

RESEARCH ARTICLE

Brands, ‘weightless’ firms and global value chains: the organisational impact of trade mark law

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Abstract

The Rana Plaza disaster of April 2013 was the most prominent of several incidents that have highlighted poor standards of business behaviour in the supply chains of well-known brands. Analysis of these incidents has attributed these poor standards to an institutional structure in which lead firms with strategic power outsource production into global value chains and pursue business models that involve rapid product upgrading and require low costs and fast turnarounds in production such as the garment industry’s ‘fast fashion’ business model. This paper aims to complement that analysis by showing how trade marks, as the main legal anchors of brands, have reinforced the strategic power of lead firms, enabled them to outsource production and encouraged them to adopt business models of this kind. The paper will also evaluate the claim that brands mitigate their harmful effects by transmitting countervailing pressure back onto their owners because they provide salient targets for bad publicity and blame, as coverage of the Rana Plaza disaster showed, which can threaten their owners with reputational damage. It will be argued that this countervailing pressure has a limited effect and cannot be relied on without more to address the issues that the Rana Plaza disaster revealed.

Keywords: trade marks; brands; business organisation

Introduction

Five firms had garment factories in the Rana Plaza building when it collapsed on 24 April 2013, namely Ether Tex Ltd, New Wave Bottoms Ltd, New Wave Style Ltd, Phantom Apparels Ltd and Phantom Tac Ltd.¹ It is highly unlikely that consumers who bought garments made by these firms would have recognised their names. What consumers would have recognised were the names of the brands under which the garments were marketed and sold, such as Primark, Matalan, Joe Fresh, Mango, Bon Marché, Asda and Walmart.² The collapse of Rana Plaza, which killed over 1,100 people, most of them workers in the factories, focused attention on the brands. This publicity tended to

[†]I would like to thank Professor Simon Baughen of Swansea University and the anonymous referees for their helpful comments and feedback.

¹The building was located in Savar on the outskirts of Dhaka: see ‘Bangladesh mourns latest factory disaster’ (*Asia Times*, 25 April 2013), available at http://www.atimes.com/atimes/South_Asia/SOU-03-250413.html (accessed 4 February 2019); ‘Rana Plaza: one year on from the Bangladesh factory disaster’ (*The Guardian*, 19 April 2014), available at <https://www.theguardian.com/world/2014/apr/19/rana-plaza-bangladesh-one-year-on> (accessed 4 February 2019). See further All Party Parliamentary Group on Bangladesh *After Rana Plaza: A Report into the Readymade Garment Industry in Bangladesh* (2013) (APPG Report), available at http://www.rochdaleonline.co.uk/uploads/fl/news/document/20131119_154658.pdf (accessed 4 February 2019); M Anner, J Bair and J Blasi ‘Toward joint liability in global supply chains: addressing the root causes of labor violations in international subcontracting networks’ (2013) 35 *Comparative Labor Law & Policy Journal* 1 at 1–2; A Rühmkorf *Corporate Social Responsibility, Private Law and Global Supply Chains* (Edward Elgar, 2015) at pp 147–156. See also *Das v George Weston Ltd* [2017] ONSC 4129 at [81]–[98].

²*Ibid.*

portray the brands as culpable even though they had no legal responsibility for the safety and wellbeing of those working there.³ This attribution of blame reflected awareness of the strategic power that brand owners enjoy as lead firms in the garment (or apparel) industry, of the pressure that lead firms can put on other firms in their supply chains and of the impact that this pressure can have on working conditions, the environment and other matters related to production.⁴

In the garment industry, as with many other industries, the main actors are rarely large-scale manufacturing firms of the kind that used to be major actors in an economy.⁵ Manufacturing firms of that kind would have competed to pull demand from consumers to their specific products (even if they did not deal directly with consumers) and organised their production in-house under the direct control of their management.⁶ Instead, the main actors are now brand owners who specialise in the retail or marketing of products. As brand owners, they still have control over the design and development of the products they market and sell and still compete to pull demand from consumers to these specific products. However, they do not produce 'their' products in-house, but outsource this activity to other firms in chains or networks of suppliers that may be located around the world.⁷ This disaggregation and externalisation of production has caused major economic actors to become 'weightless', inasmuch as their main assets are intangible and they can focus their resources and capabilities on higher-value activities, whilst externalising the risks and responsibilities of production.⁸ Moreover, as 'lead firms', the brand owners have strategic control in the chains of economic activity in which they operate (global value chains).⁹

The production and distribution of products to consumers occurs along a sequence of distinct value-adding stages that can be viewed overall as a chain or network.¹⁰ The nature of these stages can change over time for various reasons and this may affect the range of activities of the firms along the chain and the structuring of the dealings between different stages. The outsourcing of production is an example of this kind of change and it has enabled retailers and marketing firms to become 'engineers or architects of complex and extended patterns of co-ordinated activity'.¹¹ As brand owners, these firms can not only determine the design, quality and other characteristics of the products emerging

³See for example the judgments of the Superior Court of Delaware and the Ontario Supreme Court of Justice in *Rahaman et al v JC Penney Corporation, Inc, The Children's Place and Wal-Mart Stores, Inc* (2015) (Case 1:15-cv-00619-KBJ); *Das v George Weston Ltd*, above n 1.

⁴APPG Report, above n 1, at 7 and 42. See generally N Klein *No Logo: Taking Aim at the Brand Bullies* (Flamingo, 2000).

⁵On this model see M Best *The New Competition: Institutions of Industrial Restructuring* (Polity Press, 1990) pp 46–73. On the change see J Lee and G Gereffi 'Global value chains, rising power firms and economic and social upgrading' (2015) 11 *Critical Perspectives on International Business* 319.

⁶M Wilkins 'The neglected intangible asset: the influence of the trade mark on the rise of the modern corporation' (1992) 34 *Business History* 66.

⁷R Feenstra 'Integration of trade and disintegration of production in the global economy' (1998) 12 *Journal of Economic Perspectives* 31; RN Langlois 'The vanishing hand: the changing dynamics of industrial capitalism' (2003) 12 *Industrial and Corporate Change* 351; G Gereffi and J Lee 'Why the world suddenly cares about global supply chains' (2012) 48 *Journal of Supply Chain Management* 24; D Weil *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014) pp 7–27.

⁸Klein, above n 4, at pp 4 and 202; F Palpacuer 'Bringing the social context back in: governance and wealth distribution in global commodity chains' (2008) 37 *Economy and Society* 393 at 395–405; J Froud et al 'Financialization across the Pacific: manufacturing cost ratios, supply chains and power' (2014) 25 *Critical Perspectives on Accounting* 46.

⁹P Gibbon, J Bair and S Ponte 'Governing global value chains: an introduction' (2008) 37 *Economy and Society* 315; S Ponte and T Sturgeon 'Explaining governance in global value chains: a modular theory-building effort' (2014) 21 *Review of International Political Economy* 195; Lee and Gereffi, above n 5. Global value chains were originally termed 'global commodity chains': G Gereffi 'The organization of buyer-driven global commodity chains: how US retailers shape overseas production networks' in G Gereffi and M Korzeniewicz (eds) *Commodity Chains and Global Capitalism* (Praeger, 1994) p 95. The term 'global production networks' has also been used to bring out the dynamic and flexible character they can have and the different sources of influence on them: J Bair 'Analysing economic organization: embedded networks and global chains compared' (2008) 37 *Economy and Society* 339; J Bair and F Palpacuer 'CSR beyond the corporation: contested governance in global value chains' (2015) 15 *Global Networks* S1.

¹⁰GB Richardson 'The organisation of industry' (1972) 82 *Economic Journal* 883; Langlois, above n 7.

¹¹Richardson, above n 10, at 885.

from the value chains in which they operate, but also play an active role in shaping and co-ordinating activity within the chains.¹² Outsourcing production has enabled brand owners to substantially reduce their costs, but also to substantially increase their returns, through exploiting business models that involve the rapid upgrading of products and require speed and flexibility at the production stage. These models include the ‘fast fashion’ business model used in the garment industry.¹³

Blame for the Rana Plaza disaster has been directed both at the garment industry’s institutional structure and the fast fashion business model of the brand owners.¹⁴ One aim of this paper is to consider how the law’s recognition and protection of trade marks (which provide the signifiers and legal anchors of brands) has facilitated the disaggregation of production into global value chains, strengthened the strategic power of brand owners within these chains and encouraged the adoption of business models such as fast fashion.¹⁵ The paper will show how ownership of trade marks has enabled some firms to separate the demand-related activities of product design, product development and marketing from the supply-related activity of production and to reconfigure the value chains in which they operate on this basis.¹⁶

Trade mark law makes this contribution through giving firms exclusive property rights over names, logos and other signs that they can use to solicit and attract demand to products that only they can supply and to build up an established power to attract demand (goodwill) as a distinct asset that need not be tied to one firm or a continuing set of production arrangements.¹⁷ This has enabled some firms to manage and develop demand-attraction and supply-provision separately in order to maximise their overall profits. The opportunity to do this has become particularly attractive with the rise of the financial form of capitalism that has accompanied the rise of the market globalisation since the late 1980s.¹⁸ In terms of demand-attraction, firms can use trade marks to market their products more effectively and build goodwill for them both through giving them distinctive identities as products (these identities roughly equating to ‘brands’) and through providing convenient reference points for promotional activity and other communication. These brands (which may be product-focused or broader and corporate in nature) can substantially increase the appeal of products to consumers and, in effect, add substantial intangible value to them.¹⁹ The success of trade marks and the brands they signify at doing this can turn them into valuable assets and strategic resources.²⁰

In terms of supply-provision, trade mark law gives firms discretion as to how they organise the production or procurement of the products that their trade marks identify and to change these arrangements if they so decide.²¹ Nevertheless, the brands that the trade marks signify provide continuing and

¹²Gibbon, Bair and Ponte, above n 9, at 319; Ponte and Sturgeon, above n 9, at 327–328.

¹³C Campbell ‘The curse of the new: how the accelerating pursuit of the new is driving hyper-consumption’ in KM Ekström (ed) *Waste Management and Sustainable Consumption* (Routledge, 2015) p 29 at pp 39–40.

¹⁴Anner, Bair and Blasi, above n 1; IM Taplin ‘Who is to blame? A re-examination of fast fashion after the 2013 factory disaster in Bangladesh’ (2014) 10 *Critical Perspectives on International Business* 72; Social Europe Report No 3, ‘After Rana Plaza (January 2015), available at <https://www.socialeurope.eu/book/ser-3-after-rana-plaza/> (accessed 4 February 2019).

¹⁵In the EU, trade mark law has been substantially harmonised pursuant to Directive 89/104/EEC (now codified in Directive 2008/95/EC) (the EU Trade Mark Directive), which the Trade Marks Act 1994 (TMA 1994) implemented in the UK. Member States are required to implement the Recast Directive 2015/2436 (Recast Directive) by early 2019, though this will not significantly alter the law relevant to the issues addressed in this paper.

¹⁶On marketing see R Church and A Godley ‘The emergence of modern marketing: international dimensions’ (2003) 45 *Business History* 1.

¹⁷On ‘goodwill’ see *Commissioners of Inland Revenue v Muller & Co’s Margarine* [1901] AC 217 at 223–224. See further R Bone ‘Hunting goodwill: a history of the concept of goodwill in trademark law’ (2006) 86 *Boston University Law Review* 547.

¹⁸Gibbon, Bair and Ponte, above n 9, at 325–326. See further J Froud, A Leaver and K Williams ‘New actors in a financialised economy and the remaking of capitalism’ (2007) 12 *New Political Economy* 339.

¹⁹On the different kinds of branding see CA Corrado and JX Hao ‘Brands as productive assets: concepts, measurement and global trends’ (2014) WIPO Economic Research Working Paper No 13 at 10.

²⁰WIPO 2013: *World Intellectual Property Report: Brands – Reputation and Image in the Global Marketplace* (WIPO Economics and Statistics Series, 2013) at 3, available at http://www.wipo.int/edocs/pubdocs/en/intproperty/944/wipo_pub_944_2013.pdf (accessed 4 February 2019).

²¹*Bostitch TM* [1963] RPC 183 at 197; *Case C-9/93 IHT v Ideal-Standard* [1994] ECR I-2789 at [38]–[39].

apparently stable focal points for attracting demand and building goodwill that transcend their institutional structures and production arrangements.²² They can help to mask institutional complexity and significant changes in legal structures and production arrangements from consumers and thereby help to facilitate organisational innovation.

The Rana Plaza disaster revealed an institutional structure whereby the most powerful actors in an industry are separated from the activity of production along with its risks and responsibilities. It will be argued that trade mark law can help to explain the evolution of this structure and the power that brand owners can enjoy within it. However, outsourcing production can expose brand owners to certain new risks in return for reducing the costs and increasing the flexibility of production. The Rana Plaza disaster illustrated their vulnerability to bad publicity and this vulnerability gives them a significant 'Achilles' heel'.²³ This raises the question of how far brand owners can really escape the risks and responsibilities of production through outsourcing, and the second aim of this paper is to address this question. Thus, it is noteworthy that, whilst brand owners have little – if any – legal responsibility for the business behaviour of their suppliers,²⁴ the bad publicity focused on certain brands following the Rana Plaza disaster led many of them to respond with actions and initiatives that were designed to demonstrate their commitment to minimising the risk of recurrence. This 'Achilles' heel' has even prompted suggestions that brands constitute a 'transmission mechanism' that may put sufficient countervailing pressure on their owners to force them to take responsibility for working conditions, environmental impact and other aspects of business behaviour in their supply chains and to ensure that these are satisfactory.²⁵ On this basis, trade marks as the signifiers of brands could themselves offset or at least mitigate the pressure that their owners' strategic power and business models would otherwise apply down their value chains. This paper will review this claim and argue that there are significant shortcomings in the alleged transmission mechanism.

The paper will proceed as follows. Section 1 will briefly review the Rana Plaza disaster as exemplifying the pressures that can ensue when production is externalised within global value chains and brand owners as lead firms pursue business models that require low costs and a rapid turnaround of production. Section 2 will look more closely at the factors that have enabled the main actors in many industries to outsource production and to have sufficient control for their purposes within global value chains. Section 3 will show how trade marks as the signifiers and legal anchors of brands have contributed to this organisational change and encouraged lead firms to exploit business models based on the rapid upgrading of products. Section 4 will consider how far trade marks and the brands they signify constitute an 'Achilles' heel' for their owners and transmit countervailing pressure concerning working conditions and business behaviour at the production stage in global value chains. The paper ends with some conclusions.

1. Rana Plaza: An Example of the Potential Consequences of Disaggregating Production into Global Value Chains?

Rana Plaza was planned in 2004 as a six-storey building with shops, offices and apartments and not as one suitable for industrial use.²⁶ However, in response to the growing demand in Bangladesh for

²²DJ Brennan 'The trade mark and the firm' [2006] IPQ 283; DL Burk and BH McDonnell 'Trademarks and the boundaries of the firm' (2010) 51 William & Mary Law Review 345.

²³On the use of this metaphor to refer to this vulnerability of brands see for example Anner, Bair and Blasi, above n 1, at 4; M Chon 'Trademark goodwill as a public good: brands and innovations in corporate social responsibility' (2017) 21 Lewis & Clark Law Review 277 at 289.

²⁴R Mares 'The limits of supply chain responsibility: a critical analysis of corporate responsibility instruments' (2010) 79 Nordic Journal of International Law 193; L Talbot *Great Debates in Company Law* (Palgrave, 2014) at pp 108–137; Rühmkorf, above n 1.

²⁵S Hilton 'The social value of brands' in R Clifton and J Simmons (eds) *Brands and Branding* (The Economist in association with Profile Books, 2003) p 47 at p 55.

²⁶Bangladesh: British firms did not follow New Safety Regime for Clothing Production' (*The Daily Telegraph*, 2 May 2013), available at <http://www.telegraph.co.uk/news/worldnews/asia/bangladesh/10034090/Bangladesh-British-firms-did->

premises for garment factories, it ended up as an eight-storey building with factories and machinery on five upper floors and large power generators on its roof. On 23 April 2013, large cracks appeared in the building, which was evacuated and declared unsafe. On the next day, although workers in the shops and banks below stayed away pending an official inspection of the building, an engineer commissioned by the building's owner declared the building safe and the factories resumed working.²⁷ Apparently, managers ordered the factory workers back to work, threatening them with sanctions for not doing so, because of the pressure to meet strict deadlines emanating from the brand owners and to avoid the penalties they would otherwise incur.²⁸ Following a power cut, the generators were switched on and the vibrations from these apparently caused the cracks to widen. The building collapsed soon after, killing over 1,130 people and injuring a further 2,500.²⁹

The rapid growth of garment production in Bangladesh helps to explain the strength of the demand for factory premises that led to Rana Plaza having factories and machinery despite its unsuitability. Bangladesh had become the world's second largest producer and exporter of ready-made garments, which accounted for 75% of its export revenue and 13% of its gross domestic product.³⁰ However, garment manufacturers in Bangladesh, such as the firms with factories in Rana Plaza, usually operate as subcontractors in global value chains.³¹ They manufacture garments to fulfil orders from brand owners, which they receive directly or through intermediate contractors, and for which they must compete. The brand owners enjoy the benefits of access to consumers, being able to use marketing to solicit and attract demand and the goodwill that familiarity can generate. They also determine the timescale of production.

The dynamics of the fast fashion business model lay behind the pressure on the firms in Rana Plaza and their managers to keep the factories working despite the obvious danger.³² Garment production is still a labour-intensive industry and so the cost and productivity of labour are key contributors to overall production costs.³³ Outsourcing production into a flexible network of firms that have access to relatively cheap, compliant and efficient labour forces is well-suited to this business model. The growth of garment production in Bangladesh has reflected the low cost and 'disempowerment' of the labour force along with favourable changes in the international trade regime.³⁴ Brand owners also benefit from the fact that manufacturing firms have to compete for their orders and the greater capacity that outsourcing production into a flexible value chain gives them to upgrade their products frequently and bring new designs to the market rapidly.

The Rana Plaza disaster provided an extreme and disquieting example of the social costs that can follow from enabling brand owners to externalise production into global value chains and to exploit business models like fast fashion in their pursuit of profit. It provides support for the view that global value chains present a formidable challenge to those seeking to improve corporate governance and to ensure higher standards of corporate social responsibility in relation to production because they have radically changed the legal nature and internal dynamics of what it is that needs to be governed and

[not-follow-new-safety-regime-for-clothing-production.html](#) (accessed 4 February 2019); 'Bangladesh: Rana Plaza architect says building never meant for factories' (*The Daily Telegraph*, 3 May 2013), available at <http://www.telegraph.co.uk/news/worldnews/asia/bangladesh/10036546/Bangladesh-Rana-Plaza-architect-says-building-was-never-meant-for-factories.html> (accessed 4 February 2019). See further *Das v George Weston Ltd*, above n 1, paras [81]–[98].

²⁷ APPG Report, above n 1, at 18.

²⁸ See above n 1.

²⁹ See above n 1.

³⁰ APPG Report, above n 1, at 14, citing McKinsey & Company 'Bangladesh's ready-made garment landscape: the challenge of growth' (2011).

³¹ APPB Report, above n 1, at 26–27.

³² APPB Report, above n 1, at 26–27.

³³ S Azmeh and K Nadvi 'Asian firms and the restructuring of global value chains' (2014) 23 *International Business Review* 707 at 711; L Curran and K Nadvi 'Shifting trade preferences and value chain impacts in the Bangladesh textiles and garment industry' (2015) 8 *Cambridge Journal of Regions, Economy and Society* 459 at 465–466.

³⁴ APPG Report, above n 1, at 20–22; Curran and Nadvi, above n 33, at 460–462.

regulated.³⁵ Moreover, the fact that pressure from brand owners appears to have exacerbated the consequences of the building's collapse calls into question the view that the risk of bad publicity acts as a significant restraint on brand owners. In practice, it seems that association with the Rana Plaza disaster has had little impact on the brand owners and their finances and this gives further support to this pessimistic view.³⁶

If the risk of bad publicity concerning working conditions or other matters at the production stage were to present a real threat to brand owners, then one might expect that firms that could provide credible assurance of good production conditions in their value chain would have a good business model for attracting demand and building goodwill. However, the history of one of the factories in Rana Plaza suggests this is probably not the case, at least not for marketing ready-made fast-fashion garments. Phantom Tac Ltd had been set up as a joint venture with an ethical fashion brand in Spain with the aim of relaxing deadlines and improving working conditions in the expectation that consumers and retailers would be willing to pay a little more for its products.³⁷ This idealism did not survive the 2008 global financial crisis and, like other manufacturing firms in the building, it ended up competing for large orders from established brands, offering the terms that were necessary to secure these orders and imposing the working conditions that were necessary to meet these terms. At the time of the disaster, the firm was apparently producing a batch of samples for Mango in the hope of attracting large orders from this brand.³⁸

2. The Outsourcing of Production in Global Value Chains

The Rana Plaza disaster revealed an institutional structure for the garment industry based on global value chains in which retailers and other brand owners are the lead firms.³⁹ The rise of these 'weightless' firms,⁴⁰ with their ability to exercise control over production through contractual mechanisms, reflects changes in the approaches of major economic actors over the second half of the twentieth century both to attracting demand and to organising supply.⁴¹ On the demand side, there has been a greater focus on product differentiation in design and features along with a more rapid pace of product development, upgrading and other forms of innovation.⁴² On the supply side, there have been changes in technology and communication, especially digital technology, which have reduced the cost advantages of the large-scale mass production of standardised products and increased the scope for producing customised products.⁴³ The changes have also increased the feasibility of outsourcing production.⁴⁴ Lead firms can now control the development and determine the design and other characteristics of the products they sell under their brands without needing to have direct control of the

³⁵Bair and Palpacuer, above n 9.

³⁶Social Europe Report, above n 14; M Aizawa and S Tripathi 'Beyond Rana Plaza: next steps for the global garment industry and Bangladeshi manufacturers' (2015) 1 *Business and Human Rights Journal* 145; P Stanwick and S Stanwick 'The garment industry in Bangladesh: a human rights challenge' (2015) 2 *Journal of Business & Economic Policy* 40; N Sinkovics, SF Hoque and RR Sinkovics 'Rana Plaza collapse aftermath: are CSR compliance and auditing pressures effective?' (2016) 29 *Accounting, Auditing and Accountability Journal* 617; BW Jacobs and VR Singhal 'The effect of the Rana Plaza disaster on shareholder wealth of retailers: implications for sourcing strategies and supply chain governance' (2017) 49–51 *Journal of Operations Management* 52.

³⁷See 'Bangladesh disaster crushes owner's ideal of clothes with a conscience' (*Reuters*, 16 June 2013), available at <http://uk.reuters.com/article/uk-bangladesh-collapse-idUKBRE95F0I320130616> (accessed 4 February 2019).

³⁸*Ibid.*

³⁹On how a 'buyer-driven dynamic' seems to have emerged in global value chains in most industries see Gibbon, Bair and Ponte, above n 9, at 320–322.

⁴⁰Klein, above n 4.

⁴¹W Streeck 'Citizens as consumers: considerations on the new politics of consumption' (2012) 76 *New Left Review* 27.

⁴²Campbell, above n 13.

⁴³S Berger 'Toward a third industrial divide?' in Paul Osterman (ed) *Economy in Society: Essays in Honour of Michael J Piore* (Cambridge, Mass: MIT Press, 2012) p 65.

⁴⁴RN Langlois 'Modularity in technology and organization' (2002) 49 *Journal of Economic Behaviour and Organization* 19; Ponte and Sturgeon, above n 9, at 210.

manufacturing process. Moreover, their brands enable them to communicate with and influence the preferences of consumers, as section 3 will show, regardless of whether they deal with consumers directly. With modern forms of communication, brand owners can promote and market their products on a global scale,⁴⁵ which helps to secure their control over access to consumer markets. Their brands also enable them to build up goodwill with consumers and to appropriate this as an asset for their exclusive benefit, further consolidating their strategic position and bargaining power.

Another feature of global value chains of the kind that Rana Plaza illustrated is the flexibility of the production stage. Networks of suppliers compete for orders from brand owners who can now operate as ‘global buyers’ of production.⁴⁶ The brand owners have bargaining power based on their access to consumers and the size of the orders they can place.⁴⁷ In some cases, they may deal with intermediate contractors who co-ordinate production and deal with suppliers,⁴⁸ a development which increases the flexibility of the production system. Suppliers must compete within these networks for the brand owners’ orders in terms of price and their ability to meet tight deadlines.⁴⁹ This gives the production system some of the character of a market, albeit one in which buyers have the bargaining power. This has enabled brand owners to appropriate a greater share of the overall profit through squeezing the suppliers’ margins.⁵⁰ It is the intensity of competition within these supply networks that has put pressure on suppliers and their managers to keep their costs down and to push at the boundaries of regulation concerning health and safety, general working conditions, environmental protection and other matters of business behaviour.⁵¹

Although there are clear advantages for lead firms from outsourcing production into a flexible supply network, the practice has also grown because these firms have overcome certain disadvantages that would otherwise have negated the benefits. In particular, brand owners need to be sure that the products they market under their brands conform to their specifications and are consistent in quality so that they can vouch for them to consumers as ‘their’ branded products. Having direct control of production or at least relying only on suppliers who are familiar and trusted give brand owners a good basis for having this reassurance and in turn for being able to provide reassurance to consumers through branding their products. However, improvements in communication and technology along with other supply-side changes have increased the ability of brand owners to exercise adequate control remotely through contractual mechanisms.

Analysis of global value chains has identified various factors that help to explain why outsourcing production to a network of competing suppliers has become much more feasible.⁵² This analysis has drawn on the economic analysis of business structures and the hybrid contractual forms between market transactions and directing transactions within a firm.⁵³ Market transactions should be discrete and

⁴⁵A Offer *The Challenge of Affluence: Self-Control and Well-Being in the United States and Britain Since 1950* (Oxford: Oxford University Press, 2006) p 117.

⁴⁶S Barrientos et al ‘Decent work in global production networks: framing the policy debate’ (2011) 150 *International Labour Review* 299 at 302; MJ Drebes ‘Including the “other”: power and postcolonialism as underrepresented perspectives in the discourse on corporate social responsibility’ (2016) 42 *Critical Sociology* 105 at 106.

⁴⁷Ponte and Sturgeon, above n 9, at 201–202.

⁴⁸Azmeh and Nadvi, above n 33.

⁴⁹APPG Report, above n 1, at 7; Taplin, above n 14, at 73.

⁵⁰This can be seen in the division of the retail price for a T shirt among parties in the value chain: ‘What does that \$14 Shirt really cost?’ (*Maclean’s*, 1 May 2013), available at <http://www.macleans.ca/economy/business/what-does-that-14-shirt-really-cost/> (accessed 4 February 2019).

⁵¹Anner, Bair and Blasi, above n 1; Drebes, above n 46.

⁵²G Gereffi, J Humphrey and T Sturgeon ‘The governance of global supply chains’ (2005) 12 *Review of International Political Economy* 78 at 81–88; Gibbon, Bair and Ponte, above n 9, at 319–326; Gereffi and Lee, above n 8, at 25–26; Ponte and Sturgeon, above n 9, at 200–210; Lee and Gereffi, above n 5, at 320–322.

⁵³This analysis builds on the market and firm dichotomy associated with Ronald Coase: RH Coase ‘The nature of the firm’ (1937) 4 *Economic NS* 386. See I Macneil ‘Contracts: adjustments of long-term economic relations under classical, neoclassical and relational contract law’ (1978) 72 *Northwestern University Law Review* 854; OE Williamson ‘Transaction-cost economics: the governance of contractual relations’ (1979) 22 *Journal of Law and Economics* 233.

self-contained, with their terms as fully-specified as possible and satisfactory performance readily verifiable. This self-containment means that parties can be substituted for subsequent transactions, allowing greater flexibility and competition. In a firm, management has discretionary power over transactions, reducing the need for self-containment, but making them more party-dependent. The hybrid contractual forms strike varying balances between the respective degrees of self-containment and party-dependence in transactions. For value chains, three archetypal structures for production have been identified between the firm and market transactions, namely 'captive', 'relational' and 'modular' value chains.⁵⁴ The institutional structure that the Rana Plaza disaster revealed falls into the most market-like of these categories, namely modular value chains. The greater scope for modularising transactions between different stages in a value chain has been identified as a significant step generally for reorganising economic activity.⁵⁵

One factor that used to favour the in-house or closely-controlled production of customised products was its complexity as a series of transactions.⁵⁶ For firms requiring the production of customised products such as fast fashion products, ensuring consistent quality and conformity to detailed product specifications are important aims, as well as minimising production costs and achieving a fast turnaround. What makes these transactions complex is the information that needs to be communicated and acted upon to achieve the necessary consistency and conformity and the evaluation necessary to verify satisfactory performance. The production of an order of fast fashion garments requires the transmission, implementation and verification within a short time span of a specific design (or set of designs) and detailed product specifications. However, developments in communication and technology, especially digital technology, have made these tasks much easier, thereby reducing the complexity of customised production.⁵⁷ The development and adoption of recognised standards, conventions, certification systems and the like concerning product quality and other characteristics has improved the basis of communication along value chains, further reducing complexity and increasing the scope for modularising production.⁵⁸

These developments in communication and technology have also reduced the significance of another factor that used to work against outsourcing into modular value chains as a suitable production system. This was the level of capabilities that suppliers needed to have to produce customised products to the required level of conformity and consistency.⁵⁹ Capabilities are the specialist skills, tacit knowledge and expertise that a firm needs to have to perform its activities properly.⁶⁰ Where a high level of capabilities is required, as was previously the case, then lead firms may have to provide these themselves, as they can with a captive value chain, or must find and establish stable relationships with specific suppliers with the necessary capabilities, as with a relational value chain. However, the developments noted have reduced the need for a high level of capabilities in suppliers and favoured modularity.⁶¹

Finally, the brand owners' adoption of business models that require rapid product development and upgrading, such as fast fashion, has reduced the importance of another factor that used to favour direct control or close supervision of production, namely being able to spread the costs of an organisational arrangement involving less self-containment and greater party-dependence over many transactions

⁵⁴Gereffi, Humphrey and Sturgeon, above n 52, at 83–84 and 86–87.

⁵⁵Langlois, above n 44.

⁵⁶Gereffi, Humphrey and Sturgeon, above n 52, at 84–87.

⁵⁷Langlois, above n 7, at 370–376; Gereffi, Humphrey and Sturgeon, above n 52, at 85.

⁵⁸P Gibbon and S Ponte 'Quality conventions, standards and the governance of global value chains' (2005) 34 *Economy and Society* 1; Gibbon, Bair and Ponte, above n 9, at 324–326; M Chon 'Marks of rectitude' (2009) 77 *Fordham Law Review* 2311 at 2317–2329; Ponte and Sturgeon, above n 9, at 210–216.

⁵⁹Gereffi, Humphrey and Sturgeon, above n 52, at 85.

⁶⁰Richardson, above n 10, at 888; RN Langlois and NJ Foss 'Capabilities and governance: the rebirth of production in the theory of economic organization' (1999) 52 *Kyklos* 201.

⁶¹Gereffi, Humphrey and Sturgeon, above n 52, at 86.

when these transactions were likely to be uniform and repetitive.⁶² However, with business models such as fast fashion, orders are likely to vary significantly in terms of product design and characteristics and this favours a more market-like system of production if the full specification and self-containment of transactions are possible. The flexibility of a modular system can then help to secure the efficiency advantages associated with market transactions in terms of price minimisation and speed of performance. Brand owners can also make use of contractual safeguards such as penalties to offset the remaining risks of lacking direct control over production or the ability to supervise it closely.⁶³

Separating the demand-related activities of marketing and product development and design from the supply-related activity of production has enabled them to develop separately according to their own economies of scale and scope and with the specific capabilities they require. The potential advantages to some firms of being able to separate these activities have increased as marketing has become an activity that can be conducted on a much wider scale and as developments in technology have enabled production to be conducted efficiently on a much smaller scale and to be controlled remotely through contractual mechanisms. Instead of managing production directly, brand owners have developed the capabilities necessary for exploiting and managing global value chains. Moreover, the advantages to brand owners of being able to outsource production into a market-like structure are further increased by the bargaining power they enjoy as buyers in this market.

The above factors help to explain why lead firms can rely on the flexibility of modular value chains to reduce the costs and increase the turnaround of production and yet can still exercise sufficient control over production to protect their goodwill, at least insofar as their goodwill is based on product quality and other 'product characteristics'. The mechanisms by which lead firms can exercise this control and manage their relationships with their suppliers in this kind of institutional structure has been termed 'industrial governance'.⁶⁴ Nevertheless, the lead firms' lack of direct control over production and the processes it involves means that they have no easy means of controlling and therefore determining and verifying the 'process characteristics' of their products such as the impact of their production on the environment or the conditions under which they are produced.⁶⁵ Whilst lack of control over these matters reflects the economic rationale of outsourcing, it raises two further issues. One concerns the attempts that various parties have made to close this apparent 'governance gap' by cajoling lead firms into doing more to ensure that process characteristics comply with a minimum set of standards. This issue has been referred to as one of 'global governance'.⁶⁶ The second issue concerns the proposition, noted in the introduction to this paper, that the vulnerability of brands to bad publicity concerning process characteristics means that their owners have good reason to close the governance gap in any event. Section 4 will consider these issues, but section 3 will first look more closely at the role of trade marks in facilitating the transformation of production that this section has described and in providing brand owners with their 'Achilles' heel'.

3. The Role of Trade Marks in Global Value Chains

The firms in Rana Plaza have been aptly described as 'invisible' suppliers because the brands under which the garments they produced were marketed and sold were the focal points for the attention and demand of consumers and the sources consumers looked to for guidance on reassurance on style, quality and other matters of concern.⁶⁷ It was the owners of these brands who enjoyed the benefits of goodwill and the bargaining power this confers. The importance of branding in marketing and

⁶²Williamson, above n 53, at 239 and 246–247.

⁶³Gereffi, Humphrey and Sturgeon, above n 52, at 80.

⁶⁴Bair and Palpacuer, above n 9, at S2.

⁶⁵Chon, above n 23. See further DA Kysar 'Preferences for processes: the process/product distinction and the regulation of consumer choice' (2004) 118 Harvard Law Review 525.

⁶⁶Bair and Palpacuer, above n 9, at S2.

⁶⁷L Talbot 'Trying to save the world with company law? Some problems' (2016) 36 LS 513 at 518.

in consumers' decision-making grew with the rise of the mass production and distribution of consumer goods towards the end of the nineteenth century.⁶⁸ This change had increased the distance between producers and consumers and required a substitute for the trust based on personal knowledge and direct communication that had previously guided consumers' decision-making and provided the foundation for goodwill. The importance of brands (and their trade mark signifiers) as a demand-pulling mechanism has grown further with the development of new forms of marketing, communication and search based on digital technology towards the end of the twentieth century and with the emergence of the complex business structures and production arrangements that market globalisation has facilitated.

The basis of the role of trade marks in marketing, communication and the attraction of demand is their exclusivity as a form of property to one firm or other undertaking.⁶⁹ Through registering a sign as a trade mark, a firm gains the exclusive right to use the sign to brand products of the kind or kinds for which it has been registered. The firm can use the sign to establish and signify a distinctive and exclusive identity for marketing products, an identity of this kind roughly corresponding to a 'brand'.⁷⁰ The names, logos and other signifiers of brands are likely to be trade marks and the exclusivity of a brand to one firm gives it an institutional character with the capacity to acquire a reputation, an image and other associations. It can connect products to a track record and heritage and can even give them a form of personality.⁷¹ This can increase the appeal of branded products for several reasons, but especially because of the guidance and reassurance it can provide to consumers about quality and other matters of concern.⁷² Trade marks can also help firms to market different lines of products that are designed to appeal to different groups of consumers through establishing and signifying different brands. The owner's exclusive control over each brand and the products that can be sold under it means that they can acquire different sets of associations and differentiate products in different ways.⁷³ This can be useful for the marketing of fashion products.

Trade mark law reinforces an owner's exclusive control over the sign it has registered as a trade mark through entitling the owner to prevent the unauthorised use of identical or similar signs across a range of product kinds, with the scope of this protection broadly expanding in line with the trade mark's distinctiveness as a sign and the level of recognition it has achieved in the minds of consumers.⁷⁴ As well as protecting the power of the brand that it signifies to attract demand, these rights enable the owner to use identical and similar signs to exploit this power through signifying connection to the brand and to achieve cross-pollination of this power across a wide range of markets.

The contribution of trade marks to the ability of lead firms to attract demand and build goodwill does not rest only on their role in establishing and signifying exclusive identities for marketing products. They also provide a reliable means of referring to branded products in advertising and other marketing activity and in general communication. This gives their owners a valuable communication

⁶⁸Wilkins, above n 6; R Church and C Clark 'Product development of branded, packaged household goods in Britain, 1870–1914: Colman's, Reckitt's and Lever's' (2001) 2 *Enterprise and Society* 503.

⁶⁹An 'undertaking' includes a company or any other entity or organisation that operates as a cohesive unit: *IHT v Ideal-Standard*, above n 21, paras [38]–[39].

⁷⁰DR Desai and S Weber Waller 'Brands, competition, and antitrust law' in DR Desai, I Lianos and S Weber Waller (eds) *Brands, Competition Law and IP* (Cambridge: Cambridge University Press, 2015) p 75 at pp 77–83.

⁷¹R Marchand *Creating the Corporate Soul: The Rise of Public Relations and Corporate Imagery in American Big Business* (University of California Press, 2001) pp 7–47; C Gorman 'The role of trademark law in the history of US visual identity design, c 1860–1960' (2017) 30 *Journal of Design History* 371.

⁷²AP Griffiths 'Quality in European trade mark law' (2013) 11 *Northwestern Journal of Technology and Intellectual Property* 621.

⁷³*Andrew (John) v Kuehnrich* (1913) 30 *RPC* 677 (CA). See T da Silva Lopes and M Casson 'Entrepreneurship and the development of global brands' (2007) 81 *Business History Review* 651 at 655.

⁷⁴Recast Directive, Art 10(2)(b) and 10(2)(c); TMA 1994, ss 10(2) and 10(3). On Art 10(2)(b) see Case C-251/95 *Sabel v Puma* [1997] ECR I-6013; Case C-39/97 *Canon v MGM* [1998] ECR I-5507; Case C-342/97 *Lloyd Schuhfabrik v Klijsen Handel* [1999] ECR I-3819; on Art 10(2)(c), see Case C-252/07 *Intel v CPM* [2008] ECR I-8823; Case C-487/07 *L'Oréal v Bellure* [2009] ECR I-5185; Case C-252/12 *Specsavers v Asda* [2013] *Bus LR* 1277.

mechanism for promoting their products and soliciting demand for them. It gives consumers a means of obtaining or receiving information about the branded products from various sources including recommendations, reviews and expert opinions. Where trade marks signify verbally, they also give consumers a means of expressing demand for the branded products and of making searches for and enquiries about them. Trade mark law ensures that third parties selling or marketing products of the relevant kind must respect a trade mark's legal meaning as a specific reference to branded products when they respond to consumers' searches, requests or enquiries that use the trade mark as a reference point regardless of a consumer's actual intention in doing so.⁷⁵ Whilst third parties are free to promote, suggest or supply alternatives, they must make it clear to consumers and internet users that these products are not branded products or economically-linked in any way to branded products.⁷⁶

Brands and their trade mark signifiers enable their owners to attract demand to their products and to build goodwill in various ways and for various reasons. In the case of fast fashion products, a key factor is the reputation a brand has gained with consumers for selling products that are suitable for their purposes, good value and unlikely to disappoint them. Consumers are likely to be seeking a combination of novelty or modishness in style and design and adequate material quality at a relatively low price,⁷⁷ but also to need reassurance that products are good value and likely to be recognised by others as fashionable and 'on trend' at the time when they are purchased.⁷⁸ Brands can help provide this reassurance to consumers. Moreover, the role of their trade mark signifiers as communication devices can help accelerate consumer awareness that branded products are in fashion.⁷⁹ For this reason, trade marks have been recognised as an important, if not the most important, form of intellectual property protection in the fashion industry.⁸⁰ They are particularly valuable for products with designs and styles that are rapidly upgraded and therefore likely to become rapidly obsolete. The fact that a product with a particular design and style is marketed under a brand that consumers associate with stylish and well-designed products can have much more impact on their decision-making than the design and features themselves.⁸¹

As noted, trade marks can contribute to the impact and appeal of branded fashion products through conferring an image and other associations on them. A brand owner can cultivate this capacity through advertising and promotional activity and once developed it can give the consumption of branded products additional emotional impact, amounting to the addition of intangible quality.⁸² For certain consumers at least, consuming branded products can become a means of satisfying emotional desires such as that for self-expression, or self-realisation or feeling part of a distinct community of consumers.⁸³

⁷⁵*Havana Cigar v Oddenino* [1923] 1 Ch 179 (CA); *Sales Affiliates v Le Jean* [1947] Ch 295 (HC); *Premier Luggage & Bags v Premier Company* [2002] EWCA Civ 387. This has been extended to include third parties' use of a trade mark as a keyword to trigger 'pop-up' advertising, sponsored links or other pre-arranged responses when consumers use the sign in question as a search term online: Case C-236/08-238/08 *Google France v Louis Vuitton* [2010] ECR I-2417; Case C-323/09 *Interflora v Marks & Spencer* [2012] Bus LR 1440.

⁷⁶*Ibid.*

⁷⁷See Campbell, above n 13.

⁷⁸B Hilton, CJ Choi and S Chen 'The ethics of counterfeiting in the fashion industry: quality, credence and profits issues' (2004) 55 *Journal of Business Ethics* 345; V Pouillard and T Kuldova 'Interrogating intellectual property rights in post-war fashion and design' (2017) 30 *Journal of Design History* 343.

⁷⁹On the importance of speed of communication in the marketing of fashion products see K Raustiala and C Sprigman 'The piracy paradox: innovation and intellectual property in fashion design' (2006) 92 *Virginia Law Review* 1687 at 1728–1732.

⁸⁰Raustiala and Sprigman, above n 79, at 1689 and 1700–1704; AM Marshall 'Free fashion' (2013) 17 *Marquette Intellectual Property Law Review* 123 at 126–128.

⁸¹Raustiala and Sprigman, above n 79, at 1718–1728.

⁸²Case C-59/08 *Copad v Christian Dior Couture* [2009] ECR I-3421 at [24]–[26].

⁸³JB Swann, DA Aaker and M Reback 'Trademarks and marketing' (2001) 91 *Trademark Reporter* 787 at 796–797; B Beebe 'Intellectual property law and the sumptuary code' (2010) 123 *Harvard Law Review* 809.

As focal points for goodwill and conveyors of a good reputation and an attractive image, brands can become valuable marketing resources and sources of strategic advantage.⁸⁴ Once brands have gained this power, and for as long as it is maintained, their owners can add it to branded products as a form of intangible input and do so at a relatively low marginal cost. This can be especially profitable when the production of branded products can be readily scaled-up at a relatively low marginal cost through outsourcing into a modular value chain.

The scope for firms to use trade marks to establish and signify brands as exclusive intangible resources that can attract demand and enjoy goodwill is the foundation of their organisational role. The other essential aspects of this role are the absolute control that trade mark owners have over the supply of branded products and their discretion as to how they organise this supply. Trade mark law gives the owner of a trade mark the absolute right to authorise products for marketing as branded products.⁸⁵ Where the owner has outsourced their production, this right entitles it to prohibit the marketing of unauthorised 'leakages' as branded products even though they are likely to be identical to legitimate branded products in every other respect.⁸⁶ This absolute right ensures that only brand owners can profit from the goodwill of their brands and secures their strategic positions as the gateways to consumers.

A trade mark owner's absolute right of authorisation gives it control over the supply of branded products. This is the basis on which it can vouch for these products to consumers and ensure that they conform to and do not detract from a good reputation that it has acquired.⁸⁷ However, trade mark law does not specify or limit the legal mechanisms through which an owner can exercise its control and does not even require the owner to exercise its control effectively.⁸⁸ The owner has discretion as to the arrangements it makes and the freedom to vary these arrangements even though this may weaken the level of direct control that it can exercise over the supply.⁸⁹ This organisational flexibility has facilitated transformations in the activities in which lead firms engage and the rise of global value chains as an institutional structure. Changes of this kind are usually driven by the interest of lead firms in maximising their profits and this may favour the outsourcing of production into flexible value chains even where this may increase the risk of consumer disappointment with product quality or other matters of potential concern to them.⁹⁰

As well as its absolute right to authorise products for marketing as branded products, the owner of a trade mark has certain continuing rights over the further marketing (or 'commercialisation') of products that it has already authorised as branded products. These rights are worth noting briefly because they can further increase the return that owners can obtain from their brands and thereby strengthen their bargaining power within global value chains. Under EU trade mark law, a trade mark owner's absolute right of authorisation is limited to authorising the first marketing of products as branded products within the European Economic Area (EEA).⁹¹ Its right is therefore 'exhausted' for the further marketing of products once it has authorised them in this way. This means that the owner can prevent third parties from marketing products as branded products if they have been marketed as such outside

⁸⁴I Lianos 'Brands, product differentiation and EU competition law' in Desai, Lianos and Weber Waller, above n 70, p 146 at pp 148–152.

⁸⁵*Major Bros v Franklin* [1908] 1 KB 712 (HC); *Primark v Lollypop Clothing* [2001] FSR 637 (HC); *IHT v Ideal-Standard*, above n 21, at [38]–[39].

⁸⁶*Primark v Lollypop Clothing*, above n 85.

⁸⁷A trade mark guarantees that 'all the goods or services bearing it have been manufactured or supplied under the control of a single undertaking which is responsible for their quality': Case C-206/02 *Arsenal FC v Matthew Reed* [2002] ECR I-10273 at [48] and [58].

⁸⁸The 'decisive factor is the possibility of control over the quality of goods, not the actual exercise of that control': *IHT v Ideal-Standard*, above n 21, at [38].

⁸⁹*Bostitch TM*, above n 21, at 197; *IHT v Ideal-Standard*, above n 21, at [37]–[38].

⁹⁰*Scandecor Development v Scandecor Marketing* [2001] ETMR 800 (HL) at [19].

⁹¹Recast Directive, Art 15; TMA 1994, s 12.

the EEA.⁹² This territorial limitation on exhaustion makes it possible to set a higher market price for branded products inside the EEA where the strength of demand for them can support this.⁹³

The owner also enjoys certain continuing rights over the further marketing of branded products within the EEA in any event. These rights are defined loosely by reference to there being 'legitimate reasons' for the owner 'to oppose the further commercialisation of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market'.⁹⁴ The effect of these rights is to reflect and reinforce the practical significance of the owner's control over supply at the point of first marketing in the EEA so as to ensure that the owner can still be viewed as vouching for the branded products upon further marketing.⁹⁵ The owner can prevent parallel importers and other third parties from marketing products as branded products after any interference that could undermine the brand's reassurance about product quality. The Court of Justice of the EU (CJEU) has also ruled that the owner can use these rights to protect an attractive image that the trade mark has acquired, for example as a symbol of prestige and luxury.⁹⁶

The CJEU has extended the owner's control over the further marketing of branded products to include the use of its trade mark in advertising or promotional activity designed to publicise further marketing.⁹⁷ Moreover, in a case concerning the 'Lush' brand of toiletries and cosmetics, the High Court has indicated that the owner of a brand with a reputation for high standards of business behaviour should be entitled to prohibit the use of its trade marks by third parties engaged in further marketing who do not comply with the owner's standards in this respect.⁹⁸ Recognising that the rights of brand owners extend to cover business behaviour in this way could strengthen their incentive to acquire such a reputation and to use their control at the point of first marketing to ensure that their suppliers observe high standards of business behaviour. The proposition that brand owners may have some incentive to do this in the first place leads on to the question of how far the vulnerability of brands and the trade marks that signify them to bad publicity concerning business behaviour in their value chains may generate countervailing pressure in this direction.

4. Trade Marks as a Source of Countervailing Pressure Concerning Business Behaviour in Global Value Chains

It has been argued that, when they are so motivated, lead firms with their bargaining power and resources can be more effective than local regulators at influencing firms in their value chains and enforcing standards on them.⁹⁹ This influence is much easier to achieve where a value chain consists of familiar suppliers or suppliers that can be closely monitored and supervised. Where a value chain is modular and linked through contractual arrangements, lead chains may still have sufficient indirect control over the 'product characteristics' of the suppliers' output for the reasons described in section 3, but it is unlikely to be sufficient for 'process characteristics' such as working conditions and

⁹²Case C-355/96 *Silhouette v Hartlauer* [1998] ECR I-4799; Case C-173/98 *Sebago v GB-Unic* [1999] ECR I-4103; Joined Cases C-414/99-C-416/99 *Zino Davidoff v A & G Imports* [2001] ECR I-8691.

⁹³On this 'territorial price discrimination' see KE Maskus 'Economic perspectives on exhaustion and parallel imports' in I Calboli and E Lee (eds) *Research Handbook on Intellectual Property Exhaustion and Parallel Imports* (Edward Elgar, 2016) p 106 at pp 112–113.

⁹⁴Recast Directive, Art 15(2); TMA 1994, s 12(2).

⁹⁵Case C-427/93 *Bristol-Myers Squibb v Paranova* [1996] ECR I-3457; Case C-348/04 *Boehringer Ingelheim v Swingward (No 2)* [2007] ECR-3391; Case C-276/05 *Wellcome v Paranova* [2008] ECR I-10479. Much of the case law on these rights relates to pharmaceutical products.

⁹⁶Case C-337/95 *Parfums Christian Dior v Evora* [1997] ECR I-6013; Case C-59/08 *Copad v Christian Dior Couture* [2009] ECR I-3421.

⁹⁷*Ibid.*

⁹⁸*Cosmetic Warriors v Amazon* [2014] EWHC 181 (Ch).

⁹⁹MP Vandenbergh 'The new Wal-Mart effect: the role of private contracting in global governance' (2007) 54 *UCLA Law Review* 913. See further Rühmkorf, above n 1, pp 73–92.

environmental impact.¹⁰⁰ Controlling the business behaviour of a flexible network of suppliers poses much greater challenges.

Lead firms have little, if any, legal responsibility for the behaviour of firms in their supply chains and their incentive to do more depends on other factors. As a general rule, one firm does not have any legal responsibility for the activities and behaviour of another firm, even in the case of a wholly-owned subsidiary.¹⁰¹ Legal responsibility usually requires a clear statutory obligation to that effect or an established legal basis for attributing responsibility such as agency or a direct duty of care.¹⁰² In the UK, a parent company may in some circumstances owe a direct duty of care to the employees of a subsidiary or to others affected by the subsidiary's activities.¹⁰³ However, this duty only arises where the parent has taken direct responsibility for devising a material health and safety policy for the subsidiary or where it controls the relevant operations.¹⁰⁴ Issuing mandatory policies and standards which are intended to apply to the subsidiary to ensure conformity to specified standards is not sufficient.¹⁰⁵ Nevertheless, this gives lead firms a good reason to be careful with how they seek to influence the standards of business behaviour of other firms they deal with, including suppliers.¹⁰⁶

With globalisation, there have been a number of 'soft law' initiatives to encourage major economic actors to take greater responsibility for the behaviour of firms dependent on them, including suppliers, and to reduce the apparent 'governance gap'.¹⁰⁷ These initiatives require firms to exercise greater 'due diligence' on these matters and to report on their efforts.¹⁰⁸ The most prominent initiative has been the United Nations' Guiding Principles on Business and Human Rights of 2011,¹⁰⁹ which require lead firms to exercise due diligence to prevent or mitigate adverse impacts by their suppliers on the human rights of workers and other parties in their neighbourhood.¹¹⁰ These 'soft law' initiatives do not present lead firms with any significant risk of legal liability for business behaviour in their supply chains, but they are helping to establish a platform of minimum standards against which their performance can be evaluated and may therefore increase any commercial pressure on them to do more. It has been argued that they could lead to the emergence of a legally-enforceable duty on the part of lead firms to exercise the requisite due diligence.¹¹¹ However, there are formidable obstacles in the way of finding such a general duty, even where lead firms require their suppliers to observe codes of conduct concerning their behaviour.¹¹²

Nevertheless, there may still be commercial pressure on lead firms which are also brand owners to exercise greater control over their suppliers because of their interest in increasing, or at least maintaining, the power of their brands to attract demand and enjoy goodwill and to avoid publicity that could damage this. As the Rana Plaza disaster and its aftermath showed, the prominence that brands and their signifiers can gain in the minds of the public makes them particularly effective as targets for bad publicity concerning poor standards of business behaviour in their value chains and for protests

¹⁰⁰On product and process characteristics, see above n 65.

¹⁰¹*Adams v Cape Industries* [1990] Ch 433 (CA); *VTB Capital v Nutritek* [2013] UKSC 5.

¹⁰²*Adams v Cape Industries*, *ibid*; *Lungowe v Vedanta Resources* [2017] EWCA Civ 1528, paras [67]–[90].

¹⁰³*Chandler v Cape Industries* [2012] EWCA Civ 525.

¹⁰⁴*Lungowe v Vedanta Resources*, above n 102, at [83].

¹⁰⁵*Lucky Alame v Royal Dutch Shell* [2018] EWCA Civ 191 at [89] and [140].

¹⁰⁶Such concerns influenced the response of some brand owners to the Rana Plaza disaster: 'US retailers see big risk in safety plan for factories in Bangladesh' (*The New York Times*, 22 May 2013), available at <http://www.nytimes.com/2013/05/23/business/legal-experts-debate-us-retailers-risks-of-signing-bangladesh-accord.html> (accessed 4 February 2019).

¹⁰⁷SJ Baughen *Human Rights and Corporate Wrongs: Closing the Governance Gap* (Edward Elgar, 2015) pp 212–250.

¹⁰⁸See for example the Modern Slavery Act 2015, s 54(4).

¹⁰⁹Office of the United Nations High Commissioner for Human Rights 'Guiding principles on business and human rights: implementing the United Nations "protect, respect and remedy" framework' (2011).

¹¹⁰Guiding Principles 17–21.

¹¹¹D Cassel 'Outlining the case for a common law duty of care of business to exercise human rights due diligence' (2016) 1 *Business and Human Rights Journal* 179.

¹¹²*cf* *Lucky Alame v Royal Dutch Shell*, above n 105, at [89] and [140]. On the scope for action by or on behalf of consumers see Rühmkorf, above n 1, pp 93–111.

and campaigns in response to that publicity. As noted in [section 1](#), this ‘Achilles’ heel’ has been identified as a potential source of countervailing pressure that may help to reduce the governance gap that outsourcing production into global value chains has opened up.¹¹³ However, the actual impact of this pressure on brand owners is debatable and it has several shortcomings as a mechanism for closing the governance gap.

One shortcoming is the lack of direct control that brand owners have over business behaviour and other process characteristics when production has been outsourced into a modular value chain.¹¹⁴ As with product characteristics such as design and material quality, brand owners can specify process characteristics in their orders and seek to verify compliance, but are likely to face much greater costs and difficulties in ensuring compliance. This makes the transactions complex.¹¹⁵ The developments in communication and technology that have helped to mitigate complexity in relation to product characteristics and increase the scope for transactions to be self-contained do not apply so well in this context. And, as will be seen below, there are not the kind of recognised standards for process characteristics that can help to reduce complexity. Being in a good position to ensure compliance is likely to require greater party-dependence and reduce the flexibility that is a key advantage of a modular value chain for business models such as fast fashion. Nevertheless, some brand owners have responded to incidents of bad publicity by only outsourcing production to suppliers that they can monitor and oversee.¹¹⁶

A second shortcoming is that the efforts that brand owners make in practice to achieve greater control over process characteristics will be driven by their perception of the overall balance of costs and benefits of doing this. Their evaluation of the potential costs from incidents triggering bad publicity is likely to depend on how far they believe they can manage these as short-term ‘public relations’ challenges rather than significant threats to their longer-term profitability. A key factor in this assessment will be the clarity, objectivity and completeness of the messages that can be conveyed to consumers and others about process characteristics and a brand owner’s efforts in this respect. There are some major problems here.¹¹⁷ Brand owners may provide information, but its accuracy, completeness and true significance usually requires external verification from credible third parties such as non-governmental campaigning organisations. Like brand owners, these third parties face the inherent difficulty of monitoring the behaviour of suppliers from outside, especially when it may be hard to identify which firms need monitoring. In the case of Rana Plaza, the APPB report noted a ‘lack of transparency’ due to practices such as unauthorised sub-contracting.¹¹⁸ In any event, where incidents of bad publicity occur in modular value chains that supply many brands, blame for this is diluted, along with the resulting pressure on the brand owners.¹¹⁹

The lack of reliable and meaningful information about standards of business behaviour is exacerbated by the lack of the kind of specific, objective and generally-recognised standards that would provide a clear benchmark for effective accountability.¹²⁰ This gives brand owners even more scope to engage in public relations activity to shape or manipulate consumers’ perceptions of the publicity

¹¹³See above n 23.

¹¹⁴On the categorisation of value chains, see above n 54.

¹¹⁵On complexity in transactions, see above n 56.

¹¹⁶TA Hemphill and GO White III ‘The world economic forum and Nike: emerging “shared responsibility” and institutional control models for achieving a socially responsible global supply chain?’ (2016) 1 *Business and Human Rights Journal* 307.

¹¹⁷D Millon ‘Enlightened shareholder value, social responsibility and the redefinition of corporate purpose without law’ in PM Vasudev and S Watson *Corporate Governance after the Financial Crisis* (Edward Elgar, 2012) p 68 at pp 86–92; M Chon ‘Slow logo: brand citizenship in global value networks’ (2014) 47 *UC Davis Law Review* 935; Chon, above n 23.

¹¹⁸APPB Report, above n 1, at 12.

¹¹⁹This dilution is illustrated in the slogan of the Clean Clothes Campaign in response to the Rana Plaza disaster of ‘Brands pay up now!!’: see <https://cleanclothes.org/news/2013/05/24/activists-protest-fashion-brands-failure-to-pay-bangladesh-disaster-victims-compensation> (accessed 4 February 2019).

¹²⁰Chon, above n 23, at 297.

and information that is available,¹²¹ for example as to how well they have responded to incidents of bad publicity. There is a multiplicity of conflicting and competing apparent standards that brand owners can invoke, which come from a variety of sources and have varying degrees of objectivity and reliability. These include schemes such as certification marks operated by trusted third parties such as the Fairtrade Foundation,¹²² but also schemes set up by the brands themselves or their trade associations.¹²³ Rather than mitigating the problems that consumers and others face in acquiring meaningful information or credible reassurance about business behaviour, brands in this context are more likely to increase them with ‘informational clutter’.¹²⁴

A third shortcoming is that the strength of commercial pressure that bad publicity puts on brand owners depends on how consumers and other parties are likely to respond to such publicity in practice. It seems inappropriate to rely on consumers and other parties who are not directly affected by standards of business behaviour in value chains to take responsibility for improving them by factoring it into their decision-making.¹²⁵ This approach subordinates the interests of workers and other affected parties to the discretion and whims of unaffected parties. It looks to unaffected parties to give weight to these in transactions in which they would otherwise pursue their own best interests.¹²⁶ Even if they do attach importance to process characteristics, consumers must weigh the information and reassurance they receive about these against other matters of importance to them such as price, product quality, quality assurance and emotional impact. With fast fashion products, consumers tend to prioritise price along with reassurance that products are fashionable over the reassurance that an ethical reputation can provide about process characteristics, as the example of Phantom Tac Ltd has shown.¹²⁷ There is little evidence to suggest that incidents of bad publicity have had much long-term effect on consumer behaviour.¹²⁸

Nevertheless, there are firms that use a good reputation for social responsibility as part of their business model.¹²⁹ As noted in section 3, trade mark law could strengthen the position of such firms by confirming that their continuing rights over the further marketing of branded products can protect a good reputation covering process characteristics as well as a good reputation covering product characteristics.¹³⁰ This could help to increase the incentive that brand owners have to develop such a reputation. However, this alone is unlikely to carry much weight in the absence of clear, meaningful and reliable information for evaluating the actual performance of brand owners in this respect.

Moreover, the potential response of consumers and others to a good reputation concerning business behaviour or to incidents of bad publicity is just one factor in the overall balance of costs and benefits that is likely to drive the decision-making of brand owners in relation to outsourcing. It has been argued that efforts to achieve real improvement in standards of business behaviour in global value chains should address these matters directly and take account of the bargaining power of the lead firms and the buying practices that put pressure on these standards.¹³¹ It has also been argued that expecting lead firms to take responsibility for this amounts to recognising and reinforcing their strategic position and the factors that underlie this.¹³² In any event, pushing brand owners to use their

¹²¹M Chon ‘More and more(s): certification in global value chains’ in I Calboli and E Lee (eds) *Trademark Protection and Territoriality Challenges in a Global Economy* (Edward Elgar, 2014) p 79 at p 85.

¹²²On Fairtrade, see <http://www.fairtrade.org.uk/What-is-Fairtrade/Using-the-FAIRTRADE-Mark> (accessed 4 February 2019).

¹²³See for example the ‘Cocoa life’ certification scheme set up by Mondelez International: <https://www.cocoalife.org/> (accessed 4 February 2019).

¹²⁴Chon, above n 58, at 2316.

¹²⁵Palpacuer, above n 8, at 411.

¹²⁶Ibid.

¹²⁷See above nn 37–38.

¹²⁸See above n 36.

¹²⁹As with the ‘Lush’ brand: see above at n 98.

¹³⁰See above at n 65.

¹³¹Anner, Bair and Blasi, above n 1.

¹³²Drebes, above n 46.

bargaining power to improve standards in value chains and not to create pressure that reduces these is likely to require much more than fear of adverse publicity. It will require specific regulation and more stringent accountability mechanisms, along with the development of a clear set of objective standards audited by effective and reliable third parties.¹³³ It is within such a framework that the commercial accountability for production that branding achieves could have greater value as a transmission mechanism for channelling information and publicity and acting as a source of countervailing pressure on brand owners.

Conclusion

This paper has shown how the legal protection of trade marks has enabled firms to establish brands for their products and to separate the activities of demand-attraction and supply-provision. The ability to do this has influenced the development of the main actors in many industries, including the ready-made garment industry. They have been able to compete for demand at the global level and to out-source production into global value chains in which they enjoy strategic power. This in turn has enabled them to adopt business models that require a faster pace of production at a lower cost. Their bargaining power and the buying practices that their business models require can generate pressure in global value chains and the Rana Plaza disaster has shown the consequences that this pressure can sometimes have.

As brand owners, firms that have good access to consumers or are well-placed to engage in marketing have been able to focus their resources on product development and on attracting demand through the design and differentiation of their products, their ability to provide quality assurance and the cultivation of emotional appeal. These 'weightless' firms can focus on these higher-value activities whilst avoiding direct involvement in, and responsibility for, producing the supply to satisfy the demand they attract. They have adopted business models that involve rapid product development and product obsolescence in their pursuit of profit. Global value chains have proved well-suited to producing the requisite supply at the speed and cost needed to satisfy the demand that these firms can attract. This organisational transformation has had an impact on working conditions, the environment and other matters associated with production. Brand owners have externalised direct responsibility for these process characteristics onto other firms. Firms engaged in production lack significant bargaining power and must compete for orders from brand owners on price and their ability to meet tight deadlines. The pressure that this form of competition involves is not conducive to observing good standards of business behaviour.

Trade marks, as the signifiers of brands, do ensure that their owners have some commercial accountability for their suppliers through providing a transmission mechanism that can be used to link branded products to their commercial provenance and therefore to the firms that produced them. As Rana Plaza showed, publicity concerning poor working conditions in suppliers can be directed at the brands these firms supply, thereby exposing the brands to reputational damage. The branding of products thus gives consumers some scope for giving weight to process characteristics in their decision-making, if they so desire, and this in turn may give brand owners some incentive to do more to ensure that standards in their supply chains are satisfactory and unlikely to attract bad publicity. However, the strength of this countervailing pressure and the incentive that it provides depends on the clarity, completeness and reliability of the information that can be made available to consumers about business behaviour and other process characteristics, the weight that consumers are willing to put on this in practice, and how the weight of these potential responses factors into the overall balance of costs and benefits facing brand owners. This paper has noted various shortcomings in relation to each of these and concluded that branding is unlikely to transmit sufficient countervailing pressure to make a significant difference. The limited impact that the Rana Plaza disaster seems to have had on the appeal and profitability of the brands that the firms based there had been supplying is consistent with this view.

¹³³Palpacuer, above n 8, at 411–443; Sinkovics, Hoque and Sinkovics, above n 36.

Trade mark law could improve the position a little by confirming that the owners of brands with a good reputation for standards of business behaviour and other process characteristics are entitled to ensure these standards are observed throughout their value chains, including by firms involved in further marketing. This would strengthen the incentive of brand owners to cultivate such a reputation. Beyond this, reducing the chances of a disaster like Rana Plaza recurring would require stringent regulation and accounting requirements that place much greater legal responsibility on brand owners for standards of business behaviour and other process characteristics in their value chains. The commercial accountability that brands and their trade mark signifiers provide would be a useful supplement to such measures and help to increase their effectiveness. However, counteracting the incentives and pressures that lay behind the Rana Plaza disaster and minimising the risk of recurrence would require even more radical measures that address the strategic power of brand owners as economic actors, the legal mechanisms they use to reinforce their power and their freedom to pursue business models that put such pressure on their suppliers.