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Arthur D. Austin

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PRODUCT IDENTITY AND BRANDING UNDER THE ROBINSON-PATMAN ACT: IS THE FTC's APPROACH CONSISTENT WITH THE REALITIES OF THE MARKETPLACE?

ARTHUR D. AUSTIN†

I. INTRODUCTION: STATEMENT OF THE PROBLEM

That the Robinson-Patman Act poses more problems of interpretation in its application than any other piece of legislation in the trade regulation repertory has been stated well beyond the point of redundancy. The final draft of the act, subject as it was to the cross-currents of various pressure groups, lacks a quality of clarity that is so necessary to a legislative program that is designed to regulate a significant portion of the economy. Mr. Justice Frankfurter justly pointed out in an oft quoted remark that "precision of expression is not an outstanding characteristic of the Robinson-Patman Act." Hence, as might have been anticipated, the Federal Trade Commission, the courts and counsel have all experienced substantial difficulty in discovering and maintaining consistency of interpretation. Added to the problem of obscure syntax has been the emergence of new and innovative market techniques that were either unknown or in an embryonic stage of development when it was enacted.

Thus it is not surprising that a company (in this article the hypothetical Retainer Company) could very easily discover itself in the following predicament:

The Retainer Company produces and markets milk products on a national scale. Because of constant efforts at quality production and a continuous flow of intensive promotional campaigning the company's products have, over the years, been highly regarded by the public. Milk carrying the Retainer label is normally sold to retailers at 50 cents a quart. At the urging of several regional supermarket chains the Company adopted the policy of packaging its milk in containers that were marked with the brand of the particular supermarket. The private branded milk was usually sold at 45 cents per quart. In other

† Assistant Professor of Law, Cleveland-Marshall Law School of Baldwin-Wallace College. B.S., University of Virginia, 1958; LL.B., Tulane University, 1963.

words, the Retainer Company was selling milk under their brand at 50 cents per quart while the same milk, produced and packaged by Retainer, but with a private label was being sold at five cents less. The FTC issued a cease and desist order under the Robinson-Patman Act on the basis that the Retainer Company was discriminating against those retailers who paid 50 cents a quart by selling a “like grade and quality” commodity (milk packaged under a private brand) to a select group of supermarkets at 45 cents a quart.

In the Richmond, Virginia sales area Retainer Company sold its milk at the usual price of 50 cents per quart. Three other national brands also sold at that price but they did little business in the Richmond area. Despite the apparent lack of competitors, Retainer was getting stiff competition from the Colonial Corporation, a local concern who marketed “Intrepid” brand of milk at 46 cents a quart. The only difference between the Retainer product and Intrepid was the brand name, the shape of the package, and the price. Both brands contained the same chemical ingredients. As a matter of fact, Intrepid was produced by one of Retainer’s national competitors. On June 1, the price of Intrepid was lowered to 44 cents. When Retainer saw that its sales dipped sharply they followed with a 2 cents reduction of their own, still maintaining the normal 4 cents price differential. However, when Intrepid went down to 42 cents, Retainer also dropped its price to 42 cents a quart, thus completely erasing the price differential between the two brands. At this point the Trade Commission filed suit, alleging a section 2 (a) price discrimination violation in that the Retainer Company was charging less in the Richmond area for its milk and was, therefore, discriminating against those less favorably situated customers residing in outlying areas. Retainer’s defense was that instead of discriminating they were actually meeting competition in good faith by charging the same price as their competitor. Acknowledging the product similarity in terms of physical and chemical properties between the Retainer and Intrepid brands, the Trade Commission nevertheless denied the good faith meeting of competition defense on the theory that Retainer vended a “premium” product which, because of consumer preference, normally commanded a higher price than Intrepid, a so-called “regular” product. Consequently, Retainer Company, by disturbing the “normal” four cents price differential between the two brands, had not met competition, but in reality had undercut the prices of a competitor.

3. Section 2(a) makes it unlawful “[T]o discriminate in price between different purchasers of commodities of like grade and quality... where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce....” 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1964).
The two sets of events described above represent an apparent contradiction. In both situations the products involved contain the same physical or chemical properties. Yet the treatment by the FTC is different in each case. The first case involved an interpretation of the jurisdictional requirement of “like grade and quality” under section 2 (a) of the act. Where the products are composed of identical chemical properties, the Trade Commission’s policy, affirmed recently by the Supreme Court in FTC v. Borden Co., is to ignore the market impact of brands, be they national or private, and to consider the commodities to be of “like grade and quality.”

In the second situation, the seller is attempting to invoke the section 2 (b) defense which allows him to demonstrate that his “lower price . . . was made in good faith to meet an equally low price of a competitor. . . .” Although there is no “like grade and quality” requirement in the section 2 (b) proviso, it is obvious that a meaningful application requires that product similarity be read into it. This the courts and the Commission have done. However, as the second hypothetical indicates, they have applied a totally different product identity standard when interpreting section 2 (b). Under the good faith meeting of competition proviso, brands are very definitely a controlling factor; a premium brand is “different” from a regular brand — despite the fact that they contain the same ingredients.

Is the FTC’s approach, ambivalent as it is, justified? The best means of gaining a valid perspective of this problem is to examine both positions in terms of relevant judicial pronouncements, critical commentary, and contemporary marketing techniques, and to measure the results of the inquiries against the broad purposes of the Robinson-Patman Act.


Before the Trade Commission can conduct a price discrimination investigation under section 2 (a) they must first establish that com-

5. On the other hand, the Commission has attempted to use brand identity as a basis for holding dissimilar products to be of like grade and quality. Atlanta Trading Corp., 53 F.T.C. 565 (1956). The Commission held that hams of varying sizes, pork shoulders, loin roll, cottage butts and chopped ham, all sold under the trade name “Unox,” were of like grade and quality. This theory was subsequently overruled by the Second Circuit. Atlanta Trading Corp. v. FTC, 258 F.2d 365 (2d Cir. 1958).
modities of "like grade and quality" are involved in the sales transactions. There are two basic and recognized avenues of approach to the requirement: First, goods may be considered dissimilar because of discernible physical or chemical variations or, secondly, it might be said that products, otherwise physically the same, are distinguishable because different brands or labels engender such a variance in consumer reaction that one product consistently sells for a higher price than the other. The first position is commonly known as the "physical identity" test; the second position is usually called "consumer preference" or "market acceptability." It is the latter standard, its genesis resting in the sophistication and refinement of contemporary advertising techniques and in the accompanying expansion of promotional budgets, that has prompted much of the confusion that surrounds the interpretation of "like grade and quality." The FTC has historically refused to acknowledge that physically identical but differently labeled products are not of "like grade and quality." The Supreme Court, in FTC v. Borden Co., has embraced the Commission's view.

A. Premium Brand in Competition with Private Brand

Borden Company manufactures and sells food and dairy products. It has, along with the Pet and Carnation companies, a nationally known reputation. In addition to marketing its national brand of evaporated milk, Borden will also, upon request, make the very same evaporated milk available to distributors in unbranded containers. The distributor is then free to attach his own "private" label to the container and compete with Borden (or Pet and Carnation). The fact that Borden always sold the unmarked milk to distributors at lower prices than it charged for milk sold under its own brand prompted the Trade Commission to file price discrimination charges under section 2(a) of the Robinson-Patman Act. The issue was crystal clear: if the Borden


9. In 1957 Borden's total sales exceeded $900,000,000 and in 1956 its sales of evaporated milk totaled over $30,000,000. Brief for Respondent, pp. 3-4, Borden Co. v. FTC, 339 F.2d 133 (5th Cir. 1964).

10. Primary line discrimination was predicated on findings that: [T]he evaporated milk industry has suffered a decline in sales . . . that since 1930 at least ten concerns, mostly in the Midwest market area involved in the case, have discontinued production of evaporated milk . . . that because of the competitive situation of respondent and its competitors in the Midwest market area, "Little is needed to shift the competitive balance" . . . that, in contrast to its competitors, the respondent is "a large and powerful concern" . . . and that
branded milk (Silver Cow) and the privately labeled milk were analyzed in terms of the “market acceptability” test they would be dissimilar as far as the grade and quality jurisdictional requirement was concerned, and, of course, inquiry under section 2 (a) would be at an end. On the other hand, if the “physical identity” test were applied, inquiry would proceed to the question of price discrimination.

The Supreme Court, by a 7-2 vote, adopted the physical identity test. Grade and quality are to be defined by the physical and chemical characteristics of the product and not by extraneous influences. Thus, “consumer preferences, brand acceptability or what customers think of [the product] . . . and are willing to pay for it”¹¹ are not relevant. Although relying upon previous holdings by the Trade Commission and on the legislative dialogue accompanying enactment of the act to support their holding, the Court was more concerned with the possibilities to avoid the intended thrust of the Robinson-Patman Act that the market acceptability test would provide.¹²

Mr. Justice White reasoned that if the heavily promoted premium product is considered “different,” then by “selling some unspecified amount of each product to some unspecified portion of his customers, however large or small the price differential might be,”¹³ the vendor would be able to manipulate or “rig” consumer preference and brand acceptability, and thereby erase “like grade and quality” whenever he desired. Or he would be able to sell at different prices the same product packaged under his own two different labels merely because he advertises one brand more than the other.

The majority clearly feels that the paramount obstacle to the market acceptability test is that it would furnish the manufacturer with an open invitation to maneuver his advertising and sales promotional policy in such a manner as to create, whenever it was to his advantage, a varied consumer reaction to a specified brand. Before

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¹¹ 383 U.S. at 637.
¹² 383 U.S. at 641.
¹³ The Court concluded that the Commission should be allowed to proceed to the merits and “determine . . . whether the differential under attack is discriminatory within the meaning of the Act, whether competition may be injured, and whether the differential is cost justified or is defensible as a good-faith effort to meet the price of a competitor.” 383 U.S. at 646. See generally Note, The “Like Grade and Quality” Clause of the Robinson-Patman Act: A Construction To Effect the Objectives of the Act, 49 MINN. L. REV. 1176 (1965).

analyzing the majority's position it would be advisable to spell out with some precision and within the context of the Borden factual background a definition of the market acceptability test:

The product purchased by a consumer includes not only the chemical components that any competent laboratory can itemize, but also a host of commercial intangibles that distinguish the product in the market-place. The premium paid for Borden brand milk reflects consumer's awareness, promoted through advertising, that these commercial attributes are part and parcel of the premium product he is purchasing.  

The sum total of the "commercial intangibles" is, of course, manifested in consumer preference. Thus a mere difference in labels or brands, standing alone, would not automatically, as the majority infers, be sufficient under the market acceptability test to dispell product similarity. Instead, it is the capacity of one brand to attract higher prices over a sustained period of time that furnishes the necessary "difference" that results in the products being distinguishable under section 2 (a). Consumer preference is controlled by advertising and other promotional techniques. By and large, it is advertising that sets the line of demarcation between the nationally known brand or the "premium" product and the privately branded product. And, as mentioned, it is the possible use of advertising by the vendor to create marginal variances in consumer preference that disturbs the majority. This concern is unwarranted. For one thing, the cost of mounting an efficacious advertising campaign is too prohibitive to justify the periodic manipulation of brand acceptability so that "price discrimination" can be practiced. Moreover, it is a gross over-simplification to assume that consumer reaction to brands is so pliable that it can be turned off and on like a faucet. Another significant consideration is that advertising cannot be practiced with scientific and mathematical precision; it is difficult, if not impossible, to predict how long it will take before an advertising campaign will begin to show discernible results.

A final consideration is that the market acceptability test is not based upon incidental and slight price differential between branded items. There must be a "legitimate and stable market preference for the premium product." This clearly excludes ephemeral and casual

14. Id. at 649-50 (dissenting opinion). Cassady and Grether's definition is more succinct: "[R]eliance is placed on consumer-buyer evaluation of the products in determining whether they should be considered alike or different." Cassady & Grether, The Proper Interpretation of "Like Grade and Quality" Within the Meaning of Section 2(a) of the Robinson-Patman Act, 30 So. Cal. L. Rev. 241, 248 (1957).
15. 383 U.S. at 653 n.9 (dissenting opinion).
alterations in consumer preference. Instead, a "demonstrable commercial difference" in brand reaction lasting over a significant period of time is necessary. Requiring a consistent and valid pattern of consumer preference eliminates the majority's objection that market acceptability provides the manufacturer with the opportunity to make small and random sales under different brands to different customers so as to create a spurious difference in the preferences of consumers.

B. Additional Arguments Against Market Acceptability: Private Brand Discrimination

Market acceptability would also, according to Mr. Justice White's analysis, permit discriminatory price allowances between privately branded items. The objections raised by Justice White can be posed in terms of hypothetical situations:

1. Suppose the manufacturer sold the identical milk product under different private labels to two different middlemen with one of the brands possessing greater consumer appeal than the other. Would the differently labeled products be dissimilar as far as the manufacturer is concerned? If they are, the manufacturer can, of course, charge a higher price for the product sold under the brand having the greater consumer preference.17

Justice White would interpret market acceptability so as to hold that the products in the above situation would be considered similar for section 2 (a) purposes. His reasoning is that the manufacturer's "customer, as distinguished from the consumer, will not pay more than his competitor for private label milk and therefore the milk sold by . . . [the manufacturer] under one private brand is really of the same grade and quality as the milk sold under the other brand even though ultimate consumers will pay more for one than the other."18

The minority also reached the same conclusion but as the result of traveling a different route. Market acceptability is predicated upon the consumer being willing to manifest his preference for one brand

16. Borden Co. v. FTC, 339 F.2d 133, 137 (5th Cir. 1964). Judge Hutcheson added: "That is not to say that merely attaching different, but comparable brand labels to two products will, without more, make them of unlike 'grade.' Such an artificial distinction, unaccompanied by any significant difference in the public acceptance of the two brands would provide an easy means of evading the Act." Borden Co. v. FTC, supra at 138.

17. The problem was posed in the following language: "[W]hy should not Borden be able to discriminate between two purchasers of private label milk, as long as one label commands a higher price from consumers than the other and hence is of a different grade and quality?" 383 U.S. at 645 n.6.

18. Ibid.
by paying more than he would for another less acceptable label. And the reason he pays more is that one brand has been advertised and promoted to the extent that the consumer feels the brand is worth the price differential.\textsuperscript{19} There are three possible sources where brand preference building can originate — the manufacturer, the middleman, or the retailer. Under Justice Stewart's version of market acceptability, the consumer preference that the premium product possesses is attributable to the manufacturer's promotional efforts. Thus, in applying the test, "the relevant comparison would exclude promotional efforts by persons other than the producer of the premium brand."\textsuperscript{20} Consequently, in the hypothetical fact situation, the absence of promotional activity by the manufacturer would mean that no premium product is involved. And under Stewart's reasoning, since the manufacturer has not promoted either private brand and since both products are chemically the same, he must charge both middlemen the same price.

2. Suppose the manufacturer sold the same product at the same price but under different private labels to a single distributor-customer who, in turn, advertises one label so extensively that it possesses greater consumer preference than the other brand. Since the variance in consumer preference is due exclusively to the customer's promotional efforts, the minority view of Justice Stewart is that as far as the sale by the manufacturer is concerned, the products are of "like grade and quality." Justice White objects to this conclusion since it would allow the distributor-customer to pay the same for identical but differently labeled products and then sell the less advertised brand at a lower price. And presumably the distributor-customer would be immune to section 2 (a) prosecution since the goods are not similar. White concludes that this approach constitutes a serious defect in the market acceptability test in that it fails to focus "on consumer preference as determinative of grade and quality"\textsuperscript{21} and instead relies "on who spent the advertising money that created the preference...."\textsuperscript{22}

There are several arguments that can be raised against the majority's interpretation of the above possibility. Operating on the

\textsuperscript{19} "The premium paid for Borden brand milk reflects the consumer's awareness, promoted through advertising, that these commercial attributes are part and parcel of the premium product he is purchasing." 383 U.S. at 649-50 (dissenting opinion).

\textsuperscript{20} Id. at 649 n.2. Howard follows this line of reasoning and concludes: "[T]he sale of private-label products at prices lower than those of a manufacturer's nationally advertised products is not necessarily unlawful since the former do not have to bear the burden of those advertising expenses." HOWARD, LEGAL ASPECTS OF MARKETING 56 (1964).

\textsuperscript{21} 383 U.S. at 645 n.6.

\textsuperscript{22} Ibid.
assumption that consumer preference is closely related and indeed engendered by advertising (and thus not mutually exclusive as White seems to assume) it can be argued that when the customer, through promotion, builds up consumer preference for one of his brands he has, at that instant in the distributive process, added another ingredient to the product. The products are, therefore, no longer similar and a variance in prices is justified.

There is, however, a more pragmatic argument. It is highly doubtful whether the manufacturer's customer would even want to create a variance in consumer preference between his own two private brands. There are the marketing logistics of expense, time, etc., that must be met. Moreover, the essence of private brand competition is providing the consumer with an opportunity to make a price comparison between the premium and private labels. There is little logic in a single distributor jeopardizing this comparison with the introduction of a third attention-distracting brand.23

C. Branding, Promotion and the Views of Commentators

The majority of the commentators who have examined the impact of advertising, promotion, and branding on the like grade and quality proviso have dismissed a strict physical identity standard as being completely unrealistic. As early as 1937, only one year after the enactment of the Robinson-Patman Act, two commentators observed that the impact of advertising, packaging, etc., on the public, can make a national branded product "as a matter of economic fact, a different commodity"24 from a privately branded item. Rowe, who has written extensively on the Robinson-Patman Act, views the conflict in the following terms:

Since the cold fact is that the public will pay more money for a nationally advertised and branded version than it would pay for the physically same but promotionally unknown product sans brand, a manufacturer who sells a branded and an unbranded variation of the same basic item at a price differential is not "discriminating" in any economic sense. The purchaser of the unbranded version of the seller's product naturally pays less be-

23. This, of course, does not mean that there will not be competition between competing private brands. But the presence of the national or premium brand is most necessary as a basis of comparison. See Backman, Price Practices and Price Policies 405-06 (1953).

24. Zorn & Feldman, Business Under the New Price Laws 77 (1937). The authors advocated a competitive test but concluded that the "complexities involved in applying such a test" would preclude its adoption. Zorn & Feldman, op. cit. supra at 78.

Rowe advocates the use of a "commercial fungibility" test when ascertaining grade and quality under section 2 (a). Goods are fungible and therefore of "like grade and quality" when the business community shows no preference for either product (or either brand) when they are being sold at the same price. Thus if two branded items were "normally sold in the market at the same 'going price,'"^{26} they would be of like grade and quality. The emphasis is on what the business community, as opposed to an individual customer, is willing to pay. And Rowe believes that under usual conditions the business community will pay more for nationally advertised and promoted brands than for regional brands. For example, under Rowe's test nationally advertised brands of gasoline, since they attract higher prices, would not be "fungible" with unbranded gas and hence not of "like grade and quality."

Cassady and Grether, in an in depth and marketplace oriented study of the problem, concluded that an "economic-value or market-acceptance" test was preferable to a physical identity standard.^{27} Their studies prompted them to conclude that products sold under a national brand are different in terms of grade and quality from the same product sold under a private label for three reasons: First, the source of supply for the premium product is not necessarily the same as that for the unbranded item. This is because the manufacturer has complete monopoly power over the distribution of his national brand while a purchaser can obtain the same product, minus the national brand, from any supplier who agrees to furnish it. Second, there might be an actual physical disparity between the manufacturer's brand and the unbranded product. "Quality differentials between well-known and little-known brands may be due to carelessness, insufficient supply of top-quality products to meet all demands, or deliberate quality depreciation."^{28} (Borden's Supreme Court brief contained this same argument.)^{29} Finally, they argue that the higher priced and heavily ad-
Vertised national brand reaches a different strata of the market than the lesser priced unbranded item.\textsuperscript{30}

Of the studies which have probed with any degree of depth into the problem of fitting branding into the definitional boundaries of grade and quality only the Attorney General’s Committee to Study the Antitrust Laws has embraced the FTC’s position. (This is discounting those commentators who espouse physical identity but do so with no analysis of the problem or by basing their conclusions on past Trade Commission rulings.)\textsuperscript{31} A majority\textsuperscript{32} of the Committee acknowledged the efficacy of advertising, promotion, and other marketing techniques in developing “distinct consumer preferences that manifest themselves in real price margins”\textsuperscript{33} between premium and regular brands. Nevertheless they concluded that a failure to use physical identity as a standard would result in the Government becoming involved in complex and cumbersome market investigations. Moreover, any other test would enable the seller to easily evade the act “through artificial variations in the packaging, advertising or design of goods which the seller wishes to distribute at differential prices.”\textsuperscript{34} The Committee recommended that the distribution of national and private branded products be analyzed under the competitive injury or the cost justification portions of the act.\textsuperscript{35}


\textsuperscript{31} J. Antitrust Soc’y, supra note 12, at 265.


\textsuperscript{33} In this connection it might be pointed out that the authors were critical of the legislative dialogue upon which the majority in the Borden Case placed heavy reliance. It is interesting (but somewhat appalling) that various legislators and commentators seem to think that well-known brands and little-known or unknown brands must be sold at the same price. The following colloquy [the reference being to the remarks cited by Justice White, 383 U.S. at 643] . . . illustrates this misconception.

\textsuperscript{34} Cassady & Grether, supra note 14, at 265 n.56.

\textsuperscript{35} For an excellent analysis of the branding problem in terms of its effects on competition see Jordan, Robinson-Patman Act Aspects of Duel Distribution By Brand of Consumer Goods, 50 Cornell L.Q. 394 (1965).


\textsuperscript{32} The minority concluded that “a price discrimination law can consider heavily advertised and anonymous or private-brand merchandise on an equal legal footing only at a serious distortion of economic facts. Accordingly, they propose that demonstrable economic differences be evaluated under the statutory term “grade” as distinct from any purely physical consideration of “quality.” ATTY GEN. NAT’L COMM. ANTITRUST REP. 158 (1955).

\textsuperscript{33} Ibid.

\textsuperscript{34} Id. at 158-59.

\textsuperscript{35} For a contra position, see Jordan, supra note 30, at 421.
III. Product Similarity As A Requisite For The Good Faith Meeting Of Competition

Section 2 (b) of the Robinson-Patman Act furnishes the vendor with an opportunity to show that he reduced his prices in good faith so as to meet competitors' prices.\(^36\) It has been noted that section 2 (b), unlike section 2 (a), contains no express reference to "like grade and quality." It has likewise been noted that the FTC acknowledges that the good faith meeting of competition clearly envisions a seller reducing the price of his product so as to meet the prices charged by a competitor who is selling a "similar" product.

There are, however, several differences between the application of a product similarity standard in section 2 (b) and the interpretation of "like grade and quality" in section 2 (a). In section 2 (a) any product comparison is between the seller's own products while 2 (b) requires a comparison of the products sold by competing sellers. The second and most important difference is that the Trade Commission considers the physical identity test that it uses under section 2 (a) as an inappropriate means by which to measure product similarity when 2 (b) is invoked. Thus, where two products are acknowledged to have the same physical properties and one is sold under a national brand and is classified as premium while the other is a local or regular product, the seller of the premium item cannot, with section 2 (b) impunity, reduce his prices to the level of those charged by the vendor of the regular product. (This is of course the factual background that was hypothesized in the Retainer Company situation.) The FTC applies its own version of market acceptability and holds that even though the products are chemically, physically, and functionally the same, they are nevertheless dissimilar to the extent that a price differential between the two items must be maintained.\(^37\)

The Trade Commission's position is premised upon the existence of a "premium" product. Yet how can one product be labeled premium when it contains the identical chemical properties of the competing "regular" item? The Trade Commission insists that public acceptance is the test; if the public is willing to pay more for one brand, then that brand, so it is reasoned, has premium status. Thus the Commission refused to allow Anheuser-Busch to reduce its price level for Budweiser — advertised as the beer that "still sells at the premium prices around the world"\(^38\) — to that charged for the regional brands in the

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St. Louis area. The FTC expressed their position in the following language:

It is evident that Budweiser could and did successfully command a premium price in the St. Louis market as it has in most of the other markets in the nation. The test in such a case is not necessarily a difference in quality but the fact that the public is willing to buy the product at a higher price in a normal market. Clearly, therefore, respondent's reduction from the premium price to match the prices of the regional beers . . . was not a meeting of competition. The effect was to undercut competition.39

Realistically the Trade Commission has recognized that public acceptance "is determined in large measure by factors other than actual grade and quality."40 In Gerber Prods. Co. v. Beech-Nut Life Savers, Inc.,41 it was argued that packaging, which is a form of advertising, was such a factor. Both Beech-Nut and Gerber are manufacturers of strained and junior baby foods. Gerber sold its baby food in tin containers while Beech-Nut packed their product in glass. While it was admitted by both parties that their respective products were comparable in food content, it was also acknowledged that the baby food packaged in glass sold at a higher price than Gerber's product which was marketed in tin containers. The trial court concluded that "the hard core of the controversy revolves about the packaging of [the] . . . respective products — tin against glass containers."42

While acknowledging that the standardization of products has caused "attractive packaging [to] . . . become a developing aspect of competitive activity"43 and hence a means of engendering consumer preference, the court nevertheless denied premium product status to the baby food packaged in glass containers. The court felt that to "impose on the more attractive package a disability to meet the price at which it is acceptable to the consumer may of itself chill this developing area of competition."44 The court clearly felt that Beech-Nut's high prices were not justified by consumer preference and thus the price differential was not due to the consumer's willingness to pay more for glass packaged baby food. In other words, Beech-Nut was confronted with falling sales because they had priced themselves out of the market. Moreover, both firms advertised their containers as

39. Id. at 302.
42. Id. at 919.
44. 160 F. Supp. at 922.
having attributes superior to their competitor's package, thus tending to erase any significance that packaging might have had.

The Commission has also recognized the vital role that advertising and promotion plays in creating what have become known as "major" brands of gasoline. In the Standard Oil litigation it was noted that "well advertised brands of gasoline have come to be known as major brands. . . ." 45 The classification "major" is of course merely a synonym for premium. 46

There is very little to distinguish the FTC's use of public acceptance analysis in section 2 (b) actions from Justice Stewart's market acceptability test. 47 Both go far beyond a strict reliance on a physical comparison between products. Under both tests advertising and other promotional techniques operate so as to create differences between "like" products. Moreover, both tests involve the task of accurately measuring the intangibles and cross-currents of consumer tastes and proclivities. 48

IV. BRANDS: THE CORE OF THE CONTROVERSY

A. The History and Development of Branding

Much of the difficulty and uncertainty that has been encountered by counsel and courts alike in endeavoring to gain a true perspective of the product identity problem stems from a basic unfamiliarity with the objectives and the consequences of branding. This is at least partly due to the fact that while the judicial world has, over the last twenty years, absorbed refined economic theory and thinking, 49 they have strangely failed to appreciate fully the impact and scope of fast changing contemporary marketing techniques.

Branding essentially constitutes a means of indicating to the public the organization that is responsible for the quality of the product. It might be a name, a symbol, or it might be both elements integrated into a distinctive package. The use of brands is not new;

46. As might be expected the distinction between premium brands of gas and non-premium brands is not always clear. Commissioner Elman, dissenting in American Oil Co., 60 F.T.C. 1786 (1962), complained: "[H]ow was respondent in October 1958 to know that 'Paraland' owned by a 'major' producer (Phillips), would be regarded by the Commission in June 1962 as a 'private' brand entitled, apparently as a matter of law, to a 'normal' differential of 2 cents a gallon lower than 'major' brands?" American Oil Co., supra at 1825.
47. See note 14 supra and accompanying text.
48. In addition, under section 2(b) once the "premium" and "regular" brand relationship has been established there remains the substantial problem of determining the "normal" price differential between the products. See Austin, supra note 37, at 622-25; ATTY GEN. NAT'L COMM. ANTITRUST REP. 184 (1955).
49. See generally Lerner, The Supreme Court and American Capitalism, 42 YALE L.J. 668 (1933).
they can be traced through the trademark back to the craftsman's mark. "The craftsman's mark under the guild system was compulsory, its purpose being, not to provide buyers with a symbol by which they might recognize desirable merchandise, but to furnish a 'police' mark for the guilds." As the marketing distance between the manufacturer and the customer lengthened, the importance of the mark increased. The most feasible method of assuring the public that merchandise was of high quality was through an easily identifiable mark. Thus, the mark, as a guide to quality, became a valuable asset on its own. The Industrial Revolution's mass production methods widened, both geographically and by distribution channels, the line of communication between producer and ultimate customer. As a result, the mark or brand became even more necessary as a means of bridging the knowledge hiatus between manufacturer and customer.

However, there is another significant and certainly more contemporary impetus behind the use of brands. The emergence in this century of an oligopolistic market structure, where sales and production are controlled by a few large dominant manufacturers, has made brand emphasis an extremely vital part of the sales technique. Because only a few large manufacturers dominate the oligopolistic industrial society, there is a general awareness by all, of each individual participant's important marketing decisions. Thus any drastic marketing policy change by one oligopolist is quickly picked up and countered by the other firms. One significant result is that the competitive relationship between the competing organizations in an oligopoly is usually not manifested in open and direct price warfare. Instead, companies prefer to compete through less observable and more subtle methods. One economist, J. K. Galbraith, sums up the effect of oligopoly as follows:

A close examination of oligopoly shows that price competition, the very motor of the competitive model, is not only sharply circumscribed but has to be. When there are only a few firms in an industry and their products are closely substitutable, a price cut by one company must . . . be matched by the others. Otherwise the firm with the lower price will draw a disproportionate share of the business in the short run and, through operation of habit and customer good will, may retain it in the long run.

50. BORDEN, ADVERTISING IN OUR ECONOMY 24 (1945).
52. See generally CARTER & SNAVELY, INTERMEDIATE ECONOMIC ANALYSIS 214-46 (1961); CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION (6th ed. 1948); FELLNER, COMPETITION AMONG THE FEW (1949); TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 24-43 (1965).
If price competition is no longer satisfactory, firms must resort to other means of increasing sales. A popular maneuver has been the use of massive promotional campaigns to create brand loyalty. Vast sums of money are expended in attempts to persuade the purchaser that one brand is superior and more desirable than competing products. Thus the undesirable pitfalls and dangers of price competition are avoided in favor of promotional warfare. Branding is, in other words, an integral component of product differentiation. Sellers "distinguish their products through packaging, branding, and the offering of auxiliary service to buyers, and by advertising and sales promotional efforts." Even though competing products contain the same chemical properties they may get a different consumer reaction. A prestigious brand or a distinctive package may give a company's product the edge over the offerings of its competitors.

In summary, there are two significant and relevant points reflected in contemporary branding methodology. The first is that branding is now solidly established as an important and permanent component of the selling process. The permanence of a firm's market position depends to a large extent upon the capacity to create and to maintain a satisfactory brand image. Second, in today's marketplace the effectiveness of branding depends primarily upon advertising. It is against the efficacy of advertising techniques, therefore, that the effects of branding must be measured.

B. The Efficacy of Branding

Advertising is not a science; its effects upon the public are not easily measured. This means that brand preference, cultivated as it is by advertising, is likewise not susceptible to precise measurement. Nevertheless, through experience and countless market examinations, specialists have been able to develop reliable brand theories.

54. Other reasons for brand promotion include: The establishment of a stable and continuous market, establishing a direct goodwill relationship between manufacturer and the ultimate customer, stability of selling prices which allows improvement of the product, helps to establish resale price maintenance policy, and finally forecasting and budgeting is made easier. See Davies & Palmer, Market Research and Scientific Distribution 237 (1957).

55. Bain, Barriers to New Competition 114 (1956).


57. Judge Learned Hand commented that "the art of publicity is a black art" and that the "individual is as helpless against it as the child is helpless against the formulas with which he is indoctrinated. Not only is it possible by these means to shape his tastes, his feelings, his desires and his hopes; but it is possible to convert him into a fanatical zealot, ready to torture and destroy and to suffer mutilation and death for an obscene faith, baseless in fact and morally monstrous." Proceedings in Memory of Mr. Justice Brandeis, 317 U.S. IX, XV (1942). See generally Brown, Advertising And The Public Interest: Legal Protection of Trade Symbols, 57 Yale L.J. 1165 (1948).
The particular "type" or "make" of product involved plays an important role in determining the effectiveness of branding. When it is impossible for the purchaser to visually determine the quality of the product at the time of purchase, the use of a brand by the manufacturer is imperative. The brand or trademark operates as a guide to quality. Merchandise such as drugs, cosmetics, appliances and types of food products, have all been found to require strong brand identification. Distinctive branding is also necessary in those situations where there is no noticeable distinction in the appearance between competing products. An effective brand policy can create an identifiable product image in the customer's mind that distinguishes the promoted product from the competing items despite the fact that both products are basically, if not actually, similar. This is, it will be remembered, the essence of "product differentiation."

Psychology plays a persuasive role in creating and maintaining brand image. It has been noted that a brand name "is more than the label employed to differentiate among the manufacturers of a product. It is a complex symbol that represents a variety of ideas and attributes." And because of the significant role that psychological influences play in forming every consumer's buying habits, and because these influences can be manipulated, it can be argued that brand imagery assumes the same degree of importance to the sales transaction as do the physical or chemical ingredients of the product. As a matter of fact, in some instances the subjective impression that the brand makes on the purchaser may even outweigh the more tangible factors. Examples of strong brand imagery include Commander Whitehead (Schweppes), the man with the eyepatch (Hathaway shirts), and Elsie the Borden Cow.

To determine the character of these psychological factors and to aid in attempting to gauge the extent to which nonrational selection plays in brand identification, firms now spend large sums in market research. Market research, in its broadest aspects, involves the use of psychological testing techniques as a means of determining the likes

58. See Borden, op. cit. supra note 50, at 31.
59. The manufacturer who sells more than one product must decide whether to market all his products under the same brand (a family brand) or whether to sell each item under a separate brand. See Cundiff & Still, Basic Marketing 432-35 (1964).
61. One authority states that "there are countless instances where the nonrational elements of the symbol are apparently wholly responsible for the product's desirability, conveying their meanings almost entirely below the threshold of conscious awareness." Martineau, Motivation in Advertising 148 (1957). See also Brink & Kelley, The Management of Promotion 155-63 (1963).
and dislikes of the public and then composing a sales campaign in line with the findings.\textsuperscript{62}

Are the large expenditures for researching and building brand imagery justified?\textsuperscript{63} Is there such a thing as brand loyalty and can it be maintained? There are no conclusive answers. However, studies reveal that nationally known brands (at least in some product lines) are preferred by customers despite the competition of private brands selling at lower prices and despite other sales gimmicks. That nationally advertised brands do constitute an important and independent element of the sales exchange is reflected in the following comment:

A survey by Burns Roper, partner of Elmo Roper and Associates, showed why so many people continue to buy appliances at stores which sell them at higher prices than other local dealers in the neighborhood: While delivery service, willingness to stand behind a product, and charge accounts play an important role, Mr. Roper pointed out, loyalty to known brands by this group of consumers is so strong that even when store brands' competition offers gimmicks and attractive deals, they fail to lure her (or him) away.\textsuperscript{64}

The impact of branding upon consumer choice has been accentuated by the increasing use of so-called private brands. By purchasing unmarked merchandise, often from a manufacturer distributing a national brand, and then attaching their own brand label, middlemen and distributors hope to develop a brand loyalty of their own.\textsuperscript{65} It is a brand loyalty that is geared to reach the price conscious consumer. And to reach this objective the price differential must be great enough to attract customers away from the national brand. If the distributor is successful in marketing the private brand, he accomplishes two things: he creates a new market and thus "ceases to be merely part of the producer's distributional conduit"\textsuperscript{66} and, in addition, he gains a larger amount of independence in dealing with producers.


\textsuperscript{63} For the view that advertising represents a wasteful phase of our economy see Galbraith, The Affluent Society (1958).

\textsuperscript{64} Westing & Albaum, Modern Marketing Thought 249 (1964). For additional examples of national brand preference see Cassady & Grether, The Proper Interpretation Of "Like Grade And Quality" Within the Meaning of Section 2(a) of The Robinson-Patman Act, 30 So. Cal. L. Rev. 241, 256-62 (1957).

\textsuperscript{65} For a discussion of the market advantages of using private brands, see Borden, op. cit. supra note 50, at 36-37; Cundiff & Still, op. cit. supra note 59, at 435-36; Westing & Albaum, op. cit. supra note 64, at 242-51.

The use of private labels is not a post-war phenomenon. Studies reveal that in 1930, 45% of retail grocery and meat chain stores sold some products under their own labels. FTC, Chain Store Private Brands, S. Doc. No. 142, 72d Cong., 2d Sess. (1933).

\textsuperscript{66} Mueller, Appendix E, in Baum, The Robinson-Patman Act 143 (1964).
C. The Brand As A Component of the Product: Additional Support

The brand loyalty and consumer preference of any product has a fragile existence. It is always subject to attack from competitors and hence must be constantly nurtured by advertising and promotion. But the fact remains that brand loyalty does exist and different brands do generate varied consumer reaction. And it is interesting to note that strong support for the proposition that branding constitutes a distinguishable component of the product comes from a source outside the field of marketing. By recognizing and enforcing trademark and fair trade laws, legislatures and courts expressly acknowledge the market and legal significance of the national brand.

A trademark is a “device, adopted and used, by a manufacturer or merchant, in order to designate the goods that he manufactures, or sells, and distinguish them from those manufactured or sold by another. . . .” By identifying the source of the product, by assuring quality, and by developing goodwill, the trademark serves the same purposes as the brand. Frequently a brand is a trademark and thereby receives protection against infringers. Consequently, if a trademark is “in a qualified sense . . . property, protected and alienable,” it can cogently be argued that a brand, particularly a nationally recognized one, is surely a separate and distinguishable ingredient of the product.

Fair trade laws expressly acknowledge the separate quality of a brand. The Illinois statute is characteristic; it protects merchandise “which bears . . . the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class . . . .” The effect of these laws is to allow the producers of branded items to specify the prices at which their product may be resold. The underlying theory is that branding or trademarks add to the value of the product in terms of

67. Upton, Trademarks 9 (1860).
68. The protection of trade-marks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same — to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co., 316 U.S. 203, 205 (1942). See generally Schechter, The Rational Basis of Trademark Protection, 40 Harv. L. Rev. 813 (1927).
goodwill and that to fail to prevent the commodity to be sold at less than fair trade levels is to allow the producer's goodwill to be diluted or erased.\footnote{71}

V. Conclusion

The use of the physical identity standard cannot be justified on the basis that it represents a valid measurement of product similarity. There is too much evidence to the contrary. Legal commentators and marketing experts concur in acknowledging that prestige brands receive a different consumer reaction than the less promoted regular brand. Likewise, the cases (excepting, of course, the final \textit{Borden} decision and the Commission rulings) have realistically recognized that chemically and physically identical products can be different under the Robinson-Patman Act when consumers are willing to pay more for one item than another. And even the Trade Commission considers the physical identity standard inappropriate when section 2 (b) is invoked. Therefore, in light of the persuasive arguments against its use, how can the Trade Commission justify recourse to physical identity under section 2 (a)?

One argument, a negative argument, in favor of physical identity, is that the market acceptability standard is too difficult to apply. It is not an easy task to satisfactorily establish that there is a "legitimate and stable market preference for the premium product."\footnote{72} The most realistic measurement of consumer preference is the existence of a discernible price differential between two "like" products. Such a measurement is not easily made. What constitutes a price differential? A two cents variance obviously does not have the same market significance with all products. Moreover, how long, in terms of days, weeks, months, must the price difference exist before it can be said that consumer preference has converted "like" products into a premium-regular brand relationship.

Closer analysis, however, reveals that difficulty of application is not a valid argument against the market acceptability test. The expertise of the Trade Commission is geared for precisely this type of market exploration. The FTC has never avoided the equally intricate investigations that are often necessary to ascertain the boundaries of the

\footnote{71. Thus it might be possible to avoid the impact of fair trade statutes by "removing the mark or brand from the commodity — thus separating the physical property, which he owns, from the good will, which is the property of another — and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end." Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 195 (1936).}

\footnote{72. FTC v. Borden Co., 383 U.S. at 653 n.9 (dissenting opinion).}
relevant market or the ticklish problem of inclusion–exclusion involved in determining the line of commerce. Also, the Commission's "willingness to engage in the exhaustive analysis of injury to competition and cost justification under its 'physical identity' test of § 2 (a) demonstrates that the Commission's resources would be more than adequate to determine the level of commercial preference sufficient to negate a finding of 'like grade and quality' under a market test of § 2 (a)." Finally, the burden of determining consumer preference has already been assumed by the FTC under section 2 (b).

Analysis leads to the conclusion that the use of a physical identity test under 2 (a) and a market acceptability standard under 2 (b) can only be justified upon policy grounds. Implicit in the majority's opinion in *Borden* and in the FTC's Supreme Court brief is the theory that such a construction "appears . . . to further the purpose and policy of the Robinson-Patman Act." Simply stated, the Trade Commission begins its inquiry behind the presumption that the jurisdictional requirement of "like grade and quality" has been satisfied. This presumption is predicated upon the theory that the purpose of the act is to proscribe price discrimination and the Commission should not be prevented from this objective by time consuming preliminary obstacles. Hence there is no inconsistency between the different approaches followed under section 2 (a) and 2 (b) since, under the latter, the Commission has already reached price discrimination.

The policy argument ignores (or avoids) one significant factor: There can be no price discrimination if, at the threshold, the products involved are not in reality of "like grade and quality."

74. 383 U.S. at 653 n.9 (dissenting opinion).
75. See cases collected in note 6 supra.