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# Intellectual Property for Breakfast: Market Power and Informative Symbols in the Marketplace

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# INTELLECTUAL PROPERTY FOR BREAKFAST: MARKET POWER AND INFORMATIVE SYMBOLS IN THE MARKETPLACE

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ABSTRACT

This Article continues to examine an important question: are trademarks a source of market power, or, put differently, when are trademarks an antitrust problem? This fundamental question is a cause of division among antitrust and intellectual property law scholars. However, by raising the question and presenting some scenarios that can provide answers, my hope is that contemporary antitrust and intellectual property scholars can explore some of its implications. As part of my own quest to address this question, I explore the proposition that creative deception and the wealth-generating capacity of trademarks are unorthodox elements that actually contribute to allegations of monopolistic behavior through product differentiation. This article is organized in three major sections in addition to introductory and concluding observations. In Part Two, I discuss the concept of creative deception and argue that through trademarking activities creative deception helps to sustain market power. In Part Three, I offer a comparative analysis of market power in different intellectual property regimes such as patents, copyrights, and trademarks. However, I examine a few case studies where allegedly market power emerged as a result of creative deception and trademarking activities. I examine, in particular, the Cereal complaints that the FTC addressed in the 1970s. Part Four of the Article offers a more systematic discussion on creative deception through three market dynamics: (a) trademarks as promoting competition, (b) trademarks as wealth generating tools, and (c) trademarks in product differentiation. These dynamics, I argue, bring us closer to view creative deception and trademarking activities as evidence that requires greater scrutiny under antitrust law.

CONTENTS



* Faculty of Law, University of Helsinki. This essay was written as part of a series of papers, some of which have been published, addressing the issue of antitrust and trademarks (see *infra* note 1). Although the fundamental question that the papers addressed—including this one—is whether trademarks are a source of market power, the approach, analysis, methods and arguments are different.

## I. INTRODUCTION

Are trademarks a source of market power?[1] In order to properly answer such a question, a number of factors and angles must be incorporated into the discussion. This Article is one such line of argument from the perspective of economic theory on competitive markets, product differentiation, and a case law discussion which supports the notion that trademarks are a source of market power.

Based on the above question, a number of related questions also arise. For example, how strong is the current monopoly theory of trademarks? What is the nature of the presumption of market power in trademarks and how does it affect antitrust laws? Market power, as is understood in antitrust law, is the ability to raise and sustain prices above the competitive market. Trademarks play a crucial role in acquiring market power by means of trademarking activities such as product differentiation or brand extension, and firms that enjoy significant market power can also effectively restrain competition.

The debate on trademarks as monopolies saw its zenith from the late 1930s through the early 1950s (mostly in American legal scholarship) and then took a nosedive. Perhaps the strongest factor for its resurrection in recent years can be attributed to Glynn Lunney's treatment of the topic in 1999 and subsequent sporadic discussion by other scholars.[2] The courts have also struggled with the question of trademarks as monopolies for more than three centuries, indicating that such a question cannot be simply brushed under the rug; rather, the question must be looked at for its broader

[1] *See generally* P. Sean Morris, *The Economics of Distinctiveness: The Road to Monopolization in Trade Mark Law*, 33 LOY. L.A. INT'L & COMP. L. REV. 321 (2011); P. Sean Morris, *Trademarks as Sources of Market Power: Drugs, Beers and Product Differentiation*, 35 J.L. & COM. 163 (2017); P. Sean Morris, *Trademarks as Sources of Market Power: Legal and Historical Encounters*, 38 LIV. L. REV. 159 (2017).

[2] Glynn Lunney Jr., *Trademark Monopolies*, 48 EMORY L.J. 367 (1999). *But see* William Landes & Richard Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265 (1987).

implication within antitrust law.

In this Article, I will focus on the market power theory in intellectual property cases, such as patent and copyrights and the antitrust connection. The Article also investigates a complaint involving trademarks and the presumption of market power with the overall goal of capturing "a unified theoretical framework to estimate market power"[3] when trademarking activities are employed in goods and services. The Article is part of a three-part series examining trademarks as sources of market power that I hope can ultimately revisit the debate or shine more light on the matter.[4]

Primarily used as signals to identify the origin of goods where several competitors position themselves for the purchasing power of consumers, trademarks are the undisputed champions of such *economic space*. As a means of identifying product source, trademarks serve an important economic function in that they convey to consumers the origin of goods and other information associated with the goods, such as quality and reputation of the economic entity that produces the goods. One particular element of trademarks that evades commentators is their creative deception, which not only entices vulnerable consumers but also serves as one of the underlying elements in creating market power in trademarked goods. As I shall argue in the next section, creative deception is a form of trademarking activity that preys on the vulnerability of consumer psychology whereby a trademark signals both desirability (socially optimal) and monopolistic behavior (market retention) through product differentiation.

## II. Creative Deception And The Nature Of Trademarks In Competitive Markets

### *A. Trademarks as the Ultimate Intangible Property*

Trademarks have long been associated with economic enterprising. In both ancient and medieval times, man used symbols or *stellar mythos* to identify his livestock. Similarly, modern man as an economic entity (*homo economicus*) also *informs* his neighbor that his livestock are stamped with a certain sign, or, that sign as a symbol that the processed meat originated from his neighbor's livestock.

As modern trademarks developed from the late nineteenth century to present times due to the number of laws that were enacted, a trademark became to be seen as the ultimate intangible property and the very symbol of competitive markets that flourished from the turn of the twentieth century. But modern trademarks have since moved beyond using signs to more fanciful signs that are capable of graphic representation that includes a mixture of words, sounds, or smells *to mark territorial* borders in the market economy.

For modern rightsholders, trademarks are powerful symbols that determine how effective a market function is, given that, trademarks serve as the gatekeeper to quality, status, originality, and consumer behaviors. Beyond one of their essential functions of identifying the source of goods, trademarks are also economic entities in their own right that serve the wealth creating process, in particular for the rightsholders of trademarks.

In modern competitive markets, trademarks are constantly on a charm offensive to

[3] Robert Steiner, Private Labels, Brands, and Competition Policy: The Changing Landscape of Retail Competition 73 (Ariel Ezrachi & Ulf Bernitz eds., 2009).

[4] *See supra* note 1.

win the hearts and minds of the 'average consumer,'[5] while at the same time cementing their status as an infinite good due to their exclusivity. This dual complexion of trademarks suggests that trademarks are complex economic entities that offer a consumer enhancing effect on the one hand, and a form of barrier to entry on the other.

Trademarks distinguish themselves from other forms of intellectual property rights due to their fluidity and omnipresence which is largely due to the *infinite perpetuation* of a trademark. This infinite perpetuation is derived from the exclusivity in the mark which becomes an inherent form of monopoly.

### *B. Trademarks Infinity: "WONDER GREEN PILL"*

The infinite perpetuation theory can be demonstrated with the hypothetical wonder green pill, which, when taken by a male,[6] gives him the momentum for endurance in certain physical activities. The wonder green pill, in this scenario, is covered by all the major intellectual property rights in broad terms: patent, trade secret, copyright to a lesser extent, and trademark. The patent of the wonder green pill will lapse after a certain number of years, normally within twenty, whilst the inventor (patentee) may never have to reveal his secret formula and the copyright will span his lifetime (plus almost another century).

These forms of intellectual property rights in the wonder green pill are on a time continuum in the sense that they last a specific period of time. However, the trademark does not fall into this category because, upon renewal, it lasts the lifetime of the wonder green pill when placed on the market. Furthermore, it is the trademark of the wonder green pill—WONDER GREEN PILL—that creates: (a) the market for wonder green pills; (b) the reputation of the original manufacturer; (c) the goodwill; (d) the core asset of Wonder Green Pill, Inc.; (e) the investment leverage of Wonder Green Pill, Inc.; and (f) its wealth generating machine. This creates an infinite perpetuation of the trademark and how it operates in a competitive market amongst various knock offs of wonder green pills with similar "wonderness." The effect here is that trademarks not only lead to social optimality, but also carve out a piece of history, in that, they often retain some form of infinite association to business and create an aura of stellar mythos.

### *C. Trademarks Infinity: Beers, Carbonated Drinks, Hams and Market Dynamism*

If symbols of the *stellar mythos* were perhaps some of the world's oldest signs,[7]

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[5] For a discussion of the concept of the average consumer in the European context, *see* Jennifer Davis, *Locating the Average Consumer: His Judicial Origins, Intellectual Influences and Current Role in European Trade Mark Law*, 2005 (2) Intellectual Property Quarterly 183.

[6] To be fair to the opposite sex – when this article was originally written – there were no female "wonder green pill", however, nowadays, the US FDA (and by virtue globally) has since 2015 approved a female version of "wonder green pill". *See* Andrew Pollack, *F.D.A. Approves Addyi, a Libido Pill for Women*, N.Y. TIMES, Aug. 18, 2015 at B1.

[7] ALBERT CHURCHWARD, THE SIGNS AND SYMBOLS OF PRIMORDIAL MAN: THE EVOLUTION OF RELIGIOUS DOCTRINES FROM THE ESCHATOLOGY OF THE ANCIENT EGYPTIANS 196 (2d ed. 1913) (observing that the ancient man developed several mythos, such as stellar, lunar and solar using symbols, and, as such, we (modern man) should "appreciate the knowledge of all our signs and symbols, etc.."); s*ee also* FRANK SCHECHTER, THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADEMARKS 17–19 (1925) (discussing guilds).

then, in a modern way, or at least since society has been organized around capitalist ideals at the turn of the twentieth century, then one of the oldest commercial trademarks still in existence is that of the red triangle of Bass Ale in the United Kingdom[8] or that most ubiquitous COCA-COLA, a mark created by a supposedly broke *pharmo-entrepreneur*, John Pemberton, in the late 1880s for carbonated drinks.[9]

Another contender for the oldest trademark in the Western world is WEIHENSTEPHANER.[10] The mark was used by German monks in the middle ages for beers produced in their monastery and nowadays owned by the Bavarian State Brewery Weihenstephan.

Certainly, there are other contenders both in the West and Far East, or Persia for that matter. Furthermore, other "old modern" commercial trademarks exist in various countries. These range from a Pine Tree Logo in Australia[11] to an Eagle for condensed milk in Hong Kong[12] to the Bass famous red triangle for beers in the U.K.[13]

In the U.S., some of the oldest registered trademarks in continuous use include DEVILED HAMS,[14] which went to the William Underwood Company of Boston in 1868/1870,[15] and is generally known as the "Red Devil" due to the ontological nature of the trademark. Other U.S. trademarks notable for their early registration and still in use include SAMSON for ropes, cords, or lines and QUAKER for oats.

There is one noticeable feature about the contenders for the oldest trademark. Most have a connection with beer/ale and/or other forms of *alchemist* drinks, such as Coca-Cola, or food related items.[16]

But whichever trademark claims the coveted spot of being the oldest trademark still in commercial operation, there is no denying the fact that trademarks are commercial tools essential for market functions and help to distinguish one producer from another in a competitive market.

Because of man's basic needs, such as food, water, and other social necessities,

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[8] Bass & Co. Ale entered UK's trade mark registry on January 1, 1876, laying claim as the oldest registered trademark. *See* BASS & CO. ALE, UK Trademark No.UK00000000001.

[9] Bartow J. Elmore, *Citizen Coke: An Environmental and Political History of the Coca-Cola Company*, 14 ENTER. & SOC'Y 717–31 (2013).

[10] JOHN PARKES, HOME BREWING: SELF-SUFFICIENCY 12 (2009) (noting that Benedictine Abbey lay claim to be the oldest beer brewery in the world: "The oldest operating commercial brewery is the Weihenstephan Abbey in Bavaria, which obtained the brewing rights from the nearby town of Freising in 1040.").

[11] Registered under the 1905 Commonwealth Trade Marks Act, Act No. 20 of 1905, which provided a uniform trademark law for Australia the first time. *See* Adriana Casati et al., *Early Trademark Legislation Around the World–Part I*, 57 INTA BULLETIN 17 (Sept. 15, 2002).

[12] *Id.*

[13] *Id*.

[14] Teagan Schweitzer, *Deviled Ham*, *in* THE OXFORD ENCYCLOPAEDIA OF FOOD AND DRINK IN AMERICA 621 (Andrew Smith ed., 2 ed. 2013).

[15] 808 Off. Gaz. Pat. Office at 107 (Nov. 17, 1964).

[16] The third paper in this series that I have written uses branded beers as empirical evidence from the U.S. market to similarly argue that trademarks are a source of market power. *See Drugs, Beers and Product Differentiation*, *supra* note 1, at 163.

various creative individuals, such as John Pemberton and others, would turn raw material into processed items and create a ready market for such goods. However, where one lead is created, so is a follower or infringer. Thus, the market for process goods expands.

In order for the original manufacturer to distinguish his goods from followers, his mark creates a balance in the market, yet it develops into a dual complexion. In this scenario, the *duality* of a trademark is to retain the market for the goods that the trademarks identify and also, a form of creative deception of consumers' psychology, where a trademark that indicates origin or quality is socially optimal.

Markets react to the social optimality of consumer behavior given that, in the long term, the average consumer's purchasing power increases and, as such, leads to increased output for goods bearing trademarks based on origin and quality. But an increased output in goods from a single source creates two scenarios–one negative and one positive. The first is that of price, where *pricing remains constant or slowly leads upwards* and, thus, has a negative effect on the consumer. The second scenario is *market dynamism* which creates a positive effect on the market on a whole, making it more competitive.

The result of this positive effect leads to other spillovers, such as the entry of competitors with cheaper goods, but not necessarily higher quality, and an option for secondary consumers to benefit from the less pricey trademarked goods. Here, consumers are able to escape the creative deception often employed by the trademark owner in the original good for the less pricey goods. But the cost of this duality in trademark goods is that it creates a hierarchy of consumers—main consumers and secondary consumers. But further dynamism in the market where more than two players are able to compete for the hearts and minds of the consumer can create a loophole for the average consumers, who are then able to choose from a number of goods whose trademarks indicate their source.

### *D. Consumers and Creative Deception*

When a new trademark comes into existence, its creation is a signal about the commercial dynamism of the market, but nevertheless, the market's *competitive equilibrium* is disrupted. The nature of this competitive equilibrium can be equated to what the Supreme Court referred to as "commercial magnetism"[17] because, under most circumstances, the new entrant to the market was attracted by the reputation that the senior trademark built over time, and also, the new entrant is driven by the desire to create wealth for himself.

The entry of new competitors into a dynamic market allows for the trademark owners to use their *new* trademarks not only to signal the origin of the goods, but it is also an opportunity for the new entrants to use the trademark to convey to the average consumer of an improved but affordable product. The goal of a new competitor is to successfully convince the average consumer of the attributes in his trademark. If this is achieved, then the dynamism of an even more competitive market suggests that a trademark's role is moving beyond the source and origin functions to that which also include creative deception because of its ability to persuade the average consumer on

[17] Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co., 316 U.S. 203, 205 (1942). *See also* Frank Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 820 (1927).

the nature of the product. But this does not mean that only those consumers who are labeled as *average* are susceptible to the creative deception of trademarks. In fact, all consumers including the main and secondary consumers are susceptible to the creative deception of trademarks in a competitive market. This is because consumers exercise a great deal of savviness and flexibility when shopping and the signals that are conveyed to them via trademarks are interpreted in such a manner that they are able to make their purchasing decisions based on those signals in a trademark.

Creative deception is an artful form typically expressed in trademarks and other signs that preys on the psychological vulnerability of consumers in persuading them of the quality and benefits of merchandise. Creative deception does not relate to contemporary understanding of passing off, misleading, falsifying or other forms of deceptions generally found in trademark doctrines, such as the U.K.'s common law or continental Europe's unfair competition laws.[18]

Creative deception is a tool of trademarking activity employed in the competitive market of goods and services in the quest for market share and bottom line profit.[19] Although the quest for quality could also be a goal in creative deception, it is often not the underlying reason for creative deception, since the original goods that are represented by a trademark often retain a leading position over competitors or new product lines employ existing trademarks due to reputation and quality. An example would be Coca-Cola Classic and New Coke, where the latter used creative deception to drive profitability and competitors to the margins and, thus, retained its lead on the consumer market for specialized carbonated beverages.[20] Creative deception in trademarking activities can also be linked to brand extension (a topic I discussed extensively elsewhere).[21]

The incentives for trademark owners to engage in creative deception are not hard to discern since creative deception drives profitability. But the exclusivity afforded by trademark laws allows for the practice of creative deception since a trademark or brand which is a result of creative deception is linked to the original trademark where the trademark owner enjoys exclusivity. A trademark owner cannot infringe his own trademark, however, a competitor, who engages in creative deception and tries to make a link to the competitor's original mark, can infringe the competitor's mark.

[18] *Id.*

[19] Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171, 1218 (2005).

[20] *The Real Story of New Coke*, THE COCA-COLA COMPANY (Nov. 14, 2012), https://www.coca-colacompany.com/stories/coke-lore-new-coke.

[21] *See Drugs, Beers and Product Differentiation, supra* note 1. Courts are sometimes known to treat trademarks similar to brands. *See, e.g.*, O2 Holdings Ltd. v. Hutchison 3G Ltd. [2006] EWHC (Ch) 534 [4] (Eng.) ("Defining a brand is not easy. A lawyer would tend to think of goodwill, trade marks and so on."); SIDNEY LEVY, BRANDS, CONSUMERS, SYMBOLS & RESEARCH 143–44 (1999) ("[A] trademark is a brand or part of a brand that is given protection because it is capable of exclusive appropriation."). *See also* Jennifer Davis, *Between a Sign and a Brand: Mapping the Boundaries of a Registered Trade Mark in European Union Trade Mark Law*, *in* TRADE MARKS AND BRANDS: AN INTERDISCIPLINARY CRITIQUE 65 (Lionel Bently et al. eds., 2008); TRADEMARKS, BRANDS, AND COMPETITIVENESS (Teresa da Silva Lopes & Paul Duguid eds., Routledge 2010); P. Sean Morris, *Guess What Gucci?: Post-Sale Confusion Exists in Europe*, 47 VAL. U. L. REV. 1, 50 (2012); David Tan, *Differentiating Between Brand and Trade Mark: City Chain v. Louis Vuitton Malletier*, SING. J. LEGAL STUD. 202 (2010).

The broader implication of creative deception on consumers does not necessarily cause consumer confusion; rather, creative deception creates scenarios where consumers are loyal to original brands and any derivative of those brands by means of creative deception. Furthermore, the quality of goods that result from creative deception are perceived through the information that is conveyed via the creative deceptive mark, which is linked to the original mark and as such also about the brand the creative deceptive mark portrayed.

There are, however, two broader implications of trademarking activities by creative deception. First is the creation of a larger market share for the rightsholder's goods as a result of the original trademark. As such, the possibility of abusing that market share increases. The second is that of driving monopoly profits of the rightsholder and thus relegating trademarks to another function–that of wealth generation (see below). The nature of creative deception in trademarks is, in a sense, part of the discussion on the wealth generating function of trademarks but because creative deception in trademarks is an emerging theme, it should also form part of the wider debate on whether trademarks contribute to any form of innovation.

### *E. Do Trademarks Contribute to Innovation?*

A trademark is not generally considered to be part of the innovative process, given that, unlike patents, there is nothing innovative about trademarks.[22] But I beg to differ and posit that trademarks are indeed innovative (creative in a broad sense) and contribute to the innovation process. Trademarks' contribution to the innovation process stems from that fact that trademarks are an *intellectual* component of the goods they bear and therefore improve the desirability and attributes of such goods that create more competition in the dynamic market which is driven by trademark's creative deception and consumer purchasing power. If a market is competitive, then such competitiveness is an acknowledgment of the role trademarks play, since their innovative role helps to maximize the welfare of all consumers and leads to more efficiency in the market.[23]

Even if we should cast aside the innovative or efficiency arguments when framing the nature of trademarks in a competitive market, other market mechanisms such as pricing and profitability or the retention of market share have allowed a surge in the expansion of trademarks in particular, through methods such as trademark extension via brands (themes not taken up in this Article), a noticeable trait in the beer/ale and carbonated drinks industry. As competition in the market increases, other practices also contribute to how a trademark is perceived by both the consuming public and the regulatory authorities. In the first instance, trademark laws were seen as a response to some of the direct practices and methods that plagued competitive markets. In other words, trademark laws were seen as curtailing market freedoms where trademarks sole function was to drive competition. And, in the other instance, those same laws were against the spirit of the free market.[24]

Due to the world of competitive markets in which goods, ideas, innovation, and profitability are the driving forces, trademark laws were a response to those behaviors

[22] *But see* Dayoung Chung, Laws, Brands, and Innovation: How Trademark Law Helps to Create Fashion Innovation, 17 J. Marshall Rev. Intell. Prop. L. 493 (2018) (discussing designs).

[23] Ralph H. Folsom & Larry L. Teply, *Trademark Generic Words*, 89 YALE L.J 1323 (1980).

[24] Schechter, *supra* note 17, at 813.

in order to prevent consumer confusion in such competitive markets. In other words, the competitive market, of which trademarks are the unique identifier of goods and services, had become hostile to the consumers whose hearts and minds they were/are chasing, since the creative deception of trademarks causes a *state* of confusion in those consumers. One likely broader implication of creative deception is the retaining and gaining of market power.

## III. Market Power In Intellectual Property Rights

The essence of the market power inquiry in this Article is whether it can be acquired illegally by intellectual property rights that will offend the antitrust laws. I am not concerned about natural market power or those of a "historic accident"[25] by nature or, as a result of, a grant in the intellectual property.

If intellectual property rights are used to acquire market power illegally,[26] does that market power violate antitrust law? This question is investigated in this section. In *Eastman Kodak v. Image Technical Services*,[27] the Court acknowledged that market power arises as a result of "the ability of a single seller to raise price and restrict output."[28] The question of market power in intellectual property rights has been at the heart of antitrust and the intersection of intellectual property rights.[29] This notion arises primarily because of the presumption that the exclusivity in intellectual property rights confers market power. This presumption was addressed in *Illinois Tool Works*, where that Court held that evidence was required to prove the existence of market power in patent tying arrangements and there was not the presumption of market power *per se*.[30] This is good for other areas of intellectual property rights such as trademarks, since based on the *Illinois Tool Works* decision, there is no need to presume that the exclusivity in trademark protection should be used to confer market power.

At the same time, if this argument is turned in the opposite direction by looking at evidence, then arguably, the factors that determine market power, and if such market power potentially violates antitrust law, should be based on hardcore evidence and data to realistically determine the acquisition of market power.[31] But the *Illinois Tool*

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[25] United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) ("The offence of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.").

[26] *Handbook of U.S. Antitrust Sources*, 2012 ABA Sec. Antitrust L. 258–59 ("If a patent or other form of intellectual property does confer market power, that market power does not by itself offend the antitrust laws. …[M]arket power could be illegally acquired or maintained, or, even if lawfully acquired and maintained, would be relevant to the ability of an intellectual property owner to harm competition through unreasonable conduct in connection with such property.").

[27] 504 U.S. 451 (1992).

[28] *Id.* at 464 (citing Fortner Enters., Inc. v. U.S. Steel Corp., 394 U.S. 495, 503 (1969)).

[29] Ariel Katz, *Making Sense of Nonsense: Intellectual Property, Antitrust, and Market Power*, 49 Ariz. L. Rev. 837, 839 (2007).

[30] Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28 (Ill. 2006).

[31] *See also Drugs, Beers and Product Differentiation, supra* note 1.

*Works* decision was uniquely patent and also touched upon other areas of intellectual property rights, such as copyrights and trademarks, whereas, these latter two have a complex and unique approach to assessing market power.[32] This is due to the number of factors to be taken into account, and how those factors are interpreted and analyzed in the other main body of law which is uniquely important—antitrust law.[33]

Prior to *Illinois Tool Works*, the presumption that market power automatically exists where there is the conferment of copyrights and patents (trademarks are a different category) had been rejected in some lower courts in the United States.[34] Some courts were quick to discard the presumption that market power exists in intellectual property rights. For example, in *Root v. Computer Dynamics*,[35] the court rejected the notion of "absolute presumption of market power for copyrighted or patented products."[36] The judgment in *Illinois Tool Works* would do away with such a per se presumption and shift the dynamics in assessing market power in intellectual property rights. There is a silver lining in *Illinois Tool Works* for the market power analysis in trademarks. The decision supports the thesis that if evidence is gathered that shows that trademarks are tools for obtaining market power and that that market power has been used in an anticompetitive way, then trademarks serve as sources of market power and, furthermore, trademarks promotes product differentiation–it is the use of the market power in violation of the antitrust rules that makes trademarks, the bad guy, so to speak.

Market power in intellectual property ought to be justified. Certainly if a drug company were to create a new wonder pill for erectile impulses and obtain intellectual property protection for various aspects of the pill—this does not mean that there is an automatic demand for the new pill, simply because the new pill is covered by patents, copyrights, or trademarks. If one of the potent secrets of the new wonder pill would be the ability to heighten a male's impetus for encounters with another person,[37] the creators would then be able to control all aspects of how the pill is distributed and sold. A market would be created, whereas, the manufacturers of the new wonder pill would be able to command a monopoly position on the market for heightened encounters. Thus earning super normal profits for the creators, however temporary that may be.

Intellectual property protection creates market power for the product in question—however, this does not mean that the mere existence of market power is a breach of antitrust law.[38] What the existence of market power tells us is that there is a need to gather the evidence in order to demonstrate that such existence creates a willingness

[32] Ill. Tool Works, 547 U.S. at 45.

[33] *Id.* at 31.

[34] A.I. Root Co. v. Computer Dynamics, Inc, 806 F.2d 673, 676 (6th Cir. 1986).

[35] *Id.*

[36] *Id.* at 676.

[37] See also my disclaimer at *supra* note 6.

[38] Va. Panel Corp. v. MAC Panel Co., 133 F.3d 860, 872 (Fed. Cir. 1997) ("[V]iolation of the antitrust laws always requires …market power in a defined relevant market (which may be broader than that defined by the patent) . . .").

to abuse that power at the expense of the consuming public.[39]

### *A. Copyrights and Market Power*

As with the many questions that this Article raises about market power, one pertinent area of intellectual property rights that plays a critical role is copyrights. Do copyrights confer market power? This section merely alludes to the issue and does not argue the many intrinsic details pertaining to this question.

It is worth noting that copyright protection traverses complex areas of protection, whether it be an author's work, databases, collecting societies, software programming among others, and discussing market power or even antitrust in the area of copyright would also require a dissection of those many areas before a true and accurate picture of market power in the copyright context can be confirmed. Nevertheless, on a few occasions, the courts have confirmed the existence of market power in copyrighted products, and hence, was liable under antitrust law. In *Data General v. Digidyne*,[40] the Supreme Court noted that consumers were "locked in" to the product in question and "viewed the copyright . . . as creating a presumption of market power."[41] This passage alone from the court's decision raises two possible antitrust harms. The first harm under antitrust analysis would be the "locked in" scenario, where consumers are locked in to a product or services. The second antitrust implication is that of actual market power. A finding of market power would determine how that power was used to violate the antitrust rules.

In the competitive economy where ideas and the protections by copyrights and other intellectual property have become paramount, the pressing concern from an antitrust perspective is how copyright misuse affects the market. [42] For example, in *Saturday Evening Post Co. v. Rumbleseat, Inc.*,[43] the court explained that contractual restrictions could be used as instruments that may give rise to monopoly power beyond that is already protected under the copyright, and therefore, would be a violation of antitrust law.[44]

Unlike trademarks, copyright protection shares certain kinds of traits with patents,

[39] *See* Drugs, Beers and Product Differentiation, *supra* note 1.

[40] 473 U.S. 908 (1985).

[41] *Id.* at 909 ("[T]his case raises several substantial questions of antitrust law and policy, including . . . whether market power over 'locked in' customers must be analyzed at the outset of the original decision to purchase, and what effect should be given to the existence of a copyright or other legal monopoly in determining market power.").

[42] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 439 (1984); Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 976 (4th Cir. 1990); *In re* Indep. Serv. Orgs. Antitrust Litig., 964 F. Supp. 1469, 1477 (D. Kan. 1997) (noting that "[a]n alleged infringer can establish copyright misuse by showing either that (1) the defendant violated the antitrust laws, or (2) the defendant illegally extended its monopoly beyond the scope of the copyright or violated the public policies underlying the copyright laws.").

[43] 816 F.2d 1191, 1199 (7th Cir. 1987) (discussing a no contest clause).

[44] For a discussion on some European developments in the early 2000s where contractual restrictions were also a concern in legislations *see* P. Sean Morris, *Grant-Backs and No Challenge Clauses in Europe: What Lessons from the* MedImmune v. Genentech *Case*, 31 World Competition 113 (2008).

and thus copyright protection is presumed to include market power.[45] The exclusivity in the patent or copyright, for the duration of the protected term, allows the right holders to become monopolists. But there is a rational reason for such exclusivity. Copyright, like patents, serves to promote innovation and creativity in the marketplace.[46] This goal is also one that antitrust law pursues, by limiting actions that distort or monopolize the competitive process—so that creators, authors and inventors can reap some form of economic benefit.[47] The challenge that the intellectual property system and the antitrust system face is how to reconcile those two forms of conflicting goals—for the better good of a more competitive economic space.

### *B. Patents and Market Power*

Patents have always had a special place at the intersection of intellectual property law and antitrust law. The very notion of *intellectual property* could easily be substituted for *patents*, whenever such a discussion is raised. This is also evident by the voluminous case law and literature on the subject—the majority of which revolve around patents.[48] But my purpose is to merely alert the reader's awareness on the nature of patents and market power. Any substantial discussions require, at minimum, a monograph.

In rulings such as *Illinois Tool Works*, the Supreme Court has erected a more cautious wall towards holding that the presumption of market power in patent tying arrangements are illegal per se, and argued that the burden of proof is on the plaintiff to demonstrate that a defendant has market power by producing evidence to that assumption.[49] Simply assuming that market power exists due to the grant of a patent was no longer enough. In fact, *Illinois Tool Works* has implications for other areas of intellectual property law, including trademarks. One such implication is the conduct of market power in franchising agreements, as per *Siegel v. Chicken Delight*.[50] But aside from *Illinois Tool Works*, other classic cases, such as *Jefferson Parish*,[51], *Qualitex*[52] and *Loew's*[53] have all contributed to the legal approach of market power in patents.

In the last few years, as a result of the peaceful coexistence of antitrust law and intellectual property law—patent law in particular—the question of market power in patents is no longer a dreaded situation. The decision in *Illinois Tool Works* reflects

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45 Aaron Fellmeth, *Copyright Misuse and the Limits of the Intellectual Property Monopoly*, 6 J. INTELL. PROP. L. 1, 9–10 (1999); Hanna Ramsey, *Misusing Antitrust: The Search for Functional Copyright Misuse Standards*, 46 STAN. L. REV. 401, 413–14 (1994).

46 Fogerty v. Fantasy, Inc. 510 U.S. 517, 527 (1994).

47 *Id.* at 526.

48 *See also* Warren Lavey, Patents, Copyrights, and Trademarks as Sources of Market Power in Antitrust Cases, 27 Antitrust Bulletin 433 (1982).

49 Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 46 (2006).

50 448 F.2d 43, 49–50 (9th Cir. 1971).

51 *See* Jefferson Par. Hosp. Dist. v. Hyde, 466 U.S. 2 (1984).

52 *See* Qualitex Co. v Jacobson, 514 U.S. 159 (1995).

53 *See* United States v. Loew's Inc., 371 U.S. 38 (1962).

this. Much debate remains on the extent of market power in intellectual property, such as trademarks, and I concur with the Court in *Illinois Tool Works* with the producing of evidence to demonstrate market power.[54] This is even more relevant for trademarks (and in another paper where I use the U.S. beer industry as an example, the evidence is somewhat convincing).[55]

A word of caution is warranted. The difficult task of developing and analyzing evidence in relation to market power does not mean that the desired outcome will be that market power will actually be demonstrated, however, what the task itself can demonstrate is that even with the evidence—this does not necessarily mean that market power exists. Thus, patents, which have the shortest protection period when compared to copyrights and trademarks, are essential to the innovation and competitiveness of an economy, and the attainment of market power by patented products could actually be a good thing for an economy.

### *C. Trademarks and Market Power: Any Lessons from the Breakfast Cereal (Brands) Complaint?*

In 1972, the FTC filed a complaint against a number of breakfast cereal producers.[56] The FTC complained that cereal manufactures were engaged in practices that maintained a highly concentrated non-competitive market structure for ready-to-eat cereals. The companies named in the complaint were producers of ready-to-eat (RTE) breakfast cereals.[57] Several other companies such as Nabisco and Purina were named but not as respondents. The FTC alleged that the five cereal manufacturers were violating Section 5 of the FTC Act.[58] In the complaint, the FTC claimed that "competition has been hindered, lessened and eliminated" in the RTE market, resulting in a non-competitive market structure.[59]

One particular allegation by the FTC against the RTE producers stood out: "brand proliferation, product differentiation, and trademark promotion."[60] This allegation is significant because it captured the essence and core of the theory on trademark as sources of market power. The FTC developed two theses for brand proliferation, production differentiation and trademark promotion: the first was barriers to entry and the second was advertising expenditures.[61] The third aspect on trademark promotion was incorporated under the allegation of "unfair methods of competition in advertising

[54] *See Ill. Tool Works*, 547 U.S. at 46.

[55] *See Drugs, Beers and Product Differentiation*, *supra* note 1.

[56] *The Cereal Case: Opening Shot in FTC War on Structural Shared-Monopoly or Attack on Marketing Irregularities*, 5 ANTITRUST L. & ECON. REV. 71, 75 (1971) [hereinafter *Cereal Case*] (reprinting of FTC's complaint against the cereal industry, including Kellogg Company, General Mills, Inc., General Food Corporation, and the Quaker Oats Company).

[57] *Id.* at 75–76 (defining RTE as: "food products made from barley, corn, oats, rice or wheat and various combinations of such grains which are flaked, granulated, puffed, shredded or processed in other ways. RTE cereals are eaten primarily as a breakfast food requiring little or no preparation by the consumer.").

[58] *Id.* at 75.

[59] *Id.* at 79.

[60] *Id.*

[61] *Id.* at 80.

and product promotion."[62] It is the allegation on brand proliferation and production differentiation which I am mostly concerned with.[63] The FTC complaint, after almost a decade of investigation, was dismissed in 1982.[64] However, because the complaint was a Section 5 complaint, dealing with deception and unfairness and would not necessarily violate antitrust law, the complaint itself was *tainted*.[65] However, the language and style of the complaint made clear that the FTC wanted to pursue an antirust claim under Section 2 of the Sherman Act, but such a task would have been more tedious for the FTC. Part of the FTC's complaint, which I construe to be strictly antitrust was the "practices of proliferating brands, differentiating similar products and promoting trademarks through intensive advertising resulting in high barriers to entry into the RTE cereal market."[66] The allegations made by the FTC into the cereal industry effectively uncovered the notion of brand proliferation and their antitrust effect, in particular when brands are synonymous with trademarks.

The cereal brands complaint raised two interconnected issues that are significant. The first is the issue of market definition and the market for cereal. The second is the issue of brand proliferation. On the issue of market definition, or determining the market for ready-to-eat cereal, the complaint alleged that among themselves, four of the cereal manufacturers controlled 90 percent of the RTE market by 1970.[67] One of the key tests in determining market definition and possible violations of antitrust law is the calculation of market shares.[68] The 90 percent market share held by the four

[62] *Id.* at 82 ("These unfair methods of competition have contributed to and enhanced respondent's ability to obtain and maintain monopoly prices and to exclude competitors from the manufacture and sale of RTE cereal.").

[63] *Id.* at 82–85 (explaining the several other allegations such as: the control of shelf space by Kellogg; the acquisition of competitors and thereby engaging in monopoly power and maintaining artificially inflated prices).

[64] *In re* Kellogg Co., 99 F.T.C. 8 (1982).

[65] *Id.* at 265.

[66] *Cereal Case*, *supra* note 56, at 80.

[67] *Id.* at 79.

[68] Jefferson Par. Hosp. Dist. v. Hyde, 466 U.S. 2, 45 (1984).

manufacturers[69] was credible evidence for a finding of market power.[70]

The second issue of brand proliferation, which is linked to product differentiation, was predatory in nature. With more than a hundred brands among themselves, and coordinating for shelf space, the predatory brand proliferation were conduits for exclusion of new entrants in the RTE market. There are lessons to be learned from the breakfast cereal. The two most important lessons were largely ignored both by the courts and the legal academic literature.[71] The first is predatory brand proliferations (again, this issue I take up in a separate paper on the U.S. beer industry)[72] and the second lesson is that market power can be presumed with trademarks. The rest of this Article concentrates on the latter in a wider context.

## IV. TRADEMARKS, *HOMO ECONOMICUS* AND THE FIRM

### *A. Trademarks and the Promotion of Competition*

One of my claims in the previous section is that trademarks contribute to the innovation process, and as controversial as this claim may be, let us assume that this claim is correct. Thus, if trademarks contribute to the innovation process, what in broad terms should the innovation process aspire to? I argue that one such aspiration of the innovation process, for which trademarks are a part of, is the promotion of competition in a competitive market economy. My reference to competition in this section is that of rivalry between firms or individuals on a market competing for consumers using goods or services represented by a trademark or a derivative brand from a trademark. This is crucial in order to develop my further arguments, and to stay

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[69] The conventional wisdom is that even nowadays, the big four manufacturers of RTE still control the RTE market. *See* Jeffrey J. Reimer & John M. Connor, *Market Conduct in the U.S. Ready-to-Eat Cereal Industry*, 1 J. AGRIC. & FOOD INDUS. ORG. 1 (2002) ("Three characteristics distinguish the U.S. ready-to-eat (RTE) cereal industry. First, the industry is highly concentrated. Although there are approximately 40 companies producing more than 400 brands, more than 90% of output since 1980 has been produced by just five companies. Another characteristic is excessive advertising. Average selling expenses are 30% of sales value, with smaller firms tending to advertise more than large firms. Moreover, most of this expense is for mass-media advertising. The third distinguishing characteristic of the RTE cereal industry is product proliferation. New product launches have increased from one or two products per year in 1950, to more than 100 per year since 1989. If one accounts for all of the variations in sizes and flavors of the 400 brands, there are approximately 1000 RTE cereal products for sale in the U.S. Private label products, an important source of competition in other industries, have limited effect in the RTE cereal industry. Though they are priced about 40% above private label products, branded products continuously capture more than 90% of the market." (citations omitted)).

[70] Aviv Nevo, *Measuring Market Power in the Ready-to-Eat Cereal Industry*, 69 ECONOMETRICA 307, 310 (2001).

[71] *But see* Barry L. Bayus & William P. Putsis, Jr., *Product Proliferation: An Empirical Analysis of Product Line Determinants and Market Outcomes*,18 MKTG. SCI. 137, 138 (1999); William P. Putsis, Jr., *An Empirical Study of the Effect of Brand Proliferation on Private Label-National Brand Pricing Behavior*, 12 REV. INDUS. ORG. 355, 359 (1997); Ruth Raubitschek, *A Model of Product Proliferation with Multiproduct Firms*, 35 J. INDUS. ECON. 269, 277 (1987); Leonard Fong-Sheng Wang & Ya-Chin Wang, *Brand Proliferation and Inter-Brand Competition: The Strategic Role of Transfer Pricing*, 35 J. ECON. STUD. 278, 279 (2008); Steffen Ziss, *Divisionalization and Product Differentiation*, 59 ECON. LETTERS 133, 136–37 (1998).

[72] *See* Drugs, Beers and Product Differentiation, *supra* note 1.

clear of *competition* that has a linkage to antitrust as that discussion is reserved for later in this Article. Moreover, the argument that trademarks promote competition, although slightly raised in the previous sections, offers a more detailed and balanced view in this section.

Competition in the marketplace for consumer purchasing power using trademarks (or a brand) promotes the overall interest of society. The competitive market is a place where goods and services are provided by various individuals and firms using their unique source of identification–the trademark to lure consumers at a continuous frequency to those goods and services.[73] It is this competition among the varied players, whether they are firms or individuals, using their trademarks as source identifiers of goods and services that serve as one of the most important operative modules in the quest for innovation and the promotion of competition itself. Therefore, trademarks' role in this grand game of market competition is fairly obvious. First, trademarks help consumers identify the source of the goods. Second, trademarks, when used to identify new and innovative goods on the market, generate more revenue and offer additional choices to consumers. Third, trademarks, when representing an existing good, also signals the goodwill investment in that good and thereby can lead to overall profit for the trademark owners who also maintain or increase their market share.

As has been seen so far in this Article, the question is whether an increase in market share can lead to illegal market power and, relatedly, what is the actual role of the trademark itself in creating illegal market power. In Europe, there are also some interesting dynamics where trademarks connote antitrust issues.[74] At the *federal* European Union Intellectual Property Office—EUIPO—at the end of June 2014, there were four registered European Union trademarks (EUTM) for the anti-obesity (slimming pill), Grenade,[75] under class five (dietary supplements etc.,) of the Nice trademark classification system.[76] All four word marks– GRENADE; GRENADE DEFEND; GRENADE RPG and THERMO GRENADE—were owned by a single U.K. applicant (proprietor) for food and dietary supplements.[77] These four trademarks are one of the means which the proprietor of these *pink pills* has in his arsenal in order to effectively compete in what is a competitive market for dietary supplements. The proprietor is able to use those trademarks with a blast (no pun intended) to announce new products on the market for dietary supplements and also at the same time to cater to the different purchasing power of consumers. In addition, the four trademarks for

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[73] Nicholas S. Economides, *The Economics of Trademarks*, 78 TRADEMARK REP. 523, 526 (1988).

[74] *See* Grenade UK Ltd v. Grenade Energy Ltd [2016] EWHC 877 (IPEC) (this case eventually held as passing off under UK law).

[75] EUTM, 005182019; EUTM, 009206574; EUTM, 011827904; EUTM, 012086955, all owned by Grenade (UK) Ltd. EUR. UNION INTELL. PROP OFF., https://euipo.europa.eu/eSearch/#details/owners/580204 (last visited Aug. 31, 2019).

[76] Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks June 15, 1957 (as revised). Class 5 covers goods and services to include: healthcare, dietary, herbal and nutritional supplements; preparations and substances; dietary food supplements; dietary supplemental drinks and shakes.

[77] *Id.*

dietary supplements also signal that some form of *innovation* occurred, and the trademarks are used to differentiate such innovation. And, similar to the magic created by the utopian wonder green pills mentioned in the previous section, the grenade pink pills often work magic for individuals seeking a slimmer waistline. For consumers, then, there is an obvious benefit. But do these pink pills, represented by different trademarks, actually promote competition?

To justify how competition is promoted by trademarks, when the overall function of trademark law is to promote competition by protecting the reputation of the firm, in particular when a firm uses more than one trademark for essentially the same type of goods, it is possible to argue that, to a large extent, trademarks represent *dynamic efficiency*. In other words, in a dynamic market, trademarks serve as incentives for the efficient production of goods by a single proprietor, which in turn also signals to competitors to enter the market. This incentive for competitors to enter the market would be a direct result of trademarking activities where four or more trademarks are used by a single owner for the same type of goods. Arguably, under this scenario, trademarks promote effective competition and create more dynamism in the market. But the net result of this market dynamism is often overlooked or when it is addressed the standard analysis is that the various trademarks, or branding of goods for that matter, allows consumer to better identify the origin of goods and as such their welfare is better served. I do not disagree with this analysis. However, as I will suggest below, there is a new paradigm to trademarking activities and that is the wealth generating paradigm.

But let us return for a moment to the example of the pink pill above as denoted by the GRENADE trademarks. In this context, the four trademarks serve to inform the consumer who is constantly searching for anti-obesity and dietary supplements. But the market is competitive and there are other such supplements widely available. However, an anti-obesity supplement as indicated by the GRENADE trademark will give the consumer a *blast* so to speak, due to their qualities and or as being a first—a market leader. Taken in this context and by implied reference to competitors in the dietary supplements market, consumers can view trademarks' chief role as the tool for the promotion of competition since they are able to decipher all the necessary information embedded in the various trademarks that represent dietary supplements. The upshot for consumers then is their ability to choose which such dietary supplement they prefer (for a slimmer waistline), and as such, trademarks in a general sense are in the best interest of the consuming public due to their ability to promote competition. And, as I argue below, in the context of product differentiation, trademark laws responded to the promotion of competition in order to ensure that fair competition actually exists on the market but should now navigate through the trajectories of other laws such as antitrust law.

Even where consumers are the driving force behind trademarks promoting competition, it does not necessarily mean that consumers themselves recognize this phenomenon. The reason for this is not surprising because consumers often times lack the necessary expertise in markets where they purchase goods.

Take for example, the market for slimming pills, such as those represented by the GRENADE trademark. Most of the consumers would be those seeking to lose weight and therefore can easily succumb to a product that advertises itself as the best in the weight loss market. This vulnerability on the part of the consumer suggests that they are uninformed and lack expert information on the weight loss market. Therefore, certain branded products dictate their shopping behavior. The brand, as represented by the trademark, although providing consumers with valuable information, steers the consumer in a habit of refusing to seek out other weight loss products or even to compare weight loss products represented by the same trademark even under different brands. One could also argue that consumers who buy only one type of weight loss products as represented by a single trademark owner believe that switching to a different brand, even where prices are lower, is not worth the time or effort. This results in some consumers being uninformed of the relative economics of scale that are available on the market for weight loss products which trademarks promote in the broader dynamism of a competitive market. Thus, the consumer market behavior is also crucial to trademark as a means of promoting competition because that very same market behavior is responsible for the informed and the uninformed consumer, crucial for trademark's information role in competitive markets.

The crucial difference between an informed consumer and an uninformed consumer is that the uninformed consumer remains loyal to a certain product and does not take the time to switch or make comparisons of the variety of products available on the market. The informed consumer on the other hand, performs these tasks expertly, and in doing so, is able to drive competition because other trademarks (branded goods) passed on crucial information so that he can reach out to the goods or services offered by rivals, for example on the market for weight loss supplements, and as such, trademarks further help to promote competition. The informed consumer who is equipped with a wealth of information can adjust to changes in price or abandon his usual consumption pattern in favor of other brands of the same product (weight loss supplements) and fosters a competitive spirit that ultimately creates further goodwill in the multiplicity of trademarks. The irony is that, on the one hand, trademarks, while providing consumers with valuable information and driving competition, do not convince the uninformed consumer. That consumer will remain loyal only to certain brands. On the other, the informed consumer who embraces the diversity of goods trademarks represents and helps to fuel growth of the market economy. Thus, even though based on this reasoning that a market expands as a result of trademarks there is an inherent paradox: how to change the purchasing habits of the un-informed consumers when compare to the informed consumers.

By the time most modern trademark laws were introduced from the late 1880s, mostly in Europe and the U.S., courts had already begun conceding that trademarks help to promote competition and efficiency in a market and infringing trademarks can reduce that competition and efficiency if they lead to, for example, loss in sales. In *Sykes v. Sykes*,[78] for instance, where the defendant allegedly marked his goods with the same mark as that of the plaintiff's superior mark for powder flasks and shot-belts, an English court noted that the plaintiff enjoyed great reputation with the public and the defendants infringing goods lead to a loss in sales for the plaintiff.[79] Although the case was that of passing off under English Common law, it recognized the protection of trademarks and, as such, its significance was that it alerted regulators, the courts, and the subsequent development of trademark laws, the economic impact infringement can cause to the competitive process–and in this situation a negative one. In other

[78] Sykes v. Sykes (1824) 3 B. & C. 541, 542, 107 Eng. Rep. 834 (K.B.).

[79] *Id.*

decisions, such as *Blanchard v Hill*,[80] the English courts were also confronted with the many paradoxes of trademarks, such as promoting competition, but also creating monopolies.[81] But once trademark laws were introduced from the late 1880s, and onwards to the first half of the twentieth century, the courts were sympathetic to the notion that trademarks promote competition or create monopolies.[82]

Recent courts decisions have also picked up on the notion that trademarks promote competition, even if such trademarks are embedded as "keywords" to meet the demands of twenty-first century advertising on electronic mediums such as the internet. For instance, in *Google France v. Louis Vuitton*, the Court of Justice of European Union (CJEU) observed in particular that "[trademark] keyword advertising promotes competition" even in the absence of an economic link between two rivals on the market for flowers.[83] The Court was referring to the selection in "Adwords" of keywords which correspond to trademarks, and the statement by the Court can be interpreted as a formal admission of how crucial trademarks are to the functioning of an integrated economy comprised of different cultural traditions under a single rubric of market integration.[84]

In other markets where there is a continuous homogenous band of consumers, such as in the U.S., courts too have linked trademarks to that of promoting competition. In *Park N' Fly*, the U.S. Supreme Court was rather succinct on how trademarks fosters competition: "trademarks desirably promote competition and the maintenance of product quality."[85] The fostering of competition by trademarks, the U.S. Supreme Court explained was due to the fact trademarks are able to secure for "the producer the benefits of good reputation."[86] The Court might have been conservative in their references to trademarks as economic entities that foster competition and that might have been because going beyond those conservative statements would intertwine trademark law and protection with other areas of the law which would be more problematic.

Putting the above arguments in perspective, one can find two particular aspects of why trademarks' role in promoting competition is rather appealing. The first is that of what courts like *Park N' Fly* referred to as (a) good reputation and (b) trademarks as autonomous economic entities.[87] The reputation paradigm stands at the very heart of

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[80] Blanchard v. Hill (1742) 2 Atk. 484 (Ch.), 26 Eng. Rep. 692, *overruled by* Cabrier v. Anderson (1777) 2 Atk. 487.

[81] *Id.*

[82] Sara V. Dobb, *Compulsory Trademark Licensure as a Remedy for Monopolization*, 26 CATH. U. L. REV. 588, 592–93 (1977). *See also Historical Encounters, supra* note 1.

[83] Interflora, Inc. v. Marks & Spencer PLC, [2013] EWHC 1291 (Ch) (Eng.) (citing joined cases 236/08, 237/08 & 238/08, Google France v. Louis Vuitton, 2010 E.C.R. I-02417, which states that "a trade mark is selected as a keyword by a competitor of the proprietor of the mark with the aim of offering internet users an alternative to the goods or services of that proprietor.").

[84] *Id.*

[85] Park 'n Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 193 (1985).

[86] *Id.* at 198; Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 774 (1992).

[87] *Park 'n Fly*, 469 U.S. at 198; Jorge V. Ramos, The Economics of Trademarks (Aug. 31, 2019) (unpublished Ph.D. dissertation, Florida International University) (*available at* http://digitalcommons.fiu.edu/etd/2231).

trademark protection because it is the goodwill in the reputation of a trademark that allows a proprietor to reap other incentives. Then, there is the argument that trademarks are autonomous economic entities. This is so because of their reputation paradigm that drives the profit of the proprietors or form the most important asset in a firm, and, as such, trademarks can be sold, licensed or leased as a value making *property*.

These two initial observations are important as they capture some of the sentiments courts expressed in some trademark cases. Also, because both the reputation paradigm and the autonomous entity paradigm are creators of goodwill and they indicate, in particular, the autonomous entity paradigm that market forces associated with trademarks are often neglected in an analytical way. But it is also these two particular reasons why trademark law itself promotes competition because the reputation in a trademark creates an avenue for access to the trademark, as *Google France* reminded us in examples such as Adwords, or other forms of trademarks that enhances a healthy form of competition with new entrants on the market.[88] Apart from the promotion of competition, the real purpose of trademarks, I posit, is to generate wealth for its holders: *the business of business is the actual business of trademarks*.

### *B. The Economics of Trademarks and Their Wealth Generating Capacity*

The ubiquitous nature of trademarks is a constant reminder of how signs and symbols are agents that help to shape the social, religious and economic behavior of human beings. Trademarks spread the gospel of goods and services, indicating their origins and the economic wealth of the owners. Trademarks shape the behavioral pattern of how consumers shop for goods as a trademark can indicate inferiority, luxury, quality, or social status. As the religious symbol of global commerce, trademarks are a source of freeriding and comparative advertising. The contemporary instruments that regulate the protection of trademarks in national jurisdictions, such as the Lanham Act in the U.S. or the Trademark Directive (TMD) in Europe, readily invoke the exclusivity of trademarks.[89]

The exclusivity of trademarks is reinforced by the courts as any infringement barring permission from the trademark owner is a detriment to the economic livelihood of the trademark owner, creating mistrust in the marketplace for goods and services among consumers. Trademark law, in its current fashion, is an instrument that serves the market economy by promoting competition—largely by ensuring that the reputation or goodwill in a trademark is protected[90]—while seemingly providing avenues for the benefit of consumers for which trademarks, according to the current predominant theory, reduce consumer search costs.[91] Trademark law for its part has been generally viewed as suffering perhaps from intellectual *dys-functionalism* given that it is not as rich in "theoretical or practical connection" to other areas of intellectual

[88] *Google France*, 2010 ECR I-02417, PP 596.

[89] 15 U.S.C. § 1051 (2002); Directive (EU) 2015/2436, art. 5, 2015 O.J. (L 336) 1, 26.

[90] Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 601 (2006).

[91] Ty Inc. v. Perryman, 306 F.3d 509, 510 (7th Cir. 2002) (adopting the search cost function of trademarks); Landes & Posner, *supra* note 2, at 275.

property law, such as patent law or copyright law.[92]

Nevertheless, one *intellectual* discourse that trademarks have undergone in recent years is the economics, or law and economics, approach to trademark law. Under this approach, scholars use economic analysis to explain the purpose or function of trademarks and the effect of economic analysis on trademark law.[93] The impact of these views has been the main stay on the intellectual discourse of trademarks with little challenges or alternate propositions/approaches. With the exception of David Barnes's 2006 article,[94] which largely rejected the private goods nature of trademarks and classified trademarks as a form of public goods, and hence, suggested market failures are "associated with the supply of trademarks and the information they provide about products and sources of products,"[95] there has been little dissent in the trademark law literature on the economics of trademarks or positing a different economic interpretation of trademarks. There have been notable exceptions, for example Lunney[96] who argued that trademarks still retain their inherent monopolies which distort the competitive market and Griffiths[97] who offered marketing dimension on trademarks using economic analysis. My own attempt to pursue a new line of thinking in the literature on the economics of trademarks looked at the case law mostly in Europe,[98] and argued that product differentiation is one aspect that could steer the economics of trademarks in a new direction.[99] I will further develop some of the arguments on product differentiation in the final part of this Article.

If ever there was a moment to rescue or expand those arguments,[100] the opportunity is presented here in this section. I will advance this claim by proposing that the economics of trademarks should be analyzed from their wealth generating function. The creation of wealth is essential to the free market, both for individual human beings and for firms that invest in trademarks used to bring goods and services to the market. I do not reject the search costs function of trademarks as posited by Landes and Posner,[101] but my contention is that the main function of trademark cannot be watered down to search costs. Rather, the main function of trademarks should be seen for what they are, the generating of wealth for their owners, so that wealth can be used to either

[92] David Barnes, *A New Economics of Trademarks*, 5 NW. J. TECH. & INTELL. PROP. 22, 22 (2006) (advocating a public goods dimension of trademarks and rejecting the private goods label attached to trademarks).

[93] *Economics of Distinctiveness*, *supra* note 1, at 324, 340 (summarizing most of those discussions); Economides, *supra* note 64, at 525; Landes & Posner, *supra* note 2, at 265.

[94] *See* Barnes, *supra* note 94.

[95] *Id.* at 24.

[96] Lunney Jr., *supra* note 2, at 373.

[97] ANDREW GRIFFITHS, AN ECONOMIC PERSPECTIVE ON TRADE MARK LAW (2011).

[98] *See Economics of Distinctiveness*, *supra* note 1; P. Sean Morris, Trademarks and the Economic Dimensions of Trademark Law in Europe and Beyond, Encyclopedia of Law and Economics (2016) https://link.springer.com/referenceworkentry/10.1007%2F978-1-4614-7883-6_566-1.

[99] *See Drugs, Beers and Product Differentiation*, *supra* note 1.

[100] *See Economics of Distinctiveness, supra* note 1.

[101] Landes & Posner, *supra* note 2, at 270.

reinvest in more quality goods and services for the consumer or to generate more upstream wealth when the ownership in the trademark is passed on. By focusing on the wealth generating function of trademarks, I am able to not only diverge from the search cost theory but posit that this new theory of wealth generating also reinforces the exclusive monopolies in trademarks.

As a form of creative expression embodied in a sign that represents goods and services, which in the form of a word, a combination of words, shapes, sounds, colors, numbers, or other forms, a trademark represents wealth or aspirations for wealth. The current theories of the uses of trademarks predominantly place the consumer at the beneficial forefront by asserting that trademarks reduce consumer search costs.[102] This view was first developed simultaneously by Landes and Posner, where the authors asserted that trademarks reduce consumer search costs and therefore promote efficiency in the market.[103] Landes and Posner developed a model in which they explained that the essential function of trademarks is to reduce consumer search costs and explained in particular that "the benefits of trademarks in reducing consumer search costs require that the producer of a trademarked good maintain consistent quality over time and across consumers. Hence trademark protection encourages expenditures on quality."[104] Their arguments have been attractive and trademarks since have been relegated to that of easing shoppers' frustration on the market. One poignant part in the quote above is the clause which also has serious implications on the uses of trademarks: *trademark protection encourages expenditures on quality*. This little unnoticed part of their diagnosis of trademark use has generally been ignored and, in my view, contains an exposition on the use of trademarks that suggest trademarks have an investment function. Perhaps it was this investment function that courts, such as *L'Oreal v. Bellure,* had in mind when they noted that an (additional) function of a trademark is that of investment.[105]

The search cost function, which also made its way to the courts in judgments such as *Ty v. Perryman* and *Qualitex v. Jacobson,*[106] was not only attractive because of its simplicity but because trademarks in themselves were also conceived as an economic entity–goods themselves. Thus, people shop for goods the trademark represents and they also shop *for* the trademark because the consumers have developed over a period of time a certain consistency in shopping for the goods and the associated experience in doing so arguably reduces their search methods. But the unique appeal of the search cost theory that Landes and Posner developed was because of applying economic analysis the focus shifted to the consumer.[107] By doing this, the entire economic space in which trademarks exist reinforces the nature of a market where only consumers matter in the market and any actions sellers take, include in the form of a trademark,

[102] Barnes, *supra* note 94, at 27.

[103] Landes & Posner, *supra* note 2, at 265–66.

[104] *Id.* at 269.

[105] See the origins of the investment function of trademarks in L'Oréal SA v. Bellure NV, [2010] EWCA Civ 535 (Eng.).

[106] Ty Inc. v. Perryman, 306 F.3d 509, 510 (7th Cir. 2002); Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 164 (1995).

[107] Barnes, *supra* note 94, at 32.

is to the benefit of the consumer.[108] The seller was communicating to the consumer the benefits and quality of his goods, the consumer need not look further when he recognizes the seller's mark, and the seller's mark was in the best interest of the consumer for economic efficiency.

In the context of the search cost theory, a consumer who prefers WONDER GREEN PILL as the stimulant of choice to engage in physical activities, will after the first time, be able to know exactly what he or she prefers. Therefore, upon the second and subsequent times when shopping for stimulants, the trademark saves time, money, energy, and other efficiency criteria when choosing stimulants that carry the WONDER GREEN PILL trademark. In this context, the WONDER GREEN PILL trademark acts not only as the conveyor of information about the source or quality of the stimulant but it also enables the consumer to reduce his search costs. Under this scenario, the search cost theory, and by and large trademark laws, created instances where it is cheaper for the consumer to source his goods that contain certain qualities and thereby driv competition in the market, in particular the market for stimulants, where the WONDER GREEN PILL trademarked good is just one of the many. But therein lies an irony: a consumer, who only relies on the WONDER GREEN PILL without resorting to an alternative on the market, helps to create a situation in which trademark laws act as a culprit to "entrench market dominance by leading firms and make it harder for competitors to crack new markets."[109] The search costs theory, as provocative as it may be, also helps to perpetuate a crisis in trademark law, where trademark laws must act as a balance to provide consumer protection but at the same time ensure that trademark proprietors are shielded from undesirable elements in the competitive market that free-ride on their marks in the quest for consumers. Trademark laws' crisis is inevitably the conduit that generates market power and serves potentially for the abuse of dominant position by also ensuring that wealth generating techniques are employed by trademark owners.

One of the main reasons why the search cost theory in modern trademark law is predominantly the main theory that occupies both the time of scholars, and often the courts, is because it has an intellectual foundation from a law and economics approach. The appealing nature of modern law and economics approach to the law that was fully developed in the 1960s and mushroomed ever since (and even with Posner by the early 1970s) had presented opportunities for other scholars to raise the search costs theory using a non-trademark law approach, in particular advertising. This is quite interesting because advertising, by and large, involves the use of a trademark and therefore in this connection, the difference between advertising and trademark is superfluous. If, *arguendo*, there is no difference between advertising—a conduit of information using a trademark—and a trademark in the literal sense of the word—the search cost theory based on advertising that was developed in some of the earlier literature is also crucial to how we understand the modern conception of the trademark search cost theory as posited by Landes and Posner.

There are three crucial pieces of scholarship, at least in my view, from an advertising and information perspective, that are essential to understanding the search cost theory in modern trademark law. The first was a 1948 piece by Ralph Brown on

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[108] *Id.* at 27.

[109] Stacey L. Dogan & Mark A. Lemley, *A Search-Costs Theory of Limiting Doctrines in Trademark Law*, *in* TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH 65–94 (Graeme B. Dinwoodle & Mark D. Janis eds., 2008).

*Advertising and the Public Interests*;[110] the second was a 1961 piece by George Stigler on the *Economics of Information;*[111] and the third was Philip Nelson's *Information and Consumer Search Behavior* in 1970.[112] Certainly, based on the vast amount of advertising literature from an economic perspective, others can add more food for thought; however, I singled out these three pieces because of a similar connection that Landes and Posner developed in their seminal 1987 article.[113]

In 1948, Brown argued that the public primarily has an interest in a competitive market through which advertising is the cornerstone, providing that such advertising contains information about the goods so that consumers can choose.[114] Brown framed what are arguable trademarks in the context of advertising as *informative symbols*, which encompasses "the legitimate informational value of labels pointing to an established reputation."[115] Brown viewed advertising in essentially the same way modern trademark functions are viewed, in that, Brown insisted, "advertising has two main functions, to inform and to persuade."[116] But the point to take away from Brown's discussion was the suggestion that advertising in one form may promote "cost reductions"[117] and this is important to the reduction search cost theory later developed by Landes and Posner.[118] Even where Brown may have used the term "promoting cost reductions" in passing in reference to the possibility of advertising–it was a poignant point because Brown's overall discussion was that advertising serves the public interest and any protection of trade symbols should consider the degree to which that public interest is served by advertising, which essentially encompasses trademarks.[119]

Where Brown used a law and economics discussion of advertising as a form of promoting cost reductions by serving the public interest, it was Stigler in 1961 and *Economics of Information* that fully developed the consumer search cost theory from an economic perspective.[120] Brown had insisted that the "principal reason for

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[110] *See* Ralph Brown, *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165 (1948); Jessica Litman, *Breakfast With Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1718 (1999).

[111] *See* George Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961).

[112] *See* Philip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311 (1970).

[113] *See* Landes & Posner, *supra* note 2.

[114] Brown, *supra* note 110, at 1180.

[115] *Id.* at 1187.

[116] *Id.* at 1183 ("With qualifications that need not be repeated, persuasive advertising is, for the community as a whole, just a luxurious exercise in talking ourselves into spending our incomes. For the individual firm, however, it is a potent device to distinguish a product from its competitors, and to create a partial immunity from the chills and fevers of competition. The result of successful differentiation is higher prices than would otherwise prevail.").

[117] *Id.*

[118] Landes & Posner, *supra* note 2.

[119] Brown, *supra* note 110.

[120] Stigler, *supra* note 111.

advertising is an economic one"[121] and by default is the primary reason for trademarks, which are encompassed in advertising.[122] But crucially, Brown argued that one of the main functions of advertising was an informative one. Stigler, for his part on the informative role of advertising, argued that *advertising was an efficient conduit for transmitting information* to the consumer, which would have otherwise been costly to search for.[123] In Stigler's version of the search cost theory, information is a scarce resource and can incur additional costs to consumers and as such, greater search costs can result in price dispersion. Firms, Stigler argued then, use advertising to provide consumers with information and the result of that is advertising curtails the dispersion of prices: "price advertising has a decisive influence on the dispersion of prices. Search now becomes extremely economical."[124] This is a direct correlation to the reduction of search costs since advertising (functioning as trademarks) provides consumers with information, which overall leads to price dispersion and generally lowers search costs. In the context of the search cost theory, which is perhaps the most dominant theory on the functions of trademark, then it can be argued that it was Stigler who first introduced the search costs theory with advertising when read to also encompass trademarks and not necessarily Landes and Posner.[125] By using advertising as a model of optimal economic search, Stigler was able to demonstrate that when applied to the market for goods and services, trademarks inherently reduce consumer search costs even if embedded in advertising.[126] A similar line of argument to Stigler was also developed by Ozga's *Imperfect Markets*[127] prior to Stigler's paper, where he insisted that there was always an informative element in all advertising.

The next relevant discussion to the search cost theory was Nelson's 1970 contribution and later developed in *Advertising as Information* in 1974 in which he also insisted that advertising equips consumers with information allowing them to reduce payoffs.[128] Building on the informative view of advertising, including the search theory developed by Stigler (1961), Nelson posited that products with overall quality are communicated through advertising and, where consumers behaved rationally, they are not prone to false advertising.[129] Nelson further developed the notion of "search" and "experience" goods and argued that search goods were easily verifiable by the consumer and experience goods were those whose quality can only be determined once purchased.[130] Nelson developed his advertising theory around this distinction of goods and noted that advertising in experience goods is uninformative

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[121] Brown, *supra* note 110, at 1167.

[122] *Id.* at 1185 (describing trade symbols as "species of advertising" due to their "brevity and continuity in use, both of which are essential to their symbolic function.").

[123] Stigler, *supra* note 111, at 220.

[124] *Id.* at 223.

[125] *Id.*

[126] *Id.* at 216.

[127] Andrew Ozga, *Imperfect Markets Through Lack of Knowledge*, 74 Q.J. ECON. 29 (1960).

[128] Nelson, *supra* note 112, at 734.

[129] *Id.* at 731.

[130] *Id.* at 740.

whilst advertising in search goods is informative.[131] Under these scenarios, Nelson suggested that experience goods allow consumers to detect high-quality brands through advertising and can rely on repeat purchases.[132] What ties most of this literature on advertising to the search cost theory in trademark theory is the interconnection of advertising and brands and how they encompass trademarks. Given this connection of advertising to trademarks, the trademark theory of reducing consumer search costs is not entirely novel, and to some extent, has reached its capacity. In this regard, my proposition that the wealth generating function of trademark is to reestablish the original function of trademarks—the *business* of wealth creation.

In my view there are other *allied objectives* of trademarks in addition to the consumer search costs theory developed by Landes and Posner. The most notable of such allied objectives are indication of source and goodwill investment which help to create greater efficiency for consumers and trademark owners alike. There is another objective of the trademark system which registered symbols represents and this objective of trademarks has to be analyzed from the point of view where trademarks are seen as representing the economic interests of goods manufacturers and service providers. In this regard, an underlying goal of a trademark is to create wealth for goods manufacturers and service providers. This wealth generating function of a trademark eclipses the other projected goals such as the reduction of consumer search costs.

In more recent times, one of the attractive theories of trademarks, from an economic perspective that has gained much attention, is that posited by David Barnes.[133] Barnes argues that trademarks should be treated as public goods given that trademarks convey information that eventually becomes public consumption.[134] According to Barnes, trademarks are a "species of public good, in particular, mixed public goods"[135] and the ultimate goal of trademark law, when juxtaposed with public goods theory, "is to provide the optimal amount of information about products and their sources."[136] Barnes noted that it was too simplistic to consider alone trademarks as private goods. He posited that, when viewed from a public good perspective, there are market failures associated with trademarks,[137] typically to those associated with

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[131] *Id.*

[132] Sridhar Moorthy & Scott A. Hawkins, *Advertising Repetition and Quality Perception*, 58 J. BUS. RES. 354 (2005).

[133] Barnes, *supra* note 94.

[134] *Id.* at 23.

[135] *Id.* at 35. "[T]rademarks are a hybrid of public and private goods", and "the 'impurities' in a public good may take two forms relevant to trademark law: congestion by increasing the numbers of homogenous users and the co-existence of both rivalrous and non-rivalrous heterogeneous users. *Id.* at 44. Impure public goods, Barnes argues "come in an infinite variety along the dimensions of publicness. A good may be a mixed public good, one type of 'impurity,' in the sense that it is congestible or even private with respect to some uses and non-rivalrous with respect to other uses." *Id.* at 45.

[136] *Id.* at 50.

[137] Barnes fully developed the market failure thesis from a trademark perspective, where he essentially points the fingers at competitors who can "quickly distort the mark's source-indicating meaning" as opposed to referential users, but conceded that "referential users may be

other areas such as patents or copyrights. In this regard, Barnes observed that: "Public goods theory demonstrates that the market failure justifying government intervention in the regulation of trademarks is the same as the justification for regulating copyrights and patents."[138] Now we have to ask ourselves, are trademarks a form of public good based on these theoretical propositions and if so, what are the implications?

The underlining premise, as Barnes argues, for trademarks being a public good, is because of the information that a trademark conveys becomes "public" and freely available for all to use, in the sense of those words, once a trademark is in use.[139] Barnes argues that trademarks are non-rivalrous in nature and made a linkage to the Samuelson theorem of public goods, which states that once a good is introduced on the market, "any given unit of the good can be made equally available to all"[140] and that trademarks under these circumstances are used referentially. Barnes posits: "Once a supplier adopts a mark to use proprietarily and uses it in commerce, that mark is equally available to all to use referentially."[141] Thus, non-rivalry in (trademarked) goods presupposes that no matter if X amount of goods are consumed by Y, there would still be a good amount for Z and so on, to consume.[142] This linkage of public goods theory to trademark is an important one since it captured the transmission of trademarks in an information context, and similar to copyrights or patents, that information has become available for all to use without diminishing the opportunities to others to use. Arguably, the public goods theory of trademarks reveals that, as economic entities, trademark law recognizes and supports the broader wealth generating capacity of trademarks.

Barnes's underlying argument is that a trademark is a mixed form of public good because the information that a trademark conveys falls into public domain due to its informative role.[143] In other words, trademarks convey information that becomes public "once placed on the market," if I may use a term largely applicable to exhaustion theory in trademark law. The public goods theory of trademarks, and as posited by Barnes, fits into the information function of trademarks, (communicative) and similar to the search cost function of trademarks, the information function serves the welfare of the consumers. As Barnes posited, the "source or product information may be associated with a mark through advertising. Advertising tacks additional information onto marks. This information is luggage that the mark carries on its travels through the stream of commerce."[144] The information function of a trademark is

harmed by actual source confusion." *Id.* at 46. For full discussion on market failure and trademarks see *id.* at 57–64.

[138] *Id.* at 35.

[139] *Id.* at 24.

[140] *Id.* at 35.

[141] *Id.* at 47.

[142] *Id.* ("As long as there are non-rivalrous users, as there are for trademarks viewed as mixed public goods, the static/dynamic dilemma associated with non-rivalry remains.… Public goods theory suggests that the provision of search information to referential users through trademarks may be inefficient due to potential conflict between static and dynamic efficiency and inadequate demand revelation.").

[143] *Id.* at 24.

[144] *Id.* at 31.

appealing because the information function of a trademark, as opposed to search cost reduction, helps to maintain a surplus market which trademark owners in turn use to create a market power advantage for goods on the market.

But what is truly appealing about the information function of a trademark is the extent that it helps to cement the investment function of trademarks and thereby creating further opportunities for wealth generating and brushing the consumer search cost function to near irrelevance. As pointed out earlier, the function of a trademark from a search cost point of view, is consumer oriented in that trademarks are seen as realms of consumer efficiency and to make the consumer better off, so to speak. This is also one sided and does not capture the function of trademarks from that of the producer–the proprietor who sought protection for the mark in the first place. While other functions, such as the informative (communicative), tend to represent the economic interest of the rightsholder, I want to shift the focus to economic effect of the investment function of trademarks, which has been gaining a foothold in recent years, due to a ruling from the CJEU which propelled this *new* function of trademarks. Naturally, one implication of a new theory regarding trademark functions is that it highlights the resourcefulness of trademarks and at the same time sends shockwaves through trademark jurisprudence itself.

It took a quarrel over, of all things, flowers (roses) between a high-end British department store and an American flower distribution giant with global operations for courts to reckon that there was another dimension to trademarks—an investment function.[145] Not that things as glowing and beautiful as nature's gift to man–flowers–should have been the object that determined that trademarks have an investment function, but then again, it harks back to man as economic entity engaging in all sort of economic activities for his benefit, whether, as early man would do–stamp his cattle and or present *homo economicus* often do–branding his flowers with a special mark to signify the scent of utopia.

It was in *Interflora v. Marks & Spencer* that the CJEU confirmed the existence of an investment function of a trademark—even if that investment function "overlap[s] with the advertising function."[146] Of course, in one respect, the court confirming the existence of an investment function in a trademark should hardly be surprising to trademark owners, but for the trademark legal scholarship and even the trademark litigation world, it was a surprising decision or even one of bewilderment.[147] Nevertheless, the investment function of a trademark serves particular needs of not only trademark law going back to basics–in that trademark law was initially for manufacturers before it was *appropriated* to that of consumer interest—but also that the investment function is a natural percolator to the wealth generating function of trademarks.

Interestingly, what sparked the quarrel about flowers and led the court to confirm the existence of an investment function in trademarks was the new phenomenon of keyword advertising, where a competitor often selects the trademark of a competing

[145] Case C-323/09, Interflora, Inc. v. Marks & Spencer PLC, 2011 E.C.R. I-0862, ¶ 61.

[146] *Id.*

[147] I recalled a discussion with one British Judge who described the Judgment in similar terms because the CJEU was caught between something like a rock and hard place. That conversation took place during a talk at Bayreuth University and the judge who is also an accomplished IP scholar now sits in the High Court along with the earned title of "Sir".

brand as a keyword to advertise his own product on online services such as Google.com. Incidentally, it was Google Inc., that developed this new method of advertising—AdWords—for the internet (and it is a trademark headache altogether), but nevertheless, when Marks and Spencer chose the keyword "Interflora" and various derivatives–it triggered a backlash from Interflora Inc., who sued for trademark infringement.[148] In addition to the origin and advertising function of a trademark, the CJEU explained that a trademark encompasses "various commercial techniques" and if a competitor "substantially interferes with the proprietor's use of its trade mark to acquire or preserve a reputation capable of attracting consumers and retaining their loyalty, the third party's use must be regarded as adversely affecting the trade mark's investment function."[149] The substantial interference requirement that is available to competitors are that of AdWords in this context, and such AdWords can determine how consumers behave when searching for methods of delivering flowers online. Under these circumstances, AdWords can trigger a consumer to behave differently, either for comparison or ultimately rejecting the original trademark owner's services for a competitor. Although, I disagree with the argument that under similar circumstances—and AdWords do not "trigger" trademark confusion—AdWords do create or shape consumer behavior in trademark law.[150]

The choice of words by the court reflected one thing, in particular, the phrase: "various commercial techniques," as it was meant to underline the all-important economic impact of trademarks and that trademark owners ought to reap their economic rewards from the investment in their "property."[151] The Advocate General gave a similar reasoning in his Opinion and noted: "The property-based approach also protects the communication, advertising and investment functions of trade marks with a view of creating a brand with a positive image and independent economic value (brand equity or good will)."[152] This point of view essentially captured the economic effect of the investment function because it is by simply engaging in various commercial techniques that the proprietor invests in his mark so that it can lure potential customers to his goods and services while at the same time creating goodwill in reputation and increasing his "brand equity."[153] To discern the wider economic effect of the investment functions of trademarks, one must agree that trademarks are a form of property and once this belief is taken into account, then it is much easier to

[148] Case C-323/09, Interflora, Inc. v. Marks & Spencer PLC, 2011 E.C.R. I-0862, ¶ 18.

[149] *Id.* at ¶ 61–62.

[150] Stefan Bechtold & Catherine E. Tucker, *Trademarks, Triggers, and Online Search*, 11 J. EMPIR. LEG. STUD. 718 (2014).

[151] *Interflora*, 2011 E.C.R. I-0862, ¶ 61.

[152] Opinion Advocate General at ¶ 50, *Interflora*, 2011 E.C.R. I-0862.

[153] I have adopted the definition of brand equity from David Aaker & Alexander Biel, which states: "A consumer perceives a brand's equity as the value added to the functional product or service by associating it with the brand name. A company may view it as the future discounted value of the profit stream that can be attributed to the price premium or enhanced loyalty generated by the brand name. From a managerial perspective, it is a set of assets – including brand awareness, brand loyalty, perceived quality, and brand associations – that are attached to a brand name or symbol." David A. Aaker & Alexander L. Biel, *Brand Equity and Advertising: An Overview*, *in* BRAND EQUITY & ADVERTISING: ADVERTISING'S ROLE IN BUILDING STRONG BRANDS 2 (David A. Aaker & Alexander L. Biel eds., 1993).

concur with the *Interflora* Court that trademarks serve an investment function. One problem with that argument is that the CJEU does not necessarily share this view. If it does, it is quite silent on the matter, which does not necessarily demonstrate that trademarks are a form of property.[154]

The view that the CJEU subscribes to, as opposed to treating trademarks similarly to property rights, is that of economic function and this spans the various rulings of the Court over the decades that touched upon issues such as "economic link;" "economic progress;"[155] or various rhetoric infused with the word "economic." All these references and rhetoric by the CJEU on trademarks role and functions can be housed under one roof as the economic function theory of (European) trademark. But the greater implication for treating trademarks similarly to real property, despite some hesitation by the courts in recent years, is that as a form of intellectual property trademarks are perhaps "superior rights,"[156] because I believe trademarks engage the transactional world of goods and services more regularly as opposed to other *property* and the rights in them.

Frank Schechter's work, which has had a lasting impact on contemporary trademark and theory, had used the term "commercial magnetism" to describe the power and attraction of trademarks. For Schechter, who was a lead trademark counsel for a prominent firm at the time, viewed trademarks as the source of profits for a firm when his arguments on the rational basis for trademark protection are decoded using the wealth generating theory.[157] Similar to Schechter's appeal of trademark's commercial magnetism, the wealth generating theory of trademarks reflects a firm's desire for profitability and control over the market the trademarked goods represent, as evidenced by the commercial techniques trademarks employ. Viewing the functions of trademarks as wealth generating as opposed to other functions is an attempt to challenge the very foundation of the current system of trademarks so that internal contraction can be made within the system to fully recognize the impact wealth generating in trademarks has on society.

To summarize the wealth generating function of trademarks, as I posited above, is that the trademark owner has always been a "rational maximiser of self-interest"[158] and his trademarks ultimately represent those self-interests, and in one sense, the wealth generating theory of trademarks is vindicated by the wealth maximization

[154] However, in the United States, courts have often recognized that trademarks are a form of property. *See* Coll. Sav. Bank v. Fla. Prepaid, 527 U.S. 666, 673 (1999) (observing that "protected property interest is the right to exclude others … [including] trademarks …."); K Mart Corp. v. Cartier, Inc., 485 U.S. 176, 186 (1988) (holding that trademark law grants private property rights); Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 413 (1916) (noting that trademarks "and the right to their exclusive use, are of course to be classed among property rights."); Trade-Mark Cases, 100 U.S. 82, 92 (1879).

[155] Case C-10/89, SA CNL-SUCAL NV v. HAG GF AG, 1990 E.C.R. I-3711, [1990] 3 C.M.L.R 571, where the AG quipped, "trade marks reward the manufacturer who consistently produces high-quality goods and they thus stimulate economic progress."

[156] Robert Merges, *A Transactional View of Property Rights*, 20 BERKELEY TECH. L.J., 1477, 1486 (2005) (discussing patent licensing cases).

[157] Schechter, *supra* note 17, at 831.

[158] Norman Frolich et al., *Beyond Economic Man: Altruism, Egalitarianism and Difference Maximizing*, 28 J. CONFLICT RESOL. 3 (1984).

theory in general economics.

Bearing in mind the various contributions over the years on the functions and or economic aspects of trademarks, and having discussed some of those contributions in the preceding pages, I have come to realize that despite those unique arguments, the real purpose and function of a trademark did not entirely reveal itself either in those contributions and or those contributions did not properly frame the real function of a trademark. Because a trademark is an investment by its proprietor, its chief function is to generate wealth on behalf of that proprietor while serving as an economic link on the competitive free market between buyers and sellers of goods and services. The main reason why a firm or person engages in the production of goods and services is to generate a profit and hence create more wealth for shareholders in the firm and or for the individual economic entity (*homo economicus*). As the firm or individual economic entity engages in the production of goods and services, as principal gateway and connection to potential customers, a sign is chosen to represent those goods and services. While that sign performs other percolator functions such as identifying the origin of the goods and services and or reducing the amount of time a consumer uses to search for specific goods or services, the sign that is chosen as a conduit of economic activity linking the consumers and the firm or individual economic entity is merely to ensure that enough wealth is generated through sales that maximizes the potential of owners of the *new* sign representing the goods and services. Another way of viewing this same argument is to draw an analogy with the CJEU's *L'Oreal v. Bellure* decision in that trademarks serve the proprietors' best interest by allowing "financial compensation."[159]

One way of legitimizing the notion that a trademark's main function is of wealth generation is to look to the theories of brand and asset valuation in finance/accounting and marketing. The finance/accounting theory of asset valuation posits that assets, and in our case, an intellectual property asset such as a trademark (brand) that these core assets allow for economic returns, while marketing theories of brand valuation posits similar arguments.[160] Now let's, for the sake of argument based on the finance/accounting and marketing theories of valuation, refer to intellectual property rights and specifically trademarks as "intangible assets." From a trademark perspective, brand valuation entails the amount of money willing to be paid for the goodwill accumulated on the marketplace.[161] The proprietor on his part is mostly concerned with the economic return that his trademark represents. It is always and will always be about overall returns because the actual business of trademarks is to generate business.

There are a number of factors for how a trademark functions as a wealth generating device and these can range from the accumulation of goodwill; brand extensions; product differentiations; and creative deception among other factors. I have touched upon creative deception above and I will expound on product differentiation next and

[159] Case C-487/07, L'Oréal SA v. Bellure NV, 2009 E.C.R. I-05185.

[160] RUSSELL L. PARR, INVESTING IN INTANGIBLE ASSETS: FINDING AND PROFITING FROM HIDDEN CORPORATE VALUE 86–98 (1991) (discussing trademarks as intangible assets and their leveraging capabilities and as competitive barriers to entry). *See also* PETER J. GROVES, INTELLECTUAL PROPERTY RIGHTS AND THEIR VALUATION: A HANDBOOK FOR BANKERS, COMPANIES, AND THEIR ADVISERS 128–29 (1st ed. 1997).

[161] Celia Lury, *Trade Mark Style as a Way of Fixing Things, in* TRADE MARKS AND BRANDS: AN INTERDISCIPLINARY CRITIQUE 217 (Lionel Bently et al. eds., 2008).

will also allude to its role in antitrust harm.

### *C. Product Differentiation as Trademarking Activities*

One of the most proliferous weapons available to trademark holders is that of product differentiation where they are able to use this form of trademarking activity to cement their market power status and by extent, create harms for consumers. One of the claims in this Article is that product differentiation using trademarks creates more than average market power and this market power borders on the threshold of antitrust analysis and by extent a concern to antitrust law.[162] In antitrust cases, U.S. courts have recognized product differentiation as a method of measuring market power. For example, in *GT Sylvania*, the U.S. Supreme Court observed that "product differentiation" is one method used to measure market power.[163] This is not difficult to translate to the trademark settings where the proliferation of brands as a method of product differentiation has been a tool of creative deception to the detriment to consumers.

So then, what really is product differentiation,[164] and how does it relate to trademarks? Is there a connection between production differentiation and antitrust? If so, what is the effect of this relationship from a trademark perspective? These are some questions addressed in this section. In addition, these questions are crucial to the main inquiry of this Article, that is, whether trademarks are a source of market power and as such an antitrust problem. Product differentiation is a method used to differentiate and distinguish "similar products from each other by persuasive (non-informational) advertising and other forms of sales promotion."[165] This definition of product differentiation is similar to one given by Judge Richard Posner, who explained that "product differentiation is the phenomenon of purchasers' distinguishing among different sellers or brands of the same product."[166]

Product differentiation is a tool employed using mostly trademarking activities, such as branding or labeling, to give an impression on consumers that goods that are

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[162] *See also* Drugs, Beers and Product Differentiation, *supra* note 1.

[163] Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 64 (1977) (White, J., concurring).

[164] Richard E. Caves & Peter J. Williamson, *What is Product Differentiation, Really?*, 34 J. INDUS. ECON. 113, 113 (1985); James M. Treece, *Protectability of Product Differentiation: Is and Ought Compared*, 18 RUTGERS L. REV. 1019, 1020 (1964) ("The term *product differentiation* is inclusive. It includes, as has been suggested, designs and configurations of goods and their dress, as well as packaging. It also embraces symbols of origin such as trademarks and tradenames. It goes beyond the product itself and in fact extends to the seller's location, to his reputation, manner and tone, and to each of the conditions which surround a sale." (citations omitted)).

[165] Samuel A. Smith, *Antitrust and the Monopoly Problem: Toward a More Relevant Legal Analysis*, 2 ANTITRUST L. & ECON. REV. 19, 38–39 (1969) (identifying brand name price difference, concentration, vertical restraints such as rpm, exclusive dealing and territorial restrictions, as forms of product differentiation).

[166] Richard Posner, *Working Paper III: Advertising and Product Differentiation*, 2 ANTITRUST L. & ECON. REV. 19, 45 (1969) ("Product differentiation … manifests itself in consumer loyalty, is associated with product differences, trademarks, differential reputations of sellers for reliability, promptness, answerability, etc. – and with advertising.").

physically similar are different. According to one definition:

> Product differentiation can be interpreted in a strict sense to mean that, economically . . ., even physically similar goods are not the same to the consumer if there exist quite small variations of a qualitative nature. Such differences need not include the exact physical make-up of the good itself; although such factors as technical merit, finish and quality of material are, of course, important. The differences need only exist in the circumstances surround the sale of the good. Thus trade-names, labels, packing and retail services are some of the factors which must, for most cases, be considered to be a minimum part of the consumer's assessment of a good.[167]

In *U.S. v. Oracle Corp.*,[168] the court adopted a definition of product differentiation that economists often use:

> Firms in perfect competition produce homogenous product so that price is the only variable of interest to consumers, and no firm can raise its price above marginal cost without losing its entire market share . . . . Differentiated products are imperfect substitutes representing as they do different features or characteristics that appeal variously to different customers. Because no product is a perfect substitute of another in a differentiated products market, each seller continues to face a downward sloping demand curve. *Like a pure monopolist, the seller of a differentiated product, facing a downward sloping, or less than perfectly elastic curve, maximizes its profits by pricing above marginal cost*.[169]

The analysis of differentiated products in *U.S. v. Oracle* was not the first time courts have addressed the issue,[170] and therefore, the approach to product differentiation, using trademarks as a point of focus in this Article, under antitrust law, sustains such an approach and how that approach affects intellectual property rights.

The definitions of product differentiation outlined above are from an economic perspective.[171] They are equally important and applicable to a legal definition of product differentiation and also incorporate how other approaches to product differentiation such as in marketing are used. The importance of these definitions of product differentiation to trademarks is that it buttresses the argument that trademarks are an independent economic entity and that product differentiation as a form of trademarking activity "indicates the existence of some degree of market power since

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[167] Alex Hunter, *Product Differentiation and Welfare Economics*, 60 Q.J. ECON. 533, 533–34 (1955).

[168] United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

[169] *Id.* at 1115 (emphasis added) (citations omitted).

[170] United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377 (1956) (describing the concepts of monopolistic competition and differentiated product markets).

[171] Michael Spence, *Product Differentiation and Welfare*, 66 AM. ECON. REV. 407, 407 (1976) ("Product differentiation involves a set of real economic choices because there are increasing returns or declining average costs in the development, production, marketing and distribution activities of firms.").

it gives the producer the ability to price above cost."[172] The implication of this, as one author observed is that "every differentiated product" then has the ability "to be its own antitrust product market" and this then raises questions of product market definition in antitrust law. Looked at another way, a producer selling dietary supplements under the brand/trademark GRENADE will diversify into various supplements fulfilling other dietary functions but still carry the GRENADE trademark, such as GRENADE BLAST, for the sake of argument. This creates either a distinct market limited to that product, as Keyte posited, or its own antitrust product market.[173] By using trademarking activities to differentiate products then producers are able to further monopolize the product market they are in, building on the exclusivity endowed in the trademark.

One challenge of product differentiation is developing a legal definition or principles for what it entails. And this can turn out to be tricky, because, like most legal problems, they are handled on a case by case basis. From the Hunter definition of product differentiation above, we could deduce that product differentiation can occur in different ways, and Keyte also argued that product differentiation can occur in forms, such as single brand differentiation; branded and generic goods, products differentiation by price, quality and consumer utility.[174] Courts in the U.S. have identified product differentiation based on some of these criteria. For example in *FTC v. Whole Foods*, the court explained that price information was instrumental in determining product differentiation: "the key to distinguishing product differentiation from separate product markets lies in price information."[175] In terms of "separate product markets," interestingly the court noted that "product differentiation does not mean different product markets."[176] This is crucial because where two food giants merged and then also sell various products using trademarking activities such as branding, private labels and product differentiation, in terms of antitrust law what is important for consumers are "products that are distinguishable in [their] minds" as oppose to "separate markets."[177]

The gravity of this observation by the court holds one of the key factors into the possible harms of product differentiation when trademarking activities are involved and that is pricing, because consumers may ignore product markets but they do mind how much they spend on a product for which trademarking activities convey information. This does not mean that product differentiation is all together bad in the eyes of antitrust law as some courts in the U.S. were keen on pointing this out. In

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[172] NEIL J. WILKOF & DANIEL BURKITT, TRADE MARK LICENSING ¶ 2:39 (2d ed. 2005) (explaining that trademarks are also a good in itself noting "the trade mark no longer serves to sell the goods, but it serves to sell itself."); James A. Keyte, *Market Definition and Differentiated Products: The Need for a Workable Standard*, 63 ANTITRUST L. J. 697, 698 (1995).

[173] Keyte, *supra* note 172, at 698.

[174] *Id.* at 705.

[175] 548 F. 3d 1028, 1056 (D.C. Cir. 2008).

[176] *Id.* at 1055.

[177] *Id*.

*Borden v. FTC*, for instance, the Court explained that "a highly successful brand name and product differentiation achieved through extensive advertising over the years . . . does not create a presumption of monopoly power."[178]

These various positions on product differentiation, as demonstrated by some courts, only suggest that product differentiation is nonetheless an issue that divides not only courts but also a complicated issue from even a trademark law perspective. In one case where it was alleged that trademarks were being used to monopolize the product markets for fraternity insignia and class rings, the Seventh Circuit explained that if "a degree of substantial product differentiation"[179] prices for the goods in questions would have been affected and also noted that trademarks were being used as a tool to "discourage[] competitors from entering the [market for fraternity insignia's and high school class rings]."[180] In the case of *Borden v. FTC*, I disagree where the court suggested that production differentiation may not altogether be a bad thing because the reasoning did not take into consideration the negative effects of product differentiation, and in particular, product differentiation ability to facilitate the creation of barriers to entry.[181]

One of the claims I advance is that product differentiation[182] is a source of monopoly power. When I first made that argument,[183] I did not elaborate on my thesis and I have the opportunity to respond in part in this section.[184] Product differentiation

[178] 674 F.2d 498, 511–512 (6th Cir.1982). *See* Stormy Clime Ltd. v. Regroup, Inc. 809 F.2d 971, 978–89 (2d Cir. 1987) ("By focusing upon hindrances to legitimate competition, the functionality test, carefully applied, can accommodate consumer's somewhat conflicting interests in being assured enough product differentiation to avoid confusion as to source and in being afforded the benefits of competition among producers."); Sandra Co. v. FTC, 339 F. 2d 847, 857 (6th Cir. 1964) ("[S]ignificant product differentiation increases somewhat the importance of intrabrand competition between distributors . . . product differentiation increases the importance of successful advertising and promotion to inform the ultimate consumer of the advantages of one differentiated product over another."); Redwood Theatres, Inc. v. Festival Enters., 248 Cal. Rptr. 189, 199–200 (1988); *see also supra* note 7 (discussing extensively product differentiation).

[179] L.G. Balfour Co. v. FTC, 442 F.2d 1, 10 (7th Cir. 1971).

[180] *Id.* at 17.

[181] *Redwood Theatres*, 248 Cal. Rptr. at 201.

[182] Product differentiation refers to the variations within a product class that consumers view as imperfect substitute. S*ee* Simon Anderson, *Product Differentiation, in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008); *see also* Michael Lovell, *Product Differentiation and Market Structure,* 8 W. ECON. J. 120 (1970) ("Product differentiation offers the consumer the opportunity to select commodities closely tailored to his individual preferences…"). *See also* PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 572 (13th ed. 1989) ("[A] barrier to competition arises when legal restrictions or product differentiation reduces the number of competitors below the number that would survive on the basis of efficient cost structure alone."); Charles Mueller, *Sources of Monopoly Power: A Phenomenon Called 'Product Differentiation'*, 18 AM. U. L. REV. 1, 70 (1968) ("Product differentiation refers to the distinguishing or setting apart of substitute products from each other in the minds of buyers.").

[183] *Economics of Distinctiveness*, *supra* note 1.

[184] *But see* Drugs, B*eers and Product Differentiation*, *supra* note 1 for more elaborate discussions.

is a phenomenon that leads to artificial market division and therefore "differentiation . . . leads to greater concentration and more imperfect competition."[185] Or, as Edward Chamberlin, puts it: "with differentiation appears monopoly, and as it proceeds further the element of monopoly becomes greater."[186] In addition, product differentiation is a source of market power in that new firms find it harder to enter because the monopolist (or established firm) "produce products which by reason of past performance, *brand names*, or advertising have a strong hold on the affections of the buying public."[187] The brand names, which I use here as trademarks, since some consumers may have an affection for these brands, and because of their *loyalty*, switching is either impossible, or the brands have grown into status symbols.

Product differentiation is inextricably linked to trademarks,[188] in that manufacturers use product differentiation as a commercial technique, but have similar traits to trademarks as source identifiers. In *Miller Brewing v. Falstaff*, the court explained that differentiating "devices" were not "technically trademarks".[189] As a technique, product differentiation is able to separate itself from trademark rights, but yet, invoke trademark rights for product protection. The relationship between product differentiation, from a trademark perspective, and that of antitrust law, is that product differentiation sets in motion a path for a manufacture to gain dominance on a relevant market.[190] The effect is that any dominance gained as a result of product differentiation can (*probably/will*) lead to a price increase.[191] There is also an argument to be made

[185] Samuelson & Nordhaus, *supra* note 182, at 573. EDWARD CHAMBERLIN, THEORY OF MONOPOLISTIC COMPETITION 9 (2d ed. 1936) ("With differentiation appears monopoly, and as it proceeds further the element of monopoly becomes greater. Where there is any degree of differentiation whatever, each seller has an absolute monopoly of his own product, but is subject to the competition of more or less imperfect substitutes.").

[186] EDWARD CHAMBERLIN, THEORY OF MONOPOLISTIC COMPETITION 9 (2d ed. 1936).

[187] K. E. Boulding, *Barriers to New Competition: Their Character and Consequences in Manufacturing Industries*, 2 ADMIN. SCIENCE Q. 116, 117 (1957) (emphasis added).

[188] Posner, *supra* note 166.

[189] 503 F. Supp. 896, 902 (D.R.I. 1980).

[190] Barnes, *supra* note 94; Joseph Livermore, *On Uses of a Competitor's Trademark*, 20 STAN. L. REV. 448, 449–450 (1968) ("The economic effects of… product differentiation made possible by trademarks [allows] the trademark proprietor… to achieve a degree of insulation from normal competitive pressures."). *See also* Smith, *supra* note 154, at 38 ("The monopoly power involved [in product differentiation] in a particular industry is measured in terms of price differential between the advertised and the unadvertised brands of comparable quality.").

[191] Barnes, *supra* note 94, at 27 ("Firms also compete by investing in ways to make their products different from (or appear different from) competing products. By associating unique characteristics with their marks, suppliers reap the benefits of developing and marketing if their exclusive right to the mark is protected. Product differentiation has been described as the foundation of rationally functioning consumer product markets because it permits suppliers to satisfy consumers' diverse preferences. *Product differentiation can, however, lead to dominance of product markets, higher prices, and foreclosure of would-be-competitors.* Trademark law's conflicted relationship with product differentiation arises from the fact that the information content of a mark may both highlight the differences between products that satisfy different consumers and obscure similarities that might increase competition and lower prices." (emphasis added) (citations omitted)).

that product differentiation has benefits for consumers, and can be viewed the same way trademarks functions as a source identifier or to reduce search costs, product differentiation can function the same way. This is a plausible argument. However, when analyzing from a different perspective, product differentiation serves as a source of market power, then harms to a consumer that product differentiation may cause are outweighed by any benefits that product differentiation may mitigate. Product differentiation, as a creature of *fair competition*, is in itself, a creature that may create anticompetitive barriers to entry.[192] The antitrust analysis of product differentiation, thus, also turns to an antitrust analysis of trademarks and any anticompetitive harm as a result of trademarks and product differentiation.[193]

There are two observable features of product differentiation that the preceding discussion revealed. The first is that product differentiation is a tool that can promote a healthy degree of competition,[194] and the second is that product differentiation is, ironically, also a tool to determine the extent of market power that trademarking activities create and thereby monopolize the product market for goods and services.

## V. CONCLUSION

Discussions on the intersection of trademarks and antitrust often require novel arguments in order to align possible breaches of antitrust rules. The arguments in this Article are only some insights into which trademarks are possibly an antitrust problem. The notion of creative deception that I developed in the Article helped to situate how some of the broader market dynamics used by firms may potentially provide some of the answers. The arguments were in part theoretical and in part practical when the case studies are factored in the discussions. Given that I also advanced a new theory of wealth generating function for trademarks and showed that the investment function of trademarks served as a conduit for the wealth generating capacity of trademarks, I suspect not all will be convinced. However, the implications are that there is a potential new ground to consider when courts are examining antitrust cases that involved trademarks and alleged monopolistic behavior. Moreover, since I also argued that the traditional search cost function of trademarks has been unfairly elevated without giving due consideration to the original function of trademarks— business and wealth creation—then, there are grounds to further investigate the implication of wealth creation by firms using trademarks on the competitive market. Another argument I developed was that trademarks pursue a dual function to promote competition and, at the same time, serve as a source of market power. These opposites also serve to confirm the near impossibility of correctly positioning trademarks in the antitrust framework. I hope these arguments can only further drive the debate.

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[192] JULES STUYCK, PRODUCT DIFFERENTIATION: THE LEGAL SITUATION 107 (1983) ("Product differentiation, the creation of objective or subjective differences between products within the range of one or several concerns, has given rise to anxiety as to the consequences it may have for the freedom of competitors to compete (barriers to entry), the structure of the market (concentrations) and the transparency of the market.").

[193] *See Drugs, Beers and Product Differentiation*, *supra* note 1.

[194] Similar observation was made in United States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 553 (N.D. Ill. 1968) ("[C]ompetition is based only partially on price because of product differentiation, there has remained a relatively healthy degree of product competition").