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Coolhunting the Law

Mark Fenster†

"I consult on design." Then, because this is not exactly the stuff of interesting conversation: "And I hunt 'cool,' although I don't like to describe it that way. Manufacturers use me to keep track of street fashion . . ."

"(T)he 'cool' part – and I don't know why that archaic usage has stuck, by the way – isn't an inherent quality. It is like a tree falling, in the forest . . ."

"What I mean is, no customers, no cool. It's about a group behavior pattern around a particular class of object. What I do is pattern recognition. I try to recognize a pattern before anyone else does . . . [And] I point a commodifier at it."

- WILLIAM GIBSON, PATTERN RECOGNITION 86 (2003)

William Gibson's novel Pattern Recognition follows Cayce Pol- lard, a branding savant and "coolhunter." Cayce's singular abilities, which appear preternatural and are characterized as "a morbid and sometimes violent reactivity to the semiotics of the marketplace," are two-fold: she can determine whether a particular trademark or brand will be successful merely by looking quickly at a drawing of it, and she can identify those products or designs that are likely to make the jump from early adopters to the mass market. She hires these talents out to marketers of consumer goods hoping to capture the immense profit potential in mainstreaming the new and the hip, as well

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1. The term "coolhunter" seems to have emerged first in the 1990s, especially as a service relied upon by entrants in fast-changing sectors in highly competitive consumer markets such as fashion. See Malcolm Gladwell, The Coolhunt, THE NEW YORKER, Mar. 17, 1997. A "species" of corporate consultant that saw the peak of its popularity in the late 1990s, the "coolhunter" has apparently died, its job having been made impossible by an increasingly complicated and fast-moving popular culture, while its tasks are now performed by savvier corporate employees and journalists who are able to develop the expertise over which coolhunters once claimed a monopoly. See This Blog Sits at the Intersection of Anthropology and Economics, http://www.cultureby.com (June 2, 2006). My use of the term is not intended to refer to this now-extinct species. Rather, like Gibson's novel, I will invoke the fanciful idea that there is a "cool" that exists and that it can in fact be "hunted."

2. WILLIAM GIBSON, PATTERN RECOGNITION 2 (2003).
as to capture the imaginations and discretionary spending of mass consumers. She hunts the cool, and her personal and professional life seems itself to be the essence of cool – no office, no paperwork, no bureaucracy (except for immensely proficient assistants who provide her with limit-free credit cards and first-class airplane tickets), and clients in awe of her talents. Cayce represents a fantasy of the professional knowledge worker in a service economy. Perhaps it goes without saying that her work bears little resemblance to legal practice, at least as I have seen and experienced it.

In this Essay, I want to use the image of the "coolhunter" to consider what Victor Fleischer has called the "branding moments" in a corporation’s legal life – specifically, those events, most notably in initial public offerings, in which a company, with the assistance of counsel, uses its legal infrastructure and corporate transactions to further its brand. Fleischer is especially interested in the role that attorneys play in these events when they introduce and extend the corporate brand in the innovative documents of corporate governance that they draft. In a sense, Fleischer wants us to consider the lawyer either as coolhunter or as drafter of the cool – as the artisan of legal forms and practice who can engage with and further a commodifiable pattern, the brand, as well as accomplish the client’s specific legal goals. Of course, legal forms and practices, like branded products, are themselves commodities, while lawyers and their firms themselves are branded, though in more subdued patterns than most of their clients. However, what Fleischer's work in this area and the MasterCard case study offer are instances in which the attorney's work, in addition to clearing legal and regulatory hurdles and producing a functional and perhaps even somewhat creative legal entity and set of ongoing relationships, accomplishes some other purpose. The additional value for the client it creates, which I will call the branding increment, furthers a goal or goals that are not part of the specific transaction with which legal labor conventionally concerns itself. The transaction's creativity goes beyond the formal boundaries of legal doctrine and practice. It aspires to the cool.

My contentions are theoretical and, more tentatively, normative. In order to analyze and evaluate legal coolhunting for the branding increment, I suggest that both the "brand" and the multiple audiences towards whom the brand is intended – the audiences whose attention and interest will in turn create the branding increment – need to be more thoroughly theorized. Put another way, describing what lawyers are doing or prescribing what they should be doing in a particular case like the MasterCard IPO, or making some normative
claim about the larger value of this mini-trend within some utilitarian or ethical or political calculus, or even offering some regulatory framework within which these corporate structures or contractual relations should be contained – any of these requires us to better recognize our assumptions about the two parts of these transactions' equation. On one side lies the mysterious process of branding, into which both companies and their customers pour significant quantities of meaning in hopes of achieving equally significant effect. As I explain below, there is no Cayce Pollard in the art and science of branding, nor is there likely to be a Cayce Pollard of the legal cool-hunt.\(^3\) On the other side lie the audiences for the branded component of the deal. They include not only consumers but also investors, shareholders, and, in the MasterCard case study, regulators. And in between lies the corporate client, who is bound by law, regulation, and ethical norms to be transparent to some of these audiences – although less so, interestingly, to the client's consumers. Alongside the client is the attorney, who is at once helping the client comply with its legal, regulatory, and ethical duties, and, in the instances Fleischer has identified, hunting the legal cool.

Attorneys appeared to play only background roles in the branding moments Fleisher has identified elsewhere.\(^4\) In those, companies sought to dress their transactions and contracts in stylish, attractive garb: Google was the largest and most prominent company to use the Dutch auction for its IPO, fashioning itself as a vanguard of a “Silicon Valley populism” that stood ready to trump the button-down capitalists of Wall Street;\(^5\) Ben & Jerry's attempted to invoke a similar, though geographically distinct (Vermont-ish) populism by geographically limiting their IPO to local residents;\(^6\) and Apple sought to express a sense of collectivity and coolness by paying Steve Jobs, its star CEO, only one dollar per year.\(^7\) In the MasterCard IPO, however, Fleischer argues that lawyers played a key role not merely in

\(^3\) One interesting question is, if there were a Cayce Pollard of legal branding, would the cool attorney gain sufficient notoriety to allow her to brand herself? The fictional Cayce Pollard is a noted coolhunter-for-hire, and the fluidity of marketing talent is quite distinct from the stickiness of legal employment relationships and the typical subsumption of legal talent within the law firm. However, the branding of legal talent within the legal profession, as interesting a topic as it is, is beyond the scope of this essay.


\(^5\) Id. at 1596.

\(^6\) Id. at 1610-11.

\(^7\) Id. at 1618-19.
regulatory cost engineering, but in crafting the deal's branding element. The attorney is more than a scribe, or even an engineer, communicating with other members of the legal trade; she seeks to communicate and extend the nebulous concept of the client's consumer brand, and to render it in a meaningful, attractive, and cool way to the consumer.

However, to figure the roles and interests of the attorney and client, we need a better sense of the brand and the audiences. This Essay is a small effort to use Fleischer's work to think through these issues by focusing, in turn, on branding, on the various audiences for these branding moments, on the relationship between the brand and transparency norms, and, finally, on the role of the attorney in this process.

**BRAND**

A representative marketing textbook offers the following definition of “brand”: “a name, term, symbol or design, or any combination of them which is intended to identify the goods and services of one seller or group of sellers and to differentiate them from those of competitors.” The term refers both to a material thing, the physical marker of the brand itself (as it is seen or spoken or heard), and to the functions that a brand is intended to serve. The concept of “brand” thus incorporates two elements of a broader theory of communication. First, it includes a theory of signification that would explain how the name, term, symbol or design produce meaning for the producer and consumer. Second, it implies a theory of effects regarding what the brand owner intends the brand to perform upon the product and consumer, and what it actually does perform.

The latter is clearly the more significant aspect of the brand for its owner. An aesthetically pleasing or innovative brand might provide some satisfaction for ownership, management, and employees, but an effective brand increases sales. Branding is meaning-making with a purpose, an intentional form of communication that seeks to produce certain cognitive and emotional effects upon its audience, and to lead that audience to engage in very specific acts — namely, the consumption of the product or service to which the brand refers. The brand’s intended cognitive and emotional effects include heightening the audience’s awareness of a product and its brand name, increasing

consumers’ perception of the quality of the offered product or service as well as their loyalty to the brand, and shaping the mental and emotional associations that customers make with the brand.\textsuperscript{10} It is perhaps no wonder that early- and mid-twentieth century fears of advertising’s effects, and the effects of mass culture generally, frequently analogized it to propaganda.\textsuperscript{11}

Put in its simplest form, the owner ultimately hopes that the brand will build value into the products to which it is attached through consumers’ reliance on the brand for product identification, purchase, and satisfaction.\textsuperscript{12} The value manifests itself in two senses: First, in the premium that its owner can charge above what a generic or private brand can offer for a similar product; and second, in the relative market share of the branded product in the relevant product market, which indicates the extent of the brand’s effect on customer decision-making.\textsuperscript{13} A successful brand will both command a high premium and control significant market share.\textsuperscript{14} In this way, successful brands offer “brand equity,” an intangible asset with a fuzzily measurable value that can, in some instances, represent a significant portion of a corporation’s overall value.\textsuperscript{15}

This all seems straightforward. However, the brand’s effects and ability to add value come into being as a result of signification. Brands require symbolic form – indeed, as Roland Barthes explained, something as “mythical” in its communicative abilities as a brand or advertisement “is not defined by the object of its message, but by the way it utters its message.”\textsuperscript{16} Because of the complex and ambiguous

\textsuperscript{10} DAVID A. AAKER, BUILDING STRONG BRANDS 7-8 (1996).
\textsuperscript{11} On the history of this analogy as it pertains not only to advertising but to mass, commercial culture, see generally PAUL R. GORMAN, LEFT INTELLECTUALS AND POPULAR CULTURE IN TWENTIETH-CENTURY AMERICA (1996); Mark Fenster, Murray Edelman, Polemicist of Public Ignorance, 17 CRITICAL REV. 367 (2005). Perhaps unsurprisingly, members of the legal academy took the analogy and ran with it. See, e.g., Ralph S. Brown, Jr., Advertising and the Public Interest: Legal Protection of Trade Symbols, 57 YALE L.J. 1165, 1165-69 (1948).
\textsuperscript{12} AAKER, supra note 10, at 10.
\textsuperscript{13} DAVID A. AAKER, DEVELOPING BUSINESS STRATEGIES 164-65 (6th ed. 2001).
\textsuperscript{14} Vijay Vishwanath & Jonathan Mark, Your Brand’s Best Strategy, in HARVARD BUSINESS REVIEW ON BRAND MANAGEMENT 169, 171-72 (1999).
\textsuperscript{16} ROLAND BARTHES & ANNETTE LAVERS, MYTHOLOGIES 109 (Annette Lavers trans., 1972).
cultural forms that branding takes, the brand often fails in its communicative mission by providing an insufficient or excess quantity of its intended effects.\textsuperscript{17} The relative certainty with which the literature describes the brand's character, effects, and value disappears when professionals and academics attempt to explain precisely how brands work, and how to create effective ones. The literature on branding reveals that it is much easier to analyze brands after the fact, in post-mortem case studies of their significance and effects, than to construct a new brand or to project a brand's success by predicting how the brand's form will act in the cultural imagination as well as in the marketplace.

Indeed, experts seem to differ over precisely what accounts for a brand's success. On the one hand, we are told that the successful brand must be more than just simple—it must be "oversimplified" in order to cut through the clutter of an overloaded marketplace.\textsuperscript{18} However, we are also told that the brand must have a "personality" that contains and expresses demographic categories and classic human traits,\textsuperscript{19} and that exemplifies the (presumably attractive) "core values" of its corporate owner.\textsuperscript{20} In other words, it must be both simple and remarkably complicated and evocative. And leading academics and practitioners explain a brand's success in a myriad of distinct and often contradictory ways. It may be due to the exogenous cultural and historical factors that the brand developer exploits;\textsuperscript{21} or perhaps it results from the fact that the brand and product exploit diverging product categories;\textsuperscript{22} or perhaps the brand is able to meet "higher," complex consumer needs for such things as safety, love, esteem, and belonging;\textsuperscript{23} or perhaps it is the result of an interaction of consumers' understandings and experiences with the product and the icons, metaphors, phrases, and story of the brand;\textsuperscript{24} or perhaps it is

\begin{enumerate}
\item Aaker, supra note 10, at 141-42 (1996).
\item Mike Moser, United We Brand 11-31 (2003).
\end{enumerate}
merely the effects that a distinctive visual form have on the visual perception and cognitive sequences of consumers.25

From the literature, one can glean three stylized alternatives for explaining a brand’s success. A brand may have great historical agency and be able, because of its unique and powerful ability to signify in the contemporary marketplace and culture, to cut its own way through the clutter of competing products and marketing strategies to sell an easily substitutable product. Or perhaps a brand merely, and mostly through random luck, appears at the right time and is able to offer an informational and symbolic message that both connects with its cultural and historical context and assists in selling a superior product. Or third, and both most likely and most prominently in the literature, a successful brand results from some combination of agency and circumstance. It successfully harnesses extant myths and symbols circulating at a particular moment in order to respond to and in turn shape consumers’ perceptions of their needs or desires, and ultimately to sell a particular product or service.26 Even then, a brand can only work when it is consistent with customers’ “personal experiences” with the product — a factor over which the brand owner has significantly less control than in the design, production, and placement of the brand.27

This third explanation also acknowledges the limited agency of the brand and marketing strategies in shaping consumer decision-making, and as such makes the most common sense. However, it is also incoherent and indeterminate. Of course brands must accomplish something — if they did nothing to us, we would not remember them apart from the products they signify, and marketers would not knowingly waste an enormous amount of capital and energy on developing brands and exploiting them. And of course brands cannot accomplish everything — if they did, then no brands would fail and no one would change brands because they were dissatisfied with product performance. However, where, in the vast continuum between powerlessness and omnipotence, do brands lie in our cultural imagination and consumer practices? And if, as is obvious, different branding campaigns end up at quite different points on that continuum, how and why do they get there?

25. See ALINA WHEELER, DESIGNING BRAND IDENTITY: A COMPLETE GUIDE TO CREATING, BUILDING, AND MAINTAINING STRONG BRANDS 6-7 (2003).
26. See HOLT, supra note 21, at 6-10; JAMES B. TWITCHELL, BRANDED NATION 17-21 (2004).
Reviewing this literature and its largely failed efforts to explain and domesticate the branding process, it is difficult to avoid the conclusion that branding is an unpredictable, even magical process in which the seemingly arbitrary symbol becomes naturalized as it associates a product with a set of non-material, often unrelated attributes. Indeed, a century after the idea of the unified and coherent "corporate image" was initially developed, we can come only somewhat closer to understanding how and under what conditions branding works, and why some efforts will succeed while others fail. As a general matter, we know that branding serves an extraordinarily important function within an advanced capitalist economy. We can track its value-creation and either applaud its ability to move product and captivate our imaginations, or condemn its role in exploiting us and degrading our lives. However, given not only the lack of consensus among marketing professionals and academics about how and why it works, but also the complicated, competing, and contested theories of cognition, semiotics, and media effects that also attempt to explain it, branding remains a (relatively) dark art of marketing.

I draw three implications from this. First, Fleischer's approach here and in his earlier article correctly agrees with experts in this dark art that a case study method focusing on a single company's concentrated efforts to create or enhance its brand equity likely does a better job of illuminating the complexity of the branding process than do efforts to theorize, explain, and produce an abstract approach or how-to manual. Second, branding efforts are uncertain, risky endeavors. No branding boilerplate exists; no authoritative treatise stands ready to reveal the timeless principles of brand-making; no Westlaw search will find the model brand that is on-point. Third, through their use of symbolic, mythical, emotion-laden communication, branding efforts do more than communicate information about product attributes to consumers. They may inform, but they must supplement that information with evocative, indeterminate meaning whose success can rarely be predicted beforehand.

28. See Barthes, supra note 16, at 129.
This final point needs elaboration. Leading marketing proponents (professional and academic) assume that a fundamental irrationality or emotional vulnerability of the consumer is necessary for branding to be a valuable practice. One need not seek confirmation only from leftist cultural critics of advertising’s tendency to prey on consumers’ worst, most irrational human emotions, or of its furtherance of the worst excesses of capitalism—the literature on branding and marketing cheerfully admits as much (although without the critics’ normative bite decrying the exploitation and resulting alienation of the consumer). At the heart of the branding concept is the notion that an audience of consumers will respond to the brand’s symbolic communication, and that this communication will include something more than information about the branded product’s function and attributes. Accordingly, an analysis of how branding works in a particular context requires a theory of branding—how it signifies, what kind of effects it has, what that “something more” that branding produces actually is.

**AUDIENCES**

The audience serves as the ultimate commodity of mass, advertising-financed media. Whether the audience is measured by raw numbers, narrow demographics, or the level of attention it gives, its elusive gaze forms the basis for the price paid by advertisers for a broadcast spot, printed page, page view, or other measurable quantity. Presumably, a successful effort to further brand identity and brand equity in corporate transactions adds value by reaching and affecting two different sets of audiences. First, media coverage of a corporate deal’s branding element addresses the relevant market for the corporation’s products and services. When Google and Ben & Jerry’s used their IPOs as branding moments, they were presumably hopeful that their efforts would work in conjunction with their more traditional efforts to market their brand in order to increase the use of Google-owned services and the sales of Ben & Jerry’s ice cream.

32. See, e.g., AAKER, supra note 10, at 75-76; IAIN ELLWOOD, THE ESSENTIAL BRAND BOOK: OVER 100 TECHNIQUES TO INCREASE BRAND VALUE 163-78 (2d ed. 2002); DARYL TRAVIS, EMOTIONAL BRANDING – HOW SUCCESSFUL BRANDS GAIN THE IRATIONAL EDGE (2000).


The IPOs served, in part, as another aspect of a broader marketing strategy—developing and promoting the meaning, the “cool,” of the brand. This part of the branding effort seems perfectly consistent with the notion, shared by critics and proponents of marketing alike, that we live in a postmodern moment in which a multitude of signs and products produce significant clutter through which consumers must wade before purchase, and that the savvy corporate strategy is to find innovative means to promote and extend the brand in as many new contexts as possible. The analysis of this type of brand extension would be identical to an analysis of branding in any other marketing context, because the audience is the same—the consumer.

However, there is another audience for these branding efforts: investors and shareholders who transact in the capital markets rather than in the consumer marketplace. As with the decisions that consumers make while shopping for products and services, investors and shareholders might respond positively to branding efforts in corporate deal structures; doing so, they would add value to corporate assets and securities. Branding in this context can add value to stock prices in two ways, one that is perfectly consistent with a rational investor model but another that is not. Assume Corporation A performs a clever, branded IPO. A savvy investor, call him Irving, sees this effort as an effective, professional way to further the brand, and he assumes that the IPO is further evidence of Corporation A’s ability to innovatively market itself and its products and services. Rather than responding as a consumer, Irving responds as an investor attempting to gauge how consumers would respond. Irving, and like-minded Irwins in the market, might therefore value Corporation A’s brand equity and its potential for growth more highly, thereby driving up the price for Corporation A’s securities. Irving sees the production of cool, and he likes it.

However, suppose that Ignatz, another investor, is attracted to Corporation A’s branding efforts not as evidence of the company’s marketing abilities but because the corporate brand appeals to him in the emotional and self-expressive manner of effective brands. Like the “irrational” consumer who purchases a product not for its function or value but because of the brand’s non-rational attractions,

35. Compare Bedbury, supra note 23, at xiv-xv (explaining that marketing professionals and corporate executives need to understand this “brand new world” in order to succeed), with Matthew P. McAllister, The Commercialization of American Culture 248-52 (1995) (arguing that the ubiquity of advertising and marketing have enormous, adverse political and emotional effects), and Herbert I. Schiller, Culture, Inc.: The Corporate Takeover of Public Expression 135-56 (1991) (same).
Ignatz has invested in Corporation A because of some non-rational appeal embedded in the branded IPO. Ignatz unthinkingly buys the “cool” of the brand rather than coolly evaluating the value of the security. Are we as comfortable with Ignatz’s reason for purchasing Corporation A stock, and that of any other Ignatzes in the market, as we were with Irving’s? When Ignatz makes this decision in the consumer marketplace – for example, when he chooses inferior Product A over Product B because he is moved by the aesthetics and emotional appeal of the brand – we do not care much unless, perhaps, the product is damaging to Ignatz’s health or its inflated price drives him to the poorhouse. However, does the analysis change when we are thinking about capital markets rather than about markets for consumer goods?

An answer to that question requires assumptions about two things, the second of which I discuss in the next section. For now, I want to suggest that an analysis of these practices requires adopting or developing a theory of the audience. I do not want to imply that I think capital markets are filled with lots of Ignatzes. However, are they filled solely with Ivings? Is the investor and shareholder audience fully cognizant of the effects of branding on its decision-making? Further, even if members of this audience are fully cognizant of the company’s branding efforts, are these investors and shareholders nevertheless affected by them? Perhaps investors and shareholders practice a form of postmodern “cynical reason” in which they recognize and even mock firms’ efforts to puff themselves and manipulate stock prices. However, these knowing investors and shareholders nevertheless incorporate this puffery and manipulation in their decisions to buy, sell, and hold.36 This is one reading of the dot-com bubble, and other instances of wildly inflated markets, in which the cynically reasoning investor thinks: I know I am speculating. I know that the price of the asset I am purchasing is vastly over-inflated. And I know that the market in which I am purchasing it is risky, overheated, and perhaps even irrationally exuberant. But I will nevertheless buy, and smirk, wink, and nod about what I have done. I may be part of an irrationally exuberant market, but at least I know that I’m irrationally exuberant.37


37. This is idle speculation on my part; I do not know of an academic analysis of the dot-com bubble that sees its frenzy as knowing and cynical. However, it is the funny but disturbing depiction of capital markets and IPOs that emerges from Jonathan Franzen’s novel The Corrections, in which the role of the attorney in providing “caveating” disclosures in a road-show meeting for potential investors is portrayed
These questions ultimately raise the specter of the irrational investor, the figure whose discovery has called into question the efficient capital market hypothesis (ECMH) and its assumption that security prices always "fully reflect" the available information and the securities' fundamental values. 38 I will not rehearse the ECMH or its critiques here except to suggest that, if the branding mini-trend continues in IPOs, particular instances of branding may produce differing expectations among investors (the Ignatzes and the Irvings) and may trigger particular types of cultural biases and behavioral heuristics that would inflate stock prices – biases and heuristics that may not, in turn, be merely random errors that cancel each other out or be corrected by arbitrageurs. 39 Moreover, if securities laws produce an "overload" of information that investors are unable to process thoroughly and rationally, 40 investors might over-rely on the condensed communication supplied by the brand – which, as noted earlier, is at once remarkably simple and efficient, as well as exceptionally symbolic and evocative.

In short, if the effort to brand the deal creates value, then an analysis of that effort will need a better, more precise sense of how and where that value is created. To do that, the analysis will need a more developed theory of the brand as it works in this context, and a more sensitive means to track the audiences that the brand reaches and how it affects them. It would have to rely on a theory of the audience that needs development and testing.

CORPORATE TRANSPARENCY

The other assumption needed to evaluate whether an investor is a shrewd Irving or a manipulated Ignatz concerns the relationship between the information produced by the branding component of these deals and other information produced by the company. Federal securities laws and other federal and state regulatory schemes oblige a corporation to disclose certain types of information to investors, shareholders, the public, and government agencies at certain times in

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certain ways. At least in theory, these requirements inform investment decisions, allow shareholders to hold management accountable, enable consumers to make better decisions, and ensure regulatory compliance. Indeed, the information disclosure requirements of securities laws assume that by forcing transparency on the market and correcting informational asymmetries, they maximize capital market efficiency.

If one assumes that branding corporate deals and infrastructure would have little or no effect on the information available to investors and shareholders, or that this audience is filled with Irvings who can ignore or correctly interpret the branding message and thus invest rationally, then branding appears to be a benign enterprise. However, if one assumes that branding in this context can circumvent or at least push back against efforts to require or encourage transparency by obfuscating informational disclosures, then branding is a cause for concern.

Interestingly, the anecdotal use of branding in IPOs comes at the same time that corporate governance activists have increasingly, and to greater effect, called for companies to disclose their operations as fully and honestly as possible to their shareholders and to the world at large. In the same way that the branding increment presumably creates value for the company, so the affirmative steps that the ideal "transparent" corporation takes to demonstrate its openness and social responsibility would, according to advocates, satisfy the greater demand of consumers and investors for trustworthy companies and


42. Elsewhere I have challenged this consequentialist conception of transparency. See Mark Fenster, The Opacity of Transparency, 91 IOWA L. REV. 885 (2006). For purposes of this essay, I will assume this conception has some validity, although I question it below.

43. If we question the ECMH's assumption that we can know when price and value are equal and when a market is efficient, however, we also need to question when disclosure laws (or, in their absence, voluntary disclosure) have made a market transparent. See David A. Westbrook, Telling All: The Sarbanes-Oxley Act and the Ideal of Transparency, 2004 MICH. ST. L. REV. 441, 450.

thereby create what might be seen as a transparency and responsibility increment.\textsuperscript{45} These two movements do not necessarily contradict each other; indeed, one school of contemporary branding holds that with increased pressure on corporate transparency and responsibility comes a need for brands that offer "substance, not hype; honesty rather than hypocrisy."\textsuperscript{46}

Put that way, an attorney should be wary when the branding effort to hunt and develop cool produces "hype" rather than "substance," and "hypocrisy" rather than the "honesty" that the various applicable legal and regulatory regimes require. This is especially the case when such "hype" and "hypocrisy" are likely to affect decisions made in the capital markets. This assumes, of course, that an attorney can determine the substance and honesty of the branding that she embeds in the deal. This again demonstrates the importance of developing a better understanding of the branding process, or at least of recognizing its risks, as well as a more thorough understanding of how that brand will affect its intended and unintended audiences.

\textbf{MasterCard}

The MasterCard case study appears to suggest further complications to the dynamics I have outlined. The central branding element, at least as it relates to the deal's consumer (as opposed to investor) audience, is the charitable foundation established by the IPO that will hold approximately 18\% of Class A voting shares, and the foundation's purported relationship to MasterCard's "Priceless" campaign. I agree with Fleischer that this effort seems unlikely to

\begin{itemize}
  \item\textsuperscript{45} See Joshua A. Newberg, Corporate Codes of Ethics, Mandatory Disclosure, and the Market for Ethical Conduct, 29 VT. L. REV. 253, 289-91 (2005). I am merely describing current trends in theories of corporate governance rather than arguing in favor of or against them; nor am I arguing about the legal permissibility of corporate management engaging in activities that do not maximize profit. For representative arguments regarding the latter issue, compare Stephen M. Bainbridge, Corporate Law and Economics 419-29 (2002) (summarizing the legal and normative arguments as to why fiduciary duties require corporate managers to maximize corporate profits in order to further the interests of shareholders), with Einer Elhauge, Sacrificing Corporate Profits in the Public Interest, 80 N.Y.U. L. REV. 733 (2005) (arguing that corporate managers have discretion to engage in practices that sacrifice corporate profits for the public interest).
  \item\textsuperscript{46} Bedbury, supra note 23, at xv, 169; see also Marc Gobé, Citizen Brand: 10 Commandments for Transforming Brands in a Consumer Democracy xxxi (2002) (arguing that in contemporary society, and especially following the 9/11 attacks, corporations and their brands must emphasize "the values of honor, integrity, family commitments, cultural decency, and trust — anything that has to do with being a good citizen").
\end{itemize}
succeed without a clear direction for the charitable foundation and without efforts both to promote the foundation and tie its work to the brand. I see only a marginal association between the “priceless” concept, which ingeniously allows us to recognize the limits of consumption even as it promotes the use of a credit card, and the work of a charitable foundation. The deal seems to lack the ingenuity of the Google IPO’s use of technology and innovation, which synchronized well with Google’s brand values, and it lacks Ben & Jerry’s clever use of localism and of the positive associations that its national customer base was likely to have with Vermont.

Because the branding effort seems so half-hearted and unrelated to the existing campaign to market MasterCard, it is difficult to see any potential Irving/Ignatz or manipulated investor problems here. Very little seems emotional or magical about the charitable foundation as it is constituted. Instead, it seems like an obviously instrumental, possibly cynical move to avoid regulatory penalties and oversight. As such, there appears very little risk of potential investors falling prey to the direct seduction of the brand, or to the cynical reason that knows it is being seduced but that nevertheless acts as though seduction has occurred. This merely provokes the question of why the company is going to all this trouble—surely there were other, less costly means to insulate the company from the short-sighted, hostile outside interests that it fears.

However, besides what appears to be its failure as a branding effort, the MasterCard case foregrounds an issue that appeared unimportant or irrelevant in the earlier discussion—the fact that regulatory bodies may be an additional audience for a branding effort. Fleischer implies that the charitable foundation wraps the company’s efforts to engineer both a solution to their regulatory problem and a means for ownership control in the pretty paper of social responsibility. Unfortunately, however, this effort seems so patently obvious that, at least one hopes, only a thoroughly dense or captured regulator would forego imposing antitrust liability simply because the IPO offered penance in the form of a charitable foundation or reverberated with that charming “Priceless” campaign.

One can imagine, then, that the MasterCard IPO’s branding efforts may lead to one or more results that prove sub-optimal. Perhaps the IPO itself will fail or will leave money on the table because investors are wary of the complexity of the deal, of the likelihood that

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47. It does not help matters that the IPO would organize the foundation in Canada rather than in the U.S. because of favorable tax laws.
MasterCard will be unable to escape antitrust liability, and especially of the expense and the oddity, at least in the U.S., of the charitable foundation. Perhaps the charitable foundation itself will fail to advance the brand in any significant way, and will ultimately appear more like a very expensive anti-takeover measure than a contributor to the “Priceless” campaign or to the next iteration of MasterCard’s effort to brand itself as a more soulful credit card with greater integrity than its competitors. If either possibility proves true, a longitudinal case study could ultimately offer some important lessons for legal coolhunting. The less interesting and significant possibility is the banal conclusion that branding is difficult and sometimes fails to increase a product’s value. The other prospect—which would make Fleischer’s work more significant and helpful for the legal profession—is that sometimes the hunter gets the cool, and sometimes the hunter returns empty-handed. In that case, we need to ask why these variable results, and at what cost to the client and to society do they come?

**Conclusion**

Coolhunting is, well, cool. In Gibson’s novel, Cayce Pollard is the very epitome of cool, shunning commodification—she eschews all brands in her private life and personal style, going so far as to cut all of the labels from her plain, sleek, and expensive clothing—while she extends the reach and persuasive capacity of advertising and consumer goods in the lives of others. And the novel never fully resolves this tension. Cayce uses the enormous resources put at her disposal by the elite advertising and marketing agency that employs her to track down the source of a text that resists commodification, an elusive cult film with which she is obsessed that is being freely but carefully released in brief fragments on the Internet by some unknown person or persons. She chases this text because of her own fascination with it, but her client hires her, she fears, because it wants to capture the text and learn how to use its mode of distribution to sell consumer goods. Simple tales of commodification either tell us that it’s all bad, because it exploits us and degrades human existence, or that it’s mostly good, because it enables the mass production of things that enhance our capacity to live and enjoy life, and because it expands societal wealth. *Pattern Recognition* smartly rejects such simple narratives. Most of its characters ultimately get what they want—Cayce emerges wealthier and wiser but still cool, individualized, and able to live outside the mass culture she so instinctively understands; her employer apparently is able to expand its business
(though it remains unclear precisely why or how); and the mysterious film is allowed to remain an un-commodified, cult object. However, this exception relies on and proves the rule. Cayce’s talent remains viable, the agency is more powerful than ever, and so the cool remains endangered and the mass remains vulnerable to increasingly sophisticated tools of manipulation.

*Pattern Recognition* is middlebrow genre fiction for hip sci-fi, noirish nerds, and its ending fulfills the fantasies of the urban professionals (like me) who read it. We want to believe that one can make peace with commodification, that we can live successfully and happily, if only ironically, as classically liberal individuals in a world in which we define ourselves by brands and marketed lifestyles. Its ambivalence at once embraces the cool and eschews the mass consumer culture that allows the cool to exist. Its fantasy is that the cool’s exploitation of the mass comes without cost, and that the boundaries between cool and mass are stable and well-protected.

Coolhunting the law is also a kind of fantasy for attorneys seeking to avoid their status as monkeyfucking scribes. Like Cayce Pollard, who is uneasy with her abilities and the world it helps bring into being, I am ambivalent about coolhunting as a tool of legal practice. It certainly promises a more creative, fulfilling set of tasks for transactional attorneys and, when it works, can add value for clients. However, just as there is no magical Cayce Pollard in the real world of marketing who can say in advance whether a brand will succeed, so there is no risk-free branding for attorneys and their clients. Some efforts won’t work, and may as a result render the corporate deal that emerges less valuable. When it works effectively in the consumer context, branding operates by instilling affective meaning into consumer goods in order to persuade people to purchase products they may not need at prices higher than they need to or even should spend. Similarly, branding in the corporate context runs the risk of rendering opaque those legal objects, securities and corporations, that as a legal and normative matter we expect and require to be transparent.

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48. *See* Fleischer, *supra* note 8, at 139.