

“Trademark, Labor Law, and Antitrust, Oh my!”

Author : Jessica Silbey

Date : September 10, 2021

Hiba Hafiz, *The Brand Defense*, 43 **Berkeley J. Emp. & Lab. L.** __ (forthcoming, 2022), available at [SSRN](#).

I am allergic to antitrust law, but after reading Hiba Hafiz’s recent article, I understand that my aversion is problematic. This paper combines an analysis of trademark law, labor law, and antitrust law to explain how employers exploit trademark law protections and defenses to control labor markets and underpay and under-protect workers. For most IP lawyers and professors, this article will open our minds to some collateral effects of trademark law’s consumer protection rationale on other areas of law with important consequences for economic and social policies.

The Brand Defense says it “takes a systemic view of intellectual property, antitrust and work law,” which means reading it demands keeping several balls in the air and following their interacting paths. It is worth the effort. Here are three paths the article’s argument follows.

First, Hafiz explains how broadened trademark protections for franchisors, like McDonalds, shift obligations from the franchisor to the franchisee. This means that individual restaurants or other franchisees must tightly monitor workers and products in service to “the brand.” This monitoring means that ingredients, components, machines, and processes are strictly regulated under the franchise agreement, leaving little leeway on profit margin for the franchisee except in the cost of labor.

Second, franchisors structured their relationships with franchisees as independent business entities to take advantage of developing antitrust law to functionally immunize their franchisor-franchisee relationships from antitrust liability. Vertical integration by contract or license (as opposed to through ownership) supposedly produces economic efficiencies to consumers, which is thought to alleviate the need for close antitrust scrutiny. But, as Hafiz demonstrates in her literature and doctrinal review of antitrust law, antitrust benefits are supposed to flow both to product markets *and* labor markets. Hafiz shows that when franchisee-franchisor agreements significantly constrain franchisee choice in the production of goods and services, this leads franchisees to skimp on worker protections and wages, which is also an antitrust harm. Hafiz persuasively argues that antitrust court decisions mistakenly view brand protection (through trademark licensing agreements) as ultimately encouraging competition between brands to consumers’ benefit while ignoring the harm to labor markets.

The third path follows the development of lawful but distressing labor practices by which upstream employers can avoid responsibility towards downstream franchisee workers by arguing a combination of trademark protection (“the brand defense”) and vertical disintegration. Upstream franchisors impose obligations on downstream employer-franchisees through businesses contracts, which include trademark licenses. They use this to claim the absence of a joint-employer relationship despite stringent flow-through quality control requirements. Once again, product quality and labor policy are artificially disentangled. Concern over the latter is hidden or depressed in favor of the consumer welfare justification that anchors both trademark and antitrust law.

There is so much to commend this article: its succinct legal history of the three areas of law; the clarity of its doctrinal analysis in light of the complex and interacting legal regimes; and the unapologetic

championing of worker power in an era of increased economic inequality and burgeoning threats to democracy that ideally ensures accountability.

Different readers will draw different insights from it. The breadth of the terrain it covers makes it broadly appealing. When reading *The Brand Defense*, intellectual property lawyers and professors are likely to experience something familiar suddenly becoming strange. Hafiz describes how trademark law meant to promote consumer confidence and pro-consumer competition between goods and services is harnessed to justify anticompetitive vertical restraints and unfair labor practices.

Trademarks ... confer broad[] value as legal trumps in antitrust and work law, immunizing lead firms' legal exposure for anticompetitive conduct in labor markets and work law violations. Upstream firms have thus deployed a sophisticated set of legal strategies highlighting purported consumer benefits of branding in a way that has successfully obscured agency and court view of the effects of their market power, or wage-setting power, in downstream labor markets and over downstream employees' terms and conditions of work. (P. 51.)

This is not the typical trademark framework, to say the least. And those writing and thinking about how broader scope of trademark protection produces [incumbency benefits](#), disadvantages [small companies](#), and [injures competition and communication](#), should take note. *The Brand Defense* is a thoroughly devastating critique of contemporary trademark practice along related lines, but it enlists the adjacent legal fields of work law and antitrust to drive the points home. The doctrinal and regulatory reforms proposed at the end are straightforward, bold, and unfortunately (to me) unlikely to transpire given the [current political climate](#). But the proposals derive from diverse legal mechanisms and thus provide various opportunities of attack.

I cannot guess how readers from the antitrust or labor law fields will find *The Brand Defense*. If you are less allergic to trademark law than I am to antitrust law, Hafiz's article is well worth your time. Even if you are allergic, Hafiz's sophisticated ideas, delivered in systematic arguments, will bring you far enough along to learn a lot about the twenty-first century workplace and the doctrinal and regulatory framework inhibiting the fight against destabilizing economic inequality.

Cite as: Jessica Silbey, "Trademark, Labor Law, and Antitrust, Oh my!", JOTWELL (September 10, 2021) (reviewing Hiba Hafiz, *The Brand Defense*, 43 **Berkeley J. Emp. & Lab. L.** __ (forthcoming, 2022), available at SSRN), <https://ip.jotwell.com/trademark-labor-law-and-antitrust-oh-my/>.