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THE "TRADE DRESS" CONTROVERSY: A CASE OF STRATEGIC CROSS-BRAND CANNIBALIZATION

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National and private brands have been waging a war for at least the last seventy-five years to gain customer acceptance and loyalty. The stability of the branding environment has been brought into question by recent copycat private branding strategies by major food chains. The look-a-like "trade dress" uses all the visual cues, i.e., shape, size, color and the like, of the established national brand to attract consumers' attention while in the shopping environment. Retailers are using a cross-brand cannibalization strategy which sells the look-a-like private label off of the retail traffic of the nationally branded products. This paper examines the current legal environment and the resulting opportunity for retailers to use the cross-brand cannibalization strategy. A case history of three retailers using variations of copycat branding are presented to illustrate the impact of such strategies.

INTRODUCTION

What's in a name? Marketers have fought for decades to establish an awareness of their products in the consumers' mind, i.e., to differentiate themselves from "would be" competitors. One of the most frequently used areas to identify products for consumers has been a brand name. This paper examines a new trend in private labelling that allows retailers to nearly duplicate a national brands trade dress and not be considered a trademark infringement if the retailer includes on the private label, "as compared to national brand." How to most effectively promote brand products is the managerial focus of the paper.

The manufacturer has attempted through national branding to build customer loyalty and equity in its products by advertising, sales promotion, and in-store displays. Brands, on the other hand, are powerful strategic weapons which, if handled correctly and managed sensibly by the manufacturer, can provide considerable competitive rewards (Stobart, 1994). Retailers have attempted to establish private label/store brands as an alternative to the typically more expensive nationally branded products. For the most part, these divergent branding strategies have not clashed in the marketplace until recently. The controversy surrounding branding at the retail level is found in the practice of copycat branding, in legal terms, infringement of a product's "trade dress," undertaken by a number of powerful retailers (Schiller, 1993; Brookman, 1995; Quelch & Harding, 1996).

While private branding has existed for decades, particularly in the grocery and retail drug industries, the practice

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typically has not been viewed as a direct threat to nationally branded products, but rather, has been considered an alternative product for customers who were value conscious. Indeed, there were thought to be two distinct market segments that purchase products at supermarkets and drugstores; quality conscious and price motivated consumers (Moorthy & Png, 1992). Private branded products have attracted both segments of consumers. The private branded products have maintained a relatively constant market share over the past twenty years. Private label products have accounted for an average of 14 percent of the purchases in grocery stores and as high as 50 percent in some product categories in drug stores (Mammarella, 1995; Quelch & Harding, 1996). One of these product categories, health and beauty aids products, illustrates what is thought to be the primary motivation of retailers to sell private label products, that being, a 45-50 percent gross margin, as compared to the 25-30 percent margins that national brand products generate (Brookman, 1995).

Less traditional and private label products such as clothing also are experiencing significant growth and consumer acceptance. In 1994, $71.8 billion in women's clothing was sold in the United States with 27.3 percent or $19.6 billion of the total being private label brands (Tosh, 1995). Even in a product category with strong nationally branded products like denim products, private label denim products increased in market share from 14.9 percent in 1989 to 25.6 percent in 1994, while nationally branded denim merchandise decreased in market share from 43.3 percent in 1989 to 32.7 percent in 1994 (PL's squeeze, 1995). Regional department store chains, such as Carson-Pirie Scott and Bon-Ton Stores, also are trying to develop private label clothing programs to follow the successful leads of national chains such as WalMart (Kathie Lee Collection), and J.C. Penney (Arizona Jean Co.) (Edelson, 1996). The use of private label products in the clothing industry is influenced by the type of channel of distribution used to sell clothing. Mass merchandisers (60 percent) and specialty stores (27 percent) of their sales are private label clothing, while department stores sell approximately 5 percent of private label clothing products (Friedman, 1995).

Other countries, such as Canada, England, and Germany, also have experienced growing acceptance of private label products or, as they are frequently referred to, "own brand" products. Own brand products have risen an average of 7.5 percent a year since 1991, while overall retail sales have grown only by 3.4 percent (Summers, 1996). J. Sainsbury Plc., the second-largest supermarket chain in the U.K. with $14B in revenues, sells 50 percent of its grocery items from its own brands (Morgensen, 1991). Also impressive is the Loblaw Cos. supermarket chain with its now famous "President's Choice" store brand that generates 20 percent or $1.5 billion of sales from the Canadian grocery chain. Given the success of own brands the question becomes, "do these foreign countries represent a trend that could occur in the United States in the near future?" One factor that might influence the trend toward increasing prominence of private label products is the increased level of activity of European companies with large investments in United States supermarket chains, e.g., Ahold, N.V. of the Netherlands owns 90 percent of First National Supermarkets, Tengelmann of Germany owns 53 percent of A&P, Delhaize of Belgium owns 50 percent of Food Lion, and J. Sainsburg controls Shaws. Analysts believe these foreign supermarket competitors will have a significant influence on the private branding strategies employed in grocery distribution (Morgensen, 1991).

This paper explores four related brand issues: 1) the battle between national and private brands; 2) the legal background to the trade dress controversy; 3) the evolution of cross-brand cannibalization as a retail strategy; and 4) a case history of three retailers' approach to marketing private label products.

THE BATTLE BETWEEN NATIONAL AND PRIVATE BRANDS

National and private label products have been in competition for decades but the battle for market share has intensified in recent years due to a variety of reasons, including changes in the marketplace, i.e., intensified competition, evolution of the channel of distribution, as well as proactive strategic options taken by the national brand manufacturers and the private label retailer (see Figure 1). The following issues underscore the reasons for the heightened competition and the resulting brand war between national branded and private branded products in the United States.

Changing Consumer Perceptions Relative to Branding

Due to a combination of factors, i.e., difficult economic conditions, the lower cost of private branded products, private branded products of equal quality, it would appear that consumer preferences are changing between national and private branded products. In several product categories, the major market share are controlled by private label products such as in the stationery products, lawn and garden supplies, domestic glassware and dinnerware, and computer hardware (Liebeck, 1994). In a recent Roper survey, 37 percent of the respondents judged some national brand products worth paying more for, even though an earlier 1988 survey, found that 45 percent of the respondents were willing to pay more for nationally branded products (Schiller, 1993). Nationally branded products' success relies on creating brand loyalty among consumers and in some cases reducing prices to mitigate the price advantage of some of the superior private

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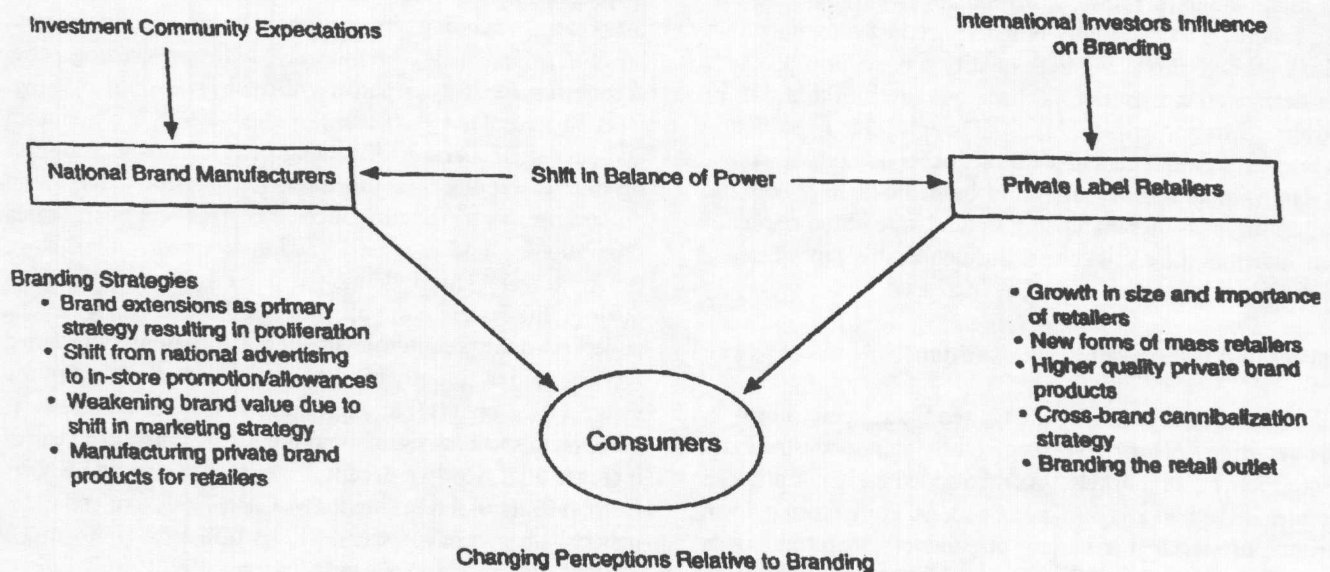
FIGURE 1
THE DYNAMIC ENVIRONMENT OF BRANDING



label products (Morgensen, 1996). Brand loyalty has obviousbenefits for the consumer, including facilitating the interpretation and processing of information, reducing search time, increasing confidence in the purchase decisions, and increasing consumer satisfaction. In addition, the manufacturer derives value from enhancing brand loyalty by increased efficiency and effectiveness of marketing programs, better prices and margins, and trade leverage, i.e., power in the channel of distribution and competitive advantage (Aaker, 1991). If private brands affect consumers' national brand loyalty there could be significant consequences for national brand manufacturers, as well as for members in the channel of distribution.

Rapid Growth of Mass Merchandisers and Discount Retailers

The phenomenal expansion of warehouse retailers, price clubs and "category killer" retailers has stimulated the growth in private brand products. In an effort to become more price competitive, these mass merchandisers incorporate a larger number of private label products in their total product assortment (Greater, 1995; Edelson, 1996). This enables the mass retailer to offer a wide assortment and provide multiple price points on the same products. Therefore, both the price sensitive and quality shoppers can be attracted/satisfied. The ability to purchase products built to retail specifications in large quantities also has supported the private label trend. National mass merchandising chains now have incentive to develop their own brands that will help tie customer loyalty to the retailer instead of the national brand. Lower prices and store identity also differentiate the retailer and the private labels and help to build repeat purchasers (Quelch & Harding, 1996).

Historically, in many industries the manufacturer has been the most powerful member of a channel of distribution. For instance, the nationally branded products have commanded a great deal of power in the distribution of their products. Some of these brands, like Kodak, Wrigley's, Gillette, Nabisco, and Coca-Cola have been the leading brands in their product categories since 1923 (Landler, *et al*, 1991). This strong relationship between manufacturers and key customer segments has resulted, to a large degree, in the control of retailers by manufacturers as relationship marketing becomes a more prominent marketing strategy; however, the knowledge (power) that was once the exclusive strategic domain of manufacturers, has slowly become the province of retailers, dramatically shifting relational positions in the channel of distribution (Shocker, *et al*, 1994).

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In many cases, the key weapon for retailers to offset the power of national brands has been the higher margins on private brands (Bhasin, Dickinson & Nandan, 1995).

As these new forms of retailers evolve and their importance to manufacturers grows, the retailers' ability to "dictate" requirements to nationally branded product manufacturers also increases. Producing high quality private label products for the mass merchandiser has been one result of this shift in power (Morgensen, 1991). Though some academic researchers do not concur with this observation (Messinger & Narasimhan, 1995), it would be difficult to follow the pattern of mass merchandising in the United States and not conclude that the retail sector's influence, in many channels of distribution relationships, has increased.

Increasing International Competition

Global competitors entering the United States, particularly in the retailing sector, have successfully imported strategies from their home markets. As mentioned earlier, European retailers have had a great deal of success in instituting "own brand" products in a variety of product categories. It is logical to expect that these retailers will use this strategy in the United States in attempt to build brand for the retail outlet. This is particularly true of retailers who have elected to introduce high quality, differentiated products (Clark & Fujimoto, 1990).

Proliferation of Nationally Branded Products

Many manufacturers also have adopted a brand extension philosophy in an effort to reduce the cost of introduction and the likelihood of failure of a newly-branded product. Roughly 9 out of 10 newly-branded products fail and these failures can be costly (Landler *et al*, 1991; Morgensen, 1991). For instance, Clorox Co. spent $225 million to develop and introduce a new line of laundry detergents that failed in the marketplace within two years (Landler, *et al*, 1991). In addition, nearly 70 percent of the 24,000 new products introduced were line extensions; the line extensions blur brand identity for national branded products (Morgensen, 1991). Brand extensions are believed to weaken the overall product image and, therefore, the value of some brands. Brand extensions also reduce consumer confidence in the brand name (Dacin & Smith, 1994), because the brand effect is closely tied to the similarity between the original and the extension products and/or categories (Broniarczyk & Alba, 1994). Many large manufacturers of nationally branded products find themselves in a catch-22. They have to adopt a costly new product introduction strategy approach with a high failure rate or conversely these national brand manufacturers must extend existing brands beyond the comprehension of their consumers.

Shift in Marketing Mix Strategies by Manufacturers of Nationally Branded Products

Nationally branded products have historically earned customer awareness, trial, and loyalty through disproportionately high advertising expenditures. Total marketing spending by national brand manufacturers, however, has shifted noticeably with advertising now accounting for just 25 percent of total expenditures, down from 70 percent ten years ago (Schiller, 1993). To maintain and gain shelf space, and to a degree to counteract the sales of private brands, manufacturers now spend advertising dollars on slotting allowances, in-store coupons, sales promotion, and other action-oriented marketing expenditures. This reduction in advertising expenditures during the later part of the 1980s and early 1990s undermined the premium image of many nationally-branded products and eventually brought about a deterioration in the value of these brands (Landler, *et al*, 1991). Today, however, advertising spending by national brands is in its third year of increase after nearly a decade of reduced spending. Robert Coen, director of forecasting for McCann-Erickson, estimates national advertisers will spend $174.1 billion in 1996, up 7.8 percent from the previous year (Morris, 1996).

Deterioration of Brand Strategy

The management of one of the most valuable assets of major national manufacturers, i.e., the control of their brand image was turned over to some of the most junior marketing managers in the organization resulting in many cases in a deterioration of brand equity in the marketplace (Landler, *et al*, 1991). These managers, usually career-oriented "fast trackers," used their highly visible positions to make sometimes dramatic strategic plays that frequently were based only on the short-run perspective of these young MBAs. As a group, these brand managers did not grasp the concept of brand equity, an intangible asset worth billions of dollars to their firms, because the asset does not show up on accounting or management reporting documents (Landler, *et al*, 1991). The present value of the brand, its brand equity, helps differentiate the product offering from competitors, and also provides the product offering a potential advantage in untapped markets and market segments (Srivastava & Shocker, 1991). Brand extensions and increased pricing became the means to illustrate growth and vitality of the brand, and maybe more importantly, the brand manager (Springer & Miller, 1990). Although audits were designed and conducted to determine tangible returns, little was done to assess the negative impact of decreasing brand equity on brand image and customer loyalty to national brands (Quelch, Farris & Oliver, 1987). Some experts have described this generation of brand managers as "murderers of brand assets...young, inexperienced, overloaded with quantitative skills, and short-term focused" (Landler, *et al*,

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1991; Low & Fullerton, 1994). The brand management scheme designed in the 1920s, therefore, has been questioned as the means to appropriately manage brands for the 21st century.

The "Slippery Slope" for National Brand Manufacturers

National brand manufacturers who are not the number one or two brand in the marketplace face an interesting conundrum: remain number three or four in the marketplace without the advertising/market strength to compete with category leaders, or produce manufacturers' private label products for retailers. In other words, take a beating from the top or be consumed from the bottom. The potential losers of the "battle of the brands" are the nationally branded products manufacturers that are not strong enough to compete and therefore have to take on the private branding business (Morgensen, 1991). The strategy of these brand name manufacturers is to better utilize their excess production capacity; they are, in essence, providing their competitive enemy with the ammunition to kill their branded products by supplying quality products to the retailer that can be sold for lower prices (Quelch & Harding, 1996). As retailers demand higher quality, upper-end private brand products, e.g., President's Choice™, Sam's Choice™, the strategic trap is finalized for the national brand manufacturer (Shocker, *et al*, 1994).

Investment Communities Expectations and Resulting Affect on National Brands Equity

National brand manufacturers, relative to the stock market, were the jewels of the 1980s. The brands of these manufacturers became assets sought after by investors as market icons more valuable than the tangible "brick and mortar" of these Fortune 500 companies. The most admired brands also had significant "street value," Coca-Cola had an estimated value of $39 billion (The Customer, 1996). The value of national brand products also became the prime target of merger and acquisition attempts in the 1980s. Out of the frenzy to purchase brand names came some of the most costly acquisitions in history: Philip Morris paid 1.3 times sales for Kraft, Clorox paid two times sales to buy Pine-Sol and Combat insecticide and the RJR/Nabisco acquisition by Kolberg, Krauts and Roberts of $22 billion capped-off the brand name lottery of the 1980s (Morgensen, 1991).

The expectations of those involved in the leveraged buyouts of manufacturers of nationally branded products included: 1) producing short-term cash flows to meet debt coverage; 2) producing steady, predictable growth in earnings; and 3) justifying how and why the marketing managers expected investments in marketing strategies to add value to the company (Shocker, *et al*, 1994). The quest for predictable returns fueled the rising prices and reduced marketing expenditures on brands.

Retailers' Attempts to Brand the Retail Outlet

Retailers have recognized the financial returns of national visibility and customer loyalty to a brand and have begun the process of branding their retail outlets. The branding of retail operations through store brands has three underlying motives: to reduce manufacturers' power in dictating margins; to differentiate product offerings from the ubiquitous national branded product offered by their retail competitors; and, ultimately, to increase the stock and/or sale value of their companies. Supermarkets have been one of the most aggressive movers in branding the store and shopping environment to gain customer loyalty (Close-up, 1996; Mathews, 1995a,b,c,d). Private brands which meet or exceed the quality of nationally branded products build consumers' confidence, and provide other cues which signal intangible qualities consumers may attribute to the store. One of the advantages of branding the retail outlet is to create a "fun" environment for the consumer to shop in and one that is significantly differentiated from generic shopping mall centers (Berry, 1996).

Branding the retail outlet in this way creates a "halo effect" for private brands, which the consumer can attribute to the store, and branding also provides the retail outlet with value in the consumers' mind. The GAP, Inc., Banana Republic, Inc., and Old Navy are some good examples of retailers branding their stores and shaping the shopping experience for the consumer. The product, store, and shopping experience are differentiated from the sea of homogenous products sold by other retailers, all buying from the same nationally branded manufacturers. The future of many retailers may be closely tied to creating an environment that encourages shopping by treating the consumer respectfully and fairly, by providing service levels that meet or exceed consumer expectations, and by using employees who are well trained, enthusiastic and there to take care of the consumer (Berry, 1996).

The competitive environment between national and private brands has not been as aggressive since branded products began to expand in the United States in the 1870s (Low & Fullerton, 1994). The combativeness between the two marketing strategies will continue to escalate due to changes in consumers, the competitive marketplace and shifts in the relative power between manufacturers and retailers. In addition, retailers have taken the battle to new heights by mirroring the trade dress of national brands through their copycat brands. The proactive cannibalization of national brands by retailer private brands is the application of an aggressive marketing strategy. What are the legal

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implications of cross-brand cannibalization to retailers and to the national brands being cannibalized?

LEGAL BACKGROUND TO "TRADE DRESS" CONTROVERSY

A recent trend developing in federal trademark law is one of the reasons why copycat branding may now be a legal possibility for retailers. Since the passage of the Trademark Act of 1946, commonly known as the Lanham Act, owners of federally registered trademarks (and owners of unregistered marks that are "inherently distinctive") have enjoyed expanding protection from trademark infringement.[1] There also have been a number of trade dress lawsuits brought by national brands manufacturers like Proctor and Gamble, who has filed at least twelve such suits (Demetrakakes, 1993; Rosendahl and Brookman, 1994; Woo, 1994; Fried, 1995). The Federal Circuit's 1994 holding in *Conopco, Inc. v. May Department Stores Co.*, and Congress' 1995 amendment to the Lanham Act, however, may have opened the door for retailers who want to use comparative advertising of their private label brands with a national brand. This section of the article reviews the Act's general requirements for trademark and trade dress protection, and analyzes why the *Conopco* decision and the Act's 1995 amendment may support retailers' copycat trade dress strategy of private label brands.

The touchstone for protection under the Act is a showing that the owner's mark is "distinctive" (Lanham Act §1051). This showing is required before an applicant may register a mark. Marks are generally characterized as "suggestive,"[2] "arbitrary,"[3] "fanciful,"[4] "generic,"[5] or "descriptive"[6] (*Abercrombie & Fitch Company v. Hunting World, Inc*). If a mark falls within the first three categories, the mark is considered "inherently distinctive." If the mark falls within the latter two categories, it is not considered distinctive absent a showing of "secondary meaning"[7] acquired through commercial use of the mark (*AmBrit, Inc. v. Kraft, Inc.*).

Section 1125 of the Act (commonly referred to as section 43(a)) is the primary vehicle for a trade dress infringement action. Section 43(a) allows for civil liability when:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--(1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person....

The key to a successful section 43(a) suit is a showing that the defendant's trade dress is likely to confuse the reasonable consumer as to the source of the product.[8] Courts will review several factors to determine a likelihood of confusion, including: the similarity of the marks, the similarity of the products, the competitive proximity of the products, the strength of the plaintiff's mark, any instances of actual confusion, and the length of time of concurrent use without actual confusion (*Squirt Co. v. Seven-Up Co.*).

In *Conopco*, the court held that a retailer's (Venture) private label brand of hand lotion packaged similarly to Conopco's hand lotion (Vaseline Intensive Care), displaying only the Venture logo on the front, and including an invitation to the consumer to "Compare [the Venture product] to Vaseline Intensive Care" was not a trademark infringement or a trade dress infringement because there was little likelihood of customer confusion. In support of this holding, the court noted:

> This is a case in which a retailer markets a national brand product and at the same time markets its own private label product in direct competition. The retailer packages its product in a manner to make it clear to the consumer that the product is similar to the national brand, and is intended for the same purposes. At the same time, the retailer clearly marks its product with its private logo, and expressly invites the consumer to compare its product with that of the national brand, by name.
>
> [T]his form of competition has become commonplace and well-known in the market place. When such packaging is clearly labelled and differentiated...we are unwilling to...make such competition presumptively unlawful (*Conopco*, 1995).

While the court's reasoning in *Conopco* has been criticized (Rosen & Gigliotti, 1995), and the precedential value of federal circuit cases is limited,[9] the holding does appear to allow truthful, comparative advertising by private label brands.

The 1995 amendment to the Act also arguably strengthens the court's refusal to enjoin truthful, comparative advertising. The amendment is an attempt to federalize the myriad state common law remedies available for trademark dilution, in

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order to provide consistency and predictability to owners of famous marks, registered or unregistered, and to make U.S. intellectual property law more consistent with the U.S.'s obligations under GATT (H.R. Report No. 104-374).

The burden of proving "dilution" is not the same as the burden of proving infringement under section 43(a). Proof of dilution requires only that "the unauthorized use of a famous mark reduces the public's perception that the mark signifies something unique, singular, or particular." (Legislative History 1030; Dinwoodie, 1997). This standard is less difficult to prove than a likelihood of confusion.

The amendment, however, specifically excludes some uses of famous marks from action under the dilution subsection, including, "Fair use of a famous mark by another person in comparative commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark." (15 U.S.C. §1125(c)(4)(A)). While the legislative history makes it clear that this amendment does not change the standards or create exclusions for a section 43(a) infringement case, it does illustrate a growing recognition by Congress that comparative advertising of private label brands and national brands is now a common occurrence. The Act's amendment, coupled with the *Conopco* court's recognition that consumers are not likely to be confused by a common marketing practice, could lay the groundwork for protection of truthful, comparative "trade-dress" in future cases.

THE EVOLUTION OF CROSS-BRAND CANNIBALIZATION AS A RETAIL STRATEGY

The underlying rationale of copycat branding is the concept of product/brand cannibalization. This concept has historically argued that a manufacturer is better off if a customer's purchasing decision is made from among several of the manufacturer's products/brands, than if the decision is between the manufacturer's product offering and those of a competitor (Mason & Milne, 1994). The theoretical roots of product/brand cannibalization can be traced to the cross-elasticity of demand theory which examines the rate of substitution of one product/brand for another. When substitute buying behavior is encouraged among consumers for two products/brands offered by the same company, the resulting activity is product/brand cannibalism (Harvey & Kerin, 1979).

The focus on product/brand cannibalism relative to manufacturers who produce multiple products or brands that compete with each other (classic examples are Proctor & Gamble, Coca-Cola, Campbells, and Colegate Palmolive) has become more relevant as brand extensions become a preferred marketing strategy by national brands. The introduction of new products, and, in particular, the extension of brands, has encouraged switching behavior by consumers within the brand extensions of one company.

When the retailers attempt to convert consumers from nationally branded products to private/store brands, this constitutes cross-brand cannibalization. The retailer can sell the national brand, while at the same time, invite the consumer to switch to the store brand. This intentional switching of consumer loyalty at the retail level of distribution from nationally branded to private branded products cannibalizes the sale of the national brand. The key for the retailer is the role of intention, that being, confusing or informing the consumer (Finch, 1996).

The concept of product cannibalization was originally thought of as manufacturers inadvertently attacking an existing brand by expanding a product line. In contrast, retailers have actively pursued cannibalization in order to convert customers to their private label, and, ultimately, to the branded retail outlet. Some of the functional consequences of cross-brand cannibalization at the retail level are: 1) to provide a means to differentiate retailer's private branded products from identical, nationally branded products, i.e., uniqueness; 2) to allow "free-riding" off the national brands' advertising simply by establishing a copycat brand, i.e., reduced cost; 3) to reduce the power/influence of dominant national brand manufacturers in the channel of distribution, i.e., shift in power; 4) to support a strategy of retailers moving to a branded store environment, i.e., using the nationally branded products to make the copycat brand legitimate in the consumers' perception; and, 5) to provide the basis for raising capital or selling the retail operations for significant increase in value, due to uniqueness of the product/store brands, i.e., a consumer franchise similar to the brand loyalty of nationally branded products of manufacturers.

This proactive, cross-brand cannibalization strategy of retailers also may have several inherent dysfunctional consequences. First, the national brand manufacturers may attempt to pull their products from distribution or at the least disrupt the distribution of their products. Second, the cross-brand cannibalization strategy may encourage nationally branded product manufacturers to increase the level of national advertising, e.g., Kellog and Post Cereals, and reduce slotting allowances, in-store promotions and couponing, all of which could affect the short-run profitability of the retailers (Morgensen, 1996). And finally, the most probable reaction of manufacturers of nationally branded products would be to increase advertising, reduce retail price, and undertake comparative advertising, thereby underscoring the reasons for customers to purchase a "known" nationally branded product rather than the retailers' private label products.

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Cross-brand cannibalization at the retail level is valuable because it provides a bridge strategy for the retailer to move from dependence on nationally branded products to the ultimate goal of branding the retail outlet. The transition from national to store branding may have a significant temporal dimension, while the cross-brand cannibalization strategy provides the means to maintain customers during the move to the branded retail outlet.

MANAGERIAL APPLICATION

A Case History of Three Retailers Private Branding Strategies

Given the legal environment relative to "trade dress" issues and the effectiveness of the cross-brand cannibalization strategy of retailers, a case history comparing three different private branding strategies is presented to highlight the impact of such strategies. National brand marketers like Proctor & Gamble assert that directly imitative packaging "confuses consumers" and causes them to mistake the imitation for the national brand, resulting in consumer deception, market share loss, and brand name degradation (Conopco, 1995). Retailers employing the cross-brand cannibalization strategy, however, claim that the copycat strategy for their private brands simply invites consumers to more carefully compare the private brand to the national brand and make a more informed choice (Rosendahl, 1994; Demetrakakes, 1993; Schloss, 1996). Since shelf space is scarce, the battle between the two types of brands has continued to escalate as retailers move away from the ladder based display system to the brand parity approach that increasingly invites consumers to purchase the best buy for the current period; this trend tends to further weaken the market power of national brands (Morgensen, 1991).

In 1994 the Perrigo Company, a major provider of private brands to retailers, completed in a broad based, national study of consumers' attitudes and behavior towards national and private brand health and beauty aid products. Among their key findings were the following: 1) comparison shopping is made easier if store brand packaging closely resembles national brand packaging; 2) look-a-like packaging increases the perceived quality of private brands; 3) comparison shopping is aided if the national and private brands are closely aligned on the store shelves; 4) price differences between the national brand and private brand are the primary determinant in the selection of a private brand; and, 5) consumers are not confused by look-a-likes. Consumers read labels carefully and make informed judgments and base future purchases on actual product performance and overall satisfaction (Perrigo Co., 1995).

In an effort to determine the impact of cross-brand cannibalization, data were collected on the effectiveness of varying degrees of copycat branding strategies as well as the influence of price promotions on the sale of the private brand products. Three major regional supermarket chains with distinctive strategic approaches to private brand package design agreed to cooperate in the study. Table One characterizes the specific strategy deployed by each of the three chains (see Table One). A panel of ten consumers and a panel of eight marketing experts, i.e., local professors (not involved in the study), advertising executives, and retailers were asked to assess the degree of similarity between nationally branded products and the retailers private brands. Information was collected from each participant on the two panels and average "likeness" categories were determined. It was decided to classify anything rated above 5 on a seven point likert scale was considered "extensive" trade dress duplications; from 4.9 - 3.0 "moderate" trade dress duplication and below 3.0 to have "minimal" trade dress dupplication. There was a great degree of consistency between the two panels on the private branding policies of the three chains included in the study. The panels also made an assessment of the overall private branding strategy as to the degree of potential confusion that might occur with nationally branded products. Both the panels estimates were combined due to the high degree of consistency among their assessments and are presented in Table One.

In general, with respect to their private strategies in the categories of products used in this study, Chain A had adopted a strategy that could be characterized as an "Extensive Copycat" branding of private label products, while Chain B's approach was a more moderate strategy with overt similarities to private label branding but without an identical "trade dress." Chain C adopted a strategy which minimized direct comparison to nationally branded products.

Each of the three supermarket chains provided unit movement, price, and promotion information for six nationally branded health and beauty aids (HAB) and six directly competitive private brand products for twenty-two (22) consecutive monthly periods from July 1993 until April 1995.

The study provides comparative national brand/private brand longitudinal data with respect to market share, price differential, and the impact of short-term promotions. This information, collectively, helps provide insights into the merits of various copycat private branding strategies, as well as some perspectives on the level of potential consumer confusion.

Private Brand Unit Proportion

Table Two illustrates the proportion of monthly unit movement accounted for by the private brand HAB competitors for chains A, B, and C for the twenty-two-month

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TABLE 1
SUPERMARKET "TRADE DRESS" STRATEGY COMPARISONS

Characteristics	Chain A	Chain B	Chain C
Relative Likeness Scale Range (0 - 10) Average	4 - 9 6.3	3 - 5 3.3	1 - 3 1.8
Overall similarity to national brand	Extensive	Moderate	Minimal
Store Logo	Primarily placed centered above upper portion of label. Logo colors changed to match specific product design colors.	Consistently displayed centered at the top of label. Logo colors remained constant throughout all products observed.	Primarily displayed above upper portion of label. Inconsistent in logo position - right side, center, left-side. Logo colors changed to match specific product design colors
Employ "Compare to.." the national brand advertisements on private label package design.	Yes Advertisement primarily appears on the design of a yellow star, yet in some cases blend in with design of the label.	Yes Advertisement primarily appears on the design of a yellow star.	Yes Advertisement primarily appears across the top of the package in specific label design colors.
Practice shelf labeling that compares private label and national brand pricing.	Yes	Yes	No
Private label shelf placement strategy	Between various sizes and extensions of national brand	Next to competing national brand	Combination: a) next to competing national brand, b) beneath national brand
Strategy observations	Conveys a strategy that could be confusing to the customer.	Engages in a strategy of providing customers with the opportunity to relate the less prices store brands with the national brand.	Adamantly moved away from a national brand look-a-like strategy and migrated toward a look of their own.

Each of the three chains provided unit movement, price, and promotion information for six health and beauty aid products

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period. The private brand penetration ranged from 35% to almost 70% for the period. The proportions closely parallel the findings reported by Discount Store News in their power brands report of 1994 (Liebeck, 1994).

For the twenty-two-month period the cumulative private brand proportion was: 1) Chain A = 60 percent; 2) Chain B = 46 percent; and 3) Chain C = 53 percent (see Table Two). In addition, the number and percent of periods with the highest proportion of private brands were: 1) Chain A = 17/22 or 77 percent; 2) Chain B = 1/22 or 4 percent; and 3) Chain C = 4/22 or 18 percent. Most importantly, Chain A, the chain with the most extensive look-a-like strategy, achieved the highest proportion of private brand penetration over the 22 months with a weighted proportion of 60%. In addition, Chain A had the highest proportion of private brand share for 17 of the 22 months provided (77% of the periods). Chain C, the chain with the least aggressive look-a-like strategy, achieved an overall proportion of private brand penetration of 53%, while Chain B, the moderate look-a-like strategist, achieved the lowest private brand penetration at 46%. From these findings it would appear, based upon private brand penetration results, that the most extensive look-a-like strategy secures the highest private brand market share.

Private Brand Price Advantage

Table Three illustrates private brand prices as a proportion of competing national brand prices. Private brand prices ranged from 40% to almost 85% of national brands. Again, these price differences closely parallel the findings reported by Discount Store News in their 1994 Power brand report (Liebeck, 1994). The average private brand proportion of national brand price was: 1) Chain A = 65 percent; 2) Chain B = 77 percent; and 3) Chain C = 53 percent. The number and percentage of periods in which each chain had the greatest difference in pricing private label to national brand products was: 1) Chain A = 1/22 periods or 5 percent; 2) Chain B = 0/11 periods or zero percent, and 3) Chain C = 21/22 periods or 95 percent.

Interestingly, Chain C, the regional competitor employing the least aggressive look-a-like strategy, had executed the most aggressive pricing strategy throughout the study with prices of its private labels averaging only 53% of the competing national brands. On the other hand, Chain B, the moderate private branding strategy, had priced its private brands at 74% of the national brand price, the highest relative private brand pricing. Finally, Chain A, the most aggressive look-a-like strategist had executed a mid-range pricing strategy with a private brand price proportion of 65%.

Impact of Short Term Price Promotion

Table Four reports the effect of short-term promotions on private brand and national brand competitors. One week or less was the duration of a majority of the price promotions during the study. While both private brands and national brands are stimulated by price promotional efforts, national brands are much more responsive to these price promotional Efforts. National brand penetration increased by twenty-two percent to a total of forty-seven percent during these short-term promotional efforts, while private brands increased at about one fourth the rate. This differential in price sensitivity might have been due to the established price point of national branded products in the consumers' frame-of-reference. Therefore, a reduction appears to be a bargain and stimulates purchase. Whereas, the private branded products price points are much less well established and therefore when there is a price reduction it is more difficult for the consumer to determine the value of the price reduction.

Managerial Implications

The research reported has research design limitations. For instance, the study was limited to one region of the country, only twelve products or six product pairs in the health and beauty aid category were included, and the data observations were limited to 22 months. However, the proportions of private brand penetration and the private brand-national brand price relationships were quite similar to the national data reported earlier. An additional limitation of the study was that three independent variables were used, i.e., branding strategy, everyday pricing strategies, and short-term price promotions. There could be a degree of confounding effects among the three independent variables. Although the chain branding strategies and price differentials between private and national brands were held constant throughout the study. The price promotions were undertaken at the same times and the regular pricing strategies were reassumed at the end of the price promotion.

Two managerial strategies may be drawn from the data. The first is that the value-based retailer has two distinct options for the expansion of a private brand product. The more extensive copycat option appears to provide the greatest returns (Chain A), as does the greater price differential option (Chain C). However, the "in-between" option selected by Chain B does not appear to be as effective. The more extensive copycat strategy may be more attractive from a margin maintenance point-of-view, particularly given the courts' recent rulings on the appropriate packaging tactics for

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TABLE 2
PRIVATE BRAND PROPORTIONS
PRIVATE BRAND AVERAGE PROPORTION OF UNIT MOVEMENT BY MONTH

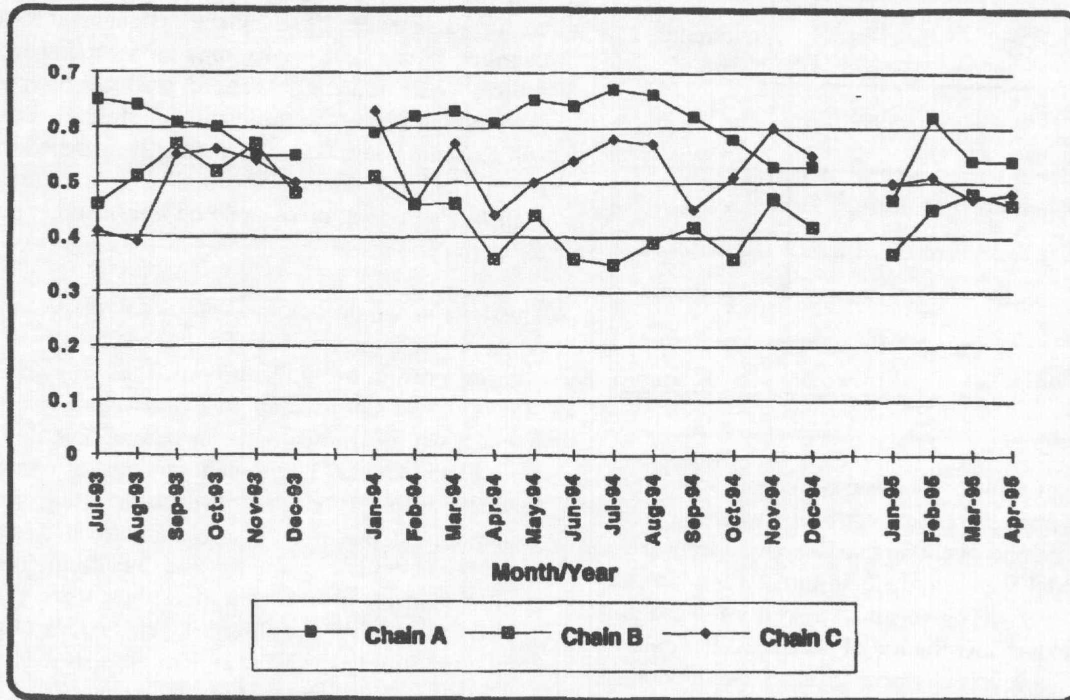

TABLE 3
PRIVATE BRAND RELATIVE PRICE STRUCTURE
PRIVATE BRAND AVERAGE PROPORTION ON NATIONAL BRAND PRICE BY MONTH

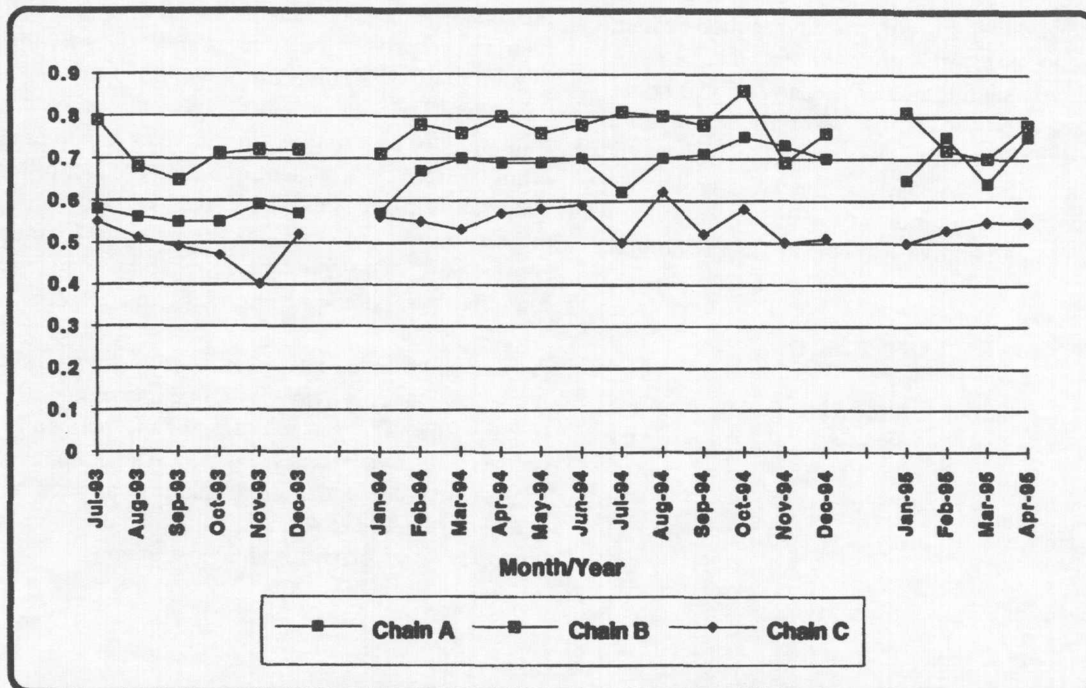

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TABLE 4
IMPACT OF SHORT TERM PRICE PROMOTIONS

	Private Brand	National Brand
Prevailing Penetration	53%	47%
Sale Period Penetration	60%	69%
Change Percentage Points	7% Points	22% Points
Percent Change	+13%	+47%

avoidance of legal issues. The second conclusion is that consumers do not appear to exhibit confusion when shopping and comparing a private label that used a copycat trade dress strategy to national brand products in the marketplace. In that, customers are willing to make a trial purchase and repurchase the product after the initial purchase. It would be anticipated that the private label product would not be repurchased if the consumer were not satisfied with the product's performance or attributes when compared to the national brand.

Brand share penetration for private brands is clearly driven by either a copycat strategy or very favorable price differentials. However, short-term price promotions which substantially reduce the price premium for the national brands resulted in very significant increases in national brand share at the expense of private brands. Most importantly, the copycat private branding strategies are not perceived by consumers as an effort to confuse them. Consumers' purchasing behavior does not indicate confusion, only value shopping through comparative assessment of private and national brands.

SUMMARY/CONCLUSIONS

Academicians have chronicled the ebb and flow of the competitive struggle between national and private brands for at least seventy-five years (Parlin, 1916). The period after World War II heightened the "battle of the brands" and affected the development of channels of distribution in the United States (Borden, 1946; Buckingham, 1946). To conclude, therefore, that the present battle between the two branding strategies is "new news" or that the war will soon be over would be foolhardy and indicates a lack of understanding of the rich history on the topic. Due to a confluence of events, however, the environment for dramatic changes in the marketplace may be occurring in the near future. Will nationally branded products disappear; will private brands become the dominant strategy for retailers; will consumers' loyalties be permanently switched to the new store branding? The answer to all three questions is more than likely no, but, there could be significant opportunities for change.

The strategic window of opportunity for retailers may hinge on the court's interpretation of the "trade dress" issue. If the retailers prevail, using the argument that copycat branding allows consumers to shop comparatively, the competitive window will be thrown open for private branding. On the other hand, national brand manufacturers also may attempt to undermine the retailers' private branding strategy by reducing retail prices and escalating national advertising to strengthen brand loyalty. The resulting competitive environment could resemble the burger wars of the early 1980s or the comparative advertising campaigns of soft drink companies during the same period. The issue is only what will happen, not when (Nichol, 1996).

Cross-brand cannibalism by retailers as a strategy allows the retailer to move to the branded retail outlet. By switching customers to the store brand, the loyalty of the consumer is aligned with the retailer rather than nationally branded products which can be purchased from a number of difference retailers. There are a number of incentives for the retailers to want to establish their own branded identity for the retail consumer. The homogeneity of product throughout the retail trade may be as strong an incentive as any to establish the branded store environment. Unique product offerings that establish a loyal customer base is also one powerful motivation to re-examine the copycat "trade dress" controversy. The competitive reaction of national brand manufacturers should be interesting to observe.

As can be observed in the findings of the study, a copycat branding strategy provides a unique opportunity for retailers to capitalize off the trade dress of the nationally branded product. The closer the trade dress of the national brand, the higher the brand penetration. Short term price promotions stimulate sales of the nationally branded products more than any of the three private branding strategies.

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ENDNOTES

[1]Two recent Supreme Court decisions provide good examples of this expansion. In *Qualitex Co. v. Jacobson Products Co, Inc.*, 111 S.Ct. 1300 (1995), the Court held that the Act's language was broad enough to allow a color to be protected as a trademark, as long as the color was "source-identifying." This holding expands trademark protection as color has historically been viewed by the courts as "functional," and not eligible for trademark protection. In *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992), the Court also expanded an owner's right to protect unregistered trade dress, the decor of a Mexican restaurant, in the absence "secondary meaning," as long as the decor was inherently distinctive.

[2]Suggestive marks generally require the consumer to use his or her imagination in order to get a sense of the product; the mark merely "suggests" what the product is without describing that product.

[3]Arbitrary marks are generally common designations used in an uncommon way unrelated the product itself, like APPLE when used to mark a computer.

[4]Fanciful marks is generally a "coined" designation used solely for trademark purposes, like KODAK for film.

[5]Generic terms merely identify the product without identifying the source.

[6]Descriptive terms generally describe only the "characteristics" of a product without identifying the source of the product.

[7]Secondary meaning develops when the consumer sees the connection between a product's nondistinctive mark and the product's producer. Secondary meaning functions like goodwill.

[8]The burden of proof required under §43(a) differs depending upon the type of relief sought. Injunction relief requires proof of a likelihood of confusion. Monetary relief requires proof of actual confusion; the latter is more difficult to prove.

[9]The federal circuit has exclusive jurisdiction over patent cases. Since Conopco combined its patent and trademark infringement claims, this court was the only court that could hear the case. For the trademark claim, the court must apply the law where the case originated, and the decision binds only the parties to the litigation. Federal circuit cases, then, have little value as precedent, but have influenced the law in other circuits.

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