

**21<sup>ST</sup> ANNUAL BUSINESS LAW FALL FORUM  
INNOVATING CORPORATE  
SOCIAL RESPONSIBILITY:  
FROM THE LOCAL TO THE GLOBAL**

**TRADEMARK GOODWILL AS A PUBLIC GOOD:  
BRANDS AND INNOVATIONS IN  
CORPORATE SOCIAL RESPONSIBILITY**

by  
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*Powerful brands dominate our transnational landscapes. Brand value—referred to in law as trademark goodwill—is co-created by trademark owners and the consumers of their products and services. Commonly defined as all possible sources of consumer patronage, trademark goodwill is critically important not only for business ability to attract and retain customers, but also for its regulatory capacity to signal process character-*

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*istics such as environmental impact or labor standards. This Article focuses on the role of trademark goodwill in signaling sustainability standards as key informational components of corporate social responsibility. In this view of trademark goodwill, brands potentially provide highly public platforms for interaction by firms and their customers to further various public and private policies. Brand value could play a more significant role in conveying robust corporate social responsibility efforts to consumers, thereby creating market-differentiation mechanisms for brand owners, improving firm efficiency, and increasing supply chain sustainability—not to mention contributing to more meaningful choices for consumers participating in now ubiquitous global value networks. In short, trademark goodwill performs a critical public, communicative function and therefore is a key public good within a regulatory governance framework.*

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## INTRODUCTION

A busy consumer stops in a store on her way to the office after her early morning yoga class. She is an ethically motivated and sophisticated brand consumer who is not easily confused.<sup>1</sup> She purchases a KIND® (hereinafter KIND) bar from a WHOLE FOODS® (hereinafter WHOLE FOODS) Market located below her yoga studio, in the hopes that she is buying a healthy snack to eat before work and supporting a socially responsible grocery store.<sup>2</sup> But having been surrounded by advertising all

<sup>1</sup> See generally Ann Bartow, *Likelihood of Confusion*, 41 SAN DIEGO L. REV. 721 (2004) (rejecting jurists' tendency to perceive consumers as easily confused).

<sup>2</sup> KIND "founder and CEO Daniel Lubetzky's focus is to 'make profit *and* make a difference . . . achieve mass distribution *and* make his products healthy.'" *How*

her life, part of her never completely trusts the representations implied by any brands. The informational challenge she faces is due to the current conflation of many different functions within a trademark. A singular mark such as KIND or WHOLE FOODS commingles the widely accepted functions of trademark goodwill (that is, origin, quality/reputation, and marketing) with other possible functions, including the signaling of any relevant ethical sourcing or other corporate social responsibility (hereinafter CSR)<sup>3</sup> practices. Furthermore, the prevailing marketing emphasis on emotional links with the consumer rather than the provision of objectively verifiable information exacerbates this fuzzy signaling.<sup>4</sup> As a result, our hungry, yet skeptical, yogi is not able to separate the firm's claims to ethical manufacturing or sourcing practices from its unverifiable marketing claims.

Trademark goodwill<sup>5</sup>—the intangible, elusive, and occasionally controversial but nonetheless legally sanctioned<sup>6</sup> symbol of a brand's value—

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*Emerging Multinationals Are Embracing Social Responsibility*, KNOWLEDGE@WHARTON (Nov. 12, 2015), [knowledge.wharton.upenn.edu/article/why-emerging-multinationals-are-embracing-social-responsibility/](http://knowledge.wharton.upenn.edu/article/why-emerging-multinationals-are-embracing-social-responsibility/) (quoting Josh Linkner, *Doing Well and Doing Good—How the CEO of KIND Snacks Is Reinventing Leadership*, FORBES (Apr. 3, 2015, 11:35 PM), <https://www.forbes.com/sites/joshlinkner/2015/04/03/doing-well-and-doing-good-how-the-ceo-of-kind-snacks-is-reinventing-leadership/#d7a89dc4ca56>). Similarly, the WHOLE FOODS Market's mission statement is: "At Whole Foods Market®, 'healthy' means a whole lot more. It goes beyond good for you, to also encompass the greater good. Whether you're hungry for better, or simply food-curious, we offer a place for you to shop where value is inseparable from values." *Mission & Values*, WHOLE FOODS MKT., <http://www.wholefoodsmarket.com/mission-values>.

<sup>3</sup> Corporate social responsibility is defined here as "corporate attitudes and responsibilities to society for social, ethical and environmental issues, including sustainable development[]." Istemi Demirag, *Responsibility, Accountability and Governance: The Presumed Connections with the State, the Market and Civil Society and an Overview*, in CORPORATE SOCIAL RESPONSIBILITY, ACCOUNTABILITY AND GOVERNANCE: GLOBAL PERSPECTIVES 11, 11 (Istemi Demirag ed., 2005). Others define corporate social responsibility as a "catch-all term referring to a wide variety of programs and socially beneficial expenditures undertaken by firms, including charitable contributions, investments in local infrastructure, social institutions, and environmental protection not required by law." David B. Spence, *Corporate Social Responsibility in the Shale Patch?*, 21 LEWIS & CLARK L. REV. 387, 389 n.3 (2017).

<sup>4</sup> Katya Assaf, *Brand Fetishism*, 43 CONN. L. REV. 83, 96–97 (2010); Jessica Kiser, Brandright 4–5 (Feb. 1, 2017) (unpublished manuscript), <https://ssrn.com/abstract=2928186>; see also Joe Dobrow, *The Un-Marketing and Re-Marketing of Whole Foods*, FAST CO.: CO.EXIST (Oct. 23, 2014), <https://www.fastcoexist.com/3037452/the-un-marketing-and-re-marketing-of-whole-foods>.

<sup>5</sup> The term "trademark" in this Article is shorthand for all marks (trademarks, service marks, certification marks, and collective marks) unless otherwise noted. "The value of a trademark lies in the goodwill associated with that trademark. Goodwill is an intangible asset that forms part of the value of the trademark owner's business." *Fact Sheet: Assignments, Licensing, and Valuation of Trademarks*, INT'L TRADEMARK ASS'N, <http://www.inta.org/TrademarkBasics/FactSheets/Pages/AssignmentsLicensesValuationFactSheet.aspx> (last updated Nov. 2016).

currently has very little to do with sourcing and traceability of components of finished products or services offered in global markets. Yet recent evidence indicates that individual, global firms such as WHOLE FOODS, and even industry associations such as the Grocery Manufacturers Association (hereinafter GMA), are taking steps to disclose more objectively verifiable information to consumers, apparently responding to a growing demand for this kind of information.<sup>7</sup> The global market for healthy food is estimated to reach \$1 trillion in 2017 and consumers are willing to pay more for food they perceive to be healthy.<sup>8</sup> The industry has responded to these trends: for example, according to the GMA, “[c]onsumers will be able to find detailed information about products in different ways. They can access SmartLabel™ via the Internet or by using a mobile device to scan a QR code on the package.”<sup>9</sup> This and other recent examples<sup>10</sup> from the food industry show a visible shift towards relying on labeling to provide more informational transparency about a product’s ingredients, taking advantage of mobile and embedded data technologies.<sup>11</sup> Indeed, emerging scholarship indicates that firms can benefit from increasing the traceability of their supply chain, resulting in:

[I]mportant benefits to companies that have been overlooked . . . [f]or instance, . . . enhanc[ing] a company’s reputation among such stakeholders as consumers, investors, and NGOs. Moreover, in the process of complying with these laws and conducting due diligence, companies can find possible inefficiencies within their supply chain and thereby improve their supply chain management so as to effectively reduce costs.<sup>12</sup>

If these kinds of information are important aspects of both consumer welfare and firm reputation and management, then why does the con-

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<sup>6</sup> Lanham Act § 10, 15 U.S.C. § 1060 (2012). *See generally* 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 18:3 (4th ed. 2014) (discussing the history and the significance of the transfer of goodwill requirement within the context of the rule on trademark assignment).

<sup>7</sup> Press Release, Grocery Mfrs. Ass’n, New SmartLabel™ Initiative Gives Consumers Easy Access to Detailed Product Ingredient Information (Dec. 2, 2015), <http://www.gmaonline.org/news-events/newsroom/new-smartlabel-initiative-gives-consumers-easy-access-to-detailed-ingredient/>.

<sup>8</sup> Nancy Gagliardi, *Consumers Want Healthy Foods—And Will Pay More for Them*, FORBES (Feb. 18, 2015, 11:30 AM), <http://www.forbes.com/sites/nancygagliardi/2015/02/18/consumers-want-healthy-foods-and-will-pay-more-for-them/#1c1c6e5a144f>.

<sup>9</sup> *SmartLabel FAQs*, GROCERY MFRS. ASS’N, <http://www.gmaonline.org/file-manager/smartlabel%20FAQ.pdf> (last updated Dec. 2015).

<sup>10</sup> *See, e.g.*, Claire Martin, *Is That Real Tuna in Your Sushi? Now, a Way to Track That Fish*, N.Y. TIMES (Aug. 13, 2016), <http://nyti.ms/2bdHnpU>.

<sup>11</sup> Margaret Chon, *Tracemarks: A Proposed Information Intervention*, 53 HOUS. L. REV. 421, 422 (2015) [hereinafter Chon, *Tracemarks*].

<sup>12</sup> Galit A. Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. INT’L. L.J. 419, 459–60 (2015).

cept of trademark goodwill seem impervious to them? Intellectual property scholars have largely ignored consumer collective action and its impact on trademark law, with the exception of the trademark consumer's First Amendment right of free expression.<sup>13</sup> This is especially curious in light of the robust scholarly literature on supply chain governance, which often pivots on collective consumer approval of, or discontent with, corporate social practices that ultimately impact the firms' brands.<sup>14</sup> Furthermore, emerging public law initiatives, such as the California Transparency in Supply Chain Act (CTSCA),<sup>15</sup> mandate disclosure of information to consumers about business supply chains. These newer types of regulation are premised upon a central (but untested) assumption that consumers will reward or punish brands depending upon their social responsibility performance.<sup>16</sup> In both these private and public law frameworks, the consumer is presumably expected to act upon relevant information to make more informed purchasing decisions with regard to brands. In the case of CTSCA, for example, if enough consumers make purchasing decisions in favor of firms that disclose socially responsible supply chains (and against firms that do not), then a market signal is supposedly delivered to the trademark owner.

Law and policymakers increasingly note the role that brands play in socially responsible undertakings by firms. For example, the most recent draft of the Restatement of Compliance, Enforcement and Risk Management for Corporations, Nonprofits, and Other Organizations, states:

Socially responsible undertakings can . . . provide a beneficial signal of quality—a signal rendered more credible because of its substantial cost. Customers may rightly conclude that organizations engaging in extensive socially responsible undertakings are good organizations to deal with in other respects. *A reputation as a socially responsible actor can be a valuable component of an organization's "brand."*<sup>17</sup>

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<sup>13</sup> See, e.g., Sonia K. Katyal, *Trademark Cosmopolitanism*, 47 U.C. DAVIS L. REV. 875, 902 (2014); Rebecca Tushnet, *Stolen Valor and Stolen Luxury: Free Speech and Exclusivity*, in *THE LUXURY ECONOMY AND INTELLECTUAL PROPERTY: CRITICAL REFLECTIONS* 121, 121 (Haochen Sun et al. eds., 2015).

<sup>14</sup> See, e.g., TIM BARTLEY ET AL., *LOOKING BEHIND THE LABEL: GLOBAL INDUSTRIES AND THE CONSCIENTIOUS CONSUMER 2* (2015).

<sup>15</sup> CAL. CIV. CODE § 1714.43 (West 2015). The CTSCA requires companies doing business in California to disclose that their company operations are free from human trafficking and slavery. Effective January 2012, it applies to all companies with annual worldwide gross receipts of \$100 million. § 1714.43(a)(1).

<sup>16</sup> Scattered empirical or experimental work is emerging on this question. See, e.g., Sarfaty, *supra* note 12.

<sup>17</sup> PRINCIPLES OF THE LAW: COMPLIANCE, ENFORCEMENT, AND RISK MANAGEMENT FOR CORPORATIONS, NONPROFITS, AND OTHER ORGANIZATIONS § 5.51 cmt. a (AM. LAW INST., Preliminary Draft No. 2, Sept. 1, 2016) (emphasis added).

CRS-related information may be gathered via consumer class action lawsuits (with attendant civil discovery), the research activities of socially responsible investment (SRI) funds, or investigations by consumer advocacy non-governmental organizations (NGOs). But the typical individual consumer has very little access to this information in a meaningful form—even when disclosure is mandated by law. And outside the context of complying with mandatory disclosure laws, trademark owners have largely ignored the problem of providing market-differentiating mechanisms to provide this sort of information.

This Article's central claim is that trademark goodwill (referred to in this Article interchangeably as brand value) should account for the critical role of brands as regulatory tools vis-à-vis CSR-related information such as environmental and social standards (hereinafter sustainability standards). It takes on the challenge of connecting largely disjunctive streams: on the one hand, trademark law, and on the other hand, corporate, human rights, and international law (not to mention extensive social science) literatures on regulatory governance of global supply chains. The developments of the last century in response to advertising and marketing innovations show that the concept of trademark goodwill is malleable. Its various functions have responded to larger cultural, economic, and social—not to mention technological—changes to support and provide more sophisticated marketing. Thus, it is abundantly clear that trademark goodwill can respond not only to marketing innovations, but also to innovations in CSR.

While the classic purpose of trademark goodwill as a type of informational “public good” is to increase overall social welfare primarily through signals to consumers of source of origin or manufacture,<sup>18</sup> its public goods component has gradually incorporated other dimensions, such as firm reputation and consumer loyalty. This global expansion of trademark's core functions has not been without debate.<sup>19</sup> Recently, and somewhat controversially, the Court of Justice of the European Union (CJEU or ECJ) endorsed multiple functions of trademark goodwill outside of its core purpose of preventing consumer confusion, to include its

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<sup>18</sup> Apostolos Chronopoulos, *Goodwill Appropriation as a Distinct Theory of Trademark Liability: A Study on the Misappropriation Rationale in Trademark and Unfair Competition Law*, 22 TEX. INTELL. PROP. L.J. 253, 303 (2014) (“The purpose behind the conceptualization of ‘product goodwill’ as a public good was to foster competition by imitation and to avoid the creation of positions of economic power based on product differentiation.”).

<sup>19</sup> See World Intellectual Prop. Org. [WIPO] & Paris Union for the Prot. of Indus. Prop., *Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks* art. 2, WIPO Doc. 833(E) (Sept. 1999), <http://www.wipo.int/edocs/pubdocs/en/marks/833/pub833.pdf>; 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, 1226–33 (2009) (critiquing this soft-law document and proposing procedures to ensure balanced and inclusive rule-making).

advertising, investment, and communications functions.<sup>20</sup> Anti-dilution protection of famous or well-known marks represents another debated expansion of the legal recognition of trademark goodwill.<sup>21</sup> Indeed, trademark goodwill has been undergoing a sea change since the 1980s, in response to newer business practices, including “brand extensions into far-flung product fields” and widespread licensing of famous brands.<sup>22</sup> These often-lucrative business models involve free-floating marks, representing trademark goodwill *per se*, unmoored from their original goods or services. Thus, while contested, it is not inevitable that trademark goodwill must remain conceptually static over time.

Trademark scholarship is beginning to engage more seriously with brand value, which is primarily viewed as a commercial rather than legal object.<sup>23</sup> Yet scant attention so far has been paid to whether trademark goodwill should be augmented to include the effective signaling of significant CSR-related information such as sustainability standards. In this context, it is problematic that the consumer-facing side of a mark, including individual consumer purchasing decisions based upon the quality and reliability of a product, is largely disconnected from the business-facing side of a mark, including valuation of its goodwill.

This Article has several goals: to connect the law and policy of trademark law with prevailing theories and practices in business law, in particular, so-called supply chain governance; to show how brand value or trademark goodwill can function as a robust information platform between these two largely disjunctive areas of legal regulation, as well as be-

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<sup>20</sup> L’Oreal v. Bellure [2010] EWCA (Civ) 535 (Eng.). See generally Dev S. Gangjee, *Property in Brands: The Commodification of Conversation*, in CONCEPTS OF PROPERTY IN INTELLECTUAL PROPERTY LAW 29 (Helena Howe & Jonathan Griffiths eds., 2013) (discussing contemporary European Union trademark law).

<sup>21</sup> See, e.g., Lanham Act § 43, 15 U.S.C. § 1125(c)(2) (2012); Agreement on Trade-Related Aspects of Intellectual Property Rights art. 16, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS]; Paris Convention for the Protection of Industrial Property, art. 6bis, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention]. See generally Christine Haight Farley, *Why We Are Confused About the Trademark Dilution Law*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1175 (2006) (describing judicial incoherence in the application of the dilution doctrine); Clarisa Long, *Dilution*, 106 COLUM. L. REV. 1029, 1030 & nn.3–11 (2006) (describing debates within the trademark scholarly community).

<sup>22</sup> Assaf, *Brand Fetishism*, *supra* note 4, at 87; see also Irene Calboli, *The Case for a Limited Protection of Trademark Merchandising*, 2011 U. ILL. L. REV. 865, 867–74 (2011).

<sup>23</sup> See, e.g., Symposium, *Brand New World: Distinguishing Oneself in the Global Flow*, 47 U.C. DAVIS L. REV. 455 (2013); Deven R. Desai, Response, *An Information Approach to Trademarks*, 100 GEO. L.J. 2119 (2012); Deven R. Desai, *From Trademarks to Brands*, 64 FLA. L. REV. 981 (2012); Eric Goldman, *Brand Spillovers*, 22 HARV. J.L. & TECH. 381 (2009). See generally Deven R. Desai & Spencer Waller, *Brands, Competition, and the Law*, 2010 BYU L. REV. 1425 (2010) (describing impact of a brand approach to trademarks on dilution theory).

tween consumers and trademark owners; and to suggest the multiple ways that both consumers and businesses could benefit in various ways by increasing the work of trademark goodwill to provide more objectively verifiable information. Part I of this Article sets forth the case for viewing trademark goodwill as part of an overall system of transnational, non-state rulemaking. It summarizes current regulatory governance tools relevant to increasing the impact of CSR efforts, including supply chain monitoring of sustainability standards as well as publicly mandated disclosure in recent legislation such as the CTSCA. Many of these recent initiatives depend upon informed consumers to send market signals back to trademark owners via consumer purchasing choices. From this perspective, brands can serve as information platforms around which various stakeholders participate to create value. While these voluntary mechanisms purport to complement or even substitute for public regulatory oversight of environmental and labor conditions, many observers question their effectiveness under current conditions of information asymmetry. In this regard, Part II revisits the concept of trademark goodwill and recasts it in light of governance objectives within global markets. It summarizes emerging suggestions about the role of brands in supply chain governance from both consumer and business perspectives. The Article concludes by proposing a new function of trademark goodwill, to augment and incorporate additional communicative nuance to its widely accepted signaling functions. This would deepen the signal now associating the trademark with its manufacturing origin and reputation to include the underlying standards and processes that the firm's goods and services embody. Such a shift in our conceptualization of trademark goodwill would redound to the benefit of trademark owners by providing meaningful market-differentiating and efficiency-enhancing tools. And it would also benefit consumers such as our hypothetical yogi by providing information to make consequential choices around a brand's CSR-related information such as its sustainability standards.

The examples in this Article relate primarily to food products because research to date indicates that the "eco-labeled products that have developed the largest markets are mainly those that consumers understand as satisfying their own self-interest," such as health foods.<sup>24</sup> This is

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<sup>24</sup> BARTLEY ET AL., *supra* note 14, at 65. Beyond the scope of this Article, but of obvious significance, is the reality that the "Big Food" industries may not be willing to tackle their dominant business models, which rely heavily on processed foods and industrial farming, to the detriment of public health and environmental sustainability. See generally Michael Pollan, *Why Did the Obamas Fail to Take on Corporate Agriculture?*, N.Y. TIMES: MAG. (Oct. 5, 2016), <https://nyti.ms/2e3kZRN> (approaching the "broken food system" as a political issue). Thus, this Article is written under the shadow of these more intractable structural issues.



borne out by the GMA labeling initiative,<sup>25</sup> which demonstrates a potential convergence of interests between consumers and businesses through the greater provision of objective information related to quality assurance and control along global supply chains, rather than by lifestyle marketing imperatives. However, the thesis presented here has broader applicability beyond food to other mass consumer goods and services.

In short, the “good” in trademark goodwill can and should increase the informational public “goods” necessary to reduce informational asymmetries as well as to promote overall social welfare in globalized markets.

## I. BRANDS AS INFORMATION PLATFORMS IN REGULATORY GOVERNANCE

### A. *Trademark Goodwill as a Regulatory Tool*

What’s in a name? According to the World Intellectual Property Organization (WIPO), much more than what is currently being measured. A recent WIPO publication states:

Consider the definition of brand—an *intangible asset that depends on an association made by consumers*—and its more precise form, an asset that *reflects customers’ implicit valuation of the revenue stream that accrues to a firm from its brand name(s)*. Now consider that investments in brand are usually measured as promotion expenditures, and that brand equity measured using standard growth accounting techniques reflects the cumulated value of those investments. A disconnect is then obvious: *all customer-facing aspects of a firm’s performance have an impact on brand equity valuation (product quality, product cost, after-sale service, etc.), not just its investments in brand.*<sup>26</sup>

As this excerpt suggests, trademark goodwill is simultaneously important and incompletely appraised. Brands possess “global communicative power”<sup>27</sup> and yet possess weak signaling functions with respect to important measures including but not limited to sustainability standards. This impaired signaling is true of both the standard accounting methods described above, as well as standard concepts of goodwill in trademark law and policy. Standard accounting methods view goodwill as a direct func-

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<sup>25</sup> See, e.g., *Facts up Front Front-of-Pack Labeling Initiative*, GMA, <http://www.gmaonline.org/issues-policy/health-nutrition/facts-up-front-front-of-pack-labeling-initiative/> (last visited Mar. 6, 2017).

<sup>26</sup> CAROL A. CORRADO & JANET X. HAO, WORLD INTELLECTUAL PROP. ORG., BRANDS AS PRODUCTIVE ASSETS: CONCEPTS, MEASUREMENTS, AND GLOBAL TRENDS 5 (Jan. 2014), [http://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_econstat\\_wp\\_13.pdf](http://www.wipo.int/edocs/pubdocs/en/wipo_pub_econstat_wp_13.pdf) (second emphasis added).

<sup>27</sup> Douglas A. Kysar, *Sustainable Development and Private Global Governance*, 83 TEX. L. REV. 2109, 2151 (2005).

tion of advertising expenditures by the firm, thus missing the extraordinary value contributed by consumer activities and attention. Standard legal theories view goodwill as a quasi-property right appurtenant to marks themselves, thus missing its public goods components.

Trademarks have been described as having three primary functions, all of which could and do contribute to brand value in the global market: “[a]n origin function—they indicate who is the producer of the product or the service; [a] quality [or reputation] function—they are a guarantee of consistent quality; and [a]n advertising function—they help in marketing products and bringing new products to the market.”<sup>28</sup> These three basic functions of trademarks “become brands when they are able to convey something positive about the product to the consumer. *The essence of a great brand lies in its capacity to foster the sales of a product by creating an emotional link with its consumers.*”<sup>29</sup> In addition to these core signaling functions, trademarks also may reflect standards embedded in a good or service. Described sometimes as “credence attributes,”<sup>30</sup> these largely invisible standards cannot be experienced directly by consumers. Yet they are often key to fully informed consumer choices in the market and thus could be viewed as comprising the “trust function” of trademarks.<sup>31</sup> For some consumers, this information is pertinent to health-related choices (as in the consumer who may need to avoid gluten or other allergens);<sup>32</sup>

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<sup>28</sup> INT’L TRADE CTR. [ITC] & WIPO, *MARKETING CRAFTS AND VISUAL ARTS: THE ROLE OF INTELLECTUAL PROPERTY* 14 (2003), [http://www.wipo.int/edocs/pubdocs/en/intproperty/itc\\_p159/wipo\\_pub\\_itc\\_p159.pdf](http://www.wipo.int/edocs/pubdocs/en/intproperty/itc_p159/wipo_pub_itc_p159.pdf).

<sup>29</sup> *Id.*

<sup>30</sup> See Ariel Katz, *Beyond Search Costs: The Linguistic and Trust Functions of Trademarks*, 2010 BYU L. REV. 1555, 1563 (2010); see also Phillip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311, 312 (1970) (distinguishing between search goods and experience goods with the examples of a dress, which can be tried on immediately, as opposed to a can of tuna fish, which has to be opened in order for the fish to be evaluated).

<sup>31</sup> Margaret Chon, *Slow Logo: Brand Citizenship in Global Value Networks*, 47 U.C. DAVIS L. REV. 935, 945 (2014) [hereinafter Chon, *Slow Logo*] (quoting Katz, *supra* note 30, at 1563); see also WORLD INTELLECTUAL PROP. ORG. [WIPO], *BRANDS—REPUTATION AND IMAGE IN THE GLOBAL MARKETPLACE* 7, 12 (2013) [hereinafter WIPO, *BRANDS*] (“Overall, [several] interrelated trends stand out: . . . companies work to create and deliver a ‘brand experience’ for the consumer. Companies increasingly have to manage not only product quality, but also their reputation as good global citizens, paying attention to how socially and environmentally responsible they are perceived to be. . . . [Yet] branding is no longer the purview of companies alone. Increasingly, individuals, civil society organizations, as well as governmental and intergovernmental organizations are adopting an active approach to branding. . . . However, the reputation mechanism only works if consumers are confident that they will purchase what they intend to purchase.”).

<sup>32</sup> MARGARET CHON & MARIA THERESE FUJIYE, *Leveraging Certification Marks for Public Health*, in *THE NEW INTELLECTUAL PROPERTY OF HEALTH: BEYOND PLAIN PACKAGING* 257, 263 (Alberto Alemanno & Enrico Bonadio eds., 2016).

for others, this information is critical to ethical consumption, such as avoiding goods made with unfair labor practices or with negative environmental impact.<sup>33</sup> Thus, a trademark's trust function includes its communication of certain quality characteristics, including relevant certifications of sustainability standards as well as related CSR efforts. Arguably the trademark's less recognized trust function is intertwined with its more apparent and widely accepted quality-signaling functions.

Brands are a central tool in global governance accounts. As described by Douglas Kysar, this prominence is

part of a global shift from “government to governance.” The latter concept may be thought to include all “processes and institutions, both formal and informal, that guide and restrain the collective activities of a group.” It may be distinguished from the former concept based chiefly on the number and diversity of actors, both public and private, that contribute to its formation, operation, and evolution.<sup>34</sup>

More specifically, regulatory governance “refers to systematic efforts to regulate business conduct that involve a significant degree of non-state authority in the performance of regulatory functions across national borders.”<sup>35</sup> And “[b]ecause ‘regulation’ is often associated with state action and binding legal rules, . . . ‘regulatory governance’ . . . encompass[es] non-state action and ‘soft’ norms.”<sup>36</sup> In this Article, global governance and regulatory governance are used interchangeably.<sup>37</sup>

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<sup>33</sup> See Margaret Chon, *Marks of Rectitude*, 77 *FORDHAM L. REV.* 2311 (2009) [hereinafter Chon, *Marks of Rectitude*]; Chon, *Slow Logo*, *supra* note 31, at 945; Chon, *Tracemarks*, *supra* note 11, at 457.

<sup>34</sup> Kysar, *supra* note 27, at 2154 (footnotes omitted).

<sup>35</sup> Burkard Eberlein et al., *Transnational Business Governance Interactions: Conceptualization and Framework for Analysis*, 8 *REG. & GOVERNANCE* 1, 3 (2014) (emphasis omitted); see also Stepan Wood et al., *The Interactive Dynamics of Transnational Business Governance: A Challenge for Transnational Legal Theory*, 6 *TRANSNAT'L LEGAL THEORY* 333, 337 (2015).

<sup>36</sup> Eberlein et al., *supra* note 35, at 3. These regulatory governance scholars proffer the Transnational Business Governance (TBG) framework as an analytical approach to the various interactions within this governance domain, as follows:

1. Framing the regulatory agenda and setting objectives;
  2. Formulating rules or norms;
  3. Implementing rules within targets;
  4. Gathering information and monitoring behavior;
  5. Responding to non-compliance via sanctions and other forms of enforcement;
- and
6. Evaluating policy and providing feedback. . . .

*Id.* at 6.

<sup>37</sup> The nuances among forms of global and regulatory governance are beyond the scope of this Article. Suffice it to state that transnational, non-state rulemaking is a common theme across all the variations. See, e.g., Gráinne de Búrca, *New Governance*

These kinds of governance strategies depend heavily upon both the underlying robustness of sustainability standards and the communication of these objective (rather than subjective) standards to consumers.<sup>38</sup> According to one longtime observer and participant,

[b]rands have become the point of leverage for a rapidly increasing number of NGO efforts to change corporate practices through “market campaigns” . . . [which are] a set of strategies designed to influence business and consumer purchases by informing buyers of some characteristics of the supply chain that might make them avoid a particular product. [A market campaign] is a direct attack on the brand of a company, or a product line, based on information about the company’s practices, and it is designed to push some of the company’s production or supply-chain activities toward more socially and environmentally responsible practices. It seeks to do that by reducing both sales of those products *and* the shareholder value embodied in the brand.<sup>39</sup>

Observers of these kinds of market-based governance approaches concede that:

[t]he ultimate impacts of conscientious consumption and production projects are often hard to discern, but this much is clear: taken together, these activities amount to a vast new set of standard-setting projects for the global economy. Promoted by a mix of NGOs, companies, and trade associations, they seek to use global production networks—or “global value chains”—rather than the national state to promote rules about fairness, justice, and sustainability. “Lead firms” in these global value chains—that is, large retailers and brands from Apple to IKEA to Zara—have the power to set styles, prices, and delivery schedules for their suppliers, so, advocates argue, they should also be able to influence the conditions of workers, communities, and the environment.<sup>40</sup>

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*and Experimentalism: An Introduction*, 2010 WIS. L. REV. 227, 232 (2010); Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 15, 18, 20 (2005); see also Kenneth W. Abbott, *Orchestrating Experimentation in Non-State Environmental Commitments* 2 (Sept. 2016) (unpublished manuscript) (on file with author).

<sup>38</sup> See MICHAEL E. CONROY, *BRANDED! HOW THE ‘CERTIFICATION REVOLUTION’ IS TRANSFORMING GLOBAL CORPORATIONS* 16 (2007).

<sup>39</sup> *Id.* at 9–10.

<sup>40</sup> BARTLEY ET AL., *supra* note 14, at 8–9 (citation omitted); see also Peter Dauvergne & Jane Lister, *Big Brand Sustainability: Governance Prospects and Environmental Limits*, 22 GLOBAL ENVTL. CHANGE 36, 40 (2011) (“[M]any of the most prominent cases of private regulatory governance involve very large lead firms with more-or-less captive suppliers. Big brands have typically used this governance power to squeeze suppliers to cut costs. This helps to keep retail prices low. But it can also push suppliers to cut corners (i.e., reducing environmental and social standards) to meet low-cost demands. Recognizing the drawbacks of this in terms of increased risk,

The trajectory from consumer boycotts to company labels that embody voluntary global standards relies entirely on consumer recognition of globally recognizable, and hence powerfully expressive, brands. With their global brands, many multinational corporations

through their expansive operations, . . . offer one of the few direct relationships—and perhaps the only such relationship that is common across diverse cross sections of international societies—that individuals have with the larger economic, political, and cultural currents that are dramatically reshaping the planet. As such . . . their iconography offer[s] unparalleled global communicative power . . .<sup>41</sup>

This undeniable, unparalleled communicative power of brands in global markets is also their proverbial Achilles heel; recognizable brands are also more vulnerable to market campaigns spurred by social movements, and other forms of negative valuation by consumers.<sup>42</sup>

In addition to these various private governance efforts, public regulatory efforts are increasing attention to the human rights conduct of corporations within both international and domestic frameworks. These public law initiatives can be classified into two non-mutually exclusive types: due diligence and mandatory disclosure initiatives. In the international context, for example, the UN Guiding Principles (UNGP or Guiding Principles) endorsed by the UN Human Rights Council in 2011,

require firms to commit to a policy of respecting human rights. Firms must conduct *due diligence* to identify, prevent, and mitigate their human rights impact, and *must report on those efforts to affected stakeholders*. . . . The thirty-one UNGPs recommend that business enterprises, regardless of size, conduct due diligence throughout their supply chains, looking for actual and potential human rights impacts; integrate and act upon the findings; track responses; and then *publicly communicate how the firm has addressed the impacts*.<sup>43</sup>

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brand companies are increasingly adopting corporate sustainability programs as a means to establish rules, oversight, and closer relationships with their suppliers: to work with them directly to keep production costs down through eco-efficiencies while also helping to ensure high-quality, reliable output.”)

<sup>41</sup> Kysar, *supra* note 27, at 2151.

<sup>42</sup> One recent example of this is the #GrabYourWallet campaign, which exhorts consumers to boycott the Trump brand. #GRABYOURWALLET, <https://www.grabyourwallet.org/> (last visited Mar. 22, 2017).

<sup>43</sup> Marcia Narine, *Disclosing Disclosure's Defects: Addressing Corporate Irresponsibility for Human Rights Impacts*, 47 COLUM. HUM. RTS. L. REV. 84, 109 (2016) (emphasis added) (citing John G. Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter *Guiding Principles*]).

The outcome of a long process of attempting to apply human rights principles to corporations, the UNGP are supplemented by the UN's three-pillar framework 'Protect, Respect and Remedy' (Framework).<sup>44</sup>

Under the Framework:

Companies are expected to "seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts." Business relationships are understood to include relationships with "entities in [a company's] value chain."<sup>45</sup>

The Framework's language suggests that a trademark owner's relationship with its suppliers in its value network is subject to the due diligence, communication, and prevention or mitigation requirements of the Guiding Principles.<sup>46</sup>

Within the U.S., domestic mandatory disclosure initiatives include the CTSCA, discussed above, and Dodd-Frank section 1502, which requires disclosure to the Securities and Exchange Commission of sourcing of so-called conflict minerals.<sup>47</sup> Not surprisingly, given the brief time in which these publicly mandated due diligence disclosures have been in

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<sup>44</sup> John G. Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Human Rights Council, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008); see also Nicola Jägers, *Will Transnational Private Regulation Close the Governance Gap?*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 295, 296 (Surya Deva & David Bilchitz eds., 2013).

<sup>45</sup> Adam S. Chilton & Galit A. Sarfaty, *The Limitations of Supply Chain Disclosure Regimes*, STAN. J. INT'L L. (forthcoming) (manuscript at 11) (citing *Guiding Principles*, *supra* note 43).

<sup>46</sup> Both the UNGP as well as the Framework are not binding upon corporations and thus have been subject to criticism by human rights advocates. See Narine, *supra* note 43, at 88; cf. Virginia Harper Ho, "Comply or Explain" and the Future of Nonfinancial Reporting, 21 LEWIS & CLARK L. REV. 317, 323–26 (2017); Celia R. Taylor, *Conflict Minerals and SEC Disclosure Regulation*, 2 HARV. BUS. L. REV. ONLINE 105, 117–20 (2012).

<sup>47</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act § 1502, 15 U.S.C. § 78m(p) (2012). This amendment to the Securities and Exchange Act was enacted in 2010; the SEC finalized its rule-making in 2012. 17 C.F.R. § 240.13p-1 (2015); see also Chilton & Sarfaty, *supra* note 45, at 14–15 ("[C]ompanies must disclose whether they source minerals originated in the [Democratic Republic of Congo] and bordering countries on a new form to be filed with the SEC (Form SD for specialized disclosures). . . . One important feature of section 1502 is that because it requires an SEC filing, it imposes penalties on companies for not reporting or complying in good faith. Form SD is deemed filed under the Securities Exchange Act of 1934 and subject to section 18 of the Exchange Act, which attaches liability for any false or misleading statements.") (footnote omitted).

effect, there is scant evidence on their impact upon consumer behavior.<sup>48</sup> The EU also recently enacted several mandatory disclosure laws,<sup>49</sup> similar to the CTSCA in design, and Congress has considered several bills that would implement a CTSCA-type scheme on a federal level.<sup>50</sup>

*B. The Regulatory Governance Ideal: Brand Citizenship within Cognitive Capitalism*

While a trademark is a legal term of art,<sup>51</sup> a brand is something much more amorphous. Intergovernmental organizations such as WIPO recognize that obtaining trademark rights is a critical legal step in the overall (non-legal) process of branding, which aims to “creat[e] and nurtur[e] an enterprise image linked primarily to the name of the proprietor, its business, or of its products.”<sup>52</sup> This linkage to a business can:

present a powerful image of quality, exclusivity, youth, fun, luxury, adventure, glamour or other reputedly desirable lifestyle attributes, not necessarily associated with specific products but capable of presenting a strong marketing message in itself. This ability to convey “images and feelings” gives reputed marks “an inherent economic value which is independent of and separate from that of the goods or services for which it is registered . . . [and] which deserves protection.”<sup>53</sup>

The construction of brand identity, meaning, and value is a complex process magnified immensely by social media. Digital network architecture allows and even encourages disintermediated voices of consumers to contribute to the overall discourse around a brand’s meaning. Brands resemble what has been described in other contexts as “two-sided” plat-

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<sup>48</sup> See generally Chilton & Sarfaty, *supra* note 45 (running an experimental study on consumer understanding of mandatory disclosure under the CTSCA and finding mixed results).

<sup>49</sup> Narine, *supra* note 43, at 88–89. The UK’s Modern Slavery Act, which was introduced by Theresa May when she was a Member of Parliament, is modeled after the CTSCA. *Id.* at 132.

<sup>50</sup> Business Supply Chain Transparency on Trafficking and Slavery Act of 2015, H.R. 3226 114th Cong. (2015); Business Supply Chain Transparency on Trafficking and Slavery Act of 2015, H.R. 4842 113th Cong. (2014); Business Transparency on Trafficking and Slavery Act of 2011, H.R. 2759 113th Cong. (2011).

<sup>51</sup> Cf. WIPO, BRANDS, *supra* note 31, at 22 (“[E]conomic research [has] clarified the distinction between a trademark as a legal instrument and a brand as a business tool. Legal scholars have similarly described trademarks as the legal anchor for the use of the commercial functions of brands.”).

<sup>52</sup> ITC & WIPO, *supra* note 28, at 14.

<sup>53</sup> Gangjee, *supra* note 20, at 41–42 (alteration in original) (footnote omitted) (quoting Case T-93/06, *Mülhens v. OHIM – Spa Monopole*, 2008 E.C.R. II-93; [2008] ETMR 69 at [26]). As stated earlier, the ECJ has gone further than US courts in recognizing trademark goodwill’s functions of advertising, communication and investment, outside of the context of anti-dilution.

forms,<sup>54</sup> functioning as information intermediaries between brand consumers and owners. As a result, the work of both consumers and producers contribute to the value of a brand,<sup>55</sup> although typically it is only the latter's advertising efforts that are recognized.

Commenting on the expansion of traditional trademark theory by the ECJ to cover brand value, Dev Gangjee observes that:

the brand is generated in the minds of consumers, corporate control over its content has always been brittle. [Brand image] is negotiated, context-sensitive and constantly reproduced. As the symbolic, social and cultural aspects of consumption have come to be better understood, the consumer's investment of time, creativity and effort into this process of negotiation is better appreciated. Today "co-creation of value is emerging as the new frontier and leading edge in marketing thought."<sup>56</sup>

Graeme Austin has recently argued that goodwill is not territorially specific because consumers are mobile and the value of brands travels with the consumer.<sup>57</sup> If these scholars are accurate, then the brand itself is a type of information platform around which many meanings converge.<sup>58</sup> The term "brand citizenship"<sup>59</sup> frames a broader participation by various stakeholders in an accountable community of global governance, albeit one that congregates around the fluid, pluralistic, and open-ended construction of the value of a mark and its associated social spectacle—its brand. In short, the "*brand*, which is not a legal term of art in any sense,

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<sup>54</sup> Marc Rysman, *The Economics of Two-Sided Markets*, 23 J. ECON. PERSP. 125, 126 (2009) ("[An important indicator of a two-sided market is w]hether the seller is paid based on the success of the platform with the buying side. Strikingly, one-sided and two-sided selling strategies exist side-by-side at Amazon.com. For some products, like certain new books, Amazon (basically) buys at a wholesale price and sells for a retail price, which is a one-sided model. But for many other products, Amazon provides a web portal for a producer that sets the retail price that a consumer would see. As this distinction often depends on the decisions of the intermediary rather than on purely technological features of the market, it may be better to use the term 'two-sided strategies' rather than 'two-sided markets.'"); see also Jane K. Winn, *The Secession of the Successful: The Rise of Amazon as Private Global Consumer Protection Regulator*, 58 ARIZ. L. REV. 193, 195–98 (2016).

<sup>55</sup> Gangjee, *supra* note 20, at 32–33.

<sup>56</sup> *Id.* at 50 (emphasis added) (footnotes omitted).

<sup>57</sup> Graeme W. Austin, *The Consumer in Cross-Border Passing Off Cases*, 47 VICT. U. WELLINGTON L. REV. 209, 225–26 (2016).

<sup>58</sup> Chon, *Slow Logo*, *supra* note 31, at 938–39 & n.7 (quoting ADAM ARVIDSSON, BRANDS: MEANING AND VALUE IN MEDIA CULTURE 7–8 (2005) ("Brands are a form of immaterial capital; a form of 'crystallized knowledge' . . . . [T]he brand works as a kind of platform that anticipates certain kinds of actions and attachments.")); see also Adam Arvidsson, *Brands: A Critical Perspective* 5 J. CONSUMER CULTURE 235, 238–39 (2005).

<sup>59</sup> See, e.g., Chon, *Slow Logo*, *supra* note 31, at 937.



drives and shapes much of the regulatory environment that legal scholars tend to see solely through the prism of the *mark*.<sup>60</sup>

Traditional trademark theory posits what Gangjee has called a one-way flow of information.<sup>61</sup> In this once dominant but now disappearing communication and marketing approach, the trademark supposedly plays a unilateral signaling function to largely passive consumers.<sup>62</sup> Within this classic model, consumers indicate their relationship to the trademark through either exit or loyalty—by either switching to another product or sticking with what is tried and true to their expectations from prior purchases.<sup>63</sup> However, instead of comprising a one-to-many signal from firm to customer, communications over brand identity are increasingly premised upon a many-to-many model of communication. Moreover, end consumers are not faced with the binary choices of exit from or loyalty to a brand; arguably consumers have a strengthened voice vis-à-vis the brand value in this pluralistic and decentralized information environment.

Drawing on a concept of “informational capital,” Gangjee coins the term “‘digital’ capitalism, which is concerned with immaterial, informational production rather than industrial production.”<sup>64</sup> Building upon these priors, I have offered a related concept of “cognitive capitalism,”<sup>65</sup> positing that the attentional value of brands (that is, the attention they receive in cultural, economic, political, and social realms, magnified by networked digital technologies) is co-created by various stakeholders as they exchange meanings with one another. As the media landscape fractures, advertisers not only provide the familiar one-way appeals to consumers, but also increasingly create original content that is hard to distinguish from non-marketing content. Advertising executives on the cusp of this trend are “put[ting] forth the idea that ads are the products of

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<sup>60</sup> *Id.* at 940.

<sup>61</sup> Gangjee, *supra* note 20, at 31. He further states that “[w]ithin this tradition: ‘it is often assumed that the brand owner exerts considerable control over the brand. From this perspective, successful brand management becomes a matter of finding the brand’s true and timeless essence and carrying out brand-building activities that will translate the identity into a corresponding brand image.’ Such thinking tracks the dominant approach to marketing in economics, which held sway until the late 1980s . . . .” *Id.* at 36 (quoting Anders Bengtsson & Jacob Ostberg, *Researching the Cultures of Brands*, in *HANDBOOK OF QUALITATIVE RESEARCH METHODS IN MARKETING* 83, 85 (Russell W. Belk ed. 2006)).

<sup>62</sup> Gangjee, *supra* note 20, at 31–33, 57.

<sup>63</sup> *See id.* at 31.

<sup>64</sup> *Id.* at 55 (citing ARVIDSSON, *supra* note 58, at vii).

<sup>65</sup> Chon, *Slow Logo*, *supra* note 31, at 950. These concepts are related to but not identical to “informational capitalism.” Guy Pessach, *Beyond IP—The Cost of Free: Informational Capitalism in a Post IP Era*, 54 *OSGOODE HALL L.J.* 225, 230 (2016) (defining informational capitalism as the “use[] [of] data, information and content as means of production and circulation to make profit and accumulate wealth”).

symbiotic relationships . . . .”<sup>66</sup> Consumers proactively participate in the creation of content and its meanings, as Annette Kur has pointed out with the example of a recent Nutella marketing campaign.<sup>67</sup> Whether appreciative or critical, consumers spin off their own reviews of products through a plethora of social media tools.<sup>68</sup>

The emergence of this dense, digital sociality in lieu of the largely analog media environment has changed the interactions between firm, consumer, and brands, and potentially accelerates the social learning process. Consumer voice can be expressed in various forms, such as Facebook “likes,” Twitter campaigns, user reviews on Yelp! or on TripAdvisor, and so on. Thus, a firm’s commitment to the norm of consistent provision of a specific credence attribute, e.g., healthy food, can be easily amplified not only through its own marketing campaigns but through the power of digital networks. Trademark goodwill or brand value can be added to (and subtracted from) a brand by consumers and other stakeholders. These increasingly prevalent communicative activities are a source of brand value in their own right within the cognitive capitalism frame. Consumer attention and participation, captured and consolidated into the container of trademark goodwill, are analogous to what is called user-generated content in the copyright context.<sup>69</sup>

For these reasons, the term “value network” is more descriptively accurate than “supply chain” because it emphasizes the creation of key attentional and informational value created by multiple stakeholders in a pluralistic communications ecology rather than focusing simply on the manufacturing components of a good or service.<sup>70</sup> Consumers signal to

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<sup>66</sup> Sydney Ember, *Ads Evolve into New Forms as Media Landscapes Shifts*, N.Y. TIMES (May 8, 2016), <http://nyti.ms/1Ty1wla>. A recent example of this is a Lyft ad campaign, available on YouTube and featuring Richard Sherman going incognito as a Lyft driver and bragging about his favorite football player (Richard Sherman, of course) to unwitting customers in a wink-wink comedic conspiracy with the consumer viewer. Tricia Romano, *Would You Recognize Seahawks’ Richard Sherman if He Were Your Lyft Driver?*, SEATTLE TIMES, (Apr. 27, 2016, 4:12 PM), [http://www.seattletimes.com/entertainment/would-you-recognize-richard-sherman-if-he-was-your-lyft-driver/?utm\\_source=email&utm\\_medium=email&utm\\_campaign=article\\_left\\_1.1](http://www.seattletimes.com/entertainment/would-you-recognize-richard-sherman-if-he-was-your-lyft-driver/?utm_source=email&utm_medium=email&utm_campaign=article_left_1.1). See generally Zahr Said, *Embedded Advertising and the Venture Consumer*, 86 N.C. L. REV. 99 (2010) (addressing possible regulatory responses to embedded advertising).

<sup>67</sup> Annette Kur, *Brand Symbols, the Consumer, and the Internet* 10–11 (Max Planck Inst. for Innov. & Comp. Research, Research Paper No. 16-01, 2016); see also Chon, *Slow Logo*, *supra* note 31, at 946 (describing a Coke marketing campaign).

<sup>68</sup> See Eric Goldman, *An Assessment of the Consumer Review Freedom Act of 2015* 1, 4 (Santa Clara Univ. Sch. of Law Legal Studies, Research Papers Series, Working Paper No. 2-15, Nov. 2015).

<sup>69</sup> See, e.g., Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. ENT. & TECH. L. 841, 842 (2009); Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1460 (2008).

<sup>70</sup> Chon, *Slow Logo*, *supra* note 31, at 941–42; Errol Meidinger, *Transnational Business Governance Interactions in Sustainable Supply Chain Management* at 3–4

other consumers by consuming branded products, then connecting to their social media platforms to approve or disapprove of them. Business to business signaling via brands is clearly for purposes of market differentiation and competition. Firms signal to consumers via brands in their targeted marketing campaigns. Consumers signal to firms through consumer purchases or boycotts, and increasingly through their own public assessments of products and services. Increasingly producers such as farm and factory workers are involved in these multidirectional conversations as a type of brand citizenship. And the pluralistic process of brand value building occurs through networked digital technologies.

Viewed this way, the value of the brand as a business asset can be no longer exclusively related to a trademark owner's efforts such as marketing expenditures. Rather, trademark goodwill is a major feature of the global public square and therefore can be viewed as a public good, with temporary and partial possession by all who contribute to its meaning. No stakeholder can be excluded and all brands potentially benefit (or are harmed) from the fluid and dynamic communicative power of brand citizenship linked with cognitive capitalism. For example, Michael Pollan recently described how farm workers who had tried for decades to bring attention to their working conditions were successful only when they started to put into question the reputation and ergo value of brands.<sup>71</sup> The anecdote is worth quoting at length, given that most accounts of successful boycotts center around the figure of the heroic, individual consumer rather than the collective voices of labor:

Since the 1990s, the Coalition of Immokalee Workers has been organizing the tomato pickers of South Florida, some of the most underpaid and ill-treated workers in the country. In their decades-long quest to improve pay (by 1 cent per pound) and working conditions (until recently some Florida tomato pickers were effectively enslaved by their employers), the coalition tried every strategy in the book: labor strikes, hunger strikes, marches across the state. But the growers would not budge. "Then we found the unlocked door in the castle wall," Lucas Benitez, the farmworker who helped establish the coalition, told me. "It was the corporate brand." Instead of going after the anonymous growers and packers, who had nothing to lose by rejecting their demands, the coalition trained its sights on the Big Food brands that bought their tomatoes: McDonald's, Burger King, Chipotle, Subway, Walmart. In 2011 the coalition drafted a Fair Food Agreement guaranteeing a raise of a penny per pound and spelling out strict new standards governing working conditions. They then pushed the big brands to sign it, using the

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(2016) (unpublished manuscript) (on file with author) (explaining evolution of "supply chain" terminology to "value chain" and arguing that "network" is more apropos than "chain").

<sup>71</sup> Pollan, *supra* note 24.

threat of boycotts, marches on fast food outlets, even the public shaming of top executives and their bankers. One by the one, the Big Food brands have given in, signing the agreement and, for the first time, accepting a measure of responsibility for the welfare of farmworkers at the far end of their food chain. The coalition achieved victories that never could have been achieved in Washington.<sup>72</sup>

Ideally, the concepts of brand citizenship and cognitive capitalism have the potential to connect the global regulatory governance of value networks (or supply chain governance) to the formation of trademark goodwill or brand value. Brand citizenship gives consumers (and others) important stakeholder roles in demanding, assessing, and enforcing product quality beyond the traditional method of repeat purchases due to customer loyalty. Ideally, brand owners would receive signals regarding consumer demands and desires, and then change or improve the underlying value networks. Consumers, in turn, could receive information regarding salient aspects of firm decisions and policies, and could also potentially engage in brand-relevant conversations with other participants in the value chain.

In reality, however, this possible multi-directional communication model rests on many assumptions about information flow and symmetry. These are explored in the next Section.

### C. *The Regulatory Governance Reality: Missing Puzzle Pieces*

Market-driven regulatory governance mechanisms have been described as a “puzzle of rules”—by which the contradictions of neoliberal markets are incompletely addressed through market-based rule-making projects, “from standardization of accounting procedures to the rules for fairness and sustainability” of consumer projects.<sup>73</sup> These projects are typically based upon voluntary private codes or standards, combined with self-monitoring, and “seek to bypass nation-states and regulate through supply chains. Potentially, they are creating new forms of authority and regulation that do not rely directly on the nation-state system.”<sup>74</sup> Despite this proliferation of rules and the emergence of “new global rulers,”<sup>75</sup> key pieces of the puzzle of rules are missing. For example, it is not been

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<sup>72</sup> *Id.*

<sup>73</sup> BARTLEY ET AL., *supra* note 14, at 29; *see also* LISBETH SEGERLUND, MAKING CORPORATE SOCIAL RESPONSIBILITY A GLOBAL CONCERN: NORM CONSTRUCTION IN A GLOBALIZING WORLD 113–15 (2010) (discussing fair trade labeling and other voluntary standards).

<sup>74</sup> Rosemary Pennington, *Five Questions with Tim Bartley*, IND. UNIV. BLOOMINGTON: FRAMING THE GLOBAL (Aug. 26, 2013), <http://framing.indiana.edu/2013/08/26/five-questions-with-tim-bartley>.

<sup>75</sup> *See* TIM BÜTHE & WALTER MATTLI, THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY 21–22 (2011).

demonstrated that consumers actually have access to the information they need to make ethical choices; indeed firms may resist making transparent their supply chain practices.<sup>76</sup> Moreover, there are unresolved questions of what consumers understand when they do have access to information; whether disclosure of information impacts consumer purchasing patterns; whether individual changes in consumption then add up to an aggregate shift in market demand; and whether that aggregate demand will in turn impact corporate behavior. For purposes of this Article, a big missing piece is how trademark law ultimately interfaces with these consumer perceptions of brand value or trademark goodwill.<sup>77</sup>

Ideally, global governance promotes transnational policy outcomes through private ordering and contractual relations between and among firms in global value networks. The involvement of consumers via social media adds additional layers to this narrative of market-based governance, by leveraging digital technologies to potentially connect the end consumer to the “last mile” of a global value network rather than relegating the end consumer to the role of a passive and often unwitting recipient of standards set by others.<sup>78</sup> It is unclear, however, how much consumers understand from the standards that are embedded in certification marks or disclosures provided in labels. Some scholars assert that mandatory disclosures or “notice” to consumers are often misunderstood or ignored,<sup>79</sup> and are therefore skeptical of notice as a robust form of regulatory governance. Others suggest that even if consumers are conscious (and furthermore conscientious), they may still prioritize price or other characteristics over ethical choices.<sup>80</sup> Studies on consumer behavior have revealed inconsistency between consumers’ stated preferences and

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<sup>76</sup> See Meidinger, *supra* note 70 (manuscript at 24) (reporting hesitancy among managers about making public their supply chain activities).

<sup>77</sup> Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 624 (2004); Graeme B. Dinwoodie & Dev S. Gangjee, *The Image of the Consumer in European Trade Mark Law* 10, 12 (Univ. of Oxford, Legal Research Paper Series Paper No. 83/2014 (assessing the Court of Justice of the European Union’s articulation of the “average consumer”).

<sup>78</sup> See Fabrizio Cafaggi, *Private Regulation, Supply Chain and Contractual Networks: The Case of Food Safety* 26 (Robert Schuman Ctr. for Advanced Studies Private Regulation Series-03, EUI Working Paper RSCAS 2010/10, 2010) (“Not only do consumers have low level of participation in contractual design and standard-setting within the food supply chain approach, but they also have very weak enforceability powers before courts. The accountability of these regimes is mainly based on the enforcement strengths of NGOs and, to a limited extent, competitors. The strengths and capacities of NGOs may vary across industries and countries.”).

<sup>79</sup> See, e.g., OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* 185–90 (2014).

<sup>80</sup> See, e.g., Chilton & Sarfaty, *supra* note 45, at 46–47; Narine, *supra* note 43, at 91.

their actual behavior.<sup>81</sup> Much of the regulatory governance literature focuses on consumer boycotts as the primary market signal of discontent. This heavy reliance on group boycotts (or possible consumer class-action lawsuits) belies the idea that individual consumers' actions in the aggregate may create a strong market signal. And, even organized boycotts and other forms of collective consumer "voice" may not ultimately have impact on a firm's behavior or bottom line.<sup>82</sup> For all these reasons, there is a potentially huge disconnect between the ideal of brand citizenship and the reality.

Critically, even if consumers are involved more in this informational interchange, which will purportedly result in more sustainable consumption choices, these governance approaches depend upon the provision of key information that the brand value does not currently signal. Trademark goodwill is currently a flat and not very deep interface for the kinds of signals that regulatory governance proponents regularly ascribe to it. To the extent that the consumer would like to receive information about the sustainability standards of a product or service, for example, a great deal more research on the part of the consumer is required than simply looking at a mark or label. It is a challenge for all but the most sophisticated and well-organized consumer groups—such as NGOs dedicated to this process—to decode the differences among the competing standards embedded in different brand, much less articulate them to the public. Thus, one additional missing piece of the regulatory governance puzzle is the lack of transparency of underlying sustainability standards coupled with the lack of harmonization of standards governing the relevant production processes. This widespread inability to discern the substance of credence attributes is even characteristic of widely recognized and harmonized public standards with public administrative rule-making procedures in place, such as the USDA organic certification.<sup>83</sup>

There might be ways to manage this information overload within market-based regulatory governance approaches that favor information-based nudges or notice. For instance, the concept of "mapping" and

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<sup>81</sup> See, e.g., Susanne Sleenhoff & Patricia Osseweijer, *Consumer Choice: Linking Consumer Intentions to Actual Purchase of GM Labeled Food Products*, 4 GM CROPS & FOOD: BIOTECH. IN AGRIC. & THE FOOD CHAIN 166, 169 (2013); Ann N. Thorndike, *Traffic-Light Labels and Choice Architecture: Promoting Healthy Food Choices* 46 AM. J. PREV. MED. 143, 147 (2014).

<sup>82</sup> Narine, *supra* note 43, at 137 ("Accordingly, I conclude that the evidence is inconsistent, at best, about the effect of disclosures on consumer behavior. The evidence is clear, however, about the lack of consumer enforcement of the social contract through boycott or other sustained action.").

<sup>83</sup> See *News Bites: Organic "Sunset" Lawsuit*, PCC NAT. MKTS.: SOUND CONSUMER (June 2015), <http://www.pccnaturalmarkets.com/sc/1506/newsbites.html#1> (describing a lawsuit against the US Department of Agriculture "over a rule changing the 'Sunset' provision restricting synthetics in organic foods[; t]he lawsuit contends USDA made the rule change illegally, without following the required process").

structuring of complex choices as a type of “choice architecture” suggests that the presentation of information in certain deliberate ways allows consumers to make different choices than they would without such information.<sup>84</sup> Even those skeptical of the effectiveness of mandated disclosure suggest that intermediaries (including information aggregators and savvy consumers or consumer groups) might assist in the provision of comprehensible information relevant to decision-making.<sup>85</sup> But key missing pieces of this puzzle of rules include not only how to remedy these information deficits and overloads, but also how to connect these consumer and firm activities more meaningfully to brand value.

## II. TRADEMARK GOODWILL IN AN AGE OF OUTSOURCING

As the previous Section demonstrates, the pervasive presence of information and communication technologies facilitate potentially meaningful interactions between trademark owners and consumers. These interactions are also partially driven by loosely connected global social-justice movements with the direct or indirect goals of increasing CSR efforts<sup>86</sup> as well as emerging public regulatory initiatives such as the CTSCA.<sup>87</sup> This Section reviews how the extensive literature on regulatory governance via brand value has developed almost completely separately from the construction of trademark goodwill within intellectual property scholarship.

### A. *Trademark Goodwill's Increasing Reach*

From a legal perspective, trademark goodwill is a nebulous concept with no standard definition.<sup>88</sup> Yet trademark goodwill forms the basis for treatment in many other areas of law, such as bankruptcy, tax, and other transactional areas; for example, most mergers and acquisition experts use goodwill as a “black box” to justify company valuations in excess of liquidation value, comparable sales or other generally accepted pricing means.<sup>89</sup> Various approaches have emerged for valuing brand value for

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<sup>84</sup> RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 83–87, 91–97 (2008).

<sup>85</sup> See, e.g., BEN-SHAHAR & SCHNEIDER, *supra* note 79, at 185–90.

<sup>86</sup> BARTLEY ET AL., *supra* note 14, at 2.

<sup>87</sup> CAL. CIV. CODE § 1714.43.

<sup>88</sup> See, e.g., Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 548–49 (2006); Irene Calboli, *Trademark Assignment “with Goodwill”: A Concept Whose Time Has Gone*, 57 FLA. L. REV. 771, 804–06 (2005); Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1850–73 (2007).

<sup>89</sup> I am indebted to Professors Diane Dick and Steve Tapia for these observations and examples from business law.

different transactional purposes.<sup>90</sup> Typical concerns about goodwill in trademark licensing revolve around the prohibition against assignments in gross or naked licenses (whether to assign or license a mark with or without goodwill), which affects the alienability of marks and raises questions of about the fate of their associated goodwill after such transactions.<sup>91</sup> Yet the question of how trademark goodwill should be defined and measured represents a surprisingly incomplete and undertheorized space.

Trademark scholarship often refers to goodwill as all possible sources of a customer's patronage.<sup>92</sup> Historically, the locus of harm to goodwill has moved from a narrow focus on a tort-based injury to a mark (and therefore by implication to one's business reputation and only incidentally to its goodwill) to the much broader conception of injury to the trademark goodwill itself. Trademark scholars tend to worry about how far to extend trademark's functions beyond its core signaling function to consumers about source of origin or manufacture (which is often explained as a proxy for quality or consistency of product).<sup>93</sup> Whatever their perspectives, almost all observers agree that goodwill has expanded beyond its origins<sup>94</sup> to what could be called second generation goodwill, which includes positive associations with the firm that sells the brand.<sup>95</sup>

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<sup>90</sup> Roy P. D'Souza, *Brand Differentiation and Industry Segmentation: Drivers for Trademark Valuation in Corporate Transactions*, in *THE LAW AND PRACTICE OF TRADEMARK TRANSACTIONS: A GLOBAL AND LOCAL OUTLOOK* 149, 162–64 (Irene Calboli & Jacques de Weirra eds., 2016).

<sup>91</sup> Calboli, *supra* note 88, at 776–99; see also Jake Linford, *Valuing Residual Goodwill After Trademark Forfeiture* 93 *NOTRE DAME L. REV.* (forthcoming 2017).

<sup>92</sup> See Calboli, *supra* note 91, at 804 n.179 (quoting *Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 555–56 (1993) (“Although the definition of goodwill has taken different forms over the years, the shorthand description of goodwill as ‘the expectancy of continued patronage,’ provides a useful label with which to identify the total of all the imponderable qualities that attract customers to the business.”)). Calboli canvases many historical definitions of goodwill, many of which refer to “consumer patronage.” See *id.* at 804–06 nn.179–89; see also Bone, *supra* note 88, at 569 (referring to sources of consumer patronage); Chronopoulos, *supra* note 18, at 266 (same); Linford, *supra* note 91, manuscript at 5 n.18 (defining “consumer goodwill to indicate the value that consumers invest in the mark, *i.e.*, its value as a source signifier to reduce consumer search costs”).

<sup>93</sup> See Farley, *supra* note 21, at 1176–78; Long, *supra* note 21, at 1030 & nn.3–11.

<sup>94</sup> Bone, *supra* note 88, at 551. *But see* Adam Mossoff, *Trademark as a Property Right* (Mar. 25, 2017) (unpublished manuscript), <https://ssrn.com/abstract=2941763> (asserting that trademark goodwill has been treated historically by courts as property).

<sup>95</sup> See Jennifer M. Black, *The “Mark of Honor”: Trademark Law, Goodwill, and the Early Branding Strategies of National Biscuit*, in *1 WE ARE WHAT WE SELL: HOW ADVERTISING SHAPES AMERICAN LIFE . . . AND ALWAYS HAS* 262, 262–77 (Danielle Sarver Coombs & Bob Batchelor eds., 2014); ARTHUR F. MARQUETTE, *BRANDS, TRADEMARKS AND GOOD WILL: THE STORY OF THE QUAKER OATS COMPANY* 5–9 (1967).



And the third generation of the concept of goodwill, ascendant today, includes anti-dilution protection based upon associations with the mark by itself, analogous to a property-based right.<sup>96</sup> Some argue that such extensions of legal protection may result no increase in overall consumer welfare and may possibly even decrease social welfare through higher barriers to entry in markets as well as restrictions on everyday speech.<sup>97</sup>

Despite various concerns and objections, the public policy rationale for protection of trademark goodwill has proved to be malleable enough to fit the needs of trademark owners in expanding global markets, particularly responding to innovations in technology and marketing.<sup>98</sup> The object lesson for purposes of this Article is that trademark goodwill can and has adapted quite rapidly over time, in response to changing business models. Both international and domestic laws have moved decisively beyond the paradigmatic confused consumer and toward more extensive

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<sup>96</sup> Bone, *supra* note 88, at 551–52 (“[T]he word ‘Tiffany’ has come to mean luxury, prestige, and high quality in general, so that it imparts those meanings to any product or firm with which it is associated. It would not be unusual for a judge to assume that these meanings are part of the plaintiff’s goodwill, just like brand and firm goodwill. I call this third type of goodwill ‘inherent goodwill’ because it inheres in the mark itself. Inherent goodwill is significantly different from brand and firm goodwill and protecting it involves different considerations. In fact, liability in our example has nothing to do with safeguarding the quality of consumer information. It has to do with protecting the seller, and appropriation of goodwill does all the justificatory work. Moreover—and this is the important point—goodwill appropriation is capable of doing this work only because it assumes an extremely broad conception of goodwill.”) (footnote omitted). As Bone further points out, the current expansive concept of trademark goodwill can be traced to “a series of articles published between 1970 and 1975, [in which] the economist Phillip Nelson developed a powerful response to the prevailing monopoly critique of advertising. He argued that advertising might actually enhance competition by improving the quality of information available to consumers and lowering barriers to entry. . . . If a consumer ends up preferring an advertised product, the consumer gets satisfaction from using it, and it is not apparent how one can justify condemning that preference except on highly paternalistic grounds.” *Id.* at 602–03 (footnote omitted).

As both Bone and Irene Calboli have documented, this most recent incarnation of trademark goodwill, beginning in the 1980s, marks a decisive shift in favor of viewing goodwill as a property right rather than a tort injury to one’s business reputation. *Id.* at 614–15; Calboli, *supra* note 88, at 802.

<sup>97</sup> See Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 405–10 (1990); Mark A. Lemley & Mark P. McKenna, *Is Pepsi Really a Substitute for Coke? Market Definition in Antitrust and IP*, 100 GEO. L.J. 2055, 2082–84 (2012).

<sup>98</sup> For an overall critique of intellectual property law’s role in promoting status distinctions, see Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 810 (2010). In defense of this expansion, see Apostolos Chronopoulos, *Legal and Economic Arguments for the Protection of Advertising Value Through Trade Mark Law*, 4 QUEEN MARY J. INTELL. PROP. 256, 256–76 (2014); Shahar J. Dilbary, *Famous Trademarks and the Rational Basis for Protecting “Irrational Beliefs,”* 14 GEO. MASON L. REV. 605, 614–19 (2007).

theories of trademark protection, including its goodwill *per se*, particularly of famous and well-known marks.<sup>99</sup> For example, as stated earlier, the ECJ has recently recognized trademark goodwill as a locus of legal protection under trademark law, separate and apart from the associated trademark.<sup>100</sup> And WIPO has recently commissioned several analyses of the economic impact and valuation of trademark goodwill in its own right.<sup>101</sup>

With respect to trademark goodwill, the general logic of the market is to emphasize emotional and psychological aspects of a brand for marketing purposes, to the detriment of communicating a branded product's objectively verifiable qualities. As Jessica Kiser writes: "[t]o illustrate the difference between the role of a trademark and that of a brand, consider that a trademark can be said to answer the question 'Who made this product?' A brand answers the more existential questions of 'Who is this product?' or 'Who am I if I buy this product?'"<sup>102</sup> The increasing domination of this marketing-oriented logic has led inexorably to the linking of trademarks with subjective "lifestyle" meanings to the detriment of objective "quality" meanings. To remedy this impoverished market signaling, trademark goodwill could and should be further parsed into more uniquely identifiable forms to help consumers ascertain whether the goods they are purchasing are manufactured under objective criteria, including sustainability standards.

### B. *From Many Villages to the Global Village*

As described in Part I of this Article, the rise of networked digital technologies potentially disrupts the information monopoly around credence characteristics of products and services with prominent marks, and creates a possible collective learning process between consumers and brand owners about how those characteristics are assessed. This governance dialogue between consumers and producers is particularly accessible to sophisticated institutional entities that act as proxies for consumer

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<sup>99</sup> Lanham Act § 43, 15 U.S.C. § 1125(c)(2) (2012); TRIPS, *supra* note 21, at art. 16; Paris Convention, *supra* note 21, at art. 6bis. This expansion of trademark theory to include the theory of anti-dilution has been widely attributed to Frank Schechter, a legal realist who penned *The Rational Basis of Trademark Protection*. Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813 (1927).

<sup>100</sup> L'Oreal v. Bellure [2010] EWCA (Civ) 535 (Eng.).

<sup>101</sup> CORRADO & HAO, *supra* note 26, at 15 ("The value of a firm's brand or brands is commonly called *brand equity*, and sometimes it is called brand and reputational equity to underscore its basis in customer perception. Brand equity can therefore be defined as an asset that reflects consumers' implicit valuation of the revenue stream that accrues to a firm from its brand name(s), mark, or logo.").

<sup>102</sup> Assaf, *supra* note 4, at 95; Kiser, *supra* note 4, at 4–5.

interests such as watchdog NGOs,<sup>103</sup> consumer advocacy organizations, and institutional investors, for example, SRIs.<sup>104</sup> However, lead firms are not obligated to disclose any particular content about sourcing and quality control measures; trademark owners typically undertake disclosure as part of a voluntary marketing effort to differentiate themselves from firms as part of its CSR activities. And few mechanisms provide a basis for individual consumer involvement and assessment. Therefore individual consumers cannot fairly be characterized as true stakeholders under these relatively impoverished information conditions.

Several factors impede trademark law from recognizing supply chain governance activities now undertaken by trademark owners. One is ideological: trademark law has its own version of the copyright's "romantic author."<sup>105</sup> Trademark law developed under a prototypical small, local family-owned business or guild, very different from the current landscape, dominated by multinational corporations with long supply chains. Thus the law arguably overemphasizes first-party certification; that is, the guaranteeing of quality control via a small firm (or even more distantly, a guild)<sup>106</sup> that also owns the mark and sources all the components. The current law also disregards the reality that most manufacturing is no longer local in nature. Under the traditional paradigm, a small firm markets a particular brand of good or service, signaling source of origin directly to consumers via trademarks. This emphasis on first-party certification assumes that a firm will act in its own self-interest and maximize quality assurance of its product or services in order to attract repeat customers. With the expansion of cross-border markets and concomitant outsourcing along value chains,<sup>107</sup> the roles played by second-party certifiers—that is, voluntary industry associations or buyer firms in a value network—have become much more prominent but their quality assur-

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<sup>103</sup> See, e.g., VERITÉ, COMPLIANCE IS NOT ENOUGH: BEST PRACTICES IN RESPONDING TO THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT (Nov. 2011).

<sup>104</sup> James Coburn, Senior Manager, Investor Programs, Ceres, Panel Presentation, Climate Risk and Sustainability Disclosure at the Lewis & Clark Law School 21st Annual Business Law Fall Forum: Innovating Corporate Social Responsibility: From the Local to the Global (Oct. 7, 2016) (podcast on file with Lewis & Clark Law Review).

<sup>105</sup> See Peter Jaszi & Martha Woodmansee, *Introduction to THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 1, 3–9 (Martha Woodmansee & Peter Jaszi eds., 1994).

<sup>106</sup> FRANK I. SCHECHTER, *THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADE-MARK* 79–80 (1925).

<sup>107</sup> See generally GARY GEREFFI & KARINA FERNANDEZ-STARK, *CTR. ON GLOB'N, GOVERNANCE & COMPETITIVENESS, GLOBAL VALUE CHAIN ANALYSIS: A PRIMER* (2011) (explaining dynamics of complex industrial interaction between actors in global production); Gary Gereffi et al., *The Governance of Global Value Chains*, 12 *REV. INT'L. POL. ECON.* 78 (2005) (proposing theoretical underpinnings of global value chains based on different economic considerations).

ance activities have not been rigorously evaluated. More (but still not very much) attention been paid to the role of third-party certifiers (independent third-party, nongovernmental standard-setting, inspection, assurance, and certification services).<sup>108</sup>

Reexamining the hungry yogi example with which this paper began—within a regulatory governance taxonomy—KIND could be viewed as the type of “first-party certification” typically represented by trademarks. That is, KIND functions as a “distinctive sign that identifies the products and services of a particular business and distinguishes them from those sold or provided by others.”<sup>109</sup> With regard to its quality function, KIND is a quintessentially self-certifying brand; its company maintains quality control over its various ingredients (or components) such as nuts, sugar, and chocolate. Indeed, its website states:

*Our health and nutrition guiding principles*

KIND has always been committed to bringing you wholesome and delicious snacks. We promise to always choose high quality ingredients over recipe short-cuts and provide snacks that are both healthy AND tasty—not one or the other. We work tirelessly to live up to our fans’ expectations. To demonstrate that continued dedication, we Promise to . . .<sup>110</sup>

The web-based marketing associated with the brand promises certain qualities about the health and nutritional quality of its ingredients to its consumers.<sup>111</sup>

The quality control measures exercised by the trademark owner presumably occur through its contracts with suppliers and sourcing agents. Thus, KIND could also be viewed as a second-party certifier, that is, a buyer firm in a value network (supply chain), which disciplines its suppliers of gluten-free or non-GMO ingredients. In this role, it is subject to some of the same problems faced by end consumers of credence goods, such as our hypothetical yogi, who must trust the representation of the brand owner about the healthiness of the food. KIND may or may not have ready mechanisms to verify the representations of its suppliers with respect to attributes of their ingredients that cannot be verified without further testing.<sup>112</sup> Emerging data suggests that it is difficult for some lead firms to verify compliance under mandatory disclosure regulations, beyond the first or second tier of suppliers.<sup>113</sup>

<sup>108</sup> CONROY, *supra* note 38, at 14–15; Jeanne C. Fromer, *The Unregulated Certification Mark(et)*, 69 STAN. L. REV. 121 (2017).

<sup>109</sup> ITC & WIPO, *supra* note 28, at 73.

<sup>110</sup> *KIND Promises*, KIND SNACKS, <http://www.kindsnacks.com/promises/>.

<sup>111</sup> *Id.*

<sup>112</sup> See, e.g., Eric L. Lane, *Greenwashing 2.0*, 38 COLUM. J. ENVTL. L. 279, 304–05 (2013).

<sup>113</sup> Sarfaty, *supra* note 12, at 431–32.

While KIND may function primarily as a first-party certifier, WHOLE FOODS functions primarily as second-party certifier, that is, as a buyer firm in a value network. Its brand represents its enormous buyer power and concomitant ability to enforce certain quality-control measures upon its suppliers. Its website publicly announces its quality standards, which include: “foods that are free of artificial preservatives, colors, flavors, sweeteners, and hydrogenated fats” as well as “organically grown foods,” and it has publicized a long list of “unacceptable food ingredients.”<sup>114</sup> By implementing these quality control standards presumably on all food brands sold within its retail spaces, it functions as a de facto second-party certifier regarding credence attributes and thereby shapes the market in credence goods such as organic food. On one side of this certification platform are consumers such as our yogi; on the other side are sellers and intermediate buyers such as KIND. Both sides converge on WHOLE FOODS as an information platform or, put another way, as a certification intermediary for a wide variety of food products. Its brand success is related to the ensuing network effects represented by the degree of trademark recognition and associated goodwill. The branding strategy of WHOLE FOODS is integrally connected to its second-party certification functions, on a scale very different from KIND but quite similar in the way it functions as a core part of both firms’ business strategies.

Both KIND and WHOLE FOODS also participate in third-party certification, which occurs through independent third-party, nongovernmental standard-setting, inspection, assurance, and certification services. These presumably provide quality assurance to brand owners through adherence to voluntary standards. One of the best known of these types of certifications as applied to commodity food products is fair trade certification.<sup>115</sup> It is true that certification marks are by their very design supposed to go beyond the initial core-signaling functions of trademarks into the realm of credence attributes that cannot be easily ascertained by consumers. However, one enormous weakness of certification marks is that they do not involve consistently reliable trust mechanisms because the certification process, which purports to require adherence to standards, is vulnerable to the objectivity and capacity of the self-auditing activities of the trademark owner or of third-party certifying bodies.<sup>116</sup> Standards

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<sup>114</sup> *Quality Standards*, WHOLE FOODS MKT., <http://www.wholefoodsmarket.com/quality-standards>.

<sup>115</sup> An illustration of the gap between the intellectual property and governance literatures is highly evident here; the former pays little attention to third-party certification, *see, e.g.*, Chon, *Marks of Rectitude*, *supra* note 33, at 2315–16; Fromer, *supra* note 108, at 183–84, while the latter focuses almost exclusively on such certification, *see, e.g.*, CONROY, *supra* note 38.

<sup>116</sup> *See* Andrea R. Hugill et al., *Beyond Symbolic Responses to Private Politics: Examining Labor Standards Improvement in Global Supply* 3 (Harv. Bus. Sch., Working Paper No. 17-001, 2016).

themselves are often incompletely disclosed and subject to change at the certifiers' whim.<sup>117</sup>

Another huge challenge to the widespread use of certification marks is that consumers often have difficulty interpreting certification marks. As stated earlier, the lack of harmonization may result in the proliferation of standards; multiple and competing certification marks may drive consumer confusion of an entirely different sort than the passing off species of misrepresentation that is the focus of classic trademark law.<sup>118</sup> For example, various separate standard-setting organizations are involved in the certification of coffee.<sup>119</sup> Thus consumers are faced with an information famine created by the failure to fully understand the meaning of these marks, while paradoxically they are also faced with an information feast in the form of too many different standards combined with insufficient cognitive bandwidth to assess them.

This Article claims that expanded certification and verification strategies involving brands as information platforms could more accurately reflect the CSR efforts in global value networks. The proposal assumes that trademark goodwill could develop the capacity to convey relevant information in a global regulatory governance structure. In particular, consumers—individual and institutional—could signal their “patronage” around sustainability standards, and trademark owners could respond to these consumer signals. These communicative activities are currently incipient but discernible. As described earlier, an array of social media branding mechanisms actively embrace the consumer's role in co-creating brand identity. The websites associated with brands usually display now-familiar icons, allowing their consumers to connect to brands via social media venues such as Facebook, Twitter, Pinterest, etc. For example, KIND's print label exhorts its consumers to “do the kind thing for your world” and to “[j]oin the conversation [at] facebook.com/kindsnacks.” Its website updates consumers with the latest information about the FDA's investigation into its “healthy” claim, and promotes its founder's book on the topic of being kind (!).<sup>120</sup> By doing so, the trademark owner engages in interactive marketing that harnesses consumer labor and communicative strategies to increase brand recognition, both

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<sup>117</sup> Fromer, *supra* note 108, at 183–84.

<sup>118</sup> For example, Fair Trade USA (sometimes referred to as Transfair) recently split from FairTrade Labelling Organizations International (FLO) over whether to certify plantations and growers that rely on hired labor, rather than the FLO emphasis on certification of agricultural cooperatives. See *Roundup on the Fair Trade USA/FLO Split*, FAIR WORLD PROJECT, <http://fairworldproject.org/blogs/roundup-of-perspectives-on-the-fair-trade-usaflo-split/>.

<sup>119</sup> Chon, *Marks of Rectitude*, *supra* note 33, at 2341–46.

<sup>120</sup> See generally *KIND Healthy Snacks & Granola Bars*, KIND SNACKS, <http://www.kindsnacks.com/>; see also Kiser, *supra* note 4, at 6–9 (describing different ways that consumers interact with brand marketing).

with regard to marketing activities of first- as well as second-party certifiers (which in turn may incorporate some aspects of third-party certification).

These social media strategies also allow the trademark owner to address criticisms by stakeholders, whether public or private, about possible misrepresentations. For example, the FDA recently listed four of KIND's bars as being mislabeled as "healthy."<sup>121</sup> KIND responded with a direct appeal to its consumers via an explanation and defense posted on its website.<sup>122</sup> Similarly, the food writer and critic Michael Pollan had a public dispute with John Mackey, the CEO of WHOLE FOODS Market, regarding Pollan's treatment of Mackey's company in Pollan's book *The Omnivore's Dilemma*. Both published open letters to each other via their blogs.<sup>123</sup> This open exchange allowed readers at large and WHOLE FOODS customers to comment on their respective positions. In the case of the Pollan-Mackey debate, some of their online dialogue related to WHOLE FOODS' decision to move to a regional distribution model, allegedly reducing local sourcing of food. Robust brand citizenship within regulatory governance rests on the premise that these kinds of interactions between consumers and trademark owners about the brand identity can lead to meaningful changes in market direction.

While these online activities are currently sporadic rather than pervasive practices, they provide a glimpse into the potential of information technologies to further connect consumers and trademark owners in governance dialogue via the brand. The communication takes place under the stick of negative publicity as well as the carrot of building goodwill. While these conversations do not completely obviate concerns over information asymmetry in the form of consumer information famine or feast regarding certifications and other credence attributes, they exemplify a degree of accountability and transparency with respect to representations of brand owners. Of course, this emergent governance dialogue is vulnerable to the general disenchantment of unverified information plaguing the Internet as well as the domination of subjective information in brand marketing campaigns. Yet, pervasive information technologies potentially allow for the circulation of more objective information about brands through multiple pathways surrounding a brand as an information interface.

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<sup>121</sup> James Hamblin, *Kind Bars to U.S. Government: Redefine 'Healthy,'* ATLANTIC (Dec. 8, 2015), <http://www.theatlantic.com/health/archive/2015/12/hands-off-nuts-govt/419352/>.

<sup>122</sup> *A Note to Our KIND Community*, KIND SNACKS: BLOG (Apr. 14, 2015), <http://www.kindsnacks.com/blog/post/a-note-to-our-kind-community-2/>.

<sup>123</sup> John Mackey, *An Open Letter to Michael Pollan*, WHOLE FOODS MKT.: JOHN MACKEY'S BLOG (May 26, 2006), <http://www.wholefoodsmarket.com/blog/john-mackeys-blog/open-letter-michael%C2%A0pollan>; Michael Pollan, *My Letter to Whole Foods*, N.Y. TIMES: OPINION PAGES (June 14, 2006), <https://nyti.ms/2jG5HC4>.

*C. Enhancing the Public Good Component of Trademark Goodwill*

Arguing that current conditions for effective regulatory governance fall short, some observers have begun to suggest changes to system design features, in order to encourage the effectiveness of sustainable trade through CSR.<sup>124</sup> This Section canvasses suggestions relevant to trademark law. Consistent with the concept of the brand as a platform for informational interchange, it first evaluates the consumer-facing side of a brand, and then evaluates its business-facing side. It then culminates in a proposal to change existing systems of valuating trademark goodwill, a change which could benefit both consumers and trademark owners.

*1. From the Consumer Side of the Brand Platform*

CSR principles are informed by the UNGPs, particularly Guiding Principle 21, which is “not only about knowing, it is also about showing.”<sup>125</sup> Building upon this and other human rights principles applicable to transnational corporations, some have recently proposed a stakeholders’ right to receive independent information “so that they can monitor whether a business has been involved in certain human rights violations.”<sup>126</sup> From the consumer perspective, trademark goodwill can provide a partial communicative role for the provision of this information. While a trademark cannot and does not disclose the dynamism of sustainability standards, it can and does perform the signaling functions of business origin, which consumers might be able to trust at face value, especially if a firm is small, has an established reputation, and/or displays a fair amount of transparency with regard to its sourcing practices. “If it has a

<sup>124</sup> See, e.g., Hugill, *supra* note 116, at 31–35; Narine, *supra* note 43, at 138–49.

<sup>125</sup> Jägers, *supra* note 44, at 314–15. (“As stated in Guiding Principle 21 . . . [i]n order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them.

In all instances, communications should:

- (a) Be of a form and frequency that reflects an enterprise’s human rights impacts and that are accessible to its intended audiences;
- (b) Provide information that is sufficient to evaluate the adequacy of an enterprise’s response to the particular human rights impact involved;
- (c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality”) (emphasis omitted).

<sup>126</sup> *Id.* at 322; see also Tara J. Melish & Errol Meidinger, *Protect, Respect, Remedy and Participate: ‘New Governance’ Lessons for the Ruggie Framework*, in *THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: FOUNDATIONS AND IMPLEMENTATION* 303, 317–19 (Radu Mares ed., 2012).



logo, then it's ok," as one observer affiliated with a small fair trade chocolate firm based in Seattle puts it.<sup>127</sup>

Arguably, however, it is difficult for many if not most trademark owners, particularly those with many tiers of suppliers and/or many products, to be absolutely certain of their sourcing.<sup>128</sup> New technologies allow both producers and consumers to access more information about the value network via what I have elsewhere called "smart information."<sup>129</sup> For example, a sushi chef in California has developed an edible QR code to prevent mislabeling of fish, which is estimated at over 30 percent in many U.S. cities.<sup>130</sup> In earlier work, I proposed a hybrid mark called a *tracermark*, which would have some characteristics of a trademark and some of a certification mark.<sup>131</sup> Thus the current informational market failure might be remedied partly through the more aggressive use of technology, and it appears that the food market is in fact moving in this direction. Similar to the tracermark proposal, others have proposed mechanisms for point of sale disclosures:

These types of disclosures, referred to as "targeted transparency," mandate information at the time of decision-making in order to "nudge" consumer behavior. Targeted disclosures may necessitate a rating system whereby the government or a third party converts disclosed information into a grade or label (e.g., a trafficking-free label) that is presented to consumers at the time of purchasing. This information could also be available to consumers through apps, several of which already provide information on companies' ethical practices. In fact, the G7 recently released a statement in support of responsible supply chains that calls for the development of "impartial tools [such as relevant apps] to help consumers and public procurers . . . compare information on the validity and credibility of social and environmental product labels."<sup>132</sup>

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<sup>127</sup> Telephone interview with Nathan Palmer-Royston, former Sourcing Manager at Theo Chocolate (Nov. 2015) (notes on file with author).

<sup>128</sup> Sarfaty, *supra* note 12, at 431 ("Global supply chains frequently include multiple layers of suppliers, which may be difficult to trace and therefore regulate. Since companies often rely on first-tier suppliers to identify and audit those in the second-tier, who in turn identify and audit the next tier and so on, comprehensive monitoring by the company may not be possible. Usually, companies can locate first-tier suppliers, but those suppliers in the lower tiers are not so visible.") (footnote omitted).

<sup>129</sup> Chon, *Tracermarks*, *supra* note 11, at 421.

<sup>130</sup> See, e.g., Nate Hindman & Joe Epstein, *Sushi Chef Creates Edible QR Codes to End Fish Fraud in California Restaurants*, BUS. INSIDER (July 15, 2013, 9:43 AM), <http://www.businessinsider.com/sushi-with-qr-codes-2013-7>; see also Martin, *supra* note 10.

<sup>131</sup> Chon, *Tracermarks*, *supra* note 11, at 421–23.

<sup>132</sup> Chilton & Sarfaty, *supra* note 45, at 47 (alteration in original) (quoting Press Release, White House Office of the Press Secretary, G-7 Leaders' Declaration (June 8,

These various suggestions for point of sale disclosure are technologically viable if underutilized options. Moreover, as Jeanne Fromer has recently argued, the United States Patent and Trademark office could strengthen the disclosure and accountability requirements of standards underlying third party certification marks.<sup>133</sup>

In addition, information intermediaries such as interested NGOs can act as representatives of consumer interests and provide some degree of access to information about otherwise invisible credence attributes. Some of these NGOs may have started as voluntary industry initiatives, or have ties to the for-profit sector. Other NGOs work independently of industries they monitor, as illustrated by a recent report from Oxfam about agricultural sourcing.<sup>134</sup> Watchdog NGOs may also work hand in glove with public agencies. For example, the CTSCA itself does not compel the audits or the adoption of anti-human trafficking standards themselves—those activities are voluntary, but it is mandatory to disclose whether the company adheres to a policy of such auditing.<sup>135</sup> Private NGOs have piggybacked on these initial public disclosure requirements to monitor the degree of compliance by covered firms.<sup>136</sup> These and other efforts and proposals to increase transparency of information for consumers<sup>137</sup> dovetail with changes on the business side, discussed below.

## 2. *From the Business Side of the Brand Platform*

At the same time that consumers demand and governments require more information about sustainability practices along global value net-

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2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/06/08/g-7-leaders-declaration>).

<sup>133</sup> Fromer, *supra* note 108, at 190–93.

<sup>134</sup> *The Behind the Brands Scorecard Methodology*, BEHIND THE BRANDS (Oxfam/GROW), Aug. 2014, at 3.

<sup>135</sup> CAL. CIV. CODE § 1714.43 (West 2015).

<sup>136</sup> Chilton & Sarfaty, *supra* note 45, at 43 (“[A]lthough our results provide some reasons to be pessimistic about consumers’ ability to interpret the information provided in CTSCA disclosures, those disclosures still may have an effect. For example, it is possible that non-profit organizations like KnowTheChain may be able to present the information in ways that consumers are better able to understand.”).

<sup>137</sup> Dauvergne & Lister, *supra* note 40, at 40 (“Beyond direct commercial gains, brand companies are implementing environmental policies across their supply chains to achieve more intangible, indirect benefits, namely risk management and stronger brand reputation. This includes increasing supplier transparency and accountability about their practices, which the brand companies are using for identifying, assessing and limiting risks, as well as increasing consumer trust. From a Disney T-shirt to a Dole organic banana, consumers can now scan with their smart phone or go online to trace a product from the farmer to the retail shelf. Big brands are employing business tools like supply chain tracing, product life-cycle assessments, and supplier audits to reveal environmental ‘hotspots’ and reduce exposure to questionable practices by poor-performing producers: from illegal sourcing to the use of hazardous chemicals. Addressing these risks is increasingly imperative, not just to guard brand reputation, but also to avoid regulatory penalties.”).

works, the independent business case for expanding trademark goodwill based upon their CSR efforts is increasingly obvious.<sup>138</sup> As the introduction to this Article stated, industry associations are initiating labeling programs to assist consumers in identifying sourcing practices. Individual firms, such as KIND and WHOLE FOODS Market, have publicly stated to their consumers their corporate goals of providing healthy food. Acceptance and internalization by consumers of these claims and initiatives depend upon the shared understanding that the branded products are in fact what they are said to be, so as to differentiate sustainable from unsustainable products and services in the market.

Apart from any given firm's attempts to control its brand's meanings through its relationship to consumers, powerful brands, especially for lead firms, arguably play a pivotal role in influencing the overall direction of the market for a given product or service. This is a crucial component of the regulatory governance approach to sustainability on a global scale. The role of lead firms as sustainability disciplinarians over their suppliers has been aptly called "big brand governance."<sup>139</sup> In these efforts, business benefits to trademark owners from CSR efforts have emerged:

as these companies compete to define and integrate environmental considerations into their core operations, products and supply chains, ultimately linking sustainability to their most valuable asset: their brand . . . [that is,] the value that consumers associate with it. . . .

[N]o doubt, some of it is still little more than greenwash. But, something is also different. Corporate sustainability goals reach further, include measurable targets, are audited by independent groups, and are integrated into the core business through increasingly standardized business tools, such as life-cycle assessment, supply chain tracing, eco-certification, and sustainability reporting. Business books are increasingly documenting the competitive value of these new tools.<sup>140</sup>

This suggests strongly that supply chain greening can in fact enhance internal efficiencies, improve corporate performance and promote innovation along value chains.<sup>141</sup> In many cases, cooperation among competitors

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<sup>138</sup> See, e.g., Peter Dauvergne & Jane Lister, *The Prospects and Limits of Eco-Consumerism: Shopping Our Way to Less Deforestation?*, 23 *ORG. & ENV'T* 132 (2010).

<sup>139</sup> Dauvergne & Lister, *supra* note 40, at 37.

<sup>140</sup> *Id.* at 38.

<sup>141</sup> See, e.g., Joshua Simko, Senior Counsel, Supply Chain and Enterprise Contract Management, Nike, Inc., Panel Presentation, Nike's Supply Chain: Sustainable Innovation and Corporate Responsibility as an Engine for Growth at the Lewis & Clark Law School 21st Annual Business Law Fall Forum: Innovating Corporate Social Responsibility: From the Local to the Global (Oct. 7, 2016) (podcast on file with

may result in industry-wide approaches, including harmonized standard-setting. An example from outside of the food industry comes from the chemical field:

[The purpose of] “Together for Sustainability”[TfS], founded in 2011 by the chief procurement officers of six multinational chemical companies . . . “is to develop and implement a global audit program to assess and improve sustainability practices within the supply chains of the chemical industry.”<sup>142</sup>

Similarly, in the absence of government mandate, “telephone companies [have] develop[ed] eco-ratings of their handsets with the express hope of influencing retail customers.”<sup>143</sup> Many of these measures go “beyond-compliance” to capture what some have called policy innovation within the internal structure of corporations or industries.<sup>144</sup>

Inter-brand competition, of course, can be fierce and can sharpen the market differentiation activities of particular firms vis-à-vis each other. Thus, the “costs to company reputations of failing to meet their [stated sustainability] goals are significant, and are increasing as competitors demonstrate corporate sustainability progress.”<sup>145</sup> This reputation cost affects both lead firms that play a largely first-party certification function over credence attributes (such as KIND) as well as second-party certification firms that primarily engage in sourcing and verifying other suppliers (such as WHOLE FOODS). This competition for customers over credence attributes is already evident. For example, WHOLE FOODS has announced more transparent sourcing information about its products in the United States, in response to sharp competition from lower-priced firms such as Wal-Mart.<sup>146</sup> Despite the need to demonstrate to consumers that they are undertaking these consumer-benefitting activities, a typical trademark owner has no ready mechanism for communicating any change in underlying quality or sustainability decisions along the value network. Reportedly, WHOLE FOODS initially relied upon a “Field of Dreams” approach to marketing its CSR message, which then was chal-

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Lewis & Clark Law Review) (discussing *Sustainable Performance Innovation*, NIKE, [http://www.nike.com/us/en\\_us/c/sustainability](http://www.nike.com/us/en_us/c/sustainability)).

<sup>142</sup> Meidinger, *supra* note 70, at 14 (quoting TOGETHER FOR SUSTAINABILITY, <http://tfs-initiative.com/about-us/>).

<sup>143</sup> *Id.* at 13.

<sup>144</sup> ASEEM PRAKASH, *GREENING THE FIRM: THE POLITICS OF CORPORATE ENVIRONMENTALISM* 2 (2000); see also KENNETH A. BAMBERGER & DEIRDRE K. MULLIGAN, *PRIVACY ON THE GROUND: DRIVING CORPORATE BEHAVIOR IN THE UNITED STATES AND EUROPE* 65 (2015).

<sup>145</sup> Dauvergne & Lister, *supra* note 40, at 42.

<sup>146</sup> Alison Griswold, *Whole Foods Desperately Wants Customers to Feel Warm and Fuzzy Again*, SLATE: MONEYBOX (Oct. 20, 2014, 5:39 PM), [http://www.slate.com/blogs/moneybox/2014/10/20/whole\\_foods\\_ad\\_campaign\\_can\\_values\\_matter\\_marketing\\_erase\\_the\\_whole\\_paycheck.html](http://www.slate.com/blogs/moneybox/2014/10/20/whole_foods_ad_campaign_can_values_matter_marketing_erase_the_whole_paycheck.html).

lenged by increased competition in the market for natural foods and ensuing decline in WHOLE FOODS share value.<sup>147</sup> This widespread inability to differentiate meaningfully from competitors' CSR efforts affects all businesses, including but not limited to lead firms and major trademark owners, and impedes innovation in business strategies toward sustainability.

### 3. *A Modest Proposal: Evaluating and Re-Valuating Goodwill*

In light of emerging CSR guidelines and regulatory governance principles, can trademark goodwill be re-conceptualized to include a firm's commitment to sustainability? The current valuation metrics and algorithms include various components. In surveying different valuation techniques, the ambiguity of trademark goodwill valuation is all too obvious. One of the leading brand valuation indices, Interbrand, provides a composite score based on seven attributes: market leadership (strength of the brand); brand stability (length of time the brand has been in existence); the market for the brand; the international degree of the brand; brand trend; marketing support; and legal protection.<sup>148</sup> Determination of the relevant inputs into the overall score is highly subjective and therefore "the results are highly sensitive to the inputs used."<sup>149</sup>

More relevant to this Article is the complete omission of any input related to sustainability standards or CSR generally.<sup>150</sup> As the recent WIPO report on brand valuation states:

We report estimates of the contribution of value of brand equity grounded in standard growth accounting methods in this report, *recognizing that they likely miss the component of brand equity that stems from the dynamic interaction of companies' names with their performance.*<sup>151</sup>

The lack of inputs relevant to CSR into the prevalent accounting and evaluation metrics means that the accounting side of brand valuation is increasingly out of alignment with a firm's CSR efforts. This misalignment results in a significant information gap. Consumers as well as key

<sup>147</sup> Dobrow, *supra* note 4 ("Ongoing media advertising doesn't work and is a waste of money . . . . Look at our industry. The companies that spent a lot of money on media advertising all ran into huge . . . problems; the only survivors have been those who have relied on the 'radical' idea of community-based marketing. There are simply no examples of large media advertising spending ever being able to increase sales of any non-startup or non-repositioned store on a sustained basis! Our company has wasted millions of dollars in ambitious advertising programs, which simply haven't worked over the long term and never will." (first alteration in original)).

<sup>148</sup> D'Souza, *supra* note 90, at 151 tbl. 7.1.

<sup>149</sup> *Id.* at 168 tbl. 7.9 (comparing FORBES, *The World's Most Valuable Brands*, 2013, with INTERBRAND, *Best Global Brands 2013*, 2013, and Millward Brown, BRANDZ TOP 100 MOST VALUABLE GLOBAL BRANDS 2014, 2014).

<sup>150</sup> Charlotte Villiers, *Integrated Reporting for Sustainable Companies: What to Encourage and What to Avoid*, 11 EUR. COMPANY L. 117–20 (2014).

<sup>151</sup> CORRADO & HAO, *supra* note 26, at 5 (emphasis added).

decision-makers within firms do not have any metrics for measuring CSR through the firm's trademark goodwill.

One question is whether any acceptable standard way of measuring CSR efforts already exists. These measures may be emerging if not yet widespread or standardized. The Reporter's Note in the ALI's most recent draft Restatement on Compliance, Enforcement, and Risk Management for Corporations, Nonprofits and Other Organizations states:

*Measuring commitment to social responsibility.* Many organizations profess a commitment to socially responsible undertakings, but do they actually carry through on this commitment? It is difficult to measure an organization's commitment to social responsibility, but some measures have been proposed. One measure is provided by Kinder, Lydenberg and Domini Research & Analytics, Inc. The KLD score takes account of an organization's actions in the areas of community, corporate governance, diversity, employee relations, environment, and product. The scores in these areas are summed together to calculate a single KLD score.<sup>152</sup>

This suggests the recent appearance of measures to assess and incorporate CSR metrics into other areas of a business, including trademark valuation. The issue then becomes how to connect such CSR measures more consistently into consumer-facing information platforms such as brands.

The non-profit Reputation Institute recently issued a 2016 Global CSR report, which suggests a general corporate reputation index. The index is an amalgam of four elements: "admiration and respect," "recognized reputation," "good feeling," and "trust."<sup>153</sup> According to the index, a firm's reputation is comprised of a combination of direct experience (products, client services, investments, employment), company initiatives (branding, marketing, public relations, and CSR), as well as third parties (media, opinion leaders, family and friends).<sup>154</sup> With respect to CSR in particular, it acknowledges that consumers are lacking in relevant information about CSR, with regard to the seven measurable CSR dimensions (products, innovation, workplace, governance, citizenship, leadership, and performance).<sup>155</sup> Thus it concludes that for many, if not most, companies, a gap exists between actual CSR efforts by a firm and perceived CSR by consumers.<sup>156</sup> And firms may not be incented to participate in the

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<sup>152</sup> PRINCIPLES OF THE LAW: COMPLIANCE, ENFORCEMENT, AND RISK MANAGEMENT FOR CORPORATIONS, NONPROFITS, AND OTHER ORGANIZATIONS § 5.51 Reporters' Note (AM. LAW INST., Preliminary Draft No. 2, Sept. 1, 2016).

<sup>153</sup> 2016 CSR RepTrak® 100, REPUTATION INST. (Sept. 15, 2016), <https://www.reputationinstitute.com/2016-Global-CSR-RepTrak.aspx>.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* It concludes by stating that "[f]or companies with a *weak reputation, third party communications* have a much stronger impact on their CSR perception. For

disclosures necessary to measure CSR efforts, particularly if their overall reputation ranking is high.<sup>157</sup> At the same time, this report makes an attempt at ranking companies by CSR reputation and advocates a concept of “reputation economy”—quite parallel to this Article’s concept of cognitive capitalism. These and other efforts indicate that diverse institutional actors are starting to address an information gap, which affects both the ability of businesses to signal accurately their CSR efforts and the capacity of consumers to assess these efforts via brands.

Perhaps the time has come for the CSR component of goodwill to become a standard and significant part of all forms of trademark valuation, not only for ranking brands in overall global indices, but also for transactional matters such as individual consumer purchases. These measurements comprise significant market signals in a regulatory governance framework and could then serve several purposes. The business case for this comes in the form of spurs to market innovations based on CSR, by providing market-differentiating mechanisms for brand owners engaged in competition in markets for ethical consumption, and by promoting supply chain efficiencies. And the consumer case for this rests in the enhanced potential for individual consumers to differentiate among firms that engage in substantive CSR efforts, as well as to make better informed choices with regard to goods and services produced according to sustainability standards.

## CONCLUSION

This Article explores the work that trademark goodwill—or brand value—could do to establish stronger signals regarding corporate social responsibility. Brand value is considered to be a key tool in regulatory governance.<sup>158</sup> Relevant actors in this information interchange range across transnational trademark owners (including big brand intrapreneurs),<sup>159</sup> trade officials, as well as consumer, environmental and labor activists. The regulatory governance focus of this interchange is at the in-

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companies with a *strong reputation, controlled communications* have the strongest impact on CSR perception.” *Id.*

<sup>157</sup> Ángel González, *Amazon Gets an ‘F’ from the Carbon Disclosure Project*, SEATTLE TIMES (Nov. 1, 2016, 6:11 PM), <http://www.seattletimes.com/business/amazon/amazon-reluctant-to-share-carbon-emissions-data/>.

<sup>158</sup> According to proponents of these alternatives or complements to state-based regulation, the impact and potential of regulatory governance is measured by assessing “the effects of interactions on the regulatory capacity and performance of actors in a regulatory space.” Eberlein et al., *supra* note 35, at 13–14; *see also* Wood et al., *supra* note 35, at 357.

<sup>159</sup> Chon, *Slow Logo*, *supra* note 31, at 966 (“[Intrapreneurs are] internal advocates within recognizable industry brands who are attempting to hold the brands accountable to rhetoric of the triple bottom line (people, planet, and profits) popularized in corporate social responsibility literature.”).

tersection of global intellectual property, trade and sustainable development.<sup>160</sup> By examining two main actors in this regulatory governance arena—consumers and trademark owners—this Article points to an unrealized capacity for trademark goodwill (or brand value) to provide more nuanced signals about important sustainability characteristics in the goods and services all of us consume, and thus to heighten the public goods component of these emerging regulatory governance efforts.

As Justice Brandeis pronounced in a different context: “Sharing in the goodwill of an article unprotected by patent or trade-mark is the exercise of a right possessed by all—and in the free exercise of which the consuming public is deeply interested.”<sup>161</sup> Brands function as omnipresent interfaces for interaction by producers and consumers around information related to brand value. These interfaces depend, however, upon an iterative and reflexive information flow between brand owner and consumer—in which the consumer responds to certain information provided by the brand owner and, in turn, the brand owner adjusts and adapts sourcing and quality control choices to capture greater market share. Viewed as information interfaces or platforms, brands could more readily transmit the practices of internal firm supply chain management to external audiences. By publicizing the performance of firms in this way, brands would be significant tools in ensuring that voluntary standards and rules operate as intended within a regulatory governance approach to sustainability standards. Ideally, then, innovations in corporate social responsibility efforts then will be accompanied by innovations in the way trademark goodwill is assessed. This would incorporate the public goods aspects of trademark goodwill into this important governance dialogue.

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<sup>160</sup> The UN has committed recently to 17 post-2015 sustainable development goals (SDGs) related to the project of “free[ing] the human race from the tyranny of poverty.” G.A. Res. 69/L.85, annex, *Transforming Our World: The 2030 Agenda for Sustainable Development* (Aug. 12, 2015); see also *Sustainable Development Goals: 17 Goals to Transform Our World*, UNITED NATIONS, <http://www.un.org/sustainabledevelopment/>.

<sup>161</sup> *Kellogg Co. v. Nat’l Biscuit Co.*, 305 U.S. 111, 122 (1938). While this observation was made in the context of assessing the relationship of competitors to trademark goodwill in the absence of misappropriation, it is apropos of the relationship of consumers to trademark goodwill where there is no threat of confusion or deception.