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COPYING METHODS OF PRODUCT DIFFERENTIATION: FAIR OR UNFAIR COMPETITION?

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Introduction

The basic theme advanced here is that in markets where competition is the regulator, certain methods of product differentiation, such as product and package design and configurations of goods, which do not qualify for statutory protection, do not merit judicial protection against copiers in unfair competition actions. If a method of product differentiation is not protected by the patent, trademark or copyright statutes from free use by business rivals, it should be protected judicially from free use only if some other public interest factor outweighs the anticompetitive effect of giving a producer a right to exclude rivals from using a method of differentiation otherwise free to all. The cases and materials examined indicate that such judicial protection has been given in certain situations, most frequently on the ground that it is demanded by the public interest in preventing customer confusion or deception as to the source of the product, and that many commentators would have such protection expanded. The view advanced here is that in order to maintain the benefits of competition, the courts should be more hesitant to grant such protection, even where the method of product differentiation is supposedly "nonfunctional," leaving the statutorily protected means of product differentiation to overcome the dangers of customer confusion as to source. Moreover, even if the prevention of such confusion is to be given precedence over the benefits of competition, the courts should examine claims of customer confusion carefully, in view of the prevalence of psychologically oriented selling techniques, to discover whether in fact source plays a substantial part in the customers' decision to purchase.

The Right to Copy

The privilege of copying is the essence of a competitive economic system. If there were a legally enforceable policy against copying, the first person to produce and distribute, say, a nonpatentable simple plastic soap dish would have the right to exclude other producers from similar manufactures.[1]

The original manufacturer could then set a price just below the minimum price for which close substitutes could be sold profitably, with the assurance that consumers would pay his price or do without. Moreover, since the originator's right to exclude copiers would be perpetual, he could pursue a leisurely advertising campaign designed to make his soap dish desirable to those consumers who would otherwise do without.

On the other hand, under an economic policy designed to preclude exclusive appropriation of ideas for which a patent would be refused, the originator

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1 *Cf.* Hygienic Specialties Co. v. H. G. Salzman, Inc., 302 F.2d 614 (2d Cir. 1962).

of a nonpatentable configuration for a soap dish would not be in a position to charge a premium price for his product, unless, of course, he somehow managed to convince consumers that a soap dish manufactured, or distributed, or assembled, or packaged, or displayed by him was worth slightly more than competitors' identical soap dishes. In other words, the right to copy operates to protect consumers from possible exploitation by a single seller.

Fashion cycles provide a concrete illustration of the importance of copying in a competitive economy. Clothing fashion originators think of the fashion cycle as roughly a two-phase operation: the origination of designs for the *haute couture,* and the copying of these designs for sale in lower quality materials, at lower prices, to consumers in income brackets much below that for which the originator created the design. Copying is thus important to the fashion cycle in two ways: consumers at lower income levels emulate the styles favored by the ten-best-dressed list, and, to accommodate their desires, fashion designers — originators and pirates — copy designs proven successful in the Paris collections. Copying activity, whether straight pirating or "style adaptation," further creates the need for new fashions by which upper-class buyers can distinguish themselves anew. Thus copying stimulates demand in the general market, and at the same time creates new demands for change-embodying originals.[2]

A similar mechanism operates in all markets where the consumer's sense of fashion is significant. Sellers are forced by the nature of such an industry to be interdependent and, in a sense, unoriginal. Style trends in things like dresses, automobiles and even houses tend to follow a predictable pattern — a pattern of ordered change. Even where a style theme has been exhausted, the change is frequently a retrogression to style of former years. Fashion designers function chiefly as interpreters of change who evolve this year's design from last year's.[3] Fashion originators, themselves copyists in a very real sense, have a difficult case for a claim that their creations are entitled to judicial protection against appropriation.[4] The fashion industry illustrates the pervasiveness of copying, in its various forms, in industries where design is important, as well as the futility of attempts to restrict the role of copying in such industries. Design "originators," to the extent that they vary rather than create, typify competitive activity. Copying is found throughout the industrial design industry, and is normal conduct wherever producers seek to differentiate their production, for all methods of differentiation are subject to the formidable limit of what is currently acceptable style.

All industrial designers do constant "market observation" by roaming through stores to discover which colors, sizes, shapes, materials and finishes are

2 On the fashion cycle, see, *e.g.,* Robinson, *Fashion Theory and Product Design,* Harv. Bus. Rev., Nov. 1958, pp. 126-27; Hutchinson, *Design Piracy,* Harv. Bus. Rev., 1940, pp. 191, 194-95; and NYSTROM, ECONOMICS OF FASHION 29-37 (1928).

3 "No single style of design, no matter how brilliantly it is conceived, can claim any independent fashion significance at all, nor can it possess more than a fugitive lease on life." Robinson, *supra* note 2, at 127. See also LIPPINCOTT, DESIGN FOR BUSINESS 51 (1947).

4 The argument implicit in the following quote, occasionally advanced by opponents of the patent system, is not seriously advanced here: "In all art expressions, certain basic principles have applied, whether the result has been a Greek temple, a prefabricated gasoline station, or a ten-cent store orange squeezer!" LIPPINCOTT, *op. cit. supra* note 3, at 32.

attracting consumers.[5] As a result, design, packaging and configuration of goods tend to be similar for similar types of merchandise.[6] That there are only about 300 independent industrial designers in the United States, each of whom specializes to a degree, provides further reason why refrigerator designs, for example, conform to a central design theme regardless of the identity of the producer of the particular machine.[7]

The point is, that to copy is to compete. Under an economic policy of competition a right of copying exists which must prevail against all but superior policies. It follows that methods of product differentiation involving configuration of goods, product design or ornamentation, or packaging, can be copied by all who choose, unless a superior right such as a patent grant is thereby contravened. In short, the public interest in competition precludes giving to a producer a reward in the form of an exclusive right for his ingenuity in making his product attractive to purchasers.[8]

A right to copy is in fact generally recognized as an economic essential in a competitive economy, insofar as that proposition is implicit in the more negative view that producers cannot have exclusive rights in the tangible embodiments of nonpatentable and noncopyrightable ideas.[9] Businessmen, lawyers, and economists agree, for instance, that if one were to confer exclusive rights in a color to the first producer to appropriate it, one would soon exhaust the supply of available colors.[10] Although the right to copy is generally recognized,[11] the proposition is not unopposed, as a statement made by Judge Charles E. Clark illustrates:

> Hence the "record of wilful and cunningly contrived pirating" reduces itself to nothing more than the copying of the Amco machine. The majority repeatedly condemns this copying. But as they also concede, it is one of the most well-settled principles in the uncertain law of unfair competition that, absent palming off,

5 See Freedgood, *Odd Business, This Industrial Design,* Fortune, Feb. 1959, p. 201.

6 See Levitt, *M-R Snake Dance,* Harv. Bus. Rev., Nov. 1960, p. 76, 77, where the author notes that menthol cigarettes all come "wrapped in a turquoise froth of . . . majestic waterfalls."

7 See Dreyfuss, *The Industrial Designer and the Businessman,* Harv. Bus. Rev., Nov. 1950, pp. 77, 79. In the future, the tendency of many designers to go to the drawing board only after the psychologist has provided a blueprint may offer a further explanation why methods of product differentiation tend to be unoriginal. That a court might grant an exclusive user in the one most psychologically appropriate method of product differentiation for a given consumer market ought perhaps to concern jurists.

8 Jack Daniel Distillery, Inc. v. Hoffman Distilling Co., 190 F. Supp. 841, 846 (W.D. Ky. 1960), *aff'd,* 298 F.2d 606 (6th Cir. 1962). See Handler, *Unfair Competition,* 21 IOWA L. REV. 175, 189 (1936).

9 "It is basic to our consideration, therefore, that the socio-economic policy supported by the general law is the encouragement of competition by all fair means, and that encompasses the right to copy, very broadly interpreted, except where copying is lawfully prevented by a copyright or patent." Application of Deister Concentrator Co., 289 F.2d 496, 501 (C.C.P.A. 1961). See Jack Daniel Distillery, Inc. v. Hoffman Distilling Co., *supra* note 12.

10 *Cf.* Norwich Pharmacal Co. v. Sterling Drug, Inc., 271 F.2d 569 (2d Cir.), *cert. denied,* 362 U.S. 919 (1959).

11 "Sharing in the goodwill of an article unprotected by patent or trademark is the exercise of a right possessed by all — and in the free exercise of which the consuming public is deeply interested." Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 122 (1938) (Brandeis, J.). "For the common law favors competition; and it is of the essence of competition that competitors copy and undersell the product of the originator." Chas. D. Briddell, Inc. v. Alglobe Trading Corp., 194 F.2d 416, 418 (2d Cir. 1952) (Frank, J.). "In the absence of a patent the freedom of manufacture cannot be cut down under the name of preventing unfair competition." Flagg Mfg. Co. v. Holway, 178 Mass. 83, 59 N.E. 667 (1901) (Holmes, J.).

> secondary meaning, and deceit, competitors are wholly privileged to copy another's product.[12]

Further, despite the general agreement supporting the right to copy, there is general disagreement concerning the existence and applicability of exceptions to the rule. Even so, when a court enjoins a copyist on the ground that his conduct falls within one of the exceptions to the rule, it generally condemns or enjoins the prospect of consumer confusion in the market place, rather than the naked act of copying.

Thus, with the exception of items subject to patent, trademark or copyright protection, a producer is generally assumed to have the right to copy any feature of goods already in production so long as his conduct does not result in confusion of consumers in the market.[13] Where competition is the economic regulator, public policy supports a general freedom of activity which includes a right to copy features of goods already in production, and copying becomes necessary and normal conduct.[14]

Arguments for Protection — Based on the Benefits of Product Differentiation

The thrust of the preceding section has been toward establishing the proposition that in a competitive system there exists no economic basis for a court to protect users of methods of product differentiation, such as unpatentable and uncopyrightable product and package designs and configurations, against the copying activities of competitors. Underlying this analysis is the belief that product differentiation is a means of vesting control of the terms of sale in the seller, and as such is not entitled to legal protection except under express legislation. Most businessmen would argue, however, that methods of product differentiation are entitled to legal protection on the ground that product differentiation is essential to competition.[15] The gist of their argument is that there can be no competition among sellers unless purchasers can distinguish among competing goods,[16] and differentiation being the feature which makes choice possible, differentiation is vital to competition.[17]

One of the difficulties with this position is that consumers do not require that a product be elaborately differentiated in design or configuration before

12 American Safety Table Co. v. Schreiber, 269 F.2d 255, 281 (2d Cir. 1959) (dissenting opinion).

13 "Absent confusion, imitation of certain successful features in another's product is not unlawful and to that extent a 'free ride' is permitted." Norwich Pharmacal Co. v. Sterling Drug, Inc., 271 F.2d 569, 572 (2d Cir. 1959). See also Blisscraft of Hollywood v. United Plastics Co., 294 F.2d 694 (2d Cir. 1961), and Barton Candy Corp. v. Tell Chocolate Novelties Corp., 178 F. Supp. 577 (E.D.N.Y. 1959). *But see* Haeger Potteries, Inc. v. Gilner Potteries, 123 F. Supp. 261, 270-71 (S.D.Cal. 1954).

14 There exist many types of goods and features of goods which are recognized by producers not to contain protectable elements. For example, the men who first introduced such products as glass-lined water heaters, radio-television combinations and gas refrigerators did so with full knowledge that competitors would copy such features rapidly, once consumer acceptance appeared likely. See Steward, *Functional Features in Product Strategy,* Harv. Bus. Rev., Mar. 1959, pp. 73-75.

15 See Dean, *Competition — Inside and Out,* Harv. Bus. Rev., Nov.-Dec. 1954, pp. 63, 66.

16 See Rogers, *The Lanham Act and the Social Function of Trade-marks,* 14 LAW & CONTEMP. PROB. 173, 182 (1949); Rogers, *Protection of Industrial Property,* 27 MICH. L. REV. 491, 493 (1929).

17 Pattishall, *Trade-Marks and the Monopoly Phobia,* 50 MICH. L. REV. 967, 969-70 (1952).

it can be associated with a source, even though virtually every visible feature of a product or its package is a potential focus of source association. Although packages and product designs and configurations can and do serve as vehicles of source association, it goes too far to reason that such methods of differentiation merit legal protection because of this identification function. Accepting the thesis that source identification is beneficial in a competitive economy does not compel the extension of protection to any package or product design or configuration which cannot qualify for protection under patent, trademark or copyright legislation, or under the common law of trademarks.[18] An unadvertised production mark unobtrusively attached to the product or package is sufficient to enable consumers to identify the source of merchandise so that the past performance of particular producers can be rewarded or penalized by a present purchase decision. In a competitive economy, extension of judicial protection to other means by which consumers might identify source is forbidden by the fundamental decision to rely on the competitive mechanism as the market regulator.

Proponents of the protectability of methods of product differentiation might argue merely that product differentiation is typical in most markets and yet there is nevertheless competition between sellers.[19] The argument might continue that the control of price associated with successful product differentiation is illusory because of the presence of numbers of rivals, also with differentiated products, ready to add to their share of the market if any seller overestimates the loyalty of his customers.[20] The position of proponents of protectability may be that judicial grants of exclusive rights in certain types of otherwise unprotectable methods of differentiation would not upset the competitive regulator since product differentiation is merely a garden variety of imperfect competition and imperfect competition is nevertheless competition.[21] But, as has been pointed out, one can accept the propositions that source identification is beneficial to consumers and that there is in fact competition among sellers of differentiated goods, without advancing the cause of protection for methods of product differentiation, particularly with respect to methods like product and package design and configuration.

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18 That trademarks serve a useful purpose in a competitive economy to the extent that they identify production with its source is acceptable on the merits. See, *e.g.*, Timberg, *Trade-marks, Monopoly, and the Restraint of Competition,* 14 LAW & CONTEMP. PROB. 323, 360 (1949); Brown, *Advertising and the Public Interest: Legal Protection of Trade Symbols,* 57 Yale L. J. 1165, 1185 (1948). But the benefits conferred on competition by trademark protection can thus be taken as "given" and used as a base for arguing that judicial protection need not be extended to non-trademark features, since the result is a restriction on competition without any benefit not already conferred under patent, trademark or copyright law.

19 Thus a tailor's skilled needle or a baker's pleasant disposition or a restaurateur's comely waitresses differentiate their several products and services, and people are willing to pay a slight premium to enjoy products and services so differentiated. Only the abstract theoretician would designate such differential advantages anticompetitive.

20 See Oppenheim, *The Public Interest in Legal Protection of Industrial and Intellectual Property,* 40 TRADEMARK REP. 613, 624 (1950).

21 "Indeed for most Americans free competition, so called, has for long been a political rather than an economic concept." GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER 27 (1952). "For competition, with us, is more than a technical concept. It is also a symbol of all that is good. Even though we mightn't survive under a regime of competition of classical purity we still must worship at its throne." Galbraith, *op. cit. supra,* at 99.

Another argument for protectability is that methods of differentiation fix responsibility for workmanship and induce pride in workmanship. A synopsis of a Soviet Russian experience illustrates the point.[22] The Russian problem concerned the marketing of inferior quality production by plants striving to meet cost reduction goals. Since goods were unmarked as to source, the plant managers were able to place inferior goods on the market with impunity. The Soviets decided to let consumers police quality since an administrative quality control program would have involved prohibitive costs. Two marks were introduced: a simple production mark to enable consumers to identify the source of poor workmanship, and a more elaborate "trademark" by which a plant could call attention to its good work. Soviet managers and workers were thus discouraged from turning out shoddy production since they were no longer protected by complete product homogeneity in the market place. Moreover, they were given a positive incentive to produce superior goods because the marks enabled consumers to recognize or differentiate goods of a particular source.

The introduction of marks contributed to a measurable increase in the quality of goods offered in Soviet markets, and it is claimed that giving producers exclusive rights in nonmark differentiating devices will provide corresponding beneficial results in a competitive economy.[23] Sellers, it is claimed, would have a significant incentive to increase quality or introduce new products if they are assured of legal rights to exclude those who would copy the devices by which such products are differentiated. It is claimed that this incentive, which can be translated into market power in the future, would spur competition in the present, and that the general welfare gains from increased competition would outweigh any losses flowing from grants of protection which lead to market power. This would be so because differentiated goods must still compete with other differentiated goods for consumer favor, thus insuring that market power positions, if attained, are transitory at best.

But this thesis is assailable at many points, including its basic premise. It is not necessarily true, for instance, that producers selling unmarked merchandise have no incentive to produce merchantable goods. Even in markets where the product is completely homogeneous, such as grain, the seller must somehow get his goods into the market stockpile before he can become an anonymous source unconcerned about the quality of his wares. In addition, even conceding that the consumer benefits significantly from a marketing system which enables workmanship to be traced to the source, the argument that a simple trademark or production mark is sufficient applies here, as elsewhere, to negate the necessity of grants of protection to other methods by which consumers might also identify source. Further, it does not follow that because a producer desires protection from competitive simulation only for a relatively

22 The experience is recounted in Goldman, *Product Differentiation and Advertising: Some Lessons From Soviet Experience,* 68 J. POL. ECON. 346, 348-53 (1960).

23 Note that it seems a firm big enough to engage in a costly product differentiation program of the type for which protection is usually sought is likely to operate on such a specialized scale that individual pride in workmanship is an organization-induced impossibility. See RUSSELL, AUTHORITY AND THE INDIVIDUAL 50 (1949).

short time he is therefore eligible for it.[24] Finally, an approach justifying judicial protection for methods of product differentiation on the assumption that any resulting lessening of competition is slight encounters a fundamental objection. As a matter of policy a court cannot undertake a cure of competitive evils by granting exclusive rights in otherwise unprotectable methods of product differentiation when the basic postulate underlying our economic system is that competition is worth more than it costs.

Although the necessity of source identification in a competitive economy, for the reasons mentioned, is the core of *any* protection argument, additional arguments can be and are advanced in favor of legal protection for methods of product differentiation. Thus product differentiation is often characterized as labor saving, and occasionally regarded as competition facilitating. Differentiated products, it is said, can be sold at self-service outlets at lower prices due to lowered sales staff requirements.[25] Although the distribution revolution involving the rise of self-service places a heavy sales burden upon design, configuration and packaging so that the "silent salesman" function of merchandising has become the subject of occupational specialization,[26] one can only speculate whether, in a given case, the cost of differentiating the product is more or less than the laborsaving self-service feature. Besides, there is the usual difficulty in accepting the conclusion that because some differentiation is beneficial, the benefit conferred increases as the legal limit of protectability for methods of differentiation is expanded.

Another and more ingenious argument in support of protection for methods of product differentiation attacks the premise that product standardization leads to a higher degree of competition while product differentiation leads to a lesser degree of competition. The hypothesis advanced is that product differentiation facilitates more competition than it suppresses because, unlike product standardization, it militates against price agreements and resale price maintenance.[27] This argument can perhaps be advanced effectively to a court which evaluates theory or policy in the light of a specific industry or market. It is difficult to support generally, and those who advance the argument admit that it applies only to specific situations, if at all, and not generally.[28]

In any event, the position that otherwise unprotectable package and product designs and configurations merit judicial protection for the reasons enumerated fails. It fails because it is not clear that effective competition depends solely upon whether producers have rights in methods of product differentiation, and it fails because the benefits of differentiation can be conferred by devices such as trademarks and trade names so that any possible justification for protecting things like product and package designs and configurations is eliminated. That a manufacturer should be given an exclusive right in a trademark because of the benefits inherent in source identification is acceptable; that for the same reasons he should be given an exclusive right to sell whiskey in square bottles

24 See Raenore Novelties, Inc. v. Superb Stitching Co., 47 N.Y.S.2d 831 (Sup. Ct. 1944).
25 See Goldman, *supra* note 22, at 352-55.
26 See Freedgood, *Odd Business, This Industrial Design,* Fortune, Feb. 1959, pp. 130, 201; *Designers: Men Who Sell Change,* Business Week, April 12, 1958, pp. 110, 112.
27 See MACHLUP, THE ECONOMICS OF SELLERS' COMPETITION 164-65 (1952).
28 *Ibid.*

or cellophane tape in sleigh carriers or horseshoe nails cast in bronze carries the argument beyond reason.

Arguments for Protection — Based on the Originator's Position

That methods of product differentiation are entitled to judicial protection other than through the patent, trademark or copyright mechanism appears impossible to justify in abstract argument against an assumed overriding policy in favor of competition. The problem is not presented to courts in this form, however. It is presented within the context of a specific adversary proceeding, and the party seeking judicial aid against a copier often presents a powerful comparative appeal. Compared with defendant, who generally wishes to use a method of product differentiation developed by plaintiff, plaintiff presents an obvious equitable appeal, either on the ground that his expenditures in time and money should entitle him to protection against one who risked nothing, or that the copyist who risked nothing is such a parasite that the court ought to set aside its policy favoring competition in the particular instance in order to put a stop to defendant's activities.

Plaintiffs succeed in inducing courts to grant legal protection to particular methods of product differentiation with some degree of regularity. Generally plaintiff's plea is either that defendant's conduct or plaintiff's investment requires equity to act despite the existence of contrary policy, or that defendant's conduct, as in design piracy situations, is not really competitive and not, therefore, favored by policy in the first place.[29]

Most businessmen take the position that a producer's "good will and business and the things which he has created in which they are embodied should be secured to him against unfair . . . appropriation by others in any way that will diminish their value to their original creator."[30] This covers much. It states that an investment in reputation amounts to a property interest, or to a protectable interest in the nature of goodwill,[31] or at least to a legally recognizable immunity from competition. A businessman who has conditioned customers to respond to a particular sales device has something worth dollars and cents, and because it can generate profits he feels that it ought not be subject to the indiscriminate plundering of casual copiers. It ought to be given the same legal protection as is given intangible property interests in goodwill and trademarks.[32]

The argument is unsound, however, because it premises legal protection on the economic value of a sales device, when in fact the economic value of the sales device depends upon its legal protectability. This argument obscures

29 For the latter argument, see, *e.g.*, GOTSHAL, TODAY'S FIGHT FOR DESIGN PROTECTION (1957), and GOTSHAL & LIEF, THE PIRATES WILL GET YOU (1945).

30 Rogers, *The Ingenuity of the Infringer and the Courts,* 11 MICH. L. REV. 358, 373 (1913).

31 See Timberg, *supra* note 18, at 328.

32 See treatment of this argument in Cohen, *Transcendental Nonsense and the Functional Approach,* 35 COLUM. L. REV. 809, 814-15 (1935). A typical argument is that the right protected in unfair competition cases is the goodwill of the business symbolized by the design or configuration involved. Enjoining defendant is said not to foster a monopoly in plaintiff because defendant's acts are against public policy. Besides, the argument continues, since goodwill is property anyway, the court need go no further. See Lum & Biunno, *Unfair Competition — A Reconsideration of Basic Concepts,* 2 U. NEWARK L. REV. 1 (1937).

the basic policy issue,[33] and in recent years courts have tended not to accept the property analogy, at least not as a screen for avoiding the policy issue. Each rejection adds another voice to the lobby for legislative recognition of a property interest in package and product designs.[34]

The appeal for protection in a given case can be buttressed by an assertion that recognizing a protectable interest in a method of product differentiation need not confer a permanent right because the useful life of the design or device is short: its value rests in novelty,[35] or the competitive nature of the industry demands constant progress.[36] A court might be convinced that there is no major harm in giving plaintiff an exclusive use in something which will have value for a year or less, but this approach is a trap. If accepted, it would permit enterprising producers to maintain exclusive rights over whatever method of differentiation was currently valuable, and would extinguish the right only when it became valueless. This is as effective an immunity from competition as it is possible to grant.[37]

Often when a producer succeeds in inducing a court to grant exclusive rights in unpatentable, uncopyrightable methods of product differentiation, it is because the successful producer focused the court's attention on the defendant's conduct. The attack in such cases is generally against copying. Copying could not have an innocent motivation, it has been said,[38] and a defendant who chooses a method of differentiation similar to plaintiff's when he has the world from which to choose contravenes free enterprise, equity rights, business morality and the laws of God and man.[39] Courts are more easily persuaded to grant protection where "nonfunctional" methods of differentiation like package design are involved. Sometimes this is done on the theory that a grant of protection in a nonfunctional feature does not have the same anticompetitive effect as where a functional method of differentiation is protected,[40] sometimes on the theory that the copying of nonfunctional features is prima facie without legal justification.[41]

33 See Frank, J., dissenting in LaTouraine Coffee Co. v. Lorraine Coffee Co., 157 F.2d 115, 125 n. 26 (2d Cir. 1946).

34 Design literature in particular is filled with articles decrying the unavailability of copyright or design patent protection for particular designs because protection is either not offered or is valueless if offered because too costly, too time consuming or too susceptible to judicial evisceration. See, *e.g.*, Nikonow, *Patent Protection for New Designs for Dresses,* 17 J. PAT. OFF. SOC'Y 253, 254 (1955); Walter, *A Ten-Year Survey of Design Patent Litigation,* 35 J. PAT. OFF. SOC'Y 389, 404-05 (1953). Usually the argument made is an appeal to equality. The time, effort and money spent on perfecting design, packaging and configuration of goods is said to exceed that spent on patentable inventions in many cases. Therefore, the argument goes, methods of product differentiation merit statutory protection similar to that given inventions.

35 *Cf.* Blunt, *Fighting the Design Pirate,* 15 J. PAT. OFF. SOC'Y 29, 35 (1933).

36 *Cf.* Barnet, *Showdown in the Market Place,* Harv. Bus. Rev., July-Aug. 1956, pp. 85, 87.

37 "If plaintiff is entitled to relief at all, it should have it on the basis of its right to that relief and not because it may not require it for long." Raenore Novelties, Inc. v. Superb Stitching Co., 47 N.Y.S.2d 831, 833-34 (Sup. Ct. 1944).

38 Mitchell, *Unfair Competition,* 10 HARV. L. REV. 275, 283 (1896).

39 See Lunsford, *The Unwary Purchaser in Unfair Trade Cases,* 1 MERCER L. REV. 48, 67 (1949).

40 Tas-T-Nut Co. v. Variety Nut & Date Co., 245 F.2d 3 (6th Cir. 1957). See Stern, *Buyer Indifference and Secondary Meaning in Unfair Competition and Trademark Cases,* 32 CONN. B. J. 381, 396-97 (1958).

41 Haeger Potteries, Inc. v. Gilner Potteries, 123 F. Supp. 261, 271 (S.D. Cal. 1954). *But see* Esquire, Inc. v. Esquire Slipper Mfg. Co., 243 F.2d 540, 545 (1st Cir. 1957), a trade-

In either case, the specific picture painted for the court contrasts one who invested time, money and effort against the future when the results could be translated into dollars, with one who put forth no effort other than sharing the fruits of plaintiff's endeavor by using plaintiff's method of product differentiation. The theme advanced is that copying is freeloading, and that as a matter of substance, doubts should be resolved against those who seek to use a method made meaningful by another.[42]

It is not difficult to counter the position that the extension of judicial protection to nonfunctional methods of differentiation is harmless in terms of the competitive process. Competitive forces and monopolistic forces operate in every market where there is product differentiation, for product differentiation is, by definition, a monopolistic force. Since product differentiation is inherent in the retail process, what the consumer receives in each retail market, measured by utility or welfare, or price, is determined by a balancing of monopolistic and competitive forces.[43] The balance may well be one of equals, for product differentiation in terms of seller services, store location, conditions of sale, and patent, copyright and trademark rights, is pervasive.

Because of competition, however, the monopoly effects of product differentiation in a given market may be so slight that even perfect control over supply may give a seller but slight or negligible control over price, as a result of the consumer's willingness to substitute. But the balance may be delicate, and courts must be wary of altering it. A grant of judicial protection to a method of differentiation as ostensibly insignificant and nonfunctional as a configuration or package design may give the seller a control over price he could have obtained in no other way, even by the most careful attention to the development of the natural and statutory methods of differentiation available to him.

In a given case it may be impossible to place two producing units in a posture of undifferentiated competition because the managerial factor, for one example, cannot be divided below one man, "and this indivisible factor may be sufficient to account for the technological, personal or locational differentiations of the products."[44] Turning a package or product design or configuration into an indivisible factor may likewise radically alter the basis of competition in a given market. As a result, consumer loyalty may develop to the

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mark case involving the same problem, where the court said:

> Although undoubtedly the defendant knew of the plaintiff's use of the word "Esquire" as the name for its magazine when it adopted the same name for use in its corporate title and in connection with its product, it is not a foregone conclusion that it did so with the bold intent of confusing the consuming public by identifying its product with the plaintiff.

And in Crescent Tool Co. v. Kilborn & Bishop Co., 247 Fed. 299, 300 (1917), Judge Learned Hand stated: "The defendant has as much right to copy the 'nonfunctional' features of the article as any others, so long as they have not become associated with the plaintiff as manufacturer or source."

42 "The form, dress and coloring of the packages and the manner in which they are presented to the consuming public are the unfailing, most significant talismans of fair or unfair dealing. The pirate flies the flag of the one he would loot. The free and honorable non-pirate flies the colors of his own distinctive ensign." Quaker Oats Co. v. General Mills, Inc., 134 F.2d 429, 432 (7th Cir. 1943). See G.H. Mumm Champagne v. Eastern Wine Corp., 142 F.2d 499 (2d Cir. 1944); Lunsford, *Ascertaining the Facts in Unfair Trade Cases,* 40 TRADEMARK REP. 753, 757 (1950); and Lum & Biunno, *supra* note 32, at 13.

43 See CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION 64 (7th ed. 1956).

44 MACHLUP, *op. cit. supra* note 27, at 152.

point where price shading does not produce shifts in patronage, with the result that price competition is foregone. Grants by courts of exclusive rights in otherwise unprotectable methods of product differentiation can never be categorized as neutral. The effect of such a grant may be of unmeasurable magnitude, but the direction of the effect will invariably be anticompetitive. Chamberlin's analogy of a twin-screw ship illustrates the point. The path of price fluctuations through time, indicated Chamberlin, is like the path of a twin-screw ship through the sea. The twin screws of pure monopoly and pure competition propel the ship of price, with actual price lying somewhere between the extremes of monopoly price and purely competitive price. Since the turning of both screws determines the direction and position of price in time and space, any action which alters, however slightly, the operation of either of the screws will alter actual price determinations.[45] Where the method of differentiation is psychologically effective, as discussed in the following section, a judicial grant of an exclusive user is likely to have more than a slight effect on competition.

In addition to de-emphasizing the economic significance of judicial interference in cases of "nonfunctional" copying, proponents of protection further claim that, in certain circumstances, permitting copying of methods of differentation endangers the continued operation of the competitive process. The proposition has theoretical merit, but it is perhaps difficult to find instances where the model occurs in the real world. The dress design industry is said to provide such a situation. There the undesirable aspects of design pirating are thought to entitle design originators to a limited legal right in their creations, at least vis-à-vis predatory pirates. Legitimate design originators incur the expense of introducing many designs each fashion season, knowing that perhaps a handful will actually catch the fancy of the buying public. Design pirates, in contrast, incur no such costs, copy the successful designs of originators, reproduce them in low-grade material, and ruin the market for the originators. In extreme cases, design pirates reap all the profits of the "hits," and design originators absorb the expense of originating, producing and not selling the "misses."[46]

This sort of systematic copying is condemned by design originators on the ground that it is not competitive. The argument is simple: Design originators cannot continue in business against pirates who steal designs and originate nothing. If originators are driven out of business, the economy will lose the design originating industry, for pirates, being parasitic, cannot replace them.[47] The thesis is that systematic copying is not competition, and therefore a policy favoring competition need not restrict a court in dealing with a claim to protection by an owner of a method of differentiation as against a systematic copier. In each case the factual question of whether defendant's conduct amounts to

45 See CHAMBERLIN, *op. cit. supra* note 43, at 64.

46 See, *e.g.*, Weikart, *Design Piracy*, 19 IND. L.J. 235 (1944); Wolff, *Is Design Piracy Unfair Competition?*, 23 J. PAT. OFF. SOC'Y 431, 433 (1941); and Callmann, *Style and Design Piracy*, 22 J. PAT. OFF. SOC'Y 557, 583-84 (1940). Frequently this situation is said to amount to a misappropriation by the pirate of the originator's entire business mechanism, the sort of misappropriation for which the *Associated Press* doctrine could be invoked (International News Service v. Associated Press, 248 U.S. 215 (1918)). See Rahl, *The Right to "Appropriate" Trade Values*, 23 OHIO ST. L.J. 56, 62-67 (1962).

47 See Callmann, *He Who Reaps Where He Has Not Sown: Unjust Enrichment In the Law of Unfair Competition*, 55 HARV. L. REV. 595, 599 (1942).

competition will be decisive.

Because the incidence of wholly parasitic pirating may be slight in the real world, design originators, in asserting claims for protection, concern themselves more with the alleged immorality of the copying conduct involved than with its competitive quality. Businessmen are convinced that design originators would be entitled to relief against design pirates if good faith in the conduct of American business was treated by the courts as being as important as the preservation of competition.[48] A policy of commercial morality and the policy of competition should not be regarded as conflicting, according to design originators, because conduct against commercial morality is per se antithetical to competition.[49] Businessmen in the dress design industry, for example, assert that courts of equity have a duty to enforce ethical trade practices,[50] to impose upon the business community principles of ordinary business morality,[51] and to develop rules of fair play based on the premise that "the law and the judge's sense of fairness should go hand in hand."[52]

The strong feeling for raising business morality (and lowering, incidentally, the incidence of competition) is typified by the first clause of a proposed Uniform Unfair Competition Act, which reads:

> Section 1. Unfair competition shall be considered as every act or deed contrary to commercial good faith or to the normal and honorable development of industrial or business activities, and is hereby declared to be unlawful and shall be actionable at the suit of any person whose business is damaged or likely to be damaged thereby.[53]

While this appeal appears somewhat insincere, some advocates have a genuine conviction that equity is properly concerned with commercial morality in cases where standards can be raised without compromising policy.[54] By and large, however, this approach ignores the favored position of the copyist in a competitive economy, lacks certainty,[55] and disregards the protection inherent in the long established legal proscription against selling one's goods as another's.[56]

Psychologically Oriented Product Differentiation

The analysis thus far illustrates that in theory the copyist and the free rider

48 See Haeger Potteries, Inc. v. Gilner Potteries, 123 F. Supp. 261, 270-71 (S.D.Cal. 1954), where the court said, "Our moral standards are well sustained and the public interest in free competition is advanced where a court of equity forbids the immoral act of misappropriation by exact copying of the goods or services of another."

49 See Wolff, *Is Design Piracy Unfair Competition?*, 23 J. PAT. OFF. SOC'Y 431, 433 (1941).

50 Misegrades, *The Scope of the Law of Unfair Competition*, 14 J. PAT. OFF. SOC'Y 763 (1922).

51 *Cf.* Haines, *Efforts to Define Unfair Competition*, 29 YALE L.J. 1, 19, 21 (1919).

52 Derenberg, *Copyright No Man's Land: Fringe Rights in Literary and Artistic Property*, 35 J. PAT. OFF. SOC'Y 770, 783 (1953). See Oneida, Ltd. v. National Silver Co., 25 N.Y.S.2d 271, 276 (Sup. Ct. 1940).

53 Lunsford, *Unfair Competition: Uniform State Act Needed*, 44 VA. L. REV. 583, 600 (1958).

54 *E.g.*, Yankwich, *Unfair Competition As An Aid to Equity in Patent, Copyright and Trademark Cases*, 32 NOTRE DAME LAWYER 438 (1957).

55 "[T]he moral scruples of the trial justice in equity are hardly the criteria by which competitive trade conduct may be tested. The authorities point to more stable standards and more certain guides." Raenore Novelties, Inc., v. Superb Stitching Co., 47 N.Y.S.2d 831, 832 (Sup. Ct. 1944).

56 See Dean v. Steel, Latch 188, 82 Eng. Rep. 339 (K.B. 1625); Southern v. How, Popham 143, 144, 79 Eng. Rep. 1243, 1244 (K.B. 1617).

occupy favored positions in a competitive economy. In reality the business community disagrees with theory, at least as applied to the simulation by others of methods of differentiation such as product and package designs and configurations. In countering the arguments generally advanced in support of protection against copyists in product differentiation matters, heavy reliance has been placed on the fundamental postulate that copying is the essence, and a right to exclude the antithesis, of competition. What follows advances other, less traditional grounds for denying judicial protection to such methods of differentiation — grounds relating the state of mind of the actual transacting consumer to the assumed state of mind of the unwary purchaser whose source associations evoke judicial restraints on competitive activities which disturb them.

In some cases where consumers appear to respond to methods of product differentiations, such as package or product design or configuration, as symbols of origin, courts have protected the originators of such methods of differentiation against copying competitors, on the ground that copying which is likely to confuse consumers about source is unlawful as unfair competition.[57] In so holding, a court may be protecting consumer responses to methods of differentiation which are elicited as a result of an experiment in applied psychology conducted by the seller, his motivation researcher, and his product and package designer.[58] Consumers are design-conscious as never before, and the appearance of a product is an important factor in a consumer's decision to purchase it. Aesthetic methods of differentiation have a sales value, for they can instill in the consumer the desire of ownership,[59] or give him an emotional "feeling" about a product which provides a strong selling point where no specific product advantage exists.[60]

Liquid cleaners, menthol cigarettes and compact cars provide vivid, real-world examples of psychology in marketing. The successful launching of Lestoil liquid cleaner brought immediate competition from Lever Brothers' Handy Andy, Procter & Gamble's Mr. Clean and Colgate's Genie. All four brands are said to entice purchases through package designs and configurations which radiate "extreme masculine symbolism combining powerful phallic overtones and magical connotations."[61] Cigarette sellers likewise appear to be in accord on the best package design for selling menthol cigarettes. All menthol cigarettes come wrapped in a blue-green package because each manufacturer apparently is convinced that green indicates to cigarette smokers freshness, coolness, youthful idealism and other "tranquilizing" images. Compact cars provide a third example of psychological selling in that each is similarly advertised and each features a short name with known connotations of "vitality, youthfulness, strength, flight, and romantic valor."[62]

57 *E.g.,* Tas-T-Nut Co. v. Variety Nut & Date Co., 245 F.2d 3 (6th Cir. 1957); Haeger Potteries, Inc. v. Gilner Potteries, 123 F. Supp. 261 (S.D. Cal. 1954).

58 "The attempt to inculcate buying habits has been the area of the first and most persistent efforts to apply psychology in marketing." Alderson, *Psychology for Marketing and Economics,* 17 J. MKTG. 119, 123 (1952). See *Designers: Men Who Sell Change,* Business Week, April 12, 1958, pp. 110, 112.

59 LIPPINCOTT, DESIGN FOR BUSINESS 17 (1952).

60 See Tyler, *The Image, The Brand, and the Consumer,* 22 J. MKTG. 162, 163 (1957).

61 Levitt, *M-R Snake Dance,* Harv. Bus. Rev., Nov. 1960, pp. 76-77.

62 *Id.* at 77-78.

These methods of differentiation attract consumers, and the appeals involved are apparently psychologically unique, at least in the minds of the rival sellers who solved their marketing problems with a uniform psychological approach. The inference is, then, that consumer response to a particular method of product differentiation can be purchased by careful attention to producer and product images, and by persistent spending for advertising layout,[63] just as easily as it can be acquired as a result of careful attention to quality in production or service. The man in charge of injecting life into the sales picture of an ailing company through an industrial design program frequently illustrates this point in that he often begins by revamping the company "image." Such a face lifting may involve a new trademark, new company colors, and new stationery, packaging, wrappers, signs and logotype.[64] In short, all company insignia will be redesigned to give the company an image which the producer intends to sell. Often the company image and the product image will be a continuation one of the other, and if successful, will produce an upturn in the sales curve.

There are three kinds of images said to be likely to aid a company bent on product differentiation, and they can be labeled subjective, objective and literal.[65] The subjective image aims at giving the consumer a feeling that the product is his kind of product. Producers who rely upon creating a subjective image, like the image presently associated with Marlboro cigarettes, usually intend to appeal to a particular type of consumer. Objective images, on the other hand, like those presently associated with Hamm's Beer, focus on the product itself as being intrinsically desirable. A producer using a literal image generally relies upon generating an automatic consumer thought process through a symbol, such as the Cadillac V or the G.E. circle.

Product image is described as embracing the whole set of attitudes which people hold toward the product.[66] Many companies rely on designs, configurations and symbols in the hope that such methods of differentiation will draw the attention of the purchasing public to the product *in themselves, without reference to a trade name.*[67] In striving to endow a product with a favorable image, effort is directed toward developing a method of differentiation which becomes associated with the brand and which symbolizes attributes generally

63 Moreover, a *protectable* consumer response can be acquired by persistent spending for advertising layout. See, *e.g.*, W. G. Reardon Labs., Inc. v. B. & B. Exterminators, 3 F. Supp. 467, 476 (D. Md. 1933), *decree modified,* 71 F.2d 515 (4th Cir. 1934), where the court, in a trademark context, said, "The plaintiff has doubtless made some public impression by its national advertising in the association of 'Mouse Seed' with its product, and one who has heretofore or hereafter first purchased the plaintiff's product under this name ought to be protected so far as possible from an unintentional purchase of a competing product by reason of a superficial similarity." Many judicial opinions, involving among others such products as Wrigley's gum, Paper Mate pens and Coronation pattern silverware, indicate that the courts in question were aware of and impressed by the expense and effort tied up by plaintiff in the method of differentiation sought to be protected. See Frawley Corp. v. Penmaster Co., 131 F. Supp. 28 (N.D. Ill. 1954); Wm. Wrigley, Jr., Co. v. Colker, 245 Fed. 907 (E.D. Ky. 1914); and Oneida, Ltd. v. National Silver Co., 25 N.Y.S.2d 271 (Sup. Ct. 1940).

64 See Freedgood, *supra* note 26, at 130.

65 Tyler, *supra* note 60, at 164.

66 Martineau, *A Case Study: What Automobiles Mean To Americans,* in MOTIVATION AND MARKET BEHAVIOR 36, 45 (Ferber & Wales ed. 1958).

67 Henry, *The Meaning of Gasoline Symbols,* in MOTIVATION AND MARKET BEHAVIOR 206 (Ferber & Wales ed. 1958).

thought desirable in the product involved. The patriotism theme involved in the red, white and blue of the Standard (American) gasoline symbol is one example of this sort of differentiation.[68] The power and speed connotations said to be associated by consumers with the Mobilgas symbol similarly influence Mobilgas sales.[69] Where the differentiation program succeeds, we are told that the buying process becomes an interaction between the personality of the individual and the so-called personality of the product itself:[70] the consumer appears to select the differentiated symbol and not the product.[71]

Often a company's success is credited to selling otherwise ordinary merchandise in a package or under a label which creates a positive consumer reaction for reasons unknown to the consumer.[72] Predictably, such successful differentiation fosters consumer loyalty, and the loyal consumer is a firm's most prized

68 "[T]he high positive definition of the Standard symbol is a blend of friendly, stable, dependable, helpful concepts." *Id.* at 220.

69 *Id.* at 215.

70 Martineau, *supra* note 66, at 44-45.

71 A caveat is warranted here. Most marketing research concerns the search for symbols that sell. Moreover, many marketing researchers believe that images do sell — that selection by a consumer of a product with a clear image aids the buyer in satisfying deep psychological needs. There is little empirical evidence, however, that unconscious motivations are important in product choices, or that a product has the same image for a significant group of consumers. See Evans, *The Brand Image Myth,* Bus. Horizons, Fall 1961, pp. 19-20. In addition, there are theoretical differences underlying marketing research. The two principal schools of motivational theory are derived from Gestalt psychology and psychoanalysis. The Gestaltist psychology of motivation is primarily concerned with the rational use of the resources of the environment to attain conscious ends, while the psychoanalytic approach to motivation tends to emphasize that behavior is primarily determined by instinctive drives motivating the actor toward unconscious goals. Alderson, *Advertising Strategy and Theories of Motivation,* in MOTIVATION AND MARKET BEHAVIOR 11, 13-14 (Ferber & Wales ed. 1958). The former, emphasizing rational behavior, sees the consumer as regarding the product as an instrument for obtaining a known end, while the latter views the consumer as more occupied with the symbolic aspect of goods and more likely to utilize goods to vent suppressed desires. Alderson, *supra,* at 15-21. Thus unconscious goal striving may not be a crucial factor in purchase decisions, and even if it is important, the inference exists that responses on the subconscious level may be so particular that it may be impossible to find a symbol which evokes similar responses from large numbers of purchasers. See Cannell, *A Psychologist's View,* in MOTIVATION AND MARKET BEHAVIOR 4 Ferber & Wales ed. 1958). *Compare* Dichter, *Toward An Understanding of Human Behavior,* in MOTIVATION AND MARKET BEHAVIOR 21 (Ferber & Wales ed. 1959), *and* Westfall, *Psychological Factors in Predicting Product Choice,* 26 J. MKTG. 34 (1962), *with* Evans *supra, and* Tucker & Painter, *Personality and Product Use,* 45 J. APPLIED PSYCH. 325 (1961).

Under either approach to motivation research, marketing theorists naturally concede that in given purchasing situations rational approaches to purchase decisions may offset any symbolism which might otherwise exert influence on an irrational level. Thus the belief that significant sexual connotations are associated with round, glass bottles may be unimportant in view of the fact that square cartons fit more easily into a refrigerator. See Scriven, *Rationality and Irrationality in Motivation Research,* in MOTIVATION AND MARKET BEHAVIOR 64, 68 (Ferber & Wales ed. 1958). The substance of this caveat, then, is that the science of consumer motivation is at best inexact. See, *e.g.,* Blum & Appel, *Consumer Versus Management Reaction In New Package Development,* 45 J. APPLIED PSYCH. 222 (1961).

72 Superior merchandising technique has this effect. People prefer prunes dipped in glucose to make them shiny to natural prunes, and appliances dressed in shiny metal over equally functional appliances dressed in black enamel. See CHASE & SCHLINK, YOUR MONEY'S WORTH 17, 48 (1927), and SMITH, MOTIVATION RESEARCH IN ADVERTISING AND MARKETING 49-50, 101-105 (1954). Housewives have perceived bread of equal freshness to be fresher when wrapped in cellophane than when wrapped in wax, even in the case of one- and two-day old bread. Brown, *Wrapper Influence on the Perception of Freshness In Bread,* 42 J. APPLIED PSYCH. 257 (1958). See Faison, *The Application of Research to Packaging,* Bus. Horizons, Feb. 1961, p. 39, and Mason, *A Theory of Packaging In the Marketing Mix,* Bus. Horizons, Summer 1958, p. 91. "Hence, the competitive battles are won, not by gear shifts and more head-room, but rather by exciting designs and new color combinations." Martineau, *supra* note 66, at 47.

asset.[73] The more easily a product is subject to differentiation, and the more intensive the effort at differentiation, the more likely are purchase patterns to show high degrees of consumer loyalty.[74] It appears, however, that any producer with the insight to aim at a specific consumer market (by age, geography, education, occupation, income, etc.) can successfully differentiate any product and build up a coterie of loyal customers.[75]

A seller who spends time and money introducing something like power steering expects his competitors to simulate his development. But a seller who devotes time and money to building consumer loyalty for a package design or product configuration views with distaste any competitive activity designed to share in the benefits of his merchandising or marketing program by duplicating the newly developed method of differentiation. If the originator seeks injunctive relief from a court, he will probably not rely expressly on the ground that he has an interest protectable per se or that the second comer has no right to copy, but on the ground that activity which is likely to confuse consumers about the origin of their purchases is antithetical to a policy of free choice in open markets. Sophisticated plaintiffs emphasize consumer confusion because courts are more likely to assume that the social value in avoiding consumer confusion outweighs the social cost of enjoining a form of competition.

Assuming that a court is correct in assigning the prevention of consumer confusion a higher value than the preservation of competitive activities, the court must critically examine the likelihood of confusion upon which the plaintiff's claim for protection rests. The plaintiff, after all, may have originally engineered the consumer response pattern, which he now seeks to protect, with a psychological rather than a commercial appeal. The method of differentiation sought to be protected may be more effective than other similar devices, for example because it involves a design or configuration which has an unusually high memory value. If such is the case, chances are that it was evolved carefully and scientifically by testing designs and configurations to find the one combination which was most readily noticed and recognized and which best conveyed favorable and meaningful connotations.[76] In addition, consumer loyalty to the method of differentiation sought to be protected may have been fostered by a psychologically sound selling technique.[77] Consumer confusion

73 See Lewis, *Notes on the Economics of Loyalty*, 9 ECONOMICA (N.S.) 333 (1942).

74 Ferber, *Brand Choice and Social Stratification*, 2 Q. REV. ECON. & BUS. 71, 78 (1962).

75 See Gardner & Levy, *The Product and the Brand*, Harv. Bus. Rev., March-April 1955, pp. 33, 38.

76 See Burdick, Green & Lovelace, *Predicting Trademark Effectiveness*, 43 J. APPLIED PSYCH. 285 (1959). The authors defined trademark effectiveness in terms of salience (is readily seen and recognized), meaningfulness (conveys meaningful connotations) and memory-value. Tests indicated that these three characteristics were positively related. Taking memory-value as the major dependent variable, the authors concluded that memory-value can be predicted accurately by combining the measures for salience and meaningfulness.

77 See Engel, *Psychology and the Business Sciences*, 1 Q. REV. ECON. & BUS. 75 (1961); PACKARD, THE HIDDEN PERSUADERS 257 (1957). Moreover, there is apparently some basis for believing that the probability of a consumer's purchasing a particular brand of product is related to the number of prior consecutive purchases of that product by the consumer; *i.e.*, a repeat purchase probability exists when a customer has made a run of 1, 2, 3 . . . n purchases of a certain product. See Frank, *Brand Choice As A Probability Process*, 35 J. BUSINESS 43 (1962). If a consumer has developed habitual purchase behavior wholly un-

based on consumer loyalty to a method of product differentiation fostered by these and similar psychological techniques seems a dubious ground for preserving to the seller an exclusive use in the method of product differentiation involved.

Presumably, a court cannot and will not pass upon the morality of applying research tools to sets of psychological variables in order to help a seller secure the repeat business of prior customers. But it nevertheless can attempt to assess qualitatively the nature of consumer responses to a given plaintiff's method of differentiation. The crucial inquiry is whether the consumer in part responds (if he responds at all) to the method of differentiation as a symbol of past satisfactions or whether he responds to the symbol solely as a short cut to purchase decisions.[78] The one case involves a consumer who cares about source; the other involves a consumer who is indifferent to source. In the latter case, even a court ranking prevention of confusion ahead of preservation of competitive activities has no basis for enjoining a defendant from simulating such a method of differentiation, for the consumer really does not care about source. In other words consumers may respond to a method of differentiation although the method of differentiation has no significance, secondary or primary, as a symbol of origin.

Gum, Inc. v. Gumakers of America, Inc.,[79] is an example of a plaintiff's failure to convince a court that consumers care about source. There defendant sold bubble gum similar to plaintiff's Blony Bubble Gum in size, shape, weight and wrapper form and color scheme. The court ruled that even if plaintiff by its pioneer work created a desire in the public for bubble gum having the appearance of Blony, this would not justify a finding that the public demand was for plaintiff's product as such.

Put still differently, it seems unlikely that a *caring* buyer would make an unwanted purchase because of a response to a copied product or package configuration or design. That is, perhaps people who do buy that way don't care about the source of their purchases. The typical consumer is such a victim of comparative well-being that "almost anything that costs less than a new car is an impulse purchase."[80] Right now about 3/5 of all family units in the

connected with any source association or source reliance, then any competitive activity which can counter this barrier should be encouraged, including the copying of competitor's methods of differentiation.

78 The classification here suggested concerns habitual purchase patterns adopted by consumers to avoid making numbers of decisions from moment to moment. Such habits are nonrational, and therefore, it would seem, do not involve source associations. See Alderson, *supra* note 71, at 12. Yet a person may rationally decide to cultivate habitual purchase patterns, and it is thus possible that where a source association motivated the original act in a series of actions which have since become habitual, the classification suggested in the text may be unsound. This is a question of fact, however, which should be determined according to the circumstances of each case.

79 136 F.2d 957 (3d Cir. 1943). *Accord,* Eagle-Freedman-Roedelheim Co. v. Allison Mfg. Co., 204 F. Supp. 679 (E.D. Pa. 1962) (Bach, Brahms, Beethoven sweat-shirts). See also James Heddon's Sons v. Millsite Steel and Wire Works, Inc., 128 F.2d 6 (6th Cir.), *cert. denied,* 317 U.S. 674 (1942) (fishing plug).

80 Tyler, *supra* note 60, at 162. "The careful calculations of pecuniary advantage which are so prominent in business were painfully learned there, and have influenced only partially the habits of men outside working hours." Edwards, *The Consumer's Selection of Goods,* in ECONOMIC PROBLEMS IN A CHANGING WORLD 43 (Thorp ed. 1939). Among the many factors which influence specific purchases of brand products are physical characteristics, packaging, habits, advertising and brand prestige. Brown, *The Determination of Factors Influencing Brand Choice,* 14 J. MKTG. 699, 702-03 (1950).

United States have some discretionary income which can be spent in ways not dictated by necessity.[81] As a result, the incidence of impulse buying has steadily increased in the last decade and is still increasing, as shoppers continue to transfer purchase planning from the home to the store, reaching the buying decision at the point of purchase.[82]

A method of product differentiation which has significance to consumers only because of such wealth-induced indolence[83] would seem not to merit legal protection on any ground. Duplication of such methods of differentiation by competitive sellers gives consumers the benefit of competition without depriving them of anything, since they cannot be deprived of a source association which they do not have.[84] Ultimately, the consumer will benefit if the way is kept open for purchase patterns not based on source preference to be broken by sellers who choose to duplicate package or product designs or configurations used by their competitors.

The preceding paragraphs merely indicate that courts should be wary of protecting otherwise unprotectable methods of product differentation under the doctrine of secondary meaning because a consumer who responds to a given method of differentiation may nevertheless be indifferent about source. Courts can go further, and should go further.

As the situation now stands, consumers have a significant amount of apparent loyalty to specific sources of supply, even for low-price, frequently purchased items.[85] These loyalties amount to a costly misallocation of resources because they are not, as a general rule, affected by relative prices of competing merchandise. They give the seller a significant control over price. Whether or not such consumer loyalties stem from indifference or habit rather than satisfaction, they should not be encouraged to the extent that otherwise unprotectable configurations and designs of packages and products should be preserved inviolate from copyists. The courts should reconsider policy alternatives so that competition is weighted more heavily than consumer nonconfusion.

Although a court is justified in listening sympathetically to a producer who claims that his patent, trademark or copyright has been infringed, there rarely is justification for entertaining a claim to legal protection for unpatented, untrademarked, and uncopyrighted methods of product differentiation, no matter how vociferous the cries of secondary meaning.[86] The literacy rate is high enough in the United States, after all, to justify the courts in requiring consumers who care about source to read names on labels.[87]

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81 Parker & Mayer, *The Decade of the "Discretionary" Dollar,* Fortune, June 1959, p. 136.

82 Stern, *The Significance of Impulse Buying Today,* 26 J. MKTG. 59, 60-61 (1962).

83 See GALBRAITH, AMERICAN CAPITALISM 106 (1952).

84 See Smith, *Production Differentiation and Market Segmentation as Alternative Marketing Strategies,* 21 J. MKTG. 3, 4 (1956).

85 Cunningham, *Brand Loyalty — What, Where, How Much?,* Harv. Bus. Rev., Jan.-Feb. 1956, pp. 116-17. See also Isaacs, *Traffic In Trade-Symbols,* 44 HARV. L. REV. 1210, 1211-12 (1931).

86 See Brown, *Advertising and the Public Interest: Legal Protection of Trade Symbols,* 57 YALE L. J. 1165, 1195-98 (1948).

87 There are two situations involving copying of nonfunctional features where courts normally rely on this approach. One occurs where the copied features have been protected directly or indirectly by a recently expired patent. See, *e.g.,* Zippo Mfg. Co. v. Manners

Conclusion

If legal-economic policy is based on competition, and if the essence of competition is copying, then courts should rarely forbid competitors to copy methods of product differentiation such as product and package design and configuration, even if a particular court believes consumers regard a method of differentiation as a symbol of origin.

There are two reasons why basic legal-economic policy favoring competition should not be subordinated to a policy of preserving to consumers their source associations. In the first place, limiting competition by preserving specific consumer source associations in otherwise unprotectable symbols flies in the face of the basic postulate that competition is worth more than it costs. In the second place, solicitude for consumer source associations can be gratified by requiring consumers who care about source to respond to legislatively protected methods of differentiation such as names and marks. Where products are almost invariably distinguished by both protected and unprotected methods of differentiation, the courts should require that consumers measure source by the protected symbol.

Further, courts should not protect source symbols such as package and product design and configuration on the theory that the defendant's copying activity is immoral, or on the theory that deleting from the public domain such inconsequential items as nonfunctional designs and configurations cannot work a significant anticompetitive effect. The first approach ignores the favored position of the copyist in a competitive economy as well as the protection inherent in the long-established legal proscription against selling one's goods as another's. The second approach ignores both the possibility that package and product design and configuration may perform a merchandising function, and the inability of anyone to measure the anticompetitive effect of judicial protection of a method of product differentiation from simulation. It perhaps ignores the reality that there must be some effect, and whatever its magnitude, it must be on the side of harm to competition.

Finally, even judges who are inclined to forbid competitors to copy their rival's package and product design and configuration when plaintiff shows likelihood of consumer confusion as to source must realize that consumer responses to product and package design and configuration can be a function of a psychologically effective selling technique, or a function of wealth-induced source indifference, as well as a function of pleasurable past consumption experiences. Such judges must examine plaintiff's proofs carefully to determine whether source plays any role in the consumer's decision to purchase.

Jewelers, Inc., 180 F. Supp. 845 (E.D. La. 1960). The other occurs where the copier is a well-known business entity in its own right, and conspicuously labels the copied product with its own label. See Lucien Lelong, Inc. v. Lauder Co., 164 F.2d 395 (2d Cir. 1947); J. C. Penney Co. v. H. D. Lee Mercantile Co., 120 F.2d 949 (8th Cir. 1941); and Elizabeth Arden, Inc. v. Frances Denny, Inc., 99 F.2d 272 (3d Cir. 1938). But see Lucien Lelong, Inc. v. George W. Button Corp., 50 F. Supp. 708 (S.D.N.Y. 1943). Even where there are no special factors, some courts, unfortunately a minority, operate on the postulate that consumers can and should read. See, *e.g.*, Rochelle Asparagus Co. v. Princeville Canning Co., 170 F. Supp. 809 (S.D. Ill. 1959). See Stern & Hoffman, *Public Injury and the Public Interest: Secondary Meaning in the Law of Unfair Competition*, 110 U. Pa. L. Rev. 935, 960 (1962), for an analysis of the legal effect of the copier's using his own insignia where the copied features are functional.