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THE EVOLUTION OF TRADEMARK ECONOMICS—FROM THE HARVARD SCHOOL TO THE CHICAGO SCHOOL TO WIPO 2013—AS SHEPARDED BY INTA AND *THE TRADEMARK REPORTER*

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In 1933, in *The Theory of Monopolistic Competition*, Edward H. Chamberlain launched the (anti-trademark) Harvard school of trademark economics. As the Harvard school reached its high point in the 1960s and 1970s, the (pro-trademark) Chicago school counterattacked,[1] and the authors of two 1988 articles in *The Trademark Reporter*[2] (bearing the fingerprints of the United States Trademark Association[3]) joined in the Chicago school effort. In 2013, the World Intellectual Property Organization ("WIPO"), citing one TMR article and the original source of the second among its highly selective list of forty-four "References,"[4] declared what had (to me) long been obvious—that the Chicago school represents the better view. This article traces the eighty-year history from inception to (current) conclusion of the trademark economics debate.

THE HARVARD SCHOOL

Harvard school economists essentially theorized that "[b]y successfully differentiating a standardized product from

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1. Daniel M. McClure, *Trademarks and Unfair Competition: A Critical History of Legal Thought*, 69 TMR 305, 346 (1979).

2. William M. Landes & Richard A. Posner, *The Economics of Trademark Law*, 78 TMR 267 (1988); Nicholas S. Economides, *The Economics of Trademarks*, 78 TMR 523 (1988).

3. Now the International Trademark Association (INTA). The Landes and Posner article was derived from Judge Posner's remarks at the USTA Foundation's A. Bradlee Boal Memorial Lecture at the N.Y.U. School of Law on March 2, 1988; his remarks, in turn, were an adaptation of Professor Landes's and Judge Posner's article *Trademark Law: An Economic Perspective*, 30 J.L. & Econ. 265 (1987); the Economides article was funded by a USTA grant to the Center for Law and Economics of Columbia University.

4. 2013 World Intellectual Property Report: Brands—Reputation and Image in the Global Marketplace, Economics & Statistics Series, WIPO Publication No. 944E/2013 ("2013 Report"), at 108.

competitors' products and achieving brand loyalty through advertising, a producer could insulate his market share from price competition . . . [and] create high barriers to entry."[5] Professor Chamberlain urged that "the public interest would be best served by permitting unlimited competition through imitation, so that it would be almost impossible to accomplish advertising differentiation [and he would have scrapped] the identification function, leaving the public to be protected against debased imitations by standard grades."[6]

In one of the most articulate (lay friendly) applications of Harvard school economics to trademark law, Ralph S. Brown, Jr. variously observed that:

> 1. "To the extent that the blandishments of sellers *inform* buyers what is to be bought, and at what price, advertising undoubtedly helps to quicken the stream of commerce [particularly as to new products]," but "most advertising [was] designed not to inform, but to *persuade*. . . ."[7]
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> 2. "The economist, who defines as irrational any market behavior not dictated by a logical pecuniary calculus, may think it irrational to buy illusions; but there is a degree of that irrationality even in economic man; and consuming man is full of it." Nonetheless, consumers were not being given *information*, but were bombarded by a bewildering manipulation of *persuasive* superlatives,[8] and "an enormous number of consumers . . . [were deemed to] have been duped by unscrupulous marketers."[9]
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> 3. Trademarks thus facilitated "monopolistic competition" in which mark owners, "[b]y differentiating their products [through persuasive advertising, could within limits] carve out

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5. McClure, *supra* note 1, at 329-31 ("'it is one of the functions of trade-marks to lift the product bearing a mark out of its general class and to place it in a class of its own, thus eliminating competition of other goods, because the public believes that 'there is nothing just as good.'").

6. Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 Yale L.J. 1165, 1195 n.126 (1948).

7. *Id.* at 1168 (italics supplied) (consumer advertising was "a black art whose practitioners [were] part of a larger army [employing] threats, cajolery, emotions, personality, persistence and facts in what [was] termed aggressive selling" (1165-66); only "[i]ndustrial advertising, directed at trained buyers unresponsive to emotional appeals [was regarded] as a model of information without embellishment" (1169 n.16)).

8. *Id.* at 1181-82.

9. Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 Yale L.J. 1687, 1692 (1999) (Lemley, for himself, being "loath to jump to such a conclusion").

separate market[s] in which demand, price, and output [could] be manipulated."[10]

4. "The task before the courts in trade symbol cases . . . should [thus] be to pick out, from the tangle of claims . . . they are set to unravel, the threads of informative advertising, and to ignore the persuasive."[11] "Communication free of confusion needs to be fostered only for sellers who give and buyers who seek information."[12]

5. The guarantee function of trademarks was only a minimum warranty of merchantable quality, and a mark owner could vary quality widely without legal consequence.[13]

6. Free riders might exist under a senior's price umbrella and cloak inferior products, but might also offer equal products at a lower price and defuse differentiation; in either event, to the extent that both senior and junior attempted to profit from differentiation, they were *in pari delicto.*[14]

The judiciary's age-old abhorrence of trademark monopolies was energized;[15] dilution was dismissed as a "demand for protection of persuasive values alone"[16] and as an unconstitutional effort to achieve copyright status for a mark;[17] Harvard school influence led the Justice Department to oppose the Lanham Act;[18] and at the height of the Harvard school's influence, the Federal Trade Commission ("FTC") was considering: (a) compulsory licensing of dominant brands; (b) dismemberment of the ready-to-eat cereal industry; and (c) assaults on what it considered to be generic marks.[19]

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10. Brown, *supra* note 6, at 1171, 1177 ("A different brand, like a patent, a secret process, control over distribution channels, or control of raw materials, is a safeguard against the risks of competition.").

11. *Id*. at 1184.

12. *Id*. at 1198.

13. *Id*. at 1186.

14. *Id*. at 1204.

15. McClure, *supra* note 1, at 315. *See* Frank I. Schechter, The Historical Foundations of the Law Relating to Trademark Law 136 (1925). *Also see* Judge Frank's remarks in *Eastern Wine Corp. v. Winslow-Warren Ltd.*, 137 F.2d 955, 959 (2d Cir. 1943) ("the basic common law policy [was the] encouraging [of] competition [whereas] the protection of monopolies in names [was] but a secondary and limiting policy").

16. Brown, *supra* note 6, at 1190.

17. George E. Middleton, *Some Reflections on Dilution*, 42 TMR 175, 178-79 (1952).

18. Milton W. Handler, *Are State Antidilution Laws Compatible with the National Protection of Trademarks?*, 75 TMR 269, 273 (1985); Stephen L. Carter, *The Trouble with Trademark*, 99 Yale L. J. 759, 775 (1990).

19. McClure, *supra* note 1, at 308-09, 349-52.

THE CHICAGO SCHOOL

My first exposure to the Chicago school's counterattack occurred in 1972 when I reviewed Professor Yale Brozen's response to the FTC's (and the Harvard school's) assertedly "obsolete" assessment that "'promoting trademarks through intensive advertising results in high barriers to entry. . .'"[20]—it being an essential tenet of the Chicago school that "the cost of personal search by buyers for sellers in the absence of advertising [and trademarks was] high."[21]

My first in-depth encounter occurred in 1988 when I reviewed the lead article in what was to be the first issue of *The Trademark Reporter* for which I served as Editor-in-Chief,[22] "The Economics of Trademark Law," by William M. Landes and Richard A. Posner.[23] (The derivation of the article is traced in note 3, *supra*.) The article's essence had been expressed in Judge Easterbrook's decision in *Scandia Down v. Euroquilt, Inc.*:[24]

> Trademarks help consumers to select goods. By identifying the source of the goods, they convey valuable information to consumers at lower costs. Easily identified trademarks reduce the costs consumers incur in searching for what they desire, and the lower the costs of search the more competitive the market. A trademark also may induce the supplier of goods to make higher quality products and to adhere to a consistent level of quality. If the seller provides an inconsistent level of quality, or reduces quality below what consumer's expect from earlier experience, that reduces the value of the trademark. The value of a trademark is in a sense a "hostage" of consumers; if the seller disappoints consumers, they respond by devaluing the mark.

My baptism into the Chicago school occurred a few months later when I edited "The Economics of Trademarks" by Nicholas S. Economides[25] and absorbed his rejection of Professor Brown's treatment of informational versus persuasive advertising:

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20. Yale Brozen, *New FTC Policy from Obsolete Economic Doctrine*, 41 ABA Antitrust L.J. 477 (1972).

21. *Id.* at 479.

22. The title was a misnomer. Under Charlotte Jones, there was only one true Editor-in-**Chief**, and it was not me.

23. 78 TMR 267 (1988).

24. 772 F.2d 1423, 1429-30 (7th Cir. 1985).

25. 78 TMR 523 (1988). Professor Economides is a brilliant economist, but English was not his first language, and his article needed substantial editing, requiring that I be fully conversant with his analysis to assure the maximum expression of his views.

> Advertising can change the perceived image of a product; it can add attributes to the product as seen by the consumer. This kind of advertising has sometimes been called *persuasive advertising* to distinguish it from *informative advertising* which disseminates information about prices, location of stores, dates of sales, and the like. More appropriately, it should be called *perception advertising*. In perception advertising a desired mental *image* is added to a physical commodity. . . . The fact that some [commodity] attributes are only perceived, and are not represented by hard physical evidence, does not diminish their significance in the mind of the consumer. . . . Instead of limiting competition, trademarks allow firms to compete in one more dimension. * * * [P]erception advertising *provides consumers with products (mental images) that they value, and which would have been scarce in its absence.*[26]

Picking up, *inter alia*, on the Senate Committee Report on the Lanham Act that "[t]rade-marks . . . are the essence of competition because they make possible a choice between competing articles by enabling the buyer to distinguish[/differentiate] one from the other,"[27] the Chicago school, at every level, rejects Harvard school analysis:

> 1. Whereas Professor Brown had been troubled that a quality signal was legally unenforceable, not only does Judge Easterbrook note that market forces punish quality deviations, but Richard Caswell emphasizes that in the absence of trademarks:
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>> . . . consumers could only learn about the quality distribution of the industry as a whole, [and] a manufacturer would gain little or nothing from improving his product's quality. Consumers would be unable to recognize high- or low-quality brands, so sales would tend to go to manufacturers who reduced their price by cutting corners on quality. The result would be a race to produce

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26. *Id.* at 532-35 (italics supplied). As I have earlier noted, the "source and quality" brands that existed through the 1940s and 1950s do not provide the "added [emotional] attributes and [image] content that consumers now want, demand and need," Jerre B. Swann, *Dilution Redefined for the Year 2002*, 92 TMR 585, 594 (2002), and the Chicago school rejects the moral overtones of the Harvard school that consumers, effectively, should be informed of and concerned only with price and quality. *See* Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. Rev. 547, 548, 555 (2005) ("The major focus of trademark law is protecting the source identification and information transmission function of marks. . . . The information might be *factual* [as to quality] . . . or it might be *emotional or affective* in content. . . . All of this factual and emotional information about a brand is what the mark communicates.") (italics supplied).

27. McClure, *supra* note 1, at 333-34.

> inferior products, rather than competition to produce better ones.[28]

2. As to "irrational" brand premiums, Judge Posner and Professor Landes observe:

> The fact that two goods have the same chemical formula does not make them of equal quality to even the most coolly rational consumer. That consumer will be interested not in the formula but in the manufactured product and may be willing to pay a premium for greater assurance that the good will actually be manufactured to the specifications of the formula. Trademarks enable the consumer to economize on a real cost because he spends less time searching for the quality he wants. * * * *The more resources the firm spends developing and promoting a mark, the stronger [and more informative] will its mark be and the lower consumer search costs will thus be; so the firm will be able to charge a higher price.*[29]

3. Brand premiums result, therefore, not from monopolistic competition, but are earned as a consequence of the greater informational value that strong, unique brands afford.

4. As to advertising, therefore, Landes and Posner note that "the hostile view of brand advertising has been largely and we think correctly rejected by economics."[30]

5. As to monopoly power, Landes and Posner observe that "the distinctive yet pronounceable combinations of letters to form words that will serve as a suitable trademark are as a practical matter infinite. . . ."[31] A mark monopoly is not a market monopoly.

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28. Richard Craswell, U.S. Dep't of Commerce, Pub. No. PB 2944465, Trademarks, Consumer Information, and Barriers to Competition 7 (1979); *accord* Edward S. Rogers, Good Will, Trade-Marks and Unfair Trading 20 (1914) ("If the bad could not be discriminated from the good, all would be bad.").

29. Landes & Posner, *supra* note 2, at 277 (italics supplied). As Kevin Lane Keller notes in *Strategic Brand Management* 202-03 (3d ed. 2008), "consumers will not pay price premiums that exceed their perceptions of the value of the brand. *** [S]trong brands cannot command an excessive price premium. . . . [P]rice hikes without corresponding investments in the value of the brand[, as Marlboro learned in 1994,] may increase the vulnerability of the brand to lower-price competition." *See* Lemley, *supra* note 9, at 1687 ("When Ralph Brown wrote his seminal article on trademark law fifty years ago, the modern era of trademark law had just begun . . . and the nature of modern commerce was only just beginning to take shape. Quite a lot has changed in fifty years. More and more the currency of commerce is not goods, but information. . . . Most economists today view trademarks as valuable aids to efficient markets.").

30. Landes & Posner, *supra* note 2, at 277.

31. *Id.* at 276. *See also* Chevron Chem. Co. v. Voluntary Purchasing Grps., Inc., 659 F.2d 695, 702-03 (5th Cir. 1981) ("varieties of advertising display and packaging are virtually endless").

> 6. As for dilution, "[a] trademark seeks to economize on information costs by providing a compact, memorable, and unambiguous identifier of a product. . . . The economy is less when, because the trademark has other associations, a person seeing it must think for a moment before recognizing it as the mark of the product. . . ."[32]

I concur with Professor Robert Bone that "[trademark] law's core mission, as it is understood today, is to facilitate the transmission of accurate information to the market."[33] "Successful marks are . . . packets of information" and "the more a mark [informs], the larger the number of consumers who attach a positive association to it, the better off the firm, which will make more sales at a higher price, and the better off the consuming public, which will realize a larger net economy on information costs."[34]

2013 WORLD INTELLECTUAL PROPERTY REPORT: BRANDS—REPUTATION AND IMAGE IN THE GLOBAL MARKETPLACE

In its 2013 report "World Intellectual Property Report: Brands—Reputation and Image in the Global Marketplace," WIPO cites Economides and Landes and Posner[35] and clearly adopts the Economides version, as opposed to the Brown version, of the "persuasion/perception" advertising debate:

> [Brands] come with a reputation for quality, functionality, reliability and other attributes, ultimately enabling consumers to exercise choice in their decision-making. Equally important, they come with a certain image—whether for luxury, trendiness or social responsibility—which consumers care

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32. Richard A. Posner, *When Is Parody Fair Use?*, 21 J. Legal Stud. 67, 75 (1992); Ty Inc. v. Perryman, 306 F.3d 509, 511 (7th Cir. 2002) (Posner, J.) ("[W]hat is dilution? * * * [T]here is concern that consumer search costs will rise if a trademark becomes associated with a variety of unrelated products. Suppose an upscale restaurant calls itself 'Tiffany.' There is little danger that the consuming public will think it's dealing with a branch of the Tiffany jewelry store if it patronizes this restaurant. But when consumers next see the name 'Tiffany' they may think about both the restaurant and the jewelry store, and if so the efficacy of the name as an identifier of the store will be diminished. Consumers will have to think harder—incur as it were a higher imagination cost—to recognize the name of the store."). *See* Lemley, *supra* note 9, at 1704 nn.90-91 ("The information consumers can obtain and process is in part a function of how clear the association between mark and product remains in their minds; 'clutter' therefore imposes real costs on consumers.").

33. Bone, *supra* note 26, at 548. To the extent that a brand conveys inaccurate information to the market, it will be "devalued" to the same degree as is a brand that fails to keep its quality promise.

34. Carter, *supra* note 18, at 759, 763.

35. 2013 Report, *supra* note 4, at 108.

> about, and which in turn influences which goods and services they purchase.[36]
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> . . . brands have *image value.* For example, a consumer may derive pleasure from wearing the same sunglasses as a Hollywood actor. More often, image value stems from displaying the ownership of a particular brand to other members of society. This is especially relevant for many luxury products, where brands enable consumers to communicate their affluence. However, it also applies to other images; for example, consumers choose brands to convey how traditional, modern, alternative, sporty, or trendy they are.[37]

In multiple other respects, WIPO adopts Chicago school reasoning:

> 1. Neoclassical economics largely assumes that buyers have full knowledge of the quality of all product offerings and that there are many sellers of the same product. * * * However, many modern markets—particularly consumer markets—do not fit these simplified assumptions. As described above, product offerings differ along a wide range of quality [and other] characteristics. * * * [C]onsumers spend time and money researching different offerings before deciding which goods or services to buy. Brand reputation helps consumers to reduce these so-called search costs. * * * [L]ower search costs create incentives to invest in higher quality goods and services. . . . More generally, trademarks are at the heart of product differentiation strategies . . . .[38]
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> 2. "[B]rand names not only indicate quality but also give the consumer a means of retaliation if the quality does not meet expectations [by curtailing] future purchases."[39]
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> 3. [T]he brand may be all that matters: when trademarks protect brands with significant image value, the brand in and of itself becomes a product characteristic that consumers care about but competitors cannot copy. . . .[40]
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> 4. In a world of imperfect information, it may be entirely rational for consumers to pay a higher price for the brand they are used to, as they save the time of researching whether other products would equally satisfy them.[41]

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36. *Id.* at 6.

37. *Id.* at 82.

38. *Id.* at 82-84.

39. *Id.* at 83, Box 2.1.

40. *Id.* at 86.

41. *Id.*

There are, of course, caveats. WIPO notes, for example, that "strong brands can create high barriers to market entry, as new competitors may not be able to bear the high advertising costs of inducing consumers to switch to their products"[42]—a proposition that Brozen rejects:

> Advertising is a means of entry and an ordinary investment. It is no more a barrier to entry than any other investment, such as that in plant and equipment. Advertising and competition are compatible—not antithetical. Investment in advertising yields the same return as investment in tangible assets—a result to be expected under competitive circumstances (assuming risks are identical) and evidence supporting the proposition that advertising is a means of entry just as building production facilities is a means of entry.[43]

WIPO clearly concludes, however, that "branding has become a central strategic asset for companies; . . . the trademark system supports consumer choice and orderly competition in the marketplace; and . . . branding is a key element of a vibrant innovation ecosystem."[44] WIPO sides not with Chamberlain and Brown, but with Economides, Landes, and Posner.

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42. *Id.* at 17.

43. Brozen, *supra* note 20, at 485.

44. 2013 Report, *supra* note 4, at 17.