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The Primary Trademark Identifier Requirement: A Change to Current Trademark Law

ABSTRACT

There are two purposes that can be identified from the protections granted upon a trademark. The first is that it protects the trademark holder's investment by distinguishing it from other products on the market. In a competitive market, as we have in the United States, companies spend countless hours and millions of dollars trying to make their product stand out among the others. Once that investment has been made and a reputation established, the name or mark given to that brand should be protected from its competitors. The second purpose of trademarks is for the benefit of the consumer. If a consumer is happy with a particular product and, either wants to purchase it again, or recommend it to someone else, the name and marks on the product help the consumer to make the appropriate choice or referral. Trademarks help protect these purposes.

With the purposes of trademark law in mind, the test for infringement on a trademark is whether or not the product causes a likelihood of confusion. This establishes the right of the trademark holder to bring a claim against anyone trying to pass his or her own product off as one of theirs. It also protects the consumer from purchasing a product that might be inferior or just not what they were expecting. At its core the laws allow the trademark holder to prevent fraudulent behavior.

I propose that with the modernization of marketing techniques trademarks have taken on an additional role, and that this new role has allowed for a new type of deception upon the very consumers trademark law was originally designed to protect. This is an important issue because consumers may want to avoid a particular company based on political, social, or ideological opposition. For example, if a large parent company was in the news about the discovery that it

employed child labor practices, a conscientious consumer may want to avoid products made by that corporation. In order for the consumer to avoid purchasing products whose sales went to that parent company, the consumer would have to inform themselves about the subsidiary companies, which sell under different trade names with different trademarks. Another example is simply that parent companies may be marketing very similar products, with similar quality under different trademarks. In both scenarios it would take the consumer a substantial period of time to be able to make informed decisions on these matters.

In analyzing this issue first, I will review the historical aspects of trademark law. Second, I will establish that most major corporations have an onslaught of trademarks that they hold and use every day, likely without consumer knowledge. Lastly, I will establish that in order to continue to protect the trademark laws as intended, corporations holding multiple trademarks under their umbrella name should be required to display all parent trademarks, even when the sales are of a subsidiary company whose trademark is owned by the parent company. This would mean that potentially two trademarks would be displayed. The only way for consumers to fully make informed purchases, and not be deceived by the trademark, is to know who the actual trademark holder is. Perhaps, in the long term, this would even move trademarks away from marketing devices and back towards the primary purpose of identification. Under the current trademark laws, however, this problem will persist and consumers will continue to be misled in defiance of the second major purpose of trademark law, educated purchasing. Since one purpose under trademark law may not persist to the other's demise therefore the rules on trademark displays should be revisited.

INTRODUCTION

Trademarks are a valuable tool for companies in today's society.¹ As a result, many companies are willing to invest hundreds of billions of dollars annually to develop or maintain a brand.² The reason for this is that a brand can become one of the most valuable assets a company may have.³ Companies like Coca-Cola and Apple have brands that were valued at over \$75 million each in 2012.⁴ While a brand and a trademark may not be exactly the same, they are inextricably linked.⁵ In fact, the Merriam-Webster online thesaurus finds the two synonymous.⁶ Branding has become such an important part of the marketing scheme used because of its ability to draw consumers to particular products through the associations made in the memory of the consumer.⁷ The question becomes whether the use of branding, through the legal process of trademarking images, words, and other way of identifying products, has clearly depicted the rationale for protecting trademarks in the first place.

Trademark law was created to help protect consumers against fraud.⁸ The law was founded on the principle that a merchant who identifies himself with a particular word or symbol

¹ Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1687 (1999) (“Most economists today view trademarks as valuable aids to efficient markets.”)

² Aaron Perzanowski, *Unbranding, Confusion, and Deception*, 24 HARV. J.L. & TECH. 1, 1-2 (2010) (“[Firms] spend hundreds of billions of dollars developing and maintaining their brands...”).

³ *Id.* (“For many companies, their brands are among their most valuable assets.”).

⁴ Interbrand, *Best Global Brands (2012)*, <http://www.interbrand.com/en/best-global-brands/2012/Best-Global-Brands-2012-Brand-View.aspx> (last visited Dec. 8, 2012).

⁵ Perzanowski, *Supra* note 2, at 46 n.1 (citing the American Marketing Association's definition of brand, “a name, term, symbol, design or a combination of them intended to identify goods or services of one seller of a group of sellers and to differentiate them from those competitors.” As compared with the definition of trademark under the Lanham Act, “any word, name, symbol, or device or a combination thereof...used by a person...to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.”) (internal citation omitted).

⁶ <http://www.merriam-webster.com/thesaurus/trademark> (last visited Dec. 8, 2012).

⁷ See Kevin Lane Keller, *Conceptualizing, Measuring, and Managing Customer-Based Brand Equity*, J. MARKETING, Jan. 1993, at 2 (discussing consumer-based brand equity) (“Perhaps a firm's most valuable asset for improving marketing productivity is the knowledge that has been created about the brand in consumers' minds from the investment in previous marketing programs.”)

⁸ Kristine Boylan, *The Corporate Right of Publicity in Federal Trademark Legislation*, 88 TRADEMARK REP. 349, 350 (1998) (“Trademark law was initiated as a means of consumer protection. Its goal was to prevent and protect consumers from fraud.”).

should not be subject to others trying to “pass-off” on the good-will created by that merchant.⁹ There were two interests protected by this type of law. That of the merchant, who was now able to use the name or mark exclusively in order to gain recognition, and the consumer, who was better equipped to make decisions in the market place, knowing that the product they were getting was what they thought it would be.¹⁰

Trademarks have long been recognized in the common law. The Court in *In re Trade-Mark Cases* as far back as 1879 made this recognition when it said, “[t]he right to adopt and use a symbol or a device to distinguish the goods and property made or sold by the person whose mark it is, to the exclusion of use by all other persons, has been long recognized by the common law and the chancery courts of England and of this county, and by the statutes of some of the states.”¹¹ It traces back to the regulation of products that were created by guilds and marked with unique stamps to identify the origin.¹² As it evolved, authenticity of the products marked became the primary concern, and thus there became concern about fraud on the consumer with respect to the source of the products sold.¹³ The Lanham Act was passed in 1946 and is a large body of text that deals comprehensively with trademarks as a type of unfair competition.¹⁴ It

⁹ See *id.* (“In general, this fraud arose when a seller adopted a trademark as a symbol to identify the origin of a good. As one would expect, others would imitate the mark in the same market in an attempt to confuse purchasers.”).

¹⁰ *Id.* (“In general, a first user who was losing business and suffering a diversion of trade would call upon the law for intervention. The Law did, indeed, intervene with a purpose of not only protecting the business good will developed by the first user, but also of protecting purchasers from being deceived.”) (internal citation omitted).

¹¹ *In re Trade-Mark Cases*, 100 U.S. 82, 92 (1879).

¹² See Frank L. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 814 (1927) (discussing the two historical roots of modern trademark law and noting that the regulatory mark was required and a true mark of origin) (“The regulatory production mark, which was compulsorily affixed to goods by statute, administrative order or municipal or guild regulation, so that defective work might be traced to the guilty craftsman and heavily punished, or that “foreign” goods smuggled into an area over which a guild had a monopoly might be discovered and confiscated. This mark was a true mark of origin, designating as it did the actual producer of the goods”).

¹³ See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003) (“Federal Trademark Law...helps assure a producer that it and not an imitating producer will reap the financial, reputation-related rewards associated with a desirable product.”).

¹⁴ *Shonac Corp. v. AMKO Intern. Inc.*, 763 F. Supp 919, 925 (S.D. Ohio 1991) (“The Lanham Act is a comprehensive federal act covering trademark law, which is a subcategory of unfair competition law.”).

largely codified the common law of trademarks.¹⁵ Many state laws continue to be applicable however, as the Lanham Act has been interpreted as harmonious with them.¹⁶

Trademark law has been vastly expanded over the years to the point where confusion exists over whether or not trademark law still has a rationale of preventing fraud in its current state.¹⁷ The holder of a trademark being called an “owner” and the fact that they are entitled to “rights” based on that ownership, creates the perception that trademark law has become a property right with a focus on the holder, as opposed to the protection of the consumer being of the utmost importance.¹⁸ However fraud is still at the core of trademark law. The test used by the court for trademark infringement relies on likelihood of confusion, meaning it is still the consumer who needs protection. In fact, one of the leading authorities on trademark law has noted that “trademarks perform four functions which are deserving of the protection in the courts.”¹⁹ Those functions are: (1) to identify one seller’s goods and distinguish them from goods sold by others; (2) to signify that all goods bearing the trademark come from or are controlled by a single source (noting that the source is anonymous); (3) to signify that the goods bearing the trademark are of an equal level of quality; and (4) as a prime instrument in

¹⁵ See 15 U.S.C. §§ 1051-1127 (Codifying Sections 1 to 46 of the Lanham Act).

¹⁶ See e.g. *Williams v. UMG Recordings*, 2003 U.S. Dist. Lexis 18400, at *26 (C.D. Cal. Aug. 11, 2003) (“The Ninth Circuit has consistently held that state law unfair competition claims are “congruent” with Lanham Act claims; Plaintiff’s putative unfair competition claim would fail for the same reasons his Lanham Act claim fails.”) (internal citations omitted).

¹⁷ Perzanowski, *Supra* note 2, at 18-20 (discussing generally some of the rationales for trademark laws and noting two very different reasons, one which is based around consumer protection and the other which focuses on misappropriation of valued marks, which seems to currently be in favor”) (“By abandoning the traditional consumer-focused test for infringement, the dilution doctrine accepts the trademark holder’s interest in goodwill as a sufficient justification for legal intervention.”).

¹⁸ Lemley, *Supra* note 1, at 1697 (“Courts seem to be replacing the traditional rationale for trademark law with a conception of trademarks as property rights, in which trademark ‘owners’ are given strong rights over the marks without much regard for the social costs of such rights.”).

¹⁹ J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 3:2 (4th ed. 1998) (citing *Springfield Fire & Marine Ins. Co. v. Founders’ Fire & Marine Ins. Co.*, 115 F. Supp. 787 (D. Cal. 1953)).

advertising and selling the goods.²⁰ That intention can still be seen through the goals outlined by McCarthy.

Trademark law under the Lanham Act and the common law are relatively similar. The laws grant a trademark owner the ability to challenge the use of a mark as violating his or her trademark, and while this may protect the holder of the trademark from losing the marketing investment that has been made, it is only as a byproduct of the lawsuit that the consumer gains a benefit. The consumer's protection has, in some ways, become secondary to the rights of the trademark holder, and that needs to change. Branding and trademarking have become so commonplace in today's society, that they are actually guilty of being deceptive in and of themselves. The purpose of trademark law was twofold: (1) to protect the investment that a holder has made in their reputation and goodwill, and (2) to ensure that consumers know what they are getting, and the quality of the product or service that they should expect to receive. Trademarks have become so over-used that consumers are no longer able to rely on them to identify the source of the product²¹, nor can they be confident that the product is of the same quality they have previously received. Trademarks are becoming more powerful to the holder and less helpful to the consumer.

There have been proposals presented which address the current problems that have been created by the vastly expanded use of trademarking laws. Two specific examples of these proposals are the Single-Signal Theory presented by Professor David Barnes²² and the other more generally addresses problems encountered when trademarks are used in the process of

²⁰ J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 3:2 (4th ed. 1998) (citing *Springfield Fire & Marine Ins. Co. v. Founders' Fire & Marine Ins. Co.*, 115 F. Supp. 787 (D. Cal. 1953)).

²¹ See Ann Bartow, *Likelihood of confusion*, 41 SAN DIEGO L. REV. 721, 734 (2004) ("Manufacturers and service providers can manipulate trademark usage to provide source identification to consumers when it is useful, or obfuscate information when doing that appears beneficial.").

²² David W. Barnes, *One Trademark Per Source*, 18 TEX. INTELL. PROP. L.J. 1 (2009) (proposing a rule that would limit each source to only one trademark).

unbranding.²³ While both address the fact that trademarking has become overused and deceitful to the public, there are some problems presented by each suggested approach to curtailing the problem. I present a somewhat different approach to facilitating change, and the approach is not something that, to date, I have not found anything particularly on point for.

I propose that the laws need to help shift the balance back, so that both goals of trademark can be facilitated. This paper discusses one way that this can be done which I call the Primary Trademark Identifier Requirement. In part one of the paper I will identify the problems inherent in the current system. Part two discusses how trademarks have expanded beyond what the law was originally intended for. Part three looks at the reasons why consumers may want to know who the owner of a trademark or brand is. Part four discusses other solutions that have been proposed to minimize the ever-expanding use of trademarks in the market-place. Lastly, part six discusses my plan to change the current trademark laws and what would be required to do so, as well as the problems that might arise as a result of its implementation.

PART I – THE SEARCH COST THEORY AND OTHER WAYS CONSUMERS ARE USED TO MEASURE THE JUSTIFICATION FOR TRADEMARKS

This section addresses the reason that trademarks exist and how they have now become a way for companies to manipulate the consumer, causing their own form of deceit. It introduces the search-cost theory, which is the most commonly used justification for trademark law and looks at the benefits trademarks provide to consumers. It also addresses how, with the shift by companies in trademark usage, the approach no longer provides an adequate basis for trademarks to be used. It begins to identify some of the hurdles consumers face should they wish to determine the source of their products. Lastly, it addresses the difficulty courts are presented

²³ Perzanowski, *Supra* note 2 (discussing the deceptive practice of unbranding and proposing limitations to curtail the practice).

with when articulating just what the “reasonably prudent consumer” is – a standard that seems to be changing with the more the availability of information. In this section you will begin to see why trademark laws have become a problem in need of redress.

There are several reasons why marks are used. For starters, a mark helps the consumer to identify the product. Perhaps they saw an advertisement that interested them, or perhaps they have purchased the product before and want the same experience they have had. These are the reasons that a consumer may seek out a particular brand. For the same reasons a consumer may want to avoid a particular product. It is hard for the consumer to really know what they are getting though. Some companies even use branding in response to unfavorable consumer responses through a process known as unbranding.²⁴ It has been suggested that the practice may actually mislead consumers about the source of their products.²⁵ Though perhaps not common,²⁶ unbranding and rebranding do occur regularly.²⁷

What makes unbranding significant is the stimulus of the change.²⁸ When there is negative consumer reaction to a particular product or brand, many companies opt to “reinvent” and start over.²⁹ This is done in lieu of trying to change the public image of the brand.³⁰ One example of this process can be seen through the transition of ValuJet to AirTran following a fatal

²⁴ Perzanowski, *Supra* note 2, at 3 (“Unbranding is the practice of eliminating or selectively reducing the use of a brand in response to unfavorable consumer opinion.”).

²⁵ *Id.* (“[Unbranding] threatens to confuse and mislead consumers about the source and characteristics of goods and services.”).

²⁶ *See id.* at 2 (This connection and the brand equity it creates take time to develop. As a result, consistency can be crucial to maximizing the value of a brand, providing firms strong incentives to think twice before altering a name or image with which consumers have grown familiar.”).

²⁷ *Id.* (“Rebranding occurs for many reasons. It is necessitated by mergers and spinouts, prompted by aesthetic considerations, and sometimes demanded by the law.”).

²⁸ *Id.* (“What sets cases of unbranding apart is the firm's motivation. When a brand suffers from strong negative consumer perceptions, it transforms from a valuable asset to a major liability.”).

²⁹ *Id.* (“Faced with the reality of an irreparably damaged brand, many firms understandably seek a fresh start.”).

³⁰ *Id.* (“Rather than take steps to repair their public image, they create a new one.”).

crash of 110 travelers in 1996.³¹ Following the bad press, ValuJet acquired AirTran, a small competitor, acquired their name and came out relatively unscathed.³² Another example can be seen with the 2004 name change of Philip Morris to Altria.³³ As a multi-brand and trademark holder, Philip Morris presumably sought to avoid the negative publicity their cigarette products were receiving, impacting their other products such as Jell-O, Kool-Aid, Post Cereals, Oreos, and Oscar Mayer meats.³⁴ To the extent that consumer confusion is a primary element in the trademark infringement actions the rationale makes no sense in today's society. Do consumers really know what they are getting and are trademarks helping to identify the products? Or, are they actually contributing to the confusion in their current state. If not the products themselves that remain confusing, certainly the source of the product is unclear.

As previously mentioned some products are re-named and launched under a different brand because of bad publicity, but often it may also be done to take up a larger share of the

³¹ *Id.* at 11. (discussing generally how there are numerous examples of unbranding in recent years and noting the ValuJet to AirTran transition as an example)

³² *Id.* (“[A]fter a fatal crash in 1996 that killed 110 travelers and crew members, discount airline ValuJet acquired a small competitor, AirTran, and adopted its name. By jettisoning the ValuJet brand, the firm shed the stigma of its blemished safety record.”) (citing Ronald J. Alsop, *The 18 Immutable Law of Corporate Reputation* 271-73 (2004); Claire Suddath, *Top 10 Worst Corporate Name Changes – To Xfinity and Beyond*, *TIME*, Feb. 8, 2010, available at http://www.time.com/time/specials/packages/article/0,28804,1913815_1914808_1914788,00.html (last visited Dec. 8, 2012).

³³ Perzanowski, *Supra* note 2, at 11 (“In 2003, Philip Morris, maker of Marlboro, Parliament, and Virginia Slims cigarettes, rechristened itself Altria.”).

³⁴ *Id.* at 11-12 (discussing how, with the pending tobacco litigation, Philip Morris sought to avoid a connection with its name from the more family friendly products that they owned) (citing Glenn Collins, *Blending Kraft and General Foods*, *N.Y. TIMES*, Jan. 5, 1995, at D1, available at <http://www.nytimes.com/1995/01/05/business/blending-kraft-and-general-foods.html>; Nanette Byrnes, *Can Betsy Holden Make Kraft-Nabisco a Tasty Blend?*, *BUS. WK.* (June 27, 2000), available at <http://www.businessweek.com/bwdailey/dnflash/june2000/nf00627b.htm> (last visited Dec. 8, 2012). As a follow up to the Philip Morris/Altria/Kraft food triangle, it is worth noting that in 2007 Kraft Foods chose to separate themselves from their parent company, Altria. The reason given in an interview on National Public Radio was that there were better ways to “use some of their financial capabilities,” but even the interviewer, Steve Inskeep, could not help but ask the question whether that meant to avoid having Kraft’s money on the line with the looming possibility of multi-million dollar judgments coming their way. The CEO denied that contention, but it does evoke that presumption for most people. Steve Inskeep, *Kraft Foods Chief Explains Split From Altria* (National Public Radio broadcast March 30, 2007), <http://www.npr.org/templates/story/story.php?storyId=9237383> (last visited Nov. 23, 2012).

market,³⁵ while still allowing consumers to feel like they have a choice. This may mean that a company like L’Oreal ParisTM, which had its beginnings as a hair care product company and later expanded into other cosmetics,³⁶ may create or acquire licensing interests in a brand like Ralph Lauren, a luxury clothing and accessory line, in order to diversify their own product offerings, as well as the products associated with the name of the licensor.³⁷ Similarly, it also means that L’Oreal can provide the consumer with choices in brands (maybe not much else), such as their L’Oreal ParisTM line which sells a host of skin and make-up products and their MaybellineTM line which sells products that directly compete for the same consumers, while still reaping the benefits of sales profits on the products.³⁸ The average consumer may know that they are getting a product that has a particular trademark on it, but they really know little else about that product.

Currently, if one wanted to get information about a trademark, he or she would have to seek assistance. Since some trademarks are actually created with an intention not to publicize (see Philip-Morris), it is not necessarily something that the average consumer would be able to find on their own. Perhaps consumer watch-dog organizations may make the information available, or a news article might shed some light on a particular company, but if the average

³⁵ Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171, 1191 (2005) (“Multiple trademarks are often owned and used by a single enterprise that builds separate brands in order to possess different shares of the market.”).

³⁶ http://lorealusa.com/_en/_us/html/our-company/history-of-l-oreal.aspx (last visited Dec. 8, 2012).

³⁷ See http://www.loreal.com/_en/_ww/index.aspx?direct1=00003&direct2=00003/00002, then click on “Ralph Lauren” button on right side of page (last visited Dec. 9, 2012).

³⁸ L’Oreal ParisTM and MaybellineTM L’Oreal ParisTM are both product line brands sold by L’Oreal in their Consumer Division Line. Annual sales for 2011 totaled 20,343 million Euros and the consumer line took in 52.1% of that. L’Oreal, Annual Report 2011, pp. 18-20, http://www.loreal.com/_en/_ww/html/company/pdf/LOREAL_RA2011_HD_27032012_EN.pdf (last visited Dec. 8, 2012).

consumer wants to know who the actual source of the product, it would be necessary to do a trademark search on the patent and trademark office's website.³⁹

There are problems with conducting a Federal Trademark Search though. The first, is that it only covers Trademarks that have been federally registered.⁴⁰ Secondly, is that it is a relatively complicated search engine, with thousands of registries, so the results can be hard to interpret. For example, a search of the words "Kraft Foods" yields nine results from the search engine.⁴¹ What is complex about the process is multi-faceted. First, there is the potential that the search may have been inaccurate. By simply putting "Kraft" instead of "Kraft Foods" the number of registries jumps to 464. Once the search is conducted, the user then has to open each entry to determine who the registrant was. The result identifies the registrant as "KRAFT FOODS GROUP BRANDS LLC LIMITED LIABILITY COMPANY".⁴² This is fine for the relatively straightforward corporate structure that Kraft Foods has since its split from Altria, but other corporate structures, including parent/subsidiary relationships, and those created through licensing agreements make the search even more complex. The availability of information on the internet has made this information more available, but, it can be difficult to know when the information is trustworthy. All of these complexities demonstrate what consumers face when they want to determine who they are purchasing from and why trademarks are actually contributing to the deceptive behaviors that trademark law was initially created to guard against.

³⁹ <http://www.uspto.gov/trademarks/index.jsp> (last visited Dec. 8, 2012).

⁴⁰ UNITED STATES PATENT AND TRADEMARK OFFICE, BASIC FACTS ABOUT TRADEMARKS (2012), <http://www.uspto.gov/trademarks/basics/BasicFacts.pdf> (last visited Dec. 8, 2012).

⁴¹ See Appendix I – This is a screen shot of the results page that I got when I entered the term "kraft foods" into the search engine page of the United States Patent and Trademark Office. It shows the nine results that were returned, meaning that there were nine federally registered trademarks that used the term "kraft foods" in them. It doesn't necessarily mean that the trademarks were used by Kraft Foods Group Brand, LLC, which was what I was trying to find. It simply provides a list of the trademarks that use the words you search for, then you have to click on each result that is returned in order to find out if it is registered to them.

⁴² See Appendix II – This is a screen shot of the page that opened when I clicked on the third result in my original search. This trademark was identical to my search and simply read "kraft food". It appears to be the words and logo for the company.

There are many reasons why a consumer may want to avoid a particular company. It may be that they have a social, political, or ideological issue that they disagree with. An example of this might be where child labor violations have been discovered with respect to a particular company, there are consumers that would want to avoid supporting them. Is it reasonable to expect a consumer to go through the motions presented in the previous paragraphs to get the information they seek? Trademarks have just become another avenue used by companies and marketing people to “sell” the consumer. While they might direct the consumer to the same trademark, it is not necessarily the same product or source, so what are they really doing?

The search cost theory assumes that, from an economic standpoint trademark protection is justifiable.⁴³ As stated by Professor Nicholas Economides:

...sellers have much better information as to the unobservable features of a commodity for sale than the buyers. This is known as information asymmetry. Unobservable features, values by the consumer, may be crucial determinants of the total value of the good... [I]f there is a way to identify the unobservable qualities, the consumer’s choice becomes clear... The economic role of the trademark is to help the consumer identify the unobservable features of the trademarked product. This information is not provided to the consumer in analytic form, such as an indication of the size or listing of ingredients, but rather in summary form, through a symbol which the consumer identified with a specific combination of features. Information in analytic form is a complement to, rather than a substitute for, trademarks.⁴⁴

What this means is that consumers would have to expend more of their own time and energy in order to get the information that the brand owner can easily reveal, making it more economical for the trademark holder to share the information.⁴⁵ As a tradeoff for the information, consumers

⁴³ Jeremy N. Sheff, *Biasing Brands*, 32 *CARDOZO L. REV.* 1245, 1254 (2011) (discussing the classic search cost rationale as proposed by Nicholas Economides and William M. Landes & Richard A. Posner).

⁴⁴ *Id.* at 1254-1255 (citing Nicholas S. Economides, *The Economics of Trademarks*, 78 *Trademarks Rep.* 523, 526-27 (1988)).

⁴⁵ Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 *VA. L. REV.* 67, 74 (Mar. 2012) (“Rather than reading the fine print on the package to determine whether the description matches his understanding of brand X, or investigating that attributes of all the different versions of the product (of which X is one brand) to determine which one is brand X, the consumer will find it much less costly to search by identifying the relevant trademark and purchasing the corresponding brand...A trademark conveys information that allows the consumer to

are willing to pay a premium for branded products.⁴⁶ This rationale has been widely adopted as a justification for the use of trademark law.⁴⁷ In fact this rationale has been explicitly adopted by the Supreme Court of the United States.⁴⁸

While search-cost theory, the favored rationale for trademark protection, is measured by its benefit for consumers, there is another evaluation that also uses consumers as the measuring stick. Trademark infringement is evaluated in the courts by whether or not a “reasonably prudent consumer” would be confused.⁴⁹ Judges will typically begin their analysis knowing that the laws are expected to protect both sophisticated and ignorant consumers alike.⁵⁰ Different circuits look at different factors when considering what a “prudent” consumer is,⁵¹ but sophistication is often one of the factors considered and usually based on a court’s assumptions about consumers.⁵² This consideration is made despite the fact that research suggests problems with the

say to himself, “I need not investigate the attributes of the brand I am about to purchase because the trademark is a shorthand way of telling me that the attributes are the same as that of the brand that I enjoyed earlier.”).

⁴⁶ Sheff, *Supra* note 43, at 1258-59 (“The model implies that any brand premium should be understood to represent the information value of the manufacturer’s trademark. This conclusion assumes a number of empirical propositions about the nature of consumer decision-making, without reference to any actual empirical evidence. In essence, the model posits that the reason consumers will pay more for branded Product A than for the equivalent unbranded Product B is that the trademark on Product A conveys information that the consumer will evaluate against her preferences. In the absence of the trademark (as will be the case for Product B), she would have to obtain such information independently, leading her to value the two products differently.”).

⁴⁷ Stacey L. Dogan and Mark A. Lemley, *A Search-Costs Theory of Limiting Doctrines in Trademark Law*, 97 TRADEMARK REP. 1223, 1223 (2007) (“Over the past two decades, the search costs theory of trademark law has attracted a substantial following among both commentators and courts”).

⁴⁸ *Qualitex Co. v. Jacobson Prod. Co.*, 514 U.S. 159, 163-64 (1995) (“[T]rademark law, by preventing others from copying a source-identifying mark, ‘reduce[s] the customer’s costs of shopping and making purchasing decisions,’ for it quickly and easily assures a potential customer that this item -- the item with this mark -- is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past.”) (citation omitted)).

⁴⁹ Andrew Martineau, *Imagined Consumers: How Judicial Assumptions About the American Consumer Impact Trademark Rights, For Better Or Worse*, DEPAUL J. ART, TECH. AND INTELL. PROP. LAW, 337, 351 (discussing the standard used by the courts for trademark infringement) (“This can exist where an ‘appreciable number of ordinarily prudent purchasers are likely to be misled, or indeed simply confused, as to the source of the goods in question or when consumers are likely to believe that the challenged use of a trademark is somehow sponsored, endorsed, or authorized by its owner.’”).

⁵⁰ Bartow, *Supra* note 21, 764 (“Judges start with the proposition that ‘[t]he category of a buyer protected by trademark law against this confusion includes not only the careful or discriminating buyer, but also the ignorant, the inexperienced, and the gullible.’”) (citing *Geoffrey Inc. v. Stratton*, 16 U.S.P.Q. 2d 1691, 1696 (C.D. Cal. 1990)).

⁵¹ Martineau, *Supra* note 49, at 351. (“Different circuits look to a (slightly) different set of factors in making this determination.”).

⁵² *Id.* (“Many, but not all, circuits explicitly include the sophistication of the product’s customer base among these factors...”).

sophistication levels of consumers and their likelihood to be confused.⁵³ Likelihood of confusion therefore varies greatly depending on the level of sophistication the court determines a consumer should have.⁵⁴ It has been suggested that we are moving more towards an aspirational consumer model,⁵⁵ but then the search-costs that the consumer must expend are greater than what they would be able to receive from trademarks only.

The expansion on the types of confusion that have found actionable in the past several years seem to be inconsistent with the search-cost theory,⁵⁶ since causes of action like dilution have become subject to judgment without having to show an actual likelihood of confusion on consumers. This implies that this doctrine is no longer able to justify trademarking products in their current faction because the laws have become more oriented towards the trademark owner and a consumer is being used neither as the benefactor of the trademark, nor the benchmark for when confusion has become a problem. Similarly the standard of reasonably prudent consumer seems to be shifting as well toward a model of a more self-educated, self-reliant person, who has done homework on the products they are about to purchase. It is becoming more evident that manipulation in marketing to consumers exists. If unbranding, and other deceptive practices exist⁵⁷, then this theory is unworkable until a change is made in the way trademarks may be used in a way that brings it back in line with their intended purpose of informing the consumer.

⁵³ *Id.* at 358 (“[R]esearch suggests that presumptions about the relationship between consumer sophistication and consumer confusion are inaccurate.”).

⁵⁴ *Id.* at 351 (“[Assumptions about the intelligence and shopping habits of potential customers permeate any trademark infringement analysis.”).

⁵⁵ *Id.* 357-58 (discussing Judge Kozinski’s opinion in *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171 (9th Cir. 2010) and noting the approach to be “pro-competitive” and an “aspirational approach to the consumer”).

⁵⁶ McKenna *Supra* note 45, at 78-79 (“Recent doctrinal developments, however, have driven a wedge between theory and practice, at least in the eyes of most trademark scholars. Courts have recognized as actionable a variety of new types of confusion, including confusion as to sponsorship or affiliation, reverse confusion, initial interest confusion, and post-sale confusion. Scholars criticize these doctrines, along with dilution, which many regard as the most objectionable doctrine, on the ground that they are disconnected from the search costs theory and inconsistent with consumer interests.”).

⁵⁷ Bartow, *Supra* note 21, at 731-32 (“The manufacturer may tout a ‘new and improved formula’ when it modifies a product’s components, or it may chose not to draw attention to such adjustments.”) (also discussing how Lands’ End

PART II – WHAT DOES A TRADEMARK MEAN TO CONSUMERS?

In this section we look at what it really means to be a source indicator. What is the expectation that a consumer has when a trademark is reviewed on the outside of a label and why does it matter? We will also consider the parameters allowed for using trademarks within related companies. The reason this is important stems from the expectations of the consumer which also creates the underlying reason why the way trademarks are used has become problematic. If consumers did not use trademarks with a purpose of obtaining information, then there would be no reason to trademark in the first place. Since there are expectations, the information being conveyed needs to be full and accurate in order to provide the benefit to the consumer that trademarks were created for.

If the purpose of a trademark is to be a source indicator, then is it sufficient to be an anonymous source? Among consumers, there may be a belief that when a source is identified “the consumer can locate and contact the responsible party...”⁵⁸ However, when a trademark refers to a large company all it does is “point to multinational byzantine structure involving geographically disbursed mazes of subsidiaries, parents, and affiliate entities with overlapping boards.”⁵⁹ This means that it is complex for consumers to use the source indicators to know where their products come from.

There are several reasons why a consumer may care about where the products they purchase or otherwise support may come from. First, perhaps that company has gotten bad

has been purchased by Sears Roebuck & Co. which hopes to capitalize on the Lands’ End mark which they apparently believe is superior to its own Sears mark – noting that “in this instance trademark usage is intended to confuse consumers, rather than protect or inform them.”)

⁵⁸ Bartow, *Supra* note 21, at 731 (discussing consumer perceptions about contacting the responsible party if they have a problem or question with the product or service affiliated with a particular mark).

⁵⁹ Lastowka, *Supra* note 35, at 1191.

press.⁶⁰ It could also be that the consumer has had a negative personal experience and wants to avoid the goods. However it may be impossible for the consumer to avoid products or services from the same source that operate under a different trademark.⁶¹ In such instances it appears that trademark usage is actually intended to confuse consumers rather than protect them.⁶²

Trademark laws allow the use of marks to be used among “related companies” without affecting the registrant rights or abilities to use the mark for itself.⁶³ Related companies is defined as “any person whose use of a mark is controlled by the owner of the marks with respect to the nature and quality of the goods or services on or in connection with which the mark is used.”⁶⁴ This means that when a product or brand is acquired by another company, the parent company can continue to trade under the brand name previously used. This is important to note because the owner has no burden imposed from the laws of trademark to let the consumer know when this has happened.⁶⁵

⁶⁰ See Perzanowski, *Supra* note 2, at 11 where she discusses ValuJet unbrading. The bad press could also be related to some political affiliation or social justice issue like use of child labor that results in a consumer wishing to avoid purchasing products made by that entity or an affiliate; Perzanowski *Supra* note 2, at 41 (“A consumer might avoid buying Nike shoes because she refuses to wear products produced by child labor, or because she has concerns about their quality.”).

⁶¹ Bartow, *Supra* note 21, at 734 (“A consumer who contracts food poisoning from a commercially purchased prepared food can certainly steer clear of products bearing the trademarks of the product that sickened her. She cannot, however avoid goods from the same source that bear different, unrelated trademarks, such as those that might be adopted in the wake of bad publicity, at least not by relying on the ‘information’ provided by trademarks alone.”).

⁶² *Id.* at 732. (discussing the marketing practice of Sears Roebuck & Co., which now owns the Lands’ End catalog clothing company and sells the products in store without disclosing its ownership) (“One might say that in this instance trademark usage is intended to confuse consumers, rather than protect or inform them. While the use of trademarks to obfuscate source and deceive consumers may be an inevitable consequence of trademark protections generally, the possibility certainly ought to weigh against strong trademark rights.”).

⁶³ Barnes, *Supra* note 22, at 43-44 (“The Lanham Act permits trademarks to be used by ‘related companies’ without affecting the Registrant’s trademark rights.”).

⁶⁴ Barnes, *Supra* note 22, at 44 (Citing 15 U.S.C. §1127 (2006)).

⁶⁵ Bartow, *Supra* note 21, at 734 (“Producers are not burdened by trademark law with any legal obligation to inform the public about trademark changes that are made to goods and services that continue to be offered or manufactured by the same entity.”).

PART III – CHANGES TO TRADEMARK LAWS THAT HAVE BEEN PRESENTED

As set forth in the introduction, my research has not presented me with any proposed changes to the trademark laws that are directly on point with mine. There are, however, some suggested changes that have been proposed, which are similar, and which have similar reasoning for proposing change to the trademark laws.

There have been other proposals that discuss how overused trademarks have become. The Single Signal theory has been proposed by Professor David Barnes. It seeks to curtail the overuse of trademarks by allowing all entities to use only one trademark. This would apply to all subsidiaries that operate under same parent or affiliate company. Like my proposal, there are some significant problems that are put forward. First is that there would be difficulties in determining what constituted a single source. It would also be problematic for those that had invested money and time into the development of the trademark selling that name.⁶⁶ There would be benefits to the consumer though in knowing where the product was coming from. Additionally, there would be a benefit to those relatively unknown businesses that sought to enter the competition.

The major distinction that I make between my proposal and the one set forth here is the motivation. While both proposals have a benefit to the consumer, my proposal is strictly for their benefit and everything else is a by-product, while the single signal rule actually seeks to level the playing field for competitors. Additionally, mine would be less detrimental to the goodwill established by the marks, and would allow that good-will to pass on to any new owner, while still identifying the source to the consumer.

⁶⁶ Barnes, *Supra* note 22, at 48 (discussing how the Mrs. Fields' Cookies brand would be lost under the signal signal rule presented because the purchaser would either have to fully acquire the Mrs. Fields' trademark, or use their own in place of it, despite acquiring the recipes and other goodwill).

Another suggestion similar to my proposal that has been put forth deals with curtailing the rebranding, and, specifically, the unbranding of trademarks. While the reasoning set forth for the proposal is substantially similar to my proposal, the scope of its application does not rise to the level needed in order to effectively provide consumers with the information they should be receiving from a mark. Unbranding is not the only deceptive practice being used to manipulate the use of trademarks to the detriment of the consumer. Therefore my proposal would apply more broadly to all trademarks. It would not, however, be as effective in curtailing the specific practice of unbranding.

PART IV – THE PRIMARY TRADEMARK IDENTIFIER REQUIREMENT

This section discusses my proposal for how trademark laws should be changed. Based on the uses of trademarks currently in existence, the history and rationale for trademark laws, and the expectations of consumers, I propose a rule that would create more transparency in the use of trademarks, instead of allowing for companies to continue using trademarks to help create a web that customers become entangled in when they try to determine the source of their products.

I propose that, when a person, be it an individual or a company, uses more than one trademark that one mark be deemed “primary” and required to be registered with the United States Patent and Trademark Office. This would leave individuals and companies who used only one trademark under the protections of common law trademark protection, unless they desired to register with the United States Patent and Trademark Office. Subsequent to the registration of that primary trademark for those that were required, it would have to appear on any products, advertisements or other materials distributed by that trademark holder. Further, the requirements would stipulate that the primary trademark appear within close proximity to any other trademarks used, and that its size be relatively proportional to the others used. If a trademark or

trademarks were part of a merger or acquisition, the new owner would have up to six months to designate the “primary” trademark, and other implementations of the policy.

If a parent and subsidiary relationship existed, then the parent company would be required to use one of its trademarks as the primary registrant. It would also require the primary trademark to include the actual name of the company within it. It could not merely be a symbol. That would mean that a company like Nike, which, although easily identifiable by the “swoosh”, would nevertheless have to select from among its other trademarks one primary that included the word “Nike”. If Nike were to subsequently establish or acquire another type of product, in this example let’s assume they acquire Powerade and Nike is the parent company, the Nike trademark, which has been established as the primary through the registration process, would have to appear on the Powerade label, even with the other trademarks that may already be present.

The same would also be true for companies that created and sold branded products through licensing agreements with other companies, as is seen in the example discussed in Part I with Ralph Lauren and L’Oreal. The licensee and the licensor would both have to appear on the product, but the primary registrant would be the licensee, since that company would ultimately control the actual product being released, and the licensor’s name is primarily being used for its name recognition, despite the fact that the licensor maintains some control over the quality of the products being released under its name. This would also allow consumers to establish if or when a licensing agreement ended or changed.

These rules would help establish that the larger name brand, and usually the most established of the companies, would be made known to the public in all situations, allowing the consumer to really understand the source of their products. While it might not create the ability

for a consumer to automatically identify all subsidiaries that were tied to each other, in the event that it was one of the smaller companies the consumer sought to avoid, that consumer could see who the parent company was, and perhaps determine that they wished to avoid all products made by that parent company.

The rationale behind my proposal is simple. A trademark needs to protect a company from consumer confusion, and the consumer needs to avoid being confused with relative ease. This proposal reaches that result. First, relatively small organizations or individuals using only one trademark could continue to enjoy the benefits of redress under the common law, or they could pursue federal trademark registration if it were desirable. In most cases they would be exempt from the new requirement though, as long as only one trademark was being used. This exception is because a single trademark cannot be used a way that creates this type of confusion. For example, if your electrician operates under the service mark Easy Electric, he may continue to do so as he has in the past. That is how his customers know him, how he has built his reputation, and nothing would have to change. Customers know what to expect. This change would only effect the situation if the electrician from the example sought to utilize an additional trademark. There are some immediate questions with the operations of this rule that should be addressed. First, how would this impact the United States Patent and Trademark Office, and secondly, how would this change labeling and advertisements.

The United States Patent and Trademark Office is likely overwhelmed⁶⁷ and there would be concern that the implementation of this proposal would lead to even more burden on its workforce. If that were to be the case however, it would be relatively short-lived. One of the

⁶⁷ In 2011 the United States Patent and Trademark Office had 301,826 applications filed for trademark registration. UNITED STATES PATENT AND TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT (Fiscal Year 2011), p. 173, *available at* <http://www.uspto.gov/about/stratplan/ar/2011/USPTOFY2011PAR.pdf> (last visited Dec. 8, 2012).

major purposes of this proposal is to create more transparency between the consumers and the products they are purchasing. As a result of that transparency, companies would no longer have a need to trademark nearly as many phrases, logos, or brands as have been over the past several years. As a result, though the workload might spike for a limited time, the number of registered trademarks would eventually even off and probably even reduce.

As for the second prong dealing with the difficulties faced with respect to the changes in the materials distributed displaying trademarks, labels and advertisements would simply have to make room for one more logo, symbol or mark if they wanted to continue to use it to sell a product or service under that name. For a brand like Coca-Cola, that would mean that their Sprite products would somehow have to incorporate the coca-cola trademark. It is already on most of the Sprite products sold, but it would be a question of making it more prominent. The consumer should not need a magnifying glass in order to be able to find it, nor should they have to turn the product around to locate the information.

The focus of my proposal is clearly on the benefit to the consumer. Since the search cost theory is commonly used as a way to analyze the benefits of trademarking for the consumer, the question becomes whether or not trademarks actually save the consumer any time. In their current state, I propose that they do not, but the addition of the Primary Trademark Identifier Requirement would help to reinstate the time saving to the consumer that the theory presupposes.

PART V – NET BENEFIT TEST

While the goal of my proposal is informed decision making for the consumer, it is not supposed to be to the detriment of the trademark holders themselves. This section discusses the pros and cons of making the changes that I have suggested. As the current system creates a windfall for the trademark holder now, making the dual objectives of trademark unbalanced, so

too would the balance be off if the trademark holders were to suffer serious consequences as a result of my proposed changes.

It has been said that the “optimal level of intellectual property protection is determined by balancing at the margin the incentive effects of broader rights against the administrative and access costs arising from the public goods aspect of intellectual property.”⁶⁸ This means that in order for an intellectual property right to be at its ideal level of protection the benefit to society must be measured against the benefit to the property holder. It is problematic when the benefit is swayed in either direction.

Looking through that lens and applying it to the proposal set forth, the change to the trademark laws presented actually help to create a more balanced approach. Though the proposal does weaken the exclusive rights of the trademark holder, there is a benefit created for society as a whole. Society would get the benefit of making more informed decisions when they purchase products and an honest time saving to the consumer, though it would not solve all of the problems. Evaluation on the side of the trademark holder shows that there would not necessarily be a reduction in a business or individual trademarking to identify themselves as the source. There might, however, be fewer trademarks used in general as a result of the fact that the primary trademark (brand) would be required to be displayed in all instances.

One rather significant consequence of this proposal does exist however. It would likely result in significant lobbying or other form of resistance against a proposal such as mine, were it ever to be seriously considered. That consequence would be the financial burden to the companies that would have to invest more money in all of their brands in order to combat this new transparency. This would not, however impact all situations. In most cases the parent

⁶⁸ David W. Barnes, *The Incentives/Access Tradeoff*, 9 NW. J. TECH. & INTELL. PROP. 96, 120 (2010) (citing William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 476 (2003).

company would be the company required to register. That means that a parent company would not necessarily have to invest significantly in all subsidiary companies, but they would need to keep the image and relations of their primary registrant in good shape, or else all of the other brands would, perhaps, suffer as a result.

As a society consumers would feel more comfortable having a source indicator that actually identified the true source of the product. Other creators would not necessarily react to the change at all because trademark infringement would be pursued in the same way it had been prior to the enactment of the new rule proposed. The benefit of implementing this policy is strong. Society gets a clear benefit and the change to the trademark holder is minimal. Infringement is no more likely and the trademark holder is just as likely to trademark a symbol, phrase, name or as they had been prior. Perhaps there may be less trademarking overall, but that too could be seen as a benefit to society.

PART VI – LIMITATIONS OF THE PRIMARY TRADEMARK IDENTIFIER REQUIREMENT

My proposal is, by no means, a perfect solution to the situation that currently exists. Like the other proposals discussed in Part III which had limitations, so does the Primary Trademark Identifier Requirement. This section discusses the limitations of my plan.

There may be difficulties with my proposal, but it would be a significant step in the right direction. The first probability is that corporations will likely argue that it is too cumbersome a requirement to be met. That argument has no merit. These companies, those with the most trademarks, which would be most impacted by this proposal already register a significant number of trademarks, and this requirement would require no more than that. Labels and advertisements change on a regular basis and there would be significant time to accommodate these changes allowed.

The deadlines could also be problematic. The goal for a turnaround on the application of a trademark registration is currently 12.5 months.⁶⁹ That being said, their turnaround time is typically significantly faster than that.⁷⁰ The amount of time necessary to get the registrations made or identified as the primary would have to be a movable target based on the volume of registration that was needed as a result in the change of legislation. The first year or so would likely result in a heavier load for the United State Patent and Trademark Office, but would either level off or be reduced once established. It could also end up increasing the cost of running the United States Patent and Trademark Office, which in turn, might create a higher chargeable rate to register a trademark.

Lastly, this proposal by no means creates a solution for all of the deceptive practices that currently exist and utilize the assistance of trademarks and brands. Unbranding is one example of problem that would not be resolved. Despite the fact that a primary trademark would need to be registered, a company would still be able to merge with, or acquire, a separate company and completely replace its mark with the newly adopted company's mark, as long as that was what was registered as the primary trademark. Additionally, the deceitful practice of changing the formula of a product without disclosing it to the consumer would not be resolved. It would, however, allow a consumer to be on alert if a product changed hands, and would allow them to more closely scrutinize that particular line of products.

PART VII - CONCLUSION

The justification for current trademark law is that it strikes a balance between the benefits to the owners of the trademarks and the underlying goal of preventing fraud on the consumer.

⁶⁹ UNITED STATES PATENT AND TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT (Fiscal Year 2011), p. 25, available at <http://www.uspto.gov/about/stratplan/ar/2011/USPTOFY2011PAR.pdf> (last visited Dec. 8, 2012).

⁷⁰ *Id.*

Under the widely used Search-Cost Theory, a major rationale of trademark use is the time it saves the unknowledgeable consumer from having to seek out familiar products from the hundreds, or even thousands, of competitors that might otherwise be indistinguishable. Additionally, it presupposes that the consumer can rely on that product fulfilling the need that consumer had, meaning that what they are getting, is, in fact, the exact product they have used in the past, were recommended, or have seen advertised. While ultimately that purpose may be served, the consumer is still not truly privy to the exact quality or formulation of that product, nor is the consumer necessarily aware of the identity of that source. Trademarks are being used by individuals and companies in ways that greatly differ from trademark origin and as a result the original laws do not adequately address the misuse that has become more prevalent. The laws need to be re-evaluated so that the original justifications of preventing fraud and deceit on the consumer can be served.

Other proposals have set forth a rationale for limiting individuals and businesses to one trademark. Though my proposal does not go that far, there is a commonality between the two that shows a need to reign in the number of trademarks being used. Trademarks are a valuable tool and should be available to those who need to identify themselves or their company and differentiate their products, but they should not serve as a means to help deceive the consumers and current laws allow for just that scenario. Though some problems with the current system remain unresolved by the Primary Trademark Identifier Requirement, such as the ability for a brand to change without notifying the consumer of the change, this is a step in the right direction. Consumers will not only be in a better position to make an informed choice based on clear factors like price, and not as a result of manipulative marketing tactics, but they will also have a

better understanding of where their products come from and whose pockets are being filled with their hard earned money.

Appendix I

Firefox | Interbrand - Best Glob... | lawschool.westlaw.co... | Search - NY-TRIALOR... | Search Results - attor... | Trademarks Home | Record List Display | what food products ar... | Google

tes2.uspto.gov/bin/showfield?doc&state=4005%3A5mp4q.1.1&p_search=search&sp_L=50&BackReference=&p_plural=yes&p_x_PARA1=&p_tagrepl-%3A=PARA1%3A

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Refine Search polly-o Submit

Current Search: S1: [kraft foods][COMB] docs: 9 occ: 54

Serial Number	Reg. Number	Word Mark	Check Status	Live/Dead
1 78849706		GOOD FOOD HAS ALWAYS BEEN AN ART WITH KRAFT. AT KRAFT, GOOD FOOD HAS ALWAYS BEEN AN ART.	TSDR	DEAD
2 78433788		KRAFT FOODS BUILDERS SERIES	TSDR	DEAD
3 77761676		KRAFT FOODS	TSDR	LIVE
4 77647697		KRAFT FOODS MAKE TODAY DELICIOUS	TSDR	DEAD
5 77476955	3758390	KRAFT FOODSERVICE BETTER WORLD	TSDR	LIVE
6 74209091	1762058	KRAFT GENERAL FOODS KGF THE WORLD'S FAVORITE FOODS	TSDR	DEAD
7 74209087	1814428	KRAFT GENERAL FOODS THE WORLD'S FAVORITE FOODS KGF ENVIRONMENTAL INSTITUTE	TSDR	DEAD
8 74045564	1732912	KRAFT GENERAL FOODS DAIRY DIVISION	TSDR	DEAD
9 74016047	1688154	KRAFT GENERAL FOODS WORLD TOUR	TSDR	DEAD

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Appendix II

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tes2.uspto.gov/bin/showfield?doc&state=4005%3A5mp4q.5.91



Word Mark KRAFT FOODS

Goods and Services IC 029. US 046. G & S: Grated cheese; processed cheeses; processed cheese foods; cottage cheese; sour cream; cream cheese; jellies, jams; processed meats, namely, turkey, chicken, beef, and ham; bacon; pickles, processed nuts, prepared meals consisting primarily of meat and cheese; processed cheese dips and spreads; vegetable based dips and spreads; snack mix consisting primarily of processed fruits and nuts; protein-based snack bars

IC 030. US 046. G & S: Coffee; mustard; horseradish; relishes; ketchup; salad dressings, barbecue sauces, mayonnaise; confectionary, namely, caramels, chocolates, and marshmallows; grain-based snack foods; seasonings; cookies; crackers; puddings; flavored and sweetened gelatins; pizza; stuffing mix containing bread; packaged meals consisting primarily of pasta and sauces; cheese sauces

IC 032. US 045 046 048. G & S: Beverages, namely, soft drinks and non-alcoholic fruit flavored drinks; powdered preparations for making beverages, namely, powders used in the preparation of fruit-based beverages

Mark Drawing Code (3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS

Design Search Code 26.03.14 - Ovals, three or more; Three or more ovals
26.03.21 - Ovals that are completely or partially shaded
26.03.28 - Miscellaneous designs with overall oval shape, including amoeba-like shapes and irregular ovals; Oval shape (miscellaneous overall shape)
26.05.13 - Triangles, exactly two triangles; Two triangles
26.05.21 - Triangles that are completely or partially shaded
26.07.21 - Diamonds that are completely or partially shaded
26.17.09 - Bands, curved; Bars, curved; Curved line(s), band(s) or bar(s); Lines, curved
26.17.13 - Letters or words underlined and/or overlined by one or more strokes or lines; Overlined words or letters; Underlined words or letters

Serial Number 77761676

Filing Date June 17, 2009

Current Basis 1B

Original Filing Basis 1B

Published for Opposition May 25, 2010

International Registration Number 1007868

Owner (APPLICANT) KRAFT FOODS GROUP BRANDS LLC LIMITED LIABILITY COMPANY DELAWARE THREE LAKES DRIVE NORTHFIELD ILLINOIS 60093

Assignment Recorded ASSIGNMENT RECORDED

Attorney of Record Susan H. Frohling

Prior Registrations 0554187;0670330;0801424

Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "FOODS" APART FROM THE MARK AS SHOWN

Description of Mark The color(s) blue, pink, red, green, yellow, purple, orange is/are claimed as a feature of the mark. The mark consists of the words "kraft foods" in the color blue with a burst of various design elements emanating clockwise around the letter "k" in the following colors orange, purple, yellow, green, red, pink and blue; with a blue curved line below the word "kraft".

Type of Mark TRADEMARK

Register PRINCIPAL

Live/Dead Indicator LIVE