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Trademark Cosmopolitanism

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The world of global trademarks can be characterized in terms of three major shifts: first, a shift from national to global branding strategies; second, a shift from national and regional systems to harmonized international regimes governing trademark law; and third, a concurrent shift from local to transnational social movements that challenge branding and other corporate practices. This Article details how each of these areas are deeply intertwined with one another, and also how the emergence of a transnational trademark regime carries important implications for freedom of expression worldwide.

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INTRODUCTION

In May of 2008, Nadia Plesner, a Danish art student, decided to do something about the lingering crisis in Darfur. She designed a T-shirt to raise money for the cause, depicting a starving Sudanese child holding a Chihuahua in one hand and a Louis Vuitton bag in the other — in a classic appropriation of a famous photograph depicting Paris Hilton in a bikini. “I started this campaign because of the distorted way the media prioritizes between big and small world news,” she explained. “How can Paris Hilton make more front covers than the genocide in Darfur?”¹ Shortly thereafter, she was served with a harshly written letter from the Intellectual Property Director for Louis Vuitton (“LVMH”) that read, in part:

Although we applaud your efforts to raise awareness and funds to help Darfur, a most worthy cause, we cannot help noticing that the design . . . includes the reproduction of a bag infringing on Louis Vuitton’s Intellectual Property Rights, in particular the Louis Vuitton Monogram Multicolore Trademark to which it is confusingly similar. We are surprised of such a promotion of a counterfeit bag.

LVMH did not mince its words. The letter goes on to request that Plesner discontinue distributing the shirt immediately.²

Plesner eventually replied, explaining to LVMH’s lawyer that she did not use an exact replica of the bag, but rather meant for her depiction to simply evoke designer bags in general.³ Nevertheless, LVMH decided to file suit against her, threatening thousands of dollars in damages.⁴ Shortly thereafter, the news quickly began to travel

¹ Ernesto, *Louis Vuitton Sues Darfur Fundraiser for Copyright Infringement*, TORRENTFREAK (Apr. 25, 2008), <http://torrentfreak.com/louis-vuitton-sues-darfur-fundraiser-for-copyright-infringement-080425> (quoting Nadia Plesner); see also Jeremiah Owyang, *Louis Vuitton Gets Brand-Jacked, Collateral Damage in Anti-Genocide Campaign*, WEB-STRATEGIST BLOG (May 4, 2008), <http://www.web-strategist.com/blog/2008/05/04/louis-vuitton-gets-brand-jacked-victimized-in-anti-genocide-campaign-tough-spot-to-be-in> (quoting Nadia Plesner) (“I felt horrified by the fact that even with the genocide and other ongoing atrocities in Darfur, Paris Hilton was the one getting all the attention.”).

² Letter from Nathalie Moullé-Berteaux, Intellectual Property Director, Louis Vuitton Malletier, to Nadia Plesner (Feb. 13, 2008), available at <http://www.clancco.com/LouisVuittonLetter.pdf>.

³ See Ernesto, *supra* note 1 (“Sometimes recognizable objects are needed to express deeper meanings, and in their new form they become more than the objects themselves, they become art,” Plesner explained, noting that she planned to “stand by my freedom of expression — artistic and/or otherwise,” and continue distribution).

⁴ LVMH demanded \$7,500 for each day she continued to sell the product,

worldwide. Speaking to *New York Magazine*, Plesner argued that “[i]f I was making bags and copying the design, I would understand the problem,” but since she was caricaturing it instead in a picture, she considered it part and parcel of her artistic freedom.⁵ Roughly six months later, and after a major maelstrom in the media, the case finally settled for an undisclosed amount, and Plesner no longer distributes the shirt as a result.

The resolution of the case might have ended the standoff between LVMH and Plesner, but only for the moment. Interestingly, a year or so after the settlement, Plesner decided to reuse the very same image in a large piece of visual art called *Darfurnica*, a piece modeled after Picasso’s *Guernica* (a famous 1937 piece protesting the bombing of the town with the same name). Plesner juxtaposed the image with a variety of global brands, political symbols, and other elements from high fashion. Plesner explained that she decided to name the painting after Picasso’s famous work after she discovered that *Guernica* was shrouded in blue cloth during a United Nations press conference on the war in Iraq in 2003. For her, *Guernica* represented the power of visual art to make connections between current political events and issues of social justice.⁶

Plesner’s own work draws obvious parallels between the power of political symbols, fashion symbols, and corporate symbols, noting how each one occupies a tremendous amount of prominence in our visual culture. Indeed, there is a triadic convergence of function between all three categories of symbols, because each type can personify *both* the brand creator as well as the audience that consumes them. Each of these audiences — whether consumers of luxury goods, political actors, or artist/activists like Nadia Plesner — oppositional or otherwise, all integrate and respond to particular brands as part of their process of self-expression.

another \$7,500 for each day she posted its cease-and-desist letter on her site, another \$7,500 per day for each time she used the name “Louis Vuitton” on her website (totaling over \$20,000 per day), and finally, another \$15,000 to cover their legal and related expenses relating to the suit. *See id.*

⁵ See The Cut, *Art Student Nadia Plesner’s Giant Louis Vuitton Copyright Suit*, N.Y. MAG. (May 6, 2008), http://nymag.com/daily/fashion/2008/05/art_student_nadia_plesners_gia.html.

⁶ See Nadia Plesner, *Darfurnica Day 18* (July 27, 2009), <http://www.nadiaplesner.com/the-making-of-darfurnica> (“It is amazing that an art work can be considered so powerful, that it has to be covered up while governments present their plans. It only proves that artists around the world must continue to work with the harsh issues to influence the people with power and to start important debates.”).

Further, as this story demonstrates, the relationships between luxury brands, artistic expression, and global politics are constantly shifting and in flux. The transnational nature of social movements and global branding strategies have evoked significant questions about the proper role of intellectual property law, sovereignty, and speech within each sphere. Whereas earlier discussions of international social justice issues (like the crisis in Darfur) might have been restricted to human rights law or other forms of public international law, today's movements now unfold within the structures of the increasing globalization of intellectual property law, as well. In other words, private law — or specifically, trademark law — is now emerging to play a role in international social justice disputes alongside these longstanding public law approaches.

We have long been aware of the magnetic pull of global brands across the world. But what is also remarkable is how powerful that pull has become, even to those who oppose their prominence. As Plesner's case demonstrates, global luxury brands have become not just the lingua franca of transnational consumption, but also of the antibranding activists who resist it. Particularly when luxury brands acquire a level of global prominence in public culture, as LVMH has done, it is inevitable that its iconic imagery becomes even more susceptible to recoding and commentary. The more LVMH has invested in its brand, making it more and more ubiquitous in consumer culture, it becomes more and more vulnerable as a result, leading many individuals to use their brands and logos as a means of expressing their own identity or as a vehicle for commenting on consumerism, luxury, or branding in general. As a result, LVMH's logo is not just a logo; precisely because of its ubiquity, it now stands for something else — luxury, elite excess, celebrity culture, and the like. As Plesner's case demonstrates, activists may seek to recode a brand for purposes that have little to do with LVMH's brand specifically. Yet in each of these cases, property principles and freedom of speech collide, with luxury brands as the backdrop, producing an impasse with variable and unpredictable results.

Clearly, unauthorized uses pose serious legal and ethical questions for global brand owners. Today, LVMH is one of the world's most valuable global brands.⁷ Like many luxury brands, LVMH, when faced

⁷ See MILLWARD BROWN, BRANDZ TOP 100 MOST VALUABLE GLOBAL BRANDS 2013, at 25 (2013), available at http://www.millwardbrown.com/brandz/2013/Top100/Docs/2013_BrandZ_Top100_Report.pdf; see also Andrew Roberts, *Louis Vuitton Tops Hermes as World's Most Valuable Luxury Brand*, BLOOMBERG (May 21, 2012, 4:00 PM), <http://www.bloomberg.com/news/2012-05-21/louis-vuitton-tops-hermes-as-world-s->

with examples of unauthorized use, has a choice to make: it can either tolerate alternative commentary, or it can choose to threaten litigation over the unauthorized use of its trademarks. Either choice carries consequences, both positive and negative, but each decision that LVMH faces underscores how much our world has changed in the last several decades regarding the rise and prominence of global branding. Today, there are a multitude of what I call transnational brands: brands that began with national origins, but which have become global icons in the process.⁸

The rise of transnational brands brings with it an attendant series of legal shifts in trademark law. Long considered the stepchild of intellectual property law, today, trademark law has morphed into a powerful global legal phenomenon, revealing a foundational shift from national and regional systems to harmonized international regimes governing trademark law. A unitary system of trademark registration is emerging. However, even if a system of harmonized registration becomes the new normal, territorial systems of trademark enforcement — not to mention constitutional protections for freedom of expression — vary widely. Here, age-old questions regarding sovereignty, human rights, and artistic freedom have also begun to play a role in modern trademark disputes, both domestically and internationally. Yet as the Plesner case clearly demonstrates, as brands become global, transnational entities, they also engender modes of resistance from a number of different social movements. These movements, it seems, are just as transnational as the global branding strategies that are often their targets, demonstrating how questions of freedom of expression emerge alongside the circulation of transnational brands.

This Article details how each of these areas are deeply intertwined with one another, and how they demonstrate the emergence of a broad phenomenon that I call trademark cosmopolitanism, which carries important implications for freedom of expression worldwide. In this Article, I refer to the phenomenon of trademark cosmopolitanism to broadly sketch out four trajectories of transnational activities, and their relationships to the various entities that play key roles in the global branding enterprise — namely, the consumer, the corporation,

most-valuable-luxury-brand.html (stating Louis Vuitton remained the world's most valuable luxury brand for the seventh consecutive year).

⁸ For example, brands such as Nike, Apple, Ralph Lauren, and Honda started off nationally before becoming global icons. See generally Mark K. Smith & Michele Erina Doyle, *Globalization: Theory and Experience*, INFED, <http://infed.org/mobi/globalization-theory-and-experience/> (last visited Oct. 3, 2013) (arguing that the growth and globalization of multinational corporations is intertwined with branding power).

the politician, and the activist. The first set of activities involves what I call consumptive cosmopolitanism, and that refers to the purchasing and shopping practices of the global consumer and the ways in which these practices reflect a kind of globalized consciousness. The second set of activities, which are closely related to the first set, involves the emergence of a corporately-oriented cosmopolitanism that stems from the global corporate social responsibility movement. The third kind of activity, which reflects a more macroeconomic set of considerations, involves the emergence of an institutionalized form of cosmopolitanism, which refers to the variety of government and nongovernment entities that have emerged to facilitate the creation, enforcement, and protection of transnational brands. The final set of transnational activities, however, typify a more politicized form of trademark cosmopolitanism that focuses on challenging, rather than consuming, the power of branding and multinational corporations.

All of these trajectories, I would argue, demonstrate broad and varied facets of a phenomenon I call trademark cosmopolitanism — underscoring the globalization of trademark law. This Article has three sections. In Part I, I describe the first three trajectories of trademark cosmopolitanism, and discuss the emergence of brands as global, transnational figures of both speech, property, and increasingly, corporate ethics. In Part II, I turn to the last trajectory and discuss how the rise of trademark cosmopolitanism also relates to the global antibranding movement, typified by the Plesner example. The interplay between the global brand, the global antibrand, and the language of ethics, cosmopolitanism, and corporate social responsibility, with all of the legal differences associated with sovereignty and speech, I would suggest, is one of the paramount issues for trademark scholars in the future.

I. THE RISE OF TRADEMARK COSMOPOLITANISM

In 1992, Jeremy Waldron published an article, *Minority Cultures and the Cosmopolitan Alternative*, which described the emergence of individuals who prefer that their cultural identities not be tied specifically to a set of rigidly defined borders.⁹ Two years later, Martha Nussbaum published a groundbreaking essay, *Patriotism and Cosmopolitanism*, where she argued in favor of a kind of moral

⁹ See, Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REFORM 751, 754 (1991–1992) (developing the idea of “cosmopolitan” individuals who do not self-identify based upon their location, ancestry, citizenship, or language).

universalism and the need for a cosmopolitan education that recognized that central features of human personhood transcended national boundaries.¹⁰ At the same time, however, she also embraced a more robust notion of empathy. “By looking at ourselves in the lens of the other,” she wrote, “we come to see what in our practices is local and non-necessary, what more broadly or deeply shared.”¹¹

Those words were written almost twenty years ago, where Nussbaum described cosmopolitanism’s roots as linked to Diogenes, the ancient Greek Cynic philosopher, who once proclaimed himself as “a citizen of the world,” in response to a question about his geographic origin.¹² In a sense, as Nussbaum explained, Diogenes meant that he eschewed a sense of identity that was defined solely by his local origins and memberships, that instead, his identity was defined by more universal aspirations. Much of this early view was later developed by the Stoics, who viewed everyone as belonging to a world community of humankind that was joined by basic ethical values and principles, like justice, dignity, and respect.¹³ As Nussbaum observed, through these globalized lenses, “[w]e recognize moral obligations to the rest of the world that are real, and that otherwise would go unrecognized.”¹⁴ At the same time, however, Nussbaum did not totally

¹⁰ See Martha Nussbaum, *Patriotism and Cosmopolitanism*, BOS. REV. (Oct. 1, 1994), <http://bostonreview.net/martha-nussbaum-patriotism-and-cosmopolitanism> [hereinafter *Patriotism and Cosmopolitanism*] (arguing that moral ideals of justice and equality are better accomplished by a primary allegiance “to the community of human beings in the entire world” than by a goal of national unity); see also COSMOPOLITICS: THINKING AND FEELING BEYOND THE NATION 2 (Pheng Cheah & Bruce Robbins eds., 1998) [hereinafter *COSMOPOLITICS*]; DEREK HEATER, *WORLD CITIZENSHIP: COSMOPOLITAN THINKING AND ITS OPPONENTS* 54 (Bloomsbury Academic 2004); Kwame Anthony Appiah, *Cosmopolitan Patriots*, 23 CRITICAL INQUIRY 617, 623 (1997); David Harvey, *Cosmopolitanism and the Banality of Geographical Evils*, 12 PUB. CULTURE 529, 529-30 (2000); Martha Nussbaum, *Kant and Stoic Cosmopolitanism*, 5 J. POL. PHIL. 1, 1-4 (1997) [hereinafter *Kant and Stoic Cosmopolitanism*]. See generally DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE* (1995) (discussing Kant’s interpretation of Democratic Cosmopolitanism); MARTHA C. NUSSBAUM ET AL., *FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM* 21-29 (J. Cohen ed., 1996) (providing multisided discussions of the interaction between patriotism and cosmopolitanism); Bruce Ackerman, *Rooted Cosmopolitan*, 104 ETHICS 516 (1994) (arguing the possibility and ease of being both a citizen of a particular nation and a citizen of the world at once).

¹¹ Nussbaum, *Patriotism and Cosmopolitanism*, *supra* note 10.

¹² See Nussbaum, *Kant and Stoic Cosmopolitanism*, *supra* note 10, at 5.

¹³ *Id.* at 7-12.

¹⁴ See, e.g., Nussbaum, *Patriotism and Cosmopolitanism*, *supra* note 10 (“If we really do believe that all human beings are created equal and endowed with certain inalienable rights, we are morally required to think about what that conception requires us to do with and for the rest of the world.”).

eschew the pull of localized loyalties; she notes that even within this approach, there was still room for patriotism, for localized attachments and identities formed from a specific geographic origin.¹⁵

Similar observations have been made by Stuart Hall,¹⁶ anthropologist Craig Calhoun,¹⁷ and others, all of whom embrace the notion of an emergent global citizenry, a kind of transnational consciousness that spanned borders and cultures and celebrated openness and solidarity.¹⁸ Many have described cosmopolitanism as having essentially two strands — one about culture and the self, and another about justice — rejecting a kind of relativism that strict nationalism might embrace.¹⁹ Others describe it along the lines of a political or

¹⁵ See, e.g., Noah Feldman, *Cosmopolitan Law?*, 116 YALE L.J. 1022, 1032 (2007) (asserting Nussbaum insisted on a “cosmopolitanism with room for local, ‘patriotic’ attachments”). Similarly, Kwame Anthony Appiah, in his book on cosmopolitanism, also applauds a view that focuses on ethical obligations to others, one that also embraces a highly robust view of autonomy, but also espouses a similar kind of partiality — what Appiah calls “rooted cosmopolitanism” — the idea that one can be partial to one’s ethical community. See KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* 213, 223-32 (2007); Appiah, *supra* note 10, at 618; see also Feldman, *supra*, at 1043 (discussing both Nussbaum and Appiah).

¹⁶ See Stuart Hall, *Political Belonging in a World of Multiple Identities*, in *CONCEIVING COSMOPOLITANISM: THEORY, CONTEXT, AND PRACTICE* 25, 26 (Steven Vertovec & Robin Cohen eds., 2002) (defining cosmopolitanism as “the ability to stand outside of having one’s life written and scripted by any one community”); see also SIDNEY TARROW, *THE NEW TRANSNATIONAL ACTIVISM* 35, 40 (2005).

¹⁷ See Craig Calhoun, *The Class Consciousness of Frequent Travellers: Towards a Critique of Actually Existing Cosmopolitanism*, in *CONCEIVING COSMOPOLITANISM: THEORY, CONTEXT, AND PRACTICE*, *supra* note 16, at 86, 102-09 (linking cosmopolitanism to the spread of democracy); see also TARROW, *supra* note 16, at 40.

¹⁸ Des Gasper, *Cosmopolitan Presumptions? On Martha Nussbaum and Her Commentators*, 37 DEV. & CHANGE 1227, 1230 (2006).

¹⁹ See, e.g., Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48, 49 (1992) (distinguishing between legal and moral cosmopolitanism); Samuel Scheffler, *Conceptions of Cosmopolitanism*, 11 UTILITAS 255 (1999) (outlining two views of cosmopolitanism); see also David A. Hollinger, *Not Universalists, Not Pluralists: The New Cosmopolitans Find Their Own Way*, 8 CONSTELLATIONS 236, 236-38 (2002) [hereinafter *Not Universalists*]. See generally SEYLA BENHABIB, *ANOTHER COSMOPOLITANISM* (Robert Post ed., 2006) (noting a transition from international to cosmopolitan formations of justice); SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS* (2004) (examining the incorporation of aliens, immigrants, and refugees in light of Kantian cosmopolitanism); *PERPETUAL PEACE: ESSAYS ON KANT’S COSMOPOLITAN IDEAL* (James Bohman & Matthias Lutz-Bachmann eds., 1997) (examining a tension between Kantian cosmopolitanism and nationalism that has remained constant throughout the last 200 years); THOMAS W. POGGE, *REALIZING RAWLS* (1989) (asserting that Rawl’s critics fail to distinguish between morality and justice); *THE POLITICAL PHILOSOPHY OF COSMOPOLITANISM* (Gillian Brock & Harry Brighouse eds., 2005) (containing works by political theorists in defense of positive cosmopolitanism as opposed to rigid support for national boundaries); KOK-CHOR

institutional formulation — focusing on the emergence of globalized institutions.²⁰

Of course, much ink can be spilled about the importance of cosmopolitanism on political and legal theory. For the purposes of this Article, however, I want to briefly sketch out some of the ways in which dominant approaches to the study of both cosmopolitanism and transnationalism reveal new ways of situating our increasingly globalized systems of trademark regulation, and the ancillary ethical and moral questions that inevitably accompany this growth.

On a primary level, I would argue that Nussbaum and the current scholarship on cosmopolitanism have much to offer intellectual property scholars, many of whom are grounded in territorial frameworks that often fail to reckon with the erosion of sovereignty, the rise of global branding, and the ancillary rise of trademark harmonization in our current legal context. Currently, the field of trademark doctrine often remains closely tied to principles of territoriality and localized principles, despite the widespread embrace of transnational forces.²¹ As a result, the two forces often collide — a

TAN, JUSTICE WITHOUT BORDERS: COSMOPOLITANISM, NATIONALISM AND PATRIOTISM (CONTEMP. POL. THEORY, Ian Shapiro ed., 2004) (suggesting cosmopolitan impartiality to nationality and citizenship applies to the distribution of justice while accommodating an individual's independent recognition of nationality); Brian Barry, *Statism and Nationalism: A Cosmopolitan Critique*, in GLOBAL JUSTICE 12 (Ian Shapiro & Lea Brilmayer eds., 1999) (attacking Statism as a narrow theory); Charles R. Beitz, *Cosmopolitan Ideals and National Sentiment*, 80 J. PHIL. 591, 591-600 (1983) (explaining the continued influence of nationalism after cosmopolitanism has taken root); Robert Fine & Robin Cohen, *Four Cosmopolitanism Moments*, in CONCEIVING COSMOPOLITANISM: THEORY, CONTEXT, AND PRACTICE, *supra* note 16, at 137, 137 (suggesting that cosmopolitanism is not a total anecdote to “nationalism, racism, ethnic conflict, and religious fundamentalism”).

²⁰ See Gasper, *supra* note 18, at 1229; see, e.g., SIMON CANEY, JUSTICE BEYOND BORDERS: A GLOBAL POLITICAL THEORY (2005) (examining political philosophy's interaction with global politics and questioning which political philosophy should govern on a global level); GLOBAL JUSTICE AND TRANSNATIONAL POLITICS: ESSAYS ON THE MORAL AND POLITICAL CHALLENGES OF GLOBALIZATION (Pablo De Greiff & Ciaran Cronin eds., 2002) (providing essays considering international institutional responses to global crises); see also GARRETT WALLACE BROWN, GROUNDING COSMOPOLITANISM: FROM KANT TO THE IDEA OF A COSMOPOLITAN CONSTITUTION 11-14 (2009); LUIS CABRERA, POLITICAL THEORY OF GLOBAL JUSTICE: A COSMOPOLITAN CASE FOR THE WORLD STATE 1 (2004); DAVID HELD, COSMOPOLITANISM: IDEALS, REALITIES AND DEFECTS 93-115 (2010); CHARLES JONES, GLOBAL JUSTICE: DEFENDING COSMOPOLITANISM 21-107 (1999); DARREL MOELLENDORF, COSMOPOLITAN JUSTICE 7-28 (2002).

²¹ For more views on this phenomenon, see Graeme B. Dinwoodie, *Trademarks and Territory: Detaching Trademark Law from the Nation-State*, 41 Hous. L. Rev 885, 887 (2004) (critiquing the principle of territoriality); Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property*

trademark system grounded in territoriality and the emergence of harmonized systems of branding, marketing, and registration.

Admittedly, given how broad the field of cosmopolitanism has become, and its vast history, it can mean a variety of things — everything from an attitude or a value, to a kind of global governance, to a set of views on social structures and beyond.²² Yet trademarks, and global brands, are often a central vehicle by which these general approaches to cosmopolitanism specifically and symbolically unfold, and often the terrain under which conflicts over globalization and localization take place. As a result, trademark cosmopolitanism, one might argue, is thus inextricably linked to global flows of content, and as content and brands circulate transnationally, so do the legal principles of intellectual property that underpin them. The same is also true for the social and political movements that have also emerged surrounding the rise of global brands. Even the forces that oppose globalization and the rise of multinational corporations, I would argue, reflect a kind of cosmopolitan ethic that is worth further analysis and study.²³ This phenomenon also includes a wide array of

Lawmaking, 29 YALE J. INT'L L. 1, 3 (2004) [hereinafter *Regime Shifting*] (exploring the relationship between TRIPS and intellectual property); Ruth L. Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 SING. J. INT'L & COMP. L. 315 (2003) (arguing that the dominant narratives of sub-Saharan Africa and Asia support, rather than question, current international intellectual property law); Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827, 833 (2007) (arguing that heightened protection of intellectual property rights has adverse effects on developing and impoverished countries); Robert Stoll, Statement at United States House of Representatives: Protecting Intellectual Property Rights in a Global Economy: Current Trends and Future Challenges (Dec. 9, 2009), available at <http://www.uspto.gov/news/speeches/2009/2009Dec9.jsp> (last visited Sept. 20, 2013) (discussing the emergence of international intellectual property law in relation to U.S. policy); and *Pharmaceutical Patent Issues: Interpreting GATT: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 227 (1996) (stating “that uniform protection of intellectual property rights around the world would promote the expansion of international trade, global economic growth, and job creation”).

²² See Ian Woodward et al., *Attitudes Towards Globalization and Cosmopolitanism: Cultural Diversity, Personal Consumption and the National Economy*, 59 BRIT. J. SOC. 207, 208 (2008) (making this observation).

²³ Several legal scholars have also studied similar themes with respect to the globalization of intellectual property. See, e.g., LOUISE BERNIER, *JUSTICE IN GENETICS: INTELLECTUAL PROPERTY AND HUMAN RIGHTS FROM A COSMOPOLITAN LIBERAL PERSPECTIVE* (Edward Elgar ed., 2010) (discussing cosmopolitization in relation to distribution of intellectual property as health resources); Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1341-42 (1996) (discussing the difficulties of conflicting legal regimes and globalization in relation to intellectual property law); Paul Schiff Berman, *Towards a*

third parties who are, directly or indirectly, broadly implicated in the process of global branding, either because they support the process, like consumers, or because they oppose it, like anti-globalization activists. All of these elements encompass descriptive and normative aspects to their approaches, and they also underwrite some of the most important challenges for trademark law in the future.

A. *From National Brand to Global Icon: Consumptive Cosmopolitanism*

In 1983, in a groundbreaking article for the *Harvard Business Review*, Professor Theodore Levitt claimed that a global market for standardized, uniform products and services had emerged.²⁴ To maximize the opportunities that this market presented, Levitt recommended selling standardized products in a wide variety of

Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era, 153 U. PA. L. REV. 1819 (2005) (discussing problems of choice-of-law and the recognition of judgments in relation to intellectual property); Margaret Chon, *Law Professor as Artist: Themes and Variations in Keith Aoki's Intellectual Property Scholarship*, 90 OR. L. REV. 1251 (2012) (discussing the work of Keith Aoki); Shubha Ghosh, *Open Borders, Intellectual Property & Federal Criminal Trade Secret Law*, 9 J. MARSHALL REV. INTELL. PROP. L. 24 (2009) (focusing on the intersection between boundaries in intellectual property law and those in immigration policy); Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804, 820 (2008) (discussing the recent countermobilization against strong international property law); Chidi Oguamanam, *Localizing Intellectual Property in the Globalization Epoch: The Integration of Indigenous Knowledge*, 11 IND. J. GLOBAL LEGAL STUD. 135 (2004) (examining the perceived conflict between the centrifugal focus of the attempt to integrate customary regimes for knowledge protection into the IP discourse, and the phenomenon of globalization as symbolized by the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement); Ernst-Ulrich Petersmann, *International Economic Law in the 21st Century: Need for Stronger "Democratic Ownership" and Cosmopolitan Reforms*, 31 POLISH Y.B. INT'L L. 9, 17 (2011) (discussing the relation between international economic law and human rights law); Kal Raustiala, *Commentary: Density and Conflict in International Intellectual Property Law*, 40 UC DAVIS L. REV. 1021 (2007) (questioning whether the infusion of human rights concepts and rhetoric will serve, on balance, to make international IP rights more socially just); Jessica Silbey, *Comparative Tales of Origins and Access: Intellectual Property and the Rhetoric of Social Change*, 61 CASE W. RES. L. REV. 195 (2010) (analyzing the community that the Access Movements create through their critiques and proposals concerning the division of property and power in our networked world).

²⁴ See Theodore Levitt, *The Globalization of Markets*, HARV. BUS. REV., May-June 1983, at 92, 92-102; see also Susan P. Douglas et al., *Integrating Branding Strategy Across Markets: Building International Brand Architecture*, 9 J. INT'L MARKETING 97, 101 (2001); Douglas B. Holt et al., *How Global Brands Compete*, HARV. BUS. REV., Sept. 2004, at 68, 69 [hereinafter *Global Brands*]; John Ruff, *The Globalization of a Food Processor*, 51 FOOD & DRUG L.J. 727, 727 (1996) (discussing the globalization of the Kraft brand).

geographic contexts and markets. Commenting on Levitt's article, years later, brand scholars Douglas Holt and others explained that even though Levitt did not explicitly discuss branding, his ideas were interpreted to suggest the need for greater standardization and uniformity — not just among products, but among brand identities — giving rise to the growth of the global branding phenomenon.²⁵

Thirty years after Levitt's article was published, we see dramatic shifts in the standardization of both goods and of trademarks globally. Corporations, just like individuals, have adopted a global outlook and approach in many aspects of their day-to-day practices regarding brand management. Today, international branding comprises much more than just a selection of brand names — remember the famous Chevy Nova story, where “No Va” translated into “no go” in Spanish — but it is also about auditory, visual, emotional brand design.²⁶ The process of global branding, for example, has been described to encompass everything from companies that use an identical marketing strategy across countries to others which utilize a similar brand with some variations in different markets.²⁷ Other definitions of global

²⁵ See Colin Grant, *Theodore Levitt's Marketing Myopia*, 18 J. BUS. ETHICS 397, 399 (1999) (“While the specific tone of Levitt's tactic might not prove particularly effective today, the level at which it aims, that of our most basic dreams and desires, remain crucial for contemporary advertising.”); Holt et al., *Global Brands*, *supra* note 24, at 69; see also Jeryl Whitelock & Carole Pimblett, *The Standardisation Debate in International Marketing*, 10 J. GLOBAL MARKETING 45, 45-46 (1997); Yoram Wind, *The Myth of Globalization*, 3 J. CONSUMER MARKETING 23, 23 (1986); Shaoming Zou & S. Tamer Cavusgil, *The GMS: A Broad Conceptualization of Global Marketing Strategy and Its Effect on Firm Performance*, 66 J. MARKETING, Oct. 2002, at 40, 41 (citing Levitt's standardization perspective as “perhaps the most influential view” on global marketing strategy).

²⁶ See Bernd Schmitt, *From the Special Issue Editor*, 10 J. INT'L MARKETING, SPECIAL ISSUE ON GLOBAL BRANDING, Summer 2002, at 2, 2-3 (containing excellent empirical papers on global trademarks and brands).

²⁷ See, e.g., David A. Aaker & Erich Joachimsthaler, *The Lure of Global Branding*, HARV. BUS. REV., Nov.-Dec. 1999, at 137 (discussing the principles that successful global branding employs); Dana L. Alden et al., *Brand Positioning Through Advertising in Asia, North America, and Europe: The Role of Global Consumer Culture*, 63 J. MARKETING, Jan. 1999, at 75 (examining “the emergence of brand positioning strategies in advertising that parallel the growth of the global marketplace”); Douglas et al., *supra* note 24 (discussing the “implications for the design and management of the firm's international brand architecture”); Andy Pike, *Geographies of Brands and Branding*, 33 PROGRESS HUM. GEOGRAPHY 619, 619 (2009) (“seek[ing] to elucidate the geographies of brands and branding through interpreting their geographical entanglements.”); Larry Roellig, *Designing Global Brands: Critical Lessons*, 12 DESIGN MGMT. J. 40 (2001) (highlighting “the numerous strategic and tactical considerations to keep in mind when producing a global brand expression”); Martin S. Roth, *The Effects of Culture and Socioeconomics on the Performance of Global Brand Image Strategies*, 32 J. MARKETING RES. 163 (1995) (studying

branding focus instead on the building of brand equity internationally, and still others focus on the harmonization of an international brand and marketing architecture.²⁸

In turn, just as brands now reflect a kind of global consciousness and design, globalization has also produced a generation of cosmopolitanist consumers.²⁹ This emerging culture is not tied to a singular global brand, or a culture of homogeneity, but a global culture instead — enabling consumers to “see themselves in relation to other cultures as well as their own.”³⁰ This is not to suggest that consumers share the same tastes, but rather, that they participate in a shared conversation that often centers around the presence and participation of global brands. “Like entertainment stars, sports celebrities and politicians,” Douglas Holt writes, “global brands have become a lingua franca for consumers all over the world.”³¹ Anecdotal evidence further demonstrates these conclusions — “Global brands make us feel like citizens of the world, and . . . they somehow give us an identity,” one Argentinian consumer observed.³²

Reading some of the vast literature on global branding, one is struck by the immediate similarity of its descriptive and normative insights to

the differing cultural effects on brand performance); Sandeep Saxena, *Challenges and Strategies of Global Branding in Indian Market*, IOSR J. BUS. & MGMT., Sept.–Oct. 2012, at 38 (discussing the six challenges (6E’s) and the strategies of global marketing); Kasia Moreno, *What’s Easier: To Make a Billion Dollars, Build a Global Company or Create a Global Brand?*, FORBES (Apr. 9, 2013, 2:19 PM), <http://www.forbes.com/sites/forbesinsights/2013/04/09/whats-easier-to-make-a-billion-dollars-build-a-global-company-or-create-a-global-brand/> (discussing how innovation in a given country affects marketing strategy); Schumpeter, *Emerging-Market Companies are Trying to Build Global Brands*, ECONOMIST (Aug. 4, 2012), <http://www.economist.com/node/21559894/> (discussing the hardships associated with global branding).

²⁸ See Pike, *supra* note 27, at 626-27 (citing sources).

²⁹ See Alden et al., *supra* note 27, at 75; Jeffrey Jensen Arnett, *The Psychology of Globalization*, 57 AM. PSYCHOLOGIST 774, 774 (2002); Rejeev Batra et al., *Effects of Brand Local and Nonlocal Origin on Consumer Attitudes in Developing Countries*, 9 J. CONSUMER PSYCHOL. 83, 83 (2000); Ernest Dichter, *The World Customer*, HARV. BUS. REV., Jul.–Aug. 1962, at 113, 113; France Leclerc et al., *Foreign Branding and Its Effects on Product Perceptions and Attitude*, 31 J. MARKETING RES. 263, 268 (1994); Yuliya Strizhakova et al., *Branded Products as a Passport to Global Citizenship: Perspectives from Developed and Developing Countries*, 16 J. INT’L MARKETING, Dec. 2008, at 57, 57; see, e.g., GEORGE RITZER, *THE McDONALDIZATION OF SOCIETY* (Westby et al. eds., 2004) (discussing how globalization has affected different social institutions, including consumers).

³⁰ Holt et al., *Global Brands*, *supra* note 24, at 70.

³¹ *Id.*

³² *Id.* at 71. Another consumer from New Zealand echoed similarly, “Global brands make you feel part of something bigger and give you a sense of belonging.” *Id.*

the literature on cosmopolitanism. Some authors, for example, tend to focus on the notion of cosmopolitanism as a fundamental set of identities that involve a sense of “belonging . . . to the world as a whole,” a kind of global citizenry that reflects transnational perspectives.³³ Other authors tend to describe cosmopolitanism in terms of a set of identities, values, and attitudes that variously embrace notions of diverse world perspectives, and a strong degree of openness to others. This type of cultural competence embraces global diversity in terms of food, music, self-presentation, and ethical world views.³⁴

As the prior sentence suggests, part of the culture of cosmopolitanism is deeply tied to consumer practices of consumption, and it is also linked to visual brand culture as well. Our sense of the world around us — our very language and ways of thinking and framing our environments — are deeply inscribed and circumscribed by the brands and advertising that inhabit our everyday world. Brands, like cosmopolitanist approaches, have symbolic, emotional, and cultural aspects. And as brands become more and more global in their design and interpretative reach, it makes sense that our cosmopolitan world view becomes reflected through patterns of consumption and changes in consumer identity.³⁵ Twenty years ago, global branding

³³ See Nancy E. Cook, *Canadian Development Workers, Transnational Encounters and Cultures of Cosmopolitanism*, 27 INT'L SOC. 3, 5-6 (2012) (suggesting three aspects — one normative, one political, and one cultural); Woodward et al., *supra* note 22, at 209 (“[Cosmopolitanism is] an intellectual and aesthetic stance of openness toward divergent cultural experiences.” (quoting Ulf Hannerz, *Cosmopolitans and Locals in World Culture*, in GLOBAL CULTURE: NATIONALISM, GLOBALIZATION AND MODERNITY: A THEORY CULTURE AND SOCIETY SPECIAL ISSUE 242-43 (Mike Featherstone ed., 1990))). Other, cultural approaches to cosmopolitanism, for example, center on increasing tolerance for diversity and cultural competence, see Cook, *supra*, at 5. For example, one author defines the cosmopolitan as possessing a “willingness to engage with the other.” *Id.* at 6; see also Michele Lamont & Sada Aksartova, *Ordinary Cosmopolitanisms: Strategies for Bridging Racial Boundaries Among Working-Class Men*, 19 THEORY, CULTURE & SOC'Y, Aug. 2002, at 1, 2; Loren B. Landau & Iriann Freemantle, *Tactical Cosmopolitanism and Idioms of Belonging: Insertion and Self-Exclusion in Johannesburg*, 36 J. ETHNIC & MIGRATION STUD. 375, 380 (2010).

³⁴ See Woodward et al., *supra* note 22, at 208.

³⁵ See generally Russell Adams, *Fragmentation and Segmentation: Marketing Global Benefits*, 10 INT'L BUS. ECON. RES. J. 59, 60 (2011) (discussing branding as building global communities); Lee Jung-Wan & Simon Tai, *Young Consumers' Perceptions of Multinational Firms and Their Acculturation Channels Towards Western Products in Transition Economies*, 1 INT'L J. EMERGING MARKETS 212 (2006) (documenting a young generation's view of multinational brands); Jan-Benedict E.M. Steenkamp et al., *How Perceived Brand Globalness Creates Brand Value*, 34 J. INT'L BUS. STUD. 53 (2003) (explaining how globalness effects brand purchase); Alladi Venkatesh & Suguna Swamy, *India as an Emerging Consumer Society: A Critical Perspective*, in RESEARCH IN CONSUMER BEHAVIOR: CONSUMPTION IN MARKETIZING ECONOMIES (Clifford J. Shultz II et

scholars argued that the less consumerized a market is, the more the emphasis is on the utilitarian aspects of a brand, and its link to the marketplace. Today, all of that has shifted in favor of advertising that trends towards being more symbolic, and more emotional in order to connect to the consumer. Trademarks, today, are less about identifications of origin; instead, their earlier function has been surpassed by their growing role as “messengers” that convey a broad range of information to the public about the product, the company, the people behind the company, and the attributes of each.³⁶ As a result, the trademark represents both a global visual receptacle and a vehicle for all of the emotive and personality characteristics that advertisers hope to associate with a particular brand.³⁷ Obviously as markets become globalized, brands — and individuals — do as well.³⁸

More recently, although the rush towards global branding has waned at different points, it has also given rise to a greater push towards localized customization to suit consumer tastes, a “glocal” strategy, as some have called it.³⁹ For example, Kraft general foods markets Philadelphia cream cheese globally, but it differs its approach — so in the United States we are encouraged to eat it on bagels, but in Spain, they sell a salmon-flavored version; Germany gets a pear-flavored version; Italy, a tuna version. McDonalds does something similar — you can get wine with your burger in France, or beer in Germany, or an Indian potato burger in India.⁴⁰ All of this, of course, depends on the interplay between satisfying and constructing consumer preferences, depending upon the context.⁴¹

al. eds., 7th ed. 1994) (arguing that consumers in developing nations have a preference for global brands because consuming them gives them a sense that they are a part of a global community).

³⁶ Matthew James Elmore, *The Implications of Intellectual Property Law for the Auditing and Protection of National and International Brands: Part III. Brands in Europe*, 15 *MANAGERIAL AUDITING J.* 209, 210 (2000).

³⁷ See Ming Hsieh, *Identifying Brand Image Dimensionality and Measuring the Degree of Brand Globalization: A Cross National Study*, 10 *J. INT'L MARKETING, SPECIAL ISSUE ON GLOBAL BRANDING*, Summer 2002, at 46, 59.

³⁸ See Julio Cerviño & Jose Maria Cubillo, *A Resource Based Perspective on Global Branding: An Analysis of Trademark Registration Data*, 21 *INT'L J. MGMT.* 451, 460 (2004).

³⁹ Holt et al., *Global Brands*, *supra* note 24, at 69.

⁴⁰ See Elmore, *supra* note 36, at 224-25.

⁴¹ For example, with respect to goods like laundry detergent — some markets prefer “green” detergents and are willing to pay a premium, others care less about these issues, but face a wide diversity in machines, water temperature, and preferences, requiring greater creativity in marketing. See *id.*

Today, Coca-Cola soft drinks and Marlboro cigarettes are the top two global brands. Soft drinks, tobacco, pet foods, and snack foods are other areas with the greatest global brand presence.⁴² Not only are global branding strategies economical from an efficiency perspective, because they enable one company to use one advertising agency for its global reach, but they also help centralize the messaging and personality that surrounds a global brand.⁴³ Further, not only do they enable the creation of a global brand identity, but they are also thought to offer a number of benefits to the consumer, namely credibility, authority, value, and power, and the feeling of belonging to a global community.⁴⁴ Some empirical evidence has shown, for example, that people tend to endorse the idea that globalization will enhance their opportunities to consume products from around the world, and relatedly, that sampling from and learning about different cultures is a widely appealing endeavor.⁴⁵

However, cosmopolitanism is not an enterprise free from critique and concern. Some scholars have critiqued cosmopolitanism for its close relationship to notions of empire, capitalism, and western idioms of thought, expressing concern that it facilitates “an improving conversion of the local other into the western universal.”⁴⁶ One must be careful not to presume that both cosmopolitanism and globalization are always connected — as one author points out, it is both historically and empirically unwarranted to view globalization as a precondition for cosmopolitanism.⁴⁷ One can be globalized, but still lacking the definitive consciousness that cosmopolitanism brings, desiring insularity, nationalism, and parochialism.

Further, there remain substantial and quite valid concerns about the impact of globalization on cultural and consumer diversity.⁴⁸ Global

⁴² Dennis Pitta, *Foundations for Building Share of Heart in Global Brands*, 17 J. PROD. & BRAND MGMT. 64, 66 (2008).

⁴³ Aaker & Joachimsthaler, *supra* note 27, at 137.

⁴⁴ See Hsieh, *supra* note 37, at 60-61.

⁴⁵ Woodward et al., *supra* note 22, at 217 (showing 85–95% of respondents to a survey endorse these views).

⁴⁶ Cook, *supra* note 33, at 5 (citation omitted).

⁴⁷ See Woodward et al., *supra* note 22, at 210.

⁴⁸ See, e.g., RITZER, *supra* note 29 (discussing the affect of globalized corporate structure on the international community); SASKIA SASSEN, *THE GLOBAL CITY* (1991) (exploring the relationship between the globalization of the financial industry and the growth of global cities); SASKIA SASSEN, *THE MOBILITY OF LABOR AND CAPITAL* (1988) (discussing cultural changes in manufacturing nations, especially South-East Asia and the Caribbean Basin, as well as changes in market locations such as California, New York, and New Jersey).

consumer culture has been described as “a cultural identity not associated with a single country, but rather a larger group generally recognized as international and transcending individual national cultures.”⁴⁹ There are, of course, distributional effects of these social formations — one scholar writes that the “rise of global consumption ideals, potentially makes the elite among Third World consumers into cosmopolitans who are more concerned with how they compare to the world’s privileged consumers than they are to compare themselves locally.”⁵⁰ Other anecdotal and theoretical treatments of this issue have emphasized the increasing homogeneity of the global consumer, to the point that localized cultures and tastes may play a secondary role to the dominance of global brand identity. Even empirical studies have suggested this to be the case.⁵¹ Other studies argue, as a variation, that “increasing globalization has reduced the homogeneity of consumer behaviors *within* countries, while increasing communalities among consumers *across* countries.”⁵² Central to this process, nevertheless, is the desire to own the “consumption symbols” or goods from countries whose lifestyles are admired.⁵³ Here, brands become a central part of the sign of membership in a global cosmopolitan community, of membership in a “transnational commerce culture.”⁵⁴

⁴⁹ See Alden et al., *supra* note 27, at 80.

⁵⁰ Mark Cleveland, Michel Laroche & Nicolas Papadopoulos, *Cosmopolitanism, Consumer Ethnocentrism, and Materialism: An Eight-Country Study of Antecedents and Outcomes*, 17 J. INT’L MARKETING 116, 120 (2009) (quoting Russell Belk, *Consumption Patterns of the New Elite in Zimbabwe*, 20 J. MACROMARKETING 204 (2000)); see also Güliz Ger & Russell W. Belk, *I’d Like to Buy the World a Coke: Consumptionscapes of the “Less Affluent World,”* 19 J. CONSUMER POL’Y 271, 272-73 (1996).

⁵¹ One study concludes that while localized behaviors still matter, “a global consumer is beginning to emerge to some degree,” noting that mass communication has the ability to “break down national identity.” Bruce Keillor, Michael D’Amico & Veronica Horton, *Global Consumer Tendencies*, 18 PSYCHOL. & MARKETING 1, 15-16 (2001).

⁵² Mark Cleveland & Michel Laroche, *Acculturation to the Global Consumer Culture: Scale Development and Research Paradigm*, 60 J. BUS. RES. 249, 250 (2007) (emphasis in original); cf. Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 544-48 (2001) (making a similar argument with respect to culture and social movements).

⁵³ Cleveland & Laroche, *supra* note 52, at 253.

⁵⁴ See Alden et al., *supra* note 27, at 77 (quoting Ulf Hannerz, *Cosmopolitans and Locals in World Culture*, in GLOBAL CULTURE: NATIONALISM, GLOBALIZATION AND MODERNITY: A THEORY CULTURE AND SOCIETY SPECIAL ISSUE 242-43 (Mike Featherstone ed., 1990)).

B. The Rise of Corporate Cosmopolitanism

So far, I have outlined how a cosmopolitan world view has become reflected in the process of global branding and transnational consumption, both by corporations and also by individuals. But for Nussbaum and others, cosmopolitanism is also deeply tied to a notion of ethics, a concept of duty to other individuals. Here, too, trademark law becomes intimately tied to the process of creating greater attention to corporate social responsibility, particularly in the creation of global brands.

As companies become more globalized, and multinational in character, and the design and creation of brands have followed suit, consumers have also followed this trend, focusing their attention on the global business practices of the companies that they patronize. While there is a vast literature on corporate social responsibility (“CSR”) and its various forms, I want to sketch out, briefly here, some of the complementarities between modern CSR approaches and the phenomenon of trademark cosmopolitanism that I have described so far.⁵⁵

Although the term “corporate social responsibility” was coined by economist Howard Bowen a decade after Nuremberg,⁵⁶ its modern formation tends to emphasize the need for corporations to consider the social and ecological impact of their practices on humanity as a whole, and without ceasing to remain a profit generating entity.⁵⁷ While the field of CSR traditionally refers to the protection of human rights, labor rights, the environment, and non-corrupt business practices, among other considerations,⁵⁸ it also connects deeply to notions of trademark cosmopolitanism for a variety of reasons.

First, as the previous section suggested, the brand’s visuality often becomes the central repository for all the ancillary conflicts that surround a corporation — social, political, economic, etc. As a result, in order to protect their brands from public reproach, most companies

⁵⁵ For more information on CSR see *Corporate Social Responsibility*, INT’L INST. FOR SUSTAINABLE DEV., <http://www.iisd.org/business/issues/sr.aspx> (last visited Sept. 29, 2013); CORP. SOC. RESP. NEWSWIRE, http://www.csrwire.com/categories/23-Corporate-Social-Responsibility/press_releases (last visited Sept. 29, 2013); and Devin Thorpe, *Why CSR? The Benefits of Corporate Social Responsibility Will Move You to Act*, FORBES (May 18, 2013, 5:04 PM), <http://www.forbes.com/sites/devinthorpe/2013/05/18/why-csr-the-benefits-of-corporate-social-responsibility-will-move-you-to-act>.

⁵⁶ See Jonathan Bellish, *Towards a More Realistic Vision of Corporate Social Responsibility Through the Lens of the Lex Mercatoria*, 40 DENV. J. INT’L L. & POL’Y 548, 558 (2012).

⁵⁷ See *id.* at 560.

⁵⁸ *Id.*

now engage in proactive strategies that infuse the brand's personality with information about a company's desirable business practices and its commitment to social responsibility.⁵⁹ Information about corporate practices in each of these areas — human rights, labor, the environment, etc. — deeply affects the way in which the brand is viewed. Think, for example, of how companies like British Petroleum have had to rebrand themselves after evidence of their ethical or environmental practices came to light.⁶⁰

Second, it also connects to consumers' own cosmopolitanism, reflected in their global buying practices. As consumers view themselves as global citizens, they increasingly offer concern for the manufacturing practices of the companies that they patronize. For example, consider the maelstrom of media attention that focused on Apple after evidence of its iPhone manufacturing practices came to light.⁶¹ Third, and relatedly, the brand becomes the visual cue for the information that the consumer possesses about a company's labor practices. That is why the relationship between a company's brand managers and activist antibranding movements can be so contentious for trademark lawyers.⁶² By recoding brands in ways that highlight a

⁵⁹ See Douglas B. Holt et al., *How Model Behavior Brings Market Power: Consumers Associate Global Brands with Good Quality But Also Hold Global Companies to Higher Ethical Standards*, FIN. TIMES (Aug. 23, 2004), <http://www.ft.com/cms/s/0/0e4c539c-f4a0-11d8-9911-00000e2511c8.html#axzz2fSailHhN>.

⁶⁰ Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TUL. L. REV. 983, 984-85 (2011); Jennifer Sawayda & O.C. Ferrell, *BP Gulf Coast Disaster and Recovery*, CENGAGE LEARNING 1, 1-4, http://cengagesites.com/academic/assets/sites/4004/BP_1439042233_250174_WM.pdf (last visited Sept. 30, 2013); see also *Rebranding Blackwater: Your Brand Is Much More than Your Name & Logo*, VISIBLE LOGIC INC. (May 21, 2009), <http://www.visiblelogic.com/blog/2009/05/rebranding-blackwater-your-brand-is-much-more-than-your-logo/> (discussing a company's motivation to rebrand).

⁶¹ See, e.g., Bobbie Johnson, *Will Child Labour Claims Stop You Buying Apple?*, GUARDIAN (Mar. 1, 2010, 3:00 PM), <http://www.theguardian.com/technology/blog/2010/mar/01/apple-ipod> (discussing allegations that children manufactured Apple products); Farhad Manjoo, *Apple in China: The iPhone Maker Should Ditch Its Troubling Labor Practices and Reinvent Gadget Manufacturing*, HUFF. POST (Feb. 1, 2012), http://www.huffingtonpost.com/2012/02/01/apple-china-foxconn_n_1246693.html (discussing the working conditions of Chinese employees producing Apple products); Bill Ray, *40,000 Apple Fanbois Demand Ethical iPhone 5*, REGISTER (Feb. 1, 2012), http://www.theregister.co.uk/2012/02/01/ethical_iphone/ (discussing a petition requesting better working conditions for employees who make Apple products); Katherine Yau, *Apple Product Sales at an All-Time High, Labor Practices at Dangerous Low*, GOLDEN GATE EXPRESS (Mar. 7, 2012), <http://www.goldengateexpress.org/2012/03/07/apple-products/> (discussing the need to refrain from buying Apple products as long as there are poor working conditions in the factories).

⁶² See *Nike, Inc. v. Kasky*, 539 U.S. 654, 676-78 (2003).

company's connection to environmental degradation, unfair labor practices, or other issues of social justice, activists can further inform the public and — literally — alter the semiotic significance of a particular brand to the public. That is why branding often plays such a powerful role in disputes about CSR.⁶³

There are other, proactive branding strategies that further underscore a commitment to CSR.⁶⁴ One of the key ways in which corporations address their CSR is through the marketplace — including “rights-sensitive” branding strategies, codes of conduct, voluntary submissions to auditing practices, and shareholder pressure.⁶⁵ “Rights-sensitive” branding involves the practice of offering a particular selection of goods to consumers who are willing to pay a premium for ethically sourced materials — like Starbucks’ “fair trade” coffees, Chiquita’s “ethical banana” marketed in Europe, and the Kimberly Process of reducing conflict diamonds in the marketplace.⁶⁶ Other market-based solutions also have branding implications as well — Royal Dutch Shell, Nike, and others have adopted private codes of conduct that are often used to buttress their reputations on the global branding platform.⁶⁷

⁶³ It also helps explain why the most prominent global brands often have the best reputations for CSR. See, for example, Jacquelyn Smith, *The Companies With the Best CSR Reputations*, FORBES (Dec. 10, 2012, 11:59 PM), <http://www.forbes.com/sites/jacquelynsmith/2012/12/10/the-companies-with-the-best-csr-reputations/> (last visited Sept. 20, 2013), for a discussion that Forbes’s ranking of the companies with the best corporate social responsibility are also companies with the most prominent global brands. See *Being a Responsible Company*, STARBUCKS COFFEE CO., <http://www.starbucks.com/responsibility> (last visited Sept. 20, 2013) (stating “[a]s we have grown to now more than 18,000 stores in over 60 countries, so too has our commitment to corporate citizenship” and noting Starbucks’s commitment to ethical sourcing); *Corporate Responsibility Report: FY 10–11*, NIKE, INC., <http://www.nikeresponsibility.com/report/> (last visited Sept. 29, 2013); *Microsoft 2012 Citizenship Report*, MICROSOFT 62, <http://www.microsoft.com/about/corporatecitizenship/en-us/reporting/> (last visited Sept. 20, 2013) (noting its commitment to global citizenship); *Sustainable Business Performance Summary: Striving for Better Performance*, NIKE, INC., <http://nikeinc.com/pages/responsibility> (last visited Sept. 20, 2013) (“As environmental, social and economic challenges in our world proliferate, they demand our best performance. We’re using the power of our brand, the energy and passion of our people and the scale of our business to create meaningful change.”).

⁶⁴ See Ellisha Nasruddin & Reevany Bustami, *The Yin and Yang of CSR Ethical Branding*, 12 ASIAN ACAD. MGMT. J. 83, 83–85 (2007).

⁶⁵ Bellish, *supra* note 56, at 567.

⁶⁶ *Id.*

⁶⁷ Some have argued that the “rights-sensitive” branding approach only affects a small segment of consumers, those that are not price sensitive, but highly value sensitive. Indeed, most of the companies that engage in fair trade and ethically sourced practices tend to be premium brands, which suggests that consumers that purchase these goods tend to be willing — and able — to pay a premium. Admittedly,

Of course, that is not the only practical strategy of CSR visibility — other companies, like Shell Nigeria, Exxon Mobil, British Petroleum, and Union Carbide also engage in rebranding and CSR-type behavior after a major disaster, attempting to retain consumers by taking measures to restore their reputation.⁶⁸ Other companies engage in voluntary codes of conduct — Nike, Gap, Levi Strauss, and other companies employ inspectors who grade suppliers on labor standards and attempt to ensure fairer practices.⁶⁹ These practices are both represented and reinforced by massive advertising campaigns that are also infused with branding these companies' social responsibility and further informing the public of their activities. Here, the global brand is actively linked to the culture and ethics of cosmopolitanism, albeit indirectly, further underlining how trademarks provide the visual, symbolic vehicle to communicate such information.

C. *The Role of Institutionalized Cosmopolitanism*

Of course, trademark cosmopolitanism would be deeply ineffective if it were not for the way in which both legal and political systems have adjusted to facilitate the production of global brands to suit consumer preferences. Here, too, we can find key synergies with traditional cosmopolitanist approaches, particularly those which focus on the growth of institutional frameworks. For example, one of the most prominent articulations of modern institutional cosmopolitanism stems from Immanuel Kant, who emphasized the idea of membership to the community of humanity as a whole.⁷⁰ Kant developed this idea in the context of a world federation that focused on cosmopolitanism as a form of right, along with the growth of world trade and a global public sphere.⁷¹ In more contemporary times, Jack Goldsmith, in his

these companies affect a smaller share of the consuming public, but they do provide visibility to the importance of ethical corporate behavior, which in turn may affect the proliferation of global branding practices and the political meanings the public associates with them. *Id.* at 567-68.

⁶⁸ *Id.* at 573.

⁶⁹ *Id.* at 574.

⁷⁰ Pheng Cheah, *Cosmopolitanism*, 23 *THEORY, CULTURE & SOC'Y* 486, 487-89 (2006).

⁷¹ See *id.* at 487; see also G. PASCAL ZACHARY, *THE GLOBAL ME: NEW COSMOPOLITANS AND THE COMPETITIVE EDGE: PICKING GLOBALISM'S WINNERS AND LOSERS*, at x-xiii (2000); Timothy Brennan, *At Home in the World: Cosmopolitanism Now*, in *CONVERGENCES: INVENTORIES OF THE PRESENT* 148 (Edward W. Said ed., 1997); Pheng Cheah, *Introduction II: The Cosmopolitical — Today*, in *COSMOPOLITICS*, *supra* note 10, at 22-28; David A. Hollinger, *Nationalism, Cosmopolitanism, and the United States*, in *IMMIGRATION & CITIZENSHIP IN THE 21ST CENTURY* 85, 92 (Noah M.J. Pickus ed., 1998);

writing on cosmopolitanism, similarly writes of a recent turn to a more institutionalized sense of cosmopolitanism — the idea that duties attach to domestic institutions (e.g., national governments) and, derivatively, to international institutions.⁷²

These ideals also resonate in the complex world of international intellectual property. In just the past few decades, we have seen a massive rise in systems of intellectual property harmonization, along with the simultaneous rise of global branding and trademarking practices. While the two may or may not be causally related, they suggest that the institutional growth of transnational entities to regulate trademarks raises related questions regarding the aftereffects of globalization on both legal and political systems. The Paris Convention and TRIPS both obligate parties to create and provide minimum standards of protection for trademarks, but this process has been messy, costly, and deeply fraught with conflict for some nations, particularly across the developing world.⁷³

Yet as applied to trademarks, the institutional afterlife of cosmopolitanism reveals a complex reordering of the notion of national borders, one that is largely scripted by the transnational

Hollinger, *Not Universalists*, *supra* note 19, at 239 (distinguishing between cosmopolitanism and pluralism); Samuel Scheffler, *Cosmopolitanism, Justice & Institutions*, 127 *DAEDALUS* 68, 68 (2008); Yuri Slezkine, *N. Ia. Marr and the National Origins of Soviet Ethnogenetics*, 55 *SLAVIC REV.* 826, 834 (1996).

⁷² Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 *STAN. L. REV.* 1667, 1670 (2003); *see also* CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 144-55 (1979); Thomas W. Pogge, *An Egalitarian Law of Peoples*, 23 *PHIL. & PUB. AFF.* 195, 196 (1994). Others also have written about the cosmopolitanist elements in extraterritorial jurisdiction, which focuses on a broad concept of a legal duty to others. *See* William F. Helmken, *Legal Duty Beyond Borders: Value Pluralism and the Possibility of Cosmopolitan Law*, 4 *WASH. U. JURISPRUDENCE REV.* 151, 160 (2011).

⁷³ *See* Margaret Chon, *Intellectual Property and the Development Divide*, 27 *CARDOZO L. REV.* 2821, 2831-32 & n.80 (2006); Carlos M. Correa, *TRIPS: An Asymmetric Negotiation*, 1993 *Third World Econ.* 9, 10; Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *Designing A Global Intellectual Property System Responsive to Change: The WTO, WIPO, and Beyond*, 46 *HOUS. L. REV.* 1187, 1188-89, 1201-04 (2009); Ruth L. Gana, *Prospects for Developing Countries Under the TRIPs Agreement*, 29 *VAND. J. TRANSNAT'L L.* 735, 743-45, 768-72 (1996); Paul J. Heald, *Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPS Game*, 88 *MINN. L. REV.* 249, 297-99 (2003); J.H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 *CASE W. RES. J. INT'L L.* 441, 452 (2000); Peter K. Yu, *TRIPS and Its Discontents*, 10 *MARQ. INTELL. PROP. L. REV.* 369, 371, 375-76 (2006); Jagdish Bhagwati, *What It Will Take to Get Developing Countries into a New Round of Multilateral Trade Negotiations*, *INST. FOR AGRIC. & TRADE POL'Y* (Sept. 23, 2002), http://www.iatp.org/files/What_It_Will_Take_to_Get_Developing_Countries_.htm.

circulation of global brands. Some brands, of course, begin as local markets and then expand internationally, and others are actually designed to be global at their outset. The emergence of transnational systems — TRIPS, the Madrid system, and Europe's Community Trademark system, among others — shift the process of branding from a national or local enterprise to one where companies must imagine, at the moment of brand creation, how their brands will fare on the worldwide stage. "At Novartis," for example, one spokesperson explains, "we only have global branding concepts. Our products are introduced at the global scale."⁷⁴

Thus, just as global branding is now an integral part of any multinational marketing enterprise, global trademark registration is an essential part of the portfolio for any growing business. In Eastern Europe, for example, companies had registered marks for over a decade prior to the fall of communism in markets that had not even opened yet.⁷⁵ Empirical evidence has shown how trademarks have dramatically risen in power, as companies have chosen to engage in far more trademarking and branding activity than in prior years, suggesting that trademarks comprise a much greater proportion of countries' GDP.⁷⁶

The increase in trademarking activity — coupled with the rise of global branding — has also spurred some significant international changes. More and more companies are choosing to register trademarks in other countries; WIPO has reported a significant increase in nonresident applications for trademarks, mostly from applicants who reside in higher income countries. Consider some statistics: According to WIPO, the number of trademarks has increased from 500,000 in 1985 to over two million in 2007.⁷⁷ From 2009 to 2010, for example, the world saw a 21.4% increase in the

⁷⁴ Roya Ghafele, *Trademark Owner's Perspective on the Madrid System: Practical Experiences and Theoretical Underpinnings*, 3 J. INTELL. PROP. L. & PRAC. 160, 166 (2007).

⁷⁵ Mitchell Smith, *Trade Marks and the Protection of Cultural Integrity* 8 (Working Paper, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1395548.

⁷⁶ The expanding economic role for trademarks in national economies is dramatic. In Australia, for example, the number of marks per billion of dollars of GDP has doubled, from 50 in the early 1990s to 100 in 2002. Joanne Loundes & Mark Rogers, *The Rise of Trade Marking in Australia in the 1990s* 3 (Melb. Inst. of Applied Econ. and Soc. Res. Inst. of Austl., Working Paper No. 8/03, 2003); see also Smith, *supra* note 75, at 2.

⁷⁷ Loundes & Rogers, *supra* note 76, at 6 (citing *Statistics on Trademarks*, WIPO, <http://www.wipo.int/ipstats/en/statistics/marks/> (last visited Sept. 20, 2013)).

global registration of trademarks.⁷⁸ 2011, in turn, saw the highest number of international trademark applications ever filed under WIPO's Madrid system, with filings from Russia, the EU, and the United States in the lead for the most applications.⁷⁹ Applications had gone up almost 7% over the previous year, to a total of nearly 42,000 filed that year.⁸⁰

Today, the Madrid Protocol remains the most powerful tool for brand owners to register their marks in other countries.⁸¹ The Madrid system is based on two treaties, the Madrid Agreement which is called the Madrid Agreement Concerning the International Registration of Marks ("Madrid Agreement"), adopted in 1891, and the Protocol Relating to the Madrid Agreement, adopted in 1989 and in force since

⁷⁸ *Intellectual Property Filings Worldwide Rebound Strongly in 2010*, WIPO 8, http://www.wipo.int/export/sites/www/ipstats/en/wipi/pdf/941_2011_highlights.pdf (last visited Sept. 20, 2013).

⁷⁹ *See Record International Trademark Filings in 2011*, WIPO (Mar. 12, 2012), http://www.wipo.int/pressroom/en/articles/2012/article_0004.html.

⁸⁰ *See id.*

⁸¹ For articles on the Madrid Protocol, see generally Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks art. 4, *adopted on June 27, 1989*, S. TREATY DOC. NO. 106-41, *available at* http://www.wipo.int/madrid/en/legal_texts/trtdocs_wo016.html; Thies Bosling, *Securing Trademark Protection in a Global Economy-the United States' Accession to the Madrid Protocol*, 12 U. BALT. INTELL. PROP. L.J. 137 (2004) (arguing the United States acceptance of the Madrid Protocol was important and will lead to further integration of international trademark laws); John M. Murphy, *Demystifying the Madrid Protocol*, NW. J. TECH. & INTELL. PROP. 1 (2004) (summarizing the Madrid Protocol and discussing it from a U.S. applicant and foreign applicant point of view); L. Donald Prutzman, *Overview of the Madrid System and the United States Perspective*, 25 INT'L L. PRACTICUM 173 (2012); Jeffrey M. Samuels & Linda B. Samuels, *International Trademark Prosecution Streamlined: The Madrid Protocol Comes into Force in the United States*, 12 J. INTELL. PROP. L. 151 (2004) (discussing the implementation of the Madrid Protocol); *The Madrid Protocol: Impact of U.S. Adherence on Trademark Law and Practice*, 92 TRADEMARK REP. 1430 (2002) (discussing the effect of the Madrid Protocol on U.S. trademark law and practice); Edwin E. Wallis III, *Recent Development, The Madrid Protocol: Will This International System Succeed in the United States?*, 8 UCLA J.L. & TECH. 1 (2004) (presenting a synopsis of the Madrid Protocol and its potential impact on the United States); Peter Wilner, *The Madrid Protocol: A Voluntary Model for the Internationalization of Trademark Law*, 13 DEPAUL-LCA J. ART & ENT. L. 17 (2003) (discussing the events leading up to the U.S. accession to the Madrid Protocol and arguing that it exemplifies a voluntary model for the internationalization of trademark law); *Protecting Your Trademark Abroad: Twenty Questions About the Madrid Protocol*, WIPO http://www.wipo.org/freepublications/en/marks/428/wipo_pub_428.pdf (last visited Sept. 20, 2013) (answering twenty questions concerning the Madrid Protocol); *The Madrid Agreement Concerning the International Registration of Marks*, WIPO, http://www.wipo.int/madrid/en/legal_texts/trtdocs_wo015.html (last visited Sept. 20, 2013).

1996.⁸² The Madrid system enables applicants to file a single registration, facilitating the global spread and growth of brands. Under the Madrid system, a firm that already has a trademark in one of the participating countries can apply to register that mark in other participating countries. The top users of the Madrid system utilize a global branding strategy, enabling them to market a single brand in multiple markets, reflecting both market power and dominance.⁸³ One business owner said that Madrid is essential for a global branding strategy: “Through Madrid we can get quicker into markets. This means we gain time and the whole management of IP is different. There are not 50 different systems, but everything is much simpler.”⁸⁴

The advantages of the Madrid system are manifold — it reduces the costs associated with trademark registration and streamlines the process. The Madrid system has been heralded for its low costs — Microsoft has claimed that costs have gone down 40% in its international filings.⁸⁵ Empiricists have also found a positive correlation between the growth of global trade and the rise of filings and renewals under the Madrid system.⁸⁶ In 1985, there were only 50,000 nonresident trademark registrations, comprising 28% of the global trade marks registered; as compared with 760,000 such registrations in 2007, making up now 36% of those marks in 2007.⁸⁷

However much the Madrid system does to advance trademark cosmopolitanism, it is not perfect. The system is mostly a procedural one, it does not actually substantively examine the specific trademarks. Instead, the substantive application takes place in the originating country, otherwise known as the Country of Origin.⁸⁸ As a result, since trademark laws vary so widely, it is entirely possible to

⁸² Ghafele, *supra* note 74, at 161.

⁸³ Smith, *supra* note 75, at 7 (citing Ghafele, *supra* note 74, at 166).

⁸⁴ Ghafele, *supra* note 74, at 166.

⁸⁵ See *Transcript from the Video Interview with Microsoft on the Madrid System*, WIPO, <http://www.wipo.int/madrid/en/transcript/microsoft.html> (last visited Sept. 20, 2013).

⁸⁶ Ghafele, *supra* note 74, at 161-62.

⁸⁷ Smith, *supra* note 75, at 6 (citing Eugenia Baroncelli et al., *The Global Distribution of Trademarks: Some Stylized Facts*, 28 *WORLD ECON.* 765 (2005)). The bulk of nonresident applications are filed from high income countries; Germany, France, and the United States accounted for 34% of trademark registration in 2007. *Id.* (citing *Madrid System for the International Registration of Marks: Summary Report for the Year 2007*, WIPO 8, <http://www.wipo.int/export/sites/www/madrid/en/statistics/pdf/summary2007.pdf> (last visited Sept. 20, 2013)).

⁸⁸ See Rachele H. Thompson, *Trademarks in International and Comparative Law: International Trademark Protection Strategy*, 19 *J. CONTEMP. LEGAL ISSUES* 479, 494 (2004).

have a mark protected in one country but not in another. Similarly, these registrations are also deeply dependent on the home country — so that whatever happens to the national trademark, an amendment, cancellation, denial, withdrawal, happens to the international one as well, although it is possible to convert some applications into national ones.⁸⁹ There is also not a lot of room for movement in terms of localizing or nationalizing global brands filed under the Madrid system — any slight change in the trademark's status usually requires a refile.⁹⁰

However mixed some of the reviews may be of the Madrid system, it is patently clear that Madrid reflects, in some ways, an institutionalized cosmopolitanist outlook that bridges the link between corporations and government systems in the process of global branding. Even as it actively facilitates global branding, it is also intrinsically designed to overlook national differences in trademark registration, the protection of speech, and so on. Further, Madrid is only one example of the trend towards trademark harmonization. The Community Trademark in Europe (“CTM”) is another example of a harmonized regime, facilitating a single process of registration for all states in Europe. This single registration is valid for all of the member countries of the European Union,⁹¹ and there are a variety of other, international, means towards trademark harmonization. Here, the European Trademark Office offers the European Trademark, which gives uniform protection for all identical brand names after a single registration is filed with the office of harmonization. The CTM is widely considered to be a model for future calls towards greater trademark harmonization, suggesting that it may serve as an inspiration for a future, unitary global system of trademark protection.⁹²

Yet optimistic predictions of the rise of global trademarking can often belie a more complicated reality regarding the distributive effects of harmonization.⁹³ At the same time that this global trend has

⁸⁹ See Ghafele, *supra* note 74, at 164-65.

⁹⁰ See *id.* at 165.

⁹¹ See Thompson, *supra* note 88, at 481.

⁹² See Timothy W. Blakeley, *Beyond the International Harmonization of Trademark Law: The Community Trade Mark as a Model of Unitary Transnational Trademark Protection*, 149 U. PA. L. REV. 309, 311 (2000).

⁹³ In a provocative article, Marshall Leaffer discusses how the terms “globalization” and “harmonization” often suggest a zero-sum game that creates winners in the form of multinational companies, who switch locations to maximize on labor costs, benefit at the cost of developing nations, unskilled workers, and small businesses, who comprise the losers in the path towards transnationalism. See

unfolded, for example, it is important to mention that there are some islands of resistance to the global branding trend. One study on the Madrid Protocol has discovered, for example, that India and South Africa have demonstrated some forms of discrimination in the registration process against foreign firms.⁹⁴ This finding resonates with the research done by another scholar, who has found evidence of trademark protectionism in China, Hong Kong, India, and South Africa, noting that “discrimination is more likely to occur when products offered by foreign firms are of similar quality to the ones produced by domestic firms.”⁹⁵

Further, perhaps one of the greatest issues faced by the rise of trademark cosmopolitanism is how to reconcile the protection of intellectual property with the protection of other fundamental rights, like the freedom of expression. Some countries, like the United States, expressly protect freedom of expression as a fundamental right, and some courts offer specific protections for things like parody; and still other commonwealth countries, like the United Kingdom, New Zealand, and Australia, do not have a constitutional right to freedom of speech, but recognize its existence in statutes or common law.⁹⁶ In addition, there has been very little discussion of the importance of protecting freedom of expression at the treaty negotiation level, suggesting that many of these issues are considered to be best left to the local and regional judicial systems to sort through. For example, according to Lisa Ramsey, the legislative history suggests that there was almost no discussion of the conflict between trademark rights and freedom of expression during the TRIPS negotiations.⁹⁷ Neither the Paris Convention, nor TRIPS, nor the Madrid Protocols have any formal declaration of a commitment to freedom of expression, suggesting that it never rose to a level of importance as a fundamental

generally Marshall A. Leaffer, *The New World of International Trademark Law*, 2 MARQ. INTELL. PROP. L. REV. 1 (1998) (demonstrating how globalization has helped in the progressing of international norms and changing trademark law).

⁹⁴ Smith, *supra* note 75, at 8 (citing Eugenia Baroncelli et al., *Trademark Protection or Protectionism*, 15 REV. INT'L ECON. 126, 128 (2007)).

⁹⁵ Eugenia Baroncelli et al., *Trademark Protection or Protectionism*, 15 REV. INT'L ECON. 126, 140 (2007). This is unsurprising, given some history: In the 1970s and 1980s, India required that foreign brands be linked to local allied companies so that local companies could benefit from the brand equity that foreign trademarks enjoyed. Kate Gillespie et al., *Protecting Global Brands: Toward a Global Norm*, 10 J. INT'L MARKETING 99, 101 (2002).

⁹⁶ See Lisa P. Ramsey, *Free Speech and International Obligations to Protect Trademarks*, 35 YALE J. INT'L L. 405, 412 (2010).

⁹⁷ *Id.* at 415.

part of the international architecture of trademark law. International protections of copyright, in contrast, do have protections for freedom of expression built into them.⁹⁸ As the following Part suggests, this absence has deep significance for the activist movements that target multinational corporations and their practices, and for the flourishing of freedom of speech, generally.

II. THE TRANSNATIONAL ANTIBRAND

As the previous Part suggested, the emergence of trademark cosmopolitanism can often implicate questions about freedom of expression as a fundamental right, demonstrating another side to the phenomenon of global branding — global antibranding. In just the last few decades, a new activist movement has sprung up internationally and domestically, engaging in artistic and political activity to challenge the expansion of the brand into public discourse.⁹⁹ Sometimes antibrands might target a certain brand for opposition; at other times (like Nadia Plesner's evocation of an LVMH bag to bring attention to Darfur), they might utilize a brand for the purposes of political, satirical, or humorous commentary on another subject. And yet, the ways in which these artists have done so have raised complicated questions of identity, language, and control — setting up a clash between the international standards for freedom of speech and intellectual property.¹⁰⁰

Transnational activism of this sort is also deeply connected to the rise of trademark cosmopolitanism, even if there is not always a perfect identity between the two. The rise of the global antibranding movement is intimately tied to the rise of global branding: one cannot have one without the other, and the proportional growth of the antibrand is tied to the growth of the brand. Much of the activities of antibrand activists, therefore, is deeply

⁹⁸ See Martin Senftleben, *The Trademark Tower of Babel — Dilution Concepts in International, US and EC Trademark Law*, 40 INT'L REV. INTELL. PROP. & COMPETITION L. 45, 62 (2009). For example, whereas many sections of the Berne convention leave room for freedom of expression, trademark law only has a section in Article 17 that provides for "fair use of descriptive terms," but no reference to the protection of parody. *Id.* (quoting Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1867 U.N.T.S. 154).

⁹⁹ For more on this phenomenon, see Sonia Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489, 492, 499-512 (2006) [hereinafter *Semiotic Disobedience*], and Sonia Katyal, *Stealth Marketing and Antibranding: The Love that Dare Not Speak Its Name*, 58 BUFF. L. REV. 795, 797-98 (2010) [hereinafter *Antibranding*].

¹⁰⁰ Katyal, *Antibranding*, *supra* note 99, at 797-98.

tied to targeting CSR practices — drawing attention to current events, or using brands to comment on issues involving racial inequities, distributive injustice, labor issues, and the like. In other words, the same elements that contribute to the global consumption of brands can often contribute to global anti-consumption of them as well. As Rosemary Coombe has written: “Protests against sweatshop labour practices, and the movement of big box stores and fast food franchises into communities, suggest that the trademark now provides a site and a symbol around which to resist forms of commodification that people find contrary to their understandings of community and social justice.”¹⁰¹

A. *The Rise of Cosmopolitan Political Solidarity*

Benedict Anderson’s famous book *Imagined Communities* powerfully postulated that a nation is conceived, not as a reality, but as a collective work of imagination that has emerged from the circulation of capital and the rise of print communication.¹⁰² From this starting point, a number of scholars relied on Anderson for a deeper study of nationalism and the territorial impulse.¹⁰³ Writing on Anderson, Partha Chatterjee writes that the newspaper, the novel, and other forms of print media “afford the opportunity for individuals to

¹⁰¹ Matthew Rimmer, *The Black Label: Trademark Dilution, Culture Jamming, and the No Logo Movement*, 5 SCRIPT-ED 70, 80 (2008) (quoting Rosemary J. Coombe, *The Politics of Intellectual Property*, The Joint Graduate Programme in Communication and Culture). Coombe’s work is foundational to understanding the relationship between trademarks and social movements. See ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 7 (1998) (expanding the impact of intellectual properties beyond considerations of legal doctrine to include its cultural impact on society); Rosemary J. Coombe, *Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property*, 52 DEPAUL L. REV. 1171, 1182-86 (2003); see also TARROW, *supra* note 16, at 43-45 (discussing the rise of transnational activism).

¹⁰² See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 30 (1991).

¹⁰³ See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 90 (1995); Evan Charney, *Identity and Liberal Nationalism*, 97 AM. POL. SCI. REV. 295, 302 (2003); Gerald W. Creed, *Constituted Through Conflict: Images of Community (and Nation) in Bulgarian Rural Ritual*, 106 AM. ANTHROPOLOGIST 56, 56-58, 68-69 (2004) (describing Anderson’s work on nationalism as “especially catalytic”); Robert J. Foster, *Making National Cultures in the Global Ecumene*, 20 ANN. REV. ANTHROPOLOGY 235, 238-39, 250, 253-55 (1991); Benjamin I. Schwartz, *Culture, Modernity, and Nationalism — Further Reflections*, 122 DAEDALUS, Summer 1993, at 207, 217-22; Kok-Chor Tan, *Liberal Nationalism and Cosmopolitan Justice*, 5 ETHICAL THEORY & MORAL PRAC. 431, 453 (2002).

imagine themselves as members of larger than face-to-face solidarities, of choosing to act on behalf of those solidarities, of transcending by an act of political imagination the limits imposed by traditional practices.”¹⁰⁴

Today, some have argued, and I would agree, that Anderson’s observations can profitably extend to today’s global circulation of media, and relatedly, to the emergence of cosmopolitan forms of solidarity.¹⁰⁵ After all, if print media helped individual citizens imagine the nation, then why can the rapid circulation of new media not help individuals imagine a similar kind of imagination of a collective, cosmopolitanist global identity? And why can the same not be true of the transnational consumption of global branding as well? Does the transnational circulation of brands signify a new global order, an imagined community of consumers — and an imagined community of global activists? As Arjun Appadurai observes, these transnational solidarities are crafted from, not nationalism, but from a commonality of tastes, of pleasures, and of politics, what Appadurai calls “communit[ies] of sentiment.”¹⁰⁶

Even as a purely non-legal matter, I would also argue that Anderson’s construction of the imagined community perfectly tracks similar observations regarding the cosmopolitanist trajectories of *both*

¹⁰⁴ Partha Chatterjee, *Anderson’s Utopia*, 29 *DIACRITICS*, Winter 1999, at 128, 128.

¹⁰⁵ Maria Kyriakidou, *Imagining Ourselves Beyond the Nation? Exploring Cosmopolitanism in Relation to Media Coverage of Distant Suffering*, 9 *STUD. ETHNICITY & NATIONALISM* 481, 485 (2009); see also Arjun Appadurai, *Disjuncture and Difference in the Global Cultural Economy*, 7 *THEORY, CULTURE & SOC’Y*, June 1990, at 295, 295-97. See generally ARJUN APPADURAI, *MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION* (1996) (discussing Anderson’s “print capitalism” — the notion that collective experience through mass media contributes to the creation of imagined communities); Bruce Robbins, *Introduction Part I: Actually Existing Cosmopolitanism*, in *COSMOPOLITICS*, *supra* note 10, at 7 (discussing Anderson as part of an overall change in the definition of cosmopolitanism).

¹⁰⁶ Kyriakidou, *supra* note 105, at 485 (quoting APPADURAI, *supra* note 105, at 8 (quoting Arjun Appadurai, *Topographies of the Self: Praise and Emotion in Hindu India*, in *LANGUAGE AND THE POLITICS OF EMOTION* 94 (C.A. Lutz & L. Abu-Lughod eds., 1990))). Anthropologist Ulf Hannerz described cosmopolitanists in a similar fashion:

Some of them may wish to redefine the nation . . . others again are in the nation but not a part of it. They may be the real cosmopolitans, or they may indeed owe a stronger allegiance to some other kind of imagined international community There may be divided commitments, ambiguities, and conflicting resonances as well.

TARROW, *supra* note 16, at 43-45 (quoting ULF HANNERZ, *TRANSNATIONAL CONNECTIONS: CULTURE, PEOPLE, PLACES* 90 (1996)).

global consumption and anti-global activism.¹⁰⁷ In the case of global consumption, as I suggested in Part I, we see a cosmopolitanist trajectory that embraces the increasing unification of global brands that operate to help individuals imagine themselves as part of a broader, global community of other consumers. But in the case of the anti-globalization activist, the lingua franca of the antibrand operates similarly, just in reverse. As scholars have argued, many transnational activists presume a kind of cosmopolitan solidarity across borders that transforms “national citizens into global citizens by creating obligations towards people suffering outside the nation.”¹⁰⁸

There is also a fascinating parallel between the cosmopolitanist consumption that I detailed in Part I, and the antibranding activists I detail in this Part and elsewhere.¹⁰⁹ Like consumers of global brands, many cosmopolitan activists accept multiplicities of roots and plural loyalties, and although they move outside of their spatial origins, they continue to be linked to a concept of place and the resources and opportunities that place offers them.¹¹⁰ As a result, the imagined community, here, is not a community of consumers, but of activists who are often deeply critical of the practices of multinational corporations and global branding. These activists are defined as transnational because they mobilize domestic and international resources in order to advance claims on behalf of external actors or in favor of goals they may hold in common with other transnational allies.¹¹¹ These individuals typify the trend of “activism beyond borders,” and they comprise groups of immigrant and labor activists, ecologists, and other political actors who may exist loosely outside of state formation.¹¹²

¹⁰⁷ See TARROW, *supra* note 16, at 41-42 (arguing that the cosmopolitanist trajectory is far more ethically and politically oriented than other accounts suggest).

¹⁰⁸ Kyriakidou, *supra* note 105, at 482 (emphasis omitted) (internal quotation marks omitted) (quoting Kate Nash, *Global Citizenship as Show Business: The Cultural Politics of Make Poverty History*, 30 MEDIA, CULTURE & SOC'Y 167, 168 (2008)).

¹⁰⁹ See, e.g., Katyal, *Semiotic Disobedience*, *supra* note 99 (connecting artistic disobedience, activism and antibranding); Katyal, *Antibranding*, *supra* note 99 (describing the complex interrelationship between branding and antibranding).

¹¹⁰ See TARROW, *supra* note 16, at 42; see also Mitchell Cohen, *Rooted Cosmopolitanism*, 39 DISSENT, Fall 1992, at 478, 483.

¹¹¹ TARROW, *supra* note 16, at 43.

¹¹² *Id.* at 9-10 (quoting MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS*, at xii (1998)). Due to their language proficiency and connectedness to international issues, people, and places, these activists are able to leverage their more nuanced understanding of society's connectedness on an international level. *Id.* at 43; see also KECK & SIKKINK, *supra*, at 2 (discussing the increasing significance and relevancy of activist networks).

Indeed, as Douglas Holt has explained, at times, global branding has lost its luster precisely because multinational corporations have become vulnerable to charges from anti-globalization activists. “Who can forget,” Holt writes, “the images of angry demonstrators smashing the windows of a McDonald’s outlet in Davos, Switzerland, or stomping Coke cans in Seattle?”¹¹³ Labor, pollution, and cultural imperialism concerns operate at the forefront of activist agendas, which tend to coalesce around the global branding enterprise.¹¹⁴ As the journalist Naomi Klein recounts in her book, *No Logo*, the antibranding movement operates at the cross-section between art, labor, and anti-globalization.¹¹⁵ By targeting companies that have invested millions in building strong global brands, antibranders seek to expose potential hypocrisy between corporate philosophy and corporate activity to the average consumer.¹¹⁶ Indeed, evidence has suggested that in countries with weak or underenforced environmental regulations, companies tend to adopt private regulatory programs only when their overseas clients and shareholders demand it.¹¹⁷ As a result, antibranding activism often exploits the same tools used in advertising — powerful visuals, brand recognition, catchy slogans, and emotionally scripted language — to get their message out to the public.

It is therefore no surprise that much of the world’s most prominent trademark cases regarding antibranding have come from one of the largest and most international environmental action groups: Greenpeace. In 2010, in response to the British Petroleum oil spill in the Gulf, Greenpeace, an environmental awareness group, announced a contest to “Redesign BP’s logo,” explaining:

¹¹³ Holt et al., *Global Brands*, *supra* note 24, at 69.

¹¹⁴ *Id.* at 69-70.

¹¹⁵ Rimmer, *supra* note 101, at 78-80.

¹¹⁶ Katyal, *Antibranding*, *supra* note 99, at 811-12.

Anti-sweatshop movements were galvanized in 1992 when the National Labor Committee performed an expose of corporate and U.S. government subsidies of maquilas. Afterward, major labels like the GAP, Nike, Disney, and Guess were forced to respond to consumer concerns about their labor practices with partners in developing nations, even though they had claimed only years earlier to be “innocent global shoppers.”

Id. (quoting Martin Morris, *Contradictions of Post-Modern Consumerism and Resistance*, 64 *STUD. POL. ECON.* 25, 26 (2001)).

¹¹⁷ Daniel Berliner & Aseem Prakash, *Signaling Environmental Stewardship in the Shadow of Weak Governance: The Global Diffusion of ISO 14001*, 47 *LAW & SOC’Y REV.* 345, 367-68 (2013).

A few years ago, BP rebranded themselves as “beyond petroleum.” And yet BP is pursuing . . . deepwater drilling, despite the massive environmental damage that’s being caused by their business.

That’s why we want you to rebrand them.

The campaign concludes: “BP’s slick green logo doesn’t suit a company that engages in dangerous offshore drilling. We’re inviting you to design them a new logo that’s more suitable for their dirty business.”¹¹⁸ Greenpeace’s work was particularly effective at changing the semiotic import of British Petroleum’s massive advertising campaign to highlight its focus on clean energy. After a few of these graphic interventions, it was hard to see British Petroleum’s advertising campaign in the light it had originally intended.¹¹⁹

In addition to a growing concern about CSR, a second factor has added to the growth in antibranding: the increasing force of “consumer sovereignty,” which has led many consumers to respond and publicize their complaints against particular corporations.¹²⁰ These dynamics have reframed the relationship between advertising and consumers into a much more dialogic relationship, as opposed to a one-way relationship of corporate inculcation. “Ethical shareholders, culture jammers, street reclaimers, McUnion organizers, human rights hacktivists, school-logo fighters and Internet corporate watchdogs are at the early stages of demanding a citizen-centered alternative to the international rule of the brands,” Naomi Klein writes in *No Logo*.¹²¹ In many cases, antibranding activists have decidedly turned to the advertising executives’ own arsenal of tools to address consumer concerns, using appropriative strategies to address the increasing dominance of branding strategies in both private and public space.

¹¹⁸ *Redesign BP’s Logo*, GREENPEACE (June 15, 2010), <http://www.greenpeace.org/usa/news/gulf-oil-spill/bp-logo>.

¹¹⁹ See Malla Pollack, *The Romantic Corporation: Trademark, Trust, and Tyranny*, 42 U. BALT. L. REV. 81, 143 (2012) (discussing BP’s rebranding efforts).

¹²⁰ See Robert Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503, 503 (2001) (defining consumer sovereignty as “the state of affairs where the consumer has the power to define his or her own wants”). For more discussion on the role of the consumer, see Graeme W. Austin, *Trademarks and the Burdened Imagination*, 69 BROOK. L. REV. 827, 854-62 (2004); Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2025-26 (2005); Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165, 1180-84 (1948); Laura A. Heymann, *The Reasonable Person in Trademark Law*, 52 ST. LOUIS U. L.J. 781, 785 (2008).

¹²¹ Rimmer, *supra* note 101, at 79 (quoting NAOMI KLEIN, *NO LOGO: TAKING AIM AT THE BRAND BULLIES* 445-46 (2009)).

Many of these practices intrinsically raise trademark concerns, however. Consider, again, the story of Nadia Plesner and her relationship to the crisis in Darfur. Plesner's ability to use LVMH bags as a floating signifier of political import is also, in part, a function of the same variety of elements that facilitate brand transnationalism.¹²² Yet Plesner felt, like many cosmopolitanists, a moral duty to draw attention to the crisis — a keen desire born from a foundational belief in the shared responsibility of humankind. Every aspect of her political expression — from the conceptualization of the project, to its execution, to her attempts to secure legal protection for her expression — was tied to other localities.¹²³ Further, Plesner's intent in drawing a transhistorical connection between Picasso's antiwar position and her own critique of celebrity branding, luxury, and contemporary political culture was also meant to place use of the LVMH logo at the center of her expression. Whereas Picasso's earlier iconoclastic work of art targeted governments, Plesner's work drew attention to the need for targeting global luxury brands and the consumptive practices that exalted them. Moreover, as the legal dispute over Nadia Plesner's work demonstrated, much of the conflict played out in reference to the global visibility of LVMH's brand — which operated as a symbol and vessel for both commentary on the global presence of luxury brands, cosmopolitanist consumption, and the need for international social justice and awareness.

There was no doubt that Plesner's use of the image was deliberately provocative, in that she had already been sued by Louis Vuitton. But it is also fascinating that Louis Vuitton chose to pursue a case against her when its previous threats against her led to such criticism in the press.¹²⁴ The court's reaction to the Darfunica case, though, was

¹²² See generally TARROW, *supra* note 16, at 35-56 (discussing the role of the availability of rapid forms of personal and digital communication, the widespread use of English, the ease of international travel, and the diffuse spread of knowledge from the Web).

¹²³ She kept a widely read blog on the creation of her painting, Darfunica, making daily updates to the painting that were explicitly linked to the ever-changing political conditions in the Sudan. See Lucie Guibault, *The Netherlands: Darfunica, Miffy and the Right to Parody!*, 2 J. INTELL. PROP. INFOR. TECH. & E-COMMERCE L. 236, 244 (2011) (quoting from the translated decision Rechtbank's-Gravenhage 4 mei 2011, KG 2011, 294 m.nt. (Plesner Joensen/Louis Vuitton Malletier SA) (Neth.), *translation available at* <http://www.nadiaplesner.com/upl/website/simple-living--darfunica1/VerdictEnglish.pdf>).

¹²⁴ There was, however, a key reason for LVMH's choice to sue. Contrary to the settlement in 2008, this time, Plesner — probably in a show of provocation to LVMH — planned to market sales of t-shirts and other goods that depicted the same image that LVMH had already objected to. When they discovered Plesner's commercial plans, LVMH was, understandably, quite incensed. After the piece was finished,

fascinating. Both parties, in fashioning their arguments, relied on different sections of the European Convention on Human Rights; Plesner relied on the right of freedom of expression, and Louis Vuitton relied on the fundamental right to property (and relatedly, intellectual property).¹²⁵ At first, the lower court ruled in favor of LVMH in its bid for a preliminary injunction, ruling in favor of its intellectual property rights. It concluded that a subsequent use of the picture in an announcement for the artist's upcoming exhibition was an "eye-catcher," and thus unjustified because it functioned as an advertisement for the artist's own work.¹²⁶ But a few months later, the same court reversed its position after fully adjudicating the issue, deciding to rule in favor of Plesner based on her freedom of expression claim instead.¹²⁷ In an insightful citation, the court explained that property rights needed to take a secondary role to the protection of freedom of speech, noting: "Opposite Louis Vuitton's fundamental right to peaceful enjoyment of its exclusive rights to the use of the design, there is, according to established case law of the European Court of Human Rights, the fundamental right of Plesner that is high in a democratic society's propriety list to express her opinion through her art."¹²⁸

Central, of course, to the court's determination was its conclusion that Plesner's activities, contrary to LVMH's arguments, did not take place in the commercial realm. "[A]rtists enjoy a considerable protection with regard to their artistic freedom, in which, in principle, art may 'offend, shock or disturb.' . . . Plesner's intention with 'Simple Living' is not (or was not) to free ride with Louis Vuitton's reputation in a commercial sense," the court concluded.¹²⁹ Instead, it found that Plesner's juxtaposition of LVMH logos and glamorous images with the

LVMH again decided to seek action to stop the work from being shown, this time from a court in The Hague. Just as it had previously done, the company argued that Plesner had illegally appropriated its marks.

¹²⁵ Guibault, *supra* note 123, at 236. Note that LVMH argued that its fundamental right to property was violated, under the European Convention on Human Rights, and extended this fundamental right to intellectual property, which the European Court of Human Rights (ECHR) did in the Anheuser/Busch decision. Plesner's freedom of expression claim, in contrast, comes from Article 10 of the ECHR, which protects the right to hold opinions and to receive and impart ideas. *See id.* at 245. For further discussion on Article 10, see Coenraad Visser, *The Location of the Parody Defence in Copyright Law: Some Comparative Perspectives*, 38 CILSA 321, 339-41 (2005).

¹²⁶ *See* Guibault, *supra* note 123, at 244 (quoting from a translation of the decision).

¹²⁷ *See id.* at 237.

¹²⁸ *See id.* at 246.

¹²⁹ *Id.*

crisis in Darfur was consistent with her critique of luxury and affluence in a time of famine. Indeed, the court explained her motivation as follows:

[S]he wished to draw attention to the poignant difference between luxury and affluence on the one hand, and poverty and famine in Darfur on the other hand. She has expressed the aspect of luxury by using the Design of [LVMH] in her work of art. She has succeeded in her purpose. Partly because of her work of art, the genocide in Darfur came to the attention of the general public in 2008.¹³⁰

It compared Plesner's symbolic brand appropriation to that of a newspaper, ascribing it an informational function by concluding that "a newspaper should not have a lesser far-reaching protection of the freedom of speech" because it pursues profits with the articles it publishes.¹³¹ Significantly, in a curt line or two, the court ordered LVMH to pay Plesner's legal fees, and also quashes the previous order with retroactive effect, meaning that any penalties that Plesner faced would no longer be due.¹³²

B. Three Antibrand Examples

Decades ago, Beaumarchais wrote, "Provided that, in my writings, I speak neither of the authorities, nor of religion, nor of politics, nor of morals, nor of the people in power, nor of the bodies in credit, nor of the opera, nor of other performances, nor of anyone who believes in anything, I shall be free to print whatsoever I choose, subject to inspection by two or three censors."¹³³ This famous quote, one trademark scholar argued, is especially pertinent in this day and age, noting that "it would probably now be necessary to add trade marks to

¹³⁰ Rechtbank's-Gravenhage 4 mei 2011, KG 2011, 294 m.nt. (Plesner Joensen/Louis Vuitton Malletier SA) (Neth.), translation available at <http://www.nadiaplesner.com/upl/website/simple-living--darfurnica1/VerdictEnglish.pdf>.

¹³¹ Guibault, *supra* note 123, at 247.

¹³² See *id.* at 248. Thrilled with the decision, Plesner told Eyeteeth, a blog, that "[t]oday is a great day for art. . . . If I had lost this, I believe it would have caused many artists to censor their own work to avoid legal trouble. Now we have won back our freedom to make reference to the modern society we live in." *Nadia Plesner on Louis Vuitton Case*: "This is a Great Day for Art," EYETEETH (May 4, 2011, 11:22 AM), <http://eyeteeth.blogspot.com/2011/05/nadia-plesner-on-louis-vuitton-case.html>.

¹³³ See Christophe Geiger, "Constitutionalising" Intellectual Property Law? *The Influence of Fundamental Rights on Intellectual Property in the European Union*, 37 INT'L REV. INTELL. PROP. & COMPETITION L. 371, 371 (2006) [hereinafter "Constitutionalising"] (quoting Beaumarchais).

the list of subjects that must be treated with delicacy and, in place of the censor, the large companies that hold these trade marks.”¹³⁴

In some ways, the antibranding activism that has evolved in the last decade or so reflects so much of the globalization that it often opposes. The problem that our antibranding movements demonstrate, however, is that while brands — and even antibrands — are now global and cosmopolitanist in character, the doctrinal architecture that protects them and enables them to flourish is not. As a result, the existing case law reflects an emerging confusion regarding how trademarks are viewed, both internationally and domestically, and whether antibrands are constitutionally protected. How do we balance protection of trademark property with protection for freedom of speech? Many cases take approaches that are similar to the Plesner case: where a court might begin by awarding relief to the trademark owner, but then take the opposite holding on appeal, usually after global media attention ensues, and the appeals court has a chance to consider other approaches.

Cases like Plesner’s, I would argue, illustrate yet another aspect of trademark cosmopolitanism, because they underscore the increasing globalization of brands as well as the jurisprudential frameworks that govern them. Here, I examine three separate cases — one involving parodic T-shirts from South Africa (the famous *Laugh it Off* case),¹³⁵ another case involving Greenpeace’s appropriation of a logo in France, and a third case involving an appropriated TATA company logo in India. My principal argument in this section is that just as we are seeing the emergence of a global branding movement, we are also seeing a global antibranding movement. However, national disparities regarding whether parody is a constitutionally protected freedom carry dramatic implications for the movement’s future, raising critical questions about the future of reconciling trademark cosmopolitanism with the freedom of political and artistic expression.

1. Laughing It Off in South Africa

The Laugh it Off case, which concerned the conflict over parody and property, is probably one of the most prominent antibranding cases outside of the United States. The plaintiff, South African Breweries, or SAB, is one of the leading beers in the country of South Africa, and a

¹³⁴ *Id.*

¹³⁵ See *Laugh It Off Promotions CC v. S. African Breweries Int’l (Fin.) BV t/a Sabmark Int’l & Another* 2005 (8) BCLR 743 (CC) at 39 para. 65 (S. Afr.) [hereinafter *Laugh It Off*].

pervasive advertiser of its brand.¹³⁶ The defendant, on the other hand, Laugh it Off, is a corporation that engages in the appropriation of brands for the purposes of humor and social commentary. According to its website, the company has two objectives: one, to create a close association with well-known brands, and two, to make fun of them.¹³⁷

This particular case is illustrative of how localized antibrand expression can often give rise to questions of international, constitutional importance. In that case, the defendant replaced SAB's trademark, which said "Black Label," with "Black Labour," and the slogan, "America's Lusty, Lively Beer — Brewed in South Africa," was replaced with "Africa's Lusty, Lively Exploitation Since 1652 — No Regard Given Worldwide." After SAB sent several cease and desist letters in 2002 that went unanswered, it decided to commence litigation.¹³⁸ At issue in the case was whether the mark had taken unfair advantage of, or was detrimental to the reputation of the Black Label mark.¹³⁹ In its defense, the defendant argued that the plaintiff had not established a likelihood of detriment, and that even if such a likelihood had been established, the antibrand was protected by the South African Constitution's protection for freedom of expression.¹⁴⁰

After having lost several times before the lower courts, Justin Nurse, the company founder of Laugh it Off, decided to appeal his case to the Constitutional Court of South Africa, the highest court, and won, in a surprising, landmark defense of freedom of expression over trademarks as property. For scholars, *Laugh it Off* represents an

¹³⁶ *Id.* at 7.

¹³⁷ *Id.* at 7-8. According to the company's founder, Justin Nurse, a journalism graduate student, his work constitutes "ideological jujitsu," whereupon brands are appropriated, but slightly modified, to send an alternative message. "The purpose," the defendant explained, "is to lampoon the brands, to make a statement about the company's policies or practices; to probe issues bearing on the broader society; to assert free expression and in doing so to challenge the inordinate use of trade mark laws to silence expressions that are unflattering about brands." *Id.* at 9-10.

¹³⁸ This was not the first time Nurse ran into trouble with trademark owners. Laugh it Off previously faced legal action initiated by Lego for a T-shirt design that used lego blocks with the word "Legover" underneath. Owners of the brand "Weet-bix" had objected to another shirt that featured the logo, "Weed-brix," Red Bull to a shirt that said "Dead Bull," the soap brand Dettol to a shirt that said "Death Toll," and the denim brand "Diesel for Successful Living" similarly expressed displeasure over a shirt that said "Denial for Successful Loafing." Coca-Cola claimed trademark infringement over a shirt that said, "Corruption." There were other brands that did not object, however, like Kentucky Fried Chicken, which was called "Unlucky Fried Chicken," or Virgin, which became "Viagra." See Rimmer, *supra* note 101, at 73-74.

¹³⁹ See Thea Illsley, *How to Tell a Take-Off from a Rip-Off: Trade Mark Parody and Freedom of Expression in South Africa: Notes and Comments*, 22 SAJHR 119-20 (2006).

¹⁴⁰ *Id.* at 120.

example of how anti-global activist movements have raised international, critical questions for scholars of both intellectual property and constitutional law.¹⁴¹ Yet the opinion, in and of itself, demonstrates a judicially-oriented cosmopolitanist masterpiece, demonstrating a significant array of global constitutional borrowing by the international range of the cases cited by the Court in reaching its decision.¹⁴²

Consider, at the outset, the question of the standard for trademark infringement, which drew heavily from foreign jurisdictions. The Court notes, for example, that its trademark provisions bear near-complete identity to similar protections from the European Directive and the United Kingdom.¹⁴³ There was, however, one significant difference — whereas those statutes required proof of *actual* detriment or unfair advantage, South Africa required only a “likelihood” of unfair advantage or detriment.¹⁴⁴ Significantly, despite this more relaxed standard, the Constitutional Court still decided to protect the antibrand, reversing the lower courts’ earlier opinions. Part of the reason for this outcome, of course, stemmed from the delicate balancing of constitutional freedoms with intellectual property. In South Africa, freedom of expression is constitutionally protected by

¹⁴¹ Australian scholar Matthew Rimmer writes, for example, of the need to contextualize the dispute over the Black Label mark “in the context of wider debates over trade mark law, culture jamming, and the No Logo anti-global capitalism movement.” Rimmer, *supra* note 101, at 86.

¹⁴² I have described this phenomenon elsewhere, as others have. See Sonia K. Katyal, *The Dissident Citizen*, 57 UCLA L. REV. 1415, 1422 (2010) (collecting citations); see also Jacob Foster, *The Use of Foreign Law in Constitutional Interpretation: Lessons from South Africa*, 45 U.S.F. L. REV. 79, 92 (2010).

¹⁴³ Section 10(3) the United Kingdom (UK) Trade Marks Act 1994, which was fashioned along the provisions of the first European Directive, provides that “A person infringes a registered trade mark if he uses in the course of trade a sign which - (a) is identical or similar to the trade mark, and (b) is used in relation to goods and services which are not similar to those for which the trade mark is registered, where the trade mark has a reputation in the United Kingdom and the use of the sign, being without cause, takes unfair advantage of, or is detrimental to, the distinctive character or repute of the trade mark.” Trade Marks Act, 1994, c. 26, § 10 (Eng.).

¹⁴⁴ See *Laugh It Off*, (8) BCLR at 13 para. 21. According to the constitutional court, Article 5(2) of the European Directive and Section 10(3) of the 1994 United Kingdom Act are virtually identical, but require proof of actual detriment or unfair advantage; the South African section requires a likelihood of unfair advantage or detriment, stating “the use of the trademark would be likely to take unfair advantage of, or be detrimental to, the distinctive character or repute of the registered trademark, notwithstanding the absence of confusion or deception.” Charles Webster, *Laugh It Off Gets Last Laugh in Dilution Case*, INT’L TRADEMARK ASS’N (July 1, 2005), <http://www.inta.org/INTABulletin/Pages/LaughItOffGetsLastLaughinDilutionCase.aspx>.

Section 16 of the Constitution, which protects the right, along with the “freedom of artistic creativity” and “freedom to receive or impart information or ideas,” along with other forms of protection.¹⁴⁵

In the case of *Laugh it Off*, the Constitutional Court took the view that the right to hold intellectual property was not universally accepted as a fundamental right, but still informally treated it as such for the purposes of the opinion.¹⁴⁶ The lower court, in contrast, had refused to consider a defense of freedom of expression for two principal reasons: first, because of the commercial purpose of the shirts; and second, because it found that the message went beyond parody and bordered, instead, on hate speech because of its invocation of race and inequality.¹⁴⁷ On appeal before the Supreme Court of Appeal (“SCA”), *Laugh it Off* fared no better.¹⁴⁸ Although the SCA noted that unlike fixed property, intellectual property enjoyed no special status under the Constitution, it chose to protect the property rights of SAB over the interests in freedom of expression.¹⁴⁹ For the SCA, like the lower court, the expression on the shirt was found to create an association that was “particularly unwholesome, unsavoury, or degrading” because it constituted an “unfair” and “unjustified racial slur” on SAB.¹⁵⁰ Under this view, *Laugh it Off* could have easily expressed an identical message about “black labour” and “white guilt” without appropriating the specific brand at issue. There was no parody here, SCA concluded, because *Laugh it Off* was not commenting on SAB, but merely employing SAB in service of its humor. In other

¹⁴⁵ See *Laugh It Off*, (8) BCLR at 2 para. 2.

¹⁴⁶ One scholar reported that the *Laugh It Off* judgment’s most promising aspect involved “its unequivocal recognition that the right to hold intellectual property is in effect a right, of equal status to the specified fundamental rights in the Bill of Rights such as freedom of speech and privacy.” Owen H. Dean, *The Irresistible Force of Freedom of Speech Meets the Immovable Object: Trade Mark Law in South Africa*, 1 J. INTELL. PROP. L. & PRAC. 614, 617, 619 (2006).

¹⁴⁷ See *Laugh It Off*, (8) BCLR at 10 para. 15.

¹⁴⁸ The plaintiff had merely asserted a likelihood of harm, by pointing out that the racial slur would build a racially insensitive association with the company, erode the exclusiveness of its mark, and discourage people from purchasing the beer. Yet because these harms were all largely speculative, and were not accompanied by added evidence or facts showing the probability of these events taking place, the Constitutional Court rejected them. “It is plain from the record that no evidence, direct or inferential, was adduced to establish likelihood of detriment either in the sense of unfavourable associations that have been created . . . or in the context of a likelihood of loss of sales by virtue of the reduced commercial magnetism of the mark.” See *id.* at 35–36 para. 58.

¹⁴⁹ See Dean, *supra* note 146, at 616.

¹⁵⁰ See *Laugh It Off*, (8) BCLR at 13 para. 21.

words, if the antibrand had not become an actual “brand,” in the sense of the shirts becoming a commodity in the court’s eyes, it might have remained protected had it remained entirely noncommercial.¹⁵¹

In contrast, the Constitutional Court’s main holding concluded that SAB had failed to show proof of infringement, because there had been no showing of material harm.¹⁵² Citing the United States Supreme Court’s decision in *Moseley v. Victoria’s Secret Catalogue, Inc.*, the court wrote that “in order to succeed, the owner of the mark bears the onus to demonstrate likelihood of substantial harm or detriment which, seen within the context of the case, amounts to unfairness.”¹⁵³ The mere fact that the expressive act causes some discomfort or “appear[s] to be morally reprobate or unsavoury to others,” however, is irrelevant if the expression is otherwise protected, the Court wrote.¹⁵⁴

To the value of freedom of expression, the Court emphasized its primary value by referencing its own decisions on the matter, in addition to other jurisdictions — Canada and the United States in particular. It also referenced the protection for freedom of expression in the African Charter on Human and People’s Rights as well as the European Convention and the Universal Declaration of Human Rights.¹⁵⁵ Yet while other antibrand decisions directly relied on the constitutional protection of freedom of expression, the South African *Laugh It Off* case interpreted the work “in light of” fundamental rights, which suggested at least some gentle reluctance to constitutionalizing

¹⁵¹ Consider the lower court’s formulation, drawing a line between protecting a fundamental right of freedom of expression, and using a mark in the course of trade:

[Appellant] may not use [the mark] in relation to goods or services. The appellant may use in relation to goods or services by placing the caricature on T-shirts, flags or whatever provided it is not so used in the course of trade. The appellant may declaim the message about black labour and white guilt from rooftops, pulpits and political platforms; and it may place the same words (without appropriating the registered marks’ repute) on T-shirts, and sell them.

See Dario Tanziani, *South Africa: Trade Marks, Infringement, Tarnishing of Marks, Defense of Freedom of Speech*, 27 EUR. INTEL. PROP. REV. N-4, N-8 (2005). Agreeing with this provision, another scholar echoed that trademark law “hardly affects the appellant’s freedom of expression. Freedom of expression does not entitle a party to damage private property such as painting graffiti on private or even public property. Why should it therefore be different simply because the property is a trade mark?” *Id.*

¹⁵² Illsley, *supra* note 139, at 120.

¹⁵³ See *Laugh It Off*, (8) BCLR at 31 para. 50.

¹⁵⁴ Rimmer, *supra* note 101, at 97 (quoting *Laugh It Off*, (8) BCLR at 34 para. 55).

¹⁵⁵ See *Laugh It Off*, (8) BCLR at 27 para. 45.

the right to antibrand.¹⁵⁶ However, in a telling section, the Court cited *Laugh it Off*'s position, extensively:

Brands, the applicant asserts, are often put to work by powerful corporations to crowd out equally legitimate expression. They tend to stifle the open and free flow of ideas. Brand building, the applicant asserts, sets out to occupy cultural space, social space, and even one's own "headspace." Since, in time, marketing brands graduate to cultural icons, they should not be beyond the reach of public disclaim or indeed applause. The purposes of copyright and trade mark laws in an open and democratic society is not to shut out critical expression or to throttle artistic and other expressive acts in a manner that gives way to inordinate brand sway.¹⁵⁷

Turning to the anti-dilution/infringement provisions within South African trademark law, the Court recognized a tension, noting that it "limits the right to free expression," but decided to reach a conclusion that interpreted trademark principles in a way that ensured its compatibility with freedom of expression.¹⁵⁸ "Courts must be astute not to convert the anti-dilution safeguard of renowned trade marks usually controlled by powerful financial interests into a monopoly adverse to other claims of expressive conduct of at least equal cogency and worth in our broader society," the Court observed.¹⁵⁹

Finally, although the Court drew on the United States Supreme Court's landmark decision on parody, *Campbell v. Acuff*,¹⁶⁰ it drew back from the suggestion that parody was constitutionally protected, but then still wound up protecting it anyway. It was unnecessary, in the Court's eyes, to consider the fairness of the parody because the plaintiff had failed to establish the likelihood of economic prejudice.¹⁶¹

It must always be kept in mind that, unlike in the US, in our jurisprudence there are no enclaves of protected expression such as parody or satire and therefore the mere characterization of an expression as such would not be decisive of what is fair use under our anti-dilution protection of section 34(1)(c) because ordinarily all categories of

¹⁵⁶ See Geiger, "Constitutionalising," *supra* note 133, at 396.

¹⁵⁷ See *Laugh It Off*, (8) BCLR at 49 para. 81.

¹⁵⁸ *Id.* at 29-30 para. 48.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 39 para. 64.

¹⁶¹ See *id.* at 39-40 para. 66; see also Rimmer, *supra* note 101, at 99.

expression, save those excluded by the Constitution itself, enjoy constitutional shield and may be restricted only in a way constitutionally authorised,

the Court concluded.¹⁶² In this manner, the Court carved out a broader area of protection for expression like parody, but did so by explaining that all speech is deserving of protection, not just parody specifically.

In a heavily cited concurring opinion, Judge Sachs opened with the question, “Does the law have a sense of humour?,” noting that judicial views on parody are tremendously varied internationally. Although parody is not a separate defense in South Africa, Judge Sachs also wrote to underscore his finding that the commercial intent of Laugh it Off should not detract from its constitutional protection. Instead, for Judge Sachs, in a world where both artists and advertisers use cultural icons to comment on society, the line between commercial and noncommercial has disappeared.¹⁶³ “In our consumerist society where branding occupies a prominent space in our public culture,” Sachs concludes, “one does not have to be a ‘cultural jammer’ to recognise that there is a legitimate place for criticism of a particular trademark, or of the influence of branding in general or of the overzealous use of trademark law to stifle public debate. In such circumstances the medium could well be the message, and the more the trademark itself is both directly the target and the instrument, the more justifiable will its parodic incorporation be.”¹⁶⁴

As a final matter, the Court also demanded that SAB pay for Nurse’s attorney’s fees, a significant win for Laugh it Off. In celebration of the decision, Laugh it Off auctioned off 1,000 t-shirts and donated the proceeds to an anti-alcohol abuse charity.¹⁶⁵

2. Protecting the Right to Critique: *Greenpeace v. Esso*

In France, the trajectory of such antibranding cases has revealed a trend that resembles that of South Africa, demonstrating again the

¹⁶² See *Laugh It Off*, (8) BCLR at 39-40 para. 66.

¹⁶³ See *id.* at 51 para. 84 (referencing Steven M. Cordero, Note, *Cocaine-Cola, the Velvet Elvis, Anti-Barbie: Defending the Trademark and Publicity Rights to Cultural Icons*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 599 (1988)).

¹⁶⁴ See *id.* at 52 para. 86. As a result of the decision, another company, Telkom, which had filed a defamation and copyright case against the creators of Helkom, a parody site protesting the company, dropped the case. See Rimmer, *supra* note 101, at 103.

¹⁶⁵ Rimmer, *supra* note 101, at 102.

global, dyadic pull of both branding and antibranding phenomena, and the tendency to borrow from other jurisdictions to resolve conflicts between them.

Early cases, however, were not as friendly to the cause. Some French courts had held that antibrand uses of trademarks could be infringing, including the use of a trademark in an antismoking campaign (a pool of tar emerging from a Marlboro packet, for example) or even the use of a trademark in a newspaper headline.¹⁶⁶ In another case, a lower French court also held that a website calling for a boycott of the Gervais Danone company was infringing.¹⁶⁷

Like South Africa, more modern cases have reversed the trend, to some extent, and reveal that most successful antibrand cases win on appeal, and usually after the court employs case law from other jurisdictions. For example, consider a case that involved an antismoking campaign that used a dying Camel from the famous cigarette maker producing smoke in the shape of a skull that also accompanied the slogan, “The fag is worse than crossing the desert”¹⁶⁸ The French Supreme Court reversed a lower court ruling that found infringement and instead found that the humorous use of the mark served the goal to protect the public health of adolescents.¹⁶⁹

¹⁶⁶ Christophe Geiger, *Trade Marks and Freedom of Expression — The Proportionality of Criticism*, 38 INT’L REV. INTEL. PROP. 317, 319 (2007) [hereinafter *Trade Marks*]. In one such case involving humor, the Paris High Court ruled that a parody of the LACOSTE label crocodile that showed two fornicating crocodiles accompanied by the expression, “Attention, j’accoste” (“Beware, I’m accosting”) was infringing. In that case, the Court cast the expression as commercial and also concluded that “the right to parody or caricature could not apply in a field which is purely commercial.” See Jean-François Bretonnière & Cordélia Flourens, *France: Trademark Rights v. Free Speech: Can Prejudicial Trademark Use Still Be Prevented?*, in 7 IP VALUE: BUILDING & ENFORCING INTEL. PROP. VALUE 136, 136-37 (2009), available at <http://www.iam-magazine.com/issues/Article.ashx?g=46a24ecb-1bcd-4c10-be35-4854fdb8a9da> (noting an initial trend towards holding defendants liable that has now shifted towards protection of freedom of expression). Both a satirical treatment of the trademark Pastis, and even a representation of a dying camel smoking a cigarette in an antismoking campaign were also the subject of a successful tarnishment claim at the lower court level. See Emmanuel Baud, *The Damage Done*, TRADEMARK WORLD, Apr. 2005, at 29, 30.

¹⁶⁷ See Bretonnière & Flourens, *supra* note 166, at 137 (discussing the case’s disposition).

¹⁶⁸ Geiger, *Trade Marks*, *supra* note 166, at 318.

¹⁶⁹ See Andreas Rahmatian, *Trade Marks and Human Rights*, in 18 INTELLECTUAL PROPERTY AND HUMAN RIGHTS 335, 350 (Paul Torremans ed., 2008) (citing Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Oct. 19, 2006, Bull. civ. II, No. 1601 (Fr.)).

Yet, like the South African case, it is important to note that in France, parody is not a complete defense against trademark infringement.¹⁷⁰ Instead, it is simply one of a multiplicity of factors that courts consider in deciding whether to protect the expression through constitutional reasoning. The absence of clear protections for parody, as we see in the Plesner and *Laugh it Off* cases, have the effect of putting greater emphasis on other factors, like whether or not the activity is commercially oriented. The same is true here, where the absence of commercial intent can be a deciding factor in the defendant's favor.

In one particularly notable case, the company Esso decided to take legal action against Greenpeace's French organization, whose Stop E\$SO Campaign targeted the oil company for its environmental practices. Esso (otherwise known as ExxonMobil) had argued that Greenpeace's use of the logo made it resemble the symbol of the Nazi SS, thereby confusing the public, and putting it within the realm of illegal hate speech associated with Nazi memorabilia.¹⁷¹

However, a French high court, while noting that parody was not a complete defense, nevertheless decided to protect Greenpeace's use of the mark "E\$SO" because Greenpeace did not aim to promote its products commercially but instead only to express its political point of view.¹⁷² It reached this conclusion, however, even though there was evidence that the antibrands had been placed on t-shirts, and Esso argued that even Greenpeace's call for an Esso boycott had a commercial impact.¹⁷³ The court rejected the import of this evidence,

¹⁷⁰ See Tanziani, *supra* note 151, at N-8.

¹⁷¹ Esso is ExxonMobil in France. See *ExxonMobil Sues Over Logo 'Abuse,'* BBC NEWS WORLD EDITION (June 25, 2002), <http://news.bbc.co.uk/2/hi/business/2064559.stm>. Some part, it seems, of Esso's allegations appeared tied to an earlier speech case that held Yahoo liable, in part, for the auction of Nazi memorabilia in France, which violates French law that prohibits the wearing or exhibition of Nazi memorabilia. See *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 379 F.3d 1120, 1122 (9th Cir. 2004). Not only did Esso demand an end to the campaign, but also claimed almost \$80,000 in daily compensation to the company due to the alleged cost of the infringement. "We find it ironic that the richest corporation in the world can't recognise the dollar sign, and confuses it with a Nazi symbol," claimed Greenpeace to the public. In response, Esso claimed that it was only trying to prevent Greenpeace's use of the logo, not alter Greenpeace's message or stop them from expressing themselves. See *ExxonMobil Sues Over Logo 'Abuse,' supra*.

¹⁷² See Tanziani, *supra* note 151, at N-8 to N-9 (discussing this case).

¹⁷³ *Esso Plc v. Greenpeace France*, Cour d'appel [CA] [regional court of appeal] Paris, 4e ch., Nov. 16, 2005, E.T.M.R. 2006, 53, 665, Carre-Pierrat (Fr.) [hereinafter *Esso*, [2006] E.T.M.R. 53].

accusing Esso of displaying “the worst kind of bad faith” in suggesting that such activities would have a business import.¹⁷⁴

Instead, the court said that “the constitutional principle of the freedom of expression implies that the organization . . . can, on its internet site, criticize, in the form that it regards appropriate, the damage to the environment and the risk caused to public health by industrial activities”¹⁷⁵ While characterizing the work as a parody, but also characterizing it as an expression of noncommercial speech, the court crafted out a special area of exception, it seems, for expression motivated specifically by political purposes and limited to the Internet. “[T]he defendant should be able to denounce attacks on the environment and the risks to human health caused by certain industrial activities, in whatever form it deemed best suited to the aim pursued. While this freedom is not absolute, it may only be subject to restrictions which are necessary to respect the rights of others,” the court wrote.¹⁷⁶

Although the case was a win for Greenpeace, it highlights a few areas of concern for trademark scholars. The first area of concern involves the reality that the French court implicitly suggests that parody cases, when they are not cast as parody, can still be vulnerable to a charge from a non-trademark claim, such as denigration, disparagement, or defamation. In such cases, plaintiffs often employ defamation or disparagement claims, in addition to the trademark causes of action, sometimes with varying success. Under French law, disparagement is described as “[a]ny act whatsoever which causes damage to another, obliges the one by whose fault it occurred to compensate it,” usually referring to conduct that aims to discredit or belittle the plaintiff.¹⁷⁷ (Some French courts have described disparagement to involve “a polemical use alien to business life.”)¹⁷⁸

In this case, Esso had charged that Greenpeace had sought to denigrate and discredit Esso’s products and services. At the same time that Esso made these allegations, however, it also admitted that Greenpeace had not actually targeted or criticized any of its products or services, but only restricted its critique to its logo specifically and to discuss Esso’s role in climate change and its environmental

¹⁷⁴ *Id.* at 666.

¹⁷⁵ Geiger, *Trade Marks*, *supra* note 166, at 321.

¹⁷⁶ Esso, [2006] E.T.M.R. 53, at 666.

¹⁷⁷ Bretonnière & Flourens, *supra* note 166, at 137 (quoting CODE CIVIL [C. CIV.] art. 1382 (Fr.)).

¹⁷⁸ Geiger, *Trade Marks*, *supra* note 166, at 322.

practices.¹⁷⁹ As a result, the court, in turn, rejected Esso's allegations, noting, "[i]t is, at the very least, paradoxical to invoke acts of denigration — of which, incidentally, the exact nature is not stated . . . and to assert that the products and services of the appellant company were not subject to any criticism."¹⁸⁰ Given the content of Greenpeace's website, the court concluded that denigration was completely unproven.

However, despite the outcome of the case in the Esso judgment, it remains noteworthy that claims like denigration, disparagement, and defamation can still be employed successfully against activist groups, particularly at the lower court level. Lawyers have suggested that the use of humor, like other types of parody, is defensible and protectable, so long as the defendants do not use the trademark for a commercial purpose, and so long as the trademark use is "proportionate," meaning that the use is not outrageous in nature.¹⁸¹ This reasoning was used to protect a website that named itself "SOS victims of Credit Agricole" on the grounds that the use was not outrageous in nature.¹⁸² But defining what is outrageous is clearly a matter that is deeply loaded with subjectivity.

For example, in another case involving Greenpeace, this time targeting Areva, a Paris High Court held that the trademark had not been infringed but was disparaged, exceeding the protection of freedom of expression and holding Greenpeace liable.¹⁸³ However, this opinion was reversed at the Court of Cassation, which held that the parody had to be read in conjunction with Article 10 of the European Convention on Human Rights. The court concluded that Greenpeace was acting in accordance with "the interest of the general public and

¹⁷⁹ *Esso*, [2006] E.T.M.R. 53, at 671.

¹⁸⁰ *Id.*

¹⁸¹ See Bretonnière & Flourens, *supra* note 166, at 138.

¹⁸² *Id.* The Supreme Court also reached a similar conclusion involving a use of a puppet in a television show, which represented the president of the Peugeot car brand who was disparaging products of the company. In that case, the Supreme Court reversed lower court rulings that found that the outrageous nature of the speech caused damage to the company. *Id.*

¹⁸³ See Baud, *supra* note 166, at 31. In that case, the "A" of the company had been modified with a skull-like shadow, and the body of a dead fish with the statement, "Stop Plutonium — the Stopping is Obvious." Here the court found that other means to communicate the same message could have been used — "the equation AREVA=DEATH proceeds from a purely disparaging reasoning for which their authors should be liable," it concluded. There was a risk that consumers would believe that all of Areva's products were harmful, the court explained, and enjoined the expression as a result. Geiger, *Trade Marks*, *supra* note 166, at 322 (quoting case).

public health, and using proportionate means in so doing, and had therefore not misused their right to freedom of expression.”¹⁸⁴

Nevertheless, while most of these cases do eventually come out in favor of the defendants, it is worth noting that disparagement can still be at issue if the defendant targets specific products or services.¹⁸⁵ And it is also worth noting the added role that defamation may play in such cases.¹⁸⁶ This cause of action has been interpreted by the Supreme Court to *not* include criticism of products or services, suggesting that it can apply as an alternative in cases where disparagement does not apply and a company (rather than its specific products or services) is targeted instead.¹⁸⁷ The availability has led some to suggest that it may be a fruitful alternative for plaintiff corporations to pursue to curb antibranding expression.

3. Gaming the Antibrand: TATA and the Turtles

Antibranding is also alive in India, whereupon Greenpeace has also faced one of its own court cases involving the creation of an online game called *Turtles v. TATA*, in which the goal of the game, modeled after Pac Man, is to help yellow turtles eat as many little white dots as possible, without running into “Ratty” who appears to be modeled after Ratan Tata, chair of the powerful multinational Tata Corporation. The game is designed so that TATA is the antagonist, and the turtle has to, literally, strategically destroy the TATA logo.¹⁸⁸ The purpose of the game was to draw attention to the potential environmental impact of a proposed TATA dam, known as the Dhamra Project, and the risk

¹⁸⁴ *France: Greenpeace France et al. v. Areva*, ARTICLE 19 (Feb. 7, 2008), <http://www.article19.org/resources.php/resource/3186/en/france:-greenpeace-france-et-al.-v.-areva#sthash.s6ndx7L9.dpuf>.

¹⁸⁵ For example, in a case involving the boycott of Danone’s website, the expression was protected because the website did not offer products or services, nor did it target Danone’s products and services specifically. This case, and others, suggests that targeting products or services, or offering alternative products or services, might risk liability. See Bretonniere & Flourens, *supra* note 166, at 138.

¹⁸⁶ The 1881 law of defamation charges that defamation occurs “where an allegation or an assessment of a precise fact is made targeting a specific person so as to harm his or her honour or reputation.” *Id.* at 139.

¹⁸⁷ *Id.*

¹⁸⁸ “The aim of the colourful and noisy game is to help the yellow turtles to eat as many of the white dots [jellyfish and other sea creatures] . . . while dodging the TATA demons if you eat a power pill, you will be gifted with super-turtle powers to vanquish the demons of development that are threatening your coastal home.” *Tata Sons Ltd. v. Greenpeace Int’l & ANR*, (2010) 9089 I.A. 1, ¶¶ 7, 26 (Delhi H.C., 2011) (India) [hereinafter *Tata Sons*, (2010) 9089 I.A.], available at <http://indiankanoon.org/doc/562656/>. Others to avoid are “matty,” “Natty,” or “Tinku.” *Id.*

of affecting a turtle habitat, the Olive Ridley Sea Turtle nesting beaches, among other environmental concerns.¹⁸⁹

As I suggested in the previous section, trademark claims often appear alongside other, speech-related claims like defamation and disparagement. Here, Tata sued for defamation and trademark infringement, arguing, in a colorful filing before the court, that “portraying [Tata] as a demon in the game with pointed use of the ‘T’ device is malicious, as it is intended to convey to the world at large the so called heartlessness in setting up the Dhamra Project.”¹⁹⁰ For support, Tata argued that “‘use’ of trademark is not confined merely to the defendant engaging itself in a trade or commercial activity, but other forms of speech or representation, which would tarnish the plaintiff’s mark,” citing the 1972 Gemini Rising case (the case involving a poster that said “Enjoy Cocaine”) and a Louis Vuitton case from 2007 involving Haute Diggity Dog, a pet toy manufacturer.

Greenpeace, as well, used its own form of comparative law — it argued that Tata’s actions demonstrated a form of a “strategic lawsuit against public participation” otherwise known as a SLAPP suit, that was intended to censor and intimidate those who are concerned with the environmental impact of the project.¹⁹¹ Greenpeace argued that its

¹⁸⁹ *Id.* ¶¶ 17-19.

¹⁹⁰ “Had the intention of the defendant really been to express dissent, and if indeed they wanted to speak in hyperboles there was other legitimate means of doing so,” the filing stated. *Id.* ¶ 11.

¹⁹¹ For more on SLAPP suits, see, for example, Robert Abrams, *Strategic Lawsuits Against Public Participation (SLAPP) Address*, 7 PACE ENVTL. L. REV. 33, 39 (1989) (noting that SLAPP lawsuits are harmful to activists regardless of whether the plaintiff wins or loses); Joseph J. Brecher, *The Public Interest and Intimidation Suits: A New Approach*, 28 SANTA CLARA L. REV. 105 (1988) (suggesting reform to prevent potential users of intimidation tactics from employing them); Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation (“SLAPPS”): An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937, 955 (1992) (illustrating statistically the success of SLAPP plaintiffs); Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 LAW & SOC’Y REV. 385 (1988) (using qualitative and quantitative data to measure the impact the SLAPP experience on subsequent political participation); Edmond Costantini & Mary Paul Nash, *SLAPP/SLAPPback: The Misuse of Libel Law for Political Purposes and a Countersuit Response*, 7 J.L. & POL. 417 (1991) (finding that enthusiasm for the SLAPPback strategy must be tempered by a recognition of its risks); Sharlene A. McEvoy, “The Big Chill”: *Business Use of the Tort of Defamation to Discourage the Exercise of First Amendment Rights*, 17 HASTINGS CONST. L.Q. 503 (1990) (arguing that there must be a balance between the right to bring an action for defamation, and the right to exercise one’s first amendment rights); Jawn Ardin Sandifer & George Bundy Smith, *The Tort Suit for Damages: The New Threat to Civil Rights Organizations*, 41 BROOK. L. REV. 559 (1975) (finding that private causes of action are a threat to boycotts led by civil rights organizations); Victor J. Cosentino,

work was entirely noncommercial, and that Indian trademark law, specifically section 29(4) of the Indian Trademarks Act of 1999 demonstrates that the use of a trademark for the purposes of criticism, fair comment, or parody does not amount to infringement.¹⁹² It alleged, similarly, that its use was not in the course of trade and therefore could not satisfy the requirements for dilution.¹⁹³

News reports initially suggested that the Delhi High Court advised Greenpeace to remove the TATA logo from its game (noting that one Judge was said to have stated to Greenpeace “[w]e are not directing you to stop using the game but you can consider not using the logo”).¹⁹⁴ However, in its written opinion, the Court advocated a strong defense of free speech, citing both the *Esso* case and the *Laugh it Off* case.¹⁹⁵ What is especially interesting about the case is that it focuses not just on trademark infringement, and also dilution, but on defamation, switching between these concerns throughout the opinion. It dismisses Greenpeace’s use of the term “demons” in conjunction with the TATA logo as “mere hyperbole,” noting that Greenpeace argued that the game “succinctly and creatively enables the registering of protest . . .” and thus must be viewed as part and parcel of criticism and commentary.¹⁹⁶

In the *TATA* case, the Court quotes extensively from a series of British opinions that suggested reluctance in granting preliminary injunctions due to the speech issues involved.¹⁹⁷ The Delhi High Court

Comment, *Strategic Lawsuits Against Public Participation: An Analysis of the Solutions*, 27 CAL. W. L. REV. 399, 427-29 (1991) (arguing that although plaintiffs in SLAPP cases have legitimate grievances, the disputes should be left to the political forum).

¹⁹² *Tata Sons*, (2010) 9089 I.A. ¶ 20.

¹⁹³ “The game in question is merely depicting the challenges that Olive Ridley turtles would have overcome in order to survive in spite of the Project,” it explained. *Id.*

¹⁹⁴ Sumathi Chandrashekar, *Greenpeace ‘Advised’ to Remove TATA Logo From Game*, SPICY IP (July 28, 2010, 2:55 PM), <http://spicyipindia.blogspot.com/2010/07/spicyip-tidbit-greenpeace-advised-to.html>. For more reports of the case, including reactions after the ruling, see also Rebecca Abraham, *Tata and the Turtles: How Environmental Activism Triggered a Complex Trademark Dispute*, GREENPEACE (Apr. 13, 2011), available at <http://www.greenpeace.org/india/en/news/Feature-Stories/Tata-and-the-turtles-How-environmental-activism-triggered-a-complex-trademark-dispute/> (reposting from the *India Business Law Journal* March 2011 issue).

¹⁹⁵ *Tata Sons*, (2010) 9089 I.A. ¶ 24.

¹⁹⁶ *Id.* ¶ 21.

¹⁹⁷ It cited an 1891 case involving a preliminary injunction, which the court denied to grant in a libel case because the court decided to test the allegations of defamation at trial. “Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of

also questioned whether the role of the Internet called for a more relaxed standard, given the ease and speed of communication. It also continued to rely on American jurisprudence in finding the absence of actual malice, noting that there was no evidence, here, of a reckless disregard for the truth, and the Internet context did not change its outcome. Instead, here, the Court noted that the issue involved a project with a tremendous degree of environmental concern and a wide diversity of opinions.¹⁹⁸

Finally, the Court also rejected the trademark infringement and dilution claims. Given the absence of a profit motive on behalf of Greenpeace, and the Court's recognition of the right of defendants to "comment, ridicule and parody" the registered trademarks, the Court refused to grant an injunction.¹⁹⁹ In its closing paragraphs, the Court drew heavily and admiringly from the *Laugh it Off* opinion, citing Judge Sachs' observation that the Court's focus on the detriment requirement tended to obscure a larger, and deeper focus on the value of parody, thus allowing a focus on property to overshadow a more substantial focus on the value and freedom of expression.²⁰⁰

The Delhi High Court also noted that at times, a parody can actually enhance the distinctiveness of a famous mark by making it into an icon.²⁰¹ Citing the *Esso* case, the Court concluded: "[T]he use of a trademark, as the object of a critical comment, or event attack, does not necessarily result in infringement If the user's intention is to focus on some activity of the trademark owner, and is 'denominative,' drawing attention of the reader or viewer to the activity," it may not be subject to injunctive relief.²⁰²

In a particularly memorable set of observations, the Court wrote, that it "cannot anoint itself as a literary critic, to judge the efficacy of use of such medium, nor can it don the robes of a censor. It merely patrols the boundaries of free speech, and in exceptional cases, issues injunctions" ²⁰³ It continued, "granting an injunction would freeze

interim injunctions," the case said. *Id.* ¶ 22.

¹⁹⁸ See *id.* ¶ 35 (citing *Texas Beef Group v. Winfrey*, 201 F.3d 680 (5th Cir. 2000) (comparing Greenpeace's work to a statement made by a guest on the Oprah Winfrey show regarding the safety of American beef, where the court dismissed the defamation claim, holding that "exaggeration does not equal defamation")).

¹⁹⁹ *Id.* ¶ 40.

²⁰⁰ *Id.* ¶ 74.

²⁰¹ The court drew on the example of the Hormel case's use of the character Sp'am, which noted that the parody "tend[ed] to increase public identification of the famous mark with its source." *Id.* ¶ 30.

²⁰² *Id.* ¶ 42.

²⁰³ *Id.*

the entire public debate on the effect of the port project on the Olive Ridley turtles habitat. That, plainly would not be in public interest; it would most certainly be contrary to established principles.” The Court recalled the words of Walter Lippman: “The theory of the free press is not that the truth will be presented completely or perfectly in any one instance, but that the truth will emerge from free discussion.”²⁰⁴

C. Three Key Themes: Fundamental Rights, Commodity and Commerciality

All of the major cases discussed thus far have all reached conclusions that are strongly protective of the antibrand, but with very different rationales. Plesner’s case, for example, relied almost exclusively on human rights reasoning, whereas the *Laugh it Off* case was resolved on trademark grounds (and a finding of an absence of actual damages). On the other hand, both the *Esso* and *TATA* cases were resolved on the grounds that the uses were noncommercial and therefore fell out of the realm of trademark law. Whatever the result, each case, I think suggests some areas that are ripe for further consideration, particularly given the global nature of each dispute.

Consider three main areas of tension, illustrated by the cases discussed above. The first major theme involves the fundamental question of which right matters more: the right to freedom of speech, and relatedly, the right to parody, or the right to intellectual property. Underlying this question, I would suggest, is an architectural question about how to situate the protection of intellectual property alongside the creation and protection of other fundamental rights.²⁰⁵ Is intellectual property a fundamental right, akin to other fundamental rights, or should it be treated as secondary to these other rights? And if intellectual property is considered to be a fundamental right, then how does that right square with that of the right to freedom of speech? The Charter of Fundamental Rights of the European Union states in Article 17 section 2 that “Intellectual property shall be protected,” and further that it “stands as an end in itself.”²⁰⁶ However, if the world is moving towards a more unitary regime for trademark registrations, it becomes necessary to confront the diversity of speech protections

²⁰⁴ *Id.* ¶ 43.

²⁰⁵ See also Geiger, “Constitutionalising,” *supra* note 133, at 371; Helfer, *Regime Shifting*, *supra* note 21, at 45-51; Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 UC DAVIS L. REV. 971, 994 (2007) [hereinafter *Human Rights Framework*]; Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 UC DAVIS L. REV. 1038, 1041-47 (2007).

²⁰⁶ Geiger, “Constitutionalising,” *supra* note 133, at 376.

within other nation states. Some countries, like the United States, expressly protect freedom of expression as a fundamental right, and other commonwealth countries, like the United Kingdom, New Zealand, and Australia, do not have a constitutional right to freedom of speech, but recognize its existence in statutes or common law.²⁰⁷

Robert Burrell and Dev Gangjee have pointed out that the concept of freedom of expression in the United States, with its attendant suspicion of government, may make transplanting its legal principles quite difficult in jurisdictions which have different approaches to freedom of speech.²⁰⁸ Speech is much more protected in the United States than in other jurisdictions like Germany, France, and South Africa, which explains in part why the commercial or noncommercial nature of the speech became so significant. There is also some suggestion that commercial courts are ill-equipped to address constitutional matters, given the complexity of constitutional matters and the difficulty of transplanting legal concepts. There is also another excellent point raised by Gangjee and Burrell: a debate about constitutional rights, framed by a conflict between property and speech, just gets us nowhere because there is no “trumping” quality of either one.²⁰⁹

Then there is also the question of how to employ human rights principles in such disputes. Recall that the case involving Plesner, for example, and also others discussed, to a lesser extent, were resolved not on trademark grounds — but on human rights principles. In Germany, too, in one case, the defendant altered the Marlboro trademark to deliver a nonsmoking message; the court cited the basic human right of freedom of expression in protecting the work.²¹⁰ This factor suggests yet another layer of complexity to trademark cosmopolitanism, because characterizing intellectual property as a fundamental right does not necessarily garner its primacy against other rights, like freedom of expression worldwide. Some have argued that human rights law operates as a “corrective” when intellectual property rights might be used “excessively” or “contrary to their functions” — and that these protections operate when other “safety valves” in intellectual property have failed, such as fair use, fair dealing, and other exceptions and limitations.²¹¹ But, at the same time,

²⁰⁷ Ramsey, *supra* note 96, at 412.

²⁰⁸ Robert Burrell & Dev Gangjee, *Trade Marks and Freedom of Expression — A Call for Caution*, 41 INT’L REV. INTELL. PROP. & COMPETITION L. 544, 558 (2010).

²⁰⁹ *Id.* at 559.

²¹⁰ See Rahmatian, *supra* note 169, at 349 (discussing these cases).

²¹¹ See Helfer, *Human Rights Framework*, *supra* note 205, at 1017.

there is growing evidence that the protection of intellectual property, itself, is now viewed as a human right — in one case before the European Court of Human Rights, involving the mark “Budweiser,” the Court decided to classify trademarks as a type of “property right” for the purpose of human rights analysis.²¹² As a result, it makes it difficult to see how relying on fundamental rights analysis assists in resolving tough cases.

Some scholars have argued, on this point, that thinking about intellectual property as a fundamental right ensures that it receives an important place in the relevant national constitution, ensuring that it ranks highly in any rights hierarchy. It also makes further justification of intellectual property unnecessary since it is viewed as a fundamental right. Finally, as Christopher Geiger has suggested, if intellectual property is considered to be a fundamental right, it becomes linked to “ethical values,” which are often considered to enjoy “widespread consent and acknowledgment under international law.”²¹³

Yet classifying intellectual property as a fundamental right gives us very little insight as to how to balance such a right against other fundamental rights, like freedom of speech.²¹⁴ Particularly in countries where there is no fundamental right to freedom of speech, the very act of classifying intellectual property in this manner raises the risk of further alienating speech interests in favor of the primacy of intellectual property.²¹⁵ Further, as Lawrence Helfer has explained, if intellectual property owners choose to invoke human rights law in order to garner additional protections, they would be likely to face stiff resistance from users and consumers, who would, in turn draw upon *other* fundamental rights in order to articulate a competing vision that focuses on the need to restrict, rather than expand, intellectual

²¹² *Anheuser-Busch, Inc. v. Portugal*, 2007-I Eur. Ct. H.R. 39, 67, paras. 72-78. For more discussion of this case, see Megan M. Carpenter, *Trademarks and Human Rights: Oil and Water? Or Chocolate and Peanut Butter?*, 99 TRADEMARK REP. 892, 908-09 (2009); Laurence R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, 49 HARV. INT'L L.J. 1, 12 (2008); Helfer, *Human Rights Framework*, *supra* note 205, at 1016; Mirela V. Hristova, *Are Intellectual Property Rights Human Rights? Patent Protection and the Right to Health*, 93 J. PAT. & TRADEMARK OFF. SOC'Y 339, 353 (2011); Katja Weckstrom, *The Lawfulness of Criticizing Big Business: Comparing Approaches to the Balancing of Societal Interests Behind Trademark Protection*, 11 LEWIS & CLARK L. REV. 671, 676 (2007); Mary W.S. Wong, *Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights*, 26 CARDOZO ARTS & ENT. L.J. 775, 810 (2009).

²¹³ See Geiger, “Constitutionalising,” *supra* note 133, at 388.

²¹⁴ See Rahmatian, *supra* note 169, at 347-48.

²¹⁵ Geiger, “Constitutionalising,” *supra* note 133, at 386.

property rights in order to protect fundamental freedoms.²¹⁶ So, for example, national courts in Europe have been using the right to freedom of expression, protected by the European Convention, towards this end, particularly in the area of copyright to protect the creation of exceptions to the law.²¹⁷

Another main theme involves the question of whether these disputes concerning antibranding are best explored through the lens of the classic division between speech and property, or whether it makes sense to turn to other areas of law, such as the internal architecture of trademark law, to resolve these disputes.²¹⁸ And, as a related matter, how much should claims like defamation and disparagement be employed as part of the dispute? Is there a benefit to not looking solely to fundamental rights to address parody, but instead by crafting exceptions *within* trademark law instead? Does only allowing a defendant recourse to fundamental rights to speech allow the property right of trademarks to grow even further, without having internal safety valves in its architecture?

Part of this question, of course, addresses the context of the protection of parody in other jurisdictions. Constitutionalizing the right to antibrand, for example, might actually suggest that the right is comparable to that of an intellectual property right — which is interesting, given that in the United States fair use is not considered to be a constitutional right, but rather seems to be characterized as a privilege.²¹⁹ The more a jurisdiction protects parody and freedom of speech, or the more uncertain of the outcome, one might argue, the more likely it will be that a plaintiff will seek to bring in other areas of law to restrict the defendant's speech, like defamation and disparagement, or moral rights, to defend its intellectual property. As a result, other areas of law become employed in the service of trademark law, reflecting areas that trademark law has really failed to conclusively address. For example, in the United Kingdom, the author of a parodied work can also bring an action for derogatory treatment — that it distorted or mutilated the work, or that it was prejudicial to the intellectual property owner's honor or reputation.²²⁰

²¹⁶ See Helfer, *Human Rights Framework*, *supra* note 205, at 1017.

²¹⁷ See *id.*

²¹⁸ See, e.g., William McGeeveran & Mark P. McKenna, *Confusion isn't Everything*, 89 NOTRE DAME L. REV. 253 (2013) (arguing for a deeper deployment of competition and communication values in trademark confusion cases).

²¹⁹ Geiger, "Constitutionalising," *supra* note 133, at 401.

²²⁰ Visser, *supra* note 125, at 337.

Even in the United Kingdom, where there are no specific mentions of the right to parody within the statutory language, scholars have argued that the trademark statute (which protects marks against unfair advantage or detriment “without due cause”) suggests some possibility that the term “due cause” might provide some support for parody.²²¹ Others have suggested the use of the “fair dealing” exception to protect parody in the copyright context.²²² (The same is also true in South Africa, where fair dealing is used instead of “fair use.”)²²³ And still other cases have protected parody on the grounds that the plaintiff has failed to show a likelihood of confusion.²²⁴

In the context of antibranding, it may not always be necessary to carve out specific protections for parody if there are other means of protection available. Often, these other means can come from other constitutional principles, or even other parts of the trademark architecture of that jurisdiction. In a German case, for example, the country’s Supreme Court defended a postcard publisher that produced a satirical image that alluded to the trademark MILKA (a chocolate company), and also employed the distinctive lilac color in its artwork.²²⁵ Yet although the Court classified the use as a trademark use, and also noted that the use of the lilac color did evoke MILKA’s reputation, it opted to protect the use — not under freedom of expression or human rights principles per se — but under what has been described as a “constitutional right of freedom of the arts,” a specific version of the right to freedom of expression.²²⁶ Here, even though it recognized that the defendant was referencing the plaintiff’s reputation, it chose to honor the principle of artistic freedom over intellectual property rights, noting

if the postcard (the media of the parody) does not debase the claimant’s trade mark and if it is not proved that the defendant acted exclusively for a commercial purpose, the protection of

²²¹ See MOHAMMAD AMIN NASER, *REVISITING THE PHILOSOPHICAL FOUNDATIONS OF TRADEMARKS IN THE US AND UK* 206-07 (2010).

²²² See Visser, *supra* note 125, at 337.

²²³ *Id.*

²²⁴ Ellen Gredley & Spyros Maniatis, *Parody: A Fatal Attraction? Part 2: Trademark Parodies*, 19 EUR. INTEL. PROP. REV. 412, 418 (1997) (discussing case where plaintiff, Miss World Productions, was unable to prevent a showing of “Miss Alternative World,” a sadomasochistic film given the lack of showing of likelihood of confusion). The Australian Trademarks Office, in another set of examples, has simply found that parodic marks are not deceptively similar in response to a series of oppositions filed from established companies. See Ramsey, *supra* note 96, at 414, n.44-46.

²²⁵ Rahmatian, *supra* note 169, at 349 (discussing this case).

²²⁶ *Id.*

artistic freedom has to prevail in the present litigation over the protection of property rights of Article 14(1) of the German Basic Law.²²⁷

An additional area of dispute, stemming from this last point, involves the question of whether the antibrand should be treated differently than a brand. Often antibrands can be sold, as well as circulated, raising questions of what to do when there are expressive as well as commercial interests present. Not dissimilarly to the United States, it appears that parody is protected so long as it does not conflict with the commercial interests of the plaintiff — so long as the mark is being used for critique or parody.²²⁸ Of course, there are costs with an approach that focuses solely on trademark use, since it is not always entirely clear what a use “in the course of trade” can comprise.²²⁹ Yet scholars have expressed fear that the line between commercial and noncommercial expression (parody and the like) becomes extraordinarily blurred, given the expansion of trademark rights as property rights, a risk that only becomes exacerbated by recent rulings by the European Court of Justice.²³⁰

But there are also a number of cases that involve, like the South African case above, the sale of goods that represent parodies or antibrands. Here, despite the South African outcome, the case law is decidedly more mixed internationally, especially in the United States, where case law has lined up on either side. The same is true internationally, where the case law is also split. For example, despite the *Laugh it Off* outcome, a German court had issued an injunction against the sale of shirts that had the Shell logo with a skull, finding that the use was commercial and therefore fell within the Unfair Competition Act.²³¹ At times in trademark-related cases, courts have even attributed commercial motivations to media that has traditionally received the highest level of constitutional protections — like newspapers and other forms of editorial media. In one such case from the United Kingdom, a court even interpreted “use in the course of trade” to include a magazine’s use of the logo of Philips Company that

²²⁷ Geiger, “Constitutionalising,” *supra* note 133, at 396 (quoting case).

²²⁸ See Rahmatian, *supra* note 169, at 352.

²²⁹ See *id.* at 351.

²³⁰ See *id.* (discussing the Arsenal case).

²³¹ Baud, *supra* note 166, at 32. Canadian courts, in addition, have held that such uses can be confusing; one case used a spoof mark of the water brand Perrier; the mark was called “Pierre-Eh” in reference to Pierre Trudeau, who was Prime Minister of Canada at the time. See Gredley & Maniatis, *supra* note 224, at 417 (discussing this case and others).

substituted the logo's stars with Nazi swastikas to draw attention to a story it was publishing on the company's activities during the Second World War.²³² The use was considered to be commercial in the sense that it was intended to increase sales of the magazine, but the risks to the concept of freedom of expression were obvious.

There are, however, a number of options to address the absence of clear protections for parody. States can easily specifically exempt noncommercial expression and political speech, and interpret parody as falling within these parameters.²³³ Or states can choose to refrain from enacting strong dilution laws.²³⁴ Still another option is for courts in member states to decline to award injunctive relief, as we saw in the *Tata* case, opting instead to focus on damages in order to preserve the interest in freedom of speech, or require the use of disclaimers to obviate confusion.²³⁵ A final option, also stemming from *Tata*, could be for member states to enact SLAPP-like statutes, or fee-shifting provisions that would force overly aggressive trademark owners to reconsider filing suit in non-meritorious cases.

A final suggestion could be a broad one. Member states could amend the Paris Convention or TRIPS to state a direct commitment to "freedom of expression" when implementing their trademark protections. Although the obligation to protect freedom of expression is already part of the international treaty world, and certainly relevant to the interpretation of treaty terms, a more specific declaration for freedom of speech might be vital to ensuring a greater balance.²³⁶

CONCLUSION

In this Article, I have suggested a link between contemporary accounts of cosmopolitanism and the growing case law on both global branding and antibranding. As I have suggested, the world of global

²³² *Id.* at 418.

²³³ See Ramsey, *supra* note 96, at 409. TRIPS Article 16 (1), for example, requires states to prevent uses of marks that cause a likelihood of confusion "in the course of trade." However, TRIPS Article 17 permits states to enact "limited exceptions" to trademark rights — these could easily include non-trademark or nominative uses, parodies, satire, and other commentaries. *Id.*

²³⁴ See also *id.* at 409-10. Since Article 16(3) of TRIPS requires only that member states prohibit third party registrations or uses of "well known" trademarks to "indicate a connection between [the third party's] goods or services and the owner of the registered trademark," there is room for underenforcement or to avoid enacting dilution statutes altogether.

²³⁵ *Id.* at 434.

²³⁶ See *id.*

trademarks can be characterized in terms of a major shift from national to global branding strategies.

Many cosmopolitanist ideals, I have suggested, have taken root in a variety of different political, economic, and social contexts, including intellectual property regulation and the international trademark system. In the trademark context, I would argue each of these areas have a variety of different facets, some that are more culturally oriented, and focused on the emergence of global brands and an accompanying transnational culture of consumption; and others more doctrinally or institutionally oriented that center on designing a legal architecture that focuses towards harmonization.

At the same time, trademark lawyers often extol the virtues of harmonization and globalization without grappling with its complex dynamics as applied to the localized interpretation and expression of intellectual property protections. We see this particularly in the growing set of case law regarding the conflicts between the transnational brand, activist movements, and freedom of speech. As I have suggested, the dyadic relationship between the global branding — and anti-branding movements — has exposed both the idealism and the fragility of cosmopolitanist ideals, offering us significant challenges for the future.