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## Slow Logo: Brand Citizenship in Global Value Networks

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# Slow Logo: Brand Citizenship in Global Value Networks

Margaret Chon\*

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## INTRODUCTION: LOOKING GOOD

Trademark<sup>1</sup> law contributes to the overall value channeled by brands, through the legally sanctioned propertization of symbols.<sup>2</sup> But in addition to the dictates of the law, people create the tremendous non-legal value associated with brands through media interventions and other forms of sociality. A brand-conscious approach to marks may identify significant gaps in trademark law doctrine and theory, as they are both currently devoid of a deep understanding of the communicative process underlying brand value, especially in this current era of cognitive or information capitalism.

Presented here therefore is a more relevant account of the symbiotic roles of marks and people in this value creation: *brand citizenship*. Brand citizenship goes beyond the formal legal boundaries of trademarks and embraces as well their non-legal (that is to say, economic, political and social) implications. This recognition of the broader context in which trademark law operates then frames a similarly broader participation by various stakeholders in an accountable community of governance, albeit one that congregates around the fluid, pluralistic, and open-ended construction of the value of a mark and its associated social spectacle — its brand.

This proposed approach acknowledges that the value of a mark is created not only through its most reductive legal form as a “word, name, symbol, or device, or any combination thereof.”<sup>3</sup> Its value is also created by the constantly evolving exchange of information around its qualities. This global process of signification involves not just consumers and firms but also intermediaries and producers as well as others creating meaning around that brand’s affiliated marks.<sup>4</sup>

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<sup>1</sup> Trademarks, service marks, certification marks, and collective marks are denoted here as “trademarks” or “marks” unless otherwise noted.

<sup>2</sup> See generally Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection*, 6 IND. J. GLOBAL LEGAL STUD. 11 (1998) (explaining how giving intellectual property protections to a good increases its value).

<sup>3</sup> See 15 U.S.C. § 1127 (1946).

<sup>4</sup> See World Intellectual Property Organization, 2013 WORLD INTELLECTUAL PROPERTY REPORT: BRANDS – REPUTATION AND IMAGE IN THE GLOBAL MARKETPLACE 7 (2013) [hereinafter WIPO, BRANDS] (“Overall, [several] interrelated trends stand out: . . . companies work to create and deliver a “brand experience” for the consumer. Companies increasingly have to manage not only product quality, but also their reputation as good global citizens, paying attention to how socially and environmentally responsible they are perceived to be . . . [yet] branding is no longer the purview of companies alone. Increasingly, individuals, civil society organizations, as well as governmental and intergovernmental organizations are adopting an active approach to branding.”); see also Margaret Chon, *Marks of Rectitude*, 77 FORDHAM L.

This is especially so within a media-saturated context.<sup>5</sup> As Celia Lury points out, brands represent the organization of “a set of relations between products or services . . . a totalising and incomplete social fact[,] . . . simultaneously virtual and actual, abstract and concrete, a means of relativity and a medium of relationality.”<sup>6</sup> A brand therefore can be defined as the entire dynamic penumbra of functions, symbolic representations associated with the marketing of a specific mark, including but not limited to its cultural, legal, political and social substrates and impacts, which contribute to its overall monetary and attentional value in information markets.<sup>7</sup>

The creation of economic markets through marketing with marks is as old as the existence of marks themselves.<sup>8</sup> Yet the mechanics of marketing and markets are often well beneath the radar of typical current accounts of trademark law, with some exceptions.<sup>9</sup> Brand

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REV. 2311, 2329-30 (2009) (“[T]he current meaning-making environment for [marks] is highly dynamic. It involves overt interplay among the usual suspects: courts, agencies such as the U.S. Patent and Trademark Office (USPTO), competitors in the realms of products and standards, and mark holders and consumers. But, the discourse also expands beyond this predictable epistemic community to include multiple other stakeholders: SSOs like ISEAL; third-party certifiers (which may or may not be the same as the mark holders); other actors in the value chain; competing standard-setting bodies and their constituents, such as industry associations, consumer organizations, other NGOs, and other intergovernmental agencies; as well as other government agencies.” (citation omitted)).

<sup>5</sup> See Deven R. Desai, *From Trademarks to Brands*, 64 FLA. L. REV. 981, 1006-07 (2012); Deven R. Desai, *Response: An Information Approach to Trademarks*, 100 GEO. L.J. 2119, 2126-27 (2012) [hereinafter *Response*].

<sup>6</sup> See CELIA LURY, BRANDS: THE LOGOS OF THE GLOBAL ECONOMY 11-12, 15 (2004) (emphasis in original) (defining a brand as “a set of relations between products or services”).

<sup>7</sup> See *id.* at 12 (characterizing its organization of social exchange as “a totalising and incomplete social fact” (emphasis omitted)); see also ADAM ARVIDSSON, BRANDS: MEANING AND VALUE IN MEDIA CULTURE 7-8 (2006) (“Brands are a form of immaterial capital; a form of ‘crystallized knowledge’ . . . . [T]he brand works as a kind of platform that anticipates certain kinds of actions and attachments.”); cf. WIPO, BRANDS, *supra* note 4 at 22 (“[E]conomic research [has] clarified the distinction between a trademark as a legal instrument and a brand as a business tool. Legal scholars have similarly described trademarks as the legal anchor for the use of the commercial functions of brands.”).

<sup>8</sup> See, e.g., Lionel Bently, *The First Trademark Case at Common Law?: The Story of Singleton v. Bolton (1783)*, 47 UC DAVIS L. REV. (2014) (discussing the role that *Singleton v. Bolton*, 99 Eng. Rep. 661 (K.B.) played in the early common law development of trademark protection); Heinrich von Staden, Medicinal “Brands” in Ancient Greece and Rome: Authentication, Falsification, “Ownership” and the Trade in “Luxury Goods,” Address at the UC Davis Law Review Symposium: Brand New World (Oct. 5, 2012).

<sup>9</sup> Cf. Desai, *Response*, *supra* note 5, at 2121-22, 2124 (arguing that trademark law

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citizenship thus also partly addresses these curious and artificial disjunctures. By emphasizing a brand's presence that exceeds the formal legal boundaries of a mark — as well as its plasticity within the economic, political and social dynamics of marketing and markets — this account of brand citizenship recognizes new, previously invisible or suppressed forms of information exchange.

This argument in favor of recognizing brand citizenship builds upon important insights that markets have adapted to the pervasiveness of media, and marketing has re-invented itself as a key component of cognitive or information capitalism, especially driven by digital networked media.<sup>10</sup> For example, Adam Arvidsson observes that:

Brand value is built through the appropriation of solidarity and affect generated in a plurality of different circumstances: in the Nikestore, on the sponsored inner-city basketball court, on the Nike goddess website for women, through the surveillance of teenage tastes and, not least by the construction of the company itself as an ambience of identification that permits employees to produce themselves as appropriate Nike people.<sup>11</sup>

Similarly, Lury has described the phenomenon of:

[C]onsumer reflexivity . . . [(]as, for example, when Amazon.com recommends books to a customer on the basis of previous purchases[)], which] has contributed to the proposal by marketers for the practices of marketing to be deployed to develop “deep” relationships with consumers, so-called relationship marketing. This is said to involve moving beyond a one-way model of exchange or communication and a single-

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hinders the information marketplace and is based on the incorrect assumption that marks operate as signs of consistent source and quality); Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137, 142-43, 145-46 (2010) (arguing that trademark law protects the integrity of the information marketplace and prevents parties from using marks that could confuse consumers). See generally Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1721-25 (1999) (discussing how trademark law has evolved to reflect the current nature of marketing and markets).

<sup>10</sup> See ARVIDSSON, *supra* note 7, at 7-8, 13-14, 16, 19-23, 45, 89-90; LURY, *supra* note 6, at 6, 15, 38; George Ritzer & Nathan Jurgenson, *Production, Consumption, Prosumption: The Nature of Capitalism in the Age of the Digital “Prosumer,”* 10 J. CONSUMER CULTURE 13, 29-30 (2010).

<sup>11</sup> See ARVIDSSON, *supra* note 7, at 89-90.

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stage transaction model of consumption to the advocacy of an on-going “dialogue” between producers and consumers.<sup>12</sup>

Lury aptly characterizes marketing as a type of performative discipline,<sup>13</sup> but this Article relies on the concept of citizenship instead. This terminological shift is intended to address the intertwined legal and political ramifications of brands, and to highlight the regulatory rather than cultural apparatus surrounding this value creation process.

In that light, it is critical to extrapolate from these insights about brands, which mostly emanate from marketing, media studies, and sociology, to the theoretical frameworks of new governance, which arise out of the fields of international law and international relations.<sup>14</sup> As explained by Gráinne de Búrca:

The rise or creation of new governance systems can be seen as a response to two broadly different kinds of impetus or background conditions. The first of these — sometimes referred to in the literature as strategic uncertainty — is the need to address complex policy problems which have not shown themselves to be readily amenable to resolution whether through hierarchy, market, or otherwise. . . . The second background condition is interdependence. More specifically, this concerns the need to manage interdependence where divergent regulatory regimes affect one other to varying degrees, creating externalities, giving rise to conflict, or hindering transactional or personal mobility.<sup>15</sup>

One premise here is that the *brand*, which is not a legal term of art in any sense, drives and shapes much of the regulatory environment that legal scholars tend to see solely through the prism of the *mark*, which is the central legal organizing principle in this area. While not arguing that a brand ought to be exalted to the status of legal personhood,<sup>16</sup> or even a legally recognized category, acknowledging

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<sup>12</sup> See LURY, *supra* note 6, at 44.

<sup>13</sup> *Id.* at 17.

<sup>14</sup> See generally Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14 EUR. L.J. 271, 289 (2008) (describing challenges of enforcing occupational health and safety regimes).

<sup>15</sup> See Gráinne de Búrca, *New Governance and Experimentalism*, 2010 WIS. L. REV. 227, 232.

<sup>16</sup> Cf. Deven R. Desai, *Speech, Citizenry, and the Market: A Corporate Public Figure Doctrine*, 98 MINN. L. REV. (forthcoming 2013), available at <http://ssrn.com/abstract=2235381> (stating that corporations do not have the same dignity interests as people).

brand citizenship nonetheless stakes out an important and hitherto absent conceptual governance or regulatory space.

Brand citizenship foregrounds profound forms of discursive and material relationships among consumers, owners and producers of goods and services marked and re-marked as these (and they) circulate across territories and exceed the capacities of any one state to regulate for the global public good.<sup>17</sup> For example, in 2001, two *Guardian* journalists followed a pair of jeans destined to be sold in the U.K. in its travels around the world and documented:

[A] global journey of 40,000 miles by land and sea, starting from the fibre grown in Benin in West Africa to the manufacturing in Tunisia . . . . The jeans label could have said “Made in Tunisia, Italy, Germany, France, Northern Ireland, Pakistan, Turkey, Japan, Korea, Namibia, Benin, Australia and Hungary” as all these countries were involved in some way.<sup>18</sup>

Moreover, situating the various informational exchanges associated with marks within territorially cross-cutting global regulatory frameworks, many scholars observe that certification, labeling and marks — along with contract and tort law — are central tools in the private regulation or governance of what are commonly referred to as global supply chains and what this Article refers to throughout instead as *value networks*. The term *value* denotes both economic and non-economic value relevant to trademark and brands; in addition to direct monetization, it includes key informational attention that builds brand awareness and recognition within a market.<sup>19</sup> The term *network* is intended to underscore a non-linear and domain-specific quality of multiple relationships among relevant actors.<sup>20</sup> For example, actors in

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<sup>17</sup> See Rosemary Coombe & Paul Stoller, *X Marks the Spot: The Ambiguities of African Trading in the Commerce of the Black Public Sphere*, 7 PUB. CULTURE 249, 254-55 (1994).

<sup>18</sup> See SANDY BLACK, *ECO-CHIC: THE FASHION PARADOX* 72-73 (2011).

<sup>19</sup> Cf. Jerre B. Swann, *An Interdisciplinary Approach to Brand Strength*, 96 TRADEMARK REP. 943, 943 n.6 (2006) (“The father of brand equity, David Aaker, defines it as ‘a set of assets and liabilities linked to a brand, its name and symbol, that add to or subtract from the value provided by a product or service to a firm and/or to the firm’s customers.’ Among brand assets, Aaker lists brand loyalty, brand awareness, perceived quality and brand associations.”).

<sup>20</sup> See generally Susan Kaiser, *Mixing Metaphors in the Fiber, Textile, and Apparel Complex: Moving Toward a More Sustainable Fashion*, in *SUSTAINABLE FASHION: WHY NOW?* 139 (Janet Hethorn & Connie Ulasewicz eds., 2006) (questioning linear metaphors of chains). The term “network” also deliberately aligns with certain aspects of network-actor theory (beyond the scope of this paper) and corresponds with the network governance based theory underlying certification systems, discussed herein.



a value network focused on the provision of wine may be organized differently in relation to each other than actors in a network focused on the provision of sustainably harvested wood or apparel.<sup>21</sup> This is not only because the industry structures differ, but also because the process of creating brand significance may differ across industries. In the wine industry, for example, brands overlap with other systems that regulate meaning such as geographical indications, cultural and religious proscriptions, as well as other regulatory regimes involving sustainability criteria such as fair wages, environmental health and workplace safety. Trademark law can intersect with this regulation of global meaning through basic trademarks and service marks, as well as certification marks such as LEED certifications, and collective marks such as union-made labels.<sup>22</sup>

A rich literature on inter-firm governance as well as intra-firm governance through contracts has developed with regard to global value networks.<sup>23</sup> This genus of private regulation involves trust, or at

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<sup>21</sup> See, e.g., Margaret M. Blair et al., *The Role of Standardization, Certification and Assurance Systems*, 4 COMP. RES. L. & POL. ECON. 1, 11-12, 14 (2008); Fabrizio Cafaggi, *Private Regulation, Supply Chain and Contractual Networks: The Case of Food Safety* 4, 26 (Robert Schuman Ctr. For Advanced Studies, EUI Working Paper RSCAS 2010/10, 2010), available at [http://cadmus.eui.eu/bitstream/handle/1814/13219/RSCAS\\_2010\\_10.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/13219/RSCAS_2010_10.pdf?sequence=1) ("Not only do consumers have low level of participation in contractual design and standard-setting within the food supply chain approach, but they also have very weak enforceability powers before courts. The accountability of these regimes is mainly based on the enforcement strengths of NGOs and, to a limited extent, competitors. The strengths and capacities of NGOs may vary across industries and countries."); Errol Meidinger, *Multi-Interest Self-Governance Through Global Product Certification Programs* 6-7 (Buffalo Legal Studies Research Paper Series, Working Paper No. 2006-016, 2006), available at <http://ssrn.com/abstract=917956>; see also TIM BÜTHE & WALTER MATTLI, THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY 21-22 (2011); LISBETH SEGERLUND, MAKING CORPORATE SOCIAL RESPONSIBILITY A GLOBAL CONCERN: NORM CONSTRUCTION IN A GLOBALIZING WORLD 113, 115 (2010) (discussing fair trade labeling and other voluntary standards); Georgios Dimitropoulos, *Private Implementation of Global and EU Administrative Law: The Case of Certification in the Climate Change Regime*, in GLOBAL ADMINISTRATIVE LAW AND EU ADMINISTRATIVE LAW 383, 383-84 (Edoardo Chiti & Bernardo Giorgio Mattarella eds., 2011).

<sup>22</sup> See Chon, *supra* note 4, at 2316; Paul Duguid, *California Marketing and Collective Amnesia*, 47 UC DAVIS L. REV. 581 (2013).

<sup>23</sup> See generally Rebecca Schmidt & Paul Verbruggen, *The Role of Certification in the Enforcement of Transnational Private Regulation* (Working Paper, 2012), available at <http://ssrn.com/abstract=2255918> (discussing three examples of certification schemes adopted in relation to transnational private regulation); Peter L. Strauss, *Private Standards Organizations and Public Law* (Columbia Pub. Law, Research Paper No. 13-334, 2013), available at <http://ssrn.com/abstract=2194210> (outlining the development of private standards organizations and related conflicts).

least mostly cooperative behavior between and among firms across spans of time and space, often crossing territories that define national trademark laws.<sup>24</sup> The centrality of maintaining consistent symbolic quality of a mark is linked to the integrity of that mark as it originates with producers in the network, making its way through the various institutional intermediaries and finally to the consumer on the other end of this series of transactions. Yet, while purporting to represent or guarantee some characteristic, quality, or value, no reliable or convincing account exists in current trademark law and theory of how the various facets of a mark's symbolic quality is enforced across far-flung actors within these global value networks. In these networked relationships, allegiance, loyalty, and trust are key components for value creation.<sup>25</sup> The concept of citizenship triggers inquiry about whether and how these components can be mapped onto soft regulatory tools such as exit, voice, and loyalty,<sup>26</sup> or over-arching governance principles such as accountability, representativeness, and transparency.<sup>27</sup> Employing the vocabulary of citizenship suggests if not demands politically meaningful participation in a community, albeit one dominated by an ethos of market-based consumption. While global governance theorists extol the advantages of private regulatory regimes over public ones, they also freely admit to the troubling implications of privatizing regulation.<sup>28</sup> Among these is the uncertain role of ordinary citizens in a *governance* structure lacking in protections ordinarily expected of *government*.<sup>29</sup> Brand citizenship is

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<sup>24</sup> See Cam Caldwell & Stephen E. Clapham, *Organizational Trustworthiness: An International Perspective*, 47 J. BUS. ETHICS (SPECIAL ISSUE) 349, 352, 355 (2003).

<sup>25</sup> See Walter W. Powell, *Trust-Based Forms of Governance*, in TRUST IN ORGANIZATIONS: FRONTIERS OF THEORY AND RESEARCH 51, 63 (Roderick M. Kramer & Tom R. Tyler eds., 1996) ("Social norm-based conceptions of trust miss the extent to which cooperation is buttressed by sustained contact, regular dialogue, and constant monitoring.").

<sup>26</sup> See generally ALBERT O. HIRSCHMANN, EXIT, VOICE AND LOYALTY (1970) (introducing the concepts of exit, voice, and loyalty); John Paul MacDuffie & Susan Helper, *Collaboration in Supply Chains: With and Without Trust*, in THE FIRM AS A COLLABORATIVE COMMUNITY: THE RECONSTRUCTION OF TRUST IN THE KNOWLEDGE ECONOMY 417 (Charles Heckscher & Paul S. Adler eds., 2005) (discussing citizenship and the concepts of exit, voice, and loyalty).

<sup>27</sup> Cf. Chon, *supra* note 4 (showing an example of an inquiry focused on the governance principles of accountability, representativeness, and transparency).

<sup>28</sup> See Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS., Summer/Autumn 2005, at 15, 18, 20.

<sup>29</sup> See generally BÜTHE & MATTLI, *supra* note 21 (providing a detailed empirical analysis of three global private regulators).

thus one approach to extending and testing the robustness of these private approaches to transnational regulation.

This Article makes the case for a theoretical departure from existing approaches to trademark law. It first develops the proffered conceptual frameworks in more detail, and then connects information capitalism to new governance through the heuristic of brand citizenship. Through these suggested analytical lenses, it then examines “Big Fashion,” which, like its counterparts “Big Pharma” or “Big Tobacco,” has become a highly concentrated industry focused almost solely on maximizing shareholder profit without regard to consumer, environment, or labor impact.<sup>30</sup> In this domain, for example, over forty million workers world-wide support the production of apparel, but they are often located thousands of miles away from trademark owners and consumers, and their collective contribution to brand value is hidden and devalued; at the same time, hidden subsidies to so-called brand owners abound.<sup>31</sup> This Article then concludes with some suggestions regarding the functions of brand citizenship in increasingly globalized markets where downward pressure on prices translates into greater global public “bads” often imposed upon the most vulnerable. For consumers to “look good” in both the aesthetic and ethical senses, brand citizenship demands attention to the ethical distance existing between these consumers and other stakeholders in the process of value creation in marks and brands.

#### I. FROM SIGNALING FUNCTION TO BRAND CITIZENSHIP

The search cost rationale of marks dominates the current theoretical approach to current trademark scholarship.<sup>32</sup> Sometimes also referred to as trademark’s signaling function, this theory posits that marks serve primarily to decrease consumers’ search costs by providing them with a shorthand reference or symbol upon which they can rely repeatedly. The roles of stakeholders other than consumers and owners of trademark rights are minimized in these accounts as well as critiques of these theoretical approaches. This Part gives a brief

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<sup>30</sup> See LUCY SIEGLE, *TO DIE FOR: IS FASHION WEARING OUT THE WORLD?* 35 (2011).

<sup>31</sup> *Id.* at 40. See generally PIETRA RIVOLI, *THE TRAVELS OF A T-SHIRT IN THE GLOBAL ECONOMY: AN ECONOMIST EXAMINES THE MARKETS, POWER, AND POLITICS OF WORLD TRADE* (2009) (tracing all of the steps of the manufacture and production of a T-shirt); National Public Radio, *Planet Money Makes a Shirt: The World Behind a Simple Shirt in Five Chapters* (December 2013), <http://apps.npr.org/tshirt/#/title>.

<sup>32</sup> See Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 *HOUS. L. REV.* 777, 778 (2004); William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 *J.L. & ECON.* 265, 275 (1987).

overview of current theoretical frames and identifies some knowledge gaps.

#### A. Troubles with Trust in Trademark

Some legal scholars have expanded upon the various assumptions underlying the search cost theory. One view extends this theory, for example, to the special case of merchandising,<sup>33</sup> which arguably leads to consumer confusion under certain circumstances. Others have critiqued the unilateral focus on the search cost rationale, while still focusing on the consumer as the key relevant stakeholder.<sup>34</sup> For example, Ariel Katz has disaggregated the reference function of marks into two major components that are related yet distinct:

[T]hey reduce search costs by condensing complex meanings into concise and unequivocal terms, and they allow buyers to trust and rely upon the signals conveyed by sellers as guarantees for quality, thus helping to prevent the lemonization of markets for goods with experience and credence attributes. Let us call the first function the *linguistic function* of trademarks and the second the *trust function* of trademarks.<sup>35</sup>

This observation exposes an implicit and rather enormous assumption underlying the quality assurance function of trademark law as a species of consumer protection law. That is, trademark law assumes that the mark precisely signals to the consumer a particular kind of information. Famously, this signal is the source of manufacturing

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<sup>33</sup> See Irene Calboli, *The Case for a Limited Protection of Trademark Merchandising*, 2011 U. ILL. L. REV. 865, 867 (expanding consumer confusion to cover unrelated goods); Stacey L. Dogan and Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 EMORY L.J. 461, 478 (2005) (“[T]here is no theoretical and little practical justification” for a broad merchandising right. “At best, trademark owners should be entitled to prevent a limited range of merchandising uses that are likely to confuse consumers.”); see also *id.* at 496 (“Unless consumers perceive a mark as a brand, it does not merit protection; and unless consumers perceive a defendant’s use of the mark as an indication of product source or sponsorship, the use does not infringe. These principles flow inevitably from trademark law’s emphasis on informational clarity and competition, and argue against a broad merchandising right.”).

<sup>34</sup> See Desai, *Response*, *supra* note 5, at 2123 (critiquing consumer confusion).

<sup>35</sup> See Ariel Katz, *Beyond Search Costs: The Linguistic and Trust Functions of Trademarks*, 2010 BYU L. REV. 1555, 1563; see also WIPO, BRANDS, *supra* note 4 at 12 (“However, the reputation mechanism only works if consumers are confident that they will purchase what they intend to purchase.”).

origin and its associated qualities (e.g., the moderately sugary taste associated with COKE as manufactured by the Coca-Cola Company, distinguished from the sweeter taste of its main U.S. competitor PEPSI) so that consumers can choose between these two products.<sup>36</sup> Trademark law to date centers around disruptions in signaling that occur when false or confusingly similar signals are attached to similar products or services.

This signaling function cannot predict what happens, however, when the qualities of the good to which the trademark is attached are not readily apparent to the consumer (trust and/or credence attributes).<sup>37</sup> For example, where a mark may state or suggest that the product is organic, the consumer has no way of checking on whether this is in fact true and must simply trust the mark and its associated labels. These opaque characteristics are often highly dependent for their accurate representation upon third party intermediaries in the value network, such as certification bodies. While trust is a highly indeterminate concept,<sup>38</sup> in this trademark context it surely relates to the degree of alignment of the mark's qualities with consumer expectation of these qualities.<sup>39</sup> In the certification of organic or other

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<sup>36</sup> See Mark A. Lemley & Mark P. McKenna, *Is Pepsi Really a Substitute for Coke? Market Definition in Antitrust and IP*, 100 GEO. L.J. 2055, 2109-11 (2012).

<sup>37</sup> See Katz, *supra* note 35, at 1561 (“Although economists use the terms search, experience, and credence goods, it is more correct to refer to attributes, as most goods or services may have different attributes that correspond to this classification. For example, the fact that a can of tuna looks like a can of tuna is a search attribute. The fact that the content tastes like tuna is an experience attribute. Whether the content is indeed tuna and not a good imitation, or whether it is safe for consumption, are credence attributes. Additional credence attributes may include whether the product contains genetically modified organisms, whether it was derived from organic farming, the age and working conditions of the work force, the environmental impact of the production process, compliance with animal welfare standards, nutritional properties, the geographical origin of the product, etc. — all of which may be important to some consumers.”); see also WIPO, BRANDS, *supra* note 4 at 16 (“How precisely branding activities support innovation investments depends, however, on a number of product-specific and industry-specific characteristics. One such characteristic is whether consumers can immediately ascertain a product’s innovative features upon purchase, or whether they need to experience the product before assessing how useful those features are. Research has shown that advertising mainly plays an informative role in the former case, whereas it plays a persuasive role in the latter case.”).

<sup>38</sup> See Morton Deutsch, *Trust and Suspicion*, 2 J. CONFLICT RESOL. 265, 265 (1958).

<sup>39</sup> See *id.* at 266 (“An individual may be said to have trust in the occurrence of an event if he expects its occurrence and his expectation leads to behavior which he perceives to have greater negative motivational consequences if the expectation is not confirmed than positive motivational consequences if it is confirmed.” (citations omitted)).

credence attributes, trust also extends critically to businesses that depend upon upstream contractual guarantees of quality assurance.<sup>40</sup>

In this light, the sole doctrinal test for trademark infringement — likelihood of consumer confusion<sup>41</sup> — is woefully inadequate to the task of policing breaches of trust in instances of non-signaling (credence) attributes of marks.<sup>42</sup> The core of an infringement action under U.S. law is the preventing of passing off by a competitor of related goods with a confusingly similar mark. However, if the purpose of marks is not just this signaling function (showing that product X really is from company Y) but increasingly to prevent the corrosive undermining of the mark's so-called "trust function" (showing that company Y's product really has quality Z), then this doctrinal test falls far short. It is virtually impossible under current trademark doctrine to get at the breach of trust that may occur if the representation of the credence attributes is false.<sup>43</sup> These breaches are instead addressed by the laws addressing false advertising or consumer protection; however, the absence of legal enforcement under trademark law *per se* is arguably a significant theoretical, if not doctrinal, omission. This is particularly so given the proliferation of

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<sup>40</sup> See also Reinhard Bachmann, *Trust and/or Power: Towards a Sociological Theory of Organizational Relationships*, in HANDBOOK OF TRUST RESEARCH 393, 397 (Reinhard Bachmann & Akbar Zaheer eds., 2006); Cafaggi, *supra* note 21, at 20 ("Contractual networks directed at information transmission should govern the different sources of safety hazards: some dependent on fraudulent and negligent conduct and some arising out of risks unknown at the time of product safety design. . . . An important yet often neglected role in these networks is played by the certifiers. These are generally third parties paid by suppliers, but chosen by retailers, which certify compliance with food safety requirements. Given their strategic monitoring function, they ideally should be part of the information network to constitute an additional and more effective source for consumer information.").

<sup>41</sup> In the United States, this likelihood of consumer confusion standard is a doctrine based on sections 32(1)(a) and 43(a)(1)(A) of the Lanham Act, which both turn on the use of a mark that is "likely to cause confusion." U.S. lawyers often refer to the multi-factor analysis associated with the judicial application of this legal standard as the "Polaroid Test" after the leading case in this area. See *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961), *cert. denied*, 369 U.S. 820 (1961). In the United Kingdom, the consumer confusion doctrine is found in section 5(2) of the U.K. Trade Marks Act of 1994 ("Relative Grounds for Refusal of Registration"), and section 10(2) ("Infringement of Registered Trademark"), as well as under section 56(2) ("Protection of Well-known Trade Marks: Article 6bis"). See also WILLIAM CORNISH, DAVID LLEWELYN & TANYA APLIN, *INTELLECTUAL PROPERTY: PATENTS, COPYRIGHTS, TRADEMARKS AND ALLIED RIGHTS* 785-87 (7th ed. 2010).

<sup>42</sup> See Chon, *supra* note 4, at 2316-17.

<sup>43</sup> See *id.* at 2331. Cf. *Pom Wonderful LLC v. Coca-Cola Co.*, 679 F.3d 1170 (9th Cir. 2012), *cert. granted*, No. 12-761 WL 92350 (Jan. 10, 2014) (pre-emption of a section 43(a) challenge to representations regarding juice contents).

trademarks representing (whether explicitly or implicitly) less visible credence or trust attributes.

*B. The Prosumers' and Producers' Roles in Co-Creating Goodwill*

In addition to the protection of consumers from deception or passing off through the misappropriation of a mark's signaling function, the other oft-cited principle of trademark law is the protection of corporate goodwill associated with the mark. Goodwill is thought to accumulate through the repeated efforts of the mark owner to frame and consolidate the mark's signaling function into a type of brand recognition.<sup>44</sup> Yet a brief examination of this alternate prong quickly exposes the assumptions underlying its rationale. One of the issues with this principle is its reliance on a dichotomous taxonomy of trademark owners vis-à-vis consumers, along with its concomitant assumption that only firms and trademark owners are relevant to the analysis. However, along with brand owners, consumers are producing enormous value for brands; they are as involved in the production of meaning, attention, and consequent value as the marketing departments of firms.

The growing literature on the construction of brands shows that the goodwill represented by a mark is not produced solely through a firm that technically owns the trademark rights, but is rather a social creation involving contributions by many actors and participants in this era of cognitive or information capitalism. Arvidsson, for example, argues incisively that:

[B]rands become valuable through their ability to manage and program human communication and appropriate the ethical surplus — the common — that it produces as a source of value. This valuable common is in turn produced by people who employ the generally available . . . media culture as a resource to enhance the productive potential of their communicative interaction.<sup>45</sup>

Analogous claims about the increasing ubiquity of “prosumption”<sup>46</sup> and “user-generated content”<sup>47</sup> in this and other contexts suggest that

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<sup>44</sup> See Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1850 (2007).

<sup>45</sup> See ARVIDSSON, *supra* note 7, at 13-14.

<sup>46</sup> See Ritzer & Jurgenson, *supra* note 10, at 14, 17 (“Prosumption involves both production and consumption rather than focusing on either one (production) or the other (consumption).” (emphasis omitted)).

<sup>47</sup> See Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-*

the global circulation of representations and symbols by and for consumers effaces formerly rigidly policed boundaries between consumers, mark owners, producers, and other stakeholders of intellectual property-protected content. An illustrative example of this in the branding arena is a recent U.K. campaign by COKE which involved the use of Twitter accounts with 150 forenames, so that consumers with those names could tweet their loyalty to the COKE brand to their friends and others.<sup>48</sup> This marketing campaign generated over eighteen million media impressions of the COKE brand, all by consumers. Pervasive social practices such as these all but destroy the untenable assumption that trademark value is all about the protection of a tightly controlled signal by a corporate owner or content creator and its unilateral delivery to consumers.<sup>49</sup> As with the trust function associated with credence attributes, these practices of creating goodwill are largely ignored in current legal scholarship. A focus on brands rather than marks makes more explicit this widely acknowledged and practiced value creation by consumers.

Poignantly and prominently absent from the discourse surrounding value creation of brands within global value networks, however, is analysis of the value-enhancing activities of the classic producers of goods and services, such as the garment worker, the cotton picker, or the coffee grower.<sup>50</sup> Work on the branding of indigenous knowledge<sup>51</sup> or other forms of culturally-sourced knowledge — what Rosemary Coombe and Nicole Aylwin have dubbed MICOs (marks indicating conditions of origin) — highlights the key roles of producers of these

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*Generated Content*, 11 VAND. J. ENT. & TECH. L. 841, 846-50 (2009); Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1460. See generally Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PENN. L. REV. 1869, 1874-80 (2009) (discussing the growing relationship between user-generated content and social norms).

<sup>48</sup> Tim Grimes, *What the Share a Coke Campaign Can Teach Other Brands*, GUARDIAN (July 24, 2013), <http://www.theguardian.com/media-network/media-network-blog/2013/jul/24/share-coke-teach-brands>.

<sup>49</sup> Dev Gangjee, *What it Means for Brands to be Property* (June 2013) (unpublished manuscript) (on file with author) (presented at the 32d Annual ATRIP Congress).

<sup>50</sup> For example, in his otherwise cogent analysis of branding, Arvidsson simply observes (using NIKE as an example) that “[m]aterial production is out-sourced and beyond the formal control of the company.” See ARVIDSSON, *supra* note 7, at 89-90.

<sup>51</sup> See, e.g., Susy Frankel, *Branding Indigenous Peoples’ Traditional Knowledge*, in THE LAW OF REPUTATION AND BRANDS IN THE ASIA PACIFIC 253 (Andrew T. Kenyon et al. eds., 2012) (discussing available legal mechanisms and objectives of branding traditional knowledge of indigenous people, including traditional value protection); Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 LAW & CONTEMP. PROBS. 97, 97 (2007).



kinds of intellectual property.<sup>52</sup> The growing literature on so-called “sustainable goods,” such as fair trade, also explores the work of the producers. Outside of these bracketed areas, however, inquiries into the brand value created by producers are not found within the field of intellectual property but rather assigned to labor sociologists,<sup>53</sup> trade analysts,<sup>54</sup> consumer activists,<sup>55</sup> and/or journalists documenting often deplorable working conditions.<sup>56</sup> These non-legal accounts often include critiques of the imposition of certification costs and standard-setting without input from producers.<sup>57</sup> In the apparel industry, moreover, a number of other stakeholders, including designers, weavers, dyers, buyers, and others, are involved in the complex process of sourcing a garment. A theory of brand citizenship may help to account for the informational value contributed by many stakeholders other than consumers and owners, but the focus here is on the big three: consumers, owners, and producers.

### C. *Network Dyads of Brand Citizenship Within Cognitive Capitalism*

In short, the value of brands (that is, the attention they receive in economic, political, and social realms) is co-created by various stakeholders as they exchange meanings with each other. Brands are a type of social performance by consumers to other consumers (“C2C”). This type of informational exchange is especially true with respect to

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<sup>52</sup> See Rosemary Coombe & Nicole Aylwin, *Bordering Diversity and Desire: Using Intellectual Property to Mark Place-Based Products*, 43 ENV'T & PLAN. A 2027, 2027-30 (2011) (discussing MICOs and their relation to culture).

<sup>53</sup> See, e.g., Doug Miller & Peter Williams, *What Price a Living Wage?: Implementation Issues in the Quest for Decent Wages in the Global Apparel Sector*, 9 GLOBAL SOC. POL'Y 99 (2009) (discussing how the success of the regulatory approaches are dependent upon brand collaboration, recognition of collective labor practices, and the brands' control over their supply chains).

<sup>54</sup> See, e.g., Sanchita Banerjee Saxena & Véronique Salze-Lozac'h, *Competitiveness in the Garment and Textiles Industry: Creating a Supportive Environment — A Case Study of Bangladesh* (The Asia Foundation, Occasional Paper No. 1, 2010) (discussing a report from trade analysts).

<sup>55</sup> See, e.g., Ralph Nader, *Legislating Corporate Ethics*, 30 J. LEGIS. 193, 196 (2004) (describing one such university-based initiative called United Students Against Sweatshops).

<sup>56</sup> See, e.g., Steven Greenhouse & Stephanie Clifford, *U.S. Retailers Offer Plan for Safety at Factories*, N.Y. TIMES (July 10, 2013), [http://www.nytimes.com/2013/07/11/business/global/us-retailers-offer-safety-plan-for-bangladeshi-factories.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/07/11/business/global/us-retailers-offer-safety-plan-for-bangladeshi-factories.html?pagewanted=all&_r=0) (describing factory safety and brand connection).

<sup>57</sup> See DANIEL JAFFEE, *BREWING JUSTICE: FAIR TRADE COFFEE, SUSTAINABILITY AND SURVIVAL* 226-28 (2007); Gavin Fridell, *Fair Trade Coffee and Commodity Fetishism: The Limits of Market-Driven Social Justice*, 15 HIST. MATERIALISM 79, 97 (2007).

the status goods such as genuine designer clothing,<sup>58</sup> but also occurs pervasively with less well-known or famous marks.<sup>59</sup> Brands exhibit key information from firms to other firms (“B2B”), for example, to signal information for market-differentiating purposes.<sup>60</sup> It goes without saying that brands are performed aggressively by firms to the consumers (“B2C”) who purchase goods that are marked.<sup>61</sup> Consumers’ expressions of feelings, motivations and set of emotional responses towards a business (“C2B”) through parody, protest, or other means have been well-documented.<sup>62</sup> The social knowledge created by consumer practices such as “playing, worshipping, wining

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<sup>58</sup> See, e.g., THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* 63 (1899), available at PROJECT GUTENBERG, <http://www.gutenberg.org/> (asserting that the commercial value of goods are made up of “fashionableness” and the “reputability” of goods); Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809 (2010) (using the fashion industry as an illustrative example of how brands are coveted); Jeffrey L. Harrison, *Trademark Law and Status Signaling: Tattoos for the Privileged*, 59 FLA. L. REV. 195 (2007), available at <http://scholarship.law.ufl.edu/facultypub/180> (arguing that public subsidization of status signaling is not defensible); Diane Leenheer Zimmerman, *Upstairs/Downstairs, Fashionwise: A View of Design Protection from Lower Down the Food Chain* (N.Y.U. Sch. of Law Pub. Law & Leg. Theory Res. Paper Series, Working Paper No. 12-48, 2012), available at <http://ssrn.com/abstract=2147948> (arguing that knock-off fashion is democratizing).

<sup>59</sup> See generally ARVIDSSON, *supra* note 7, at 7-11, 124-37 (discussing brands as informational capital). Related to this is the claim that trademark law should be rooted in the value in consumers’ autonomy to respond to marks as they please in order to enhance their own individual intellectual and personal development, including creation of identities and development of critical faculties. See Laura A. Heymann, *The Public’s Domain: A First Amendment Theory of the Consumer*, 43 GA. L. REV. 651, 656-57 (2009).

<sup>60</sup> See Guy Mundlak & Issi Rosen-Zvi, *Signaling Virtue?: A Comparison of Corporate Codes in the Fields of Labor and Environment*, 12 THEORETICAL INQUIRIES IN L. 603, 656 (2011) (concluding that the audience for CSR codes is not consumers, but perhaps other firms or constituents within a firm); see also Victor Fleischer, *Brand New Deal: The Branding Effect of Corporate Deal Structures*, 104 MICH. L. REV. 1581, 1636 (2006) (“In sum, companies that sell products rich in credence qualities would seem to benefit most from using deal structure as a branding mechanism, particularly if early adopters or opinion leaders are important to their marketing strategy.”).

<sup>61</sup> See generally LURY, *supra* note 6 (discussing brands impacting the economy on a global scale); Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165 (1948), available at [http://digitalcommons.law.yale.edu/iss\\_papers/2689](http://digitalcommons.law.yale.edu/iss_papers/2689) (discussing advertising, brand protection, and impact on consumers); Peter S. Menell, *2014: Brand Totalitarianism*, 47 UC DAVIS L. REV. (2014) (discussing increasing prevalence of advertising in media and Internet and its effect on consumers).

<sup>62</sup> See generally NAOMI KLEIN, *NO LOGO: TAKING AIM AT THE BRAND BULLIES* (1999) (discussing consumers rebelling against global brands); ADBUSTERS, <https://www.adbusters.org> (a non-profit, anti-consumerist organization that publishes an activist magazine devoted to challenging consumerism).

and dining or just looking — that used to be considered part of the wasteful realm of consumption” are viewed as a source of value in its own right within the frame of cognitive capitalism.<sup>63</sup>

A more precise correspondence of trademark doctrine and theory to evolving social practices would account for these and other informational exchanges. For example, it would also provide space for more and more meaningful exchange from producers to firms (“P2B”) — one not confined solely to the logic and metrics of labor law. And it might open the possibility of direct exchange between producers and other stakeholders within a global value network. The art collective known as Superflex has, for example, literally performed (as a type of art) creative, discursive, and material collaborations between Brazilian producers of a drink product and Danish consumers of the same.<sup>64</sup> While perhaps idiosyncratic, Superflex’s efforts arguably herald and model the urgent need for a less distanced information flow between consumers and producers (“C2P” and “P2C”) than currently exists through certification and labeling regimes.

Brands generate myriad social and environmental consequences in addition to the sales of goods and services. While private regulatory systems hold potential for ameliorating these externalities, they depend unduly on trust mechanisms that are thin.<sup>65</sup> They also maintain and enforce remoteness between key stakeholders (such as consumer and producers) through their insistence on reliance on voluntary codes of conduct while simultaneously communicating these regulatory norms solely through price and wage mechanisms.<sup>66</sup>

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<sup>63</sup> See ARVIDSSON, *supra* note 7, at 6.

<sup>64</sup> *Guaraná Power*, SUPERFLEX (Sept. 10, 2003), [http://www.superflex.net/tools/guarana\\_power](http://www.superflex.net/tools/guarana_power).

<sup>65</sup> See generally Martin Gargiulo & Gokhan Ertug, *The Dark Side of Trust*, in HANDBOOK OF TRUST RESEARCH 165 (2006) (discussing the effects of trust in organizational settings and examining the detrimental consequences of excessive trust).

<sup>66</sup> See GAY W. SEIDMAN, BEYOND THE BOYCOTT: LABOR RIGHTS, HUMAN RIGHTS, AND TRANSNATIONAL ACTIVISM 39-46 (Douglas L. Anderton et al. eds., 2007) (“Braithwaite and Drahos suggest that corporate monitoring capacities could be linked to the ILO’s reporting capacities, but the only concrete enforcement mechanism they suggest involves ‘taking corporate abuses to mass publics.’ The UN’s Global Compact is perhaps even more voluntaristic; Ruggie notes that it has thus far depended entirely on consumer pressure, since firms’ decisions to engage with the compact are ‘driven . . . above all by the sensitivity of their corporate brands to consumer attitudes.’ Ruggie adds: ‘The Compact is not a code of conduct but a social learning network. It operates on the premise that socially legitimated good practices will help drive out bad ones through the power of transparency and competition’” (internal citations omitted)). See generally Jung E. Ha-Brookshire & Pamela S. Norum, *Willingness to Pay for Socially Responsible Products: Case of Cotton Apparel*, 28 J. CONSUMER MARKETING 344 (2011)

This inherent paradox also compartmentalizes away any value (besides in the classic Marxist sense of appropriated surplus value) contributed by producers and renders it invisible. Brand citizenship tentatively suggests new and creative pathways to participate and claim value-generating activities towards the brand. At the very least, a focus on brands rather than marks more accurately depicts the entire governance field in which trademark law operates to ensure consistent and recognizable quality, which is its supposed *raison d'être*.

## II. BRAND CITIZENSHIP IN THE NEGATIVE SPACE OF INTELLECTUAL PROPERTY

Fashion (otherwise referred to as the apparel industry) provides fertile ground for the investigation of brand citizenship. Barton Beebe has focused on fashion's role in promoting status distinctions<sup>67</sup> despite the constitutional mandate of intellectual property in the United States "to promote Progress."<sup>68</sup> Other legal scholars have focused on fashion's democratizing potential through the provision of lower cost status items, whether genuine or not.<sup>69</sup> Characterized as a form of semiotic disobedience,<sup>70</sup> forms of free expression around fashion and other intellectual property-protected goods are well-recognized and documented.<sup>71</sup> Recently, fashion has been recruited to the so-called "negative space of IP"<sup>72</sup> where the source of competitive advantage

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(discussing the factors influencing consumers' willingness to pay a premium for socially responsible products).

<sup>67</sup> See Beebe, *supra* note 58, at 819-24.

<sup>68</sup> U.S. CONST. art. I, § 8.

<sup>69</sup> See Zimmerman, *supra* note 58, at 38-39; cf. Haochen Sun, *Can Louis Vuitton Dance with Hiphop?: Rethinking the Idea of Social Justice in Intellectual Property Law*, 15 U. PA. J.L. & SOC. CHANGE 387, 406, 421 (2012), available at SSRN: <http://ssrn.com/abstract=2055136> (describing the *shanzhai* low cost counterfeit production movement and its effect on IP law).

<sup>70</sup> See Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489, 493 (2006); see also Lisa P. Ramsey, *Free Speech and the International Obligation to Protect Trademarks*, 35 YALE J. INT'L L. 405, 412, 441, 443 (2010). See generally Keith Aoki, *How the World Dreams Itself to be American: Reflections on the Expanding Scope of Trademark Protection and Free Speech Norms*, 17 LOY. L.A. ENT. L. REV. 523 (1997) (discussing court decisions involving free expression and IP-protected goods).

<sup>71</sup> See Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1866-77 (1991). See generally Rochelle C. Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397 (1990) (analyzing free expression and trademarks through cases).

<sup>72</sup> Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1764 (2006) (coining and

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derives from copying rather than copyright.<sup>73</sup> The global industrial sector of apparel design, production, sourcing, and distribution bears further scrutiny through brand citizenship, if only because trademark and trade dress laws are the principle regulatory mechanism in the area of design (including fashion) in jurisdictions such as the United States.<sup>74</sup>

#### A. *Looking Good*

In both the aesthetic and ethical senses, human desires to look good exemplify many of the broader issues around information exchange creating value. Fashion is a site for myriad public conversations (C2C, B2C, etc.) around the images of a fashion item as well as the creation of a consumer “common” around aesthetic practices of fashion.<sup>75</sup> As Juliet Schor states:

What we wear is important to the way we experience our sexuality. Our age. Or ethnicity. It allows us to show respect for others (by dressing specially for a social occasion) or to signal community (through shared garments or styles). Finally, clothing can be part of the aesthetic of everyday life. There is genuine pleasure to be gained from a well-made, well-fitting garment. Or from a piece of clothing that embodies beautiful design, craftsmanship, or artistry. Throughout history, human beings have exercised their creativity through clothing, footwear, and accessories.

In sum, dressing and adorning are a vital part of the human experience. This is why any attempt to put them into a minimalist, utilitarian box will fail. Clothes embody far more

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defining the term “negative space” in the intellectual property context).

<sup>73</sup> See KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* 5 (2012). One could question whether fast fashion with its ever-shortening product cycles is truly about product innovation or whether it is about rampant market expansion through copying combined with unsustainable price competition.

<sup>74</sup> Susan Scafidi, *Intellectual Property and Fashion Design*, in *INTELLECTUAL PROPERTY AND INFORMATION WEALTH* 115, 120-21 (Peter K. Yu ed., 2006).

<sup>75</sup> See ARVIDSSON, *supra* note 7, at 18-19; see, e.g., Alison Syrett, *Kate Middleton's Closing Ceremony Outfit: Shop Her Outfit for Less Than \$100*, *LUCKY MAG.* (Aug. 13, 2012), <http://www.luckymag.com/blogs/luckyrightnow/2012/08/Kate-Middletons-Closing-Ceremony-Outfit-Shop-Her-Outfit#slide=1> (collating low cost versions of Princess Kate's Olympic outfit).

than our physical bodies; they are also a measure of our basic values and culture.<sup>76</sup>

From an ethical angle, a distinguishing feature of the fashion sector is its direct intersection with fair labor issues. Persistent out-sourcing of manufacturing and consequent lack of direct accountability over producer conditions sharpens many of the challenges associated with global governance in this domain. Unlike the positive valorization associated with distributed and decentralized digital networks to date,<sup>77</sup> the decentralized producers of democratizing fashion are often associated with the most recognizably oppressive labor conditions.<sup>78</sup> Their activities are informalized, that is:

[I]nhabit[ing] a social world where [they] sell their labour power but where enterprises are often officially illegal due to non-compliance with labour and tax legislation. . . . Typically, the labour of women, children and ethnic “minorities” (in a social sense but not necessarily numerical sense) has been seen as “outside” the realm of organised labour, and therefore the work they do has been seen as falling “outside” the orbit of “formal” industry where labour legislation is considered rightly applicable.<sup>79</sup>

In utter contrast to the glamorous images associated with high-end celebrity consumers and designers who tout fashion brands through red carpet appearances, the factories that are supplying much of the goods in this sector continue to evoke references to the 1911 Triangle Waist Company shirtwaist factory fire in New York City.<sup>80</sup> This tragedy brought into existence the National Consumers League and eventually catalyzed labor regulation at the national level in the United

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<sup>76</sup> Juliet Schor, *Cleaning the Closet: Toward A New Fashion Ethic*, in ENVIRONMENTAL SOCIOLOGY: FROM ANALYSIS TO ACTION 439, 446 (Leslie King & Deborah McCarthy eds., 2005).

<sup>77</sup> See Ann Barron, *Commons-ism and New Capitalism*, in SAGE HANDBOOK OF INTELLECTUAL PROPERTY (forthcoming 2013).

<sup>78</sup> See, e.g., Marion Traub-Werner, *Women in Slavery: Nike's Sweatshops*, FEMINISTEZINE, <http://www.feministezine.com/feminist/modern/Women-in-Slavery-Sweatshops.html> (last visited Sept. 13, 2013) (discussing Nike and its poor sweatshop conditions).

<sup>79</sup> See FIONA WILSON, SWEATERS: GENDER, CLASS AND WORKSHOP-BASED INDUSTRY IN MEXICO 191 (1991).

<sup>80</sup> See MARSHA A. DICKSON ET AL., SOCIAL RESPONSIBILITY IN THE GLOBAL APPAREL INDUSTRY 9-11 (Olga T. Kontzias et al. eds., 2009) (describing the fire and its aftermath and noting a similar Bangladesh fire incident in 2000, resulting in deaths of 51 women).

States.<sup>81</sup> For today's U.S. consumers who avail themselves of the myth that "Made in the U.S.A." means sweatshop-free, however, the reality is that poor labor conditions abound in export processing zones and special territorial carve-outs,<sup>82</sup> not to mention hidden enclaves within the territorial United States.<sup>83</sup> The situation is repeated throughout the developing world.

In addition to the negative externalities in the labor sector, fashion has enormous negative environmental impact. This includes disproportionate use of pesticides, hazards from chemical dying, over-herding or poor treatment of animals, deforestation, over-use of energy in washing and aftercare (which constitutes the lion's share of the energy life cycle of a garment), as well as the exponential rise of clothing disposed in landfills.<sup>84</sup> The market in second-hand clothing donated by consumers in industrialized countries has also negatively impacted textile markets in developing countries.<sup>85</sup>

These various concerns have resulted in what is sometimes denoted the sustainable fashion movement.<sup>86</sup> One could call this slow fashion, in contradistinction to so-called fast fashion that dominates apparel consumption today.<sup>87</sup> Fast fashion is inexpensive to produce and

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<sup>81</sup> *Id.* at 97-107; see also CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION 68-72 (Jim Manis ed., Electronic Classics Series Publication 2013) (1913), available at <http://www2.hn.psu.edu/faculty/jmanis/dickens/AmericanNotes6x9.pdf>.

<sup>82</sup> DICKSON ET AL., *supra* note 80, at 12-13 ("Saipan was described by one lawyer as 'America's worst sweatshop,' where more than 50,000 Asians have been recruited with promises of good wages to make clothing tagged 'Made in the USA . . . .' [These conditions] have persisted for the past decade in the 13-mile-long tropical isle in the Central Pacific . . . [and] 'make medieval conditions look good,' [according to one observer] . . . . The factories . . . stamp their clothing with 'Made in the USA' and are able to sidestep duties, tariffs and quotas imposed on imported clothing."); see, e.g., *30 Rock: Brooklyn Without Limits* (NBC television broadcast Nov. 11, 2010) (containing a fictional storyline about jeans sold in a local store actually being made by a "Vietnamese slave tribe" on an "island prison") (thanks to both Madhavi Sunder and Charlotte Garden for pointing this episode out).

<sup>83</sup> See, e.g., Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry*, 1 J. GENDER RACE & JUST. 405 (1998) (discussing the poor working conditions Thai garment workers are subjected to in El Monte, California).

<sup>84</sup> Schor, *supra* note 76, at 443; see also Belinda Orzada & Mary Ann Moore, *Environmental Impact of Textile Production*, in SUSTAINABLE FASHION: WHY NOW?, *supra* note 20, at 299, 299-313.

<sup>85</sup> See BLACK, *supra* note 18, at 193-94; see also DICKSON ET AL., *supra* note 80, at 249-81.

<sup>86</sup> See ELIZABETH L. CLINE, OVERDRESSED: THE SHOCKINGLY HIGH COST OF CHEAP FASHION 190 (2012).

<sup>87</sup> RAUSTIALA & SPRIGMAN, *supra* note 73, at 49 (calling this "induced obsolescence").

consume, and designed to become obsolete in a short period of time. Scholars have contrasted fast fashion to the previous industry norm of moderate price points appealing to the middle demographic and clothing designed to last several seasons.<sup>88</sup> This new norm of rapid and inexpensive apparel production allegedly democratizes through its accessibility to all income levels, so that high and low as well as fast and slow fashion can be hacked, mashed, and remixed. Michelle Obama's fondness for J. Crew and Catherine, the Duchess of Cambridge's occasional forays into Topshop illustrate that even the most privileged who can afford luxury clothing can also bargain-shop with the rest of us. Biannual product cycles are non-existent in apparel companies such as Zara — its clothes are produced in small batches and are intended to be replaced by buyers as soon as the latest trend appears (the firm can do this through vertical integration uncharacteristic of current trends in the industry).<sup>89</sup> Typically, market nimbleness is associated with a tremendous increase in decentralization and distributed sourcing. The last few decades have seen the decline if not the collapse of apparel manufacturing within highly industrialized countries such as the United States;<sup>90</sup> instead, these countries are the central sites for coordination of brands through marketing and other management decisions.

Sustainable fashion, by contrast, strives to reduce environmental impact and promote fair labor practices, combining social with economic development. It is associated loosely with socially responsible trade and its brands have grown in impact and attention. Indeed slow fashion has progressed rapidly to the point that distinctions can be made among various sub-sectors such as community and fair trade; ecological and slow design; recycle, as well as reuse and redesign.<sup>91</sup>

### B. *Apparel and the Limits of New Governance*

Apparel is a critical industry for the study of the emergence of new institutional forms of governance because the certification systems in

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<sup>88</sup> See *id.* at 22-27.

<sup>89</sup> See SIEGLE, *supra* note 30, at 20-25.

<sup>90</sup> See Cathy Horyn, *A Tennessee Clothing Factory Keeps Up the Old Ways*, N.Y. TIMES (Aug. 14, 2013), [http://www.nytimes.com/2013/08/15/fashion/a-tennessee-clothing-factory-keeps-up-the-old-ways.html?\\_r=1&..](http://www.nytimes.com/2013/08/15/fashion/a-tennessee-clothing-factory-keeps-up-the-old-ways.html?_r=1&..); see also Stephanie Clifford, *That 'Made in U.S.A.' Premium*, N.Y. TIMES (Nov. 30, 2013), <http://www.nytimes.com/2013/12/01/business/that-made-in-usa-premium.html?emc=eta1>.

<sup>91</sup> See generally SASS BROWN, *ECO FASHION* (2010) (describing different sub-categories of eco-fashion in chapters one, two, and three).



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this area appear (according to Doug Miller and Peter Williams) to be among:

[T]he first programs that have attempted to address the operation of entire industries, rather than building niche markets for products made through uncommon practices, as has been the strategy in organics and Fair Trade products. In this sense . . . labor standards certification programs are attempting to be more “regulatory” than some other labeling efforts, although they clearly mix regulatory strategies with marketing ones. They are therefore highly relevant for building theories of private regulation and industry governance.<sup>92</sup>

Responding to the twin pressures of social movements and global trade, brand citizenship — particularly as linked to the trust function of trademarks — is potentially a key frame for new governance. In short, brands are much more vulnerable to consumer and other movements when they are well-known and where they intersect with questionable producer conditions. The anti-sweatshop movement targeting Nike in the 1990s is one prominent example of this dynamic. Along these lines, the U.S. Supreme Court considered a lawsuit brought by a consumer alleging that Nike’s advertisements relating to its newfound social responsibility were false.<sup>93</sup> Although the appeal was ultimately dismissed as improvidently granted, it raised interesting threshold First Amendment issues about whether advertising about social problems is commercial speech or political speech; the answer would likely have been dispositive of the question whether consumers (or states) can sue companies for making misleading statements in advertisements that focus on a company’s purported social responsibility. As a result of this and other forms of public scrutiny, Nike has oddly become one of the industry leaders in social reporting systems, such as auditing trails — although given the overall low standards existing with respect to these kinds of systems, this pinnacle achievement may not be a sign of great progress. As Lucy Siegle astutely observes:

Big Fashion will always be fighting against itself: it is predicated on a business model that is too vast and too sprawling for the exercise of proper control. So even while a brand is receiving compliments from the industry on its CSR

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<sup>92</sup> See Miller & Williams, *supra* note 53, at 438.

<sup>93</sup> Nike, Inc. v. Kasky, 539 U.S. 654, 655-58 (2003).

[Corporate Social Responsibility] reporting, that same brand could end up in the newspapers, or at the heart of a sweated labour scandal, in flagrant violation of its own codes of conduct.<sup>94</sup>

Current public policies addressing the apparel industry's labor practices are arguably forged in the failure of multilateral or intergovernmental solutions to problems posed by transnational markets in goods such as fashion.<sup>95</sup> "Two types of factors led to the initial emergence of private certification: (1) social movement campaigns targeting companies and (2) a neo-liberal institutional context."<sup>96</sup> The alternative trade approach conveniently relies on certification and labeling by private, non-governmental organizations ("NGOs"), which can be performed in lieu of certain regulatory functions that might be viewed as non-tariff barriers to trade if implemented by public agencies under the multilateral framework of the World Trade Organization.<sup>97</sup> In addition, so-called "alternative trade" is often assumed to include meaningful oversight of the sustainability dimensions of trade, such as labor and environment. Yet many have noted the lack of effective enforcement in this private governance realm.

This relates to the larger, important point that even proponents of new governance acknowledge: Private regulatory efforts such as codes of conduct cannot wholly replace functioning public law frameworks.<sup>98</sup> Moreover, regulatory capture analogous to the capture of public agencies can and does occur in this realm; for example, third party certifiers may be compensated by the same industry actors who require certification, raising an obvious conflict of interest.<sup>99</sup> Given this structural deficiency, public law institutions, including

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<sup>94</sup> See SIEGLE, *supra* note 30, at 249.

<sup>95</sup> See Tim Bartley, *Certifying Forests and Factories: States, Social Movements, and the Rise of Private Regulation in the Apparel and Forest Products Fields*, 31 POL. & SOC'Y 433, 454 (2003).

<sup>96</sup> See *id.* at 433.

<sup>97</sup> See *id.* at 451 ("[G]overnment support played a critical role in the rise of certification of both forests and factories. Furthermore, it was international institutional arrangements that led governments to put money into private forms of regulation, in part because these private systems were not subject to rules about 'non-tariff barriers to trade.'). See generally Sujith Xavier, *Theorising Global Governance Inside Out: A Response to Professor Ladeur*, 3 TRANSNAT'L LEGAL THEORY 268 (2012), available at <http://ssrn.com/abstract=2231792> (observing regulatory capture in global governance).

<sup>98</sup> See Sabel & Zeitlin, *supra* note 14, at 289.

<sup>99</sup> See *id.* at 288-89.

multilateral and other trade regimes, should identify where private frameworks operate optimally and where they fail. Trade pressures in the wake of the recent spate of building fires and collapses have forced at least one government to enact labor legislation to appease the brand owners and consumers in the European Union and United States.<sup>100</sup>

Any long-term success of privatized regulatory approaches is highly dependent upon collaboration among major brands to reach higher collective standards, as well as their recognition of collective labor practices, combined with greater control by individual brand owners of their so-called “supply chains.”<sup>101</sup> None of these conditions for success is likely to emerge quickly or without much public pressure. For example, in the recent debate after the largest apparel industry accident in history, a building collapse in Bangladesh that killed over 1,000 garment workers, most of the big U.S. brands did not join the initial plan implemented by the major European brands.<sup>102</sup> Ultimately, the U.S. manufacturers converged on an alternative agreement committing them to far less potential legal liability.<sup>103</sup>

These and other recent high profile tragedies have made clear that the apparel industry is still not fully internalizing the costs of safety and welfare of workers or their impact on the environment.<sup>104</sup> Global decentralization of so-called “cut-make-and-trim” (“CMT”) factories has resulted in widespread loss of direct oversight and control by major brands over the way apparel is sourced and produced.<sup>105</sup> At the same time, the rapid product cycle associated with fashion depends

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<sup>100</sup> See Stephen Greenhouse, *U.S., Urging Worker Safety, Outlines Steps for Bangladesh to Regain Its Trade Privileges*, N.Y. TIMES (July 19, 2013), [http://www.nytimes.com/2013/07/20/business/global/us-urging-worker-safety-outlines-steps-for-bangladesh-to-regain-its-trade-privileges.html?\\_r=0](http://www.nytimes.com/2013/07/20/business/global/us-urging-worker-safety-outlines-steps-for-bangladesh-to-regain-its-trade-privileges.html?_r=0) (outlining plan that: “[U]rges Bangladesh to impose stiffer penalties, including taking away export licenses, on garment factories that violate labor, fire or building safety standards. In addition, the [Obama] administration recommended that Bangladesh create a public database of all garment factories for reporting labor, fire and building inspections, including information on violations found, penalties assessed and violations corrected, with the names of the lead inspectors.”).

<sup>101</sup> See Miller & Williams, *supra* note 53, at 99.

<sup>102</sup> See Liz Alderman, *Public Outrage Over Factory Conditions Spurs Labor Deal*, N.Y. TIMES (May 19, 2013), [http://www.nytimes.com/2013/05/20/business/global/hm-led-labor-breakthrough-by-european-retailers.html?partner=rss&emc=rss&\\_r=1&](http://www.nytimes.com/2013/05/20/business/global/hm-led-labor-breakthrough-by-european-retailers.html?partner=rss&emc=rss&_r=1&).

<sup>103</sup> See Susan Berfield, *Bangladesh Safety Accord Is Too Binding for American Retailers*, BLOOMBERG BUSINESSWEEK (May 15, 2013), <http://www.businessweek.com/articles/2013-05-15/bangladesh-safety-accord-is-too-binding-for-american-retailers>; see also Greenhouse & Clifford, *supra* note 56.

<sup>104</sup> See M.T. Anderson, *Clothed in Misery*, N.Y. TIMES (Apr. 29, 2013), [http://www.nytimes.com/2013/04/30/opinion/bangladeshs-are-only-the-latest-in-textile-factory-disasters.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2013/04/30/opinion/bangladeshs-are-only-the-latest-in-textile-factory-disasters.html?pagewanted=all&_r=1&).

<sup>105</sup> See SIEGLE, *supra* note 30, at 47-48 (referencing Doug Miller).

heavily upon largely unregulated manufacturing sites (particularly in fast fashion, often marketed to young demographic groups at low cost — at the other extreme from couture, which was and still is produced in ateliers at great expense by skilled workers).

Among most chroniclers of Big Fashion, there is outright skepticism that certification to private standards, the use of audit trails by brand owners, or even greater numbers of state inspectors will be capable of regulating against poor working conditions, substandard wages, or child labor.<sup>106</sup> For instance, U.S.-based non-profit organization Social Accountability International (“SAI”) certifies factories in compliance with its private standard, known as “SA 8000.”<sup>107</sup> However, compliance with this standard does not necessarily guarantee worker safety; one of the factories that caught on fire in Pakistan recently, causing the deaths of over 250 garment workers, was allegedly certified to meet this standard.<sup>108</sup> One observer describes the industry-based genesis of SAI:

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<sup>106</sup> See *id.* at 248; Miller & Williams, *supra* note 53, at 99.

<sup>107</sup> See DICKSON ET AL., *supra* note 80, at 231 (explaining that the SA 8000 standard “stipulates that workers be paid enough to meet the basic needs of workers and their families, or a living wage”); Paul Harpur, *New Governance and the Role of Public and Private Monitoring of Labor Conditions: Sweatshops and China Social Compliance for Textile and Apparel Industry/CS900T*, 38 RUTGERS L. REC. 49, 57 (2010–11), available at [http://lawrecord.com/files/38\\_Rutgers\\_L\\_Rec\\_49.pdf](http://lawrecord.com/files/38_Rutgers_L_Rec_49.pdf) (“The Fair Labour Association and SA8000 are both schemes which posit standards and certify third party certification bodies to actually perform the audits. The Fair Labour Association and Social Accountability International do not actually perform audits themselves. The SA8000 scheme, for example, contains extremely detailed standards on labor conditions including safety protection and guards, OSH training, hygiene and other OSH factors. Factories are audited by qualified certification bodies. Auditing firms become certified under SA8000 by applying to Social Accountability Accreditation Services for accreditation. Social Accountability Accreditation Services assesses the expertise of the auditing firm through an impartial assessment procedure, and periodically reviews the accuracy of the certification body’s auditing by performing their own audits. This means that a certification body which performs confounded audits may have their certification revoked.”).

<sup>108</sup> Declan Walsh & Steven Greenhouse, *Certified Safe, a Factory in Karachi Still Quickly Burned*, N.Y. TIMES (Dec. 7, 2012), [http://www.nytimes.com/2012/12/08/world/asia/pakistan-factory-fire-shows-flaws-in-monitoring.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/12/08/world/asia/pakistan-factory-fire-shows-flaws-in-monitoring.html?pagewanted=all&_r=0) (“Despite survivors’ accounts of locked emergency exits and barred windows that prevented workers from leaping to safety, the Bhailas’ lawyer says their SA8000 certificate, issued under the auspices of Social Accountability International, a respected nonprofit organization based in New York, proves they were running a model business. ‘This was a state-of-the-art factory that met international standards,’ said the lawyer, Amer Raza Naqvi. ‘The SA8000 is accepted all over the world. They have very strict rules before issuing any certificate.’”).

The not-for-profit, industry-controlled auditors are funded generally by corporations, and are intended to operate independently from the corporations that established them. These entities first emerged in 1996 and 1997 when two associations emerged. The first association was developed by the Apparel Industry Partnership which established the Fair Labour Association and the second association was the Council on Economic Priorities Accreditation Agency, which subsequently changed its name to Social Accountability International. These industry-controlled certification associations were established directly in response to the lack of accountability and appearance of validity of the existing auditing procedures.<sup>109</sup>

The deficit in regulatory effectiveness and oversight, whether U.S.-based or elsewhere, arises not only from private regulatory capture, but also from the overall lack of trained auditors and certifiers, as well as insufficient incentives and numbers for those who are trained to be rigorously evaluative in their assessments of conformity to industry standards.<sup>110</sup> The leading non-profit transnational standard-setting institution, the International Organization for Standardization (“ISO”), recently promulgated a standard on social responsibility — the ISO 26000 standard. This new standard does away with auditing and compliance altogether, replacing it with a more nebulous responsibility on the organization to “conform to social expectations,”<sup>111</sup> a standard left undefined with regard to environmental and labor practices.<sup>112</sup>

Under current “social expectations” in an increasingly accelerated fast fashion cycle, the apparel industry employs buyers who are under extreme pressure to make deadlines and cut costs, and therefore turn a blind eye to any sustainability issues.<sup>113</sup> And the consistent failure of industry oversight is due as well in no small part to the reluctance of major brand owners to work towards common industry-wide regulatory standards regarding environmental impact, to extend

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<sup>109</sup> See Harpur, *supra* note 107, at 57 (internal citations omitted).

<sup>110</sup> See *id.* See generally Xavier, *supra* note 97 (discussing how international institutions are susceptible to capture by special interest groups).

<sup>111</sup> ISO 26000 — *Social Responsibility*, INT’L ORG. FOR STANDARDIZATION, <http://www.iso.org/iso/home/standards/iso26000.htm> (last visited Nov. 4, 2013).

<sup>112</sup> See Andrew Johnston, *ISO 26000: Guiding Companies to Sustainability Through Social Responsibility?*, 9 EUR. COMPANY L. 110, 110-11 (2012).

<sup>113</sup> See DICKSON ET AL., *supra* note 80, at 297-300; SIEGLE, *supra* note 30, at 80-86.

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financial support to factory owners to upgrade facilities or to support national regulation with regard to workers' rights.<sup>114</sup>

At the same time, consumers are remote in every sense of the word from these practices. Ironically, however, most scholars focus on consumer-based social movements as a key policy lever to change this dynamic. They posit that NGOs and other civil society organizations are a potentially effective counterweight to the decisions of brand owners in their race to the bottom. Before this counterbalancing policy shift can occur within the framework of cognitive capitalism, however, certain informational "market failures" need to be addressed and remedied.

*C. Brand Citizenship within Alternative Trade, Cognitive Capitalism, and New Governance*

Brand owners harness and ultimately appropriate the work of consumers and producers (as well as others) in creating value in brands. Brands are an intensely personal form of identity construction for consumers,<sup>115</sup> and this is reflected in current widely accepted marketing strategies and theories. Social media marketing via brands represents an innovative and highly successful adaptation of capitalism to information-driven markets, moving away from a one-way broadcast model toward what could be described as a controlled chaos.<sup>116</sup> Brand owners rely overtly on mostly unremunerated labor in the form of consumers conveying information within multiple social matrices and dense information networks.

However, the efforts of these heroic consumers, enshrined in either narratives of new governance or prosumption, inevitably overshadow the work of other key stakeholders in the creation of brand value. Producers such as garment workers often do not recognize either the mark or the brand for which they are producing fashion, yet in the words of one of these workers, "I have lots of feelings about where I work. . . . Lots of bad feelings, really. I feel like we suffer a lot, particularly if we can't meet the targets we are set."<sup>117</sup> The critical question under the paradigm of brand citizenship then is how to bring these voices into meaningful information exchange about the brand,

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<sup>114</sup> See Greenhouse, *supra* note 100 (describing the relatively weak new provisions concerning collective bargaining efforts, which have to be registered with the government).

<sup>115</sup> See Sarah Roberts, *Supply Chain Specific?: Understanding the Patchy Success of Ethical Sourcing Initiatives*, 44 J. BUS. ETHICS 159, 160 (2003).

<sup>116</sup> See ARVIDSSON, *supra* note 7, at 16.

<sup>117</sup> See BLACK, *supra* note 18, at 45.

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possibly moving the brand in a more sustainable direction. Can encouraging greater information exchange between and among participants in value networks function as a type of soft regulatory power — a type of governance by information within cognitive capitalism — in order to align needed reforms with negative labor or environmental impact?

*D. A Consumer Ethics and Politics of Brand Citizenship*

From a consumer perspective, applying socially responsible trade criteria to Big Fashion results in suggestions for reform that include “exit” from the system: either breaking the addiction to fast fashion (which can be analogized to fast food addiction), buying higher quality clothing (including hand-crafted or even artisanal clothing — obviously more within the reach of some than others) or turning to recycled or up-cycled fashion rather than buying new products. These proposals do not intersect with brand citizenship so much as signal a type of boycott from the overall vehicle of branding altogether, to avoid being complicit with the so-called “Walmartization” of retail.

By contrast, stakeholders who would rather not abandon Big Fashion (or the potential of economic development through global trade) want to exercise a type of agency or “voice” with respect to credence attributes. In these cases, brand citizenship may point to avenues ensuring greater informational exchange among stakeholders. These consumer stakeholders yearn to be able to rely on the transparency of information so as to make better choices. Suggestions include to “buy like a utility,” “buy the story,” or “buy right” in the face of incomplete, opaque, and outright fraudulent certification and labeling regarding conditions of manufacturing source.<sup>118</sup>

Consumer and other social movement boycotts (in the manner of the Nike-based imbroglio) can be a symbolic stick by threatening brand loyalty through its up-ending of brand trust. Tim Bartley writes:

An interesting sort of politics of legitimacy and information ensues, along with pressures for institutions that can generate credibility and impersonal trust. This dynamic is especially likely to take hold when companies have invested in creating brand images that are cognitively and emotionally significant in the minds of consumers and investors — and thus worth defending in the media and public arena. As social movements increasingly target companies — rather than or in addition to

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<sup>118</sup> See SIEGLE, *supra* note 30, at 279, 286, 288.

governments — and brands become sites of cultural and political struggle, it may add a new layer to the politics of regulation in the twenty-first century.<sup>119</sup>

Over-relying on the sticks of “exit” or “voice” may have unintended consequences, however. As labor sociologist Gay Seidman notes, consumer campaigns can be (but are not always) successful.<sup>120</sup> They tend to have more success when articulated within a collective institutional voice, such as through universities or churches, rather than scattered individual consumer choices. Regardless, these efforts often result in reducing the producer to a voiceless victim status, and may also result in the opposite of what is intended by the boycott by creating incentives for firms to feign compliance.<sup>121</sup> She proposes instead expanding institutional spaces for the direct empowerment of producers.<sup>122</sup>

#### E. *Slow Logos: Putting the People and Planet into Profit*

In the apparel industry and elsewhere, observers across the spectrum realize that the current system of audit trails and reliable certification is inadequate and inefficient. Opinions vary on whether these private forms of regulation can be made more effective.<sup>123</sup> Some theorists have posited that decentralized competition over standards can sometimes result in a race to the top, rather than an inevitable race to the bottom.<sup>124</sup> However, most observers believe the conditions for such a virtuous circle are non-existent in the apparel industry as it is

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<sup>119</sup> See Bartley, *supra* note 95, at 458.

<sup>120</sup> See SEIDMAN, *supra* note 66, at 7.

<sup>121</sup> See *id.* at 32-33 (“The appeal for protection of innocent victims has deep roots. From the eighteenth century, David Brion Davis . . . writes, Western writers popularized ‘an ethic of benevolence’ in which ‘the man of sensibility needed to objectify his virtue by relieving the sufferings of innocent victims.’ This ethic required, of course, that beneficiaries of altruistic acts be conceived as victims.”); *id.* at 134-35 (“Most transnational activists recognize the pitfalls inherent in stressing victimization over voice and the danger that global codes will reinterpret local priorities, yet as trade unionists in each of these cases insist, even well-intentioned transnational networks find it difficult simultaneously to respond to local workers’ concerns and to mobilize the kind of global support that will get the attention of global brands.”).

<sup>122</sup> See *id.* at 32-33, 134-35.

<sup>123</sup> See Harpur, *supra* note 107, at 49. See generally Miller & Williams, *supra* note 53 (discussing the implementation issues in the quest for decent wages in the global apparel sector).

<sup>124</sup> See DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATIONS IN A GLOBAL ECONOMY* 5-6, 248-70 (1995).



currently structured. In response to a question about the need for urgent reform, one fair trade manufacturer observed:

Transparency and traceability urgently need to be improved within the fashion industry to help prevent child labour and sweatshops. [We are] working on an exciting project for the E.U. Geo Fair Trade project which will increase transparency throughout the supply chain. Ultimately, the consumers will be able to scan a barcode into their phone and see our entire production process, from the community-owned plantation on the coast of Ecuador where our straw grows, through to the women's weaving association in the highland region.<sup>125</sup>

And "by opening channels of communication within functional areas of the business, such as design and product development, sourcing, and logistics," producers might have opportunities to address embedded institutional and industry customs with new perspectives from their ground-level experiences and knowhow.<sup>126</sup> A small but growing segment of Big Fashion reformers have made attempts to increase labeling information to trace production all the way through the value network, and to communicate these provenance characteristics of the brand to their markets.<sup>127</sup> This includes alternative brands, but also internal advocates within recognizable industry brands who are attempting to hold the brands accountable to rhetoric of the triple bottom line (people, planet, and profits) popularized in corporate social responsibility literature.<sup>128</sup>

Greater capacity of brands and marks to convey these forms of traceability, transparency and tacit knowledge is largely aspirational, but nonetheless well within reach with the assistance of available technologies such as Quick Response ("QR") codes, smart phones,

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<sup>125</sup> See SAFIA MINNEY, LUCY SIEGLE & LIVIA FIRTH, *NAKED FASHION* 172 (2011) (interview with Carry Somers).

<sup>126</sup> See DICKSON ET AL., *supra* note 80, at 310.

<sup>127</sup> The brand PATAGONIA founded by Yvon Choinard is often cited as an early innovator in this regard. Its current website has what it calls a footprint of its suppliers. See PATAGONIA, <http://www.patagonia.com/us/footprint>. Other first movers in this area include Katharine Hamnett, Deborah Lindquist, Lynda Grose (ESPRIT ECOLLECTION), Safia Minney (PEOPLE TREE), Sarah Ratty (CONSCIOUS EARTHWEAR, CIEL), Marci Zaroff (UNDER THE CANOPY), and Leila Hafzi. See generally SUMMER RAYNE OAKES, *STYLE, NATURALLY: THE SAVVY SHIPPING GUIDE TO SUSTAINABLE FASHION AND BEAUTY* (2009) (discussing eco-fashion, sustainable styles, and hundreds of eco-friendly brands).

<sup>128</sup> See MINNEY, SIEGLE & FIRTH, *supra* note 125, at 158 (interview with Claire Hamer, who uses the term "intrapreneur").

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and on-line industry-wide databases with more detailed information around the sustainability characteristics of specific brands. Currently, information made available by brand owners around these characteristics are largely subsumed within marketing claims not subject to genuine regulatory accountability or transparency. Yet emerging practices in response to the excesses of Big Fashion suggest possible models for brand citizenship that facilitate the emergence of robust information exchange around brand characteristics that emphasize and evaluate credence qualities.

#### CONCLUSION: SLOW LOGO

The ruins of conventional trademark doctrine and theory are largely undiscovered, although evidence abounds about the crumbling, if not of trademark law's empire, then at least of many of its foundational assumptions. Examined here is one particular piece of evidence: the practices of those who participate in informational exchanges to create the meanings of marks (that is to say, all of us who participate in market-based interchanges). Global consumers are increasingly activist, playful, skeptical, and sophisticated regarding marks' linguistic functions, but arguably they are rather more feckless and uninformed about the credence and other trust-based representations of a brand-owner with respect to unseen qualities of a mark.

In the current brand-driven universe, the ethical distance from producers to other stakeholders remains immense.<sup>129</sup> Prevailing accounts of cognitive capitalism and new governance add to the almost unilateral focus on consumer agency and consumer efforts in creating or critiquing value through speech. This singular focus on consumers concomitantly disregards most other stakeholders who are nevertheless materially if not discursively present. An informational market failure on a grand scale has been tolerated, and even driven by consumer confusion quite different from the passing-off privileged by trademark law. The marketing of marks through markets is a key site for future inquiry and action, and brand citizenship through value networks may expand our understanding of brands as a medium for expressing certain qualities embedded within the quantities demanded

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<sup>129</sup> See V. ANN PAULINS & JULIE L. HILLERY, *ETHICS IN THE FASHION INDUSTRY* (2009) (discussing ethics in the fashion industry); SIEGLE, *supra* note 30, at 59 (observing the: “[H]uge effort to distance us from the people who make our clothes, and their skills. Branding, labelling [sic] and trends tend to remove those people’s heritage and their history”).

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by these marks. The term “slow logo” in the title of this Article signifies then the re-introduction of:

[The] social — frequently understood as value, meaning or culture — into what are seen as restricted accounts of the rationality of the agents of the economy . . . in ways which introduce *qualitative intensivity* into the extensive but limited rationality of a conventional market economy of price.<sup>130</sup>

By operating through collective signifying networks, brand citizenship may hold out a partial solution to the informational market failures in cognitive capitalism created by the proliferation of credence attributes, the increasing reliance on private governance mechanisms as well as the interdependent yet still too distantly connected interests of producers and consumers within global value networks.

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<sup>130</sup> See LURY, *supra* note 6, at 6 (emphasis added).