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# BRAND AS INFORMATION INTERMEDIARY

*Kishanthi Parella†*

*This essay examines how brand names facilitate exchanges that would not otherwise occur in the global marketplace because of asymmetries of information between buyers and sellers. A transnational corporation facilitates exchanges by providing information through its brand that persuades Group A (buyers) to exchange with Group B (third party suppliers). Recognizing the information functions leads to two important implications. First, brand corporations may need to disclose their intermediary role to consumers in order to reduce risks to consumers, workers, and other actors in the supply chain. Second, the type of disclosure matters. While different disclosure strategies may prove similarly effective at shining a light on conditions in supply chains, some disclosure strategies involve greater brand damage and are therefore more likely to incentivize brand corporations to do something about conditions in their supply chains. Therefore, viewing corporations as information intermediaries provides us with a useful lens to evaluate competing strategies for information regulation concerning the supply chain.*

## INTRODUCTION

An information intermediary is a party who informs one group of actors (Group A) of the characteristics, capacities, and other relevant information of another group of actors (Group B). Information intermediaries matter because in a market characterized by asymmetries of information, Group A may not exchange with Group B but for the information that intermediaries supply.

In this essay, I suggest that in many global supply chains the function of a transnational corporation is best conceived of as an information intermediary. Many corporations have outsourced several functions to one or more third party suppliers: manufacturing,

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research and development, marketing, sales, and customer support.<sup>1</sup> We may not purchase the products from a third-party supplier because we are unfamiliar with it and cannot verify the quality of the product before purchase; these suppliers do not have a brand that we trust. Therefore, we rely on the information conveyed by the transnational corporation through *its* brand when we make our purchasing decisions. The transnational corporation acts as an intermediary that facilitates market exchanges by providing information through its brand that persuades Group A (buyers) to exchange with Group B (third party suppliers).<sup>2</sup>

Recognizing the information intermediary role of corporations has at least two important implications. First, brand corporations may need to disclose their intermediary role to consumers in order to prevent these consumers from suffering “identity harms” that result from risks in the supply chain.<sup>3</sup> Second, the intermediary role played by brand corporations can potentially hurt more than just consumers. Practices that persist in supply chains also harm workers in overseas sites.<sup>4</sup> The way corporations disclose information can incentivize them to deter wrongdoing in the supply chain.<sup>5</sup> Their willingness to do so depends on the incentives created in the regulations that apply to them. While different disclosure strategies may prove effective at shining a light on conditions in supply chains, some strategies might prove better at incentivizing intermediary cooperation than others. Therefore, viewing corporations as information intermediaries provides us with a useful lens to evaluate competing strategies for information regulation concerning the supply chain.

#### I. UNDERSTANDING THE INFORMATION ROLE OF TRANSNATIONAL BRAND CORPORATIONS: THE MAGHRIBI TRADERS RE-VISITED

Many American household names do not make the goods we associate with them. Instead, they outsource a variety of traditional

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1. See Kishanthi Parella, *Outsourcing Corporate Accountability*, 89 WASH. L. REV. 747, 749 (2014) (listing functions outsourced by international businesses).
  2. See Clayton P. Gillette, *Reputation and Intermediaries in Electronic Commerce*, 62 LA. L. REV. 1165, 1170 (2002).
  3. See Sarah Dadush, *Identity Harms*, 89 COLO. L. REV. \_\_\_\_ (forthcoming 2018) (defining and discussing “identity harms”), available at <https://ssrn.com/abstract=2990526>.
  4. See Parella, *supra* note 1, at 801 (brief discussion of intermediary reporting affecting workers’ rights).
  5. See Parella, *supra* note 1, at 807 (brief discussion of intermediary reporting on supply chain).

business functions to third-party suppliers, including manufacturing, customer service, marketing, sales, design, and research and development.<sup>6</sup> The corporation may outsource these functions to one or, more likely, several actors both here in the United States and abroad.<sup>7</sup>

For example, while Nike sells tens of millions of athletic shoes in the United States every year, “all of the firm’s manufacturing operations are conducted overseas.”<sup>8</sup> Additionally, Nike “never relocated domestic production abroad, . . . because the firm actually originated by importing shoes from Japan. It has subcontracted nearly all of its production’ overseas ever since.”<sup>9</sup> The result is that “[i]n the United States, Nike has developed essentially as a design, distribution, and marketing enterprise.”<sup>10</sup> As one of Nike’s vice-presidents aptly stated, “We are marketers and designers” - “[w]e don’t know the first thing about manufacturing.”<sup>11</sup>

For these reasons, we usually think about the functions overseas suppliers provide to transnational corporations as opposed to exploring the functions that transnational corporations provide to overseas suppliers. It is also important, however, to understand the benefits that flow from the brand corporation to the overseas supplier (besides payment).

Consider a hypothetical involving Acme, a US-based corporation, that outsources all of the functions necessary to support its primary product, Widget, to a third party, Overseas Supplier. In an extreme example of outsourcing, assume that the latter organization designs Widget (including improvements), invests in R&D concerning Widget’s technology, manufactures, markets, and sells Widget in the United States.

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6. Parella, *supra* note 1, at 749.

7. See Samuel Palmisano, *The Globally Integrated Enterprise*, 85 FOREIGN AFF. 127, 131 (2006) (“Now the spread of outsourcing is encouraging companies to view themselves as an array of specialized components: procurement, manufacturing, research, sales, distribution, and so on. . . . The corporation, then, is emerging as a combination of various functions and skills-some tightly bound and some loosely coupled-and it integrates these components of business activity and production on a global basis to produce goods and services for its customers.”).

8. Miguel Korzeniewicz, *Commodity Chains and Marketing Strategies: Nike and the Global Athletic Footwear Industry*, in COMMODITY CHAINS & GLOBAL CAPITALISM 247, 252 (Gary Gereffi & Miguel Korzeniewicz eds., 1994).

9. *Id.*

10. *Id.*

11. *Id.*

Overseas Supplier may not be able to sell in the US market without Acme due to information asymmetries or “the lemons problem.” George Akerlof explained that information asymmetries often characterize market exchanges because a potential buyer knows less about the product than the product’s seller.<sup>12</sup> These asymmetries increase the risk that the seller may exploit the buyer by selling him a product he would not want if he had known the truth before the sale.<sup>13</sup> These asymmetries also occur in the sale of goods in the global marketplace: A buyer in one country may refuse to purchase a good from a seller in another country because the former cannot evaluate the quality of the good prior to sale.<sup>14</sup> In these situations, transnational corporations serve as critical information intermediaries by addressing information asymmetry problems in cross-border sales – information problems that would prevent sales in the absence of the information intermediary functions performed by transnational corporations.

In order to appreciate the significance, consider how information asymmetries determine the likelihood of sales in two hypotheticals. In Hypothetical 1, a transnational corporation based in the United States, Acme, sells Widget. Buyer is excited to purchase this new product, but wary because he cannot verify its properties prior to sale (even a cursory examination at a store will not reveal all potential hidden defects). Buyer runs the risk that Acme may sell him an inferior product; however, Buyer has access to other resources that give him greater confidence in the transaction because he (a) purchased from Acme previously (prior dealings), (b) trusts Acme based on available information (reputation), or (c) feels confident in post-sale assurances that reduce the risk of opportunism, such as return policies, warranties, and dispute resolution procedures. For these reasons, he decides to go ahead with the purchase of Widget from Acme.

Now consider how the information problem grows if Buyer does not purchase a Widget from Acme, but instead purchases it directly from Overseas Supplier. In Hypothetical 2, Buyer is not familiar with Overseas Supplier, having never purchased from it. Buyer can find very little information about Overseas Supplier online and there are very few customer reviews of Widget. Overseas Supplier sells directly from another country and its website states that any disputes arising from product sales will be arbitrated in that country as the exclusive

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12. George Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q. J. OF ECON. 488, 489 (1970).
  13. See Akerlof *supra* note 12, at 489-490 (illustration of effects of asymmetry of information between buyer and seller).
  14. See Gillette, *supra* note 2, at 1169-70 (discussion of information asymmetry in global context).

forum. Unsurprisingly, Buyer feels less willing to enter into an exchange with Overseas Supplier because he lacks the information that an exchange with Acme would make available.<sup>15</sup> He does not have any previous dealings with Overseas Supplier and is unaware of its reputation. Additionally, Overseas Supplier's return policy requires returns to its overseas location and disputes are subject to mandatory arbitration before a foreign tribunal. He therefore foregoes the exchange (despite how badly he wants a Widget!!).

This illustrates the challenge information asymmetries in cross-border sales presents. A buyer in one country knows very little about the goods offered for sale in another or about the merchants offering it. The enforcement sanctions for opportunism are also weak or insufficient to assuage the buyer, who may need to incur high costs to verify product quality or protect his interests after the parties complete the sale.

These problems are not new. Avner Greif famously studied information problems encountered by Maghribi traders in long-distance trade in the 11<sup>th</sup> century.<sup>16</sup> These traders sold their goods across long distances through agents.<sup>17</sup> This presented an information problem because these agents operated distantly and beyond the direct supervision of the merchants; therefore, the latter undertook the risk that the former may take advantage of them.<sup>18</sup> To address this risk, the traders established coalitions that served as information intermediaries regarding the behavior of agents: the coalition had the capability to disseminate information regarding agent conduct rapidly throughout the coalition, thereby putting agents on notice that news of any opportunistic behavior would reach the relevant merchant.<sup>19</sup> As an information intermediary, the coalition helped to correct information asymmetries between agent and trader across greater distances and gave the latter greater confidence in his transactions with agents.<sup>20</sup>

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15. See Gillette, *supra* note 2, at 1166-67 (“[T]he need for buyers and sellers to trust each other where compliance with contractual terms cannot readily be verified *ex ante* or enforced *ex post* diminishes the likelihood of trade. Thus, even while electronic commerce reduces search costs and transaction costs of putting together willing buyers and sellers, its full potential cannot be realized if parties fear that trading partners will perform opportunistically because remedies for breach or chiseling are unavailable.”).
  16. Avner Greif, *Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders*, 49 J. ECON. HIST. 857 (1989).
  17. *Id.* at 864-65.
  18. *Id.* at 865.
  19. *Id.* at 867-69; Gillette, *supra* note 2 at 1177.
  20. Greif, *supra* note 16 at 879-80.

This example illustrates how information intermediaries play vital roles in facilitating exchanges across great distances. The information asymmetry between a Maghribi merchant and his agent is similar to the information asymmetry between Overseas Supplier and Buyer because the latter fears opportunistic behavior by the former, operating at great distance from himself. Buyer is reluctant to transact with Overseas Supplier without some type of information intermediary to supply relevant information, especially concerning the risk of opportunism. With the Maghribi merchant, the coalition transmitted information regarding agent behavior.<sup>21</sup> With the Buyer, brand serves as the information intermediary.

Consider Hypothetical 3, where Overseas Supplier and Acme work together. Overseas Supplier undertakes all production functions for Widget. However, Acme stamps its name to every Widget that Overseas Supplier makes and sells. This stamp is key. It assuages Buyer's concern and he is willing to buy a Widget now even though he refused to do so in Hypothetical 2. These two hypotheticals are almost identical except for one difference: the Acme stamp.

In order to understand the function of the Acme stamp, we need to change our perspective on who we exchange with when we purchase goods made in overseas supply chains. In Hypothetical 3, Buyer may believe that his primary exchange partner is Acme (and he may be oblivious to Overseas Supplier). However, in reality, his exchange partner is Overseas Supplier.

So, if Buyer primarily exchanges with Overseas Supplier, what role does Acme have? Acme is in the business of selling informational products. Here, information products do not refer to information technology or related products and services. Instead, information products refers to the provision of information concerning a product or service and the associated merchant or service provider. Brand is an information product because it tells us certain things about Widget, for example: reliability, desirability, popularity, affordability, etc. This informational product helps to address the information asymmetry between a US buyer and an overseas merchant, thereby facilitating the exchange between the two. By branding the product made overseas with an Apple logo or a Nike swoosh, the corporations "rent" their reputation to Overseas Supplier in order to facilitate exchange between it and a domestic buyer.<sup>22</sup> Without that

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21. Greif, *supra* note 16, at 867-68.

22. See Ronald Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE LAW J. 239, 289-90 (1984) Yuri Mishina, Emily S. Block, and Michael J. Mannor, *The Path Dependence of Organizational Reputation: How Social Judgment Influences Assessments of Capability & Character*, 33 STRAT. MGMT. J. 459, 459-460 (2012); Ronald Sims, *Toward a Better Understanding of Organizational Efforts to Rebuild Reputation following an Ethical*

intermediary role, Buyer may be unwilling to exchange with Overseas Supplier.

## II. IMPLICATIONS FOR INFORMATION REGULATION

What significance does recognizing the information intermediary role of corporations in modern exchanges have? The remainder of this essay explores two questions: (a) what is the nature of brand responsibility in those exchanges when the primary role of the corporation is to bring buyers and suppliers together, and (b) can we borrow lessons from the regulation of information intermediaries in other exchange contexts in order to regulate transnational supply chains more effectively?

### A. *The Responsibility of a Name*

When we shop, we often make decisions based on brand names that signify certain attributes to us: quality, sustainability, desirability, affordability, and even community. Brand can serve as a beacon, attracting us to certain products over others. As discussed above, in some contexts, the primary function of a brand is information intermediary by bringing together sellers and buyers who may not otherwise exchange. In these circumstances, do brand companies need to disclose their intermediary role and, if so, why?

Consider a hypothetical where Buyer purchases a Widget from Acme because Acme has an established reputation for product quality and affordability. Buyer later learns that Acme had outsourced its manufacturing tasks for Widget to a variety of third-party suppliers, but Widget continues to perform exactly as Buyer expected and provides the best deal around. Is Buyer entitled to know the true identity of her exchange partners and the nature of the exchange?

There are two reasons why Buyer is entitled to this information disclosure: *consent* and *risks*. First, Buyer did not consent to the exchange that occurred. She received the good that she contracted for but not under the conditions she imagined. This more complex

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*Scandal*, 90 J. BUS. ETHICS 453, 455 (2009) (“[T]he value of a good reputation continues to grow largely because of the competitive advantage and market differentiation it delivers - higher sales generated by satisfied customers and their referrals; relationships with the right strategic and business partners; ability to attract develop and retain the best talent; benefit of the doubt by stakeholders if crisis strikes; spread of positive word of mouth; potential to raise capital and share price; and in some cases, the option to charge premium prices. Also, in an age of regulatory watchdogs, a positive reputation can improve relationships with government officials and regulators.”); Charles Fombrun, *The Building Blocks of Corporate Reputation in THE OXFORD HANDBOOK OF CORPORATE REPUTATION* 104-107 (Barnett & Pollock eds., 2012).

transaction involves more actors, many of whom are not subject to the direct control of Acme. Her assumptions of Acme's brand – the information upon which she made the decision to purchase – may not extend to all those actors. Buyer did not consent to an exchange with third party suppliers; she consented to an exchange with Acme. It's not that Buyer *would not* have consented to exchanging with third party suppliers; the issue is that she, in fact, *did not*.

Buyer entered into the exchange for Widget based on threshold information that Acme supplied to Buyer based on its brand. The brand provided Buyer the information she needed in order to go ahead with the exchange. However, if Buyer had known that her exchange involved a variety of third-party suppliers who were her exchange partners, and not Acme, Buyer remains in an information deficit. She lacks information regarding characteristics of the exchange and she may not have consented to it without first obtaining that additional information. But Buyer does not know what she does not know because the brand masks the information problem. It is not the identity of the counterparty that determines whether Buyer would go ahead with the exchange but the extent of the information that Buyer has before she consents to the exchange.

The second reason it matters to Buyer that she knows the intermediary role played by Acme is that the actual exchange exposed her to unique risks of which she had no awareness at contracting. The first risks that come to mind are ones that concern the attributes of the product purchased: quality, performance, appearance, safety, etc. Since Acme did not actually manufacture the product, perhaps the product falls short of our expectations for it. However, corporations like Acme have measures in place to address disappointed consumers regarding the product sold.

Product risks are not the only risks that arise in the supply chain. Specifically, global supply chains can be sites of significant human rights abuses.<sup>23</sup> These conditions create a number of physical, economic, and cultural risks for the men, women, and children who work in these supply chains or whose lives the operations of Acme or its third-party suppliers negatively impact.<sup>24</sup>

While those working for or living near supply chain sites bear the brunt of these risks, supply chains also create a different set of risks for consumers far away – consumers like Buyer. Specifically, consumers who purchase goods manufactured in vulnerable supply chains may unwittingly contribute to those conditions without knowing these risks when they purchase the product. When

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23. Parella, *supra* note 1, at 774-775.

24. See Parella, *supra* note 1, at 769-784 (discussing various human rights concerns that stem from Apple's global commerce).

consumers later learn of their role, they suffer a type of harm Sarah Dadush terms “identity harms”:

Identity harm refers to the distress experienced by consumers who learn that a company with which they transacted has failed to honor its environmental or social promises. It arises when consumers discover that, as a result of some form of deception, they have become unwittingly implicated in a commercial scheme that causes harm to other beings—the planet (its atmosphere, oceans, rivers, animals, etc.) or fellow humans.<sup>25</sup>

According to Dadush, these harms are especially acute when “conscious consumers” purchase products based on more than price and physical attributes but also because of “environmental and social-environmental impact.”<sup>26</sup> When a “green consumer” who cares about the environment purchases a “clean-fuel car,” she expects that her purchasing decision is contributing to a cleaner environment (or at least not damaging it). When she later learns that the “clean-fuel car” actually pollutes the environment more than she expected, she suffers an “identity harm” because of her unwitting complicity in perpetuating the very problem that she had set out to alleviate through her purchase.

Buyer may still suffer an identity harm even if she is not a “conscious consumer.” Widget may not be particularly environmentally friendly and, even if it is, Buyer may not have purchased it for those “green” reasons. But simply because Buyer did not intend to improve the environment through her purchasing decision does not mean that she intends to contribute to its destruction or that she is unaffected it turns out that her purchasing decisions had that effect. She bought Widget without realizing the risks of negative impact and the possibility of “identity harm.” She may or may not have purchased Widget had she known the real nature of the exchange and the risks to her (and third-party victims in the supply chain). She needed more information to assess that purchasing decision in light of those risks.

One may object to this conclusion by claiming that most people are not like Buyer. They care about the quality of the product purchased and not the nature of the exchange; they are indifferent as to whether the exchange involves only Acme or 100 suppliers. Supply chain information does not matter to them.

Admittedly, some consumers may be indifferent the nature of the exchange and the risks that may arise. However, other consumers have recently sued companies for failing to alert them at the point of

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25. Dadush, *supra* note 3 at 3.

26. *See id.* (defining conscious consumers and their connections to identity harms).

purchase of the risks of human rights abuses in different types of supply chains.

For example, in *Hodsdon v. Mars*, plaintiffs allege that Mars uses child labor in its cocoa supply chain but fails to disclose that risk to consumers at the point of purchase.<sup>27</sup> These plaintiffs claim that “[h]ad consumers known the truth, they would not have purchased or paid as much for Mars Chocolate Products.”<sup>28</sup> Similarly, in *Sud v. Costco*, plaintiffs brought a lawsuit alleging that the food giant failed to disclose to consumers that its products could have been produced with slave labor.<sup>29</sup> It is important to note that the product that the consumers received corresponded to their beliefs concerning what they were buying: they wanted a chocolate bar and they got a chocolate bar. The product did not change or disappoint. Instead, their objections concern the nature of the exchange and the risks involved in that exchange – risks of which they were unaware at the time of purchase. These complaints reinforce Dadush’s identification of “identity harms” and consumer demands for information regarding the nature of the exchange and not just the product purchased.<sup>30</sup>

*B. Intermediary Liability: How Information is Disclosed Matters*

Information disclosure does not only affect consumer behavior. It also can exert significant influence on the behavior of corporations like Acme depending on the manner in which this information is disclosed. There are various approaches that public actors can adopt in order to improve information regarding conditions in the supply chain. Each of these information mechanisms can inform the public about conditions in Acme’s supply chain.

However, information is not an end in itself. The act of revealing information can encourage change by the actor doing the revealing. That is why the designers of mandatory disclosure laws hope that forcing corporations to disclose their due diligence practices in supply chains will lead to an upgrade of those practices. This organizational change differs from the sharing of information through disclosure. In other words, information disclosure involves two different functions: *information function* (adding to the supply of information available about supply chains) and an *organizational change function* (relating

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27. Class Action Complaint for Violation of California Consumer Protection Laws & Demand for Jury Trial at 4-6, *Hodsdon v. Mars, Inc. et al.*, 162 F. Supp. 3d 1016 (N.D.Cal. 2016) (No. 15-cv-04450).

28. *Id.* at 22.

29. Class Action Complaint & Demand for Jury Trial at 5-7, *Sud v. Costco Wholesale Corp.*, 229 F. Supp. 3d 1075 (N.D.Cal.2017) (No. 3:15-cv-03783).

30. Dadush, *supra* note 3.

to the likelihood that the organization will change its practices because of its disclosure obligations).

While different information strategies may be equivalent in the information function, they potentially vary significantly in the organizational change function. This latter function relates to how the information is transmitted to the public. Not all information mechanisms are equally effective in the organizational change function even if they are comparable in the information function. Moreover, the effectiveness of the organization function of an information mechanism potentially varies according to the industry, corporation, and market characteristics.

The way we regulate information in the supply chain has consequences for the likelihood that a brand corporation will exercise its capacity to detect and deter harm in the supply chain or the *organizational change function*. Not all information transmission regulatory strategies are equal when it comes to this function. Instead, it is quite likely that each of these strategies imposes different levels of brand costs on a corporation, thereby applying varying levels of pressure to detect and deter wrongdoing. The strategy we choose should be the one that imposes a sufficient level of brand cost on the corporation to incentivize it to do something about the conditions in the supply chain.

An optimal information mechanism should incentivize Acme or another information intermediary to deter harm, not just disclose information. Acme may not take many steps to deter harm, however, because it could derive significant benefits from the wrongdoing committed by Overseas Seller, benefits that exceed those captured by Overseas Supplier. For those reasons, Acme may have more, not less, incentive to participate in wrongdoing in the supply chain. For example, imagine that Acme's supply chain is notorious for incidents of environmental damage despite local laws prohibiting it. Let  $x$  represent the value Acme obtains for products made that cause environmental damage and  $y$  represent the value that Overseas Supplier obtains for the same products. When  $x > y$ , Acme has very little incentive to deter or desist Overseas Supplier from causing environmental damage.

However, that is only part of the picture. Payoffs are relative. Even if  $x > y$ , Acme has an incentive to deter environmental damage when the costs of environmental damage exceed  $x$ . The most obvious cost to Acme is brand damage as a result of association with environmental damage. Many transnational corporations invest considerable resources in their brand and its management. Brand is the primary product made by Acme. Brand also ensures that the exchange between Buyer and Overseas Seller occurs. As such, brand (or reputational capital) remains front and center for transnational corporations. When that brand damage,  $z$ , exceeds  $x$ , it is in Acme's interest to deter environmental damage in its supply chain. Critically,

z is not static;<sup>31</sup> instead, as discussed below, it may vary with the regulatory regime we apply to Acme.

Different types of regulatory responses to supply chain behavior could possibly impose different levels of brand damage. Consider three types of regulatory responses: mandatory disclosures, government investigation, or civil litigation. Each of these may inform the public that Acme's supply chain involves child labor and this revelation will lead to "brand damage." Brand damage may differ, however, for all three responses. Some responses may exert a greater level of damage than the others. For example, stakeholders may react more badly to news of Acme's inadequate due diligence regarding environmental damage when it involves a civil lawsuit than when Acme discloses it through its mandatory non-financial disclosures.

What supports the belief that these different strategies exert different levels of reputational damage? This is an empirical question (not explored here) but some facts indicate that the extent of brand damage may vary with the mechanism for information dissemination. First, most people learn about corporate misconduct through the news media (or, now, social media). But not all information is equally news worthy. The media picks up some stories over others, so the way that information gets out matters.<sup>32</sup> A mandatory corporate disclosure or press release acknowledging deficient human rights due diligence is unlikely to prove as equally newsworthy as a lawsuit or government investigation alleging the same. The greater the newsworthiness, the more likely that the media will cover it and that more people will hear about it. And the more people who hear it, the greater risk that they will re-evaluate their perceptions of the corporation implicated in the wrong doing: brand damage.

The type of information mechanism does not only affect the extent of information dissemination but also the frame through which we understand it. The media influences how we perceive the information it shares and our resulting views on the corporation at issue: "[I]n performing its functions of informing, highlighting, and framing, the media presents market participants with information that affects impression formation and the legitimation of firms."<sup>33</sup>

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31. See John C. Coffee, Jr., *Gatekeeper Failure and Reform: Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301, 309-11 (2004) (explaining the cost-benefit analysis facing gatekeepers).
  32. See RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 194 (2015) (explaining why the media is "more likely to cover the press release about a lawsuit than a press release about legal claims not backed by a lawsuit").
  33. Timothy G. Pollock & Violina P. Rindova, *Media Legitimation Effects in the Market for Initial Public Offerings*, 46 ACAD. MGMT. J. 631, 632 (2003).

By deciding factors such as the length of a story or its frequency, the media affects public perceptions regarding which organizations' behavior most warrants their attention.<sup>34</sup> Media coverage also has an affective aspect related to tone and feeling about various organizations and influences the perception of organizations. Therefore, if the media (mainstream, social, etc) react differently to the regulatory strategy employed (disclosure, litigation, investigation), then those differences influence how people view information regarding supply chain conduct and impacts the extent of brand damage.

Second, self-disclosures by Acme could decrease the extent of brand damage because of the "stealing thunder" effect: a corporation facing imminent negative publicity could reduce the effect of that publicity on its reputation through self-disclosure instead of waiting for a third-party to share it with the public.<sup>35</sup> The availability of information explains why "stealing thunder" works.<sup>36</sup> When things are rare, we tend to value them more and want them more.<sup>37</sup> This holds true for information as well.<sup>38</sup> If a corporation remains silent following a crisis, "crisis-information" becomes rare, enhancing the public's demand for more information and the importance they attach to the information when it finally emerges (usually from a third party).<sup>39</sup> A corporation in crisis can decrease the demand and salience of crisis information by contributing to the supply of it through its own self-disclosures.<sup>40</sup> Although mandated disclosures are not the

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34. Craig E. Carroll & Maxwell McCombs, *Agenda-setting Effects of Business News on the Public's Images and Opinions about Major Corporations*, 6 CORP. REPUTATION. REV. 36, 37 (2003).
  35. An-Sofie Claeys, Verolien Cauberghe, & Mario Pandelaere, *Is old news no news? The impact of self-disclosure by organizations in crisis*, 69 J. BUS. RES. 3963, 3964 (2016).
  36. *See id.* (describing impact of "stealing thunder" on self-disclosure).
  37. *See id.* at 3964-65 (discussing "commodity theory").
  38. *See id.* at 3964 ("If the commodity is information, people may not only desire to read scarce information more and thus devote more attention to the message. Scarce information may also be more likely to impact people's evaluation of the position in the message than would be the case if the information would not be scarce.").
  39. *See id.* at 3965 (discussing impact of crisis on information and self-disclosure).
  40. *See id.* at 3968 ("The results show that when an organization self-discloses a crisis, both the attention to negative publicity and the relation of this attention to post-crisis reputation are low, irrespective of the level of crisis involvement. So, if an organization reveals a crisis, consumers will neither feel inclined to read subsequent negative publicity, nor will they let such an attack influence their opinion about the organization in crisis, even when their involvement with the crisis is high.").

same as voluntary self-disclosures, the research on crisis communication suggests that information transmitted by the corporation may not have as much of a negative impact on the corporation's reputation compared to when that information is transmitted by a third-party. This suggests that information from government investigation and civil lawsuits may exert greater brand costs.

If true that mandatory disclosure, government investigation, or civil lawsuit exert different levels of brand damage ( $z_1$ ,  $z_2$ , and  $z_3$ , respectively) on Acme, then we should pick the strategy that outweighs  $x$ . In other words, the benefit that Acme derives from wrongdoing is not the only factor that will determine whether it deters Overseas Supplier in the commission of that wrongdoing. Instead, it will deter Overseas Supplier so long as  $z > x$ .<sup>41</sup>  $Z$  is not static; instead, it changes based on the type of regulatory response offered. We need to choose the strategy that causes Acme's brand damage to exceed any value it derives from the wrongdoing. Which strategy accomplishes that may depend on context, varying with the corporation, its key stakeholders, nature of the supply chain, type of wrongdoing, and benefits it derives from wrongdoing, among other factors.

The essential point remains: the optimal information mechanism should ensure that  $z > x$ . It should ensure that the choice of regulatory strategy (mandatory disclosure, investigation, or litigation) leads to a level of brand damage that outweighs the level of benefit that Acme derives from permitting the wrongdoing in its supply chain. It is an empirical question whether that would be accomplished through mandatory disclosure, investigation, or litigation. We can improve the likelihood that Acme will deter wrongdoing in the supply chain by changing the costs that it faces for that wrongdoing. And those costs should help determine the regulatory strategy that we adopt.

Of course,  $z$  is not costless either. Different regulatory strategies require different levels of public (and even private) resources. All things being equal, we will most likely prefer the least costly regulatory strategy that will still lead to  $z > x$ . However, that strategy varies among different corporations and supply chains because the value of  $z$  will change based on a number of factors that vary among supply chains and corporations.

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41. See Coffee, *supra* note 31, at 318 (discussing factors that deter corporations).

## CONCLUSION

It is no secret that brand has power. We gravitate towards some products over others because of the power of the swoosh or the apple. But with that power comes great responsibility. At the least, this responsibility involves informing consumers of the nature of the exchange they are entering and the risks that are involved. It also involves a responsibility to the parties at the other end of the supply chain. Their lives are impacted by the choices transnational corporations make concerning their brand. Therefore, it is fitting that brand vulnerability should supply the lever by which to incentivize transnational corporations to disclose and improve conditions in supply chains.