law over-objectivizes the brand, depriving it of its many cultural associations and performative and collaborative dimensions. But there are also suggestions that trademarks do not always deliver on even the narrow promise to convey information about the quality of a product. Dan Kevles's fine-textured essay on the nineteenth-century trademarking of plants and fruits by innovative U.S. breeders who could not rely, at that time, on patents, dwells on the very serious problem posed by the variability of any plant variety. One simply could not know with certainty the precise features of the plant that would grow from seeds one purchased from a nursery. There were, in sum, two closely intertwined and equally serious problems: breeders could not patent the new varieties they had bred, and the variety was not a stable object that bred true and continued to reproduce itself in the same form and features through each generation. The trademarking of plants and fruits, therefore, may be read as an attempt to use the only tool the law offered breeders to protect their "intellectual property" (if limited to names and logos), but it can also be seen, more obliquely but not less importantly, as an attempt to use trademark law to create the effect that there was a stable plant or fruit variety one could name, depict, and sell in the first place. The trademarked name of the fruit and the accompanying attractively colorful picture in the catalogue created the effect — the "reality effect" — of the fruit's stability as an object when it was, in fact, subject to substantial variations. The trademark, in sum, did not simply convey information about the quality of the fruit or plant as an object or good, but actually helped to construe those trademarked plants and fruits *as objects*. The trademark helped to create the stability it was supposed to be based on.⁴¹

II. BRAND FUTURES

Even as they increasingly dominate our lives, there are counter-movements at work. If brands were about conveying information, that function has been replaced in part by new kinds of reputation systems

⁴¹ See Daniel J. Kevles, *A Primer of A, B, Seeds: Advertising, Branding, and Intellectual Property in an Emerging Industry*, 47 UC DAVIS L. REV. (2014).

made possible by the Internet. Customer rankings and reviews, of the kind popularized by Amazon and eBay, now supply a great deal of comparative and continuously updated information about products. Yelp, Angie's List, and Google reviews go beyond reviews of goods to reviews of services. Internet intermediaries, from Amazon to eBay and from Facebook to Google, increasingly interact with the branding phenomenon. In many instances, these ranking systems supply more information than can be carried by the brand alone — for example, the usability of a good or service for certain functions of interest to a narrow subset of purchasers, or whether a specific product by a famous brand is really as good as we would have assumed based on the brand's reputation.

These trends may exceed the logic of trademark law and its justification, but are certainly not surprising to scholars external to the legal community who have approached marks on objects (in both the past and present, in the West and everywhere else) as ways to develop and maintain social relations, construct persons and personae, produce cultural and material distinction, standardize practices and goods, or even protect intellectual property when patents or copyrights are not available or do not seem to provide sufficient protection. Similarly, scholars interested in collaborative and collective forms of cultural and knowledge production have focused on brands as windows beyond the individualist view of the author and the inventor. (For instance, the role of brands and trademarks is central to studies of cultural and religious heritage, as well as to the development of new religious movements.)

Even these can perhaps be improved on. Facebook and Google have recognized that an individual's social graph can be mined for products and services that might be of special interest to one's friends. Madhavi and Anupam are more likely to trust Mario's restaurant recommendations, than those of Yelp or OpenTable or even the *New York Times*.

There is another concern: if brands represent auras or stories, perhaps they have overreached and ought to be ratcheted back. Perhaps the law should try to ensure that trademarks serve a singular and narrow function to relate product to source. But we might find in the search for distinction, an understandable effort for individualization in a world of mass production. Brands can lend meaning to markets. Markets after all are an expression of social relations, including a human desire not only to understand the source of their products, but also how a good is produced and the role of that object in our social and cultural lives.

Producers find brands crucial in a world of efficient supply chains made possible by modern transportation, communication, and global mass production. Thus, a brand strategy is at the same time the embodiment of, and the antidote to, global capitalism. Brands then are the producer's response to the problem of commoditization hypercharged by a world of efficient worldwide production and distribution. When a product with reliable and attractive qualities can be mass-produced and distributed, the producer needs to change the way that product is understood or risk facing the relentless price-pressures of commoditization. The product must now "tell a story" to distinguish itself from what are otherwise functionally similar products. Rather than an engineer, businessperson or manufacturer, a producer becomes a seller of a story — an author, a narrator, a designer, or an artist.

Storytelling may be a better rubric for understanding brands than the conventional one of brands as static vessels of information. As Rasmus Nielsen of the acclaimed Danish artist trio Superflex beautifully conveyed in his Keynote address for the Brand New World conference, the issue is not simply what story a brand tells, but who has the power to tell the story — and to retell it. Stories can grow on, but also bounce off, each other. While brand producers are becoming artists, Superflex (echoing Andy Warhol in this respect) has recognized that brands can themselves become the material for art. When a beverage multinational showed little concern for the Brazilian indigenous farmers who cultivated an energizing ingredient called guarana, for example, Superflex encouraged the farmers to brand themselves through a kind of guerilla use of the multinational's trademark.⁴² As Nielsen observes in his Keynote, "we tend to communicate with things, as well, not just words and papers."⁴³ Nielsen adds that brands "mirror our desires and create our desires . . . they colonize our desires."⁴⁴

Thus, there is at once a socially useful role for brands as helping tell stories, but also a more disquieting aspect — subtly shaping ordinary people. In the latter mode, brand auras might be misleading or manipulative, a way to get a gullible consumer to part with a few more

⁴² Anupam Chander, *Illegal Art? The Artists' Group Superflex Co-opts Global Trademarks*, FINDLAW.COM, May 13, 2004, at http://writ.news.findlaw.com/commentary/20040513_chander.html.

⁴³ Rasmus Nielsen, Superflex, Keynote address at UC Davis Law Review Symposium: "Brand New World: Distinguishing Oneself in the Global Flow" (Oct. 4-5, 2012) in 47 UC DAVIS L. REV. (2014).

⁴⁴ *Id.*

coins. In his contribution to the symposium, Peter Menell reviews the psychological literature observing the exploitative nature of advertising.⁴⁵ He warns of a totalitarianism wrought by corporations, not governments: “It is more Adam Smith and Facebook than Benito Mussolini or Joseph Stalin.”⁴⁶

Some have observed the capacity of marks to entrench social difference, to reinforce the existing social hierarchies, if not by titles of nobility, then by the clothes or fragrance one wears, the handbag one carries, or the car one arrives in. Barton Beebe reports that some governments in China have become increasingly concerned about the capitalist class differentiation promoted by brands, as antithetical to “social harmony.”⁴⁷ He notes, “Beijing is reported to have banned the use of such words as ‘royal,’ ‘imperial,’ ‘supreme,’ ‘high class,’ and, ‘luxury’ in billboard advertising.”⁴⁸ Noting the “ethical crisis” faced by places such as Hong Kong, where Gucci stores proliferate alongside the misery of people who live as “cage dogs,” Haochen Sun would offer luxury brands strong trademark rights only in return for efforts to educate their consumers about poverty.⁴⁹ Sun believes this is necessary to, as his title indicates, live “together in one civilized world” that goes from Victoria Peak to more humble addresses.⁵⁰ Dagmar Schäfer also focuses on China’s keen concern with the relation between brands and social hierarchy, but goes back to the Ming and Qing periods to show how extraordinarily intricate marking practices were applied to a wide variety of goods, straddling the line between trademarks and certification marks.⁵¹ In diametrical opposition to their modern cousins, Schäfer shows that early Chinese marks were not about conveying the product differentiation so crucial to the production of value in a global capitalistic economy, but rather about reinforcing the central authority of the emperor by articulating and inscribing it through the goods that circulated in his domain. Early Chinese marks were not antithetical to “social harmony” (as some modern Chinese politicians take brands to be), but the “harmony”

⁴⁵ Peter S. Menell, 2014: *Brand Totalitarianism*, 47 UC DAVIS L. REV. (2014).

⁴⁶ *Id.*

⁴⁷ Beebe, *Shanzhai*, *supra* note 12.

⁴⁸ *Id.*

⁴⁹ Haochen Sun, *Living Together in One Civilized World: How Luxury Companies and Consumers Can Fulfill Their Ethical Responsibilities to the Poor*, 47 UC DAVIS L. REV. (2014).

⁵⁰ *Id.*

⁵¹ Schäfer, *supra* note 22.

they sought to maintain was surely not one that either Mao or the neoliberals would have approved of.

There is yet another dialectic at work with brands, one that is internal to them. The more ubiquitous a brand becomes, the less it marks an individual as distinct. An Apple logo would become meaningless as a mark of distinction for any consumer, if all consumers owned Apples. So producers of brands that distinguish consumers, and not just producers, must manage their brands carefully to avoid losing this characteristic.

Indeed, the logic of brands is such that, in many circumstances, a brand is worth more the less visible it is. Gucci's new "Jackie" bag is monogram free.⁵² A discreetly placed mark (or even no mark) on a good whose value is known only to the cognoscenti marks a discerning buyer. Such brands trade on the fact that such items are largely inaccessible, marking the buyer as one of the privileged few — even if that status is known only to the buyer himself or herself.

Does recognizing a mark's broader role in society necessarily enlarge the scope of a trademark holder's rights? No. By recognizing a mark as part of culture, a cultural theory supports the rights of those outside the corporate mark holder to comment on it, to critique it, to deploy it as part of cultural conversation, and even to play with it. Two of us (Chander and Sunder) have responded to the concern of over-propertization in an earlier *UC Davis Law Review* intellectual property symposium as follows:

Recognizing the diversity of values underlying intellectual property should lead us to share certain rights in intellectual products, rather than reserve them more closely. Recall that new theories of property, from personhood to social relations, enhanced our ability to explain and justify legal limits on property, even while they served to bolster some property claimants, such as tenants.⁵³

Nicole Aylwin and Rosemary Coombe describe exactly this, noting efforts to assert "countervailing rights such as those of consumers, patients, communities, farmers, indigenous peoples, and the users of

⁵² Liao Danlin, *Discreet by Design*, GLOBAL TIMES (July 6, 2013, 7:13 PM), <http://www.globaltimes.cn/content/789115.shtml#.UouyZmR4bNA>; Erin Donnelly, "Discreet Luxury" In, *Flashy Logos Out*, STYLELIST (Aug. 10, 2010, 6:50 PM), <http://main.stylelist.com/2010/08/10/logos-discreet-luxury/>.

⁵³ Anupam Chander & Madhavi Sunder, Foreword: *Is Nozick Kicking Rawls's Ass? Intellectual Property and Social Justice*, 40 UC DAVIS L. REV. 563, 578 (2007).

cultural goods more generally.”⁵⁴ Sonia Katyal notes that “global luxury brands have become not just the lingua franca of transnational consumption, but also of the anti-branding activists who resist it.”⁵⁵ Margaret Chon’s “brand citizenship” would recognize “the fluid, pluralistic and open-ended construction of the value of a mark and its associated social spectacle.”⁵⁶

CONCLUSION

The collection of papers in these two issues of the *UC Davis Law Review* attests to the growing importance of brands to culture and economics. A focus on brands (as opposed to trademarks alone) helps us move beyond simplistic accounts of the value of marks as merely signaling source or conveying information about a static object. Brands move from the realm of logic to the realm of emotion. The papers collected here demonstrate the agency of brands. Brands fashion brand new worlds: forming and reforming objects, collectives, hierarchies, lifestyles, meanings, and tangible material cultures that did not previously exist. At the same time, brands are tools for personal, social, and cultural performance and expression. In short: signaling source is just the beginning of the complex social and cultural work that brands and logos do. An interdisciplinary approach will thus remain necessary to understand the brand new world in which we live.

⁵⁴ Aylwin & Coombe, *supra* note 35.

⁵⁵ Katyal, *supra* note 13.

⁵⁶ Chon, *supra* note 5.